

Exhibit 5

COURT REPORTERS
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Transcript of the Testimony of
Todd Rhett Hawkins

Taken On: August 19, 2008

Case Number: 2:06-CV-2141-DGC

Case: Soilworks, LLC, vs. Midwest Industrial Supply, Inc.,

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IN THE UNITED STATES DISTRICT COURT IN AND FOR THE DISTRICT OF ARIZONA	I N D E X
SOILWORKS, LLC, an Arizona corporation, Plaintiff/Counterdefendant/ Counterclaimant, vs. MIDWEST INDUSTRIAL SUPPLY, INC., an Ohio corporation authorized to do business in Arizona, Defendant/Counterclaimant/ Counterdefendant.	CASE NO. 2:06-CV-2141-DGC ATTORNEYS' EYES ONLY PORTIONS CONTAINED WITHIN
Videotaped deposition of TODD RHETT HAWKINS, a witness herein, called by the Plaintiff for Examination pursuant to the Federal Rules of Civil Procedure, taken before me, the undersigned, Mary Lyn Uphold, a Registered Diplomate Reporter, Certified Realtime Reporter and Notary Public in and for the State of Ohio, pursuant to Notice and agreement of counsel at the offices of Court Reporters of Akron, Canton and Cleveland, 221	EXAMINATION 4 Plaintiff's Exhibit 1 47 Plaintiff's Exhibit 2 49 Plaintiff's Exhibit 3 51 Plaintiff's Exhibit 4 53 Plaintiff's Exhibit 5 54 Plaintiff's Exhibit 6 63 Plaintiff's Exhibit 7 83 Plaintiff's Exhibit 8 84 Plaintiff's Exhibit 9 89 Plaintiff's Exhibit 10 129
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1 Springside Drive, Akron, Ohio, on Tuesday, the	THE VIDEOGRAPHER: We are on the
2 19th day of August, 2008, commencing at 9:31	record.
3 o'clock a.m.	TODD RHETT HAWKINS
4 ---	of lawful age, a witness herein, having been
5 APPEARANCES:	first duly sworn, as hereinafter certified,
6	deposed and said as follows:
7 On Behalf of the Plaintiff:	EXAMINATION
8 KUTAK ROCK LLP	BY MR. DOSEK:
9 BY: E. Scott Dosek, Attorney at Law	Q. State your full name, please.
10 Suite 300	A. Todd Rhett Hawkins.
11 8601 North Scottsdale Road	Q. And what is your date of birth?
12 Scottsdale, Arizona 85253-2742	A. January 21st, 1962.
13 480/429-5000	Q. Mr. Hawkins, have you ever had your
14	deposition taken before?
15 On Behalf of the Defendant:	A. No.
16 BROUSE McDOWELL	Q. Have you ever testified in court before?
17 BY: John M. Skeriotis, Attorney at Law	A. No.
18 388 South Main Street, Suite 500	Q. Have you ever testified under oath in any
19 Akron, Ohio 44311-4407	kind of proceeding prior to today?
20 330/535-9999	A. Possibly. I am not sure. Maybe during my
21	divorce. I mean, I may have. I am not sure if
22 Also Present:	you have to do that or not.
23 Bob Vitale	Q. Okay. Did you have to go to court for your
24 Jim Torok, Videographer	divorce?
25 ---	A. Magistrate.

