UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA
BEFORE THE HONORABLE MIRANDA M. DU, DISTRICT JUDGE
---o0o---

Chemeon Surface Technology, LLC, a Nevada limited liability company,	:	No. 3:15-cv-294-MMD-VPC
Plaintiff,	:	March 31, 2016
-vs-	:	United States District Court 400 S. Virginia Street
Metalast International, Inc., a Nevada corporation, et al.,	:	Reno, Nevada 89501
Defendants.	:	
Chemeon Surface Technology, a Nevada limited Liability company,	:	Case No. 3:15-cv-295-MMD-VPC
Plaintiff,	:	
-vs-	:	
MHA Group and Marc Harris,	:	
Defendants.	:	

TRANSCRIPT OF MOTIONS HEARING
(No. 12, 52, 10, 11 and 30)

A P P E A R A N C E S:

FOR THE PLAINTIFF: Robert Ryan
Christopher Hadley
Tamara Reid
Attorneys at Law

A P P E A R A N C E S (cont'):

FOR THE DEFENDANT: Michael Hoy
Attorney at Law

FOR THE DEFENDANT: Marc Harris
In Pro Per

Proceedings recorded by mechanical stenography produced by computer-aided transcript

Reported by: KATHRYN M. FRENCH, RPR, CCR
NEVADA LICENSE NO. 392
CALIFORNIA LICENSE NO. 8536

Reno, Nevada, Thursday, March 31, 2016, 9:00 a.m.

---OoO---

THE COURT: Good morning. Please be seated.

THE CLERK: 3:15-civil-294-MMD-VPC, Chemeon Surface Technology, LLC versus Metalast International, et al., base file, with its member file of 3:15-civil-295-MMD-VPC, Chemeon Surface Technology versus MHA Group and Marc Harris.

Counsel, enter your appearances, please.

MR. RYAN: Good morning, Your Honor.

Robert Ryan for the plaintiffs Chemeon, and the Meilings in this matter.

MR. HADLEY: Chris Hadley, Your Honor, on behalf of Chemeon and the other defendants -- or plaintiffs in the case. Sorry, Your Honor.

MS. REID: Good morning, Your Honor.

Tamara Reid on behalf of plaintiff.

MR. HARRIS: Good morning, Your Honor.

Marc Harris on behalf of the MHA Group and myself, pro se.

MR. HOY: Good morning, Your Honor.

I'm Michael Hoy. I represent Metalast International, Inc.; Metalast Inc.; Sierra Dorado, Inc.; David Semas; Greg Semas; and Wendi Semas-Fauria.

Susan Semas is also present in the courtroom.

David Semas is at counsel table with me.

THE COURT: All right. Good morning, counsel.

I have reviewed the stipulation that the parties filed, I think it was last Thursday or Friday, and approved that stipulation. I've also reviewed the transcript of the October 2015 hearing, parts of the brief that were filed that I had reviewed last year, and it seems to me that in light of parties' stipulation, there are -- the way I see it and I'll hear arguments -- there are three, kind of, broad categories. The first is what the settlement agreements' definition of the term "trademark," regarding the name Metalast, what that entails and whether it covers the local marks and the product marks, or is it just limited to only the mark named "Metalast." Judge Zive may or may not have resolved that issue and I'll have questions to the parties about that.

The second is if I limit -- if I think that the Settlement Agreement is limited to only the name Metalast and who owns, I think I still have to resolve the issue who owns the local mark and product marks because I think there's a dispute about that as well.

And the final issue is assuming I agree with the defendants that the Settlement Agreement covers not just the name, but the other trademark rights, then is Chemeon limited from referring to Chemeon "as formerly Metalast," I think in

all contexts, is the third issue, as I understand it. But, I may be incorrect. I thought the stipulation resolved the other issues with respect to the misappropriation claims and so on, but you tell me if I'm wrong in thinking that these are the three broad issues.

And with that, I'll hear arguments from counsel. I assume, first of all, that you don't have any evidence that you wish me to hear first? In other words, any testimony that you're offering.

MR. HOY: Good morning, Your Honor.

We do have some exhibits that we would like to offer and I believe the plaintiff does as well. The defendants would offer Exhibits 501 through 559.

THE COURT: This is in the binder that was delivered to chambers, I think on -- a couple days ago?

MR. HOY: Yes, Your Honor.

THE COURT: I thought that was pursuant to the parties' stipulation.

MR. HOY: I -- honestly, I can't recall, Your Honor, if we had a written stipulation at the October hearing or not, but --

THE COURT: Well, I don't know. I looked at the binders yesterday and for the defendant's binders at least, under "admitted," there are notations about stipulations. I assumed that the parties stipulated

to it but, if I'm wrong, I'll address it.

MR. HOY: Yes, Your Honor. My recollection is back before October hearing, counsel met and conferred and exchanged documents and these are our stipulations. But I don't think there's a written stipulation to this effect, so the idea was that we would offer our exhibits, and then there would be no objection to them and the Court would admit those exhibits.

THE COURT: All right.

MR. HOY: So --

THE COURT: Is that the same -- do you take the same position, Mr. Hoy, with respect to the plaintiff's exhibits then?

MR. HOY: Yes, Your Honor.

THE COURT: All right. Let me hear from Mr. Ryan then.

MR. RYAN: Thank you, Your Honor. Thank you very much, Your Honor.

Your Honor, if it's okay with the Court, what we would like to do and propose is that each of us give an opening statement. We have two witnesses we would like to present from our client; the Chief Operating Officer and the Chief Financial Officer, to explain some context here and put these exhibits, some of which are very important, in context of what they know and what they were seeing because one of

the -- there's a fourth issue, Your Honor, which is unclean hands.

THE COURT: I'm sorry. What's the fourth issue?

MR. RYAN: Unclean hands, whether there should be injunction given what happened here, and how the registration is an issue, for example, or procured.

THE COURT: Was that issue raised in the motion?

MR. RYAN: Yes. Yes, it is.

THE COURT: I know that that's kind of the underlying argument in terms of the statement of facts.

MR. RYAN: Yes, it is.

THE COURT: But, I -- all right.

MR. RYAN: It was expressly identified in our opposition brief that unclean hands is a defense. We cited to the Complaint and the exhibits in support and we would like to present that to the Court.

THE COURT: The opposition to the defendant's motion?

MR. RYAN: To the defendant's motion. And, we presented the same thesis in our main motion, which is still before the Court, at least for purposes of its content, though not the request for relief. The request for relief today -- and please feel free to chime in, Mr. Hoy --

THE COURT: Don't go into your argument yet then.

MR. RYAN: Yes.

THE COURT: So your proposal is that you want the Court to take testimony from two witnesses before the parties make additional arguments.

Is that your proposal?

MR. RYAN: I would like to make an argument first to give you context of what's coming, a summary argument. Then I would like to present these two witnesses and possibly call Mr. Semas adversely. We're not sure yet whether we want to do that. We'd like to see what they have to say in their argument.

THE COURT: I'll tell the parties about my time for today. I had not planned to set aside the whole day for the hearing.

MR. RYAN: Okay.

THE COURT: Today is the last day in which I have to resolve a lot of motions and I have three more orders that I'm looking at; so, I do need to set aside some time this afternoon.

MR. RYAN: Okay.

THE COURT: At most, I would set aside until about noon today. If I need to, I'll continue the hearing until tomorrow, although I realize there are some parties who may not be able to be here tomorrow. If that's the case, I will accommodate that party and take their testimony today.

But, I had not planned for the hearing to last all day. I don't know if there was communication with my staff as to that issue or not.

But, just so you know my time limitation.

MR. RYAN: Your Honor, we're happy to accommodate. We can come back later if we don't get it all done. That's not a problem at all.

THE COURT: All right. I don't have any issue with the parties presenting testimony then, as long as it's limited to this morning and then I'll continue it to tomorrow, if I need to.

I'll hear from Mr. Hoy to see if he has any concern he would like to raise before I allow the parties to make their brief opening.

MR. RYAN: Thank you.

THE COURT: Mr. Hoy.

MR. HOY: Thank you, Your Honor.

My intention today was to only offer testimony if it was needed to rebut what was coming in from the other side. My intention was to argue the case based on the evidence that's in the record already and I'm prepared to do that at this time.

But, the Court's question of plaintiff's counsel was not answered because --

THE COURT: I realize that. I am going to ask

him that question.

MR. HOY: Right.

THE COURT: About the exhibits, Mr. Ryan.

MR. RYAN: Oh. Forgive me, Your Honor.

THE COURT: Because even though you were proposing to do opening and have me take testimony, my question still is do you have any -- is Mr. Hoy's representation accurate; and that is, the parties have stipulated to the admissibility of both the defendant's proposed exhibits and the plaintiff's exhibits?

MR. RYAN: I believe the answer is yes. Let me just make sure.

(Plaintiff and defense counsel confer.)

MR. RYAN: Yes. We stipulate to the admission of all the exhibits. There are some that are covered by ITAR regulations, government confidentiality, and we will identify those to the Court. They should be kept confidential and not go -- should be sealed. They shouldn't go into the public record. They're ITAR documents.

Do we agree on that?

MR. HOY: Your Honor, counsel is referring to Exhibits 528 through 542. These are specifications from various defense contractors. Candidly, I don't know if they're secret, top secret or what, but I have no problem sealing those from the public.

THE COURT: And they -- I don't see the word "stipulation" next to them but, of course, to the extent they're exhibits that counsel -- well, that doesn't affect their admissibility. So, for the record, the defendant's proposed exhibits -- all right.

The exhibits that defendants marked as 501 through 569 are admitted and counsel can work with Miss Clerk to identify which ones should be marked as confidential.

And then I have plaintiff's Exhibits 1 through 57. They will be admitted as well, at least with respect to the lower case number. That's 3:15-cv-294.

(Above-referenced exhibits received in evidence.)

MR. RYAN: Thank you, Your Honor.

THE COURT: All right.

MR. HARRIS: May I be heard?

THE COURT: Hang on, Mr. Harris. I saw you standing up.

MR. HARRIS: All right.

THE COURT: With that, I'm going to have counsel make their opening statement, but I'll hear from Mr. Harris first.

MR. HARRIS: Just for the record, I wanted to just object to the plaintiff's exhibit number 35. It says it's filed under seal. I had some questions about that, so I'm not sure if that requires that it not be filed under seal

or if this can remain that way. But, that's my only objection to their exhibits.

THE COURT: You don't object to the exhibit being admitted. You just have concerns about why they are filed under seal?

MR. HARRIS: Yes. Yes.

THE COURT: Or you have concern about --

MR. HARRIS: That's right. And I guess I can ask them that. But, otherwise, I have no objections to them filing --

THE COURT: All right. If you have any objections to the Court sealing, allowing for certain exhibits to be filed under seal, you can raise those later.

MR. HARRIS: Yes.

THE COURT: But, for now, those exhibits are admitted. And just because they're filed -- the fact that exhibits are filed under seal, unless there's a specific request that -- I don't know how it would apply here -- you would have access to them as a party.

MR. HARRIS: Okay. Thank you.

THE COURT: The public wouldn't have access to them.

MR. HARRIS: Thank you, Your Honor.

THE COURT: Counsel, have you worked on a stipulated protective order governing the filing of sealed

documents and the production of sealed documents?

MR. HOY: Yes, Your Honor. It's not completed yet, but we are working on that.

THE COURT: All right.

Well, there are competing motions here. Mr. Hoy, since you're standing up, I'll hear from you first with respect to any brief opening remarks that you would like to make.

MR. HOY: Thank you, Your Honor.

I think the competing motion has been taken care of with the stipulation that Your Honor approved a few days ago. And that would be plaintiff's Motion For Preliminary Injunction, docket number 12, is not on for debate today because that was resolved by the stipulation. That's my understanding.

THE COURT: Is that correct, that --

MR. RYAN: No.

THE COURT: I'm sorry. Mr. Hoy, when you say defendant's, your client's motion is not for debate?

MR. HOY: My client's motion is for debate. The plaintiff's Motion For Preliminary Injunction is not on for debate today; that was resolved by the stipulation, the stipulated preliminary injunction.

MR. RYAN: If I may clarify just a little bit.

The injunction that was entered is a middle ground.

There are still remaining issues that are not resolved by our motion. What we're doing, and I believe we agreed on this, is that we reached this middle ground for the injunction that you've entered. Our motion, Chemeon's motion, is not on for today. Chemeon would like to see what happens with regard to their motion and what the Court does to decide whether other aspects of the preliminary injunction motion, if filed, should be further pursued.

THE COURT: All right. I'm sorry. I misunderstood. I thought the -- the stipulation resolved certain issues, but not the entire motion?

MR. RYAN: Correct.

THE COURT: But Mr. Hoy is correct, though, in his representation to me just now -- because it seems like you agree -- in fact, it does resolve Chemeon's motion as well?

MR. RYAN: Not completely. There are aspects of it that are not yet resolved, but we think what happens here today may resolve them. There are certain things that are not yet resolved that were raised in that motion.

THE COURT: But, you're not raising those issues today?

MR. RYAN: Correct.

THE COURT: All right. So then, for the record then, I'm only hearing the defendant's Motion For Preliminary

Injunction, slash, TRO?

MR. RYAN: That's correct.

THE COURT: All right.

MR. RYAN: Thank you, Your Honor.

THE COURT: I'm sorry, Mr. Hoy.

Mr. Ryan, I have one more question then.

MR. RYAN: Surely.

THE COURT: With respect to the motion against Mr. Harris, there are still two motions pending that Chemeon filed. And they both are the same motion; motion for TRO and Motion For Preliminary Injunction against Mr. Harris.

What is the status of that motion?

MR. RYAN: He never filed an opposition. We believe that the T -- that the requested -- I'm sorry, Your Honor.

THE COURT: Just so you understand, when a party is appearing pro se, I'm not going to grant the motion just because it's unopposed.

MR. RYAN: Okay.

THE COURT: So, what's your position?

MR. RYAN: Well, our position is we would like to have that motion heard. I don't know that -- we had not planned to present the entire motion today. Because there's no opposition, we have no idea what he's contending.

THE COURT: I'll hear from Mr. Harris briefly,

but this is my intention with respect to the motion filed against Mr. Harris. I'm denying it without prejudice because it seems to me that whatever I decide with respect to the defendants, I certainly would be able to ensure that they apply to Mr. Harris as well. Because as I understand Mr. Harris' role, he was involved in assisting Mr. Semas in soliciting investors and that's the reason why the motion was brought against him.

