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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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IN THE UNITED STATES DISTRICT COURT

IN AND FOR THE DISTRICT OF ARIZONA

- - -

SOILWORKS, LLC, an Arizona corporation,	)	CASE NO.
Plaintiff/Counterdefendant/ Counterclaimant,	)	2:06-CV-2141-DGC
vs.	)	
MIDWEST INDUSTRIAL SUPPLY, INC., an Ohio corporation authorized to do business in Arizona,	)	
Defendant/Counterclaimant/ Counterdefendant.	)	

- - -

30(b)(6) Deposition of ROBERT W. VITALE, a Witness herein, called by the Plaintiff/Counterclaimant/Counterdefendant for Examination pursuant to the Federal Rules of Civil Procedure, taken before me, the undersigned, Christina A. Arbogast, a Registered Professional Reporter and Notary Public in and for the State of Ohio, pursuant to Notice and agreement of counsel at the law offices of

1 Vorys, Sater, Seymour and Pease, LLP, First
2 National Tower, 106 South Main Street, Suite
3 1100, Akron, Ohio, on Wednesday, the 20th day of
4 February, 2008, commencing at 10:03 o'clock a.m.
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1 **APPEARANCES:**

2

3 On Behalf of the

4 Plaintiff/Counterdefendant/Counterclaimant:

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1 I N D E X

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3 EXAMINATION 5

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6 Plaintiff's Exhibits 8 and 9 44

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1 ROBERT W. VITALE

2 of lawful age, a Witness herein, having been

3 first duly sworn, as hereinafter certified,

4 deposed and said as follows:

5 EXAMINATION

6 **BY MR. PASSARELLI:**

7 **Q.** Good morning.

8 **A.** Good morning.

9 **Q.** Could you please state your name for the

10 record?

11 **A.** Robert Vitale.

12 **Q.** You've had your deposition taken before, I

13 understand.

14 **A.** Yes.

15 **Q.** Approximately how many times?

16 **A.** Oh, six or eight.

17 **Q.** Have any of those been in connection with

18 the patents that are involved in this suit?

19 **A.** No.

20 **Q.** Have you ever -- strike that. Has Midwest

21 Industrial Supply, Inc., ever sued anybody with

22 respect to the patents involved in this case?

23 **A.** No.

24 **Q.** Has Midwest Industrial Supply, Inc., ever

25 sued anybody with respect to the trademarks that

1 are involved in this lawsuit?
2 **A.** No.
3 **Q.** I'm going to hand you what has been marked
4 as -- or what has been served on your counsel,
5 it's an amended notice of 30(b)(6) deposition,
6 and ask if you've seen that.
7 **MR. SKERIOTIS:** You want to mark it
8 as an exhibit?
9 **MR. PASSARELLI:** If you want, I
10 could.
11 **THE WITNESS:** I don't know that
12 I've seen -- I have seen the -- that, Exhibit A.
13 **BY MR. PASSARELLI:**
14 **Q.** Exhibit A to the -- those are the
15 categories for which you're here to testify
16 today?
17 **A.** Correct. Right.
18 **Q.** What did you do to prepare for your
19 deposition today?
20 **A.** Talked with John. That was about it.
21 **Q.** When did you talk -- I don't want the
22 substance of your communication with
23 Mr. Skeriotis, but when did you talk to him?
24 **A.** There were -- it was at the office two days
25 last week when your representative was in the

1 office and we were -- talked over the course of
2 those two days.
3 **Q.** Mr. Peterson?
4 **A.** Yes.
5 **Q.** So these were personal meetings with
6 Mr. Skeriotis, or were they telephone or both?
7 **A.** Personal.
8 **Q.** And these took place at Midwest's offices?
9 **A.** Correct.
10 **Q.** And can you describe for me how long those
11 meetings with Mr. Skeriotis were in preparation
12 for this deposition in terms of minutes or
13 hours?
14 **A.** I would say an hour, hour and a half.
15 **Q.** Was there anybody present besides
16 Mr. Skeriotis when you had those conversations?
17 **A.** No.
18 **Q.** Did you review any documents in
19 connection -- at those meetings?
20 **A.** We reviewed things like this. It was
21 during that time that he showed me --
22 (Indicating.)
23 **Q.** The 30(b)(6)?
24 **A.** 30(b)(6).
25 **Q.** And the categories for which you were to

