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No. 20-16796

IN THE

United States Court of Appeals for the Ninth Circuit

MICHAEL R. RATTAGAN,
Plaintiff-Appellant,

v.

UBER TECHNOLOGIES, INC.
Defendant-Appellee.

On Appeal from the United States District Court
for the Northern District of California
No. 3:19-CV-01988 (Chen, J.)

ANSWERING BRIEF OF DEFENDANT-APPELLEE UBER TECHNOLOGIES, INC.

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Defendant-Appellee Uber Technologies, Inc. certifies that it has no parent corporation and that no publicly held corporation owns ten percent or more of its stock.

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INTRODUCTION

Michael Rattagan is an Argentina-based attorney who sued his purported client, Uber Technologies,[1] for tort damages based on an alleged failure to disclose to him its forward-looking business plans. Rattagan withdrew his first complaint because there was no jurisdiction, was sanctioned for false statements in his second complaint in a ruling he does not appeal, abandoned his third complaint after his lawyers withdrew, and then filed a fourth complaint that the District Court correctly dismissed with prejudice.

The thrust of his fourth complaint was that Uber Technologies breached the parties' attorney-client contract by failing to keep him informed about its plans to launch the Uber platform in Argentina. Rattagan missed the limitations period for that contract claim and his claim for negligence, as the District Court found and Rattagan does not appeal. His remaining tort claims recast his breach of contract claim as fraud, and the District Court correctly applied California's economic loss rule to dismiss those claims.

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[1] "Uber Technologies" refers to Uber Technologies, Inc., and "Uber" refers collectively to Uber Technologies, Inc., and its subsidiaries and affiliates.

On appeal, Rattagan disputes the applicability of the economic loss rule, relying chiefly on new arguments that he did not present to the District Court. Rattagan's new arguments are not based on changes in the law or new cases, and there were no exceptional circumstances excusing his failure. Indeed, by the time the parties litigated Rattagan's fourth complaint, the economic loss rule had been at issue for more than a year, as Uber Technologies had briefed it in a prior motion to dismiss. Rattagan's new arguments on appeal are waived.

None of Rattagan's appellate arguments, preserved or waived, disturbs the District Court's ruling. Under California law, when a party to a contract suffers economic injury caused by a breach of a contractual obligation, its remedy is in contract, not tort. To hold otherwise would allow the law of contract, and the predictability it affords contracting parties, to be swallowed by the law of tort. Rattagan expressly alleged that Uber Technologies' duty to disclose its business plans arose from a contractual attorney-client relationship between the parties, and he asserted a breach of contract claim. A straightforward application of the economic loss rule requires such claims to be evaluated under the law governing contracts—including the statute of limitations—not tort.

The exceptions to the economic loss rule that Rattagan raises for the first time on appeal do not apply. The "professional services" exception, which permits clients to assert negligence claims against their attorneys, does not apply because Uber Technologies did not perform professional services for Rattagan. And the "special relationship" exception does not apply because it benefits only third parties, not contracting parties. These arguments would have failed even if Rattagan had preserved them.

Rattagan's fourth complaint also suffers from other fatal defects that provide additional grounds for affirmance. In particular, Rattagan failed to plausibly allege that Uber Technologies owed him a duty to disclose its future business plans. There is no general duty for a client to keep its attorney informed of future plans; that would be tantamount to a claim for "client malpractice" that has never been recognized and would splinter the attorney-client relationship.

STATEMENT OF JURISDICTION

Uber Technologies agrees with the jurisdictional statement in Rattagan's opening brief.

STATEMENT OF ISSUES PRESENTED

1. Whether Rattagan waived his economic loss rule arguments by failing to present them to the District Court.

2. Whether the District Court correctly applied the economic loss rule to dismiss Rattagan's tort claims arising out of his alleged contractual relationship with Uber Technologies.

STATEMENT OF THE CASE

A. Uber's Operations In Argentina.

As with virtually all multinational companies, Uber is structured as a group of separate corporate entities connected through subsidiary and affiliate relationships. Uber Technologies, a Delaware corporation headquartered in California, is the ultimate parent company of the corporate group. 2-ER-194-95 ¶¶ 12, 14-15. When the Uber platform is launched in a new country, a new Uber affiliate company is sometimes formed to support local operations and achieve the conventional benefits of the corporate form.

In 2013, Uber began preparations to launch the Uber platform in Argentina, including taking steps to form a new Argentine limited liability company. 2-ER-200 ¶¶ 35, 37. The shareholders of this

Argentine entity would be two Dutch corporations—Uber International BV and Uber International Holding BV (the "International Entities"). Liesbeth ten Brink, a Dutch attorney for Uber International BV, contacted Rattagan for legal advice on incorporating the local entity. 2-ER-196-97 ¶ 21, 2-ER-200 ¶ 35.

Under Argentine law, the Uber International Entities also needed to designate a local resident to act as their "legal representative" for certain ministerial functions and to provide a local address as their "legal domicile." 2-ER-201 ¶¶ 39-42. Rattagan, who presents himself as "one of the top and most renowned business lawyers in Buenos Aires" with "nearly 30 years in practice," 2-ER-194 ¶ 11, agreed to perform these functions in addition to his legal work assisting with the Argentine entity's incorporation. 2-ER-201 ¶ 42. To protect himself from liability in his role as legal representative, Rattagan requested that the International Entities indemnify him against "any action, suit or proceeding . . . by reason of the fact that [Rattagan] is or was legal representative of [the International Entities]," and they did. 2-ER-193 ¶ 8; 2-ER-140-42, 150-52 (indemnity letters).

After providing the International Entities with initial advice on creating an Argentine corporation, Rattagan's relationship with them went "dormant" between 2013 and 2015. 2-ER-202 ¶ 44. He alleged that responsibility for the incorporation of the foreign entities was transferred to corporate paralegals at Uber Technologies' California headquarters and that in 2015 he provided those paralegals legal advice related to the Argentine entity's incorporation. 2-ER-202-04 ¶¶ 46-48. He claims that, because of this contact with the paralegals, he and Uber Technologies "were in express and/or implied *contractual* relationships arising from [Uber Technologies'] and Rattagan's direct attorney-client relationship starting in 2015." *See* 2-ER-216 ¶ 94 (emphasis added).

On April 12, 2016, the Uber platform launched in Buenos Aires. 2-ER-207 ¶ 59. Rattagan alleged that because he was publicly associated with Uber as the International Entities' legal representative, protesters gathered at his office and "local media outlets were filled with angry interviews and negative coverage concerning 'Uber' and all those associated with it, including Rattagan and his firm." 2-ER-210-11 ¶¶ 65-66. On April 15, 2016, police executed a search warrant on Rattagan's office "[as] the result of a charge that Rattagan, as the legal

representative of 'Uber,' was using public space for commercial gain, without a permit." 2-ER-211 ¶ 69. About two months after the launch, at Rattagan's request, the International Entities replaced Rattagan as their legal representative. 2-ER-211 ¶ 68. Rattagan alleged that he continued to suffer harm from his prior association with Uber, including prosecution on tax charges. 2-ER-213-14 ¶¶ 77-80. In 2019, proceedings in Argentine courts concluded that Uber's operations in Argentina were lawful. 1-SER-51-56, 107-10, 138-42, 184 (court decisions subject to uncontested judicial notice). Rattagan was acquitted of the charges against him.

B. Rattagan's Lawsuit And The First Three Complaints.

In April 2019, Rattagan sued the International Entities and Uber Technologies for breach of fiduciary duty, deceit, fraud, intentional infliction of emotional distress, and negligence. 3-ER-446. By letter, Uber informed Rattagan that the inclusion of the International Entities as defendants defeated diversity jurisdiction, which does not extend to suits by a foreign plaintiff against foreign defendants. *See Nike, Inc. v. Comercial Iberica de Exclusivas Deportivas, S.A.*, 20 F.3d 987, 991 (9th Cir. 1994). Attempting to preserve federal jurisdiction, Rattagan

filed the First Amended Complaint, which removed the International Entities but did not plead any factual allegations tethering his claims to the actions of Uber Technologies, the remaining defendant. *See* 3-ER-424-45; 3-ER-353-74 (redline comparing the complaints).

Because the First Amended Complaint imputed all of the allegations previously lodged against the International Entities to Uber Technologies, without any evidentiary support, Uber Technologies filed a Rule 11 motion. 3-ER-336-48. The motion showed that Rattagan misleadingly attributed the actions of the International Entities to Uber Technologies, such as allegations that Uber Technologies "appointed Mr. Rattagan as the legal representative . . . in Argentina," actions that plainly were not performed by Uber Technologies. 3-ER-343. The Rule 11 motion further established that these allegations were central to the First Amended Complaint because they directly affected whether Uber Technologies—as distinct from the International Entities—owed Rattagan any duties, and thus whether Rattagan had stated a claim against Uber Technologies. 3-ER-344-45. Uber Technologies contemporaneously filed a motion to dismiss, including based on the economic loss rule. 2-SER-299-327. After reviewing the evidence, the

District Court found that the First Amended Complaint was "inaccurate and misleading," granted the Rule 11 motion, awarded sanctions, and gave Rattagan leave to amend his complaint. 3-ER-261-63. Rattagan complains about but does not challenge that ruling on appeal.[2]

Rattagan then filed a Second Amended Complaint, making minor changes to the preceding complaint. *See* 2-ER-226-252. One day before Uber Technologies' response was due, Rattagan's counsel withdrew. 1-SER-2-3. After securing new counsel, Rattagan moved to file yet another amended complaint. *See* 3-ER-479. The District Court observed that "[i]t would be obvious to anyone reading the three previous complaints and the proposed Third Amended Complaint that Plaintiff's claims have been inconsistently pled throughout the early stages of this lawsuit." 2-ER-

[2] Rattagan continues to blur the distinction between Uber Technologies and the International Entities, the same misleading practice that led the District Court to impose sanctions. For example, Rattagan states in his opening brief that Uber Technologies hired Rattagan as the International Entities' legal representative, alleges that Rattagan informed Uber Technologies of a legal representative's risk of liability, and describes ten Brink as "an Uber lawyer." *See* Applt. Br. 1-2, 7. All of this is contrary to what he eventually acknowledged in the District Court: that ten Brink was an Uber International BV lawyer, she retained him as legal representative on behalf of Uber International BV, and he allegedly warned her—not Uber Technologies—about liability risk. *See* 2-ER-196-97 ¶ 21; 2-ER-200; 2-ER-201 ¶ 41.

