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Case No. 2023-CV-00165

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BY *sp. Weidner* DEPUTY

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

MI94, LLC, formerly a Nevada limited liability
company,

Plaintiff,

vs.

DAVID M. SEMAS; METALAST, INC.; METALAST
INTERNATIONAL, INC.; and Does 1-10,

Defendants.

**NOTICE OF ENTRY OF ORDER GRANTING
PARTIAL SUMMARY JUDGMENT (NRCP 56)**

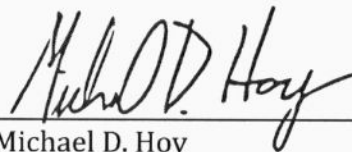
PLEASE TAKE NOTICE that the Court entered an order granting Motion for Partial
Summary Judgment (NRCP 56), a copy of which is attached as Exhibit 1.

Privacy Certification

This document does not contain any "personal information" as defined in NRS
603A.040.

Dated January 11, 2024.

HOY CHRISSINGER VALLAS, PC



Michael D. Hoy
Attorneys for Defendants David M. Semas;
Metalast, Inc.; and Metalast International, Inc.

HOY | CHRISSINGER | VALLAS

Certificate of Service

I hereby certify that on January 12, 2024, I served a true and correct copy of the foregoing, by mailing a true and correct copy by USPS, postage prepaid, in envelopes addressed to:

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I also emailed courtesy copies to Scott E. Gizer (sgizer@earlysullivan.com), Eric P. Early (eearly@earlysullivan.com), and Jeremy J.F. Gray (jgray@earlysullivan.com).

/s/ Shondel Seth
Shondel Seth

HOY | CHRISSINGER | VALLAS

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Exhibit 1

Exhibit 1

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1 Case No. 2023-CV-00165

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Douglas County
District Court Clerk

BOBBIE R. WILLIAMS
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BY A. WEIDNER, DEPUTY

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

9 MI-94, LLC, a Nevada limited
10 liability company, formerly
11 known as METALAST INTERNATIONAL
12 LLC, a Nevada limited liability
13 company,

14 Plaintiff,

15 vs.

ORDER GRANTING PARTIAL
SUMMARY JUDGMENT
(NRCP 56)

16 DAVID SEMAS, an individual,
17 METALAST, INC., a Nevada
18 corporation; METALAST
19 INTERNATIONAL, INC., a Nevada
20 corporation; and DOES 1-10,

21 Defendants.

22 THIS MATTER comes before the Court on Defendants' Motion to
23 Dismiss for Lack of Capacity to Sue; Alternative Motion for
24 Summary Judgment filed October 11, 2023. The motion is fully
25 briefed and ripe for consideration. The parties did not request a
26 hearing and a hearing would not assist the Court. NJDCR 6. Good
27 cause appearing, the Court finds and orders as follows:

28 Overview

Plaintiff MI-94, LLC, formerly known as Metalast
International, LLC, and Metalast International, LLC are
collectively referred to herein as "MI94."

1 Defendants David Semas, Metalast, Inc., and Metalast
2 International, Inc. are collectively referred to herein as
3 "Semas."

4 Semas, the holder of registered trademark and service marks
5 for the METALAST, a patented and proprietary aluminum surface
6 treatment technology, created MI94 for the purpose of
7 marketing, licensing and developing additional uses of METALAST.
8 Semas, MI94's manager, extended a non-exclusive and revocable
9 license ("License") to MI94 for the use of the METALAST trademark
10 ("Trademark"). In 2013, a judicial receivership action culminated
11 in the sale of MI94 assets. Approximately ten years later, MI94
12 initiated the pending action against Semas alleging, in part, that
13 any money earned or to be earned by Semas from exploitation of the
14 Trademark, must be set aside to MI94.

15 Semas moves for dismissal/summary judgment, arguing that the
16 receiver sold all or substantially all of MI94's assets, an event
17 triggering dissolution per MI94's operating agreement. As a
18 matter of law, dissolved companies lack capacity to sue. In any
19 event, the receiver sold the License, leaving MI94 without any
20 cognizable interest in the Trademark.

21 MI94 argues the receiver did not sell all or substantially
22 all of MI94's assets, MI94 is not dissolved and the receivership
23 sale did not include the License.

