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IN THE NINTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF DOUGLAS

DSM PARTNERS, LTD., a Colorado
Limited partnership

Plaintiff,

v.

METALAST INTERNATIONAL, LLC, a;
Nevada limited-liability company;
METALAST INTERNATIONAL, INC., a
Nevada corporation,
and DOES 1-10, inclusive,
Defendants.

Case No.: 13-cv-0114
Dept. No.: 2

RECEIVER'S REPLY TO DAVID SEMAS'S OPPOSITION TO FIRST STATUS REPORT



**MERIDIAN
ADVANTAGE**
Forensic Accounting | Litigation Support
Business Valuation

June 27, 2013

The Honorable Judge Michael Gibbons
Ninth Judicial District, of the State of Nevada,
In and For the County of Douglas
Minden, NV

Re: Metalast International, LLC, Case No: 13-cv-0114, Dept. 2

To the Honorable Judge Gibbons,

This is the Receiver's Response to Mr. David Semas' Opposition to Receivers Status Report (Opposition), late filed on June 25, 2013. Any Opposition or Pleading was due by June 21, 2013 and the Opposition was filed late, and hand delivered shortly before noon on June 25, 2013. This allowed the Receiver only two business days to file this response. Thus, this Response is general and the Receiver reserves the right to further supplement this Response and provide additional testimony and exhibits at the hearing on July 1, 2013. It was hoped that any response to any pleading could be handled, verbally, at the July 1, 2013 hearing, but because of a number of inaccuracies and misleading statements, this written Response is necessary. Where it is possible, I will outline my response as to the page and paragraph on Semas' Opposition.

Actually, in hindsight the Semas Report was extremely accurate.

Mr. David Semas' (Semas) letter to the Court, dated June 25, 2013 is in error. I spoke to Semas, shortly before 5:00 p.m. on April 25, 2013, not the 26th, or the day after as stated in the letter. Further, Semas raised the issue regarding noticing at which time I terminated the telephone conference and checked with legal counsel for DSM Partners, Ltd. that this was not a problem that the Receiver had to address before assuming his duties. Approximately one-half hour later a telephone conference with Semas took place, after I was assured by legal counsel that there had been proper notice. I will leave it to the attorneys for DSM Partners, Ltd. (DSM) to address that issue with the Court. While the wrong date appears to be a minor issue, there appears to be a number of subtle differences in Semas' Opposition, which if not pointed out and corrected, could be misleading.

Semas representation to the Court as to computer access appears to be inaccurate. On June 24, 2013 I was forwarded email correspondence that Semas had sent on June 22, 2013 to his Metalast email account. As it appears that the email was meant for Semas use, and possibly to legal counsel, I did not open or read that correspondence and forwarded it to attorney Michael Rounds, who I understand may represent Semas. However, the date is June 22, 2013, clearly the date before Semas represented he had access to a computer. The Court should note that emails of former employees are monitored for customer and vendor correspondence and for other business matters that need to be handled by the Receiver, staff, or employees.

The Opposition calls into question the Receivers' correspondence and request for information from attorney Ian Burns. Attorney Burns has performed legal work on intangible assets for the Company, and for Metalast International, Inc (3:18). As part of the Receiver's investigation into the assets of Metalast (Company) I contacted Mr. Burns to obtain information on the Company's intangible assets, including trademarks and patents. Along with that correspondence and request for information and documents I included a copy of the Court Order appointing the Receiver, clearly stating what my role is as Receiver for Metalast International, LLC (Company). Mr. Burns and I have had several telephone conversations and a conference regarding that request. There is and was no attempt to mislead Mr. Burns, or to breach

Misrepresentation. Proctor's letter stated he had been appointed as receiver for "Metalast." Unlike all other communications sent he did not distinguish the legal difference between the LLC or Inc. in his attempt to get Metalast International, Inc. ("MII") files.