222. Recognizing, however, that leave to amend must be granted with "extreme liberality," the District Court permitted the amendment. 2-ER-222, 225.

C. The District Court's Dismissal Of The Third Amended Complaint

Rattagan's Third Amended Complaint abandoned all of the legal claims he had previously asserted, except negligence, and introduced three new claims: (1) fraudulent concealment; (2) breach of the implied covenant of good faith and fair dealing; and (3) aiding and abetting fraudulent concealment. *See* 2-ER-214-18 ¶¶ 82-87, 92-102.

The overall theory of each of Rattagan's four causes of action was the same: Rattagan alleged (1) that he and Uber Technologies "were in express and/or implied contractual relationships" arising from an attorney-client relationship, 2-ER-216 ¶ 94, and (2) based on this alleged contractual relationship, Uber Technologies purportedly owed Rattagan a "duty to disclose all facts known to [Uber Technologies] that were material to both Rattagan's legal representation and his role as legal representative of the Foreign Entities," 2-ER-214-15 ¶ 83 (fraudulent concealment); *see also* 2-ER-215-17 ¶ 89 (negligence), ¶¶ 94-95 (breach of the implied covenant), ¶ 99 (aiding and abetting fraudulent

concealment).[3] Rattagan alleged that Uber Technologies breached this purported duty by not alerting him to its pending launch in Buenos Aires, which it allegedly anticipated would face pushback from local authorities and taxi drivers. 2-ER-215-17 ¶¶ 84, 90, 95, 98.

Uber Technologies moved to dismiss the Third Amended Complaint, and, after full briefing and argument, the District Court dismissed it with prejudice. 1-ER-18, 2-ER-157-89.

The District Court first ruled that the claims for negligence and breach of the implied covenant of good faith and fair dealing were time-barred. 1-ER-7-13. Rattagan does not appeal this ruling. Applt. Br. 3 n.1.

The District Court found that the fraudulent concealment and aiding and abetting fraudulent concealment claims were foreclosed by the economic loss rule. 1-ER-13-16. It explained that "the economic loss rule limits a party to a contract 'to recover[ing] in contract for purely economic loss due to disappointed expectations,' rather than in tort,

[3] For the aiding and abetting claim, pled in the alternative, Rattagan alleged that the International Entities owed him a duty of disclosure based on their attorney-client relationship, and that Uber Technologies had somehow assisted their breach of that duty. 2-ER-217 ¶ 99.

'unless he can demonstrate harm above and beyond a broken contractual promise.'" 1-ER-13 (quoting *Robinson Helicopter Co. v. Dana Corp.*, 102 P.3d 268, 272 (Cal. 2004)). The District Court recognized that the rule "serves to prevent every breach of a contract from giving rise to tort liability and prevents the law of contract and the law of tort from dissolving one into the other." 1-ER-13 (internal quotation marks omitted).

The District Court considered and rejected each of the three arguments Rattagan advanced against application of the economic loss rule. First, Rattagan argued that the economic loss rule "normally applies in products liability and construction defect cases where physical injury is even possible." 1-ER-13-14; *see* 2-ER-102. The District Court disagreed, and explained that courts regularly apply the rule to a broad range of contracts and "[t]here is no per se rule limiting the economic loss doctrine to products liability or construction defect cases." 1-ER-14.

Second, Rattagan argued he had alleged "fraud in the inducement," which qualifies for an exception to the economic loss rule. 1-ER-14; *see* 2-ER-103. The District Court again disagreed: Rattagan's "TAC actually alleges 'fraudulent concealment,' which involves non-disclosure after the

contractual relationship arose; it does *not* allege fraud in inducing Mr. Rattagan into the contract." 1-ER-14.

The District Court gave a close reading to the California Supreme Court's *Robinson Helicopter* decision, which ruled in a "narrow" holding that the economic loss rule does not bar fraud claims based on affirmative misrepresentations during the course of contract performance. 1-ER-14-15. The District Court observed that Rattagan did not allege that Uber Technologies made any affirmative misrepresentation; his complaint was limited to fraudulent concealment. Because courts have interpreted *Robinson Helicopter* to exempt affirmative misrepresentation but not concealment from the economic loss rule, the District Court found that the rule applied to Rattagan's claims. *Id.*

Third, Rattagan argued that the economic loss rule did not apply because he was not "attempt[ing] to recast a breach of contract claim as tort claims based on an alleged failure to make good on contractual promises." 1-ER-16; *see* 2-ER-103. He argued that the alleged contract only required Uber Technologies to pay his invoices, whereas his claims were based on separate "tortious conduct." 2-ER-103. The District Court

rejected this argument, observing that "here, too, Mr. Rattagan's complaint tells a different story." 1-ER-16.

The District Court recognized that a breach of contract could become tortious, and fall outside the economic loss rule, if the defendant's actions violated an independent duty imposed by tort law. 1-ER-17. However, it found that the allegations in the Third Amended Complaint "are squarely inconsistent with [Rattagan's] now-raised assertion that Uber Technologies breached a duty that was independent of the contract." 1-ER-17 (internal quotation marks omitted). The District Court quoted Rattagan's allegation that Uber Technologies and Rattagan "were in express and/or implied contractual relationships arising from" their direct attorney-client relationship. 1-ER-16. It observed that "[t]he attorney-client relationship is undoubtedly a contractual one." 1-ER-16 (citing *Sky Valley Ltd. P'ship v. ATX Sky Valley, Ltd.*, 150 F.R.D. 648, 651 (N.D. Cal. 1993) ("[T]he attorney-client relationship can be formed . . . only by contract, express or implied.")). The District Court then catalogued Rattagan's allegations that the duty to disclose Uber's launch plans arose from the parties' contractual attorney-client relationship. 1-ER-16-17. It concluded that the alleged duty was "rooted

in the contractual relationship," and that as a result, the independent duty exception did not apply. 1-ER-17.

Having addressed every argument Rattagan advanced, the District Court dismissed the Third Amended Complaint. The dismissal was with prejudice "because Mr. Rattagan has demonstrated, through multiple iterations of his allegations, many of which exemplify shifting and often inconsistent and contradictory allegations and theories, that his claims suffer from deficiencies that cannot be cured by further amendment." 1-ER-18.

The District Court entered judgment for Uber Technologies on August 19, 2020. 1-ER-19.

STANDARD OF REVIEW

A dismissal for failure to state a claim upon which relief can be granted is reviewed de novo and may be affirmed on any ground supported by the record. *Ebner v. Fresh, Inc.*, 838 F.3d 958, 962 (9th Cir. 2016).

SUMMARY OF THE ARGUMENT

The economic loss rule maintains the integrity of contract law by preventing plaintiffs from restating contractual obligations as tort duties. Rattagan himself alleged that he and Uber Technologies had a

contractual attorney-client relationship, and that this relationship was the source of Uber Technologies' supposed duty to disclose to him its launch plans. Rattagan's contract and tort claims allege exactly the same duty to disclose, the same source of that duty (the attorney-client relationship), and the same actions constituting the breach of that duty. *Compare* 2-ER-214-15 ¶¶ 83-84 (fraudulent concealment claim) *with* 2-ER-216-17 ¶¶ 93-95 (implied covenant claim).

Because Rattagan's complaint implicates the core purpose of the economic loss rule—to prevent transforming contractual duties into tort duties—his attempts to invoke various exceptions to the economic loss rule are unavailing. The District Court correctly rejected his assertion of a supposedly independent tort duty as "squarely inconsistent" with the Third Amended Complaint's allegations that the contractual attorney-client relationship supplied the duty to disclose. 1-ER-17; *see* Section I, *infra*. This is the only argument that Rattagan preserved for appeal.

Rattagan waived his remaining arguments by failing to present them to the District Court. There is no reason for this Court to excuse the waiver and delve into the esoterica of California economic loss doctrine, given that Rattagan is a U.S.-educated attorney, represented

by multiple lawyers, who has identified no new facts, no new law, or any other reason why his new arguments were not preserved below. *See* Section II, *infra*.

If the waived arguments were entertained, they would fail:

Fraudulent concealment claims. The economic loss rule applies to fraudulent concealment claims where, as here, there is no breach of a duty independent of the contract. The California Supreme Court declined to categorically exempt fraud claims from the economic loss rule when presented with the opportunity in *Robinson Helicopter*, opting instead to issue a "narrow" ruling exempting only affirmative misrepresentations that caused harm beyond a broken contractual promise. *See Robinson Helicopter*, 102 P.3d at 276. Indeed, creating a categorical exception for all fraud claims would swallow the rule, as any contractual breach could be recast as a misrepresentation or omission of some sort. Where, as here, the alleged fraudulent omission simply repackages a purported contractual duty, the economic loss rule bars the fraud claim. *See* Section III.A, *infra*.

Professional services exception. The professional services exception does not apply on its face. That exception permits a *client* to

bring negligence and malpractice tort claims against a professional such as a doctor or lawyer, and it is based on professionals' inherent duty to reasonably use their specialized skills. As Rattagan acknowledges, the exception has never been applied to the situation here, where it is the professional who seeks to sue his *client* in tort. *See* Applt. Br. 47. The Court should not reach a waived argument to create a new branch of California tort law governing the relationship between attorneys and clients. *See* Section III.B, *infra*.

