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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.,
Defendants-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

REPLY BRIEF OF APPELLANT MICHAEL R. RATTAGAN

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I. INTRODUCTION[1]

Uber's Answering Brief can be distilled down to the following arguments:

1. Application of the economic loss rule to bar recovery in tort for economic loss requires *no identifiable* contractual terms or conditions.
2. As a matter of social policy, a client owes *no duties* to its lawyer, other than to pay the lawyer's bills.
3. A lawyer can *never* sue a client in tort because the attorney-client relationship is contractual.
4. Parties to a contract can *never* employ the "special relationship" exception to the economic loss rule.
5. Rattagan waived *all* legal arguments on appeal that he did not raise in the district court even though they are nuanced extensions of the arguments he did make.

This Brief eviscerates each of these arguments. There was no "contract" between Uber and Rattagan which could properly form the basis for applying the economic loss rule to his tort claims. Public policy dictates that clients should not be immunized as a matter of law from liability for committing intentional fraud against their lawyers simply by virtue of the attorney-client relationship. There is no policy

[1] Wherever possible, Rattagan continues to use the same terminology used in his Opening Brief.

justification for having a bright-line rule holding contracting parties can never assert the special relationship exception to the economic loss rule. Rather, a flexible, case-by-case approach is required and the *J'Aire* factors are the proper tool to do that. Finally, there is nothing in this Court's jurisprudence that supports dispensing with Rattagan's expanded legal arguments here based on waiver.

The issues posed by this appeal concerning the duties of a client to his or her attorney and the rights of an attorney to sue a client for fraud under California law have never been directly addressed by this Court, any court in this district, or any California state court. This case also presents the Court with the opportunity to either resolve a split of authority on the special relationship exception or certify these issues to the California Supreme Court for its determination.

Unless this Court is prepared to adopt the extremist views espoused by Uber, the Court must vacate the judgment against Rattagan, reverse the district court's order granting Uber's 12(b)(6) motion to dismiss and remand the case for further proceedings.

II. UBER'S FICTION

In an appeal from an order granting a Rule 12(b)(6) motion to dismiss, the operative complaint - here, the TAC - provides the factual guardrails for consideration of the issues presented. Uber's Answering Brief crashes through those guardrails by ignoring numerous well-pleaded facts, twisting other alleged facts and

fabricating still others. Because the issues presented by this appeal are purely legal, however, Rattagan will not address each of Uber's not-so-factual "creative writings." Rattagan stands on the allegations of the TAC.

One point does bear repeating: Uber took more than just "poetic license" in the district court when it denied it had a direct attorney-client relationship with Rattagan and obtained Rule 11 sanctions. It got away with this because Rattagan's prior counsel was not armed with the documents and witnesses relied on by successor counsel in drafting the TAC. Suffice it to say every material allegation in the TAC is provable with documents and witnesses. Uber knew it was being untruthful when it filed its Rule 11 sanction motion. That motion changed the course of history in this case and, understandably, predisposed the district court. Rattagan should be allowed a fresh start to prove this and redeem himself in district court.

III. LEGAL ARGUMENT

A. THE ECONOMIC LOSS RULE DOES NOT APPLY TO RATTAGAN'S FRAUD OR AIDING AND ABETTING CLAIMS.

1. Rattagan's Claims Are not Based on Any *Contractual* Duty Owed to Him by Uber.

Throughout its Answering Brief, Uber repeatedly refers to a "contract" between it and Rattagan and argues his claims are "contractual" and thus barred by the economic loss rule. Uber's mantralike repetition is sophistry. No matter how deep this Court dives into the record, it will not find any "contract" defining Uber's legal duties to Rattagan or that contains any term, condition, covenant or other

hallmark of a contract from which one could possibly identify any contractual duty of Uber to Rattagan, beyond Uber paying Rattagan's bills. This is fatal to Uber's economic loss rule argument.

The economic loss rule prevents tort claims based on breach of contract where the breach is nothing more than a violation of a promise which undermines the expectations of the parties to an agreement. *UMG Recordings, Inc. v. Glob. Eagle Entm't, Inc*., 117 F.Supp. 3d 1092, 1103 (C.D. Cal. 2015). Where there are no contractual promises, it necessarily follows there cannot be any contractual expectations to enforce and thus the rule should not apply.

