No. S272113

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

MICHAEL R. RATTAGAN,

Plaintiff and Appellant,

v.

UBER TECHNOLOGIES, INC.,

Defendant and Respondent.

United States Court of Appeals for the Ninth Circuit
Case No. 20-16796
Appeal from U.S. District Court for Northern California
Case No. 3:19-cv-01988-EMC
Honorable Edward M. Chen

REPLY BRIEF ON THE MERITS

STEYER LOWENTHAL BOODROOKAS ALVAREZ & SMITH LLP
Andrew A. August, SBN 112851
aaugust@steyerlaw.com
235 Pine Street, 15th Floor
San Francisco, California 94104
(415) 421-3400 / Fax (415) 421-2234

GREINES, MARTIN, STEIN & RICHLAND LLP
*Cynthia E. Tobisman, SBN 197983
ctobisman@gmsr.com
Alana H. Rotter, SBN 236666
arotter@gmsr.com
Jeffrey E. Raskin, SBN 223608
jraskin@gmsr.com
Laura G. Lim, SBN 319125
llim@gmsr.com
6420 Wilshire Boulevard, Suite 1100
Los Angeles, California 90048
(310) 859-7811 / Fax (310) 276-5261

Attorneys for Petitioner MICHAEL R. RATTAGAN

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INTRODUCTION

The Ninth Circuit asked a broad question: "Under California law, are claims for fraudulent concealment exempted from the economic loss rule?"

Uber purports to answer a "narrower" question: Whether there's an economic-loss-rule exemption for fraudulent concealment claims that duplicate breach-of-contract claims. (Answer Brief (AB)-10.)

We return to the broad question. We also explain why the premise underlying Uber's "narrower" question is flawed and why the claim here is exempt under the rationale of *Robinson Helicopter Co., Inc. v. Dana Corp.* (2004) 34 Cal.4th 979.

To answer the broad certified question, the Court must address the two relevant types of fraudulent concealment: (1) fraudulent concealment in *inducing* a contract, and (2) fraudulent concealment during *performance* of a contract. The certified question doesn't specify one or the other. Thus, it necessarily encompasses both.

Fraudulent inducement. We showed that *all* fraudulent inducement claims—whether by concealment or misrepresentation—are outside the economic loss rule ("ELR"). Uber responds by *agreeing* that "if a party fraudulently induces a contract by concealing material information, such a claim is already exempt from the economic loss rule via the fraudulent inducement exception." (AB-44, fn. 8; see AB-20, 27-28, 55.)

In *Robinson Helicopter*, this Court stated that fraudulent inducement is outside the ELR, but didn't expressly state that this exception applies to both concealment and to misrepresentation. (34 Cal.4th at pp. 989-990.) Thus, the Court should clarify here that the ELR doesn't bar claims that a party induced a contract *by fraudulent concealment*.

Fraud during performance. The Court also should hold that fraudulent concealment during contractual performance is outside the ELR. In *Robinson Helicopter, supra*, 34 Cal.4th at pp. 988-990, this Court held that *misrepresentations* during contractual performance were outside the ELR. *Robinson Helicopter* didn't address fraudulent *concealment* during contractual performance. But there's no meaningful difference between concealment and misrepresentation, and *Robinson Helicopter*'s rationale applies equally to fraudulent concealment. (Opening Brief on the Merits (OBM)-27-45.)

Uber cautions against "tort-ifying" contract law. But the danger isn't tort-law principles creeping into contract actions. The danger is the opposite—namely, the risk of contract law displacing long-standing tort remedies. In other words, the danger is of "contract-ifying" tort law. Uber's position is that defendants are insulated from tort liability for fraud if the parties happen to be in a contractual relationship. That cannot be right. So long as a plaintiff can allege and prove that a defendant's conduct amounts to fraud, it doesn't matter if there's a contract between the parties. The existence of a contract isn't a free pass to defraud.

Uber's intentional concealment of its plan to turn Michael Rattagan into a scapegoat isn't the sort of risk parties allocate in negotiating a contract. It is separately wrongful and independent of any contractual duty. No policy or rule supports closing the courthouse doors to litigants who've suffered such fraud.

ARGUMENT

I. Uber Agrees The Economic Loss Rule Doesn't Bar Claims For Fraudulent Concealment In *Inducing* A Contract.

Uber concedes the answer to half of the certified question: Uber agrees that the ELR doesn't bar claims for fraudulent inducement—regardless of whether that fraud was committed by misrepresentation or concealment. (OBM-20-21, 27-28, 36-41; AB-27-28, 44, fn. 8.) Uber says: "[I]f a party fraudulently induces a contract by concealing material information, such a claim is already exempt from the economic loss rule via the fraudulent inducement exception." (AB-44, fn. 8.)

Uber's concession is consistent with this Court's decisions recognizing that tort damages are available for fraud in inducing a contract. (*Erlich v. Menezes* (1999) 21 Cal.4th 543, 551-552; *Robinson Helicopter*, *supra*, 34 Cal.4th at pp. 989-990; *Lazar v. Superior Court* (1996) 12 Cal.4th 631, 645.) None of those decisions indicates that it matters whether the fraud was committed by intentional concealment or misrepresentation.

There's no meaningful distinction between the two types of fraudulent inducement claims because in either circumstance

"'[a] party to a contract cannot rationally calculate the possibility that the other party will deliberately misrepresent terms critical to that contract.' No rational party would enter into a contract anticipating that they are or will be lied to." (*Robinson Helicopter, supra,* 34 Cal.4th at p. 993, internal citation omitted.)

Thus, the Court should answer this aspect of the certified question by confirming that claims for fraudulent concealment in *inducing* a contract are always exempt from the ELR.

II. Claims For Fraudulent Concealment During Contractual Performance Should Also Be Exempt From The Economic Loss Rule.

In answering the remaining aspect of the certified question (i.e., whether fraudulent concealment claims that arise during contractual performance are outside the ELR), the Court should apply *Robinson Helicopter*'s reasoning, which permits no distinction between misrepresentation and concealment—both are equally exempt from the ELR. (See OBM-36-45.)

In response, Uber concedes there's no economic-loss-rule distinction between fraudulent *inducement* claims that are based on misrepresentations or intentional concealment. (§I, *ante*.)

But this is equally true for claims based on fraud committed during *performance* of a contract. (OBM-27-45.) Likewise, there's no principled basis to condition application of the ELR on the nature of the damages to which the fraud exposed the plaintiff. (OBM-45-54.)

A. Intentional concealment and affirmative misrepresentations must be on par: The claims that *Robinson Helicopter*'s rationale would permit if defendant affirmatively lied must also be permitted if defendant intentionally concealed material information.

