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Docket No. 20-16796

In the

UNITED STATES COURT OF APPEALS

For the

NINTH CIRCUIT

MICHAEL R. RATTAGAN,
Plaintiff-Appellant,

vs.

UBER TECHNOLOGIES, INC.,
Defendant-Appellee.

APPEAL FROM JUDGMENT OF THE
UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA
CASE NO. 3:19-CV-01988-EMC
HON. EDWARD M. CHEN, UNITED STATES DISTRICT JUDGE

OPENING BRIEF OF APPELLANT MICHAEL R. RATTAGAN

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I. JURISDICTIONAL STATEMENT

This appeal by Plaintiff/Appellant Michael Rattagan ("Rattagan") is from a final Judgment entered on August 19, 2020 in favor of Defendant/Respondent Uber Technologies, Inc. ("Uber") following the District Court's August 19, 2020 "Order Granting Defendant's Motion to Dismissing Case with Prejudice" pursuant to Federal Rule of Civil Procedure 12(b)(6). 1-ER-002 and 1-ER-019. The District Court's jurisdiction was based on 28 U.S.C. Section 1332 as the matter in controversy exceeded the value of $75,000, and Rattagan is a citizen of a different country than Uber. On September 16, 2020, Rattagan timely filed his Notice of Appeal. This Court has jurisdiction pursuant to 28 U.S.C. Section 1291.

II. INTRODUCTION

Rattagan is an Argentine lawyer who was hired by Uber to provide legal services and be the legal representative in Buenos Aires for its wholly-owned foreign subsidiaries. When Rattagan was first hired in 2013, he told Uber in writing that under Argentine law, as a legal representative, he could be held personally responsible for any illegal activities by Uber in the country.

In April 2016, Uber launched its now ubiquitous Uber Rideshare in Buenos Aires without telling Rattagan it was doing so. More significantly, Uber also concealed from Rattagan that it had been informed months earlier during a series of meetings with Buenos Aires' governmental officials that the City considered Uber's

business model to be unlawful under City transportation regulations and warned Uber against launching Rideshare. Thus, Rattagan was Uber's registered legal representative at the time of the launch. Uber's fraudulent concealments prevented him from taking the steps necessary to protect himself, including withdrawing as Uber's lawyer and legal representative.

The Buenos Aires prosecutor arrested Rattagan and charged him with, among other things, aggravated tax evasion despite Rattagan's lack of involvement in or knowledge of the launch or of the City's dire warnings. His business reputation and his law practice suffered significant economic harm. This lawsuit sought to recover those damages based on tort theories, including fraudulent concealment and intentional omission and aiding and abetting.

The District Court dismissed the operative complaint with prejudice and entered judgment against Rattagan. Relevant to this appeal, the Court ruled that Rattagan's fraud claims are barred by California's Economic Loss Rule ("ELR" or the "Rule"). The ELR is a common law rule that precludes recovery in tort for what are essentially contract damages. The District Court ruled that because Rattagan's fraud claim was "rooted" in an implied-in-fact attorney-client contract with Uber (there is no written contract and no particular terms or conditions), he could not as a matter of law recover tort damages. Because Uber's only contractual obligation was to pay Rattagan's legal bills, which it did, this ruling together with the Court's

dismissal of Rattagan's negligence-based claims based on the applicable two-year statute of limitation,[1] effectively rendered him without a remedy.

The District Court erred as a matter of law in applying the ELR to Rattagan's claims in the first place and because it failed to address or misconstrued several exceptions to the ELR. After summarizing the key factual allegations in the operative complaint (*see* fn. 3, *infra*) and the procedural history of the case, this brief will explain why the ELR does not apply. It will then discuss why, even if the Rule is applicable, several exceptions preclude its application to the facts here. These exceptions include the "separate duty" exception, the "fraud" exception, the "special relationship" exception, and the "professional services" exception. Each of these exceptions dictates that the order granting Uber's motion to dismiss and judgment thereon should be vacated and the case remanded to District Court so Rattagan can have his proverbial "day in court."

To uphold the District Court's order, this Court must determine as a matter of law that: (1) clients have no duty of disclosure to their lawyers of their business plans even where those plans are related to the services to be provided by the lawyer and even when failure to disclose places the lawyer in harm's way; (2) intentional fraudulent concealment, as distinct from affirmative misrepresentation, does not

[1] This appeal does not challenge the District Court's statute of limitation holding.

obviate application of the ELR to tort claims; and (3) the attorney-client relationship is not a "special relationship" for purposes of the ELR. These conclusions, however, are contrary to strong social policy that is the bedrock of the attorney-client relationship – the ability of the attorney and client to freely and confidentially exchange information between them in furtherance of the client's interests. Lawyers in Rattagan's shoes will be loath to represent clients knowing they could become a sacrificial lamb if the client decides to go rogue without any duty of disclosure toward the attorney. This Court should not condone such a result.[2]

III. STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Does the ELR apply to Rattagan's fraud claims even though there was no contract that addresses Uber's duties of disclosure, no breach of contract claim asserted and Rattagan suffered no contract damages?
2. Does the attorney-client relationship include any duty owing from the client to the lawyer, separate and distinct from the client's contractual duty to pay the lawyer, where the client solely possesses material facts that are relevant to the attorney's representation and could form the basis for the lawyer's personal liability?
3. If the answer to Issue Two is yes, then did Uber have a common law duty

[2] Remarkably, there seems to be no prior case that has explored the boundaries of legal duties running from client to lawyer in the tort context. Thus, this appeal presents a clean slate upon which this Court may write.

– i.e., one separate from the implied-in-fact attorney-client arrangement - to disclose to Rattagan its meetings with Buenos Aires government officials, their warnings not to launch Rideshare and its intent to do so despite the warnings, where Uber was told in advance by Rattagan that he could be held personally responsible for Uber's alleged illegal activities?

4. Does the ELR apply to shield a client from tort liability to its lawyer for intentional fraudulent concealment of material facts where the concealment prevents the lawyer from taking steps to protect himself from the risk of personal liability resulting from the client's actions?

5. Does the "Special Relationship" exception to the ELR based on the attorney-client relationship between Uber and Rattagan exempt Rattagan's claims from the ELR?

IV. STATEMENT OF THE CASE

A. FACTUAL BACKGROUND[3]

Rattagan is a prominent corporate lawyer in Buenos Aires, Argentina and co-

[3] Because this appeal is from a judgment following the District Court's order granting Uber's 12(b)(6) motion to dismiss, the very detailed allegations in Rattagan's Third Amended Complaint control. 2 ER 191-219. Rather than repeat those allegations in full here, the pertinent facts will be briefly summarized. Although Rattagan had filed an original Complaint and First and Second Amended Complaints, the Third Amended Complaint was the first *and only* complaint addressed on the merits by the District Court. Hereinafter, the Third Amended Complaint will be referred to as the TAC. *See* Procedural Background discussion *infra* at Section IV.B.

founder of the law firm Rattagan, Macchiavello Arocena. Rattagan was his firm's managing partner and the originating/responsible partner for all legal services provided by the firm to Uber. 2-ER-191. Separately, Mr. Rattagan was appointed as the "legal representative" in Argentina of two Uber Netherland-based subsidiaries (the "Dutch Entities" or "Foreign Subsidiaries") which would become the registered shareholders of Uber's Argentine entity registered in Buenos Aires. 2-ER-191. Throughout this time, Rattagan was the "legal representative" of the Foreign Subsidiaries in Argentina. 2-ER-191-92.

Uber is the now ubiquitous transportation provider that pairs drivers and riders through its technology platform, Uber Rideshare. Uber's principal place of business is San Francisco, California. As set forth in detail in the TAC, Uber had created a complicated web of entities which was designed to enable it to roll out its Rideshare around the world. 2-ER-191, 194-196. All of Uber's decisions giving rise to the allegations in the TAC, however, ultimately came directly from Uber's legal department in San Francisco and similarly, after 2015, all of Rattagan's legal advice and work product was provided directly to Uber's legal department in San Francisco. 2-ER-192. In short, by February 2015, Uber had established a direct attorney-client relationship with Rattagan. 2-ER-192.[4]

[4] Although Uber denies this, for purposes of this appeal, these allegations must be accepted as true. *See* section V. *infra*.

In early 2013, Rattagan was contacted by a New York University law school classmate (Liesbeth Ten Brink) who was an Uber lawyer in the Netherlands. She solicited Rattagan to form and register a local Buenos Aires entity in anticipation of Uber's expansion into South America (at the time, Uber was a nascent company that few people had heard of outside of San Francisco and New York). 2-ER-196-97. Ten Brink wrote an email to Rattagan from her @uber.com email address with the subject matter "Re Uber Argentina." She explained that "Uber was an American start-up company" (her words) that was expanding rapidly and was starting to consider Argentina. She attached a four-page request for a fee quote ("RFQ") which was replete with references to "Uber." The RFQ was on "Uber" letterhead. It provided background on "Uber" (her word) and a proposed scope of corporate work. 2-ER-200. Rattagan agreed to provide the requested corporate legal services. 2-ER-200. However, neither Rattagan nor Uber reduced their *de facto* arrangement to a formal engagement agreement. Rather, Rattagan and his team simply did the legal work requested and sent their bills wherever Uber directed them to be sent for payment. 2-ER-200-01, 205.