Special relationship exception. Rattagan's invocation of the special relationship exception confuses two distinct rules governing economic loss claims. The basis for the District Court's decision is the rule that prevents contracting parties from repackaging contract claims as torts. There is no special relationship exception to that rule. The special relationship exception relates to a different rule, which states that no negligence claim will lie for purely economic losses because an actor generally has no duty of care to prevent purely economic harm to third parties. The special relationship exception imposes such a duty of care in certain circumstances, thereby permitting a negligence claim by a third party for purely economic losses.

This exception is inapplicable for at least three reasons. First, Rattagan alleges that he and Uber Technologies were in contractual privity, so Rattagan is not a third party who could avail himself of the exception. Second, the exception permits only a negligence claim, which here is barred by the statute of limitations. Third, the California Supreme Court requires courts to consider several threshold policy issues, including whether parties should be encouraged to rely on their own contracting power to protect themselves, before finding a special relationship. Those policy considerations, which due to Rattagan's waiver were not briefed below, weigh strongly in Uber Technologies' favor, as do the six special relationship exception factors. *See* Section III.C-D, *infra*.

Finally, the Court can affirm on two additional grounds. First, although Rattagan alleges that the contractual attorney-client relationship imposed on Uber Technologies a duty to disclose its future business plans to Rattagan, its purported attorney, that duty is not plausibly alleged. A *client* does not owe its *attorney* a duty to disclose its future business plans, nor does a parent company owe such a duty to its subsidiaries' professional service providers. And Rattagan was not

pursued by the local authorities because he acted as an attorney; it was because he was the International Entities' legal representative. The aiding and abetting claim also fails because Rattagan did not adequately allege that the International Entities breached a duty to disclose, nor did he identify what actions Uber Technologies allegedly took to aid the supposed breach.

ARGUMENT

I. The District Court Correctly Ruled That The Economic Loss Rule Bars Rattagan's Tort Claims.

Rattagan does not appeal the District Court's dismissal of his claims for breach of contract and negligence. Applt. Br. 3 n.1. What remains are his fraudulent concealment and aiding and abetting claims. The District Court dismissed these claims based on the economic loss rule. 1-ER-13-17. Under that rule, "[a] person may not ordinarily recover in tort for the breach of duties that merely restate contractual obligations." *Archer v. Coinbase, Inc.*, 53 Cal. App. 5th 266, 278 (2020) (internal quotation marks omitted).

A. The Economic Loss Rule Prohibits Tort Claims That Are Premised On Contractual Duties.

The economic loss rule exists because the broader remedies and more nebulous duties offered by tort law tempt plaintiffs to improperly

recast contract claims as tort claims—"an expansion of tort law at the expense of contract principles" that has been "aptly dubbed 'con*torts*.'" *Erlich v. Menezes*, 981 P.2d 978, 982 (Cal. 1999).

The economic loss rule protects the boundary between the law of contract and the law of tort—and preserves parties' ability to define potential liability through contract—by requiring the dismissal of tort claims that overlap with duties created by contract. *See Robinson Helicopter*, 102 P.3d at 273 ("Quite simply, the economic loss rule prevent[s] the law of contract and the law of tort from dissolving one into the other." (internal quotation marks omitted)); *Applied Equip. Corp. v. Litton Saudi Arabia Ltd.*, 869 P.2d 454, 460 (Cal. 1994) (limiting recovery to contract damages enables parties "to estimate in advance the financial risks of their enterprise"); *cf. E. River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 866 (1986) (adopting economic loss rule in admiralty and recognizing that without such a rule, "contract law would drown in a sea of tort").

B. The Economic Loss Rule Applies To Rattagan's Claims.

The economic loss rule applies foursquare here. Rattagan alleged that he was Uber Technologies' lawyer, that their relationship was

governed by the contract between them, and that their contractual, "direct attorney-client relationship" obligated Uber Technologies to disclose its future business plans to him. Based on Uber Technologies' purported failure to meet its obligations under this contract, Rattagan brought both contract and tort claims. 2-ER-214-15 ¶¶ 83-84; 2-ER-217 ¶¶ 98-99.

Based on those allegations, the District Court correctly found that the parties' relationship was contractual and that the economic loss rule limited any recovery to contract. 1-ER-16-18; *see BFCG Architects Planners, Inc. v. Forcum/Mackey Constr., Inc.*, 119 Cal. App. 4th 848, 853 (2004) ("The only allegations of defendants' misconduct are based on their alleged breach of contract, despite plaintiff's gloss that in doing so, they breached their duties. This is an improper attempt to recast a breach of contract cause of action as a tort claim.").

Rattagan appeals the District Court's ruling on two grounds. Rattagan makes a threshold argument that the economic loss rule does not apply at all because he purportedly could not and did not bring a breach of contract claim. Applt. Br. 24. Rattagan also contends that his tort claims are based on independent tort duties, not on contractual

duties. *Id.* at 25-26 (Rattagan refers to this as the "separate duty" exception). Both are wrong.

First, Rattagan *did* assert a contract claim: breach of the covenant of good faith and fair dealing based on "express and/or implied contractual relationships." *See* 2-ER-216-17 ¶ 94. A claim based on breach of a contractual covenant, implied or otherwise, is a contract claim, full stop. *See Digerati Holdings, LLC v. Young Money Ent., LLC*, 194 Cal. App. 4th 873, 885 (2011) ("a breach of the implied covenant is necessarily a breach of contract").[4]

Nor does the economic loss rule require a plaintiff to actually bring a breach of contract claim. If it did, a plaintiff could circumvent the rule simply by opting to bring tort claims rather than contract claims.[5] *See*

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[4] Contrary to Rattagan's suggestion, Applt. Br. 23 n.9, Uber Technologies did not deny that there was a contract between the parties, but rather argued that his implied covenant claim was inadequately pled. And as he acknowledges, the limitations period for any contract claim has expired. *Id.* at 3 n.1.

[5] Rattagan contends that the economic loss rule does not apply to implied-in-fact contracts, but his authorities do not support that argument. Applt. Br. 17, 23. *UMG Recordings, Inc. v. Global Eagle Ent., Inc.*, No. CV 14–3466 MMM (JPRx), 2015 WL 12746208, at *11 (C.D. Cal. Oct. 30, 2015), only holds that the economic loss rule does not apply where there is no contract at all. Here, Rattagan alleged that there was a contract. And his argument that the contract did not cover

Baggett v. Hewlett-Packard Co., No. SACV 07-0667 AG (RNBXx), 2009 WL 3178066, at *3 (N.D. Cal. Sept. 29, 2009) (rejecting argument that economic loss rule did not apply where plaintiff had not brought contract claims and reasoning that the relationship between plaintiff and defendant "ar[ose] solely out of their contract"). *Deseret Trust Co. v. Unique Investment Corp.*, cited by Rattagan, turns on breach of an independent, non-contractual duty. No. SA CV 18-1180-DOC (KES), 2019 WL 7938223, at *7 (C.D. Cal. Sept. 10, 2019); *see* Applt. Br. 24. It does not stand for the proposition that a plaintiff can avoid the economic loss rule by choosing to forgo contract claims.[6]

Second, the independent duty exception does not apply. "A breach of contract is tortious only when some independent duty arising from tort law is violated." *Erlich*, 981 P.2d at 984. But when a plaintiff merely

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Uber Technologies' purported duty to disclose is contrary to the Third Amended Complaint's allegation that the duty to disclose arose from the contractual attorney-client relationship. 2-ER-214-15 ¶ 83.

[6] Rattagan's other case, *Eads v. Marks*, 249 P.2d 257, 259-60 (Cal. 1952), is inapplicable because it predates the creation of the California economic loss doctrine and concerns physical injury, an exception to the rule. *See* Applt. Br. 24.

recasts the breach of a contractual duty as a tort, the economic loss rule bars the tort claim. *See Archer*, 53 Cal. App. 5th at 278.

Food Safety Net Services v. Eco Safe Systems USA, Inc. is instructive. 209 Cal. App. 4th 1118 (2012). Eco Safe was a manufacturer of food disinfectant equipment. *Id.* at 1121-22. It contracted with Food Safety, a testing agency, for testing services. Eco Safe failed to pay Food Safety, so Food Safety sued, and Eco Safe brought cross-claims for fraud and deceit. *Id.* at 1122-23. Eco Safe contended that Food Safety falsely represented its capabilities and made false statements in its report about the testing that it performed. *Id.* at 1125.

The California Court of Appeal found that the fraud and deceit claims were barred by the economic loss rule, rejecting Eco Safe's argument that the misstatements breached an independent tort duty. *Id.* at 1130, 1132. It explained that even if there were triable issues about the existence of misrepresentations, those misrepresentations were "not conceptually distinct from the contract, as Food Safety's obligation to perform the tests and report the results arose exclusively from the contract." *Id.* at 1132 (internal quotation marks omitted).

The same reasoning applies here. Rattagan alleged that the contractual attorney-client relationship supplied Uber Technologies' duty to disclose its launch plans to Rattagan. *See* 2-ER-214-15 ¶¶ 83-84 ("Based on the direct attorney-client relationship between [Uber Technologies] and Rattagan starting in 2015 . . . [Uber Technologies] both directly and as principal owed Rattagan a duty to disclose all facts known to [it] that were material to both Rattagan's legal representation and his role as legal representative of the Foreign Entities."); 2-ER-217 ¶¶ 98-99 (similar). The District Court held that "[t]hese allegations are squarely inconsistent with his now-raised assertion that Uber Technologies breached a duty that was 'independent of the contract.'" 1-ER-17.

Nowhere does Rattagan allege any source of a duty independent of the alleged contractual relationship. *See* 2-ER-190-218. Nor could there plausibly be one; an attorney-client relationship by its nature is contractual. Under these circumstances, the District Court correctly determined that the independent duty exception does not apply. *See, e.g.*, *Archer*, 53 Cal. App. 5th at 278 (affirming dismissal of negligence claim based on economic loss rule where plaintiff argued his claim was not based on the contract but failed to identify any independent duty); *Neu v.*

Terminix Int'l, Inc., No. C 07-6472 CW, 2008 WL 962096, at *4 (N.D. Cal. Apr. 8, 2008) (dismissing breach of duty to warn claim where complaint did not identify "any duty outside of the duties arising under the contract").

