

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 8, 2008
9:00 a.m.

CONFIDENTIAL DEPOSITION OF DORIAN FALKENBERG

LEA, SHERMAN & HABESKI
Registered Professional Reporters
834 North First Avenue
Phoenix, Arizona 85003
Phone: 602.257.8514 - Fax: 602.257.8582
Reported by: Jennifer Hanssen, RPR
Certified Reporter
Certificate No. 50165

I N D E X

EXAMINATION PAGE

By Mr. Skeriotis 4

EXHIBITS DESCRIPTION PAGE

1 Notice of Deposition dated 3-24-08 5

2 Complaint for Damages and Equitable Relief and
Demand for Jury Trial dated 9-7-06 553 Letter to John M. Skeriotis from John P.
Passarelli dated 10-3-07 824 Midwest Industrial Supply, Inc.'s Answers and
Counterclaims dated 3-26-07 905 Reply to Midwest Industrial Supply, Inc.'s
Counterclaims dated 4-16-07 976 Soilworks, LLC's Rule 26 Disclosures
dated 5-21-07 987 Soilworks, LLC's Answers To Midwest Industrial
Supply, Inc.'s First Set of Interrogatories
dated 7-23-07 1028 Soilworks, LLC's Responses to Midwest Industrial
Supply, Inc.'s First Request for Production of
Documents dated 7-23-07 1229 Facsimile Transmission to John M. Skeriotis from
E. Scott Dosek dated 4-1-08 12810 Soilworks, LLC's Response to Midwest Industrial
Supply, Inc.'s First Set of Request for
Admissions to Soilworks, LLC dated 12-31-07 ... 13611 Soilworks Settlement Conference Memorandum dated
2-20-08 137

12 Durasoil Material Safety Data Sheet 164

13 Trademark Principal Register 169

1 CONFIDENTIAL DEPOSITION OF DORIAN FALKENBERG,

2
3 taken at 9:23 a.m., on April 8, 2008, at the law offices
4 of Jones, Skelton & Hochuli, P.L.C., 2901 North Central
5 Avenue, Suite 800, Phoenix, Arizona, before JENNIFER
6 HANSSEN, RPR, a Certified Reporter in the State of
7 Arizona.

8
9 APPEARANCES:

10 For the Plaintiff/Counterdefendant:

11 Kutak Rock, L.L.P.
12 by E. SCOTT DOSEK, ESQ.
13 8601 North Scottsdale Road
14 Scottsdale, Arizona 85253

15 For the Defendant/Counterclaimant:

16 Brouse McDowell
17 by JOHN M. SKERIOTIS, ESQ.
18 388 East Main Street, Suite 500
19 Akron, Ohio 44311-4407

20 Also present:

21 Robert Vitale
22
23
24
25

1 DORIAN FALKENBERG,

2
3 called as a witness herein, having been first duly
4 sworn, was examined and testified as follows:

5
6 EXAMINATION

7 BY MR. SKERIOTIS:

8 Q. Ms. Falkenberg, this deposition is being taken
9 pursuant to notice and agreement of the parties. It's
10 being taken also pursuant to the Federal Rules of Civil
11 Procedure for purposes of discovery and other purposes
12 allowed pursuant to the Federal Rules of Evidence and to
13 the Notice of Deposition that we issued in this case.

14 Can you state your name, please?

15 A. Dorian Falkenberg.

16 Q. Can you spell your last name, please?

17 MR. DOSEK: I'm sorry to interrupt.

18 Before we go any further I do want on the record to
19 invoke pursuant to the Protective Order my right to
20 review the transcript of this entire deposition within
21 20 days to designate information that is provided today
22 as either confidential information or confidential
23 attorneys' eyes only information.

24 MR. SKERIOTIS: Anything else that you
25 know of right now?

1 MR. DOSEK: No.

2 Q. BY MR. SKERIOTIS: Spell your last name,
3 please.

4 A. F-a-l-k-e-n-b-e-r-g.

5 MR. SKERIOTIS: And just for purposes of
6 the record, the people who are in this room are Scott
7 Dosek representing Ms. Falkenberg and Robert Vitale, CEO
8 of Midwest, along with myself.

9 Q. BY MR. SKERIOTIS: Ms. Falkenberg, did you
10 bring any documents with you here today?

11 A. Yes.

12 Q. Can I have those documents that you brought
13 with you today, take a look at them.

14 What you've handed me then is the Notice of
15 Deposition that I sent to you; correct?

16 A. Yes.

17 Q. Okay. I'll hand that back to you. Have you
18 had your deposition taken before?

19 A. Yes.

20 Q. How many times?

21 A. Once.

22 Q. And when was that?

23 A. Several years ago.

24 Q. What type of case was that?

25 A. An auto accident.

1 Q. And were you the plaintiff or defendant?

2 A. Plaintiff.

3 Q. Who was the defendant?

4 A. I believe the insurance company.

5 Q. Now I'm sure that Mr. Dosek has informed you of
6 how this deposition process goes and you may even recall
7 it from your prior deposition in your auto accident;
8 however, I'd like to go over just some ground rules so
9 you and I are on the same page of how it's going to go
10 today. If you don't understand a question, will you let
11 me know?

