PROPOSED TENTATIVE

On March 18, 2024, plaintiffs Airpark Drive, LLC (Airpark, an entity owned by Dunn & Mavis, Inc. (Dunn & Mavis)) (hereafter, collectively plaintiffs when individual corporate names are not otherwise used) filed a first amended complaint[1] against defendants Curations Foods, Inc. (Curation), and Lifecore Biomedical, Inc (Lifecore)(hereafter, collectively defendants when individual corporate names are not otherwise used), advancing four causes of action: 1) breach of contract; 2) a request for "rent and damages" per Civil Code section 1951.2; 3) unjust enrichment; and 4) fraud in the inducement. As detailed in the operative pleading, plaintiffs are commercial landlords, who leased to defendants a 36,600 square foot building (hereafter, the leased premises). Plaintiffs explain the leasing history (with corresponding exhibits) as follows: 1) on March 17, 2017, plaintiffs' predecessor-in-interest, NKT Development, LLC (NKT) leased commercial space to defendants' predecessor in interest, Apio, Inc., (a "Commercial Single-Tenant Lease); 2) a "First Amendment to the Lease" was entered into between NKT and Curation; 3) on December 10, 2019, NKT assigned all of its rights to the leased premises to plaintiff Dunn & Mavis; 4) on January 20, 2020, Dunn & Mavis and Airpark entered into an assignment in which the former assigned all rights in the above-mentioned lease agreements to the latter; and 5) on May 4, 2021, Dunn & Mavis and Curation entered into a "Second Amendment to the Lease," in which Curation agreed to reimburse plaintiffs for property taxes connected to the lease. The operative pleading also indicates Curation was permitted to assign or sublet part of the property subject to the lease agreements (subject to prior written consent of plaintiffs); any subleases were for "portions of the Premises listed by Defendant Lifecore" as its principal place of business. Subleases were consummated with JS Audit Group (JS Audit), on February 9, 2023, and on July 7, 2023, with Perfotec, Inc (Perfotec). Pursuant to the subleases, Curation was required to construct a demising or petition wall for the subleased premises. Additionally, sublessees were "authorized to use certain equipment and installations of Defendant Curation under their subleases." It is alleged in the operative pleading that at all times Lifecore is the alter ego Curation. Commencing in November 2023, defendants failed to pay delinquent rents and other monetary obligations (including fire sprinkler inspection and real property taxes). Plaintiffs served defendants and all sublessees with a 3-day notice to quit. Further, defendants failed to provide sublessees with the agreed-upon equipment and improvements.

Both defendants (Curation and Lifecore) generally demur to the alter ego allegations, claiming plaintiffs have failed to allege sufficient evidentiary facts in support. Defendants also claim that that third cause of action for "unjust enrichment" is not a cause of action in California,

[1] Plaintiffs originally filed a complaint in unlawful detainer on January 12, 2024, and defendant Curation Foods, Inc. answered. Curation vacated the premises on February 29, 2024; parties agreed in a March 1, 2024 stipulation, that the matter should be converted to an ordinary civil action, allowing a first amended complaint to be filed. The court signed the order authorizing this on March 6, 2024, and the first amended complaint was filed on March 18, 2024.

and that there are insufficient facts to support the fourth cause of action for fraud in the inducement against either defendant. Defendants insists that the court should sustain the demurrer without leave to amend. Plaintiffs have filed opposition, claiming they have adequately pleaded alter ego allegations against defendants. They also contend that unjust enrichment is a cause of action and it has been adequately pleaded; finally, they argue that they specifically pleaded all the facts necessary to support the fourth cause of action for fraud in the inducement (promissory fraud). Defendants filed a reply on May 20, 2024, essentially reiterating the arguments advanced in the demurrer.

The court will first address the merits of defendants' challenges to the alter ego allegations; it will then separately assess the sufficiency of the allegations to support the third cause of action for unjust enrichment, and then assess the merits of the demurrer to the fourth cause of action for fraud in the inducement. The court will conclude with a summary.

A) Alter Ego

i) Allegations in First Amended Complaint

Plaintiffs acknowledge that Lifecore is a corporation organized under Delaware law, and is a registered foreign corporation with the California Secretary of State to do business. They nevertheless allege that Lifecore was at all relevant times the "alter ego" of Curation, and vice versa, because Curation is a wholly owned subsidiary of Lifecore; in 2020, Curation and Lifecore entered into a "creditor borrowing agreement as coborrowers"; in 2023, both defendants "experienced financing issues related to defaults stemming from credit loan agreements with BMO Bank," and on December 31, 2023, both defendants "entered into agreements with BMO Bank resolving the defaults"; John Moberg, "executive vice president and secretary of" of both defendants, "executed the agreements on behalf of both entities," and "Lifecore caused [] Curation to sell all of its assets between 2021 and 2023. Plaintiffs allege at all relevant times there existed a "unity of intent and ownership" between defendants. Further, Lifecore "controlled the business affairs of" Curation "and diverted corporate funds and assets"; disregarded legal formalities and failed to maintain and arm's length relationship with Curation; "inadequately capitalized" Curation; used the same office or business location and employed the same employees as Curation; held itself out as personally liable for Curation's debts,; used Curation as "a shell, instrumentality, or conduit" and used Curation "to procure labor, services, or merchandise"; "manipulated the assets and liabilities between the corporate entities"; used "Curation to conceal their ownership and financial interest"; and used Curation "to shield against personal obligations, and in particular those alleged in this First Amended Complaint." In the end, according to plaintiffs, "there was such a unity of interest and ownership that the individuality or separateness of the entities has ceased, and further, that adhering to the fiction

that these are separate entities would, under these particular circumstances, resulting in sanctioning of a fraud or promote injustice." (First Amended Complaint, ¶ First 8(f), (g.).)

