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

JULIE E. MISSUD,

Plaintiff,

v.

OAKLAND COLISEUM JOINT
VENTURE, et al.

Defendants.

Case No.: 12-02967 JCS

**ORDER GRANTING DEFENDANTS’
MOTION TO DISMISS; DISMISSING
FIRST AMENDED COMPLAINT
WITH PREJUDICE; DENYING
DEFENDANTS’ MOTION TO STRIKE
AS MOOT**

I. INTRODUCTION

Plaintiffs Patrick A. Missud and Julie E. Missud (“the Missuds” or “Plaintiffs”)¹ brought this putative class action against Defendants Oakland Coliseum Joint Venture (“OCJV”), City of Oakland, Alameda County, and SMG Corporation (“SMG”) (“Defendants”).² Plaintiffs allege causes of action for (1) violations of the Clean Water Act (“CWA”); (2) violations of the Resource Conservation and Reclamation Act (“RCRA”); (3) violations of the Americans with Disabilities Act (“ADA”); (4) violations of the National Highway Safety and Traffic Act (“NHSTA”); (5) violations of the requirements established by Cal-trans (“Caltrans”);³ (6) negligence; (7) breach of contract; (8) fraudulent inducement; and (9) unfair business practices in violation of California Business and

¹ For ease of reference, the Court refers to Patrick A. Missud as “Patrick” and Julie E. Missud as “Julie” throughout this Order.

² In the original Complaint, Patrick, an attorney, brought this action in pro per and on behalf of a putative class. After dismissal of the Complaint, Julie was added as a party to this action. The First Amended Complaint also names “Eric S., Sameer Q., [and] Heather B.” as potential plaintiffs, but none are a party to this action. The FAC pleads that Patrick is no longer a party to this action, but rather acts only as class counsel. Moreover, Plaintiffs’ Response to Defendants’ Motions to Dismiss and to Strike the First Amended Complaint put forward Joe Straton (“Straton”) as a potential plaintiff, going so far as to list Straton as the only plaintiff in the caption of their motion. Straton is not a party to this action. The Court will treat only Julie as the plaintiff in this case. Nevertheless, the Court refers to Patrick and Julie as “Plaintiffs” because a number of factual allegations in the First Amended Complaint pertain only to Patrick.

³ The Complaint uses “Cal-trans” interchangeably with the “California Transportation Authority.” It appears the Complaint is referring to the California Department of Transportation, Caltrans.

1 Professions Code section 17200 (“UCL”). Presently before the Court are (1) Defendants’ Motion to
2 Dismiss the First Amended Complaint (“Motion to Dismiss”); and (2) Defendants’ Motion to Strike
3 Portions of the First Amended Complaint (“Motion to Strike”). Defendants and the sole plaintiff in
4 this action, Julie Missud (see note 6 below), have consented to the jurisdiction of the undersigned
5 magistrate judge pursuant to 28 U.S.C. § 636(c). For the reasons stated below, the Motion to Dismiss
6 is GRANTED, the FAC is dismissed with prejudice, and the Motion to Strike is DENIED as moot.

7 **II. BACKGROUND**

8 **A. Prior Order**

9 In the original Complaint, Patrick made the following allegations. On June 7, 2011, the
10 Oakland Coliseum (“Coliseum”) hosted a concert featuring the band U2 (“Concert”). Order Granting
11 Defendants’ Motion to Dismiss Without Prejudice; Granting in Part and Denying in Part Defendants’
12 Motion to Strike (“Order”), 2. Patrick alleged that OCJV cut services to maximize profits at the
13 Concert. *Id.* Defendants were aware for approximately one year that the Concert would be sold out
14 such that 69,000 people would be in attendance. *Id.* Defendants were required to provide access to
15 the venue, security, safe premises, sanitary facilities, light, ventilation, water, safety evacuation plans,
16 ramps, walks, elevators, on-site emergency services, and parking. *Id.*

17 The Missuds purchased two tickets to the Concert. *Id.* Upon arrival, Patrick discovered that
18 the necessary facilities were either severely deficient or non-existent, and that only one of his tickets
19 would be honored by Defendants. *Id.* The Court dismissed each of Patrick’s asserted causes of
20 action, with leave to amend, as follows:⁴

21 (1) Violation of the CWA: The Court dismissed Patrick’s CWA claim for failure to
22 provide notice to all proper parties – the Environmental Protection Agency Administrator, the state in
23 which the violation was occurring, and the violator – in compliance with the statute. *Id.* at 21-23.
24 The Court also dismissed Patrick’s CWA claim for failure to allege Article III standing. *Id.* at 22-23.
25 The Court did not address the substantive merits of Patrick’s allegations.

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28 ⁴ In addition to the analysis of specific claims repeated below, the Court dismissed Patrick’s claims against the City of
Oakland and Alameda County, with leave to amend, for failure to comply with the California Tort Claims Act. Order, 21.

1 (2) Violation of the RCRA: The Court dismissed Patrick’s RCRA claim for failure to
2 provide notice to all proper parties in compliance with the statute. *Id.* at 23-24.⁵ The Court also
3 dismissed Patrick’s RCRA claim for failure to allege Article III standing. *Id.* The Court did not
4 address the substantive merits of Patrick’s allegations.

5 (3) Violation of the ADA: The Court dismissed Patrick’s ADA claim because he did not
6 plead any disability in his Complaint, and thus had not pled Article III standing or stated a claim for
7 relief. *Id.* at 27. The Court engaged in no further substantive discussion of Patrick’s allegations.

8 (4) Violation of the National Highway Safety and Traffic Act: The Court dismissed
9 Patrick’s claim, asserted under the National Highway Safety and Traffic Act, for failure to identify
10 any authority that would entitle him to relief responsive to Defendants’ assertion that there was no
11 private right of enforcement under the National Highway Traffic Safety Act, to which they argued
12 Plaintiff was referring, and failure to allege any injury. *Id.*

13 (5) Violation of Caltrans Requirements: The Court dismissed Patrick’s claim for Caltrans
14 violations based on his failure to identify any authority that would entitle him to relief on this cause of
15 action and his failure to allege any injury he suffered as a result of any such violation. *Id.* at 28.

16 (6) Breach of Contract: The Court dismissed Patrick’s claim for breach of contract
17 because he did not sufficiently plead that Defendants breached their legal duties under the contract.
18 *Id.* at 29. Specifically, the Court held that Patrick had not pled that Defendants were obligated by any
19 contract to provide any of the amenities he asserted were lacking. *Id.*

20 (7) Negligence: The Court dismissed Patrick’s negligence claim premised on Defendants’
21 failure to provide certain amenities as barred under the economic loss rule. *Id.* at 30-31. The Court
22 dismissed Patrick’s negligence claim predicated on the dangers presented by the overflow parking lot
23 because he failed to allege any injury or damages caused by those dangers. *Id.* at 31.

24 (8) Fraudulent Inducement: The Court dismissed Patrick’s fraudulent inducement claim
25 because he did not properly set forth the particular statements made, by whom they were made, when

26 ⁵ Instead of specifically enumerating the proper entities, the Court provided a citation to the relevant statute, 42 U.S.C. §
27 6972. Order, 24. That statute authorizes suit “against any person” where certain predicates are met and advance notice
28 has been provided to the Administrator, the state in which the alleged violation occurs, and the violator in accordance with
the statute. 42 U.S.C. § 6972(b).

1 and where they were made, and why each such statement was false in accordance with Federal Rule
2 of Civil Procedure 9(b). *Id.*

3 (9) UCL: The Court construed the Complaint as setting forth two UCL theories. *Id.* at 34.
4 On one theory, Defendants engaged in fraudulent acts by advertising the concert in a way that misled
5 the putative class into believing that their tickets would be honored. *Id.* The Court held that Patrick
6 did not have standing to assert that UCL claim, because he did not allege that he relied on any
7 unspecified misleading advertising. *Id.* On the other theory, Defendants engaged in fraudulent acts
8 by overselling the concert knowing they were incapable of accommodating their patrons. *Id.*
9 Although the Court held that Patrick had alleged a sufficient economic injury to support standing, it
10 further held that Patrick had not pled a cause of action under the unlawful, fraudulent, or unfair prongs
11 of the UCL analysis. *Id.* at 34-36. Specifically, the Court found Patrick’s allegations of fraudulent
12 and unfair conduct to be factually deficient because he did not identify any particular statements, as
13 discussed above, and because he did not identify specific amenities that were promised, were lacking,
14 and made the Coliseum incapable of accommodating the number of people who purchased tickets for
15 the Concert. *Id.* at 35-36.

16 **B. The First Amended Complaint**

17 The First Amended Complaint (“FAC”) identifies the Plaintiffs in this action as follows:

18 The class action Plaintiffs [Class] are or will be represented by any combination of four
19 similarly aggrieved Invitees who have tentatively agreed or already committed to becoming
20 lead Plaintiff(s) in this case. They are Mrs. Missud, Eric S., Sameer Q., Heather B., and others
21 who will likely be interested after this case has survived the present motions to dismiss and/or
22 additional Class members have been located. Missud is now only the attorney of record
23 herein.⁶

23 FAC, 2:25-29.

24 The First Amended Complaint (“FAC”) recites the same underlying factual allegations as
25 were set forth in the initial Complaint. As described in this Court’s previous Order:

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27 ⁶ The FAC refers to Patrick as “Missud,” and Julie, to the extent she is specifically referenced, as “Mrs. Missud” or “his
28 wife.” FAC, 2:27, 19:21. The Court interprets this provision as identifying Mrs. Julie Missud as a party, and Patrick
Missud as counsel. The remaining identified individuals are potential parties – especially in light of the fact that there are
no other allegations about them in the FAC.

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On the evening of June 7, 2011, the Oakland Coliseum (“Coliseum”) hosted a concert featuring the band U2 (“Concert”). [FAC, 2:2-3].⁷ Plaintiffs make the following allegations. OCJV cut services to maximize profits at the Concert. *Id.* at [3:12-15]. Defendants were aware for approximately one year that the concert would be sold out such that 69,000 people would attend the concert. *Id.* at [9:2-3]. Defendants were required to provide access to the venue, security, safe premises, sanitary facilities, light, ventilation, water, safety evacuation plans, ramps, walks, elevators, on-site emergency services, and parking. *Id.* at [9:8-9:13].

