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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
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11 DONALD R. SWORTWOOD, et al.,
12 Plaintiffs,
13 v.
14 TENEDORA DE EMPRESAS, S.A. DE
C.V., a Mexico Corporation, et al.,
15 Defendants.
16

Case No. 13cv362 BTM(BLM)

**ORDER GRANTING IN PART AND
DENYING IN PART MOTION FOR
LEAVE TO FILE THIRD AMENDED
COMPLAINT**

17 Plaintiffs have filed a motion for leave to file a Third Amended Complaint.
18 On July 1, 2014, the Court heard oral argument on the motion. For the reasons
19 discussed below, Plaintiffs' motion is **GRANTED IN PART** and **DENIED IN**
20 **PART.**
21

22 **DISCUSSION**

23 Plaintiffs seek leave to file a Third Amended Complaint to add
24 (1) allegations that Tenedora breached the Securities Transfer Agreement in
25 connection with its purchase of the ChinaVest shares; and (2) allegations that
26 Tenedora breached its fiduciary duty and made fraudulent misrepresentations
27 by using Neology's money to fund the purchase of the ChinaVest shares.

28 The cut-off date for motions to amend pleadings was July 22, 2013.

1 (Doc. No. 32.) Plaintiffs' instant motion was filed on May 28, 2014. Therefore,
2 the Court must construe Plaintiffs' motion as a motion to amend the scheduling
3 order. Johnson v. Mammoth Recreations, Inc., 975 F.2d 604, 608-09 (9th Cir.
4 1992).

5 The scheduling order can be modified for "good cause." Fed. R. Civ. P.
6 16(b)(4). Under Rule 16(b), the "good cause" standard "primarily considers the
7 diligence of the party seeking the extension." Johnson, 975 F.2d at 609.
8 "Carelessness is not compatible with a finding of diligence and offers no reason
9 for a grant of relief." Id. Although prejudice to the opposing party may provide
10 additional reasons to deny the motion, the focus of the inquiry is upon the
11 moving party's reasons for seeking the modification; if the moving party was not
12 diligent, the inquiry should end. Id.

13 Here, Plaintiffs clearly knew about the Securities Transfer Agreement by
14 November of last year. In their Motion to Amend Preliminary Injunction, filed
15 on December 4, 2013, Plaintiffs asserted that Tenedora breached the
16 Securities Transfer Agreement by failing to enter into a new Voting Agreement.
17 (Doc. 59-1 at 11-13.) However, Plaintiffs did not, at that time, move to amend
18 their Second Amended Complaint ("SAC") to include a claim for breach of the
19 Securities Transfer Agreement.

20 Plaintiffs argue that they did not know that their claim regarding the
21 Securities Transfer Agreement was inadequately pled until the Court said so
22 in its order denying the motion to amend preliminary injunction. The Court is
23 not convinced by this argument. The Second Amended Complaint does not
24 contain any allegations regarding breach of the Securities Transfer Agreement
25 and cannot reasonably be construed as encompassing a claim for breach of
26 the Securities Transfer Agreement.

27 Plaintiffs next argue that even if the SAC did not include a claim for
28 breach of the Securities Transfer Agreement, Tenedora had timely notice of the

1 claim by way of the Motion to Amend Preliminary Injunction. But the fact that
2 Tenedora may have received notice of the claim does not bear upon the issue
3 of diligence.

4 The Court concludes that Plaintiffs did not act with diligence with respect
5 to their claim for breach of the Securities Transfer Agreement, and the Court
6 therefore denies Plaintiffs' motion to amend as to this claim.¹ The Court does
7 not decide whether Plaintiffs may use evidence of any breach of the Securities
8 Transfer Agreement to support their claim for breach of the Voting Agreement.

9 Plaintiffs have a stronger claim of diligence with respect to their new
10 allegations that Tenedora purchased the ChinaVest shares with funds
11 misappropriated from Neology. By November 2013, Plaintiffs had received in
12 discovery documents that revealed that \$383,994.70 was deducted from the
13 \$854,765 transferred from Tenedora to Neology, and that the \$383,994.70 was
14 then documented as a loan, repaid to Tenedora, and used by Tenedora to
15 purchase the ChinaVest shares. (See, e.g., Exs. 4, 7 and 14 to Sneed Decl.
16 in Support of TRO App.) But, according to Plaintiffs, due to the number of
17 documents they received in discovery and the need to translate the documents
18 from Spanish into English, it took some time to "connect the dots." Plaintiffs
19 also claim that it was not until the depositions of Francisco Martinez and
20 Fernando Ellias-Calles in May of 2014, that they realized that the \$383,994.70
21 "loan" was a sham.

22
23 ¹ The Court recognizes that even if Plaintiffs had moved to amend the SAC in
24 November or December 2013, the deadline for moving to amend pleadings had already
25 expired in July. However, Plaintiffs should have moved to amend the scheduling order as
26 soon as they discovered the Securities Transfer Agreement. District Courts within this
27 Circuit have refused to allow amendment where the moving party learned of new claims after
28 the deadline for moving to amend pleadings, but then delayed seeking relief for several more
months without a good reason. See, e.g., Zest IP Holdings, LLC v. Implant Direct MFG,
LLC, 2014 WL 67494, at *4 (S.D. Cal. Jan. 8, 2014) (concluding that there was no diligence
where defendants did not seek to amend their answer until five months after the events
defendants claim justified the amendment); County of Santa Clara v. Astra USA, Inc., 2009
WL 1765811, at * 2 (N.D. Cal. June 22, 2009) ("Even accepting that defendants learned
further details of the counterclaims in early March, moreover, they offer no basis for the
additional delay of nearly three months thereafter.").

1 Given the volume of discovery, the language barrier, and the somewhat
2 confusing history of the transactions in question, the Court finds that Plaintiffs
3 have made a sufficient showing of diligence with respect to their allegations
4 that Tenedora purchased the ChinaVest shares with Neology funds. Therefore,
5 the Court grants the motion to amend as to these allegations.

6 Tenedora argues that Plaintiffs should not be granted leave to amend
7 because their new claim regarding misappropriation of Neology funds is futile.
8 Specifically, Tenedora contends that the claim can only be brought, if at all, as
9 a shareholder derivative claim. The Court does not reach this issue at this
10 time. Tenedora can raise this argument in opposition to the pending motion for
11 preliminary injunction and/or in a dispositive motion.

12 13 **CONCLUSION**

14 For the reasons discussed above, Plaintiffs' motion for leave to file a TAC
15 is **GRANTED IN PART** and **DENIED IN PART**. Plaintiffs may amend their
16 Complaint only to add allegations regarding Tenedora's alleged use of Neology
17 funds to purchase the ChinaVest shares. Plaintiffs must electronically file their
18 TAC within 10 days of the entry of this Order.

19 The parties should address Tenedora's derivative claim argument in their
20 briefs on the motion for preliminary injunction. The Court grants Plaintiffs leave
21 to file a reply brief that is an additional 10 pages long (20 pages total) to
22 respond to Tenedora's derivative claim argument.

23
24 **IT IS SO ORDERED.**

25 DATED: July 8, 2014

26 
27 BARRY TED MOSKOWITZ, Chief Judge
28 United States District Court