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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

SHENZHEN TECHNOLOGY CO. LTD, a Corporation,  
Plaintiff,  
v.  
ALTEC LANSING, LLC, a Delaware Limited Liability Company, and  
ALTEC LANSING, B.V., a limited company,  
Defendants.

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Case No. 3:12-cv-2188-GPC-BGS  
**ORDER GRANTING  
DEFENDANT PROPHET  
EQUITY, LP’S MOTION TO  
DISMISS PLAINTIFF  
SHENZHEN FENDA  
TECHNOLOGIES’ FRAUD AND  
NEGLIGENT  
MISREPRESENTATION CLAIMS  
AGAINST DEFENDANT  
PROPHET EQUITY, LP**  
**(ECF NO. 52)**

Before the Court is defendant Prophet Equity LP’s (“Prophet Equity”) Motion to Dismiss plaintiff Shenzhen Fenda Technology’s (“Fenda”) claims for fraud and negligent misrepresentation as pled in Fenda’s Second Amended Complaint (“SAC”). (ECF No. 52.) Fenda filed an opposition<sup>1</sup> to the Motion to Dismiss, (ECF No. 79), and Prophet Equity filed a reply, (ECF No. 81). For the reasons set forth below, Prophet Equity’s Motion to Dismiss is **GRANTED WITH LEAVE TO AMEND.**

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<sup>1</sup>The Court notes that Fenda’s opposition brief fails to include a table of contents and a table of authorities as required by Civil Local Rule 7.1.h.

1 **BACKGROUND**<sup>2</sup>

2 Defendant Altec Lansing LLC (“Altec LLC”), a limited liability company  
3 organized under Delaware law, develops and sells multimedia audio products. (ECF  
4 No. 42, SAC ¶¶ 2, 11.) Defendant Altec Lansing B.V. (“Altec BV”) is a company  
5 organized under the laws of the Netherlands and is a wholly owned subsidiary of Altec  
6 LLC. (Id. ¶ 3.) Fenda is a Chinese corporation that manufactures and sells audio and  
7 electro-acoustic devices. (Id. ¶ 1.)

8 Altec LLC and Fenda began conducting business together in 2003. (Id. ¶ 11.)  
9 Pursuant to memoranda of understanding (“MOUs”) and various agreements, Fenda  
10 supplied Altec LLC with audio and electro-acoustic products specified by Altec LLC.  
11 (Id.) These MOUs and agreements provided the general terms of agreement between  
12 Fenda and Altec LLC with regard to cost, shipment, quality standards, exclusivity,  
13 confidentiality, and other matters. (Id.)

14 In July 2005, a company called Plantronics, Inc. (“Plantronics”) acquired Altec  
15 LLC. (Id. ¶ 12.) Then, in December 2009, Plantronics sold Altec LLC to its (i.e.,  
16 Plantronic’s) parent company: Audio Technologies Holdings LLC (“Audio  
17 Technologies”). (Id. ¶¶ 12-13.) Audio Technologies is controlled by defendant  
18 Prophet Equity, which is a limited partnership organized under the laws of Texas. (Id.  
19 ¶¶ 4, 13.) Thus, Prophet Equity is an equity owner of Altec LLC. (Id. ¶ 4.)

20 “Historically, no matter what company controlled Altec LLC, or what name  
21 Altec LLC took, Altec LLC’s US office dealt directly with Fenda on all major issues  
22 of the transactions.” (Id. ¶ 12.) The transaction process generally entailed bidding,  
23 providing specifications, creating samples, approving the samples, mass production,  
24 and finally payment. (Id.) If there were any defects, Altec LLC would resolve the  
25 dispute with Fenda, and if there were any payment issues, Altec LLC would negotiate  
26 directly with Fenda to reset the payment schedule. (Id.)

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<sup>2</sup> In reviewing Prophet Equity’s Motion to Dismiss, the Court assumes the truth of all factual allegations pled in Fenda’s SAC. See Thompson v. Davis, 295 F.3d 890, 895 (9th Cir. 2002).

1 At some point before it became Altec LLC, Altec LLC conducted business as  
2 Altec Lansing Technologies, Inc. (“Altec Lansing”). (Id. ¶ 11.) Indeed, when  
3 Plantronics acquired Altec LLC, Altec LLC was operating as Altec Lansing. (See id.  
4 ¶ 13.) In October 2009, the management of Altec Lansing approached Fenda, seeking  
5 to continue business as a newly formed entity: Altec LLC. (Id.) Further, Altec LLC  
6 arranged for Altec BV to place orders to Fenda on Altec LLC’s behalf. (Id.) Any  
7 agreements reached between Altec BV and Fenda, however, would require Altec  
8 LLC’s prior approval. (Id. ¶ 30.) Fenda knew Altec BV “was a trading company with  
9 no paying capacity without the support of Altec LLC.” (Id. ¶ 60.)

