

1 IN THE UNITED STATES DISTRICT COURT
 2 FOR THE NORTHERN DISTRICT OF CALIFORNIA

3
 4 IN RE IPHONE 4S CONSUMER
 LITIGATION,

No. C 12-1127 CW

5 ORDER GRANTING
 MOTION TO DISMISS
 6 (Docket No. 32)

7 Defendant Apple, Inc. moves to dismiss the amended class
 8 action complaint (ACAC) filed by Plaintiffs Frank M. Fazio,
 9 Carlisa S. Hamagaki, Daniel M. Balassone, and Benjamin Swartzmann.
 10 Plaintiffs oppose Apple's motion. Having considered the arguments
 11 presented by the parties in their papers and at the hearing, the
 12 Court GRANTS Apple's motion to dismiss.

13 BACKGROUND

14 Unless otherwise noted, the factual background is taken from
 15 Plaintiffs' ACAC, taken as true for purposes of a motion to
 16 dismiss. On October 4, 2011, Apple introduced the iPhone 4S
 17 mobile phone at a press conference. ACAC ¶¶ 3-4. At the time the
 18 iPhone 4S was launched, it was priced starting at \$199, while the
 19 previous iPhone model, the iPhone 4, was priced starting at \$99.
 20 Id. ¶ 14. Apple distinguished the iPhone 4S from previous iPhone
 21 models such as the iPhone 4 in part by the inclusion of a voice-
 22 activated personal assistant feature named "Siri." Id. ¶ 4.
 23 Apple called Siri "the coolest feature of the new iPhone 4S." Id.
 24 ¶ 34. The October 4, 2011 presentation featured an interactive
 25 demonstration where Siri was asked to answer a series of questions
 26 and to perform various tasks (Siri presentation). Id. For
 27 example, Siri was asked to set a wake up alarm, find a restaurant
 28 in a specific city, and tell the user about the weather. Id.

1 Siri responded to each question correctly. Id. The presenter
2 stressed that Siri can understand general words and "conceptual
3 questions," and respond by "get[ting] answers, find[ing] facts and
4 even perform[ing] complex calculations." Id. ¶ 33-34. The
5 presenter noted that Siri was still in "beta" and that one
6 couldn't ask Siri everything. Docket No. 33-3 at 72:56, 82:49,
7 86:41.¹

8 Around the same time, Apple issued a press release touting
9 Siri. ACAC ¶ 33. The press release stated, "iPhone 4S also
10 introduces Siri, an intelligent assistant that helps you get
11 things done just by asking. Siri understands context allowing you
12 to speak naturally when you ask it questions." Id. The press
13 release listed a number of Siri's functions, noting that it could
14 help "make calls, send text messages or email, schedule meetings
15 and reminders, make notes, search the Internet, find local
16 businesses, get directions and more." Id.

17 I. Apple's marketing campaign featuring Siri

18 Shortly after the announcement of the iPhone 4S and Siri,
19 Apple began a marketing campaign of presentations, e-mail
20 solicitations, and video demonstrations highlighting Siri's
21 performance and functionalities. See id. ¶¶ 5-6.

22 Apple sent out emails to potential consumers showcasing Siri.
23 For example, on or about October 4, 2011, Apple sent out an iPhone
24 4S pre-order email that included a link to a video on Apple's
25 website demonstrating Siri's capabilities. Id. ¶¶ 36-37. During

26
27 ¹ The Court previously granted Apple's request for judicial
28 notice as to these documents and others to which this order
refers. See Docket No. 68 at 12-13.

1 the video, Siri was described as an "amazing assistant that
2 listens to you, understands you, can answer your questions and can
3 even accomplish tasks for you . . . A lot of devices can recognize
4 the words you say, but the ability to understand what you mean and
5 act on it, that's the breakthrough with Siri." Id. ¶¶ 38. The
6 iPhone 4S video also contained multiple Siri demonstrations. Id.
7 ¶ 37. For example, Siri was asked to find a restaurant near a
8 particular location and to schedule a business meeting for a
9 certain time, to which Siri responded appropriately. Id.

10 On December 1, 2011, Apple sent out another marketing email
11 encouraging consumers to purchase the iPhone 4S for holiday gift-
12 giving purposes (iPhone 4S holiday email), highlighting that it
13 came with "an all-new 8MP camera, iOS 5, iCloud, and Siri: the
14 intelligent assistant you can ask to make calls, send texts, set
15 reminders, and more." Id. ¶ 47. Apple's website, www.apple.com,
16 contained very similar descriptions, adding that "Siri understands
17 what you say and knows what you meant" and that users could
18 "[j]ust talk the way [they] talk." Id. ¶ 40.