Rattagan's argument that the law of agency supplies an independent duty does not lead to a different result. Applt. Br. 27-30. A broad range of contracts give rise to agency relationships, and those contracts do not escape the economic loss rule simply because they create an agency relationship. *See* Restatement (Third) of Agency § 1.01 (2006) (listing common types of agency contracts, including employer-employee and real estate, literary, and sports agent contracts). None of the cases cited by Rattagan authorizes tort claims in agency relationships defined by contract. Indeed, none of his agency cases address the economic loss rule at all. Applt. Br. 27-30.[7] The fact that an attorney by definition acts

[7] *Yanchor v. Kagan*, 22 Cal. App. 3d 544, 549 (1971), mentions agency law only when discussing whether an attorney can bind a client to a contract. Applt. Br. 27. It does not address a *client's* duty to its attorney. *Cunningham v. Northern California Region, LLC*, No. A147128, 2017 WL 2666110, at *4 (Cal. Ct. App. June 21, 2017), which is unpublished and unciteable in California, merely assumed that an agency relationship could give rise to a duty to disclose, and it went on to find no breach of duty. *Walter v. Libby*, 72 Cal. App. 2d 138, 144 (1945), concerns the

as his client's agent does not exempt all attorney-client contracts from the economic loss rule. If anything, protecting the attorney-client relationship would weigh strongly against permitting the attorney to sue his client in tort.

II. Rattagan Waived His Remaining Arguments By Failing To Present Them To The District Court.

Rattagan makes several other arguments against application of the economic loss rule, but he forfeited these arguments by failing to present them to the District Court. "Absent exceptional circumstances, [this Court] generally will not consider arguments raised for the first time on appeal . . . ." *AMA Multimedia, LLC v. Wanat*, 970 F.3d 1201, 1213 (9th Cir. 2020) (quoting *In re Am. W. Airlines, Inc.*, 217 F.3d 1161, 1165 (9th Cir. 2000)). This rule "serves to ensure that legal arguments are considered with the benefit of a fully developed factual record, offers

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circumstances in which a principal (in that case, a landowner) can end the agency relationship with an agent (a real estate broker). *Burton Way Hotels, Ltd. v. Four Seasons Hotels Ltd.*, No. CV 11-303 PSG (PLAx), 2012 WL 12883616, at *17 (C.D. Cal. Feb. 23, 2012), features a principal suing its agent, not the other way around. And *Lawrence Warehouse Co. v. Twohig*, 224 F.2d 493, 498 (8th Cir. 1955), a case about hijacked beef carcasses, addressed whether a principal was unjustly enriched by its failure to disclose the hijacking to its cattle-purchasing agent; it says nothing about whether an attorney can sue its client in tort through an exception to the economic loss rule.

appellate courts the benefit of the district court's prior analysis, and prevents parties from sandbagging their opponents with new arguments on appeal." *Dream Palace v. Cnty. of Maricopa*, 384 F.3d 990, 1005 (9th Cir. 2004). No "exceptional circumstances" warrant any exception here.

A. Rattagan Did Not Present The Remaining Arguments To The District Court.

For an argument to be considered on appeal, it "must have been raised sufficiently for the trial court to rule on it." *A-1 Ambulance Serv., Inc. v. Cnty. of Monterey*, 90 F.3d 333, 338 (9th Cir. 1996). Rattagan did not do so. In the District Court, Rattagan opposed application of the economic loss rule on two grounds, in addition to the independent duty argument discussed above: (1) the economic loss rule purportedly only applies to construction or product defect cases where physical injury is possible, 2-ER-102; and (2) Rattagan purportedly alleged fraudulent inducement, to which the economic loss rule does not apply, 2-ER-103.

The District Court correctly disposed of these arguments. The first is unsupported by law; courts regularly apply the economic loss rule outside the construction and product defect contexts. *See, e.g.*, *Archer*, 53 Cal. App. 5th at 278 (applying rule to cryptocurrency exchange services);

Food Safety Net Servs., 209 Cal. App. 4th at 1132 (applying rule to safety testing services). And the second misstated Rattagan's claim, which is a fraudulent concealment claim, not a fraudulent inducement claim. *See* 1-ER-13-14; *see, e.g.*, 2-ER-214-15 ¶¶ 83-84 (alleging fraudulent concealment claim based upon 2016 breach of contract formed in 2015). Rattagan does not contend that these rulings were incorrect.

Having lost on these arguments, Rattagan now advances three arguments that he did not raise below and are therefore waived. *First*, he argues that the economic loss rule does not apply to fraudulent omission claims. Applt. Br. 31-37. He did not brief this argument before the District Court, nor did he raise it at the motion to dismiss hearing. *See* 2-ER-102-04 (opposition to motion to dismiss); 2-ER-21-57 (hearing transcript).

Second, Rattagan argues that the rule does not apply to professional services contracts. Applt. Br. 46-48. Once again, Rattagan neither briefed nor argued this purported exception to the District Court, thereby waiving it. *See* 2-ER-102-04 (opposition to motion to dismiss); 2-ER-21-57 (hearing transcript).

Third, Rattagan contends that the so-called special relationship exception, which imposes a duty of care to avoid negligently causing purely economic losses to third parties, saves his claims. Applt. Br. 38-46. He did not advance this argument in opposing Uber Technologies' motion to dismiss. *See* 2-ER-102-04. He did mention the exception in passing at the hearing, but he did not explain the purported exception, give any reason why it would apply, or address any of the six factors that a court must assess to determine whether the exception applies.[8] This was insufficient to allow the District Court to rule on the issue. *See A-1 Ambulance Serv.*, 90 F.3d at 338.

This Court has found waiver in similar circumstances. For example, in *Greisen v. Hanken*, a First Amendment retaliation case, the appellant had made a "cryptic allusion" to "*Pickering* balancing" in a post-trial motion, then briefly argued in his reply that *Pickering* balancing should apply. 925 F.3d 1097, 1115 & n.6 (9th Cir. 2019). This Court held that the "cryptic allusion" in the opening brief before the district court

[8] Rattagan does not address his waiver of these arguments in his opening brief, other than to assert that he preserved the special relationship exception by alluding to it orally at the hearing. *See* Applt. Br. 38 & n.17.

was "insufficient to raise the issue," and that the district court "appropriately declined to consider" an argument presented for the first time in a reply brief. *Id.* This Court held that the appellant had waived the argument and declined to consider it on appeal. *See id.*; *see also Zamani v. Carnes*, 491 F.3d 990, 997 (9th Cir. 2007) ("The district court need not consider arguments raised for the first time in a reply brief.").

If a district court need not consider arguments raised for the first time in a reply brief, it certainly need not consider unbriefed arguments raised for the first time at a hearing. *See, e.g.*, *Quillan v. Cigna Healthcare of Cal., Inc.*, No. 15-cv-00989-EMC, 2016 WL 1461491, at *6 (N.D. Cal. Apr. 14, 2016) ("that argument has been waived, as Plaintiff brought it up for the first time at the hearing"); *Day v. Sears Holding Corp.*, 930 F. Supp. 2d 1146, 1168 n.84 (C.D. Cal. 2013) (collecting cases declining to consider arguments raised for the first time at a hearing).

The transcript makes Rattagan's waiver plain. The entire hearing exchange related to the special relationship exception is as follows:

> The Court: You think this is like a plea in the alternative; that is—
>
> [Rattagan's counsel]: That's it exactly.

The Court: —if [the contract] claim is out, then you should be able to recover a tort claim, but the problem is that tort claim is still rooted in the contract. I mean—

[Rattagan's counsel]: It is not, and that's—

The Court: How is it not?

[Rattagan's counsel]: I'll tell you how it's not. We have a special relationship. This is called a special relationship exception. And let me cite—the cases are cited in I think both parties' briefs—*UMG Recording, Inc. vs. Global Eagle Entertainment, Inc.*, 117 F. Supp. 3d 1092.[9] And what that case says, and there are other cases that I will cite you if you'd like, there are other cases that say if a special relationship existed between the parties, a party can still recover from California's economic loss rule or otherwise apply to bar tort recovery. My point is this: There's two ways to look at this—oops.

(Pause in proceedings.)

* * *

[Rattagan's counsel]: Okay. So there's two ways to look at this. . . . Uber has taken the position that other than paying a client's—a lawyer's bills, a client has no duty. And I'm going to come to that in a minute. But under the *UMG Recordings* case, there's—let me give you two other cases, *Takano vs. Procter & Gamble*, 2018 WL5374817, Eastern District of California case; and, last, *Avago* — A-V-A-G-O — *Technologies U.S., Inc. vs. Venture Capital Limited*.

The Court: Are these cited in your brief? I'm looking.

[Rattagan's counsel]: They are not. This is what—so what we did was we went back and looked at this economic loss rule,

[9] Rattagan had cited this case, but not with respect to its comments on the special relationship doctrine. 2-ER-104.

> and we dove deeper into their reply brief. And what Uber has not—what Uber has not told it—has not addressed with the Court—and, frankly, maybe it was our oversight as well—that there is another exception; but before you get to exception—to an exception, you have to apply the rule.

2-ER-43:25-46:15.