Fraudulent concealment and misrepresentation are on an equal footing. (OBM-29, 36-37.) The Legislature has defined fraud to include *both*, and caselaw recognizes that concealment is just as fraudulent as misrepresentation. (*Ibid.*) There's no basis for deviating from that equality when it comes to the ELR. (OBM-27-45.) Any fraud claim that would be exempt from the ELR under *Robinson Helicopter* if the fraud was perpetrated by misrepresentation must *also* be exempt if the fraud was perpetrated by concealment. Uber has no real answer.

1. There's no basis to treat concealment and misrepresentations differently for purposes of the economic loss rule.

a. The sole difference between concealment and misrepresentation that Uber asserts—different pleading standards—doesn't exist.

In search of some principled distinction, Uber says it's "easy" for a plaintiff to allege concealment because the heightened pleading standard for fraud doesn't apply. (AB-49-52.) Uber says *Robinson Helicopter* relied on the heightened

pleading standard as a basis for allowing fraudulent misrepresentation claims, but that the standard "provides little protection" against concealment claims. (AB-51.) Uber's wrong.

A fraudulent omission must be pled with particularity. Earlier in this litigation, Uber *acknowledged* that fraudulent concealment must be plead with particularity. (OBM-42; ER-177 [Uber motion to dismiss, citing *Kearns v. Ford Motor Co.* (9th Cir. 2009) 567 F.3d 1120, 1127].) Indeed, contrary to Uber's current fretting that the pleading standard is "relaxed" for concealment claims and so "provides little protection" (AB-51), California law holds that the particularity requirement "applies equally to a cause of action for fraud and deceit based on concealment." (*Cansino v. Bank of America* (2014) 224 Cal.App.4th 1462, 1472.)

Uber says fraudulent-concealment plaintiffs don't have to plead "the who, what, when, where, and how of a statement" was made, because the point of a concealment claim is that *no* statement was made. (AB-51.) But the case Uber cites illustrates that the particularity requirement is simply adjusted to fit the context: Instead of describing the details of a misrepresentation, a concealment plaintiff must "'describe the content of the omission and where the omitted information should or could have been revealed….'" (*Spring Spectrum Realty Company, LLC v. Hartkopf* (N.D. Cal., Nov. 22, 2019, No. 19-cv-03099-JSC) 2019 WL 6251251, p. *3.) That *is* the "who, what, when, where, and how" of the concealment. And demonstrating that the particularity requirement has teeth, courts routinely

dismiss concealment claims for failure to plead an omission with sufficient particularity. (E.g., *Tilahun v. Nissan North America, Inc.* (C.D. Cal., Aug. 16, 2022) 2022 WL 3591068, *3 (cited at AB-50).) Uber's concerns are strawmen.

Even if intent could be generally pleaded, that would be equally true for affirmative misrepresentations claims. Equally unavailing is Uber's assertion that a fraudulent concealment plaintiff need only plead *intent* generally. (AB-51.) Uber relies only on cases that interpret Federal Rule of Civil Procedure 9(b), not California's pleading requirements. (*Ibid.*) Rule 9(b) explicitly permits "intent" to be pled "generally." But this Court has recognized that in California courts, "[e]very element of the cause of action for fraud must be alleged in the proper manner (i.e., factually and specifically)…." (*Committee on Children's Television, Inc. v. General Foods, Corp.* (1983) 35 Cal.3d 197, 216, superseded by statute as recognized in *Branick v. Downey Savings & Loan Assn.* (2006) 39 Cal.4th 235, 242.) California shouldn't prohibit all fraudulent concealment claims based on the procedural rules that a *federal* court might apply if it hears the state-based claim.

And whatever the standard for pleading intent, that standard cannot possibly be a principled basis for distinguishing between misrepresentation and concealment claims. Even under the federal rules, intent may be alleged generally for *all* "fraud" claims—that is, *both* claims for misrepresentation and claims for concealment. (Fed. R. Civ. P. 9(b).) Uber cites no authority that the standard for pleading intent varies according to whether the

fraud was by misrepresentation or by concealment. Thus, even assuming arguendo that intent can be pleaded generally in fraud claims, that isn't a basis for holding that the ELR bars concealment claims but permits misrepresentation claims.

Uber's argument is bad policy. Uber urges a blanket ban on *all* fraudulent concealment claims arising during contractual performance—necessarily including meritorious claims that could be pleaded with particularity. Speculation that a supposedly-relaxed pleading standard may make it easier to plead a claim cannot justify barring *all* claims, even meritorious and specifically-pleaded claims.

The goal of not making it too easy to "rais[e] a cry of fraud" is "understandable," but "is better advanced by using a high standard of proof" on scienter "and dismissing cases that do not satisfy it" than by treating the ELR as barring fraud claims. (Rest.3d Torts, Liability For Economic Harm, § 9, reporter's notes, subd. (a) ("Rest.3d Torts").)

There are good ways to weed out non-meritorious claims, including demurrers and summary judgment motions. There are good mechanisms for discouraging non-meritorious claims, including sanctions and malicious-prosecution liability. It makes no sense to instead use the blunt instrument of the ELR to bar *all* claims for fraudulent concealment in contractual performance. Indeed, the specter of non-meritorious claims "does not justify a wholesale rejection of the entire class of claims in which that potentiality arises." (Cf. *Dillon v. Legg* (1968) 68 Cal.2d 728, 736; *id.* at p. 744 [""[We] should be sorry to adopt a rule which would

bar all [negligent infliction of emotional distress] claims on grounds of policy alone, and in order to prevent the possible success of unrighteous or groundless actions"""].)

Uber's claim about a flood of cases is unfounded. Contrary to Uber's sky-is-falling message, there's no evidence of any flood of frivolous fraud claims. Back in 2004, the *Robinson Helicopter* dissent expressed concern that the majority's decision "taken to its logical conclusion" applies equally to concealment (34 Cal.4th at p. 996 (dis. opn. of Werdegar, J.)), which would mean more litigation. But in the decades since, those concerns haven't materialized. Uber hasn't pointed to any deluge of such fraud cases or of commentators bemoaning the glut of litigation created by *Robinson Helicopter*.

Despite the lack of empirical evidence of its imaginary concern, Uber asserts that its floodgates argument is "not a theoretical concern," because plaintiffs regularly allege that car manufacturers fraudulently concealed a defect. (AB-50.)

But Uber's proposed ban on concealment claims that arise during contract *performance* wouldn't have an impact on these car-related claims. All of the cases Uber cites (AB-50) involved fraudulent *inducement* via concealment—a category of claims that Uber concedes are already properly exempt from the ELR.

And Uber hasn't shown that fraudulent concealment claims against dealers/manufacturers are routinely non-meritorious or improperly taxing the system. Uber couldn't possibly do so, given

recent examples of rampant fraud by manufacturers.[1] The potential for tort liability for fraudulent concealment remains a necessary deterrent in the car industry and in others.

b. Uber hasn't identified any inherent difference between concealment and misrepresentation when it comes to whether fraud violates a duty that's independent of the contract.

