No. 14-15487

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re: iPHONE 4S CONSUMER LITIGATION

FRANK M. FAZIO; CARLISA S. HAMAGAKI; DANIEL M. BALASONNE; BENJAMIN SWARTZMANN, individually and on behalf of all others similarly situated,

Plaintiffs-Appellants,

vs.

APPLE, INC., a California Corporation,

Defendant-Appellee.

Appeal from the United States District Court
Northern District of California – Oakland Division
No. 4:12-cv-01127-CW
The Honorable Claudia Wilken

PETITION FOR REHEARING AND REHEARING EN BANC PURSUANT TO FED. R. APP. P. 35 AND 40

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I. INTRODUCTION

Applying this Court's decision in *Kearns v. Ford Motor Co.*, 567 F.3d 1120 (9th Cir. 2009), the district court and the panel majority subjected Plaintiffs' claims that Apple falsely advertised the capabilities of its Siri product, made under California's Consumers Legal Remedies Act ("CLRA")[1], False Advertising Law ("FAL")[2], and Unfair Competition Law ("UCL")[3], to "the heightened pleading requirements of [Fed. R. Civ. P.] 9(b), because they are 'grounded in fraud.'" *Fazio v. Apple, Inc.*, No. 14-15487, slip op. at 2 (9th Cir. Feb. 25, 2016) ("Mem.") (citing *Kearns*, 567 F.3d at 1125, and *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1102-05 (9th Cir. 2003)).[4] But "fraud is not a necessary element" of those claims, *see, e.g.*, *Kearns*, 567 F.3d at 1125, and *Vess* actually does not support the majority's conclusion. Rather, *Kearns* effectively overruled *Vess*'s analysis of the same claims at issue here, relying upon a specious assertion that the California authority relied upon in *Vess* to define California fraud had been superseded by subsequent California

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[1] Calif. Civ. Code §1770.

[2] Calif. Bus. & Prof. Code §17500.

[3] Calif. Bus. & Prof. Code §17200.

[4] The Memorandum is attached. Judge Silverman vigorously dissented on the merits. *See* Mem.:1-2 (Silverman, J., dissenting). The majority comprised Circuit Judge Tallman and Senior District Judge Lasnik. Unless otherwise indicated, citations are omitted and emphasis is added.

Supreme Court authority. *See Kearns*, 567 F.3d at 1126-27. Because *Kearns* is ***indisputably*** wrong in its assessment of California law, *Kearns* and *Vess* conflict, and only en banc review can resolve the conflict. *See Kwai Fun Wong v. Beebe*, 732 F.3d 1030, 1035 n.1 (9th Cir. 2013) (en banc), *aff'd.*, __ U.S. __, 135 S.Ct. 1625 (2015). Such review "is therefore necessary to secure and maintain uniformity of the court's decisions." Fed. R. App. 35(b)(1)(A).

Vess actually held that certain of the plaintiff's claims (under the same California statutes as here), primarily ones involving omissions, "do not rely entirely on a unified fraudulent course of conduct, … [and] are not 'grounded in fraud,'" and that Rule 9(b) therefore did not apply to them. *See* 317 F.3d at 1106. *Kearns* rejected that holding, reasoning that *Vess* "derived its elements of fraudulent misrepresentation from the California Court of Appeals case, *Hackethal v. National Casualty Co.*, 189 Cal. App. 3d 1102, 1111 (1987)," *Kearns*, 567 F.3d at 1127, and that the "elements [of California fraud] have been changed by the Supreme Court of California to include nondisclosure." *See id.* (citing *Engalla v. Permanente Med. Grp., Inc.*, 15 Cal. 4th 951, 974 (1997)). But the elements of California fraud listed in *Hackethal*, 189 Cal. App. 3d at 1111, are ***identical*** to the elements described in *Engalla*, 15 Cal. 4th at 974. Because *Kearns* therefore had no basis for rejecting *Vess*'s analysis, *see Miller v. Gammie*, 335 F.3d 889, 893 (9th Cir. 2003) (en banc), *Kearns* created an intra-Circuit

conflict, which only en banc review can resolve. *See Beebe*, 732 F.3d at 1035 n.1. This Court should grant the petition.

