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4 UNITED STATES DISTRICT COURT  
5 NORTHERN DISTRICT OF CALIFORNIA

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7 MARKUS WILSON, et al.,  
8 Plaintiffs,

9 v.

10 FRITO-LAY NORTH AMERICA, INC.,  
11 Defendant.

Case No. 12-cv-01586-JST

**ORDER DENYING MOTION TO  
SUBSTITUTE PARTY AND TO AMEND**

Re: ECF No. 184

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13 Before the Court is Plaintiffs Markus Wilson and Doug Campen's (collectively,  
14 "Plaintiffs") Motion to Substitute and Amend. ECF No. 184. In light of the Court's order  
15 granting summary judgment in favor of Defendant Frito-Lay North America, Inc. ("Frito Lay"),  
16 ECF No. 183, in which the Court found that Plaintiffs did not rely on the allegedly misleading  
17 labels on Frito-Lay's potato chip products, Plaintiffs now seek to substitute Jeff Mains as a new  
18 plaintiff and class representative. Because the deadline to join additional parties passed more than  
19 three years ago and Plaintiffs do not state good cause for amending the case schedule to permit  
20 substitution, the Court will deny the motion.

21 **I. BACKGROUND**

22 This is a putative class action on behalf of purchasers of Frito-Lay potato chips. Plaintiffs  
23 filed their initial complaint in this action on March 29, 2012, alleging that Frito-Lay placed  
24 misleading labels on its potato chip products. ECF No. 1. Plaintiffs initially challenged numerous  
25 labels, but the claims were narrowed following pre-trial motions to the "0g Trans Fat" and "All  
26 Natural" labels, which appeared on a variety of Frito-Lay's products. See ECF No. 46; ECF No.  
27 73; SAC, ECF No. 47 ¶¶ 2, 5. Plaintiffs asserted claims under California's Unfair Competition  
28 Law ("UCL"), Cal. Bus. & Prof. Code § 17200 et seq., California's False Advertising Law

1 (“FAL”), Cal. Bus. & Prof. Code § 17500 et seq., and the Consumers Legal Remedies Act  
2 (“CLRA”), Cal. Civ. Code § 1750, et seq. Id. ¶¶ 189-245. The putative class includes all persons  
3 in California who purchased a Frito-Lay product that contained an allegedly misleading label from  
4 December 17, 2010 to March 25, 2013. ECF No. 119 at 2.

5 On January 24, 2014, Judge Conti, who was then presiding over this case, conducted a case  
6 management conference. ECF No. 84. At that conference, Plaintiffs’ counsel represented that  
7 they did not anticipate “hav[ing] any additional plaintiffs,” and said they would be “happy with  
8 setting a cutoff date of April 1, [2014] for adding parties.” Id. at 4:3-6. The Court later entered  
9 the parties’ stipulated scheduling order setting an April 1, 2014 deadline to join additional parties.  
10 ECF No. 87. Until now, Plaintiffs never sought to modify this deadline.

11 Over the next year, the parties engaged in discovery, including depositions of Plaintiffs  
12 Wilson and Campen in January 2015. See ECF Nos. 119-6, 7. By February 2015, the parties had  
13 completed discovery, and Plaintiffs moved to certify the class. ECF No. 119. While that motion  
14 remained pending, the Court granted Plaintiffs’ motion to stay the case pending the resolution of  
15 two Ninth Circuit appeals: Jones v. Conagra Foods, Inc., Appeal No. 14-16327 (9th Cir. filed July  
16 14, 2014) and Brazil v. Dole Packaged Foods, LLC, Appeal No. 14-17480, 2016 WL 5539863  
17 (9th Cir. Sept. 30, 2016).<sup>1</sup> ECF No. 150. Two years later, the Court partially lifted the stay to  
18 consider Frito-Lay’s motion for summary judgment. ECF No. 159. On May 26, 2017, the Court  
19 granted summary judgment as to all of Plaintiffs’ claims challenging Frito-Lay’s “0 grams Trans  
20 Fat” and “All Natural” labels. ECF No. 183. The Court, relying primarily on the January 2015  
21 deposition testimony of Plaintiffs Wilson and Campen regarding their reasons for buying Frito-  
22 Lay products, found the evidence demonstrated that Plaintiffs had not relied on Frito-Lay’s  
23 allegedly objectionable packaging. Id. at 1. The Court directed Frito-Lay to submit a proposed  
24 judgment in accordance with the Court’s order.<sup>2</sup> Id. at 16.