24 The Court, deciding the motion in the context of NRCP 56,
25 finds that MI94's position regarding what assets were sold by the
26 receiver is at odds with unambiguous orders entered in the
27 Receivership Action. Based upon MI94's operating agreement, MI94
28 dissolved in 2013 when the receiver sold all or substantially all

1 MI94 assets. As a dissolved LLC, MI94 has capacity to sue, but
2 does not have capacity to carry on its business, including any
3 capacity to use the License. NRS 86.505. Regardless, the
4 receiver sold the License back in 2013.

5 Legal Standard

6 If, as here, matters outside the pleadings are presented and
7 considered as part of a motion to dismiss for failure to state a
8 claim, NRCPC 12(b)(5), the motion must be treated as one for
9 summary judgment pursuant to NRCPC 56. NRCPC 12(d).

10 A court "shall grant summary judgment if the movant shows
11 that there is no genuine dispute as to any material fact and the
12 movant is entitled to judgment as a matter of law." NRCPC 56(a).
13 "Summary judgment is appropriate if, when viewed in the light most
14 favorable to the non-moving party, the record reveals there are no
15 genuine issues of material fact and the moving party is entitled
16 to judgment as a matter of law." *DTJ Design, Inc. v. First*
17 *Republic Bank*, 130 Nev. 35, 37 (2014) (citing *Pegasus v. Reno*
18 *Newspapers, Inc.*, 118 Nev. 706, 713 (2002)). "A factual dispute
19 is genuine when the evidence is such that a rational trier of fact
20 could return a verdict for the non-moving party." *Wood v.*
21 *Safeway*, 121 Nev. 724, 731, 121 P.3d 1026, 1031 (2005) (internal
22 citations omitted).

23 With respect to burdens of proof and persuasion,

24 [T]he party moving for summary judgment bears the
25 initial burden of production to show the absence
26 of a genuine issue of material fact. If such a
27 showing is made, then the party opposing summary
28 judgment assumes a burden of production to show
the existence of a genuine issue of material
fact. The manner in which each party may
satisfy its burden of production depends on

1 which party will bear the burden of persuasion on
2 the challenged claim at trial. If the moving
3 party will bear the burden of persuasion, that
4 party must present evidence that would entitled
5 it to a judgment as a matter of law in the
6 absence of contrary evidence. But if the
7 nonmoving party will bear the burden of
8 persuasion at trial, the party moving for summary
9 judgment may satisfy the burden of production by
10 either (1) submitting evidence that negates an
11 essential element of the nonmoving party's
12 claim, or (2) pointing out...there is an absence of
13 evidence to support the nonmoving party's case.
14 In such instances, in order to defeat summary
15 judgment, the nonmoving party must transcend the
16 pleadings and, by affidavit or other admissible
17 evidence, introduce specific facts that show a
18 genuine issue of material fact.

19 *Cuzze v. University & Community College System of Nevada*, 123 Nev.
20 598, 602-03, 172 P.3d 131 (2007) (internal citations and quotations
21 omitted).

22 "While the pleadings and other proof must be construed in a
23 light most favorable to the nonmoving party, that party bears the
24 burden to do more than simply show that there is some metaphysical
25 doubt as to the operative facts in order to avoid summary judgment
26 being entered in the moving party's favor. The nonmoving party
27 must, by affidavit or otherwise, set forth specific facts
28 demonstrating the existence of a genuine issue for trial or have
summary judgment entered against him. The nonmoving party is not
entitled to build a case on the gossamer threads of whimsy,
speculation, and conjecture." *Wood v. Safeway*, 121 Nev. at 732
(internal quotes and citations omitted).

"There is no issue for trial unless there is sufficient
evidence favoring the nonmoving party for a jury to return a
verdict for that party. If the evidence is merely colorable, or
is not significantly probative, summary judgment may be granted."

