

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

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

vs.

) NO. 2:06-CV-02141-DGC
)

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

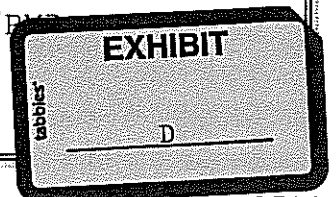
Phoenix, Arizona

April 9, 2008

9:00 a.m.

C O N F I D E N T I A L
DEPOSITION OF CHAD FALKENBERG
SOILWORKS, LLC 30(b)(6)
(VOLUME I, Pages 1 - 229)

LEA, SHERMAN & HABESKI
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1 DEPOSITION OF CHAD FALKENBERG,
2 taken at 9:09 a.m., on April 9, 2008, at the law
3 offices of Jones, Skelton & Hochuli, 2901 North Central
4 Avenue, Suite 800, Phoenix, Arizona, before LINDA
5 BLACKMON, RPR/RMR, a Certified Reporter in the State of
6 Arizona.

7

8 APPEARANCES:

9 For the Plaintiff/Counterdefendant:

Kutak Rock, LLP

10 BY E. SCOTT DOSEK, ESQ.

8601 North Scottsdale Road

11 Scottsdale, Arizona 85253-2742

12 For the Defendant/Counterclaimant:

Brouse McDowell

13 BY JOHN M. SKERIOTIS, ESQ.

388 South Main Street, Suite 500

14 Akron, Ohio 44311-4407

330-535-5711

15

16 Also Present:

Robert Vitale

17

18

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1 (Deposition Exhibit No. 14 was marked.)

2 **MR. SKERIOTIS:** Some introductory
3 remarks. This deposition is being taken pursuant to
4 notice and agreement of the parties, it's also being
5 taken pursuant to the Federal Rules of Civil Procedure
6 for purposes of discovery and other purposes allowed
7 under the Federal rules. This deposition is also
8 taking place pursuant to the notice of deposition to
9 you, Mr. Falkenberg, as well as the 30(b)(6) notice of
10 deposition.

11 Counsel have agreed that since much of
12 your knowledge is within the 30(b)(6) parameters of
13 this schedule I am about to show you that this
14 deposition and your personal deposition are being
15 combined as a 30(b)(6).

16 **THE WITNESS:** Okay.

17 **MR. SKERIOTIS:** What that all means to
18 you is you are here testifying today for the company
19 Soilworks.

20 **THE WITNESS:** So is this the 30(b)(6) or
21 are they combined?

22 **MR. DOSEK:** We are combining them.

23 **THE WITNESS:** Okay.

24 **MR. DOSEK:** And I think that, and you
25 tell me what you think, it seems to me that we could

1 agree that all of the answers that he gives to
2 questions that are posed to the extent that they are
3 within the scope of the categories defined in the
4 30(b)(6) are corporate answers, if you will, and that
5 if he gives an answer that is uniquely personal, a
6 personal opinion, not binding on the company and not
7 within the scope of the categories defined in the
8 30(b)(6) notice that he will tell us that. Does that
9 make sense?

10 **MR. SKERIOTIS:** Yeah, that's fine, that's
11 perfectly fine. I agree with that, that will be real
12 easy. Thanks, Scott.

13

14 **CHAD FALKENBERG,**
15 called as a witness herein, having been first duly
16 sworn, was examined and testified as follows:

17

18 **EXAMINATION**

19 **BY MR. SKERIOTIS:**

20 **Q.** Mr. Falkenberg, can you please state and spell
21 your name for the record.

22 **A.** Chad, C-h-a-d, Falkenberg,
23 F-a-l-k-e-n-b-e-r-g.

24 **MR. SKERIOTIS:** Just for the record the
25 individuals who are here present today are

1 Mr. Falkenberg, his lawyer Mr. Dosek, myself and
2 Mr. Bob Vitale who is the corporate representative of
3 the Defendant Midwest Industrial.

4 Q. BY MR. SKERIOTIS: I would like to hand you
5 what has been marked as Exhibit 14. And the reason
6 it's Exhibit 14 is we picked up from yesterday's
7 deposition of Mrs. Falkenberg and continued, so we had
8 13 exhibits yesterday, this is the first one today and
9 we started with 14 to keep everything simple.

