

Exhibit 5

COURT REPORTERS
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Transcript of the Testimony of
Robert W. Vitale

Taken On: February 20, 2008
Case Number: 2:06-CV-2141-DGC

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

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1 A. Again, I don't recall, but I would say he's
 2 been with us between 10 and 20 years.
 3 Q. And he at all times headed up the
 4 information technology --
 5 A. Yes.
 6 Q. -- systems? When did you first consult a
 7 patent lawyer concerning the '270 and '266
 8 methods and compositions?
 9 A. Now, that I don't recall, but I'm sure that
 10 that's in the record.
 11 Q. Is that the first time you consulted a
 12 patent lawyer for Midwest's methods or products?
 13 A. I believe so, yes.
 14 Q. And you don't remember the lawyer? Was it
 15 Mr. Skeriotis?
 16 **MR. SKERIOTIS:** Objection.
 17 **THE WITNESS:** No. It was Joe
 18 Sebolt of Sand & Sebolt.
 19 **BY MR. PASSARELLI:**
 20 Q. Is that a law firm?
 21 A. It's a -- he's a patent attorney. A
 22 trademark attorney.
 23 Q. Where at?
 24 A. Canton.
 25 Q. Is he still around?

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1 A. Yes.
 2 Q. So who prepared the initial application for
 3 the method of chemical soil stabilization and
 4 dust control that's the subject of the '270
 5 patent?
 6 **MR. SKERIOTIS:** Objection.
 7 **THE WITNESS:** Within Midwest it
 8 would have been Todd Hawkins, and within the law
 9 firm it would have been -- or the firm, it would
 10 be Sand & Sebolt.
 11 **BY MR. PASSARELLI:**
 12 Q. And at some point you transferred the legal
 13 responsibility for the application to another
 14 lawyer?
 15 A. Correct.
 16 **MR. SKERIOTIS:** Objection.
 17 **BY MR. PASSARELLI:**
 18 Q. When did you do that?
 19 A. Again, I -- that I don't recall, but
 20 sometime -- I just don't recall. I would have
 21 to look at the file to see exactly when that
 22 was.
 23 Q. You would have records on that?
 24 A. Yes.
 25 Q. Besides Mr. Sebolt, do you recall any other

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1 names of lawyers that assisted you in
 2 application/registration process of the '270 and
 3 '266 patents?
 4 A. No. Joe Sebolt himself, and then he had, I
 5 believe, two other attorneys and I don't recall
 6 their names.
 7 Q. May I assume that Midwest has maintained
 8 files as it relates to these patent
 9 applications?
 10 A. Yes.
 11 Q. Do you know if those files were made
 12 available to Mr. Peterson last week?
 13 A. Oh, I'm sure they were, yes.
 14 Q. Who were Midwest's primary competitors in
 15 the dust control category at the time that this
 16 patented method and composition were developed?
 17 **MR. SKERIOTIS:** Objection.
 18 **THE WITNESS:** You mean in broad,
 19 general terms?
 20 **BY MR. PASSARELLI:**
 21 Q. Correct.
 22 A. I mean there are literally hundreds. Ones
 23 that we see most often are -- were/are, Syntech,
 24 S-y-n-t-e-c-h, Nalco --
 25 Q. I'm sorry?

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1 A. N-a-l-c-o. I have to -- I could -- I would
 2 have to compile a list of, I mean, 50 that are
 3 sort of on any given day competitors that we
 4 compete with, but including Soilworks.
 5 Q. Have you done an analysis of Soilworks'
 6 products to determine whether they infringed the
 7 '266 or '270 patents?
 8 **MR. SKERIOTIS:** Objection.
 9 Attorney work product as well as some
 10 attorney-client privilege.
 11 If -- you can answer the question,
 12 unless any information was derived during the
 13 course of this litigation by us or otherwise was
 14 not subject to attorney-client privileged
 15 communications.
 16 If, in fact, there's any test that
 17 Midwest did outside of an attorney representing
 18 you or being with you or in anticipation of
 19 litigation, you can answer that question.
 20 Otherwise I instruct you not to answer. Do you
 21 understand?
 22 **THE WITNESS:** I don't know.
 23 **MR. SKERIOTIS:** If Midwest did a
 24 test outside of preparing for litigation or in
 25 anticipation of litigation or outside of me --