12 A. M'hum. Yes.

13 Q. If you don't hear any part of the question,
14 will you tell me?

15 A. Yes.

16 Q. If you don't tell me, I'm going to assume that
17 you heard the question and you understand the question.
18 Is that okay?

19 A. Yes.

20 Q. Now if you realize that during this deposition
21 that you have given an answer that was either inaccurate
22 or incomplete, please let me know and I'll give you a
23 chance to correct it on the record. Is that okay?

24 A. Yes.

25 Q. And you understand that your responses, your

1 answers, are being recorded by the court reporter?

2 A. Yes.

3 Q. And you already understand I can tell that you
4 must give audible, verbal answers; correct?

5 A. Yes.

6 Q. And you understand that you may request a
7 chance to review the transcript that's going to be
8 generated by the court reporter from your testimony
9 today?

10 A. Yes.

11 Q. And you also understand that after you review,
12 you may correct any errors in the transcript; correct?

13 A. Yes.

14 Q. And you understand that any changes that you
15 make to the transcript, I will have an opportunity to
16 comment upon those changes at trial?

17 A. Yes.

18 Q. Is there any reason why you feel that you
19 cannot testify fully and accurately here today?

20 A. No.

21 Q. Do you have any questions about how it's going
22 to go today?

23 A. No.

24 Q. Now I plan on taking breaks during the
25 deposition so do you have any special needs I need to be

1 aware of?

2 A. Yes.

3 Q. What are those?

4 A. I need to excuse myself to go pump because I'm
5 breastfeeding an infant.

6 Q. Okay. I've been there, my wife has done that,
7 I fully appreciate that. Okay, thanks for letting me
8 know. The only thing I ask is that when a question is
9 pending we don't take a break.

10 A. Yes.

11 Q. We can take a break right after that to go
12 ahead and do what you need to do, that's fine.
13 Obviously if you need to use the rest room, just let me
14 know as well, not a problem.

15 Did you meet with anybody before this
16 deposition for the purposes of preparing?

17 A. Yes.

18 Q. Who did you meet with?

19 A. My attorney.

20 Q. And would that be Mr. Dosek?

21 A. Yes.

22 Q. And how many times did you meet with Mr. Dosek
23 to prepare for this deposition?

24 A. Once.

25 Q. And when was that?

1 address?

2 A. Yes.

3 Q. When was Soilworks formed?

4 A. 2003.

5 Q. Who are the principals of Soilworks?

6 A. Chad Falkenberg, myself and Masterson

7 Properties, L.L.C.

8 Q. Is Chad the president?

9 A. Yes.

10 Q. And you are the vice president?

11 A. Yes.

12 Q. And what is Masterson Properties, L.L.C.?

13 A. The financial member.

14 Q. Can you explain what a financial member is?

15 A. They've invested in the company.

16 Q. Who are the principals of Masterson Properties,

17 L.L.C.?

18 A. I don't know.

19 Q. Who are the owners of Masterson Properties,

20 L.L.C.?

21 A. I don't know.

22 Q. Do you know anybody who works for Masterson

23 Properties, L.L.C.?

24 A. Yes.

25 Q. Who do you know that's associated with

1 Q. But you do have an operating agreement?

2 A. We do.

3 Q. And the officers in that operating agreement
4 are Chad Falkenberg, Dorian Falkenberg and Masterson
5 Properties, L.L.C.; correct?

6 A. Yes.

7 Q. There are no other officers; correct?

8 A. Correct.

9 Q. Does Masterson Properties, L.L.C. provide any
10 other assistance to Soilworks other than the \$950,000?

11 A. I don't believe so.

12 Q. You said you don't believe so. Would anyone
13 else have any other information about that other than
14 you?

15 A. I don't know.

16 Q. You indicated that Soilworks sells chemicals
17 for soil stabilization and dust control; correct?

18 A. Yes.

19 Q. What products does Soilworks sell?

20 A. Soiltac, Powdered Soiltac, Gorilla-Snot,
21 Durasoil and Surtac.

22 Q. So if I did it right, I counted five products?

23 A. Yes.

24 Q. And what is Soiltac?

25 A. It's a polymer-based soil stabilizer.

1 Q. And then in 2003 he forms Soilworks; correct?

2 A. Yes. We did.

3 Q. You both did, correct. Okay.

4 MR. DOSEK: Are you doing okay?

5 A. I'm fine, thank you.

6 Q. BY MR. SKERIOTIS: I'd like to establish some
7 areas of knowledge that you have with respect to
8 Soilworks. Do you have knowledge of marketing with
9 respect to Soilworks?

