No. S272113

IN THE SUPREME COURT OF CALIFORNIA

MICHAEL R. RATTAGAN,
Petitioner,

vs.

UBER TECHNOLOGIES, INC.,
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

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ISSUE PRESENTED

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

The facts of this case present a narrower question: Under California law, is there an exception from the economic loss rule where claims for fraudulent concealment duplicate breach-of-contract claims?

INTRODUCTION

Contract law facilitates commerce by permitting parties to choose the obligations they will and will not owe to each other, allocate economic risks, and obtain a predictable set of remedies if those obligations are breached. Contract plaintiffs, however, are frequently tempted to allege tort claims in order to create uncertainty and gain leverage, seek additional remedies such as punitive damages, or overcome statute-of-limitations or other substantive problems with their contract claims. To protect contractual expectations, this Court has consistently held that contract plaintiffs must proceed under the law of contract.

The economic loss rule provides that where a relationship is governed by contract, a plaintiff suffering only economic damages may pursue contract claims, but the plaintiff is generally foreclosed from pursuing tort claims such as negligence, conversion, fraud, and the like. Recognizing the economic loss rule's importance, this Court has been careful to carve out only limited exceptions when warranted by specific circumstances: for fraudulent inducement; to protect particularly vulnerable consumers in

insurance bad faith, professional liability, and fiduciary duty actions; and for affirmative misrepresentations that are separable from a breach of contract and that expose the plaintiff to personal liability for injury beyond economic loss. California, like many other states, forecloses tort claims that arise from and merely duplicate a breach-of-contract claim.

In this case, plaintiff Michael Rattagan alleged a contract claim, but because it was barred by the statute of limitations, he restated the exact same conduct as "fraudulent concealment." To permit this re-pleading would severely undercut the economic loss rule and transform many commercial contract claims into tort claims. When this Court created a narrow exception to the economic loss rule in *Robinson Helicopter Co. v. Dana Corp.* (2004) 34 Cal.4th 979, 988, it held that a contract plaintiff could allege a fraud claim only if it (a) identified an affirmative misstatement; (b) that was separate from the alleged breach of contract; and (c) created a risk of personal liability for damages beyond economic loss. These limits were crucial to the Court's finding that the exception it was recognizing would not open the floodgates to tort claims in commercial contract cases. Rattagan's proposed carve-out from the economic loss rule would sweep away all three limitations. The Court should decline to adopt the proposed exception to the economic loss rule for fraudulent concealment claims, especially for fraudulent concealment claims like Rattagan's that merely duplicate breach-of-contract claims.

STATEMENT OF FACTS AND CASE

A. Uber's Operations in Argentina

Uber, like many multi-national enterprises, is organized as a group of separate corporate entities connected through subsidiary and affiliate relationships. Uber Technologies, a Delaware corporation headquartered in California, is the ultimate parent company of the corporate group. (2-ER-194-95 ¶¶ 12, 14-15.) When the Uber platform is launched in a new country, a new Uber affiliate company is sometimes formed to support local operations and achieve the conventional benefits of the corporate form.

In 2013, Uber began preparations to launch the Uber platform in Argentina, including taking steps to form a new Argentine limited liability company.[1] (2-ER-200 ¶¶ 35, 37.) Uber contacted Argentine attorney Michael Rattagan for legal advice on incorporating the local entity. (2-ER-196-97 ¶ 21, 2-ER-200 ¶ 35.)

Under Argentine law, Uber also needed to designate a local resident to act as its "legal representative" for certain ministerial functions and to provide a local address as its "legal domicile." (2-ER-201 ¶¶ 39-42.) Rattagan, who presents himself as "one of

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[1] Rattagan's initial contacts and contracts were with two Dutch Uber subsidiaries. (*See* 2-ER-200-202.) The corporate distinctions between Uber Technologies and the Dutch subsidiaries are critically important for the merits of Rattagan's claims, but because they do not affect the economic loss rule issue before this Court, this brief refers to Uber Technologies and its subsidiaries collectively as "Uber" for the sake of simplicity. In doing so, Uber Technologies expressly preserves and does not waive its arguments related to corporate distinctions.

the top and most renowned business lawyers in Buenos Aires" with "nearly 30 years in practice" (2-ER-194 ¶ 11), agreed to perform these functions in addition to legal work assisting with the Argentine entity's incorporation. (2-ER-201 ¶ 42.) To protect himself from liability in his role as legal representative, Rattagan asked for and obtained an agreement that Uber would indemnify him against "any action, suit or proceeding . . . by reason of the fact that [Rattagan] is or was [its] legal representative." (2-ER-193 ¶ 8; 2-ER-140-42, 150-52 (indemnity letters with Dutch subsidiaries).)

After providing Uber with initial advice on creating an Argentine corporation, the parties' relationship went dormant between 2013 and 2015. (2-ER-202 ¶ 44.) Rattagan alleges that in 2015 he provided Uber with further legal advice related to the Argentine entity's incorporation. (2-ER-202-04 ¶¶ 46-48.) He claims that as a result, he and Uber "were in express and/or implied *contractual* relationships arising from [Uber] and Rattagan's direct attorney-client relationship starting in 2015." (*See* 2-ER-216 ¶ 94 (emphasis added).)

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

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

B. Rattagan's Lawsuit Against Uber

In April 2019, Rattagan sued various Uber entities in federal district court for breach of fiduciary duty, deceit, fraud, intentional infliction of emotional distress, and negligence. (3-ER-446.) After Rattagan's first three complaints were dismissed because, among other things, they included false statements and untenable jurisdictional allegations, Rattagan received grudging permission to file a third amended complaint, even as the district court noted that "[i]t would be obvious to anyone reading the three previous complaints and the proposed Third Amended Complaint that Plaintiff's claims have been inconsistently pled throughout the early stages of this lawsuit." (2-ER-222; *see also* 3-ER 261-63, 340, 446.) The complaint alleges only economic losses such as harm to Rattagan's law practice and reputation. There are no allegations of any actual or potential physical injury.

C. The District Court's Dismissal of the Third Amended Complaint

Rattagan's Third Amended Complaint alleged four claims, including a contract claim of breach of the contractual covenant of good faith and fair dealing, and three tort claims for negligence, fraudulent concealment, and aiding and abetting fraudulent concealment. (*See* 2-ER-214-18 ¶¶ 82-87, 92-102.)

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

Rattagan's contract and fraudulent concealment claims were premised on identical alleged conduct and were described using the same language in the complaint. Rattagan alleged that Uber breached its supposed disclosure duty by failing to alert him

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[2] For the aiding and abetting claim, pleaded in the alternative, Rattagan alleged that Uber's Dutch subsidiaries owed him a duty of disclosure based on their attorney-client relationship with him, and that Uber Technologies had somehow assisted their breach of that duty. (2-ER-217 ¶ 99.)

to its pending launch in Buenos Aires, which Uber allegedly expected would anger local authorities and taxi drivers. (*See, e.g.*, 2-ER-215 ¶ 84 (tort claim of fraudulent concealment alleging that Uber "knowingly and intentionally failed to disclose, concealed and/or suppressed material facts from Rattagan, including . . . [its] plans to launch Uber Ridesharing in Buenos Aires in a manner that it knew would be disruptive and that authorities would deem to be illegal"); *id.* ¶ 95 (contract claim alleging that Uber "breached the implied covenant of good faith and fair dealing by failing to apprise Rattagan of its plans to launch Uber Ridesharing in Buenos Aires in a manner that it knew would be disruptive and that authorities would claim to be illegal").)

Uber moved to dismiss the Third Amended Complaint, and the district court dismissed it with prejudice. (1-ER-18, 2-ER-157-89.)

The district court first ruled that the claims for negligence and breach of the implied contractual covenant of good faith and fair dealing were time-barred. (1-ER-7-13.) Rattagan did not appeal this ruling. (Applt. Br. 3 fn.1.)

The district court found that Rattagan's tort claims of fraudulent concealment and aiding and abetting fraudulent concealment were foreclosed by the economic loss rule. (1-ER-13-16.) The court explained that "the economic loss rule limits a party to a contract 'to recover[ing] in contract for purely economic loss due to disappointed expectations,' rather than in tort, 'unless he can demonstrate harm above and beyond a broken contractual promise.'" (1-ER-13 (quoting *Robinson Helicopter Co. v. Dana Corp.*

(2004) 34 Cal.4th 979, 988).) The district court explained that the rule exists to "prevent every breach of a contract from giving rise to tort liability and prevents the law of contract and the law of tort from dissolving one into the other." (1-ER-13 (internal quotation marks omitted).)

