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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

CARMELO ANTHONY; MELO
ENTERPRISES, INC.; and CHOSEN
ONE PROPERTIES, LLC,

No. 2:09-cv-02272 MCE KJM

Plaintiffs,

v.

MEMORANDUM AND ORDER

LARRY HARMON aka LARRY W.
HARMON aka LAWRENCE HARMON,
et al.,

_____ Defendants. _____

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Plaintiffs Carmelo Anthony, Melo Enterprises, Inc., and
Chosen One Properties, LLC ("COP"), filed this action against
Defendants Larry Harmon aka Larry W. Harmon aka Lawrence Harmon
("Harmon"), Larry Harmon & Associates, P.A., Harmon-Castillo,
LLP, Frank Castillo, Kelly Runkle, Sora Barnes, Kenny Cruz aka
Kenneth Cruz, KC Development, LLC, Vitalis Partners, LLC
("Vitalis"), Professional Partners, LCC, and MCG Partners
alleging various claims arising out of Defendants' transfers of
Plaintiffs' monies. Plaintiffs now move for leave to file a
Second Amended Complaint ("SAC").

1 **BACKGROUND**

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3 Plaintiffs filed the initial Complaint on August 17, 2009.
4 (ECF No. 1.) On November 19, 2009, the Court dismissed the
5 Complaint in order to afford Plaintiffs an opportunity to amend
6 their Complaint in accordance with pleading standards recently
7 announced in Ashcroft v. Iqbal, 556 U.S. ----, 129 S. Ct. 1937
8 (2009). (ECF No. 26.) Plaintiffs subsequently filed the First
9 Amended Complaint ("FAC" (ECF No. 43)) on January 8, 2010. The
10 FAC omitted fraud and concealment claims, which had been pled in
11 the initial Complaint. The parties have previously exchanged
12 Rule 26(a)(1) initial disclosures, and proceeded in further
13 discovery, which is to be completed by January 10, 2011.

14 Plaintiffs now seek leave to file a SAC, based on, inter
15 alia, Harmon's testimony at the July 22 and 23, 2010 deposition
16 that Anthony agreed to the transfers through several
17 communications and that COP acquired a passive membership
18 interest in Vitalis and Harmon's testimony that may indicate
19 Harmon failed to disclose facts about Vitalis' finances and
20 financial relationship with Harmon at the time of the transfers.
21 The proposed SAC alleges additional factual allegations about the
22 circumstances surrounding the transfers and adds six new claims
23 for false statements or omissions in violation of federal and
24 state securities law, federal and state non-registration of
25 securities, and common law concealment.

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1 **DISCUSSION**

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3 Generally, a motion to amend is subject to Rule 15(a) of the
4 Federal Rules of Civil Procedure, which provides that “[t]he
5 court should freely give leave [to amend] when justice so
6 requires.” Fed. R. Civ. P. 15(a)(2)¹. However, once a pretrial
7 scheduling order is filed pursuant to Rule 16, “that rule’s
8 standards control[.]” Johnson v. Mammoth Recreations, Inc.,
9 975 F.2d 604, 607-08 (9th Cir. 1992).

10 Under Rule 16(b), a party seeking leave to amend must
11 demonstrate “good cause,” which primarily considers the
12 “diligence of the party seeking amendment.” Id. at 609. “If
13 that party was not diligent, the inquiry should end.” Id.
14 Although “the focus of the inquiry is upon the moving party’s
15 reasons for seeking modification[,]” a court may make its
16 determination by noting the prejudice to other parties. See id.
17 (finding that “the existence or degree of prejudice to the party
18 opposing the modification might supply additional reasons to deny
19 a motion” to amend).

20 If good cause is found, the court must then evaluate the
21 request to amend the complaint in light of Rule 15(a)’s liberal
22 standard. Id. A court considers whether the amendment (1) would
23 prejudice the opposing party; (2) is sought in bad faith;

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28 ¹ Unless otherwise noted, all further references to Rule or
Rules are to the Federal Rules of Civil Procedure.

1 (3) produces an undue delay in litigation; or (4) is futile.²
2 Eminence Capital, LLC v. Aspeon, Inc., 316 F.3d 1048, 1052 (9th
3 Cir. 2003) (citing Foman v. Davis, 371 U.S. 178, 182 (1962)).
4 The greatest weight is afforded to prejudice, with the burden
5 resting on the non-movant. Eminence Capital, LLC, 316 F.3d at
6 1052. "Absent prejudice, or a strong showing of any of the
7 remaining Foman factors, there exists a *presumption* under
8 Rule 15(a) in favor of granting leave to amend." Id. (emphasis
9 in original).