Just as *Robinson Helicopter* saw misrepresentation as "separate from" or "independent" of a contract breach so, too, is fraudulent concealment. (OBM-28, 31.) Uber doesn't show otherwise. Uber just argues generally that there can't be a fraud claim if there's a contract, while accepting that fraudulent inducement (in both forms) and fraud during contractual performance via misrepresentation are all types of fraud claims that are excepted from the ELR.

Thus, Uber leaves unrefuted that *Robinson Helicopter*'s "separate" or "independent" duty rationale applies *equally* to fraud by concealment and fraud by misrepresentation.

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[1] E.g., *In re Volkswagen "Clean Diesel" Marketing, Sales Practices, and Products Liability Litigation* (N.D. Cal., Oct. 25, 2016, MDL No. 2672 CRB) 2016 WL 6442227 [Volkswagen secretly installed defeat device to cheat emissions tests, deceive regulators]; *Anderson v. Ford Motor Co.* (2022) 74 Cal.App.5th 946, 957 [affirming fraud; supervisor "recommend[ed] we delete" emails showing defects to avoid liability]; *Johnson v. Ford Motor Co.* (2005) 35 Cal.4th 1191, 1196-1200 [affirming punitive damages; Ford fraudulently concealed material facts from car owners].

c. Uber hasn't refuted that *Robinson Helicopter*'s policy reasons for permitting fraudulent misrepresentation claims apply equally to fraud by concealment.

Robinson Helicopter's policy rationales apply equally to concealment and misrepresentation-based fraudulent performance claims. (OBM-31-34.) Uber doesn't show otherwise.

Uber says *Robinson Helicopter*'s fraud exception is one of three exceptions to the ELR, and that the rationales for the *other* two exceptions don't apply to claims for fraudulent concealment during contractual performance. (AB-43-46.) Uber attacks a straw man. The other two exceptions Uber identifies are (1) fraudulent *inducement* claims, and (2) consumer claims for insurance bad faith or professional liability. Our argument didn't rely on either of those exceptions. Rather, we relied on what Uber acknowledges is a distinct third exception—*Robinson Helicopter*'s exception for fraudulent misrepresentations during contract performance. We said this exception should encompass fraud by concealment, not just fraud by misrepresentation, because *Robinson Helicopter*'s rationale applies equally to both. (OBM-31-34.) Whether the rationale in pre-*Robinson Helicopter* cases for *other* exceptions to the ELR applies to this category of claims is irrelevant to that point.

When Uber finally turns to the actual exception at issue here—*Robinson Helicopter*'s exception for fraud during contractual performance—Uber makes a fact-specific claim about

this case: Uber says Mr. Rattagan alleged that the contract required disclosing the concealed information—and on that basis, Uber characterizes his argument as being that tort damages are necessary to deter contract breaches. (AB-48.) But the same thing could be said of *Robinson Helicopter*, where the manufacturer breached the contract by not supplying parts conforming to the contract, and then committed fraud by providing certificates that claimed that the parts did conform to the contract. But as *Robinson Helicopter* observed, "[a] decision to breach a contract and then acknowledge it has different consequences than a decision to defraud," which justifies different damages. (34 Cal.4th at p. 993, fn. 8.)

Regardless, the question here is whether the ELR bars *all* claims of fraudulent concealment in the performance of a contract—not just Mr. Rattagan's specific allegations (or Uber's mischaracterization of those allegations).

A blanket ban on fraudulent concealment claims arising from fraud committed during performance of a contract would do violence to the public policies identified in *Robinson Helicopter*. There, the Court explained that tort remedies are appropriate where "the conduct in question is so clear in its deviation from socially useful business practices that the effect of enforcing such tort duties will be… to aid rather than discourage commerce." (*Id.* at p. 992.) Fraud isn't a "socially useful business practice." (*Ibid.*, quotation marks omitted.) Pursuing fraud actions is the socially useful practice, because such actions punish and deter fraud, and "California has a legitimate and compelling interest in

preserving a business climate free of fraud and deceptive practices." (*Ibid.*) That's equally true whether the fraud is in making misrepresentations or in failing to disclose material facts during performance of a contract.

Uber says any deterrence is outweighed by the negative effects of allowing tort claims between contracting parties, including increasing uncertainty in commercial contracts and discouraging breaches that would be economically efficient. (AB-48.) But *Robinson Helicopter* rejected that argument: Fraud is *outside* the risks allocated by contract terms. (34 Cal.4th at pp. 992-993.) "[P]arties cannot, and should not, be expected to anticipate fraud and dishonesty in every transaction." (*Ibid.*)

Finally, fraud is nothing like the simple "economically efficient" breach of contract that Uber touts. (AB-48.) As *Robinson Helicopter* said: "A decision to breach a contract and then acknowledge it has different consequences than a decision to defraud, and we fail to see how [the defendant's fraud] could be deemed 'commercially desirable.'" (34 Cal.4th at p. 993, fn. 8.) Barring fraud claims would "encourage[] fraudulent conduct at the expense of an innocent party." (*Id.* at p. 993.)

Again, *all* of that's as true for fraudulent concealment as it is for misrepresentations. Public policy doesn't support barring concealment actions that *Robinson Helicopter* would permit if the fraud had been a misrepresentation instead of a concealment.

d. Uber ignores that applying different rules to fraud by concealment and fraud by misrepresentation would be unworkable.

We noted the *Robinson Helicopter* dissent's point that treating concealment and misrepresentation claims differently is unworkable. (OBM-44-45.) As the dissent queried, "[i]f a party makes statements that are true but incomplete and that may or may not have false implications, is this a tortious misrepresentation or a nontortious nondisclosure?" (34 Cal.4th at p. 1000 (dis. opn. of Werdegar, J.).) Answering that question "will not be easy for parties seeking to order their affairs, judges obligated to instruct juries, or juries forced to split hairs by such a set of rules." (*Ibid.*) Thus, treating the two fraud variants differently doesn't just lack a principled basis. It also creates real-world problems for parties and the lower courts.

Uber has no answer.

———♦———

There's no reason to treat claims for fraudulent concealment during contractual performance differently from misrepresentations during contractual performance. *Robinson Helicopter*'s rationale applies equally to concealment claims. Accordingly, the Court should hold that any fraud-during-performance claim that would be exempt under *Robinson Helicopter* if the fraud was by misrepresentation is also exempt if the fraud was by concealment.

2. Uber's arguments based on case law are meritless.

a. *Robinson Helicopter* has already explained that the economic loss rule's policy rationale doesn't apply to fraud. The Restatement agrees.

Uber cites cases for the proposition that the ELR honors the parties' allocation of the risks in their contractual relationship and allows parties to make informed judgments about the costs of breaching a contract. (AB-24-26, 53-54.)