The district court's dismissal of the tort claims relied on this Court's *Robinson Helicopter* decision, which had created a narrow exception for only certain affirmative misrepresentations during the course of contract performance. (1-ER-14-15.) The district court observed that Rattagan did not allege that Uber made any affirmative misrepresentation; his complaint was limited to fraudulent concealment. Because *Robinson Helicopter* by its terms created an exception to the economic loss rule only for affirmative misrepresentation but not concealment, the district court found that the rule foreclosed Rattagan's tort claims. (*Id.*)

The district court found that "[t]he attorney-client relationship is undoubtedly a contractual one." (1-ER-16 (citing *Sky Valley Ltd. P'ship v. ATX Sky Valley, Ltd.* (N.D.Cal. 1993) 150 F.R.D. 648, 651 ("[T]he attorney-client relationship can be formed . . . only by contract, express or implied.")).) The district court then catalogued Rattagan's allegations that a duty to disclose Uber's launch plans arose from the parties' contractual attorney-client relationship. (1-ER-16-17.) The court concluded that the alleged duty was "rooted in the contractual relationship," and that as a result, the economic loss rule foreclosed Rattagan's tort claims of

fraudulent concealment. (1-ER-17.) The district court further observed that Rattagan's fraudulent concealment allegations were identical to his contract allegations. (1-ER-16-17.)

The district court entered judgment for Uber on August 19, 2020. (1-ER-19.)

D. Proceedings in the Ninth Circuit

Rattagan appealed the dismissal of his tort claims of fraudulent concealment and aiding-and-abetting, challenging the district court's application of the economic loss rule. The Ninth Circuit ruled that most of the arguments Rattagan pressed on appeal were waived or legally meritless. (*See* Certification Order at 4.) It concluded that whether the economic loss rule precluded Rattagan's fraudulent concealment claim was a contestable legal question of state law, and certified the question to this Court. (*Id.* at 8-9.)

SUMMARY OF ARGUMENT

California's economic loss rule forecloses tort claims "when they arise from—or are not independent of—the parties' underlying contracts." (*Sheen v. Wells Fargo Bank, N.A.* (2022) 12 Cal.5th 905, 923.) At a minimum, where the alleged tort claim is based on the exact same conduct alleged to have breached the parties' commercial contract, the economic loss rule limits a plaintiff to contract claims and contract remedies. In so doing, the rule protects the boundary between tort and contract, which is essential to secure parties' contractual expectations.

If contract plaintiffs were allowed to recast their allegations as tort claims, contract duties that are clear and specific would turn into nebulous tort obligations, and contract damages

that are bounded and economically rational would turn into unpredictable tort damages. To prevent these results, this Court has repeatedly declined to recognize "tortious breach of contract" theories and has applied the economic loss rule to require that claims arising from contractual relationships be governed by the law of contract rather than the law of tort. In the rare instances this Court has recognized the need for an exception to the economic loss rule, it has proceeded carefully to avoid opening the floodgates to tort claims in contract cases.

Part I below addresses the scope of the economic loss rule and its exceptions. It explains how the economic loss rule creates a boundary between contract law and tort law. One of the primary benefits of contract law is that it allows contracting parties to negotiate and allocate in advance the potential costs and economic risks of a transaction. Contract law protects the parties' negotiated expectations, and contract damages are aimed at returning parties to their expected positions—not improving the position of an aggrieved party or inflicting punishment. By contrast, tort law is aimed at compensating for personal injury and deterring tortious conduct, and includes consequential and punitive damages.

When parties choose to order their relationship through a contract, the economic loss rule generally holds them to that contract. It prevents plaintiffs from recasting contract breaches as torts and from seeking unpredictable tort damages. Without such a rule, the lure of tort damages would lead many contract plaintiffs to plead their claims in tort instead of contract, and

"contract law would drown in a sea of tort." (*See E. River S.S. Corp. v. Transamerica Delaval, Inc.* (1986) 476 U.S. 858, 866.)

To protect the boundary between contract and tort, this Court has refused to allow claims for tortious breach of contract. And when the Court has recognized exceptions to the economic loss rule, it has carefully limited them to three specific exceptions.

First, fraudulent *inducement* claims are not foreclosed by the economic loss rule because such claims necessarily involve tortious conduct that predates the contract, and so is separate from the contract. Moreover, where a contract is procured by fraudulent inducement, the contract does not represent an outcome the parties freely and fairly bargained for, and so the traditional justifications for the economic loss rule do not apply.

Second, certain claims of bad faith denial of insurance coverage, professional liability, and breach of fiduciary duty have been excepted from the economic loss rule because such claims involve contractual relationships that place consumers in a particularly vulnerable position. Because this exception is a major departure from contract law and the economic loss rule, the Court has stressed that attempts to extend it to new claims must be carefully scrutinized.

Third, the Court in *Robinson Helicopter* recognized a narrow exception that allows tort claims of fraud based on (a) affirmative misrepresentations (b) that are separable from an underlying breach of contract and (c) that expose a plaintiff to personal damages beyond economic loss. The Court relied on these three

requirements to ensure that its decision would not "open the floodgates to future litigation." (*See Robinson Helicopter*, 34 Cal.4th at 993.)

This Court's precedents are consistent with similar doctrines applied by other states to foreclose tort claims that duplicate breach-of-contract claims.

Part II explains why there is no basis for creation of a new, broad exception to the economic loss rule for the type of duplicative fraudulent concealment claim at issue here.

None of the rationales for the existing exceptions apply to Rattagan's proposed exception. First, fraudulent concealment during the course of contract *performance*, as alleged by Rattagan here, occurs in the context of a contract that the parties freely accepted and agreed to. It is completely unlike the fraudulent *inducement* exception, which applies to situations where one party did not freely agree to the contract. Second, none of the consumer-protection concerns at issue in the exception for the insurance bad faith, professional liability, or fiduciary duty contexts are at issue in ordinary commercial contract cases like this one. And third, Rattagan misreads the scope of the affirmative misrepresentation exception in *Robinson Helicopter* by focusing exclusively on the presence of an independent tort duty. He ignores the critical limitations on the *Robinson Helicopter* holding, which required fraudulent conduct distinct from the alleged breach of contract, and required a risk of personal damages beyond economic loss. Neither factor exists where, as here, a plaintiff seeks

to allege a tort claim involving exclusively economic harm based on the very same conduct that gives rise to a contract claim.

Rattagan's proposed exception would greatly erode the economic loss rule in a way that the *Robinson Helicopter* exception does not. Virtually any breach of contract could be recast as a fraudulent concealment—for instance as a failure to disclose the party's intent to breach or inability to perform—whereas affirmative misrepresentation cannot be so easily pleaded. Recognizing an exception to the economic loss rule that would allow fraudulent concealment claims for contracting parties would undermine the benefits of contract, including the ability to predict costs and allocate risks in advance.

Rattagan's proposed exception would conflict with more than three decades of this Court's precedent stressing the importance of the boundary between contract claims and tort claims, and repeatedly rejecting attempts to expand tort. For example, this Court has rejected bad-faith tort claims in employment suits and fraud claims in wrongful termination suits. Rattagan makes no real attempt to address the economic loss rule's motivating rationales or to reconcile his proposed rule with this Court's precedents beyond *Robinson Helicopter*. His argument also proves far too much. He asserts that *Robinson Helicopter* found that fraudulent misrepresentation claims are excepted from the economic loss rule because they involve violation of an independent tort duty not to defraud a counterparty, and he reasons that any duty that can be framed as "independent" therefore can lead to a tort claim. This argument would swallow the

law of contract whole, as any tort claim can be stated to involve duties independent of a contract. It also ignores the fact that parties to a contract are, by the act of entering into a contract, choosing the duties that they will accept, to the exclusion of other possible duties.

Last, recognizing an exception for fraudulent concealment in the context of this case, where an attorney sues his client in fraud for allegedly failing to disclose the client's business plans, would undermine the attorney-client relationship, even though corporate attorneys like Rattagan are uniquely capable of protecting themselves through contract.

ARGUMENT

I. The Economic Loss Rule Preserves the Boundary Between Tort and Contract.

Contracts facilitate commerce by allowing parties to select and agree on the obligations they owe to one another. The damages in contract law align with this purpose by allowing an aggrieved contracting party to obtain the position it would have occupied had the contract been complied with, but not to obtain a better position. The economic loss rule protects the realm of contract by barring contracting parties from bringing tort suits against each other for "'purely economic losses,' meaning financial harm unaccompanied by physical or property damage."[3] (*See*

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[3] The economic loss rule in nearly every state, including California, forecloses negligence claims for only economic loss. Although some states distinguish between negligence and intentional torts

Sheen v. Wells Fargo Bank, N.A. (2022) 12 Cal.5th 905, 922 (quoting *In re S. Cal. Gas Leak Cases* (2019) 7 Cal.5th 391, 400).)[4] To prevent "the law of contract and the law of tort from dissolving one into the other" (*Robinson Helicopter*, 34 Cal.4th at 988 (citation omitted)), this Court has been careful to recognize only limited exceptions to the rule, as explained further below. Other states have crafted similar doctrines to bar tort claims that duplicate breach-of-contract claims.

