

Exhibit 3

SOILWORKS VS. MIDWEST INDUSTRIAL

CHAD FALKENBERG, VOL. I

4/09/08

LEA, SHERMAN & HABESKI

PHOENIX, AZ (602)257-8514

SOILWORKS VS. MIDWEST INDUSTRIAL

1 IN THE UNITED STATES DISTRICT COURT
 2 FOR THE DISTRICT OF ARIZONA
 3
 4 SOILWORKS, LLC, an Arizona)
 corporation,)
 5 Plaintiff/Counterdefendant,)
 6 vs.) NO. 2:06-CV-02141-DGC
 7
 8 MIDWEST INDUSTRIAL SUPPLY,)
 INC., an Ohio corporation)
 authorized to do business)
 9 in Arizona,)
 10 Defendant/Counterclaimant.)
 11
 12 Phoenix, Arizona
 13 April 9, 2008
 9:00 a.m.
 14
 15
 16 C O N F I D E N T I A L
 17 DEPOSITION OF CHAD FALKENBERG
 18 SOILWORKS, LLC 30(b)(6)
 19 (VOLUME I, Pages 1 - 229)
 20
 21 LEA, SHERMAN & HABESKI
 22 Registered Professional Reporters
 834 North First Avenue
 23 Phoenix, Arizona 85003
 Phone: 602.257.8514 - Fax: 602.257.8582
 24 Reported by: Linda Blackmon, RPR/RMR
 Certified Reporter
 Certificate No. 50320
 25

1 I N D E X
 2
 3
 4 EXAMINATION PAGE
 5
 6 BY MR. SKERIOTIS 6
 7
 8
 9
 10 EXHIBITS DESCRIPTION PAGE
 11
 12 14 Notice of Deposition of Soilworks 30(b)(6) 5
 13 15 ConocoPhillips Web Page of Group 2 Base Oils 54
 14 16 ConocoPhillips Pure Performance Base Oils
 Specifications Sheet 56
 15
 16 17 Letter dated 7-27-06 to Donald Dunavant from
 Robert Vitale 129
 17 18 Letter dated 7-27-06 to David Shooner from
 Robert Vitale 129
 18
 19 19 Letter dated June 8, 2006 to Douglas Allsworth
 from John Skeriotis 140
 20 20 Letter dated July 18, 2006 to John Skeriotis
 from John Passarelli 142
 21 21 Letter dated July 27, 2006 to John Skeriotis
 from John Passarelli 144
 22 22 Letter dated August 8, 2006 to John Passarelli
 from John Skeriotis 147
 23 23 Series of E-mails Re Patent dated 11-22-06 152
 24
 25

1 I N D E X (CONTINUED)
 2
 3
 4 EXHIBITS DESCRIPTION PAGE
 5
 6 24 E-mail dated 12-12-06 to Steve Gordner from
 Dorian Falkenberg Re Indemnification Letter 157
 7 25 Indemnification Letter dated 12-12-06 to
 Steve Gordner from Dorian Falkenberg 157
 8 26 Invitation to Bid issued May 31, 2007 188
 9 27 Invitation to Bid issued July 10, 2006 188
 10 28 Notice of Intent to Award a Contract
 dated 6-27-07 196
 11 29 Notice of Intent to Award a Contract
 dated August 1, 2006 198
 12 30 Document titled Dust Palliative Re Material
 Requirements 199
 13 31 Fax to Chad Falkenberg from Steve Hickman
 Re Kokhanok Surface Requirements 202
 14 32 State of Alaska Laboratory Report Re Soil
 Cement Specimens 204
 15 33 Fax dated 5-4-6 to Chad Falkenberg from Steve
 Hickman Re Chevak Airport Specification 206
 16 34 E-mail dated 11-14-07 to Steve Gordner from
 Jaquel Shepperson Re Chevak Airport 211
 17 35 Picasa Web Albums for Soilworks 213
 18 36 Bid Schedule for Circle Hot Springs Airport 221
 19 37 E-mail dated August 2, 2006 to Bob Vitale
 from Jim Simko Re Prices 225
 20
 21
 22
 23
 24
 25

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.
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 12 For the Defendant/Counterclaimant:
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 14 Akron, Ohio 44311-4407
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 15
 16 Also Present:
 Robert Vitale
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 18
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SOILWORKS VS. MIDWEST INDUSTRIAL

