

Gregory D. Wolflick
WOLFLICK & SIMPSON
130 North Brand Blvd., Suite 410
Glendale, California 91203
818.243.8300
818.243.0122 - Facsimile

Donald W. Stewart (Admitted *Pro Hac Vice*)
STEWART & STEWART, P.C.
P.O. Box 2274
Anniston, Alabama 36202
(256) 237-9311
(256) 237-0713 – Facsimile

J. Paul Lynn (Admitted *Pro Hac Vice*)
STEWART & STEWART, P.C.
1826 3rd Avenue North, Suite 300
Bessemer, AL 35020
(205) 425-1166
(205) 425-5959 - Facsimile

Counsel for Plaintiffs

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA**

NANCY ROMINE MINKLER,)	
Individually and on Behalf of All)	Case No. 5:13-cv-05332-EJD
Others Similarly Situated,)	
)	PLAINTIFF’S OPPOSITION TO
Plaintiffs)	APPLE’S MOTION TO DISMISS
)	CLASS ACTION COMPLAINT
v.)	
)	
)	Judge: The Honorable Edward J. Davila
APPLE, INC.,)	
)	
)	
Defendant.)	

TABLE OF CONTENTS

I. INTRODUCTION4

II. STATEMENT OF FACTS.....5

III. LEGAL STANDARD.....6

IV. ARGUMENT.....7

V. CONCLUSION.....11

TABLE OF AUTHORITIES

Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009)7

Bardin v. DaimlerChrysler Corp., 136 Cal. App. 4th 1255, 1268 (2006).....12

Bell Atl. Corp. v. Twombly, 550 U.S. 544, 547 (2007)7

Cal-Tech Commc’ns, Inc. v. Los Angeles Cellular Tel. Co., 20 Cal. 4th 163 (1999).....12

Colony Cove Props., LLC v. City of Carson, 640 F.3d 948, 955 (9th Cir. 2011).....7

Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv., Inc.,
911 F.2d 242, 246 (9th Cir. 1990).....10

Cooper v. Pickett, 137 F.3d 616, 627 (9th Cir. 1998).....8

Henderson v. J.M. Smucker Co., No. CV-10-4524-GHK-VBK,
2011 WL 1050637, at *3 (C.D. Cal. Mar. 17, 2011).....9

Keegan v. Am. Honda Motor Co., 838 F. Supp. 2d 929, 949–50 (C.D. Cal. 2012).....12

Neubronner v. Milken, 6 F.3d 666, 671–72 (9th Cir. 1993).....8

Sanders v. Apple, Inc., 672 F. Supp. 2d 978, 989 (N.D. Cal. 2009).....12

Starr v. Baca, 652 F.3d 1202, 1212 (9th Cir. 2011)7

Williams v. Gerber Prods. Co., 552 F.3d 934, 938 (9th Cir. 2008)... ..8

I. INTRODUCTION

Plaintiff's Class Action Complaint ("CAC") (Dkt. No. 1) states claims for relief pursuant to Federal Rules of Civil Procedure 8 and 9(b). The CAC provides, in detail, how Defendant Apple, Inc.'s ("Apple"), marketing and advertising campaign for its mapping application, Apple Maps ("Maps"), was based on false and misleading statements. Through numerous press releases, press conferences, website representations, and direct email solicitations, Apple solicited consumers to purchase its devices by representing that the Maps feature was an innovative, accurate, and versatile navigational tool. The Maps application has been featured on the iPhone operating system since the release of the first-generation iPhone on June 29, 2007, and was powered by Google Maps from then until September 19, 2012. A new version was announced by former Apple executive, Scott Forstall, in a keynote address at Apple's Worldwide Developers Conference on June 11, 2012.

The new version would use Apple's own mapping system with data provided by a number of providers instead of Google Maps, mainly through Dutch manufacturer of navigation systems TomTom. This was a strategic move by Apple to compete with Google's Android operating system in mapping. However, the technology was undeveloped and launched prematurely. Apple knew the shortcomings of Maps but chose to include it in its new mobile operating system, iOS 6.

Despite the failures of Maps, Apple continued its marketing campaign which touted the accuracy and improvements of Maps. The truth is that Maps was horribly inaccurate and not improving. The CAC details how the Plaintiff experienced these representations, relied upon them when making her decision to purchase the iPhone 5, and the expectations formed by the Plaintiff in reliance on Apple's misrepresentations.

