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Transcript of the Testimony of
Robert W. Vitale

Taken On: February 19, 2008
Case Number: 2:06-CV-2141-DGC

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

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UNITED STATES DISTRICT COURT
IN AND FOR THE DISTRICT OF ARIZONA

- - -

SOILWORKS, LLC, an Arizona)
corporation,)
Plaintiff,)

vs.)

MIDWEST INDUSTRIAL SUPPLY,)
INC., an Ohio corporation)
authorized to do business)
in Arizona,)
Defendant.)

CASE NO.
2:06-CV-2141-DGC
ATTORNEYS' EYES
ONLY PORTIONS
CONTAINED WITHIN

- - -

Deposition of ROBERT W. VITALE, a witness herein, called by the Plaintiff for Examination pursuant to the Federal Rules of Civil Procedure, taken before me, the undersigned, Binnie Purser Martino, 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 law offices of Vorys, Sater, Seymour and Pease, LLP, First National Tower, 106 South Main Street, Suite 1100, Akron, Ohio, on Tuesday, the 19th day of February, 2008, commencing at 9:50

1 o'clock a.m.

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4 **APPEARANCES:**

5

6 On Behalf of the Plaintiff:

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1 (Thereupon, Plaintiff's Exhibit 1 of
2 the R.W. Vitale deposition was marked
3 for purposes of identification.)

4 ROBERT W. VITALE
5 of lawful age, a witness herein, having been
6 first duly sworn, as hereinafter certified,
7 deposed and said as follows:

8 EXAMINATION

9 BY MR. DOSEK:

10 Q. State your full name, please.

11 A. Robert William Vitale.

12 Q. You are not related to Dick, are you?

13 A. No.

14 Q. You have probably never been asked that
15 before, have you?

16 A. No.

17 Q. Sir, what is your date of birth?

18 A. August 31st, '42.

19 Q. Have you ever had a deposition taken
20 before?

21 A. I have.

22 Q. How many times?

23 A. Five.

24 Q. When is the last time?

25 A. About, I think, three years ago.

1 Q. Okay. Were those previous depositions that
2 you have given in connection with your business?

3 A. Correct.

4 Q. Let me just give you a little bit of
5 background, so that we have our ground rules set
6 for today.

7 I will be asking you a series of questions,
8 and everything that we say here today is going
9 to be recorded by the court reporter. You
10 understand that, don't you?

11 A. Correct.

12 Q. And because she is taking down everything
13 that we say, it is difficult for her to record
14 two people talking at one time. So I am going
15 to ask you to try to wait until I am finished
16 with a question before you give me an answer. I
17 will try to wait until you are finished with the
18 answer before I ask the next question. Fair
19 enough?

20 A. Fair enough.

21 Q. Also, because she is taking down what we
22 say today, it is important that we speak in
23 verbal words, rather than a shake of the head or
24 a nod of the head, which is more common in
25 everyday discourse. You understand that, don't

1 you?

2 A. Yes.

3 Q. You took an oath swearing to tell the
4 truth, to truthfully answer the questions that I
5 ask you today. You understand that, don't you?

6 A. Yes.

7 Q. Have you ever testified in court before?

8 A. Yes.

9 Q. You understand that the oath you took today
10 is the same oath that you would take in a court
11 of law?

12 A. Yes.

13 Q. If I ask you any question today that you
14 don't understand -- and, frankly, that is
15 likely -- please ask me to rephrase the question
16 or ask it in a different way so that when you
17 give me an answer, I will know that it is an
18 answer to a question that you do understand.
19 Fair enough?

20 A. Fair enough.

21 Q. Then when we are done today, we will know
22 that all of the answers that you have given me
23 have been truthful answers to questions that you
24 understood. Okay?

25 A. Yes.

1 Q. Okay. What is your occupation?

2 A. CEO of Midwest Industrial Supply,
3 Incorporated.

4 Q. How long have you held that position?

5 A. From the time I started the business in
6 1975.

7 Q. Give me a summary of your educational
8 background, beginning with your graduation from
9 high school.

10 A. I graduated from Central Catholic High
11 School in Canton in 1960, went to St. Joseph's
12 College in Rensselaer, Indiana, for a year. I
13 transferred to Walsh College in Canton, Ohio,
14 and attended there approximately three years or
15 four.

16 I have attended Harvard Business School's
17 program known as OPM, Owners and Presidents
18 Management Program.

19 Q. Did you attain any kind of degree or
20 certification from St. Joseph's?

21 A. No.

22 Q. Did you attain any sort of degree or
23 certification from Walsh College?

24 A. No.

25 Q. What was your course of study at

1 St. Joseph's?

2 A. Basic liberal arts program.

3 Q. Okay. How about at Walsh College?

4 A. Concentration on business-related programs
5 from accounting, economics.

6 Q. Were you pursuing a business degree? Let
7 me ask it a little bit differently. Was the
8 course of study that you were pursuing one that
9 was designed to lead to a business degree?