Rattagan's implied-in-fact arrangement with Uber merely required Rattagan to do the work for Uber that it requested and required Uber to pay him for that work. Because Uber paid Rattagan for his services, Rattagan could not plausibly bring a contract claim as a matter of law because he suffered no contract damages. Therefore, Uber's reliance on *Baggett v. Hewlett-Packard Co.*, 2009 WL 3178066, (N.D. Cal. Sept. 29, 2009), is unhelpful because in that case the plaintiff *elected* to pursue tort remedies, even though he could have brought a breach of contract claim. It would be cruel irony to bar a claim based on the economic loss rule when there was never a legal basis to bring a breach of contract claim in the first place.

The cases cited by Uber in support of its assertion that Rattagan's claims are contractual and thus *per se* barred by the economic loss rule all involved detailed

written contracts from which the court could easily identify the parties' contractual duties and thus expectations. Unsurprisingly, these cases all held that the tort claims merely restated breach of contract claims and thus the economic loss rule applied. *Archer v. Coinbase, Inc.*, 53 Cal.App.5th 266, 278 (2020); *Food Safety Net Services v. Eco Safe Systems USA, Inc.* 209 Cal.App.4th 1118 (2012); *Neu v. Terminix Int'l, Inc.*, 2008 WL 962096, (N.D. Cal. Apr. 8, 2008).

Because Uber cannot point to any "contract" terms between it and Rattagan, Uber jumps to a conclusory non-sequitur - because Rattagan was Uber's attorney/legal representative and the attorney-client relationship is contractual in nature, *a fortiori,* the economic loss rule must apply. [Answering Brief at pp. 14-15]. But it is well-settled that even where parties are in contractual privity, tort claims may be asserted where the duty that is breached is independent or separate from those imposed by the contract. *Deseret Tr. Co. v. Unique Inv. Corp.*, 2019 WL 7938223, at *7 (C.D. Cal. Sept. 10, 2019).

Uber's Answering Brief continues to ignore the distinction between a breach of duty expressly *set forth in* the contract and a duty impliedly *arising out of* contract. The latter, which Rattagan asserts here, gives rise to tort claims. *Eads v. Marks*, 39 Cal.2d 807, 810-11 (1952) ("It has been well established in this state that if the cause of action arises from a breach of a promise set forth in the contract, the action is *ex contractu*, but if it arises from a breach of duty growing out of the contract it is *ex*

delicto.").

Because Uber has identified no *contractual* duty owed to Rattagan that Rattagan claims was breached, the question is whether there is a duty separate or independent arising from the implied-in-fact contract. The answer must be and is yes, otherwise, what Uber did to Rattagan will go without remedy.

2. Rattagan's Claims are Based on a Limited Duty of Disclosure that Derives from Social Policy, Not from the Implied-in-Fact "Contract" with Uber.

The distinction between tort and contract "is well grounded in common law, and divergent objectives underlie the remedies created in the two areas. Whereas contract actions are created to enforce the intentions of the parties to the agreement, tort law is primarily designed to vindicate 'social policy'." 5 Witkin, *Summary 11th Torts* § 2 (2020), *citing Foley v. Interactive Data Corp*. 47 Cal.3d 654, 683 (1988). It is beyond cavil that a tort action may be predicated on a contract. *Erlich v. Menezes*, 21 Cal.4th 543, 551 (1999). "[C]onduct amounting to a breach of contract becomes tortious only when it also violates a duty independent of the contract arising from principles of tort law." *Robinson Helicopter Co. v. Dana Corp*., 34 Cal.4th 979, 989 (2004).

Uber's sole *contractual* duty to Rattagan was to pay for services rendered. The duty Rattagan seeks to impose upon Uber here is different, separate and independent from any term, condition or covenant that possibly can be inferred from

that arrangement – the duty to not conceal from him facts known only to Uber which it knew could expose Rattagan to serious personal consequences. This narrow duty – disclosure by a client to its attorney of material information necessary to enable the lawyer to protect him or herself from personal harm resulting from the client's misconduct – arises not from the "contract" but from common law principles that eschew fraudulent concealment and intentional omission in business relationships generally. *See e.g., Deseret supra* (denying motion for judgment on the pleadings in part because both the special relationship and independent duty exceptions to the economic loss rule applied on the face of the complaint).

