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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

CHEMEON SURFACE TECHNOLOGY, LLC, a Nevada limited liability company,

Plaintiff,

v.

METALAST INTERNATIONAL, INC., a Nevada corporation, et al.,

Defendants.

Case No. 3:15-cv-00294-MMD-CBC
AMENDED ORDER¹

I. SUMMARY

This dispute stems from the breakup of a business and disagreement over the terms of a subsequent settlement agreement, including who may use which trademarks and branding to advertise similar products. Before the Court is Defendant Greg Semas' renewed motion for summary judgment on Plaintiff Chemeon Surface Technology LLC's remaining claims against him ("Motion").² (ECF No. 427.) Plaintiff's motion for leave to file supplemental briefing and related motion to seal are also before the Court, which relate to a larger question the Court also addresses herein—whether Plaintiff has standing to seek cancellation of a Metalast trademark.³ (ECF Nos. 451, 452.) Primarily because Greg has met his initial burden of showing Plaintiff has no evidence to support each of its

¹The Court amends its prior order (ECF No. 463) only to remove the final paragraph from that order, which stated that all issues in this case were resolved. (ECF No. 480.)

²The Court refers to defendant Greg Semas as Greg for convenience, because multiple members of the Semas family were named as defendants in this case. The Court has reviewed Plaintiff's opposition (ECF Nos. 436, 441), and Greg's reply (ECF No. 449).

³The Court also reviewed Defendant and Counter Claimant David Semas's ("David") response (ECF No. 457), and Plaintiff's reply (ECF No. 460). The Court previously requested supplemental briefing on the standing question (ECF No. 398 at 21), and the parties complied (ECF Nos. 404, 405).

1 remaining claims against him, and Plaintiff has generally failed to proffer any evidence in
2 opposition to Greg’s Motion—and as further explained below—the Court will grant Greg’s
3 Motion. In addition, the Court finds Plaintiff lacks standing to seek cancellation of the
4 Metalast trademark because it does not have its own directly competing mark. And as
5 further discussed below, the Court will deny Plaintiff’s motion for leave to file supplemental
6 briefing because Plaintiff has failed to establish the required good cause, and will
7 therefore also deny the related motion to seal as moot.

8 **II. RELEVANT BACKGROUND**

9 **A. Greg’s Renewed Motion for Summary Judgment**

10 The Court refers to some of its prior orders for this case’s factual background. (ECF
11 Nos. 411 at 2-4, 425 at 1-2.) As relevant here, Greg was a member and officer of Metalast
12 International, LLC (“the LLC”), which was governed by a 1994 operating agreement (the
13 “Operating Agreement”). (ECF No. 348 at 3-6, 54-55.) The Court directed Greg to file his
14 Motion after determining on Plaintiff’s motion for reconsideration that the Court should not
15 have sua sponte granted Greg summary judgment on certain of Plaintiff’s claims when
16 the Court ruled orally at a prior hearing. (ECF No. 425 at 8.) At that hearing, the Court
17 granted summary judgment to Greg on all of the claims Plaintiff asserted against him,
18 though he had not moved for summary judgment on all of them. (ECF No. 409 at 58-68.)
19 Greg has now moved for summary judgment on all eight claims asserted against him.
20 (ECF No. 427.) The Court addressed six of those claims—all except for conversion and
21 common law trademark infringement—in its prior oral ruling. (ECF No. 409 at 58-68.)

22 **B. Plaintiff’s Standing to Seek Cancellation of the Metalast Trademark 23 and Motion for Leave to File Additional Briefing**

24 In another of the Court’s earlier orders in this case, the Court directed
25 supplemental briefing on the question of whether Plaintiff has standing to seek
26 cancellation of a Metalast trademark registered to David. (ECF No. 398 at 21, 21-24.)
27 David and Plaintiff filed supplemental briefs. (ECF Nos. 404, 405.) Plaintiff now seeks to
28 supplement its supplemental briefing because David and Metalast International, Inc. (the
“Inc.”) filed a lawsuit against some of Plaintiff’s distributors in the Central District of

1 California, alleging that those distributors cannot note that their products were “formally
2 Metalast” without infringing the Metalast trademark at issue here, and other related
3 trademarks. (ECF No. 451 at 2.) Plaintiff argues that the Court should consider David and
4 the Inc.’s filing of this lawsuit as additional evidence tending to show that Plaintiff has
5 standing to seek cancellation of David’s Metalast trademark. (Id.)