This Court should also rehear the entirety of majority's analysis, *see* Mem.:2-4 – which Judge Silverman characterized as "baloney," *see* Mem.:1 (Silverman, J., dissenting) – because (1) it should grant en banc review to resolve the intra-Circuit conflict between *Kearns* and *Vess* and when en banc review is granted, this Court "take[s the] entire case en banc, and not merely a single issue," *United States v. Lopez*, 484 F.3d 1186, 1188 n.3 (9th Cir. 2007) (en banc); (2) the majority's analysis is wrong as Judge Silverman explained, *see* Mem.:1-2 (Silverman, J., dissenting); (3) the majority's as-a-matter-of-law holding conflicts with this Court's holding that the question whether "a business practice is deceptive will usually be a question of fact not appropriate for decision on demurrer," *Williams v. Gerber Prods. Co.*, 552 F.3d 934, 938 (9th Cir. 2008); and (4) the majority's as-a-matter-of-law rejection of the accounts of four different consumers of Apple's Siri product's failure to perform as depicted in Apple's advertising conflicts with this Court's holding that "anecdotal evidence may suffice" to establish such a claim. *See Clemens v. DaimlerChrysler Corp.*, 534 F.3d 1017, 1026 (9th Cir. 2008). Consequently, this matter should be reheard en banc or by the panel. *See* Fed. R. App. P. 35(b)(1)(A), 40(a)(2).

II. BACKGROUND

Plaintiffs challenge, as false advertising, Apple's marketing of its iPhone 4S and its advertising of the then-new voice-activated feature called "Siri." 2ER207-10(¶¶1-16).[5] Plaintiffs purchased the 4S in reliance on Apple's misrepresentations regarding Siri's capabilities made in Apple's ubiquitous advertisements, 2ER210-12(¶¶19-26); 2ER221-29(¶¶54-82), and, as relevant here, assert causes of action under the CLRA, FAL, and UCL, 2ER235-39(¶¶105-133), because when Plaintiffs made queries or issued commands that were functionally identical to those depicted and successfully executed in Apple's television commercials, website presentations, and direct email solicitations, Siri frequently failed to perform. 2ER209, 214, 226, 228(¶¶13, 35, 72, 79).

Demonstrations were Apple's go-to method for conveying information regarding Siri to the consuming public. Indeed, an Apple executive stated in Apple's presentation introducing Siri that "really the best way to understand how amazing this Siri technology is in the i-phone 4S, is with a demo." 2ER126(1:12:50).[6] Apple's various demonstrations established a core of simple tasks that Siri could accomplish.

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[5] "ER" refers to Excerpt of Record.

[6] The presentation is available at https://www.youtube.com/watch?v=Nqol1AH_zeo (last visited April 4, 2016). The presenter also indicates that Siri is "beta" software but, as the district court observed, and the presenter stated, "***by beta, we mean that we will add more languages over time and more services over time as well***." 1ER4. Thus, the presenter clarified that Apple's "beta" terminology had a specific meaning –

Plaintiffs alleged that, in reality, Siri was unable to perform those basic functions on multiple occasions, leading to frequent wrong answers and claims not to understand. 2ER226(¶72), 228(¶79). Indeed, tasks lifted directly from Apple's demonstrations and commercials resulted in the failures alleged in the Complaint, which Judge Silverman found were sufficiently specific. *See* Mem.:1 (Silverman, J., dissenting). For instance, Apple's demonstrations showed Siri could provide directions. 2ER213-14(¶34) (locating Greek restaurants); 2ER215-16(¶41) ("get directions"), 2ER216(¶43) ("find restaurants"); 2ER217(¶46) (providing walking directions to a hotel). Yet the Individual Plaintiffs alleged repeated instances in which they asked Siri for directions to businesses and public parks, and Siri was unable to perform as represented in Apple's demonstrations and commercials. 2ER222(¶58), 224(¶66).

Apple's demonstrations and commercials also depicted Siri's abilities to define terms, 2ER214(¶34); provide weather reports, *id*., 2ER215-16(¶41), 2ER217(¶46); identify the dates of holidays, 2ER214(¶34); and communicate with individuals on a "contacts" list. 2ER213-14(¶34), 2ER214-15(¶¶36-37), 2ER215-16(¶41), 2ER216(¶43), 2ER218(¶47). Plaintiffs alleged Siri's failures in every one of these

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addition of new languages and services – that did not suggest that consumers could not expect Siri to be able to answer the same types of simple questions that were posed and invariably successfully answered in the demonstrations.

categories of simple tasks. *See* 2ER222(¶58) (cannot define "guided reading," a term easily found on the Internet); 2ER228(¶80) (could not provide a current weather report for Palm Springs); 2ER228(¶80) (could not provide the date of St. Patrick's Day); 2ER228(¶80) (multiple failures in attempting to communicate with people on a Plaintiff's "contacts" list).

