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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 LISA KOUBALL, on behalf of herself,
12 and all others similarly situated,

13 Plaintiff,

14 v.

15 SEAWORLD PARKS &
16 ENTERTAINMENT, INC.,

17 Defendant.

Case No.: 20-cv-870-CAB-BGS

**ORDER GRANTING DEFENDANT'S
MOTION TO DISMISS**

[Doc. No. 12]

18 This matter is before the Court on a motion to dismiss Plaintiff's complaint filed by
19 Defendant SeaWorld Parks & Entertainment, Inc. ("SeaWorld"). [Doc. No. 12.] The Court
20 held a telephonic hearing on September 9, 2020. For the reasons set forth below, the Court
21 grants SeaWorld's motion to dismiss.

22 **I. BACKGROUND**

23 Plaintiff Lisa Kouball filed this putative consumer class action complaint against
24 Defendant SeaWorld on May 8, 2020. [Doc. No. 1.] The complaint asserts claims for: (1)
25 violation of California's Consumers Legal Remedies Act ("CLRA"), Cal. Civ. Code §§
26 1750, et seq.; (2) violation of California's Unfair Competition Law ("UCL"), Cal. Bus. &
27 Prof. Code §§ 17200, et seq.; (3) violation of California's False Advertising Law ("FAL"),
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1 Cal. Bus. & Prof. Code §§ 17500, et seq.; (4) breach of contract; (5) unjust enrichment;
2 and (6) money had and received. [Id.]

3 SeaWorld operates several amusement parks and water parks throughout the United
4 States, with locations in San Diego, Orlando, and San Antonio. [Id. at ¶ 6.¹] Plaintiff
5 alleges SeaWorld offers annual passes that allow its customers to access its parks on an
6 unlimited basis. [Id.] Plaintiff purchased four annual passes for SeaWorld’s San Diego
7 location for which she is charged a total of \$48.99 per month. [Id. at ¶ 10.] In March of
8 2020, SeaWorld closed all its parks due to the COVID-19 pandemic. [Id. at ¶ 8.] On
9 approximately April 23, 2020, Plaintiff was charged the full amount of her monthly
10 payment of \$48.99 for her annual passes even though Plaintiff did not have access to
11 SeaWorld’s parks due to the closure. [Id. at ¶ 10.] Plaintiff alleges she “signed up for
12 [SeaWorld’s] annual membership passes with the belief and on the basis that he [sic] would
13 have access to SeaWorld San Diego amusement park at any time during the month in which
14 she was charged.” [Id.] Plaintiff further alleges she would not have paid for the
15 membership had she known that she would not have access to the park and that SeaWorld
16 continues charging its customers monthly fees while the parks remain closed. [Id.]

17 Plaintiff seeks to represent a Nationwide class and California subclass of all persons
18 who were charged annual membership fees for a period in which SeaWorld’s parks were
19 closed. [Id. at ¶ 12.] SeaWorld moved to dismiss the complaint on July 1, 2020. [Doc.
20 No. 12.]

21 **II. LEGAL STANDARD**

22 Federal Rule of Civil Procedure 12(b)(1) allows a party to move to dismiss based on
23 the court’s lack of subject matter jurisdiction. Fed. R. Civ. P. 12(b)(1). Plaintiff has the
24 burden of establishing that the court has subject matter jurisdiction over an action. *Assoc.*
25 *of Med. Colls. v. U.S.*, 217 F.3d 770, 778-79 (9th Cir. 2000). In a class action at least one
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28 ¹ Document numbers and page references are to those assigned by CM/ECF for the docket entry.

1 of the named plaintiffs must meet the Article III standing requirements. *Bates v. United*
2 *Parcel Servs., Inc.*, 511 F.3d 974, 985 (9th Cir. 2007). Article III requires that: “(1) at least
3 one named plaintiff suffered an injury in fact, (2) the injury is fairly traceable to the
4 challenged conduct, and (3) the injury is likely to be redressed by a favorable decision.”
5 *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (quotation marks and citation
6 omitted).