Is that correct?

MR. RYAN: That's correct, Your Honor.

THE COURT: So if the injunction applies to the defendants in this case, in terms of what they can do with Chemeon's trade secrets and copyrighted information, the same would apply to Mr. Harris and, therefore, there's really no need, at this point in time, for the Court to hear the motion against Mr. Harris.

MR. RYAN: Okay. If Your Honor -- what we would like to know, though, is, it would help us to understand what he's contending that is inappropriate and what we've asked for in make -- with regard to the entire requested relief we seek from him. We don't know what his position is with regard to that by way of preliminary injunction standards and responses.

So, I think what would be appropriate is -- by the way, I appreciate very much what Your Honor just said. That's very helpful. I do believe that what happens here on

the motion today may have a serious impact on that entire matter with regard to Mr. Harris, and so perhaps what would be best is to wait to see how Your Honor rules on what we've discussed today, and then discuss what to do with, if anything further, with regard to Mr. Harris and preliminary relief.

THE COURT: Mr. Harris, let me hear from you first and then I'll give you my ruling on the two pending motions.

MR. HARRIS: Thank you, Your Honor.

And again, I would like to begin by just asking the Court's apologies for my appearing pro se. I'm unable to afford counsel. But having said that, I know I make a lot of procedural errors and I appreciate the Court's understanding and leniency. But --

THE COURT: And just so you understand, while I said that, when a party is appearing pro se, I don't grant the motion just because it's unopposed. There is a local rule that provides that a party who fails to submit points and authorities in opposition, that you are deemed to have consented to the request.

I, when a party is pro se, I do carefully look at the motion to see if there's a basis for the relief they're requesting. So, I don't automatically grant it. I do take a look at the merits of the motion.

However, as a pro se party, you are required to

comply with the procedural rules, just like the parties. You're obligated to look at the Court's Local Rules, which are available online at the Court's website. You are required to be familiar with the Federal Rules of Civil Procedure. You'll be treated no different than a party who is represented.

So, now that you have that warning from me, I want to make sure you understand, going forward, you're held to the same standard as the other parties.

MR. HARRIS: I understand. The Restraining Order, I was not aware at the time it was presented as a motion. I received it at the same time that I was served the Complaint. I answered the Complaint because there was a deadline. So, I answered the Complaint and I assumed that that incorporated -- because the Restraining Order presented the same contentions as the Complaint, so I assumed that that was sufficient in my answer and the response. If it's not, I'm happy to prepare a response to the Restraining Order or opposition to that motion, if that's what that is.

THE COURT: Well, I'm not going to -- at this point, I'm not going to require you to prepare it because I thought at the last hearing in October this issue came up. I didn't -- I wasn't under the impression that you didn't realize that you didn't have to respond to the motions. At that point in time, it was represented to me that the parties

would like the opportunity to try to resolve the motion and resolve the case. And I thought the parties had a discussion and were not able to reach a resolution.

MR. HARRIS: Yes, the settlement.

THE COURT: I'm directing, Mr. Harris, you and Mr. Ryan to make another attempt at resolution because I think that the issues presented with respect to you are not as complicated as they are with respect to the other parties. And as I said, what I do with the other parties, probably, I will equally apply in your case.

But, in light of the fact that you haven't filed an opposition, in light of the fact that I think these issues should be resolved, given the parties' attempt previously, I'm directing the parties to try to resolve the motions again.

I'm going to deny the motion that's docketed as number 10 and 11 in the higher case number, the case number 3:15-cv-295 without prejudice. If the parties are not able to resolve it, and if Mr. Ryan and his clients believe that another motion should be filed, then they have leave to file a renewed motion, a more refined one, so that you're not repeating the same arguments that you already made in the excess briefs that were filed previously.

MR. HARRIS: Thank you, Your Honor.

THE COURT: Okay. Thank you.

Mr. Hoy.

MR. HOY: Thank you, Your Honor.

I am going to make my argument, mindful of the three categories that the Court already identified. Please feel free to interrupt --

THE COURT: Now, if I'm wrong about the three categories, you need to tell me as well. When I was envisioning the remaining issues, that's how I categorized them.

MR. HOY: All right. We --

MR. RYAN: Your Honor, may I address that before we proceed because there's a pending motion --

THE COURT: You may address it when you -- well --

MR. RYAN: Well, there's a category -- I'm sorry, Your Honor.

THE COURT: You identified a fourth category.

MR. RYAN: There's one category, the middle category with regard to the logo that is not before the Court today.

THE COURT: That is not before me?

MR. RYAN: Yeah. Their motion is with regard to the Metalast word mark only.

THE COURT: No, I understand -- Mr. Ryan's point, Mr. Hoy, is that my categories that I identified may not apply to your motion. I was thinking about both parties'

motions when I came up with the categories.

MR. RYAN: Thank you, Your Honor. Yes.

THE COURT: So, that's a fair point.

MR. RYAN: Yes.

MR. HOY: Our motion, Your Honor, is based on the Settlement Agreement approved by the Bankruptcy Court on March 11, 2015. That Settlement Agreement does not contain any sort of a covenant not to compete. Mr. Semas never agreed that he would not compete with the company now known as Chemeon. What the Settlement Agreement said is: "All claims between the parties" -- up to that point in time -- "are released." And as I go through the argument, I want to point out again and again that this claim that the trademark that is now an issue in the case, was under attack for validity and ownership and that was released by the Settlement Agreement.

So, all of the claims that you're going to hear this morning about unclean hands and invalidity and who paid for maintaining the mark and all of that, that's all in the release in the Settlement Agreement, March 11, 2015.

What the Settlement Agreement provides that is really the main issue here today, is the language that:

"David Semas and his entities will own the Metalast trademark going forward and, after a 90-day transition period, the company known as Chemeon now will never again use the term "Metalast" in any fashion or manner whatsoever."

This is not just a prohibition against trademark infringement. It is an absolute prohibition against using the term. And this is clear because the judge, the bankruptcy judge who approved the settlement said so. And I'll get to that in some more detail.

One of the important aspects of this case, Your Honor, is that when parties have litigation and have a Settlement Agreement, the settlement agreements need to be enforced as a matter of public policy, for the broader society, and for these particular parties. And that didn't happen here.

This Settlement Agreement contemplated that the parties -- that the plaintiffs in this case would have 90 days to make a transition; that is, they could change their company name, they could change their product names, and they had 90 days to do that. That was a negotiated term. It was put in the transcript and everybody was sworn up and agreed to that under penalty of perjury. And, so, the 90-day transition period began on March 11th, 2015, and ended June 9th, 2015.

So, what did these plaintiffs do?

They changed their company name. At the time it was called Metalast Surface Technologies, LLC and they changed it to Chemeon Surface Technologies, LLC. We have no quarrel with them doing that. But, as the 90-day transition period approached, or the end of the transition period approached,

Chemeon started marketing itself as "formerly Metalast," and started calling each one of its products, 120 products, "Chemeon," whatever, A, B, C, parentheses, "formerly known as Metalast, A, B, C." So they adopted the exact same naming convention that Metalast had before, and then used the term "formerly known as Metalast" or "formerly Metalast."

They put this on all of their e-mail signatures, "formerly Metalast." They put this on all of their safety data sheets describing their products, "formerly known as Metalast;" they put it on all of their invoices, "formerly Metalast;" purchase orders; order confirmation; letterhead. Everything said "formerly Metalast" or "formerly known as Metalast." Their labeling, when they were sending products out into the market, said "formerly known as Metalast" or "formerly Metalast." And, then, they filed this lawsuit to have this court say that they were entitled to do that, notwithstanding what the language of the Settlement Agreement was.

Now let's back up a little bit and understand from the record evidence how this Settlement Agreement came into being. There was a settlement conference before Judge Zive on January 27th, 2015 and the Court has the transcript of the terms of that settlement. Within 10 or 15 days after that settlement conference, counsel for the plaintiff, now Chemeon, had a phone conference with Judge Zive and says I think we've

made a terrible mistake. This is not what we wanted to do. And then when the debtor in the bankruptcy case moved for court approval of the Settlement Agreement, Madylon Meiling, Dean Meiling, Ted Vantyresca all filed declarations in the bankruptcy court to say this is horrible. We can't possibly continue in business without calling our products "Metalast" or "formerly Metalast." And this all happens before the March 11th approval of the Settlement Agreement.

The point to this, Your Honor, is to demonstrate that Chemeon, and its officers and owners, knew that what they were doing was violating the Settlement Agreement that they had reached with Judge Zive in January of 2015.

The Court is aware that we've been back to Judge Beesley for some advice on what the Settlement Agreement says and what it means.

Can you please turn on my computer, please.

THE CLERK: Yes.

MR. HOY: This is -- we filed a Request For Judicial Notice. This is docket 89. And this is the transcript from a hearing before Judge Beesley. And Judge Beesley said, so I read, quote:

"No longer able to use the name 'Metalast' in any fashion whatsoever following that 90-day period would include not only the trademark, but any use of the name 'Metalast' for any purpose at all" -- which I believe would include

the tradename."

But, I believe a fair reading of what Judge Zive said includes limits on any use of the term "Metalast" at all. It can go on for 90 days. It cannot be used by any of the Meiling entities or the Meilings or anything they own thereafter. It is an absolute prohibition.

And Judge Beesley went on to say: "They're stuck with it and it applies to both trademarks and tradenames and any other use of the term 'Metalast' for any purpose whatsoever. That is the agreement that I approved in court."

So there should be no more debate before this Court, Your Honor, about what the Settlement Agreement was, what the parties agreed to. In this case, Chemeon, I believe, is attacking the ownership and the validity of the Metalast trademark and tradename. And I infer this mostly from the exhibits that have been offered on behalf of Chemeon.

The second argument they make is that even if the trademark is valid, use of the tag line "formerly Metalast" or "formerly known as Metalast" to identify the company and its products do not violate trademark law. And then Chemeon even argues that calling itself or its products "formerly Metalast," does not violate the Settlement Agreement because the agreement only prohibits a trademark infringement. But, I think the logic is up side down here Your Honor.

The settlement agreement plainly prohibits any use

of the term "Metalast" in any fashion or manner whatsoever. If this is true, Chemeon's use of the phrase "formerly Metalast" is a contract breach, even if it's not a trademark infringement. And again, Chemeon is trying to equate breach of the contract with trademark infringement. They're two separate concepts, Your Honor.

Part of the point of any request for interlocutory relief, injunctive relief, is to prevent ongoing harm. And part of our argument, Your Honor, is that Chemeon, using the term "formerly Metalast" or "formerly known as Metalast," whether or not it's a trademark infringement, it is definitely a breach of the contract, and that contract breach is causing harm to the party who negotiated for it and paid value for the covenant by Chemeon to never use the term "Metalast" again.

Going back to Chemeon's knowledge or the knowledge of the principals of Chemeon, in the bankruptcy court, when Mr. Semas, as the debtor, moved to approve the settlement with Chemeon, Chemeon objected. Their opposition is Exhibit 3 to the Motion For Preliminary Injunction. In that opposition, Chemeon made these claims:

Number one, that the Meilings, Mr. and Mrs. Meiling didn't understand that they had agreed to surrender all use of the Metalast trademarks. If they had known this, they would not have agreed. They say: "The loss of trademarks means the

lost of customers, contracts, and RFPs, request for bids, tied to the Metalast brand." They said that their branding consultant advised that re-branding would take at least a year and cost a half-million dollars, and that the Meilings didn't contemplate this when they were negotiating for the settlement.

And this is a quote from their opposition, Your Honor. It's a bit lengthy, but I think it's important:

"After a 90-day transition, the Meilings will no longer be able to use the name 'Metalast' in any fashion or manner whatsoever. This expansive phrase runs counter to the well-established right to utilize a trademark in an identifying manner without infringing on the rights of the trademark owner. That right is important for the Meilings to ameliorate problems associated with the loss of the trademark. If they can refer to their products as, quote, formerly known as Metalast, end quote, they can continue to satisfy the requirements of existing contracts and standards that require Metalast brand products."

This is Exhibit 3 to our motion, Your Honor, page 2, lines 1 through 21.

So, this is back before the bankruptcy court approves the Settlement Agreement. They're informing the bankruptcy court, and the world, that if they can call their products "formerly known as Metalast," then they're fine with

this; but, they then withdraw their opposition, which effectively was asking the court to refuse to approve the settlement, so that they could go back and renegotiate the settlement.

So, they recognized that they had a problem. They filed a document with the Court that said we would like to renegotiate. And meanwhile, we don't want you to approve the Settlement Agreement. And, this is what we want the Settlement Agreement to say. And then they withdrew it. But, this is important as well. In Exhibits 8 and 9 to our motion, Madylon and Dean Meiling gave declarations to the bankruptcy court that basically supports our claim here today, which is that they recognized that the Settlement Agreement would have this effect; that, under the Settlement Agreement, they could not call their products "formerly known as Metalast." They could not use the term "Metalast" in any fashion or manner whatsoever. They knew it.

So, to the extent that the plaintiff in this case comes before this court and says, oh, gees, we didn't have any understanding that we couldn't use the term "Metalast," is contradicted by the sworn testimony that was given to the bankruptcy court.

Before the bankruptcy court, Chemeon made another point that's very key to our motion here today, and this is in the Declaration of Ted Vantyresca. And that's Exhibit 11 to

our motion, Your Honor. Mr. Vantyresca was absolutely correct when he told the bankruptcy court, under oath, that the use of the Metalast moniker was a key to the business. And the reason was that there were private and government specifications to produce chemicals according to a particular tradename and a particular product identification. And this is the point of Exhibits 528 through 542. These are all specifications that call for a product by the Metalast name with the Metalast product name behind it. And so Mr. Vantyresca was absolutely right that the use of the term "Metalast" impacts who is buying these products because they're in a government spec. And this is a right that Dean and Madylon Meiling and their company traded away in exchange for valuable consideration in the Settlement Agreement. They gave that up.

Now, there's supposed to be this 90-day transition period, now we're up to 10 months, because Chemeon has taken what it had no right to take. And we want to put an end to that, Your Honor.