As discussed in Rattagan's Opening Brief [at pages 26-27], the TAC properly pleads fraudulent concealment [ER-214]. Uber attacks the duty element by arguing under no circumstance does a client owe any duty to its lawyer for anything, other than paying the lawyer's bill and any attempt by an attorney to sue a client other than for fees is *per se* a breach of the lawyer's professional ethics. *See* Answering Brief at 61-62. This ultra-extremist view finds no support in the law or, more importantly, in social policy.

First, Uber ignores well-settled California law that holds a duty to disclose exists when the defendant has exclusive knowledge of material facts not known to the plaintiff, or when the defendant actively conceals material facts from the plaintiff, or when the defendant makes partial representations but also omits some

material facts. *Heliotis v. Schuman*, 181 Cal.App.3d 646, 651 (1986). No reported case carves out an exception for fraud by clients *vis a vis* their attorney solely based on the attorney-client relationship.

In a fit of rhetorical flourish, Uber posits that if it is held accountable to Rattagan for fraud on the facts of this case a new tort of client malpractice will be created and all clients will be obligated to disclose to their attorney any and all future business plans".[2] This is manufactured hyperbole that bears no relationship to the limited duty of disclosure Rattagan actually seeks to impose. Uber's overblown rhetoric does not stop there; relying on well-settled California Rules of Professional Responsibility governing *attorney* misconduct, Uber flips this case on its head and assaults Rattagan's legal ethics, going so far as to argue that lawyers can never sue their clients in tort because any such lawsuit would be in flagrant breach of the lawyer's ethical obligations. *See* Answering Brief at 60-61.

Not only does Uber fail to address the applicability of California State Bar Rules to an Argentine lawyer who is not licensed in California and who provided services in Argentina, Uber cites no case from which such a conclusion can reasonably be inferred, because there is no such case.[3]

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[2] At least ten times in its Answering Brief, Uber repeats this strawman argument that clients could be sued by their lawyers for simply not disclosing their "future business plans." Uber's "parade of horribles" is grossly simplistic.

[3] Evidence Code section 958 implies the opposite. It is a broad exception to

[Footnote Text Cont'd on Next Page]

Uber stretches beyond recognition two wholly inapposite cases to support its extraordinary proposition - *Oasis W. Realty LLC v. Goldman*, 51 Cal.4th 811, 815 (2011) and *Wutchumna Water Co. v. Bailey*, 216 Cal. 564 (1932). Neither case involved the situation here: A lawsuit by a lawyer against his/her former client for damages the lawyer suffered personally due to the client's fraud. *Oasis* involved an action by the client against the lawyer who, acting in his own self-interest, actively opposed the client's ongoing neighborhood real estate project, the same project for which he previously represented the client. The Court permitted the client's case against the lawyer for breach of fiduciary duty, breach of contract and negligence to proceed in the face of an anti-SLAPP motion by the lawyer. There is nothing in the opinion, however, that holds a former client may use the lawyer's prior representation of the client as an impenetrable shield against liability for the client's own intentional torts committed against the attorney.

Wutchumna upheld a client's effort to prevent its former attorney from representing the client's competitors (competing claims to water rights), where the attorney had represented the client for many years, including in matters involving the same water rights. Again, there is nothing in this nearly 90-year-old case that

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the attorney-client privilege that addresses communications between the lawyer *charging* or charged with a breach of duty, on the one hand, and the client charging or *charged* with a breach of duty, on the other. *Anten v. Superior Ct.*, 233 Cal.App.4th 1254, 1259 (2015), as modified (Feb. 10, 2015). There is nothing in the code suggesting any limitation on the nature of the breached duty.

suggests the attorney-client relationship provides *per se* immunity for clients who act tortiously towards their attorney.