Rattagan also agreed to act as the legal representative of the Uber-owned Foreign Subsidiaries of the to-be-formed Argentine entity. 2-ER-200. Importantly, Rattagan explained to Ten Brink in writing that a "legal representative," is a local resident registered with the Buenos Aires Office of Corporations IGJ ("*Inspección*

General de Justicia" or "IGJ") and serves as the human face of a foreign entity that wants to conduct business in Argentina on a permanent basis. 2-ER-192, 201. Rattagan further explained to Ten Brink in a detailed memorandum that acting as a legal representative is not merely a formality; rather, legal representatives face potential personal liability for wrongful acts of their principals. 2-ER-192, 201. Recognizing this, Uber even issued a letter of indemnity to Rattagan. 2-ER-193.

Throughout 2013, Rattagan and his firm colleagues provided legal advice to Uber on matters concerning the creation of an Argentine entity and prepared drafts of the company's by-laws, certificates of incorporation, resolutions, key contracts and other legal documents. 2-ER-201-02. Although Rattagan and his firm did very little work for Uber in 2014, in early 2015, Uber began ramping up its plan to launch Rideshare in Argentina. To this end, Uber had Rattagan and his firm resume its corporate work. This time, however, Uber's senior corporate paralegals in San Francisco took over direct responsibility for directing Rattagan's legal team from Uber's lawyers and paralegals in the Netherlands. 2-ER- 202-03.

Throughout 2015 and into early 2016 Rattagan and his firm colleagues exchanged hundreds of emails and draft documents with Uber's senior paralegal team in San Francisco and had numerous telephone conferences regarding the legal issues surrounding its potential future expansion of Uber Rideshare in Argentina. Throughout this time, Rattagan remained the registered legal representative of the

Foreign Subsidiaries. 2-ER-203.

By March 2016, Uber had made the decision to launch Uber Rideshare the following month even though the Argentine entities were still in formation and had not been registered with the Buenos Aires tax authority as required by Argentine law. 2-ER-206. Despite knowing that Rattagan could be subject to personal liability for Uber Rideshare's violations of Argentine law as the Foreign Subsidiaries' legal representative, Uber concealed its impending launch plans from Rattagan. 2- ER-206.

Even more nefariously, between December 2015 and March 2016, Uber's government compliance team had several in-person meetings with Buenos Aires transportation department government officials to discuss Uber's plans. 2-ER-208-09. During the meetings, the Buenos Aires officials told Uber that its plan to launch Uber Rideshare would be considered unlawful unless and until it was in full compliance with all applicable Buenos Aires transportation regulations. Uber concealed these warnings from Rattagan and proceeded to launch on April 12, 2016 despite the warnings and even though Rattagan remained its legal representative. 2-ER-209-10.

Uber knew from its prior launch experiences in many other cities around the world that launching Uber Rideshare without complying with governmental regulations would be met with immediate and adverse reaction. 2-ER-207. In fact,

to counteract these foreseeable responses, Uber developed a written "how to" manual for its "armed forces" who were responsible for the launch. This war-styled strategy was similarly not shared with Rattagan. 2-ER-210. Even though Uber knew that Rattagan would bear the brunt of the unlawful launch as the legal representative of the Foreign Subsidiaries, it provided no prior notice or forewarning to Rattagan nor did it seek to remove him as legal representative in advance of the launch. Rattagan could do nothing to protect himself or his colleagues. 2-ER-193.

Predictably, within a couple of days of the launch, law enforcement authorities targeted the only public face of Uber in Argentina – Rattagan. Buenos Aires police raided Rattagan's office and the homes of his business colleagues in connection with a charge that Rattagan, as the legal representative of "Uber," was illegally using public space for commercial gain. The raid was televised on prime-time news programs. 2-ER -193, 211.

On April 15, 2016, Rattagan resigned from his representation of Uber and asked to be replaced as legal representative of the Foreign Subsidiaries. Despite his resignation, and despite multiple subsequent requests from Rattagan, Uber slow-walked submitting the necessary documents for removing Rattagan as representative in the official documents filed with the IGJ. 2-ER-212. Instead, Uber caused to be delivered to Buenos Aires officials an informal letter that continued to use Rattagan's firm's name and address, thereby falsely implying that Rattagan was part

of, consented to, or ratified Uber unlawful actions. 2-ER-212. For approximately two months following Rattagan's resignation, Uber operated Uber Rideshare with a full cadre of drivers while Rattagan remained, as far as the IGJ and the City authorities knew, the sole legal representative of the Foreign Subsidiaries. 2-ER-213.

Although Rattagan had no role in or knowledge of Uber's actions leading up to and following its launch of Uber Rideshare, Uber's conscious disregard of the warnings by Buenos Aires government officials, its concealment of these meetings and warnings from Rattagan, its inexcusable failure to timely replace him as legal representative of the two Foreign Subsidiaries before the launch, and its decision not to advise City officials immediately after the launch that Rattagan had no involvement whatsoever, resulted in the City prosecutor concluding that Rattagan helped design, plan, and implement the Uber Rideshare launch. Rattagan was subsequently charged with the unauthorized use of public space with a commercial aim and eventually aggravated tax evasion. 2-ER-213-14.

As a result of the charges, Rattagan was temporarily banned from traveling abroad, which prevented him from conducting his professional activities and jeopardized his key and essential contribution to his firm. Moreover, Rattagan's carefully cultivated reputation for honesty and integrity was significantly harmed, as Rattagan's name became synonymous with aggravated tax evasion and illegal

commercial operations by a foreign multinational. 2-ER-214.

B. PROCEDURAL BACKGROUND

On April 12, 2019, Rattagan filed his original complaint naming Uber and the Dutch Entities. 3-ER-446. The core allegations of this pleading are similar to those of the TAC except it sought relief directly from the Dutch Entities which had initially hired Rattagan. Uber persuaded Rattagan's prior counsel that including the Dutch Entities as parties was a fatal misjoinder because they were not subject to the District Court's jurisdiction. Consequently, Rattagan voluntarily filed a First Amended Complaint ("FAC") naming Uber as the sole defendant and removing any references to the Foreign Subsidiaries. 3-ER-424. But the FAC also removed all allegations that the Dutch Entities had initially hired Rattagan and instead alleged he was hired by Uber itself.

This was a monumental error by Rattagan's counsel because although the Dutch Entities did in fact hire Rattagan – in 2013 – they were shell companies completely controlled by Uber. Rattagan should have alleged in the FAC the detailed allegations of these facts that are included in the TAC. 2-ER-200-02. Instead, the FAC simply ignored these facts and alleged only that there was a direct attorney-client relationship between Rattagan and Uber. 3-ER-424, 440-43.

Uber seized on this error and filed a motion for sanctions and dismissal of the FAC under Federal Rule of Civil Procedure 11. 3-ER-336. Uber argued that the

allegations in the FAC that Rattagan had a direct attorney-client and contractual relationship with Uber were false because Rattagan previously alleged that he was hired by the Foreign Subsidiaries. 3-ER-336. In its motion, Uber presented selective and misleading evidence to support its argument that Uber – as distinct from the Dutch Entities - never had a direct attorney-client relationship with Rattagan. 3-ER-337, 342-43. However, Uber lied to the District Court. The emails and documents that Uber had in its possession establish that in February 2015, Uber and Rattagan forged a direct attorney-client relationship that lasted until after the Uber launch in April 2016. 2-ER-193, 200, 202-06.

Unfortunately, Rattagan's prior counsel was ill-prepared to counter Uber's misrepresentations because he had not obtained the key documents from Rattagan proving the direct implied-in-fact attorney-client relationship with Uber. On August 19, 2019, the District Court granted Uber's Rule 11 motion. The Court dismissed the FAC as a sanction, but with leave to amend. The Court did not rule on Uber's 12(b)(6) motion to dismiss. 3-ER-254.