25 One week later, Plaintiffs filed the instant motion to substitute Jeff Mains as lead plaintiff  
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27 <sup>1</sup> The Ninth Circuit has issued its decision in Brazil, but the appeal in Jones remains pending.  
28 <sup>2</sup> As directed by the Court, on June 9, 2017 Frito-Lay submitted a proposed judgment. ECF No.  
187.

1 and class representative. ECF No. 184. Plaintiffs filed their motion more than three years after  
2 the April 1, 2014 deadline to join additional parties. ECF No. 87. Frito-Lay opposes the motion.  
3 ECF No. 188.

4 **II. LEGAL STANDARD**

5 A plaintiff seeking to join an additional party after the deadline for doing so must satisfy  
6 the requirements of both Federal Rule of Civil Procedure 15 and 16. Johnson v. Mammoth  
7 Recreations, Inc., 975 F.2d 604, 608 (9th Cir. 1992). Rule 16 requires district courts to enter a  
8 scheduling order that “limits the time . . . to join other parties and to amend the pleadings,” and  
9 provides that this “schedule shall not be modified except by leave of court upon a showing of good  
10 cause.”<sup>3</sup> Fed. R. Civ. P. 16(b)(3)(A), 16(b)(4).

11 If a party can demonstrate good cause to amend the case schedule, it must then  
12 demonstrate that substitution and amendment of the complaint are proper under Rule 15. Id. at  
13 608. “Rule 15(a) is very liberal and leave to amend ‘shall be freely given when justice so  
14 requires.’ . . . But a district court need not grant leave to amend where the amendment: (1)  
15 prejudices the opposing party; (2) is sought in bad faith; (3) produces an undue delay in litigation;  
16 or (4) is futile. AmerisourceBergen Corp. v. Dialysist W., Inc., 465 F.3d 946, 951 (9th Cir. 2006)  
17 (internal citation omitted).

18 “‘A court’s evaluation of good cause [under Rule 16] is not coextensive with an inquiry  
19 into the propriety of the amendment under . . . Rule 15.’” Johnson, 765 F.2d at 609 (quoting  
20 Forstmann v. Culp, 114 F.R.D. 83, 85 (M.D.N.C.1987)). “Unlike Rule 15(a)’s liberal amendment  
21 policy which focuses on the bad faith of the party seeking to interpose an amendment and the  
22 prejudice to the opposing party, Rule 16(b)’s ‘good cause’ standard primarily considers the  
23 diligence of the party seeking the amendment.” Id.; see also Jimenez v. R. Sambrano, No. 04-cv-  
24 1833 L(PCL), 2009 WL 937042, at \*2 (S.D. Cal. Apr. 6, 2009) (in determining whether good  
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26 <sup>3</sup> “The Federal Rules of Civil Procedure take a liberal position on parties amending pleadings  
27 before trial. Fed. R. Civ. P. 15(a). But once a district court issues a scheduling and case  
28 management order, Rule 15(a)’s generous standard gives way to the more stringent good-cause  
standard under Rule 16(b)(4).” Hinojos v. Kohl’s Corp., No. 2:10-CV-07590-ODW, 2013 WL  
5835780, at \*1 (C.D. Cal. Oct. 29, 2013).

1 cause exists for the amendment of a scheduling order, courts should consider “whether the movant  
2 was diligent in seeking amendment once the need to amend became apparent.”). The possibility  
3 of prejudice to the non-moving party “might supply additional reasons to deny a motion, [but] the  
4 focus of the inquiry is upon the moving party’s reasons for seeking modification. If that party was  
5 not diligent, the inquiry should end.” Johnson, 975 F.2d at 609 (internal citations omitted).

6 **III. ANALYSIS**

7 In their motion, Plaintiffs do not directly address the good cause standard under Rule 16.  
8 Instead, they focus on prejudice to the putative class from denying substitution and the lack of  
9 prejudice to Defendant from allowing it. ECF No. 185 at 3. Plaintiffs contend that “California  
10 class members face potential prejudice if they are left without a representative seeking to advance  
11 their claims.” Id. On the other hand, they argue that “[t]he substitution will not prejudice Frito-  
12 Lay,” because substitution will not change the nature of the class claims and Frito-Lay could  
13 immediately take discovery from Mr. Mains without having to provide any new discovery to  
14 Plaintiffs. Id.

