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8 **UNITED STATES DISTRICT COURT**  
9 **SOUTHERN DISTRICT OF CALIFORNIA**

10 AZCO BIOTECH, INC., a Nevada  
11 Corporation; and J. ADAMS, an  
12 individual,

Plaintiffs,

13 vs.

14 QIAGEN, N.V., a Netherlands holding  
15 company; et al.,

Defendants.

CASE NO. 12-CV-2599-BEN (DHB)

**ORDER DENYING PLAINTIFFS'  
MOTION FOR LEAVE TO AMEND**

[Docket Nos. 74, 88]

16  
17 Before this Court is a Motion for Leave to Amend the Complaint, filed by  
18 Plaintiffs Azco Biotech, Inc. and J. Adams on December 8, 2014. (Docket No. 74).  
19 On January 6, 2015, Plaintiffs filed an Amended Notice of Motion that included the  
20 date and time of hearing. (Docket No. 88). The Court considers the two  
21 documents, the Motion and the Amended Notice, as one motion. For the following  
22 reasons, the Motion is **DENIED**.

23 **BACKGROUND**

24 On August 24, 2012, Plaintiffs initiated this action against Defendants,  
25 alleging eighteen claims. In December 2012, Defendants moved to dismiss  
26 pursuant to Federal Rule of Civil Procedure 12(b)(6). (Docket No. 10). On January  
27 4, 2013, the Court granted Defendants' motion to dismiss in part, and particularly  
28 limited Plaintiffs' fraud claims. (Docket No. 25, Aug. 20, 2013 Order 18-19.) The

1 Court also granted Plaintiffs leave to file an amended complaint within 21 days of  
2 the Order. Plaintiffs did not file an amended Complaint.

3 On December 20, 2013, the Magistrate Judge issued a scheduling order  
4 pursuant to Federal Rule of Civil Procedure 16, in which a deadline to amend  
5 pleadings was set for February 24, 2014. (Docket No. 44.) The Magistrate's order  
6 scheduled discovery to close on August 22, 2014. At the Parties' request, the  
7 discovery cut-off deadline was continued to October 22, 2014. (Docket No. 58.)

8 Plaintiffs filed the instant Motion to Amend just two days before they filed a  
9 motion for partial summary judgment.

### 10 LEGAL STANDARD

11 Once the court issues a "pretrial scheduling order pursuant to Federal Rule of  
12 Civil Procedure 16 which establishe[s] a timetable for amending pleadings," Rule  
13 16 standards control. *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 607-08  
14 (9th Cir. 1992). A scheduling order "may be modified only for good cause and with  
15 the judge's consent." Fed. R. Civ. P. 16(b)(4). Rule 16(b)'s "good cause" standard  
16 looks to the "diligence of the party seeking the amendment." *Johnson*, 975 F.2d at  
17 609.

### 18 DISCUSSION

19 Plaintiffs desire to amend their Complaint in order to include more specific  
20 factual allegations to bolster three claims that this Court previously limited:  
21 promissory fraud, intentional misrepresentation, and negligent misrepresentation.  
22 Plaintiffs contend that they discovered new facts throughout discovery. Forty-five  
23 new paragraphs appear in the proposed amended complaint. The new paragraphs  
24 allege that Defendants induced Plaintiffs to partner with them and to market and  
25 distribute Defendants' products. All the while, it was Defendants' intent to be  
26 acquired by a third party. During acquisition negotiations, Plaintiffs allege that  
27 Defendants urged them to keep working by claiming the new parent company would  
28 continue to use Plaintiffs to distribute their products even after the acquisition.

1 First, Plaintiffs argue that Federal Rule of Civil Procedure 15 contains the  
2 correct standard to apply in this case. The Ninth Circuit made it clear in *Johnson*  
3 that Rule 15 does not control once a scheduling order has been issued. *Johnson*,  
4 975 F.2d at 608. Rule 16 controls the instant Motion. *See In re W. States*  
5 *Wholesale Natural Gas Antitrust Litig.*, 715 F.3d 716, 736 (9th Cir. 2013) (applying  
6 the “good cause” standard in Rule 16 where plaintiffs moved to amend their  
7 complaints to add new claims after a scheduling order was issued).

8 Second, an amended complaint to simply add new facts is unnecessary at this  
9 stage in the litigation. This action has progressed beyond a motion to dismiss.  
10 Motions for summary judgment are pending. Plaintiffs have also included the  
11 proposed new facts in their motion for partial summary judgment.

12 Third, Plaintiffs’ reasoning for amending their complaint is insufficient to  
13 show they acted diligently. Once Defendants advised Plaintiffs of the position they  
14 would take in a motion for summary judgment—that insufficient evidence had been  
15 established to support Plaintiffs’ fraud claims—Plaintiffs decided to add new  
16 factual allegations to their Complaint. (Mot. 2.) Plaintiffs argue amendment is  
17 necessary to defend against Defendants’ position. That is not so. Plaintiffs can  
18 properly contest the defense case in an opposition to Defendants’ motion for  
19 summary judgment.

20 Finally, Plaintiffs comment that the “new facts” were not known to them  
21 before the discovery phase. Yet, they do not point to any particular facts that were  
22 learned from Defendants’ disclosures. Defendants claim that they produced  
23 documents on two occasions: first in May 2014, and again in July 2014. (Opp’n 5.)  
24 Some of these “new facts” are supported by public documents or emails that  
25 Plaintiffs had in their possession. (Mot. 2.) Further, even if Plaintiffs could not  
26 have known these facts until discovery, Plaintiffs provide no sufficient reason for  
27 waiting until December 2014 to amend their Complaint.

28 The deadline to amend pleadings was February 24, 2014. Over one year has

1 passed. Defendants' last production of documents occurred in July 2014.  
2 Discovery closed on October 22, 2014. Yet, Plaintiffs provide no good cause for  
3 waiting until the deadline to file motions for summary judgment to attempt to  
4 amend their Complaint. Nor do Plaintiffs give a reason for why an amendment is  
5 necessary.

6 **CONCLUSION**

7 Upon review, the Court finds the time for amending the complaint has passed,  
8 and no good cause has been shown for permitting a late amendment to the  
9 Complaint. Accordingly, the Motion to Amend is **DENIED**.

10 **IT IS SO ORDERED.**

11  
12 Dated: March 13, 2015

  
13 HON. ROGER T. BENITEZ  
14 United States District Judge