Missud purchased two tickets to the Concert. *Id.* at [5:14-15].⁸ Upon arrival, Missud discovered that the necessary facilities were either severely deficient or non-existent, and that only one of his tickets would be honored by Defendants. *Id.* at [5:15-17]. Plaintiff alleges that (1) the class consists of in excess of 400 similarly situated members; (2) the issues pertaining to each of the causes of action pled in the Complaint are common to all class members; (3) Missud’s claims are typical of the claims of each member of the class because each member had a ticket to see the concert, was denied access to the Coliseum, and properly planned to allow ample time to access the Coliseum; and (4) Missud will fairly and adequately represent and protect the interests of the class and will retain additional counsel that is competent and experienced in class action litigation. *Id.* at [5:19-8:21]. Plaintiff alleges that they have citizen standing to enforce federal laws. *Id.* at [5:11-12]. Plaintiff seeks injunctive relief, restitution, and punitive damages. *Id.* at [24:7-26:15].

Order, 2.

Plaintiffs allege nine causes of action. Additional factual allegations are added following each cause of action. Otherwise, the factual allegations are unchanged. The causes of action are pled as follows:

(1) Violation of the CWA: As in the original Complaint, Plaintiffs allege that “Defendants willfully violated the CWA with discharges of storm water, untreated sewage, and other pollutants into the Oakland Estuary, a protected state and federal wetland.” *See* FAC, 10:7-9. Plaintiffs allege that the wetland is within the overflow parking lot. *Id.* at 24:10-11. To support this cause of action, Plaintiffs allege that Defendants operate an “overflow parking lot” during events at the Coliseum. *Id.* at 6:3-6. Plaintiffs allege that the overflow parking lot generates wastewater, at least in part because “greasy, leaking cars” are parked there. *Id.* at 6:7-8, 6:12-14. Plaintiffs allege that the use of the overflow parking lot has created “industrial-type point-source pollution” such that it may require

⁷ The citations have been modified to refer to the FAC, as opposed to the Complaint.
⁸ The allegations in this paragraph have not been updated. It appears, in accordance with the initial Complaint and with Plaintiffs’ Opposition to the present Motions that “Missud” refers to Patrick.

1 Defendants to perform an environmental impact report. *Id.* at 6:18-20. Plaintiffs further allege that
2 the Oakland Estuary is being polluted by garbage discarded by Defendants’ invitees because
3 Defendants do not provide trash receptacles to manage the solid wastes discarded at the overflow
4 parking lot. *Id.* at 6:25-7:3. Plaintiffs allege that Defendants should be subjected to Section 309 fines
5 starting from the day they knew of the CWA violations, June 16, 2011. *Id.* at 7:4-5.

6 Plaintiffs make the following new factual allegations in their FAC. Plaintiffs gave Elliot
7 Myles, attorney for OCJV, which includes all Defendants in this action, notice of this suit more than
8 364 days before bringing this suit. *Id.* at 10:11-11:15. Moreover, Plaintiffs provided notice to various
9 state and federal Department of Justice Agents and to agents from the FBI. *Id.* at 11:16-19. “Any and
10 all officials in a position to act were notified of the OCJV’s ongoing violations.” *Id.* at 11:19-20. As
11 to standing, Plaintiffs allege that Patrick would have continued to eat lunch at the nature walk near the
12 Oakland Estuary in the vicinity of the Coliseum but for Defendants’ pollution.⁹ *Id.* at 11:22-28.
13 However, Plaintiffs acknowledge that the area has been cleaned up such that Patrick will return to
14 lunch there. *Id.* at 12 n.4.

15 (2) Violation of the RCRA: As in the original Complaint, Plaintiffs allege that
16 “Defendants willfully violated the RCRA with discharges of storm water, untreated sewage, and other
17 pollutants into the Oakland Estuary, a protected state and federal wetland.” *Id.* at 12:6-9. Plaintiffs
18 allege that the groundwater under the overflow parking lot is being contaminated by “various alkali
19 compounds, antifreeze, and motor transmission oils.” *Id.* at 12:9-11. For the first time in the FAC,
20 Plaintiffs allege that they notified “all required entities and all Defendants.” *Id.* at 12:11-12
21 (referencing discussion earlier in the FAC).

22 (3) Violation of the ADA: Plaintiffs allege that “Defendants willfully violated the ADA
23 by failing to provide adequate walkways, railings, landings, ramps, and other components prescribed
24 by the act.” *Id.* at 12:21-22. Plaintiffs allege that the Coliseum is open to the public and offered for
25 use by the City of Oakland and the County of Alameda. *Id.* at 13:9-10. Plaintiffs allege that
26 Defendants violated the ADA because they do not provide lighting, bathrooms, walkways, ramps,

27 ⁹ Although the new factual allegations in the FAC refer to “Missud,” they refer to “Missud” using male-gender pronouns
28 indicating that they are referring to Patrick, not Julie.

1 transitions, or safety systems at or around the overflow parking lot. *Id.* at 7:11-16. Plaintiffs also
2 allege that there are no ADA compliant facilities, curbs, walks, handrails, or ramps between the
3 overflow parking lot and the Coliseum. *Id.* at 24:16-17. In addition, Plaintiffs allege that minimum
4 walk widths, ascent angles, and railings are non-existent. *Id.* at 24:19-20.

5 Plaintiffs make the following new factual allegations in their FAC. Patrick suffers from
6 sclerosis and sciatica, limiting his walking mobility to two city blocks. *Id.* at 13:5-20. The walk from
7 the Coliseum to the overflow lot aggravated his sciatica. *Id.* at 14:11-12. The walk requires
8 traversing curbs exceeding twelve inches and there are no ramps available. *Id.* at 14:10-11. In
9 addition, he nearly tripped over a collapsed chain link fence and nearly fell in a rut full of muddy
10 water. *Id.* at 14:12-13, 14:14-15. Patrick also had to walk through “a maze of barbed wire, and
11 assorted booby-traps” to return to the parking lot. *Id.* at 14:24-25. Even so, Patrick “will absolutely
12 return” to the Coliseum for an A’s game this summer, so there is a real, immediate threat of repeated
13 injury in the future. *Id.* at 14:18-21. Plaintiffs also allege that, since suit was brought, the “lot’s been
14 graded and is rut-free; area routinely patrolled for debris and trash; grasses are growing where tire
15 treads once scarred the land; collapsed fences have been removed and/or repaired; rusty barbed wire
16 replaced with new; and various other improvements.” *Id.* at 12 n.4.

17 (4) Violation of the NHSTA: As in their initial Complaint, Plaintiffs allege that
18 “Defendants willfully violated the NHSTA by failing to provide adequate walkways, railings,
19 landings, ramps, and other components which require separation from vehicular traffic, roadways, and
20 thoroughfares as prescribed by the Act.” *Id.* at 15:3-5. Plaintiffs elaborate that pedestrians using the
21 overflow parking lot are forced to “share the same vehicular path” with traffic. *Id.* at 24:25-25:1. For
22 the first time in the FAC, Plaintiffs allege that Defendants are not in compliance with several
23 publications of the National Highway Traffic Safety Administration addressing roadway design. *Id.*
24 at 15:7-26. This is because the overflow lot is situated so as to require jay-walking across a freeway
25 onramp to access a sidewalk. *Id.* at 15:26-16:7. Plaintiffs state their belief that there are now major
26 public works in the area that were apparently undertaken to improve pedestrian safety. *Id.* at 16 n.7.

1 (5) Violation of Caltrans Requirements: Plaintiffs allege that “Defendants willfully
2 violated [Caltrans] safety codes by failing to provide adequate pedestrian walkways, railings,
3 landings, ramps, and other components which require separation from vehicular traffic, roadways, and
4 thoroughfares as prescribed by the state.” *Id.* at 16:15-18. This claim appears based on the same
5 underpinning as the NHTSA claim: That pedestrians using the overflow parking lot are forced to
6 “share the same vehicular path” with traffic. *Id.* at 24:25-25:6. For the first time in the FAC,
7 Plaintiffs incorporate the Caltrans mission statement and state that Defendants are misusing Caltrans
8 maintained thoroughfares as pedestrian pathways. *Id.* at 16:20-17:19.

9 (6) Negligence: Plaintiffs allege that Defendants had a duty to provide “adequate
10 services” to invitees. *Id.* at 17:23. Plaintiffs allege that Defendants did not provide adequate services.
11 *Id.* at 17:23-25. Plaintiffs allege that Defendants failure to provide adequate services caused them to
12 be “effectively barred” from attending the concert. *Id.* at 17:25-27. Plaintiffs allege that they were
13 damaged in an amount to be proven at trial. *Id.* at 17:27-18:2. Plaintiffs allege that the overflow
14 parking lot lacks lighting and contains “mounds of refuse, deep water-filled potholes, cavernous ruts,
15 collapsed chain link fencing, slick mud, assorted other trip and slip hazards, and rusted barbed wire
16 surrounding [its] perimeter.” *Id.* at 25:10-14. Plaintiffs seek damages for all those physically injured
17 by the premises or barred from attending the Coliseum by “mismanagement of premises under
18 [Defendants’] control, including their ‘overflow parking lot.’” *Id.* at 25:18-24.

19 For the first time in the FAC, Plaintiffs allege that Defendants’ mismanagement of the
20 overflow lot caused Patrick pain in his back and leg. *Id.* at 18:8-9. Moreover, Plaintiffs allege that
21 Defendants breached their covenant of good faith and fair dealing and fraudulently induced Plaintiffs
22 to attend the event. *Id.* at 18:17-18. Plaintiffs allege that they reasonably relied on Defendants’
23 representations that they could handle the volume of ticketholders invited to the event, and that
24 Defendants had a duty to provide adequate safe parking and traffic control. *Id.* at 18:20-22.
25 Moreover, Plaintiffs allege that Defendants had a duty to provide access to the Coliseum because
26 Plaintiffs paid for seat licenses inside the Coliseum. *Id.* at 18:27-28. Plaintiffs allege that Defendants
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1 intentionally and maliciously caused them to waste time sitting in traffic outside the Coliseum in an
2 effort to boost profits by requiring Plaintiffs to wait to pay for parking. *Id.* at 18:28-19:8.