But *Robinson Helicopter* rejected this contract-protection argument when it comes to fraud. (OBM-25-27.) There, the defendant "urge[d] this court to apply the economic loss rule to [plaintiff's] fraud and intentional misrepresentation claims in light of the public policy of promoting predictability in contracts in commercial transactions." (34 Cal.4th at p. 992.) *Robinson Helicopter* acknowledged the rationale for limiting parties to their contractual obligations and remedies, but explained that contracting parties are *not* presumed to calculate the possibility that the other party will lie to them, and should *not* be expected to anticipate fraud. (*Id*. at pp. 992-993.)

Uber doesn't argue that *Robinson Helicopter* was wrong. Uber doesn't articulate a reason that the policy considerations supporting the result in *Robinson Helicopter* are any less compelling when one party to a contract intentionally conceals material information from the other, intending to induce reliance.

Sheen v. Wells Fargo Bank, N.A. (2022) 12 Cal.5th 905—the only post-*Robinson Helicopter* California decision cited in Uber's discussion of the need to protect contracting parties' expectations—doesn't support Uber's position. *Sheen* held only that the ELR bars a *negligence* claim against the mortgage holder. (*Id.* at pp. 915-916.) *Sheen* cited *Robinson Helicopter* for the proposition that a claim based on *intentional* conduct, including fraud, "of course" *would* be allowed. (*Id.* at p. 943, fn. 10 [borrower injured by a lender's intentional conduct during the loan-modification process "may pursue various intentional tort theories, such as fraud and intentional misrepresentation"].)

The portion of *Sheen* that Uber quotes comes from a discussion of when the ELR "bar[s] claims in *negligence"* for pure economic losses. (12 Cal.5th at p. 922, italics added.) *Sheen*, in turn, quoted a law review article by the reporter for the Restatement (Third) of Torts. (*Ibid.*) That article explains that in the Restatement's view, the ELR bars only *negligence*—it doesn't bar *fraud* claims. (Farnsworth, *The Economic Loss Rule* (2016) 50 Val.L. Rev. 545, 557-558 ("Farnsworth").) The excerpt Uber quotes, thus, cannot support a conclusion that the ELR bars fraudulent concealment claims that could proceed if the defendant had lied about information instead of concealing it.

b. Uber's cherry-picked non-California authorities don't support the *California* rule that Uber urges.

Uber asserts that California follows the same approach to the ELR as certain other states, and that those other states bar

fraud claims because they are "interwoven" with or duplicative of a contract claim. (AB-34-42.) Uber suggests this supposed alignment with other states means California, too, bars claims for fraudulent concealment during contractual performance. Not so.

Uber's non-California cases don't reflect California law—they conflict with it. The other states that Uber cherry-picks don't share California's approach to the ELR; they maintain versions of the ELR that bar fraud claims that California law would *exempt*—including fraudulent inducement claims and the fraud-during-performance claim at issue in *Robinson Helicopter*.

Uber *concedes* that California's version of the ELR doesn't bar fraudulent inducement claims. (§I, *ante*.) Uber concedes "it would not make sense to limit a plaintiff to contract remedies where the contract was procured through fraud." (AB-44.) Yet, the very cases that Uber describes as "consistent with" California law (AB-35-42 & fn. 5) apply the ELR to *bar* claims for fraudulent inducement. Uber doesn't explain how that outcome is consistent with California law or how those cases are nonetheless relevant.

Uber acknowledges that *Robinson Helicopter* permitted a fraud-during-performance claim based on misrepresentations that parts supplied under a contract conformed to the contract specifications. (AB-31.) Yet, Uber portrays California's rule as "consistent with" jurisdictions that bar fraud claims if they are based on misrepresentations about the "quality and characteristics" of the goods at issue in the contract, or are "interwoven" with contract claims. (AB-34-35, citing cases.)

California follows no such rule. After all, doing so would've dictated a different outcome in *Robinson Helicopter*. And indeed, a Tennessee Supreme Court decision that Uber cites expressly *distinguished* California as *not* having adopted the "quality or the characteristics" or "interwoven" standard: The Tennessee Supreme Court described California as adopting a "broad" fraud exception, *as opposed to* the "narrow or limited fraud exception" that permits only claims where fraud is "'extraneous to the contract,' not 'interwoven with the breach of contract.'" (*Milan Supply Chain Solutions, Inc. v. Navistar, Inc.* (Tenn. 2021) 627 S.W.3d 125, 148, 149, cited at AB-36.) Uber cannot seriously argue that the "interwoven" standard reflects California law.

Because the non-California cases Uber cites don't reflect California law, the standards that those other states use have no bearing on whether *California*'s version of the ELR bars claims for fraudulent concealment committed during performance.

Uber ignores jurisdictions holding that the ELR doesn't bar fraud claims at all. Uber largely ignores jurisdictions that treat the ELR as *not* broadly barring fraud claims. But that same Tennessee Supreme Court decision makes clear that California is in good company in rejecting a "narrow" exception to the ELR, instead broadly *permitting* fraud claims: "Although the narrow fraud exception remains viable in Wisconsin and Michigan, it has not been adopted by as many jurisdictions as the broad fraud exception." (*Ibid.*; see Rest.3d Torts, *supra*, § 9, reporter's notes, subd. (a) [criticizing the "'intertwined'" standard; "[i]f the defendant did defraud the

plaintiff, even within a contractual relationship, allowing the tort claim is more sensible and manageable than asking whether the tort and contract claims are conceptually extricable or inextricable"].)

Yet other jurisdictions have even further limited the ELR. The Florida Supreme Court returned the rule to its origins, holding that it only bars *products liability* claims. (*Tiara Condominium Ass'n, Inc. v. Marsh & McLennan Companies, Inc.* (Fla. 2013) 110 So.3d 399, 403-407, cited in Ninth Circuit Certification Order 7-8.) The Idaho Supreme Court limited the ELR to negligence claims, holding that it doesn't bar any claims for "the intentional tort of fraud." (*Taylor v. Taylor* (Ida. 2018) 422 P.3d 1116, 1125-1126, cited in Ninth Circuit Certification Order 7.)

Thus, to the extent that what other jurisdictions do is relevant, the Court should look to those jurisdictions that have permitted fraud claims, not to jurisdictions that would bar the fraudulent inducement and performance claims that California law already permits.

Uber's cited cases don't distinguish between concealment and misrepresentation claims. None of Uber's non-California cases turns on the distinction Uber urges here—namely, whether fraud was by concealment or misrepresentation. Thus, even outside of California, Uber finds no support for arguing that the ELR permits a fraud claim if the defendant lied about information, but bars the same claim if the defendant instead hid the information.

c. Permitting fraudulent concealment claims is consistent with this Court's precedent.