10 A. Some.

11 Q. How about advertising?

12 A. Not really.

13 Q. Who would have information about advertising at
14 Soilworks?

15 A. Chad.

16 Q. How about sales, do you have knowledge of sales
17 at Soilworks?

18 A. What do you mean by "sales," sales reps or?

19 Q. To whom sales are made.

20 A. Yes.

21 Q. The amount of your sales?

22 A. Yes.

23 Q. By the way, would that be by product? Would
24 you have information about the sales of Soilworks by
25 product?

1 A. Yes.

2 Q. Do you have knowledge about Soilworks about
3 product application, how to apply the products?

4 A. Some.

5 Q. How about the product ingredients, would you
6 have knowledge of that?

7 A. Some.

8 Q. Who would have the most knowledge of the
9 product applications?

10 A. Chad.

11 Q. How about the ingredients of the products?

12 A. Chad.

13 Q. How about sales, if I didn't ask you that
14 already, who would have the most knowledge about sales?

15 A. I would say myself or Chad.

16 Q. How about the manufacturing of the product, do
17 you have knowledge about that?

18 A. Some.

19 Q. Who would have the most knowledge of that?

20 A. I believe Chad.

21 Q. How about the shipping of the products?

22 A. Can you clarify "shipping of the products"?

23 Q. Yeah. Who would be in charge of shipping the
24 products? Who would have the most knowledge about the
25 actual shipping and getting it delivered there,

1 et cetera, et cetera?

2 A. Probably Chad.

3 Q. Do you have technical product knowledge?

4 A. Some.

5 Q. Who would have the most?

6 A. I believe Chad.

7 Q. I assume your products have had some testing
8 associated with them; would that be a fair statement?

9 A. Yes.

10 Q. Who would have knowledge of that product
11 testing?

12 A. Chad.

13 Q. Would you have some of that knowledge at all or
14 not at all?

15 A. Not really.

16 Q. I wouldn't assume from your background, but I
17 still have to ask the question.

18 Who would have the most knowledge about
19 profitability of Soilworks?

20 A. I believe I would.

21 Q. How about the cost/expense side, who would have
22 knowledge about that?

23 A. Probably myself and Chad.

24 Q. Associated with labor and employment, who does
25 the hiring and the firing?

1 A. Chad and myself.

2 Q. Do you have an HR person specifically
3 designated for human resources?

4 A. No.

5 Q. Does Soilworks the corporation have books and
6 records?

7 A. Yes.

8 Q. Who keeps those books and records?

9 A. Myself or the bookkeeper.

10 Q. Do you have a corporate lawyer?

11 A. What do you mean by that?

12 Q. Do you have a lawyer that set up the L.L.C.?

13 A. No, I don't believe so.

14 Q. Do you have a lawyer you turn to just for
15 general questions about your business?

16 A. Yes.

17 Q. Who would that be?

18 A. Mr. Dosek.

19 Q. You're also familiar with Mr. Passarelli;
20 correct?

21 A. Yes.

22 Q. Do you know what his role is with respect to
23 Soilworks?

24 A. He's counsel for us.

25 Q. Do you know what he handles for Soilworks other

1 Q. Do you have a trademark lawyer to work with for
2 those trademarks?

3 A. No.

4 Q. You do them yourself?

5 A. Yes.

6 Q. You don't often find that. Has Soilworks
7 applied for any copyrights on any of the material?

8 A. I don't believe so.

9 Q. With respect to sales, does Soilworks have
10 independent sales representatives that works for them?

11 A. I don't think so.

12 Q. You say you don't think so, would somebody else
13 know more than you?

14 A. Can you clarify what you mean by "independent
15 sales"?

16 Q. Does anyone sell products for Soilworks that
17 you have not identified thus far with Soilworks?

18 A. No.

19 Q. So all the sales, just to be perfectly clear,
20 all the sales are conducted by the sales representatives
21 you previously identified?

22 A. No.

23 Q. Okay.

24 A. We have distributors.

25 Q. Okay. Who are your distributors?

1 A. I don't know all of them.

2 Q. How many distributors do you have?

3 A. I don't know.

4 Q. More than 10?

5 A. I would say approximately maybe a dozen or so.

6 Q. In fact, one of them was Polar Supply; correct?

7 A. Yes.

8 Q. And is it now Spenard Builder Supply?

9 A. Yes.

10 Q. And that would be S-p-e-n-a-r-d; correct?

11 A. Yes.

12 Q. Who would have the knowledge on who the
13 distributors are?

14 A. I would.

15 Q. You just don't recall as you sit here today who
16 they all are?

17 A. Yes.

18 Q. You have documents, though, that would show who
19 those distributors are; correct?

20 A. Yes.

21 MR. SKERIOTIS: Why don't we take a quick
22 break, I can bring Bob back in.

23 (Recessed from 10:29 a.m. until
24 10:49 a.m.)

25 (Mr. Vitale returns to the deposition.)

1 Q. Turning now to paragraph 8, you see where it
2 says "Midwest competes with Soilworks and has recently
3 embarked on a scheme to injure the reputation that
4 Soilworks has established with its distributors,
5 customers and end-users." Did I read that correctly?

6 A. Yes.

7 Q. Is that a true statement?

8 A. I believe so.

9 Q. Can you tell me what that scheme is that's
10 referred to in paragraph 8?

11 A. I don't know.

12 Q. What led you to believe that the statement was
13 true and accurate?

14 A. That would be in proprietary conversations with
15 my husband or privileged conversations why I would
16 believe that's true.

