Supreme Court of California
Jorge E. Navarrete, Clerk and Executive Officer of the Court
Electronically RECEIVED on 7/11/2022 at 2:32:26 PM

Supreme Court of California
Jorge E. Navarrete, Clerk and Executive Officer of the Court
Electronically FILED on 7/11/2022 by M. Alfaro, Deputy Clerk

No. S272113

**IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA**

MICHAEL R. RATTAGAN,

Plaintiff and Appellant,

v.

UBER TECHNOLOGIES, INC.,

Defendant and Respondent.

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

OPENING BRIEF ON THE MERITS

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

GREINES, MARTIN, STEIN & RICHLAND LLP
*Cynthia E. Tobisman, SBN 197983
ctobisman@gmsr.com
Alana H. Rotter, SBN 236666
arotter@gmsr.com
Jeffrey E. Raskin, SBN 223608
jraskin@gmsr.com
Laura G. Lim, SBN 319125
llim@gmsr.com
5900 Wilshire Boulevard, 12th Floor
Los Angeles, California 90036
(310) 859-7811 / Fax (310) 276-5261

Attorneys for Petitioner MICHAEL R. RATTAGAN

TABLE OF CONTENTS

PAGE

ISSUES PRESENTED 9

INTRODUCTION 9

STATEMENT OF THE FACTS AND CASE 11

A. Uber Hires Michael Rattagan To Provide Legal Services Related To Its Potential Launch In Argentina. 11

B. Uber Launches Its Platform In Argentina In An Unlawful Manner. 12

C. Uber's Concealed Actions Inflict Harm On Mr. Rattagan. 13

D. Relevant District Court Proceedings. 15

E. The Parties' Arguments To The Ninth Circuit, And The Ensuing Certification. 15

ARGUMENT 17

I. This Court Has Recognized That The Economic Loss Rule Does Not Bar Fraudulent Inducement Claims, Or Fraudulent Performance Claims Based On Misrepresentations That Expose The Plaintiff To Certain Types Of Liability. 18

A. The economic loss rule is a common-law doctrine whose contours are shaped by public policy considerations. 18

B. The Court has repeatedly recognized that the economic loss rule does not bar fraudulent inducement claims. 20

TABLE OF CONTENTS

PAGE

C. The Court has held that claims for fraudulent misrepresentations in the *performance* of a contract are exempt from the rule, at least where the fraud exposed the plaintiff to certain types of potential liability. 21

1. *Independent duty:* The *Robinson Helicopter* Court recognized that fraud in the performance arises from a duty that is independent of any contract duties. 23

2. *Public policy:* The Court also reasoned that public policy "strongly favors" permitting fraud liability. 25

II. Just Like Fraudulent Misrepresentation Claims, Fraudulent Concealment Claims Are Exempt From The Economic Loss Rule. 27

A. *Robinson Helicopter*'s two-part analysis applies equally to fraud claims based on intentional concealment. 28

1. Fraudulent concealment violates a duty that is independent of the contract. 28

2. Permitting fraudulent concealment claims furthers California's public policies of deterring fraud and promoting socially useful business practices. 31

B. There is no principled basis to distinguish between fraudulent affirmative misrepresentations and fraudulent concealment. 36

1. Statutorily and in case law, fraudulent concealment is on par with fraudulent affirmative misrepresentations. 36

TABLE OF CONTENTS

PAGE

2. None of the federal district court decisions treating fraudulent concealment claims differently than fraudulent misrepresentation claims articulate *any* principled basis for doing so. 37

3. Contrary to Uber's argument, treating misrepresentation and concealment claims equally will not "swallow" the economic loss rule. 41

4. Applying different rules to fraud by concealment and fraud by misrepresentation would be unworkable. 44

III. The Court Also Should Clarify That The Economic Loss Rule's Fraud Exemption Is Not Contingent On The Fraud Having Exposed The Plaintiff To Liability For Damages Other Than Economic Loss. 45

1. *Robinson Helicopter* had no occasion to consider fraud that risks purely economic losses to the plaintiff, and so necessarily did not rule out an exemption to the economic loss rule in that circumstance. 47

2. *Robinson Helicopter*'s rationale compels concluding that plaintiffs can pursue a claim for fraud that exposed them to economic losses. 47

3. The economic loss rule should not be applied to bar the tort recovery—including punitive damages—that the Legislature has prescribed for fraud. 50

CONCLUSION 54

CERTIFICATION 56

TABLE OF CONTENTS

PAGE

PROOF OF SERVICE 57

SERVICE LIST 58

TABLE OF AUTHORITIES

PAGE(S)

Cases

Aas v. Superior Court
(2000) 24 Cal.4th 627 — 42

Anderson v. Apple Inc.
(N.D.Cal. 2020) 500 F.Supp.3d 993 — 31

Anderson v. Ford Motor Co.
(2022) 74 Cal.App.5th 946 — 21

Applied Equipment Corp. v. Litton Saudi Arabia Ltd.
(1994) 7 Cal.4th 503 — 51

B.B. v. County of Los Angeles
(2020) 10 Cal.5th 1 — 39

Baker v. Superior Court
(1983) 150 Cal.App.3d 140 — 21

Bermel v. BlueRadios, Inc.
(Colo. 2019) 440 P.3d 1150 — 53

Cansino v. Bank of America
(2014) 224 Cal.App.4th 1462 — 42

Carillo v. BMW of North America, LLC
(C.D.Cal. Mar. 25, 2020, No. CV 19-8702 DSF (GJSx))
2020 WL 12028895 — 31, 40

Diamond Multimedia Systems, Inc. v. Superior Court
(1999) 19 Cal.4th 1036 — 26

Erlich v. Menezes
(1999) 21 Cal.4th 543 — 20, 24, 40

General Acc. Fire & Life Assur. Corp. v. Industrial Acc. Comm.
(1925) 196 Cal. 179 — 37

Goldstein v. General Motors LLC
(S.D.Cal. 2021) 517 F.Supp.3d 1076 — 38

Harris v. Atlantic Richfield Co.
(1993) 14 Cal.App.4th 70 — 20

TABLE OF AUTHORITIES

PAGE(S)

In re Ford Motor Co. DPS6 Powershift Transmission Products Liability Litigation
(C.D.Cal. 2020) 483 F.Supp.3d 838 — 38

Jimenez v. Superior Court
(2002) 29 Cal.4th 473 — 51

Kuchta v. Allied Builders Corp.
(1971) 21 Cal.App.3d 541 — 21

Las Palmas Associates v. Las Palmas Center Associates
(1991) 235 Cal.App.3d 1220 — 20, 21

Lazar v. Superior Court
(1996) 12 Cal.4th 631 — 20, 21, 30, 43, 52, 53

Lovejoy v. AT&T Corp.
(2001) 92 Cal.App.4th 85 — 37

NuCal Foods, Inc. v. Quality Egg LLC
(E.D.Cal. 2013) 918 F.Supp.2d 1023 — 31, 40

Oasis West Realty, LLC v. Goldman
(2011) 51 Cal.4th 811 — 23, 30

Outboard Marine Corp. v. Superior Court
(1975) 52 Cal.App.3d 30 — 37

People v. Vangelder
(2013) 58 Cal.4th 1 — 53

Persson v. Smart Inventions, Inc.
(2005) 125 Cal.App.4th 1141 — 42

Riverisland Cold Storage Inc. v. Fresno-Madera Production Credit Assn.
(2013) 55 Cal.4th 1169 — 34

Robinson Helicopter Co., Inc. v. Dana Corp.
(2004) 34 Cal.4th 979 — passim

Rosen v. State Farm General Ins. Co.
(2003) 30 Cal.4th 1070 — 42

Seely v. White Motor Co.
(1965) 63 Cal.2d 9 — 41

TABLE OF AUTHORITIES

PAGE(S)

Sheen v. Wells Fargo Bank, N.A.
(2022) 12 Cal.5th 905 — 19, 20

Stevens v. Superior Court
(1986) 180 Cal.App.3d 605 — 36

Walker v. Signal Companies, Inc.
(1978) 84 Cal.App.3d 982 — 21

Statutes

Civ. Code, § 1572 — 21, 29, 36

Civ. Code, § 1709 — 24, 29, 32, 36, 49, 51, 53

Civ. Code, § 1710 — 24, 29, 32, 36

Civ. Code, § 3294 — 36

Civ. Code, § 3294, subd. (a) — 29, 32, 49, 53

Civ. Code, § 3294, subd. (c)(3) — 29, 49, 53

Other Authorities

CACI 1900 — 30

CACI 1901 — 30, 40, 42

ISSUES PRESENTED

The Ninth Circuit certified, and the Court accepted, this question: Under California law, are claims for fraudulent concealment exempted from the economic loss rule?

INTRODUCTION

The common law economic loss rule seeks to avoid imposing tort damages where there is really nothing more than a contract breach. Developed in the strict-products-liability context, the rule provides that when a party's contract expectations are frustrated, his remedy is in contract alone because this honors the parties' allocation of risk as to their foreseeable damages in forming their contract.

This Court held in *Robinson Helicopter Co., Inc. v. Dana Corp*. (2004) 34 Cal.4th 979, that a defendant's fraudulent *misrepresentations* in performing a contract were outside the economic loss rule. But the *Robinson Helicopter* Court expressly refrained from addressing fraudulent *concealment*, finding it unnecessary to resolving the case. (*Id.* at p. 991.)