6 Plaintiff’s related motion to seal (ECF No. 452) seeks to seal an exhibit to Plaintiff’s
7 proposed supplemental brief regarding the lawsuit, consisting of a contract between
8 Plaintiff and one of its distributors, which Plaintiff represents contains confidential
9 business information, and shows that Plaintiff is required to indemnify Plaintiff’s distributor
10 in David and the Inc.’s Central District of California lawsuit against it. Plaintiff states that
11 a ruling on the motion to seal is only necessary if the Court grants its motion to supplement
12 its supplemental briefing. (Id. at 2 n.1.)

13 David opposes Plaintiff’s request to supplement its supplemental briefing. (ECF
14 No. 457.) He argues Plaintiff has not shown good cause to further supplement its briefing
15 because the proposed brief does not address the type of damage required to establish
16 standing to seek cancellation of a trademark, and because it relies on documents not
17 produced in discovery. (ECF No. 457 at 1-2.)

18 The Court addresses herein the ultimate question of whether Plaintiff has standing
19 to seek cancellation of the Metalast trademark (infra Section IV.B), along with the
20 subsidiary questions raised by Plaintiff’s motion seeking leave to file supplemental
21 briefing and the related motion to seal (infra Sections IV.C and D).

22 **III. LEGAL STANDARD**

23 “The purpose of summary judgment is to avoid unnecessary trials when there is
24 no dispute as to the facts before the court.” *Nw. Motorcycle Ass’n v. U.S. Dep’t of Agric.*,
25 18 F.3d 1468, 1471 (9th Cir. 1994). Summary judgment is appropriate when the
26 pleadings, the discovery and disclosure materials on file, and any affidavits “show that
27 there is no genuine issue as to any material fact and that the moving party is entitled to a
28 judgment as a matter of law.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). An issue

1 is “genuine” if there is a sufficient evidentiary basis on which a reasonable fact-finder
2 could find for the nonmoving party and a dispute is “material” if it could affect the outcome
3 of the suit under the governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248
4 (1986). Where reasonable minds could differ on the material facts at issue, however,
5 summary judgment is not appropriate. See *id.* at 250-51. “The amount of evidence
6 necessary to raise a genuine issue of material fact is enough ‘to require a jury or judge to
7 resolve the parties’ differing versions of the truth at trial.” *Aydin Corp. v. Loral Corp.*, 718
8 F.2d 897, 902 (9th Cir. 1983) (quoting *First Nat’l Bank v. Cities Serv. Co.*, 391 U.S. 253,
9 288-89 (1968)). In evaluating a summary judgment motion, a court views all facts and
10 draws all inferences in the light most favorable to the nonmoving party. See *Kaiser*
11 *Cement Corp. v. Fishbach & Moore, Inc.*, 793 F.2d 1100, 1103 (9th Cir. 1986).

12 The moving party bears the burden of showing that there are no genuine issues of
13 material fact. See *Zoslaw v. MCA Distrib. Corp.*, 693 F.2d 870, 883 (9th Cir. 1982). Once
14 the moving party satisfies Rule 56’s requirements, the burden shifts to the party resisting
15 the motion to “set forth specific facts showing that there is a genuine issue for trial.”
16 *Anderson*, 477 U.S. at 256. The nonmoving party “may not rely on denials in the pleadings
17 but must produce specific evidence, through affidavits or admissible discovery material,
18 to show that the dispute exists,” *Bhan v. NME Hosps., Inc.*, 929 F.2d 1404, 1409 (9th Cir.
19 1991), and “must do more than simply show that there is some metaphysical doubt as to
20 the material facts.” *Orr v. Bank of Am., NT & SA*, 285 F.3d 764, 783 (9th Cir. 2002)
21 (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986)).
22 “The mere existence of a scintilla of evidence in support of the plaintiff’s position will be
23 insufficient.” *Anderson*, 477 U.S. at 252.