19 Apple also launched TV advertisements focused solely on Siri,
20 depicting individuals using Siri's functions. Id. ¶ 7, 42. Seven
21 out of ten commercials Apple used to market the iPhone 4S focused
22 solely on Siri. Id. ¶ 42.

23 In the commercial dubbed "Introducing Siri," which began
24 airing around October 4, 2011, Siri was able to understand,
25 answer, and perform requests with ease. Id. ¶ 44. For example, a
26 user asked Siri, "What's the traffic like around here?" to which
27 Siri responded, "Here's the traffic" and provided a map display of
28 traffic around the user's location. Id. Upon the user's command,

1 Siri also read text messages aloud, sent text messages, played
2 music, gave weather information, converted ounces into cups, and
3 set the iPhone 4S internal timer. Id. ¶ 45.

4 The "Siri, Snow Today" commercial began airing on or about
5 October 31, 2011, and showed Siri answering questions and
6 performing commands for four different individuals, including a
7 child. Id. ¶ 46. When asked, "What's my day look like?" Siri
8 responded, "Not bad, only two meetings today." Id. Siri also
9 provided directions to "Belvedere Hotel." Id. When asked, "Do
10 you think it will snow today?," Siri answered, "It sure looks like
11 snow today" and displayed the weather forecast. Id.

12 On or about February 10, 2012, Apple started airing "Road
13 Trip," a Siri-focused commercial depicting a couple asking Siri
14 several questions while traveling to Santa Cruz, California. Id.
15 ¶ 48. They asked, "Where is the best barbeque in Kansas City?"
16 "Is there a rodeo in Amarillo today?" and "How big is the Grand
17 Canyon?" Id. When asked for nearby gas stations that the couple
18 could walk to, Siri answered, "I found two gas stations fairly
19 close to you" and provided the names and star ratings of two gas
20 stations. Id. When asked, "What does Orion look like?" Siri
21 responded with a map of the Orion constellation, stating, "I found
22 this for you." Id.

23 In the "Rock God" commercial which began airing on or about
24 February 10, 2012, a guitar player user asked Siri how to play a
25 number of songs, by querying, for example, "How do I play London
26 Calling?" and "How do I play Whole Lotta Love?" Id. ¶ 49. In
27 response to these questions, Siri provided the proper notes,
28 chords, and sheet music. Id. The user then commanded, "Tell

1 Julie and Kate our band is playing at the garage tonight," which
2 prompted Siri immediately to formulate a text message to "Julie,
3 Kate" that read, "Our band is playing at the garage tonight." Id.
4 ¶ 50.

5 In sum, each of these commercials depicted users asking Siri
6 to answer questions or perform commands, which Siri did promptly
7 and with ease. Each commercial, however, contained a disclaimer
8 at the end stating "sequences shortened." Docket No. 33-6.

9 Plaintiffs allege that Apple's marketing gave consumers the
10 false expectation that Siri could perform the basic tasks depicted
11 (e.g. making appointments, finding restaurants, crafting text
12 messages, displaying guitar chords, searching information) in
13 Apple's advertisements "on a consistent basis." Id. ¶ 6-7. In
14 reality, Siri is unable to perform many of these tasks "on a
15 consistent basis." Id. ¶ 7. Others have found Siri to be
16 similarly disappointing. Huffington Post published an article
17 entitled, "Apple's Siri 'Rock God' Commercial: How Accurate Is It,
18 Really?" which included a video wherein a Huffington Post blogger
19 repeats word for word every voice command prompt in the "Rock God"
20 commercial. Id. ¶ 83. Siri was only able to respond to two of
21 seven prompts on the first try. Id. ¶ 84.