3 (7) Breach of Contract: As in the original Complaint, Plaintiffs indirectly allege that they
4 entered a contract with Defendants when they purchased licenses, tickets, from Defendants. *Id.* at
5 19:12. Plaintiffs allege that they performed under the contract by timely arriving at the Coliseum. *Id.*
6 at 19:12-13. Plaintiffs allege that Defendants breached the contracts by “constructively voiding” the
7 licenses. *Id.* at 10:13-14. Plaintiffs explain that Defendants did not provide sufficient staffing or
8 amenities to accommodate the 69,000 invitees they knew would be attending the concert. *Id.* at
9 10:15-16. Plaintiffs also allege some tickets were not honored, and that Defendants sold more tickets
10 than they could reasonably accommodate. *Id.* at 25:25-26, 26:3-5. Plaintiffs also allege that
11 Defendants made improper staffing assumptions. *Id.* at 8:6-8.

12 For the first time in the FAC, Plaintiffs clarify that they purchased two tickets with community
13 funds, and only one was timely honored. *Id.* at 19:20-22. Plaintiffs further clarify that their ticket
14 directs them to www.ticketmaster.com for the terms and conditions of their contract, but state that
15 they are unable to find the terms and conditions at that website. *Id.* at 20:1-3. Instead, Plaintiffs
16 allege that “[j]ust because the services which are required to support a Concert aren’t specifically
17 enumerated on the Ticket or under ‘terms and conditions’ yet to be found, that doesn’t mean they
18 aren’t necessary when a multi-million-dollar consortium of private/public special interests want to
19 make lots of money hosting 69,000 people. A traffic control plan and adequate parking were a must
20 for this event.” *Id.* at 20:25-29. Further, Plaintiffs invoke the doctrine of *res ipsa loquitur*. *Id.* at
21 21:2-4.

22 (8) Fraudulent Inducement: Plaintiffs allege that “Defendants knowingly oversold the
23 Concert.” *Id.* at 21:8. Plaintiffs explain that Defendants knew they did not have sufficient amenities
24 to accommodate 69,000 invitees but misrepresented that they could do so, inducing Plaintiffs to buy
25 tickets that Defendants knew would not be honored. *Id.* at 10:9-11.

26 Plaintiffs make the new factual allegation that they “believed that since their Licenses were
27 offered for sale, they would be guaranteed admission to the Concert if they performed per contract
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1 and arrived timely...” *Id.* at 21:20-22. Plaintiffs made arrangements to attend the concert and arrived
2 timely. *Id.* at 21:22-29. Plaintiffs further allege that Defendants promised “to put on an epic
3 Concert,” and Plaintiffs bought tickets. *Id.* at 22:6-7. The concert took place June 7, 2011. *Id.* at
4 22:8-10. Defendants mismanaged the concert for unknown reasons, but probably because they sought
5 to maximize profits by minimizing expenses. *Id.* at 22:10-12.

6 (9) UCL: Plaintiffs allege that “Defendants engaged in fraudulent acts by selling more
7 Licenses for the Concert at the Venue than they were capable of accommodating with their facilities
8 and amenities. Further, the Defendants advertised the Concert in a way which misled the Plaintiffs-
9 Invitees to believe that their Licenses, once bought, would be honored at the Venue for the Concert.”
10 *Id.* at 22:20-24. Plaintiffs allege that Defendants’ unfair, unlawful, and deceptive acts and practices
11 have caused them damages in an amount to be shown at trial. *Id.* at 22:24-23:2.

12 For the first time in the FAC, Plaintiffs allege that they learned of the Concert through some
13 means of advertisement. *Id.* at 23:5-6. As to the unlawful prong, Plaintiffs allege that Defendants
14 sold out the concert knowing they could not handle a sold out crowd. *Id.* at 23:8-11. As to the
15 fraudulent prong, Plaintiffs imply that they have produced circumstantial evidence that Defendants
16 were driven by greed to sell the maximum number of tickets possible knowing they could not handle
17 such a crowd. *Id.* at 23:12-16. As to the unfair prong, Plaintiffs allege that Defendants violated
18 public policy by stranding ticketholders in traffic for hours, preventing any disaster relief first
19 responders from accessing the Coliseum and preventing any evacuation of the Coliseum that could
20 have become necessary. *Id.* at 23:16-22. Plaintiffs also allege that public-policy prevents
21 conditioning ticketholders’ access to a venue on buying parking in the muddy overflow lot. *Id.* at
22 23:22-25.

23 **C. The Motions**

24 Defendants separately filed both a Motion to Dismiss the FAC and a Motion to Strike (1) the
25 prayer for punitive damages; (2) the class allegations; (3) the allegations that Julie could properly
26 serve as a class representative; (4) the prayer for attorneys’ fees; and (5) web addresses improperly
27 listed in the FAC. *See* Dkt. Nos. 58-59. Plaintiffs filed a consolidated Opposition to both Motions.
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1 Plaintiffs organize their Opposition with serial responses to specific points made in
2 Defendants’ papers. As to the Motion to Dismiss, Plaintiffs first argue that they notified the proper
3 authorities prior to filing suit pursuant to a master email list that Patrick maintains. Opposition to
4 Motion to Dismiss and Motion to Strike (“Opposition”), 11. Plaintiffs assert that the list includes
5 Defendants’ counsel, the FBI, state and federal departments of justice, and county and state attorneys
6 representing state agencies. *Id.* Second, Plaintiffs assert that they have standing under the CWA and
7 RCRA because judicial oversight is necessary to prevent Defendants from again ravaging the Oakland
8 Estuary to boost their profits. *Id.* at 12.

9 Third, Plaintiffs make a series of responses pertaining to their ADA claim. Plaintiffs argue
10 that ADA discrimination can include failure to remove architectural barriers and state that Defendants
11 could have installed ramps in their twelve-inch concrete curbs, picked up collapsed fencing, filled
12 potholes and ruts, and collected other debris. *Id.* Plaintiffs also reiterate that the overflow lot is under
13 Defendants’ control. *Id.* at 13. Next, Plaintiffs clarify that Patrick arrived at the Coliseum using
14 BART, which was crowded. *Id.* The walk from BART to the Coliseum’s entry gates was time-
15 consuming, as “throng of concertgoers were shuffling feet in unison to make forward progress.” *Id.*
16 Patrick was in severe back pain by the time he reached the gates. *Id.* On the other hand, Julie took a
17 car to the event, parked in the overflow lot, and missed the vast majority of the concert as a result of
18 the traffic snafu Plaintiffs argue was caused by Defendants. *Id.* Plaintiffs argue that any ADA
19 accessible parking is irrelevant because they could not get to it through traffic. *Id.*

20 Fourth, Plaintiffs do not dispute Defendants’ assertion that there is no private right of action
21 supporting their NHSTA claim, but state that Defendants’ failure to comply with the safety advisories
22 demonstrates Defendants’ “cavalier attitude when it comes to commingling children and the elderly
23 among 18-wheelers.” *Id.* at 14.

24 Fifth, Plaintiffs contend that their inability to find the terms of their contracts is proof that the
25 terms do not exist. *Id.* However, Plaintiffs request Defendants provide the terms of the contract in
26 Defendants’ Reply brief. *Id.* In any event, Plaintiffs assert that Defendants prevented them from
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1 accessing the venue at all by causing the traffic congestion because, once stuck in traffic, Plaintiffs
2 could not be expected to leave their cars and walk into the venue. *Id.* at 14-15.

3 Sixth, Plaintiffs argue that the economic loss rule does not apply because the terms of their
4 contract of adhesion were not bargained and because Defendants withheld the material information
5 that they were cutting corners to maximize profits in such a way that jeopardized Plaintiffs' ability to
6 access the Coliseum. *Id.* at 15.

7 Seventh, Plaintiffs assert that they pled fraud with particularity. *Id.* They state that OCJV
8 knowingly oversold the concert, knowing it could not handle the crowds based on its past experiences
9 *Id.* Plaintiffs contend that they were impliedly misinformed, by sale of the ticket, that they could get
10 into the venue within three hours of arrival. *Id.* Plaintiffs appear to argue that the misrepresentation
11 occurred at the Coliseum on the day of the Concert as a result of Defendants reckless greed. *Id.*

12 Eighth, Plaintiffs assert that they have established a UCL claim based on Defendants'
13 misrepresentation that they could handle 69,000 guests. *Id.* at 15-16. Plaintiffs state that their tickets
14 were not honored at entry gates because those gates were inaccessible because of the traffic
15 congestion that resulted from the concert being oversold. *Id.* at 16. Plaintiffs assert that the traffic
16 congestion and the overflow lot created dangerous conditions. *Id.*

17 **III. JUDICIAL NOTICE**

18 The standard for judicial notice is set forth in Rule 201 of the Federal Rules of Evidence,
19 which allows a court to take judicial notice of an adjudicative fact not subject to "reasonable dispute,"
20 either because it is "generally known within the territorial jurisdiction of the trial court" or it is
21 "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably
22 be questioned." Fed. R. Evid. 201. As a general rule, the court "may not consider any material
23 beyond the pleadings in ruling on a Rule 12(b)(6) motion." *U.S. v. Corinthian Colleges*, 655 F.3d
24 984, 998-99 (9th Cir. 2011) (quoting *Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001)).
25 However, the court may consider unattached evidence on which the complaint "necessarily relies" if:
26 "(1) the complaint refers to the document; (2) the document is central to plaintiff's claim; and (3) no
27 party questions the authenticity of the document." *Id.* at 999 (citing *Marder v. Lopez*, 450 F.3d 445,
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1 448 (9th Cir. 2006)). In addition, the court may take judicial notice of “matters of public record,” but
2 not facts that may be “subject to reasonable dispute.” *Id.* (citing *Lee*, 250 F.3d at 689).

3 Patrick referenced eleven web pages in his initial Complaint. Each of those webpages remains
4 in his FAC, unchanged. The Court adopts its judicial notice ruling as to the contents of those eleven
5 web pages. *See* Order, 16-18.

6 The FAC adds five new internet references. Two are links to support the assertions that third-
7 party organizations have referenced various government reports. FAC, 15:22-24. Incorporation by
8 reference of these websites is improper because the FAC does not necessarily rely on their contents,
9 and the articles are not central to Plaintiffs’ claims. Moreover, they are not subject to judicial notice
10 as public records. Nevertheless, the Court will consider Plaintiffs’ allegation that the government
11 reports are referenced in third party publications at two internet addresses.