24 **IV. DISCUSSION**

25 The Court first addresses below Greg’s Motion, then whether Plaintiff has standing
26 to seek cancellation of the Metalast trademark, and then Plaintiff’s motion for leave to file
27 a supplement to its supplemental briefing and related motion to seal.

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1 **A. Greg’s Motion for Summary Judgment**

2 Greg moved for summary judgment on the eight remaining claims Plaintiff brought
3 against him. (ECF No. 427.) The Court addresses Greg’s Motion with respect to each of
4 these eight claims, in turn, below.

5 **1. Breach of Fiduciary Duty**

6 Plaintiff alleges that Greg breached his fiduciary duty to the LLC by: (1) redirecting
7 a trademark registration to the LLC’s managing entity, the Inc.; (2) selling his personal
8 shares in the LLC while it reported losses; and (3) filing and accepting excessive expense
9 reimbursements while the LLC was losing money. (ECF No. 441 at 14-15.) Greg argues
10 he is entitled to summary judgment on this claim because Greg never had any accounting
11 role or the power to expend the LLC’s funds, and because there is no evidence that Greg
12 ever caused the LLC to spend excessively via his reimbursement requests. (ECF No. 427
13 at 8.) The Court agrees with Greg.

14 A breach of fiduciary duty claim requires a plaintiff to show the existence of a
15 fiduciary duty, the breach of that duty, and damages proximately caused by the breach.
16 See *Klein v. Freedoms Strategic Partners, LLC*, 595 F. Supp 2d 1152, 1162 (D. Nev.
17 2009) (citation omitted). “[A] fiduciary relation exists between two persons when one of
18 them is under a duty to act for the benefit of another upon matters within the scope of the
19 relation.” *Stalk v. Mushkin*, 199 P.3d 838, 843 (Nev. 2009) (internal quotation marks and
20 citation omitted). Moreover, fiduciary relationships arise where the parties do not deal on
21 equal terms, and there is special trust and confidence placed in the superior party. See
22 *Hoopes v. Hammargren*, 725 P.2d 238, 242 (Nev. 1986).

23 Greg is entitled to summary judgment on Plaintiff’s breach of fiduciary duty claim
24 because he has met his burden of showing that there are no genuine issues of material
25 fact, and Plaintiff has failed to “set forth specific facts showing that there is a genuine
26 issue for trial” in response. *Anderson*, 477 U.S. at 256.

27 Plaintiff first argues that Greg violated his fiduciary duty by having the LLC pay for
28 intellectual property on behalf of the Inc. (ECF No. 441 at 15-16.) However, Plaintiff

1 presents no argument as to why the LLC paying for the Inc.'s intellectual property
2 registrations violated a fiduciary duty owed by Greg to the LLC, and presents no evidence
3 that Greg actually caused the LLC to expend funds on intellectual property owned by the
4 Inc. (Id.) This lines up with Greg's statement from his declaration that he had no authority
5 to expend the LLC's funds. (ECF No. 312 at 5.) Thus, this argument lacks merit.

6 Plaintiff next argues that Greg breached his fiduciary duty to the LLC by selling
7 and profiting from from his personal shares in the LLC while the LLC reported losses.
8 (ECF 441 at 15.) However, Greg's last sale of his shares occurred in 2008. (See id.)
9 Accordingly, Plaintiff's breach of fiduciary duty claim based on these sales is barred by
10 the applicable three-year statute of limitations. See *In Re: Amerco Derivative Litigation*,
11 252 P.3d 681, 703 (Nev. 2011) (relying on NRS Section 11.190(3)(d)).