22 II. Plaintiffs

23 A. Fazio

24 On November 19, 2011, Fazio purchased an iPhone 4S after
25 viewing the "Introducing Siri" and "Siri, Snow Today" commercials
26 and looking through Apple's website. Id. ¶ 54-55. Fazio claims
27 the representations made in the advertisements and website led him
28 to believe that Siri would be able to understand his plain

1 language questions and commands and provide an "adequate response"
2 "on a consistent basis." Id. ¶ 56. Instead, Fazio found that
3 Siri did not work as he expected it would, often pausing for a
4 long period of time and not responding, or responding with "I
5 don't understand." Id. ¶ 57. For example, Fazio asked Siri,
6 "Which has more fat?" and mentioned two different McDonald's
7 sandwiches. Id. ¶ 58. Siri waited for a long period of time and
8 then stated "I don't understand." Id. Siri also could not
9 provide the meaning of the term "guided reading" and could not
10 locate two places called "Dr. Fiasconaro's office" or "Funtasia."
11 Id. Siri failed to meet Fazio's expectation that it would be able
12 to perform the features displayed in Apple advertising "on a
13 consistent basis." Id. ¶ 59. Fazio paid a premium on the iPhone
14 4S based on the utility of the Siri feature, and would not have
15 done so if he had not relied on Apple's allegedly false and
16 misleading statements. Id. ¶¶ 20, 60.

17 B. Hamagaki

18 After seeing and relying on the "Introducing Siri"
19 commercial, the iPhone 4S video, the iPhone 4S pre-order email,
20 and Apple's representations on its website, Hamagaki pre-ordered
21 her iPhone 4S through Apple's website and on November 6, 2011
22 purchased her iPhone 4S for \$199. Id. ¶¶ 61, 63. Hamagaki asked
23 questions she believed were very similar to the ones asked in
24 Apple's advertisements, such as "Where is Mason Park?" and "Where
25 is Balboa Park?" Id. ¶ 66. Siri paused for a long period of time
26 and then responded with "I don't understand," even though the
27 addresses of those locations are available on www.google.com. Id.
28 Siri failed to meet Hamagaki's expectation that it would be able

1 to perform the features displayed in Apple advertising "on a
2 consistent basis." Id. ¶ 64. Hamagaki paid a premium on the
3 iPhone 4S based on the utility of the Siri feature, and would not
4 have done so if she had not relied on Apple's allegedly false and
5 misleading statements. Id. ¶¶ 22, 68.

6 C. Balassone

7 On October 20, 2011, after seeing and relying on the
8 "Introducing Siri" commercial and Apple's representations during
9 the iPhone 4S presentation, Balassone purchased an iPhone 4S for
10 \$299. Id. ¶ 69. Balassone asked Siri questions similar to those
11 he saw in Apple's advertisements, but found that Siri was not
12 working properly. Id. ¶ 73. For example, Balassone attempted to
13 mirror the commands in Apple's "Rock God" television
14 advertisement, such as, "How do you play an A chord?" to which
15 Siri responded, "OK, how about a web search for 'how do you plan a
16 quart?'" Id. ¶ 73. When Balassone asked Siri, "How do you play a
17 B minor chord?" Siri said "looking for B minor chord," followed
18 by "still thinking," and eventually, "Sorry, I couldn't find B
19 minor chord in your music." Id. Siri did not meet his
20 expectation that it could answer the same type of questions
21 demonstrated in Apple's advertisements. Id. ¶¶ 77-81. Balassone
22 paid a premium on the iPhone 4S based on the utility of the Siri
23 feature, and would not have done so if he had not relied on
24 Apple's allegedly false and misleading statements. Id. ¶¶ 24, 75.

25 D. Swartzman

26 On January 7, 2012, after seeing and relying on the iPhone 4S
27 pre-order email, the iPhone 4S holiday email, and the iPhone 4S
28 video, Swartzman purchased an iPhone 4S for \$199. Id. ¶ 76-77.

1 Swartzman found that Siri often could not perform tasks or answer
2 questions similar to those demonstrated in Apple's advertisements.
3 Id. ¶ 78. For example, Siri often gave the wrong names or contact
4 information of people Swartzman tried to call or email. Id. ¶ 80.
5 When Swartzman asked Siri for the weather in Palm Springs, Siri
6 did not understand. Id. When Swartzman asked, "When is St.
7 Patrick's day?" Siri responded with, "Sorry, I don't understand
8 'When is St. Patrick's day.'" Id. Swartzman paid a premium based
9 on the inclusion of the Siri feature, and would not have done so
10 if he had not relied on Apple's allegedly false and misleading
11 statements. Id. ¶¶ 26, 82.