Rattagan's counsel then changed to another topic and did not return to the exception until the very end of the hearing, when he stated, without elaboration, "And the special relationship exception that I quoted those three cases, clearly an attorney and a client is a special relationship." *See* 2-ER-46:16-57:10. No district court could reasonably be expected to rule on an argument expressed in this manner. As this Court has aptly stated, "judges are not 'like pigs . . . hunting for truffles'" buried in parties' briefs or referenced in passing at hearings. *See G & G Prods. v. Rusic*, 902 F.3d 940, 950 (9th Cir. 2018) (quoting *Guatay Christian Fellowship v. Cnty. of San Diego*, 670 F.3d 957, 987 (9th Cir. 2011)).[10]

[10] The cases Rattagan cites for his assertion that raising an issue at a hearing preserves it are not to the contrary. Applt. Br. 38-39 n.17. All of them involved situations either where the district court had addressed the issue on the merits, or where this Court exercised its discretion to excuse the waiver.

Rattagan's passing mention of the special relationship exception at the hearing did not sufficiently present the issue to the District Court, and that argument, too, is waived.

B. The Court Should Not Exercise Its Discretion To Hear Rattagan's Waived Arguments.

No party has a right to have arguments considered for the first time on appeal. *A-1 Ambulance Serv.*, 90 F.3d at 339; *AMA Multimedia*, 970 F.3d at 1214. The Court has exercised its discretion to excuse a waiver only where: "(1) there are exceptional circumstances why the issue was not raised in the trial court; (2) the new issue arises while the appeal is pending because of a change in the law; or (3) the issue presented is a pure question of law and the opposing party will suffer no prejudice as a result of the failure to raise the issue in the trial court." *AMA Multimedia*, 970 F.3d at 1214 (internal quotation marks omitted).

Even when one of these exceptions applies, "review of such unraised issues is discretionary, not automatic," *A-1 Ambulance Serv.*, 90 F.3d at 339, and the Court must "still decide whether the particular circumstances of the case overcome [the] presumption against hearing new arguments," *Raich v. Gonzales*, 500 F.3d 850, 868 (9th Cir. 2007). What occurred here—"[a] party's unexplained failure to raise an

argument that was indisputably available below"—presents "perhaps the least 'exceptional' circumstance warranting [the Court's] exercise of this discretion." *AMA Multimedia*, 970 F.3d at 1214-15 (quoting *G & G Prods.*, 902 F.3d at 950).

First, it is entirely Rattagan's fault that he did not timely raise these arguments in the District Court. *See A-1 Ambulance*, 90 F.3d at 339 (disagreeing with district court's methodology but affirming based on waiver because "the County is responsible for failing to raise both adequately and timely this argument in the district court"). Uber Technologies argued economic loss in two rounds of motions to dismiss that were briefed over the course of a year. *See* 2-ER-174-75; 1-SER-21-22, 45-46; 2-SER-322-23. Yet, Rattagan still failed to present his current arguments to the District Court. Rattagan was represented by capable counsel, he is himself a U.S.-educated attorney, and the waived arguments are not based on new law or recent cases. He simply failed to timely and adequately raise them.

Second, throughout the District Court proceedings, Rattagan manipulated his allegations for procedural advantage. He sued Uber Technologies, with which he did not have a relevant relationship, to try

to recover beyond the limits in the indemnity agreements with the International Entities. 2-ER-140-42, 150-52; 3-ER-446. He dropped the International Entities, with which he had more relevant relationships, to manufacture federal jurisdiction. 3-ER-424. He made false statements in his complaint, as the District Court found. 2-ER-261. He asserted tort claims rather than contract claims to escape the statute of limitations. *See* 1-ER-7-13. And now he raises a host of new arguments on appeal. The equities do not favor allowing him to continue to flout the rules that ensure orderly and efficient litigation.

Third, by Rattagan's own admission, reaching the merits will require the Court to make new California law on both economic loss and the attorney-client relationship. *See* Applt. Br. 3-4 & n.2 (acknowledging that "there seems to be no prior case that has explored the boundaries of legal duties running from client to lawyer in the tort context"); *id.* at 47 ("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").

This case offers no equities supporting the irregular procedure of considering California tort law issues for the first time on appeal.

III. Rattagan's Third Amended Complaint Does Not Qualify For Any Exception To The Economic Loss Rule.

If Rattagan's waived arguments were considered, they would be unsuccessful. First, contrary to Rattagan's contention, the economic loss rule applies to fraudulent concealment claims that simply restate an alleged breach of a contractual duty. Second, the professional services exception is inapplicable on its face; it would preserve a professional negligence claim against Rattagan, the professional, not against Uber Technologies, the client. And third, the special relationship exception governs whether a defendant owes a duty to avoid negligently causing economic harm to a third party. It is not available here, because Rattagan alleges the parties were in privity. And even if it were, the relevant factors would weigh strongly against its application.

A. The Economic Loss Rule Applies To Rattagan's Fraudulent Concealment Claim.

Rattagan argues that fraud claims should be categorically exempt from the economic loss rule. Applt. Br. 31-38. The California Supreme Court declined to adopt such a rule in *Robinson Helicopter*, as the District Court correctly recognized. *See* 1-ER-14-15.

Robinson Helicopter confronted an unusual set of facts. The defendant was a helicopter clutch manufacturer that secretly changed its

manufacturing process, in breach of contractual specifications, and also issued false certificates of conformance. 102 P.3d at 273-74. The non-conforming clutches were failing at a ten percent rate, creating a risk that helicopters would fall out of the sky. On this extraordinary set of facts, where the manufacturer created false certifications that risked catastrophic consequences, the court held that the economic loss doctrine did not bar the fraud claims. However, so as not to "open the floodgates to future litigation," *Robinson Helicopter* underscored that 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." *Id.* at 276.

Robinson Helicopter by its terms does not authorize Rattagan's claims. He does not allege any "affirmative misrepresentation[]"; he alleges omissions. Nor does he allege that Uber's conduct exposed him to "liability for personal damages" independent of his economic loss; instead, he alleges only his own economic loss. Rattagan's case is exactly the type of case against which the California Supreme Court closed the "floodgates." *Id.*

This Court should not extend *Robinson Helicopter*'s "narrow" and "limited" exception for affirmative fraud for at least three reasons.

First, the Court need not reach the issue at all because Rattagan waived it.

Second, adopting a categorical rule that extends beyond the "narrow" exception for affirmative misrepresentations articulated in *Robinson Helicopter* would swallow the rule. Nearly any breach of contract could be restated as fraudulent omission or concealment merely by alleging that the breaching party did not disclose its intent to breach, its inability to perform, or its actual breach. To permit fraud claims in such a circumstance would threaten the fundamental principle that, in the absence of affirmative fraud, "it is appropriate to enforce only such obligations as each party voluntarily assumed, and to give him only such benefits as he expected to receive," through the contract. *Robinson Helicopter*, 102 P.3d at 275 (quoting *Applied Equip. Corp*, 869 P.2d at 461).

Third, California law permits tort claims only where the defendant has breached a duty independent of the terms of the contract. Indeed, this was the rationale for *Robinson Helicopter*. 102 P.3d at 274 (holding

that the economic loss rule did not bar fraud and intentional misrepresentation claims because they "were independent of [the defendant's] breach of contract"). To permit fraud claims based on conduct already regulated by a contract would destroy the economic loss rule and "dissolv[e]" the distinction between the "law of contract and the law of tort." *Id.* at 273.

Accordingly, where the alleged fraud is nothing more than a breach of a contractual duty, courts have consistently held that the economic loss rule bars a fraudulent concealment claim. *See, e.g.*, *Hsieh v. FCA US LLC*, 440 F. Supp. 3d 1157, 1163 (S.D. Cal. 2020) (applying economic loss rule to fraudulent concealment claim in part because plaintiff did not identify a separate, non-contractual duty that was breached); *Vigdor v. Super Lucky Casino, Inc.*, No. 16-cv-05326-HSG, 2017 WL 2720218, at *6 (N.D. Cal. June 23, 2017) (applying economic loss rule to fraudulent concealment claim where "Plaintiffs do not allege that Defendants had any duty outside their contractual obligations to Plaintiffs" and commenting that plaintiffs "cannot simply retitle" the same conduct supporting their contract claim as "fraud").

Here, Rattagan affirmatively alleged that Uber Technologies' duty to disclose information to him arose from the attorney-client relationship, which is contractual. *See* 2-ER-214-15 ¶¶ 83-84; 2-ER-217 ¶¶ 98-99; 1-ER-16-17. The economic loss rule thus bars a fraudulent concealment claim merely recasting that duty in tort.

B. The Professional Services Exception Does Not Apply To Rattagan's Claims.

Rattagan invokes an exception to the economic loss rule for negligently performed professional services contracts, Applt. Br. 46-48, but that exception is inapplicable on its face. The professional services exception authorizes negligence claims in order to protect clients, recognizing that, due to the specialized knowledge of professionals such as lawyers and architects, clients are uniquely dependent on the proper exercise of their skills. *See* Restatement (Third) of Torts: Liability for Economic Harm § 4 (2020) (explaining policy rationale for exception); *see N. Am. Chem. Co. v. Super. Ct.*, 59 Cal. App. 4th 764, 774 (1997) ("A contract to perform services gives rise to a duty of care which requires that such services be performed in a competent and reasonable manner. A negligent failure to do so may be both a breach of contract and a tort.").

These considerations are unique to professional malpractice, and so courts regularly apply the economic loss rule to bar tort claims for other services. *See, e.g.*, *Food Safety Net Servs.*, 209 Cal. App. 4th at 1132 (applying economic loss rule to services contract for safety equipment testing); *JMP Sec. LLP v. Altair Nanotechs. Inc.*, 880 F. Supp. 2d 1029, 1042-44 (N.D. Cal. 2012) (finding that economic loss rule barred fraud claim related to contract for financial advisory services); *Med. Sales & Consulting Grp. v. Plus Orthopedics USA, Inc.*, No. 08cv1595 BEN (BGS), 2010 WL 11432458, at *3-4 (S.D. Cal. Dec. 2, 2010) (dismissing tort claims related to sales agent contracts); *Neu*, 2008 WL 962096, at *4 (rejecting argument that economic loss rule does not apply to services contracts).[11]

The professional services exception does not apply here. Uber Technologies did not undertake to perform any professional services *for Rattagan*. Instead, Rattagan alleges that *he* undertook to perform legal

[11] Rattagan cites *North American Chemical*, 59 Cal. App. 4th at 765-766, for the idea that all services contracts, not just professional services contracts, are exempt from the economic loss rule. Applt. Br. 47-48. The California Supreme Court has not adopted *North American Chemical*; in the later case of *Erlich*, for example, it applied the economic loss rule to a construction contract. 981 P.2d at 983.

services for *Uber Technologies*. As the lawyer, *he* had a duty to act in Uber Technologies' interests and perform the legal services with reasonable skill. The professional services exception therefore would preserve Uber Technologies' ability to bring a malpractice claim against Rattagan. It does not allow a lawyer to sue his client in tort for failure to disclose business plans. Rattagan concedes that he has no legal authority to support his position: "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." Applt. Br. 47.