1 testify today?
2 **A.** Yeah. Correct.
3 **Q.** But you didn't review any Midwest records
4 during that one and a half hours of meeting?
5 **A.** No. We went through, I think, the answers
6 to interrogatories. Just filings as part of the
7 action.
8 **Q.** The pleadings that were filed with the
9 court?
10 **A.** Yeah. And the answers to questions that we
11 had provided.
12 **Q.** Do you recall reviewing any other
13 information or documentary materials in
14 connection with those discussions with
15 Mr. Skeriotis?
16 **A.** I don't really recall and I -- I mean the
17 thing that I really recall is sitting down
18 with -- the two of us with all this stuff and
19 just, "Go to page so and so," and --
20 **Q.** The two books, can you describe what those
21 are for me?
22 **A.** The -- the filings, the interrogatories.
23 **MR. SKERIOTIS:** I just want to
24 caution you not to discuss what we talked about.
25 **THE WITNESS:** Yeah. Oh, yeah.

1 Yeah.

2 **MR. SKERIOTIS:** Just discuss -- you

3 know, answer his question about, like he said,

4 what books. You can answer his question, but

5 don't talk about the substance of our

6 conversations about those books.

7 **THE WITNESS:** Yeah.

8 **BY MR. PASSARELLI:**

9 **Q.** Your understanding is those books contained

10 court filings that were prepared either by your

11 counsel or Soilworks' counsel and filed in the

12 litigation?

13 **A.** Yes.

14 **Q.** Other than what you've described here for

15 me today, did you review any other materials in

16 those discussions you had with Mr. Skeriotis

17 about today's deposition?

18 **MR. SKERIOTIS:** Objection.

19 **THE WITNESS:** No, not that I can

20 recall.

21 **BY MR. PASSARELLI:**

22 **Q.** Okay. One of the topics of the 30(b)(6)

23 deposition is: "Midwest Industrial Supply,

24 Inc.'s claim that it has received US Patent

25 Number 7,074,266 and US Patent Number 7,081,270

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 --

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

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.

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

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

1 little break. I would like to visit with my --
2 **MR. SKERIOTIS:** Yeah.
3 (Thereupon, a recess was taken.)
4 **BY MR. PASSARELLI:**
5 **Q.** What I would like to get from you,
6 Mr. Vitale, is any substantiation you have that
7 your lawyer isn't contending is privileged that
8 substantiates that my client infringed your two
9 patents.
10 What substantiation do you have, are you
11 aware of?
12 **A.** The claims in the marketing materials. The
13 bidding, their product in terms of meeting the
14 specification of a user which would indicate
15 violation or infringement of patents.
16 Claims that appear in various military
17 publications and handbooks about what their
18 product is that would, in my opinion, be an
19 infringement.
20 **MR. SKERIOTIS:** John, I think -- I
21 just want to make sure the record's clear.
22 We're talking about Durasoil? You just said
23 client's products.
24 **MR. PASSARELLI:** Any products.
25 **THE WITNESS:** Durasoil.