1 Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-250 (1986)
2 (internal citations omitted). "A mere scintilla of evidence will
3 not do, for a jury is permitted to draw only those inferences of
4 which the evidence is reasonably susceptible; it may not resort to
5 speculation." *British Airways Board v. Boeing Co.*, 585 F.2d 946,
6 952 (9th Cir. 1978). Moreover, "[i]f the factual context makes the
7 nonmoving party's claim of a disputed fact implausible, then that
8 party must come forward with more persuasive evidence than
9 otherwise would be necessary to show there is a genuine issue for
10 trial." *Blue Ridge Ins. Co. v. Stanewich*, 142 F.3d 1145, 1149 (9th
11 Cir. 1998) (internal citation omitted). Unsupported, conclusory
12 allegations cannot defeat a motion for summary judgment. *Taylor*
13 *v. List*, 880 F.2d 1040 (9th Cir. 1989).

14 Undisputed Facts¹

15 MI94 is governed by an Operating Agreement ("OA") entered on
16 December 1, 1994, as amended on June 6, 1996.

17 "The purpose of [MI94] is to market and license the worldwide
18 rights (excluding Japan) of METALAST, a patented and proprietary
19 aluminum surface treatment technology, further enhance and develop
20 computer software for the METALAST Process Control System
21
22

23 ¹ MI94 offers no opposition to Semas' request for judicial notice of an order
24 entered by this Court in *DSM Partners, LTD v. Metalast International, LLC,*
25 *Metalast International, Inc.*, 2013-CV000114 ("Receivership Action"). The
26 Court finds that the pending action is closely related to the Receivership
27 Action, that orders made in the Receivership Action are relevant to the
28 issues presented and that MI94 was a party to the Receivership Action. The
Court takes judicial notice of its *Order Granting Motion for Appointment of*
Receiver and Preliminary Injunction, April 25, 2013, *Order (A) Preliminarily*
Approving Sale of Assets, *(B) Approving Bid Procedures*, & *(C) Setting Sale*
Hearing, October 17, 2013, *Order Approving Sale of Assets to D&M-MI, LLC*,
November 4, 2013, and *Order Terminating Receivership*, December 19, 2013, as
entered in the Receivership Action and attached hereto. NRS 47.150; See,
Occhiuto v. Occhiuto, 97 Nev. 143, 625 P.2d 568 (1981).

1 ("MPCS"), and research and develop additional uses for the
2 technology." OA, Article I, § 1.1.

3 On August 12, 1996, Semas (licensor) and MI94 (licensee)
4 entered into a written agreement "concerning the licensing and
5 revocable right of use to the United States Patent and Trademark
6 Office ("USPTO") registered trademark and service mark for the
7 "METALIST" name and brand in all fields of use as identified in
8 the USPTO issued registered trademark and service mark
9 ("Trademark"), as may be amended from time to time." License
10 Agreement, Motion, Exhibit 11 ("License"). Therein, Semas granted
11 MI94 "a license and the conditional right of use for the
12 Trademark...." *Id.*

13 On April 25, 2013, this Court placed MI94 into receivership.
14 *Order Granting Motion for Appointment of Receiver and Preliminary*
15 *Injunction*, case number 2013-CV-0114.

16 On November 4, 2013, this Court authorized the receiver to
17 sell the MI94 assets used as collateral for secured loans obtained
18 from D&M-MI, LLC. *Order Approving Sale of Assets to D&M-MI, LLC.*
19 The collateral consisted of specific assets plus "any and all
20 other assets of [MI94]. All property of [MI94] of every kind and
21 nature, and all beneficial interests belonging to or to which
22 [MI94] may be entitled, and all property and assets that shall,
23 after the effective date hereof, come into the possession of
24 [MI94], are included within the scope of 'Collateral.'" *Id.* at p.
25 3, lines 23-26. "Also included in the sale to D&M-MI, LLC is
26 [MI94's] right to pursue claims to recover this and any other
27 intellectual property in the name of another person or entity but
28 that should rightfully be in the name of [MI94]. Specifically,

1 the sale includes those in action against [Semas] to recover
2 intellectual property, improperly in [Semas'] name, rather than
3 the name of [MI94]." *Id.* at p. 10, lines 15-19. "The sale shall
4 further include any and all contracts and licenses of [MI94],
5 subject to approval of the counter party." *Id.*, p. 10, lines 20-
6 21 (emphasis added).