Moreover, one of the Individual Plaintiffs, despite asking questions and giving commands similar to those in Apple's "Introducing Siri" commercial, received frequent wrong answers, 2ER225-26(¶¶71, 74), and followed up by repeating questions from Apple's "Rock God" commercial. 2ER226-27(¶¶73-74). Siri's inability to answer the "Rock God" questions reaffirmed his conclusion that Siri was not performing as Apple had represented and continued to represent to consumers. 2ER226-27(¶¶73-74). Indeed, Siri's inability to perform as depicted in the "Rock God" commercial was confirmed by a *Huffington Post* blogger who reported that Siri could answer only two of seven "Rock God" prompts, and who made a video record depicting Siri's failures. 2ER229(¶¶83-84).

III. ARGUMENT

A. This Court Should Rehear This Matter En Banc to Resolve the Intra-Circuit Conflict Between *Kearns* and *Vess*

Relying upon *Kearns*'s improper revisions of *Vess*'s holdings, the majority holds that "[a]ll of Plaintiffs' claims fall under the heightened pleading requirements of Rule 9(b) because they are 'grounded in fraud,'" a conclusion it attributes to *Vess*,

which it describes as holding that "the Rule 9(b) pleading standards apply to California CLRA, FAL, and UCL claims because, though fraud is not an essential element of those statutes, a plaintiff alleges a fraudulent course of conduct as the basis of those claims." Mem.:3. Thus, the Memorandum holds that Plaintiffs' California law claims necessarily "allege[] a fraudulent course of conduct." *Id.*

Vess provides no support for that per se rule; *Vess* actually held that Rule 9(b) applied to the statutes at issue here ***only*** when plaintiffs allege "a unified course of fraudulent conduct," 317 F.3d at 1103, and, even then, the only consequence of Rule 9(b)'s application is that any "'allegations of fraud would be stripped from the claim.'" *Id.* at 1105. After having "'disregard[ed]' [such] averments, or 'strip[ped]' them from the claim[,] [t]he court should then examine the allegations that remain to determine whether they state a claim." *Id.*

Again contrary to the majority's per se rule, *Vess* held that ***some*** of the plaintiff's claims (made under the same statutes as here) ***were not subject to Rule 9(b)***. *See id.* at 1106 (holding that "[b]ecause Vess's allegations against Novartis do not rely entirely on a unified fraudulent course of conduct, his claims against Novartis are not 'grounded in fraud'" and describing the claims to which Rule 9(b) did not apply). The claims *Vess* shielded from Rule 9(b) "neither mention[ed] the word 'fraud,' nor alleg[ed] facts that would necessarily constitute fraud,'" *id.* at 1105-06, and primarily asserted failures to disclose various facts. *See, e.g., id.* ("Novartis …

'negligently' failed to disclose its financial relationship with [codefendants]"). *Vess* therefore reversed the district court's dismissal of those claims. *See id.*

On its face, *Vess* precludes application of Rule 9(b) here, because Plaintiffs' claims under the CLRA, FAL, and UCL do not require fraud, *see id.* at 1103, and the relevant causes of action do not allege fraud. *See*, *e.g.*, 2ER237-39(¶121) (false-advertising claim alleging that Apple "should have known its advertisements were untrue and misleading"); (¶¶124-33) (strict liability UCL claim).[7]

But *Kearns* effectively overruled *Vess*'s determination that certain of the *Vess* plaintiff's claims were not subject to Rule 9(b). *See Kearns*, 567 F.3d at 1126-27. *Kearns* held that *Vess* "derived its elements of fraudulent misrepresentation" from *Hackethal*, 189 Cal. App. 3d 1102, *see* 567 F.3d at 1126, but that the "elements [of fraud] have been changed by the Supreme Court of California" in authority decided