Uber argues that permitting claims for fraudulent concealment during contract performance would conflict with this Court's prior decisions, which Uber describes as rejecting tortious-breach-of-contract claims or as declining to allow exceptions to the ELR. (AB-54-58.) But none of the cases Uber cites is actually inconsistent with recognizing that fraudulent concealment claims are exempt from the ELR.

Foley. *Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 682-701 (AB-54-55) declined to recognize a new cause of action for breach of the implied covenant of good faith and fair dealing in employment terminations. Uber cites *Foley* as an example of the Court rejecting theories that would allow contract breaches to be replead as torts—and says that's what Mr. Rattagan is advocating. (AB-54.) But this Court has already limited *Foley*: In *Lazar*, the Court rejected an argument that *Foley* barred an employee's fraudulent inducement claim, explaining that "the issue in *Foley* was whether to acknowledge the existence of a *previously unrecognized cause of action*," not whether to "restrict the availability of traditional tort remedies" like fraud. (12 Cal.4th at p. 644.) *Lazar* emphasized that fraud actions "advance[] the public interest" in punishment and deterrence, and that "in fraud cases *we are not concerned about the need for 'predictability about the cost of contractual relationships*"—the concern that drove *Foley*. (*Id.* at p. 646,

italics added.) *Robinson Helicopter* cites *Lazar* for those propositions. (34 Cal.4th at p. 992.)

Uber ignores *Lazar*'s *rationale* for limiting *Foley*. Instead, Uber asserts that *Lazar*'s *result*—permitting a fraudulent inducement claim—"does not alter the result here, because fraudulent inducement claims are already subject to a recognized exception to the economic loss rule." (AB-55, fn. 11.) But *Lazar*'s explanation of why *Foley* doesn't apply to fraud claims didn't turn on fraudulent inducement versus performance. *Lazar*'s point was that *Foley* rejected the concept of creating a *new* cause of action (tortious breach of contract), and that fraud is a traditional cause of action, not a new one. A claim for fraudulent concealment during contract performance is just as traditional a cause of action as fraudulent inducement. (OBM-36-37.) *Lazar*'s rationale makes clear that *Foley* doesn't bar fraud claims.

Uber makes no effort to reconcile its reading of *Foley* with *Robinson Helicopter,* which held that the ELR doesn't bar claims for fraudulent misrepresentations during the performance. (34 Cal.4th at p. 993.) *Robinson Helicopter* post-dates *Foley*. If as Uber claims, excepting fraudulent concealment claims is inconsistent with *Foley*, why wasn't the same true of claims where the fraud in the performance was by misrepresentation?

Uber has no answer.

Hunter. *Hunter v. Up-Right, Inc.* (1993) 6 Cal.4th 1174, 1184-1185 (AB-55-57) held an employee couldn't recover fraud damages for a misrepresentation used to cause his termination.

Uber describes *Hunter* as declining to permit fraud claims for wrongful termination because fraud claims are easy to plead and hard to dispose of early in a case—and Uber argues that permitting claims for fraudulent-concealment-during-contract-performance would be inconsistent with *Hunter*. (AB-55.)

But *Hunter* didn't bar all fraud claims. It "specifically preserved promissory fraud claims" and "expressly left open" the possibility of a fraud claim based on misrepresentations aimed at inducing the employee to detrimentally alter his position in some respect other than a termination. (See *Lazar, supra*, 12 Cal.4th at pp. 640-641, 647.)

And as *Lazar* later explained, *Hunter*'s "core rationale" was that the employee couldn't establish all the elements of a fraud claim. (12 Cal.4th at p. 643.) Specifically, he couldn't establish detrimental reliance on his employer's misrepresentation where the employer could— and would—have terminated him anyway, had the misrepresentation not led him to resign. (*Id.* at pp. 641-643.) *Hunter*, thus, simply reflects that to recover for fraud, a plaintiff must be able to establish all the elements of the claim.

Applied Equipment. *Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503, 510-514 held that a party cannot be liable in tort for conspiring to interfere with its own contract. Uber emphasizes *Applied Equipment*'s observation that limiting recovery to contract damages encourages commercial activity by enabling the parties "'to estimate in advance the financial risks of their enterprise.'" (AB-55.) But this Court has already made clear that fraud triggers a different policy analysis:

"[I]n fraud cases we are not concerned about the need for 'predictability about the cost of contractual relationships….'" (*Lazar, supra*, 12 Cal.4th at p. 646.) Instead, the focus is on "'preserving a business climate free of fraud and deceptive practices.'" (*Robinson Helicopter* at p. 992.) Uber thus hasn't shown that permitting a claim for fraudulent concealment during contractual performance is inconsistent with *Applied Equipment*.

Freeman. *Freeman & Mills, Inc. v. Belcher Oil Co.* (1995) 11 Cal.4th 85, 103 held there's no tort claim for bad-faith denial of a contract. Uber emphasizes that *Freeman* wanted to avoid treating bad-faith denials of *liability* under a contract as tortious and saw no way to permit one claim but not the other. (AB-55-56.) That reasoning has no bearing on whether the ELR bars claims for the long-recognized tort of fraudulent concealment during contractual performance—claims that have different elements and different pleading standard than breach of contract.

Voris. *Voris v. Lampert* (2019) 7 Cal.5th 1141, 1148-1156 (AB-56) held that a plaintiff's difficulty in enforcing a judgment against a former employer didn't warrant creating a new claim for conversion of unpaid wages. Uber cites *Voris*'s statement that plaintiff's position would allow conversion claims in every suit involving non-payment of wages. (AB-56.) But the Court's point was just that because conversion is a strict- liability tort and would apply even against defendants who make good-faith mistakes, the plaintiff's proposed rule was not "well suited to address the particular problem [plaintiff] alleges," namely, the desire to punish "individual corporate officers who withhold

wages to punish disfavored employees or who deliberately run down corporate coffers to evade wage judgments." (*Voris* at p. 1162.) There's no such issue with allowing fraudulent concealment claims, given that fraud *is* an intentional tort.

Uber says *Voris* shows alleging breach of a tort duty isn't enough to escape the ELR. (AB-58.) But Mr. Rattagan doesn't argue that *every* tort is outside the ELR. He argues *fraud* is outside the ELR, because it's an *intentional* independent tort and contravenes the assumptions that otherwise justify limiting parties to their contract damages. *Voris* isn't to the contrary.

B. *Robinson Helicopter* exempts fraud based on the nature of the tort.

Uber says *Robinson Helicopter* exempts only fraud claims that are based on *conduct* that's "distinct" and "wholly separable" from the *conduct* constituting the breach of contract. (AB-46-47.) From this premise, Uber says the fraud must be "wholly separable" from the conduct that constitutes a breach of contract. (AB-32, 46-47.) If true, the same limitation would apply to fraudulent concealment claims, as well. But a careful reading of *Robinson Helicopter* belies that characterization. *Robinson Helicopter* categorically exempts fraud based on *the nature of the tort*; the exemption doesn't turn on whether *conduct* underlying the fraud claim also underlies the contract claim.