7 On December 19, 2013, this Court entered its Order
8 *Terminating Receivership*, finding that the receiver sold the
9 collateral assets which "included substantially all of the assets
10 of [MI94]." *Order Terminating Receivership*, p. 3, lines 6-7,
11 citing UCC-1 Financing Statements, Exhibit 4 to Affidavit of D.
12 Meiling filed in support of the Motion to Appoint (emphasis
13 added). "As a result of the sale of the assets of [MI94], the
14 Receivership has no funds or monies in which to operate the
15 Receivership, and has no assets in which to further conduct the
16 business operation of the [MI94]." *Id.*, p. 6, ¶37. "D&M-MI, LLC
17 has agreed to pay reasonable wind-up costs." *Id.*, ¶39.

18 Article X, § 10.1 of the OA, entitled Dissolution Events,
19 provides that MI94 "shall dissolve upon the happening of any of
20 the following events: (a) The sale of all or substantially all of
21 the Company's assets, unless Members unanimously agree in writing
22 within ninety (90) days of such sale to continue the Company."
23 *Motion*, Exhibit 1, MI 072629.²

24 Article X, § 10.2 of the OA, entitled Date of Dissolution
25 states, "The dissolution of the Company shall be effective on the
26

27 ² Other triggering events, such as "The...bankruptcy of a Common or Preferred
28 Member...and the failure of a majority of the remaining Common Members to
agree within ninety (90) days after such occurrence to continue the
Company," OA, Article X, §10.1(c), have not been raised by Semas and are
not considered herein.

1 day on which the event occurs giving rise to the dissolution, but
2 the Company shall not terminate until (a) the Certificate of
3 Dissolution is filed with the Nevada Secretary of State; and (b)
4 the Company assets shall have been distributed as provided in this
5 Operating Agreement." *Id.*

6 MI94, its members and/or manager, never filed a Certificate
7 of Dissolution with the Nevada Secretary of State.

8 MI94 members did not unanimously agree in writing to continue
9 the company within 90 days of the sale of MI94 assets.

10 Discussion

11 I. Capacity to Sue

12 Semas claims that MI94 lacks legal capacity to sue. Semas
13 points to dissolution components of MI94's OA, the sale of MI94
14 assets as part of the receivership and the lack of unanimous
15 written consent of MI94 members offered within 90 days of the
16 sale, to continue the company. Semas opines that a dissolved
17 company does not, as a matter of law, have capacity to sue.

18 MI94 denies that it is a dissolved company.³ MI94 disputes
19 that the receivership triggered dissolution of MI94, arguing that
20 the receivership did not result in the sale of all or
21 substantially all of the MI94's assets. MI94 maintains that the
22 license was not sold as part of the receivership and, based on
23 value, the license is a substantial asset. MI94 further argues
24 that even if a triggering event occurred, "no Articles of
25 Dissolution were ever filed with Nevada's Secretary of State and

26
27 ³ Although not considered here, MI94 previously represented to this Court
28 that the receivership rendered MI94 a "shell entity" and "The Nevada
Secretary of State subsequently administratively dissolved MI94 (i.e.
MILLC)." 2013-CV-00114, MI94's Motion to Dismiss, p. 6, lines 13-14, April
26, 2019. See, NRPC Rules 3.3(a) and 3.1 and NRCP Rule 11.

1 the Company's three-year limitation on any remedy or cause of
2 action does not begin to run until the effective date of the
3 Articles of Dissolution (NRS 86.505)." *Opposition*, p. 3, lines
4 15-18. MI94 also argues that Semas is estopped from arguing
5 against MI94's capacity because in 2017 he entered into an
6 agreement to sell the Trademark to MI94.⁴

7 The Court finds that the identification of MI94 assets sold
8 by the receiver was actually and necessarily litigated in the
9 Receivership Action. The unambiguous Court orders were on the
10 merits and have become final. The orders plainly state that all
11 or substantially all of MI94's assets were sold⁵, including the
12 License.⁶ No extemporaneous evidence or discovery can change this
13 outcome. In any event, MI94, a party to the receivership action,
14 is issue-precluded from re-litigating what assets the receiver
15 sold. *Five Star Capital Corp. v. Ruby*, 124 Nev. 1048, 1055, 194
16 P.3d 709, 713 (2008).