Rattagan's prior counsel subsequently filed a Second Amended Complaint which began to lay out the facts of Uber's control over the Foreign Subsidiaries. 2-ER-226. Thereafter, Rattagan's current counsel substituted into the action and sought and was granted leave to file the TAC. 2-ER-219, 2-ER-190. Before doing so, however, new counsel traveled to Buenos Aires and met with Rattagan and

several other witnesses and reviewed hundreds of emails and documents sent to and received from Uber's legal department in San Francisco. As a result of this exhaustive investigation and based primarily on documents in Uber's possession, the TAC alleges in great detail how: (1) Rattagan was initially hired by an Uber lawyer (Ten Brink) on behalf of the Dutch Entities; (2) the *de facto* attorney-client arrangement was an implied-in-fact contract with no discernible terms other than payment by Uber for services by Rattagan; (3) Uber, as principal, controlled the shell Dutch Entities; (4) the relationship morphed in early 2015 into a direct *de facto* attorney-client relationship with Uber; and (5) Uber fraudulently concealed from Rattagan its launch plans and its meetings with and warnings from the Buenos Aires government officials all the while knowing Rattagan was in direct harm's way.

Despite its prior misrepresentations to the District Court and with no sign of contrition, Uber moved to dismiss the TAC continuing to assert it never had a direct attorney-client relationship with Rattagan. 2-ER-157, 178. Six days after oral argument, during which the special relationship exception to the ELR was raised [2-ER-021, 044-57], on August 19, 2020, the District Court granted Uber's motion to dismiss the TAC pursuant to Federal Rule of Civil Procedure 12(b)(6) and entered judgment against Rattagan. 1-ER-002, 1-ER-019. The District Court ruled that Rattagan's claims for negligence and breach of the implied covenant of good faith and fair dealing are time-barred. 1-ER-007 to 013. The District Court further

held that the claims for fraudulent concealment and aiding and abetting fraudulent concealment are barred by the economic-loss doctrine. 1-ER-013 to 017. On September 16, 2020, Rattagan timely filed this appeal. 3-ER-468.

V. STANDARD OF REVIEW

The Ninth Circuit reviews *de novo* a district court's determination of state law. *Rabkin v. Oregon Health Scis. Univ.,* 350 F.3d 967, 970 (9th Cir. 2003). Thus, the District Court's ruling is entitled to no deference. *Id.*

"To survive dismissal, a plaintiff must allege 'enough facts to state a claim to relief that is plausible on its face.'" *Friedman v. AARP, Inc.*, 855 F.3d 1047, 1051 (9th Cir. 2017), quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). All factual allegations in the complaint must be accepted as true and the complaint must be construed "in the light most favorable to the plaintiff." *Tento Intern., Inc. v. State Farm Fire and Cas. Co.*, 222 F.3d 660, 662 (9th Cir. 2000). Dismissal of the complaint should only be affirmed if "'it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" *Id.*, quoting *Chandler v. McMinnville Sch. Dist.*, 978 F.2d 524, 527 (9th Cir. 1992). Because of the "strong policy permitting amendment," a denial of leave to amend is "strictly reviewed." *Californians for Renewable Energy v. Cal. Pub. Utilities Comm.*, 922 F.3d 929, 935 (9th Cir. 2019).

VI. LEGAL ARGUMENT

A. AS A MATTER OF LAW, THE ECONOMIC LOSS RULE DOES NOT APPLY TO RATTAGAN'S FRAUD AND AIDING AND ABETTING CLAIMS (1ST AND 4TH CLAIMS FOR RELIEF).

The ultimate question posed by this appeal is whether the ELR, as interpreted under California law and applied to the facts alleged in Rattagan's fraud-based claims (the First and Fourth Claims for Relief), bars those claims as a matter of law. The remainder of this brief will discuss the genesis of the ELR, explain how it has been interpreted under California law and elucidate several legal grounds for why it does not bar Rattagan's claims.

1. The Economic Loss Rule – Background.

The ELR is a common law legal doctrine first articulated by Chief Justice Roger Traynor in his landmark 1965 decision in *Seely v. White Motor Co*., 63 Cal.2d 9 (1965).[5] Since then it has evolved in various strains throughout each state. *See* Goodman, et al. *A Guide to Understanding the Economic Loss Doctrine*. 67 Drake L. Rev. 1 (2019) ("*Goodman*"). The premise of the ELR is simple: contract and tort are separate and distinct areas of the law that provide separate and distinct remedies.

[5] In *Seely*, the plaintiff purchased a truck for his hauling business. White Motor Co. manufactured the truck and offered an express warranty with it. The truck brakes failed, causing the truck to overturn. The plaintiff suffered no injuries as a result of the accident. The plaintiff sued White Motor Co. and the dealership that sold him the truck for not only the repair costs and the purchase price, but also his business's lost profits. The trial court denied the plaintiff's claims for damages beyond those allowed under the express warranty.

Contract law exists to enforce legally binding agreements between parties; "tort law is primarily designed to vindicate 'social policy.'" *Foley v. Interactive Data Corp.*, 47 Cal.3d 654, 683 (1988) quoting Prosser, Law of Torts (4th ed. 1971) p. 613.

The California Supreme Court, quoting Professor Prosser, has described the essential difference between contract and tort: "'[Whereas] [c]ontract actions are created to protect the interest in having promises performed,' '[t]ort actions are created to protect the interest in freedom from various kinds of harm. The duties of conduct which give rise to them are imposed by law, and are based primarily on social policy, and not necessarily based upon the will or intention of the parties.'" *Tameny v. Atlantic Richfield Co.* 27 Cal.3d 167, 176 (1980).

The purpose of the ELR is to preserve the boundaries between contract and tort law by preventing a plaintiff from recovering in tort when the plaintiff suffers only monetary damages that would be recoverable in a normal breach of contract action. *See Jimenez v. Superior Court*, 29 Cal.4th 473, 481-84 (2002). However, the Rule presupposes that a contract exists with identifiable terms that can be breached. *UMG Recordings, Inc. v. Glob. Eagle Entm't, Inc.*, 2015 WL 12746208, at *11 (C.D. Cal. Oct. 30, 2015).

Where there is a contract that contains terms the parties have negotiated and which address anticipated expectations, the ELR makes sense because accounting for future disappointed expectations during contract formation is at the core of the

law of contracts. "Contract damages are generally limited to those within the contemplation of the parties when the contract was entered into or at least reasonably foreseeable by them at that time; consequential damages beyond the expectation of the parties are not recoverable. [citations omitted]. This limitation on available damages serves to encourage contractual relations and commercial activity by enabling parties to estimate in advance the financial risks of their enterprise." *Applied Equipment Corp. v. Litton Saudi Arabia Ltd.*, 7 Cal.4th 503, 515 (1994). "In contrast, tort damages are awarded to compensate the victim for injury suffered." *Id.* at 516 (*citing* 6 Witkin, *Summary of Cal. Law*, Torts, (1988) § 1319 at p. 776.)

While the purposes behind contract and tort law are distinct, the boundary line between them is not. *Freeman & Mills, Inc. v. Belcher Oil Co.*, 11 Cal.4th 85, 106 (1995) (conc. and dis. opn. of Mosk, J.). Because of this and due to the breadth of the recovery available for tort actions, there exists the potential for the expansion of tort law at the expense of contract principles. *Erlich v. Menezes*, 21 Cal.4th 543, 550–51 (1999). The ELR is a bulwark against this.

However, where the defendant's action that constitutes a breach of duty 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," the courts will impose tort remedies. *Id.* at 554, quoting *Freeman & Mills, Inc. supra* at 109 (conc. and dis. opn. of Mosk, J.). That is precisely the case here.

2. The Economic Loss Rule Under California Law[6] – The *Robinson* Decision.

Although the ELR was pioneered by the California Supreme Court in 1965 (*Seely v. White Motor, supra)*, today California is one of only 17 states that has adopted a modified approach to its application. *Goodman*, *supra.*[7] This minority approach eschews a strict application of the Rule and instead allows tort recovery for economic loss under certain circumstances which, as discussed below, exist here but which the trial court either improperly analyzed or failed to even consider.

One of the cases the District Court relied on but misapplied is the 2004 watershed decision in *Robinson Helicopter Co. v. Dana Corp.*, 34 Cal.4th 979 (2004) ("*Robinson*"). 1-ER-013 to 016. There, the California Supreme Court addressed the question of whether the ELR bars a claim of affirmative fraud by a purchaser of goods against a seller where the purchaser and seller are in privity of contract.

Dana and Robinson contracted for Dana to supply a part for Robinson's helicopters. *Id.* at 985. Their contract required the part to be manufactured to certain

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[6] Federal courts sitting in diversity apply state substantive law and federal procedural law. *In re County of Orange*, 784 F.3d 520, 523-524 (9th Cir. 2015), quoting *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 419 (1996). Application of the ELR is substantive and thus governed by California law. *City of Pomona v. SQM North America Corp.*, 750 F.3d 1036, 1050 (9th Cir. 2014).