1. *Robinson Helicopter* focused on the nature of fraud generally. In fact, that fraud was deeply intertwined with the conduct constituting a breach of contract.

Uber's reading of *Robinson Helicopter* misses the mark. The surest sign of this? *Robinson Helicopter*'s facts would fail the test that Uber derives from the case, and thus would've required the opposite result in *Robinson Helicopter*.

Uber latches onto *Robinson Helicopter*'s statement that the defendant's "'tortious conduct was separate from the breach itself.…'" (AB-47, quoting 34 Cal.4th at p. 991.) But *Robinson Helicopter* didn't mean that the conduct underlying the claims must be entirely separate and distinct rather than "intertwined," as Uber contends. Indeed, the fraud in *Robinson Helicopter* was very much intertwined with the breach of contract:

The contract obligation. The contract required defendant to (1) supply parts that conformed to "particular specifications," and (2) to provide certificates attesting to the parts' conformity. (34 Cal.4th at p. 986 (maj. opn. of Brown, J.).) The certificates of compliance were themselves "contractually required." (*Id.* at p. 994 (dis. opn. of Werdegar, J.).)

The breach. Defendant breached its contractual obligations by supplying nonconforming parts. (*Id.* at p. 991.)

The fraud claim. The claim was based on the inexorably-intertwined conduct of supplying certificates that misrepresented the actual parts supplied. (*Id.* at pp. 990-991.) That is, the

certificates falsely stated that the parts matched the specifications required by the contract, even though the manufacturer was "contractually required" to certify the qualities of the actually-delivered parts. (*Id.* at p. 994 (dis. opn. of Werdergar, J.).)

It's difficult to imagine fraud that's more closely intertwined with the contract obligation and breach. If that were fatal—as Uber contends—then *Robinson Helicopter* would've come out the other way; indeed, it would've held that the particular fraud claim at issue wasn't independent and therefore fell within the ELR. But that's not what *Robinson Helicopter* held. Thus, Uber misreads *Robinson Helicopter*.

So, what then did *Robinson Helicopter* mean when it said defendant's "tortious conduct was separate from the breach itself"? (34 Cal.4th at p. 991.) It meant the tort of fraud-during-performance-of-contract is inherently independent from a claim for breach of the contract—even a highly-related breach of contract—because the two claims arise from independent *duties*.

As this Court explained, the focus is on whether a claim is "based on an *independent duty* that [defendant] breached" and fraud claims *always* arise from an independent duty than the contract obligation. (*Id.* at pp. 989-991, italics added.) *Robinson Helicopter* made clear that overlapping *conduct* between a contract claim and fraud claim isn't relevant: "'[C]onduct amounting to a breach of contract becomes tortious'" when it "'also violates a duty independent of the contract arising from principles of tort law.'" (*Id.* at p. 989, internal citation omitted.)

It's the *independent source of the duty*—not the overlapping *conduct*—that matters for purposes of the ELR.

In turning to the specific claim before it, the *Robinson Helicopter* court made no effort to say that the *conduct* underlying the fraud claim was distinct from the *conduct* in the breach of contract. Again, as shown, *Robinson Helicopter*'s facts would've flunked that test. What the Court said *was* "separate" and "independent" in *Robinson Helicopter* was that fraud is an *intentional* tort, with the *duty* not to defraud arising from a source independent of the contract—namely, from the common law and the Civil Code. (OBM-28-30.) That's why the Court's discussion focused on the "elements" of the tort claim, immediately before saying that "[a]ccordingly, [the defendant's] tortious conduct was separate from the breach itself, which involved [the defendant's] provision of the nonconforming clutches." (*Robinson Helicopter, supra*, 34 Cal.4th at p. 991.) And that's why *Robinson Helicopter* explained that "'[f]ocusing on intentional conduct gives substance to the proposition that a breach of contract is tortious only when some independent duty arising from tort law is violated.'" (*Id.* at pp. 990-991 & fn. 7.)

The rest of *Robinson Helicopter*'s discussion confirms that the Court's holding was based on the *nature of fraud*, not whether there was an overlap between the *conduct* constituting fraud and the *conduct* constituting a contract breach. For instance, the opinion stressed that fraud raises "different policy concerns" than the product-liability claims and negligence claims where the ELR originated. (34 Cal.4th at p. 991, fn. 7.)

Robinson Helicopter then emphasized California's strong interests in deterring fraud through tort remedies (*id.* at pp. 991-992)—interests that apply regardless whether the conduct constituting fraud also relates to a contract breach. For instance, *Robinson Helicopter* emphasized that "[n]o rational party would enter into a contract anticipating that they are or will be lied to," and in allocating contract risks, parties "cannot, and should not, be expected to anticipate fraud and dishonesty in every transaction." (*Id.* at p. 993.)

Accordingly, one reason fraud claims are independent of the contract is fraud violates all the assumptions underlying contract law. That's true of *all* fraud. Fraud violates contract norms/expectations regardless whether the conduct constituting the fraud also breaches the contract.

2. Like the proper interpretation of *Robinson Helicopter*, the Restatement endorses the view that fraud is categorically outside the economic loss rule.

The Restatement (Third) Torts agrees that the ELR's fraud exemption should be categorical, not dependent on what specific conduct constitutes the fraud: The Restatement says the ELR bars only claims for *negligence* in performance or negotiation of a contract. (Rest.3d Torts, *supra,* § 3 ["there is no liability in tort for economic loss *caused by negligence* in the performance or negotiation of a contract between the parties," italics added].)

The ELR "does not impair" fraud claims. (*Id.* at § 9, com. a ["the economic-loss rule generally forecloses tort liability for negligence in the negotiation or performance of a contract, but it does not impair the claims of fraud discussed in this Chapter"].) Although published after *Robinson Helicopter* was decided, the Restatement's reasoning echoes this Court's.

The Restatement's reporter explains that negligence "is considered a matter for resolution under the terms of the contract," because "[e]veryone understands that honest mistakes are part of commercial life…." (Farnsworth, *surpa*, 50 Val.L. Rev. at p. 558.) Fraud is different: "A defendant who commits fraud in the making or performance of a contract *may be sued in tort*. The economic loss rule does not enter in to such a case" because "most parties don't treat the chance that they are lying to each other as an ordinary subject for their contract to allocate." (*Id.* at p. 557, italics added.)