ii) Legal Background

To recover on an alter ego theory, a plaintiff need not use the words "alter ego," but must allege sufficient facts to show a unity of interest and ownership, and an unjust result if the corporation is treated as the sole actor. (*A.J. Fistes Corporation v. GDL Best Contractors, Inc.* (2019) 38 Cal.App.5th 677, 696*: Leek v. Cooper* (2011) 194 Cal.App.4th 399, 415; cf. *Rutherford Holdings, LLC v. Plaza Del Rey* (2014) 223 Cal.App.4th 221, 235 [plaintiff sufficiently alleged unity of interest by alleging corporate entity was inadequately capitalized, failed to "abide by the formalities of corporate existence," and was dominated, controlled, and used by defendant as a "mere shell and conduit"].) Detailed pleading is not required. Indeed, as explained in *Rutherford Holdings, LLC v. Plaza Del Rey, supra*, 223 Cal.App.4th at page 236, a plaintiff need allege **"**only 'ultimate rather than evidentiary facts' **"** to support an alter ego theory, and allegations "adequate to apprise [defendant] that [it] was being held accountable as an alter ego . . . ." Further, "here is no requirement that the facts supporting alter ego be pled with specificity, particularly when the objecting party is in the best position to know its own involvement. (*Ibid.*)

With respect to the first element, unity of interest, relevant factors include allegations that one defendant dominated and controlled the other; that one defendant was "a mere shell and conduit" of the other; that one defendant was inadequately capitalized; that defendants failed to abide by the formalities of corporate existence; and that one defendant used the other defendant's assets as its own. (*Leek, supra*, 194 Cal.App.4th at pp. 417-418 [relevant factors for unity of interest include commingling of personal and corporate funds and assets, diversion of corporate assets or funds to personal use, treatment of corporate assets as personal, absence of corporate assets, gross undercapitalization, and disregard of corporate formalities].) " 'No one characteristic governs, but the courts must look at all the circumstances to determine whether the doctrine should be applied.' [Citation.]" (*Shaoxing County Huayue Import & Export v. Bhaumik* (2011) 191 Cal.App.4th 1189, 1198.)

An unjust result (as relevant to the second element) is adequately pleaded if it is alleged that a recognition of separate existence of the corporations would promote injustice. (*Rutherford Holdings, LLC v. Plaza Del Rey, supra,* 223 Cal.App.4th at pp. 235-236; see also *Toho-Towa Co., Ltd. v. Morgan Creek Productions, Inc.* (2013) 217 Cal.App.4th 1096, 1109-1110, fn. 5 [use of corporation to structure finances to avoid meeting payment obligations sufficient to support trial court's finding of inequitable result]; see also *A.J. Fistes Corp. v. GDL Best Contractors, Inc., supra,* 38 Cal.App.5th at pp. 696–697.) "There must be some conduct amounting to bad faith that makes it inequitable for [defendants] to hide behind the corporate form." (*Leek, supra,* 194 Cal.App.4th at p. 418.) Such allegations are "adequate to apprise [a defendant] that [it] was

being held accountable as an alter ego." (*Leek, supra,* 194 Cal.App.4th at p. 412.) Pleadings must be construed liberally and with a view to substantial justice. (Code Civ. Proc., § 452.) At the same time, an allegation that a person owns all of the corporate stock and makes all of the management decisions is insufficient to cause the court to disregard the corporate entity." (*Leek, supra, at* p. 415.)

iii) Merits

Defendants contend the court should sustain the demurrer because 1) (as to the second element) plaintiffs have failed to plead an inequitable result, and specifically, failed to plead any bad conduct that would make it unjust to hide behind the corporate form; and 2) as to both the unity and inequity elements, the allegations are conclusory; plaintiffs in other words have failed to allege sufficient evidentiary facts to support any element of alter ego. As defendants articulate, "Without Plaintiffs pleading how Lifecore controlled the business affairs of Curation, or how the funds and assets of Lifecore and Curation were commingled, etc., the Plaintiffs simply went through a checklist without going beyond conclusory allegations. . . ."

It is true that some of the allegations alleged in the operative pleading fall short of satisfying the requirements of alter ego. That being said, however, and taking the allegations as a whole, defendants challenges are unpersuasive. Initially, as noted above, plaintiffs need only allege *ultimate* facts, not evidentiary facts, in support of an alter ego theory. Ultimate facts are essential elements of a claim or defense. (*Metis Development LLC v. Bohacek* (2011) 200 Cal.App.4th 679, 689.) They "are the logical conclusions deduced ***from***" evidentiary facts. (*Rhode v. Bartholomew* (1949) 94 Cal.App.2d 272, 279, emphasis added; see also *Central Valley General Hospital v. Smith* (2008) 162 Cal.App.4th 501, 513 [ultimate facts are "core" facts, distinguishable from evidentiary facts and bare conclusions of law].)