7 Under Rule 12(b)(6), a party may bring a motion to dismiss based on the failure to
8 state a claim upon which relief may be granted. A Rule 12(b)(6) motion challenges the
9 sufficiency of a complaint as failing to allege “enough facts to state a claim to relief that is
10 plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). For purposes
11 of ruling on a Rule 12(b)(6) motion, the court “accept[s] factual allegations in the complaint
12 as true and construe[s] the pleadings in the light most favorable to the non-moving party.”
13 *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008).
14 “[D]ismissal may be based on either a lack of a cognizable legal theory or the absence of
15 sufficient facts alleged under a cognizable legal theory.” *Johnson v. Riverside Healthcare*
16 *Sys.*, 534 F.3d 1116, 1121 (9th Cir. 2008) (internal quotations and citations omitted).

17 Even under the liberal pleading standard of Rule 8(a)(2), which requires only that a
18 party make “a short and plain statement of the claim showing that the pleader is entitled to
19 relief,” a “pleading that offers ‘labels and conclusions’ or ‘a formulaic recitation of the
20 elements of a cause of action will not do.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)
21 (quoting *Twombly*, 550 U.S. at 555). “[C]onclusory allegations of law and unwarranted
22 inferences are insufficient to defeat a motion to dismiss.” *Adams v. Johnson*, 355 F.3d
23 1179, 1183 (9th Cir. 2004); see also *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011)
24 (“[A]llegations in a complaint or counterclaim may not simply recite the elements of a
25 cause of action, but must contain sufficient allegations of underlying facts to give fair
26 notice and to enable the opposing party to defend itself effectively.”). The court must be
27 able to “draw the reasonable inference that the defendant is liable for the misconduct
28 alleged.” *Iqbal*, 556 U.S. at 663. “Determining whether a complaint states a plausible

1 claim for relief ... [is] a context-specific task that requires the reviewing court to draw on
2 its judicial experience and common sense.” *Id.* at 679.

3 Because Plaintiff’s claims are all grounded in fraud, the complaint must satisfy the
4 heightened pleading requirements of Federal Rule of Civil Procedure 9(b) which provides:
5 “in alleging fraud or mistake, a party must state with particularity the circumstances
6 constituting fraud or mistake.” Fed. R. Civ. P. 9(b). The pleader must “identify the who,
7 what, when, where, and how of the misconduct charged, as well as what is misleading
8 about the purportedly fraudulent statement, and why it is false.” *Davidson v. Kimberly-*
9 *Clark Corp.*, 873 F.3d 1103, 1110 (9th Cir. 2017) (quoting *Cafasso, U.S. ex rel. v. Gen.*
10 *Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1055 (9th Cir. 2011). These heightened pleading
11 requirements apply equally to any claims based on UCL, FAL and CLRA claims which
12 ground in fraud. *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1124 (9th Cir. 2009).

13 **III. DISCUSSION**

14 SeaWorld moves to dismiss on the grounds that Plaintiff fails to plead all of her
15 claims with the required specificity under Federal Rules of Civil Procedure 8(a) and 9(b),
16 fails to state each of her claims as a matter of law, and lacks standing to seek injunctive
17 relief.

18 **A. Standing**

19 SeaWorld argues that because Plaintiff failed to allege exposure to, or reliance on,
20 any specific statement by SeaWorld, she has failed to allege standing to pursue her CLRA,
21 UCL, and FAL claims. “[T]o have standing to bring a UCL, FAL, or CLRA claim,
22 Plaintiffs must plead that they relied on the misleading materials.” *Bronson v. Johnson &*
23 *Johnson, Inc.*, No. C 12–04184 CRB, 2013 WL 1629191, at *2 (N.D. Cal. Apr. 16, 2013);
24 see also *Davidson v. Kimberly–Clark Corp.*, No. C 14–1783 PJH, 2014 WL 3919857, at
25 *9 (N.D. Cal. Aug. 8, 2014) (“[T]o maintain a claim under the FAL and CLRA, as well as
26 under any UCL claim premised on fraud or misrepresentation, a plaintiff must plead facts
27 showing that she relied on the defendant’s alleged misrepresentation.”); see also *Cohen v.*
28 *DIRECTV, Inc.*, 178 Cal.App. 4th 966, 980 (Cal. Ct. App. 2009) (“[W]e do not understand

1 the UCL to authorize an award for injunctive relief and/or restitution on behalf of a
2 consumer who was never exposed in any way to an allegedly wrongful business practice.”).