12 III. Procedural history

13 On March 6, 2012, Fazio filed a consolidated class action
14 complaint against Apple. Docket No. 1. On March 20, 2012,
15 Balassone and Swartzman initiated a separate action in this
16 district. Case No. 12-1384. The parties jointly moved to
17 consolidate the two cases, which the Court granted on March 29,
18 2012. Docket No. 14. On April 10, 2012, Plaintiffs amended their
19 complaint, adding Hamagaki as Plaintiff. See Docket No. 18. On
20 May 10, 2012, Apple filed a motion to dismiss, which the Court
21 granted, but with leave to amend. See Docket No. 68. Plaintiffs
22 filed their ACAC, asserting claims on behalf of the class for
23 (1) violation of California's Consumer Legal Remedies Act (CLRA),
24 Cal. Civil Code. § 1750 et seq., (2) violation of California's
25 False Advertising Law (FAL), Cal. Bus. & Prof. Code § 17500, et
26 seq., (3) violation of California's Unfair Competition Law (UCL),
27 Cal. Bus. & Prof. Code § 17200, et seq., (4) breach of express
28

1 warranty; (5) intentional misrepresentation; and (6) negligent
2 misrepresentation. See ACAC.

3 LEGAL STANDARD

4 A complaint must contain a "short and plain statement of the
5 claim showing that the pleader is entitled to relief." Fed. R.
6 Civ. P. 8(a). On a motion under Rule 12(b)(6) for failure to
7 state a claim, dismissal is appropriate only when the complaint
8 does not give the defendant fair notice of a legally cognizable
9 claim and the grounds on which it rests. Bell Atl. Corp. v.
10 Twombly, 550 U.S. 544, 555 (2007). In considering whether the
11 complaint is sufficient to state a claim, the court will take all
12 material allegations as true and construe them in the light most
13 favorable to the plaintiff. NL Indus., Inc. v. Kaplan, 792 F.2d
14 896, 898 (9th Cir. 1986). However, this principle is inapplicable
15 to legal conclusions; "threadbare recitals of the elements of a
16 cause of action, supported by mere conclusory statements," are not
17 taken as true. Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009)
18 (citing Twombly, 550 U.S. at 555).

19 In determining whether to allow leave to amend, the court
20 considers four factors: "bad faith, undue delay, prejudice to the
21 opposing party, and the futility of amendment." Cahill v. Liberty
22 Mut. Ins. Co., 80 F.3d 336, 339 (9th Cir. 1996).

23 DISCUSSION

24 I. Fraud-based claims

25 The UCL prohibits "unlawful, unfair or fraudulent business
26 act[s] or practice[s] and unfair, deceptive, untrue or misleading
27 advertising." Kearns v. Ford Motor Co., 567 F.3d 1120, 1125 (9th
28 Cir. 2009) (quoting Cal. Bus. & Prof. Code § 17200) (internal

1 quotation marks omitted). The FAL makes it unlawful to make or
2 disseminate any "untrue or misleading" statement "in any newspaper
3 or other publication, or any advertising device." Cal. Bus. &
4 Prof. Code § 17500. The CLRA makes unlawful any "unfair methods
5 of competition and unfair and deceptive acts or practices
6 undertaken by any person in a transaction intended to result or
7 which results in the sale . . . of goods or services to any
8 consumer." Kearns, 567 F.3d at 1125 (quoting Cal. Civ. Code
9 § 1770). Claims of deceptive labeling under these California
10 statutes are evaluated by whether a "reasonable consumer" would be
11 likely to be deceived. Williams v. Gerber Prods. Co., 552 F.3d
12 934, 938 (9th Cir. 2008) (citing Freeman v. Time, Inc., 68 F.3d
13 285, 289 (9th Cir. 1995)). Common law claims for fraud and
14 negligent misrepresentation similarly require that the consumer
15 justifiably rely on a representation that is false or subject to a
16 misleading omission. Robinson Helicopter Co., Inc. v. Dana Corp.,
17 34 Cal. 4th 979, 990 (2004) (common law fraud); Century Sur. Co.
18 v. Crosby Ins., Inc., 124 Cal. App. 4th 116, 129 (2004) (negligent
19 misrepresentation).

20 A. Rule 9(b)

21 "In all averments of fraud or mistake, the circumstances
22 constituting fraud or mistake shall be stated with particularity."
23 Fed. R. Civ. P. 9(b). Because Plaintiffs allege that Apple
24 deceived them, their allegations sound in fraud and are subject to
25 the requirements of Rule 9(b). Kearns, 567 F.3d at 1125. To
26 satisfy the heightened pleading standards of Rule 9(b), Plaintiffs
27 must describe "the who, what, when, where, and how" of the
28 misconduct charged. Id. at 1124. Plaintiffs must describe the

1 alleged fraud in specific enough terms "to give defendants notice
2 of the particular misconduct so that they can defend against the
3 charge." Id.