[7] The *Goodman* article identifies 28 states that strictly apply the ELR without exception. *Goodman* at pp. 16-26.

specifications and prohibited changes to the manufacturing process without approval. *Id.* When it delivered the parts, Dana provided Robinson with certificates required by the Federal Aviation Administration (FAA). *Id.* at 986. These certificates asserted that the parts had been manufactured to the requisite specifications. *Id.* at 985–986. After a couple of years, Dana changed its manufacturing process so that the parts did not meet Robinson's specifications and did not comport with the required certificates. *Id.* at 986. Dana, however, continued to supply the required certificates but did not tell Robinson about the change. *Id*. After more than a year of supplying the nonconforming parts, Dana switched back to the original manufacturing process that met the required specifications. *Id.* It did not notify Robinson of this change either. *Id.*

Eventually, Robinson's helicopters began to experience a high failure rate for this part. *Id.* It was only after Robinson complained to Dana about the high failure rate that Dana disclosed that the parts were nonconforming. *Id.* The defective parts did not cause any physical injury to person, property or other components of the helicopters. *Id.* However, Robinson was required to recall and replace the nonconforming parts. *Id.* Robinson incurred more than $1.5 million in expenses for replacement parts and employee time spent investigating the matter, identifying the nonconforming parts and replacing them. *Id.* at 985-986.

Robinson sued for breach of contract, products liability and fraud. *Id.* at 987. At trial, the jury awarded Robinson nearly all of its claimed expenses as compensatory damages and also awarded Robinson $6 million in punitive damages. *Id.* On appeal, the Court of Appeal applied the ELR and held that Robinson had no tort action (and therefore could not recover punitive damages) because it had suffered only economic loss under the contract. *Id.* at 988. The California Supreme Court granted review to decide the scope of the ELR.

Robinson claimed that its fraud cause of action was permitted because it arose independently from the contract breach: the contract was breached by the supply of nonconforming parts; the fraud was providing false certificates claiming that the parts conformed. *Id*. at 989. Dana countered by asserting the alleged fraud and breach of contract were one and the same. *Id*. at 992.

The first part of the *Robinson* opinion addresses whether Dana's wrongful conduct constituted tortious conduct. The Court concluded that Dana's fraud constituted a tort independent of Dana's breach of contract even though the fraud was rooted in the contractual relationship because Robinson relied on the certificates, lacked knowledge of the nonconformity and was exposed to liability if any of the affected helicopters failed and caused physical injury. *Id.* at 990-991. The Court then turned to the application of the economic loss rule. *Id.* at 991.

The Court held the ELR did not bar Robinson's fraud and intentional

misrepresentation claims because they were independent of Dana's breach of contract. *Id. at* 991. The Court relied on California's strong public policy denouncing fraud to support its holding: "In pursuing a valid fraud action, a plaintiff advances the public interest in punishing intentional misrepresentations and in deterring such misrepresentations in the future. [Citation.] Because of the extra measure of blameworthiness inhering in fraud, and because in fraud cases we are not concerned about the need for 'predictability about the cost of contractual relationships' [citation], fraud plaintiffs may recover 'out-of-pocket' damages in addition to benefit-of-the bargain damages" (citing *Lazar v. Superior Court,* 12 Cal.4th 631, 646 (1996)). In addition, "California also has a legitimate and compelling interest in preserving a business climate free of fraud and deceptive practices. (*Diamond Multimedia Systems, Inc. v. Superior Court, 19 Cal.4th 1036, 1064* (1999))." *Robinson*, at 992.

After *Robinson,* it is no longer a question of whether claims for economic loss caused by intentional affirmative fraud are immune from the ELR even if those claims arise from a contractual relationship. *Cty. of Santa Clara v. Atl. Richfield Co.,* 137 Cal.App.4th 292, 326-29 (2006). Against this background, we now explain why the ELR does not apply to Rattagan's tort claims at the threshold and why, if this Court believes it does, the several exceptions to the Rule require reversal of the District Court's Order and Judgment.

3. Because Rattagan Did Not and Could Not Assert a Breach of Contract Claim for Contract Damages, the Economic Loss Rule Does Not Apply to His Claims.

It bears emphasizing – the ELR was created to prevent tort law from swallowing up contract law. Rattagan's claims here, however, are not contract claims and he does not (because he cannot) seek contract damages. There was no written engagement agreement between Uber and Rattagan containing any terms or conditions governing the relationship. Rather, the *de facto* attorney-client relationship arising from emails between the parties was simply an implied-in-fact contractual arrangement whereby Rattagan agreed to provide legal services as and when requested and act as legal representative for Uber's subsidiaries in exchange for payment by Uber of his legal bills.[8] Uber paid Rattagan as required and thus he suffered no contract damages as a result of any breach of contract. The TAC, therefore, neither contains a breach of contract claim[9] nor does it seek contract

[8] "An implied contract consists of obligation arising from a mutual agreement and intent to promise where the agreement and promise have not been expressed in words." *California Emergency Physicians Medical Group v. PacifiCare of California*, 111 Cal.App.4th 1127, 1134 (2003) (internal citations and punctuation omitted).

[9] Ironically, Uber argued in its Motion to Dismiss Rattagan's claim for breach of the covenant of good faith and fair dealing that it failed to state a claim because there was no contract alleged upon which the claim could be properly founded. 1-ER-014:24-015:11. The District Court dismissed the claim on the ground that as an oral/implied-in-fact contract, it was time-barred. Thus, despite there being no viable contract claim, the District Court nevertheless applied the ELR because it believed

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damages (i.e., payment for services rendered).[10] In short, Rattagan's claims for relief for fraud are not subject to the ELR because he does not allege Uber breached any duty contained in any terms of any contract. *Cf. Deseret Tr. Co. v. Unique Inv. Corp.*, 2019 WL 7938223, at *7 (C.D. Cal. Sept. 10, 2019).

As discussed below, although Uber's limited duty to disclose to him the warnings from Buenos Aires government officials and its launch plans so he could protect himself was "rooted" in the *de facto* attorney-client relationship, that duty was separate and distinct from Uber's sole contractual duty – to pay Rattagan. The District Court incorrectly conflated a breach of a duty impliedly *arising out of* contract with a breach of a promise *expressly set forth in the* contract. The former, which Rattagan asserts here, gives rise to tort claims. *Eads v. Marks*, 39 Cal.2d 807, 810-11 (1952).

For this reason alone, the Court should vacate the Judgment and remand for further proceedings in the District Court.

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the duty of disclosure was "rooted" in the implied contract. 2-ER-043-44.

[10] Courts have applied the economic loss rule to bar fraud claims where the damages plaintiffs seek are the same economic losses arising from the alleged breach of contract, *see e.g., Buckley v. Cracchiolo*, 2014 WL 545751, at *6 (C.D. Cal. Feb. 7, 2014), but that is not this case.

B. THE DISTRICT COURT FAILED TO PROPERLY CONSIDER APPLICABLE COMMON LAW EXCEPTIONS TO THE ECONOMIC LOSS RULE.

Uber cannot reasonably dispute that California has rejected the strict application of the ELR, *Robinson* at 991 n.7, and therefore several exceptions to the Rule are available. The remainder of this brief will discuss the exceptions the District Court either misconstrued or ignored in dismissing Rattagan's TAC, starting with the "Separate Duty" exception first articulated in *Robinson*.[11]

1. The Economic Loss Rule Does Not Apply Where, as here, the Defendant Breaches a Duty Separate and Distinct from Its Contractual Obligation.

In *Robinson*, the Court recognized that "a party's contractual obligation may create a legal duty and that a breach of that duty may support a tort action." *Robinson*, at 989. The Court held that Robinson's affirmative fraud and intentional misrepresentation claims were not subject to the ELR even though there was a contract governing the same subject matter giving rise to the fraud claims because they were "independent of [defendant's] breach of contract." *Id.* at 991; *see also Erlich v. Menezes*, 21 Cal.4th at 551 ("conduct amounting to a breach of contract becomes tortious when it also violates a duty independent of the contract arising from principles of tort law").

[11] This brief will address the "special relationship" exception, the "separate duty" exception, the "fraud" exception, and the "professional services" exception.

The sole duty Rattagan seeks to impose on Uber in this case – one of disclosure by a client to its attorney of material information necessary to protect the lawyer from personal harm resulting from the client's misconduct – arises not from the implied-in-fact contract between them but from common law principles that eschew fraudulent concealment and intentional omission in business relationships generally. In short, from important social policy. *See* discussion following.

A claim for fraud based on concealment or omission requires that: (1) the defendant must have concealed or suppressed a material fact; (2) the defendant must have been under a duty to disclose the fact to the plaintiff; (3) the defendant must have intentionally concealed or suppressed the fact with intent to defraud the plaintiff; (4) the plaintiff must have been unaware of the fact and would have acted otherwise if he had known of the concealed or suppressed fact; and (5) as a result of the concealment or suppression of the fact, the plaintiff sustained damage. *In re Ford Motor Co. DPS6 Powershift Transmission Prod. Liab. Lit.*, 2019 WL 3000646, at *5 (C.D. Cal. May 22, 2019) citing *Boschma v. Home Loan Center, Inc.*, 198 Cal.App.4th 230, 248 (2011). Facts supporting each of these elements are alleged in the TAC. 2-ER-214, ¶84.