12 Plaintiff also argues that Greg breached his fiduciary duty to the LLC by
13 excessively spending the LLC's funds for employee travel, marketing, and car
14 allowances. (ECF No. 441 at 15.) Greg says he had no authority over expense
15 reimbursements. (ECF No. 427 at 8 (citing ECF No. 312 at 5).) Plaintiff attempts to
16 contradict this statement by citing a portion of an expert declaration that does not identify
17 Greg's expenditures. (Compare ECF No. 441 at 15 (citing ECF No. 316-1 at 8, 12, 20)
18 with ECF No. 316-1 at 38-39 (listing the LLC's expenses generally, without attribution to
19 any individuals).) Thus, Plaintiff has no evidence to respond to Greg's declaration that he
20 had no authority over the LLC's expense reimbursements.

21 Having dispensed with Plaintiff's three arguments as to why Greg breached his
22 fiduciary duty to the LLC, the Court grants summary judgment on Plaintiff's breach of
23 fiduciary duty claim.

24 **2. Contract Claims**

25 Plaintiff also brought three contract-based claims against Greg; specifically,
26 breach of the Operating Agreement, and both contractual and tortious breach of the
27 implied covenant of good faith and fair dealing. (ECF No. 348 at 54-57.) These claims
28 appear to be based on Greg's failure, as a member of the LLC, to comply with Section

1 14.3 of the Operating Agreement, and/or his failure as an officer of the LLC to comply
2 with Section 11.6 of the Operating Agreement. (ECF No. 441 at 16-21.) Greg argues he
3 is entitled to summary judgment on Plaintiff's three contract-based claims because
4 Plaintiff lacks standing to enforce the Operating Agreement. (ECF No. 427 at 8-10.) The
5 Court again agrees with Greg.

6 Plaintiff was not a party to the LLC's Operating Agreement, or a member of the
7 LLC. See NRS § 86.101 (defining "operating agreement" as an agreement between its
8 members). (See also ECF No. 310-1 (lacking a provision indicating that the LLC is a
9 member of itself).) Plaintiff is a separate entity whose predecessor purchased the assets
10 of the LLC, and cannot be an intended third-party beneficiary of the Operating Agreement
11 because Plaintiff did not exist at the time the LLC's members entered into the Operating
12 Agreement. (ECF No. 310-1 at 31 (indicating the Operating Agreement is dated
13 December 9, 1994); see also ECF No. 348 at 15-21 (indicating that the family that owns
14 Plaintiff began investing in Metalast International in 1999, purchased its assets out of
15 receivership in 2013, and created the Chemeon name in 2015).) Thus, Plaintiff lacks
16 standing to enforce the terms of the Operating Agreement. See *Meritage Homes of
17 Nevada, Inc. v. FNBN-Rescon I, LLC*, 86 F. Supp. 3d 1130, 1143 (D. Nev. 2015), *aff'd*,
18 690 F. App'x 507 (9th Cir. 2017) ("A breach of contract claim may only be raised by the
19 recipient of the promise, and third-party beneficiaries are only entitled to seek
20 remuneration if it can be clearly discerned that the contracting parties intended to benefit
21 the third party when the agreement was formed—incidental beneficiaries lack the right to
22 claim relief.").

23 Plaintiff's lack of standing to enforce the Operating Agreement is similarly fatal to
24 its contractual breach of the implied covenant of good faith and fair dealing claim. As
25 Plaintiff lacks standing to enforce the Operating Agreement, it also lacks standing to
26 enforce any covenant implied in the Operating Agreement. See *Meritage Homes*, 86
27 F. Supp. 3d at 1145 (holding that the plaintiff's "claim based on the implied covenant of
28 good faith and fair dealing must also necessarily fail" where the plaintiff had no

1 enforceable rights on which to sue for breach of contract). Further, Plaintiff's claim for the
2 tortious breach of the implied covenant of good faith and fair dealing also fails because—
3 as explained above—there is no fiduciary or other special relationship between Greg and
4 Plaintiff. See *Alam v. Reno Hilton Corp.*, 819 F. Supp. 905, 911 (D. Nev. 1993) (finding
5 that “claim for tortious breach of the implied covenant of good faith and fair dealing must
6 fail as a matter of law” where the facts evidenced no special relationship between the
7 parties).