A. The Economic Loss Rule Protects Parties' Expectations, Allocation of Economic Risk, and Reliance Interests.

The law of contract and the law of tort address different scenarios and advance "divergent objectives." (*Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 683.) "Whereas contract actions are created to enforce the intentions of the parties to the agreement, tort law is primarily designed to vindicate social policy." (*Id.* (internal quotation marks omitted).) "The differences between contract and tort give rise to distinctions in assessing damages" as well. (*Applied Equip. Corp. v. Litton Saudi Arabia Ltd.* (1988) 7 Cal.4th 503, 515.) Contract damages "seek to ap-

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(*see infra* page 42 fn.7), the facts of this case do not require the Court to reach such a categorical holding, particularly because the fraudulent concealment claim is completely duplicative of the breach-of-contract claim. (*See infra* Section II.)

[4] A different branch of the economic loss rule addresses whether parties *not* in contractual privity owe a duty of care to avoid causing economic losses. (*See Sheen*, 12 Cal.5th at 922.) That branch of the rule is not at issue here.

proximate the agreed-upon performance" and generally do not encompass consequential or punitive damages; tort damages aim to compensate a victim for injury and to deter wrongful conduct. (*See id.* at 515-16.)

When parties choose to order their relationship via contract, they have the opportunity to consider the economic risks of their transaction and to allocate those risks in advance. They bargain with the knowledge that a breach of their contract ordinarily will not give rise to consequential or punitive damages. Contract law seeks to honor these *ex ante* allocations, and in turn creates "predictability about the cost of contractual relationships [that] plays an important role in our commercial system." (*See Foley*, 47 Cal.3d at 683; *see also Applied Equip.*, 7 Cal.4th at 515 (limitation on contract damages "serves to encourage contractual relations and commercial activity by enabling parties to estimate in advance the financial risks of their enterprise"); Dobbs' Law of Torts § 614 (2022) (discussing rationales for contractual damages principles, including honoring allocation of economic risks).) Parties rely on the stability of contract law in structuring their economic affairs.

The economic loss rule furthers these goals by ensuring that a contracting party whose expectations are disappointed cannot opt out of the contract regime *ex post* by recasting a breach-of-contract claim as a tort claim. This is critical in promoting certainty and facilitating commerce. The wide-open damages that are authorized in tort actions, including punitive damages, are contrary to the purpose of commercial contracts. (*See*

Erlich v. Menezes (1999) 21 Cal.4th 543, 553 (reasons to deny tort recovery in contract cases include "the importance of predictability in assuring commercial stability in contractual dealings" and "the potential for converting every contract breach into a tort, with accompanying punitive damage recovery").)

As this Court recently explained in *Sheen*, allowing contracting parties to transform breach-of-contract claims into tort claims "would disrupt the parties' private ordering, render contracts less reliable as a means of organizing commercial relationships, and stifle the development of contract law." (*Sheen*, 12 Cal.5th at 915.) The Court elaborated:

> Using contract law to govern commercial transactions lets parties and their lawyers know where they stand and what they can expect to follow legally from the words they have written. But if a disappointed buyer has the option of abandoning the contract and suing in tort, the significance of the contract is diminished and the doctrines that protect the integrity of the contractual process are reduced in importance. Parties wrangle over integration clauses to make clear that their obligations are the ones stated in the contract and nothing else; the point of bothering about such matters becomes unclear if a disappointed party can later invoke an outside set of obligations that are imposed on the promisor and defined by the law of tort.

(*Sheen*, 12 Cal.5th at 923 (quoting Ward Farnsworth, *The Economic Loss Rule* (2016) 50 Val. U. L. Rev. 545, 553-554); *see also Tietsworth v. Harley-Davidson, Inc.* (Wis. 2004) 677 N.W.2d 233,

242 ("If a [contracting party] is permitted to sue in tort when a transaction does not work out as expected, that party is in effect rewriting the agreement to obtain a benefit that was not part of the bargain." (alteration in original)).)

To protect these important principles, this Court has repeatedly declined to create broad exceptions to the economic loss rule or to create claims for "tortious" breach of contract. Instead, the Court has permitted only narrow exceptions when warranted by special circumstances not relevant here, such as when a plaintiff is in a uniquely vulnerable relationship with the counterparty.

B. Exceptions to the Economic Loss Rule Are Limited to Three Specific Circumstances.

There are three exceptions to the economic loss rule: (1) claims for fraudulent inducement; (2) narrow policy-driven exceptions to protect consumers' rights in certain uneven contracting relationships; and (3) misrepresentations that are wholly independent of a contract breach and that expose the party to personal liability beyond economic loss.

1. Fraudulent Inducement Claims

The first exception to the economic loss rule is fraudulent inducement claims. When a party is "tricked into contracting," it would of course be unfair to limit that party to a remedy under the fraudulently induced contract. (*Huron Tool & Eng'g Co. v. Precision Consulting Servs., Inc.* (Mich.Ct.App. 1995) 532 N.W.2d 541, 544-545.) This logic does not apply where the plaintiff, such

as Mr. Rattagan, voluntarily enters into a contractual relationship and does not allege that any duties were breached or misstatements made in the pre-contract period.

2. Protecting Vulnerable Consumers

The second exception applies to a narrow set of insurance, fiduciary duty, and professional malpractice claims where this Court has "allowed tort actions to proceed even though they arise from, and are not independent of, a contract." (*See Sheen*, 12 Cal.5th at 929.) This exception protects consumers when they otherwise face structural challenges in enforcing their contractual rights. (*Id.* at 929-932.)

For example, this Court allowed a bad faith tort claim in the insurance context based on its recognition that multiple aspects of the insurance relationship make an insured particularly vulnerable to the insurance company's bad faith denial of claims. First, "the insured cannot turn to the marketplace to find another insurance company willing to pay for the loss already incurred." (*Id.* at 930 (quoting *Foley*, 47 Cal.3d at 692).) Second, insurance companies play a "quasi-public" role because insurance policies are not purchased for profit, but rather for security in the event of an accident or catastrophe. (*Id.*) Third, "the insurer's and insured's interest are financially at odds, because paying a claim directly harms an insurer's bottom line." (*Id.* (internal quotation marks omitted).)

Consumers who contract for certain kinds of professional services face similar structural disadvantages. "In such settings,

professionals generally agree to provide 'careful efforts' in rendering contracted-for services, but most clients do not know enough to protect themselves by inspecting the professional's work or by other independent means." (*Id.* at 933 (internal quotation marks omitted).) As an example, a client depends on an accountant's specialized training and expertise, and so allowing a client to pursue a negligence claim against an accountant "can serve the important purpose of ensuring that professionals render the 'careful efforts' they have contracted to provide." (*See id.*; *see also Congregation of the Passion, Holy Cross Province v. Touche Ross & Co.* (Ill. 1994) 636 N.E.2d 503, 514 (allowing negligence claim against accountant because client must rely on accountant's knowledge and expertise).)

Because this exception represents "a major departure from traditional principles of contract law" (*Sheen*, 12 Cal.5th at 929-930 (quoting *Foley*, 47 Cal.3d at 690)), this Court has "exercise[d] great care in considering whether to extend the exceptional approach taken in those cases to another contract setting" (*Cates Constr., Inc. v. Talbot Partners* (1999) 21 Cal.4th 28, 46 (internal quotation marks omitted))). This scrutiny includes assessing whether an exception to allow tort claims is justified because the consumer contract is "quasi-public" in nature like an insurance policy, the financial interests of the consumer and the other party are at odds, and the claim is closely related to the consumer's vulnerability. (*See Sheen*, 12 Cal.5th at 930-933.)

To preserve the role of contract law, the Court has repeatedly used the economic loss rule or similar reasoning to reject efforts to impose tort duties where plaintiffs reasonably can be expected to protect themselves by contract. (*See id.* at 929-933 (rejecting tort claim against lender for negligently processing loan modification applications); *Jonathan Neil & Assocs., Inc. v. Jones* (2004) 33 Cal.4th 917, 938-940 (insurer's bad faith retroactive billing of excessive premiums); *Erlich*, 21 Cal.4th at 553 (negligent breach of home construction contract); *Cates Constr.*, 21 Cal.4th at 52-56 (breach of implied covenant in construction surety bonds); *Freeman & Mills, Inc. v. Belcher Oil Co.* (1995) 11 Cal.4th 85, 94-95, 103 (bad faith denial of contract); *Applied Equip.*, 7 Cal.4th at 517-518 (tortious interference with party's own contract); *Hunter v. Up-Right, Inc.* (1993) 6 Cal.4th 1174, 1180-1181 (fraud based on misrepresentations made in course of wrongful termination); *Foley*, 47 Cal.3d at 689-693 (tortious breach of the implied covenant in employment contracts).)