<p style="text-align: right;">121</p> <p>1 isoalkanes.</p> <p>2 Q. Forgive me if I asked you this before, but</p> <p>3 do you know what a "Mercury 300 NMR spectrometer</p> <p>4 test" is?</p> <p>5 A. It's a spectrometer test, but no, I do not</p> <p>6 know. I do not run those tests.</p> <p>7 Q. What is a "spectrometer test"?</p> <p>8 A. It gives you a reading of the composition</p> <p>9 of materials you are analyzing.</p> <p>10 Q. Have you ever done such a thing?</p> <p>11 A. No.</p> <p>12 Q. I am going to guess here that in order to</p> <p>13 run a spectrometer test, you need to have a</p> <p>14 spectrometer. Is that true, to your knowledge?</p> <p>15 A. Yes.</p> <p>16 Q. Do you know what a "spectrometer" is?</p> <p>17 A. I've seen some, yes.</p> <p>18 Q. What is it? Is it bigger than a bread box?</p> <p>19 A. Yes.</p> <p>20 Q. When you were an employee of Midwest</p> <p>21 Industrial Supply, was there a spectrometer at</p> <p>22 Midwest?</p> <p>23 A. No.</p> <p>24 Q. Have you ever conducted a spectrometer</p> <p>25 test?</p>	<p style="text-align: right;">123</p> <p>1 upon -- same objection I lodged in the prior</p> <p>2 depositions, that with respect to any testing</p> <p>3 that's been done pursuant to an attorney or not,</p> <p>4 we maintain the attorney work product.</p> <p>5 If there was any testing done prior</p> <p>6 to any attorney being involved and prior to this</p> <p>7 litigation, you are free to answer that</p> <p>8 question.</p> <p>9 MR. DOSEK: I don't think there</p> <p>10 is any work product in January of '05, John.</p> <p>11 MR. SKERIOTIS: You didn't limit it</p> <p>12 to January '05.</p> <p>13 MR. DOSEK: Well, January '05</p> <p>14 is the time that this exhibit was prepared,</p> <p>15 Exhibit 23.</p> <p>16 THE WITNESS: I am thoroughly</p> <p>17 confused now.</p> <p>18 BY MR. DOSEK:</p> <p>19 Q. Okay.</p> <p>20 A. If you would re --</p> <p>21 Q. Fine, we will back up.</p> <p>22 As of January '05, are you aware of any</p> <p>23 chemical analysis or any other kind of analysis</p> <p>24 that had been performed by or on behalf of</p> <p>25 Midwest Industrial Supply with respect to the</p>
<p style="text-align: right;">122</p> <p>1 A. Personally, no.</p> <p>2 Q. Do you know if anyone else at Midwest</p> <p>3 Industrial Supply ever did?</p> <p>4 A. I don't know.</p> <p>5 Q. So if I can just kind of go back and</p> <p>6 summarize a little bit with respect to</p> <p>7 Exhibit 23, in the first two pages, which</p> <p>8 constitutes essentially a letter to the Patent</p> <p>9 and Trademark Office, correct?</p> <p>10 A. Correct.</p> <p>11 Q. And that letter was written because it was</p> <p>12 the feeling of the applicant, in January of '05,</p> <p>13 or the belief of the applicant in January of</p> <p>14 '05, that there was an infringing device or</p> <p>15 product actually on the market, correct?</p> <p>16 A. Correct.</p> <p>17 Q. And that one of those products was the</p> <p>18 Soilworks Durasoil product?</p> <p>19 A. Yes.</p> <p>20 Q. For which no chemical testing or analysis</p> <p>21 had been done by you at that point, correct?</p> <p>22 A. I personally had not done any chemical</p> <p>23 analysis.</p> <p>24 Q. Are you aware of any that had been done?</p> <p>25 MR. SKERIOTIS: Objection, based</p>	<p style="text-align: right;">124</p> <p>1 Durasoil product?</p> <p>2 MR. SKERIOTIS: Same objection. I</p> <p>3 mean, if, in fact, some testing was done, it</p> <p>4 would be in anticipation of litigation. So to</p> <p>5 the degree that your objection is -- I mean, it</p> <p>6 clearly references "allegedly infringing</p> <p>7 product," and should Midwest have received the</p> <p>8 patent as these claims were drafted on page 3, I</p> <p>9 would assume litigation would be anticipated;</p> <p>10 and therefore, I would maintain the objection.</p> <p>11 And if, in fact, any of your response</p> <p>12 would be that any testing or not was done with</p> <p>13 an attorney present, then I instruct you not to</p> <p>14 answer that question, unless you have knowledge</p> <p>15 prior to any attorney being involved, of any</p> <p>16 testing done.</p> <p>17 THE WITNESS: I have no knowledge</p> <p>18 of any testing being done without the attorney</p> <p>19 being present.</p> <p>20 BY MR. DOSEK:</p> <p>21 Q. Do you have knowledge of testing being done</p> <p>22 with an attorney present?</p> <p>23 MR. SKERIOTIS: Objection.</p> <p>24 Instruct you not to answer. Same objection.</p> <p>25 MR. DOSEK: And you are</p>