10 So I have handed you what has been marked
11 as Exhibit 14, have you seen that document before?

12 A. I believe so.

13 Q. Could you take a minute to go through it
14 briefly, just to make sure that you have, I guess,
15 three pages and then a Schedule A which should be --

16 A. Yes.

17 Q. -- six pages long. Do you have all of those
18 pages?

19 A. I do.

20 Q. Okay. I would like to go over Schedule A with
21 you to ensure that you are the corporate representative
22 who is here today to testify with respect to the
23 information that we requested. Specifically I would
24 like you to turn to Page 2 of Schedule A. Underneath
25 the heading Categories/Topics for Deposition. Do you

1 see that?

2 A. Yes.

3 Q. There are a lot of categories here, roughly
4 46; however, I will note that on Page 4 there are two
5 number 15s and on Page 6 request No. 35 is incomplete.
6 It says "all information and facts regarding." If you
7 can fulfill that request, that would be wonderful. I
8 am kidding.

9 Could you take a look at those categories
10 and let's take a look at Page 2 and do you see 1
11 through 5, could you please take a moment to take a
12 look at Categories 1 through 5 and make sure that you
13 are the person who has knowledge with respect to each
14 of those categories from Soilworks.

15 A. Okay.

16 Q. So would that be a true statement that you
17 have knowledge on behalf of Soilworks for each of those
18 categories 1 through 5?

19 A. Yes.

20 Q. And the second page, 6 through 12, the same
21 question, are you the person who has knowledge with
22 respect to those categories from Soilworks?

23 A. I am the most appropriate.

24 Q. And then Category 13 begins at the bottom of 3
25 and continues on Page 4, same question with respect to

1 those categories?

2 A. Again I would be the most appropriate person.

3 Q. And then the same thing with Page 5, if you
4 want to speed it up?

5 A. Same answer.

6 Q. Same answer for Page 5 and 6?

7 A. Same answer.

8 Q. Okay, good. We kind of got a little bit of
9 ahead of ourselves. Have you ever had your deposition
10 taken before?

11 A. I think for a car accident probably ten years
12 ago.

13 Q. Is that the only time you have had your
14 deposition taken before then?

15 A. To the best of my knowledge.

16 Q. Did you bring anything with you here today,
17 any documents?

18 A. No.

19 Q. Now I am sure that Mr. Dosek has explained to
20 you the process we are going to go through, but I still
21 want to make sure that we are on the same page
22 together. First of all, if you don't understand the
23 question will you tell me?

24 A. I will do my best.

25 Q. And if you don't hear any part of the question

1 will you let me know?

2 A. Okay.

3 Q. If you don't otherwise tell me, I am going to
4 assume you have heard the question and you understand
5 it; is that okay?

6 A. All right.

7 Q. If you realize that during this deposition
8 that an earlier answer you gave was inaccurate or
9 incomplete, please let me know, we will go back to it
10 and I will give you a full opportunity to change or
11 correct that answer; is that okay?

12 A. Thank you, I will.

13 Q. Now you understand that all of your answers
14 are being recorded today by the court reporter?

15 A. Yes.

16 Q. And you understand you have to give verbal,
17 audible answers, and that means no uh-huhs or huh-uhs,
18 you can't do that?

19 A. Yes, I understand.

20 Q. And you understand that you are going to get a
21 chance to review this transcript today that's going to
22 be generated by the court reporter and that you can
23 correct any misinformation or possible errors by the
24 court reporter; do you understand that?

25 A. I understand that.

1 Q. And you do you understand that if you make any
2 changes or corrections, I will get an opportunity to
3 question you about those changes at trial?

4 A. Yes.

5 Q. Is there any reason why you can't testify
6 fully and accurately here today?

7 A. No.

8 Q. Do you have any questions about how we are
9 going to proceed?

10 A. Not right now.

11 Q. I plan on taking breaks. If you ever want a
12 break, just let me know. If you have to use the
13 restroom, make a phone call, I understand. Do you have
14 any special needs I need to be aware of?

15 A. Not yet.

16 Q. I want to get into a little bit of your
17 preparation for this deposition. Did you meet with
18 anyone before this deposition for the purposes of
19 preparing?

20 A. Yes.

21 Q. Who did you meet with?

22 A. I met with Scott.

23 Q. And that would be Mr. Dosek, your lawyer?

24 A. Yes.

25 Q. Who else was present?

1 Exhibit 8 we have gone back to the last two pages on,
2 and you indicated that you prepared this document and
3 we are going through it to say Durasoil does not have a
4 binder, correct?

5 **A.** That's my belief.

6 **Q.** You indicate Durasoil does not have any
7 carboxylic acid; is that a true statement?