With this standard in mind, as for unity of interest, courts look to a non-exclusive combination of factors, such as " 'the commingling of funds and assets of the two entities, identical equitable ownership in the two entities, use of the same offices and employees, disregard of corporate formalities, identical directors and officers, and use of one as a mere shell or conduit for the affairs of the other. [Citation.]' " (*Toho–Towa Co., Ltd. v. Morgan Creek Productions, Inc., supra,* 217 Cal.App.4th at pp. 1108–1109.) These factors are considered ultimate facts for pleading purposes. The ultimate facts alleged in paragraph 8(g) of the operative pleading, as detailed above section (A)(i), *ante,* essentially duplicate those that have survived demurrer. (*Rutherford Holdings, LLC, supra,* 223 Cal.App.4th at p. 235 [plaintiff survived demurrer by alleging domination and control, unity of interest, use of corporate alter ego as "a mere shell and conduit," inadequate capitalization, failure to abide by the formalities of corporate existence, use of corporate assets as own, and recognition separate corporate existence would be an injustice]; *Leek v. Cooper, supra,* 194 Cal.App.4th at p. 415].)

As to the second element based on inequitable result, plaintiffs in paragraph 8(c) of the First Amended Pleading allege that between 2021 and 2023, Lifecore caused Curation to sell "all of its assets on behalf of both entities," meaning (essentially) that Curation's assets were used to pay the debts of Lifecore, rendering Curation unable to meet its financial obligations on the lease agreements at issue (See, e.g., Exhibits 2 [First Amendment to Lease involving NKT assignment to Curation]; 4 [Second Amendment to Lease between Dunn & Mavis and Curation]; 6 [sublease between JS Audit and Curation]; 7 [sublease between Perfotec and Curation].) In paragraph 8(g) of the First Amended Pleading, plaintiffs further alleges that because "there was such a unity of interest and ownership [between Lifecore and Curation], that the individuality, or separateness, of the entities has ceased, and further, that adhering to the faction that these are separate entities would, under these particular circumstances, result in the sanction of a fraud or promote injustice." Similar allegations have been deemed sufficient to withstand demurrer as ultimate facts, as detailed above, particularly when less pleading is required where defendant may be assumed to possess knowledge of the facts at least equal, if not superior, to that possessed by plaintiff. (*Burks v. Poppy Construction Co.* (1962) 57 Cal.2d 463, 474.)

Defendants' reliance on *Leek v. Cooper, supra,* 194 Cal.App.4th 416, and *Vasey v. California Dance Co.* (1977) 70 Cal.App.3d 742 in opposition is misplaced. In *Leek*, which involved summary judgment, plaintiffs requested in their opposition to defendant's summary judgment motion leave to amend their complaint in order to add an alter ego allegation, offering facts tendered in their opposition as the basis for the request. The trial court denied the application, and the appellate court affirmed. According to the *Leek* court, plaintiffs had offered "no evidence [in the summary judgment opposition] to support" any conduct amounting to bad faith that makes it inequitable to hide behind the corporate form. (*Leek, supra,* at p. 418.) As explained by the *Leek* court: "Plaintiffs have proffered no evidence to support" the inequitable result element, for all they offered was their argument that defendant "might raid the corporate coffers," without any evidence regarding the corporation's financial situation, the amount or nature of corporate assets, or whether the corporation was adequately capitalized. "Absent such evidence, plaintiffs cannot show that the result will be inequitable, and have not stated the second element of an alter ego claim." (*Id.* at p. 418.)

Leek involved plaintiff's request to amend a complaint in opposition to a summary judgment motion. The plaintiff in *Leek* expressly failed to make an offer of proof in support of the request to amend the pleading to add an alter ego theory, relying exclusively on the facts in their summary judgment opposition. (*Leek, supra*, at p. 416.) As *Leek* observed, in these situations, the summary judgment motion is in reality transmuted into a motion for judgment on the pleadings. (*Leek, supra*, at p. 416 [in determining whether the trial court erred in denying the motions to amend the complaint, we treat the matter as if it arose in motion for judgment on the pleadings].) The problem in *Leek* was the absence of evidence presented in the summary judgment opposition to support the second element of alter ego – an inequitable injustice . In

other words, while it remains true that ultimate facts are the ones that must actually be pleaded, there must be an evidentiary basis from which the ultimate facts exist, given the procedural posture in which the issue was presented in *Leek* – the opposition to summary judgment based on a request to amend the pleading, necessitating a showing that there was a reasonable possibility an amendment could be made. (*Leek, supra,* at pp. 416-417.) The evidence in opposition did not show a reasonable possibility that an amendment could be made. The present case is procedurally distinct, involving a challenge to the alter ego allegations in the operative pleading itself, not a request to amend the pleading to add an alter ego theory, necessitating evidence to show a reasonable possibility that such an amendment is appropriate. The procedural posture of this case is the same as *Rutherford Holdings, Inc.*, which involved a demurrer to the operative pleading.