[7] *Vess* correctly describes California law. *See Kearns*, 567 F.3d at 1125 ("fraud is not a necessary element of a claim under the CLRA and UCL"). "The UCL imposes ***strict liability*** when property or monetary losses are occasioned by conduct that constitutes an unfair business practice." *Cortez v. Purolator Air Filtration Prods. Co.*, 23 Cal. 4th 163, 181 (2000); *see also In re Tobacco II Cases*, 46 Cal. 4th 298, 312 (2009) ("'A [common law] fraudulent deception must be actually false, known to be false by the perpetrator and reasonably relied upon by a victim who incurs damages. None of these elements are required to state a claim for injunctive relief' under the UCL"). The CLRA does not require knowledge of falsity, *see* Calif. Civ. Code §1770, and allows a limited affirmative defense that the "violation was not intentional and resulted from a bona fide error." Calif. Civ. Code §1784. The FAL establishes a negligence standard, imposing liability for a statement "which is known, ***or which by the exercise of reasonable care should be known***, to be untrue." Calif. Bus. & Prof. Code §17500.

subsequent to *Hackethal*. *See Kearns*, 567 F.3d at 1126-27 (citing *Engalla*, 15 Cal. 4th at 974). *Kearns* was wrong: the California fraud elements set out in *Hackethal*, 189 Cal. App. 3d at 1111, are ***identical*** to the elements of fraud in *Engalla*, 15 Cal. 4th at 974, the authority cited by *Kearns*, 567 F.3d at 1126-27. *Compare Hackethal*, 189 Cal. App. 3d at 1111 ("'The elements of fraud … are (1) misrepresentation (false representation, concealment or non-disclosure); (2) knowledge of falsity (or 'scienter'); (3) intent to defraud, *i.e.*, to induce reliance; (4) justifiable reliance; and (5) resulting damage.'") *with Engalla*, 15 Cal. 4th at 974 ("The elements of fraud … are: '(a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity (or "scienter"); (c) intent to defraud, *i.e.*, to induce reliance; (d) justifiable reliance; and (e) resulting damage.'").

This Court recognizes that if "the reasoning or theory of our prior circuit authority is clearly irreconcilable with the reasoning or theory of intervening higher authority, a three-judge panel should consider itself bound by the later and controlling authority, and should reject the prior circuit opinion as having been effectively overruled." *See Miller*, 335 F.3d at 893. Because *Engalla* was not intervening authority that undercut *Vess*'s rationale, *Miller* obligated *Kearns* to follow *Vess*.

Based upon its mistaken analysis of California law, *Kearns* refused to do so and incorrectly applied Rule 9(b) to the *Kearns* plaintiff's claims under the CLRA and UCL, holding that the "contention that [plaintiff's] nondisclosure claims need not be

pleaded with particularity is unavailing." 567 F.3d at 1127. *Kearns* compounded its error by not applying *Vess*'s remedial approach. *Kearns* reasoned that the plaintiff's "claims of nondisclosure were couched in general pleadings alleging Ford's intent to conceal from customers that [the] vehicles [in question] were essentially the same as ordinary used vehicles," and held that "[s]uch general pleadings do not satisfy the heightened pleading requirements of Rule 9(b)." *See id.*

Kearns did not proceed to the second requisite portion of *Vess*'s analysis: it did not undertake an analysis in which any "'allegations of fraud would be stripped from the claim,'" *see Vess*, 317 F.3d at 1105, nor did it "examine the allegations that remain to determine whether they state a claim." *Id.*[8] Thus, not only did *Kearns* purport to overrule *Vess*'s analysis of the *Vess* plaintiff's non-disclosure claims, *Kearns* ignored *Vess*'s allegations-stripping holding.

Like the *Kearns* and *Vess* plaintiffs, Plaintiffs' pleadings here allege non-disclosure claims and omissions. *See* 2ER237-39(¶¶121-22, 128, 130). *Kearns* was therefore binding on the parties, the district court, and the three-judge panel, because only an en banc panel of this Court can resolve the intra-Circuit conflict between *Vess* and *Kearns*. *See Beebe*, 732 F.3d at 1035 n.1. Moreover, this Court has "the authority and discretion to decide questions first raised in a petition for rehearing en banc,"

[8] *Kearns* cited that portion of *Vess*, *see* 567 F.3d at 1124, but neither applied it nor explained its failure to do so.