1 **A.** I don't know if there would be anything
2 else.
3 **Q.** Okay. As I understand it, you are claiming
4 that Soilworks infringes Midwest trademarks; is
5 that correct?
6 **A.** Yes.
7 **Q.** And what trademarks are they infringing?
8 **A.** The trademark Synthetic Organic Dust
9 Control.
10 **Q.** Is that the only one you contend they're
11 infringing?
12 **MR. SKERIOTIS:** Objection.
13 **THE WITNESS:** Yes, I believe so.
14 **BY MR. PASSARELLI:**
15 **Q.** And is that because they actually used that
16 phrase?
17 **A.** Correct.
18 **Q.** And you believe that you are the only
19 manufacturer -- strike that.
20 You believe that you are the only entity
21 that can use that phrase?
22 **A.** Yes.
23 **MR. SKERIOTIS:** Objection.
24 **BY MR. PASSARELLI:**
25 **Q.** In the soil -- in the dust control arena,

1 correct?
2 **A.** Yes.
3 **Q.** Have you attempted to quantify the alleged
4 damages that you have sustained as a result of
5 our client's use of the term Synthetic Organic
6 Dust Control?
7 **A.** Not yet.
8 **Q.** What have you done to quantify damages
9 resulting from our client's infringement of your
10 alleged trademarks?
11 **A.** Nothing specific as yet other than general.
12 **Q.** Have you described for me what you mean by
13 "general"?
14 **A.** Just -- just the sense of customers lost
15 and/or customers buying Durasoil in lieu of.
16 **Q.** And is it your testimony that customers are
17 buying product -- Durasoil product because our
18 client uses the phrase Synthetic -- Synthetic
19 Organic Dust Control?
20 **MR. SKERIOTIS:** Objection.
21 **THE WITNESS:** I would say the --
22 that and the -- the representation of what that
23 is. Meaning that that's what they are selling,
24 so they have to buy it.
25 **BY MR. PASSARELLI:**

1 **Q.** So it's your testimony that our client is
2 representing its product -- its Durasoil product
3 as Synthetic Organic Dust Control?
4 **A.** Correct.
5 **Q.** And that that is causing Soilworks'
6 customers to buy that particular product?
7 **MR. SKERIOTIS:** Objection.
8 **THE WITNESS:** Yes.
9 **BY MR. PASSARELLI:**
10 **Q.** In those cases, it's clear the customer's
11 not deceived into believing they're buying
12 product from Midwest?
13 **MR. SKERIOTIS:** Objection.
14 **THE WITNESS:** No.
15 **BY MR. PASSARELLI:**
16 **Q.** In other words, it's not your -- strike
17 that.
18 You're not saying that customers are buying
19 product from Soilworks thinking they're buying
20 products from Midwest?
21 **MR. SKERIOTIS:** Objection.
22 **THE WITNESS:** I'm not saying
23 that.
24 **BY MR. PASSARELLI:**
25 **Q.** So your objection is to any use our client

1 makes of Synthetic Organic Dust Control?
2 **A.** Yes.
3 **Q.** And at this point in time you have not
4 quantified the volume of revenues our client
5 allegedly derived from its use of the term
6 Synthetic Organic Dust Control?
7 **A.** That is right. We have not quantified
8 that.
9 **Q.** Category number 4, "Midwest's claim that
10 Soilworks has made false or misleading
11 statements of fact in its commercial
12 advertisements and promotions that misrepresent
13 the nature, characteristics, qualities or origin
14 of its own services, products or commercial
15 activities." What information do you have with
16 regard to that subject?
17 **A.** Well, we would base that on a claim of
18 being a manufacturer of Durasoil and their claim
19 associated with environmental claims of
20 Durasoil.
21 **Q.** And so it's your testimony that any time
22 Soilworks describes itself as a manufacturer, it
23 is engaging in false advertising?
24 **MR. SKERIOTIS:** Objection.
25 **THE WITNESS:** I would -- with

1 removal of the word "any," because I don't know
2 what all they do, I would say that they're using
3 when they use -- in terms of Durasoil the word
4 manufacturer.
5 **BY MR. PASSARELLI:**
6 **Q.** Okay. So -- so it's your position that
7 Soilworks is representing to its customers and
8 prospective customers that it is a manufacturer
9 of Durasoil when, in fact, it is not?
10 **A.** Yes. That and Soiltac and Gorilla-Snot. I
11 don't --
12 (Thereupon, a discussion was held off
13 the record.)
14 **BY MR. PASSARELLI:**
15 **Q.** What substantiation do you have that
16 Soilworks' customers are misled by their use of
17 the term manufacturer as you described?
18 **MR. SKERIOTIS:** Objection.
19 **THE WITNESS:** I don't have an
20 answer to that. If it's -- if it's false, it's
21 false. If it's false, I would think that it is
22 misleading.
23 **BY MR. PASSARELLI:**
24 **Q.** And how do you believe it to be false?
25 **A.** I don't believe they are manufacturers