I made the point earlier that the Settlement Agreement contains no covenant by Mr. Semas not to compete in this market. Mr. Semas is free to use the Metalast name in any business he wants. The only restraint on what he can do is that he cannot use any of the trade secrets, any of the copyrights, any of the patent rights, any of the

licensing rights that are all the intellectual property of Chemeon. But, aside from that, he can take the Metalast name and go out into the market and start selling chemicals or anything else he wants. So for example, the main product of Chemeon, as I understand it, is something called TCP-HF. And this is a chemistry that is licensed from the Department of the Navy, which owns the patent rights to this chemistry. Well, Chemeon is not the only licensee. There are three or four other licensees out there. Mr. Semas could easily take the Metalast name, go out to one of those licensees, obtain a sub-license from them and start selling that last TCP again.

Now, there are some technical problems with procurement regulations and so forth, listing in the QPL, which is the Qualified Product List database, and certifications and all of that. But in so far as this civil case is concerned, Mr. Semas has the right to do that.

Likewise, there's a product called AA-200. And this is a product that I understand is available for nine or ten different vendors in the world --

MR. RYAN: Your Honor, may I interrupt for a second?

THE COURT: Mr. Ryan, please let Mr. Hoy finish in his argument and then you can have your turn.

MR. RYAN: Well, there's a -- what he's about to say I'm concerned may be a very important trade secret to

the company and should be under seal. I would like to make sure that there's nobody in the room that would hear this, what I think he's about to say.

THE COURT: Well, if there is a concern about -- well, to the extent that the parties are going to go into areas that you think should be sealed, you just need to alert Miss Reporter.

I don't know, other than the CSO, there is an extern for one of the judge's here, who is a member of the court, and so I'm not concerned about -- so, therefore, there's really no members of the public that should not be here, as far as I can tell, other than one gentleman who just raised his hand.

MAN IN THE AUDIENCE: I should probably not be here if you're going to go into that testimony.

THE COURT: Well, I don't know that Mr. Hoy will.

MR. HOY: I'm not. I think I understand --

MR. RYAN: Can we talk for just a second? Could we have just a brief side bar, Your Honor? Because it's so important to my client, I want to make sure there's no mistake about this.

THE COURT: Are you requesting that the two of you confer?

MR. RYAN: For just a second, please.

THE COURT: This a public proceeding. I'm not going to limit members of the public from participating unless I absolutely have to seal, briefly, the hearing.

MR. RYAN: Thank you, Your Honor. Yes, that's all we would ask for.

(Plaintiff counsel and defense counsel confer.)

MR. HOY: Your Honor, I was talking about Mr. Semas has the right to take his Metalast trademark and tradename --

THE COURT: Right. And you're just giving me examples. You don't have to go into details for me to understand the gist of your argument as to what Mr. Semas can do. In fact, the Settlement Agreement is very clear that after 90 days, Mr. Semas could use the name. The parties may dispute what that means; but, clearly, it was made clear that he intended to use the name after that 90-day period.

MR. HOY: Yes. Absolutely.

The plaintiff's main argument, main legal argument here has to do with the Steppenwolf case. And we traversed this case a little bit in October --

THE COURT: Why don't you save your arguments on that case for the end after I hear the evidence because I -- I mean, I've read the case and I know the parties -- I kind of understand the parties' respective arguments with respect to that case.

MR. HOY: All right. Thank you, Your Honor. I'll sit down now and hear from counsel.

THE COURT: All right. Thank you.

MR. HOY: Thanks.

THE COURT: Mr. Ryan.

MR. RYAN: Thank you, Your Honor.

Can we put my computer screen up on the monitor?

Thank you.

We just heard nothing about any claims of trademark infringement or dilution, so I don't know why we're here because all that leaves is a contract between the parties and an argument of breach of the contract. There's no argument -- by the way, there was no evidence submitted at all in the briefs or in the argument you just heard about irreparable harm. But even if there were, we're talking about a contract breach. The only remedy for that is damages. There is no remedy for injunction for a contract breach. We're not talking about trademark infringement or dilution anymore. So, for that reason alone, this motion should be denied and the parties should go forth and handle the rest of the case.

I would like to talk a little bit about why we're here and I want --

THE COURT: And to be fair, Mr. Hoy was presenting, well, partially opening, partially argument, but he may still present evidence. I don't know if he will.

But, I'll hear your argument.

MR. RYAN: Yes. Thank you, Your Honor.

But as you may know, in the briefs that he submitted, there was nothing whatsoever about irreparable harm to an individual or a company. Nothing. Not a declaration. Nothing. Just attorney argument. And that's why we're here.

The reason we're here is we're here on a Motion For Preliminary Injunction by the defendants and the motion is curiously absent, curiously missing the core of what would be in a motion for preliminary injunction; which is, evidence to show things. And so the defendant's briefing offers only "old Chemeon uses of formerly Metalast." By the way, Your Honor, we will show you we have to do that in the data sheets. It's required by OSHA. OSHA requires that when you issue a technical data sheet for these kinds of products, which are dangerous, a lot of them, very dangerous, that you must identify former names of the products.

Why is that?

So, people don't make mistakes and use the wrong products. And in going forward, to make sure that they're using the right products so that when they need the TCP-HF product, which is only provided to the market by Chemeon. There is no other provider of that product to market. It's unique and it's a trade secret as to how it's made and what

it's comprised of. The market needs to know, going forward, if we get a Metalast product from somebody else, is that the right product? And in the past, when we designated on our certifications, on our engineering drawings that we want Metalast TCP-HF, where do we get that going forward?

So, as we issue new data sheets, the OSHA requires -- and this is in the exhibits which we're going to be submitting and have been admitted -- OSHA requirements require -- I think it's Exhibit 46, it's Section 1, the first bullet item requires that you must identify other names that this product has been sold by, sold as in the marketplace. And there's a great reason for that and I'll get into that a little more as we go.

But, the defendants briefing offers only these old formerly Metalast technical data sheets, again, required by OSHA; offers the settlement transcripts and related documents, and nothing else. And that's what we're here on the Motion for Preliminary Injunction for. I don't understand why we're hear for that.

Now, with regard to their argument about confusion, dilution and harm -- and it's just argument. There's no evidence -- as Your Honor might notice, the defendants are not offering products on the market. They don't have any products. So, there's no possibility that what we're doing is diverting any sales to them. There's no evidence of

confusion of source of origin. Why? They're not making any products for which a source of origin could be confused. Again, defendants have no products.

There's no evidence before this Court that anybody in the market has been deceived or confused; that the market doesn't thoroughly understand going forward that Chemeon is not Metalast and its products are no longer Metalast.

And, by the way, with regard to the attorney argument about dilution, dilution is a very tough thing to prove, as we will show you. You must prove fame. And by -- the Ninth Circuit and other courts have made very clear -- by the way, the statute was amended to make this clear because the courts were not quite getting what Congress meant by "fame" -- it means it has to be a household name.

So, for example, the Federal Circuit affirmed, affirmed the decision where the trademark for the women's bags, uh, Coach, was held not to be sufficiently famous under the dilution law because it's not a household name. There's are a lot of women who know all about it, and some men as well, but it's not a household name.

So they can't prevail under dilution, regardless of the contract and whether what we're doing is fair use, what Chemeon is doing is fair use.

Next screen, please.

Now, what you just heard -- and we agree -- from

counsel for the defendants, is that the settlement, which actually is quite unclear -- and we'll get into that -- only provides that Mr. Semas owns the Metalast word and logo mark registrations as of 1-27-15, the date of the settlement, going forward. That was it. The past was not addressed at the settlement. It's expressly limited by the parties, pursuant to a clarification by their own counsel in the transcript, Mr. Burns, that the agreement was merely that Mr. Semas would own the registrations as of that date going forward.

THE COURT: On page 9 of the Settlement Agreement, Mr. Burns, I think, was representing Mr. Semas.

MR. RYAN: Correct, Your Honor.

THE COURT: I was going to save my questions for later, but this is a pretty glaring point to me.

MR. RYAN: Yes.

THE COURT: Mr. Burns said to the Court that: "It's agreed among the parties that the trademark is currently owned by the Semases and that no assignment was necessary." And nobody objected.

MR. RYAN: We didn't object. We weren't going to give them an assignment. There was no way we would give them an assignment --

THE COURT: No, no, no. Nobody objected to the representation to Judge Zive that Mr. Semas owned the trademark name at that time.

MR. RYAN: And currently. Currently; that day.

THE COURT: All right.

MR. RYAN: I'm serious, Your Honor. This is what created the serious problem at that hearing. And if you back up, you'll see it in the discussion of Judge Zive where he talks about a name and says they won't -- they can't use the name anymore. He didn't say mark. That created a lot of confusion on the part of my client. He did -- they did not understand that what they were agreeing to was they can't further describe their history. They can't put what they did in a resume. They can't write on -- as this court discussed, the literal interpretation of the agreement, just as in Steppenwolf, is that our client cannot write the word "Metalast" in chalk on a sidewalk. That's absurd. And the Court said so, I think, in Steppenwolf.

But, that's not all. Even the defendants, in their reply brief, at pages 10 and 11, admit that the literal wording of the Settlement Agreement cannot be. They say that there are things we can do with Metalast to identify our former -- the client's former association with it. That is an admission that the agreement is absurd and it can't mean what it says.

So once we're to that point, then we're to construction --

THE COURT: But, we're not in the realm of

the absurd here. I'm sure the defendants are not going to argue that Chemeon shouldn't be able to say, "We're not Metalast." They're not going to disagree with that. By saying "We're not Metalast," you're using the word "Metalast."

MR. RYAN: I agree.

THE COURT: But, we're not arguing these odd scenarios. I want to focus on what your clients are actually asking here; and that is, the ability to say "Chemeon, formerly Metalast, or "formerly known as Metalast," in the commercial context.

MR. RYAN: Yes.

THE COURT: You're not writing a word on the street. You're using it in the context to compete.

MR. RYAN: Yes. And so what did the Court in Steppenwolf say?

You have to look -- once you agree that we're -- by the way, what are the absurdities that we can do and we can't do? We don't know. But, once you're at that point of -- and it's common, under fair competition, in analyzing this entire area, says Once you're to the point of recognizing that the literal words on the page are not correct, we're not going to enforce those very broad, unreasonable statements that you can't use the word -- and by the way, the only thing the judge said in settlement, and Judge Beesley can't change this -- we submit he didn't have jurisdiction, by the way, in

that matter -- those discussions should -- are not pertinent. But in the settlement itself, before Judge Zive, all it says is you won't use the name. It doesn't say you won't use the mark. Okay? It does say that the mark is owned by him going forward, but there's no agreement that they wouldn't use the name -- the mark going forward in any way whatsoever.

Next, and I think really importantly, once you're past the fact that the broad words in the statement are not going to be enforced as they are, because they're absurd at the extremes, where are we?

Now we turn to what was the purpose, what were the circumstances of the settlement. The purpose and circumstances of the settlement were identical in Steppenwolf to those here: To resolve ownership of a mark and a name. The Court in Steppenwolf expressly identified that as the circumstances. And since what we're talking about is resolving ownership of a tradename and a trademark, what you can't do going forward is you can't use those terms in a way that would confuse or deceive. You can make fair use of them. You can say "formerly band member" of whatever. You can say "formerly that was my company." We were "formerly Metalast." By the way, think of the consequences, if we can't do that, to the public. There is an enormous quantity of our product out in the field. And as I mentioned before, some of these products are very dangerous. They treat metal. You

have to be very careful in how you use them. Those products are sitting on a shelf. They've been applied. When people need warranty claims presented and the product on the shelf is Metalast, where do they go?

If they can't find out by doing a web search that we were formerly Metalast. We're the party you want to come to if you need service, if you need repair, if you've got a product's liability claim -- which we would like to take care of -- how do you find out?

By the way, this is why OSHA requires what it does in the data sheets, so that people can find out and get to the right source. Again, and it goes to the core of trademark law and unfair competition. Trademark law and unfair competition is about preserving -- protecting against confusion as to source of origin, sponsorship, affiliation. Right? That's the key. There's lots of law on that. And we can cite the Court to -- I have some cases here I'll cite a little later on that topic.

Once that's understood, what we have to be careful to do, and we want to be careful to do, is to make sure that people don't think we are Mr. Semas or are associated or sponsored by him.

With regard to the way we use it, for example, prominence of "formerly Metalast," that was not argued in the briefs. That was never -- it's never been presented as the

problem; that we use it too prominently, has never been the argument. We have always said to Mr. Semas and his counsel, we are willing to sit down anytime to make sure there's no deceit, that nobody is confused. And if it's too prominent, let's talk about it and work it out. He has refused those discussions at every turn. Okay? And that's why it's not in the briefs is because they don't want to talk about how we might do this in a way that ensures that there's no possible deception or confusion, if there's a concern about that.

But, again -- and by the way, since this case has started, nobody has, from the other side, has ever communicated to us that there's a problem with regard to prominence, as opposed to the absolute ban that they want.

Why do they want the absolute ban? I'll get to that. But, first, the net result of the settlement is unclear on its face. D. Semas, Mr. Semas, owns the Metalast word and logo mark registrations only as of the date of the settlement. There's no question that Chemeon did not assign the goodwill that the Receiver assigned to it from the LLC when it had purchased all of the assets of the LLC, and the order expressly identified that they acquired the goodwill of the LLC. Mr. Semas does not own that. Chemeon does. Then Chemeon resumed the business as Metalast Surface Technology.

In their briefs, the defendants make a very big deal, repeatedly saying, that we are mis -- that our client

is misrepresenting that they were formerly Metalast because they weren't.

They were. They were formerly Metalast Surface Technology and on the webs everybody called them Metalast. That went on for over a year, by the way, without any complaint at all from -- no former, legal complaint by Mr. Semas. No action was taken. Now we're here. And that's part of our laches defense, by the way. In fact, what's happened here, and I think Mr. Semas has finally recognized it, is in the settlement he divorced the marks from their goodwill. It violates the very premise of trademark law. You can't do that. The settlement -- in fact, we believe the settlement invalidated Mr. Semas' trademark rights by separating the LLC's goodwill from the mark. I cite some law there. I won't burden the Court with reading it. But, that's the law. You can't separate. You have to have an ongoing business. He doesn't. And you've heard nothing that he does. There's not one statement in the record that he has an ongoing business.

Next, please.