II. STATEMENT OF FACTS

This is a class action brought on behalf of the Plaintiff and other purchasers of the Apple iPhone, iPod touch and/or iPad mobile devices (the “Apple Devices”) which utilize Apple’s iOS operating systems 6.0, 6.1.3, 7.0, or 7.0.3. (CAC ¶ 1). The Maps application has been featured on the Apple’s mobile operating system since the release of the first-generation iPhone on June 29, 2007, and was powered by Google Maps from then until September 19, 2012. A new version was announced by Scott Forstall in a keynote address at Apple’s Worldwide Developers Conference on June 11, 2012. (CAC ¶¶ 2-4)

Upon release of Apple’s iOS 6 mobile operating system, it was met by considerable criticism. Apple issued a statement saying that it is working hard to improve the technology. “We launched this new map service knowing that it is a major initiative and we are just getting started with it,” said Trudy Muller, an Apple spokeswoman. “We are continuously improving it, and as Maps is a cloud-based solution, the more people use it, the better it will get. We’re also working with developers to integrate some of the amazing transit apps in the App Store into iOS Maps.”¹ (CAC ¶ 4)

According to a New York Times article, “[a]t least Apple signaled that Siri was a work-in-progress by describing it as being in beta. The maps service carries no such disclaimer and is likely being viewed even more critically than Siri because maps have become such an essential tool for smartphone users.”² The article stated, [t]he service was blasted for everything from

¹ September, 2012 statement by Trudy Muller of Apple.

² http://bits.blogs.nytimes.com/2012/09/20/apple-on-its-ios-6-maps-things-can-only-get-better/?_r=0

inaccuracies in its location data for businesses to the sometimes distorted imagery of landmarks.”

Id. (CAC ¶ 11)

Upon the release of the new version on September 19, 2012, many users and commentators were critical of the app for a variety of reasons ranging but not limited to improper labeling of places to unmapped roads.³ A legion of technology writers classified Apple Maps as the number one tech screw up of 2012. The Apple Maps launch has been described as an “apocalyptic horror show.”⁴ (CAC ¶ 31)

Users complained about the errors it contained. This included showing the wrong location of the Apple Store in Sydney, Australia, marking an entire city as a hospital, misclassifying a nursery as an airport, and identifying the nearest gas station to be as far as 76 miles away from the user's location.⁵ 3D views appearing in Maps were also completely distorted in most cases, with iconic constructions like the Brooklyn Bridge seeming to be collapsed or impossibly built.⁶ (CAC ¶ 32)

In response to the criticism, Apple CEO Tim Cook issued a statement on September 28, 2012, claiming the company is "continuously improving" Maps and “the more our customers use our Maps the better it will get.” (CAC ¶ 33)

In October 2012, Scott Forstall, Senior Vice President of iOS software and the executive responsible for Maps (or "directly responsible individual," in Apple jargon), was removed from

³ Allsopp, Ashleigh (September 1, 2012). "[Apple's iOS 6 Maps app fails to impress, users want Google Maps back](#)". *Macworld*. Retrieved September 21, 2012.

⁴ <http://gizmodo.com/5967025/the-biggest-tech-screw+ups-of-the-year/>

⁵ "[17 People Apple Maps Has Already Horribly Misled](#)". *Gizmodo*. September 20, 2012. Retrieved September 23, 2012.

⁶ Levine, Eitan (September 2012). "[Apple iOS 6 Maps Fails](#)". *Heavy*. Retrieved June 6, 2013.

his position.⁷ According to Adam Lashinsky of *Fortune*, Forstall sealed his fate when he refused to sign the apology for Maps.⁸ (CAC ¶ 34)

Apple Maps was named one of the Top 10 technology 'fails' of 2012 by CNN in December 2012.⁹ (CAC ¶ 35)

III. LEGAL STANDARD

“[U]nder the federal rules a complaint is required only to give the notice of the claim such that the opposing party may defend himself or herself effectively.” *Starr v. Baca*, 652 F.3d 1202, 1212 (9th Cir. 2011). Detailed factual allegations are not required; rather, a complaint must only allege sufficient facts to “state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 547 (2007). “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 556). When reviewing a motion to dismiss under Fed. R. Civ. P. 12(b)(6), courts “accept[] factual allegations in the complaint as true and construe[] the pleadings in the light most favorable to the nonmoving party.” *Colony Cove Props., LLC v. City of Carson*, 640 F.3d 948, 955 (9th Cir. 2011).