4 Apple contends that Plaintiffs' ACAC still fails to describe
5 several of the key elements of the alleged misrepresentation. The
6 Court previously dismissed Plaintiffs' complaint on this ground:

7 However, Apple is correct that Plaintiffs have not alleged
8 sufficiently how these statements were misrepresentative or
9 fraudulent, and how Siri failed to perform as advertised.
10 For example, Plaintiffs do not make clear in the CCAC whether
11 their theory is that the advertisements were misleading,
12 because Siri never responds to questions or is always
inaccurate, does so more slowly than shown in the ads, uses
more data than advertised or is less consistent than shown in
the ads.

13 Docket No. 68 at 23. Moreover, the Court stated that the
14 complaint must state "what particular statements" were false or
15 misleading, and how Siri failed to meet those representations.
16 Docket No. 68 at 23. See also Maxwell v. Unilever v. U.S., Inc.,
17 2013 WL 1435232, at *2, *5 (N.D. Cal.) (dismissing UCL, FAL, and
18 CLRA claims for failure to satisfy Rule 9(b) where plaintiff did
19 not "unambiguously specify . . . the particular statements
20 Plaintiff allegedly relied on when making her purchases"); Garcia
21 v. Sony Computer Entm't Am., LLC, 859 F. Supp. 2d 1056, 1063 (N.D.
22 Cal. 2012) (holding complaint to be insufficient where it
23 generally asserted that statements on the product's packaging and
24 on Sony's website were misleading, but did not "specifically aver
25 that Garcia relied on those particular statements"). Rule 9(b)
26 therefore requires Plaintiffs to aver specifically the statements
27 they relied upon in making their purchases, what is false or
28 misleading about the statements, and why those statements turned

1 out to be false. Decker v. GlenFed, Inc. (In re GlenFed, Inc.
2 Sec. Litig.), 42 F.3d 1541, 1548 (9th Cir. 1994) (vacated on other
3 grounds).

4 Plaintiffs contend that they have now crystallized their
5 theory. They explain that, after viewing certain Apple
6 advertisements about Siri, they were "led to believe that Siri
7 could function on a consistent basis as a personal assistant by
8 understanding spoken questions and/or commands, knowing what those
9 questions and/or commands meant, and by providing an adequate
10 response to them." ACAC ¶ 13. Based on Apple's statements,
11 Plaintiffs believed they could use Siri to "make appointments,
12 find restaurants, craft text messages, learn the guitar chords to
13 classic rock songs and how to tie a tie," "make calls," "set
14 reminders," and more. Id. ¶ 7. Plaintiffs also believed Apple's
15 representation that Siri could understand "context" and
16 "understand[] what you mean and act on it." Id. ¶¶ 33, 38, 41.
17 Plaintiffs also relied upon Apple's commercials depicting Siri
18 performing without issues. The truth, however, was that Siri
19 could not answer similar questions "on a consistent basis" and
20 instead "frequently" gave Plaintiffs the wrong answer. See id.
21 ¶¶ 56, 57, 59, 64, 65, 67, 71, 72, 74, 77, 78, 81. In other
22 words, Plaintiffs believed that Siri would be able to respond to
23 certain types of questions and commands, and further, that it
24 would be able to do so "on a consistent basis."

25 Plaintiffs still fail to isolate the particular statements at
26 issue and explain each statement's false and misleading nature.
27 Although the ACAC now names the advertisements that each
28

1 individual Plaintiff viewed,² this is not equivalent to what the
2 Court required, which is to identify the specific statements
3 within those advertisements that were false and misleading.
4 Although Plaintiffs generally describe the contents of those
5 commercials or advertisements in a separate section of the ACAC,
6 that does not give Apple sufficient notice of which
7 representations caused the deception alleged. The descriptions of
8 those commercials and advertisements include a plethora of
9 statements, including demonstrations of Siri's functionalities as
10 well as general marketing statements about Siri. See ACAC ¶ 38
11 (e.g., "It's like this amazing assistant that listens to you,
12 understands you"). Apple would be hard-pressed to defend against
13 an allegation that the overall impact of these commercials and
14 advertisements misled Plaintiffs. That does not meet the level of
15 specificity required by Rule 9(b). Additionally, because
16 Plaintiffs have not isolated specific statements, they also have
17 not explained how those statements were false or misleading.