3. Misrepresentation Claims Wholly Separate from Alleged Contract Breach And Exposing the Party to Personal Liability Beyond Economic Loss

The third exception to the economic loss rule allows misrepresentation claims that are wholly independent of any breach of the parties' underlying contracts, and when the harm to the plaintiff includes potential liability for personal injury or property damage. (*See Sheen*, 12 Cal.5th at 923-924; *Robinson Helicopter*, 34 Cal.4th at 991 fn.7, 993.) *Robinson Helicopter* establishes the contours of this exception.

In that case, plaintiff Robinson Helicopter manufactured helicopters using "sprag clutches" produced by defendant Dana Corporation. Sprag clutches protect the safety of helicopter passengers by allowing "the rotor blades to continue" if the helicopter loses power and permitting the pilot "to maintain control and land safely." (*Robinson Helicopter*, 34 Cal.4th at 985.) To protect the flying public, aircraft must be manufactured in exact conformance with a "type certificate" approved by the Federal Aviation Administration. (*Id.*) In *Robinson Helicopter*, the defendant secretly changed its manufacturing process, yet "nonetheless continued to provide written certificates to Robinson with each delivery of clutches that the clutches had been manufactured in conformance with Robinson's written specifications." (*Id.* at 986.) Those certifications were false. The clutches proceeded to fail at a nearly ten percent rate, creating a major safety risk. (*Id.*) The FAA required Robinson to replace all non-compliant clutches at significant cost. Robinson sued Dana for breach of contract and negligent and intentional misrepresentation, among other claims, based on Dana's provision of false certificates of conformance, concealment of the change in manufacturing process, and five-month delay in providing the serial numbers of affected clutches. (*Id.* at 986-987, 990.) A jury found that Dana both breached the contract and knowingly misrepresented or concealed material facts with intent to defraud, and awarded compensatory and punitive damages. (*Id.* at 987.)

This Court evaluated whether the economic loss rule foreclosed the jury's verdict on the fraud and concealment claims.

The Court agreed with Robinson as to the affirmative misrepresentation claim based on the false certificates of conformance. (*Id.*) It did not reach a separate theory of fraud based on Dana's alleged concealment of the change in manufacturing process and serial numbers of affected clutches. (*Id.* at 990-991.)

The Court reasoned that Dana's "tortious conduct" in making the affirmative misrepresentation in the certificate "was separate from the breach itself, which involved Dana's provision of the nonconforming clutches," contrary to the terms of the contract. (*Id.* at 991.) Dana did not merely breach the contract by providing the faulty clutches. It *separately* made affirmative misrepresentations to Robinson in its certificates, falsely stating the clutches were compliant with the original specifications, and Robinson relied on the false certificates by accepting the clutches and using them in its helicopters. The conduct constituting the breach of contract and the conduct constituting the fraud were separate and distinct.

The affirmative misrepresentation in the certificates also compounded Robinson's legal risk by causing Robinson to accept and use the bad clutches, which "exposed Robinson to liability for personal damages if a helicopter crashed and to disciplinary action by the FAA," which was liability beyond mere economic loss from a contractual breach. (*Id.*) This was a critical limitation on the scope of the Court's ruling: "Our holding today is 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 (emphasis added).)

That limitation directly relates to the foundational definition of the economic loss rule: the rule forecloses tort claims for purely economic losses that do not involve personal injury or damage to property. (*See, e.g.*, *Seely v. White Motor Co.* (1965) 63 Cal.2d 9, 18-19.) The facts of *Robinson* sit on the economic loss rule's outer boundary. Although Robinson in fact incurred only economic losses, Dana's affirmative misrepresentations risked both personal injury and damage to property, and so exposed Robinson to liability for both. The Court found these facts crucial in distinguishing *Robinson* from cases that applied the economic loss rule to foreclose tort claims in construction defect cases "where no safety concerns are implicated," and where "recourse . . . in contract law" was "sufficient." (*Robinson Helicopter*, 34 Cal.4th at 991 fn.7.)

The Court explained that, unlike construction defects that posed no risk of liability for physical injury, Robinson's claims were "based on Dana's intentional and affirmative misrepresentations that *risked physical harm to persons*." (*Id.* (emphasis added).) The risk of physical harm was part of what brought Dana's conduct outside the scope of the economic loss rule: "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.*)

The *Robinson* Court also cited California's heightened pleading standard for fraudulent misrepresentations as a bulwark against a flood of litigation. (*Id.* at 993.) "This particularity requirement necessitates pleading *facts* which show how, when, where, to whom, and by what means *the representations were tendered*." (*Id.* (internal quotation marks omitted) (emphasis added).) Accordingly, this Court "trust[ed] the trial courts" to enforce this heightened pleading requirement. (*Id.*)

The *Robinson Helicopter* exception to the economic loss rule is narrow: the economic loss rule does not foreclose a tort claim for affirmative fraud that is separable from a breach of contract, that is pleaded with particularity, on which a plaintiff relies, and that "expose[s] a plaintiff to liability for personal damages independent of the plaintiff's economic loss." (*Id.*)

C. California's Rule Is Consistent with the Approach of Other States.

California's economic loss rule is a mainstream approach that generally forecloses tort claims that duplicate contract claims, consistent with the approach of several other states, including Wisconsin, Michigan, Utah, Tennessee, New Hampshire, Texas, and Wyoming, along with other states that reach the same result under the "gist of the action," "source of the duty," or "bootstrapping" rules. These states, like California, have recognized that permitting plaintiffs to attach tort claims to ordinary contract actions would undermine commerce.

1. The Economic Loss Rule in Other States Forecloses Tort Claims "Interwoven" with Breach-of-Contract Claims.

Several states have adopted a version of the economic loss rule that forecloses a plaintiff's tort claims for commercial losses where those claims are "interwoven" with, rather than "extraneous to," his breach-of-contract claims. These states apply the economic loss rule both to negligence and to intentional torts like fraud, so long as the tort and contract claims are intertwined.

For example, in *Huron Tool*, the Michigan Court of Appeals explained that the law of tort risks swallowing the law of contract in cases where the "fraud and breach of contract claims are factually indistinguishable." (532 N.W.2d at 546.) Similarly, the Wisconsin Supreme Court in *Tietsworth v. Harley-Davidson, Inc.*, held that the economic loss rule foreclosed fraudulent concealment tort claims premised on Harley-Davidson's alleged failure to disclose an engine defect in certain motorcycles. (677 N.W.2d at 238, 244.) The court explained that, because the "fraud alleged . . . plainly pertains to the character and quality of the goods that are the subject matter of the contract," the remedy was in contract, not in tort. (*Id.*; *see also Taizhou Yuanda Inv. Grp. Co. v. Z Outdoor Living, LLC* (7th Cir. 2022) 44 F.4th 629, 632-634 (affirming dismissal of fraud claims that repackaged a "'straightforward breach of contract claim,' which is precisely the type of claim that Wisconsin's economic loss doctrine seeks to prevent").)

The Supreme Courts of Utah and Tennessee have reached similar conclusions. In *HealthBanc International, LLC v. Synergy Worldwide, Inc.*, the Utah Supreme Court "conclude[d] that the economic loss rule applies where a party's tort claims are entirely duplicative of its contract claims" and where the fraud claim "arises out of the very grounds alleged as a basis for" a contract claim. ((Utah 2018) 435 P.3d 193, 194, 198.) The Supreme Court of Tennessee followed suit in *Milan Supply Chain Solutions, Inc. v. Navistar, Inc.* (Tenn. 2021) 627 S.W.3d 125, 154. It ruled that the economic loss rule foreclosed a fraud claim where the alleged misrepresentations concerned the quality of the goods sold in a "contract between sophisticated commercial business entities." This rule "str[uck] a careful balance" between "freedom of contract and abhorrence of fraud." (*Id.* at 153-154.)

The economic loss rules of New Hampshire, Texas, and Wyoming similarly foreclose tort claims that are indistinguishable from breach-of-contract claims. These states look to whether the alleged misrepresentations occurred during the course of performance, whether the duties allegedly breached arose from contract, and scope of the claimed damages. (*See Skyco Res., LLP v. Family Tree Corp.* (Wyo. 2022) 512 P.3d 11, 28; *Mentis Sciences, Inc. v. Pittsburgh Networks, LLC* (N.H. 2020) 243 A.3d 1223, 1232; *Sharyland Water Supply Corp. v. City of Alton* (Tex. 2011) 354 S.W.3d 407, 418; *Southwestern Bell Tel. Co. v. DeLanney* (Tex. 1991) 809 S.W.2d 493, 494-495; *W. Loop Hospitality, LLC v. Houston Galleria Lodging Assocs., LLC* (Tex.App. 2022) 649 S.W.3d 461, 487-488, reh'g den. (May 19, 2022), review den.