I'd like to give a little history for purposes of the unclean hands defense in context. Metalast International, LLC, the original entity, was created in 1994, November of that year. It became a money raising and spending machine, the likes of which I personally have never seen. It raised

over -- from that point forward, through 2013, when our clients stopped writing checks -- the last one, by the way, to try to help them out and keep them going. Nobody else would help. Our clients helped. Gave them lots of money, over $6 million. Wrote them hundreds of thousands of dollars of checks in 2013 and here they are. Over $110 million in people's monies, over 1300 investors invested in this company, it's all lost. Every penny gone. Never earned a profit. At the end, it was still burning over $100,000 a month in red. Okay?

Now, the LLC's manager, Metalast International, Inc., now the CEO of the LLC, was Mr. Semas. And he was the CEO of the Inc. as well as its manager. The Chief Accounting Officer of the LLC was defendant Wendi Semas, an accountant. A lady trained in accounting, with a degree in accounting, and passed all four sections of the CPA exam. That's going to be important, as you'll see.

Now they all, and this is undebated, had an expressed, undivided duty of loyalty to the LLC, not the Inc. This is in Exhibit 1, the Operating Agreement, in Section 14.3. And Mr. Semas emphasized this to investors and the others, like the SEC -- and this will become important in a minute -- the IRS. He did this for years, emphasizing his fiduciary duties.

Now, as you all know, the LLC developed and sold

no processing systems and products, and became incurably insolvent in 2013. It wasn't the first time it ran into financial problems. It had lots of them, but -- that's why no one else would pitch in any further. No one would pay anything to keep it alive.

Next screen, please.

So, after creation of the LLC in '94, it's the operating entity. The Inc. is not the operating entity. It doesn't earn the goodwill; the LLC does from the use of these marks. It was admitted by Wendi Semas at her deposition that after the creation of the LLC, the LLC paid for everything that was done by the business. The Inc. paid for nothing after that. It was all paid for by the LLC. The major LLC, one of the major LLC investors, and I don't know if he's the biggest, but one of the biggest investors was our clients through an entity called -- was the Meilings, through an entity called DSM Partners, which eventually became what's called D&M-MILLC, which is the entity that acquired the assets from the Receiver in the receivership of the LLC. That entity eventually became Metalast Surface Technology, and then after the settlement Chemeon Technology.

Now, from '99 to 2013, the Meilings invested over $6 million of cash, that was cash outlay in the entity. With interest, by the time of the -- it was over by the time of the insolvency in 2013, it was a total of $9 million that

they'd put into the company, into the LLC. In 2009, this is several years before all the problems arise, the company is in --

THE COURT: Now, Mr. Ryan, I realize -- I want to give you as much opportunity to argue and this relates to your unclean hands defense, but --

MR. RYAN: Yes.

THE COURT: -- this is all set out in the briefs. And to your credit, the plaintiff's briefs include evidence and, as noted, the defendant's brief did not, where the defendant, I think their standard contention in the brief was they're prepared to submit evidence, if needed, at the hearing, or something to that effect.

So I've read the briefs several times now. I understand the history --

MR. RYAN: Okay. I'll speed it up.

THE COURT: -- and the Meilings' investment.

MR. RYAN: I will speed it up.

THE COURT: All right.

MR. RYAN: Next screen, please.

THE COURT: Because you asked for opening. This is your opening --

MR. RYAN: It is. Yes, Your Honor. But, I don't want to make you listen to things you know well. So, please don't hesitate to say, Mr. Ryan, you don't need to go

into that.

THE COURT: Well, no, I'm allowing you to make opening. I didn't realize that you were going to repeat all the allegations in the briefs.

MR. RYAN: Okay. I'll shorten it up.

Okay. So I think what's important here is to recognize that during receivership the Meilings continue to put money into the company. They're trying to save this company. They didn't just take over a company and walk away with a bunch of money. That's not what happened. The receivers -- the company was still bleeding badly, including when -- the receivership started in April of 2013. The company was sold to them in November 2013. They were putting substantial amounts of money into the company every month to keep it alive during that period. And after they acquired it, they continued to put money into it.

Today, the company is in the black and growing. It's looking for more -- it has 11 employees currently. It's trying -- it wants to hire more. By the way, when I say it's in the black, that's except for the cost of this lawsuit. All right?

Now --

THE COURT: Which your clients bought.

MR. RYAN: Which our clients bought. But, my point is these people have taken a company that was a mess and

losing massive cash and turned it around. And, hopefully, it's going to be a productive member of this economy in this State going forward. It's looking for more employees. It's in the black, except of the cost of this lawsuit. That's a good thing on the balance of the equities of what's been happening here, as opposed to the fact that Mr. Semas has no business that he's identified to this court.

Now, importantly, in the receivership, when the Receiver -- when the Court ordered the sale -- approved of the sale to the Meilings, the Court said -- and there's going to be lot more of this. This is the unclean hands -- there's evidence of self-dealing with the executives of the company. There was a lot of it. And we're going to show you some of that as we go.

Next page, please.

THE COURT: But there's no dispute that the release is broad enough to cover any such claims, which is why you're asserting it as an affirmative -- as a defense.

Is that correct?

MR. RYAN: We agree we can't do it affirmatively as a claim. But as a defense to a request for an injunction, a release of claims does not release defenses.

And by the way, there's no argument that our defenses -- they didn't present that argument in their briefs. There's no such argument in their briefs. You just heard

him say that it was waived in his argument. It's not in the briefs. There's no argument about that. It hasn't been briefed. The fact is the release only released affirmative claims, not defenses.

They're seeking equity of the Court. The Court doesn't give equity to people that aren't entitled to it. They have not done equity to get the equity that they want.

So, the furtherance of -- I'll give you examples and I'll make this very quick. I know it's in the briefs. These people used LLC dollars to register these marks. All the work, and it was over $50,000 worth, was paid for by the LLC; while, at the same time, they're going to the SEC, to the IRS, to the Meilings themselves, in a document we're going to show you, where they repeatedly say the marks are owned by the LLC. They give balance sheets that list those marks as LLC assets as they're investing.

What happened here was gross. While they have a fiduciary duty to the LLC -- by the way, a lot of this we didn't discover until this matter arose, this dispute, last summer, when we were forced to look into the company records and find eye-popping records of what happened here, that the LLC was taking money from their investors and registering the marks in the name of the Inc. Unbelievable.

And then we see -- it wasn't argued in the argument -- Mr. Semas produces in this -- by the way, the

first time it ever surfaces is in the adversary proceeding in the bankruptcy in 2014. He produces a license, supposedly, from the Inc. to the LLC in 1996, which he signed on both sides for both parties. An Incredible breach of his fiduciary duty to the LLC. It's a license of the Metalast name and brand from the Inc. to the LLC in '96. Remember, the LLC has already been operating since December of '94. It's been using the mark, not the Inc. And then out comes this document that nobody has ever seen before of the Metalast last name and brand that licenses from the Inc. to the LLC?

It's non-exclusive. It's terminable at will by Mr. Semas. But, it requires the LLC to pay all expenses even if he terminates it. It's not assignable by the LLC, but it's assignable by him. It's signed by D. Semas on both sides. The consideration is his continued employment.

This is one of the most outrageous violations of a fiduciary duty that I, as a lawyer, have ever seen. Nobody is a witness. Nobody sees it. There's no corporate record of it. The company has an extensive database developed by Mr. Semas at some great expense. It's not in the records. Okay?

So what is he trying do?

Remember, I told you, you'll recall earlier, I'm going to tell you what's going on here. This is what's going on here. Mr. Semas wants to take Metalast registrations and

sell them to some -- a third party to compete with us. No third party is going to buy it unless he has goodwill to support it. He has no goodwill to support it unless he can convince somebody that that '96 license is real, because the Inc. didn't use the marks, the LLC did. That's what's going on here.

Again, the Inc. has extensive records. The database management system is remarkable. Every communication, every e-mail with every customer, every client, every law firm, it's all in there. All the company's contracts are there. Not the license. It's not there. It's not in the company records.

Then, in the middle of the receivership, Mr. Semas assigns those registrations from the Inc. to himself and doesn't tell the Receiver about them.

Next screen, please.

Again, as you're going to see in the evidence that we want to put on, what happened here is directly the opposite to what he was telling the LLC investors throughout the years; that they owned the brand, the LLC did. Obviously, it did. He told the IRS in the tax returns when they deducted the expenses and amortized them, the trademarks, that -- you can't amortize an expense that is an asset for a third party, when it's a trademark. You can't do that.

By the way, he also misled, we're going to show you,

he misled his accountants about all this. He told them the LLC owned the brand in a letter. That's why they did that in the tax returns.

The SEC and Dean Meiling were misled. He tells the SEC in a letter, okay -- which we're going to show you soon -- the MI-LLC, the LLC, has spent 14 years and $44 million of our investors' capital -- there was an SEC investigation about wrongdoing, abuse of funds which was going on. They didn't find it. We did -- in developing products, branding the Metalast -- see the registration -- name, and building a quality reputation with manufactures from around the world and throughout the metal finishing industry. And then he proceeds, at the end, to say:

"I am confident that if the books and records are thoroughly examined by the Commission, they will reflect that management has always acted as a proper fiduciary on behalf of the LLC members."

Really?

By the way, that same letter identifies that the tax returns we're going to show you were given to the LLC. And those tax returns say the LLC owns these marks. They paid for it.

Next page, please.

Now, the Meilings are very successful people. Mr. Meiling was an incredibly successful businessman and his

wife has been very successful as well; Ph.D., and has done great things with it.

Now, they were in retirement, happily doing what productive retirement people do, engaged in tons of charitable activities up at the lake, doing really great things. They wanted this headache? They didn't want this. But, they wanted to turn this company around because they want to help the community.

So, they came out of retirement to run this company, turn it around, and get it going again. They changed the name to Metalast Surface Technology. They invested in the company further. They hired Ted Vantyresca, who you'll hear from. They paid substantial past debts that they didn't have to, but they did to preserve relationships. They kept people's health insurance going. They built a new company and they stabilized to grow the business.

Again, at that time, Mr. Semas sought no injunction against MST's use of Metalast. Proof of lack of irreparable harm, Your Honor.

Now -- then Mr. Semas files his bankruptcy.

Next page, please.

Now, here, let me -- I won't repeat this because we've already talked about the settlement and what it provides by way of what's in those headings.

If you can move to the next page.

So the result is D. Semas owns the registrations as of 1-27 -- maybe. That's, as between us, he does -- but he cannot sell or license them -- and I told you why. And that is why he wants to stop "formerly Metalast," and refuses to talk to us about how we might do it in a way that doesn't deceive, if he's got a concern about that.

Next page, please.

Now, I want to talk a little bit about Steppenwolf because I think it's really, it's -- we believe this slide makes it clear what Steppenwolf did and how it applies here.

Steppenwolf --

THE COURT: Well, I'm going to ask you to save that portion for your argument.

MR. RYAN: Okay.

THE COURT: Are you almost finished with your opening because I have a question with respect to the evidence that you wanted to present.

MR. RYAN: Okay. Great.

Next page, please.

Judge Zive did not construe the meaning of the words -- I mean, that they would not use the name in any fashion whatsoever and denied a motion when asked to do that. They asked him to go further into it and he refused to do it.

So did Judge Beesley, including in his most recent

denial. You know, in their request that you take notice, they included all sorts of characterizations of the transcript. The transcript, we have no objection to Your Honor looking at. The characterizations are wrong. They asked Judge Beesley to do basically the same thing and enter those characterizations in an Order. He refused to do it. And with great respect, and I mean that because Judge Beesley is well-known. He's a great judge, and so is Judge Zive --

THE COURT: At the October hearing, you represented that Judge Zive had said that the parties were talking about the tradename and trademark and you represented it's difficult to make all the changes with respect to, I think, 120 odd products --

MR. RYAN: Yes.

THE COURT: -- but the plaintiffs did it anyway.

MR. RYAN: They did, in the time frame, in the 90 days. They spent a great deal of money.

THE COURT: So what do you mean by what Judge Zive didn't -- based on that representation, didn't Judge Zive already construe the parties' agreement --

MR. RYAN: That's why -- no.

THE COURT: -- that it included both the tradename and the trademark?

MR. RYAN: No, no. No, Judge Zive -- Judge Zive, the only thing we have --

THE COURT: I'm referring to page 12 of the transcript to the October hearing.

MR. RYAN: Okay.

THE COURT: Let me look at it again. I'm pretty sure you said Judge Zive.

MR. RYAN: Yes.

Okay. Are you talking -- which one are we talking about, Your Honor?

THE COURT: And this is docket number 35. This is the October hearing before me.

MR. RYAN: Oh. Oh, I don't have that in front of me. I'm sorry.

THE COURT: You said, this is on page, beginning on page 11, line 24 --

MR. RYAN: Yes.

THE COURT: -- you said: "We weren't counsel at that time" -- this was at the settlement -- "that was before we were brought into the case. Prior counsel tried to raise the issue."

And then the next sentence which begins on line 2 of page 12 of docket number 35, you said: "Judge Zive said, no, that's not correct. We were talking about both the trademark -- the tradename and the trademark, so you have to change both within 90 days. Very difficult to do. Over 100 products. Massive task. But, they did it anyways."

MR. RYAN: Well --

THE COURT: How should I construe that?

MR. RYAN: Here, what I was talking about was that was the subsequent -- there was a telephone call with Jan Chubb. I wasn't on the call. There was a subsequent telephone call. Mr. Harris was there, I believe, and Judge Zive. And that's where that came up. That wasn't part of the settlement.

Now --

THE COURT: My question is so -- and I'll read the transcript again of the hearing before Judge Beesley, and if there's a transcript of that call, I would like for that to be filed as well. But, to the extent that I have both the settlement judge and the bankruptcy court judge making a determination as to what the parties agreed, the scope of the Settlement Agreement, what kind of weight should that be given? Is that binding on me? Because they were the settlement judge and the judge presiding over the case that approved -- well, that, ultimately, approved the settlement, I think. Shouldn't that carry some weight?

MR. RYAN: I don't think so, Your Honor. I think the settlement is the settlement. The words on the transcript are the settlement and you can't bind the Meilings to anything more than is in the Settlement Agreement itself, notwithstanding the judges may have thought something

different. What's in the record is in the record.

THE COURT: So if I apply contract law principles --

MR. RYAN: Yes.