17 Q. Those conversations that you allege are
18 privileged, why do you believe they're privileged?

19 A. Because they're just between my spouse and
20 myself.

21 Q. Your lawyer can object as well, but I will
22 indicate to you that they are not privileged so I'd ask
23 you to answer the question. I think what you're
24 referring to is a spousal immunity and I'm not trying to
25 tell you the law on that, but typically that arises when

1 it's one spouse against another or if you're
2 incriminating one's spouse in another setting. This is
3 not one of those types of disputes so you don't have a
4 spousal immunity in this case. I just represent that to
5 you and obviously you can turn to your lawyer for his
6 advice.

7 MR. DOSEK: What's the question?

8 MR. SKERIOTIS: The question is -- I can
9 repeat the question. What scheme did Midwest embark
10 upon and she said she knows the answer but it's
11 between -- she had conversations between her and her
12 husband with respect to this scheme.

13 MR. DOSEK: Dorian, I think that you can
14 go ahead and answer that unless the information that you
15 received was information that Chad had learned only in
16 communication and consultation with his lawyers.

17 A. Okay. To the best of my knowledge it would be
18 the letter that was sent to Polar Supply.

19 Q. BY MR. SKERIOTIS: And is that the only -- I
20 just want to make sure that we cover everything. Is
21 that the only scheme that you're aware of that Midwest
22 has embarked upon to injure the reputation of
23 Soilworks?

24 A. That I can recall.

25 Q. So that would be a "yes"?

1 A. No, that's what I can recall.

2 Q. Is that all you know or is that all you recall?

3 A. That's all I can recall.

4 Q. So as you sit here today you don't recall
5 anything else; correct?

6 A. Not that I remember.

7 Q. Is there any documents that would help you in
8 your recollection with respect to a scheme that's
9 mentioned in paragraph 8 of the Complaint?

10 A. There could be.

11 Q. What documents could there be?

12 A. I know there's a letter sent to Polar Supply.

13 Q. That's what you've already mentioned though as
14 far as a scheme. Is there anything else?

15 A. I don't know.

16 Q. How did that letter to Polar Supply injure
17 Soilworks?

18 A. I don't really know.

19 Q. Has Soilworks lost any money to its knowledge
20 with respect to the letter that allegedly injured the
21 reputation of Soilworks?

22 A. I don't know.

23 Q. Does Soilworks continue to do business with
24 Polar Supply?

25 A. Yes.

1 Q. But now it's with Spenard Builder Supply;
2 correct?

3 A. Yes.

4 Q. Because Spenard purchased Polar; correct?

5 A. I believe so.

6 Q. Has there ever been a time when Polar Supply
7 and Soilworks did not do business?

8 A. I don't recall.

9 Q. Has there ever been a disruption of business
10 between Soilworks and Polar Supply?

11 A. I don't recall.

12 Q. Who would have that knowledge if there has been?

13 A. Probably myself.

14 Q. I think we already established that Soilworks
15 continues to do business with Polar Supply now known as
16 Spenard; correct?

17 A. Yes.

18 Q. Paragraph 8 goes on to say "pursuant to this
19 scheme, Midwest has disparaged Soilworks and its
20 products, falsely represented that Soilworks is
21 infringing alleged patent rights of Midwest and falsely
22 represented that Soilworks' products fall within the
23 scope of alleged patent claims owned by Midwest." Did I
24 read that correctly?

25 A. Yes.

1 represents characteristics and attributes of its company
2 and products." Do you see that?

3 A. Yes.

4 Q. Do you know how Midwest falsely represents
5 characteristics and attributes of its company and
6 products?

7 A. I don't know.

8 Q. Who would know?

9 A. I don't know.

10 Q. It goes on to say "pursuant to this scheme,"
11 and the one scheme you've identified is the letter to
12 Polar Supply, "Midwest has attempted to divert sales
13 from Soilworks and injure Soilworks' reputation by,
14 among other things, representing that Soilworks'
15 products infringe Midwest's alleged patent rights." Is
16 that a true statement?

17 MR. DOSEK: Object to the form,
18 foundation.

19 A. I believe so.

20 Q. BY MR. SKERIOTIS: Has Midwest attempted to
21 divert sales from Soilworks?

22 A. I don't know.

23 Q. Has Midwest tried to injure Soilworks'
24 reputation?

25 MR. DOSEK: Object to the form,

1 foundation.

2 A. I would just be speculating.

3 Q. BY MR. SKERIOTIS: The next paragraph is
4 paragraph 9, it says "Midwest has disseminated
5 information and documentation to Soilworks'
6 distributors, customers and end-users which is
7 inaccurate, misleading and which is causing irreparable
8 harm and damage to Soilworks, Soilworks' reputation and
9 the reputation of Soilworks' products." Do you see
10 that?

11 A. Yes.

12 Q. Did I read that correctly?

13 A. Yes.

14 Q. Do you know what information Midwest has
15 disseminated to Soilworks' distributors that has caused
16 irreparable harm and damage to Soilworks?