10 From December 2009 through May 2012, Altec LLC continued to have Fenda  
11 design, produce, and supply products for Altec LLC. (Id. ¶ 14.) Altec LLC, however,  
12 “was constantly behind its payment schedule.” (Id.)

13 On April 12, 2011, H.M. Leng (“Leng”)—the general manager of Altec LLC and  
14 the Far East operation and general manager of Altec BV—sent Fenda a letter, stating  
15 “George Stelling [“Stelling”], COO, Managing Director and Co-Founder of Prophet  
16 Equity LP will lead Altec LLC as President and CFO” at some point in the future. (Id.  
17 ¶ 15.) Thereafter, Stelling dealt with Fenda on a frequent basis. (Id.)

18 From July to August 2011, Stelling, Paul Stacey (“Stacey”) (then CFO of Altec  
19 LLC), and Pelham Smith (“Smith”) (senior principal of Prophet Equity) negotiated  
20 directly with Justin Wang (“Wang”) (CEO of Fenda) regarding certain defect issues by  
21 phone and email. (Id. ¶ 16.) Stelling proposed settlement plans on behalf of Altec  
22 LLC’s board of directors and executive management team in two letters to Wang. (Id.)  
23 The proposed settlement plan called for Fenda to address certain defect issues and for  
24 Fenda to fund tooling and “NRE cost” for Altec LLC’s new products. (Id.) Stelling  
25 further proposed a trademark license agreement which would allow Fenda to sell  
26 certain goods under the Altec LLC brand name. (Id.) On August 10, 2011, “Fenda  
27 agreed to bear 60% of Altec LLC’s Apple IC audit cost.” (Id. ¶ 17.)

28 On September 29, 2011, Keith Tong Tong—the director of yet another company

1 called Altec Lansing Audio Technologies (Shenzhen) Co., Ltd. (“Altec Shenzhen”),  
2 which is a wholly owned subsidiary of Altec BV—scheduled a meeting between  
3 Stelling, Stacey, and Brendon Stead (“Stead”) (then co-president of Altec LLC) and the  
4 management of Fenda in China. (Id. ¶ 18.) On October 10, 2011, Stead and Stacey  
5 traveled to China to discuss and negotiate future payment and new order issues with  
6 the management of Fenda. (Id.)

7 In the same month of October 2011, “Fenda urged Altec LLC to pay its balance  
8 due.” (Id. ¶ 19.) “[T]o get Fenda to continue to supply merchandize [sic], Mr. Stacey  
9 promised Fenda that Altec LLC would catch up with the payment schedule and would  
10 pay off any overdue payment soon.” (Id.) Altec LLC wired Fenda \$1 million on  
11 November 1, 2011. (Id. ¶ 20.)

12 On November 3, 2011, Stacey and Stelling proposed to renegotiate the payment  
13 terms with Wang and thus arranged a conference call. (Id.) On November 7, 2011,  
14 Stacey sent Wang an email before the conference call, confirming that, as of November  
15 3, 2011, Altec LLC owed Fenda \$1,398,552.48. (Id.) On the conference call, Stacy,  
16 Stelling, and Smith proposed a new, two-part payment plan, whereby 5 weekly  
17 payments would be made from November 9 through December 7, 2011, and 9.3 weekly  
18 payments would be made thereafter. (Id. ¶ 21.) Stacey, Stelling, and Smith “asked  
19 Fenda to support Altec LLC,” given the two companies’ history of doing business  
20 together, and “promised that Altec LLC would make all the payment [sic] as it was  
21 turning around its business with its revolutionary wireless products.” (Id.) On  
22 November 10, 2011, Smith emailed Wang, saying, “the payment will follow next week  
23 as proposed. The payment for the week of November 9 is being processed now.” (Id.)  
24 At no point during these negotiations or subsequent conversations did Altec LLC ever  
25 deny its obligation to pay or indicate that Fenda should turn only to Altec BV for  
26 payment. (Id.)