8 In sum, Greg is entitled to summary judgment on Plaintiff's contract-based claims,
9 including both claims that Greg breached covenants implied in the Operating Agreement.

10 **3. Unjust Enrichment**

11 Plaintiff conceded in its opposition to Greg's Motion that it is not seeking monetary
12 damages on its unjust enrichment claim, “as the conduct of Greg Semas seems to have
13 abated at this time.” (ECF No. 441 at 21-22.) Thus, Plaintiff appears to have at least
14 partially abandoned this claim.⁴ Nonetheless, Plaintiff states it seeks a permanent
15 injunction to prevent Greg from unjustly enriching himself in the future. (*Id.*)

16 Plaintiff appears to argue that Greg unjustly enriched himself by retaining access
17 to confidential information that belonged to the LLC after he stopped working there. (ECF
18 No. 441 at 21.) But, as Greg argues in his Motion, there is no evidence that Greg ever
19 used Plaintiff's trade secrets, trademarks, logo marks, or copyrights; instead, the
20 undisputed evidence is that he did not. (ECF No. 427 at 16.) Indeed, Greg highlights that
21 the evidence Plaintiff points to in opposition to his Motion is based upon information and
22 belief, and thus not established fact. (ECF No. 449 at 17; see also ECF No. 441 at 21
23 (citing to ECF No. 14, specifically to statements that begin “upon information and belief”).)
24 The Court finds that Greg has met his initial summary judgment burden on this claim, and
25 Plaintiff failed to respond with material facts tending to show a trial on this claim would be
26 worthwhile. Thus, to the extent Plaintiff has not fully abandoned its unjust enrichment

27 ⁴Further, Plaintiff's unjust enrichment claim may be time-barred. See *In Re:*
28 *Amerco Derivative Litigation*, 252 P.3d at 703 (“The statute of limitation for an unjust
enrichment claim is four years.”) (citation omitted).

1 claim against Greg, the Court will grant summary judgment to Greg on this claim. See
2 Anderson, 477 U.S. at 256.

3 **4. Civil Conspiracy**

4 Plaintiff also seeks to hold Greg liable under a civil conspiracy theory. (ECF No.
5 348 at 58-59.) To establish an actionable civil conspiracy, Plaintiff must show: “A
6 combination of two or more persons, who, by some concerted action, intend to
7 accomplish an unlawful objective for the purpose of harming another, and damage
8 resulting from the act or acts.” Hilton Hotels v. Butch Lewis Productions, 862 P.2d 1207,
9 1210 (Nev. 1993).

10 Greg argues he is entitled to summary judgment on this claim because, even
11 assuming concerted action, Plaintiff has proffered no evidence of any unlawful objective.
12 (ECF No. 427 at 10-12.) Plaintiff appears to respond that Greg participated in a scheme
13 with David and Wendi Semas-Fauria to divert intellectual property assets that rightfully
14 belonged to Plaintiff from the LLC to a new business that would compete with Plaintiff,
15 causing Plaintiff harm. (ECF No. 441 at 22-25.) Greg replies that Plaintiff proffers no
16 admissible evidence to support its civil conspiracy claim against Greg in Plaintiff’s
17 opposition. (ECF No. 449 at 18-21.) Because the Court agrees with Greg that Plaintiff has
18 proffered no evidence to support its theory that Greg participated in an unlawful
19 conspiracy that harmed Plaintiff, the Court will also grant Greg summary judgment on this
20 claim. (ECF No. 441 at 22-25 (citing no evidence tending to show Greg’s participation in
21 a conspiracy).)

22 **5. Conversion**

23 Conversion requires that Greg exert dominion over another’s personal property in
24 denial of, or inconsistent with his title or rights therein, or in derogation, exclusion, or
25 defiance of such title or rights. See Evans v. Dean Witter Reynolds, Inc., 5 P.3d 1043,
26 1048 (Nev. 2000) (citation omitted). There is no evidence that he has done so. Further,
27 Plaintiff does not oppose entry of summary judgment in Greg’s favor on this claim. (ECF

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1 No. 441 at 30.) Thus, the Court grants Greg summary judgment on Plaintiff's conversion
2 claim.