17 A. I believe it would be stating that we're
18 infringing or potentially infringing their patent.

19 Q. Would that be that information that's contained
20 in that letter to Polar Supply you referred to earlier?

21 A. I believe so.

22 Q. Okay. Do you know what is the irreparable harm
23 caused to Soilworks pursuant to that letter?

24 A. I don't know.

25 Q. Do you know what damage has been done, if any,

1 to Soilworks pursuant to that letter?

2 A. I don't know.

3 Q. Is there any damage that you're aware of to
4 Soilworks pursuant to that letter?

5 A. I don't know.

6 Q. Has Soilworks' reputation been damaged?

7 A. I don't know.

8 Q. Do you know who would know that?

9 A. No.

10 Q. Do you know who would know if Soilworks has
11 been damaged?

12 A. I don't know.

13 Q. Has Soilworks to your knowledge lost any
14 business pursuant to that letter to Polar Supply?

15 A. I don't know.

16 Q. Who would know if Soilworks has lost business
17 with respect to that letter to Polar Supply?

18 A. I would believe it would be me.

19 Q. And as you sit here you say you don't know?

20 A. I don't know.

21 Q. Next paragraph is paragraph 10 and it says
22 "Midwest's conduct is intended to cause mistake,
23 deception and consumer confusion and was done with the
24 intention of damaging Soilworks' reputation Soilworks
25 has earned in the industry." Did I read that

1 correctly?

2 A. Yes.

3 Q. Is that conduct that's referred there to your
4 knowledge the letter to Polar Supply?

5 A. I don't know.

6 Q. Do you know of any of Midwest's conduct that
7 caused mistake, deception and consumer confusion to
8 Soilworks?

9 A. I don't know.

10 Q. The next sentence states "the conduct of
11 Midwest wrongfully diverts the potential market and
12 customer loyalty to which Soilworks is entitled." Do
13 you see that?

14 A. Yes.

15 Q. Do you know of any diversion of customer
16 loyalty from Soilworks to Midwest?

17 A. I don't know.

18 Q. Have you lost any customers from Soilworks to
19 Midwest because of the letter to Polar Supply?

20 MR. DOSEK: Object to the form.

21 A. I don't know.

22 Q. BY MR. SKERIOTIS: Who would know if you've
23 lost any customers from Soilworks to Midwest pursuant to
24 the letter to Polar Supply?

25 MR. DOSEK: Form.

1 A. Don't know. Probably myself.

2 Q. BY MR. SKERIOTIS: And as you sit here you
3 don't know if you've lost any customers or not;
4 correct?

5 A. I don't know.

6 Q. The next paragraph is paragraph 11, it says
7 "defendant has engaged in the foregoing wrongful conduct
8 intentionally and in order to profit from such
9 conduct." Is that a true statement?

10 A. I don't know.

11 Q. The next sentence states "Midwest's conduct is
12 causing and will continue to cause irreparable harm to
13 Soilworks and to tarnish and diminish the substantial
14 goodwill Soilworks has cultivated with respect to its
15 company, products and the proprietary rights associated
16 therewith." Did I read that correctly?

17 A. Yes.

18 Q. Is that a true statement?

19 A. I don't know.

20 Q. Again, do you know of any irreparable harm to
21 Soilworks that Midwest is causing or has caused?

22 MR. DOSEK: Object to the form,
23 foundation.

24 A. I don't know.

25 Q. BY MR. SKERIOTIS: Has Midwest tarnished and

1 MR. DOSEK: Same objection, form and
2 foundation.

3 A. I would be speculating if I gave a definition.

4 Q. BY MR. SKERIOTIS: But you said you did think
5 you had an understanding of what it was, what was that?

6 A. My definition I believe would be irreparable
7 damages.

8 Q. Typically those that money damages cannot
9 suffice, not to make you whole? A quick example is if
10 somebody owned a piece of property that they had for
11 sale on the coast of California and you lost the
12 opportunity to buy that property, money couldn't make
13 you whole because that was a specific valuable piece of
14 property and therefore even if they paid you the money
15 for it, you still lost that piece of property. Does
16 that make sense?

17 A. Yes.

18 Q. So what I'm trying to get at is what other than
19 money damages has Soilworks suffered, if any?

20 A. I don't know.

21 Q. Next one is Count 4, Tortious Interference with
22 Business Relationship and Expectancy. Go ahead and read
23 paragraphs 28, 29 and 30, please.

24 A. I'm finished.

25 Q. Turn back, please, to page 5, paragraph 29.

1 You see where it says, I'm paraphrasing, Midwest
2 intentionally interfered with existing business
3 relationships?

4 A. Yes.

5 Q. What business relationships did Midwest
6 intentionally interfere with?

7 MR. DOSEK: Object to the form and
8 foundation.

9 A. I don't know.

10 Q. BY MR. SKERIOTIS: Do you know of any
11 relationships that Midwest has interfered with?

12 MR. DOSEK: Same objection.

13 A. I don't know.

14 Q. BY MR. SKERIOTIS: Has Midwest gotten in the
15 way of any business relationships?

16 MR. DOSEK: Same objection.

17 A. I don't know.

18 Q. BY MR. SKERIOTIS: You've referred to a letter
19 to Polar Supply earlier, would that be possibly what
20 this is referring to?