17
18
19 ⁴ Semas produced sufficient evidence and argument to rebut judicial estoppel.
20 *See, Reply*, p. 5-6. In particular, Semas sufficiently rebuts having taken a
21 contrary position in a different judicial proceeding. *See, Marcuse v. Del*
Webb Communities, 123 Nev. 278, 287, 163 P.3d 462 (2007) (criteria for
judicial estoppel includes a finding that "the same party has taken two
positions").

22 ⁵ This finding is consistent with other post-receivership court rulings.
23 *See, Chemeon Surface Technology, LLC v. Harris*, 445 P.3d 219 (table), 2019
24 WL 3470741, Case No. 75370 (*Order of Affirmance*, July 24,
2019) (unpublished) (characterizing MI94 as a "now defunct shell company that
25 had owned intellectual property later purchased by Chemeon in a state court
receivership action."); *Chemeon v. MI94*, 2017-CV-0100, February 23, 2018,
Order Denying Preliminary Injunction (characterizing the receivership sale
of assets as being "the sale of nearly all, if not all, of [MI94]'s
assets...").

26 ⁶ Even if MI94's license was not sold/transferred as part of the
27 receivership, as incorrectly maintained by MI94, MI94 provides insufficient
28 evidence under the summary judgment standard in support of its claim that
the 2013 value of the License was "substantial" in comparison to other
company assets. To this end, MI94 only supplies an estimated value of the
Trademark in 2016 and provides no evidence regarding the value of the
License as compared to other company assets.

1 The asset sale required MI94 to dissolve. NRS 86.491(1)(b);
2 OA, Article X, ¶ 10.1 ("The Company shall dissolve upon...(a) The
3 sale of all or substantially all of the Company's assets..."). The
4 effective date of MI94's dissolution was November 4, 2013 upon
5 entry of the Court's *Order Approving Sale of Assets to D&M-MI,*
6 *LLC.* OA, Article X, ¶ 10.2 ("The dissolution of the Company shall
7 be effective on the day on which the event occurs giving rise to
8 the dissolution..."). MI94 is a dissolved LLC, a legal conclusion
9 that no amount of discovery will change. MI94's failure to file
10 articles of dissolution, as mandated by the OA, does not compel a
11 different result. Per the OA, the filing of articles of
12 dissolution is not optional. See also, NRS 86.531 (1) ("as soon as
13 practicable after the dissolution of a limited-liability company,
14 articles of dissolution must be prepared and signed...").

15 The Court turns to addressing MI94's capacity, as a dissolved
16 LLC, to bring the lawsuit. Semas posits that dissolution
17 automatically and completely defeats the capacity to sue. Semas
18 does not cite any legal authority for this sweeping proposition.

19 The Court disagrees with Semas' statement of the law. Nevada
20 law makes clear that an LLC does not lose all capacity upon
21 dissolution. Specifically, "A dissolved company continues as a
22 company for the purpose of prosecuting and defending suits,
23 actions, proceedings and claims of any kind or nature by or
24 against it and of enabling it gradually to settle and close its
25 business, to collect and discharge its obligations, to dispose of
26 and convey its property, and to distribute its assets, but not for
27 the purpose of continuing the business for which it was
28 established." NRS 86.505(1). Generally, MI94 has capacity to

1 file suit. *Id.*⁷

2 II. License

3 Semas contends the receiver sold the License in 2013. Semas
4 requests summary judgment that MI94 has no interest in the
5 Trademark directly or by virtue of the License.

6 MI94 states that it would be improper for the Court to
7 consider summary judgment because doing so will not dispose of any
8 MI94 claims.

9 The Court disagrees. Parts of claims may be subjected to
10 NRCP 56 scrutiny and a court "may enter an order stating any
11 material fact...that is not genuinely in dispute and treating the
12 fact as established in the case." NRCP 56(g); *See also*, NRCP
13 56(a) (a party may move for summary judgment that is "part of" a
14 claim or defense). MI94 acknowledges that License is a "hotly
15 contested issue." *Opposition*, p. 13, line 20. The Trademark and
16 License are key components of MI94's *Complaint* and corresponding
17 claims for relief. For example, MI94's first cause of action is
18 for Anticipatory Breach of Contractual Fiduciary Duty and
19 Imposition of a Constructive Trust. MI94 anticipates that Semas
20 might keep for himself all funds that he receives in the future as
21 "earned from the exploitation of the [Trademark]," *Complaint*, p.
22 18, ¶76, and requests "a constructive trust on any and all
23 monies...received by Semas...that arise from or relate to the
24 [Trademark] from any sources whatsoever." *Id.* at ¶80. MI94's
25 second cause of action, Breach of Contract and Imposition of a