Rattagan argues that the Court should impose a new California duty of disclosure on clients because professionals need full disclosure "so the professional can perform his or her services in the manner required." *Id.* at 48. At most, this argument would permit an attorney to withdraw from a representation or assert a client's failure to disclose relevant information as a defense to a legal malpractice claim. But Rattagan is not claiming he needed more information to perform services for Uber—he is seeking to sue his client in tort. In essence, he asks the Court to

recognize a tort claim for client malpractice. That type of claim does not exist, and would undermine the attorney-client relationship.

C. The Special Relationship Exception Addresses Duties Owed To Non-Contracting Third Parties, And Does Not Apply To Rattagan's Claims.

Rattagan contends that California law permits tort recovery for purely economic losses if there is a "special relationship" between the parties. *See* Applt. Br. 38-39. But the special relationship exception does not apply here. In arguing that it does, Rattagan confuses two different rules governing economic losses.

The first rule states that parties who are *not in privity* with each other generally do not owe one another a duty of care to avoid negligently causing economic losses. *See S. Cal. Gas Leak Cases*, 441 P.3d 881, 891 (Cal. 2019); *J'Aire Corp. v. Gregory*, 598 P.2d 60, 63 (Cal. 1979). The classic example is where a defendant in a car accident case has to pay for the losses of the other driver in the accident, but not the losses of the person who was late to work because of the resulting traffic jam. Courts have declined to impose a general tort duty to avoid negligently caused economic harm, out of concern that such a duty would lead to

unpredictable, unbounded liability. *See S. Cal. Gas Leak Cases*, 441 P.3d at 887-88; *Bily v. Arthur Young & Co.*, 834 P.2d 745, 761-62 (Cal. 1992).

In *J'Aire*, and before that in *Biakanja v. Irving*, the California Supreme Court recognized an exception to this rule in order to impose duties of care where the parties were not in contractual privity, but where the plaintiff was an intended beneficiary of a particular transaction and was harmed by the defendant's negligence in carrying it out. *See S. Cal. Gas Leak Cases*, 441 P.3d at 887; *J'Aire*, 598 P.2d at 61-64; *Biakanja*, 320 P.2d 16, 17-19 (Cal. 1958); *Glenn K. Jackson Inc. v. Roe*, 273 F.3d 1192, 1197 (9th Cir. 2001). In those circumstances, the plaintiff was allowed to assert a negligence claim, even absent privity, because of the parties' special relationship. But neither that general rule nor the special relationship exception has any application here, because Rattagan alleged that the parties *are* in privity and is no longer pursuing a negligence claim.

The second rule dealing with economic losses—the one at issue here—prevents parties that are *in* privity from recasting contract claims as torts. *See Archer*, 53 Cal. App. 5th at 278; 1-ER-13. The special relationship exception simply does not exist in this context, and that

should be the end of Rattagan's argument. If the Court were to attempt to apply the policy considerations and factors courts use to evaluate whether to impose a duty of care to parties not in privity, they would weigh strongly against Rattagan.

1. The Special Relationship Exception Does Not Apply To Parties In Privity, Including Rattagan And Uber Technologies.

The special relationship exception, which governs negligence duties for non-contracting parties, has nothing to do with the situation here, where Rattagan alleges that there was a contract between the parties, contends that the duty to disclose arose from that contract, and is no longer asserting a negligence claim. *See* 2-ER-214-16; *Glenn K. Jackson*, 273 F.3d at 1197 (characterizing the special relationship exception as governing "the existence of a legal duty of one party to another *in the absence of privity of contract between them*") (emphasis added); *Kalitta Air, L.L.C. v. Central Tex. Airborne Sys., Inc.*, 315 F. App'x 603, 605 (9th Cir. 2009) (unpublished) (describing special relationship exception as governing "whether a plaintiff *lacking privity* with a defendant may recover purely economic loss") (emphasis added); *Body Jewelz, Inc. v. Valley Forge Ins. Co.*, 241 F. Supp. 3d 1084, 1092-93 (C.D. Cal. 2017)

(finding that the special relationship exception did not apply because the parties were in privity of contract); *Elsayed v. Maserati N. Am., Inc.*, 215 F. Supp. 3d 949, 963 (C.D. Cal. 2016) (same).

At issue here is the distinct rule that bars tort actions for economic loss where a contract governs the relationship. *See* 1-ER-13. Invoking the special relationship exception here would be non-sensical: Rattagan argues that the contract created a special relationship, and therefore he is not limited to contract remedies. *See* Applt. Br. 43-46. But if that were so, then *every* contractual relationship would qualify for the special relationship exception, which would abolish the economic loss rule and be directly at odds with established California law. *See, e.g.*, *Robinson Helicopter*, 102 P.3d at 273 (reiterating that there must be a breach of an independent duty for a tort claim to escape the economic loss rule where the parties are in contractual privity).

Courts that have been asked to extend the special relationship exception to parties in privity have refused. *Body Jewelz*, for example, observed that the exception "was not intended for application to parties in privity," and that if it were so applied, "essentially all of the parties'

relationships would be deemed 'special.'" 241 F. Supp. 3d at 1093 (citation omitted).

Elsayed similarly reasoned that the factors "make clear why extension to direct relationships is unwarranted." 215 F. Supp. 3d at 963. If the special relationship test were applied in the context of privity, there would "almost always" be "a special relationship between directly-contracting parties." *Id.* "Such a result is directly contrary to the special relationship's status as a *narrow* exception to the economic loss doctrine." *Id.*; *accord Berk v. Coinbase, Inc.*, No. 19-16594, 2020 WL 7658357, at *2 & n.1 (9th Cir. Dec. 23, 2020) (unpublished) (rejecting argument that *Biakanja* applied to parties in privity and observing that "the California Supreme Court has gone to great lengths to distinguish tort duties from those arising from contracts between the parties").

Rattagan argues that California courts have extended the special relationship exception to cases where the parties are in contractual privity, Applt. Br. 42, but the two cases he cites are readily distinguishable, and more recent decisions have refused to adopt the broad reading that Rattagan offers.

Rattagan first cites *Ott v. Alfa-Laval Agri, Inc.*, 31 Cal. App. 4th 1439, 1448 (1995), for its convoluted statement that "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." *See* Applt. Br. 42. *Ott* concerned a defective milking machine whose stray electric shocks decreased cows' milk production. The plaintiff dairy farmer sued the manufacturer, with which he had no contract. *See Ott*, 31 Cal. App. 4th at 1442. The court's statements about the special relationship exception's application to parties in privity were entirely dicta, because the parties in that case were not in privity.[12]

Rattagan also relies on *Pisano v. American Leasing*, 146 Cal. App. 3d 194, 197 (1983). Applt. Br. 42. In *Pisano*, a cabinetmaker sued the manufacturer, supplier, and lessor of a sanding machine. *See id.* at 196.

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[12] *Ott*'s dictum is also not an accurate statement of California law. As courts have held, *Ott* overlooks the point in *J'Aire* and *Biankanja* that the special relationship exception only applies to parties not in privity. *See Dep't of Power & Water of City of L.A. v. ABB Power T & D Co.*, 902 F. Supp. 1178, 1188 (C.D. Cal. 1995) (criticizing *Ott* for misreading *J'Aire* and *Biakanja*); *Goonewardene v. ADP, LLC*, 434 P.3d 124, 138 (Cal. 2019) (describing *J'Aire* and *Biakanja* as relating to parties not in privity). The few cases to cite *Ott* approvingly have not engaged with its reasoning. *See N. Am. Chem.*, 59 Cal. App. 4th at 783-84; *Aas v. Superior Court*, 12 P.3d 1125, 1137 (Cal. 2000), *superseded by statute on other grounds*.

The cabinetmaker alleged that the sander was defective and damaged his cabinets. *Id.* The court held in the first instance that because the sander caused physical property damage, not just economic loss, the economic loss rule did not apply at all. *Id.* at 197. The case's discussion of *J'Aire* was therefore superfluous.

More recent decisions reject the extension of the special relationship exception to parties in privity, confirming that *Ott* and *Pisano* do not accurately portray California law. *See Berk*, 2020 WL 7658357, at *2 & n.1; *Stop Loss Ins. Brokers, Inc. v. Brown & Toland Med. Grp.*, 143 Cal. App. 4th 1036 (2006); *Body Jewelz, Inc.*, 241 F. Supp. 3d at 1092-93; *Elsayed*, 215 F. Supp. 3d at 963.

The California Court of Appeal's 2006 *Stop Loss* decision speaks directly to the proper application of the special relationship exception: "*Biakanja* and *J'Aire* address the specific situation that arises when (1) the defendant was acting pursuant to a contract, and (2) the defendant's negligent performance of the contract injures a *third party*." 143 Cal. App. 4th at 1042 (emphasis added). To apply the special relationship exception "to create a tort duty in the absence of injury to a

third party would circumvent [the economic loss] rule and blur the law's distinction between contract and tort remedies." *Id.* at 1043.

Rattagan alleged that he was in privity with Uber Technologies, and so the special relationship exception does not apply.