THE COURT: -- if I look at the Settlement Agreement and as I said I don't think there's any ambiguity. It should be construed as the terms state, then I may construe -- and I don't know how that's -- let's assume I agree with the defendant --

MR. RYAN: Yeah.

THE COURT: -- it clearly includes the trademark and the name.

MR. RYAN: Right.

THE COURT: So the other option is I can say, well, it's not clear what it means. It's ambiguous. Then, would I look to the parties' intent and then I would have to determine -- and, to me, if I look at the parties' intent, certainly the settlement judge and the judge who approved the settlement, how they understood the terms, because they were involved, should carry weight.

MR. RYAN: I, I would say this --

THE COURT: And when there's ambiguity, I'm not sure I can construe it, by the way. But, we're on an injunction motion --

MR. RYAN: Right.

THE COURT: -- where I determine the likelihood of success.

MR. RYAN: Yes, correct. Yes.

Well, I think Steppenwolf makes clear that it can't -- it's ambiguous. The wording like this is ambiguous because it's absurd, literally.

But the point being -- and that, by the way, courts will not construe -- the rule, and this is true in Nevada. I cited it and you can see that in the Federal Circuit -- or the Nevada Supreme Court law that I cited on the prior page -- the rule that clear language, if it's not ambiguous, is honored and enforced as literally stated is subservient, clearly. And it's so stated, by the way, in Steppenwolf. And, it's stated in Nevada Supreme Court law to the rule that courts will not construe things to an absurdity, even if, literally, that's what they mean. And so the absurdity rules supersedes clear language if it leads to absurdity, as it does here. As I say, at 11 and 12 -- at pages 10 and 11 of the defendant's brief, reply brief, they admit that it leads to absurdity here.

But the point that I make in response to Your Honor's question, to make sure I answer it, the defendants do not disagree that the agreement required that they terminate all use of the name and mark as a name and a mark, as a current name and a current mark, as opposed to a historical

reference, within 90 days. They agree that that's what people agreed to.

What I wanted to point out to Your Honor was the ambiguity in the state --

THE COURT: Mr. Hoy, do you agree with that?

MR. RYAN: I do, provided that it is --

THE COURT: I'm sorry. I'm asking Mr. Hoy, since you're making representations on a very important point.

MR. HOY: No.

THE COURT: All right.

MR. RYAN: So the point that I'm talking about with regard to ambiguity and absurdity is two-fold. First of all, the words can't literally mean what they say when it says "the name will not be used in any way whatsoever." And it only says the name. It doesn't say the mark. That's number one -- well, it's two points. It can't mean what it literally says. And the second point being it's only the name, it's not the mark.

And I hope Your Honor understands the Meilings aren't lawyers --

THE COURT: They were represented by counsel.

MR. RYAN: They were, but I feel the difference between a tradename and a trademark is not clear to everybody. That most -- a lot of lawyers don't understand it. I have a lot of lawyers in my firm that couldn't explain it to you and

they're darn good lawyers.

And by the way, the Nevada trademark law messes it up and calls a tradename a trademark at one place. So, it gets really messed up as to what we're talking about at what time.

I can tell you this. My clients, in very best of faith, understood what they heard to say and it was based on other discussions that had taken place. Theythoughtwhat they were agreeing to was that they will not use the tradename. They really didn't even think that they couldn't use the trademark going forward. They didn't understand that.

They also thought that they had a right to address things that were incorrect later after they had a chance to talk to counsel. Now they were mistaken about that, so that's why they -- well, they dropped the motion. They brought a motion for reconsideration. They found out about the Steppenwolf case and that there were other issues, such as absurdity, construction of meaning, trying to get to a reasonable meaning and result given OSHA regulations, given the needs of the customers with products on the shelves and warranty claims and all of that, that there could be a reasonable way to go forth with their business, make the name change, don't fight about it, change your name, change your mark. Let's just use "formerly Metalast." If there's a problem, if they think we're using it too prominently, let's

talk about it. If they think we need to get some clarifying language, let's talk about it. We'll be reasonable. We'll work it out.

We can't get to that discussion, which we're more than willing to have.

So, does that answer Your Honor's question?

THE COURT: Yes.

MR. RYAN: Okay. Thank you.

Now, next page, please. We're almost done, Your Honor.

So, the injunction should be denied. There's no likelihood of success or serious questions. There's no showing of trademark infringement at all. You didn't even hear it argued. No evidence to support. No Metalast products offered by Mr. Semas. So under various factors that are the infringement test in the Ninth Circuit, uh, they don't even apply here. They don't -- so why are we granting an injunction on anything?

No showing of any confusion. No survey or actual confusion shown. By the way, a registration is presumed abandoned by three years of non-use in connection with actual product. Mr. Semas has not used the mark with actual product, to our knowledge, and has never alleged that he has, in any event, that we're aware of, with product that matters under these registrations.

Chemeon, there's no question that Chemeon, as of June 9th, 2015, is not using Metalast as its name or mark and there's no dilution because of fair use and it is not a household name as required by the law.

Next screen, please.

No showing of irreparable harm because they're not in the market. There cannot be confusion possible given the OSHA regulations required that we have to put this out there. We could put it at anywhere we want on the internet. There's no possibility of harm since OSHA requires us to do what we're doing in the data sheets. We can put them in every package, on every label of every product with the data sheet.

And again, they did not move against the LLC's or MST's use of the name after D. Semas left the company in April 2014, until they brought this motion in this court. Now they, they cite to their motions before the District Court to try to get some relief, but -- the bankruptcy court. Forgive me -- but, they didn't bring anything in response to our motion in this court until September -- until five months after we brought our motion, and long after MST had been using the mark out in the marketplace -- that's Metalast Surface Technology. Chemeon's prior name.

Balance of harm. What harm have you heard about here to the defendants versus what's going to happen to our client and our customers? If we can't tell third parties that

we used to sell TCP-HF, that's on their engineer drawings and called Metalast, that, clearly, isn't reasonable and was not intended by anyone. It was not discussed at the hearing. By the way, there was no discussion at the hearing about the past and that you wouldn't be able to talk about your history and your product's history. There was no such discussion and it's not on the transcript.

And then, of course, you've heard all about their unclean hands here.

Last screen, please.

Public interest. Promoting free speech by allowing Chemeon to explain its history. How -- I mean, I can't imagine a stronger free speech interest.

Promoting Chemeon's business success and employment, hiring people, as they're doing; promoting truthful information -- that's all we want to put out -- about product names, their source of origin, his versus ours, responsible source for the products that are out there -- us, Chemeon -- certifications of which products and sources.

In their briefs they made a very big deal, very big deal about that there's all these product certifications that are out there. Yeah, there are. Whose products are they for?

Not his. They're ours. What he was hoping was he could use this literal interpretation so that we wouldn't go

tell people. He complained. He actually sent a letter to a customer of ours, a distributor, saying they can't change those certifications and make it be Chemeon.

So, what they're trying to do is deceive people as to the source of origin because the source of origin was the LLC, not the Inc. We own the goodwill of the LLC. We were the source of those products. We have those formulations in product.

Now, if he can find a way get those products lawfully out there with Metalast, in a way that doesn't confuse people in thinking that was the Metalast product that you bought 20 years ago -- because it isn't. It's not from the same source of origin. He can't say that -- fine. But, he's got to be very careful about how he goes about that or, otherwise, he's going to have a deceptive trades practices claim and unfair competition claim against him.

So you see the problem here, Your Honor, is how do we go about this in a way that tells the market carefully and clearly what's what, and we're complying with government regulations all the while?

Thank you, Your Honor.

THE COURT: All right. Thank you.

You know, in light of -- Mr. Ryan, you indicated that you have testimony that you would like to offer. I'm not sure now that I've heard arguments and understand the

issues remaining for me to decide, that I need testimony. Why don't you make a proffer and I'll tell you if I think I need -- the testimony is necessary. Because as I noted in your brief, you did offer extensive evidence relating to the history of the company, how the company was operated, Mr. Semas' involvement, the Meilings' investment and so on, so I have a pretty good understanding of the history. If that's what you're offering, I don't think I need to hear evidence relating to those issues.

MR. RYAN: Okay. May we take a 10-minute break so that I can talk to the client about what we'll do?

THE COURT: You may. If I decide to go that route and not take testimony because, as I said, I've read everything. I have a pretty good understanding of the history and --

MR. RYAN: Yes.

THE COURT: -- the parties' arguments as to the equities involved. If I don't hear testimony, I will allow you to make some additional brief arguments because I have some questions that I sometimes ask and sometimes didn't because I didn't want to interrupt what I thought was your opening arguments. So I do have a few questions that I would like to have resolved before I can decide the issue.

MR. RYAN: Okay. Thank you, Your Honor.

THE COURT: So, we'll take a 10-minute recess.

MR. RYAN: Thank you, Your Honor.

(Recess taken.)

THE COURT: Please be seated.

And Mr. Ryan.

MR. RYAN: Thank you, Your Honor.

By the way, a little housekeeping matter. Exhibit 35 will also be placed under seal for ITAR purposes. And I wanted to answer a question with regard to Your Honor's question --

THE COURT: That's not the only exhibits, right? Earlier, Mr. Hoy identify Exhibit 528 -- so, currently, what I have is Exhibits 528 through 542 --

MR. RYAN: Yes.

THE COURT: -- will be filed under seal.

MR. RYAN: Yes.

THE COURT: Those will be sealed. And Exhibit 35, you said?

MR. RYAN: Yes, Your Honor.

THE COURT: All right.

MR. RYAN: And then with regard to your inquiry about the subsequent discussions before Judge Beesley, I would like to point Your Honor to transcript page 16, where he expressly said, in the most recent hearing, that he was not deciding whether OSHA law, federal statutes, have an impact. He wasn't deciding what's before Your Honor. He

wasn't deciding issues like absurdity or Steppenwolf. He was not deciding that at all. He was only talking about his view and what was on the record.

And then with regard to Your Honor's inquiry about a proffer, we appreciate that suggestion very much. What we would propose to do is to give you a short written proffer later today, after we hear your questions, so we know what we should do, if anything.

THE COURT: I'm probably -- I'm going to give you my ruling today.

MR. RYAN: Okay.

THE COURT: What I'm saying is I don't need additional testimony on the issue of unclean hands.

MR. RYAN: Okay.

THE COURT: But if you want to make a record and have a written statement proffer in addition to what you have, I'll permit you to do that, even though I thought the issue had been fully briefed.

MR. RYAN: Okay. Thank you.

THE COURT: Now, I can change my mind after I hear additional argument, but I think I'm prepared to rule today.

So, with that, let me hear arguments.

Mr. Hoy.

MR. HOY: Thank you, Your Honor.

The Court, before the recess, heard arguments that are self-contradictory in several different respects and I'd like to jump right into that.

First of all, the argument from the plaintiffs was you can't listen to Judge Zive or Judge Beesley interpret the Settlement Agreement because the language is clear and needs no construction whatsoever. But, then the argument switches and says Your Honor can't possibly apply the contract language as written because it's absurd; therefore, you must construe it in a way that's consistent with what their subjective beliefs are, and what public policy demands. Those contradict one another.

Now, let's talk about the argument that the court --

THE COURT: Well, let me ask you this question. Do you disagree with Mr. Ryan's argument that on the breach of contract claim, that the defendants would not be entitled to injunctive relief on a straightforward breach of contract claim because, of course, with contract, here, you are asking for damages. And if you disagree, do you have a case that supports that a likelihood of -- that a preliminary injunction relief can be based upon a breach of contract claim?

MR. HOY: I don't have it with me, Your Honor, but I will do the research and submit additional authorities, if I'm permitted to do that. I've had cases in the past, in state court, where we have an injunction against the ongoing

breach of a contract, so it's -- this is not something that was briefed in the opposition, so I didn't respond to it in the reply. But, yeah, I think it's imperative that courts be able to enforce contracts in a number of different ways. One way is by damages, of course, but there is also a remedy of specific performance. And so an interlocutory injunction is really a specific performance type of order.

And so that's really what we're asking for here is specific performance of the Settlement Agreement; and, particularly, that covenant to stop using the term "Metalast," at least in a commercial setting.

If the Court is amenable to testimony, we would offer the following evidence --

THE COURT: I thought you weren't going to offer testimony until you hear from plaintiff's witnesses? In other words, you weren't -- you had represented to me at the beginning of the hearing that you were not offering testimony in support of your motion, which is why I decided I didn't need to hear from the plaintiff's representative.

MR. HOY: Okay. Then this would be rebuttal testimony, if the Court is going to open up the hearing to evidence from the opposition.

THE COURT: Right. So if they offer witness statements following this hearing, then I'll allow your client -- you, to offer rebuttal statements if needed.

MR. HOY: All right. Here's, really, the gist of the opposition. The opposition says, yeah, we agreed to the Settlement Agreement, but it's absurd for a couple of reasons. The primary reason is you can never, ever divorce goodwill from the trademark; and, therefore, it's absurd to try and do that.

THE COURT: So you concede that your client did not obtain the goodwill as part of the Settlement Agreement? He got the name and perhaps the trademark, but the goodwill remains with the company, which would later change its name.

MR. HOY: I don't agree to that, Your Honor. What I agree to is it's difficult or impossible to divorce goodwill from a trademark or a tradename. And by entering into the Settlement Agreement that specifically says we affirm that Mr. Semas continues to own the trademark -- not that he's now getting it as something new, but he continues to own it -- and we will never use the term "Metalast," that, effectively, sells to Mr. Semas the goodwill. That's their argument.

You can't divorce the two. The agreement is crystal clear that Mr. Semas has the exclusive use of the name Metalast in two different ways: Number one, he owns the mark. Number two, we hereby covenant never to use the name.

So if the argument -- and I think the argument is

probably correct -- there can be no divorce. Then, the goodwill must go with the mark and it must go to Mr. Semas, as the Settlement Agreement is written.

Now I don't believe this testimony would be admissible under general conditions. Mr. Semas, if asked, would testify that during that January 27th, 2015 settlement conference, he told Judge Zive that you can't divorce the goodwill from the trademark.

THE COURT: Why does the goodwill follow the LLC?

MR. HOY: Uh --

THE COURT: The LLC established the goodwill.

MR. HOY: This is an important point, Your Honor. The company that it before you today as Chemeon Surface Technology was originally called, I believe, D&M Partners or something like that. D&M Partners had a couple of name changes. That entity purchased a promissory note --

THE COURT: You mean DSM Partners?