27 After the new payment plan was adopted, “Fenda relied upon the promise of  
28 Altec LLC and Prophet Equity, and delivered merchandizes [sic] in large quantity until

1 May[] 2012.” (Id. ¶ 22.) Most of the debt currently owed by Altec LLC to Fenda “was  
2 incurred after the management of Altec LLC and Prophet Equity established the new  
3 payment schedule and committed itself to pay.” (Id.) As of May 17, 2012, Altec  
4 LLC’s total balance due to Fenda was \$4,172,274.35, with the last payment of  
5 \$254,532.26 having been made on April 20, 2012. (Id.) In addition, “there are over  
6 three million dollars’ worth of materials that were procured by Fenda to fulfill Altec  
7 LLC’s order.” (Id.)

8 In early May 2012, Altec LLC “shut down” Altec BV and its subsidiary Altec  
9 Shenzhen, “as the new wireless products of Altec LLC turned out to sell poorly.” (Id.  
10 ¶ 23.) Allen Soong of Altec LLC informed Fenda on May 15, 2012, that Altec BV’s  
11 general manager resigned. (Id.) Around the same time, “all the employees of Altec BV  
12 and Altec Shenzhen were let go and most of the management of Altec LLC, including  
13 Mr. Stelling and Mr. Stacey, were terminated by the board of directors of Altec LLC.”  
14 (Id.) Raleigh Wilson (“Wilson”) became the new president of Altec LLC, and Smith  
15 (then senior principal partner of Prophet Equity) became Altec LLC’s CFO. (Id.) After  
16 this sea change, Altec LLC abruptly changed its position on making payments to  
17 Fenda. (Id.)

18 On June 8, 2012, Wang visited Altec LLC’s San Diego headquarters and met  
19 with Wilson to try and resolve the issues of nonpayment and unused materials. (Id. ¶  
20 25.) Upon Wang’s request, Wilson obtained the permission of Ross Gatlin (CEO of  
21 Prophet Equity) to grant Fenda a license to sell products under Altec LLC’s brand  
22 name using the materials already procured to fill Altec LLC’s prior order. (Id.) As of  
23 the time Fenda filed its SAC, however, Altec LLC refused to make full payment. (Id.  
24 ¶ 26.) Fenda is still owed \$4,172,274.35. (Id.)

25 On Defendants side, “Prophet Equity is engaging in an auction sale to dispose  
26 [of] all its assets and inventories of Altec LLC.” (Id.) Prophet Equity “has sold Altec  
27 LLC’s brand, intellectual property, inventory, and other assets for an amount not less  
28 than 20 million dollars.” (Id.)

1 “During the above process, Altec LLC used Altec BV as its instrumentality to  
2 place order[s] from Fenda and other suppliers.” (Id. ¶ 27.) “Altec LLC managed and  
3 controlled the daily business of Altec BV and other subsidiaries by directing them to  
4 make purchase[s] for [Altec LLC] at the terms set and pre-negotiated by [Altec LLC].”  
5 (Id.) “Altec BV was represented to Fenda as a division of Altec LLC and Altec LLC  
6 was referred to as the US headquarter[s].” (Id.) “Altec BV ha[d] no other business  
7 other than assisting Altec LLC to purchase inventory for the latter to resell in the US  
8 and globally.” (Id.) “There [were] no arm’s length transactions between Altec LLC,  
9 Altec BV, and any other Altec affiliates.” (Id.)

10 Based on the foregoing allegations, Fenda asserts eight causes of action as  
11 follows: (1) breach of contract against Altec LLC and Altec BV; (2) breach of implied-  
12 in-fact contract against Altec LLC; (3) unjust enrichment against Altec LLC and Altec  
13 BV; (4) breach of the implied covenant of good faith and fair dealing against Altec  
14 LLC and Altec BV; (5) action for the price under UCC § 2-709 against Altec LLC and  
15 Altec BV; (6) account stated against Altec LLC and Altec BV; (7) fraud (false promise)  
16 against Altec LLC, Prophet Equity, Smith, and Stelling; and (8) negligent  
17 misrepresentation against Altec LLC, Prophet Equity, Smith, and Stelling.

18 Prophet Equity now moves to dismiss Fenda’s claims for fraud and negligent  
19 misrepresentation as asserted against Prophet Equity.

