UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

SOILWORKS, LLC, Plaintiff,	)	CV 06-02141-PHX-DGC
vs.	)	Phoenix, Arizona October 9, 2008
MIDWEST INDUSTRIAL SUPPLY, INC., Defendant.	)	

BEFORE: THE HONORABLE DAVID G. CAMPBELL, JUDGE

REPORTERS' TRANSCRIPT OF PROCEEDINGS

FINAL PRETRIAL CONFERENCE

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A P P E A R A N C E S

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P R O C E E D I N G S

THE COURTROOM DEPUTY: Civil case 06-2141, Soilworks LLC versus Midwest Industrial Supply, Inc. This is the time set for final pretrial conference.

Counsel, please announce your presence for the record.

MR. DOSEK: Good afternoon, Your Honor. I'm Scott Dosek with the law firm Kutak Rock on behalf of plaintiff. And with me is my partner John Passarelli, with the same firm from our Omaha office. Also present in court are Chad Falkenberg, president of Soilworks, and his wife Dorian Falkenberg, vice president.

THE COURT: All right. Good afternoon.

MR. MARVINNEY: Good afternoon, Your Honor. My name is Craig Marvinney of the Akron based law firm of Brouse McDowell. I'm out of the Cleveland office. Together with me today is John Skeriotis of our Akron office, Brouse McDowell, and next to him is Don Myles of Jones Hochuli Skeleton here in Phoenix. And of course we have our client, Bob Vitale, of Midwest Industrial. And the three of us represent Midwest Industrial, defendant and counterclaimant.

THE COURT: All right. Good afternoon.

Our purpose is for a final pretrial conference today. I think what I want to do first is talk through the motions in

Mr. Vitale said was, based upon a document that was presented to him as an exhibit during his deposition, it would seem to indicate, based upon that document, that there would be no infringement. He did not say that pursuant to all of the information that he's received with respect to the Durasoil product that there is no patent infringement. He never testified to that.

And in fact, Your Honor, we've received other documents after the close of discovery which shed further light on the Durasoil patent infringement produced by Soilworks.

THE COURT: You're saying you received the documents from Soilworks?

MR. SKERIOTIS: That's correct, Your Honor.

THE COURT: Do you agree with the assertion of Mr. Passarelli that you have never explained to Soilworks how their product infringes the '266 and '270 patents?

MR. SKERIOTIS: We do not, Your Honor.

At the time -- again, we've never been asked a question with respect to all the documents that have been produced in this case, is there any infringement based upon the documents produced and the testimony of Mr. Falkenberg, which, by the way, occurred after Mr. Vitale's deposition, whether or not there was any infringement.

For example, Your Honor, the claim chart produced by

Soilworks indicates that they meet several elements of claim 1 of the '266 and '270 patents. Then we received a document afterwards, Your Honor, that shows that they indeed meet other elements of the claim. Their own documents, Your Honor, prove patent infringement, that they have supplied to us.

THE COURT: That wasn't my question. My question was, that I didn't ask very clearly, have you ever explained to them how you think there's infringement? Do they know today how you think there's infringement?

MR. SKERIOTIS: I guess I beg the Court to explain that question. Have we outlined the case for them as to why we believe --

THE COURT: No. You just explained why you think their products infringe your patent.

MR. SKERIOTIS: Yes, we have. We told them based upon publicly available information that we were able to ascertain at the time the deposition was taken that they infringe our patents.

THE COURT: Well, have you said more than that? Have you said, "and this is why," and explain to them the infringement?

MR. SKERIOTIS: This is a chemical case, Your Honor. What we did was we said your product contains a synthetic isoalkane, and we believe your product contains a binder consisting of either carboxylic acid, an ester, and two other

things I can't recall. Or two other things. So we have told them that, yes.

THE COURT: In what form did you tell them that?

MR. SKERIOTIS: We told them in written form that predated this trial -- I'm sorry, predated the complaint that gave rise to declaratory judgment action and we asked for more information about that, which they never supplied. We've also supplied -- given testimony based upon, again, publicly available information and said these are the claim elements we believe are met.

THE COURT: What testimony are you referring to?

MR. SKERIOTIS: Mr. Vitale's testimony, Your Honor, where he said these claim elements are met, but then they would specifically provide him a document and say, based upon this document, would you believe there's any patent infringement. And his answer was based upon the document we have thus received, it appears you don't have the binder.

But then later documents, such as claim chart, as well as testimony from Mr. Falkenberg, would indicate that they do.

THE COURT: All right. Any other comments, Mr. Passarelli?

MR. PASSARELLI: Yes, Your Honor, I believe that is a misstatement. We asked Interrogatory Number 7: For each claim of defendant's patents that defendant asserts are infringed by