15 Frito-Lay argues that Plaintiffs “offer no good cause why they should be allowed to  
16 disregard the scheduling order – and the substantial investment of time and effort by both Frito-  
17 Lay and the Court based on the existing plaintiffs and record – by substituting a new plaintiff  
18 now.” ECF No. 188 at 3. According to Frito-Lay, it has been clear Plaintiffs could not adequately  
19 represent the class since January 2015, when Plaintiffs stated unambiguously in their depositions  
20 that they had not relied on the allegedly misleading labels when purchasing Defendant’s products.  
21 See ECF No. 183 at 7-8, 13-15. However, Plaintiffs did not seek amendment and substitution  
22 until more than two years later, undermining any claim that they were diligent.

23 In their reply brief, Plaintiffs respond that they have been diligent, and therefore good  
24 cause exists for the amendment to the case schedule, because they sought leave to amend their  
25 complaint and substitute Mr. Mains as a plaintiff within two weeks of the Court’s summary  
26 judgment order. ECF No. 193 at 2. Specifically, Plaintiffs argue that “[t]he timeline of any  
27 ‘diligence’ inquiry begins only at the time the original class representative cannot adequately  
28 represent the class,” id. at 2, and that it only became clear that Plaintiffs could no longer represent

1 the class when the Court issued its summary judgment order. Id. Plaintiffs dispute Frito-Lay’s  
2 characterization of the motion as an attempt to “start all over,” and instead contend that they  
3 “merely seek to preserve the case given the good cause of the original class representatives’ claims  
4 now being dismissed.” Id.

5 The Court finds that Plaintiffs have not stated good cause to amend the case schedule and  
6 substitute Mr. Mains as a plaintiff. Plaintiffs’ counsel either knew – or should have known  
7 through a reasonable pre-filing investigation – as of the date they filed this action that Wilson and  
8 Campen did not rely on the allegedly misleading labels in making their decision to purchase Frito-  
9 Lay products. The deposition testimony of the named plaintiffs made it plain that Frito-Lay’s  
10 labels played no part in their purchase decisions, and had Plaintiffs’ counsel inquired of their  
11 clients before filing suit, they would have discovered that fact. Yet Plaintiffs’ counsel not only  
12 agreed to, but actually suggested, an April 2014 deadline to amend the pleadings, and expressed  
13 confidence that they would not need to join additional parties. ECF No. 84 at 4:3-6. Even if they  
14 were unaware when they filed this action that Plaintiffs did not rely on the allegedly misleading  
15 labeling in making their decision to purchase Frito-Lay potato chip products, counsel should have  
16 realized after the depositions of Wilson and Campen in early 2015 that Plaintiffs Wilson and  
17 Campen had no viable claim and should have immediately sought to substitute new class  
18 representatives. They did not do so. Instead, Plaintiffs delayed more than two years – waiting  
19 until after the Court granted Defendant summary judgment – to seek leave to amend their  
20 complaint to substitute plaintiffs.<sup>4</sup> Plaintiffs’ lack of diligence in seeking substitution  
21 demonstrates a lack of good cause for amending the scheduling order.<sup>5</sup> Johnson, 975 F.2d at 609  
22 (“If th[e] party [seeking amendment] was not diligent, the inquiry [regarding good cause] should  
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24 <sup>4</sup> Plaintiffs cite no authority to support their contention that the relevant date for purposes of  
25 evaluating diligence is the date of the Court’s summary judgment order. The facts the Court relied  
26 on in granting summary judgment were known to Plaintiffs long before the Court issued its order.  
27 That the Court did not issue its summary judgment order until months after Plaintiffs’ depositions  
28 does not excuse their lack of diligence in seeking substitution.

<sup>5</sup> Moreover, given Plaintiffs’ counsel’s familiarity and past experience representing Mr. Mains,  
they could have identified him as a suitable plaintiff long ago. They did not reach out to him until  
after the Court issued its summary judgment order. ECF No. 193 at 2.

1 end.”).

2 The Ninth Circuit’s opinion in Johnson is instructive. There, the plaintiff sued the wrong  
3 corporate entity. Id. at 607. The defendant informed plaintiff’s counsel of this defect in the  
4 complaint both in correspondence and in discovery responses served later in the case. Id. Despite  
5 this notice, the plaintiff waited until four months after the deadline to join additional parties under  
6 the scheduling order to seek leave to amend his complaint. Id. The Ninth Circuit found that the  
7 district court did not abuse its discretion in denying the motion to amend. Id. at 610. The court  
8 noted that counsel “filed pleadings and conducted discovery but failed to pay attention to the  
9 responses they received,” and that “[t]hat is precisely the kind of case management that rule 16 is  
10 designed to eliminate.” Id. In its concluding remarks, the panel discussed the importance of  
11 adhering to a scheduling order:

12 The scheduling order does not simply exalt procedural technicalities  
13 over the merits of Johnson’s case. Disregard of the order would  
14 undermine the court’s ability to control its docket, disrupt the  
15 agreed-upon course of the litigation, and reward the indolent and the  
cavalier. Rule 16 was drafted to prevent this situation and its  
standards may not be short-circuited by an appeal to those of Rule  
15.