1 of --
2 **Q.** Those particular products?
3 **A.** Right.
4 **Q.** You believe -- well, if Soilworks requires
5 its suppliers of those products to meet
6 Soilworks' proprietary product specifications,
7 would that change your opinion as to whether
8 they can describe themselves as a manufacturer
9 or not?
10 **MR. SKERIOTIS:** Objection.
11 **THE WITNESS:** If -- if they are
12 actually having them toll blended, I would think
13 that -- you know, that that would be
14 considered -- and toll blended to a specific
15 formula as opposed to it being an off-the-shelf,
16 standard item that is simply being sourced,
17 labeled and shipped to something other than what
18 it ships to other people as.
19 **BY MR. PASSARELLI:**
20 **Q.** That would -- so under your definition of
21 manufacturer, that would include a company who
22 provides a product specification to a supplier
23 and a supplier meets that product spec?
24 **MR. SKERIOTIS:** Objection.
25 **THE WITNESS:** Yeah. Again, it

1 would go to is their product specification an
2 off-the-shelf product or a product that the
3 supplier has that is sold for other purposes
4 that is now just being relabeled. If it's being
5 sourced as opposed to made.
6 **BY MR. PASSARELLI:**
7 **Q.** On what do you base your definition of
8 manufacturer?
9 **A.** Just a general understanding of making
10 things.
11 **Q.** Okay. So you haven't based it on any
12 market research?
13 **A.** No.
14 **Q.** Or any specific dictionary definition?
15 **A.** No. I mean I -- in one of the responses
16 you gave us you identified Soilworks as sourcing
17 and marketing, which is what I understand them
18 to do, as opposed to manufacturing.
19 **Q.** Is there any authoritative source that you
20 rely on as to who meets the qualifications of
21 describing themselves as a manufacturer?
22 **MR. SKERIOTIS:** Objection.
23 **THE WITNESS:** No, I'm not
24 referring to any authoritative source.
25 **BY MR. PASSARELLI:**

1 AFTERNOON SESSION

2 1:13 p.m.

3 **THE WITNESS:** I would like to add

4 one thing in with all the marketing stuff to the

5 one question.

6 **BY MR. PASSARELLI:**

7 **Q.** Okay.

8 **A.** There is also the, like, misuse or use of

9 our registered trademark in their meta tagging

10 of their website, which is also part of our

11 complaint.

12 **Q.** What -- what do you know about that?

13 **A.** That they were just doing copies of it.

14 **Q.** What trademark specifically?

15 **A.** I -- I don't remember what all -- I know

16 the one that -- I mean that I know is

17 S-o-i-l-S-e-m-e-n-t, Soil-Sement, which is a

18 product competitive with their Soiltac.

19 **Q.** And it's your allegation that through the

20 use of META Tags they're infringing your

21 trademark?

22 **A.** Yes.

23 **Q.** And --

24 **A.** And I think violating other things. You're

25 not supposed to be doing that. I think that's

1 an illegal practice.
2 **Q.** On what do you base that conclusion?
3 **MR. SKERIOTIS:** Objection.
4 **THE WITNESS:** Just, you know,
5 internet law or whatever is the practice or the
6 law.
7 **BY MR. PASSARELLI:**
8 **Q.** Do you have any information or
9 documentation that substantiates that?
10 **A.** The law?
11 **Q.** No, the infringement.
12 **MR. SKERIOTIS:** Objection.
13 **THE WITNESS:** I got copies of it.
14 **BY MR. PASSARELLI:**
15 **Q.** You have copies. And what is it that you
16 have copies of?
17 **A.** Of their meta tagging on their website that
18 includes our mark or marks.
19 **Q.** Have you attempted to quantify any alleged
20 damage from that conduct?
21 **A.** Not yet.
22 **Q.** Are there any other trademarks involved
23 other than Soil-Sement and Soiltac?
24 **A.** Well, Soiltac is their name. I don't
25 recall. I mentioned these yesterday and I