3 Thus, “in a false advertising case, plaintiffs meet this requirement if they show that,
4 by relying on a misrepresentation . . . they ‘paid more for a product than they otherwise
5 would have paid, or bought it when they otherwise would not have done so.’” *Reid v.*
6 *Johnson & Johnson*, 780 F.3d 952, 958 (9th Cir. 2015) (quoting *Hinojos v. Kohl’s Corp.*,
7 718 F.3d 1098, 1104 n.3, 1108 (9th Cir. 2013)); see also *Kwikset Corp. v. Superior Ct.*, 51
8 Cal.4th 310, 322 (2011) (holding that in a UCL case, to establish standing, “a party must .
9 . . (1) establish a loss or deprivation of money or property sufficient to qualify as injury in
10 fact, i.e., economic injury, and (2) show that that economic injury was the result of, i.e.,
11 caused by, the unfair business practice or false advertising that is the gravamen of the
12 claim.”) (emphasis in original).² Put differently, “a UCL fraud plaintiff must allege he or
13 she was motivated to act or refrain from action based on the truth or falsity of a defendant’s
14 statement . . .” *Kwikset*, 51 Cal. 4th 310, 327 n.10.

15 **1. Affirmative Misrepresentations**

16 Plaintiff argues she specifically alleged that “she signed up for Defendant’s annual
17 membership passes with the belief and on the basis that [s]he would have access to
18 SeaWorld San Diego amusement park at any time during the month in which she was
19 charged [and] would not have paid for the membership, or would not have paid for it on
20 the same terms, had she known that she would not have access to Defendant’s amusement
21 park.” [Doc. No. 1 at ¶ 10.] Plaintiff’s allegations fail to identify any statement made by
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24 ² See also *Moore v. Apple, Inc.*, 73 F.Supp.3d 1191, 1200 (N.D. Cal.2014) (“[T]he Court has consistently
25 required allegations of actual reliance and injury at the pleading stage for claims under all three prongs of
26 the UCL where such claims are premised on misrepresentations.”); *Williamson v. Apple, Inc.*, No. 5:11–
27 CV–00377 EJD, 2012 WL 3835104, at *4 (N.D. Cal. Sept. 4, 2012) (“[A] plaintiff asserting a CLRA
28 claim which sounds in fraud must establish reliance and causation.”); *Cattie v. Wal-Mart Stores, Inc.*, 504
F.Supp.2d 939, 946 (S.D. Cal.2007) (“California requires a plaintiff suing under the CLRA for
misrepresentations in connection with a sale to plead and prove she relied on a material
misrepresentation.”).

1 SeaWorld, which Plaintiff relied on, proclaiming the alleged “unlimited access” to its
2 parks. Instead, Plaintiff admits that the only thing she actually relied on was her own
3 subjective belief that she would have unlimited access to the parks. This alone is
4 insufficient under any pleading standard, let alone the heightened pleading standards of
5 Rule 9(b), to allege actual reliance on an affirmative misrepresentation. Plaintiff’s citation
6 to *Hendricks v. StarKist, Co.*, 30 F. Supp. 3d 917, 923-24 (N.D. Cal. 2014), only highlights
7 this issue. In *StarKist*, the plaintiff alleged he purchased a 5-ounce can of StarKist Tuna,
8 relied on the packaging in purchasing the product, and identified specific claims or
9 statements made on the packaging. Here, Plaintiff merely provides vague and general
10 allegations. The complaint does not identify when and where she purchased the annual
11 membership passes, nor does it identify any specific statement that SeaWorld made that
12 she read, viewed, or heard, that led her to a belief that she would have unlimited access to
13 the parks. Accordingly, to the extent Plaintiff’s CLRA, UCL, and FAL claims are based
14 on affirmative misrepresentations by SeaWorld, Plaintiff’s claims are **DISMISSED**
15 **without prejudice** for lack of standing.