(Sept. 23, 2022); *Dionne v. Fed. Nat'l Mortg. Ass'n* (D.N.H. June 14, 2016) 2016 WL 3264344, at *12-13.)[5]

2. Other States Reach the Same Result Through Similar Doctrines.

The courts of other states and the District of Columbia reach a similar result through different doctrines that they call the "gist of the action," "source of the duty," or "bootstrapping" rules, among other names. Those courts dismiss tort claims, including intentional torts, "if they are 'intertwined' with the plaintiff's claims for breach of contract, or if the tort claims amount to claims for breach of contract with a different label attached." (Restatement (Third) of Torts: Liability for Economic Harm § 9 (2020).)

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[5] Although the Supreme Courts of Maine and New Jersey have not squarely addressed the question, federal district courts have predicted that the economic loss rule in these states would apply to foreclose fraud claims where the alleged fraud concerns the subject matter of the contract. (*See Bergen Beverage Distributors LCC v. Eastern Distributors, Inc.* (D.N.J. Mar. 21, 2022) 2022 WL 833373, at *9; *Am. Aerial Servs., Inc. v. Terex USA, LLC* (D.Me. 2014) 39 F.Supp.3d 95, 111; *Bracco Diagnostics, Inc. v. Bergen Brunswig Drug Co.* (D.N.J. 2002) 226 F.Supp.2d 557, 563-564.) Still other jurisdictions' economic loss rules foreclose fraud claims without analyzing whether the fraud and contract claims are duplicative, and so take a broader view of the rule than this Court did in *Robinson Helicopter*. (*See, e.g.*, *Sapp v. Ford Motor Co.* (S.C. 2009) 687 S.E.2d 47, 51 (remedy was in contract, not tort, for claim related to a vehicle defect where only harm was to the vehicle itself).)

For example, Pennsylvania's intermediate appellate court identified four circumstances in which the gist of the action doctrine forecloses tort claims between parties to a contract: (1) where the claims arise solely from a contract between the parties; (2) where "the duties allegedly breached were created and grounded in the contract itself "; (3) where "the liability stems from a contract"; or (4) where the tort claim "essentially duplicates a breach of contract claim or the success of which is wholly dependent on the terms of a contract." (*eToll, Inc. v. Elias/Savion Advertising, Inc.* (Pa.Super.Ct. 2002) 811 A.2d 10, 19.) The court explained that Pennsylvania's courts "have **not** carved out a categorical exception for fraud, and have not held that the duty to avoid fraud is always a qualitatively different duty imposed by society rather than by the contract itself." (*Id.* (emphasis in original).)

Just as under the economic loss rule, a tort claim can proceed between contracting parties under "the gist of the action" doctrine only "if the action in tort would arise independent of the existence of the contract." (*See Gaddy Eng'g Co. v. Bowles Rice McDavid Graff & Love, LLP* (W.Va. 2013) 746 S.E.2d 568, 577 (internal quotation marks omitted).) But when the "alleged duties breached [a]re grounded in the contract itself," the tort claims are foreclosed. (*Id.* (internal quotation marks omitted); *see also Erie v. Bruno Ins. Co.* (Pa. 2014) 106 A.3d 48, 68 (holding that where an action is based on violation of a promise "to do something that a party would not ordinarily have been obligated

to do but for the existence of the contract," the gist of the action doctrine forecloses tort claims).)

Virginia applies a similar rule it sometimes calls the "source of the duty" rule.[6] Under that rule, a court looks to whether the duty at issue would have existed if there had not been a contract. Where all relevant duties arise from a contract, a fraud claim cannot proceed. (*See Richmond Metropolitan Authority v. McDevitt Street Bovis, Inc.* (Va. 1998) 507 S.E.2d 344, 346-347; *see also Dunn Constr. Co. v. Cloney* (Va. 2009) 682 S.E.2d 943, 947 (foreclosing fraud claim for "unquestionably deliberate and false" statements guaranteeing a construction defect had been repaired because the false statements related to the contractual duty to build the wall at issue in a workmanlike manner).)

Delaware law forecloses tort claims that are duplicative of contract claims through the "bootstrapping doctrine." Under that doctrine, a plaintiff may not restate a breach-of-contract claim as a fraud or fiduciary duty claim where the claims overlap completely and arise from the "same underlying conduct or nucleus of operative facts." (*Backer v. Palisades Growth Capital II, L.P.* (Del. 2021) 246 A.3d 81, 109 (internal quotation marks omitted) (fiduciary duty claim); *see also Transdev On Demand, Inc. v.*

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[6] The Virginia Supreme Court also at times has framed the source of the duty rule as a preliminary step in the economic loss rule. (*See Tingler v. Graystone Homes, Inc.* (Va. 2019) 834 S.E.2d 244, 265-266; *Abi-Najm v. Concord Condominium, LLC* (Va. 2010) 699 S.E.2d 483, 489.)

Blackstreet Investment Holdings, LLC (Del.Ch., Nov. 30, 2020) 2020 WL 7027538, at *6 (fraud claim); *Furnari v. Wallpang, Inc.* (Del.Super.Ct., Apr. 16, 2014) 2014 WL 1678419, at *8 (fraud claim).)

The law in the District of Columbia is similar. (*See Choharis v. State Farm Fire & Cas. Co.* (D.C. 2008) 961 A.2d 1080, 1089 (conduct during course of contract performance can only support a fraud claim if based on separate conduct, duty, and damages from breach of contract).) Put differently, "[t]he tort must stand as a tort even if the contractual relationship did not exist." (*ED-Care Mgmt., Inc. v. DeLisi* (D.C. 2012) 50 A.3d 448, 452.)

Although not always framed in terms of the economic loss rule, New York courts have ruled that "[m]erely charging a breach of a 'duty of due care,' employing language familiar to tort law, does not, without more, transform a simple breach of contract into a tort claim." (*Dormitory Authority v. Samson Construction Co.* (N.Y. 2018) 94 N.E.3d 456, 460 (internal quotation marks omitted).) Thus, where a tort claim was "merely a restatement, albeit in slightly different language, of the implied contractual obligations asserted in the cause of action for breach of contract," New York's highest court affirmed dismissal of the tort claim. (*Id.* at 461-462 (internal quotation marks omitted); *see also, e.g., Oceanview Assocs., LLC v. HLS Builders Corp.* (N.Y.App.Div. 2020) 184 A.D.3d 843, 845-846 (affirming dismissal of fraud claim where fraud and breach-of-contract claims were based on same allegations); *Carpenter v. Plattsburgh Wholesale Homes, Inc.* (N.Y.App.Div. 2011) 83 A.D.3d 1175, 1176 (affirming

dismissal of fraud claims "indistinguishable" from breach-of-contract claims).)

And Indiana's intermediate appellate courts have denied plaintiffs' attempts to "repackage[]" breach-of-contract claims as tort claims to increase potential damages. (*See JPMCC 2006-CIBC14 Eads Parkway, LLC v. DBL Axel, LLC* (Ind.Ct.App. 2012) 977 N.E.2d 354, 364; *French-Tex Cleaners, Inc. v. Cafaro Co.* (Ind.Ct.App. 2008) 893 N.E.2d 1156, 1167-1168; *see also Greg Allen Const. Co. v. Estelle* (Ind. 2003) 798 N.E.2d 171, 173 ("Because a tort may produce more generous damages and open the door to the possibility of punitive damages, there is obvious incentive to seek to frame a contract breach as a negligence claim.").)

Finally, Kentucky's Supreme Court frames its rule in terms of recovery of punitive damages: "when a plaintiff may obtain complete relief for his contractual losses by means of compensatory damages under a breach of contract claim, *even when the breach is motivated by malice and accomplished through fraud*, he may not simultaneously recover punitive damages after being made whole on his contractual damages." (*Nami Resources Co., L.L.C. v. Asher Land & Mineral, Ltd.* (Ky. 2018) 554 S.W.3d 323, 336 (emphasis added).) Under Kentucky's rule, plaintiffs may assert an independent claim for "fraudulent . . . conduct" only when they suffer "damages that differ from the damages sustained by reason of the breach of contract." (*Id.*)

As all of these states have recognized, permitting tort claims that duplicate contract claims disrupts parties'

expectations and impedes commerce. This Court has consistently and correctly found the same.[7]

II. There Is No Justification for a Broad Exception for Fraudulent Concealment Claims.

Rattagan presses this Court to recognize a new, broad exception from the economic loss rule for all fraudulent concealment claims regardless of their relationship to contract claims between the parties. (*See* Op. Br. at 45 (arguing that the Court

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[7] Some states, such as Colorado and Washington, have suggested that their versions of the economic loss rule do not foreclose intentional tort claims because such claims arise from a duty independent of contract, regardless of whether the tortious conduct was also regulated via contract. (*See, e.g.*, *Van Rees v. Unleaded Software, Inc.* (Colo. 2016) 373 P.3d 603, 607; *Eastwood v. Horse Harbor Found., Inc.* (Wash. 2010) 241 P.3d 1256, 1261-1265.) But intent alone is not sufficient to qualify for an exception under California law, as the reasoning in *Robinson Helicopter* makes clear. (*See Robinson Helicopter*, 34 Cal.4th at 990-991 (focusing on whether conduct giving rise to fraud and breach-of-contract claims is separate).)