Thus, "the economic-loss rule is meant to protect contractual allocations of risk against interference by the law of tort. Claims for fraud rarely cause such interference because parties to a contract do not usually treat the chance that they are lying to each other as a risk for their contract to allocate. They regard honesty as an assumed backdrop to their negotiations." (Rest.3d Torts, *supra*, § 9, com. a.) Tort liability for fraud "thus helps to protect the integrity of the contractual process and sometimes furnishes useful remedies that the law of contract does not as readily provide." (*Ibid.*)

This is the same rationale as *Robinson Helicopter*'s policy discussion. That it led the Restatement to categorically exempt fraud from the ELR reinforces that *Robinson Helicopter* should be read as doing the same.

3. Mr. Rattagan's position doesn't "prove too much."

Uber says Mr. Rattagan's position that fraudulent concealment categorically violates an independent tort duty "proves far too much" because negligence also violates a tort duty, and the ELR bars negligence claims. (AB-47-48.)

But we didn't argue that concealment is exempt from the ELR just because concealment is a tort; our argument is that *Robinson Helicopter*'s holding turned on multiple points, *all* of which apply equally to fraudulent misrepresentation and concealment: (1) fraud is *intentional*; (2) fraud violates a duty independent of the contract; and (3) subjecting fraud to tort remedies advances public policy. (OBM-22-35.)

This argument is consistent with the fact that the ELR bars claims for negligence, which doesn't require intent and which presents different policy considerations. (See *Robinson Helicopter, supra*, 34 Cal.4th at pp. 991-993 & fn. 7.)

4. Because *Robinson Helicopter*'s fraudulent misrepresentation exemption turns on the nature of fraud rather than the conduct underlying the fraud claim, so, too, does the fraudulent concealment exemption.

As shown, *Robinson Helicopter*'s exception to the ELR turns on the nature of fraud rather than the specific conduct underlying a particular fraud claim. As shown, there's no basis for distinguishing between fraudulent misrepresentations and fraudulent concealment when it comes to the ELR. (OBM-36-45.) Thus, the Court should clarify that fraudulent concealment is exempt because of the nature of fraud and that the exemption doesn't turn on whether the conduct constituting fraud is also part of the breach of contract.

5. Mr. Rattagan's fraudulent concealment claims don't "duplicate" breach-of-contract claims.

Uber says "[a]t a minimum," the ELR must foreclose Mr. Rattagan's fraud claim because the claim "duplicates" his breach-of-contract claim. (E.g., AB-43, 52, 56.) But breach-of-contract and fraud claims have different elements. Fraudulent concealment claims require proving, among other things, an *intent* to conceal information, an *intent* to induce reliance, and reasonable reliance. Contract claims don't have those elements. Scienter is "the point that most often separates fraud from breach of contract." (Rest.3d Torts, *supra*, § 9, reporter's notes,

subd. (a).) And there's an "'extra measure of blameworthiness inhering in fraud'"—such that victims should be able to pursue the remedies the Legislature deemed necessary for compensation, punishment, and deterrence. (See *Robinson Helicopter, supra*, 34 Cal.4th at p. 992.)

To the extent Uber suggests there's some term in the contract that covers Uber's tortious conduct, Uber hasn't pointed to any term. Nor could it. There was no written engagement agreement and whatever implied-in-fact agreement existed necessarily didn't include agreeing to Uber's fraudulent conduct. Mr. Rattagan didn't agree to become a scapegoat for Uber's concealed illegal activities. (See §III, *post*.)

C. *Robinson Helicopter*'s limitation of the fraud-during-performance exception to conduct risking certain types of harm was unnecessary. There should be no such limitation.

In addition to holding fraudulent-concealment-during contractual-performance claims are exempt from the ELR to the same extent as fraudulent-misrepresentation-during-performance claims, the Court should clarify that the exemption isn't contingent on the type of potential harm or liability that the fraud exposed the plaintiff to. (OBM-45-54.) This clarification is necessary because of *Robinson Helicopter*'s statement that its holding is limited to misrepresentations "'which expose a plaintiff to liability for personal damages independent of the plaintiff's

economic loss.'" (OBM-45, quoting *Robinson Helicopter*, 34 Cal.4th at p. 993.)

Uber doesn't squarely address this argument. The closest it comes is in a section describing *Robinson Helicopter*, where it asserts that *Robinson Helicopter*'s limiting the exemption to misrepresentations that risked certain types of harm "directly relates to the foundational definition of the economic loss rule: the rule forecloses tort claims for purely economic losses that do not involve personal injury or damage to property." (AB-32-33.) Uber asserts that "[t]he risk of physical harm was part of what brought [the defendant's] conduct outside the scope of the economic loss rule" in *Robinson Helicopter*. (AB-33.)

Uber omits that *Robinson Helicopter* didn't only reference physical harm—*Robinson Helicopter* also noted that the defendant's fraud exposed the plaintiff to "disciplinary action by the FAA." (34 Cal.4th at p. 991.)

Here, Mr. Rattagan was interrogated, fingerprinted, mugshot, charged with aggravated tax evasion, and barred from leaving the country. His office was surrounded by protestors and raided by the police. His name was publicly associated with serious crimes he never committed. (2-ER-213-214 ¶¶74-75, 77-78.) Accordingly, his claim would be exempt from the ELR even if *Robinson Helicopter* were read as *only* exempting fraud-during-contract-performance claims where the fraud risked harm similar to the potential harm at issue in *Robinson Helicopter* (i.e., the risk of prosecution/disciplinary action).

Regardless, this Court should clarify that fraud is exempt from the ELR regardless whether it posed risks of harm similar to *Robinson Helicopter*. Nowhere is it written in stone that the ELR *necessarily* bars fraud claims unless there was personal injury or property damage. *Robinson Helicopter* already departed from that version of the rule, in allowing a fraud claim based on the *possibility* of personal injury or property damage even though no such damage actually occurred. (34 Cal.4th at p. 991 & fn. 7.) And the Restatement's version of the rule doesn't bar fraud claims at all—it bars only *negligence* claims for economic loss.

There's ample reason to permit claims for fraud-during-contractual-performance without any limitation based on the particular type of harm the fraud risked. As *Robinson Helicopter* and the Restatement explain, the premise for limiting parties to contract remedies (i.e., the ELR) is that parties negotiate contract obligations and allocate risks of loss based on the premise that they'll keep their word—and in that scenario, it's appropriate to give them the benefits they expected to receive. (34 Cal.4th at pp. 992-993; Farnsworth, *supra*, 50 Val.L.Rev. at pp. 557-558.) That premise doesn't apply to fraud: Parties aren't expected to anticipate fraud and dishonesty in commercial transactions. (*Robinson Helicopter, supra*, 34 Cal.4th at p. 993.) That's equally true regardless whether the potential harm from fraud is economic, personal injury, or property damage.

Fraud is likewise equally distinct from a contract breach regardless of the type of harm that it risks: Fraud requires scienter, while contract breaches don't. And fraud is equally

deleterious to California's business climate—and not a "socially useful business practice" (*Robinson Helicopter, supra*, 34 Cal.4th at p. 992)—regardless of which type of harm it risks.