The Court should now take the small—and logical—step of holding that there's no principled basis for distinguishing between fraud committed via misrepresentation and fraud committed via concealment. Fraud is fraud. Deception is deception. Both forms of fraud far exceed a mere breach of contract or anything that the parties foreseeably allocated as risks.

Indeed, fraudulent concealment checks all the boxes that *Robinson Helicopter* identified in holding that fraudulent misrepresentations are exempt from the economic loss rule:

- Fraudulent concealment is just as much of an intentional tort, independent of a breach of contract, as fraudulent misrepresentation; indeed, both forms of fraud have substantively identical elements;
- Fraudulent concealment is just as corrosive to California's public policies and business climate as fraud perpetrated by fraudulent misrepresentation;
- Fraudulent concealment is just as outside of the reasonable expectations of contracting parties as fraudulent misrepresentation. Fraud in either form is not one of the risks that people allocate in a contract, since people do not assume that their contracting partner will deceive them.
- Barring fraudulent concealment claims would not advance the purpose of the economic loss rule. To the contrary, it would reward defiance of contract norms.

The Court should also go one step further: *Robinson Helicopter* contains language that seems to limit its holding to fraud that potentially exposed the plaintiff to governmental discipline or risked physical harm. Although that limitation reflects the particular facts in *Robinson Helicopter*, the Court's *rationale* was in no way contingent on any particular type of

harm. Rather, the Court's analysis rested on the elements that are present for *every* fraud claim and on public policies that apply to *every* fraud claim.

The Court should therefore answer the certified question, "yes," and hold that:

(1) Fraudulent concealment is just as exempt from the economic loss rule as fraudulent misrepresentation; and

(2) This fraud exemption is not limited only to fraud that exposed the plaintiff to the particular type of harm or to the types of liability specifically at issue in *Robinson Helicopter*.

STATEMENT OF THE FACTS AND CASE

Because the certified question arises from an order dismissing a complaint, we recite the facts as alleged in the operative complaint.

A. Uber Hires Michael Rattagan To Provide Legal Services Related To Its Potential Launch In Argentina.

Michael Rattagan is a corporate attorney in Argentina. (Ninth Circuit Order Certifying Question to the California Supreme Court ["Certification Order"], Docket No. 41, at p. 2.) [1]

Two of Uber Technologies, Inc.'s Dutch subsidiaries, acting as Uber's agents, hired Mr. Rattagan to provide legal services

---

[1] All record citations are to the Ninth Circuit docket and Excerpts of Record.

related to Uber's potential launch and new subsidiary formation in Argentina. (2-ER-191, 198-199 ¶¶ 1, 32.) The Dutch subsidiaries also hired Mr. Rattagan to be their legal representative before the Office of Corporations in Buenos Aires. (2-ER-191, fn. 1.)

B. Uber Launches Its Platform In Argentina In An Unlawful Manner.

Unbeknownst to Mr. Rattagan, Uber's government compliance team thereafter met with Buenos Aires transportation department officials regarding Uber's Argentina launch. (2-ER-192, 208-210 ¶¶ 4, 63.) The government officials rejected Uber's theory that Uber was a mere technology company that was not subject to transportation regulations. (*Ibid.*) The officials warned Uber that its launch would be unlawful unless Uber first fully complied with all applicable Buenos Aires transportation regulations. (*Ibid.*)

Even without the officials' warnings, Uber was on notice that there would be substantial adverse consequences to launching its operation without the government's imprimatur; Uber's adverse experiences in other locations, including Rio de Janeiro, Sao Paulo, and Colombia, amply showed Uber that taking the position that it was just a tech company wouldn't work. (2-ER-192, 207-208 ¶¶ 4, 60-61.) Indeed, based on its prior launch experiences in numerous other cities around the world, Uber knew that launching in cities with such "regulatory

challenges" would mean immediate and adverse reactions. (2-ER-192-193 ¶ 6.)

Yet Uber chose to go ahead with launching its Argentina operation despite the government's warning, despite not having completed corporate formation or tax registration, and despite knowing that it was Mr. Rattagan who would be held liable for Uber's violations of Argentina law. (2-ER-192-193, 206 ¶¶ 6, 55.)

Uber concealed *all* of this from Mr. Rattagan. It concealed its pre-launch meetings with governmental officials—and their warnings. (2-ER-192, 210-211 ¶¶ 4, 65.) It concealed its plan to launch regardless of the backlash it knew Mr. Rattagan would personally suffer. (2-ER-206-207 ¶¶ 56, 59.) Indeed, Uber did not give Mr. Rattagan any advance notice that it was launching, despite its knowledge (1) that the government would consider the launch a non-compliant and tax-evasive transportation business, and (2) that Mr. Rattagan, as the Dutch entities' legal representative, could be subject to *personal* tax and criminal liability, and adverse publicity, for Uber's violations of Argentine law. (2-ER-206-207 ¶¶ 55, 59.)

C. Uber's Concealed Actions Inflict Harm On Mr. Rattagan.

The hostile response to Uber's launch was swift. Thousands of local taxi drivers stormed local government transportation offices. (2-ER-193 ¶ 7.) Within days, law enforcement authorities targeted Mr. Rattagan and his colleagues as Uber's only public faces in Argentina, just as Uber

knew they would. Law enforcement authorities raided the homes and offices of both Mr. Rattagan and his business colleagues. (2-ER-192-193, 211-212 ¶¶ 5, 7, 69.) The raids were related to an initial charge that Mr. Rattagan, as an Uber representative, was illegally using public space for commercial gain without a permit. (2-ER-211-212 ¶ 69.) And things got worse from there.

Thousands of protestors surrounded Mr. Rattagan's office. (2-ER-193, 211 ¶¶ 7, 66.) His firm was vilified in the media and subjected to scorn and ridicule at social and professional gatherings. (*Ibid.*)

Mr. Rattagan asked Uber's Dutch entities to remove him as their legal representative. (2-ER-211¶ 68.) But it took more than two months for the entities to finally update their documents to remove Mr. Rattagan—causing him substantial damage in the meantime. (*Ibid.*)

Mr. Rattagan was later charged with aggravated tax evasion for his perceived involvement with the launch. (2-ER-213-214 ¶¶ 74-75, 77-78.) The investigation against him received significant media attention. (2-ER-211-212 ¶ 69.)

Mr. Rattagan was interrogated by the Buenos Aires City Prosecutor about the preparation, launch, and operations of Uber in Argentina—subjects he knew nothing about. (2-ER-213-214 ¶ 78.) He had his mugshot and fingerprints taken—thirteen separate times so that original prints could be sent to each interested government agency. (*Ibid.*)

The Argentine court banned Mr. Rattagan from traveling abroad. (2-ER-214 ¶ 80.) The City Prosecutor announced that Mr. Rattagan would be detained and imprisoned if he attempted to leave the country—an announcement that went viral, thus exacerbating his severe embarrassment and anguish, as well as further damaging his reputation as an honest, competent international business lawyer. (2-ER-214 ¶¶ 80-81.)

D. Relevant District Court Proceedings.

Mr. Rattagan sued Uber for negligence, breach of the implied covenant of good faith and fair dealing, fraudulent concealment, and aiding and abetting fraudulent concealment. (Certification Order at pp. 3-4.)

Uber moved to dismiss the complaint. (2-ER-157.)

The district court granted Uber's motion with prejudice, concluding that the statute of limitations barred Mr. Rattagan's negligence and breach of the implied covenant claims, and that the economic loss rule foreclosed Mr. Rattagan's fraudulent concealment claims. (Certification Order at p. 4.)

E. The Parties' Arguments To The Ninth Circuit, And The Ensuing Certification.

Mr. Rattagan appealed to the Ninth Circuit, challenging the district court's conclusion that the economic loss rule foreclosed his fraudulent concealment claims. (Certification Order at p. 4.) As relevant here, he argued that the economic loss rule does not apply to fraudulent concealment claims. (See Opening Brief on Appeal, Docket No. 14, at pp. 31-38.)

Uber disagreed. (See Appellee's Brief on Appeal, Docket No. 18, at pp. 38-42.)

The Ninth Circuit found that there were no California Supreme Court or appellate court decisions on point, and that the federal district courts were divided. (Certification Order at p. 4.) Thus, the Ninth Circuit certified the question to this Court, which agreed to answer it. (*Ibid.*; Supreme Court Order Granting Request for Certification, Docket No. 43.)

ARGUMENT

The certified question is whether the economic loss rule bars claims for fraudulent concealment. To answer that question:

1. We discuss this Court's case law on the availability of fraud damages in cases where there is also an alleged breach of contract—case law establishing (a) fraudulent inducement is exempt from the economic loss rule, and (b) so is fraudulent misrepresentation in performance of a contract, at least under some circumstances.

2. We then demonstrate that there is no principled reason to treat fraud by concealment any differently than fraud by misrepresentation. Fraudulent concealment claims therefore must be exempt from the economic loss rule in all instances where fraud by misrepresentation is exempt from the rule.