8 **A.** I would like to say that it is my belief that
9 we do not have carboxylic acid. I am certainly not the
10 best person to ask what carboxylic acid is or where it
11 can be found or what its synonyms or alternate
12 descriptions are and I think it's important to note
13 that I did the best I could with putting these
14 together.

15 **MR. DOSEK:** John, are we looking at 270
16 or 266, which one?

17 **MR. SKERIOTIS:** 270.

18 **MR. DOSEK:** Okay.

19 **Q.** BY MR. SKERIOTIS: You are going to have to
20 help me with this, Mr. Falkenberg. I thought you told
21 me earlier that all we had to do was test your product
22 and we would know if it's infringed our patent or not.
23 Did you not tell me that earlier?

24 **A.** I think you could determine that by testing
25 it.

1 Q. So then how come you can't tell me for certain
2 whether or not your product has a carboxylic acid or
3 not because you could have done the same testing,
4 correct?

5 A. Well, if Midwest provided us with a CAS number
6 for carboxylic acid, that would probably have helped a
7 lot to determine that, but instead they use a very
8 broad term that is ambiguous in my opinion that does
9 not very accurately describe the ingredients that go
10 into making that product and I think that is
11 intentional to confuse others about what is in there.

12 Q. But as you sit here you have said you are not
13 a chemist, correct?

14 A. I am not a chemist.

15 Q. So you don't know what carboxylic acid is?

16 A. I have an opinion.

17 Q. Do you know what carboxylic acid is?

18 A. I do not emphatically know what carboxylic
19 acid is.

20 Q. Does Durasoil contain an ester?

21 A. I have been informed that it does and so it is
22 now my belief that it does.

23 Q. So if it contains an ester, then it would
24 meet A, correct, if a binder is an ester?

25 A. If ester is a binder, then yes.

1 Q. Does Durasoil contain any thermoplastic
2 polyolephines?

3 A. Again I am going to refer to what I put here
4 on my reply. Would you like me to read it?

5 Q. Sure.

6 A. Durasoil does not contain any thermoplastic
7 polyolephines, however, this term needs better defining
8 because there is no CAS number, it's a general term,
9 it's not specific. And that really is a problem that
10 these terms were not good terms.

11 Q. Does Durasoil contain a synthetic isoalkane?

12 A. If a synthetic isoalkane is defined by being
13 manufactured molecule by molecule such as a Group 4 PAO
14 base oil, then our product is not and does not contain
15 any synthetic isoalkane.

16 Q. Okay.

17 A. But I would also like to say that I don't
18 think that's how Midwest is defining it.

19 Q. How do you think Midwest is defining it?

20 A. It's so ambiguous I think the intention is to
21 be ambiguous and cover the sky.

22 Q. So what is the ambiguity as you understand it?

23 A. I am going to make a far-out generality, it's
24 like I am going to patent the group food. Well, that's
25 pretty broad and it encompasses a lot of things. And I

1 mean that's an overexaggeration, but the point is is
2 that synthetic isoalkane covers a lot of different
3 things and it can be defined in many different ways.
4 Again, it's too broad.

5 Q. Do you think it could be defined in a way such
6 that Durasoil would be interpreted to have a synthetic
7 isoalkane?

8 A. Here is what I would love to see, I would love
9 to see that mineral oil is or is not with CAS number
10 such and such, does or does not meet the terms of being
11 what Midwest is defining as a synthetic isoalkane.
12 That's the kind of stuff I would love to be able to
13 look at, but in fact we have to infer what they are
14 meaning by these broad terms and that's not easy.

15 Q. So back to my question though, do you think
16 that there is a definition of synthetic isoalkane
17 wherein Durasoil would meet having a synthetic
18 isoalkane?

19 A. I think it's possible. For example, if
20 mineral oil is a synthetic isoalkane or base oil that
21 we describe in our ingredient list are considered as a
22 synthetic isoalkane, then it is what it is.

23 Q. Well, let me ask you is mineral oil an
24 isoalkane?

25 A. I don't know.

1 Q. Do you know is mineral oil synthetic?

2 A. I know mineral oil is refined.

3 Q. But do you know if it is synthetic?

4 A. It depends on how you are defining
5 "synthetic," and if you are defining synthetic as
6 something that is not natural, then I would certainly
7 classify it as synthetic.

8 Q. Because you believe mineral oil is not
9 natural?

10 A. I believe so.

11 Q. So in other words is your definition of
12 "synthetic" just anything that's not natural?

13 A. Mineral oil to the best of my knowledge cannot
14 be obtained in the form that we use it today without
15 going through some sort of process.

16 Q. But my question was a little bit broader than
17 that. Is your definition of "synthetic" anything
18 that's not natural?