In addition, the tortious conduct at issue in those cases would be actionable under the exceptions to California's rule (*see infra*, Part II.A), and does not support a categorical exception for all fraud claims. In *Van Rees*, the Colorado Supreme Court addressed fraudulent inducement, which is actionable under California law (*see Van Rees*, 373 P.3d at 605-607), and in a decision that came after *Van Rees*, the Tenth Circuit held that Colorado's economic loss rule foreclosed fraudulent concealment claims (*see Spring Creek Exploration & Production Co., LLC v. Hess Bakken Investment, II, LLC* (10th Cir. 2018) 887 F.3d 1003, 1022.) And in *Eastwood*, the Washington Supreme Court held that Washington's rule does not bar tort claims for waste, *i.e.*, for economic loss accompanied by substantial injury to real property. (*Eastwood*, 241 P.3d at 1260-1261.)

should hold that all types of fraud are exempt from the economic loss rule, regardless of type of harm or liability that the plaintiff was exposed to).) He must do so because, having missed the statute of limitations for his implied contract claim, he wishes to reframe *exactly* the same allegations as fraudulent concealment. Under Rattagan's formulation, fraudulent concealment claims would be a new exception to the economic loss rule no matter how duplicative of a breach-of-contract claim. The Court should decline to create such an exception for multiple reasons.

First, the rationales underlying the three exceptions to the economic loss rule recognized by this Court do not support the new exception sought by Rattagan for fraudulent concealment claims. *Second*, Rattagan's expansive exception would conflict with this Court's precedent and significantly expand tort litigation in California. It also would undermine contract law by permitting disappointed parties to a contract to ignore their bargained-for allocation of risk under the contract and instead threaten tort actions for punitive damages. *Third*, recognizing such an exception in this case in particular—where an *attorney* is suing his *client* in fraud for allegedly failing to disclose business operations information—would gravely undermine the attorney-client relationship.

A. The Rationales for the Exceptions to the Economic Loss Rule Do Not Support a New Exception for Fraudulent Concealment Claims.

The three existing exceptions to the economic loss rule are based on considerations that do not support the further exception Rattagan seeks in this case.

1. The Fraudulent *Inducement* Exception Does Not Support a Fraudulent *Concealment* Exception.

Rattagan attempts to base the creation of a new fraudulent concealment exception on the rationale underlying the fraudulent *inducement* exception (Op. Br. at 20-21), but such inducement claims are fundamentally different from concealment claims. Fraudulent *inducement* claims challenge whether a valid contract exists in the first place. An exception to the economic loss rule is warranted for fraudulent inducement because it would not make sense to limit a plaintiff to contract remedies where the contract was procured through fraud. (*See supra* Section I.B.1.) But that rationale does not apply to the type of fraudulent concealment claim at issue here.[8] Rattagan does not challenge the validity or enforceability of his contract with Uber. (*See* 1-ER-14.) Instead, Rattagan alleges concealment of information *in the course of* performance under a valid contract that, but for his procedural defaults, he could have addressed through a contract claim.

2. The Policy Concerns for Protecting Vulnerable Consumers Do Not Apply Here.

The exception allowing tort claims by consumers for insurance bad faith and circumstances presenting similar policy concerns, such as fiduciary duty and professional liability claims, is

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[8] Indeed, if a party fraudulently induces a contract by concealing material information, such a claim is already exempt from the economic loss rule via the fraudulent inducement exception.

rooted in the structural challenges that consumers face in enforcing their rights under such contracts. (*See supra* Section I.B.2.)

When analyzing whether to extend this "exceptional approach" beyond the insurance bad faith context, this Court compares the structural features of the underlying contract to the relationship between an insurance company and the insured. (*See Sheen*, 12 Cal.5th at 930.) The Court has declined to extend the exception where the contract does not share the same features as an insurance contract. (*See id.* at 929-931; *Cates Constr.*, 21 Cal.4th at 52-56.)

Rattagan's claims do not present the structural features of the insurance relationship that justify the insurance bad faith exception. First, a contract between an attorney and a corporate client for legal advice does not have a quasi-public nature, which is a primary justification for the insurance bad faith exception. At least from the standpoint of the attorney, a corporate attorney-client relationship "more closely resemble[s] a typical commercial contract." (*Sheen*, 12 Cal.5th at 931 (internal quotation marks omitted).) A corporate attorney does not contract to provide legal services for his own "peace of mind and security in the event of an accident or other catastrophe." (*See id.* (internal quotation marks omitted).) Rather, he does so "for profit or advantage." (*See id.*)

Second, the parties to a corporate attorney-client relationship are not "financially at odds" with each other in the same way that an insurance company and an insured is. (*Id.*) An insurer

accepts premiums hoping that it never needs to perform—payment of a claim is pure loss to the insurer that it is motivated to avoid. But this Court has recognized that other contractual relationships, such as those between a lender and borrower or an employer and employee, do not present that same zero-sum situation. The relationship between an attorney and corporate client is akin to that between an employer and employee in this regard: "Similar to how paying salary typically benefits both the worker being paid and the employer who gets work done" (*id.*), an attorney-client relationship benefits the attorney, who receives income, and the client, who receives legal services.

Third, a corporate attorney is not inherently vulnerable in his relationship with his corporate clients. (*Id.* at 932-933.) Quite the contrary, corporate attorneys are uniquely qualified to protect themselves through contract at the outset of a relationship with clients. And indeed, Rattagan did so here. In addition to the indemnity that he did in fact negotiate, Rattagan could have negotiated additional protections with Uber, but he did not do so. And there is no basis for imposing non-contract restraints on a corporate attorney's client beyond the negotiated legal engagement. (*See Sheen*, 12 Cal.5th at 931.)

3. *Robinson Helicopter* Does Not Justify an Exception Beyond Fraudulent Misrepresentations That Are Wholly Separate from Contract Breach and That Risk Personal Injury or Property Damage.

Rattan contends that *Robinson Helicopter*'s reasoning justifies a general exception from the economic loss rule to allow tort claims for all fraudulent concealment. But Rattagan ignores

highly relevant aspects of *Robinson Helicopter*'s holding and critical policy concerns.

Rattan misreads *Robinson Helicopter* to hold that all affirmative fraud breaches a separable tort duty not to deceive that is independent of any contractual duty. (*See* Op. Br. 29.) *Robinson Helicopter*'s analysis depended critically on whether there was distinct conduct underlying the fraudulent misrepresentation claim—there, the false certifications—that was separate from the conduct constituting the alleged breach of contract—there, the failure to provide conforming parts. It was that wholly separable fraudulent conduct that justified allowing a tort claim. (*See Robinson Helicopter*, 34 Cal.4th at 990-991 ("Dana's tortious conduct was separate from the breach itself, which involved Dana's provision of the nonconforming clutches.").) *Robinson Helicopter* also focused heavily on the fact that the fraudulent conduct there created a risk of personal injury liability—helicopters crashing—far different from the economic consequences in most contractual situations including this one. (*Id.* at 991 & fn.7.)

Rattagan says that any concealment violates a separable tort duty, but that proves far too much and would undermine the very purpose of the economic loss rule. For example, negligence claims involve alleged violations of a tort duty of care independent of contract, just as fraud claims do, but the economic loss rule unquestionably forecloses negligence claims. Indeed, in *Hunter*, 6

Cal.4th at 1185, the Court foreclosed a fraud claim in an employment contract context even though it involved the same tort duty not to defraud a counterparty that Rattagan proposes here.

Rattagan is also wrong that the public policy against deceit articulated in *Robinson Helicopter* justifies a tort claim in this case. (*See* Op. Br. 31-35.) In this case, the allegedly concealed information was, according to Rattagan's contract claim, required to be disclosed under the contract itself. (*See* 2-ER-216-217 (alleging that Uber breached implied contractual covenant by failing to disclose its business plans for launch of new services).) Rattagan's argument is tantamount to saying that tort damages are necessary to deter breaches of contract—an argument this Court repeatedly has rejected. (*See, e.g.*, *Cates Constr.*, 21 Cal.4th at 57-58; *Applied Equip.*, 7 Cal.4th at 516-517; *Hunter*, 6 Cal.4th at 1184-1185.) And any incremental deterrence that tort law might provide is vastly outweighed by the negative effects of allowing tort claims between contracting parties, including increasing uncertainty in commercial contracts, transforming contract cases into tort cases, and discouraging contract breaches that would be economically efficient. (*See infra* Section II.B.2-3.)