Wrong. Proctor tried to mislead MII attorney Ian Burns that he was appointed receiver for "Metalast." The Company did not include MII records or files. Based on the Bruce Leslie (Meiling attorney) email stating there was never and Exhibit B listing trademarks attached to the original December 2009. Proctor and the Meiling wanted to get their hands on MII trademark files.

any attorney client privilege. **It is within the Receiver's duties to investigate and secure the assets of the Company and the request to Mr. Burns is in accordance with those duties and the responsibilities.** Further, I understand that there has been threatened legal action as to the intangible assets, by Semas as to dispute of ownership. It is incumbent upon the Receiver to understand the true disposition of those assets. I am still investigating and researching that issue, with the understanding that the Company (LLC) paid for fees associated with those assets, which were developed by Company personnel.

Correct

Semas in his Opposition states that he has lent the Company over \$2,600,000 since 2009 (6:15). I am still verifying that assertion. Throughout the Opposition Semas continually states that he has not received a salary from the Company. Yet those statements are misleading. In the one year period prior to the Receivership Semas received approximately \$160,000 more from the Company than what was loaned or contributed to the Company. **That amount does not include any perquisites and fringe benefits, and the large amount of travel and entertainment expenses charged and paid for by the Company.** To continue to represent to the Court that Semas has not been paid a salary can be misleading - while not paid a salary, **he was paid interest** on his debt and other disbursements. As mentioned in the Receivers 1st Status Report those amounts and transactions are being further researched. Further, after a \$200,000 loan from DSM on March 1, 2013 there were disbursements to **Semas and Wendi Fauria of \$89,000 in March.** This was during a period where creditors were not being paid, including the landlords. **Interest and employee health insurance**

Where's Proof?

Yes, paid interest on \$2.5M borrowed on MILLC behalf

The Opposition discusses the Receiver's interaction with creditors (7:18). **The statement that I have somehow represented to trade vendors and creditors that they should pursue Semas individually is wrong.** While there may be some Receiverships where that is the case, to date, it does not appear that is the situation in this present case. I am currently winding up a Receivership for the Honorable Judge Flanagan where that is the case, that prior debts will need to be pursued against the debtor. In another Receivership for Judge Elliott, that was not the case, and the creditors were paid pro rata. In yet another Receivership case for Judge Hardy the trade creditors were left with no recourse from the Receivership for their unpaid debts. The only situation where I discussed, the possibility of pursuing Semas was as guarantor on debt with Prestige Funding in a telephone conference with their legal counsel. The conversation also included the possible issue of LLC member interests as part of the debt satisfaction as provided for in the debt agreement. I am continuing to work with trade creditors, suppliers and vendors payment arrangements and options. At this point it is still too early to determine whether those debts incurred prior to the Receivership (April 26th, not May 1st) can be paid and what amount they might be paid. **The Court will recall that in the Receiver's 1st Status Report, that those debts are more than \$1 million.** The Receiver's first priority as to payment of creditors is to those incurred during the Receivership. As of this date, the operations of the Company, even with the advances by DSM, there is not enough to pay many of the debts incurred prior to the Receivership. **Not including Semas and Meiling debt, \$1 million debt is minor, Chapter 11?**

Yes, he did.

The Receiver continues to be reminded of the Securities and Exchange Commission (SEC) investigation by Semas. Yet the assertions by Semas that he and or the Company have been somehow exonerated cannot be verified. Indeed I have heard from LLC members and creditors that such is not accurate. I have no way to verify such as the records pertaining to that SEC investigations are missing and not at the Company offices. I would request the Court to order that all records, documents, and correspondence relating to the SEC investigation, and any other governmental or taxing authority investigation, be turned over to the Receiver. **Statement designed to smear Semas. Proctor had August 30, 2010 SEC termination letter. How would LLC members know the statement is not accurate. What he means is bomb threat Ken's lie.** The Opposition misrepresents that there was a settlement with the Company's two landlords for a partial payment for full satisfaction of the unpaid rents (8:12). **This is false; the landlords assert that there was no agreement.** I have met with both landlords on numerous occasions to attempt to agree to some type of settlement or arrangement whereby the Company can continue to operate out of its present location. Agreement has been reached to surrender the premises to one landlord and to continue to occupy the

This is a lie. SVP Jeff Mackinen had negotiated with the landlords a reduced debt by about \$200,000.