21 A. It may be.

22 Q. Do you believe that Midwest interfered with the
23 relationship between Soilworks and Polar Supply?

24 A. Can you repeat that?

25 Q. Yes. Do you believe that Midwest interfered

1 with the relationship between Soilworks and Polar
2 Supply?

3 A. I don't know.

4 Q. Do you have any reason to believe that Midwest
5 would want to interfere with that relationship?

6 MR. DOSEK: Object to form.

7 A. I would be speculating.

8 Q. BY MR. SKERIOTIS: To your knowledge has
9 Midwest ever approached Polar Supply to be a distributor
10 of Midwest?

11 A. I don't know.

12 Q. Who would know, if anyone, at Soilworks what
13 business relationships Midwest has interfered with at
14 Soilworks?

15 A. I don't know.

16 Q. So it could be that nobody at Soilworks knows
17 the answer to that question?

18 MR. DOSEK: Object to the form.

19 A. I don't know.

20 Q. BY MR. SKERIOTIS: Paragraph 30 says "as a
21 direct result of Midwest's actions as set forth above,
22 Soilworks has been damaged." Do you see that?

23 A. Yes.

24 Q. If the actions at set forth above is the letter
25 to Polar Supply, how has Soilworks been damaged?

1 A. I don't know.

2 Q. Count 6 is entitled Arizona Common Law and
3 Unfair Competition. Do you see that?

4 A. Yes.

5 Q. Take a look at paragraphs 31, 32 and 33,
6 please.

7 A. I'm finished.

8 Q. Probably the same answers, but I have to ask
9 anyway. Do you know what Midwest's conduct constitutes
10 unfair competition?

11 MR. DOSEK: Form and foundation.

12 A. I don't know.

13 Q. BY MR. SKERIOTIS: Do you know Midwest's
14 conduct that is referred to in those paragraphs?

15 MR. DOSEK: Form and foundation.

16 A. I don't know.

17 Q. BY MR. SKERIOTIS: Paragraph 33 states "as a
18 result of Midwest's actions, Soilworks has been
19 damaged." Do you see that?

20 A. Yes.

21 Q. Do you know how under the Arizona Common Law
22 and Unfair Competition Soilworks has been damaged?

23 MR. DOSEK: Same objection.

24 A. I don't know.

25 Q. BY MR. SKERIOTIS: The next section is Prayer

1 for Relief and specifically what I want to turn your
2 attention to is paragraph 6 on page 7. It states that
3 you're asking the Court to award Soilworks actual
4 damages in an amount to be proven at trial. Do you see
5 that?

6 A. Yes.

7 Q. Do you know what Soilworks' actual damages are?

8 A. I don't know.

9 Q. Are there any actual damages to Soilworks?

10 A. I don't know.

11 Q. The next section that I want to turn to is that
12 "the Court award Soilworks its attorneys' fees and costs
13 incurred herein." Do you see that?

14 A. Yes.

15 Q. You understand you're asking the Court to award
16 Soilworks their attorneys' fees; correct?

17 A. Yes.

18 Q. Do you know what your attorneys' fees are to
19 date?

20 A. I don't know.

21 Q. Do you know if they're less than \$100,000?

22 A. I don't know.

23 Q. Who would know?

24 A. I would.

25 Q. Are they less than \$200,000?

1 That's it for that one.

2 (Exhibit No. 6 was marked.)

3 Q. BY MR. SKERIOTIS: Ms. Falkenberg, I'm handing
4 you what's been marked as Exhibit 6. Have you seen this
5 document?

6 A. I believe so.

7 Q. Page 2 continues from page 1 underneath
8 "individuals likely to have discoverable information."
9 Do you see all of the individuals and/or entities listed
10 there?

11 A. Do I read them, yes.

12 Q. Do you have any knowledge of any other
13 individuals that are not listed in paragraphs 1 through
14 5 that may have information with respect to this case?

15 A. I don't know.

16 Q. Paragraph 1 states that "Ms. Falkenberg has
17 knowledge concerning the overall operation of Soilworks,
18 the composition of Soilworks' products, the manner in
19 which Soilworks' products are manufactured, marketed,
20 sold and distributed, the competitive environment
21 amongst Soilworks, Midwest and their competitors and the
22 facts alleged in the Complaint and Reply and
23 Counterclaim." Is that a true statement as we sit here
24 today?

25 A. I believe so.

1 without researching it?

2 A. Yes.

3 Q. Could it be that that information was not
4 provided to us to your knowledge?

5 A. I don't know.

6 Q. With respect to page 15, number 13 asks for the
7 identification of what makes plaintiff's Durasoil
8 product ultra-pure and a synthetic organic fluid. Do
9 you see that?