IV. ARGUMENT

“A pleading is sufficient under Rule 9(b) if it identifies the circumstances constituting fraud so that the defendant can prepare an adequate answer from the allegations.” *Neubronner v.*

⁷ Rodriguez, Salvador (October 29, 2012). "Apple ousts Scott Forstall, executive in charge of Maps and Siri". Los Angeles Times. Retrieved October 29, 2012. "Apple's head of mobile software, Scott Forstall, is leaving the company following the release of Apple Maps and Siri, two major projects that were considered flops for the technology giant."; see also, "Apple Announces Changes to Increase Collaboration Across Hardware, Software & Services". *Apple Inc.* October 29, 2012. Retrieved October 29, 2012.

⁸ Lashinsky, Adam (October 29, 2012). "Inside Apple's major shakeup". *Fortune*. Retrieved December 10, 2012.

⁹ http://www.cnn.com/2012/12/28/tech/web/tech-fails-2012/index.html?hpt=hp_bn5

Milken, 6 F.3d 666, 671–72 (9th Cir. 1993) (citations omitted). While Rule 9(b) imposes a heightened standard, it does not require a plaintiff to allege each and every detail about the alleged conduct. *Cooper v. Pickett*, 137 F.3d 616, 627 (9th Cir. 1998) (“we cannot make Rule 9(b) carry more weight than it was meant to bear”).

Consistent with Federal Rule of Civil Procedure 9(b), the CAC sufficiently sets forth: “who” (Apple) (¶20); “what” (that Apple made specific representations that Maps would be accurate and improve over time) (¶¶16, 33); “when” (Apple’s false representations to consumers began with the announcement to launch iOS 6 in June of 2012 and continues through the present) (¶¶16, 88–89); “where” (Apple markets and advertises the Maps feature of its Devices nationwide through press releases, press conferences, emails, and the Internet) (¶¶13, 21-35); and “how” (Apple knew or should have known that Maps would not perform as advertised, yet it advertised Maps as an accurate and improving navigational tool to consumers nationwide) (¶¶16, 39–41).

A. Plaintiff’s UCL, FAL, CLRA, and Misrepresentation Claims are Valid.

“[The UCL, FAL, and CLRA] 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.’” *Williams v. Gerber Prods. Co.*, 552 F.3d 934, 938 (9th Cir. 2008) (citing *Kasky v. Nike, Inc.*, 27 Cal. 4th 939, 951 (2002)). These laws are governed by the “reasonable consumer” standard, under which a plaintiff must show that “members of the public are likely to be deceived.” *Id.* Plaintiffs’ allegations plausibly support that Apple’s advertisements and promotions regarding the functionality of Maps were likely to deceive members of the public.

Apple CEO Tim Cook’s statement that Maps is “continuously improving” and “the more our customers use our Maps the better it will get” is belied by the numerous media reports, *supra*. (CAC ¶ 33) As such, a reasonable consumer could certainly have been deceived by the fact that Maps was unable to perform as advertised.

As an initial matter, Apple's arguments are premature because whether a defendant's business practices were deceptive under California consumer law is a question of fact that is rarely appropriate for resolution at the motion to dismiss stage. *Henderson v. J.M. Smucker Co.*, No. CV-10-4524-GHK-VBK, 2011 WL 1050637, at *3 (C.D. Cal. Mar. 17, 2011) (“[I]t is a rare situation where granting a motion to dismiss a false advertising claim is appropriate.”).

Moreover, Apple's argument regarding perfect functionality is premised on allegations that the Plaintiff has not made in support of her claims. To be clear, nowhere in the CAC does the Plaintiff suggest that Maps should be infallible. Apple's attacks on such non-existent allegations should be ignored outright.

Apple next contends that a reasonable consumer could not possibly be deceived when a product is unable to function in a consistent manner as specifically demonstrated during an advertisement absent a specific representation that a consumer product will work perfectly every time without fail. This assertion flies in the face of California consumer law, which recognizes that an advertisement can be deceptive and misleading without being literally false. *See Williams v. Gerber Prods. Co.*, 552 F.3d 934, 938 (9th Cir. 2008). Apple relies upon inapplicable authority in attempting to support this flawed contention. In *Baltazar II*, 2011 WL 6747884, at *4, the Court dismissed the plaintiffs' complaint because the “advertisement and specifications could not be understood to represent or promise that the iPad would operate without interruption in the specific environmental conditions under which it allegedly tended to shut down.” Neither of these decisions reasonably supports that consumers could not be deceived when a product is unable to consistently perform as advertised.