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1 claiming that whether or not he knows whether
 2 there was any testing done by any lawyer is
 3 privileged?
 4 **MR. SKERIOTIS:** Yes. It's attorney
 5 work product, absolutely. Because then you
 6 would know whether or not any testing was done.
 7 And that whether or not any attorney did any
 8 testing on any product pursuant to this
 9 litigation in anticipation thereof is absolutely
 10 privileged.
 11 **MR. DOSEK:** And you're --
 12 **MR. SKERIOTIS:** And that's the same
 13 objection, Scott, I've noted in the Detloff
 14 deposition and the Vitale deposition as well,
 15 and I have never been questioned until today.
 16 So --
 17 **MR. DOSEK:** Well, just because
 18 you haven't been questioned doesn't mean that
 19 your objection is not ill founded, because it
 20 is, John, particularly when you are talking
 21 about something that is in the time frame of
 22 January of '05, a year and a half before any of
 23 the -- before the patent was issued, before any
 24 of this --
 25 **MR. SKERIOTIS:** Sure.

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1 **MR. DOSEK:** -- controversy ever
 2 arose.
 3 **MR. SKERIOTIS:** You are absolutely
 4 true.
 5 **MR. DOSEK:** That is akin to an
 6 insurance company claiming work product whenever
 7 it drafts an insurance policy, because there may
 8 be litigation about the insurance policy.
 9 And, John, you know as well as I do
 10 that the attorney work product doctrine does not
 11 extend that far.
 12 **MR. SKERIOTIS:** And I think we
 13 disagree with respect to patent cases,
 14 especially where you've got a document, Scott,
 15 that says that they believe that there is a
 16 product that is being infringed. How that's not
 17 in anticipation of litigation is beyond question
 18 to me.
 19 So I am maintaining the objection and
 20 you are welcome to disagree with it.
 21 **MR. DOSEK:** All right. Just so
 22 I am clear then, you are saying that this, in
 23 January of '05, constitutes something that is in
 24 anticipation of litigation, even though you
 25 filed, in your motion to dismiss this lawsuit,

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1 an argument that your letters to Polar Supply in
 2 the summer of '06 did not constitute threats of
 3 litigation, is that what you are saying?
 4 **MR. SKERIOTIS:** That's exactly what
 5 I am saying, with one caveat.
 6 **MR. DOSEK:** Okay.
 7 **MR. SKERIOTIS:** If you would take a
 8 look, Scott, at page 3, the claim at issue is "A
 9 compound for chemical soil stabilization and
 10 dust control, the compound comprising: a
 11 synthetic isoalkane," period. If that claim
 12 were to have issued, that is exactly my
 13 position.
 14 **BY MR. DOSEK:**
 15 **Q.** Are you aware of any chemical analysis or
 16 testing that has been done with respect to the
 17 Durasoil product?
 18 **MR. SKERIOTIS:** Same objection.
 19 Other than if an attorney was working on it --
 20 **THE WITNESS:** Same answer as I
 21 gave before.
 22 **MR. DOSEK:** And you are saying,
 23 John, that whether he knows if any such testing
 24 has even been done -- I am not asking him for
 25 the results of any such testing -- whether he

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1 knows whether any such testing has been done is
 2 privileged and work product?
 3 **MR. SKERIOTIS:** If an attorney was
 4 present, correct. You can ask him that
 5 question, if an attorney wasn't present, if it
 6 was done, yeah. That's exactly what I am
 7 saying.
 8 **BY MR. DOSEK:**
 9 **Q.** The question was, are you aware of any
 10 testing that's been done, chemical testing of
 11 the Durasoil product, by anybody?
 12 **MR. SKERIOTIS:** Same objection.
 13 **THE WITNESS:** Same answer. Not
 14 without the attorney present.
 15 **BY MR. DOSEK:**
 16 **Q.** So you are aware of testing of the Durasoil
 17 product that was done under the supervision of
 18 lawyers; is that correct?
 19 **MR. SKERIOTIS:** Objection. Again,
 20 he already asked and answered this question
 21 already. So, I mean, to the degree you got your
 22 answer, you got your answer. Let's move on.
 23 You are just asking the same question a
 24 different way.
 25