26 _____
27 ⁷ The Court does not consider or address the statute of limitation (Semas
28 makes clear that its pending motion does not raise the statute of
limitation). The Court points out, however, that the three-year limitation
referred to by MI94 runs from the "date of the dissolution," not the
"effective date of the Articles of Dissolution," as incorrectly represented
by MI94. NRS 86.505(1); MI94's *Opposition*, p. 3, lines 17-18.

1 Constructive Trust, alleges Semas "breach[ed] his duties arising
2 from the [OA] and License Agreement..." *Id.* at p. 19, ¶87. MI94's
3 third cause of action, Declaratory Relief and Imposition of
4 Constructive Trust, alleges that MI94 and its members are third-
5 party beneficiaries of the License. *Id.* at p. 21, ¶89(c). MI94's
6 fourth and final cause of action, Imposition of Constructive
7 Trust, claims ownership of any consideration that has been
8 received or will be received by Semas "arising from or relating to
9 the [Trademark], from any sources whatsoever..." *Id.* at p. 21,
10 ¶92. Given the content of MI94's *Complaint*, it is proper for the
11 Court to consider Semas' NRCP 56 challenge to MI94 interest in the
12 Trademark, directly or by virtue of the License.

13 MI94 next argues that the License was not sold by the
14 receiver or, at the very least, the Court should defer the issue
15 pending discovery. MI94 points out that the receivership court
16 authorized sale of the License "subject to approval of [Semas],"
17 *Order Approving Sale of Assets to D&M-MI, LLC*, p. 10, lines 20-21.
18 MI94 questions whether the contingency occurred and requests time
19 to conduct discovery on the issue. However, the order approving
20 sale of MI94 assets was followed by the *Order Terminating*
21 *Receivership* wherein the Court determined that the sale of MI94
22 assets had been consummated. Specifically, "As a result of the
23 sale of the assets of [MI94], the Receivership has no funds or
24 monies in which to operate the Receivership, and has no assets in
25 which to further conduct the business operation of the [MI94]."
26 *Id.*, p. 6, ¶37. "D&M-MI, LLC has agreed to pay reasonable wind-up
27 costs." *Id.*, ¶39.

28 In any event, "The purpose of [MI94] is to market and

1 license the worldwide rights (excluding Japan) of METALAST, a
2 patented and proprietary aluminum surface treatment technology,
3 further enhance and develop computer software for the METALAST
4 Process Control System ("MPCS"), and research and develop
5 additional uses for the technology." OA, Article I, § 1.1.
6 Semas, as holder of the Trademark, granted MI94 a non-exclusive,
7 revocable and conditional "right of use for the Trademark...."
8 License Agreement, Motion, Exhibit 11. When MI94 dissolved, it
9 lost the capacity to continue its business. NRS 86.505(1).
10 Accordingly, even if the License survived the receiver's sale of
11 MI94 assets, which it did not, MI94 lost capacity to use the
12 Trademark when the company dissolved.

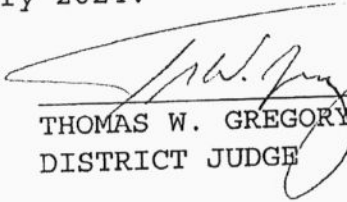
13 Conclusion

14 Partial Summary Judgment (NRCP 56) is GRANTED as follows:

- 15 1) MI94 dissolved in 2013.
16 2) Upon dissolution, MI94 lost capacity to continue the business
17 for which it was established, including any ability to use the
18 Trademark by way of the License.
19 3) Irrespective of (1) and (2), the receiver sold the License in
20 2013, leaving MI94 without any interest in the Trademark by virtue
21 of the License.

22 IT IS SO ORDERED.

23 DATED this 10th day of January 2024.


24
25 
26 THOMAS W. GREGORY
27 DISTRICT JUDGE
28

1 Copies served by mail on January 10th 2024, addressed to:

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