MR. HOY: Yes, Your Honor. I apologize. DSM Partners.

DSM Partners acquired a promissory note from Metalast International, LLC. That note was foreclosed. That note foreclosure was the reason for the receivership down in Douglas County. As a result of that foreclosure, DSM Partners acquired assets of Metalast International, LLC. And their

argument is that --

THE COURT: Doesn't that include the goodwill?

MR. HOY: That's what the document says; yes. Absolutely. But, the point is that happened a couple years before the Settlement Agreement. And when the parties got to Judge Zive in his settlement conference, Mr. Semas said, Judge Zive, I appreciate that they've offered that I can have -- I can keep the trademark but, as a practical matter, they're going to have a difficult time going forward with their business. And the response that Mr. Semas heard was we don't think it's a problem. And then, again, two weeks later, Your Honor has asked for this transcript when Jan Chubb calls Judge Zive and says we've made a terrible mistake. We can't proceed on these grounds. This all came back to light again.

And so --

THE COURT: Now this representation or this exchange between Mr. Semas and Judge Zive, that's not in the settlement -- the transcript of the settlement? That's not part of the Settlement Agreement? That might have been negotiations, but it's not reflected in what I'm considering here.

MR. HOY: Right. I believe that would be parol evidence, Your Honor, and not admissible -- at least not admissible for the --

THE COURT: But, you're mentioning it here.

MR. HOY: Not admissible for the purpose of interpreting the agreement, but the new argument that we've heard is this concept that you can't divorce the goodwill from the trademark, and that's all I'm responding to. So, I think that testimony would be admissible on that point.

The parties -- contracting parties are free to make unreasonable contracts and the Court has already observed that these parties had counsel with them. These parties had intellectual property counsel with them. They had bankruptcy counsel with them. They were both informed about what was going on. And here's, here's a really important point, Your Honor. If they were not ready to live with the plain language of the contract, then how come they withdrew their objection to approval of the settlement and, furthermore, they never filed any action for rescission?

They're here telling you, today, that it's impossible to perform as written. It's impossible. But, they haven't sought an order for rescission. Why is that?

Because they want to keep the benefits of the Settlement Agreement, but they don't want to be bound by the Settlement Agreement where it affects them in a negative way.

If the Court is going to make a ruling on unclean hands, we would like to proffer some evidence on that point.

And Mr. Ryan has made some comments that are not supported in the record about what a miserable human being Mr. Semas is in the way he conducted this business. Well, let me just tell you a little bit about what the testimony and documentary evidence would be.

Mr. Semas, between 1996 and 2009, took a salary of $86,000 a year. Three-and-a-half years, he took no payroll whatsoever. On average, he received about $28,000 in expenses.

He made a personal cash investment of $3 million. He lost it. He personally gave up a million dollars in his stock or LLC membership to settle a claim against the company. He had no obligation to do that. He was not a personal guarantor on that debt. He was trying to help the company. And, he made personal guarantees of $7 million of company debt. Again, he wasn't required to do that.

So, when you start hearing all of this chatter about excessive salaries and excessive expenses and breach of fiduciary duty, we're ready to meet that challenge, Your Honor. There are no unclean hands here that have anything, whatsoever, to do with this license.

Now, the License Agreement is Exhibit 3. It's in evidence. Metalast International, Inc. owned the mark. And this is so because David Semas started the business as Metalast International, Inc. He created the name. He created

the brand. Metalast International, LLC, was created later to allow outside investors to come into the business. And, at that point, Metalast International, Inc. became the manager of Metalast International, LLC. And so we have this Exhibit 3 License Agreement that very plainly says that Metalast International, LLC, can license that trademark. Metalast International, LLC, does not pay a royalty back to Metalast International, Inc.; instead, Metalast International, LLC, pays to maintain the mark.

So, there's no overreaching here at all. There's no royalty stream going back to Mr. Semas or anything like that. Did he use the License Agreement as a -- as personal protection? Yes, he did. It is tied to his ongoing employment. But it's his creation anyway, so there's nothing afoul there.

The Court has already noted that the Settlement Agreement recites that Mr. Semas is not receiving ownership of the trademark anew as of January 27th, 2015; but, rather, simply confirms that he owns it and continues to own it because he owned it before. And I'm not sure how important that is to this case, but it seemed to be important enough for the opposition to constantly try and argue that Mr. Semas didn't own the trademark before the settlement.

THE COURT: Well, to be fair, Judge Zive, did begin, on the record, I think it was on page, on page 5 of

the settlement transcript, that "there is a dispute regarding ownership."

MR. HOY: Correct.

THE COURT: So I think that, there, Judge Zive recognized that the party disputes who owns the name "Metalast," and perhaps the trademark, too, depending on how the agreement is construed because he begins with: "There is a trademark regarding the name 'Metalast." There is a dispute regarding ownership."

MR. HOY: Yes. Absolutely, Your Honor.

THE COURT: So --

MR. HOY: And to understand --

THE COURT: -- I don't construe that to say that the plaintiff here did not concede that Mr. Semas owned the mark before the settlement conference.

MR. HOY: If I gave that impression, I apologize, Your Honor. I didn't mean to say that plaintiff agreed or conceded that point.

THE COURT: But I asked, to be fair to Mr. Ryan, I asked him that question earlier because later on in the hearing, Mr. Burns represented that no assignment was necessary because Mr. Semas owned the name.

MR. HOY: That's right; Mr. Semas was the record owner of the mark. And to really understand what the dispute was, I suppose the Court can go back to the Complaint in the

adversary proceeding. I'm not sure we made that part of the record here. But, that Complaint alleges all of these unclean hands arguments that are before the Court now; that is, that Mr. Semas doesn't own the mark and, in any event, the Metalast International, LLC, really owned the mark and, therefore, conveyed it to Chemeon through the receivership sale. So all of that was before the bankruptcy court at the time of the settlement and those claims were released.

THE COURT: I'm sorry. Isn't the Complaint your Exhibit 501? You said you hadn't made a record of the --

MR. HOY: Yes.

THE COURT: Yeah. That's a Complaint in the adversary proceeding?

MR. HOY: Yes. Yes, Your Honor.

So one of the things that sort of took me aback today was hearing, for the first time, that a release doesn't apply to defenses. Well, if it's an affirmative defense with elements that you have to prove, and those are the same elements of the affirmative claim and the affirmative claim is released, it's our contention that the affirmative defense is also released. You can't, you can't release a claim and then come back later and say, yeah, we're going to revive it, but we're just going to call it an affirmative defense this time. Because really what this is, what their unclean hands affirmative defense is, is simply the flip side of the claim

that they settled before; which is, Metalast International, LLC, should own the mark because of the history of the company.

Let me address harm. There is a record here of harm, Your Honor.

THE COURT: And what is that harm?

MR. HOY: The harm is that Mr. Semas can do absolutely nothing with the name Metalast or the Metalast trademark, so long as Chemeon is out in the marketplace saying we are formerly Metalast or we are selling products that were formerly Metalast.

You know, counsel made a big point about confusion in the marketplace. Can you imagine the confusion in the marketplace if you've got David Semas Metalast selling products, and Chemeon selling products that are formerly owned --

THE COURT: But why not? And if he hasn't -- if the only argument as to harm is that Mr. Semas cannot do anything, given Chemeon's conduct here; and that is, Chemeon using -- Chemeon referring to itself as "Chemeon, formerly Metalast," and that would preclude Mr. Semas from doing anything, I want to know what is it that precludes him from doing -- and if that's speculative, the harm that he's claiming because that's, of course, an element you have to prove under the Winters standard.

MR. HOY: Sure. I mean, we can't prove damages today, Your Honor, because --

THE COURT: But, you have to show likelihood of irreparable harm and it cannot be speculative. You cannot say I'm not able to do this because I can't because there is confusion because of the way the mark is being used, versus I tried to do this. I wasn't able to do it. The feedback I got id there's already a Metalast in the marketplace.

MR. HOY: I would refer the Court to Exhibit 541 in evidence. This is a Pratt & Whitney specification. It says, "Source material can be procured only from sources listed below or from intermediate sources in accordance with 4.2.1."

I'm down at almost the bottom of the page where it's highlighted in pink.

The source is Metalast International, Inc. The type is Metalast TCP-HF.

Metalast International, Inc. is on this side of the courtroom as the movant here. Metalast International, Inc., even though it has the contract right to go out and sell Metalast TCP-HF, as a practical matter, it can't do that because Chemeon is saying, no, we are Metalast. Our product is the Metalast product and, by implication, nobody is going to go to Metalast International, Inc. in order to purchase this product.

Now, can we prove this, empirically, based on people trying? No.

THE COURT: But, is Mr. Semas selling the product? He doesn't have -- he's not even in business of selling anything right now. He's trying to obtain the funding to do it.

MR. HOY: He, pursuant to advice from his IP lawyer, he is selling some product under the Metalast name in order to preserve what is required by statute; but, no, he's not at a full scale marketing operation, in serious competition with Chemeon. No.

Another example, Your Honor, Exhibit 539, this is a specification -- actually, it's a drawing with some specifications on the left side. Delta number 6 there says:

"Chemically treat using Metalast, cage code 3CE-7," I believe, "process TCP, hyphen, HS -- HF. Surface conductivity shall meet or exceed (unintelligible) per military C-17711. Apply per manufacturer's recommendations."

Okay? One of the reasons that the Settlement Agreement is worded the way it is, and contains an absolute prohibition against Chemeon using the name Metalast, is to resolve ambiguities like this in the specification. Because this particular specification doesn't say you get it from a particular source, it just calls it Metalast TCP-HF. And so

if, if Mr. Semas goes out and starts selling Metalast TCP-HF, it's going to be potentially chemically different than what, than what "Chemeon's, formerly known as Metalast TCP-HF" is, because Chemeon has a special process that other Navy licensees don't have. So now this specification is going to become ambiguous.

I'm not sure I explained that well enough. Does Your Honor understand what I -- understand that point?

THE COURT: I understand the point, but I think it persuades me to reach a different conclusion; and that is, it is necessary to explain the relationship between Chemeon and Metalast, otherwise there would be confusion for products that have already been on the market, which is what Mr. Ryan's argument is.

MR. HOY: And our counter-argument to that, Your Honor, is that Chemeon is free and was free to go out to Hughes Network Systems, and every other defense contractor, and say we've changed our name. We changed the name of the company. We're a new source. We're not a continuation of the company from which we bought assets. We're a new company and we're changing the name of our products. So, would you please change your specification to specify Chemeon TCP-HF, as opposed to Metalast TCP-HF.

Now, the 90-day transition period was designed to do that. And rather than go transition the way at least my

client understood, Chemeon didn't. Instead, they say we're not even going to attempt it.

Because, remember, attached to our motion is a -- there's a couple Declarations from Dean and Madylon Meiling and -- I apologize, Your Honor. I can't remember the fellow's name, but the branding expert. He said, wait, 90 days isn't enough. You're going to need more time and it's going to cost you a half million dollars.

So Chemeon didn't come back to the Court and it didn't come back to my client and say, hey, Mr. Semas, we agreed to a 90-day transition period, but we can't manage that. It's going to take us a year -- or whatever it's going to take. Instead, they just did what the Settlement Agreement, in clear terms, says that they can't do.

THE COURT: So just so I understand, you're not contending that Mr. Semas would not be able to sell the products, because he's able to use the name. So even with the specification on page -- on Exhibit 539 that you just explained to me, what you say is Mr. Semas could do that. He could say that he is selling -- he could represent that he's -- that the chemical that he's selling is still Metalast, just the processing may be different. And because the processing may be different than what Chemeon would be using, there could be confusion. But it doesn't -- but that may be a separate factor. That has nothing to do with the

harm to Mr. Semas. Because I'm concerned you're conflating the two issues, which is why it's confusing to me.

MR. HOY: Here's how I would put it. The specification currently says that the contractor "shall chemically treat using Metalast process TCP-HF." If Mr. Semas had a product called Metalast process TCP-HF, he could sell that to Hughes or to its contractors. But, that doesn't mean that Chemeon also should have the right to say we've got the same thing because we are -- we are calling our product "formerly Metalast."

Now, again, Chemeon could go back to Hughes and say please change your specification to add an alternate here --

THE COURT: No, I understand that argument.

MR. HOY: Okay.

THE COURT: But, I want to focus on the first part.

So you do agree that Mr. Semas could do that. He could sell a product called Metalast TCP-HP?

MR. HOY: Theoretically. As a practical matter, no.

THE COURT: Why is it no as a practical -- has he tried to do so?

MR. HOY: No.

THE COURT: All right. And why not as a practical matter, and then why isn't that speculative harm?

MR. HOY: Because the military specifications, the contracting specifications, the procurement regs, and the qualified product listing all dovetail and the QPL certification for Metalast has been hijacked, now, by Chemeon. And it's not that Chemeon went to the military and said we would like our own QPL listing -- and this is actually in the record, Your Honor. And I can find the exhibits for you, if you'd like -- Chemeon didn't go to the Navy and say we would like to have our own product listed in the database. What they said was you have previously listed Metalast in your database. We are formerly Metalast. We want the QPL listing to now say "Chemeon, formerly Metalast."

And so what's the Navy going to do when David Semas shows up and says, no, I'm Metalast? This is the practical problem.

Your Honor, I'm happy to answer any other questions that the Court has at this time. Again, if the Court is going to rule based on unclean hands, we would like to offer testimony on that point.

THE COURT: If I rule, it won't be based on unclean hands.

MR. HOY: Thank you.

THE COURT: But, I do have a question.

On page 11 of your brief, which is docket number 52, you raised the argument as to violation of the Federal

Trademark Dilution Act.

MR. HOY: Yes.

THE COURT: I'm sorry. I'm trying to read my handwriting.

Actually, let me ask you a question on page 12 first. You argue that it is "self-evident that calling the product 'Chemeon TCP-HF, formerly known as Metalast TCP-HF' is intended to destroy the Metalast brand."

How does it destroy the Metalast brand?

MR. HOY: Because Chemeon is in -- pardon me.

It's our contention, Your Honor, that anytime a company goes out into the market and says we were formerly known as something, the implication is that the "formerly known as" no longer exists and never can again.