16 Id. Here, too, had Plaintiffs’ counsel paid attention to the discovery, they would have realized that  
17 the named plaintiffs could not assert a viable claim for relief. And by waiting until after the Court  
18 and Frito-Lay expended considerable resources in connection with the summary judgment motion,  
19 Plaintiffs have attempted to “disrupt the agreed-upon course of the litigation.” Id.

20 Because Plaintiffs have not satisfied Rule 16’s diligence requirement, the Court need not  
21 find that substitution will prejudice Frito-Lay to deny the motion. See Johnson, 975 F.2d at 609.  
22 Nevertheless, the Court concludes that permitting substitution at this late stage in the case would  
23 prejudice Frito-Lay. Substitution would impose new discovery burdens on Frito-Lay, as it would  
24 have to start its discovery efforts from scratch, beginning with written discovery and a deposition  
25 of Mr. Mains. Even if Mr. Mains provides this discovery on an expedited basis, as Plaintiffs offer  
26 in their papers, Frito-Lay would still have to undertake the substantial effort and expense of  
27 conducting this discovery and preparing and re-filing pre-trial motions that were specific to  
28 Messrs. Wilson and Campen. ECF No. 193 at 5. These burdens would prejudice Frito-Lay. See

1 Velazquez, 2009 WL 2959838, at \*4 (concluding that “moot[ing] the substantial amount of  
2 discovery that ha[d] already been completed regarding the [named plaintiffs]” would prejudice  
3 defendants); Hitt v. Arizona Beverage Co., LLC, No. 08cv809WQH-POR, 2009 WL 4261192, at  
4 \*6 (S.D. Cal. Nov. 24, 2009) (denying motion to amend complaint to substitute plaintiff, finding  
5 substitution would prejudice defendants by “effectively moot[ing] the Plaintiff-specific work  
6 Defendants have done,” including taking discovery and filing a motion to dismiss).

7 Plaintiffs’ additional justifications for substitution, which fall outside the scope of the Rule  
8 16 inquiry, are unpersuasive. Plaintiffs contend, for example, that permitting substitution would  
9 be efficient because otherwise absent class members will file a new suit, which would require  
10 “redoing an entire discovery process.” ECF No. 185 at 4. However, it is not clear how allowing  
11 substitution would lead to any different result. As explained above, substitution would still  
12 require Frito-Lay to take discovery of the named plaintiff and prepare and file a new set of  
13 plaintiff-specific motions. Plaintiffs further contend that the Court should permit substitution  
14 because courts “routinely” grant it in class action litigation. ECF No. 185 at 1. While it is  
15 generally true that courts permit substitution in the early stages of class action litigation, courts  
16 typically deny such requests when made late in the case, particular after the filing and disposition  
17 of substantive and plaintiff-specific motions. See e.g., Miller v. Mercedes-Benz USA LLC, No.  
18 cv 06-05382 ABC (JTLX), 2009 WL 1393488, at \*2 (C.D. Cal. 2009) (describing an attempt to  
19 substitute the lead plaintiff after two years of litigation and two rounds of motions to dismiss as an  
20 impermissible “bait-and-switch tactic”). Here, the litigation is at an extremely advanced stage:  
21 the case has been pending for five years, there have been multiple rounds of motions to dismiss,  
22 discovery has concluded, and summary judgment has been briefed and decided.<sup>6</sup>

23 Because the Court concludes that Plaintiffs have not established good cause to amend the  
24 case schedule under Rule 16, the Court does not reach Defendant’s additional arguments.

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27 <sup>6</sup> The Court is mindful that without a named plaintiff, the claims of the putative class will  
28 potentially be extinguished. This possibility generally weighs, at least to some extent, in favor of  
permitting amendment. But this consideration cannot trump every other factor in the Court’s  
analysis. At some point, a delay in seeking amendment becomes so long fairness dictates that  
amendment be denied. This is such a case.

1 **CONCLUSION**

2 Plaintiffs' Motion for Substitution and to Amend is denied. As the Court has already  
3 granted Frito-Lay summary judgment as to the current plaintiffs and a class has not been certified,  
4 the Court will enter Frito-Lay's proposed judgment. ECF No. 187.

5 IT IS SO ORDERED.

6 Dated: August 14, 2017

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9 JON S. TIGAR  
United States District Judge

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