18 This problem is especially pronounced in regards to the
19 latter half of Plaintiffs' theory, which is that Siri could
20 perform with consistency. Descriptions of the product as "the
21 coolest feature," "this amazing assistant," "breakthrough," and
22 "an intelligent personal assistant" are mere puffery and are not
23 actionable. As the Court has already observed, while
24 "misdcriptions of specific or absolute characteristics of a
25

26 ² See, e.g., ACAC ¶ 55 ("Fazio saw and reasonably relied upon
27 Apple's 'Introducing Siri' and 'Siri, Snow Today' commercials, as
28 well as Apple's representations about Siri made on Apple's
website, www.apple.com.").

1 product" are actionable, "[a]dvertising that merely states in
2 general terms that one product is superior" is not. Docket No. 68
3 at 25.

4 Plaintiffs do not allege any specific statement by Apple that
5 expressly indicates that Siri would be able to answer every
6 question, or do so consistently. See McKinney v. Google, Inc.,
7 2011 WL 3862120, at *5 (N.D. Cal.) (dismissing complaint because
8 plaintiff failed to identify specifically any representation "that
9 the Nexus One would maintain consistent 3G connectivity"). The
10 only statements that come close to stating explicitly that Siri
11 would perform "consistently" are those that describe Siri as a
12 "breakthrough" and an "intelligent" product that "understands what
13 you mean." But the Court has already held that such statements
14 are non-actionable puffery. Docket No. 68 at 25-27 (while
15 Plaintiffs may target "misdescriptions of specific or absolute
16 characteristics of a product," they may not rely on advertising
17 "that merely states in general terms that one product is superior"
18 in making their case).

19 Plaintiffs could instead show that Apple made a "perfectly
20 true statement" "couched in such a manner that [was] likely to
21 mislead or deceive the consumer," for example, by failing to
22 disclose other relevant information. Garcia, 859 F. Supp. 2d at
23 1062. Plaintiffs appear to argue that, because the advertisements
24 portrayed Siri responding to various questions and commands
25 without issues, they expected real-life Siri to perform in a
26 similarly flawless fashion every time. As Plaintiffs note, the
27 commercials depicted Siri performing "without a single hiccup" and
28 "without complications," giving Plaintiffs the impression that

1 Siri would always operate adequately and "on a consistent basis."
2 ACAC ¶ 43, 90. But Plaintiffs fail to plead that theory with
3 sufficient particularity.

4 The standard provided by Plaintiffs, "on a consistent basis,"
5 is unacceptably ambiguous. The Court warned Plaintiffs at the
6 hearing on Apple's first motion to dismiss that Plaintiffs would
7 have to provide at least an estimate of Siri's level of
8 performance in order to give proper notice of their charge. The
9 Court stated, "[I]f you're going to say sometime it does, but
10 sometimes it doesn't, it seems like we need something a little
11 more specific than that, like how often or why not?" Tr. 7:22-25.
12 The Court again reiterated that Plaintiffs would have to say how
13 often they expected Siri to succeed, for example as measured by a
14 certain percentage: "If you're not saying that it always has to
15 answer every question correctly, then you're necessarily saying
16 sometimes it does, and sometimes it doesn't. And then the
17 question becomes how often? Is [] 90 percent good enough? . . .
18 [I]s 50 percent good enough?" Id. at 8:7-12. Plaintiffs do not
19 elaborate on the meaning of the term "on a consistent basis"
20 anywhere in their complaint or their argument. Apple and the
21 Court are left to guess whether Plaintiffs expected Siri to
22 operate without fail, or more often than not, or at any other
23 level below perfection. Apple, for one, argues that consistency
24 denotes a standard of perfection.³ Plaintiffs disagree, but avoid

25 ³ Apple bases its interpretation on the definition of
26 "consistent" as "marked by harmony, regularity, or steady
27 continuity: free from variation or contradiction." Merriam
28 Webster, <http://Merriam-webster.com/dictionary/consistent> (last
visited Jan. 16, 2014).

1 providing any counter-definition, perpetuating the ambiguity.⁴
2 The Court cannot determine whether Plaintiffs have properly plead
3 that a misrepresentation occurred, including the questions of
4 whether Plaintiffs were justified in inferring such a standard
5 from the advertisements, whether a reasonable consumer would
6 perceive the same standard, and whether Siri failed to meet such a
7 standard, and how Apple would be shown to have known Siri did not
8 meet the expected standard. Including this information is
9 necessary to give Apple notice of what level of performance it
10 must defend, framing the dispute for summary judgment and trial.
11 Despite the Court's explicit admonition to do so, however,
12 Plaintiffs declined to provide any kind of definition, and further
13 did not elaborate on the definition of "consistent" when
14 challenged by Apple.