### 20 STANDARD

21 A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) tests the  
22 sufficiency of a complaint. Navarro v. Block, 250 F.3d 729, 732 (9th Cir. 2001).  
23 Dismissal is warranted under Rule 12(b)(6) where the complaint lacks a cognizable  
24 legal theory. Robertson v. Dean Witter Reynolds, Inc., 749 F.2d 530, 534 (9th Cir.  
25 1984); see Neitzke v. Williams, 490 U.S. 319, 326 (1989) (“Rule 12(b)(6) authorizes  
26 a court to dismiss a claim on the basis of a dispositive issue of law.”). Alternatively,  
27 a complaint may be dismissed where it presents a cognizable legal theory yet fails to  
28 plead essential facts under that theory. Robertson, 749 F.2d at 534. While a plaintiff

1 need not give “detailed factual allegations,” a plaintiff must plead sufficient facts that,  
2 if true, “raise a right to relief above the speculative level.” Bell Atlantic Corp. v.  
3 Twombly, 550 U.S. 544, 545 (2007). “To survive a motion to dismiss, a complaint  
4 must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that  
5 is plausible on its face.’” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting  
6 Twombly, 550 U.S. at 547). “Determining whether a complaint states a plausible  
7 claim for relief will . . . be a context-specific task that requires the reviewing court to  
8 draw on its judicial experience and common sense.” Iqbal, 556 U.S. at 679.

9 Where a motion to dismiss is granted, “leave to amend should be granted ‘unless  
10 the court determines that the allegation of other facts consistent with the challenged  
11 pleading could not possibly cure the deficiency.’” DeSoto v. Yellow Freight Sys., Inc.,  
12 957 F.2d 655, 658 (9th Cir. 1992) (quoting Schreiber Distrib. Co. v. Serv-Well  
13 Furniture Co., 806 F.2d 1393, 1401 (9th Cir. 1986)). In other words, where leave to  
14 amend would be futile, the Court may deny leave to amend. See Desoto, 957 F.2d at  
15 658.

### 16 ANALYSIS

17 In support of its fraud claim, Fenda alleges that, “[a]t the time when Altec LLC  
18 and Fenda negotiated the settlement and payment plan, Mr. Smith and Mr. Stelling had  
19 actual knowledge of material facts relating to Altec LLC and Altec BV’s financial  
20 arrangements and understood that once the market turned worse Altec LLC was not to  
21 pay the order placed by Altec [sic] BV.” (SAC ¶ 58.) Fenda claims, Smith and Stelling  
22 “misrepresented to Fenda that Altec LLC was to stand behind Altec BV to make the  
23 payment,” and, therefore, Smith and Stelling “in fact made a promise with no intention  
24 to perform it at the time the promise was made.” (Id.) Fenda asserts Smith and Stelling  
25 made these misrepresentations “knowingly for the purpose of inducing Fenda to design  
26 and supply more products to Altec LLC.” (Id. ¶ 59.) Fenda claims it “took more orders  
27 from Altec LLC and supplied more products at the inducement of Mr. Smith and Mr.  
28 Stelling in reliance on the misrepresentations.” (Id. ¶ 60.) Then, with no further

1 elaboration, Fenda alleges Smith “was acting as the managing partner of Prophet  
2 Equity, therefore his wrongful act may be imputed to Prophet Equity.” (Id. ¶ 62.)  
3 Fenda similarly asserts Stelling “was acting as the president of Altec LLC, and  
4 therefore his wrongful act should be imputed to Prophet Equity.” (Id. ¶ 63.) In support  
5 of its negligent misrepresentation claim, Fenda generally reasserts these allegations,  
6 including its conclusory allegations that Smith and Stelling’s conduct should be  
7 imputed to Prophet Equity. (Id. ¶¶ 65-70.)

8 Prophet Equity moves to dismiss Fenda’s claims for fraud and negligent  
9 misrepresentation on the basis that Fenda failed to plead these claims with sufficient  
10 particularity. Prophet Equity further moves to dismiss these claims because Fenda  
11 failed to plead facts sufficient to demonstrate that Stelling and/or Smith were acting  
12 within the scope of their alleged relationship with Prophet Equity when they allegedly  
13 negotiated a settlement and payment plan with Wang. Prophet Equity further asserts  
14 that Fenda’s claims fail because “the SAC is littered with statements” that Smith was  
15 in fact acting within the scope of his alleged relationship with Altec LLC.

#### 16 **I. Fraud and Negligent Misrepresentation Claims**

17 A plaintiff must prove the following elements to establish a claim for fraud by  
18 false promise: “(1) the defendant represented to the plaintiff that an important fact was  
19 true; (2) that representation was false; (3) the defendant knew that the representation  
20 was false when the defendant made it, or the defendant made the representation  
21 recklessly and without regard for its truth; (4) the defendant intended that the plaintiff  
22 rely on the representation; (5) the plaintiff reasonably relied on the representation; (6)  
23 the plaintiff was harmed; and (7) the plaintiff’s reliance on the defendant’s  
24 representation was a substantial factor in causing that harm to the plaintiff.” Perlas v.  
25 GMAC Mortg., LLC, 187 Cal. App. 4th 429, 434 (2010) (quoting Manderville v. PCG  
26 & S Grp., Inc., 146 Cal. App. 4th 1486, 1498 (2007)) ( citations omitted).