As to the duty element, a duty to disclose exists when: (1) the defendant is in a fiduciary relationship with the plaintiff; (2) the defendant has exclusive knowledge of material facts not known to the plaintiff; (3) the defendant actively conceals

material facts from the plaintiff; **or** (note the disjunctive) (4) the defendant makes partial representations but also omits some material facts. *In re Ford Motor Co. DPS6 Powershift Transmission Prod. Liab. Lit., supra*; *citing Heliotis v. Schuman*, 181 Cal.App.3d 646, 651 (1986) and *LiMandri v. Judkins*, 52 Cal.App.4th 326, 336 (1997).

Even if the attorney-client relationship does not create parallel fiduciary duties running from client to attorney, the TAC here alleges the remaining three circumstances giving rise to a duty to disclose to Rattagan the warnings it received from the Buenos Aires authorities and its intent to launch Rideshare despite those warnings. Uber's concealment of these facts is quintessential fraudulent concealment.

Bolstering this ineluctable conclusion is the law of agency. The attorney-client relationship is one of agent/principal. *Yanchor v. Kagan*, 22 Cal.App.3d 544, 549 (1971) (internal citations omitted) ("An attorney is the agent of his client and the attorney-client relationship is governed by the rules applicable to the relationship of principal and agent in general."). California courts follow the Restatement of Agency (Third) in determining the parameters of the principal-agent relationship. *See, e.g., Ayala v. Antelope Valley Newspapers, Inc.*, 59 Cal.4th 522, 532 (2014); *Phillips v. TLC Plumbing, Inc.*, 172 Cal.App.4th 1133, 1144 (2009); *Blickman*

Turkus, LP v. MF Downtown Sunnyvale, LLC, 162 Cal.App.4th 858, 887 (2008); *Huong Que, Inc. v. Luu*, 150 Cal.App.4th 400, 410-414 (2007).

The Restatement provides that "[a] principal has a duty to deal fairly and in good faith with an agent." Restatement (Third) of Agency, §8.15 (2006). This duty "obliges the principal to refrain from engaging in conduct that will foreseeably result in loss for the agent when the agent's own conduct is without fault" and "requires that the principal furnish information to the agent, in particular, information about circumstances of which the agent is unaware that might subject the agent to physical or pecuniary loss in acting on the principal's behalf." *Id.*

This duty also mandates that "the principal refrain from conduct that is likely to injure the agent's business reputation through the agent's association with the principal." *Id.; see also Cunningham v. Northern California Region, LLC*, 2017 WL 2666110, at *4 (June 21, 2017) (citing section 8.15 of the Restatement of Agency as authority for the proposition that a principal owes an agent a duty to act fairly and in good faith, including a duty to provide the agent with information about risks that the principal knows, has reason to know, or should know are present in the agent's work but unknown to the agent).

In *Walter v. Libby*, 72 Cal.App.2d 138, 144 (1945), the court confirmed that a principal owes a duty of disclosure of pertinent facts to its agent – "While the duty to make full disclosure as between principal and agent is more often emphasized

with respect to the conduct of the agent, the doctrine is by no means one-sided." *See also Lawrence Warehouse Co. v. Twohig*, 224 F.2d 493, 497 (8th Cir. 1955) ("A principal has the obligation of exercising good faith toward his agent in the incidents of their relationship. He is subject to the responsibility in favor of the agent of using care to prevent harm coming to the agent in the prosecution of the enterprise, and this extends in general to his disclosing facts which, if unknown, would be likely to subject the agent to pecuniary loss.").

Moreover, "[t]hat 'the relationship is one between two sophisticated business entities does not necessarily preclude the imposition of confidential or fiduciary disclosure obligations where there is inequity in the parties' skill and experience *or access to information*.'" *Burton Way Hotels, Ltd. v. Four Seasons Hotels Ltd*., 2012 WL 12883616, at *17 (C.D. Cal. Feb. 23, 2012) (citing *In re Daisy Sys. Corp*., 97 F.3d 1171, 1177-78 (9th Cir. 1996)) (emphasis added).

The TAC details the agent/principal relationship between Rattagan and Uber arising from the *de facto* lawyer/client relationship. S*ee, e.g.*, 2-ER-191-192, 203-206. The TAC also alleges facts establishing that Uber knew of the harm that could befall Rattagan if it failed to comply with Argentine law when it launched Uber Rideshare. *See, e.g.*, 2-ER-192-93, 201,207-211. In the face of these factual allegations and applicable law, Uber must argue that as a matter of law it owes no duty as a client because a lawyer can neither assert the existence of a confidential

relationship nor rely on the duties inherent in that relationship because they are a one-way street – from lawyer to client (the sole duty of the client being payment of the lawyer's bills).[12]

This argument essentially and effectively relegates a client's obligations to his or her lawyer in the course of that relationship to little more than a barren commercial relationship akin to a buyer/seller of airplane parts. Adopting this extremist view will countenance a client's fraudulent and perhaps even criminal conduct towards its lawyer which, of course, is antithetical to an overarching social policy encouraging full factual disclosure by client to lawyer, at least when reasonably related to the circumstances of the lawyer's retention and especially where the lawyer is potentially at risk.

[12] Such an interpretation, which finds no basis in any legal authority, runs counter to the basic notion that the attorney client relationship is a fiduciary or 'confidential relationship,' with the latter being founded on a moral, social, domestic, or merely personal relationship as well as on a legal relationship. *See Stevens v. Marco*, 147 Cal.App.2d 357, 374 (1956); *Bolander v. Thompson*, 57 Cal.App.2d 444, 447 (1943); *Robbins v. Law*, 48 Cal. App. 555, 561 (1920). "'Fiduciary' and 'confidential' have been used synonymously to describe 'any relation existing between parties to a transaction wherein one of the parties is in duty bound to act with the utmost good faith for the benefit of the other party.'" *Hardisty v. Moore*, 6 F.Supp.3d 1044, 1061 n. 11 (S.D. Cal. 2014); *see also Committee on Children's Television, Inc. v. General Foods Corp*., 35 Cal.3d 197, 221 (1983); *Oushana v. Lowe's Companies, Inc*, 2017 WL 5070271, at *5 (E.D. Cal. Nov. 3, 2017).

While parties can be expected to allocate risks during contract formation regarding negligent product design or manufacture, those same parties cannot, and should not, be expected to anticipate fraud and dishonesty in every transaction. *NuCal Foods, Inc. v. Quality Egg LLC,* 918 F.Supp.2d 1023, 1031-33 (E.D. Cal. 2013), citing Steven C. Tourek, Thomas H. Boyd & Charles J. Schoenwetter, *Bucking the "Trend": The Uniform Commercial Code, the Economic Loss Doctrine, and Common Law Causes of Action for Fraud and Misrepresentation,* 84 Iowa L.Rev. 875, 909 (1999).

While the ELR may in certain cases increase certainty in contractual relationships, applying it to fraudulent conduct poses unjustifiable risks to an innocent party, particularly if Uber's "one-way" view of the attorney-client relationship is adopted. We now address the current contours of the "fraud exception" to the ELR.

2. Claims for Fraudulent Concealment or Intentional Omission Should be Excepted from the Economic Loss Rule.

In California, because the duty to not lie arises from common law, not from contract, the doctrine of economic loss does not apply to all fraud claims. *See, e.g.*, *Hannibal Pictures, Inc. v. Sonja Prods. LLC*, 432 Fed. Appx. 700, 701 (9th Cir. 2011) ("The California Supreme Court has declined to apply the economic loss rule to fraud and misrepresentation claims where, as here, one party has lied to the other" - *citing Robinson*). Courts have refused to apply the doctrine to fraudulent

inducement claims. *See, e.g., Yetter v. Ford Motor Company*, 2019 WL 3254249, at *7 (N.D. Cal. Jul. 19, 2019); *Finney v. Ford Motor Company*, 2018 WL 2552266, at *9 (N.D. Cal. Jun. 4, 2018), quoting *United Guar. Mortg. Indem. Co. v. Countrywide Fin. Corp.*, 660 F. Supp. 2d 1163, 1188 (C.D. Cal. 2009) ("The economic loss rule poses no barrier to a properly pled fraudulent inducement claim: '[I]t has long been the rule that where a contract is secured by fraudulent representations, the injured party may elect to affirm the contract and sue for fraud.'") *Robinson* is clear in its ruling that the ELR will not be applied to defeat *affirmative* fraud and misrepresentation claims. *Robinson*, at 993. Here, however, Rattagan's fraud claims are based on claims of intentional fraudulent concealment and omission. Thus, the question posed on this appeal is whether these species of fraud committed by Uber are subject to the ELR.