Nor is *Vasey* particularly helpful to defendants. In *Vasey*, individual and corporate defendants defaulted in an unlawful detainer action. The court entered default judgments against all defendants, but the liability of the individual defendants was predicated solely on an alter ego theory. On appeal, the individual defendants asserted that the complaint did not properly plead an alter ego theory, and the Court of Appeal agreed. (*Vasey, supra,* 70 Cal.App.3d at pp. 748–749.) Defendants here argue that plaintiff's alter ego allegations mirror the allegations found to be inadequate in *Vasey.* Not so. The allegations in the complaint in *Vasey* "asserted a bare conclusory allegation that the individual and separate character of the corporation had ceased and that CDC was the alter ego of the individual defendants." (*Id.* at 749.) The *Vasey* court then observed: "In order to prevail in a cause of action against individual defendants based upon disregard of the corporate form, the plaintiff must plead and prove such a unity of interest and ownership that the separate personalities and corporation and the individuals do not exist, and that an inequity will result if the corporate entity is treated as the sole actor." (*Id.* at p. 749.) Plaintiffs "pleadings and the evidence he presented at the default hearing fell far short of meeting those requirements," (*Id*. at p. 749.) That is not the case here. The necessary allegations in the operative pleading here are far more robust than the bare, conclusory allegations in *Vasey,* and are more in line with *Rutherford* and progeny.

Defendant contends in its reply that *Rutherford Holdings, LLC, supra,* is an "outlier," and that this "single case flies in the face of the weight of authority" on the nature of the allegations to support an alter ego theory. This argument is unavailing. In concluding that only "ultimate rather than evidentiary facts" need be alleged to support an alter ego theory, the *Rutherford Holdings, LLC* court cited to *Doe v. City of Los Angeles* (2007) 42 Cal.4th 531, 550, which in turn had observed that under general rules of pleading, "the complaint ***ordinarily*** is sufficient if it alleges ultimate rather than evidentiary facts," and thus its rule was commensurate with the general rule of California pleading, as articulated in *Burks v. Poppy Construction Co., supra,* 57 Cal.2d at pages 473-474 and reflected in *Doheny Park Terrace Homeowners Assn. Inc. v. Truck Ins. Exchange* (2005) 132 Cal.App.4th 1076, 1099 ["It has been consistently held that ' "a plaintiff is required only to set forth the essential facts of his case with reasonable precision and

with particularity sufficient to acquaint a defendant with the nature, source and extent of his cause of action" ' "]. *Rutherford Holding, Inc.* is consistent with this longstanding rule.

Additionally, the court in *Rutherford Holdings Inc*. looked to *First Western Bank & Trust Co. v. Bookasta* (1968) 267 Cal.App.2d 910, 915-916, in which the court found that plaintiff had sufficiently alleged an alter ego theory based on allegations in the complaint, namely that respondent "dominated" the affairs of the corporation; that there was "unity of interest and ownership" between respondent and the corporation; that the corporation is a "mere shell and naked framework" for individual manipulations; that its income was diverted to the use of the individuals and respondent; that the corporation was, in effect, inadequately capitalized; that the corporation failed to issue stock and to abide by the formalities of corporate existence; that the corporation has and is insolvent; and that adherence to the fiction of separate corporate existence would, under the circumstances, promote injustice. All of these are ultimate, not evidentiary facts. And as emphasized by *First Western Bank & Trust* court, "[a[ssuming these facts can be proved," alter ego can be demonstrated at trial. (*Id.* at p. 916 [these allegations are sufficient to withstand challenge at the pleading stage].) The allegations here are similar to those in *First Western Bank & Trust Co*, and, as there, if plaintiff here can prove them at trial *with evidentiary facts*, alter ego can be demonstrated here. In light of *Rutherford Holdings Inc.*'s citation to these cases, it seems hardly appropriate to label it as an "outlier."

Plaintiffs also cite to *A.J. Fistes Corp., supra*, 38 Cal.App.5th 677 and *Vasey, supra*, 70 Cal.App.3d 742 to support its characterization of *Rutherford Holdings, Inc*, as an "outlier." There is nothing inconsistent between *Vasey* and *Rutherford Holdings, Inc*.; as noted above, the pleading deficiency in *Vasey* was not an evidentiary issue, but the fact plaintiff failed to plead ***ultimate facts.*** (*Vasey, supra*, at p. 749 [the complaint asserted a "bare conclusory allegation that the individual and separate character of the corporation had ceased and that CDC was the alter ego of the individual defendant"; defendant must plead a "unity of interest and ownership" and that "an inequity will result if the corporate entity is treated as sole actor"; the "pleadings (and evidence at the default hearing) fell far short of these requirements].) The pleadings here are not similarly situated.