3. Finally, we address an apparent limitation of this Court's holding in *Robinson Helicopter*. In that case, the Court noted that the fraud at issue posed a safety risk and exposed the plaintiff to potential governmental discipline. (34 Cal.4th at pp. 991 & fn. 7.) Consistent with that factual context, *Robinson Helicopter* said that its holding that fraudulent misrepresentations are exempt from the economic loss rule was limited to fraud that risked "expos[ing] a plaintiff to liability for personal damages independent of the plaintiff's economic loss." (34 Cal.4th at p. 993.) As we will show, however, *Robinson Helicopter*'s *rationale* for exempting fraud is not contingent on the particular type of potential damage resulting from the fraud.

Specifically, *Robinson Helicopter* reasoned (a) that fraud is an intentional tort arising from a duty that is independent of a contract breach, and (b) that public policy strongly favors permitting fraud claims because fraud is not a "'socially useful business practice[],'" fraud carries an "'extra measure of blameworthiness,'" and although a contract remedy assumes that contracting parties can negotiate certain risks, parties to a contract "'should not be expected to anticipate fraud and dishonesty in every transaction.'" (*Id.* at pp. 991-993.) None of that reasoning turns on what type of harm the fraud risked causing. Fraud is equally intentional, equally based on a duty that is independent of the contract, and equally corrosive to California's business climate and beyond the reasonable expectations of contracting parties, whether it risks causing only economic loss to the plaintiff, or other types of harm. There is no tenable basis for limiting the fraud exemption based on the type of harm that the fraud risked inflicting.

I. This Court Has Recognized That The Economic Loss Rule Does Not Bar Fraudulent Inducement Claims, Or Fraudulent Performance Claims Based On Misrepresentations That Expose The Plaintiff To Certain Types Of Liability.

A. The economic loss rule is a common-law doctrine whose contours are shaped by public policy considerations.

The economic loss rule is a common-law doctrine designed to "'prevent the law of contract and the law of tort from dissolving one into the other.'" (*Robinson Helicopter*, *supra*, 34 Cal.4th at p.

988, citation omitted.) Under the rule, a plaintiff who suffers purely economic losses is limited to recovering in contract, as opposed to tort, "unless he can demonstrate harm above and beyond a broken contractual promise." (*Ibid*.)

This Court has rejected a broad construction of the rule that would bar tort claims in every case involving only economic damages. (*Id.* at p. 991, fn. 7; see also *Sheen v. Wells Fargo Bank, N.A.* (2022) 12 Cal.5th 905, 952 (conc. opn. of Liu, J.) ["today's opinion does not state a broad rule against recovery for pure economic loss in tort in the context of a contractual relationship"].)

Instead, this Court has recognized that there are many situations where a party to a contract can sue in tort and can recover tort damages. (See, e.g., *Robinson Helicopter, supra*, 34 Cal.4th at pp. 989-991.) Those contexts include (1) breach of the covenant of good faith and fair dealing in insurance contracts; (2) wrongful discharge in violation of fundamental policy; and (3) as relevant here, various types of fraud. (*Id.* at pp. 990 [fraudulent inducement of contract], 993 [fraud in the performance by affirmative misrepresentations that expose plaintiff to liability for personal damages].)

Factors governing whether a tort claim is exempt from the economic loss rule include whether the underlying conduct was intentional, whether the duty giving rise to tort liability is "completely independent of the contract," and whether barring or permitting the claim better advances California public policy.

(See, e.g., *id.* at pp. 989-993; see also *Sheen*, *supra*, 12 Cal.5th at p. 952 (conc. opn. of Liu, J. ["courts should not invoke the [economic loss] rule without considering the basis for its application"].)

B. The Court has repeatedly recognized that the economic loss rule does not bar fraudulent inducement claims.

The Court has recognized that tort damages are available for fraudulently *inducing* a contract. (*Erlich v. Menezes* (1999) 21 Cal.4th 543, 551-552 [instances where "[t]ort damages have been permitted in contract cases" include "where the contract was fraudulently induced," citing *Las Palmas Associates v. Las Palmas Center Associates* (1991) 235 Cal.App.3d 1220, 1238-1239]; *Robinson Helicopter*, *supra*, 34 Cal.4th at pp. 989-990 [quoting *Erlich*, and citing *Harris v. Atlantic Richfield Co.* (1993) 14 Cal.App.4th 70, 78]; *Lazar v. Superior Court* (1996) 12 Cal.4th 631, 645 [permitting tort damages for fraudulent inducement of contract].)

Thus, the Court has recognized that the mere fact that a plaintiff and defendant have a contractual relationship does not insulate the defendant from tort liability for having fraudulently induced the contract. Rather, the plaintiff may seek damages for fraud in the inducement of the contract *and* damages for breach of that same contract. (*Lazar*, *supra*, 12 Cal.4th at pp. 638-639, 645, 648-649 ["fraudulent inducement of contract—as the very phrase suggests—is not a context where the 'traditional separation of tort and contract law' obtains," citation omitted];

see also Civ. Code, § 1572 [a party can commit fraud by intentionally inducing another party to enter into a contract].) The Court has explained that "contract remedies alone do not address the full range of policy objectives underlying the action for fraudulent inducement of contract," including that such conduct must be punished and deterred. (*Lazar*, *supra*, 12 Cal.4th at p. 646.) The Courts of Appeal uniformly agree on the availability of tort remedies for such fraud, albeit without mentioning the economic loss rule.[2]

C. The Court has held that claims for fraudulent misrepresentations in the *performance* of a contract are exempt from the rule, at least where the fraud exposed the plaintiff to certain types of potential liability.

The Court has also held, in *Robinson Helicopter, supra*, 34 Cal.4th 979, that plaintiffs can pursue at least some claims for fraud committed during the *performance* of a contract.

[2] See, e.g., *Las Palmas, supra*, 235 Cal.App.3d at pp. 1238-1239 (the law recognizes the adverse effect fraud has on commercial transactions and permits punitive damages where a defendant fraudulently induces the plaintiff to enter into a contract); *Baker v. Superior Court* (1983) 150 Cal.App.3d 140, 146 (plaintiff could recover for both fraudulent inducement and breach of same contract, since fraudulent inducement and breach of contract involve "separate obligations and also involved separate acts at different points in time"); *Kuchta v. Allied Builders Corp.* (1971) 21 Cal.App.3d 541, 549 (punitive damages available for plaintiff's fraud in the inducement of contract claim, which is separate from plaintiff's breach of contract claim); *Walker v. Signal Companies, Inc.* (1978) 84 Cal.App.3d 982, 996 (same); *Anderson v. Ford Motor Co.* (2022) 74 Cal.App.5th 946, 963-969 (same).

In *Robinson Helicopter*, a contract required a manufacturer to supply a helicopter company with clutches that conformed to certain specifications. (*Id.* at pp. 985-986.) When the manufacturer provided non-compliant clutches and false conformance certificates, the helicopter company sued for both breach of contract and fraud. (*Id.* at pp. 986-987.) The Court held that the plaintiff could pursue a fraud claim based on the knowingly false conformance certificates, because the economic loss rules does not bar a fraud claim based on "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 pp. 989-991, 993.)

The Court identified two bases for its holding that the economic loss rule did not bar the plaintiff's claim for fraudulent misrepresentation during performance of a contract. First, the fraud was intentional and violated a duty independent of the contract—i.e., it violated a duty that arises from principles of tort law, rather than from the terms of the parties' contract. (*Id.* at pp. 990-991.) Second, permitting fraud claims better advances California public policy than banning them. (*Id.* at pp. 991-993.)

We discuss each point in more detail below.

1. *Independent duty:* The *Robinson Helicopter* Court recognized that fraud in the performance arises from a duty that is independent of any contract duties.

In *Robinson Helicopter*, the Court reasoned that the defendant manufacturer's conduct met the elements of a fraud cause of action: The manufacturer's false certificates of conformance were affirmative misrepresentations that plaintiff "relied on to its detriment," and but for the misrepresentations, the plaintiff would not have used the nonconforming clutches or incurred the costs of investigating the cause of the faulty clutches. (34 Cal.4th at pp. 990-991.) "Accordingly, [the manufacturer's] tortious conduct was separate from the breach itself, which involved [the manufacturer's] provision of the nonconforming clutches." (*Id.* at p. 991.)

Indeed, as the Court noted, fraud and breach of contract have distinct "elements" and implicate distinct duties—the hallmark of claims that are *outside* of the economic loss rule (*id.* at pp. 990-991):

A contract claim is premised on a failure to fulfill a contractual promise. (See *Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 821.) The claim requires proof of (1) the contract; (2) plaintiff's performance or excuse for nonperformance; (3) defendant's breach; and (4) resulting damage. (*Ibid.*) The conduct is only wrongful by virtue of the contractual terms themselves.

By contrast, fraud is explicitly prohibited by the Legislature as conduct that is inherently wrongful. (E.g., Civ. Code, §§ 1709 ["One who willfully deceives another with intent to induce him to alter his position to his injury or risk, is liable for any damage which he thereby suffers"], 1710 [deceit includes affirmative misrepresentations and concealments].) Fraud claims require proof of "(1) a misrepresentation (false representation, concealment, or nondisclosure); (2) knowledge or falsity (or scienter); (3) intent to defraud, i.e., to induce reliance; (4) justifiable reliance; and (5) resulting damage." (*Robinson Helicopter*, *supra*, 34 Cal.4th at p. 990, citation omitted.)