United States v. Hernandez-Estrada, 749 F.3d 1154, 1159-60 (9th Cir. 2014) (en banc), and has done so when, as here, "it would have been futile for [Plaintiffs] to urge the three-judge panel to overrule binding circuit precedent," *i.e.*, *Kearns*. *See id.*[9] There was no intra-Circuit conflict in *Hernandez-Estrada*, but the question was "significan[t]." *See id.* The same is true here, as failure to resolve the conflict will result in confusion in the application of Rule 9(b) to several California causes of action that are repeatedly litigated before this Court, and muddy application of Rule 9(b) in other cases as well.

B. The Court Should Grant the Petition Because Judge Silverman Correctly Explains that Plaintiffs Adequately Pleaded a False-Advertising Claim and the Majority's Analysis Conflicts with Decisions by This Court and the California Courts

This Court should also rehear the majority's analysis in its entirety, *see* Mem.:2-4, because (1) if this Court resolves the *Kearns*/*Vess* conflict, it "take[s] [the] entire case en banc, … not merely a single issue," *Lopez*, 484 F.3d at 1188 n.3; (2) Judge Silverman correctly approves Plaintiffs' complaint, *see* Mem.:1-2 (Silverman, J., dissenting); (3) the majority's as-a-matter-of-law holding conflicts with authorities holding that whether "a business practice is deceptive will usually be a question of fact," *Williams*, 552 F.3d at 938; and (4) the majority's rejection of the accounts of

[9] Obviously, the district court would also be precluded from "overruling" *Kearns*, and, at any rate, this Court is not "obligated" to treat the Rule 9(b) issue as waived under these circumstances. *See id.*

four different consumers regarding Siri's failure to perform as advertised contravenes *Clemens*'s holding that "anecdotal evidence may suffice." *See* 534 F.3d at 1026.

The majority's analysis under Fed. R. Civ. P. 9(b) and 8(a) turns on its findings that Plaintiffs purportedly "fail to define what level of consistency they expected from the[] representations [contained in Apple's advertising campaign] and how often Siri actually performed as requested," Mem.:3 (Rule 9(b)), and "cannot articulate what level of consistent performance Apple fraudulently represented, [and] they similarly fail to define the level of consistency a reasonable consumer would expect." *Id.* at 4 (Rule 8(a)). No authority supports the majority's invention of a "consistency" pleading requirement, and Judge Silverman correctly dismissed that analysis, explaining that Plaintiffs "alleged that Siri did not work ***as advertised***. In a false advertising case, that is a crucial distinction." Mem.:1 (Silverman, J., dissenting) (emphasis in original).

As Judge Silverman concluded, Plaintiffs' allegations were specific enough: "The plaintiffs set forth in their complaint, in great detail, the specific functions that the Apple commercials claimed that Siri will do. The plaintiffs then allege in plain English that Siri does not do those specific things. They then allege exactly what Siri does instead." *Id*. Those allegations – involving four individual plaintiffs – are summarized above. *See supra* at 4-6. In short, Apple's demonstrations and commercials created an expectation in reasonable consumers that Siri could easily

perform certain simple tasks, such as answering requests for directions, definitions, weather reports, and dates of holidays, and requests to communicate with persons on a user's "contacts" list. There was no suggestion that Siri could perform those tasks only sometimes.

Judge Silverman flatly rejected Apple's (and the majority's) "consistency" analysis: "The essence of Apple's attack on the sufficiency of the complaint is that plaintiffs did not plead that the commercials specifically state that Siri will work 'consistently.' With all due respect, that's baloney. The same can be said of virtually any advertisement," Mem.:1 (Silverman, J., dissenting), because "a reasonable person would understand that such [consistent] performance is implied, especially when the function is demonstrated in a commercial." *Id.* at 1-2.

Judge Silverman is correct; no reasonable consumer would view Siri's repeated successful executions of simple commands under varying conditions – in the car, while jogging, while walking – and draw the conclusion that Siri will ***sometimes*** be able to get directions to a business or only ***occasionally*** access a weather report for a well-known resort destination like Palm Springs. Nothing that Apple said or did sought to create an impression of intermittent performance of the same tasks Apple depicted. A reasonable consumer, confronted with Apple's demonstrations of consistent performance, would conclude that "such [consistent] performance is implied." *Id.* at 1.