1 A. I cannot think of anything right now.
 2 Q. The next paragraph, Paragraph 10, talks about
 3 Midwest's conduct is intended to cause mistake,
 4 deception, and consumer confusion. What conduct has
 5 caused mistake, deception and consumer confusion?
 6 A. Let's go back to both the letter that Bob
 7 wrote to Polar Supply and their marketing materials
 8 about Soilworks being an imitator, both of those would
 9 fit the bill for No. 10.
 10 Q. The letter to Polar Supply you believe causes
 11 what, mistakes, deception and confusion or just one of
 12 the three?
 13 A. Well, it could be multiple, but I would say
 14 the one that jumps out would certainly be confusion.
 15 Q. Confusion as to how, as to what?
 16 A. Polar Supply didn't know if it was true or not
 17 and if they were going to be liable or sued if they
 18 used our products or sold our products. They were
 19 scared.
 20 Q. But that didn't cause confusion between any
 21 product of Soilworks and any product of Midwest, did
 22 it?
 23 A. I think I understand what you're saying is the
 24 letter itself didn't cause confusion between the two
 25 product lines?

1 A. I wouldn't know. I am not aware of anything
 2 but that doesn't mean that it hasn't happened.
 3 Q. Who would know?
 4 A. I would think our books would show it.
 5 Q. Back to the initial question. Has Polar
 6 Supply ever ceased being a distributor with Soilworks?
 7 A. Not to my knowledge.
 8 Q. Have they ever indicated to you they are not
 9 selling your product?
 10 A. During the period from the time Bob sent the
 11 letter to the time we provided them indemnification I
 12 don't believe there was any transactions that took
 13 place and I believe it was because of the letter.
 14 Q. Did they miss a bid or a sale in that time
 15 period that you know of?
 16 A. Actually, yes, I think so.
 17 Q. Which one?
 18 A. I believe it was another ADOT-related project
 19 or an airport-related project. There were several.
 20 Q. Do you know specifically which airport?
 21 A. No.
 22 Q. Do you have a date by which they would have
 23 missed something?
 24 A. No.
 25 Q. Do you have any information whatsoever to

1 Q. Correct.
 2 A. In that case I don't think so.
 3 Q. Is Polar Supply a current distributor?
 4 A. Yes, they are.
 5 Q. Under Spendar Builder Supply though, correct?
 6 A. I believe so.
 7 Q. Have they ever ceased being a distributor of
 8 Soilworks?
 9 A. I would like to say that they would not
 10 purchase from us until -- until we gave them
 11 indemnification and protected them they ceased to do
 12 business with us.
 13 Q. What indemnification have you given to them?
 14 A. I would have to refer to Scott on what all was
 15 provided, I don't know all the details of what you are
 16 looking for.
 17 Q. Have you given them something other than a
 18 letter indicating that you would indemnify them should
 19 they get sued for selling your product?
 20 A. It was something to that effect I believe.
 21 Q. Have you given them any money, have you paid
 22 them anything?
 23 A. I don't understand.
 24 Q. Have you paid Polar Supply any money as an
 25 indemnification yet?

1 identify the instance you are saying they missed
 2 because of this letter?
 3 A. Not the firm details you are looking for, no.
 4 Q. I am looking for any detail. By the way, all
 5 you have told me is that there may be an airport but
 6 you don't know of any, correct?
 7 A. I think you would be best off when you depose
 8 Polar that they would have the closest information
 9 relating to those projects.
 10 Q. Do you know what irreparable harm has been
 11 caused by Midwest against Soilworks?
 12 MR. DOSEK: Object to the form.
 13 A. I don't know.
 14 Q. BY MR. SKERIOTIS: Do you know what
 15 "irreparable harm" is?
 16 A. I have an idea.
 17 Q. I will represent to you that when I use that
 18 term I mean harm that can't be repaired monetarily. So
 19 with that definition what irreparable harm is Midwest
 20 causing to Soilworks?
 21 MR. DOSEK: Same objection.
 22 A. I don't know.
 23 Q. BY MR. SKERIOTIS: With respect to
 24 Paragraph 12, Paragraph 12 states "Midwest
 25 intentionally has misrepresented the scope of said

1 that when we get finished with this would be an
 2 appropriate time, but given the amount of time we have
 3 spent on it so far it seems logical to me that you have
 4 got another hour or so to deal with this particular
 5 exhibit.
 6 MR. SKERIOTIS: I may have but right now
 7 I would like to go through it.
 8 THE WITNESS: It is 12:30 and it would be
 9 nice to get lunch.
 10 MR. SKERIOTIS: I don't have a problem
 11 with that.
 12 THE WITNESS: I had to get up at 5:00
 13 just to be here on time because of traffic.
 14 MR. SKERIOTIS: I understand that and
 15 that's fine, but we will take a break after Count IV.
 16 I won't get to Count V or VI, how about that?
 17 MR. DOSEK: All right.
 18 Q. BY MR. SKERIOTIS: With respect to Count IV on
 19 Page 5 it's called Tortious Interference With Business
 20 Relationship and Expectancy. Paragraph 29 talks about
 21 Midwest knows of Soilworks' business relationships and
 22 expectancies and without justification intentionally
 23 interfered with existing business relationships and has
 24 sought to frustrate Soilworks' expected customer
 25 relationships. Do you see that?