Robinson involved only claims for affirmative misrepresentation. Therefore, the Court noted its holding was "… narrow in scope and limited to a defendant's affirmative misrepresentations on which a plaintiff relies, and which expose a plaintiff to liability for personal damages independent of the plaintiff's economic loss." *Robinson*, at 993. The *Robinson* Court expressly declined to address the question of whether fraudulent concealment, as distinct from affirmative fraud, was also exempt from the ELR. *Id.* at 994 n.9 and 1000 (Werdegar, dis. opn.).

This qualification has led to a divide among district courts of this Circuit as to whether the *Robinson* decision applies only to affirmative fraud or to fraudulent concealment as well. This divide is spotlighted by this case because Rattagan's claims are based on intentional fraudulent concealment. The facts alleged by Rattagan underscore the illogical and vain attempt to draw a distinction between affirmative fraud and fraudulent concealment[13] and therefore counsel this Court to resolve the divide among the district courts so that allegations of fraudulent concealment are not subject to the ELR.

The District Court here sided with those cases that read *Robinson* as applying only to affirmative representation cases.[14] *See, e.g., Stewart v. Electrolux Home Products, Inc.*, 304 F.Supp.3d 894, 902 (E.D. Cal. 2018); *Zagarian v. BMW of North*

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[13] Even Justice Werdegar acknowledged in her dissent that trying to distinguish between tortious misrepresentation and non-tortious concealment may prove "untenable and virtually impossible to administer." *Robinson*, at 1001 (Werdeger, dis. opn.) While she also attempted to balance this with her concern about the floodgates of litigation ("every litigator can be expected to attach such a piggyback tort claim to each breach of contract claim…" and "the threat of tort damages in every such instance can do no good for parties weighing the likely benefits and risks before entering any commercial contract"), there is no empirical evidence that her doomsday prediction has been borne out. *Id.*

[14] As noted above, *Robinson* expressly declined to address the issue of fraudulent concealment. Thus, these decisions belie the well-settled rule that "it is axiomatic that cases are not authority for propositions not considered." *Mancinas v. Pollard*, 2020 WL 43266, at *7 (N.D. Cal. Jan. 3, 2020); *Amwest Sur. Ins. Co. v. Wilson*, 11 Cal.4th 1243, 1268 (1995) ("an opinion is not authority for a proposition not therein considered").

America, LLC, 2019 WL 6111731, at *3 (C.D. Cal. Oct. 23, 2019); *Traba v. Ford Motor Co.*, 2018 WL 6038302, at *4 (C.D. Cal. Jun. 27, 2018); *Sloan v. Gen. Motors LLC*, 2020 WL 1955643, at *23-24 (N.D. Cal. Apr. 23, 2020).[15]

Other courts, noting that *Robinson* did not address the question whether material omissions or concealment rather than affirmative misrepresentation are covered by the ELR, have concluded the former would similarly be exempt from the ELR.[16] *See, e.g., Finney v. Ford Motor Company*, 2018 WL 2552266, at *9 (N.D. Cal. Jun. 4. 2018) (citing *County of Santa Clara v. Atlantic Richfield Co.*, 137 Cal.App.4th 292, 329 (2006) as declining to apply the economic loss rule to fraud claims including fraudulent concealment); *In re Ford Motor Co. DPS6 Powershift*

[15] It is noteworthy that none of these cases involve a confidential or principal/agent relationship such as the one between Uber and Rattagan.

[16] These courts have attempted to predict what the California Supreme Court would decide. "In determining the law of the state for purposes of diversity, a federal court is bound by the decisions of the highest state court." *Albano v. Shea Homes Ltd. P'ship*, 634 F.3d 524, 530 (9th Cir. 2011). If the state's highest court has not decided an issue, it is the responsibility of the federal courts sitting in diversity to predict "how the state high court would resolve it." *Id.*; *Air-Sea Forwarders, Inc. v. Air Asia Co., Ltd.*, 880 F.2d 176, 186 (9th Cir. 1989) (internal quotation marks omitted). In the absence of clear authority, the Court looks for guidance from decisions of the state appellate courts and other persuasive authorities, such as decisions from courts in other jurisdictions and treatises. *Strother v. S. Cal. Permanente Med. Grp.*, 79 F.3d 859, 865 (9th Cir. 1996); *R Power Biofuels, LLC v. Chemex LLC*, 2016 WL 6663002, at *3 (N.D. Cal. Nov. 11, 2016).

Transmission Prod. Liab. Lit., supra; *NuCal Foods, Inc. v. Quality Egg LLC, supra* at 918 F.Supp.2d 1031-32.

None of the cases applying the ELR to bar fraudulent concealment or omission claims articulate any meaningful distinction between affirmative misrepresentation and intentional concealment/omission nor do they attempt to address Justice Werdegar's concern in her dissent in *Robinson* that distinguishing between the types of fraud will be "untenable and virtually impossible to administer". *See* fn. 13, *supra*. And they ignore the material distinction of whether the tortious conduct was intentional or negligent. *Robinson,* at 990 (noting that California courts have found exceptions to the ELR in this non-contractual duty category where a defendant's conduct was committed "intending or knowing that such a breach will cause severe, unmitigable harm in the form of mental anguish, personal hardship, or substantial consequential damages"). Here, as in *Robinson*, Rattagan alleges intentional misconduct beyond the contract between the parties.

Nor should there be any distinction drawn between fraudulent omission and intentional concealment – they are analytically synonymous. *Compare Peel v. BrooksAmerica Mortg. Corp.*, 788 F.Supp.2d 1149, 1159 (C.D. Cal. 2011) (citing *Hahn v. Mirda,* 147 Cal.App.4th 740, 748 (2007)) ("Under California law, the elements of a common-law claim for fraudulent omission are: (1) the defendant concealed or suppressed a material fact; (2) the defendant was under a duty to

disclose the fact to the plaintiff; (3) the defendant intentionally concealed or suppressed the fact with intent to defraud the plaintiff; (4) the plaintiff was unaware of the fact and would have acted differently if she had known of the concealed or suppressed fact; and (5) the plaintiff sustained damage as a result of the concealment or suppression." (emphasis added)); *with Hambrick v. Healthcare Partners Med. Grp., Inc.*, 238 Cal.App.4th 124, 162 (2015) (citing *Graham v. Bank of Am., N.A.*, 226 Cal.App.4th 594, 606 (2014)) ("The required elements for fraudulent concealment are: (1) concealment or suppression of a material fact; (2) by a defendant with a duty to disclose the fact to the plaintiff; (3) the defendant intended to defraud the plaintiff by intentionally concealing or suppressing the fact; (4) the plaintiff was unaware of the fact and would not have acted as he or she did if he or she had known of the concealed or suppressed fact; and (5) plaintiff sustained damage as a result of the concealment or suppression of the fact.") Each of these elements are pled in the TAC. 2-ER-214-15.

This Court, in *Kalitta Air, LLC v. Central Texas Airborne Systems, Inc.*, 315 Fed.Appx. 603, 607 (9th Cir. 2008) went beyond the intentional/negligent conduct dichotomy discussed in *Robinson:* "We hold that California law classifies negligent misrepresentation as a species of fraud, *see Bily v. Arthur Young & Co.*, 3 Cal.4th 370 (1992), for which economic loss is recoverable" (citing *Robinson*). At bottom, there is simply no legal or logical justification for applying the ELR to affirmative

misrepresentation claims, fraudulent inducement claims, even negligent misrepresentation claims, but barring tort recovery for intentional concealment and omission claims. Indeed, Justice Werdegar's concerns ring especially true here: applying a distinction between intentional misrepresentation and intentional concealment will be, as a practical matter, untenable and impossible. *Robinson*, *supra* at 1000.

In direct contrast to Uber's overarching argument, the law should encourage clients to be candid and truthful in disclosing to the lawyer all material information in the client's possession related to the subject matter of the representation and to cooperate reasonably with the lawyer in pursuing the objectives of representation, especially where failure to do so will put the lawyer in harm's way. A rule of law that does anything to undermine these goals and enables clients to lie and conceal material facts from their lawyer with impunity will create conflicts between lawyer and client that will inevitably erode the very foundation of the relationship – the ability for the client to make full disclosure to the lawyer so that the lawyer can zealously represent the client without fear of personal harm or, alternatively, choose to withdraw from the representation.

Imposing tort liability on clients for lying to or concealing material information from their lawyer which causes harm to the lawyer is consistent with the strong social policy goal of preserving the integrity and sanctity of the attorney-

client relationship. Exempting clients from tort liability for lying to or concealing material facts from their lawyer solely because the attorney-client relationship is "rooted" in contract portends danger for the norms of the profession. Lawyers should not be forced to anticipate in their engagement contracts that their client will lie to them nor does it serve any social policy to immunize clients who do and thereby cause consequential harm to their lawyer.

We now address an applicable exception to the ELR the District Court simply ignored – the "special relationship" exception under *J'Aire Corp. v. Gregory*, 24 Cal.3d 799 (1979) *("J'Aire").*

3. The *J'Aire* "Special Relationship" Exception to the Economic Loss Rule Requires Reversal of the District Court's Order Dismissing the TAC with Prejudice.