Nor can the majority's "consistency" analysis be reconciled with this Court's cases. Under the applicable "reasonable consumer" test, the fundamental question is whether a plaintiff can show that "'"members of the public are likely to be deceived."'" *Williams*, 552 F.3d at 938. The relevant statutes "'prohibit "not only advertising which is false, but also advertising which[,] although true, is either actually misleading or which has a capacity, likelihood or tendency to deceive or confuse the public."'" *Id.* That standard "raises questions of fact that are appropriate for resolution on a motion to dismiss only in 'rare situation[s].'" *Reid v. Johnson & Johnson*, 780 F.3d 952, 958 (9th Cir. 2015). "'[W]hether a business practice is deceptive will usually be a question of fact not appropriate for decision on [a motion to dismiss].'" *Davis v. HSBC Bank Nev., N.A.*, 691 F.3d 1152, 1162 (9th Cir. 2012); *accord Suchanek v. Sturm Foods, Inc.*, 764 F.3d 750, 762 (7th Cir. 2014) ("'the determination [] whether an ad has a tendency to deceive is an impressionistic one more closely akin to a finding of fact than a conclusion of law'").

California law is to the same effect: "It is well established that whether a statement is 'likely to deceive' a reasonable consumer is 'generally a question of fact.'" *Hypertouch, Inc. v. ValueClick, Inc.*, 192 Cal. App. 4th 805, 839-40 (2011); *accord Consumer Advocates v. Echostar Satellite Corp.*, 113 Cal. App. 4th 1351, 1361-62 (2003). Thus, the question of "whether a business practice is deceptive is based on the likely effect such practice would have on a reasonable consumer," and is

a "question of fact, requiring consideration and weighing of evidence from both sides before it can be resolved." *Klein v. Chevron U.S.A., Inc.*, 202 Cal. App. 4th 1342, 1380-81 (2012).

The majority disregards all of these authorities and necessarily holds that, ***as a matter of law***, Apple's advertisements featuring flawless performance as to certain basic queries and commands would not cause a reasonable consumer to believe that Siri would consistently perform those tasks as depicted in the demonstrations and commercials. It is simply extraordinary that the panel majority assumes the role of factfinder and concludes that that the "likely effect" on "reasonable consumer[s]," *see Klein*, 202 Cal. App. 4th at 1380-81, of Apple's repeated demonstrations of consistent performance by Siri would not be to create an (inaccurate) expectation of such performance by the consumers to whom the ads were directed. Certainly whether Apple created the false impression of consistent performance – rather than the multiple failures experienced by the four Plaintiffs here – is a "question of fact, requiring consideration and weighing of evidence from both sides before it can be resolved." *Id*. at 1376.

Moreover, the majority's holding effectively labels the Individual Plaintiffs, who relied upon Apple's advertising, as ***un***reasonable as a matter of law because they believed that Apple's advertising assured them that they would not experience multiple failures on questions effectively identical to those depicted by Apple. This

latter consequence of the majority's usurpation of the jury's role is particularly anomalous because it contradicts Apple's assessment of its own advertising. An Apple executive stated in Apple's introduction of Siri that "really the best way to understand how amazing this Siri technology is in the i-phone 4S, is with a demo." 2ER126 (1:12:50).[10] Thus, far from being "unreasonable" as a matter of law, the Individual Plaintiffs did ***exactly what Apple recommended, relying upon the demonstrations as "really the best way to understand" Siri***.

The majority, however, holds that while Apple says that demonstrations are "really the best way" to convey Siri's capabilities, consumers may not rely upon those demonstrations to form expectations regarding Siri's performance. Because consumers may not rely upon the demonstrations that Apple offered for the very purpose of inducing reliance, the majority says they may not be misled by them. But even if the majority's theory were tenable – *i.e.*, it is plausible that "really the best way to understand" Siri is "really [an unreasonable] way" – that theory would still pose nothing more than a "question of fact, requiring consideration and weighing of evidence from both sides before it can be resolved." *Klein*, 202 Cal. App. 4th at 1380-81. In short, this is not the "'rare'" case where this determination should be taken

[10] *See* https://www.youtube.com/watch?v=Nqol1AH_zeo.

away from the jury, *see Reid*, 780 F.3d at 958, as Judge Silverman correctly realized. *See* Mem.:1-2 (Silverman, J., dissenting).[11]