Proctor fails to inform Judge Gibbons that Semas, just a few years prior had negotiated with Preferred Members and converted \$22 million of debt to equity. Nearly all Preferred Members and creditors cooperated, that is except for Dean Meiling!

space of the other landlord at a reduced amount, and month to month. The Court may recall that the present space of the Company occupies more than 12,000 square feet, most of it not used and vacant.

The Opposition takes exception to the positions that were eliminated and the employees that had to be terminated due to the dire financial condition of the Company (page 9). As outlined in the Receiver's 1st Status Report, with over \$100 million in accumulated losses, and many months where the product sales revenue is less than the payroll expense, the Company could not afford and maintain the staffing levels. Staff and management are some of the last areas that one wants to reduce, but in the present situation the Company was not in a financial position to continue the level of staff and the salaries and perquisites. Two employees were laid off due to performance issues. The Receiver conducted proper research and analysis of each position before eliminating any employees. Indeed it was hoped that Mr. Greg Semas would remain with the Company but he chose to resign.

All employees received health insurance.

Semas in his Opposition refers to Wendi Fauria and her position and value to the Company, which the Receiver doesn't take exception to, but Semas neglects to inform the Court that Ms. Fauria is his daughter, was paid \$85,000 per year, received a generous automobile allowance, and health insurance coverage for her entire family. Ms. Fauria was replaced by a part-time bookkeeper. Ms. Semas has a BS in accounting. She passed the CPA and will receive her final certification by Dec 2019. So called part-time was fulltime Allison Young. The Opposition criticizes the communication and interaction with the LLC members (9:10). The Receiver recognized early on that communication with 999 members could be problematic and require a lot of time and effort that the Company cannot afford. Notice was given to the LLC members of the Receivership. Periodic correspondence to the members will be forthcoming. The Receiver has been in contact with some members and corresponding with some members, to the extent that it is pragmatic and cost effective. This is what happens when you slash staff. Ms. Semas was also VP Investor Relations.

The Opposition alleges that the Receiver is willfully and intentionally intending to set the business up for failure or bankruptcy (9:15). This is an unfounded accusation. The Receiver is not responsible for the precarious financial condition of the Company; the fact that it has had insufficient revenues to cover operating costs, expensive perquisites and unnecessary costs, and relied upon capital infusions in order to maintain operations. The Receiver has taken steps to further reduce costs and is exploring ways to increase revenue with the assistance of employees. The Receiver is attempting to keep the Company out of bankruptcy; something that would not serve well the creditors, members, and Semas.

This is a lie. A Chapter 11 would have preserved the Company for the LLC members and the \$10M Semas creditor. The Opposition questions whether the Receiver can understand the business in under a year (12:6). How does Semas know what and what the Receiver knows, and makes conclusions to such? As a professional I understand a number of types of businesses. What the Receiver does understand is that the Company under Semas has incurred significant operating losses and debt. Spin. Proctor no experience in metal finishing or the chemical business.

The Opposition takes exception to the costs that have been reduced by the Receiver (12:13). While admittedly some of the costs are minimal, the fact remains that the Company still can't afford any extra costs, whether it is bottled water or plants or the past perquisites to employees and to management. The Receiver does not, nor has ever disputed, that Company management has also reduced costs. As explained in the Receiver's 1st Status Report, costs needed to be reduced, but revenues also need to be increased. Yes, in less than 16-months Semas cut monthly burn for \$400,000 to less than \$100,000.

