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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

EVAN WEAVER,

CASE NO. 5:12-cv-01117 EJD

Plaintiff(s),

**ORDER GRANTING PLAINTIFF'S  
MOTION FOR LEAVE TO FILE FIRST  
AMENDED COMPLAINT AND MODIFY  
CASE MANAGEMENT ORDER**

v.

TAMPA INVESTMENT GROUP, LLC,

[Docket Item No(s). 46]

Defendant(s).

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**I. INTRODUCTION**

On February 2, 2012, Plaintiff Evan Weaver (“Plaintiff”) filed a state-court Complaint against Defendant Tampa Investment Group, LLC (“Tampa”) asserting causes of action for breach of written agreements, breach of the covenant of good faith and fair dealing and fraud. See Compl., Docket Item No. 1. Central to the Complaint is Plaintiff’s allegation that Tampa failed to perform on an agreement to purchase his stock in Twitter, Inc. (“Twitter”) after representing to Plaintiff that it was financially ready to do so.

Subsequent to removal, this court issued a case management order setting a deadline of June 26, 2012, for the parties to amend the pleadings or join additional parties. See Docket Item No. 26. The parties participated in formal discovery proceedings which resulted in a court order compelling Tampa to respond to Plaintiff’s discovery demands. See Docket Item Nos. 31, 41, 44. This process, however, took months to finally resolve.

1 Based on what he learned in discovery, Plaintiff filed a Motion for Leave to File First  
2 Amended Complaint and Modify Case Management Order on November 9, 2012 (hereafter the  
3 “Motion”, Docket Item No. 46), in order to join three new defendants (Halcyon Cabot Partners Ltd,  
4 Felix Investments, LLC and John Bivona) and allege three additional causes of action (negligent  
5 misrepresentation, breach of fiduciary duty, and professional negligence). According to Plaintiff,  
6 discovery in this case revealed additional participants in the alleged plan to deceive him in relation  
7 to the sale of his Twitter stock.

8 Plaintiff’s Motion is presently before the court. Defendant has filed written opposition, and  
9 the court found this matter suitable for decision without oral argument pursuant to Civil Local Rule  
10 7-1(b). Having carefully reviewed the relevant pleadings, the court has determined that Plaintiff’s  
11 motion should be granted for the reasons explained below.

## 12 II. LEGAL STANDARD

13 Most motions to amend the pleadings are initially subject to the liberal standard for  
14 amendments contained in Federal Rule of Civil Procedure 15. Fed. R. Civ. P. 15(a)(2) (“The court  
15 should freely give leave [to amend] when justice so requires.”); Morongo Band of Mission Indians  
16 v. Rose, 893 F.2d 1074, 1079 (9th Cir. 1990). But here, the court-imposed deadline for amendments  
17 to the pleadings has passed. See Docket Item No. 26. As such, Plaintiff’s motion is governed by  
18 Rule 16 rather than Rule 15. Johnson v Mammoth Receptions Inc., 975 F.2d 604, 607-608 (1992).

19 Under Rule 16, Plaintiff must initially demonstrate sufficient “good cause” to modify the  
20 scheduling order so as to allow for the late amendment. See id.; see also Fed. R. Civ. Proc. 16(b)(4)  
21 (“A schedule may be modified only for good cause and with the judge’s consent.”). If the requisite  
22 good cause is shown, the court then turns to an examination of the relevant factors under Rule 15.  
23 Hood v. Hartford Life & Accident Ins. Co., 567 F. Supp. 2d 1221, 1224 (E.D. Cal. 2008).

## 24 III. DISCUSSION

### 25 A. The Rule 16 Analysis

26 “Unlike Rule 15(a)’s liberal amendment policy which focuses on the bad faith of the party  
27 seeking to interpose an amendment and the prejudice to the opposing party, Rule 16(b)’s ‘good  
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1 cause' standard primarily considers the diligence of the party seeking the amendment." Johnson,  
2 975 F.2d at 609. "The district court may modify the pretrial schedule if it cannot reasonably be met  
3 despite the diligence of the party seeking the extension." Id. (internal quotations omitted). "[N]ot  
4 only must parties participate from the outset in creating a workable Rule 16 scheduling order but  
5 they must also diligently attempt to adhere to that schedule throughout the subsequent course of the  
6 litigation." Jackson v. Laureate, Inc., 186 F.R.D. 605, 607 (E.D. Cal. 1999)