This Court has recognized that liability for a plaintiff's recovery of economic loss will be allowed in the absence of personal injury or physical damage to property where there is a 'special relationship' between the parties, or where some other common law exception to the Rule applies. *See Kalitta Air, supra at* 605 (citing *J'Aire*). The District Court, however, failed to address the "special relationship" exception to the ELR despite Rattagan's arguments at the hearing on Uber's Motion to Dismiss.[17] Under this exception (often referred to as the *J'Aire* exception), the

[17] 2-ER-044:20-047:10; 57:2-12. This Court has repeatedly held that arguments are preserved for appeal where they were raised before the district court

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Rule does not prevent recovery in tort if a "special relationship" exists between the plaintiff and the defendant. *See, e.g., In re Yahoo! Inc. Customer Data Security Breach Litig.*, 313 F.Supp. 3d 1113, 1131 (N.D. Cal. 2018) [hereinafter *In re Yahoo!*] (citing *J'Aire* at 804); *NuCal Foods, Inc. v. Quality Egg LLC*, supra at 918 F.Supp.2d 1028.

The California Supreme Court recently defined a "special relationship" for purposes of the exception as one where the plaintiff was an intended beneficiary of a particular transaction but was harmed by the defendant's tortious conduct in carrying it out. *S. California Gas Leak Cases*, 7 Cal.5th 391, 400 (2019). Whether there is a special relationship under *J'Aire* presents a question of law for the court. *Huynh v. Quora, Inc.*, 2020 WL 7495097, at *13 (N.D. Cal. Dec. 21, 2020) *citing Greystone Homes, Inc. v. Midtec, Inc.*, 168 Cal.App.4th 1194, 1228 (2008).

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at oral argument. *Boracchian v. Biomet, Inc.*, 348 Fed.Appx. 269, 270 (9th Cir. 2009); *See also U.S. v. Bonds*, 608 F.3d 495, 502 (9th Cir. 2010) (points raised at oral argument were preserved on appeal). Moreover, waiver of issues on appeal is a discretionary, not jurisdictional, determination. *In re Mercury Interactive Corp. Securities Litigation*, 618 F.3d 988, 992 (9th Cir. 2010). Some Ninth Circuit decisions provide that "parties are not limited to the precise arguments they made below." *Thompson v. Runnels*, 705 F.3d 1089, 1098 (9th Cir. 2013); *see also United States v. Pallares-Galan*, 359 F.3d 1088, 1095 (9th Cir. 2004) ("[I]t is claims that are deemed waived or forfeited, not arguments."); *Engquist v. Oregon Dept. of Ag.*, 478 F.3d 985, 996 n.5 (9th Cir. 2007) ("[W]here an issue is purely legal, and the other party would not be prejudiced, [the court] can consider an issue not raised below."); *Broad v. Mannesmann Anlagenbau AG*, 196 F.3d 1075, 1076 n. 3 (9th Cir. 1999) ("We may consider an argument not raised in the district court if it is…an issue of law not dependent on a factual record developed by the parties.").

When determining whether a special relationship exists between parties that are in privity of contract, California courts distinguish between contracts involving goods and contracts involving services. *See, e.g., R Power Biofuels, LLC v. Chemex LLC*, 2016 WL 6663002, at *5 (N.D. Cal. Nov. 11, 2016) (*see also* Section VI.B.4, below). If the contract is for services, the *J'Aire* exception is available to plaintiffs. *See In re Yahoo!, supra at* 132; *Corelogic, Inc. v. Zurich Am. Ins. Co.*, 2016 WL 4698902, at *5 (N.D. Cal. Sept. 8, 2016); *North American Chemical Co. v. Superior Court*, 59 Cal.App.4th 764, 783 (1997) ("*North American"*).

J'Aire was a straightforward case factually: Plaintiff, a lessee, sued defendant, a general contractor, for damages resulting from the delay in completion of a construction project at the premises where plaintiff operated a restaurant. *J'Aire*, at 802. The complaint alleged that defendant's contract with the owner of the building required defendant to complete the project within a reasonable time. *Id.* The work was not completed within a reasonable time, and plaintiff suffered a loss of business and profits. *Id.*

Defendant demurred successfully and the complaint was dismissed. *Id*. at 803. The issue before the Supreme Court was whether a contractor who undertakes construction work pursuant to a contract with the owner of premises may be held liable in tort for business losses suffered by a lessee when the contractor negligently fails to complete the project with due diligence. *Id.* at 802. The court readily

dispensed with the liability issue (based mostly on foreseeability) and concluded that defendant had a duty to complete the project without unnecessary injury to plaintiff's economic interests. *Id.* at 805.

The Supreme Court then turned to the issue of damages. Previous cases had suggested that "recovery may not be had for negligent loss of prospective economic advantage," when not accompanied by personal injury or damage to property. *Id.* at 806. But the Court held that this was not the rule in California and determined that recovery of tort damages will be permitted where there is a "special relationship" between the parties such that "the risk of harm is foreseeable and is closely connected with the defendant's conduct, where damages are not wholly speculative and the injury is not part of the plaintiff's ordinary business risk." *Id.* at 808. In addition, *J'Aire* expressly held that the prospective economic damages claimed by a plaintiff need *not* be accompanied by personal injury or property damage in order to be recoverable. *Id.* at 804-805.

Noting that every person is responsible for the injuries caused by his or her lack of ordinary care (Cal. Civ. Code, § 1714(a)), the court saw no reason to distinguish between different types of damage. "[Section 1714(a)] does not distinguish among injuries to one's person, one's property or one's financial interests. Damages for loss of profits or earnings are recoverable where they result from an injury to one's person or property caused by another's negligence. Recovery

for injury to one's economic interests, where it is the foreseeable result of another's want of ordinary care, should not be foreclosed simply because it is the only injury that occurs." *J'Aire,* at 806.

Drawing on its decision in *Biakanja v. Irving,* 49 Cal.2d 647 (1958), the Court applied the six factors articulated in that case to determine whether a special relationship exists between the parties, such that a plaintiff may recover in tort even where the parties were not in contractual privity.[18] *J'Aire,* at 804. Subsequent decisions have extended *J'Aire* to cases where the parties are in contractual privity. *Ott* v. *Alfa–Laval Agri, Inc.*, 31 Cal.App.4th 1439, 1448 (1995); *Pisano v. American Leasing*, 146 Cal.App.3d 194, 197 (1983). As the *Ott* court put it, "the reasoning of *J'Aire* is wholly incompatible with a limitation of the cause of action to those instances in which the plaintiff and defendant are not in privity..." *Ott v. Alfa–Laval Agri, Inc., supra,* 31 Cal.App.4th at 1448.

This Court has counseled that district courts must analyze and balance all six *J'Aire* factors in determining whether a special relationship exists to overcome the ELR. *See Kalitta Air, supra at* 315 Fed. Appx. 606; *Tyson & Assocs., Inc. v. Denko,*

[18] The six factors are: (1) the extent to which the transaction was intended to affect the plaintiff, (2) the foreseeability of harm to the plaintiff, (3) the degree of certainty that the plaintiff suffered the injury, (4) the closeness of the connection between the defendant's conduct and the injury suffered, (5) the moral blame attached to the defendant's conduct and (6) the policy of preventing future harm. *J'Aire* at 804.

89 F.3d 846 (9th Cir. 1996). Here, the District Court did not consider, let alone analyze and balance, any of the factors. 1-ER-002-018. While in some cases the question requires a subtle analysis (*Gas Leak Cases*, *supra,* 7 Cal.5th at 398-400), that is not the case here because all six *J'Aire* factors clearly and heavily weigh in Rattagan's favor.[19]

(a) The Extent to Which the Transaction Was Intended to Affect Rattagan (First *J'Aire* Factor).

The allegations of the TAC make clear that: (1) Uber hired Rattagan based on his personal relationship with one of Uber's lawyers in the Netherlands; (2) Rattagan was the managing partner of his firm throughout the firm's and his personal relationship with Uber; and (3) Rattagan agreed to be the personal legal representative of Uber's foreign shareholders *vis a vis* the Buenos Aires government. 2-ER-191, 192. There was nothing tangential or coincidental about the transaction between Rattagan and Uber. It was undeniably intended to affect Rattagan exclusively. This factor, therefore, falls squarely on Rattagan's side of the ledger.

(b) The Foreseeability of Harm to Rattagan (Second *J'Aire* Factor).