And in *AJ Fistes Corporation*, the appellate court, after expressly acknowledging *Rutherford Holdings Inc*. (*id.* at p. 696), found the allegations in the complaint were insufficient to establish both unity of interest and an unjust result to support to establish alter ego. As to the former, observed the appellate court, Fistes alleged the Lopezes "were the ones actually controlling GDL as its only officers, directors and shareholders and they benefited the most from [the District's] illegal payments to GDL." This allegation was akin to the deficient allegation in *Leek v. Cooper, supra*, 194 Cal.App.4th at pate 415, in which the *Leek* court noted that an "allegation that a person owns all the corporate stock and makes all of the management decisions is insufficient to cause the court to disregard the corporate entity." (*AJ Fistes Corporation, supra*, at p. 696.) The allegations here are (again) far more detailed and thus less conclusory.

As for unjust result, according to the court in *AF Fistes Corporation*, plaintiff alleged only that "GDL was used [by the Lopezes] to perpetrate fraud (i.e., obtain payment from [the District] on an illegal contract), circumvent a statute (i.e., not comply with the Public Contract Code statutes applicable to school district bidder pre-qualification and contract awards), and/or accomplish some other wrongful or inequitable purpose (i.e., obtain payment from [the District] on an illegal contract)." (*Id.* at p. 696.) These allegations were insufficient (i.e., as an ultimate fact), because there were no allegations of wrongdoing by the Lopezes, nor any contention that "adherence to the fiction of the separate existence of the corporation would promote injustice . . . or bring about inequitable results." (*Ibid.*) This conclusion seems entirely consistent with *Rutherford Holdings, Inc.*. And in the end, after comparing the allegations here with the allegations in *AF Fistes Corporation*, the latter authority indicates why the demurrer here should be *overruled.*

For these reasons, the court overrules defendants' demurrer based on challenges to the alter ego allegations.

B) Unjust Enrichment (Third Cause of Action)

i) Allegations In the First Amended Complaint

In the third cause of action, plaintiffs allege "unjust enrichment," based on the fact defendants "collected and received" from JS Audit the JS Audit payments for November 1, 2023, through December 31, 2023, "for the purpose of remitting and paying the same to Plaintiffs pursuant to the Lease." That is, "Defendants have retained the JS Audit Payments for the months of November and December 2023 and have failed to pay Plaintiffs all rent under the Lease for the same months." By their wrongful acts, defendants were unjustly enriched to plaintiffs' detriment of $41,193 at a minimum.

ii) Legal Background

There is a split in authority on whether a discrete unjust enrichment cause of action exists in California. (See *Ghirardo v. Antonioli* (1996) 14 Cal.4th 39, 50, 52, 53–55 [recognizing split in authority]; compare *Durell v. Sharp Healthcare* (2010) 183 Cal.App.4th 1350, 1370 [" '[T]here is no cause of action in California for unjust enrichment' "] with *Lyles v. Sangadeo-Patel* (2014) 225 Cal.App.4th 759, 769 [recognizing unjust enrichment as a cause of action].) Even if not "strictly speaking, a theory of recovery," unjust enrichment may be asserted whenever a person " 'acquires a benefit which may not justly be retained,' " in which case the court shall order the " 'return [of] either the thing or its equivalent to the aggrieved party so as not to be unjustly enriched.' [Citation.]" (*Prakashpalan v. Engstrom, Lipscomb & Lack* (2014) 223 Cal.App.4th 1105, 1132; see *O'Grady v. Merchant Exchange Productions, Inc.* (2019) 41 Cal.App.5th 771, 781 [unjust enrichment is " 'synonymous with restitution' "]; *Rutherford*

Holdings, LLC, supra, 223 Cal.App.4th at p. 231 [unjust enrichment " 'is not a cause of action,' " but a general principle underlying "a quasi-contract claim seeking restitution"].) Even so, an unjust enrichment claim does not lie "where . . . express binding agreements exist and define the parties' rights." (*California Medical Assn, Inc. v. Aetna U.S. Healthcare of California, Inc.* (2001) 94 Cal.App.4th 151, 172; *Hedging Concepts, Inc. v. First Alliance Mortgage Co.* (1996) 41 Cal.App.4th 1410, 1420 ["When parties have an actual contract covering a subject, a court cannot -- not even under the guise of equity jurisprudence -- substitute the court's own concepts of fairness regarding that subject in place of the parties' own contract"].)

It is settled that restitution is a remedy and not a freestanding cause of action. (*Reid v. City of San Diego* (2018) 24 Cal.App.5th 343, 362; *McBride v. Boughton* (2004) 123 Cal.App.4th 379, 387 [whether amended complaint claiming unjust enrichment and seeking restitutionary relief "was properly sustained depends . . . not on the nature of the damages [the plaintiff] seeks, but rather on the viability of the causes of action he has attempted to plead].) There are several potential bases for a cause of action seeking restitution. For example, restitution may be awarded in lieu of breach of contract damages when the parties had an express contract, but the contract was procured by fraud or is unenforceable or ineffective for some reason. Alternatively, restitution may be awarded where the defendant obtained a benefit from the plaintiff by fraud, duress, conversion, or similar conduct. In such cases, the plaintiff may choose not to sue in tort, but instead to seek restitution on a quasi-contract theory (an election referred to at common law as "waiving the tort and suing in assumpsit"). (See, e.g., *Murrish v. Industrial Indemnity Co.* (1986) 178 Cal.App.3d 1206, 1209 [election to waive tort and sue in assumpsit is a fiction that broadens remedies available to plaintiff, but does not create a contract where none existed]; see generally 55 Cal.Jur.3d (May 2004) Restitution and Constructive Contracts, § 21.) In such cases, where appropriate, the law will imply a contract (or rather, a quasi-contract), without regard to the parties' intent, in order to avoid unjust enrichment. [Citation.]" (*McBride, supra,* 123 Cal.App.4th at p. 388.)