B. The Exception Urged by Rattagan Would Drastically Expand Tort Law at the Expense of Contract and Conflict with Precedent.

Creating the broad exception from the economic loss rule proposed by Rattagan would significantly expand tort law at the expense of contract law and the predictability that facilitates commerce. The Court should decline Rattagan's proposal as it

has repeatedly done with similar proposals to merge contract and tort law together.[9]

1. Rattagan's Exception Would Significantly Increase Tort Litigation.

Creation of the exception urged by Rattagan—to allow tort claims between contracting parties based on an allegation of "fraudulent concealment" for failure to disclose information that the contract allegedly required—would convert many breach-of-contract claims into tort cases. It is easy for a plaintiff to allege that a defendant intentionally failed to make a statement in connection with a contract—for example, failing to disclose that it was planning to breach or that it was unable to perform. (*See Robinson Helicopter*, 34 Cal.4th at 1001 (Werdegar, J., dissenting) (if fraudulent concealment exception were recognized, "every litigator can be expected to attach such a piggyback tort claim to each breach of contract claim, and every breach case can be expected to focus on when a party learned it was in breach and why it failed to disclose that fact to the other side").)

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[9] Rattagan's suggestion that the economic loss rule cannot foreclose fraud claims because the legislature codified a claim for deceit is beside the point. (*See* Op. Br. 24, 29.) The Court's authority to develop common law doctrines that may interact with statute is well established. For example, a claim for negligence is also codified (*see* Cal. Civ. Code § 1714(a)), yet the Court has held that "particular policy considerations may weigh in favor of limiting that duty in certain circumstances" (*Brown v. USA Taekwondo* (2021) 11 Cal.5th 204, 209), and the economic loss rule clearly forecloses negligence claims for economic loss (*Seely*, 63 Cal.2d at 18-19).

If such tort claims were allowed, plaintiffs would rarely pass up the opportunity to use "the club of tort and punitive damages," however unmeritorious their concealment claims might ultimately be and regardless of the contract remedies available. (*See Cates Constr.*, 21 Cal.4th at 58-59; *see also Hunter*, 6 Cal.4th at 1185 ("Fraud is easily pleaded, and in all likelihood it would be a rare wrongful termination complaint that omitted to do so.").)

This is not a theoretical concern. Plaintiffs regularly allege tort claims of fraudulent concealment in automobile warranty or lemon law cases, arguing that a car dealer or manufacturer fraudulently concealed a defect. Many federal district courts hold that the economic loss rule precludes these tort claims in favor of warranty contract remedies—particularly where the defect poses no safety risk. (*See, e.g.*, *Tilahun v. Nissan N. Am., Inc.* (C.D.Cal. Aug. 16, 2022) 2022 WL 3591068, at *3 (granting judgment on the pleadings on fraudulent concealment claim that "overlap[ped] entirely" with warranty claims); *Lemus v. Nissan N. Am., Inc.* (C.D.Cal. June 7, 2022) 2022 WL 2057738, at *2 (granting judgment on the pleadings on fraudulent concealment claim based on transmission defect and collecting cases); *Glassburg v. Ford Motor Co.* (C.D.Cal. Nov. 2, 2021) 2021 WL 5086358, at *9-10 (foreclosing fraud claim based on failure to disclose defect causing intermittent, momentary malfunction in backup camera).)

When the Court allowed an exception for affirmative fraud claims in *Robinson Helicopter*, it relied on California's heightened pleading requirements for affirmative fraud as a safeguard against claims that merely replicated contract claims. The Court

emphasized that, under that requirement, a plaintiff on such a fraud claim must plead facts that "show how, when, where, to whom, and by what means the representations were tendered." (*Robinson Helicopter*, 34 Cal.4th at 993.) But that heightened pleading standard provides little protection against fraudulent concealment claims and thus does not support creation of the exception urged here. By definition, a claim of concealment concerns a defendant's alleged failure to speak, and so the plaintiff usually cannot—and so is not required to—plead with the same particularity as an affirmative misrepresentation the who, what, when, where, and how of a statement that was never made. (*See Sprint Spectrum Realty Co., LLC v. Hartkopf* (N.D.Cal. Nov. 22, 2019) 2019 WL 6251251, at *3 (collecting cases holding that Federal Rule of Civil Procedure 9(b)'s analogous heightened pleading requirement is relaxed for concealment claims).)

Rattagan disputes that tort claims of concealment will become a common feature of breach-of-contract cases, arguing that not all breach-of-contract claims constitute fraudulent concealment because concealment requires an allegation and eventual proof of fraudulent intent. (*See* Op. Br. 42-43.) But given that intent must be pleaded only generally, and is a fact issue not easily resolved at summary judgment, the harm from authorizing unfounded fraudulent concealment claims would be incurred well before trial. (*See Hunter*, 6 Cal.4th at 1185 (recognizing that fraud is easily pleaded but "[m]uch harder" to defeat at the de-

murrer or summary judgment stage and citing resulting litigation costs as reason to disallow fraud claim in wrongful termination context).)

This case shows how dangerous Rattagan's proposed exception is. Rattagan asserted an implied contract claim alleging that Uber was contractually obliged to provide him with certain information, but that claim failed because he missed the statute of limitations. To revive his claim, Rattagan recast his contract theory as a tort claim of fraudulent concealment by adding general allegations about intent. (*See* 2-ER-215.) And even though he will ultimately be unable to prove fraudulent intent, litigating the tort claim of fraudulent concealment alone has already added more than two years and considerable cost to a case that otherwise could have been resolved based on the statute of limitations. At a minimum, any meaningful formulation of the economic loss rule must foreclose tort claims of fraud that are based on conduct entirely duplicative of breach-of-contract claims. (*See Sheen*, 12 Cal.5th at 923 (economic loss rule bars tort claims that "arise from—or are not independent of—the parties' underlying contracts").)[10]

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[10] *See also HealthBanc*, 435 P.3d at 194, 196-197 (Utah's economic loss rule precludes a plaintiff's claim for intentional fraud that "overlaps entirely" with, or "arises out of the very grounds alleged as a basis for," a contract claim); *Huron Tool*, 532 N.W.2d at 545 (under Michigan law, tort claims of fraud are not extraneous to a contract dispute, and so not independently actionable, where "undergirded by factual allegations identical to those supporting [plaintiffs'] breach of contract counts").

2. Creation of the Proposed Exception Would Undermine Contract Law.

The exception proposed by Rattagan would interfere with one of the primary benefits of commercial contracts: the predictability afforded by the ability to weigh and allocate economic risks in advance. (*See Sheen*, 12 Cal.5th at 923 (economic loss rule "allows parties to make dependable allocations of financial risk without fear that tort law will be used to undo them later"); *see also Robinson Helicopter*, 34 Cal.4th at 1001 (Werdegar, J., dissenting) (constant threat of tort damages "can do no good for parties weighing the likely benefits and risks before entering any commercial contract").) And to the extent that contracting parties may begin to take the threat of tort damages into account in their contract negotiations, costs for contracting parties and consumers will increase. (*See Cates Constr.*, 21 Cal.4th at 59 (allowing tort recovery in construction bond context would ultimately increase the cost of the bond).)

Allowing plaintiffs to layer tort claims onto a contractual relationship also impairs the parties' ability to make informed judgments about the costs of breaching the contract during the life of the contract. Consider the concept of efficient breach, in which a party chooses to breach a contract and pays expectation damages because the cost of performance outweighs the cost of breach. Contract law recognizes that an efficient breach is not morally objectionable and allows "the movement of resources to their more optimal use" and the "increased production of goods and services at lower cost to society." (*Freeman & Mills*, 11 Cal.4th at 98, 106 (Mosk, J., concurring in part and dissenting in

part).) But efficient breach is no longer efficient if the counterparty can transform a contract claim into a tort claim for fraudulent concealment. Creation of the exception Rattagan urges would thus undermine the core benefits of commercial contracts: predictability, efficiency, and the freedom to allocate risks.

3. Creation of a New Exception for Contracting Parties to Bring Tort Claims of Fraudulent Concealment Would Conflict with This Court's Precedent.

Before Rattagan, other plaintiffs have repeatedly asked this Court to authorize the creation of "tortious breach-of-contract" claims, and the Court has repeatedly said no. Moreover, Rattagan's exception is based on the purported violation of an independent tort duty, but this Court has rejected claims based on the same or analogous tort duties.

a) Analogous Tortious Breach-of-Contract Claims Have Been Repeatedly Rejected by This Court.

Many plaintiffs have tried to create a tortious breach-of-contract claim, either directly or via an exception to the economic loss rule, and this Court has repeatedly rejected those attempts. The Court has considered whether such proposals would permit breach-of-contract or other claims to be easily re-pleaded as torts, and has declined to allow such claims, especially when they duplicated existing contract, statutory, or common law claims. Rattagan's proposed exception is contrary to this precedent.