12 The other three addresses are to government websites, provided as citation to support
13 allegations in the FAC. *Id.* at 16:21, 17:2, 17:14. Incorporation by reference of these websites is
14 improper for the same reasons. However, the Court takes judicial notice of the information contained
15 at each of the government websites included in the FAC as public records. *See Paralyzed Veterans of*
16 *America v. McPherson*, 2008 WL 418391, at *5-*6 (N.D. Cal. Sept. 9, 2008) (taking judicial notice of
17 information appearing on official government websites). The information on these websites, much of
18 which is repeated in the FAC in any event, is not subject to reasonable dispute.

19 As in its previous Order, even where the Court does not take judicial notice of the content of
20 certain websites it still considers the allegations pled in the FAC relating to the contents of those
21 websites in resolving the present motions.

22 **IV. ANALYSIS**

23 **A. Legal Standard**

24 **1. Rule 12(b)(6)**

25 A complaint may be dismissed for failure to state a claim for which relief can be granted
26 under Rule 12(b)(6) of the Federal Rules of Civil Procedure. Fed. R. Civ. P. 12(b)(6). “The purpose
27 of a motion to dismiss under Rule 12(b)(6) is to test the legal sufficiency of the complaint.” *N. Star*
28

1 *Int'l v. Ariz. Corp. Comm'n*, 720 F.2d 578, 581 (9th Cir. 1983). Generally, a plaintiff's burden at the
2 pleading stage is relatively light. Rule 8(a) of the Federal Rules of Civil Procedure states that "[a]
3 pleading which sets forth a claim for relief . . . shall contain . . . a short and plain statement of the
4 claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a).

5 In ruling on a motion to dismiss under Rule 12, the court analyzes the complaint and takes
6 "all allegations of material fact as true and construe[s] them in the light most favorable to the non-
7 moving party." *Parks Sch. of Bus. v. Symington*, 51 F.3d 1480, 1484 (9th Cir. 1995). Dismissal may
8 be based on a lack of a cognizable legal theory or on the absence of facts that would support a valid
9 theory. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990). A complaint must
10 "contain either direct or inferential allegations respecting all the material elements necessary to
11 sustain recovery under some viable legal theory." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 562
12 (2007) (citing *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1106 (7th Cir. 1984)). "A
13 pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of
14 action will not do.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at
15 555). "Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual
16 enhancement.'" *Id.* (quoting *Twombly*, 550 U.S. at 557).

17 The factual allegations must be definite enough to "raise a right to relief above the speculative
18 level." *Twombly*, 550 U.S. at 555. However, a complaint does not need detailed factual allegations to
19 survive dismissal. *Id.* Rather, a complaint need only include enough facts to state a claim that is
20 "plausible on its face." *Id.* at 570. That is, the pleadings must contain factual allegations "plausibly
21 suggesting (not merely consistent with)" a right to relief. *Id.* at 545 (noting that this requirement is
22 consistent with Fed. R. Civ. P. 8(a)(2), which requires that the pleadings demonstrate that "the pleader
23 is entitled to relief"). Generally, a plaintiff's statement in an opposition brief cannot amend the
24 complaint under Rule 15. See *Fabbrini*, 544 F.Supp.2d at 1050 (citing *Car Carriers, Inc. v. Ford*
25 *Motor Co.*, 745 F.2d 1101, 1107 (7th Cir. 1984)).

26 The Ninth Circuit has "repeatedly held that a district court should grant leave to amend even if
27 no request to amend the pleading was made, unless it determines that the pleading could not possibly
28

1 be cured by the allegation of other facts.” *Lopez v. Smith*, 203 F.3d 1122, 1130 (9th Cir. 2000)
2 (citations and internal quotation marks omitted).

3 **2. Rule 9(b)**

4 Rule 9(b) of the Federal Rules of Civil Procedure requires that “[i]n alleging fraud or mistake,
5 a party must state with particularity the circumstances constituting fraud or mistake.” Fed. R. Civ. P.
6 9(b). A court may dismiss a claim grounded in fraud when its allegations fail to satisfy Rule 9(b)’s
7 heightened pleading requirements. *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1107 (9th Cir.
8 2003). The plaintiff must include “the who, what, when, where, and how” of the fraud. *Id.* at 1106
9 (citations omitted). “The plaintiff must set forth what is false or misleading about a statement, and
10 why it is false.” *Decker v. GlenFed, Inc.*, 42 F.3d 1541, 1548 (9th Cir. 1994). A claim for fraud must
11 be “specific enough to give defendants notice of the particular conduct which is alleged to constitute
12 the fraud charged so that they can defend against the charge and not just deny that they have done
13 anything wrong.” *Semegen v. Weidner*, 780 F.2d 727, 731 (9th Cir. 1985).

14 **B. Motion to Dismiss**

15 **1. The California Tort Claims Act**

16 **a. Legal Background**

17 No civil suit may be brought against a public entity “until a written claim therefor has been
18 presented to the public entity and has been acted upon by the board, or has been deemed to have been
19 rejected by the board...” Cal. Gov’t Code § 945.4; *see also State of California v. Superior Court of*
20 *Kings County*, 32 Cal.4th 1234, 1243, 13 Cal.Rptr.3d 534, 90 P.3d 116 (2004) (“*Bodde*”). The
21 “board” is the governing body of a local public entity, including a county. Cal. Gov’t Code §§ 900.2,
22 900.4. The board must grant or deny a claim within forty-five days after it is presented or the claim is
23 deemed rejected. Cal. Gov’t Code § 912.4. Lawsuits that seek monetary relief based on claims
24 sounding in tort, as well as claims sounding in contract, are lawsuits for “money or damages.” *See*
25 *City of Stockton v. Superior Court*, 42 Cal.4th 730, 738, 68 Cal.Rptr.3d 295, 171 P.3d 20 (2007).
26 Failure to allege facts demonstrating or excusing compliance with the claim presentation requirement
27 is grounds for dismissal of a plaintiff’s claims. *Bodde*, 32 Cal.4th at 1245, 13 Cal.Rptr.3d 534, 90
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1 P.3d 116. This requirement applies in federal court. *Butler v. Los Angeles Cnty.*, 617 F.Supp.2d 994,
2 1001 (C.D. Cal. 2008). The written claim “shall show all of” the enumerated requirements listed in
3 California Government Code section 910. Cal. Gov’t Code § 910. Claims statutes must be satisfied
4 even in the face of the public entity’s actual knowledge of the circumstances surrounding the claim.
5 *City of Stockton*, 42 Cal.4th at 738, 68 Cal.Rptr.3d 295, 171 P.3d 20.

6 **b. Application to Facts**

7 Plaintiffs allege that they provided notice of their claims to the attorney for the OCJV,
8 including the County of Alameda and the City of Oakland. FAC, 9:19-28. Plaintiffs have not alleged
9 compliance with the California Tort Claims Act. *See* Cal. Gov’t Code § 910 *et seq.* Plaintiffs’ claims
10 against the City of Oakland and Alameda County for money or damages are again dismissed on this
11 basis, this time with prejudice.

12 **2. Violation of the CWA**

13 **a. Notice Requirement**

14 A private citizen may commence a civil action on his own behalf under the CWA against any
15 violator of the Act. *Northern California River Watch v. Honeywell Aerospace*, 830 F.Supp.2d 760,
16 765 (N.D. Cal. 2011) (citing 33 U.S.C. § 1365(a)). The CWA requires a prospective plaintiff to give
17 a 60-day notice to the proper parties – the Environmental Protection Agency Administrator, the state
18 in which the violation is occurring, and the violator – before commencing suit against an alleged
19 violator. *Id.* (citing 33 U.S.C. § 1365(b)). Compliance with the notice requirement is a jurisdictional
20 necessity. *Center for Biological Diversity v. Marina Point Dev. Co.*, 566 F.3d 794, 800 (9th Cir.
21 2008) (citing *Waterkeepers N. Cal. v. AG Indus. Mfg., Inc.*, 375 F.3d 913, 916 (9th Cir. 2004)).

22 **b. Application to Facts**

23 Even assuming Plaintiffs have adequately pled notice to Defendants, the purported violators,
24 and California, the state in which the violation occurred, Plaintiffs have not pled that they provided a
25 60-day notice to the Administrator. Rather, Plaintiffs allege:

26 [V]arious state and federal Department of Justice agents received notice of the OCJV’s
27 violations. The DOJ’s Wong and Reding who are attorneys of record for C:11-2567 and 12-
28 161, as well as agents from the FBI, who will for the moment remain un-named, knew of and

1 received notice of the OCJV’s violations in real-time. Any and all officials in a position to act
2 were notified of the OCJV’s ongoing violations. The principle actors and violators, the OCJV,
did nothing but brazenly continue polluting the Estuary.

3 FAC, 11:16-21. In addition, pursuant to their RCRA cause of action, Plaintiffs allege: “As discussed
4 supra, Missud notified all required entities and all Defendants who’ve already lied about not receiving
5 proper notice.” *Id.* at 12:11-12. In Opposition, Plaintiffs clarify that Patrick sent notice, of some sort,
6 to Defendants’ counsel, county and state attorneys representing governmental agencies, the FBI, and
7 state and federal Departments of Justice, through his own master email list. Opposition, 11-12.

8 In spite of the Court’s Order, which stated that the Environmental Protection Agency
9 Administrator was a party that must be provided notice as a jurisdictional requirement and provided a
10 citation to the relevant statute, and two extensions of time to amend their complaint, Plaintiffs have
11 not made the specific factual allegation that they provided notice to the Administrator. Moreover,
12 Plaintiffs do not acknowledge or address their failure to do so in their Opposition despite Defendants’
13 clear argument that their claim should be dismissed without leave to amend for failure to provide
14 notice to the Administrator. *See* Motion to Dismiss, 10. Accordingly, Plaintiffs’ CWA claim is
15 dismissed without leave to amend as further amendment would be futile.