10 A. Yes.

11 Q. Are you familiar with the term "ultra-pure"?

12 A. Yes.

13 Q. Are you familiar with the term "synthetic
14 organic fluid"?

15 A. Yes.

16 Q. Do documents to your knowledge exist that would
17 support Durasoil's product being ultra-pure?

18 A. No.

19 MR. DOSEK: Object to the form.

20 Q. BY MR. SKERIOTIS: Why not?

21 A. I believe it's just a term to describe a
22 product.

23 Q. Do you believe that there are documents that
24 exist in Soilworks' possession to support that it's a
25 synthetic organic fluid?

1 MR. DOSEK: Object to the form.

2 A. I don't know.

3 Q. BY MR. SKERIOTIS: You don't know if any
4 documents exist or you don't know if there are any
5 documents to support that?

6 A. Either way I don't know.

7 Q. And do you see that the answer to the
8 interrogatory on the next page, page 16, indicates that
9 Soilworks will make documents available from which
10 Midwest may derive or ascertain the answer; do you see
11 that?

12 A. Yes.

13 Q. Do you know if any of those documents were
14 given to us?

15 A. I don't know.

16 Q. I will represent to you that we have no
17 documents that represent that so to my knowledge then
18 those documents don't exist.

19 Number 14 indicates or requests the
20 identification of all ingredients including the
21 proprietary ingredients as listed on plaintiff's MSDS
22 sheet. Do you see that?

23 A. Yes.

24 Q. Are you familiar with the Material Safety Data
25 Sheet with respect to Durasoil?

1 A. Yes.

2 Q. Do you understand there's a section listed
3 where it says that something is proprietary?

4 A. Yes.

5 Q. Do you know if there are documents that would
6 show what information is proprietary in possession of
7 Soilworks?

8 A. What do you mean?

9 Q. That's what I'm trying to ask you. Do you have
10 documents that would support that certain ingredients
11 within Durasoil are proprietary?

12 A. I don't know.

13 Q. Are there any proprietary ingredients in
14 Durasoil?

15 MR. DOSEK: Objection, confidential.

16 A. I don't know.

17 MR. DOSEK: Don't answer.

18 A. Okay.

19 MR. SKERIOTIS: Don't answer? You're
20 instructing your witness not to answer because of what?

21 MR. DOSEK: Because Mr. Vitale is here.

22 MR. SKERIOTIS: I thought you were going
23 to say "confidential, attorneys' eyes only," that's what
24 you've done in the past, because there's two levels.

25 MR. DOSEK: I understand. And what I

1 Q. But the actual mineral oil would not be
2 organic, just where it originated from would be organic?

3 A. These are our own definitions.

4 Q. Oh, okay. But I'm still trying to figure out
5 where do you believe based on your own definitions that
6 the mineral oil --

7 A. We believe something like mineral oil can be
8 called synthetic organic because it started out as an
9 organic, raw, natural occurring product as crude oil,
10 it's been refined or synthesized or gone through a
11 process which we call synthetic and that's the component
12 that makes it a synthetic organic dust control product.
13 That's my own definition of it.

14 Q. Is there any industry standard that you're
15 aware of with respect to calling something synthetic?

16 A. No.

17 Q. Is there any industry standard that you know of
18 with respect to calling something organic?

19 A. I don't believe so.

20 Q. Where did you come up with the terms synthetic
21 organic, do you recall?

22 A. I don't.

23 Q. Did you come up with that wording?

24 A. No.

25 Q. Do you know who at Soilworks did?

1 A. No.

2 Q. Did someone at Soilworks come up with that?

3 A. I don't know.

4 Q. Do you recall where you first saw the words
5 synthetic organic?

6 A. I don't.

7 Q. Do you know of any competitors that use the
8 words synthetic organic?

9 A. Yes.

10 Q. Who are they?

11 A. Midwest.

12 Q. Do you know of anyone else who uses the words,
13 the term "synthetic organic" to describe their products?

14 A. I don't know the details of it. I know there's
15 a Synthetic Organic Chemical Association so I know it's
16 a widely-used term.

17 Q. You're saying there's a Synthetic Organic --

18 A. Chemical Association.

19 Q. -- Chemical Association? How did you come
20 across them?

21 A. Through research on the Internet.

22 Q. When did you do this research?

23 A. I personally didn't do it, Chad did it, but I
24 was made aware of it maybe a couple of months ago.

25 Q. Do you know if he did that research pursuant to

1 MR. VITALE: We figured that out.

2 MR. SKERIOTIS: Scott knows that's
3 happened before many times to us.

4 Q. BY MR. SKERIOTIS: With respect to Midwest's
5 products, can you identify which product of Midwest's
6 compete with Durasoil?