19 A. I think that could be a good definition.

20 Q. Why don't you just tell me what is your
21 definition of "synthetic." I kind of put words in your
22 mouth, I didn't mean to do that.

23 A. I think it could be described as something
24 that's not natural or naturally occurring.

25 Q. Not naturally occurring?

1 **A.** Sure.

2 **Q.** Because you said naturally occurring, I just
3 want to make sure you are talking about not naturally
4 occurring.

5 Have you tested Durasoil to find out if
6 it has an isoalkane?

7 **A.** Again, I don't know what an isoalkane is. I
8 don't know what you guys are trying to classify as an
9 isoalkane.

10 **Q.** But let me ask you this, we have determined
11 that you are not a chemist, correct?

12 **A.** Again, yes.

13 **Q.** Have you turned to a chemist to find out if
14 they can determine whether or not Durasoil has an
15 isoalkane?

16 **A.** I have been advised by people, yes.

17 **Q.** Who have you been advised by?

18 **A.** Randy McFarlane.

19 **Q.** Who is Randy?

20 **A.** He is with ConocoPhillips.

21 **Q.** What has Randy told you?

22 **A.** Randy helped clarify his take on what these
23 binders and acids and esters and thermoplastics, he
24 helped paint his knowledge and his picture of what he
25 believes that might be.

1 Q. Do you know what it means to be applied neat?

2 A. My definition of being "applied neat" is that
3 we do not have to dilute the product in order to apply
4 it, it can be applied as is.

5 Q. It goes on in No. 4 to say "Durasoil does not
6 contain thermoplastic polyolephines." Is that a true
7 statement?

8 MR. DOSEK: Object to the form.

9 A. If you read what I wrote here, you will see
10 that this term needs better defining. This term is
11 even worse than the synthetic isoalkane, so we are
12 really going deep in the ugly hole here with broad
13 terms.

14 Q. BY MR. SKERIOTIS: But you did state "Durasoil
15 does not contain thermoplastic polyolephines, did you
16 not?

17 A. To the best of my knowledge and based on the
18 help I got from Randy McFarlane, it would seem that it
19 does not.

20 Q. You go on to say "Durasoil does not contain
21 carboxylic acids" and that's consistent with what you
22 have in No. 1, correct?

23 A. Those two match.

24 Q. There is a sentence up there that says that.

25 A. If I am struggling with this I can only

1 imagine you struggling with this.

2 Q. Oh, it's not that bad. You go on to say in
3 No. 10 "Durasoil does not reduce erosion." Is that a
4 true statement?

5 MR. DOSEK: Object to the form.

6 A. I can't say for sure. We talked earlier that
7 we do not intend to use Durasoil for erosion control as
8 it relates to water erosion, that is not our purpose.

9 Q. BY MR. SKERIOTIS: So is that statement that
10 you wrote there a true statement or not?

11 MR. DOSEK: Object to the form.

12 A. I wrote it.

13 MR. SKERIOTIS: Scott, just out of
14 curiosity, what is the objection? It's his own
15 writing, he wrote it, he has an understanding of what
16 he wrote.

17 MR. DOSEK: Because the way the question
18 is formed. And I am not sure that you can ask a proper
19 question given the fact that we don't have a definition
20 of the term "erosion" and we have got it clear on the
21 record today that when we are talking about wind
22 erosion versus water erosion, we are talking about two
23 different things. So I just want that to be clear.

24 MR. SKERIOTIS: I want to be clear too, I
25 am just asking him what he wrote. I mean he wrote it.

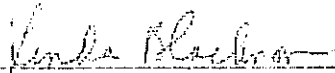
1 STATE OF ARIZONA)
) ss.
2 COUNTY OF MARICOPA)

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 BE IT KNOWN that the foregoing deposition was taken before me, LINDA BLACKMON, a Certified Reporter in the State of Arizona; that the witness before testifying was duly sworn by me to testify to the whole truth; that the questions propounded to the witness and the answers of the witness thereto were taken down by me in shorthand and thereafter reduced by computer-aided transcription to print under my direction; that the deposition was submitted to the witness to read and sign; that the foregoing 228 pages are a true and correct transcript of all proceedings had upon taking of said deposition, all done to the best of my skill and ability.

 I FURTHER CERTIFY that I am in no way related to any of the parties thereto nor am I in any way interested in the outcome hereof.

 DATED at Phoenix, Arizona, this 15th day of April, 2008.



Linda Blackmon, RPR/RMR
Certified Reporter
Certificate No. 50320