Fraud's *intentionality* requirement informed the *Robinson Helicopter* Court's independent-duty conclusion:

In addressing the plaintiff's independent-duty argument, the Court recounted an earlier decision's description of when courts have allowed tort damages in contract cases, including the observation that "'[f]ocusing on *intentional conduct* gives substance to the proposition that a breach of contract is tortious only when some independent duty arising from tort law is violated. [Citation.] If every *negligent* breach of a contract gives rise to tort damages the limitation would be meaningless . . . .'" (*Robinson Helicopter, supra*, 34 Cal.4th at pp. 989-990, italics added, quoting *Erlich, supra*, 21 Cal.4th at pp. 553-554.)

Immediately following that legal synopsis, the Court summarized the jury's findings that the defendant "(1) made false representations of material fact, (2) *knowingly* misrepresented *or*

concealed material facts with *intent* to defraud, (3) and by clear and convincing evidence was guilty of oppression, fraud, or malice in its *intentional* misrepresentations and concealments." (34 Cal.4th at p. 990, italics added.) And, in a footnote one paragraph later, the Court observed that "affirmative acts of fraud and misrepresentation raise[] different policy concerns than those raised by negligence or strict liability claims." (*Id.* at p. 991, fn. 7.)[3]

2. *Public policy:* The Court also reasoned that public policy "strongly favors" permitting fraud liability.

In addition to the "independent" tort analysis, *Robinson Helicopter* also recognized that "California's public policy also strongly favors" holding that fraud in the performance of the contract is exempt from the economic loss rule. (34 Cal.4th at pp. 991-992.)

For instance, the Court observed:

---

[3] The Court also noted an *additional* fact that—for reasons not made clear—the Court thought contributed to the independence of the fraud: The Court stated, "[i]n addition, [the manufacturer's] provision of faulty clutches exposed [the plaintiff] to liability for personal damages if a helicopter crashed and to disciplinary action by the FAA." (34 Cal.4th at p. 991.) "Thus," the Court concluded, the fraud "is a tort independent of the breach." (*Ibid.*; see also *id.* at p. 991, fn. 7 [noting that the fraud "risked physical harm to persons"].) As discussed later in this brief, the economic loss rule's application to fraud should not turn on whether there was a safety risk or threatened disciplinary action. (See § III, *post*.)

● Tort remedies are appropriate “‘“when the conduct in question is so clear in its deviation from socially useful business practices that the effect of enforcing such tort duties will be . . . to aid rather than discourage commerce.”’” (*Id.* at p. 992, ellipsis in *Robinson Helicopter*.)

● Fraud “cannot be considered a ‘“socially useful business practice[].”’” (*Ibid.*) To the contrary, the socially useful practice is *deterring* fraud by permitting valid fraud actions. (*Ibid.* [fraud actions ‘“advance[] the public interest in punishing intentional misrepresentations and deterring such misrepresentations in the future”’].) Put another way, California ‘“has a legitimate and compelling interest in preserving a business climate free of fraud and deceptive practices.”’ (*Id.* at p. 992, quoting *Diamond Multimedia Systems, Inc. v. Superior Court* (1999) 19 Cal.4th 1036, 1064.)

● Barring fraud claims would “encourag[e] fraudulent conduct at the expense of an innocent party. No public policy supports such an outcome.” (*Id.* at p. 993.)

● Contract law’s function is to “enforce only such obligations as each party voluntarily assumed, and to give him only such benefits as he expected to receive . . . .” (*Id.* at pp. 992-993.) “No rational party would enter into a contract anticipating that they are or will be lied to.” (*Id.* at p. 993.) Parties may be presumed to allocate ‘“risks relating to negligent product design or manufacture,”’ but they ‘“cannot, and should not, be expected to anticipate fraud and dishonesty in every transaction.”’ (*Ibid.*;

see also Rest.3d Torts, Liability For Economic Harm, § 9, com. a [while "[t]he economic-loss rule is meant to protect contractual allocations of risk against interference by the law of tort," fraud claims "rarely cause such interference because parties to a contract do not usually treat the chance that they are lying to each other as a risk for their contract to allocate"].)

● "A decision to breach a contract and then acknowledge it has different consequences than a decision to defraud, and we fail to see how [fraudulent] actions could be deemed 'commercially desirable.'" (34 Cal.4th at p. 993, fn. 8.)

● "The economic loss rule is designed to limit liability in commercial activities that negligently or inadvertently go awry, not to reward malefactors who affirmatively misrepresent and put people at risk." (*Id.* at p. 991, fn. 7.)

II. Just Like Fraudulent Misrepresentation Claims, Fraudulent Concealment Claims Are Exempt From The Economic Loss Rule.

There is no principled reason to distinguish between fraudulent misrepresentations (which are exempt from the economic loss rule) and fraudulent concealment (which remains an open question in this Court). Both forms of fraud are a tort that is independent of a contract breach. Both involve essentially the same elements. Both are intentional wrongdoing. Both implicate the same policy concerns identified in *Robinson Helicopter*. Accordingly, the Court should hold that in contexts where a fraud claim is exempt from the economic loss rule (fraudulent inducement, and fraud in the performance on which a

plaintiff relies and which exposes a plaintiff to liability for personal damages independent of the plaintiff's economic loss), a fraud claim based on concealment is just as exempt as a fraud claim based on misrepresentations.

A. ***Robinson Helicopter*'s two-part analysis applies equally to fraud claims based on intentional concealment.**

As discussed, *Robinson Helicopter* used a two-part analysis to decide whether a fraud-in-the-performance claim based on misrepresentations was exempt from the economic loss rule: It considered (1) whether fraud was a tort independent of the contract breach, and (2) what result best furthers California public policy. (34 Cal.4th at pp. 989-993.) Both factors lead to the same conclusion in the context of fraudulent concealment: The economic loss rule does not bar such claims. Indeed, as the *Robinson Helicopter* dissent pointed out, the "logical conclusion" of the majority decision is that "deceit by nondisclosure is a tort independent of any breach, just like deceit by misrepresentation." (34 Cal.4th at p. 1001 (dis. opn. of Werdegar, J.).) That is the correct result here.

1. **Fraudulent concealment violates a duty that is independent of the contract.**

In *Robinson Helicopter*, the Court held that the defendant's fraudulent misrepresentations during the performance of the contract (by falsely certifying that parts conformed to required standards) were "separate from the breach itself" (providing nonconforming parts). (34 Cal.4th at pp. 990-991.)

Fraudulent concealment is just as “separate” from a contract breach. The Legislature has imposed an obligation not to “willfully deceive[] another with intent to induce him to alter his position to his injury or risk”; one who does so “is liable for any damage which [the victim] thereby suffers.” (Civ. Code, § 1709.) “Deceit” for these purposes *includes* concealment. The Legislature defined “deceit” to include “[t]he suppression of a fact, by one who is bound to disclose it, or who gives information of other facts which are likely to mislead for want of communication of that fact . . . .” (Civ. Code, § 1710 [defining deceit also to include “[t]he assertion, as a fact, of that which is not true”]; see also *id.* § 1572 [“fraud” may be committed by “suggestion,” “positive assertion,” or “suppression of that which is true,” i.e., concealment].) The Legislature has also authorized punitive damages for fraud, including fraud by “conceal[ing] a material fact” with an intent to cause injury. (*Id.* § 3294, subds. (a), (c)(3).)

Thus, a fraudulent concealment claim is *not* based on a breach of contractual obligations. It is instead based on breach of an independent duty dictated by statutory and common-law principles that one cannot tortiously deceive another person, and for which the Legislature has prescribed tort damages.

Reflecting the distinct nature of fraudulent concealment (as compared to breach of contract), the *elements* of a fraudulent concealment claim are essentially the same as the elements of the fraudulent misrepresentation claim that *Robinson Helicopter*

found to be independent of a contract breach. Both forms of fraud require a misrepresentation; knowledge of falsity/scienter; an intent to defraud/induce reliance; justifiable reliance; and resulting damages. (*Robinson Helicopter, supra*, 34 Cal.4th at p. 990 [describing elements of fraud based on "a misrepresentation (false representation, concealment, or nondisclosure)"].) [4] That is true of fraud in the performance, and of fraudulent inducement (which *Robinson Helicopter* treated as already exempt, see § I.B, *ante*). (See *Lazar, supra*, 12 Cal.4th at p. 638 [promissory fraud, including fraudulent inducement, "is a subspecies of the action for fraud and deceit"].)

Proving fraud requires conduct that is distinct from a breach-of-contract claim. Indeed, a contract claim requires proving only the existence of a contract; plaintiff's performance or excuse for nonperformance; defendant's failure to perform; and resulting damages. (*Oasis West, supra*, 51 Cal.4th at p. 821.)