16 **3. Violation of the RCRA**

17 **a. Notice Requirement**

18 A private citizen may commence a civil action on his own behalf under the RCRA against any
19 violator of the Act. *Northern California River Watch*, 830 F.Supp.2d at 765 (citing 42 U.S.C. §
20 6972(a)). The RCRA requires a 60-day notice to the proper parties before commencing a suit for a
21 violation of any “permit, standard, regulation, condition, requirement, prohibition or order” and a 90-
22 day notice to a violator who has contributed to the “past or present handling, storage, treatment,
23 transportation, or disposal of any solid or hazardous waste which may present an imminent and
24 substantial endangerment to health or the environment.” *Id.* (citing 42 U.S.C. § 6972). The required
25 notice must be provided to the Administrator of the Environmental Protection Agency, the state in
26 which the alleged violation occurs, and the alleged violator. 42 U.S.C. § 6972(b). Notice to the
27 alleged violator may be less than 60 or 90 days prior to initiating suit in certain enumerated
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1 circumstances. *Id.* Giving pre-suit notice is a “mandatory condition[] precedent to commencing suit
2 under the RCRA citizen suit provision.” *Gregory Village Partners, L.P. v. Chevron U.S.A., Inc.*, 805
3 F.Supp.2d 888, 899 (N.D. Cal. 2011) (quoting *Hallstrom*, 493 U.S. 20, 31, 110 S.Ct. 304, 107
4 L.Ed.2d 237 (60-day notice)); *see also Covington v. Jefferson County*, 358 F.3d 626, 636 (9th Cir.
5 2004) (both 60-day and 90-day notice provisions are jurisdictional).

6 **b. Application to Facts**

7 Even assuming Plaintiffs have adequately pled notice to Defendants, the purported violators,
8 and California, the state in which the violation occurred, Plaintiffs have not pled that they provided
9 any notice to the Administrator. Rather, as noted above, Plaintiffs allege:

10 [V]arious state and federal Department of Justice agents received notice of the OCJV’s
11 violations. The DOJ’s Wong and Reding who are attorneys of record for C:11-2567 and 12-
12 161, as well as agents from the FBI, who will for the moment remain un-named, knew of and
13 received notice of the OCJV’s violations in real-time. Any and all officials in a position to act
14 were notified of the OCJV’s ongoing violations. The principle actors and violators, the OCJV,
15 did nothing but brazenly continue polluting the Estuary.

15 FAC, 11:16-21. In addition, pursuant to their RCRA cause of action, Plaintiffs allege: “As discussed
16 supra, Missud notified all required entities and all Defendants who’ve already lied about not receiving
17 proper notice.” *Id.* at 12:11-12. In Opposition, Plaintiffs clarify that Patrick sent notice, of some sort,
18 to Defendants’ counsel, county and state attorneys representing governmental agencies, the FBI, and
19 state and federal Departments of Justice, through his own master email list. Opposition, 11-12.

20 Once again, the Court provided statutory authority demonstrating that, as a jurisdictional
21 necessity, notice had to be afforded to the Administrator prior to bringing suit. Despite two
22 extensions of time to amend their complaint, Plaintiffs have not pled that they provided any notice to
23 the Administrator. Rather, as with their CWA claim, Plaintiffs do not acknowledge or address their
24 failure to do so in their Opposition despite Defendants’ clear argument that their claim should be
25 dismissed without leave to amend for failure to provide notice to the Administrator. *See Motion to*
26 *Dismiss*, 10. Accordingly, Plaintiffs’ RCRA claim is dismissed without leave to amend as further
27 amendment would be futile.

1 **4. Violation of the ADA**

2 **a. Legal Background**

3 **i. Article III Standing**

4 The ADA was enacted to address Congress’ finding that although “physical or mental
5 disabilities in no way diminish a person’s right to fully participate in all aspects of society ... many
6 people with physical or mental disabilities have been precluded from doing so because of
7 discrimination.” 42 U.S.C. § 12101(a)(1). The purpose of the ADA is to “provide a clear and
8 comprehensive national mandate for the elimination of discrimination against individuals with
9 disabilities.” 42 U.S.C. § 12101(b)(1); *see also PGA Tour, Inc. v. Martin*, 532 U.S. 661, 675 (2001)
10 (the ADA provides a “broad mandate” “to eliminate discrimination against disabled individuals, and
11 to integrate them ‘into the economic and social mainstream of American life.’”)(quoting S.Rep. No.
12 101–116, p. 20 (1989); H.R.Rep. No. 101–485, pt. 2, p. 50 (1990), U.S. Code Cong. & Admin. News
13 1990, pt. 2, pp. 303, 332)). Further, because the ADA is a civil rights statute that relies primarily on
14 private enforcement actions to obtain compliance, the Supreme Court has instructed that courts should
15 take a “broad view of constitutional standing.” *Chapman v. Pier 1 Imports (U.S.) Inc.*, 631 F.3d 939,
16 946 (9th Cir. 2011) (citing *Doran v. 7-11, Inc.*, 524 F.3d 1034, 1039 (9th Cir. 2008)(quoting
17 *Trafficante v. Metro Life Ins. Co.*, 409 U.S. 205, 209 (1972)). Nonetheless, a plaintiff asserting claims
18 under the ADA must establish the existence of a case or controversy under Article III of the
19 Constitution. *Id.* (citing U.S. Const. art. III, § 2; *Lujan*, 504 U.S. 555, 560, 112 S.Ct. 2130, 119
20 L.Ed.2d 351).

21 In *Chapman v. Pier 1 Imports (U.S.) Inc.*, the Ninth Circuit addressed the requirements for
22 Article III standing to seek injunctive relief under the ADA. *Id.* The starting point of the court’s
23 analysis was the general principal that to establish Article III standing, a plaintiff must demonstrate
24 that he or she has suffered an injury-in-fact traceable to the defendant’s actions and that the injury can
25 be redressed by a favorable decision. *Id.* (citing *Fortyune v. Am. Multi-Cinema, Inc.*, 364 F.3d 1075,
26 1081 (9th Cir. 2004)). In addition, to obtain injunctive relief a plaintiff must “demonstrate a ‘real or
27 immediate threat of repeated injury’ in the future.” *Id.* (quoting *O’Shea v. Littleton*, 414 U.S. 488,
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1 496 (1974)).¹⁰ In *Chapman*, the court explained that under the ADA, actual injury does not require
2 that a barrier completely preclude a plaintiff from entering or using a facility in any way. *Id.* at 947.
3 Rather, it is sufficient that barrier “interfere with the plaintiff’s ‘full and equal enjoyment’ of the
4 facility.” *Id.* (citing 42 U.S.C. § 12182(a)). “Because the ADAAG establishes the technical standards
5 required for ‘full and equal enjoyment,’ if a barrier violating these standards relates to a plaintiff’s
6 disability, it will impair the plaintiff’s full and equal access, which constitutes ‘discrimination’ under
7 the ADA.” *Id.*

8 To meet the “real and immediate threat of repeated injury” requirement for injunctive relief, a
9 plaintiff who has suffered injury-in-fact can demonstrate either that: 1) “he intends to return to a
10 noncompliant accommodation and is therefore likely to reencounter a discriminatory architectural
11 barrier;” or 2) “discriminatory architectural barriers deter him from returning to a noncompliant
12 accommodation.” *Id.* at 950. As to the scope of an ADA plaintiff’s standing, the *Chapman* court held
13 that “[t]he ADA’s remedial scheme is not limited to orders for the removal of encountered barriers,
14 but instead dictates that ‘injunctive relief shall include an order to alter facilities to make such
15 facilities readily accessible to and usable by individuals with disabilities.’” *Id.* at 951 (quoting 42
16 U.S.C. § 1288(a)(2)). Thus, “the ADA specifically does not require that the disabled individual
17 personally encounter each architectural barrier as a predicate to seeking its removal.” *Id.* Further,
18 even where the barriers that were encountered are later remedied, an ADA plaintiff does not lose his
19 standing to challenge unencountered barriers. *Id.* at 952 (citing *Doran*, 524 F.3d at 1047).

20 In *Chapman*, the court held that the plaintiff failed to establish injury-in-fact where he alleged
21 only that he was “physically disabled” and that he visited the defendant’s store and “encountered
22 architectural barriers that denied him full and equal access.” *Id.* at 954. He did not allege what the
23 barriers were or how his disability was affected by them. *Id.* Instead, he attached to his complaint an
24 accessibility study, which merely identified alleged ADA and California Building Code violations
25 “without connecting the alleged violations to Chapman’s disability, or indicating whether or not he

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27 ¹⁰ 42 U.S.C. § 12188(a)(1) affords private plaintiffs the remedies provided under the Civil Rights Act of 1964, 42 U.S.C. §
28 2000a-3(a). Damages may be awarded to aggrieved individuals when requested in suits brought by the Attorney General.
See U.S.C. § 12188(b)(2).

1 encountered any one of them in such a way as to impair his full and equal enjoyment” of the facility.
2 *Id.* at 955. Citing *Ashcroft v. Iqbal*, the court held that these were “precisely the ‘formulaic recitation’
3 of the elements of a claim that the Supreme Court has deemed insufficient under Rule 8.” *Id.* (citing
4 556 U.S. 662, 677). Because the plaintiff’s allegations “[left] the . . . court to guess which, if any, of
5 the alleged violations deprived him of the same full and equal access that a person who is not
6 wheelchair bound would enjoy when shopping at [the defendant’s store],” and also failed to “identify
7 how any of the alleged violations threatens to deprive him of full and equal access due to his
8 disability” in the future, Plaintiff did not sufficiently allege standing. *Id.*

9 **ii. General Principles**

10 Title III of the ADA provides that “[n]o individual shall be discriminated against on the basis
11 of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages,
12 or accommodations of any place of public accommodation by any person who owns, leases (or leases
13 to), or operates a place of public accommodation.” 42 U.S.C. § 12182. To prevail on a
14 discrimination claim under Title III, a plaintiff must show that: “(1) he is disabled within the meaning
15 of the ADA; (2) the defendant is a private entity that owns, leases, or operates a place of public
16 accommodation; and (3) the plaintiff was denied a public accommodation by the defendant because of
17 his disability.” *Cullen v. Netflix, Inc.*, 880 F.Supp.2d 1017, 1023 (N.D. Cal. 2012) (quoting *Ariz. ex*
18 *rel. Goddard v. Harkins Amusement Enters.*, 603 F.3d 666, 670 (9th Cir. 2010)).