2. Application Of The Special Relationship Exception To An Attorney-Client Relationship Would Violate Public Policy.

Even if the special relationship exception could apply to parties in privity, three threshold policy concerns must first be addressed before it can be applied to any particular relationship:

> (1) liability may in particular cases be out of proportion to fault; (2) parties should be encouraged to rely on their own ability to protect themselves through their own prudence, diligence and contracting power; and (3) the potential adverse impact on the class of defendants upon whom the duty is imposed.

Glenn K. Jackson, 273 F.3d at 1198 (holding that *Bily*, 834 P.2d at 762-66, "arguably limited the application of" the special relationship exception to cases meeting the three policy concerns). The California Supreme Court has stressed the importance of these policy considerations, but Rattagan completely ignores them in his opening brief. *See S. Cal. Gas Leak Cases*, 441 P.3d at 887 ("Deciding whether to impose a duty of care turns on a careful consideration of the 'the sum

total' of the policy considerations at play, not a mere tallying of some finite, one-size-fits-all set of factors.").

The second and third policy concerns, encouraging parties to protect themselves and the adverse effect on the class of potential defendants, weigh against finding a special relationship in these circumstances. In *Bily*, a case about whether auditors owed a duty of care to third-party investors who may rely on their opinions, the California Supreme Court concluded as to the second concern that "the generally more sophisticated class of plaintiffs in auditor liability cases (e.g., business lenders and investors) permits the effective use of contract rather than tort liability to control and adjust the relevant risks through 'private ordering.'" 834 P.2d at 761. The same is true here: the class of plaintiffs contemplated by Rattagan are corporate attorneys, who are well suited—better than anyone, really—to "effective[ly] use . . . contract rather than tort liability to control and adjust the relevant risks through 'private ordering.'" *Id.* Indeed, Rattagan in fact negotiated indemnity agreements with the International Entities to limit his liability.

The third concern, the potentially adverse effect on the class of potential defendants—here, clients of attorneys—renders untenable the

duty proposed by Rattagan. Adopting Rattagan's view would undermine the attorney-client relationship by weakening the absolute duty of loyalty that attorneys owe their clients and expose clients to tort suits by their lawyers complaining that a relevant fact was not disclosed.

D. *J'Aire* Does Not Save Rattagan's Claims.

Even if the special relationship exception could apply to non-negligence claims where the parties are in privity, and even if public policy permitted such a result, the six factors that courts use to evaluate whether to impose a duty of care based on a special relationship weigh in Uber Technologies' favor.

The first special relationship factor is "the extent to which the transaction was intended to affect the plaintiff." *J'Aire*, 598 P.2d at 63. For example, in *J'Aire*, the court determined that a contract between a landlord and a general contractor to renovate a tenant's premises was intended to affect the tenant. *Id.*. This factor highlights the poor fit of the exception to parties in privity, because any contract is arguably intended to affect the parties to the contract. *See Elsayed*, 215 F. Supp. 3d at 963. To the extent that the factor asks whether the contract was

intended to affect a third party, this factor does not apply because Rattagan was a party.

The second factor is "the foreseeability of harm to the plaintiff." *J'Aire*, 598 P.2d at 63. Again, this factor makes little sense in the context of a contract. If harm is foreseeable, the parties should allocate the relevant risk in their contract, as Rattagan did by insisting on indemnity agreements with the International Entities. The fact that some harm may be foreseeable provides no reason to allow the parties to escape the contract and recover in tort.

The third factor is "the degree of certainty that the plaintiff suffered injury." *Id.* Whether Rattagan suffered injury is unknowable at this stage in the litigation: he dropped the emotional distress allegations that he asserted in previous complaints; he was acquitted of the charges against him that gave rise to his supposed injuries; and his firm has been acquired by one of the largest law firms in the world, throwing into question any economic losses.[13]

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[13] Contrary to Rattagan's allegations of severe reputational harm, 2-ER-214 ¶¶ 80-81, a joint press release with Dentons, which acquired Rattagan's firm during the pendency of this litigation, described Rattagan's firm as a "leading firm[] in Argentina" that "enjoy[s] a high

The fourth factor is "the closeness of the connection between the defendant's conduct and the injury suffered." *Id.* Rattagan's alleged injury is several steps removed from Uber Technologies' alleged conduct of launching the Uber platform in Buenos Aires without warning Rattagan: intervening forces include local police taking unsupported actions, negative media coverage, and the local prosecutor filing unfounded charges even after Rattagan was replaced as legal representative. *See* 2-ER-211-12 ¶¶ 66, 69; 2-ER-213-14 ¶¶ 77-80.

In addition, Rattagan asks the Court to believe that he would have withdrawn from involvement with Uber had he known of the pending launch, but this is contrary to his own allegation that he pitched for more Uber work after the launch. *See* 2-ER-211 ¶ 67. The California Supreme Court found similarly implausible allegations to weigh against finding a special relationship in *Bily*. *See Bily*, 834 P.2d at 763-64. In that case, the court examined the plaintiffs investors' claim that they would not

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recognition in their respective areas of expertise." *See* Press Release, *The world's largest law firm to combine with leading firms in Argentina and Uruguay*, (Sept. 4, 2019), DENTONS, available at https://www.dentons.com/en/whats-different-about-dentons/connecting-you-to-talented-lawyers-around-the-globe/news/2019/september/the-worlds-largest-law-firm-to-combine-with-leading-firms-in-argentina-and-uruguay (last accessed Mar. 11, 2021).

have invested but for an auditor's inaccurate report and found that "Plaintiffs' revisionist view of the company's history, the audit, and their own investments, suggests something less than a 'close connection' between Arthur Young's audit report and the loss of their invested funds." *Id.*

The fifth factor is "the moral blame attached to the defendant's conduct." *J'Aire*, 598 P.2d at 63. As confirmed by the Buenos Aires appellate court, Uber's actions were lawful, and there is no moral blame in a company launching operations without giving each of its and its subsidiaries' current and former professional service providers notice of its business plans. *See* 1-SER-51-56, 107-10, 138-42, 184.

The sixth factor is "the policy of preventing future harm." *J'Aire*, 598 P.2d at 63. Rattagan acknowledges that he cannot identify another instance of an attorney bringing similar claims. Applt. Br. 3-4 & n.2.

In short, the special relationship exception was waived, it does not apply because the parties were in privity, public policy precludes even reaching the six-factor test, and the six factors if applied would not support a finding of a special relationship.

IV. The Court Can Affirm On Additional Grounds.

Because the District Court dismissed Rattagan's case based on the statute of limitations and the economic loss rule, it did not reach Uber Technologies' other grounds for dismissal, which provide additional grounds for affirmance here. *See Ebner*, 838 F.3d at 962. Uber Technologies focuses on two: (1) Rattagan did not plausibly allege a duty to disclose the information at issue; and (2) Rattagan did not adequately allege the elements of an aiding and abetting claim.[14]

A. Rattagan Did Not Plausibly Allege A Duty To Disclose.

To state a claim for fraudulent concealment, Rattagan must plausibly allege that Uber Technologies owed him a duty to disclose its plans to launch in Argentina.[15] *See Hambrick v. Healthcare Partners Med. Grp., Inc.*, 238 Cal. App. 4th 124, 162 (2015); 2-ER-215 ¶ 84.

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[14] All of the other grounds of course would be preserved in the event of a remand.

[15] 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." *Hambrick*, 238 Cal. App. 4th at 162.

Rattagan alleged three possible bases for such a duty: (1) the attorney-client relationship between Rattagan and Uber Technologies; (2) the attorney-client relationship between Rattagan and the International Entities; and (3) Rattagan's role as the International Entities' legal representative. 2-ER-214-15 ¶ 83. None are sustainable: a *client* does not owe its *attorney* a disclosure duty; any such duty would not require a client to disclose forward-looking business plans; and most of Rattagan's theories depend on inadequate allegations that the International Entities were agents of Uber Technologies.

1. A *Client* Does Not Owe Its *Attorney* A Duty Of Disclosure.

A developed body of law requires attorneys to meet rigorous standards with respect to protecting the interests of their clients. *See, e.g.*, Cal. R. Prof'l Conduct 1.4(a)(3) (requiring attorney to "keep the client reasonably informed about significant developments relating to the representation"). The contrary is not true, and Rattagan acknowledges that he is asking this Court to create new duties running from the client to the attorney. *See, e.g.*, Applt. Br. 46 (acknowledging that "no case has delineated the scope of duties running from clients to lawyers" and arguing that "[t]his case presents a clean slate upon which this Court

may and should provide guidance"). For example, Rattagan contends that a client owes its attorney a duty to disclose its forward-looking business plans and its intent to continue its lawful operations, or else be sued by its own lawyer for fraud and punitive damages. 2-ER-192 ¶ 4, 206 ¶ 55, 210-11 ¶ 65, 215 ¶ 84, 216 ¶ 90 .

Rattagan supplies no basis for asserting a duty to disclose such information, which would fundamentally undermine the attorney's stringent duty of loyalty to the client. *See Oasis W. Realty LLC v. Goldman*, 250 P.3d 1115, 1121 (Cal. 2011). There is a reason suits like Rattagan's are practically unheard-of. A lawyer is not supposed to break faith with his client even after the representation has terminated. *See id.* (attorney's "fiduciary obligations [of] loyalty and confidentiality" continue "even after the representation has ended"); Cal. Bus. & Prof. Code § 6068(e)(1) ("It is the duty of an attorney to . . . maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client").

Rattagan breached his duty to Uber Technologies and the International Entities by bringing this lawsuit, because an attorney may never "do anything which will injuriously affect his former client in any

manner in which he formerly represented him," nor may he "at any time use against his former client knowledge or information acquired by virtue of the previous relationship." *Wutchumna Water Co. v. Bailey*, 15 P.2d 505, 509 (Cal. 1932); *see also Oasis W. Realty*, 250 P.3d at 1122. This is so even where "no confidences are actually disclosed." *Oasis W. Realty*, 250 P.3d at 1122; *see also Fremont Reorganizing Corp. v. Faigin*, 198 Cal. App. 4th 1153, 1174 (2011) (similar).