15 Plaintiffs' fraud-based claims must therefore again be
16 dismissed for lack of specificity.

17 B. Rule 8(a)

18 Apple next contends that Plaintiffs' UCL, FAL, and CLRA
19 claims should be dismissed because no reasonable consumer would
20 believe that Siri would always operate perfectly. It is
21 well-established that the plausibility of false or misleading
22 advertising and unfair business practices claims "must be
23

24 ⁴ "To be clear, nowhere in the [ACAC] is it alleged that Siri
25 would 'answer all questions perfectly regardless of the
26 circumstances' or that 'Siri would perfectly answer all questions
27 and perform all commands in all possible scenarios,' as Apple
28 suggests. Apple's attacks on such non-existent allegations should
be ignored outright." Docket No. 74 at 18 (internal citations
omitted).

1 evaluated from the vantage of a reasonable consumer." Williams,
2 552 F.3d at 938. Courts must apply the "reasonable consumer" test
3 and ascertain whether plaintiffs have demonstrated that members of
4 the public are likely to be deceived. Id. At the motion to
5 dismiss stage, plaintiffs must put forth factual allegations which
6 "raise a right to relief above the speculative level." Id.
7 (quoting Twombly, 550 U.S. 544).

8 Plaintiffs' allegations are that Apple's advertising campaign
9 led them to believe that Siri would operate "on a consistent
10 basis" as an intelligent assistant, but often failed to do so. As
11 noted previously, Plaintiffs do not describe with particularity
12 the bounds of their allegations. Without a clear concept of what
13 level of performance "consistent" denotes, the Court cannot
14 properly determine if a reasonable consumer would be deceived, or
15 if Plaintiffs have stated a claim.

16 Assuming for purposes of discussion that "consistency"
17 indicates operation that is virtually perfect, Plaintiffs cannot
18 show that a reasonable consumer would expect such a level of
19 performance based on the advertisements alleged. Apple made no
20 promise that Siri would operate without fail. A reasonable
21 consumer would understand that commercials depicting the products
22 they are intended to promote would be unlikely to depict failed
23 attempts. Absent a representation that a product feature would
24 perform at a certain level, a reasonable consumer is unlikely to
25 be deceived by advertising that merely demonstrates a product has
26 such a feature. See McKinney, 2011 WL 3862120, at *5 (N.D. Cal.)
27 (although phones were advertised as capable of connecting to a 3G
28 network, defendants never claimed that the phone would maintain 3G

1 connectivity for any specified period of time, and so a reasonable
2 consumer would not be likely to be deceived). See also Stuart v.
3 Cadbury Adams USA, LLC, 458 F. App'x 689, 691 (9th Cir. 2011)
4 ("[o]nly an unreasonable consumer would be confused or deceived by
5 Cadbury's failure to clarify that Trident White gum works only if
6 consumers continue to brush and floss regularly"); Baltazar, 2011
7 WL 6747884, at *3 (even under "the most liberal pleading
8 standard," brief depictions of the iPad being used or being taken
9 outdoors "cannot be construed as a promise that the device will
10 operate relentlessly outdoors in sunlight").

11 II. Breach of express warranty

12 To plead a claim for breach of express warranty under
13 California law, a plaintiff must allege "that the seller:
14 '(1) made an affirmation of fact or promise or provided a
15 description of its goods; (2) the promise or description formed
16 the basis of the bargain; (3) the express warranty was breached;
17 and (4) the breach caused injury to the plaintiff.'" Bilodeau v.
18 McAfee, Inc., 2013 U.S. Dist. LEXIS 89226, at *38 (N.D. Cal.)
19 (citations omitted). In addition, a plaintiff must plead that he
20 or she notified Apple of the breach. Cal. Com. Code § 2607(3)(A).
21 A buyer who fails to comply with the notice requirement is "barred
22 from any remedy." Id.

23 Apple argues that Plaintiffs have not properly alleged
24 notice. "To avoid dismissal of a breach of contract or breach of
25 warranty claim in California, '[a] buyer must plead that notice of
26 the alleged breach was provided to the seller within a reasonable
27 time after discovery of the breach.'" Alvarez v. Chevron Corp.,
28 656 F.3d 925, 932 (9th Cir. 2011) (quoting Stearns v. Select

1 Comfort Retail Corp., 763 F. Supp. 2d 1128, 1142 (N.D. Cal. 2010))
2 (formatting in original). The notice requirement "is designed to
3 allow the seller the opportunity to repair the defective item,
4 reduce damages, avoid defective products in the future, and
5 negotiate settlements." Cardinal Health 301, Inc. v. Tyco
6 Electronics Corp., 169 Cal. App. 4th 116, 135 (2008). Notice also
7 serves to alert the seller of the need to preserve evidence and
8 prepare to defend suit, and further protects against stale claims.
9 Id. The question of whether notice is reasonable is determined in
10 light of the circumstances. Id. at 136.