Uber fails to explain how any desirable social policy will be furthered by giving clients blanket immunity from liability for tortious conduct against their lawyer based solely on the lawyer's ethical obligations to the client. To the contrary, there is a line of cases that recognizes an in-house lawyer's right to sue their "client" – their employer – for employment-related claims connected to their responsibilities as in-house attorneys. *General Dynamics Corp. v. Superior Court*, 7 Cal.4th 1164, 1191 (1994); *Fox Searchlight Pictures, Inc. v. Paladino*, 89 Cal.App.4th 294 (2001); *Chubb & Son v. Superior Court*, 228 Cal.App.4th 1094, 1105-1106 (2014). These cases counsel that the severity of the consequences of Uber's extremist views must be tempered by a balancing of interests favoring a narrow exception to what is otherwise an absolute privilege. That balance here is finding a duty of limited disclosure of actions the client intends to take that may put the lawyer in jeopardy, especially where such disclosure enables the lawyer to protect herself without disclosing any client confidences.

Sound social policy also counsels against Uber's "solution" that lawyers can never sue clients in tort because they can protect themselves against client misconduct in the engagement agreement. Answering Brief at 52-53. Lawyers should not have to anticipate at the outset of their engagement that clients will lie to

them, conceal information from them or otherwise act tortiously toward them. This is antithetical to full and candid disclosure and trust that form the foundation of the attorney-client relationship. Uber's argument that lawyers may only rely on their own skills to "protect themselves" against deceitful clients through the lawyer's diligence and contracting power is a harbinger of the erosion of the mutual trust and respect that lawyers and clients must have towards each other. *See* Answering Brief at 52. Requiring lawyers to begin a client relationship with an agreement that expressly provides the client may be held liable for fraud committed against the lawyer creates the potential for an adversary relationship from the outset.

3. The Law of Agency Provides a Well-Settled Basis for Finding an Independent Duty of Disclosure.

In his Opening Brief Rattagan details how the law of agency in California directly supports his position that a client as principal has a duty to refrain from engaging in conduct that will foreseeably result in loss for the lawyer as agent and requires that the principal furnish information to the agent 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. (*See* Opening Brief at 27-30). Uber does not contest this black letter rule of California law. Instead, it tepidly argues that *despite* this rule, where the principal asserts the economic loss rule as a defense to a tort claim by the agent, agency law should be ignored because "none of [Rattagan's] agency cases address the economic loss rule at all." Answering Brief at 28. Uber

offers no contrary authority and, more importantly, offers no rationale why the law of agency should not apply.[4]

There are multiple sources of duty independent of the implied in fact "contract" between Rattagan and Uber this Court can and should look to hold Uber had a limited duty to disclose to Rattagan its meetings with Buenos Aries officials, their warnings to Uber and Uber's intent to ignore those warnings.

4. The Economic Loss Rule Should Not Be Applied in Cases of Intentional Fraud by the Defendant, Regardless of the Species of Fraud.

As discussed in Rattagan's Opening Brief, 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*). In *Robinson*, the Court was faced with the question of whether the economic loss rule should apply

[4] Nearly every case cited by Uber in support of its economic loss rule argument involved an arms-length commercial contract relationship between business and customer where rules of agency were not implicated. *Hsieh v. FCA US LLC*, 440 F.Supp.3d 1157, 1163 (S.D. Cal. 2020); *Body Jewelz, Inc. v. Valley Forge Ins. Co.*, 241 F.Supp.3d 1084, 1091 (C.D. Cal. 2017); *Elsayed v. Maserati N. Am., Inc.*, 215 F.Supp.3d 949, 963 (C.D. Cal. 2016); *Archer v. Coinbase, Inc.*, 53 Cal.App.5th 266, 267 (2020)*; Food Safety Net Services v. Eco Safe Systems USA, Inc.*, 209 Cal.App.4th 1118 (2012)*; Stop Loss Ins. Brokers, Inc. v. Brown & Toland Med. Grp.*, 143 Cal.App.4th 1036 (2006).

to affirmative fraud claims. Because there was no allegation of fraudulent concealment, the Court expressly declined to address the question of whether fraudulent concealment, as distinct from affirmative fraud, was also exempt from the Rule. *Robinson* at 994 n.9 and 1000 (Werdegar, dis. opn.). The Court opted instead for a holding "… 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 993.

Several district courts in this Circuit, including the District Court here, have interpreted the Court's narrow holding as an affirmative rejection of exempting fraudulent concealment from the economic loss rule. *See* Opening Brief at pp. 33-34 and cases cited therein. But because *Robinson* did not involve material omissions or concealment and the court expressly decided the case narrowly based on affirmative misrepresentations, other district courts have concluded the former would similarly be exempt from the economic loss rule. *See* Opening Brief at p. 34 and cases cited therein.