27 The elements of a negligent misrepresentation claim are: “(1) a misrepresentation  
28 of a past or existing material fact, (2) without reasonable ground for believing it to be



1 true, (3) with the intent to induce another’s reliance on the fact misrepresented, (4)  
2 justifiable reliance on the misrepresentation, and (5) resulting damages.” Nat’l Union  
3 Fire Ins. Co. v. Cambridge Integrated Servs. Group, Inc., 171 Cal. App. 4th 35, 50  
4 (2009).

5 Furthermore, “it is well-established in the Ninth Circuit that both claims for  
6 fraud and negligent misrepresentation must meet Rule 9(b)’s particularity  
7 requirement.” Neilson v. Union Bank of Cal., N.A., 290 F. Supp. 2d 1101, 1141 (C.D.  
8 Cal. 2003) (citing Glen Holly Entm’t, Inc. v. Tektronix, Inc., 100 F. Supp. 2d 1086,  
9 1093 (C.D. Cal. 1999)). Rule 9(b) provides that, “in alleging fraud or mistake, a party  
10 must state with particularity the circumstances constituting fraud or mistake.” Thus,  
11 “[a]verments of fraud must be accompanied by the who, what, when, where, and how  
12 of the misconduct charged.” Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1106 (9th  
13 Cir. 2003) (internal quotation marks omitted).

14 “Rule 9(b) does not allow a complaint to merely lump multiple defendants  
15 together but require[s] plaintiffs to differentiate their allegations when suing more than  
16 one defendant . . . and inform each defendant separately of the allegations surrounding  
17 his alleged participation in the fraud.” Swartz v. KPMG LLP, 476 F.3d 756, 764-65  
18 (9th Cir. 2007) (internal quotation marks omitted). “[T]he plaintiffs must, at a  
19 minimum, identify the role of each defendant in the alleged fraudulent scheme.” Id.;  
20 see also Moore v. Kayport Package Express, Inc., 885 F.2d 531, 541 (9th Cir. 1989)  
21 (“While statements of the time, place and nature of the alleged fraudulent activities are  
22 sufficient, mere conclusory allegations of fraud are insufficient”).

23 **A. Rule 9(b)**

24 Here, Fenda fails to allege sufficient facts to state fraud and negligent  
25 misrepresentation claims against Prophet Equity. While Fenda alleges “the who, what,  
26 when, where, and how” of Smith and Stelling misrepresenting to Fenda on November  
27 7, 2011, that Altec LLC would make all payments owed to Fenda, (SAC ¶ 20-21),  
28 Fenda does not identify Prophet Equity’s role in the November 7, 2011 conference call,

1 state whether Prophet Equity made any representation to Fenda at the conference call,  
2 or even allege that Prophet Equity had knowledge of Smith and Stelling’s  
3 representation. In any event, Fenda alleges that Smith and Stelling represented that  
4 Altec LLC—not Prophet Equity—“would make all the payment [sic] as it was turning  
5 around its business with its revolutionary wireless product.” (SAC ¶ 21.) As such,  
6 Fenda has failed to allege that Stelling and Smith’s alleged misrepresentation was made  
7 on behalf of Prophet Equity. Because Fenda has not alleged with particularity Prophet  
8 Equity’s participation in or connection with the alleged misrepresentation, Fenda has  
9 failed to sufficiently state claims for fraud and negligent misrepresentation against  
10 Prophet Equity under Rule 9(b).

11 **B. Respondeat Superior**

12 Fenda has further failed to allege facts sufficient to impute Smith’s and/or  
13 Stelling’s conduct to Prophet Equity based on vicarious liability. Fenda does not plead  
14 any facts demonstrating Smith and Stelling were acting within the scope of their  
15 employment or relationship with Prophet Equity at the time of their alleged  
16 misrepresentation, which is required under California’s law of respondeat superior.  
17 See Nationwide Mut. Ins. Co. v. Liberatore, 408 F.3d 1158, 1163 (9th Cir.2005) (citing  
18 Farmers Ins. Gr. v. Cnty. of Santa Clara, 11 Cal. 4th 992, 1004 (1995)). In fact, Fenda  
19 does not even allege that Stelling had any employment or other potential agency  
20 relationship with Prophet Equity as of November 7, 2011; rather, Fenda alleges  
21 “Stelling was acting as the president of Altec LLC.” (SAC ¶ 62.) The only connection  
22 alleged between Stelling and Prophet Equity was in the letter Fenda received from  
23 H.M. Leng of Altec LLC, identifying Stelling as a co-founder of Prophet Equity and  
24 stating that Stelling “will lead Altec LLC as President and CFO.” (Id. ¶ 15.)