10 A. Yes, my interest was business.

11 Q. And did you attend college immediately
12 after graduation from high school?

13 A. Yes.

14 Q. So the time that you spent in college was
15 early '60s, it looks like, '61 to '65, something
16 like that?

17 A. Approximately, yes.

18 Q. Have you ever served in the military?

19 A. No.

20 Q. When did you attend the OPM program at
21 Harvard?

22 A. Around 1988, I believe.

23 Q. What is the scope of that program? First
24 of all, how long does it last?

25 A. It is a three-year program that lasts three

1 Q. In the same position the whole time you
2 were there?

3 A. Yes.

4 Q. What did you do then?

5 A. I think that is when I started Midwest
6 Industrial Supply, which would be approximately
7 1975.

8 Q. When you started Midwest Industrial Supply,
9 was that in Canton?

10 A. Correct.

11 Q. Is that a business that you started from
12 scratch, or was it previously existing?

13 A. The corporate shell, Midwest Industrial
14 Supply, Inc., was a previously existing
15 corporate entity. Myself, along with two other
16 people, you know, had it become active.

17 Q. Who are those two other people?

18 A. Dick Morena, M-o-r-e-n-a, and Tom
19 Woischnik, W-u-i-s-c-h-n-i-k. That may not be
20 the correct spelling.

21 Q. Okay. So in approximately '75, you and
22 Mr. Morena and Mr. Woischnik acquired the rights
23 to Midwest Industrial Supply. Did you purchase
24 stock?

25 A. They had formed the corporation and, you

1 know, had it sitting dormant. I had a business
2 idea that they funded, and that we went
3 together. They were the owners at that time,
4 and I embarked upon trying to develop the
5 business that at that time I had in mind.

6 Q. Okay. When you say "they" in that answer
7 to the last question, are you referring to
8 Mr. Morena and Mr. Woischnik?

9 A. Yes.

10 Q. Are they still involved in Midwest
11 Industrial Supply?

12 A. No.

13 Q. What was the business idea that you had in
14 mind when you got involved with Midwest
15 Industrial Supply?

16 A. The sale of chemical products to coal
17 mining companies and power plants.

18 Q. What particular type of chemical products?

19 A. At the time, I had no idea, but was
20 focusing more on those markets, coal mining and
21 power plants.

22 Q. What type of need was it that you saw in
23 the coal mining industry or in power plants that
24 you were attempting to fulfill?

25 A. I didn't know the need. I saw in the coal

1 the dust control business?

2 A. No. It would be a wild guess.

3 Q. Are you the biggest player in that market?

4 A. We are a large player.

5 Q. If you are not the biggest, who is?

6 MR. SKERIOTIS: Objection.

7 THE WITNESS: You know, there
8 could be larger players that would fit under the
9 major corporate umbrella, such as Nalco or --
10 and I just don't know how much business they
11 have, how much they do, versus what we do.

12 BY MR. DOSEK:

13 Q. Is there a trade association for the dust
14 control industry?

15 A. Not specifically.

16 Q. Okay. Does Midwest market and distribute
17 its products nationwide?

18 A. Yes.

19 Q. All 50 states, to your knowledge?

20 A. Yes.

21 Q. Does Midwest consider Soilworks to be a
22 major competitor?

23 A. We consider Soilworks to be a competitor.

24 Q. To your knowledge, does Soilworks
25 distribute its products nationwide?

1 **A.** I would expect that they do.

2 **Q.** So in other words, you would consider
3 Soilworks to be a competitor all across the
4 country wherever you do business?

5 **A.** Yes.

6 (Thereupon, Plaintiff's Exhibit 5 of
7 the R.W. Vitale deposition was marked
8 for purposes of identification.)

9 **BY MR. DOSEK:**

10 **Q.** Mr. Vitale, I am showing you what has been
11 marked as Exhibit Number 5. This is identified
12 as Midwest Industrial Supply's Rule 26
13 disclosures.

14 Do you recall ever having seen that
15 document before?

16 **A.** I can't recall specifically when, but I am
17 sure that I have.

18 **Q.** Okay. Just a couple of questions with
19 regard to this document. It identifies on page
20 2 at the bottom, as a person who may have
21 knowledge of facts that are relevant to this
22 case, a Kathy Motter. Who is Kathy Motter?

23 **A.** Kathy Motter was a former employee that was
24 in our marketing, material, design and creation
25 and now is a contract services provider to

1 the second set of interrogatories?

2 A. Let me read what the questions are, then I
3 will give you a good indication.

4 Q. Okay.

5 (Pause.)

6 A. I would say it is unlikely to be anybody
7 else but myself.

8 Q. Okay. I would like to direct your
9 attention to interrogatory number 1, which is on
10 page 2, which asks, "Does any Soilworks product
11 infringe U.S. patent number 7,081,270?"

12 And the answer essentially on the top of
13 the next page says, "From the available public
14 information, yes."

15 That was your answer, correct?

16 A. Correct.

17 Q. What available public information are you
18 referring to there?

19 A. The Soilworks Material Safety Data Sheet
20 for Durasoil, Soilworks bidding, for instance,
21 Alaska Department of Transportation, where there
22 is a clear specification for what is called for.

23 There is multiple military agencies, but
24 handbook which would, if correct, indicate a
25 patent infringement.