19 In addition, Title II of the ADA covers discrimination in the provision of public services. *See*
20 42 U.S.C. §§ 12131-12165. Title II is divided into two parts: Part A covers public services generally,
21 42 U.S.C. §§ 12131-12134; Part B applies specifically and only to public transportation provided by
22 public entities, 42 U.S.C. §§ 12141-12165. To state a claim under Title II of the ADA, a plaintiff
23 must allege that: (1) she is an individual with a disability under the Act; (2) she is “otherwise
24 qualified” to participate in or receive the benefit of the entity’s services programs, or activities, i.e.,
25 she meets the essential eligibility requirements of the entity, with or without reasonable
26 accommodation; (3) she was either excluded from participation in or denied the benefits of the
27 entity’s services, programs, or activities, or was otherwise discriminated against by the public entity
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1 solely by reason of her disability; and (4) the entity is a public entity. *Zukle v. Regents of Univ. of*
2 *Cal.*, 166 F.3d 1041, 1045 (9th Cir. 1999). “The ADA shall be construed broadly in order to
3 effectively implement the ADA’s fundamental purpose of providing a clear and comprehensive
4 national mandate for the elimination of discrimination against individuals with disabilities.” *D.K. ex*
5 *rel. G.M. v. Solano County Office of Educ.*, 667 F.Supp.2d 1184, 1190 (E.D. Cal. 2009) (citing
6 *Barden v. City of Sacramento*, 292 F.3d 1073 (9th Cir. 2002)).

7 **b. Application to Facts**

8 Patrick is removed as a party from the FAC, he is now “only the attorney of record herein.”
9 Nevertheless, the amended allegations of disability pertain only to Patrick. There are no allegations in
10 the FAC that Julie, the only Plaintiff, is disabled. Therefore, there are no allegations of any
11 deprivations under the statute as to the sole plaintiff. The ADA claim is therefore dismissed without
12 leave to amend.

13 In addition, even if Patrick were still a party, he has not adequately pled his standing to pursue
14 an ADA claim for injunctive relief pursuant to *Chapman*. Plaintiffs allege that Patrick suffers from
15 sciatica and severe sclerosis, and is accordingly limited to a walking range of two city blocks.
16 Plaintiffs allege the following barriers to access: (1) the distance between the overflow parking lot
17 and the Coliseum; (2) some unspecified number of curbs between the overflow lot and the Coliseum
18 that lack ramps; and (3) various hazards in and around the overflow lot. Plaintiffs further plead that
19 Patrick will return to the Coliseum to attend an A’s game. Plaintiffs do not plead that Patrick will be
20 required to use the overflow lot to do so. Thus, Plaintiffs have not pled that Patrick is likely to
21 reencounter any of the alleged discriminatory architectural barriers at the Coliseum. Moreover,
22 Plaintiffs have not pled that the discriminatory architectural barriers deter Patrick from returning to
23 the Coliseum. *See Chapman*, 631 F.3d at 950.

24 **5. The National Highway Safety and Traffic Act and Caltrans Requirements**

25 **a. Article III Standing**

26 “[T]o satisfy Article III’s standing requirements, a plaintiff must show (1) it has suffered an
27 ‘injury in fact’ that is (a) concrete and particularized and (b) actual or imminent, not conjectural or
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1 hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is
2 likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.”
3 *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 180-181, 120 S.Ct. 693, 145
4 L.Ed.2d 610 (2000).

5 **b. Application to Facts**

6 In his FAC, Plaintiffs assert a violation of the National Highway Safety and Traffic Act and
7 Caltrans requirements based on Defendants’ failure “to provide adequate pedestrian walkways,
8 railings, landings, ramps, and other components which require separation from vehicular traffic,
9 roadways, and thoroughfares prescribed by the Act.” FAC, 15:3-5, 16:15-18. Plaintiffs provide
10 citations to several National Highway Traffic Safety Administration publications, the Caltrans
11 Mission Statement, and a Caltrans press release relating to improvements made on Interstate 5 to
12 support their assertion that these violations are actionable. FAC, 15:7-16:10, 16:20-17:19.

13 Plaintiffs have not demonstrated that there is a private right of action for violation of any of
14 these provisions. Moreover, Plaintiffs have not alleged any injury resulting from the alleged
15 violations.¹¹ Plaintiffs have had ample opportunity to allege an injury to support standing. In its
16 Order, this Court dismissed both causes of action noting that Plaintiffs had neither identified any
17 supporting authority nor any injury they suffered as a result of any violation of that authority.
18 Moreover, in their Motion to Dismiss Defendants noted that Plaintiffs made no attempt to allege any
19 injury. Yet Plaintiffs have made no attempt to allege or otherwise argue that they suffered any injury
20 as a result of the purported violations. The record makes clear that they cannot do so. Plaintiffs’
21 clauses of action for violations of the NHSTA and Caltrans Requirements is dismissed without leave
22 to amend.

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25 ¹¹ Plaintiffs distance themselves from the proposition that there is a private right of action under any of these provisions in
26 their Opposition, responding to Defendants’ assertion that there is no private right of action under the National Highway
27 Traffic Safety Act by stating: “That may be, however - ... the information contained[in the NHSTA websites] can be used
28 to prove that the OCJV has an extraordinarily cavalier attitude when it comes to commingling children and the elderly
among 18-wheelers.” Opposition, 14. Plaintiffs do not respond to Defendants’ assertion that there is no private right of
action to support the purported Caltrans requirements.

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6. Breach of Contract

a. Legal Background

The elements of a cause of action for breach of contract in California are: (1) the existence of the contract; (2) performance by the plaintiff or excuse for nonperformance; (3) breach by defendant; and (4) damages. *First Commercial Mortg. Co. v. Reece*, 89 Cal.App.4th 731, 745, 108 Cal.Rptr.2d 23 (2001). “There is implied in every contract a covenant by each party not to do anything which will deprive the other parties thereto of the benefits of the contract.” *Harm v. Frasher*, 181 Cal.App.2d 405, 417, 5 Cal.Rptr. 367 (1960). A breach of contract may be established on the basis of either an express provision of the contract or on the implied covenant of good faith and fair dealing. *See Storek & Storek, Inc. v. Citicorp Real Estate, Inc.*, 100 Cal.App.4th 44, 55, 122 Cal.Rptr.2d 267 (2002) (“every contract imposes upon each party a duty of good faith and fair dealing in the performance of the contract such that neither party shall do anything which will have the effect of destroying or injuring the right of either party to receive the fruits of the contract”). An implied covenant of good faith and fair dealing cannot contradict the express terms of a contract. *Id.* (Citing *Carma Developers (Cal.), Inc. v. Marathon Dev. Cal., Inc.*, 2 Cal.4th 342, 374, 6 Cal.Rptr.2d 467, 826 P.2d 710 (1992)). Further, because “the implied covenant operates to protect the express covenants or promises of [a] contract ... [it] cannot impose substantive duties or limits on the contracting parties beyond those incorporated in the specific terms of [the parties’] agreement.” *McClain v. Octagon Plaza, LLC*, 159 Cal.App.4th 784, 806, 71 Cal.Rptr.3d 885 (2008).

“Facts alleging a breach, like all essential elements of a breach of contract cause of action, must be pleaded with specificity.” *Levy v. State Farm Mut. Auto. Ins. Co.*, 150 Cal.App.4th 1, 5, 58 Cal.Rptr.3d 54 (2007). Thus, to state a claim for breach of the implied covenant of good faith and fair dealing, a plaintiff must identify the specific contractual provision that was frustrated. *See Lingad v. Indymac Fed. Bank*, 682 F.Supp.2d 1142, 1154 (2010).

b. Application to Facts

The Court dismissed Plaintiffs’ initial Complaint for failure to identify any factual basis underlying any express or implied contractual duty owed by Defendants. In the FAC, Plaintiffs state

1 that they are unaware of any of the terms and conditions of their contract, because they cannot find
2 those terms on www.ticketmaster.com, except for the words: “Rain or Shine.” FAC, 19:28-20:3.
3 Without providing contractual terms, Plaintiffs allege that a traffic control plan and adequate parking
4 were necessary for the Concert. FAC, 20:28-29. Plaintiffs plead that “[a]ll the many, many Plaintiffs
5 (1) had a Ticket..., (2) timely arrived to the Venue for admission, (3) were directed by the Defendants
6 in all sorts of weird directions through a maze of gridlocked cars to get an additional \$25 per car
7 thereby denying them admission to the Venue which they paid handsomely to enter, (4) and suffered
8 damages but-for these Defendants’ greed and insistence that they go to the overflow parking lot and
9 other mismanaged facilities. Plaintiffs wasted money on Tickets that weren’t honored by these
10 Defendants.” *Id.* at 20:6-12. However, Plaintiffs also allege that they, the Missuds, purchased two
11 tickets, only one of which was timely honored. *Id.* at 19, 21:22. In their Opposition, Plaintiffs clarify
12 that Patrick took BART to the Coliseum and had his ticket timely honored, whereas Julie drove her
13 car, became stuck in traffic, and missed the vast majority of the Concert. Opposition, 13.

14 In the absence of the contractual provisions, the Court cannot conclude that, by virtue of
15 Plaintiffs’ tickets, Plaintiffs were entitled to anything other than admission to the venue when their
16 tickets were presented at the entry gate.¹² Plaintiffs Opposition makes clear that both tickets were
17 accepted for admission upon their presentation at the entry gate, although because of the traffic jam
18 one of the tickets could not be presented until the Concert was nearly over. *Id.* Without the
19 contractual provisions, Court cannot conclude that Plaintiffs have stated a claim for breach of an
20 express provision of the contract based on the allegation that Defendants failed to provide parking or
21 traffic control in such a way that significantly delayed, or even prevented, access to the venue for
22 those who drove expecting to be able to use the Coliseum’s parking lot.

23 The Court also cannot conclude that Plaintiffs have stated a claim for a breach of the covenant
24 of good faith and fair dealing. Plaintiffs essentially allege that Defendants constructively prevented
25 Plaintiffs from attending the Concert, the purpose of their contract, by mismanaging the traffic in their
26 parking lots and by selling tickets to more patrons than they could expect to provide parking for. To

27 ¹² Plaintiffs do not even directly plead this term of their contract. Rather, Plaintiffs imply that arrival in the vicinity of the
28 Coliseum should be sufficient.