So, for example, if you go out into the market, and one of the examples I used is we're Johnson Photocopiers and we bought technology from Xerox and so we're going to call our technology, "Johnson, formerly known as Xerox," the implication is that Xerox doesn't exist any longer.

THE COURT: Well, then, for the third element, I think the defendant's argument is that Mr. Semas started building the brand in 1994 and Chemeon only started using the mark in 2013, but it wasn't Mr. Semas who built the brand. It was the LLC and Chemeon acquired the assets of the LLC. So isn't that kind of a slippery argument for the third element?

And as I said, I think --

MR. HOY: By "the third element," does the Court mean the defendant's use began after the mark became famous?

THE COURT: Yes.

MR. HOY: Well, the mark was famous before Chemeon began using the mark. In the context of this block quote from the case, defendant refers to --

THE COURT: No, I know. I know it's the opposite because this is the defendant's motion. My point is Chemeon, for all intents and purposes, is the LLC, the Metalast, because it acquired the assets of the LLC and obtained the goodwill that went with the mark. I know you disagree with that. I know that's the other side's argument. So, it seems kind of deceptive to say Chemeon only began using the mark in 2013. That's not entirely true, is it?

MR. HOY: Yeah, Chemeon --

THE COURT: Because Mr. Semas didn't use the mark, it was the LLC that used the mark.

MR. HOY: Well, the Inc. did use the mark in the sense that it licensed it to the LLC.

THE COURT: The LLC used the mark.

MR. HOY: The LLC used the mark in commerce; yes.

THE COURT: All right.

MR. HOY: But as far as the mark -- you know,

using the mark after it became famous, my point here was that Chemeon's own declarations, which were attached to our motion, demonstrate the theme. Counsel's got these arguments that it's got to be a household name. Within the chemistry industry, it is a household name. Metalast was a household name. And that's obvious from all the specifications that we have here.

THE COURT: How do you distinguish the Kassbaum versus Steppenwolf case?

MR. HOY: Very simply. The base player, Mr. Kassbaum, simply said I was formerly in the band. I was formerly a member of... Mr. Kassbaum didn't say my band is Lone Wolf, formerly known as Metalast. He didn't say, ever, that his songs are Steppenwolf's songs. He just said I was previously a member of the band. And that's it.

THE COURT: And isn't that what Chemeon is doing here, is trying to explain its association, one; and, two, to make a distinction in the event that Mr. Semas used the name Metalast?

MR. HOY: You know, Chemeon might have a point if they put on all their letterheads, invoices, purchase orders and so forth, "We are Chemeon. We purchase assets from a company previously known as Metalast International, LLC." But, they didn't do that. They said "We are formerly known as Metalast. We are formerly Metalast. Our products

are formerly known as Metalast products." That's, that's the distinction between this case and the Kassbaum case.

THE COURT: All right. Thank you, Mr. Hoy.

MR. HOY: Thank you --

THE COURT: Actually, I have a question for you. So if Chemeon were to say "Chemeon," as you said, "formerly part of Metalast," there wouldn't have been a motion for preliminary injunction?

MR. HOY: It -- yes, there would have because, because Chemeon is trying to conflate statutory infringement concepts with breach of contract concepts. And I recognize that that was part of the Steppenwolf case as well, but I think that our contract is much more strong than the Steppenwolf contract.

So, yeah, we would have still sought some form of relief for specific performance of the contract. The distinction that I would draw between what Chemeon did and what it might have done differently is, as I said before, it's truthful to say that we acquired some assets from the company. But, that's not what they did. And Chemeon was not formerly a part of Metalast. It was a lender. It was a successor in interest to a lender in Metalast International, LLC.

THE COURT: What if it says "Chemeon" -- well, what if it says "Chemeon, formerly owner of Metalast?"

MR. HOY: I don't think that that would be accurate because --

THE COURT: Why isn't that accurate?

MR. HOY: -- because Chemeon was not a member of Metalast International, LLC. It's -- all of the memberships got foreclosed. They all got wiped out by the foreclosure. Chemeon's interest is as a foreclosing lender, not as an owner of the company, as opposed to the new owner of the former company's assets.

THE COURT: What about "Chemeon a successor in interest to Metalast?"

MR. HOY: That would be historically accurate, but it still doesn't explain how to get around the contract.

THE COURT: Well, now, you do concede under the Kassbaum case, that in terms of the contract, the argument that Chemeon can never, ever use the word "Metalast" seems unreasonable and absurd. So, I think the analysis with both the contract claim and the Lanham Act claim are similar, in that there has to be some way for Chemeon to explain its former relationship to Metalast, even though under the contract, as construed, even by your client, under the strict terms of the contract.

So, I want to think through this. One option is I can give the parties my tentative ruling. The other option is I want to encourage the parties to workout the language

that describes that relationship because I do think that, without doing so, there could be risk of confusion with two companies competing when the time comes for Mr. Semas to compete.

Now, I could find that there's no likelihood of irreparable harm at this time because Mr. Semas has not demonstrated that he will likely suffer irreparable harm. Some of the arguments show maybe the harm may be speculative. That's kind of where I'm leaning right now. I want to tell you my thoughts. But, I want to think through this for a few minutes.

I could give that ruling, which may mean that your client may bring another motion; or, the parties can work out the language because I do think it would help consumers for that issue to be clarified, the relationship between Chemeon and Metalast so there's no confusion in the marketplace. And if the parties work out that language, then there would be no denial of a motion for preliminary injunction that may result in -- and who knows what the ultimate merits of the case will be because we're only talking about preliminary injunction.

But, that's one thought I have right now. So, if the parties want me to hold off, I will defer my ruling. Something you can think about while I hear arguments from Mr. Ryan.

MR. RYAN: Thank you very much, Your Honor.

THE COURT: And why don't you pick up where Mr. Hoy left off with the Kassbaum case.

MR. RYAN: Yes.

THE COURT: And I think I may have said this at the last hearing. If I didn't, I thought about it. And that is, Mr. Hoy's distinction is a good distinction, in that Kassbaum was a member of the band.

MR. RYAN: Right.

THE COURT: So, it would be fair for him to say formerly a member of this band.

MR. RYAN: Yes.

THE COURT: Whereas Chemeon -- well, is saying, I'm formerly the whole part of this organization and not a member of that organization.

MR. RYAN: Yes. But, I don't believe the reasoning of the case turns on that distinction and all the reasoning is different. The rationale is -- we want people to be able to put out their resume. We want, and foremost under trademark law, is we want to prevent confusion as to source of origin. And so what has to be clear is that you're not misrepresenting source of origin, and so we're not confusing people into thinking that we are Metalast today, or associated with David Semas as the owner of the mark.

THE COURT: Well, if Chemeon says nothing, if Chemeon doesn't mention Metalast, how would -- because

you're saying you need to mention your former ties to Metalast so there's no confusion.

MR. RYAN: Yes.

THE COURT: If Chemeon says nothing, why would there be confusion?

MR. RYAN: Well, there's very good example that he just provided to you, by the way. If you look at the exhibit he cited, and I'll show you another one --

THE COURT: Which one, 539 or 541?

MR. RYAN: How about 541.

The product -- by the way, this is -- that's a mistake, obviously, that it says the "Inc." because the Inc. was not the operating entity; the LLC was. Okay? Somebody made a mistake. The product that's there was the LLC's product, not the Inc.'s. The Inc. didn't make any products. The LLC did. There's no dispute about that. And if there is, it would floor me because there's -- and I will cite to you in our proffer later today. There was voluminous evidence that the Inc. id the operating entity. Period. It paid for everything. It operated everything. It was the company people invested in. Nobody -- they weren't investing in the Inc. --

THE COURT: Hang on just a moment.

Mr. Hoy, you stood up. That distinction, for my purposes, is irrelevant -- if that's what you were arguing,

Mr. Hoy.

MR. HOY: I was just going to make the point that Metalast International, Inc. did sell chemistry before the LLC came into being.

MR. RYAN: There's no evidence of that in the record. And number two, even if it did, it stopped once the LLC started, and the LLC did everything. By the way, that as testified to by Wendi Semas in her deposition. The money was for the LLC. The LLC did everything. It was the operating entity.

That product, Metalast TCP-HF, is, first of all, proprietary. They can't make it. It's our product and -- but --

THE COURT: But what about Mr. Hoy's argument that you could ask for the specification to be modified to say "Chemeon TCP-HF?"

MR. RYAN: Forgive me. I'm sorry.

THE COURT: What about Mr. Hoy's argument you could ask for the specification to modify to say "Chemeon TCP-HF?"

MR. RYAN: We did. We did that. We did just that. We went to the Navy and said we've changed our name. We were the supplier of TCP-HF when we were Metalast Surface Technology. And before that, we acquired all the assets of the company and its personnel, including its technicians, who

came to join us to have us make the products.

All of the assets transferred and all the personnel transferred.

THE COURT: No, you did, but you said "Chemeon, formerly Metalast."

MR. RYAN: We did. And the question is -- and they say that's wrong. You shouldn't say "formerly Metalast." The problem is is it's true that we were formerly Metalast. And we want to make sure that people out in the field that are working with this stuff know what to do. For example, in the field, Your Honor, they will put Metalast --

THE COURT: What about Mr. Hoy's argument that, technically, that's not entirely true because Chemeon formerly owned the assets of Metalast?

Was that what happened in the --

MR. RYAN: In the goodwill --

THE COURT: -- you acquired the assets in goodwill?

MR. RYAN: All the assets and the goodwill. And, of course, the goodwill is the use of brands and what they represent. That all went to Chemeon.

By the way, remember, they took the IRS deductions. They told the SEC that we own these things, that the LLC owns all this. They told the LLC it was the company's brand. It, obviously, was.

THE COURT: No, but his point is to say that you are formerly Metalast, that's not true because you formerly owned the assets of Metalast.

MR. RYAN: No. We were formerly Metalast to this extent: We were formerly Metalast Surface Technology for over a year. We were Metalast Surface Technology with --

THE COURT: Oh, until the name change?

MR. RYAN: Until the name change. Because there was a continuity, there was continuity maintained for the Metalast mark for that period of time from when the company was the LLC; then the Meilings acquired all the assets and they promptly changed the name.

THE COURT: Was the name Metalast Surface Technology, LLC, did that come into place in 2013?

MR. RYAN: Yes, in the fall 2013. Yes. Late fall.

And so the problem here is they can't -- this is about source of origin. The source of origin of TCP-HF on that spec was the LLC. That's who you called. That's who you got your bills from. That's who you paid when you bought the product.

Out in the field, today, if you go to certain shops -- not a lot of them, because they actually didn't have a lot of customers, only 300 or so, at the most by the end, in a field of tens of thousands of these job shops all

over the country and world.

In fact -- by the way, with regard to fame, it's not a famous mark and there's no evidence of that. But, where I'm going with this is think of the confusion out there where, in the relatively few number of job shops where it was used, they have -- they'll frequently put on these baths that they use or other shelves, "TCP-HF, Metalast TCP-HF goes here in this bath for treating."

What they're talking about was the product from the LLC that was then provided by Metalast Surface Technology, Inc., and is now provided by Chemeon. If that doesn't get fixed, he's going to be selling -- they're going to be buying the wrong product from the wrong source of origin, whether it be with the LLC, whose goodwill we own and technology we own, and whose people are working for us now; or, it is Metalast Surface Technology as it then became after the Receiver sale.

THE COURT: Do you see a point where that wouldn't occur? There wouldn't need to be a distinction made between Chemeon and Metalast as the source of origin?

MR. RYAN: Yes. Well, in fact, our company has been working at reducing -- their client's company has been working at reducing the use of Metalast for several reasons. One being they don't want to help Mr. Semas to help the business by keeping it too prominent out there in terms of people thinking of Metalast. They want to get people to

understand that that product is now provided by Chemeon. Eventually, we suspect it will go away completely.

But as -- but there are ways to work this out. I agree completely with Your Honor that the parties should be sitting down to work out a fair way where we can make sure that Pratt Whitney doesn't misunderstand that that product on that document is now provided by Chemeon, and allow us to work through it. There has to be a way to do that and we're willing to do that. We're willing to have that discussion.

As I've mentioned to Your Honor before, in the past they've said, nuh-uh. Won't even talk about it. Won't talk about it at all. You can't use the word "Metalast." Period. End of story. Never before did they intimate in this case that we could do something with the word "Metalast" at all, until the reply brief, where they admitted that there was something we could do, although it's unclear what, which proves --

THE COURT: Well, to be fair to the other side, their argument isn't that you -- well, Chemeon argued that it should be able to describe its history. But, the argument is you do more than that in saying, in all these products, "Chemeon, formerly Metalast."

MR. RYAN: Yes. And so what we're doing today, Your Honor, and it's in the exhibits that we've submitted, our product label has extremely prominently, the "Chemeon" name on

the top and --

THE COURT: Which exhibit is that?

MR. RYAN: The label.

MR. HADLEY: 50 and 51.

MR. RYAN: 50 and 51, Your Honor.

And then below it is the Chemeon TCP-HF mark, prominently. And then there's a footnote. And at the bottom of the label it says, in very small type, "formerly Metalast." And that's the way we're moving. That's the way they're headed and that's -- they're doing the same thing on their website. They're trying to make it as little as possible, but so that somebody could find it if they needed it and not get confused.

Again, we've been very willing to have discussions about that and are still willing to discuss it and think that it's a good way to go. We think there should be a way for Mr. Semas to go forth with his mark in a way that we will not contest or confuse. And, we think that's in the interest of the public. Let's get together and work this out so the public is not confused and understands, which is the purpose of trademark law.

THE COURT: And why wasn't that carried out during the 90-day period? In other words, the change with the footnote to exhibit, I think 50 or 51 that you just referenced.

MR. RYAN: Well, first what happened is they used "formerly Metalast," because they thought, and do still think, that that's entirely appropriate under Steppenwolf. The reason they're moving it away is because they don't want to -- they don't -- we think that -- and I suppose it's obvious, that the word "Metalast" is not a good one in the industry. It doesn't have a good reputation.

So, they're trying to diminish it, diminish it, diminish it and not use it anymore than necessary, so that people can find them, so that when they see a product on the shelf that says "Chemeon," if they check and they look closely and look at the asterisk, they'll look at the footnote and figure out, oh, yeah, yeah, we used to buy that product. That's what that is.