iii) Merits

The court, under the authority noted above, will construe the purported cause of action for unjust enrichment as an attempt to plead a cause of action giving rise to a claim of restitution. (*McBride, supra,* 123 Cal.App.4th at p. 388; see *O'Grady v. Merchant Exchange Productions, Inc.* (2019) 41 Cal.App.5th 771, 791 [the point is largely academic because this district has long taken the position that, even if unjust enrichment does not describe an actual cause of action, the term is "synonymous with restitution," which *can* be a theory of recovery].) Assertions of unjust enrichment or a claim for restitution should be assessed to determine if allegations of fraud, quasi-contract or some other theory is stated entitling the plaintiff to the requested relief. (*Rutherford Holdings, LLC, supra,* 223 Cal.App.4th 221, 231; *Munoz v. MacMillan* (2011) 195 Cal.App.4th 648, 661; *McBride v. Boughton, supra,* 123 Cal.App.4th at p. 387; accord *Astiana v. Hain Celestial Group, Inc.* (9th Cir.2015) 783 F.3d 753, 762 [applying California law].)

Plaintiffs do allege a basis for restitution in the first amended complaint (under the raiment of unjust enrichment) – at least based on the allegations in the fourth cause of action involving fraud in the inducement. (*Durell, supra,* 183 Cal.App.4th at p. 1370 [restitution may be awarded in lieu of breach of contract damages when the parties had an express contract, but it was procured by fraud or is unenforceable or ineffective for some reason].) Contrary to defendants' argument, therefore, fraud can act as a basis for "unjust enrichment" when viewed through the prism of restitution, as it is not be based on express contract. But observation this begs a deeper problem for plaintiff, for restitution is a remedy, not a cause of action, and its viability is associated with the fourth cause of action for fraud in the inducement, discussed below. As alleged, such restitution should be aligned with the fourth cause of action, not a freestanding claim. If this were all at play, the court would sustain the demurrer without leave to amend.

But that is not the only issue before the court. Plaintiffs in opposition, while conceding the deficiency of the existing pleading, contend that they should be afforded an opportunity to amend in order to allege another basis for restitution (under the raiment of unjust enrichment), based on implied or quasi-contract. The court agrees this is reasonably possible. "[A]n action based on an implied-in-fact or quasi-contract cannot lie where there exists between the parties a valid express contract covering the same subject matter." (*Lance Camper Manufacturing Corp. v. Republic Indemnity Co.* (1996) 44 Cal.App.4th 194.) Thus, a party to an express contract can assert a claim for restitution based on unjust enrichment by "alleging in that cause of action that the express contract is void or was rescinded." (*Id.* at p. 203.) In this situation, a claim for restitution is permitted even if the party inconsistently pleads a breach of contract claim that alleges the existence of an enforceable agreement. (*Klein v. Chevron U.S.A., Inc.* (2012) 202 Cal.App.4th 1342, 1389; *Rutherford Holdings, LLC, supra,* 223 Cal.App.4th at p. 231.) The allegations in the operative pleading are predicated exclusively on an enforceable contract. It appears plaintiffs can plead in the alternative. Accordingly, the court sustains the demurrer *with leave to amend,* so plaintiffs can articulate a basis for restitution (unjust enrichment) based on an implied-in-fact or quasi-contractual theory.

C) Fraud in the Inducement (Fourth Cause of Action)

i) Allegations in the First Amended Complaint

Plaintiffs allege in the fourth cause of action that there was fraudulent inducement with regard to the subleases. Specifically, plaintiffs allege that defendants "presented to plaintiffs that they would construct certain demising walls to accommodate the sublessees. Defendants further represented that they would continue to pay all rental obligations and perform all other obligations under the Lease." At the time of these representations, however, it is alleged that defendants had already liquidated Curation's assets, and thus knew their representations were false, and with an intent not to perform. "In fact, Defendant[s] . . . did not provide the sublessees

with demised space nor other services they agreed to provide in the subleases and had represented to Plaintiffs that they would provide. . . . Had Plaintiffs known that Defendants did not intend to perform, Plaintiffs would not have approved the subleases per Defendants' request without demanding financial guarantees. [¶] Defendants' misrepresentations were intended to induce reliance by Plaintiffs, and Plaintiffs reasonably relied on such representations in authorizing the subleases."