Moreover, fraudulent concealment requires *intentionality*, the same factor that *Robinson Helicopter* identified as "'giv[ing] substance to the proposition that a breach of contract is tortious only when some independent duty arising from tort law is

---

[4] Fraud by misrepresentation requires that the plaintiff reasonably relied on the representation. (E.g., CACI 1900.) Fraud by concealment requires that the plaintiff reasonably would have behaved differently if the concealed information had been disclosed. (E.g., CACI 1901.) Both are slightly different articulations of the same concept: reliance.

violated.'" (*Robinson Helicopter, supra*, 34 Cal.4th at p. 990.)[5] In this respect, too, fraudulent concealment—whether in inducing the contract or in its performance—is every bit as "independent" of a contract breach as is fraud by affirmative misrepresentation.

2. Permitting fraudulent concealment claims furthers California's public policies of deterring fraud and promoting socially useful business practices.

Likewise, the public policies that *Robinson Helicopter* held "strongly favor[ed]" its holding (34 Cal.4th at p. 991) apply just as much to fraud by concealment as they do to fraud by misrepresentation.

Violation of a social policy that merits imposition of tort remedies. *Robinson Helicopter* recognized that contract breaches are punished through contract law, "except when the actions that constitute the breach violate a social policy that

---

[5] Federal district courts permitting fraudulent concealment claims have relied on this intentionality factor. (See, e.g., *Anderson v. Apple Inc.* (N.D.Cal. 2020) 500 F.Supp.3d 993, 1021-1022 [*Robinson Helicopter*'s "reasoning compels finding that recovery for fraudulent omissions is not barred by the economic loss rule" and "[a] fraudulent omission, additionally, is just as intentional as an affirmatively misleading misrepresentation"]; *NuCal Foods, Inc. v. Quality Egg LLC* (E.D.Cal. 2013) 918 F.Supp.2d 1023, 1031 [*Robinson Helicopter* "strongly suggests no meaningful distinction exists between intentional concealment and intentional misrepresentation; rather, the material distinction is whether the tortious conduct was intentional or negligent"]; *Carillo v. BMW of North America, LLC* (C.D.Cal. Mar. 25, 2020, No. CV 19-8702 DSF (GJSx)) 2020 WL 12028895, * 7 [same].)

merits the imposition of tort remedies." (*Id.* at pp. 991-992, quotation marks omitted.) The Court noted that fraud violates many of those social policies, and therefore warrants imposing tort damages, including out-of-pocket and punitive damages. (*Id.* at p. 992; Civ. Code, §§ 1709, 1710, 3294, subd. (a).)

Punishing and deterring in order to preserve a business climate free from fraud. In *Robinson Helicopter*, the Court observed that California has an interest in "'preserving a business climate free of fraud and deceptive practices.'" (34 Cal.4th at pp. 991-992.) Permitting tort liability for fraudulent concealment advances that interest just as much as permitting tort liability for fraudulent misrepresentations. Both types of fraud undermine the "'legitimate and compelling'" goal of a fraud-free business climate. (*Id.* at p. 992.) As *Robinson Helicopter* observed, fraudulent conduct is not a "socially useful business practice" to be protected; to the contrary, it is a detrimental practice to be discouraged. (*Ibid.* ["'a contract is not a license allowing one party to cheat or defraud the other'"].)

Exactly as with fraudulent misrepresentation, eliminating liability for fraudulent concealment would have the perverse effect of *rewarding* dishonest dealings. It would lead to *more* fraud, not less—thereby "encouraging fraudulent conduct at the expense of an innocent party." (*Id.* at p. 993.) This is not a "'commercially desirable'" result. (*Id.* at pp. 992-993 & fn. 8.) A fraudster should not be able to avoid liability just because he conceals information instead of affirmatively lying about it.

Expecting honesty in business relationships. In *Robinson Helicopter*, the Court observed that the rationale for limiting parties to a breach-of-contract remedy is that the parties have "negotiate[d] the risk of loss occasioned by a breach." (*Id.* at p. 992.) But parties can only be expected to negotiate *foreseeable* risks, such as negligence (i.e., unintentional wrongdoing). The risk of being defrauded by one's contracting partner is not a foreseeable risk, regardless of whether the fraud is committed by misrepresentation or by concealment.

The present case provides an example: In negotiating a business contract, no party should have to anticipate—and allocate risk based on—the possibility that he might be subjected to *criminal charges* because the other party will fraudulently conceal material information with the intention of inflicting harm. That is not the sort of risk of loss that parties to a business deal can or should be expected to have to calculate. A contrary result would be absurd. Is a party supposed to have to negotiate up front for more consideration because of a concern that the other party might commit such fraud? Cleary not.

Such a lack of trust is impracticable in forming relationships, not something that parties should have to factor into their allocation of risks when negotiating a contract. As the *Robinson Helicopter* Court recognized, parties "'cannot, and should not, be expected to anticipate fraud and dishonesty in every transaction.'" (*Id.* at p. 993; see also Rest.3d Torts, *supra*, § 9, com. a [rational parties "regard honesty as an assumed

backdrop to their negotiations"]; *Riverisland Cold Storage Inc. v. Fresno-Madera Production Credit Assn.* (2013) 55 Cal.4th 1169, 1182 ["[F]raud undermines the essential validity of the parties' agreement. When fraud is proven, it cannot be maintained that the parties freely entered into an agreement reflecting a meeting of the minds"].)

When someone enters into a contract, he should not expect that his contracting partner is *lying* to him or will lie to him in the future. By the same token, he should not be expected to anticipate that his contracting partner will intentionally conceal material information from him with the intent to cause harm. Just like fraudulent misrepresentations, fraudulent concealment must be deterred so as to promote business stability. (See Rest.3d Torts, *supra*, § 9, com. a [liability for fraud "helps to protect the integrity of the contractual process"].)

Giving plaintiffs an opportunity to limit harm to them. *Robinson Helicopter* noted that if the defendant had "been truthful" about not performing the contract according to specifications, the plaintiff could have refused to accept nonconforming products, "thereby avoiding the damages it later suffered" when it had to replace them. (34 Cal.4th at p. 993.) The defendant's fraud "denied [the plaintiff] this opportunity." (*Ibid.*) This is why "[a] decision to breach a contract and then acknowledge it has different consequences than a decision to defraud," and fraud is not "'commercially desirable.'" (*Id.* at p. 993, fn. 8.)

Again, that is equally true for fraud by intentional concealment: A defendant's act of hiding material information prevents the plaintiff from making informed decisions.

For example, if Uber had told Mr. Rattagan that it was going to launch in a way it knew would be treated as unlawful, Mr. Rattagan could have taken steps to protect himself, including by withdrawing as Uber's lawyer and legal representative *before* the launch. But by concealing its plans and the warnings it had received from city transportation officials, Uber deprived Mr. Rattagan of the opportunity to avoid injury, including the damages he incurred from the adverse publicity following the law enforcement raids, and criminal charges for aggravated tax evasion for his perceived involvement in the launch. (See Statement of the Facts and Case, § C, *ante*.)

The bottom line: The same policy considerations that animated the Court's decision in *Robinson Helicopter* apply equally to fraud by concealment or misrepresentation. Both types of fraud are intentional conduct that undermine business norms and stem from duties independent of contract terms. And, treating the economic loss rule as a bar would reward malefactors while depriving the innocent party of a complete remedy for wrongs he cannot be expected to anticipate as part of his contract. Public policy thus compels concluding that a contract does not insulate defendants from tort liability for fraud, whether by concealment or affirmative misrepresentation.

B. There is no principled basis to distinguish between fraudulent affirmative misrepresentations and fraudulent concealment.

Although *Robinson Helicopter*'s rationale for permitting fraudulent misrepresentation claims applies equally to fraudulent concealment, some trial courts have concluded—and Uber has argued in this case—that although fraudulent misrepresentation claims are permitted, fraudulent concealment claims are barred. There is no principled basis for that distinction.

1. Statutorily and in case law, fraudulent concealment is on par with fraudulent affirmative misrepresentations.

There is no reason to distinguish between fraud by concealment and fraud by misrepresentation.

As discussed, the Civil Code puts the two on equal footing: The statutory definitions of fraud and deceit expressly include both types of fraud. (Civ. Code, §§ 1709, 1710, 3294.)

Courts, too, have long equated the two means of fraud. For example:

- "[I]ntentional concealment of a material fact is an alternative form of fraud and deceit *equivalent to direct affirmative misrepresentation*." (*Stevens v. Superior Court* (1986) 180 Cal.App.3d 605, 608-609 [citing Civ. Code, §§ 1572, 1709, 1710, italics added; "[c]ase law and secondary authorities

recognize this fundamental principle”]; see *Lovejoy v. AT&T Corp.* (2001) 92 Cal.App.4th 85, 97 [quoting *Stevens*].)

- “The legal effect in each instance amounts to the same thing, fraud.” (*General Acc. Fire & Life Assur. Corp. v. Industrial Acc. Comm.* (1925) 196 Cal. 179, 190.)

- “‘Where failure to disclose a material fact is calculated to induce a false belief, the distinction between concealment and affirmative misrepresentation is tenuous. Both are fraudulent. An active concealment has the same force and effect as a representation which is positive in form.’” (*Outboard Marine Corp. v. Superior Court* (1975) 52 Cal.App.3d 30, 37.)

2. None of the federal district court decisions treating fraudulent concealment claims differently than fraudulent misrepresentation claims articulate *any* principled basis for doing so.

As the Ninth Circuit noted, some federal district courts have treated fraudulent misrepresentations and fraudulent concealment differently under the economic loss rule, while others treat them the same. (See Certification Order at p. 6.)