16 2. Omissions

17 Under California law, an essential element for a fraudulent omission claim is actual
18 reliance. *Daniel v. Ford Motor Co.*, 806 F.3d 1217, 1225 (9th Cir. 2015) (citing *In re*
19 *Tobacco II Cases*, 46 Cal. 4th 298 (2009)). As with affirmative misrepresentations, “[t]o
20 prove reliance on an omission, a plaintiff must show that the defendant’s nondisclosure
21 was an immediate cause of the plaintiff’s injury-producing conduct.” *Id.* In other words,
22 “a plaintiff must show that had the omitted information been disclosed, one would have
23 been aware of it and behaved differently.” *Sanchez v. Wal Mart Stores, Inc.*, No.
24 CIV206CV02573JAMKJM, 2009 WL 2971553, at *2 (E.D. Cal. Sept. 11, 2009) (internal
25 quotation marks omitted).

26 As discussed above, Plaintiff does not allege that she read, viewed, or heard anything
27 when making her purchase of the annual membership passes. While Plaintiff alleges that
28 she “would not have paid for the membership, or would not have paid for it on the same

1 terms, had she known that she would not have access to Defendant’s amusement park”
2 [Doc. No. 1 at ¶ 10], Plaintiff also alleges that the only thing she relied on when making
3 her purchase was her own subjective belief. Thus, regardless of what she alleges should
4 have been disclosed, it would not have made a difference as she relied solely on her own
5 beliefs. Plaintiff does not identify she actually viewed or relied on anything SeaWorld
6 said, and therefore the complaint fails to show how if any omitted information had been
7 disclosed, Plaintiff would have acted any differently when she manifested her own beliefs
8 on the idea of unlimited access.

9 Even if Plaintiff had adequately alleged standing for claims based on an omission,
10 SeaWorld also argues that Plaintiff failed to allege a duty to disclose any purported
11 omission. “The elements of a cause of action for fraud in California are (a)
12 misrepresentation (false representation, concealment, or nondisclosure): (b) knowledge or
13 falsity (or scienter): (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance;
14 and (e) resulting damage.” *Davis v. HSBC Bank Nevada, N.A.*, 691 F.3d 1152, 1163 (9th
15 Cir. 2012). Under California law, an allegedly fraudulent omission is actionable only if
16 the omission is “contrary to a representation actually made by the defendant, or an omission
17 of a fact the defendant was obliged to disclose.” *Daugherty v. Am. Honda Motor Co.*, 144.
18 App. 4th 824, 835 (2006). “California courts have generally rejected a broad obligation to
19 disclose.” *Wilson v. Hewlett-Packard Co.*, 668 F.3d 1136, 1141 (9th Cir. 2012). “[U]nder
20 the CLRA, plaintiffs must sufficiently allege that a defendant was aware of a defect at the
21 time of sale to survive a motion to dismiss.” *Id.* at 1145. The same is true for a claim
22 under the UCL. *Id.* (allegation of knowledge at the time of sale required). Similarly, a
23 plaintiff bringing a claim under the FAL must allege sufficient facts to show that a
24 defendant knew, or should reasonably have known, the false or misleading statements were
25 false when they were made. *Punian v. Gillette*, No. 14–cv–5028–LHK, 2015 WL 4967535,
26 at * 9 (N.D. Cal. Aug. 20, 2015).