25 Because Fenda has not alleged facts demonstrating Smith and Stelling were  
26 acting within the scope of their respective relationships with Prophet Equity, Fenda has  
27 failed to sufficiently state a claim for fraudulent and negligent misrepresentation  
28 against Prophet Equity on the basis of vicarious liability.

1 **II. Leave to Amend**

2 **A. Fraud and Negligent Misrepresentation Claims**

3 Finding it possible for Fenda to cure the aforementioned deficiencies, the Court  
4 concludes leave to amend should be granted as to Fenda’s claims for fraud and  
5 negligent misrepresentation against Prophet Equity.

6 **B. Breach of Fiduciary Duty Claims**

7 In its opposition brief, Fenda asserts Prophet Equity breached its fiduciary duties  
8 to Fenda. (ECF No. 79 at 9-13.) Fenda argues that, under the trust fund doctrine,  
9 “Smith and Stelling, on behalf of Defendant Prophet, had a fiduciary duty to Altec  
10 BV’s creditors,” and, because Smith and Stelling breached that duty to Fenda, Prophet  
11 Equity is liable “for dissipating the assets of Altec BV and failing to pay Plaintiff.”  
12 Fenda also asserts that Prophet Equity breached a duty of good faith and fair dealing  
13 because it ultimately controlled Altec BV and did not ensure that Altec BV’s debts  
14 were paid. (*Id.* at 13-14.) Plaintiff thus requests leave to amend its SAC to—not only  
15 cure the deficiencies with regard to its fraud and negligent misrepresentation  
16 claims—but to assert two additional claims against Prophet Equity.

17 The Court finds Fenda’s request to add two additional claims in its opposition  
18 brief to be improper. First, Fenda has missed the deadline to file a motion to amend its  
19 SAC, as the April 8, 2013 Case Management Conference Order provides that “[a]ny  
20 motion to join other parties, to amend the pleadings, or to file additional pleadings shall  
21 be filed on or before May 8, 2013.” (ECF No. 32 at 1.) Fenda took no action with  
22 regard to adding these new claims until October 25, 2013, when it filed its opposition  
23 to Prophet Equity’s Motion to Dismiss. (*See* ECF No. 79 at 9-14.) Furthermore, an  
24 opposition brief is not the appropriate vehicle for seeking leave to amend a complaint  
25 to add claims beyond those challenged in the motion to dismiss. *See Ruiz v. Laguna*,  
26 2007 WL 1120350 at \*26 (S.D. Cal. Mar. 28, 2007) (“It is axiomatic that the complaint  
27 may not be amended by the briefs in opposition to a motion to dismiss.”) (citing *Car*  
28 *Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1107 (7th Cir.1984)). Finally, Fenda


1 has not shown good cause to extend the deadline to seek leave to amend its SAC, see  
2 Fed. R. Civ. P. 16(b)(4), nor excusable neglect for having already missed the deadline,  
3 see id. 6(b)(1)(B). Accordingly, the Court will deny Fenda's request to assert new  
4 claims against Prophet Equity for breach of fiduciary duty.

5 **CONCLUSION**

6 For the foregoing reasons, **IT IS HEREBY ORDERED** that:

- 7 1. Prophet Equity's Motion to Dismiss, (ECF No. 52), is **GRANTED**;
- 8 2. At this time, Fenda is granted **LEAVE TO AMEND** only its claims for  
9 fraud and negligent misrepresentation as asserted against Prophet Equity;
- 10 3. Fenda's request to add claims for breach of fiduciary duty is **DENIED**;
- 11 4. If Plaintiff wishes to file a third amended complaint, Plaintiff shall do so  
12 on or before **December 13, 2013**; and
- 13 5. The hearing on Prophet Equity's Motion to Dismiss, currently set for  
14 November 22, 2013, is **VACATED**.

15 DATED: November 21, 2013

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17 HON. GONZALO P. CURIEL  
18 United States District Judge  
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