But of the district courts that treat the two types of fraud differently, none has articulated any *principled* basis for doing so. They have not attempted to distinguish the two types of fraud in terms of *Robinson Helicopter*’s independent-duty analysis or public-policy analysis. Nor have they attempted to square their conclusion with California authorities that recognize that there is

no substantive difference between fraud by concealment and fraud by affirmative misrepresentation.

Rather, those district courts have simply observed that *Robinson Helicopter*'s holding did not extend to intentional concealment-based fraud claims—and ruled *on that basis alone* that fraudulent concealment claims are barred.[6] That's it. Those district court cases contain no deeper explanation or other rationale on the concealment-versus-affirmative-misrepresentation point.

And, indeed, that's what the district court did here, and Uber has urged the same rationale in the Ninth Circuit. (1-ER-14-15 [Order Granting Motion to Dismiss pp. 13-14] [district

---

[6] See, e.g., *Goldstein v. General Motors LLC* (S.D.Cal. 2021) 517 F.Supp.3d 1076, 1093 ("The narrowly tailored exception to the economic loss rule articulated in *Robinson Helicopter* does not extend to fraudulent omission claims. [*Robinson Helicopter*] at 993, 22 Cal.Rptr.3d 352, 102 P.3d 268 (holding the 'narrow' exception to the economic loss rule is 'limited to a defendant's *affirmative misrepresentations* on which a plaintiff relies and which expose a plaintiff to liability for personal damages.' (emphasis added)). Plaintiffs have stated that this is a fraud in the omission case, and therefore the exception based on intentional misrepresentations does not apply"); *In re Ford Motor Co. DPS6 Powershift Transmission Products Liability Litigation* (C.D.Cal. 2020) 483 F.Supp.3d 838, 849 ("*Robinson Helicopter* provides that a claim for fraud by *affirmative misrepresentation* may avoid the economic loss rule, but it does not establish any other exception, such as for a claim for fraud by omission, as Plaintiff argues for in this case. The Court therefore rejects Plaintiff's broad interpretation of the *Robinson Helicopter* exception," italics in original).

court citing *Robinson Helicopter* for the proposition that "to get around the economic loss doctrine, the fraud must be based on an affirmative misrepresentation" and finding that Mr. Rattagan's claims are based on fraudulent *concealment*]; Appellee's Brief on Appeal, Docket No. 18, at p. 39 [arguing that *Robinson Helicopter* requires affirmative misrepresentations and that the complaint alleges concealment].)

The district court's/Uber's position does not withstand scrutiny. *Robinson Helicopter* expressly *declined to decide* whether the plaintiff's claim for fraudulent concealment was outside the economic loss rule. (34 Cal.4th at pp. 991 ["we need not address the issue of whether Dana's intentional concealment constitutes an independent tort"], 994, fn. 9 ["(w)e only address the Court of Appeal's application of the economic loss rule to Dana's affirmative misrepresentation and do not decide any other issues"].) That is *not* a holding that *only* claims based on affirmative misrepresentations survive the economic loss rule, or that fraudulent concealment claims are barred. The Court simply did not reach the issue. (*B.B. v. County of Los Angeles* (2020) 10 Cal.5th 1, 11 ["As we have repeatedly observed, '"cases are not authority for propositions not considered"'"].)

Moreover, *Robinson Helicopter*'s analysis concerned only the availability of a fraud in the *performance* claim. *Robinson Helicopter* recited as well-settled law that fraudulent *inducement* claims are exempt from the economic loss rule, without any indication whatsoever that it meant only fraudulent inducement

based on affirmative misrepresentations. (34 Cal.4th at pp. 989-990.)

The better-reasoned district court orders recognize that *Robinson Helicopter*'s analysis "strongly suggests no meaningful distinction exists between intentional concealment and intentional misrepresentation," and permit concealment claims to proceed. (*NuCal Foods*, *supra*, 918 F. Supp. 2d at p. 1031; see also, e.g., *Carrillo*, *supra*, 2020 WL 12028895, at *7 [quoting *NuCal Foods*, and concluding that "fraudulent omission claims are likely exempt from the economic loss rule"].)

Instead, the better-reasoned district court orders recognize that the "material distinction" stressed by *Robinson Helicopter* is "whether the tortious conduct was intentional or negligent"; intentional misrepresentation or omission is outside of the economic loss rule. (*NuCal Foods*, *supra*, 918 F. Supp. 2d at p. 1031; see also, e.g., *Carillo*, *supra*, 2020 WL 12028895, at *7 [quoting *Erlich*, *supra*, 21 Cal.4th at p. 552 for the proposition that "tort damages are allowed where the claim 'arises from conduct which is both intentional and intended to harm'"]; see pp. 24-25, 30-31, *ante* [discussing *Robinson Helicopter*'s intentionality analysis].) Of course, fraud is, by definition, intentional, whether by concealment or fraud by affirmative misrepresentation. (*Robinson Helicopter*, *supra*, 34 Cal.4th at p. 990 [fraud elements include "a misrepresentation (false representation, *concealment*, or nondisclosure)," "knowledge of falsity (or scienter)," and "intent to defraud"]; CACI No. 1901

[fraud by concealment requires proving that defendant "intended to deceive [plaintiff] by concealing the fact[s]"].)

3. Contrary to Uber's argument, treating misrepresentation and concealment claims equally will not "swallow" the economic loss rule.

Uber's Ninth Circuit brief made one other argument: That exempting fraudulent concealment claims from the economic loss rule would "swallow" the rule because "[n]early any breach of contract could be restated as a 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." (Appellee's Brief on Appeal at p. 40.) That is wrong, for at least two reasons.

First, the economic loss rule would have an ongoing role even if *all* fraud claims were exempt from it. For example, strict products-liability and negligence claims—which is where the doctrine originated—would still be barred, given that such claims do not involve intentional malfeasance, and that they "raise[] different policy concerns" than intentional fraud and misrepresentation. (*Robinson Helicopter*, *supra*, 34 Cal.4th at p. 991, fn. 7 ["the rule's development in the context of product liability claims and its extension to claims for negligent breach of contract were not mere fortuities"; "[t]he economic loss rule is designed to limit liability in commercial activities that negligently or inadvertently go awry"]; see also, e.g., *Seely v. White Motor Co.* (1965) 63 Cal.2d 9 [strict liability claims

barred]; *Aas v. Superior Court* (2000) 24 Cal.4th 627, 640 [negligence claims barred], superseded by statute on another ground as noted in *Rosen v. State Farm General Ins. Co.* (2003) 30 Cal.4th 1070, 1079-1080.)

Fraud is distinct from these areas, regardless whether it is by concealment or affirmative misrepresentation; indeed, fraud is always *intentional* wrongdoing. (*Robinson Helicopter*, *supra*, 34 Cal.4th at p. 990.) Recognizing that fraudulent concealment claims should be treated the same as fraudulent affirmative misrepresentation claims would leave untouched all of the other applications of the economic loss rule.

Second, it isn't true that nearly every contract breach can be reframed as fraudulent concealment. Fraudulent concealment isn't just a failure to disclose information. It requires *intentional* failure to disclose information and an *intent* to deceive. (CACI 1901; see also *Robinson Helicopter*, *supra*, 34 Cal.4th at p. 990 [describing elements of fraud by "false representation, concealment or nondisclosure"].) Those elements must be pled with particularity—*and proven*—for a fraudulent concealment claim, just as with an affirmative misrepresentation claim. (E.g., *Robinson Helicopter, supra*, 34 Cal.4th at p. 993 ["'fraud must be pled specifically'"]; *Cansino v. Bank of America* (2014) 224 Cal.App.4th 1462, 1472 [particularity requirement "applies equally to a cause of action for fraud and deceit based on concealment"]; *Persson v. Smart Inventions, Inc.* (2005) 125 Cal.App.4th 1141, 1168 [fraudulent concealment "is not

actionable absent all the elements of fraud"]; see also *Lazar*, *supra*, 12 Cal.4th at p. 645 [fraud's particularity pleading requirement reduces concern that permitting fraud claims will create potential tort recovery in every employment discharge case].)

When the elements of fraud can be proven, they should be punished—and future fraud deterred—through tort liability, including punitive damages when appropriate. There's no justification for immunizing and encouraging fraud simply because the parties happen to be in a contractual relationship. Intentional fraud is *outside* of the risks allocated by the contract terms. (See §I.C.2, *ante*.) It is a tort and should be punished as such, regardless of whether the parties are in a contractual relationship.

Uber's Ninth Circuit brief is also wrong in arguing that permitting fraudulent concealment claims would "threaten the fundamental principle that, *in the absence of affirmative fraud*," courts should enforce only voluntarily-assumed obligations and award only anticipated contract benefits. (Appellee's Brief on Appeal at p. 40, italics added.) Uber cites *Robinson Helicopter* for this supposed "fundamental principle." (*Ibid.*) But *Robinson Helicopter* did not proclaim any such principle. It did not hold that *only* "affirmative" fraud is exempt from the economic loss rule, or that the rule bars concealment claims. In fact, *Robinson Helicopter* did not comment on concealment claims at all.