Defendants contend that plaintiffs have failed to this allege this cause of action with the necessary factual specificity required, particularly as defendants are corporate employers. According to defendants, plaintiffs have failed to plead facts showing, how, when where, to whom, and by what means the representations were tendered. Further, according to defendants, plaintiffs have failed to allege damages, and specifically how they were damaged. Plaintiffs in opposition disagree, claiming they have provided all necessary requisite factual specificity to survive demurrer.

ii) Legal Background

Fraud in the inducement, or promissory fraud, "is a subspecies of fraud, and an action may lie where a defendant fraudulently induces the plaintiff to enter into a contract, by making promises he does not intend to keep." (*Reeder v. Specialized Loan Servicing LLC* (2020) 52 Cal.App.5th 795, 803; see *Lazar v. Superior Court* (1996) 12 Cal.4th 631, 638.) " 'The elements of promissory fraud . . . are (1) a promise made regarding a material fact without any intention of performing it; (2) the existence of the intent not to perform at the time the promise was made; (3) intent to deceive or induce the promisee to enter into a transaction; (4) reasonable reliance by the promisee; (5) nonperformance by the party making the promise; and (6) resulting damage to the promise[e].' " (*Rossberg v. Bank of America, N.A.* (2013) 219 Cal.App.4th 1481, 1498.) "To establish a claim of fraudulent inducement, one must show that the defendant did not intend to honor its contractual promises when they were made." (*Food Safety Net Services v. Eco Safe Systems USA, Inc.* (2012) 209 Cal.App.4th 1118, 1131; see *Lazar, supra,* at p. 638 ["[a]n action for promissory fraud may lie where a defendant fraudulently induces the plaintiff to enter into a contract"].) With regard to fraud damages, "it is not enough for the complaint to allege damage was suffered. The fraud plaintiff must also allege his damages were caused by the actions he took in reliance on the defendant's misrepresentations." (*Beckwith v. Dahl* (2012) 205 Cal.App.4th 1039, 1064.) Plaintiff must plead each element with factual particularity, including how, when, where, to whom, and by what means the false representations were tended. (*Lazar, supra,* 12 Cal.4th at p. 645.) "A plaintiff's burden in asserting a fraud claim against a corporate employer is even greater. In such a case , the plaintiff must 'allege the names of the persons who made the allegedly fraudulent representations, their authority to speak, to whom they spoke, and what they said or wrote, and when it was said or written. (*Ibid.*)

iii) Merits

The court sustains the demurrer to this cause of action, for plaintiffs have failed to allege how, when, where, to whom, and by what means the false representations were tendered, particularly as defendants are corporate employers. Further, the court agrees that plaintiffs have failed to show with factual specificity what damages they suffered as a result of defendants' misrepresentations, as they claim perfunctorily that "Plaintiff[s] were damaged as a proximate result of Defendant Curation's and its alter ego, Defendant Lifecore's, fraudulent inducement to approve the subleases." (First Amended Complaint, ¶ 77.) At the pleading stage, the complaint must show a cause and effect relationship between fraud and damages sought; otherwise, no cause of action is stated. (*Small v. Fritz Companies, Inc.* (2003) 30 Cal.4th 167, 202.) Like any other element of fraud, allegations of damages without allegations of fact to support them are conclusions of law, which are not admitted by demurrer. (*Ibid.*) While it may be true, for example, that restitution as claimed in the third cause of action are damages, plaintiffs fail to allege the necessary nexus to survive demurrer.

The court is not persuaded by plaintiffs' contentions advanced in opposition that the allegations in the operative pleading are sufficient to withstand challenge. Plaintiffs argue that in Exhibit 6, John Morbert, Chief Financial Officer of Curation, signed the sublease; and that in the agreement, in paragraph 6.2, Curation was required to "construct a demising wall . . . " According to plaintiffs, "these statements provide the "how, when, where, to whom, and by what means the presentations were made . . . .." Not so. In the body of the fourth cause of action (¶ 73), plaintiffs allege expressly that defendants "presented ***to Plaintiffs*** that they would construct certain demising walls to accommodate the sublessees," and further, "represented that they would continue to pay all rental obligations and perform all other obligations under the Lease." Further, in paragraph 76 of the First Amended Complaint, it is alleged that defendants' misrepresentations were intended to induce reliance by plaintiffs. And finally, plaintiffs indicate in paragraph 75 of the First Amended Complaint that had plaintiffs "known that Defendants did not intent to perform, Plaintiffs would not have approved the subleases *per Defendants' request* . . . ." What request? ***When*** was the request made? More globally, how, when, where, to whom, and be what means were the misrepresentations made in the Sublease between Curation and the sublessee (the basis of the false representations) conveyed to plaintiffs, for plaintiffs were not signees to the sublease as contained in Exhibit 6, and under what conditions did plaintiffs approve? What did John Morberg say/write to plaintiffs, when did that occur, and how? The court is never told. Plaintiffs are required to plead this with factual specificity, and they have not. In the end, while plaintiffs may have adequately alleged the substance of the misrepresentations, and the fact the statements amounted to misrepresentations, plaintiffs have not alleged with specificity how, when, where, by whom, and by what means ***the misrepresentations were conveyed to plaintiffs, particularly as defendants are corporate employers.***