The TAC alleges precisely when and how Rattagan advised Uber in writing

[19] In the context of a motion to dismiss, this means the complaint must allege facts constituting such special relationship. *Exxonmobil Oil Corp. v. Nicoletti Oil, Inc.*, 713 F.Supp.2d 1105, 1113 (E.D. Cal. 2010).

of the risks he could face as its legal representative if Uber violated Buenos Aires or Argentine law. 2-ER-192, 201. The TAC also details when and how Uber was advised by Buenos Aires' authorities that its planned launch would be perceived by the authorities as illegal. *Id* at 2-ER-208, 209. These allegations more than satisfy the "foreseeability" test – they make clear Uber *actually knew* it was putting Rattagan in harm's way (and foreclosing his chance at self-preservation) by launching Rideshare despite warnings from the authorities not to and concealing from Rattagan both its plans and warnings.[20]

(c) The Degree of Certainty that Rattagan Suffered the Injury (Third *J'Aire* Factor).

The TAC alleges the precise nature and extent of the economic damages and damages to his reputation Rattagan suffered as a result of Uber's unlawful launch and its concealment from him of its plans. 2-ER-193, 210-214. Because this issue arises on review of an order (and judgment) on a motion to dismiss, these allegations must be accepted as true and therefore this factor is satisfied. *In re Yahoo! supra at* 313 F. Supp. 3d 1127.

[20] One plausible explanation for Uber's decision to keep Rattagan in place and in the dark lies, perhaps, in the crime-fraud exception to the attorney client privilege. If Uber had shared with Rattagan the warnings it received from the Buenos Aires government officials and had disclosed its launch plans and its "war manual", its communications to Rattagan may not have been privileged. Only discovery will uncover whether this postulation is viable.

(d) The Closeness of the Connection Between Uber's Conduct and the Injury Suffered By Rattagan (Fourth *J'Aire* Factor).

The TAC alleges that Rattagan's reputational and consequent economic damages directly and solely resulted from Uber's disregard of the warnings from the Buenos Aires transportation officials, its failure to disclose them to Rattagan which would have enabled him to withdraw as legal representative before the Rideshare launch and the prosecutor's filing of criminal charges against him.[21] These allegations demonstrate a close connection between Uber's fraud and Rattagan's injury. Therefore, the TAC pleads sufficient facts establishing this factor.

(e) Moral Blame Attached to Uber's Conduct (Fifth *J'Aire* Factor).

The TAC sets forth in great detail the numerous pre-launch communications that Uber had with Buenos Aires government officials during which they informed Uber's representatives that a launch of Rideshare without the full regulatory compliance they demanded would be perceived as illegal. Uber never shared this information with Rattagan and worse, consciously disregarded the warnings. The

[21] Uber argued in the District Court that Rattagan's damages, if any, were the result of the public outcry not its actions in launching Rideshare. 2-ER-166, 170-171. From this, Uber argued that the public reaction was an intervening and superseding cause of Rattagan's injury. 2-ER-166, 170-171, 185-186. This argument misconstrues the allegations of the TAC which must be accepted as true: Uber knew there would be public outrage, planned for it and Rattagan's real injury resulted not from the public reaction but rather from the government's filing criminal charges against him which it was warned could happen. 2-ER-214-215, 217.

moral blame attached to Uber's conduct could not be higher because it, and it alone, was in the position to inform Rattagan of its plans and allow him the choice to step down as its legal representative before the launch. There is no conceivable moral justification for Uber's conduct.

(f) The Policy of Preventing Future Harm (Sixth J'Aire Factor)

Although the law is replete with cases articulating the fiduciary duties of lawyers to clients, no case has delineated the scope of duties running from clients to lawyers. This case presents a clean slate upon which this Court may and should provide guidance. The ELR is designed to limit liability in commercial activities that negligently or inadvertently go awry, not to reward malefactors such as Uber who engage in fraudulent activity and put people at risk. At bare minimum, clients should not be enabled to use their lawyer as a shield for their lawlessness nor should the lawyer be rendered impotent *vis a vis* the client merely because he or she is a lawyer. A contrary holding would be antithetical to the legal profession and American jurisprudence. The Court can and should reverse the District Court's order and judgment because the special relationship exception under *J'Aire* applies.

4. The Economic Loss Rule Does Not Apply to Professional Service Agreements Where Tortious Conduct Results in Foreseeable Economic Loss.

In determining the applicability of the ELR to claims for economic damages, California courts distinguish between contracts involving the sale of goods or

products and contracts for services. *North American, supra,* at 59 Cal. App. 4th 765-766; *see also R Power Biofuels, LLC v. Chemex LLC,* 2016 WL 6663002, at *5 (N.D. Cal. Nov. 11, 2016); *Ladore v. Sony Computer Entm't Am., LLC,* 75 F.Supp.3d 1065, 1075-76 (N.D. Cal. 2014). In holding that the ELR bars Rattagan's tort claims, the District Court failed to make this distinction.

In *North American,* a chemical company sought to recover the money it paid in settlement of a customer's claim that arose from a contaminated chemical product packaged and shipped for the plaintiff by the defendant. The court relied on the well-settled fundamental principle that "[a]ccompanying every contract is a common-law duty to perform with care, skill, reasonable expedience, and faithfulness the thing agreed to be done, and a negligent failure to observe any of these conditions is a tort, as well as a breach of the contract." *North American,* at 774, quoting *Roscoe Moss Co. v. Jenkins,* 55 Cal.App.2d 369, 376 (1942).[22] In such a hybrid circumstance, the plaintiff is entitled to pursue both legal theories until an occasion for an election of remedies arises. *North American, supra,* at 774-775.

To be sure, there seems to be no case that has addressed the question of whether a claim for fraudulent concealment may be pursued by the service provider against the customer or client. Uber seeks to have this Court hold that the services

[22] Although the service agreement exception has typically involved tort claims based on negligent performance, there is no rationale that justifies excluding other tortious conduct from its reach, especially fraud which is particularly odious.

agreement exception to the ELR does not apply because it is a one-way street; only the service provider (Rattagan) is bound by the duty of due care and faithfulness and the client should owe no like-kind duties. Such a holding, however, portends erosion of the universal application of the long-settled rule that professional or other business engagements require the exercise of care, skill and knowledge by the professional. *Id.* at 774. Very often, as here, professional service providers must rely on their clients to inform them of the facts and circumstances within the realm of the professional engagement so the professional can perform his or her services in the manner required.

A blanket rule that excludes clients from all tort liability for their own unfaithful performance in the course of the relationship, such as concealing material facts from the professional, especially where the client knows the professional is at a foreseeable risk, is bad public policy. This is especially true where, as here, a contract measure of damages would not result in full compensation for client's alleged wrongful conduct. *Id.* at 785 n.16.

VII. CONCLUSION

In the final analysis, there is no social policy that militates in favor of giving Uber a free pass on its fraudulent conduct vis a vis Rattagan. Nor is there any legal or moral precept that drives the case in favor of Uber. To the contrary, lawyers should be protected from the unscrupulous unforeseeable actions of their clients

that cause foreseeable substantial economic harm. For these public policy reasons and for the legal reasons discussed throughout this brief, this Court should vacate the order of the District Court granting Uber's motion to dismiss and judgment thereon and remand the case for further proceedings consistent with its ruling.

Respectfully submitted,

Dated: January 27, 2021

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CERTIFICATE OF COMPLIANCE

(Fed. R. App. P. 32(a) & 9th Cir. Rule 32-l)

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) and Circuit Rule 32-1(a) because this brief contains 10,340 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5), and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 word processing program, a 14-point font size, and the Times New Roman type style.

Respectfully submitted,

Dated: January 27, 2021

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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STATEMENT OF RELATED CASES

(9th Cir. R. 28-2.6)

Appellant does not know of any related cases pending in this Court.

Respectfully submitted,

Dated: January 27, 2021

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STATUTORY ADDENDUM

Fed. Rule Civil Proc. §12(b):

> **(b) How to Present Defenses.** Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion:
>
> **(1)** lack of subject-matter jurisdiction;
> **(2)** lack of personal jurisdiction;
> **(3)** improper venue;
> **(4)** insufficient process;
> **(5)** insufficient service of process;
> **(6)** failure to state a claim upon which relief can be granted; and
> **(7)** failure to join a party under Rule 19.
>
> A motion asserting any of these defenses must be made before pleading if a responsive pleading is allowed. If a pleading sets out a claim for relief that does not require a responsive pleading, an opposing party may assert at trial any defense to that claim. No defense or objection is waived by joining it with one or more other defenses or objections in a responsive pleading or in a motion.

Cal. Civil Code §1714(a):

> (a) Everyone is responsible, not only for the result of his or her willful acts, but also for an injury occasioned to another by his or her want of ordinary care or skill in the management of his or her property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself or herself. The design, distribution, or marketing of firearms and ammunition is not exempt from the duty to use ordinary care and skill that is required by this section. The extent of liability in these cases is defined by the Title on Compensatory Relief.

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing **OPENING BRIEF OF APPELLANT MICHAEL R. RATTAGAN** with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on January 27, 2021.

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s/ Andrew A. August
Andrew A. August