

FILED

NOT FOR PUBLICATION

FEB 25 2016

UNITED STATES COURT OF APPEALS

MOLLY C. DWYER, CLERK  
U.S. COURT OF APPEALS

FOR THE NINTH CIRCUIT

In re: IPHONE 4S CONSUMER  
LITIGATION,

No. 14-15487

D.C. No. 4:12-cv-01127-CW

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

MEMORANDUM\*

Plaintiffs - Appellants,

v.

APPLE, INC., a California Corporation,

Defendant - Appellee.

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

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\* 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)

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\*\* 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.**

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

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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

-2-

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.

## United States Court of Appeals for the Ninth Circuit

Office of the Clerk  
95 Seventh Street  
San Francisco, CA 94103

### Information Regarding Judgment and Post-Judgment Proceedings

#### Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

#### Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

#### Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)

#### Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)

#### (1) A. Purpose (Panel Rehearing):

- A party should seek panel rehearing only if one or more of the following grounds exist:
  - ▶ A material point of fact or law was overlooked in the decision;
  - ▶ A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
  - ▶ An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

#### B. Purpose (Rehearing En Banc)

- A party should seek en banc rehearing only if one or more of the following grounds exist:

- ▶ Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
- ▶ The proceeding involves a question of exceptional importance; or
- ▶ The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

**(2) Deadlines for Filing:**

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- *See* Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

**(3) Statement of Counsel**

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

**(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))**

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or answer must be accompanied by a Certificate of Compliance found at Form 11, available on our website at [www.ca9.uscourts.gov](http://www.ca9.uscourts.gov) under *Forms*.
- You may file a petition electronically via the appellate ECF system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

### **Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)**

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at [www.ca9.uscourts.gov](http://www.ca9.uscourts.gov) under *Forms*.

### **Attorneys Fees**

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at [www.ca9.uscourts.gov](http://www.ca9.uscourts.gov) under *Forms* or by telephoning (415) 355-7806.

### **Petition for a Writ of Certiorari**

- Please refer to the Rules of the United States Supreme Court at [www.supremecourt.gov](http://www.supremecourt.gov)

### **Counsel Listing in Published Opinions**

- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
  - ▶ Thomson Reuters; 610 Opperman Drive; PO Box 64526; St. Paul, MN 55164-0526 (Attn: Jean Green, Senior Publications Coordinator);
  - ▶ and electronically file a copy of the letter via the appellate ECF system by using “File Correspondence to Court,” or if you are an attorney exempted from using the appellate ECF system, mail the Court one copy of the letter.

## United States Court of Appeals for the Ninth Circuit

### BILL OF COSTS

This form is available as a fillable version at:

<http://cdn.ca9.uscourts.gov/datastore/uploads/forms/Form%2010%20-%20Bill%20of%20Costs.pdf>.

**Note:** If you wish to file a bill of costs, it MUST be submitted on this form and filed, with the clerk, with proof of service, within 14 days of the date of entry of judgment, and in accordance with 9th Circuit Rule 39-1. A late bill of costs must be accompanied by a motion showing good cause. Please refer to FRAP 39, 28 U.S.C. § 1920, and 9th Circuit Rule 39-1 when preparing your bill of costs.

v.  9th Cir. No.

The Clerk is requested to tax the following costs against:

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Name of Counsel:

Attorney for:

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Costs are taxed in the amount of \$

Clerk of Court

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