7 A. I would say EK3,5 Envirokleen, Arena Rx and
8 Dust Dr.

9 Q. Did you mean Diamond Dr.?

10 A. Oh, yes. Sorry.

11 Q. Soiltac is your product; correct?

12 A. Yes.

13 Q. And that competes with what product of Midwest?

14 A. Soil-Sement.

15 Q. When did you first become aware of Soil-Sement?

16 A. Oh, I don't recall. Since the beginning of our
17 business.

18 Q. Since 2003?

19 A. Yes.

20 Q. When did you first become aware of Envirokleen?

21 A. I don't remember exactly when.

22 Q. Somewhere between 2003 and 2005?

23 A. I would say that's fair, yes.

24 Q. When did you first introduce Durasoil?

25 A. I think 2004.

(End of attorneys' eyes only section.)

Q. BY MR. SKERIOTIS: "This technologically-advance fluid does not cure allowing for immediate use upon its application;" correct?

A. Yes.

Q. It says "Durasoil has the unique ability to be reworked and still maintain its dust controlling properties;" correct?

A. Yes.

Q. Later on it says "key advantages" and it says, among the things we've already stated, that it's "nonslippery and oil-sheen free." Do you see that?

A. Yes.

Q. Do you know what is meant by "oil-sheen free"?

A. No, I don't.

Q. Do you know if there's been any tests to support that it's oil-sheen free?

A. I don't know.

Q. But that would be another thing that's descriptive of what Durasoil is; correct?

A. Yes.

Q. It's also self-penetrating and wetting; correct?

A. Yes.

Q. Basically the key advantages, many of those

1 A. Okay.

2 Q. I'll represent that to you. So has anyone
3 reviewed that history of this trademark for Soilworks?

4 A. I have not.

5 Q. You have not. Do you know if anybody else at
6 Soilworks has reviewed the trademark prosecution history
7 for this mark?

8 A. I don't believe so.

9 Q. Are you aware that it received no rejection for
10 being generic?

11 A. No.

12 Q. This is the first time you've heard of this?

13 A. Yes.

14 Q. Are you aware that it did not receive a
15 rejection for even being descriptive?

16 A. No.

17 Q. Soilworks' use of the word "synthetic organic
18 dust control" is identical to this registered trademark
19 of Midwest's; correct?

20 A. I believe so. I don't have our literature
21 right in front of me.

22 Q. Going back again to Exhibit 3, here is one
23 piece of promotional literature. Do you see that?

24 A. Yes.

25 MR. DOSEK: What's the date of Exhibit 3?

1 MR. SKERIOTIS: It just says "printed
2 September of '05."

3 MR. DOSEK: Okay.

4 Q. BY MR. SKERIOTIS: You continue to use
5 synthetic organic dust control; correct?

6 A. Yes.

7 Q. Even as we sit here today it's on your website;
8 correct?

9 A. Yes.

10 Q. And as far as the goods that are listed in this
11 trademark registration of Exhibit 13, you see there "for
12 dust suppressant in the nature of aliphatic and cyclic
13 organic dust suppressing compositions for use in
14 controlling dust on roadways, shoulders, trails,
15 helipads, stockpiles, heavy traffic roads, baseball
16 diamonds and horse tracks." Do you see that?

17 A. Yes.

18 Q. The Durasoil product, is it for use with that
19 same nomenclature that's listed in Exhibit 13 that I
20 just read?

21 A. I don't know what "aliphatic and cyclic
22 organic" means.

23 Q. Okay. But other than that, it would be --

24 A. Are you asking is it used for the same kinds of
25 applications?

1 Q. BY MR. SKERIOTIS: How do you market Durasoil,
2 what are the marketing channels that you use?

3 A. What do you mean?

4 Q. For example, do you use the Internet?

5 A. Yes.

6 Q. What other ways do you market your Durasoil
7 product?

8 A. I don't know all of them.

9 Q. Give me the ones that you know of.

10 A. The Internet mainly, brochures.

11 Q. Anything else?

12 A. Not that I can think of.

13 Q. Does Midwest use the Internet to advertise its
14 products that are synthetic organic dust control?

15 A. I don't know.

16 Q. Have you been to the Midwest website?

17 A. Not recently.

18 Q. Have you ever seen the term "synthetic organic
19 dust control" on Midwest's website?

20 A. Yes.

21 Q. Okay. So is it fair to say that they use the
22 words "synthetic organic dust control" on their own
23 website and so do you?

24 A. Yes.

25 Q. And Midwest does have brochures that you're

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

3

4 BE IT KNOWN that the foregoing confidential
5 deposition was taken before me, JENNIFER HANSSEN, a
6 Certified Reporter in the State of Arizona; that the
7 witness before testifying was duly sworn by me to
8 testify to the whole truth; that the questions
9 propounded to the witness and the answers of the witness
10 thereto were taken down by me in shorthand and
11 thereafter reduced to print by computer-aided
12 transcription under my direction; that the confidential
13 deposition was submitted to the witness to read and
14 sign; that the foregoing 180 pages are a true and
15 correct transcript of all proceedings had upon the
16 taking of said confidential deposition, all done to the
17 best of my skill and ability.


18 I FURTHER CERTIFY that I am in no way related
19 to any of the parties hereto nor am I in any way
20 interested in the outcome hereof.

21 DATED at Phoenix, Arizona, this 9th day of
22 April, 2008.

23

24

25



Certified Reporter
Certificate No. 50165