1 find a breach of the covenant of good faith and fair dealing on this theory, the Court would have to
2 conclude that Defendants were obligated by the contract to provide parking and traffic control. *See*
3 *McClain*, 159 Cal.App.4th at 806, 71 Cal.Rptr.3d 885 (because “the implied covenant operates to
4 protect the express covenants or promises of [a] contract ... [it] cannot impose substantive duties or
5 limits on the contracting parties beyond those incorporated in the specific terms of [the parties’]
6 agreement”). On this record, the Court cannot.

7 Accordingly, Plaintiffs’ breach of contract claim is dismissed with prejudice. As Plaintiffs
8 have pled that they are unable to locate the terms of their contract, leave to amend would be futile.

9 **7. Negligence**

10 **a. Legal Background**

11 **i. General Considerations**

12 To state a claim for negligence, a plaintiff must allege: (1) the defendant’s legal duty of care
13 to the plaintiff; (2) breach of that duty; (3) causation; and (4) resulting injury to the plaintiff. *Merrill*
14 *v. Navegar, Inc.*, 26 Cal.4th 465, 500, 110 Cal.Rptr.2d 370, 28 P.3d 116 (2001). The existence of a
15 duty is a question of law to be determined by the court. *Id.* at 501.

16 **ii. The Economic Loss Rule**

17 “[T]he economic loss rule prevents the law of contract and the law of tort from dissolving one
18 into the other.” *Robinson Helicopter*, 34 Cal.4th at 988, 22 Cal.Rptr.3d 352, 102 P.3d 268. It
19 “requires a purchaser to recover in contract for purely economic loss due to disappointed expectations,
20 unless he can demonstrate harm above and beyond the broken contractual promise.” *Id.* Tort
21 damages have been permitted in contract cases where a breach of duty directly causes physical injury,
22 for breach of the covenant of good faith and fair dealing in insurance contracts, for wrongful
23 discharge in violation of public policy, and where the contract was fraudulently induced. *Erllich*, 21
24 Cal.4th at 551-52, 87 Cal.Rptr.2d 886, 981 P.2d 978. In each of those cases, the duty that gives rise to
25 tort liability is either completely independent of the contract or arises from conduct that is both
26 intentional and intended to harm. *Id.* at 552. In addition, in the products liability context the rule may
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1 be overcome by allegations of personal injury or damages to property aside from the defective
2 product. *See Robinson Helicopter*, 34 Cal.4th at 988, 22 Cal.Rptr.3d 352, 102 P.3d 268.

3 **b. Application to Facts**

4 Plaintiffs negligence claim rests on the following theories: (1) Defendants breached their duty
5 to provide adequate safe parking and traffic control by requiring Plaintiffs to park in an expensive and
6 muddy overflow lot; (2) Defendants breached their duty to provide access to the Coliseum by creating
7 a traffic jam through their attempts to collect a \$25 fee for parking; and (3) Defendants breached their
8 duty to maintain the overflow lot in a safe condition by leaving a number of hazards exposed, such as
9 rusty barbed wire, muddy ruts, and collapsed chain link fences. FAC, 17:22-19:8, 25:10-15.¹³
10 However, Plaintiffs have not alleged any damage or other injury arising from any breach or any
11 alleged duty except Defendants' duty to provide adequate parking. That is, Plaintiffs have not alleged
12 any harm caused by the hazardous conditions in the overflow lot. Rather, Plaintiffs claims are
13 essentially (1) that the overflow lot is too far from the Coliseum, such that Patrick, who is no longer a
14 plaintiff in this action, suffered leg pain from covering the distance, and (2) that the Coliseum did not
15 provide sufficient parking.¹⁴

16 However, in spite of an opportunity to amend their complaint and a second round of briefing,
17 Plaintiffs have still failed to identify any authority to support the proposition that Defendants were
18 under any duty to provide adequate parking that arose independently from the contract. Rather,

19 _____
20 ¹³ In pleading their negligence cause of action, Plaintiffs also state that Defendants breached their covenant of good faith
and fair dealing and fraudulently induced plaintiffs into paying hard-earned wages to sit in traffic for hours. These claims
are not negligence claims, and are discussed in other sections of this Order.

21 ¹⁴ Plaintiffs invoke, in another portion of their FAC, the doctrine of res ipsa loquitur. FAC, 21:2-4. Res ipsa loquitur is an
22 evidentiary rule for "determining whether circumstantial evidence of negligence is sufficient." *Brown v. Poway Unified*
23 *School Dist.*, 4 Cal. 4th 820, 825, 15 Cal.Rptr.2d 679, 843 P.2d 624 (1993). "In order to invoke res ipsa loquitur, the
24 plaintiff has the burden to establish three conditions: (1) the event must be of a kind which ordinarily does not occur in the
25 absence of someone's negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the
26 defendant; (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff." *Howe v.*
27 *Seven Forty Two Co., Inc.*, 189 Cal.App.4th 1155, 1161, 117 Cal.Rptr.3d 126 (2010) (citations omitted). Plaintiffs allege,
28 in essence, that something under Defendants' control went wrong, causing the traffic jam. Plaintiffs do not identify any
agent or instrumentality within Defendants control. Moreover, Plaintiffs cannot allege that Defendants exercised
exclusive control over the public roadways surrounding the Coliseum or even the parking lots themselves, as the
independent action of any driver in the parking lot or on the roadway could cause a traffic jam by blocking the roadway or
access to the parking lot. Put another way, the Court cannot infer that Defendants were negligent because there was a
traffic jam in the vicinity of the Coliseum at the time of the Concert, or even because the parking lot was not accessible
during the Concert.

1 Plaintiffs ignore Defendants’ argument, made in their Motion to Dismiss, that Plaintiffs have not
2 alleged a breach of any duty arising independently of the contract. *See* Motion to Dismiss, 19.
3 Moreover, Plaintiffs have not alleged that the contract provided any duty to provide adequate parking.
4 Finally, the only injury alleged under this negligence theory is that Plaintiffs’ expectations under the
5 contract were frustrated. Because Plaintiffs have failed to remedy the defects of their Complaint, their
6 negligence cause of action is dismissed without leave to amend.

7 **8. Fraudulent Inducement**

8 **a. Legal Background**

9 **i. General Considerations**

10 “Fraud in the inducement is a subset of the tort of fraud. It ‘occurs when ‘‘the promisor knows
11 what he is signing but his consent is induced by fraud, mutual assent is present and a contract is
12 formed, which, by reason of the fraud is voidable.’’’” *Hinesley v. Oakshade Town Ctr.*, 135
13 Cal.App.4th 289, 294-295, 37 Cal.Rptr.3d 364 (2005) (quoting *Rosenthal v. Great Western Fin.*
14 *Securities Corp.*, 14 Cal.4th 394, 415, 58 Cal.Rptr.2d 875, 926 P.2d 1061 (1996)). “The elements of
15 fraud are (a) a misrepresentation (false representation, concealment, or nondisclosure); (b) scienter or
16 knowledge of its falsity; (c) intent to induce reliance; (d) justifiable reliance; and (e) resulting
17 damage.” *Id.* at 294 (citing *Lazar*, 12 Cal.4th at 638, 49 Cal.Reptr.2d 377, 909 P.2d 981). To plead a
18 claim for fraud in the inducement, Plaintiffs’ allegations must be sufficiently detailed to meet the
19 heightened Rule 9(b) pleading standard for fraud. *Parino*, 838 F.Supp.2d at 906.

20 **ii. The Economic Loss Rule**

21 The economic loss rule does not bar a properly pled fraudulent inducement claim: “[I]t has
22 long been the rule that where a contract is secured by fraudulent representations, the injured party may
23 elect to affirm the contract and sue for fraud.” *United Guar. Mortg. Indem. Co.*, 660 F.Supp.2d at
24 1188 (quoting *Lazar*, 12 Cal.4th at 645, 49 Cal.Reptr.2d 377, 909 P.2d 981).

25 **b. Application to Facts**

26 The FAC rests on the same theory as the original Complaint. That is, Defendants oversold the
27 concert knowing that they did not have adequate parking to accommodate 69,000 ticketed invitees.

1 Defendants misrepresented that they could accommodate each ticketed guest by selling 69,000 tickets.
2 Moreover, by selling the tickets they guaranteed admission to the Concert upon timely arrival.
3 Plaintiffs relied on those representations by buying tickets. Plaintiffs have not added any allegations
4 to the FAC concerning any statements made by Defendants, either through advertisements or directly
5 to individuals. Instead, Plaintiffs rely solely on the implications of a ticket sale. Moreover, Plaintiffs
6 make clear in their briefing that they do not mean timely arrival at the gates of the Coliseum, but
7 rather timely arrival in the vicinity of the Coliseum by car, as opposed to by BART or by some other
8 means of transit. *See* FAC, 19:20-22 (stating that one of the Missuds’ tickets was timely honored),
9 Opposition, 13, 15 (stating that Patrick took BART to the Coliseum whereas Julie drove, parked in the
10 overflow lot, and missed almost all of the concert after sitting in traffic for upwards of three hours).
11 In the absence of any alleged representations relating to whether Plaintiffs would be able to park at the
12 venue, the amount of time it would take to park, or that parking would be available regardless of
13 Plaintiffs’ arrival time, the Court cannot conclude that Plaintiffs have stated a claim for fraudulent
14 inducement. That is, a promise to provide parking, regardless of arrival time, cannot be implied from
15 sale of a ticket for a seat at an event without more. Plaintiffs have already been afforded an
16 opportunity to plead, to the specificity required by Rule 9(b), particular false statements. As it is now
17 apparent that they cannot do so, Plaintiffs’ fraudulent inducement cause of action is dismissed without
18 leave to amend.