In *Foley*, for example, this Court declined to recognize an intentional tort claim for bad faith breach of the implied covenant

of good faith and fair dealing in the employment context. It observed that "[v]irtually any firing" could be alleged as a bad faith breach of the implied covenant under the standards the petitioner advocated, posing "potentially enormous consequences for the stability of the business community." (*Foley*, 47 Cal.3d at 699.)

Similarly, in *Hunter*, this Court declined to permit tort claims of fraud in the context of wrongful terminations, citing the potential "adverse consequences for industry in general." (*Hunter*, 6 Cal.4th at 1185.) It explained: "Fraud is easily pleaded, and in all likelihood it would be a rare wrongful termination complaint that omitted to do so. Much harder, however, is the defense of such claims and their resolution at the summary judgment or demurrer stage of litigation." (*Id.*)[11]

Applied Equipment held that a contracting party cannot be sued in tort for conspiring to interfere with its own contract, reasoning that limiting recovery to contract damages encourages commercial activity "by enabling parties to estimate in advance the financial risks of their enterprise." (*Applied Equip.*, 7 Cal.4th at 515.)

And in *Freeman & Mills*, this Court held that there was no tort claim for bad faith denial of contract, overruling an earlier

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[11] In *Lazar v. Superior Court* (1996) 12 Cal.4th 631, 640-648, this Court ruled that *Foley* and *Hunter* did not foreclose a fraudulent *inducement* claim in the employment context. That case does not alter the result here, because fraudulent inducement claims are already subject to a recognized exception to the economic loss rule.

case. (*Freeman & Mills*, 11 Cal.4th at 87-88.) Among other reasons, the Court recognized that there was no logical basis for treating as a tort the bad faith denial of the *existence of* a contract, but treating as a contract claim the bad faith denial of *liability under* a contract. Because treating bad faith denials of liability as torts would "potentially convert every contract breach into a tort," the Court concluded that its earlier holding to the contrary should be overruled. (*Id.* at 103; *see also Voris v. Lampert* (2019) 7 Cal.5th 1141, 1162 (recognizing conversion claim for unpaid wages would "authorize plaintiffs to append conversion claims to every garden-variety suit involving wage nonpayment or underpayment," the effect of which "would be to transform a category of contract claims into torts"); *Long Beach Mem'l Med. Ctr. v. Kaiser Found. Health Plan, Inc.* (2021) 71 Cal.App.5th 323, 339 (recognizing that creating a tort claim for under-reimbursing a hospital for emergency medical care would "create a powerful incentive for a hospital or other medical provider to bring such a tort claim in every case").)

The new exception Rattagan advocates conflicts with this precedent because it would allow tort claims of fraud that duplicate contract claims, despite this Court's repeated holdings that such duplication inappropriately expands the threat of tort damages to contracting parties and unnecessarily disrupts the predictability of commercial contracting.

b) This Court Has Declined to Allow Exceptions to the Economic Loss Rule for Violation of Independent Tort Duties.

Rattagan argues that an alleged violation of an independent tort duty is sufficient to overcome the economic loss rule (*see* Pet. Br. 24, 27-31). But that argument conflicts with more than thirty years of this Court's precedent that forecloses tort claims that are based on violation of the same or similar independent tort duties as the duty Rattagan invokes here.

For example, in 1993, the Court in *Hunter* barred a fraud claim based on alleged misrepresentations made in the context of an employment termination. (*See Hunter*, 6 Cal.4th at 1178.) The Court reached this result notwithstanding the fact that the defendant allegedly breached the same independent tort duty that Rattagan invokes here—the duty not to defraud a counterparty. (*See id.*; Pet. Br. 29.) The Court did not look to whether the conduct could be framed as breaching a tort duty, as Rattagan suggests, but instead held that a fraud claim was available only when the conduct giving rise to the claim was "separate from the termination of the employment contract." (*Hunter*, 6 Cal.4th at 1178; *accord Robinson Helicopter*, 34 Cal.4th at 991 (focusing on separate conduct).) The result in *Hunter* would have been different under the rule Rattagan advocates, because nothing in Rattagan's rule would preclude any plaintiff in an employment termination case from bringing duplicative fraud and wrongful discharge claims based on misrepresentations or omissions in the course of termination.

The same is true for other cases. In *Voris*, for example, the Court barred a tort claim of conversion based on failure to pay wages, even though there is an independent tort duty not to possess another's property. (*See Voris*, 7 Cal.5th at 1150, 1162.) But under the logic of Rattagan's rule, the breach of the independent duty would have been sufficient to allow conversion claims to proceed alongside contract and statutory claims for non-payment of wages, a result that this Court rejected. And negligence claims involve an independent duty of care, yet it is well established that the economic loss rule forecloses negligence claims notwithstanding the existence of an independent duty. (*See, e.g.*, *Seely*, 63 Cal.2d at 18-19.)

C. Rattagan's Proposed Exception Would Have Especially Damaging Effects on the Attorney-Client Relationship.

No reasonable interpretation of the economic loss rule can allow the tort claim here, where a corporate attorney is suing his *client* in tort because the client company allegedly failed to disclose to the attorney the company's lawful business plans. (*See* 2-ER-192 ¶ 4, 206 ¶ 55, 210-11 ¶ 65, 215 ¶ 84, 216 ¶ 90.)

Attorney-client relationships and the duties that attorneys owe their clients are governed by extensive case law as well as professional and ethical rules. (*See, e.g.*, *Neel v. Magana, Olney, Levy, Cathcart & Gelfand* (1971) 6 Cal.3d 176, 189 (attorney owes client duty to disclose material facts); Cal. R. Prof'l Conduct 1.4(a)(3) (requiring attorney to "keep the client reasonably informed about significant developments relating to the representation").) These principles are designed to protect *clients* from their

lawyers, not the other way around. Lawyers are expected to protect themselves through diligence before taking on a client and through contract.

Rattagan acknowledged to the Ninth Circuit that he is asking for judicial creation of new legal duties that would run from a client to the attorney. (*See, e.g.*, Applt. Br. 46). He noted that "no case has delineated the scope of duties running from clients to lawyers" and argued that "[t]his case presents a clean slate upon which this Court may and should provide guidance." (*Id.*; s*ee id.* 47 ("there seems to be no case that has addressed the question of whether a claim for fraudulent concealment may be pursued by the service provider against the customer or client").)

Rattagan provides no rationale for creating a tort action against a client for failing to disclose business information, and such a cause of action would fundamentally undermine the attorney's duty of loyalty to the client. (*See Oasis W. Realty LLC v. Goldman* (2011) 51 Cal.4th 811, 821.) There is a reason suits like Rattagan's are practically unheard-of. A lawyer is obligated not to break faith with his client even after the representation has terminated, an obligation that precludes the type of lawsuit Rattagan is bringing. (*See id.* (attorney's "fiduciary obligations [of] loyalty and confidentiality" continue "even after the representation has ended"); Cal. Bus. & Prof. Code § 6068(e)(1) ("It is the duty of an attorney to . . . maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client").)

Moreover, creating a tort claim for fraud to be brought by an attorney against his client when the client's actions prove controversial—here, Uber's underlying business in Argentina has been adjudicated to be perfectly lawful—would have especially far-reaching negative effects on clients. For example, under Rattagan's new exception, a criminal defendant would face not only criminal liability if convicted, but also civil tort liability to his attorney for fraud if information comes out at trial about the defendant that arguably harms the attorney's reputation.

In the rare legal representation where an attorney believes enhanced disclosure duties running from the client are needed, the attorney is well positioned to negotiate for those duties in advance. Rattagan, for example, as "one of the top and most renowned business lawyers in Buenos Aires" with U.S. training and "nearly 30 years in practice" (2-ER-194 ¶ 11), was undoubtedly capable of writing a contract that would have provided additional protection if he had believed it necessary.

CONCLUSION

This Court should answer the certified question, "No, fraudulent concealment claims are not exempted from the economic loss rule."

DATED: October 10, 2022 COVINGTON & BURLING LLP

By: 

Jeffrey M. Davidson

Attorney for Respondent Uber Technologies, Inc.

CERTIFICATE OF WORD COUNT

Pursuant to rules 8.204(c) and 8.504(d) of the California Rules of Court, I hereby certify that the text of this Answering Brief on the Merits contains 12,435 words, including footnotes. In making this certification, I have relied upon the word count of Microsoft Word, used to prepare the Brief.

DATED: October 10, 2022

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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 1999 Avenue of the Stars, Los Angeles, CA 90067. On October 10, 2022, I caused to be served true copies of the foregoing Answering Brief on the Merits in this action on the interested parties as follows:

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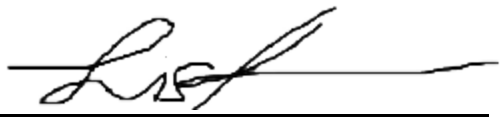

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