3 **6. Common Law Trademark Infringement**

4 Finally, Plaintiff seeks to hold Greg liable for common law trademark infringement
5 for using the following marks without permission: (1) TCP-HF (and its related marks); (2)
6 AA-200; and (3) the Chemeon logo mark. (ECF No. 348 at 44.) Greg argues he is entitled
7 to summary judgment on this claim because Plaintiff cannot establish it owns the
8 applicable marks, and no evidence supports Plaintiff's claim that Greg is using any of
9 Plaintiff's common law marks, or otherwise selling chemical products in competition with
10 Plaintiff. (ECF No. 247 at 14.) Plaintiff responds that it does own the applicable marks,
11 and that Greg's Motion should be denied because it did not address likelihood of
12 confusion, but then concedes Plaintiff has no evidence to dispute Greg's statement that
13 he is not using any of Plaintiff's trademarks in commerce. (ECF No. 441 at 25-28.) Plaintiff
14 then argues that Greg threatened to infringe its common law trademarks in 2015 by re-
15 posting a press release to his Facebook page in which David said he was going to start
16 a company called Sierra Dorado that was going to sell the "METALAST TCP-HF family
17 of products as well as high performance specialty chemicals such as the METALAST AA-
18 200 anodizing additive," and because he was cc'd on certain emails David sent in 2015.
19 (Id. at 28-30.) Greg replies that he is entitled to summary judgment because Plaintiff
20 presented no evidence that he is—or ever was—using Plaintiff's common law trademarks
21 in commerce. (ECF No. 449 at 21-24.) The Court again agrees with Greg.

22 "[A] common law infringement claim in Nevada requires the same two core
23 elements as under federal law: (1) creation of a protectable right and (2) likelihood of
24 confusion." *Russell Rd. Food & Beverage, LLC v. Galam*, 180 F. Supp. 3d 724, 744 (D.
25 Nev. 2016) (citation omitted). Naturally, the alleged infringer must actually use a similar
26 or identical mark in commerce to be liable for infringement. See, e.g., *Mayweather v. Wine*
27 *Bistro*, Case No. 2:13-cv-210-JAD-VCF, 2014 WL 6882300, at *6 (D. Nev. Dec. 4, 2014)

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1 (first citing *Caesars World, Inc. v. Milanian*, 247 F.Supp.2d 1171, 1193 (D. Nev. 2003),
2 then citing 15 U.S.C. § 1125(a)).

3 Plaintiff has proffered no evidence that Greg has actually used any of its purported
4 common law trademarks in commerce. Greg proffered a declaration saying he claims no
5 interest in any of Plaintiff's intellectual property, and that he has not—and does not intend
6 to—compete with Plaintiff. (ECF No. 247 at 6 (citing ECF No. 312).) Plaintiff was unable
7 to point to any evidence Greg was using, or intended to use, any of its common law
8 trademarks in opposition. (ECF No. 241 at 27-30.) Indeed, Plaintiff conceded it has no
9 evidence that Greg is using any of its purported common law trademarks. (Id. at 28.)

10 Plaintiff's purported evidence of infringement—that Greg was cc'd on emails David
11 sent in 2015, and that he re-posted to Facebook a press release that David issued in
12 2015—even if admissible, does not tend to show that Greg has used any of Plaintiff's
13 common law trademarks in commerce. Further, the Court is unpersuaded by the caselaw
14 Plaintiff cites to support its position that threatened trademark use can give rise to
15 common law trademark infringement liability. (ECF No. 441 at 28-30.) The only threat
16 Plaintiff points to—the 2015 Facebook post—has come and gone, and Greg proffered a
17 declaration stating he does not intend to compete with Plaintiff going forward. (ECF Nos.
18 441 at 29, 427 at 2, 312 at 3-5.) Thus, Greg is also entitled to summary judgment on
19 Plaintiff's common law trademark infringement claim.