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1 **THE WITNESS:** Yeah. We did some
 2 testing in our lab.
 3 **MR. SKERIOTIS:** -- the lawyer --
 4 then the answer is -- then you can't answer
 5 that. But if you're testing it in the lab
 6 without anybody around --
 7 **THE WITNESS:** We did some testing
 8 in our lab.
 9 **BY MR. PASSARELLI:**
 10 **Q.** When did you do that?
 11 **MR. SKERIOTIS:** And I just want to
 12 make sure he answers correctly. The question
 13 was -- and you can repeat it and I don't want to
 14 take over, but the question was: Did you do any
 15 testing in preparation -- to determine
 16 infringement.
 17 **THE WITNESS:** Oh.
 18 **MR. SKERIOTIS:** Just make sure you
 19 understand the question.
 20 **THE WITNESS:** Oh.
 21 **MR. SKERIOTIS:** So if these lab
 22 results you did for infringement, that's okay,
 23 but make sure you understand the question.
 24 **THE WITNESS:** We did not do that
 25 for infringement. But that was -- again, we did

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1 no -- I guess when Durasoil first came out we
 2 didn't know what it was other than to read what
 3 they said in their published materials.
 4 **BY MR. PASSARELLI:**
 5 **Q.** So when -- you described the product as
 6 Durasoil?
 7 **A.** Yes.
 8 **Q.** When you encountered Durasoil in the
 9 marketplace you did an evaluation of the
 10 product?
 11 **MR. SKERIOTIS:** Objection.
 12 **THE WITNESS:** Yes.
 13 **BY MR. PASSARELLI:**
 14 **Q.** Can you describe for me what you did?
 15 **A.** Probably testing of different types of
 16 soils to see its action or reaction, testing
 17 viscosity. Testing some physical properties
 18 like viscosity, pH.
 19 **Q.** Did you arrive at any conclusions as a
 20 result of that testing?
 21 **A.** No.
 22 **Q.** What was the purpose of the testing?
 23 **A.** Just to see what it was.
 24 **Q.** Did you learn anything?
 25 **A.** Not really, no.

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1 **Q.** Did you use that evaluation in any respect
 2 in your business?
 3 **A.** In our business?
 4 **MR. SKERIOTIS:** Objection.
 5 **THE WITNESS:** We may have created
 6 some type of comparison document between
 7 Durasoil and our product.
 8 **BY MR. PASSARELLI:**
 9 **Q.** And our product would be what?
 10 **A.** EnviroKleen.
 11 **Q.** Do you remember if you did that?
 12 **MR. SKERIOTIS:** Objection.
 13 **THE WITNESS:** We did do that.
 14 I'm not sure what we did with it. It might have
 15 been internal.
 16 **BY MR. PASSARELLI:**
 17 **Q.** Do you know if you provided any of those
 18 evaluations to any customers or prospective
 19 customers?
 20 **A.** I don't recall.
 21 **Q.** Have you performed any evaluations to
 22 determine whether Soilworks products infringe
 23 the '270 or '266 patents?
 24 **MR. SKERIOTIS:** Objection. Same
 25 objection. When you say "evaluations," you're

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1 looking at tests, John?
 2 **MR. PASSARELLI:** Tests.
 3 **MR. SKERIOTIS:** All right. It's
 4 asked and answered and I maintain the objection.
 5 And he's already identified the one test -- the
 6 testing he did.
 7 **BY MR. PASSARELLI:**
 8 **Q.** So let me confirm for the record that
 9 the -- you understand Midwest has asserted
 10 claims of patent infringement in this case,
 11 correct?
 12 **A.** Yes.
 13 **Q.** As far as your testimony is concerned,
 14 Midwest has never performed any analysis about
 15 that infringement?
 16 **MR. SKERIOTIS:** Objection. Again,
 17 that's attorney work product, preparation for
 18 litigation, in anticipation thereof, and during
 19 the course of litigation as to whether or not
 20 what they did pursuant to this litigation. He's
 21 already identified the only test that they did.
 22 He's already answered that, so I'm not going to
 23 let him answer that question. So I instruct you
 24 not to answer.
 25 **MR. PASSARELLI:** Why don't we take a