The violation of professional ethics is especially bad where an attorney "actively oppose[s] the former client with respect to an ongoing matter that was the precise subject of the prior representation." *Oasis W. Realty*, 250 P.3d at 1122. Rattagan, a corporate lawyer who purports to have represented Uber on corporate formation issues for Uber's expansion in Argentina, is now (1) claiming that Uber's alleged operation in Argentina without proper corporate entities was unlawful, *see* 2-ER-192 ¶ 5; 2-ER-212 ¶ 71; 2-ER-214 ¶ 79; and (2) arguing that the Court should disregard the corporate form of Uber's subsidiaries, which is directly at odds with the work he did for them, *see* 2-ER-191 ¶ 2; 2-ER-198-200 ¶¶ 32-34. He then multiplies his violations with a frontal attack on the character of his alleged former client. *See* 2-ER-207-08 ¶ 60; 2-

ER-210 ¶ 63(g); Applt. Br. 44 n.20 (speculating that Uber Technologies concealed information from Rattagan out of fear that the crime-fraud exception would lead him to disclose it).

Recognizing the duty proposed by Rattagan would permit attorneys to bring lawsuits in flagrant breach of their ethical obligations. As a result, the alleged attorney-client relationship cannot form the basis for a fraudulent concealment claim.

2. Any Duty To Disclose Would Not Have Included The Information At Issue.

Even if the Court were to find that a client owes its attorney some duty of disclosure of facts necessary to the representation, there is a mismatch here between the alleged source of the duty (the attorney-client relationship with Uber Technologies) and the role that allegedly resulted in harm to Rattagan (acting as the International Entities' legal representative).

Rattagan's allegations make clear that any purported harm he faced flowed from his non-attorney role as the International Entities' legal representative. For example, he alleged that protesters surrounded his office, police searched his office, and he was charged because he was registered as the International Entities' legal representative, a

ministerial role under Argentine law—not because he allegedly was Uber Technologies' corporate attorney. *See* 2-ER-210-12 ¶¶ 65-66, 69, 2-ER-213-14 ¶¶ 77-78; *see also* 2-ER-201 ¶ 42 (emphasizing that legal representative role was "separate and apart from the legal services provided"). He did not allege that he faced any repercussions at all for allegedly serving as Uber Technologies' corporate attorney advising on corporate formation issues. Legal work on such matters would not have entitled him to information about Uber's launch plans, and the alleged "concealment" of those plans did not harm Rattagan based on his role as an attorney.

Rattagan attempted to plead around the mismatch between the alleged sources of duty and harm by alleging that because of the attorney-client relationship, Uber Technologies owed him a duty to disclose "all facts . . . that were material to *both* Rattagan's legal representation *and* his role as legal representative of the Foreign Entities." 2-ER-214-15 ¶ 83 (emphasis added). Yet he has never offered any support for the idea that a client would be obligated to disclose confidential information to its attorney because that information might economically affect the attorney in some way unrelated to the legal representation.

3. The Uber International Entities Were Not Uber Technologies' Agents.

Rattagan's other alleged sources of duty fail as well. *See* 2-ER-214-15 ¶ 83. He asserted that Uber Technologies, the sole defendant, owed him a disclosure duty based on his role as legal representative of the separate International Entities, imputing the obligations of the subsidiaries to the corporate parent. *Id.* However, as part of his strategy to manufacture diversity jurisdiction, Rattagan chose not to name the International Entities, and it is "a general principle of corporate law deeply ingrained in our economic and legal systems that a parent corporation . . . is not liable for the acts of its subsidiaries." *United States v. Bestfoods*, 524 U.S. 51, 61 (1998) (internal citations and quotations omitted).

The alter ego doctrine provides "limited" exceptions to this deeply ingrained rule, *see Katzir's Floor & Home Design, Inc. v. M-MLS.com*, 394 F.3d 1143, 1149 (9th Cir. 2004), but Rattagan disclaimed reliance on that doctrine in open court. *See* 3-ER-266:21-23, 267:7-11 (Rule 11 hearing).

Having disavowed alter ego liability and abandoned his incorrect claims that Uber Technologies directly appointed him to be its legal representative, Rattagan retreated to a theory that the International

Entities acted as the "agents" of Uber Technologies, the corporate parent. *See* 2-ER-191 ¶ 2; 2-ER-198-200 ¶¶ 32-34. Corporate affiliates can only be "agents" of each other if the parent company has "moved beyond the establishment of general policy and direction for the subsidiary and in effect taken over performance of the subsidiary's day-to-day operations in carrying out that policy." *Sonora Diamond Corp. v. Super. Ct.*, 83 Cal. App. 4th 523, 542 (2000). The level of control required to establish an agency relationship "must be over and above that to be expected as an incident of the parent's ownership of the subsidiary and must reflect the parent's purposeful disregard of the subsidiary's independent corporate existence." *Id.*

Common features of parent-subsidiary relationships, such as "interlocking directors and officers, consolidated reporting, . . . shared professional services," close financial relationships, and "a certain degree of direction and management" exercised by the parent, are not sufficient to create an agency relationship. *Id.* at 540-41. Likewise, "evidence of co-branding or the broad use of terms linking the corporations together . . . do not establish control rising to the level of an agency

relationship." *Strasner v. Touchstone Wireless Repair & Logistics, LP*, 5 Cal. App. 5th 215, 225 (2016).

Rattagan failed to plausibly allege agency through pervasive control. He alleged only the generalities that Uber Technologies' legal department "exercised complete control over" policies governing international expansion and "controlled and directed" the International Entities' work in accomplishing those policies. 2-ER-199 ¶ 33. These recitations of the legal principles are a nullity. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) ("[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements" are not enough to state a claim).

The only non-conclusory allegation related to control—that Uber Technologies' General Counsel allowed a lawyer for one of the International Entities to decide which firm to hire for the expansion in Argentina, *see* 2-ER-199 ¶ 33—actually establishes the opposite of day-to-day control, showing that the International Entities had discretion in hiring professional services firms in order to implement a broader directive.

Moreover, even if the International Entities' lawyers worked at the direction of the lawyers at Uber Technologies, courts have repeatedly stated that "shared professional services," including legal services, are a normal feature of a parent-subsidiary relationship and do not establish an agency relationship. *See Strasner*, 5 Cal. App. 5th at 225 (declining to find agency relationship despite "some integration of accounting and human resources functions" and that "some managers at [the parent] oversaw some managers at [the subsidiary] in human resources or accounting"); *Sonora Diamond*, 83 Cal. App. 4th at 540-41; *cf. Calvert v. Huckins*, 875 F. Supp. 674, 679 (E.D. Cal. 1995) (in alter ego context, parent's counsel providing legal services to parent and subsidiary "does not suffice to establish the measure of control necessary to justify disregarding the corporate entity").

Rattagan's conclusory allegations of control are not remotely enough to justify the extreme step of disregarding corporate separateness. If any duty to Rattagan in his capacity as legal representative was owed, it was owed by the International Entities who hired him, not Uber Technologies. The Court can thus affirm on the

alternate ground that Rattagan failed to plausibly allege a duty of disclosure on the part of the relevant defendant.

B. Rattagan Did Not Adequately Allege The Elements Of An Aiding And Abetting Claim.

A tort claim can be brought against "one who aids and abets the commission of an intentional tort if the person . . . knows the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other to so act." *Casey v. U.S. Bank Nat'l Ass'n*, 127 Cal. App. 4th 1138, 1144 (2005). "The plaintiff must also allege and prove that the elements of an underlying tort were fulfilled by a primary wrongdoer."[16] Restatement (Third) of Torts: Liability for Economic Harm § 28 (2020). Rattagan asserts a claim for aiding and abetting fraudulent concealment "in the alternative," "applicable if and to the extent the trier of fact determines that [Uber Technologies] had no direct relationship with Rattagan and/or was not the principal of the Dutch Entities liable for their acts." 2-ER-217 ¶ 97.

[16] Rattagan's claim for aiding and abetting fraudulent concealment fails if, as Uber Technologies has shown, there can be no viable claim for fraudulent concealment.

This claim fails because Rattagan does not plausibly plead how Uber Technologies substantially assisted or encouraged the International Entities' purported fraudulent concealment. The only allegation Rattagan makes is that, upon "information and belief," Uber Technologies "expressly or impliedly directed the Dutch Entities to conceal these facts from Rattagan." 2-ER-217-18 ¶ 101. Such a conclusory allegation of assistance does not satisfy Rattagan's obligations under Rule 8, let alone the heightened pleading standard of Rule 9(b), which applies because the claim for aiding and abetting fraudulent concealment sounds in fraud. *See Iqbal*, 556 U.S. at 678; *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1125 (9th Cir. 2009) (holding that Rule 9(b) applies to claims that are "grounded in fraud" or "sound in fraud"). The Third Amended Complaint contains no other allegation of what actions the International Entities took to conceal information from Rattagan or what Uber Technologies may have done to aid or encourage them.

As a result, the Court can affirm on the additional ground that Rattagan did not sufficiently allege his aiding and abetting claim.

CONCLUSION

The District Court correctly held that the economic loss doctrine bars Rattagan's fraudulent concealment and aiding and abetting claims. Rattagan waived his principal appellate arguments, which would be unavailing in any event. The judgment of the District Court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief contains 13,853 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f). It therefore complies with the type-volume requirements of Circuit Rule 32-1.

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the typestyle requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Office Word in Century Schoolbook 14-point font.

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March 29, 2021

STATEMENT OF RELATED CASES

Defendant-Appellee Uber Technologies, Inc. is not aware of any related cases within the meaning of Ninth Circuit Rule 28-2.6 currently pending in this Court.

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March 29, 2021