19 **9. UCL**

20 **a. Legal Background**

21 The UCL prohibits “unfair competition,” which is defined as any “unlawful, unfair or
22 fraudulent business act or practice.” Cal. Bus. & Prof. Code § 17200. A claim may be brought under
23 the UCL “by a person who has suffered injury in fact and has lost money or property as a result of
24 unfair competition.” Cal. Bus. & Prof. Code § 17204. Therefore, to establish standing under the UCL
25 a plaintiff must “(1) establish a loss or deprivation of money sufficient to qualify as injury in fact, i.e.,
26 *economic injury*, and (2) show that the economic injury was the result of, i.e., *caused by*, the unfair
27 business practice ... that is the gravamen of the claim.” *Lawther v. OneWest Bank, FSB*, 2012 WL
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1 298110, at *23 (N.D. Cal. Feb. 1, 2012) (quoting *Kwikset Corp. v. Superior Court*, 51 Cal.4th 310,
2 337, 120 Cal.Rptr.741, 246 P.3d 877 (2011)).

3 To establish a violation of Section 17200, a plaintiff may establish a violation under any one
4 of three prongs. To state a cause of action based on an “unlawful” business act or practice under the
5 UCL, a plaintiff must allege facts sufficient to show a violation of some underlying law. *People v.*
6 *McKale*, 25 Cal.3d 626, 635, 159 Cal.Rptr. 811, 602 P.2d 731 (1979). A “fraudulent” business act or
7 practice is one in which members of the public are likely to be deceived. *Weinstat v. Dentsply Intern.,*
8 *Inc.*, 180 Cal.App. 4th 1213, 1223 n.8, 103 Cal.Rptr.3d 614 (2010) (citations omitted). “‘Fraudulent,’
9 as used in the statute, does not refer to the common law tort of fraud but only requires a showing that
10 members of the public ‘are likely to be deceived.’” *Olsen v. Breeze*, 48 Cal.App.4th 608, 618, 55
11 Cal.Rptr.2d 818 (1996). UCL claims premised on fraudulent conduct trigger the heightened pleading
12 standard of Rule 9(b) of the Federal Rules of Civil Procedure. *Kearns v. Ford Motor Co.*, 567 F.3d
13 1120, 1125 (9th Cir.2009).

14 Finally, while there is disagreement among California courts regarding the definition of
15 “unfair” business practices, three tests have been applied, as the court in *Phipps v. Wells Fargo*
16 explains:

17 In consumer cases, such as this, the California Supreme Court has not established a
18 definitive test to determine whether a business practice is unfair. *Drum v. San Fernando*
19 *Valley Bar Ass’n*, 182 Cal.App.4th 247, 256, 106 Cal.Rptr.3d 46 (2010). A split of
20 authority has developed among the California Courts of Appeal, which have applied three
21 tests for unfairness in consumer cases. *Drum*, 182 Cal.App.4th at 256, 106 Cal.Rptr.3d
22 46.

23 The test applied in one line of cases requires “that the public policy which is a predicate
24 to a consumer unfair competition action under the ‘unfair’ prong of the UCL must be
25 tethered to specific constitutional, statutory, or regulatory provisions.” *Drum*, 182
26 Cal.App.4th at 256, 106 Cal.Rptr.3d 46 (citing *Bardin v. Daimlerchrysler Corp.*, 136
27 Cal.App.4th 1255, 1260–1261, 39 Cal.Rptr.3d 634 (2006); *Davis v. Ford Motor Credit*
28 *Co.*, 179 Cal.App.4th at 581, 595–596, 101 Cal.Rptr.3d 697 (2009); *Gregory v.*
Albertson’s Inc., 104 Cal.App.4th 845, 854, 128 Cal.Rptr.2d 389 (2002).

26 . . .

27 A second line of cases applies a test to determine whether the alleged business practice “is
28 immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers and

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requires the court to weigh the utility of the defendant’s conduct against the gravity of the harm to the alleged victim.” *Drum*, 182 Cal.App.4th at 257, 106 Cal.Rptr.3d 46 (citing *Bardin*, 136 Cal.App.4th at 1260, 39 Cal.Rptr.3d 634; *Davis*, 179 Cal.App.4th at 594–595, 101 Cal.Rptr.3d 697)).

...

The test applied in a third line of cases draws on the definition of “unfair” in section 5 of the Federal Trade Commission Act (15 U.S.C. § 45, subd. (n)), and requires that “(1) the consumer injury must be substantial; (2) the injury must not be outweighed by any countervailing benefits to consumers or competition; and (3) it must be an injury that consumers themselves could not reasonably have avoided.” *Drum*, 182 Cal.App.4th at 257, 106 Cal.Rptr.3d 46 (citing *Davis*, 179 Cal.App.4th 597–598, 101 Cal.Rptr.3d 697; *Camacho v. Automobile Club of Southern California*, 142 Cal.App.4th 1394, 1403, 48 Cal.Rptr.3d 770 (2006)).

2011 WL 302803, at *16 (E.D.Cal., Jan. 27, 2011).

b. Application to Facts

As discussed below, Plaintiffs’ UCL claim, relying on the same facts and theories set forth in the original Complaint, is dismissed without leave to amend.

i. Standing

Plaintiffs allege that Defendants engaged in fraudulent acts by selling more tickets to the concert than they were capable of accommodating and by advertising the concert in a way that misled the putative class of “Plaintiffs-Invitees” to believe that their tickets would be honored. Plaintiffs allege that they suffered damage as a result. Reading the Complaint in the light most favorable to Plaintiffs, they have standing to assert a claim under the UCL on the theory that the concert was oversold because they allegedly suffered economic injury, the lost value of one of the two tickets they purchased, because Defendants sold tickets to more people than they were capable of accommodating. However, Plaintiffs still do not have standing to assert a UCL claim on a theory of misleading advertising because Plaintiffs still have not alleged that they purchased their tickets, or otherwise suffered economic injury, in reliance on any of the unspecified misleading advertising. Indeed, they cannot identify any advertisement that they were aware of, instead stating that they “learned of the Concert through some means of advertisement” because the performer “Bono did not personally call”

1 each person who bought a ticket to the event. FAC, 23:5-7. Accordingly, Plaintiffs claim premised
2 on the misleading advertising theory is dismissed without leave to amend.

3 **ii. Unlawful Prong**

4 In its previous Order, the Court stated:

5 Plaintiff alleges that he suffered injury “[a]s a result of Defendants’ unfair, unlawful and
6 deceptive acts.” Plaintiff fails to allege that Defendants violated any law by overselling the
7 concert or through their allegedly misleading advertising. Moreover, Plaintiff has failed to
8 plead that Defendants violated any other law. To state a cause of action, Plaintiff must do so.
9 Plaintiff has not pled a cause of action under the unlawful prong. Plaintiff will be given leave
10 to amend.

11 Order, 35. In spite of the opportunity to amend their Complaint, Plaintiffs restated their allegations
12 that Defendants knowingly oversold the Concert without any attempt to plead that Defendants’
13 conduct violated any other law. FAC, 23:8-11. The remainder of the FAC makes clear that the basis
14 for the theory is Defendants inability to provide sufficient parking for a crowd of that size. Once
15 again, the UCL claim under the unlawful prong is dismissed. Plaintiffs will not be given leave to
16 amend because further amendment would be futile.

17 **iii. Fraudulent Prong**

18 Plaintiffs amend their Complaint to include a legal argument, but no additional factual
19 allegations, in support of their UCL claim under the fraudulent prong. FAC, 23:12-16. Presumably,
20 Plaintiffs rely on the same factual allegations set forth in their fraudulent inducement claim.
21 However, Plaintiffs still have not pled, to the standard required by Rule 9(b), that Defendants made
22 any statement that would have deceived the public into believing that they would be able to drive to
23 the Coliseum and park their car regardless of their time of arrival. Rather than do so, explicitly
24 responding to two footnotes in the Court’s prior Order, Plaintiffs plead that reasonable access is as
25 necessary as clean air, potable water, and safe premises. FAC, 23-24 n.9. However, Plaintiffs still
26 make no attempt to address their failure to plead, noted by the Court in one of the footnotes Plaintiffs
27 explicitly respond to, facts to support their conclusory allegation that the only means of “reasonable
28 access to the Venue” was by driving. *See* FAC, 23-24 n.9; Order, 36 n.18. Indeed, Plaintiffs’

1 Opposition makes clear that BART provided an alternative means of access that enabled Patrick to
2 timely access the venue. Opposition, 13. Thus, Plaintiffs still have not pled facts to justify their
3 conclusion that Defendants oversold the event because they could not provide parking for attendees.
4 As discussed above, and in light of Plaintiffs' footnote, the Court concludes that Plaintiffs cannot do
5 so. The UCL claim under the fraudulent prong is dismissed without leave to amend.

6 To reach a contrary result on this record, the Court would be required to conclude as a matter
7 of law that by selling tickets to attend an event, without making any representations whatsoever,
8 Defendants could have promised to provide parking to each ticketholder regardless of whether or not
9 there were other reasonable means of accessing the event. It cannot do so.

10 **iv. Unfair Prong**

11 Plaintiffs allege that Defendants lack of adequate parking and traffic control measures created
12 a traffic jam, preventing emergency personnel from being able to use the roads surrounding the
13 Coliseum and putting thousands of people in peril. FAC, 23:16-25. This does not cure the
14 deficiencies in their Complaint. First, Plaintiffs still have made no effort to tether their public policy
15 argument to any specific constitutional, statutory, or regulatory provisions. Second, as discussed
16 above, Plaintiffs have not alleged that the business practices related to ticket sales, selling tickets to
17 more individuals than Defendants could provide parking for, was immoral, unethical, oppressive,
18 unscrupulous, or substantially injurious to consumers in light of Plaintiffs' failure to plead that
19 Defendants made any indication parking would be provided for all ticketed patrons. To the extent
20 Defendants disregard for any collateral effects of the lack of parking could qualify as such conduct,
21 Plaintiffs have not alleged that any person suffered actual injury, aside from inability to attend the
22 concert, as a result of the traffic jam. Finally, as to the third formulation of the test, Plaintiffs still
23 have not pled that they could not have avoided the alleged injury. As noted above, Plaintiffs have not
24 pled that they could not access the Coliseum using other means of transportation. In light of Plaintiffs
25 failure to address the deficiencies in their Complaint, their UCL claim is dismissed without leave to
26 amend.

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VI. CONCLUSION

For the foregoing reasons, the FAC is dismissed without leave to amend. The Motion to Strike is denied as moot. The Clerk shall close the file.

IT IS SO ORDERED.

Dated: June 27, 2013



JOSEPH C. SPERO
United States Magistrate Judge