27 Plaintiff’s theory for a fraudulent omission claim is that SeaWorld failed to disclose
28 that it would continue charging annual passholders while the parks were closed and that

1 only SeaWorld was privy to this fact. Plaintiff failed to allege SeaWorld knew or should
2 have known, of the existence of any material fact that it should have disclosed. SeaWorld,
3 like the rest of the world, would not have been aware it would need to temporarily close its
4 parks due to an unprecedented global pandemic. Moreover, such temporary closures were
5 likely required under state or local orders and the decision on how to charge customers or
6 provide other relief would be dependent on the agreements between them. Accordingly,
7 to the extent Plaintiff’s CLRA, UCL, and FAL claims are based on an omission by
8 SeaWorld, Plaintiff’s claims are **DISMISSED without prejudice** for lack of standing and
9 failure to allege a duty to disclose any purported omission.

10 **B. Specific Statement under CLRA, UCL, and FAL Claims**

11 Even if Plaintiff adequately alleged actual reliance on a misrepresentation or
12 omission to establish standing, SeaWorld contends Plaintiff’s CLRA, UCL, and FAL
13 claims still fail because the complaint does not identify with sufficient particularity any
14 statement or purported omission by SeaWorld. SeaWorld argues the complaint instead
15 contains vague allegations which are insufficient under Rule 9(b). Rule 9(b) requires that
16 Plaintiff allege “the who, what, when, where, and how” of the misrepresentations or
17 omissions at issue. Kearns, 567 F.3d at 1124.

18 As discussed above, the complaint does not identify any statement SeaWorld made
19 that Plaintiff relied on and centers around Plaintiff’s subjective belief about unlimited
20 access to the park. This is insufficient under the liberal pleading standards let alone the
21 heightened pleading standards under Rule 9(b). In her opposition, Plaintiff attempts to
22 show the who, what, when, where, and how, from the complaint, but it falls short. To be
23 sufficient, Plaintiff needs to allege what specific statements SeaWorld made, when and
24 where it made it, and why the statements are false. As for the representation of “unlimited”
25 access, the complaint does not provide where or in what context SeaWorld made this
26 statement. Plaintiff only includes a footnote cite to SeaWorld’s website where under
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1 various annual pass options it states, “unlimited admission.”³ The complaint does not
 2 allege Plaintiff ever relied on the website or this statement from the website when she
 3 purchased the passes. Moreover, under each annual pass option it also states, “Restrictions
 4 may apply. . . hours and services are subject to change or cancellation without prior notice.”
 5 Therefore, by agreeing to purchase the annual pass Plaintiff would have agreed to the above
 6 allowing for a temporary closure without notice. Beyond this footnote cite to SeaWorld’s
 7 website, the complaint fails to identify what SeaWorld said, where and when it said it, or
 8 how it is false. Nor does the complaint include any facts on when and where Plaintiff
 9 purchased the passes. Accordingly, Plaintiff’s CLRA, UCL, and FAL claims based on
 10 affirmative misrepresentations are **DISMISSED without prejudice** for failure to state a
 11 claim.

12 C. Application of the CLRA

13 The CLRA prohibits practices “undertaken . . . in a transaction . . . which results in
 14 the sale or lease of goods or services.” Cal. Civ. Code § 1770(a). The CLRA:
 15 defines “goods” as “tangible chattels bought or leased for use primarily for
 16 personal, family, or household purposes, including certificates or coupons
 17 exchangeable for these goods, and including goods that, at the time of the sale
 18 or subsequently, are to be so affixed to real property as to become a part of
 19 real property, whether or not severable from the real property.” (Civ. Code,
 20 § 1761, subd. (a).) It defines “services” as “work, labor, and services for other
 21 than a commercial or business use, including services furnished in connection
 22 with the sale or repair of goods.” (Id., § 1761, subd. (b).)
 23 *Fairbanks v. Superior Court*, 46 Cal. 4th 56, 60–61 (2009).