And, like all of *Robinson Helicopter*'s reasons for exempting fraudulent affirmative misrepresentation claims, the rationale in the paragraph that Uber cites applies equally to fraudulent concealment claims: *Robinson Helicopter* explained that limiting parties to a contract remedy assumes that the parties can trust each other to keep their word and honor their commitments, but that "'parties cannot, and should not, be expected to anticipate fraud and dishonesty in every transaction.'" (34 Cal.4th at pp. 992-993.) As *Robinson Helicopter* put it, public policy does not support "increas[ing] the certainty in contractual relationships by encouraging fraudulent conduct at the expense of an innocent party." (*Id.* at p. 993.) That is as true for fraudulent concealment as it is for fraudulent misrepresentation.

4. Applying different rules to fraud by concealment and fraud by misrepresentation would be unworkable.

There is another reason not to treat fraudulent concealment claims differently than fraudulent affirmative misrepresentation claims: Any such rule would be unworkable. As the *Robinson Helicopter* dissent pointed out, applying the economic loss rule to concealment-based fraud claims but not affirmative misrepresentation-based fraud claims "may prove untenable and virtually impossible to administer." (34 Cal.4th at p. 1000 (dis. opn. of Werdegar, J.).)

For example, it would be unclear whether true, yet incomplete statements—which may or may not have false implications—constitute a tortious misrepresentation or a

non-tortious nondisclosure. (*Ibid.*) Figuring out which category statements fall into, and thus whether tort liability is permitted or forbidden, would "not be easy for parties seeking to order their affairs, judges obligated to instruct juries, or juries forced to split hairs by such a set of rules." (*Ibid.*) This regime would create uncertainty, gamesmanship, additional litigation, and the risk of inconsistent determinations. The Court should reject a rule with that effect, particularly given that, as described above, there is no reasoned basis for distinguishing between fraudulent affirmative misrepresentation and fraudulent concealment.

III. The Court Also Should Clarify That The Economic Loss Rule's Fraud Exemption Is Not Contingent On The Fraud Having Exposed The Plaintiff To Liability For Damages Other Than Economic Loss.

In addition to holding that fraudulent concealment claims must be treated identically to fraudulent misrepresentation claims for purposes of the economic loss rule, the Court should clarify that fraud in either form is exempt from the economic loss rule regardless of the type of potential harm or liability the fraud exposed the plaintiff to. This clarification is necessary because *Robinson Helicopter*'s penultimate paragraph states that its holding exempting affirmative misrepresentations from the economic loss rule is limited to misrepresentations "which expose a plaintiff to liability for personal damages independent of the plaintiff's economic loss." (34 Cal.4th at p. 993.)

Robinson Helicopter did not specify what it meant by "personal damages independent of the plaintiff's economic loss."

But earlier in the opinion, the Court defined economic loss as "damages for inadequate value, cost or repair and replacement of the defective products or consequent loss of profits—without any claim for personal injury or damages to other property," and the Court mentioned that the defendant's fraud had put people at risk and had exposed the plaintiff to damages liability and governmental disciplinary action, if a helicopter crashed. (*Id.* at pp. 984, 988-989, 991 & fn. 7, quotation marks omitted.)

In light of those references, *Robinson Helicopter*'s statement about the scope of its holding could be read as *only* exempting fraud in the performance claims where the fraud posed risks of harm similar to the potential harm in *Robinson Helicopter*, or as suggesting that claims are exempt only if the fraud created some risk other than the plaintiff suffering an economic loss. Any such limitation isn't well-founded. Although the alleged fraud here exposed Mr. Rattagan to potential damage beyond his own economic loss (including potential criminal liability), in answering the broader question framed by the Ninth Circuit, the Court should clarify that fraud is exempt from the economic loss rule regardless of the type of harm that it risks inflicting.

1. ***Robinson Helicopter* had no occasion to consider fraud that risks purely economic losses to the plaintiff, and so necessarily did not rule out an exemption to the economic loss rule in that circumstance.**

Robinson Helicopter had no occasion to consider whether fraud in the performance that risks only economic harm to the plaintiff is exempt from the economic loss rule, because the fraud in *Robinson Helicopter* risked other types of potential harm: The Court noted that the nonconforming clutches jeopardized safe operation of helicopters, put people at risk, and exposed the plaintiff to FAA disciplinary action. (34 Cal.4th at p. 991 & fn. 7.) Because *Robinson Helicopter* did not consider fraud that risked purely economic loss to the plaintiff, its holding cannot be interpreted as *rejecting* an economic-loss-rule exemption in that situation. Rather, as with the concealment-versus-misrepresentation question, *Robinson Helicopter* simply did not reach the issue.

2. ***Robinson Helicopter*'s rationale compels concluding that plaintiffs can pursue a claim for fraud that exposed them to economic losses.**

Although the Court in *Robinson Helicopter* said it was only addressing the viability of fraud claims for conduct that created a risk of "liability for personal damages independent of the plaintiff's economic loss," the Court's *reasoning* for allowing the fraud claim is not specific to non-economic harm. Rather, it applies equally to fraud that risks causing any type of damage.

As discussed (§§I.C.1-2, *ante*), the Court concluded that the defendant's fraud was "separate from the breach itself," and that permitting tort damages for fraud advances the public interest in "preserving a business climate free of fraud and deceptive practices." (*Robinson Helicopter*, *supra*, 34 Cal.4th at pp. 990-993.) Both points are equally true regardless whether the fraud created a risk of personal injury/property damage/disciplinary action, or purely economic harm to the plaintiff.

Independent tort. As *Robinson Helicopter* recognized, the "elements" of a fraud claim are what render the duty independent of a contract claim—the knowing misrepresentation with an intent to defraud, justifiable reliance, and "resulting damage." (*Id.* at p. 990.) Nothing in that definition of the tort depends on a risk of personal injury/property damage/disciplinary action. A fraud claim therefore arises from an independent tort duty regardless of the specific type of harm it risked inflicting.

Indeed, *Robinson Helicopter* stated that the defendant's "tortious conduct was separate from the breach itself" immediately after describing how the conduct satisfied the elements of a fraud claim, without reference to the particular type of potential harm at issue. (*Id.* at p. 991.) Only *after* stating that the "tortious conduct was separate from the breach" did *Robinson Helicopter* note: "*In addition*, [the defendant's] provision of faulty clutches exposed [plaintiff] to liability for personal damages if a helicopter crashed and to disciplinary action by the FAA. Thus, [the defendant's] fraud is a tort

independent of the breach." (*Ibid.*, italics added.) It thus appears that, at most, the Court treated potential liability as an *additional* fact indicating that the fraud was independent; it was not a required element.

Public policy. Fraud is also just as destructive to commerce and business norms whether it creates a risk of purely economic loss, or of personal injury/property damage/disciplinary action. The Legislature has implicitly recognized this by allowing tort damages—including punitive damages—for all fraud, without any limitation based on the *nature* of the potential or actual harm. (Civ. Code, §§ 1709 ["One who willfully deceives another with intent to induce him to alter his position to his injury or risk, is liable for any damage which he thereby suffers"], 3294, subds. (a), (c)(3) [punitive damages for fraud that "depriv[es] a person of property or legal rights *or otherwise caus[es] injury*," italics added].)

As *Robinson Helicopter* noted, tort damages for fraud are available "[b]ecause of the extra measure of blameworthiness inhering in fraud, and because in fraud cases we are not concerned about the need for predictability about the cost of contractual relationships." (34 Cal.4th at p. 992, quotation marks omitted.)

That is equally true whether the potential harm is purely economic, or of a different nature. Either way, fraud upends the "mini-universe" contracting parties create in which they "trust[] the other's willingness to keep his word and honor his

commitments.” (*Id.* at p. 992.) Either way, fraud “cannot be considered a socially useful business practice.” (*Ibid.*, quotation marks omitted.) Either way, allowing plaintiffs to pursue a fraud action aids California’s “legitimate and compelling interest in preserving a business climate free of fraud and deceptive practices.” (*Ibid.*, quotation marks omitted.)

Moreover, *not one* of the many points in *Robinson Helicopter*’s section beginning “California’s public policy also strongly favors this holding” is specific to fraud that risks personal injury/property damage/disciplinary action. (See *id.* at pp. 991-993.) All of the public policy reasons that *Robinson Helicopter* identified for exempting fraud claims from the economic loss rule (see §I.C.2, *ante*) apply equally to fraud that only risked economic loss.

Accordingly, this Court should clarify that fraud claims are exempt from the economic loss rule regardless of whether the fraud posed the same types of potential harm as were at issue in *Robinson Helicopter*.

3. The economic loss rule should not be applied to bar the tort recovery—including punitive damages—that the Legislature has prescribed for fraud.

On its own, *Robinson Helicopter*’s rationale warrants a rule that fraud is exempt from the economic loss rule, without any limitation based on the nature of the potential harm from the fraud. But there is also another consideration supporting that

result: The Legislature itself has prescribed tort recovery, including punitive damages, for fraud.

The economic loss rule is a *common-law* doctrine—i.e., it is judicially-created. (*Jimenez v. Superior Court* (2002) 29 Cal.4th 473, 481-483 [describing evolution of rule].) Where the economic loss rule applies, it limits a plaintiff to contract damages—i.e., to the reasonably foreseeable, benefit-of-the bargain damages. (*Ibid.*; *Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503, 515.)