So -- but, eventually, if I were Chemeon, I would want to get rid of it. Not too soon, not until the market is too clear about all this. And it isn't yet. There's a lot of product on the shelves still yet that was bought years ago and has that Metalast mark on it. And these product specifications -- and by "a lot of product," I mean by the relatively small customers, but they have product on the shelves.

So, it's about trying to help the market understand without trading on anything that he has. He doesn't have any products. You heard he's selling some product. There's no

evidence of that. We're unaware of it. We searched on the internet. We can't find anything about it. So, that's not in evidence and can't help him. But, again, if he wants to market product, we are more than happy to sit down and work out a way so that people understand that when it's his product, it's his product, not our product. And when it's -- if he doesn't want to do that, he doesn't have to. But, he'll have to worry about whether anyone gets deceived and a claim arises by what he's doing. But, in the meantime, we're more than happy, on the flip side -- whether he will agree to that discussion or not -- to discuss how we do this and do it in a way that is, if he's got a concern about under the law, we're happy to talk about it.

THE COURT: I want you to respond to Mr. Hoy's argument, though, that -- well, I don't think the injunction request is filed based on the products, the few products that may be sold currently. You heard Mr. Hoy's argument as to irreparable harm; the fact that Mr. Semas really cannot market and sell these products because of the confusion.

How would you respond? At least I think that's true, I mean --

MR. RYAN: There's no evidence of that. None. Not even a declaration before the Court. No evidence. Nothing. Just the attorney argument. It wasn't in their briefs. I would like the opportunity to address it if it

ever became pertinent. But on the motion here before the Court, with the agreement by the parties that the briefing was ceased last Friday, and that's in the Order, they don't have anything to rely on.

And they, clearly, knew that they had to bring that to the Court if they wanted to rely on it. The brief talks at length about their burden. They recognize their burden. They just didn't meet it. You know, so -- and the same thing with regard to fame.

By the way, I wanted to point out to the Court, the Ninth Circuit decision, if I could cite this case to the Court, in -- forgive my shuffling here -- in Nissan Motor Company versus Nissan Computer Corp., 378 F.2d 1002 at 1012, the Ninth Circuit, in 2004, said that: "A famous mark, under dilution law, is one that has become household name," quote, unquote. So, there's no evidence of a household name being involved here.

And by the way, that's why -- recall that when the company went into receivership, there was no one bidding on the company but the Meilings. If this was such a big deal and such a great mark, famous mark, somebody would have been in there bidding millions to get it. There was no such thing.

The last thing I would like to point out to Your Honor, if I may, is, first of all, with regard to

Mr. Semas' income, during the period of the existence of the LLC, he sold over $9 million in stock in the LLC and all those people lost all their money -- by the way, the list of people is in evidence. We'll show that in our proffer later. Thirteen hundred, most of them, many of them, you know, former 401-K plans.

So, I would like to read from a comment on unfair competition because in answer to your question about the Kassbaum case, Steppenwolf, Coleman analyzes all the law in that area. There's other cases. Te Kingsman case, which that case cites. The Playboy Enterprises case from the Ninth Circuit, 279 F.3d. It's at 796. All these cases say, basically, the same thing. You can recite former association. Coleman, who has analyzed it, says: "In general, when a, now, independent entity" -- forgive me. The word "when" is a typo.

"In general, a, now, independent entity may use the name or mark of one with which it used to be affiliated, but it may not use the former connections trade indicium so conspicuously as to mislead the public regarding the, now, independent entity's current status."

We agree with that.

Now, please keep in mind prominence has not been argued in this case in the briefs. And as I'm sure -- I hope Your Honor understands, that's because they didn't want us to make any use of the word "Metalast." I think what finally

happened in the reply brief is they recognize they can't win on that. But, prominence has never been an issue. And if it's an issue, we are willing to talk about it. But, they haven't made any proofs -- they haven't -- they didn't argue it in their briefs. We heard about it for the first time today. In any event, there's no evidence, whatsoever, that anyone has been misled. And there's nobody that wants to ensure that people aren't misled more than my client, Chemeon.

Thank you very much, Your Honor.

THE COURT: All right. Thank you.

Mr. Hoy, any brief response?

MR. HOY: Two small points, Your Honor. Two new points. Counsel said that if this mark was so valuable there would have been more bidders at the foreclosure sale. I believe that may be a topic for some other litigation that my client and I are not involved with. That file, in my view, reflects the receivership file I'm talking about. It reflects no adherence to the Uniform Commercial Code, improper notice and so forth. There's a reason why there was only one bidder; and that is because the Receiver who was in charge of giving notice and other process was being paid for by the Meilings.

Second, counsel just said -- made the representation that his clients are actively working to diminish the Metalast mark and brand in the marketplace. He said that.

Now, if there's no evidence -- and I think there

is evidence of irreparable harm in the record, but that representation from counsel, alone, tells you what the intention is here. Chemeon's intention is to completely trash what Mr. Semas got in the Settlement Agreement.

Thank you.

THE COURT: All right.

Counsel, I'm going to take a few minutes. When I return, I'll give you my ruling. I still -- I'm going to give you my ruling because it's not clear to me -- well, perhaps I should ask whether you would like for me to defer my ruling so the parties can work out the issue relating to Chemeon's reference to Metalast. If you do, I will defer my ruling. If you don't, I'll give you my ruling. I still would encourage the parties to try to resolve that issue.

MR. HARRIS: May I be heard on --

THE COURT: Hang on just a moment, Mr. Harris. I'm not hearing argument on the motion relating to you anymore, so hang on.

Mr. Hoy.

MR. HOY: Thank you, Your Honor. We appreciate the opportunity to negotiate for Chemeon to continue to violate the Settlement Agreement, but we're not going to do that.

THE COURT: All right. I'll give you my ruling in a few minutes.

Mr. Harris.

MR. HARRIS: Thank you, Your Honor.

My comments simply are brief. They just go, in so much as my fate in their litigation against me may be related or hang in the balance of this motion by Mr. Hoy and Mr. Semas. I just wanted to clarify a couple of things.

First of all, let me say, just for the record, as one of those 401-K plans that was wiped out by the Meilings' actions and basically hijacking this company and it's 20 years of history, uh, we were -- none of us were ever notified by Mr. Proctor about this impending sale and there were no bidders because nobody was given notice that the company was available to be bid on. So, as Mr. Hoy said, that's probably a topic for another litigation among the members who were damaged and wiped out.

But I think -- I just wanted to -- I'm, by background, an environmental engineer, not a chemical engineer, but enough of an understanding of the chemical business, especially after my association for these 20 years with Metalast as an investor and a LLC, former LLC member. I think there's a little bit of a confusion between the term that's being used of "goodwill" and "brand," which I think has more relevance to what's, what is going on and, certainly, as it applies to their claims against me, that I improperly used, infringed upon their copyright and their

trademark; and that is that -- if you look at some of the documents that are in evidence in the file, the brand goes with the name. And I think that was the point that was raised with the issue you can't divorce the goodwill from the name. And so in one of the documents, and this is actually the plaintiff's Exhibit 5 in my case relating to an e-mail from some fictitious person named Susan O'Brian, they attached exhibits to that e-mail, which I had sent an e-mail response to. The e-mail address is AnnObrian of gmail.com. And one of those exhibits that they sent and had access to was called the "Generic Executive Summary." And this was the summary prepared by Mr. Semas in which I used, in this instance and one other one involving Sutter Capital, pursuant to Madylon Meiling's e-mail of February 24th, giving Mr. Semas, basically, her blessings, or her indication that she wanted him to go out and raise money and buy them back out so that they could retire from their investment that they had made in taking over the company.

In that generic executive summary, there is a point, uh -- this is, I think, page, it would be page 3 of that exhibit because they are all attached. It says: "After 75 million investment and corporate validation, it is continuing with growth and revenues and via its impressive strategic alliances, the business's widely acknowledged industry influence brand recognition..." -- not goodwill recognition.

To me, and to most of us, the goodwill was, um, the development of the Tech Center and the staff and their technical expertise and collective experience in chemical engineering and creating and developing products for the metal industry and corrosion industry, but the brand recognition is what the chemical engineers and product specialists that the clients, the customers who buy these chemicals and who have to do the R & D testing to determine whether or not they are suitable for the application, um, it's the chemistry. It's the validation of it. It's the R & D testing by those companies and then the brand that's associated with all of that.

In the bottom of it, one of the barriers to entry -- and by the way, Mr. Semas made this clear to the Meilings during their settlement negotiations when he tried to convince them to take the brand and they refused to do it --

THE COURT: And were you at the settlement conference?

MR. HARRIS: No, I was not.

THE COURT: All right. Then I don't need to hear arguments about what happened at the settlement conference.

MR. HARRIS: Okay. The barriers to entry are significant, requiring "10 years to formulate, test, validate competing products, build a technical center, develop

infrastructure, hire staff, and penetrate the market and establish brand recognition."

So, you have this recognition by the Meilings that if they didn't want to take the brand, they were free to take and now start with the goodwill of having the Tech Center already open, built out, uh, equipped, staffed, and ready to go forward. They were certainly welcome to start building the Chemeon brand, to the same way that David Semas built the Metalast name. So -- and again, that was my understanding and, certainly, what I understood was Madylon Meiling's wish to maybe get rescued and buy out now that she had a little more understanding -- Mr. Meiling as well -- that this is not just simply as easy as taking whatever skills you have in business and simply walking in the door and suddenly becoming a chemical engineering expert. It takes a lot of years. But, the industry recognizes the brand Metalast, which is why they, of course, I believe, want to continue to use it. Because if they just said -- one of the options is to say "Chemeon, Navy license TCP licensee," uh, that probably would suffice. But if they just wanted to say "Chemeon TCP-HF," there probably would have to be a little bit more scrutiny by the companies that have been buying Metalast TCP-HF, to make sure it's the same chemical, manufactured the same way, and has the same R & D test results. And as the brand expert testified, it would probably take about a year and cost them

a half-a-million dollars, let alone maybe the half-million dollars the companies that are going to do the R & D testing are going to have to spend to prove it up. And I think they just, in my view, just wanted to try to short-circuit that tedious task. But, that could have all been resolved if they just maybe bought the brand.

So, again, uh, part of -- one of my affirmative defenses, if that's the proper term to call it that, to their claims against me --

THE COURT: And I'm not hearing --

MR. HARRIS: Okay.

THE COURT: I've already denied their motion --

MR. HARRIS: I understand.

THE COURT: -- with respect to you without prejudice.

MR. HARRIS: Okay.

THE COURT: So, I'm not hearing any argument on your motion.

MR. HARRIS: All right. Thank you.

THE COURT: I'm going to take a brief recess and when I return, I will give you my ruling.

(Recess taken.)

(Back on record.)

THE CLERK: Your Honor, Mr. Harris should be coming in in just a second.

THE COURT: I'm sorry. Is Mr. Harris not out --

GENTLEMAN IN AUDIENCE: Your Honor, he's not outside. I did check the lavatory and there is no one in there.

THE COURT: I'll give him a minute.

THE CLERK: Your Honor, Mr. Semas is text messaging Mr. Harris now.

(Mr. Harris enters the courtroom.)

THE COURT: All right. Counsel, with respect to the defendant's Motion For Preliminary Injunction, preliminary injunction is an extraordinary remedy. I think the parties here are familiar with the standard for a preliminary injunction under Winter versus Natural Resources Defense Counsel. The citation for that is 555 U.S. 7, a 2008 Supreme Court decision.

One of the essential elements is that the parties seeking injunction must establish that it is likely to suffer irreparable harm in the absence of preliminary relief. Defendants have not offered evidence to establish this element. Defendants main argument with regard to irreparable harm is that Mr. Semas cannot do anything with the Metalast name or the trademark as long as Chemeon is referring to itself as "Chemeon formerly Metalast." And as an example, counsel offers two exhibits to demonstrate why Mr. Semas has been foreclosed from selling product under the Metalast name.

One example was Exhibit 541, which showed that the supplier was required to purchase Metalast TCP-HF, and if Mr. Semas were to sell a product under that name, the product would, necessarily, involve a different chemical process. But, this example does not show that he cannot sell the product. I think Mr. Semas is just saying that the way that Chemeon is using its association with Metalast could, potentially, affect his ability to market and sell the product or other products under the Metalast name. This argument underscores the speculative nature of Mr. Semas' and the other defendants' claimed harm because they have not made any attempts to sell these products.

Mr. Semas' counsel represents that he is selling some Metalast product per the advice of his intellectual property counsel to maintain the strength of the mark, but he does not claim that Chemeon's use of the Metalast name affects the sale of these products. And to the extent that Mr. Semas argues that the "Formerly known as" label that Chemeon has been using suggests that Metalast is no longer in existence, he offers no evidence of this potential harm other than his own speculation.

Although Mr. Semas does not have to prove actual harm for a preliminary injunction, he still must show that irreparable injury is likely in the absence of an injunction. And that's clear under Winter, as well as the Ninth Circuit's

recent decision that was issued at the end of 2013 in the Herb Reed Enterprises versus Florida Entertainment. The defendants' speculative arguments here do not show such likelihood of harm.

Now, because I find that the defendants cannot show likelihood of irreparable harm, I don't have to address the other Winter factors. For example, I don't have to address the likelihood of success on the merits. But, I do want the parties to know that I do think that element presents a closer call because I think that Chemeon's use of the Metalast name could potentially cause consumer confusion and may not be fair use, even under Chemeon's interpretation of the terms of the settlement agreement. That's the reason why I thought it would be productive for the parties to at least attempt to resolve the dispute relating to Chemeon's use of the Metalast name. But as the evidence is before me, there's not enough evidence for me to grant the motion for preliminary injunctive relief and, for those reasons, the motion is denied.

And I still have an open invitation to the parties if you think that the Court can be involved in helping facilitate resolution of the issue. I certainly would be happy to refer this matter to one of our magistrate judges to help the parties resolve the dispute. But because I sent you for settlement several months ago and that was

unsuccessful, I'm not going to order you to participate in settlement unless I have a request from both parties that you would like to do so.

All right. Is there anything else I need to address, counsel?

MR. HOY: No, Your Honor. Thank you.

THE COURT: All right. Thank you.

(Court Adjourned.)

-o0o-

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

\s\Kathryn M. French — April 12, 2016

KATHRYN M. FRENCH, RPR, CCR — DATE
Official Reporter