24 As the parties are aware, this Court previously held in *Hall v. SeaWorld Ent., Inc.*,
 25 Case No. 3:15-CV-660-CAB-RBB, 2015 WL 9659911 (S.D. Cal. Dec. 23, 2015), that “to
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28 ³ <https://seaworld.com/san-diego/annual-pass/>

1 hold that the tickets, or more specifically the admission to the parks that the tickets provide,
2 constitute a service requires a strained and unnatural construction of the term” services. *Id.*
3 at *15. Plaintiff argues the Court should instead rely on *Anderson v. SeaWorld Parks and*
4 *Ent., Inc.*, 2016 WL 8929295 (N.D. Cal. Nov. 7, 2016), where the court disagreed and held
5 “the term ‘services’ encompasses the ‘educational and entertainment services’” the
6 plaintiff alleged she purchased from SeaWorld. *Id.* at *12.

7 The Court is not persuaded and declines to construe the term services in this broad
8 fashion. Instead the Court continues to follow the reasoning by the California Supreme
9 Court in *Fairbanks*, that “[r]ather than applying to all businesses, or to business
10 transactions in general, the Consumers Legal Remedies Act applies only to transactions for
11 the sale or lease of consumer ‘goods’ or ‘services’ as those terms are defined in the act.”
12 46 Cal. 4th at 65. Here, the annual passes merely allow access to SeaWorld’s parks, and
13 do not qualify as “services” in the Court’s view. Cf. *Kissling v. Wyndham Vacation*
14 *Resorts, Inc.*, No. 15–CV–04004–EMC, 2015 WL 7283038, at *5 (N.D. Cal. Nov. 18,
15 2015) (holding that “timeshare points do not fall under the CLRA’s definition of ‘goods’
16 or ‘services.’”); *Wixon v. Wyndham Resort Dev. Corp.*, No. C07–02361 JSW, 2008 WL
17 1777590, at *4 (N.D. Cal. Apr. 18, 2008) (holding that timeshare credits which provide “a
18 vacation license, the right to use, occupy and enjoy . . . properties” do not qualify as
19 services). Accordingly, Plaintiff’s CLRA claims are **DISMISSED with prejudice**.
20 Likewise, Plaintiffs’ UCL claims, to the extent they are premised on a violation of the
21 CLRA, are also **DISMISSED with prejudice**. *Silcox v. State Farm Mut. Auto. Ins. Co.*,
22 No. 14CV2345 AJB MDD, 2014 WL 7335741, at *5 (S.D. Cal. Dec. 22, 2014) (“Where a
23 plaintiff cannot state a claim under the “borrowed” law, she cannot state a UCL claim
24 either.”).

25 **D. Injunctive Relief**

26 SeaWorld contends Plaintiff has not established standing for injunctive relief.
27 Plaintiff argues she alleged she continues to be charged without access to the parks and
28 therefore faces an actual and imminent harm.

1 To establish standing for injunctive relief, Plaintiff must “demonstrate that [she] has
2 suffered or is threatened with a concrete and particularized legal harm, coupled with a
3 sufficient likelihood that [she] will again be wronged in a similar way.” *Bates v. United*
4 *Parcel Serv., Inc.*, 511 F.3d 974, 985 (9th Cir. 2007) (internal quotations omitted). Here,
5 although Plaintiff does not allege that she plans to repurchase the pass, she alleges she
6 continues to face imminent harm because she continues to be charged while the parks are
7 closed. See *Davidson v. Kimberly-Clark Corp.*, 889 F.3d 956, 967 (9th Cir. 2018) (holding
8 that a deceived consumer may have standing to sue for injunctive relief based on allegedly
9 false advertising, but the consumer must still establish the threat of actual and imminent
10 injury). However, because Plaintiff fails to allege any facts on when she purchased the
11 pass, when the pass is set to expire, coupled with the fact that the park may have re-opened
12 since the complaint, the threat of actual and imminent harm remains speculative.
13 Accordingly, without further information, Plaintiff’s claims for injunctive relief are
14 **DISMISSED without prejudice.**

15 **E. Breach of Contract**

16 “The elements for a breach of contract claim are: (1) the existence of the contract;
17 (2) performance by the plaintiff or excuse for nonperformance; (3) breach by the defendant;
18 and (4) damages.” *Castro v. Wells Fargo Bank, N.A.*, No. CV 12-2393 RSWL AGRX,
19 2012 WL 2077294, at *1 (C.D. Cal. June 6, 2012).