Moreover, the majority's holding that Plaintiffs were required to articulate some unknown standard of consistency beyond the allegations, by multiple Individual Plaintiffs, of Siri's repeated failures to perform the same tasks depicted as flawlessly performed in Apple's demonstrations and commercials is effectively a requirement that Plaintiffs allege something beyond Plaintiffs' own experiences with Siri's profound shortcomings. But both the California courts and this Court have confirmed that claims such as those made here may be advanced by "anecdotal evidence." *See Echostar*, 113 Cal. App. 4th at 1362; *accord Clemens*, 534 F.3d at 1025-26. In short, "'[t]he falsity of … advertising claims may be established by testing, scientific literature, ***or anecdotal evidence***.'" *Echostar*, 113 Cal. App. 4th at 1362 (quoting *National Council Against Health Fraud, Inc. v. King Bio Pharmaceuticals, Inc.*, 107 Cal. App. 4th 1336, 1348 (2003)). This Court similarly recognizes that "[s]urveys and expert testimony regarding consumer assumptions and expectations ***may be offered but are not required; anecdotal evidence may suffice***." *Clemens*, 534 F.3d at 1026.

[11] *Freeman v. Time, Inc.*, 68 F.3d 285 (9th Cir. 1995), is such a "rare" case. There, the plaintiff claimed to have been deceived into believing he had won a sweepstakes, but actually "would be put on notice that this was not guaranteed ***simply by doing sufficient reading to comply with the instructions for entering the sweepstakes***." *Id.* at 289-90. Nothing in Apple's advertising revealed that Siri would perform the demonstrated tasks only intermittently.

While *Clemens* offered the caveat that "'a few isolated examples' of actual deception are insufficient,'" *id.*, that is not an issue here: Plaintiffs alleged multiple Siri failures experienced by multiple Individual Plaintiffs.

The majority, which insists on some unknown specific allegation regarding the "consistency" of Siri's performance, apparently requires something beyond the individual experiences of the Individual Plaintiffs. That requirement has no basis in the law, *see Clemens*, 534 F.3d at 1026, and is another reason that rehearing should be granted.

IV. CONCLUSION

This Court should rehear this matter or rehear it en banc.

DATED: April 11, 2015

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned counsel certifies that the **PETITION FOR REHEARING AND REHEARING EN BANC PURSUANT TO FED. R. APP. P. 35 AND 40** uses a proportionally spaced Times New Roman typeface, 14–point, and that the text of the brief comprises 4,196 words according to the word count provided by Microsoft Word 2010 word processing software.

s/ STEVEN F. HUBACHEK
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FILED

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MOLLY C. DWYER, CLERK
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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In re: IPHONE 4S CONSUMER LITIGATION, FRANK M. FAZIO; CARLISA S. HAMAGAKI; DANIEL M. BALASONNE; BENJAMIN SWARTZMANN, individually and on behalf of all others similarly situated, Plaintiffs - Appellants, v. APPLE, INC., a California Corporation, Defendant - Appellee.	No. 14-15487 D.C. No. 4:12-cv-01127-CW MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
Claudia Wilken, Senior District Judge, Presiding

Argued and Submitted February 12, 2016
San Francisco, California

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

Before: SILVERMAN and TALLMAN, Circuit Judges and LASNIK,** Senior District Judge.

Plaintiffs appeal the district court's order granting Apple's Motion to Dismiss Plaintiffs' California Consumer Legal Remedies Act ("CLRA"), California False Advertising Law ("FAL"), California Unfair Competition Law ("UCL"), and intentional and negligent misrepresentation claims. The district court held that Plaintiffs' amended consolidated class action complaint, alleging that Apple's advertising campaign misrepresented the functionality of the Siri feature of the iPhone 4S and deceived consumers, failed to plead fraud with particularity as required by Federal Rule of Civil Procedure 9(b) and failed to plead plausible claims under Federal Rule of Civil Procedure 8(a). We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

1. The district court did not err in finding that Plaintiffs failed to meet the heightened pleading requirements of Rule 9(b) when Plaintiffs failed to describe how and why Apple's statements were fraudulent or misleading. All of Plaintiffs' claims fall under the heightened pleading requirements of Rule 9(b) because they are "grounded in fraud." *See Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1125 (9th Cir. 2009); *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1102-05 (9th Cir. 2003)

** The Honorable Robert S. Lasnik, Senior United States District Judge for the Western District of Washington, sitting by designation.