B. Apple's Statements About Maps Are Actionable

Plaintiff's claims are premised upon actionable statements. “Misdescriptors of specific or absolute characteristics of a product are actionable.” *Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv., Inc.*, 911 F.2d 242, 246 (9th Cir. 1990). Plaintiffs allege the specific content of Apple's advertisements and promotional demonstrations regarding Maps functionality and capabilities. Plaintiff also alleges that Maps was unable to consistently perform as shown and

represented in these advertisements and promotions. Such deceptive and misleading advertising is actionable under California law.

Plaintiffs adequately allege a violation of the UCL's fraud prong. An advertisement or representation violates the UCL's fraud prong if it is likely to deceive members of the public. *See Williams*, 552 F.3d at 938. Plaintiffs' allegations support that Apple's advertisements and promotions were likely to deceive members of the public.

Plaintiffs also adequately allege a violation of the UCL's unfairness prong. Conduct is unfair under the UCL if it "threatens an incipient violation of [a] law, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competitions." *Cal-Tech Commc'ns, Inc. v. Los Angeles Cellular Tel. Co.*, 20 Cal. 4th 163 (1999). An alternative test for unfairness is whether a "practice offends an established public policy or . . . is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers" and the "gravity of the harm to the victim outweighs the utility of the defendant's conduct." *Bardin v. DaimlerChrysler Corp.*, 136 Cal. App. 4th 1255, 1268 (2006) (citations omitted).

Plaintiffs' allegations satisfy applicable pre-suit notice requirements. Pre-suit notice must be provided "within a reasonable time after [the buyer] discovers or should have discovered any breach." Cal. Com. Code §2607(3)(A). Plaintiff's counsel sent Apple a letter as set forth in the CAC.

Moreover, California's pre-suit notice requirement does not apply to Plaintiff's express warranty claims. The pre-suit notice requirement only applies when products are purchased directly from a manufacturer. *See Keegan v. Am. Honda Motor Co.*, 838 F. Supp. 2d 929, 949–50 (C.D. Cal. 2012); *Sanders v. Apple, Inc.*, 672 F. Supp. 2d 978, 989 (N.D. Cal. 2009) (quoting

Greenman v. Yuba Power Prods., 59 Cal. 2d 57, 61 (1963)). This rule is “designed to protect a consumer who ‘would not be aware of his rights against the manufacturer [A]t least until after he has had legal advice it will not occur to him to give notice to one with whom he has had no dealings.’” Sanders, 672 F. Supp. 2d at 989 (quoting Greenman, 59 Cal. 2d at 61).

3. Plaintiffs’ Properly Allege a Breach of Express Warranty

Plaintiffs adequately plead a breach of express warranty. “Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.” Cal. Com. Code §2313(b). Advertisements can be construed as warranty statements. *Aaronson v. Vital Pharm., Inc.*, No. 09-CV-1333 W(CAB), 2010 WL 625337, at *6 (S.D. Cal. Feb. 17, 2010); *Fundin v. Chi Pneumatic Tool Co.*, 152 Cal. App. 3d 951, 957 (1984) (holding that when a consumer relies on representations made by a manufacturer in labels or advertising materials, recovery is allowable under express warranty). As detailed *supra* this is exactly what Plaintiff has done in the CAC. Plaintiff alleges the specific advertisements and promotions that they each saw, describe the specific content of these advertisements—in many cases word by word—and expressly and specifically allege their reliance thereon.

IV. CONCLUSION

The CAC, in every respect, meets the pleading requirements of Federal Rules of Civil Procedure 8 and 9(b). Thus, Apple’s Motion should be denied.

Dated: April 4, 2014

By: /s/ J. Paul Lynn _____

DONALD W. STEWART (*Admitted Pro Hac Vice*)

STEWART & STEWART, P.C.

P.O. Box 2274

Anniston, Alabama 36202

(256) 237-9311

(256) 237-0713 – Facsimile

J. PAUL LYNN (*Admitted Pro Hac Vice*)

STEWART & STEWART, P.C.

1826 3rd Avenue North, Suite 300

Bessemer, AL 35020

(205) 425-1166

(205) 425-5959 - Facsimile

Counsel for Plaintiffs