By contrast, the *Legislature* has expressly provided more extensive remedies for fraud: A fraud victim is entitled to recover for "any damage which he thereby suffers." (Civ. Code, § 1709 ["One who willfully deceives another with intent to induce him to alter his position to his injury or risk, is liable for any damage which he thereby suffers"].) Fraud perpetrators are also subject to liability for punitive damages. (Civ. Code, § 3924, subds. (a), (c)(3) [authorizing punitive damages "[i]n an action for the breach of an obligation not arising from contract," and defining "fraud" for punitive damages purposes as "an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury"].) That is far broader than a breach-of-contract remedy. (See *Applied Equipment*, *supra*, 7 Cal.4th at pp. 515-516 [comparing contract and tort damages].)

In singling out fraud as warranting both punitive damages and all compensatory damages needed to make the plaintiff whole, the Legislature did not split hairs about the type of harm that the fraud risked causing. Rather, the Legislature determined that fraud—whatever its form and whatever the resulting damages—is so caustic and contrary to California public policy that it must be discouraged through the fullest range of compensatory and punitive damages.

This legislative judgment is consistent with *Robinson Helicopter*'s lengthy discussion about how fraud seriously harms California commerce and violates contract norms. (34 Cal.4th at pp. 992-993; see also *Lazar*, *supra*, 12 Cal.4th at p. 646 [emphasizing "the extra measure of blameworthiness inhering in fraud" and that fraud actions "advance[] the public interest in punishing intentional misrepresentations and in deterring such misrepresentations in the future"].)

The Legislature's determinations regarding the need to discourage fraud and how to do so should not be undermined by a common-law rule that would treat fraud as subject only to contract remedies just because the fraud happens to have exposed the plaintiff to one type of harm as opposed to another. Disregarding the Legislature's policy judgment simply because a given fraud did or didn't risk *certain types* of harm would damage the Legislature's policy determination and encourage more fraud.

Lazar, *supra*, 12 Cal.4th 631 is illustrative. There, this Court rejected an argument that employees are limited to contract damages, and cannot pursue a tort action for fraudulent inducement of the employment contract. The Court explained, "we should be mindful that our Legislature more than a century ago codified the common law cause of action for promissory fraud in inducing a contract, along with actions for promissory fraud and fraud, generally. [Citation.] These statutes provide no express exception for employers and employees." (*Lazar*, *supra*, 12 Cal.4th at p. 644.) Likewise, the fraud statutes do not provide any exception for fraud that risks only economic injury. It is not the judiciary's role to create such exceptions. (See also *People v. Vangelder* (2013) 58 Cal.4th 1, 34 ["It is hornbook law that a 'court's authority to second-guess the legislative determinations of a legislative body is extremely limited'"]; *Bermel v. BlueRadios, Inc.* (Colo. 2019) 440 P.3d 1150, 1157-1158 [Colorado Supreme Court holding economic loss rule does not bar statutory claim for civil theft, and collecting cases for proposition that "to limit or abrogate a clear legislative pronouncement by reason of such judicial policy concerns would offend the separation of powers"].)

The Court should honor the Legislature's clear intention that a fraud perpetrator is liable to his victim for "any damage which he thereby suffers," and subject to punitive damages. (Civ. Code, §§ 1709, 3294, subds. (a), (c)(3).) Fraud—including fraudulent concealment—must be exempt from the judicially-created economic loss rule.

Simply put, the answer to the Ninth Circuit's certified question must be an unqualified "Yes."

CONCLUSION

There is no principled reason to distinguish between fraudulent misrepresentation claims and fraudulent concealment claims when it comes to the economic loss rule. Both types of fraud violate the same tort duty and implicate the same public policy concerns. Thus, at the very least, fraudulent concealment claims should be exempt from the economic loss rule to the same extent that *Robinson Helicopter* exempted claims for fraudulent affirmative misrepresentations.

But more broadly, the Court should clarify that whether fraud claims are exempt from the economic loss rule does not turn on the type of potential harm from the fraud. Fraud is an intentional tort arising from a duty that is independent of the contract, and public policy strongly favors subjecting fraudsters to tort damages, including punitive damages, for their wrongdoing, regardless of the specific type of harm that the fraud risked inflicting. The answer to the certified question therefore is

an unqualified “yes”: Fraudulent concealment claims are exempt from the economic loss rule.

Date: July 11, 2022

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

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

By s/ Cynthia E. Tobisman

Attorneys for Petitioner
MICHAEL R. RATTAGAN

CERTIFICATION

Pursuant to California Rules of Court, rule 8.520 (c)(1), I certify that this **Opening Brief on the Merits** contains 10,203 words, not including the tables of contents and authorities, the caption page, signature blocks, or this Certification page.

Date: July 11, 2022   s/ Cynthia E. Tobisman

PROOF OF SERVICE

State of California, County of Los Angeles

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 5900 Wilshire Boulevard, 12th Floor, Los Angeles, California 90036.

On July 11, 2022, I served the foregoing document described as: **Opening Brief on the Merits** on the parties in this action by serving:

SEE ATTACHED SERVICE LIST

I electronically filed the document(s) with the Clerk of the Court by using the TrueFiling system. Participants in the case who are registered TrueFiling users will be served by the TrueFiling system. Participants in the case who are not registered TrueFiling users will be served by mail or by other means permitted by the court rules.

Executed on July 11, 2022, at Los Angeles, California.

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

Digitally signed by Chris Hsu
Date: 2022.07.11 13:39:15 -07'00'

Chris Hsu

SERVICE LIST

Via Truefiling:

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

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

Attorneys for Defendant and Respondent
UBER TECHNOLOGIES, INC.

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

Supreme Court of California
Jorge E. Navarrete, Clerk and Executive Officer of the Court
Electronically FILED on 7/11/2022 by M. Alfaro, Deputy Clerk

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **RATTAGAN v. UBER TECHNOLOGIES**
Case Number: **S272113**
Lower Court Case Number:

1. At the time of service I was at least 18 years of age and not a party to this legal action.

2. My email address used to e-serve: **ctobisman@gmsr.com**

3. I served by email a copy of the following document(s) indicated below:

Title(s) of papers e-served:

Filing Type	Document Title
BRIEF	Opening Brief on the Merits

Service Recipients:

Person Served	Email Address	Type	Date / Time
Mike Terry STEYER LOWENTHAL BOODROOKAS ALVARES & SMITH LLP	mterry@steyerlaw.com	e-Serve	7/11/2022 2:32:26 PM
Laura Lim Greines, Martin, Stein & Richland LLP 319125	llim@gmsr.com	e-Serve	7/11/2022 2:32:26 PM
Records Unit United States Court of Appeals for the Ninth Circuit	CA09_Records@ca9.uscourts.gov	e-Serve	7/11/2022 2:32:26 PM
Jeffrey Davidson Covington Burling, LLP 248620	jdavidson@cov.com	e-Serve	7/11/2022 2:32:26 PM
Cynthia Tobisman Greines Martin Stein & Richland, LLP 197983	ctobisman@gmsr.com	e-Serve	7/11/2022 2:32:26 PM
Allan Steyer Steyer Lowenthal Boodrookas Alvarez & Smith, LLP 100318	asteyer@steyerlaw.com	e-Serve	7/11/2022 2:32:26 PM
Beth Brinkmann Covington & Burling 129937	bbrinkmann@cov.com	e-Serve	7/11/2022 2:32:26 PM
Lindsey Barnhart Covington & Burling, LLP 294995	LBarnhart@cov.com	e-Serve	7/11/2022 2:32:26 PM
Alana Rotter Greines, Martin, Stein & Richland LLP 236666	arotter@gmsr.com	e-Serve	7/11/2022 2:32:26 PM
Richard Lee	rlee@cov.com	e-	7/11/2022

Covington & Burling LLP 338126		Serve	2:32:26 PM
Martin Anderson Anderson Law Firm 178422	firm@andersonlaw.net	e-Serve	7/11/2022 2:32:26 PM
Andrew August Steyer Lowenthal Boodrookas Alvarez & Smith LLP	aaugust@steyerlaw.com	e-Serve	7/11/2022 2:32:26 PM
Rebecca Nieto Greines Martin Stein & Richland LLP	rnieto@gmsr.com	e-Serve	7/11/2022 2:32:26 PM
Chris Hsu Greines Martin Stein & Richland LLP	chsu@gmsr.com	e-Serve	7/11/2022 2:32:26 PM
Amy Heath Covington & Burling LLP 312516	aheath@cov.com	e-Serve	7/11/2022 2:32:26 PM
Denis Listengourt Covington & Burling LLP	dlistengourt@cov.com	e-Serve	7/11/2022 2:32:26 PM
Clara Shin Covington & Burling LLP 214809	cshin@cov.com	e-Serve	7/11/2022 2:32:26 PM

This proof of service was automatically created, submitted and signed on my behalf through my agreements with TrueFiling and its contents are true to the best of my information, knowledge, and belief.

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

7/11/2022
Date

/s/Chris Hsu
Signature

Tobisman, Cynthia (197983)
Last Name, First Name (PNum)

Greines Martin Stein & Richland LLP
Law Firm