(holding that the Rule 9(b) pleading standards apply to California CLRA, FAL, and UCL claims because, though fraud is not an essential element of those statutes, a plaintiff alleges a fraudulent course of conduct as the basis of those claims). In pleading fraud or misrepresentation a plaintiff "must state with particularity the circumstances constituting fraud or mistake." Fed. R. Civ. P. 9(b). To meet this standard a plaintiff must allege the "who, what, where, when, and how" of the misconduct and explain what is false or misleading about the statement made and why it is false. *Cafasso ex. rel. United States v. Gen. Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1055 (9th Cir. 2011).

Merely pointing to product demonstrations of Siri in Apple's general advertising campaign is insufficient to show that Apple fraudulently misled Plaintiffs into believing Siri would perform consistently. Plaintiffs fail to define what level of consistency they expected from these representations and how often Siri actually performed as requested. Plaintiffs also do not allege that Siri never worked, just that Siri did not work as consistently as they expected. Failure to meet Plaintiffs' undefined expectations of consistency does not render Apple's representations misleading. Therefore, Plaintiffs failed adequately to allege why the representations were misleading and the district court did not err in holding that Plaintiffs failed to satisfy the pleading requirements of Rule 9(b).

2. The district court did not err when it dismissed Plaintiffs' CLRA, FAL, and UCL claims for failing to meet the pleading requirements of Rule 8(a) because it could not determine if a reasonable consumer would be misled by Apple's representations. Complaints alleging fraud subject to Rule 9(b) must also meet the plausibility requirement of Rule 8(a) under *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). *Cafasso*, 637 F.3d at 1055. To be plausible, claims must meet the "reasonable consumer" test by showing that members of the public are likely to be deceived. *Williams v. Gerber Prods. Co.*, 552 F.3d 934, 938 (9th Cir. 2008).

Because Plaintiffs cannot articulate what level of consistent performance Apple fraudulently represented, they similarly fail to define the level of consistency a reasonable consumer would expect. Therefore, Plaintiffs failed to satisfy the reasonable consumer test and the district court did not err in holding Plaintiffs' complaint deficient for failure to state a claim that satisfies Rule 8(a).

3. Because Plaintiffs elected to stand on their amended consolidated class action complaint, there was no abuse of discretion in dismissal with prejudice. *See Zucco Partners, LLC v. Digimarc Corp.*, 552 F.3d 981, 1007 (9th Cir. 2009).

Costs are awarded to Appellees.

AFFIRMED.

Fazio v. Apple, Inc. No. 14-15487

SILVERMAN, Circuit Judge, dissenting:

Contrary to what the majority says, the plaintiffs do not allege that "Siri did not work as consistently as they expected." In truth, they alleged that Siri did not work *as advertised.* In a false advertising case, that is a crucial distinction.

The plaintiffs set forth in their complaint, in great detail, the specific functions that the Apple commercials claimed that Siri will do. The plaintiffs then allege in plain English that Siri does not do those specific things. They then allege exactly what Siri does instead. That's specific enough for me.

The essence of Apple's attack on the sufficiency of the complaint is that plaintiffs did not plead that the commercials specifically state that Siri will work "consistently." With all due respect, that's baloney. The same can be said of virtually any advertisement. Does a commercial for a refrigerator specifically claim that the refrigerator will *consistently* keep the food cold? Does a commercial for a television specifically claim that it will *consistently* turn itself on and off when the power button is pushed? Does a commercial for a car specifically claim that it will *consistently* stop when the brakes are applied? Of course not, but a reasonable person would understand that such performance is implied, especially

when the function is demonstrated in a commercial. Faced with a motion to dismiss, the plaintiffs are entitled to the benefit of the reasonable inferences that can be drawn from the detailed facts they alleged in their complaint, especially when the cause of action does not require proof of falsity, just that the claims are misleading.

In this case, plaintiffs have alleged that Apple's commercials for the iPhone 4s specifically claim – indeed, the commercials *show* – that the phone will perform certain specific functions, and that the iPhone 4s does not perform those specific functions as specifically advertised. It may well be that, down the road, Apple can show that an occasional Siri mistake is not unacceptable performance – i.e., that the phone reasonably performs as advertised. I express no opinion on what the evidence will show; the only issue before us now is the sufficiency of the complaint. Taking the specific allegations in the light most favorable to the plaintiffs, the motion to dismiss should have been denied.

9th Circuit Case Number(s) 14-15487

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