Semas attempts to infer that the Company has had auditors in agreeing with the \$119 million in accumulated deficit. Again, a subtlety the Court should note; the last audited financial statements of the Company were in 2006; some seven years ago. Further, as reported in the Receiver's 1st Status Report the CPA firm presently used by the Company is not independent; its partner is a member in the LLC, and the CPA firm is owed substantial amounts of monies. I don't know the purpose of the financial statements presented in Exhibit 8 to the Opposition, but again the Court should be aware of the subtlety; the financial

Gross misrepresentation. Grant Thornton was an independent auditor that audited books and records from 1996 through 2006. The highly respected 60-person CPA firm of Kieckhafer and Schiffer LLP was owed about \$100,000 and was working with Semas management team.

statements are internally prepared by the Company, they give the appearance of statements prepared by a CPA firm but they are not. They were prepared by Wendi Fauria, daughter of Semas.

Semas in the Opposition attempts to cloud the issue of credit card charges and the investigation into such (14:23). **Like many small businesses a personal credit card is used for the business; the card holder is not the issue, the large amount of travel and entertainment charges are the items being questioned.** The Receiver would request the Court to order the turnover of Semas' calendar and other documentation substantiating the business use of the charges. If ever questioned by the IRS the Company does not have in its files the documentation to substantiate those business deductions. If Semas assertion is correct that they are ordinary and necessary business expenses, then there should not be an issue of providing documentation for such. While the Opposition discusses that those charges are reviewed and authorized, by who, him and his daughter? *Complete spin. Where's the proof of large amount of T&E?*

On pages 16 – 17 Semas asserts that as the Manager he had the authority to transfer assets and make loans. He made such at the time that the Company was incurring significant losses, **membership interests were being sold to subsidize the operating losses, landlords and other creditors were not being paid.** This is evidence of self dealing. *R&D losses are normal. Yes, capital was being raised through the sale of MILLC interests as had been done since its formation in 1995. Company had been working with creditors reducing debt. Self dealing claim a distortion.*

If Semas and Greg Semas refuse to turn back to the Company the laptop computers that were charged on the credit card and recorded as Company assets, then at the very least, the Company data and proprietary information should be deleted and evidence of such provided to the Receiver. Such represents assets of the Company. The Receiver requests an Order from the Court for the turnover of such equipment and data. *Yes, they wanted to get their hands on computers to stop Semas from having access to files. Court denied.*

The Opposition alleges that the DSM, through the Meiling's are running the Company, this is a misrepresentation. I have solicited the Meiling's assistance in performing certain tasks in order to reduce costs of the Receivership and utilize their past knowledge of the Company. The Meilings are not charging the Receivership for their services. Specifically, I have requested the Meiling's assistance in:

- Coordinating the sales and marketing efforts with Mr. Greg Semas, prior to his resignation.
- Research into fringe benefit alternatives.
- Alternatives to compensation structures.
- Contacting former employees and consultants for assistance in coordinating sales, marketing.
- Personnel, training, team building among employees.
- Assisting in discussions of reorganization and developing strategies.

Any recommendations of the Meilings are discussed and coordinated with the Receiver and the Receiver has final approval. If not performed by the Meilings they would need to be performed by the Receiver.

As outlined in the Receiver's 1st Status Report, having performed a number of similar engagements, the Receiver is very concerned about the costs of a Receivership. Where possible the Receiver delegates duties to others; whether staff, employees, consultants, or other outside parties. **The limited duties that the Meilings have undertaken and performed are on behalf of the Receivership, under the supervision and approval of the Receiver, with no cost to the Receivership.**

The Receiver has also engaged a part-time CPA, with reorganization experience to assist in developing budgets, forecasts and prepare analyses, as well to oversee the accounting department including preparation of financial statements and reconciliations.