In answering the Ninth Circuit's question, the Court therefore should make clear that although *Robinson Helicopter* limited its holding to the threat of harm before it, *Robinson Helicopter* didn't thereby bar fraud claims involving *other* types of harm.

III. Uber Had A Duty To Disclose Information That Would Foreseeably Put Mr. Rattagan In Harm's Way.

Uber says the ELR doesn't permit Mr. Rattagan's fraud claim because clients have no tort-duty to disclose information to attorneys. (AB-58-60.) But Mr. Rattagan didn't sue Uber merely for failing to disclose a lawful business plan or because Uber's actions "prove[d] controversial…." (AB-60.) He alleged Uber failed to disclose *specific* information that *it knew in advance* would put him directly in harm's way, including:

- Uber *knew* officials would consider its launch unlawful and tax-evasive—officials had so warned Uber. (2-ER-192, 208-210.)

- Uber *knew* launching without governmental approval was likely to cause riots and other immediate adverse reactions—that's what had happened in other cities. (2-ER-192-193.)

- Uber *knew* that because Mr. Rattagan was its public face and legal representative in Argentina, he *personally* would suffer the fallout from an unauthorized launch, including potential criminal liability and adverse publicity. (2-ER-192-193, 206.)

- Uber launched anyway, without giving him any advance notice and thus any chance to withdraw. (2-ER-206-207.)

- He suffered the personal consequences Uber foresaw or reasonably should've foreseen: Protestors surrounded his office. His firm was vilified. Law enforcement raided his office. He was charged with aggravated tax evasion—criminal conduct entailing prison terms and social condemnation. He was barred from leaving the country and prosecuted. (2-ER-192-193, 211-214.)

Mr. Rattagan's position is that *in these circumstances,* Uber owed him a duty to disclose that officials had warned Uber not to launch this way—and that Uber was planning to launch anyway. Mr. Rattagan alleges he had the right to know that Uber was about to bring down the wrath of the government and public on him. Such a duty to disclose is consistent with settled law that defendants have a duty to disclose material facts of which they have exclusive knowledge. (E.g., *Bank of America Corp. v. Superior Court* (2011) 198 Cal.App.4th 862, 870.) It's also consistent with the law of agency—a principal (here, client) has a duty to deal with its agent (here, lawyer) "fairly and in good faith, including a duty to provide the agent with information about risks of physical harm or pecuniary loss that the principal knows, has reason to know, or should know are present in the agent's work but unknown to the agent." (Rest.3d Agency, § 8.15.)

None of Uber's arguments negates a duty of disclosure as a matter of law.

Uber knew its launch would be considered unlawful. Uber's claim that its operations were lawful (AB-58, 60) is beside the point. Even if the dense Argentina legal rulings Uber cites (1-ER-51-56, 107-10, 138-142, 185, cited at AB-14) amounted to a decision that Uber's operations are lawful, those decisions came *more than two years after the fact*, and after Mr. Rattagan was predictably dragged through the mud. (Compare *ibid.* [November 2018 ruling] with 2-ER-193 [April 2016 launch].) Uber knew before launching that officials considered its launch unlawful and that Mr. Rattagan would bear the brunt of that view. Uber had a duty to disclose that information to him so that he could decide whether to step down and avoid bearing the brutal personal consequences of Uber's strategy. He didn't get that chance.

Contracting parties aren't expected to allocate the risk of fraud. Uber says lawyers' only way to protect themselves from clients is through due diligence and contract. (AB-59-60.) Uber cites no authority for this radical claim, which contradicts *Robinson Helicopter*'s rationale that parties aren't expected to allocate the risk of being defrauded. (34 Cal.4th at p. 993.)

An attorney's duty of loyalty doesn't immunize the client for harming the attorney. Uber says Mr. Rattagan's duties of client confidentiality and loyalty bar his suit. (AB-59.) But *Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 819 merely states an attorney cannot (1) do anything to injure a former client "in any matter in which" the attorney formerly represented the client, or (2) use against the former client

"knowledge or information acquired by virtue of the previous relationship." (*Ibid.*) Mr. Rattagan has done neither: He isn't injuring Uber *in the matter in which he represented it* (setting up the Argentine entity), nor is he using knowledge acquired from the former relationship against Uber. His suit is predicated on Uber's *failure to give him information*.

CONCLUSION

The Court should answer the certified question "Yes" in all respects.

Date: December 30, 2022

STEYER LOWENTHAL BOODROOKAS
ALVEREZ & SMITH LLP
Andrew A. August
Jill K. Cohoe
Allan Steyer

GREINES, MARTIN, STEIN & RICHLAND LLP
Cynthia E. Tobisman
Alana H. Rotter
Jeffrey E. Raskin
Laura G. Lim

By: s/ *Cynthia E. Tobisman*
Cynthia E. Tobisman
Attorneys for Petitioner
MICHAEL R. RATTAGAN

CERTIFICATION

Pursuant to California Rules of Court, rule 8.520 (c)(1), I certify that this **REPLY BRIEF ON THE MERITS** contains 8,399 words, not including the tables of contents and authorities, the caption page, signature blocks, or this Certification page.

Date: December 30, 2022

s/ *Cynthia E. Tobisman*
Cynthia E. Tobisman

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 6420 Wilshire Boulevard, Suite 1100, Los Angeles, California 90048, and my email address is pherndon@gmsr.com.

On December 30, 2022, I hereby certify that I electronically served the foregoing **REPLY BRIEF ON THE MERITS** through the Court's electronic filing system, TrueFiling. I certify that all participants in the case who are registered TrueFiling users and appear on its electronic service list will be served pursuant to California Rules of Court, rule 8.70. Electronic service is complete at the time of transmission:

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I further certify that participants in this case who are not registered TrueFiling users are served by mailing the foregoing document by First-Class Mail, postage prepaid, to the following:

Executed on December 30, 2022 at Los Angeles, California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Pauletta L. Herndon

Pauletta L. Herndon

SERVICE LIST

Via Truefiling:

Clara J. Shin, Esq.
cshin@cov.com
Jeffrey M. Davidson, Esq.
jdavidson@cov.com
Amy S. Heath, Esq.
aheath@cov.com
COVINGTON & BURLING, LLP
Salesforce Tower
415 Mission Street, Suite 5400
San Francisco, CA 94105

Lindsey C. Barnhart, Esq.
lbarnhart@cov.com
COVINGTON & BURLING, LLP
3000 El Camino Real
5 Palo Alto Square, 10th Floor
Palo Alto, CA 94306

Attorneys for Defendant and Respondent
UBER TECHNOLOGIES, INC.

Office of the Clerk
United States Court of Appeals
for the Ninth Circuit
CA09_Records@ca9.uscourts.gov
95 7th Street
San Francisco, California 94103
Case No. 20-16796