11 The Court previously ruled that Plaintiffs failed to plead
12 notice, but gave Plaintiffs leave to amend. Plaintiffs' ACAC
13 alleges that, on March 16, 2012, Balassone and Swartzman sent
14 Apple's Chief Executive Officer Tim Cook a letter notifying him of
15 Apple's alleged breach regarding Siri's functionalities. ACAC ¶
16 111, Ex. A. On March 6, 2012, Fazio sent a similar letter. ACAC
17 ¶ 111, n.26. Both letters advised that Plaintiffs would take
18 further action if the breach was not cured within thirty days.
19 See id. However, Fazio filed suit on March 6, 2012, the same day
20 as he gave notice. Balassone and Swartzman filed suit a mere four
21 days after giving notice, on March 20, 2012. Plaintiffs therefore
22 failed to give reasonable notice because they gave little or no
23 opportunity for Apple to cure the alleged breach, contradicting
24 their letters. See Alvarez v. Chevron Corp., 656 F.3d 925, 932
25 (9th Cir. 2011) (concluding that notice was unreasonable under
26 section 2607(3)(A) because the notice letter was sent to
27 defendants simultaneously with the complaint). Plaintiffs did not
28 permit Apple time to "repair or remedy the problem by providing

1 the opportunity to negotiate a settlement," which is the objective
2 of the notice requirement. Id. (internal quotations omitted).

3 Further, a breach of express warranty claim requires that the
4 plaintiff identify a "specific and unequivocal written statement"
5 about the product that constitutes an "explicit guarantee[]." Maneely v. Gen. Motors Corp., 108 F.3d 1176, 1181 (9th Cir. 1997).

6 Plaintiffs have not changed a word of their breach of warranty
7 obligations.⁵ The Court advised Plaintiffs that they would have
8 to allege "which particular commercials and webpages they each
9 relied upon, must describe the content of those advertisements and
10 pages with particularity and must allege with specificity their
11 reasonable reliance thereon." Docket No. 68 at 36. Plaintiffs
12 merely rely on the rest of the complaint to show that Siri did not
13 perform "as advertised." The Court has already found that
14 Plaintiffs' fraud allegations are either non-actionable puffery or
15 inadequately plead. Without specifying what the express written
16 statements are, and relying on inadequate fraud allegations,
17 Plaintiffs do not properly state a claim for breach of express
18 warranty.
19

20 III. Leave to amend

21 In dismissing the previous complaint, the Court advised
22 Plaintiffs of exactly what they must allege for both their fraud-
23 based claims and breach of express warranty claim, yet Plaintiffs
24

25 ⁵ Compare ACAC ¶ 135 with Docket No. 18 ¶ 104 ("The terms of
26 the contract include the promises and affirmations of fact and
27 express warranties made by Defendant on its website and through
28 its marketing and advertising campaign that the iPhone 4S's Siri
feature performs as advertised, as described above.")

1 were unable to do so.⁶ Although Plaintiffs request leave to
2 amend, they do not specify any additional facts they could provide
3 in their amended complaint that would state a claim. See Docket
4 No. 74 at 25 n.12. Because Plaintiffs have given no reason to
5 believe that a fourth amended complaint would succeed in stating a
6 claim, the ACAC is dismissed without leave to amend.

7 CONCLUSION

8 Plaintiffs' ACAC is dismissed with prejudice.

9 IT IS SO ORDERED.

10
11 Dated: 2/14/2014

12 
13 _____
14 CLAUDIA WILKEN
15 United States District Judge
16
17
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23 _____
24 ⁶ See Arroyo v. Chattem, Inc., 926 F. Supp. 2d 1070, 1081
25 (N.D. Cal.) ("Plaintiff has already had an opportunity to amend
26 her complaint and was specifically instructed to add facts
27 describing "the circumstances [i.e., who, what, when, where, and
28 how] of the purchase and [Plaintiff's] reliance on the particular
statements that were made in connection with the product . . .
Because Plaintiff's FAC does not state claims with the required
particularity, the Court GRANTS Defendant's Motion to Dismiss,
this time with prejudice.").