7 Focusing on the issue of diligence, Plaintiff argues he has satisfied that standard. In support,  
8 Plaintiff points out that following the removal to this court in March, 2012, and the parties' initial  
9 disclosures, he promptly served written discovery on Tampa to which he received inadequate  
10 responses. He attempted to meet and confer with Tampa on discovery issues, but eventually filed a  
11 motion to compel on July 31, 2012. The motion was heard by the assigned magistrate judge on  
12 September 4, 2012, and was granted in its entirety by a written order filed October 16, 2012.  
13 Plaintiff also deposed two witnesses - Scott McCabe, the stock broker who arranged the transaction  
14 with Plaintiff on behalf of Tampa, and Robert Forlizzo ("Forlizzo"), Tampa's manager - in  
15 September, 2012. According to Plaintiff, it was not until the completion of this initial discovery and  
16 some subsequent investigation that he obtained sufficient information to support the additional  
17 defendants and additional causes of action he wishes to include in an amended complaint.

18 For its part, Tampa argues that the "new" facts Plaintiff asserts to have learned through  
19 discovery were actually known to Plaintiff much sooner than he claims. As examples, Tampa avers  
20 that: (1) Plaintiff always knew he was dealing with affiliates of Felix Investments, LLC in arranging  
21 the purchase agreements, (2) the SEC investigation referenced by Plaintiff in the proposed amended  
22 complaint was widely publicized long before this motion was filed, (3) Plaintiff knew that Forlizzo  
23 and Tampa's lawyer, John Bivona, were involved in the stock transaction, (4) Plaintiff's attorneys  
24 had sufficient information to allege Tampa's inadequate capitalization and potential alter-ego  
25 liability in 2011, and (5) Plaintiff knew that Tampa would receive a portion of any "break up" fees  
26 should the deal fall through.

27 Having considered the respective positions, Tampa's arguments do have some merit. Based  
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1 on his deposition as well as communications between Plaintiff and McCabe, it appears Plaintiff had  
2 knowledge of at least a portion of the new factual allegations well before he commenced this case,  
3 let alone before this motion was filed. It may also be true, as Tampa believes, that the specified  
4 terms of the purchase agreement prevent Plaintiff from recovering against Tampa or any other  
5 defendant on a breach of contract or other similar theory.

6 But as Plaintiff points out, the existence of “good cause” does not depend on an examination  
7 of this action’s merits. Nor is Plaintiff’s alleged prior knowledge of certain factual information  
8 dispositive of the Rule 16 inquiry. As one of this court’s contemporaries has observed: “[a]lthough  
9 the court may deny the motion to amend where the moving party knows or should have known of  
10 the facts but failed to include them in the original complaint, this is but one indicator of diligence.”  
11 Nucal Foods, Inc. v. Quality Egg LLC, No. CIV S-10-3105 KJM-CKD, 2012 U.S. Dist. LEXIS  
12 10067, at \*12-13, 2012 WL 260078 (E.D. Cal. Jan. 27, 2012) (internal citation omitted). Here,  
13 despite what Plaintiff may have known earlier, there are certainly more substantial indicators of  
14 Plaintiff’s diligence. Indeed, Plaintiff sought discovery from Tampa soon after commencing this  
15 litigation and timely filed a motion to compel upon receiving inadequate responses. Plaintiff also  
16 promptly moved to amend the complaint when he finally did obtain information sufficient to support  
17 the additional factual contentions and causes of action he now seeks to raise. That is what the  
18 Federal Rules of Civil Procedure required Plaintiff to do,<sup>1</sup> and he cannot be faulted for the time it  
19 took to obtain a ruling on a motion to compel or arrange for the depositions of adverse witnesses.

20 In sum, Plaintiff could not have exercised a greater degree of diligence under the  
21 circumstances. Moreover, “Courts routinely allow parties to amend their pleadings after new  
22 information comes to light during discovery.” M.H. v. County of Alameda, No. 11-2868 CW, 2012  
23 U.S. Dist. LEXIS 168412, at \*9, 2012 WL 5835732 (N.D. Cal. Nov. 16, 2012). Such is the case  
24 here, and neither a dilatory motive nor an inexcusable failure to act are apparent from what has been

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26 <sup>1</sup> By waiting until after he received the discovery which apparently confirmed the additional  
27 factual allegations, Plaintiff seemingly complied with Federal Rule of Civil Procedure 11(b)(3) by  
28 ensuring that “the factual contentions have evidentiary support or, if specifically so identified, will  
likely have evidentiary support after a reasonable opportunity for further investigation or discovery.”