1 didn't check anything. It's just I forgot.
2 **Q.** Okay. Earlier you described -- or you
3 mentioned that you had invoiced customers.
4 These invoiced customers, are they all users or
5 are any of them resellers?
6 **MR. SKERIOTIS:** Objection.
7 **THE WITNESS:** Users. We do have
8 resellers, but users. The ones I'm --
9 **BY MR. PASSARELLI:**
10 **Q.** Do you have any resellers of dust control
11 products?
12 **A.** Yes.
13 **Q.** Approximately how many reseller -- would
14 you invoice sales to them?
15 **A.** Yes.
16 **Q.** Approximately how many invoiced customers
17 in the calendar year 2007 were resellers?
18 **A.** Ten approximately.
19 **Q.** Would you describe these as dealers?
20 **A.** Dealers or distributors.
21 **Q.** Can you identify the top three?
22 **A.** EarthCare Consultants, Belterra, Nor --
23 N-o-r-d-u-s-t, Nordust.
24 **Q.** So these would be customers that Midwest
25 sells product to and they, in turn, resell to

1 **Q.** On page 11, line 3, you are seeking an
2 injunction against my client from using
3 Midwest's marks.
4 Can you specifically identify which marks
5 you're referring to?
6 **A.** It would be Synthetic Organic Dust Control.
7 **Q.** Anything else?
8 **A.** This may include the meta tagging issue, if
9 they are still doing that.
10 **Q.** And you've told me everything you know
11 about the meta tagging conduct that --
12 **A.** Yeah, that I'm aware of.
13 **Q.** -- that you're finding objectionable?
14 **MR. SKERIOTIS:** Objection.
15 **THE WITNESS:** Yeah.
16 **BY MR. PASSARELLI:**
17 **Q.** Anything else?
18 **A.** I don't think so.
19 **Q.** Paragraph 2, "Falsely designating the
20 origin of the Soilworks products and services,"
21 have you told me everything you know about my
22 client falsely designating the origin of
23 Soilworks products and services?
24 **MR. SKERIOTIS:** Objection.
25 **THE WITNESS:** I believe I have,

1 C E R T I F I C A T E
2

STATE OF OHIO,)
3) SS:
SUMMIT COUNTY,)
4

I, Christina A. Arbogast, a Registered
5 Professional Reporter and Notary Public within and for the State of Ohio, duly commissioned and
6 qualified, do hereby certify that the within named witness, ROBERT W. VITALE, was by me first
7 duly sworn to testify the truth, the whole truth and nothing but the truth in the cause
8 aforesaid; that the testimony then given by him was by me reduced to Stenotypy in the presence
9 of said witness, afterwards prepared and produced by means of Computer-Aided
10 Transcription and that the foregoing is a true and correct transcript of the testimony so given
11 by him as aforesaid.

I do further certify that this deposition
12 was taken at the time and place in the foregoing caption specified, and was completed
13 without adjournment.

I do further certify that I am not a
14 relative, employee of or attorney for any party or counsel, or otherwise financially interested
15 in this action.

I do further certify that I am not, nor is
16 the court reporting firm with which I am affiliated, under a contract as defined in Civil
17 Rule 28(D).

IN WITNESS WHEREOF, I have hereunto set my
18 hand and affixed my seal of office at Akron, Ohio on this 26th day of February, 2008.
19
20
21
22
23 Christina A. Arbogast
Christina A. Arbogast, RPR
24

My commission expires December 7, 2010.
25
- - -