Rather than confronting this split of authority and articulating a cogent reason why this court should treat intentional concealment in the context of a confidential relationship differently than affirmative misrepresentation in a non-confidential

relationship,[5] Uber asserts that "adopting a categorical rule that extends beyond the 'narrow' exception for affirmative misrepresentations articulated in *Robinson Helicopter* would swallow the [economic loss] 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." Answering Brief at 40. The Court should not march in this simplistic "parade of horribles."

Robinson recognizes that fraud in business relations must be dealt with harshly. Neither Uber nor any court has articulated any rational basis to dilute that approach based on the particular species of fraud involved, especially where the evidence demonstrates the concealment was intentional and the parties are in a confidential relationship, such as attorney and client. *See* Opening Brief at fn. 12 and accompanying text.

B. THE SPECIAL RELATIONSHIP EXCEPTION TO THE ECONOMIC LOSS RULE APPLIES TO THIS CASE.

1. Rattagan and Uber were in a "Special Relationship" as Defined under Common Law.

The core question presented here is simple: Does the confidential (if not

[5] Under California law, both intentional concealment where there is a duty to disclose and affirmative misrepresentations are species of fraud. *See* discussion in Opening Brief at pp. 35-37.

fiduciary) relationship[6] that a client has *vis a vis* its lawyer amount to a "special relationship" under California law such that the lawyer may seek economic damages against the client for the client's intentionally tortious conduct? Put differently, is there any legal or policy basis to immunize fraudulent clients from tort liability to their lawyer simply because of the relationship? As noted by both parties, there is no case that directly addresses the question in the context of a lawyer-client relationship. However, there is a well-developed body of caselaw the Court can draw upon to guide its analysis.

The common law concept of special relationships for purposes of tort liability covers a very broad spectrum of relationships. *See Rodriguez v. Inglewood Unified School Dist.,* 186 Cal.App.3d 707, 712-15 (1986) (listing the types of special relationships). It is well-settled in California that a special relationship for purposes of negligent nonfeasance liability[7] may arise out of a contractual duty. *Seo v. All–Makes Overheard Doors,* 97 Cal.App.4th 1193, 1203 (2002). The rule that a special relationship may arise out of a contract is based on an implied duty on all persons

[6] See Opening Brief at pp. 29-30 for discussion of "confidential relationship" under California law. *See also, Peregrine Pharms., Inc. v. Clinical Supplies Mgmt., Inc.*, No. SACV121608JGBANX, 2015 WL 13309286 (C.D. Cal. June 22, 2015).

[7] Although this is not a case involving negligent nonfeasance, the analysis for determining whether a duty in such cases exists should be equally, if not more so, applicable for determining whether a duty exists in a case involving fraudulent concealment.

who by contract undertake professional or other business engagements requiring the exercise of care, skill and knowledge. *Luebke v. Auto. Club of S. California*, 59 Cal. App.5th 694 (2020). Whether such a special relationship and duty of care exists presents a question of law for the court. *Greystone Homes, Inc. v. Midtec, Inc.*, 168 Cal.App.4th 1194, 1228 (2008).

2. The "Special Relationship" Exception to the Economic Loss Rule Under *J'Aire* Applies to Rattagan's Claims Even if the Court Determines the Economic Loss Rule Applies.

Rattagan's Opening Brief discusses at length how the "special relationship" exception to the economic loss rule applies to his relationship with Uber. Opening Brief at pp. 38-46. The exception recognizes that certain relationships create duties which, when breached, override the concern of conflating contracts and torts, particularly when the actions that constitute the breach violate a social policy that merits the imposition of tort remedies. *See Whitesides v. E*TRADE Sec., LLC*, No. 20-CV-05803-JSC, 2021 WL 930794, (N.D. Cal. Mar. 11, 2021) ("*E*Trade*").

Because the relationship between Rattagan and Uber involved services not goods, *North American Chemical Co. v. Superior Court*, 59 Cal.App.4th 764 (1997) applies here, and the court is to apply the six *J'Aire* factors to determine there exists a special relationship between the parties giving rise to a duty of care independent of the contract. In his Opening Brief, Rattagan does just that. Rattagan also cites to *Ott v. Alfa–Laval Agri, Inc.*, 31 Cal.App.4th 1439, 1448 (1995) and *Pisano v.*

American Leasing, 146 Cal.App.3d 194, 197 (1983), both of which hold the special relationship exception may apply even where the parties are in direct contractual privity. These cases also draw on the *J'Aire* test and remain good law.