1 your allegation?
 2 A. I think that could be part of it.
 3 Q. And in fact Midwest was not successful,
 4 though, in getting Polar Supply to be its customer,
 5 correct?
 6 MR. DOSEK: Object to form, foundation.
 7 A. I hope Midwest doesn't do business with Polar
 8 Supply.
 9 Q. BY MR. SKERIOTIS: And as far as you know they
 10 don't do business with Polar Supply, correct?
 11 A. I don't have any knowledge of that.
 12 Q. In other words you don't have any knowledge
 13 that Midwest does business with Polar Supply, correct?
 14 A. No, I don't.
 15 Q. Can you tell me how you have been damaged by
 16 this interference between you and Polar Supply?
 17 A. One of the things would be the fact that we
 18 didn't make any sales during the time between the
 19 letter being received by Polar and the letter provided
 20 from us from our attorneys committing to
 21 indemnification of them. But who knows how far that
 22 goes in terms of their -- there is many different
 23 pieces of this.
 24 Q. But it's true you haven't to your knowledge
 25 lost any sales pursuant to the letter sent by Midwest

1 A. Yes.
 2 Q. Is the relationship that's referred to there
 3 between Soilworks and Polar Supply?
 4 A. Can you ask me that again, please?
 5 Q. Yes. Is the business relationship that's
 6 referred to in Paragraph 29 the relationship between
 7 Soilworks and Polar Supply?
 8 A. I think that would certainly fall here.
 9 Q. And what led to that alleged interference is
 10 the letter to Polar Supply that you later on then
 11 indemnify Polar Supply for, correct?
 12 MR. DOSEK: Object to the form.
 13 A. Can you ask it again, please?
 14 Q. BY MR. SKERIOTIS: Sure. I didn't ask it very
 15 well, that's a fair question. The interference that's
 16 mentioned here is the letter that Midwest drafted and
 17 sent to Polar Supply, correct?
 18 A. I would assume that that letter constitutes
 19 interference.
 20 Q. And that's interference that's referenced in
 21 Paragraph 29, correct, of your Complaint?
 22 A. I believe so.
 23 Q. And I take it, then, that it's your position
 24 that Midwest tried to interfere with that relationship
 25 to gain Polar Supply as a customer, correct? Is that

1 to Polar Supply, correct?
 2 A. The letter was very timely and because of a
 3 project that was taking place, and to the best of my
 4 recollection that project was lost to Midwest, actually
 5 to Nana Supply or Nana Pacific who markets Midwest's
 6 materials. So I believe that we directly lost an ADOT
 7 project, one more reference, one more plot, one more
 8 sale, because of that.
 9 Q. Are you saying, then, that Polar Supply did
 10 not bid on that project because of Midwest's letter to
 11 Polar Supply?
 12 A. I don't want to speak on their behalf, it's
 13 best that you talk to them directly about that.
 14 Q. Do you know if they bid on a project during
 15 this time period that we are speaking of between the
 16 letter and the indemnification?
 17 A. I am fairly certain.
 18 Q. That they did or did not?
 19 A. I am fairly certain that during this time
 20 there was a bid that they were involved in. I don't
 21 know if it was bid or not bid, I don't know.
 22 Q. Other than that, though, there is no other
 23 damage that you know of caused by the letter to Polar
 24 Supply from Midwest?
 25 A. I certainly could not say that for sure.

SOILWORKS VS. MIDWEST INDUSTRIAL

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.

Page 177

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?

Page 178

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.

Page 179

1 Q. Did Randy help you in drafting these two
2 pages?
3 A. I asked him questions relating to what you
4 have in your patent so that I could answer this.
5 Q. So he helped you draft or he helped you with
6 your drafting of these two pages, correct? Based on
7 the conversations you had with him you drafted these
8 two pages?
9 A. Based on our conversation he helped me fill
10 in, you know, fill in the blanks that I needed to go
11 and make this document.
12 Q. Okay, fair enough.
13 A. But he did not sit down and help me put this
14 together.
15 Q. And who is Randy McFarlane?
16 A. He is with ConocoPhillips and he is -- I
17 believe he's one of the salesmen. He is one of my main
18 points of contact.
19 Q. So did you ask Randy if Durasoil has an
20 isoalkane in it?
21 A. I did.
22 Q. And what did he say?
23 A. He said that if a synthetic isoalkane -- and I
24 am paraphrasing.
25 Q. Sure.

Page 180