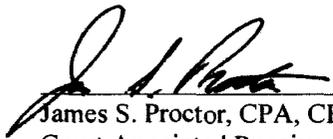
Substantial evidence will prove Dean Meiling was running the Company. In many email communications between Meiling and others Proctor wasn't even copied. "With no cost to the Receivership?" How about stripping all assets of MILLC five months later without a business valuation or competitive bidding.

The Opposition infers that some of the issues, procedures, investigation, and research performed by the Receiver are to benefit the Receiver. As mentioned in this Response and the Receiver's 1st Status Report, the Receiver is very cognizant and concerned about costs associated with a Receivership. The items performed by the Receiver are within the duties of the Receiver and must be performed. There are a lot of issues and transactions that could be further researched and investigated, but the cost, vs. the benefit must be analyzed. Thus, there has been limited analysis and investigation, there could be more. Further, the actions of Semas may well determine as to how much of such additional work needs to be performed.

The Receiver's 1st Status Report, and this Response, only addresses issues relative to the Receivership and in accordance with the duties and responsibilities of the Receiver. **It does not consider nor is it intended to address issues and possible causes of actions that others, such as creditors and members may have against Semas, and Metalast International, Inc.** Another attempt to smear Semas in the public record. What causes of action? For loaning over \$5M to the Company and guaranteeing another \$5M? The Receiver reserves the right to supplement this response.

Respectfully submitted,

Dated: June 27, 2013



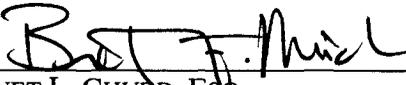
James S. Proctor, CPA, CFE, CVA, CFF
Court Appointed Receiver, Metalast
International, LLC

AFFIRMATION PURSUANT TO NRS 239B.030

The undersigned does hereby affirm that the preceding document does not contain the Social Security Number of any person.

DATED this 28th day of June, 2013.

ARMSTRONG TEASDALE LLP

By: 

JANET L. CHUBB, ESQ.
BRET F. MEICH, ESQ.

1 CERTIFICATE OF SERVICE

2 I, Zabett Buzzone, declare that:

3 I am over 18 years of age and not a party to, or interested in, the within entitled action. I am an
4 employee of Armstrong Teasdale, LLP located at 50 West Liberty Street, Suite 950, Reno, Nevada, 89501.

5 On June 28, 2013, I served the following document:

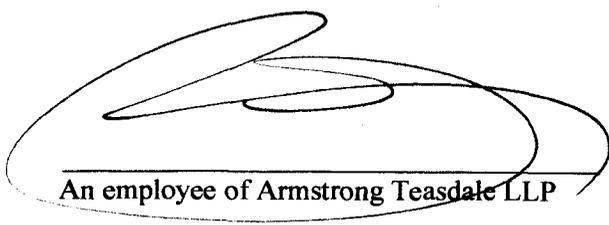
6 RECEIVER'S REPLY TO DAVID SEMAS'S OPPOSITION TO FIRST STATUS REPORT

7 [X] BY MAIL [N.R.C.P. 5(b)] I caused each envelope to be placed for deposit with the U.S. Postal Service in
8 a sealed envelope, with postage prepaid, and that each envelope was placed for collection and mailing on that
9 date following ordinary business. I am readily familiar with the business practice at my place of business for
10 collection and processing of correspondence for mailing with the U.S. Postal Service. Correspondence so
11 collected and processed is deposited with the U.S. Postal Service that same day in the ordinary course of
12 business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date
13 or postage meter date is more than one day after date of deposit for mailing in affidavit;

14 James S. Proctor, Receiver
15 Meridian Advantage
16 200 Ridge Street, Suite 240
17 Reno, Nevada 89501

Michael D. Rounds, Esq.
Watson Rounds
5371 Kietzke Lane
Reno, Nevada 89511

18 I declare under penalty of perjury under the laws of the State of Nevada that the above is true and correct.

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22 An employee of Armstrong Teasdale LLP
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