In *R Power Biofuels, LLC v. Chemex LLC*, No. 16-CV-00716-LHK, 2016 WL 6663002 (N.D. Cal. Nov. 11, 2016), the court predicted that the California Supreme Court would follow *North American Chemical* and conclude that parties in contractual privity can have a special relationship giving rise to an independent duty of care. Other courts in this district have consistently followed *R Power Biofuels*' holding. *See In re Yahoo! Inc. Customer Data Sec. Breach Litig.*, 313 F.Supp.3d 1113, 1131–32 (N.D. Cal. 2018*)(*"*In re Yahoo!"*); *Kemp v. Wells Fargo Bank, N.A.*, No. 17-CV-01259-MEJ, 2017 WL 4805567, at *3 (N.D. Cal. October 25, 2017) ("*Kemp*").

In its Answering Brief, Uber argues there is a *per se* bar to the special relationship exception where the parties are in privity, criticizing *Ott* and *Pisano* and relying on cases which read *J'Aire* and the special relationship exception as not applying to parties in direct contractual privity. However, Uber does not address the split in case authority in the district courts and the lower California appellate courts or deal with the fact that in each of its cited cases, unlike here, the contracting parties had entered into detailed written contracts, sued for breach of contract and added tort claims that were held to be patent restatements of the parties' contractual

obligations.[8] Unfortunately, none of Uber's cases provide a thorough analysis for this Court to draw on in deciding this issue. In stark contrast is Magistrate Judge Corley's opinion in *E*Trade*, a case decided barely two weeks before Uber filed its Answering Brief but which it chose not to cite.

(a) The *E*Trade* Analysis

Plaintiffs entered into a written agreement with E*Trade to use its electronic trading service platform. Plaintiffs alleged E*Trade system failures caused them to suffer substantial economic losses. E*Trade moved to dismiss plaintiffs' claims for negligence, gross negligence, and violation of California's Unfair Competition Law, arguing the claims were barred by the economic loss rule. The court granted the motion to dismiss, finding that the economic loss rule barred plaintiffs' claims, but granted plaintiffs leave to amend to allege additional facts giving rise to a "special relationship" under *J'Aire*. The Court rejected E*Trade's argument – the same argument that Uber makes here – that the special relationship exception can never apply to parties in contractual privity.

In concluding that parties in privity can have a special relationship giving rise to an independent duty of care, the Court discussed *Biofuels* and noted that the Northern District has consistently followed *Biofuels'* holding, citing *In re Yahoo!*

[8] See cases cited in fn. 4, *supra*. See also, *Dep't of Water & Power of City of Los Angeles v. ABB Power T & D Co*., 902 F.Supp. 1178 (C.D. Cal. 1995).

and *Kemp*. The Court noted that neither the California Supreme Court nor the Ninth Circuit have decided whether parties in contractual privity can also be in a "special relationship", and the lower California appellate courts are split so, as the court did in *Biofuels*, it predicted how the California Supreme Court would decide this issue.

The Court looked to the most recent California Supreme Court decision on the economic loss rule, *S. Cal. Gas Leak Cases*, 7 Cal.5th 391 (2019) (Opening Brief at pp. 39-43) and concluded "[t]he California Supreme Court's flexible, fact-specific approach to the question of duty in *S. Cal. Gas Leak* suggests that it would carefully examine the policy considerations at play before categorically barring negligence actions for economic loss where the parties are in privity of contract." The Court found the conflicting policy arguments in the cases unconvincing and concluded:

> [T]he sum total of policy considerations does not justify a blanket rule barring or allowing the recovery of economic losses when parties are in privity of contract. Instead, the Court predicts that the California Supreme Court would hold that courts must examine the particular policy considerations at play under the facts of each case to determine if a special relationship exists giving rise to an independent duty of care.

*E*Trade*, 2021 WL 930794, at *6.

This Court should follow the *E*Trade* court's thoughtful and correct analysis and apply a "flexible, fact-specific approach to the question of duty…and carefully examine the policy considerations at play before categorically barring negligence

actions for economic loss where the parties are in privity of contract."[9] *Id.* at *5.

