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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/)	2:06-CV-2141-DGC
Counterclaimant,	)
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 :**

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3       On Behalf of the

4       Plaintiff/Counterdefendant/Counterclaimant:

5                   KUTAK ROCK LLP

6     BY:       John P. Passarelli, Attorney at Law

7                   E. Scott Dosek, Attorney at Law

8                   Suite 300

9                   8601 North Scottsdale Road

10                  Scottsdale, Arizona 85253-2742

11                  480/429-5000

12

13       On Behalf of the

14       Defendant/Counterclaimant/Counterdefendant:

15                   BROUSE McDOWELL

16     BY:       John M. Skeriotis, Attorney at Law

17                   388 South Main Street, Suite 500

18                   Akron, Ohio 44311-4407

19                   330/535-9999

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EXAMINATION

5

Plaintiff's Exhibits 8 and 9

44

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                   **MR. SKERIOTIS:**       Objection.

2                   **THE WITNESS:**           MeadWestvaco.

3   **BY MR. PASSARELLI:**

4   Q.    That's for packaging, right?

5   A.    They're in chemicals.

6   Q.    Okay.

7   A.    And they also are user chemicals for  
8   packaging. They sell packaging materials.

9   Q.    What chemicals -- I'm sorry. What  
10   chemicals do you buy from MeadWestvaco?

11   A.    One of the ingredients that we use in the  
12   manufacture of several products of ours that --  
13   it's a specially formulated tall oil pitch.

14   Q.    Specially formulated for Midwest?

15   A.    Correct.

16   Q.    Okay. And, I'm sorry, you mentioned -- you  
17   were going to --

18   A.    Petro-Canada is certainly a large supplier.  
19   Dow Chemical.

20   Q.    Dow?

21   A.    Dow, D-o-w. There are Rohm and Haas.  
22   There are -- there are a number of, you know,  
23   large vendors like that.

24   Q.    You mentioned the phrase "oil sheen"?

25   A.    Yes. That's s-h-e-e-n. Oil-sheen free.

1 Q. And what do you mean by that?

2 A. That is a requirement of the NPDES, the  
3 National Pollution Distribution Elimination  
4 System, regulation for storm water runoff that  
5 oil sheens are violations and/or a condition  
6 that is monitored for and which -- for which any  
7 business has to get permitting in order for that  
8 to be allowed.

9 Q. So oil sheen is defined by a governmental  
10 body?

11 A. Yes. US EPA.

12 Q. And you believe that Soilworks is using the  
13 phrase oil-sheen free with regard to products  
14 that it should not?

15 A. That's correct.

16 Q. So you believe that Soilworks represents  
17 certain of its products as oil-sheen free when,  
18 in fact, they are not?

19 A. Yeah. The product Durasoil, yes.

20 Q. Any other product besides Durasoil that you  
21 believe should not be represented to be  
22 oil-sheen free?

23 A. That's the only one that they so represent.

24 Q. And on what do you base the conclusion that  
25 Durasoil is not oil-sheen free?

1     **A.**     Partially on the public information where  
2     they claim that it is -- that they have a  
3     hydro-treated -- that their product is a mixture  
4     of severely hydro-treated blah-blah-blah.

5             As I would understand what they are  
6     claiming on a Material Safety Data Sheet, it  
7     would be our experience that that material would  
8     not pass the test method that is a standard test  
9     method to determine whether something is  
10    oil-sheen free.

11    **Q.**     So you -- you've described the term  
12    manufacturer, the term Synthetic Organic Dust  
13    Control, the term oil-sheen free and the term  
14    ultra-pure as words or phrases that our client  
15    uses when it should, in fact, not use, correct?

16    **A.**     If they are false, yes, they should not use  
17    them.

18    **Q.**     Well, when you say "if they are false,"  
19    it's your testimony that they are using them and  
20    that it constitutes false advertising?

21    **A.**     Yes.

22                     **MR. SKERIOTIS:**     Objection.

23    **BY MR. PASSARELLI:**

24    **Q.**     And have you provided to me today all  
25    substantiation you have for those conclusions?

1                   **MR. SKERIOTIS:**       Objection.

2                   **THE WITNESS:**        Yeah.  I'm not sure  
3    that I have remembered everything, but for the  
4    most part I would say yes.

5    **BY MR. PASSARELLI:**

6    **Q.**    Am I to understand then that Midwest has  
7    conducted an analysis with regard to those terms  
8    and concluded that they're misused?

9                   **MR. SKERIOTIS:**        Objection.  
10   Remember, the question is:  Did Midwest do this.  
11   So anything that your lawyers may have done will  
12   be privileged information that you are not -- I  
13   instruct you not to answer on.

14                   But anything that Midwest did, you're  
15   more than welcome to answer that question.

16                   **THE WITNESS:**        Yeah.  Our  
17   experience would be that what they claim their  
18   product is in their Material Safety Data Sheet  
19   would not pass the oil-sheen free test.  We have  
20   not tested their product to see if it is  
21   oil-sheen free.  We have tested those types of  
22   materials for our own studies.  Ultra-pure, we  
23   have -- I mean that is a matter of looking at  
24   the specific ingredients and seeing if they meet  
25   the definitions determining what ultra-pure

## C E R T I F I C A T E

1  
2 STATE OF OHIO, )  
3 ) SS:  
4 SUMMIT COUNTY, )

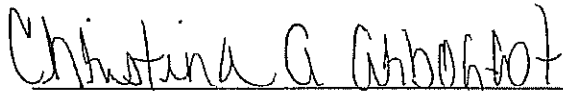
5 I, Christina A. Arbogast, a Registered  
6 Professional Reporter and Notary Public within  
7 and for the State of Ohio, duly commissioned and  
8 qualified, do hereby certify that the within  
9 named witness, ROBERT W. VITALE, was by me first  
10 duly sworn to testify the truth, the whole truth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

19 I do further certify that this deposition  
20 was taken at the time and place in the  
21 foregoing caption specified, and was completed  
22 without adjournment.

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

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

IN WITNESS WHEREOF, I have hereunto set my  
hand and affixed my seal of office at Akron,  
Ohio on this 26th day of February, 2008.

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Christina A. Arbogast, RPR

My commission expires December 7, 2010.

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