20 In sum, the Court grants Greg's summary judgment motion in its entirety.

21 **C. Whether Plaintiff Has Standing to Seek Cancellation of the Metalast
22 Mark**

23 The Court will dismiss Plaintiff's claim against David seeking cancellation of the
24 Metalast trademark (Registration No. 2963106) (ECF No. 348 at 41-43) because the
25 parties' supplemental briefing (ECF Nos. 404, 405) has clarified that Plaintiff lacks
26 standing to bring it. Specifically, Plaintiff has failed to proffer evidence that it has an "actual
27 commercial or pecuniary interest in [its] own mark," which it must to have standing. *Star-*
28 *Kist Foods, Inc. v. P.J. Rhodes & Co.*, 735 F.2d 346, 349 (9th Cir. 1984). Said another
way, this dispute is really about whether Plaintiff can write "formerly Metalast" on its

1 products and marketing materials, and not—as it would have to be for Plaintiff to have
2 standing—about some mark of Plaintiff’s that is so similar to the Metalast mark it causes
3 consumer confusion. Where, as here, the dispute is about whether Plaintiff can use or
4 refer to David’s trademark, rather than about competing marks, Plaintiff lacks standing to
5 cancel David’s trademark.

6 The Court refers to the legal standard in its prior order addressing this issue. (ECF
7 No. 398 at 22-23.) In his supplemental brief, David argues, in relevant part, that Plaintiff
8 lacks standing because it “has not offered evidence that its own mark in any way is or
9 would be harmed if Semas’s Metalast Mark under Reg. No. 2963106 is not cancelled.”
10 (ECF No. 404 at 3 (emphasis added, emphasis in original omitted).) The Court finds this
11 argument determinative on the standing question.

12 Plaintiff attempts to counter that it can still be damaged even without showing
13 damage to its own mark—as is the case here, where Plaintiff cannot—but Plaintiff’s
14 argument is unpersuasive. (ECF No. 405 at 2-3.) First, Plaintiff attempts to limit *Star-Kist*,
15 735 F.2d 346 at 349, “because the cancellation plaintiff in that case only asserted damage
16 by reason of its mark.” (ECF No. 405 at 2.) While that may be true, it is not limiting—in
17 *Star-Kist* and other applicable cases, there must be harmful competition between two
18 marks that gives one party standing to seek to cancel the other’s mark. See *Star-Kist*,
19 735 F.2d 346 at 349-50; see also *Halicki Films, LLC v. Sanderson Sales & Mktg.*, 547
20 F.3d 1213, 1229 (9th Cir. 2008) (regarding two Eleanor marks). Second, Plaintiff cites an
21 Eighth Circuit case that actually supports David’s argument, not Plaintiff’s. See *E. Iowa*
22 *Plastics, Inc. v. PI, Inc.*, 832 F.3d 899, 903-05, 908 (8th Cir. 2016) (vacting district court’s
23 order cancelling trademarks where plaintiff lacked standing to seek trademark
24 cancellation because it had not shown it was damaged by the registration, in part because
25 it had no competing registration of its own). Thus, because Plaintiff cannot show harm to

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1 its pecuniary interests—stemming from harm to its own marks—from David’s registration
2 of the Metalast mark, Plaintiff lacks standing to seek its cancellation.⁵

3 The Court thus denies summary judgment on Chemeon’s claim for cancellation of
4 David’s Metalast mark and dismisses this claim for lack of standing.

5 **D. Plaintiff’s Motion for Leave To File Supplemental Briefing**

6 The Court will also deny Plaintiff’s motion for leave to file supplemental briefing in
7 further support of its supplemental briefing on the standing question because nothing in
8 the motion or the proposed supplemental briefing attached to it changes the Court’s
9 analysis, *supra* in Section IV.B.