Nor is the court persuaded by plaintiffs' argument in opposition that they have "clearly suffered damage "based on their reliance" on defendants' attestations about the demise wall. (*Moncada v. West Coast Quartz Corp.* (2013) 221 Cal.App.4th 768, 776 [the specificity requirement applies not only to the alleged misrepresentation, but also to the elements of causation and damage].) Plaintiffs argue that the "proximate damages as a result of Defendants' fraudulent acts are clear cut, [and] they amount costs of fulfilling the Defendants obligations made to JS Audit. The failure to state the exact amount of money amounts to a timing issue . . . ." Damages may in fact be "clear cut," but one looks in vain in the operative pleading for any mention of the type and scope of the actual damages suffered as a result of the alleged fraudulent misstatements. Are plaintiffs required to do what Curation did not, and build the demise? Have they done so? While actual amounts are not required (*Beckwith, supra,* 205 Cal.App.4th at p. 1064 [it is the existence of damages, not the amount, which cannot be too remote, speculative or uncertain]), plaintiffs are required to plead with specificity they types of damages that occurred. It is not enough to allege damages generically (*ibid.*), which is all that has been accomplished in the present pleading. While this pleading defect may be easily corrected, it nevertheless is a defect (and remains one until corrected).

Plaintiffs contend that *Lazar v. Superior Court, supra,* 12 Cal.4th 631, supports their argument that the allegations here are sufficient. Our high court in *Laza*r concluded that plaintiff adequately pleaded all the elements of promissory fraud (keeping in mind the need for factual specificity), concluding as follows: ". . . . Lazar alleges that, in order to induce him to come to work in California, [defendant] intentionally represented to him he would be employed by the company so long as he performed his job, he would receive significant increases in salary, and the company was strong financially. Lazar further alleges that [defendant's] representations were false, and he justifiably relied on them in leaving secure New York employment, severing his connections with the New York employment market, uprooting his family, purchasing a California home, and moving here." Additionally, Lazar alleged that defendant "knew is representations regarding the terms upon which he would be retained . . . , potential salary increases, and the financial strength of the company were false at the time they were made. He also alleges that, at the time [defendant] represented to him his job would be permanent and secure, [defendant] was planning an operational merger likely to eliminate Lazar's job, and [defendant] had no intention of retaining him so long as he performed adequately. . . ." (*Id.* at p. 639.)

Lazar involved a far more detailed pleading than the complaint here. Plaintiffs' reliance on our high court's summary of what was pleaded ignores the ***specific allegations*** that supported its summary, which are contained earlier in the *Lazar* opinion. Lazar pleaded that between September 1989 through February 1990, defendant (through its Vice President, and later, President and Chief Executive Officer), "intensively recruited" plaintiff while plaintiff was in New York, at one point bringing plaintiff and his wife to Los Angeles to visit defendant's

offices, to visit realtors, and to see the city. The fraudulent misrepresentations at issue were orally (and perhaps in writing) made by these same individuals to plaintiff during this same time frame, despite plaintiff's concern (also expressed during these interactions) that plaintiff was reluctant to relocate to Los Angeles. (*Lazar, supra,* at p. 635.) This was evident, so it appears, although Lazar asked for a written employment contract, defendant's representatives indicated that written contract was unnecessary, because "our word is our bond." (*Id*. at p. 636.) Further, Lazar pleaded that as a result of the misrepresentations, and his reliance thereon, "Lazar lost past and future income and employment benefits. He lost contact with the New York employment market so that reemployment there is difficult or impossible. Lazar is burdened with payments on Southern California real estate he can no longer afford. Lazar and his family have experience emotional distress, with both psychological and physical manifestations." (*Id*. at p. 637.) The factual specificity in *Lazar,* addressing the fraudulent misrepresentations that were conveyed, as well as the types and scope of the damages suffered, stand in stark contrast to the lack of specificity alleged by plaintiffs here. *Lazar* if anything underscores why plaintiffs' allegations of promissory fraud are *inadequate.*

The court sustains the demurrer to the fourth cause of action, with leave to amend.

D) Summary of Court's Conclusions

- The court overrules the demurrer to defendants' challenges to the alter ego allegations.
- The court sustains the demurrer to the third cause of action with leave to amend. Courts have allowed "unjust enrichment" claims as a form of restitution, at least when a basis for restitution has been stated. If fraud is the basis for the restitution claim, restitution as a remedy should be alleged with the fourth cause of action, and not act a freestanding claim. If this were the only issue, the court would sustain the demurrer without leave to amend. *But it is not the only issue*. In opposition, plaintiffs indicate that they can state a claim for restitution based on an implied-in-fact contract or quasi-contractual basis, should the lease agreement(s) be unenforceable. This is a viable theory; they court will thus permit plaintiffs an opportunity to amend. Leave to amend on this basis is thus permitted.
- The court sustains the demurrer to the fourth cause of action involving fraud in the inducement (promissory fraud), as plaintiffs have failed to meet the specific factual pleadings requirements as mandated by *Lazar v. Superior Court* and progeny, for the reasons discussed in the body of this order.
- The court will allow plaintiffs 30 days from today's date to file an amended pleading.
- The parties are directed to appear at the hearing either personally or by Zoom, as a CMC hearing is also scheduled.