(b) The *J'Aire* Factors Applied to the Facts Alleged Here Dictate that the Special Relationship Exception Applies.

In arguing that the *J'Aire* factors weigh in Uber's favor, Uber fails to analyze the unique facts alleged here, instead merely parroting the discussion in the cases it chose to cite.

(i) The Extent to Which the Transaction Was Intended to Affect the Plaintiff.

Relying on *Elsayed*, Uber argues that every contract is arguably intended to affect the parties thereto, so this factor does not weigh in Rattagan's favor. This ignores the critical distinction between contracts that are intended to affect the specific plaintiff in a particular way as compared to contracts that are intended to be used *en masse*. *See e.g.*, *E*Trade* (plaintiffs did not plead intent particular to them, as opposed to all users of E*TRADE's trading platform); *see also In re Sony Gaming Networks & Customer Data Sec. Breach Litig.*, 996 F.Supp.2d 942, 972 (S.D. Cal. 2014) (goods and services not developed for the plaintiffs' "specific benefit, above and beyond what was offered to all consumers").

[9] Alternatively, the court should consider certifying the question(s) to the California Supreme Court. This is especially true given the growing split of authority on the issue of whether there should be blanket rule barring the recovery of economic losses when parties are in privity of contract.

Here, the "contract" between Uber and Rattagan was a one-off arrangement for a particular person/law firm to provide particular services for a specific purpose. This is not a "mass market" commercial services arrangement between a service provider and the public. This specific intent requirement avoids creating limitless liability and unending litigation resulting in liability for economic loss that may be "indeterminate and out of proportion to a defendant's culpability." *S. Cal Gas Leak supra* at 403. As the court in *E*Trade* noted, "used properly, the first *J'Aire* factor is a tool for courts to limit recovery for economic losses to those relationships that are truly "special". *See S. Cal. Gas Leak*, 7 Cal.5th at 401. *Mere privity of contract should not shortcut this analysis*." Here, the transaction was intended to exclusively affect Rattagan and this factor weighs in favor of the imposition of a duty.

(ii) Foreseeability of Harm to the Plaintiff.

This factor also weighs heavily in favor of imposing a duty, as the TAC explicitly alleges (ER-201, 207 paragraphs 39, 41) that Rattagan informed Uber in writing of the consequences under Argentine law that could befall him as legal representative of the Foreign Entities.[10] As such, Rattagan alleged sufficient facts to

[10] Uber argues that 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) and his role as registered legal representative. Although Rattagan's responsibilities as lawyer and legal representative were separate and distinct, he was one and the same person in the eyes of Argentine law. Uber's "mismatch" argument ignores practical reality and attempts to dance on the tip of a pin.

raise a plausible inference that his injury – being arrested and professionally shamed in the press with substantial economic consequence - was foreseeable to Uber.

Uber's answer to this factor is nonsensical: "The fact that some harm may be foreseeable provides no reason to allow the parties to escape the contract and recover in tort." Answering Brief at 55. Uber also proposes that lawyers should ensure their clients do not lie to them by addressing those issues in their engagement agreements. This of course begs the question of how that would protect the lawyer for economic damages caused by a deceitful client and presents an unseemly situation of a lawyer having to assume at the outset of the relationship her client will lie to her. Moreover, the California Supreme Court has limited the power of contracting parties to allocate liabilities where parties act with gross negligence. *See City of Santa Barbara v. Superior Court*, 41 Cal.4th 747, 781 (2007). There is no justification for abandoning this limitation for intentional misconduct.

(iii) The Degree of Certainty that the Plaintiff Suffered Injury.

The TAC clearly alleges Rattagan suffered substantial economic loss as a result of Uber's fraudulent concealment [ER-210-214]. These allegations must be accepted as true for purposes of a Rule 12(b)(6) motion to dismiss, and therefore this factor is easily met. Uber's argument contradicts the allegations of the TAC and must be rejected.

(iv) The Closeness of the Connection between the Defendant's Conduct and the Injury Suffered.