20 Here, Plaintiff has alleged the existence of a contract with SeaWorld and
21 performance, via her purchase of the annual passes. However, Plaintiff’s allegations on
22 the substance of the terms of the contract remain vague and conclusory. As discussed
23 above, Plaintiff purchased the annual passes with a belief she would have unlimited access
24 to the parks. Yet, Plaintiff does not support this belief with any sufficient factual support.
25 Instead, the website citation that Plaintiff provided contained terms that would dispute her
26 allegation. While it is not necessary to attach a contract for a plausible breach of contract
27 claim, it would provide a means for Plaintiff to bolster the factual support behind her breach
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1 on contract claim in this instance to identify a plausible breach. Accordingly, Plaintiff's
2 breach of contract claim is **DISMISSED without prejudice**.

3 **F. Unjust Enrichment and Money Had and Received**

4 “[I]n California, there is not a standalone cause of action for ‘unjust enrichment,’
5 which is synonymous with ‘restitution.’” *Astiana v. Hain Celestial Group, Inc.*, 783 F.3d
6 753, 762 (9th Cir. 2015) (citing *Durell v. Sharp Healthcare*, 183 Cal. App. 4th 1350, 1370
7 (2010)). “As a matter of law, an unjust enrichment claim does not lie where the parties
8 have an enforceable express contract.” *Id.* Unjust enrichment must be plead along with a
9 quasi-contract cause of action, such as alleging that the contract was void or rescinded. See
10 *id.* A plaintiff may assert alternative theories, even if those theories appear inconsistent.
11 *Klevin v. Chevron U.S.A, Inc.*, 202 Cal. App. 4th 1342, 1388 (2012). An action for money
12 had and received is based on the existence of a quasi-contract. See *Pollak v. Staunton*, 210
13 Cal. 656, 665 (1930). “An action in quasi-contract . . . does not lie when an enforceable,
14 binding agreement exists defining the rights of the parties.” *Paracor Fin., Inc. v. Gen.*
15 *Elec. Capital Corp.*, 96 F.3d 1151, 1167 (9th Cir. 1996) (citation omitted); see also *Lloyd*
16 *v. Williams*, 227 Cal.App.2d 646, 649 (1964).

17 Here, Plaintiff does not allege a quasi-contractual theory. Plaintiff maintains there
18 is a valid, enforceable contract through the purchase of the annual passes. Therefore, any
19 amendment to these claims would be futile and Plaintiff's request for recovery under unjust
20 enrichment and money had and received are **DISMISSED with prejudice**.

21 **IV. CONCLUSION**

22 For the reasons discussed above, SeaWorld's motion to dismiss is **GRANTED**.
23 Plaintiff's claims are dismissed as follows:

- 24 1. Plaintiff's CLRA, unjust enrichment, and money had and received claims are
25 **DISMISSED with prejudice;**
- 26 2. Plaintiff's UCL and FAL claims based on an omission by SeaWorld, are
27 **DISMISSED without prejudice;**

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1 3. Plaintiff's UCL and FAL claims based on an affirmative misrepresentation by
2 SeaWorld are **DISMISSED without prejudice**;

3 4. Plaintiff's injunctive relief claim is **DISMISSED without prejudice**;

4 5. Plaintiff's breach of contract claim is **DISMISSED without prejudice**.

5 Plaintiff may file an amended complaint by **September 23, 2020**. Failure to do so
6 will result in a final judgment of dismissal. SeaWorld must respond to any amended
7 complaint within the time required by the applicable rules.

8 It is **SO ORDERED**.

9 Dated: September 9, 2020



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11 Hon. Cathy Ann Bencivengo
12 United States District Judge
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