10 Plaintiffs were sufficiently diligent in seeking leave to
11 amend. The FAC did not allege that Plaintiffs acquired a
12 security interest in Vitalis. Instead, Plaintiffs alleged that
13 Plaintiffs did not agree to the transfers, regardless of the
14 nature of the interest acquired. The documents obtained through
15 discovery before the FAC and subsequent to it were conflicting as
16 to the nature of the interest in Vitalis.³ (Hirsh Decl. ¶¶ 45-
17 46, Exs. B-C (ECF No. 112).)

18 At Harmon's deposition in July, Harmon testified that
19 Anthony agreed to the transfers through several communications
20 (Hirsh Decl. Ex. D at 161-67) and that COP acquired a passive
21 membership interest in Vitalis. (Id. at 23-25.)

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23
24 ² Because bad faith is neither alleged nor apparent to the
25 Court and because Rule 16(b) considers Plaintiffs' diligence, the
26 Court will consider only prejudice and futility for the Rule
27 15(a) standard.

28 ³ The K-1 Schedule that Defendants allegedly sent to
Plaintiffs in early 2009 indicated a membership interest; a
June 30, 2008 balance sheet for Vitalis obtained through
discovery indicated a creditor-debtor relationship. (Hirsh Decl.
Exs. B-C.)

1 Assuming Anthony agreed to the transfers, Harmon's testimony may
2 also indicate that Harmon did not disclose facts about Vitalis'
3 finances and financial relationship with Harmon at the time of
4 the transfers.⁴ Id. at 175-86. Accordingly, Plaintiffs have
5 shown good cause under Rule 16(b).

6 Defendants have failed to make a strong showing of prejudice
7 meriting denial of Plaintiffs' motion under Rule 15(a).
8 Plaintiffs' counsel sent Defendants' counsel a copy of the
9 proposed SAC before the deposition of the only Plaintiff,
10 Anthony, to be deposed thus far in the discovery process. (Hirsh
11 Decl. ¶ 59.) While discovery is to be completed on January 10,
12 2011, the additional allegations and six additional claims arise
13 from the same transfers that gave rise to the claims in the FAC.
14 Defendants have not only failed to show how any additional
15 discovery or any delay would cause prejudice, they have also
16 failed to show how the additional allegations and claims would
17 even require additional discovery or cause delay.

18 Defendants only make brief, general arguments about
19 Plaintiffs' legal theories and the factual allegations under the
20 pleading standards in Iqbal, and the heightened pleading
21 standards in Rule 9(b) and the Private Securities Litigation
22 Reform Act, 15 U.S.C. § 78u-4(b)(1).

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24
25 ⁴ Plaintiffs' counsel states that he discovered the
26 following facts through discovery: (1) Vitalis had a large
27 negative net worth that was increasing at the time of the
28 transfers; (2) Vitalis' outstanding debt to Bank of the West
exceeded \$6,000,000.00, was personally guaranteed by Harmon, and
had fallen due and been extended on several occasions in exchange
for large fees; and (3) Vitalis was servicing Harmon's personal
loan obligation to Citibank. (Hirsh Decl. ¶ 52.)

1 Defendants fall short of a strong showing of futility to overcome
2 the presumption in favor of granting leave to amend. Further,
3 "denial on [futility] is rare and courts generally defer
4 consideration of challenges to the merits of a proposed amended
5 pleading until after leave to amend is granted and the amended
6 pleading is filed." Duhn Oil Tool, Inc. v. Cooper Cameron Corp.,
7 No. CV-F-05-1411 OWW GSA, 2010 WL 596312, at *14 (E.D. Cal.
8 Feb. 16, 2010) (internal citations omitted).

9
10 **CONCLUSION**

11
12 In light of the above, and given that the previous trial
13 dates have been vacated and the case is now before this Court,
14 Plaintiffs' motion for leave to file a Second Amended Complaint
15 is GRANTED.⁵ Plaintiffs have twenty (20) days from the date this
16 Order is electronically filed to file their Second Amended
17 Complaint.

18 IT IS SO ORDERED.

19 Dated: November 16, 2010

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22 MORRISON C. ENGLAND, JR.
23 UNITED STATES DISTRICT JUDGE
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27 ⁵ Because oral argument will not be of material assistance,
28 the Court orders this matter submitted on the briefs. E.D. Cal.
Local Rule 230(g).