10 “A party may not file supplemental pleadings, briefs, authorities, or evidence
11 without leave of court granted for good cause.” LR 7-2(g). The Court will only find good
12 cause under LR 7-2(g) if Plaintiff was reasonably diligent in seeking leave to supplement.
13 See, e.g., *De Luna v. Sunrise Hosp. & Med. Ctr., LLC*, Case No. 2:17-cv-01052-JAD-
14 VCF, 2018 WL 4053323, at *5 (D. Nev. Aug. 24, 2018). Further, the Court will only find
15 good cause exists to allow Plaintiff’s supplemental briefing if the proposed briefing will
16 make a substantive difference. See, e.g., *Morrison v. Quest Diagnostics Inc.*, Case No.
17 2:14-cv-01207-RFB-PAL, 2016 WL 6246306, at *3 (D. Nev. Oct. 24, 2016), *aff’d*, 698 F.
18 App’x 350 (9th Cir. 2017) (declining to consider supplemental documents filed in
19 opposition to summary judgment motions because the supplemental documents failed to
20 raise any issues of material fact).

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23 ⁵Further, as David also argues (ECF No. 404 at 3), Plaintiff previously agreed to
24 stop selling products and services under the Metalast name. This also weighs in favor of
25 finding Plaintiff lacks standing to cancel the Metalast trademark. See *Smith v.*
26 *Entrepreneur Media, Inc.*, 667 F. App’x 975 (9th Cir. 2016) (“The district court properly
27 dismissed Smith’s claim challenging the ‘Entrepreneur Expo’ mark for lack of standing
28 because Smith had previously been enjoined from using colorable imitations of EMI’s
‘Entrepreneur’ mark for advertising and business services.”).

1 Even assuming Plaintiff was diligent in seeking leave to file further supplemental
2 briefing,⁶ good cause is lacking here because Plaintiff's proposed supplemental briefing
3 does not affect the Court's decision that Plaintiff lacks standing to seek cancellation of the
4 challenged Metalast trademark. The heart of Plaintiff's argument in its proposed
5 supplemental briefing is that David and associated entities filed a lawsuit against Plaintiff's
6 distributors in California for using the "formerly Metalast" language on their products,
7 which Plaintiff contends causes it harm because it has to indemnify those distributors in
8 the lawsuit, and suggests that David is attempting to "make an end run around this Court's
9 rulings." (ECF Nos. 451, 451-1 at 4.) However, this does not change the Court's standing
10 analysis supra in Section IV.B. Plaintiff still has no competing mark from which its
11 purported harm flows. Thus, there is no good reason for the Court to permit further
12 briefing on the standing question. Lacking good cause, Plaintiff's motion for leave to file
13 additional supplemental briefing is denied.

14 **E. Plaintiff's Motion to Seal**

15 As Plaintiff stated, a ruling on the motion to seal would only be necessary if the
16 Court were to grant its motion to supplement its supplemental briefing. (ECF No. 452 at
17 2 n.1.) Because the Court denies Plaintiff's motion for leave to file further supplemental
18 briefing, it also denies Plaintiff's motion to seal (ECF No. 452) as moot.

19 **V. CONCLUSION**

20 The Court notes that the parties made several arguments and cited to several
21 cases not discussed above. The Court has reviewed these arguments and cases and
22 determines that they do not warrant discussion because they do not affect the outcome
23 of the motions before the Court.

24 It is therefore ordered that Defendant Greg Semas' motion for summary judgment
25 (ECF No. 427) is granted.

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27 ⁶The lawsuit that apparently prompted the supplemental briefing was filed
28 November 19, 2018, and Plaintiff filed its motion December 27, 2018. (ECF No. 451 at 2.)


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It is further ordered that Plaintiff's claim against David Semas seeking cancellation of the Metalast trademark having registration No. 2963106 (ECF No. 348 at 41-43) is dismissed because Plaintiff lacks standing to bring it.

It is further ordered that Plaintiff's motion for leave to file a supplement to its supplemental brief (ECF No. 451) is denied.

It is further ordered that Plaintiff's motion to seal (ECF No. 452) is denied as moot.

DATED THIS 26th day of February 2019.


MIRANDA M. DU
UNITED STATES DISTRICT JUDGE