Here again, Uber improperly ignores Rattagan's allegations that his economic injury directly resulted from Uber concealing the launch of Uber Rideshare in Buenos Aires. Uber's argument that the police raid, negative media coverage and Rattagan's arrest were superseding, intervening causes is at best, a fact issue inappropriate for resolution on a 12(b)(6) motion. Similarly, Uber's implausibility argument under *Bily v. Arthur Young & Co.*, 3 Cal.4th 370, 379, (1992), *as modified* (Nov. 12, 1992) must be rejected because it relies on facts not alleged in the TAC and presents questions of fact (*Bily* was decided after a 13 week jury trial). The TAC adequately alleges facts establishing that this factor weighs in favor of imposing a duty.

(v) The Moral Blame Attached to Defendant's Conduct.

Uber avoids this factor altogether with misdirection. The moral blame at issue here is not launching Rideshare despite warnings not to from the authorities. As alleged in the TAC (ER-2017-210), the moral blame here is intentionally concealing material facts from one's lawyer for the client's sole benefit knowing that the lawyer may be exposed to economic injury, especially where disclosure could have enabled the lawyer to protect himself. This factor also weighs in favor of imposing a duty.

(vi) The Policy of Preventing Future Harm.

Uber contends that because there are no reported cases of an attorney bringing

similar claims, future harm will not be prevented by imposing a duty under these circumstances. This argument makes no sense. Of course, future harm will be prevented if clients are held accountable for the harm that befalls their attorney as a result of their concealing facts material to the representation. This factor weighs in favor of imposing a duty.

Accordingly, a review of the *J'Aire* factors compels the conclusion that Rattagan and Uber were in a "Special Relationship" as defined under California law.

C. RATTAGAN'S ARGUMENTS ON APPEAL WERE NOT WAIVED AND SHOULD BE CONSIDERED BY THE COURT ON THE MERITS.

1. Rattagan Did Not Waive His Arguments Regarding the Economic Loss Rule

Using its "pigs hunting for truffles" metaphor, Uber essentially argues that Rattagan should be deemed to have waived the nuanced arguments made in this appeal because he did not make the precise arguments to the district court below. Answering Brief at 27-37. Uber's argument does not persuade.

Parties are not limited to the precise arguments they made below. *Thompson v. Runnels*, 705 F.3d 1089, 1098 (9th Cir. 2013). "[I]t is claims that are deemed waived or forfeited, not arguments." *United States v. Pallares-Galan*, 359 F.3d 1088, 1095 (9th Cir. 2004). Rattagan should not be precluded from bolstering his argument below with alternative arguments on the same issue on appeal, even though he did not present these exact arguments in the district court. *Id.* at 1095*;*

Smith v. Arthur Andersen LLP, 421 F.3d 989, 998 (9th Cir. 2005).

Uber's argument that Rattagan waived his argument regarding the special relationship exception because he only raised it at the motion to dismiss hearing especially strains credulity. If points are sufficiently raised at oral argument, they are preserved for appeal. *United States. v. Bonds*, 608 F.3d 495, 502 (9th Cir. 2010). Whether the district court actually ruled on the argument is not controlling; the proper analysis is whether the district court could have ruled on the argument. *See Western Watersheds Project v. U.S. Dept. of the Interior*, 677 F.3d 922, 925 (9th Cir. 2012).

As the Answering Brief shows, Rattagan explicitly raised the special relationship exception at the hearing on the motion to dismiss and cited applicable caselaw. This was hardly a "cryptic allusion." *Greisen v. Hanken*, 925 F.3d 1097, 1115 & n.6 (9th Cir. 2019).

Even if the Court determines that any of Rattagan's arguments were not sufficiently raised in the district court, the Court should exercise its discretion and consider them, especially given the important policy issue concerns and the split of authority regarding the application of the special relationship exception to parties in contractual privity. The Court may consider arguments raised for the first time on appeal where "the issue presented is a pure question of law and the opposing party will suffer no prejudice as to the result of the failure to raise the issue in the trial

court." *Engquist v. Oregon Dept. of Ag.*, 478 F.3d 985, 996, n.5 (9th Cir. 2007). The issues presented by this appeal are purely legal ones. They all directly challenge the district court's application of the economic loss rule in a more nuanced and expanded manner. And considering the standard of review here is *de novo* and the issues are purely legal, Uber cannot reasonably argue that it has been prejudiced.

Respectfully submitted,

Dated: May 19, 2021

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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