1 presented for this motion. Accordingly, the court finds that Plaintiff has met his burden to  
2 demonstrate the “good cause” necessary for an amendment to the scheduling order.

3 **B. The Rule 15 Analysis**

4 With the analysis under Rule 16 having been determined for Plaintiff, the court now turns to  
5 whether the proposed amendments are appropriate under Rule 15.

6 A request for leave to amend may be denied under Rule 15 where the amendment would  
7 cause the opposing party undue prejudice, is sought in bad faith, constitutes an exercise in futility, or  
8 creates undue delay. Foman v. Davis, 371 U.S. 178 (1962); Janicki Logging Co. v. Mateer, 42 F.3d  
9 561, 566 (9th Cir. 1994). Not all of the Rule 15 considerations are created equal; “it is the  
10 consideration of prejudice to the opposing party that carries the greatest weight.” Eminence Capital,  
11 LLC v. Aspeon, Inc., 316 F.3d 1048, 1052 (9th Cir. 2003).

12 Tampa articulates prejudice in the form of delay and has provided a detailed demonstration  
13 of when Plaintiff knew particular information. But as already indicated in the preceding section, the  
14 court does not find that Plaintiff unduly delayed seeking leave to amend based on that contention. In  
15 addition, this case still remains at the early stages of litigation. Although the court initially set a  
16 discovery completion deadline of December 31, 2012, it is apparent that this deadline is no longer  
17 workable due to the length of time it took for the assigned magistrate judge to hear and decide a  
18 motion to compel. Furthermore, a trial date has not been set in this case, the court has not heard  
19 summary judgment motions, and the deadline for filing such motions will not expire until February,  
20 2013 - at least under the schedule as it was originally contemplated. For these reasons, the court  
21 similarly rejects Tampa’s claim of prejudice based on delay.

22 Tampa also suggests prejudice because the proposed amendments, which admittedly will  
23 result in three additional defendants and three additional causes of action, would “radically” change  
24 this case and force Tampa to modify its litigation strategy or put on a new defense. While the court  
25 does not agree that the proposed amendments will result in something that can be described as a  
26 “radical” change, the court has nonetheless considered the need for Tampa to modify its litigation  
27 plan as a potential consequence of granting Plaintiff’s request. This potential is unmovable, however,  
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1 because Tampa can request whatever time it may need when the case management deadlines are  
2 modified to account for the new defendants. Thus, any prejudice to Tampa which could stem from  
3 the additional causes of action can be easily alleviated.

4 This leaves the questions of whether Plaintiff has sought to amend in bad faith or whether the  
5 amendments are futile. Neither of these considerations assist Tampa here. The court has already  
6 noted the lack of evidence suggesting bad faith on the part of Plaintiff, and Tampa did not provide  
7 meaningful argument on the issue of futility. In any event, the court has reviewed the new causes of  
8 action and does not find them futile on their face, at least for the purpose of this motion. The result  
9 of a motion to dismiss may prove otherwise, but that is a decision for another time.

10 Since the court is unable to find a supportable reason to deny leave to amend under Rule 15,  
11 this issue will also be resolved in Plaintiff's favor. This result coupled with the existence of "good  
12 cause" under Rule 16 dictates that the Motion should be granted.

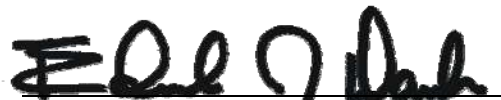
13 **IV. ORDER**

14 Based on the foregoing, Plaintiff's Motion for Leave to File First Amended Complaint and  
15 Modify Case Management Order (Docket Item No. 46) is GRANTED. Plaintiff shall file the First  
16 Amended Complaint as a separate docket entry on ECF/PACER forthwith.

17 The deadlines previously imposed by the Case Management Order filed April 27, 2012  
18 (Docket Item No. 26) are VACATED. The court schedules this case for a Case Management  
19 Conference on **February 15, 2013, at 10:00 a.m.**, and advises Plaintiff to diligently attempt service  
20 on the new defendants as soon as possible so that they may enter this case in due course and  
21 participate in the conference. The parties shall file a Joint Case Management Conference Statement  
22 on or before **February 8, 2013.**

23 **IT IS SO ORDERED.**

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25 Dated: December 20, 2012

  
EDWARD J. DAVILA  
United States District Judge

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