No. S277568

IN THE SUPREME COURT OF CALIFORNIA

SOBITA DHITAL, et al.,

Plaintiffs and Appellants,

v.

NISSAN NORTH AMERICA, INC.,

Defendant and Respondent.

After a Decision of the Court of Appeal,
First Appellate District, Case No. A162817
Appeal from Alameda County Superior Court
Case No. RG19009260, Honorable Richard Seabolt

ANSWER TO PETITION FOR REVIEW

KNIGHT LAW GROUP LLP
Roger R. Kirnos, SBN 283163
rogerk@knightlaw.com
Christopher Swanson, SBN 278413
chriss@knightlaw.com
10250 Constellation Blvd. Suite 2500
Los Angeles, California 90067
(310) 552-2250 / Fax (310) 552-7973

GREINES, MARTIN, STEIN & RICHLAND LLP
*Cynthia E. Tobisman, SBN 197983
ctobisman@gmsr.com
Alana H. Rotter, SBN 236666
arotter@gmsr.com
6420 Wilshire Boulevard, Suite 1100
Los Angeles, California 90048
(310) 859-7811 / Fax (310) 276-5261

Attorneys for Plaintiffs and Appellants
SOBITA DHITAL and DANIEL NEWMAN

SUPREME COURT OF CALIFORNIA

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Supreme Court Case No: S277568

Case Name: *Dhital, et al. v. Nissan North America, Inc.*

[X] There are no interested parties.

Interested entities or parties are listed below:

Name of Interested Entity or Person	Nature of Interest
1.	
2.	
3.	
4.	

/s/ Cynthia E. Tobisman
Signature of Attorney/Party Submitting Form

Printed Name: Cynthia E. Tobisman
Address: Greines, Martin, Stein & Richland LLP
6420 Wilshire Boulevard, Suite 1100
Los Angeles, California 90048
State Bar No. 197983

Party Represented: *SOBITA DHITAL and DANIEL NEWMAN*

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INTRODUCTION

Nissan asks the Court to grant review to decide if the economic loss rule bars "fraud-by-concealment claims in warranty cases." (Pet. 18-19.)

But in reality, the Court of Appeal's opinion ("Opinion") involves a far narrower issue: Whether the economic loss rule bars a claim that a defendant fraudulently *induced* a contract by concealment.

As to *that* issue, this state's intermediate appellate courts and this Court *uniformly* recognize that tort damages are available against a defendant who defrauds a plaintiff into forming a contractual relationship. A defendant's success in fraudulently inducing a contract is a separate and distinct wrong from the contract breach; the contractual relationship formed as a result of the fraud does not limit the plaintiff to contract damages for fraudulent inducement. This isn't controversial.

Notwithstanding this easy answer based on settled law, Nissan urges that review is necessary because state and federal trial courts supposedly diverge on whether the economic loss rule bars fraudulent inducement claims based on intentional *concealment* as opposed to affirmative *misrepresentation*. To make this argument, Nissan cites to case authorities that do not involve the economic loss rule in the context of fraudulent inducement at all.

Review is unnecessary because there's no split in California appellate authority on whether fraud damages are available for

fraudulent inducement claims. None of the California decisions allowing tort damages for fraudulent inducement draw a distinction between concealment and misrepresentations, and statutory law treats the two modes of fraud the same. (Civ. Code, § 1572.) The Opinion simply applies well-established law to a new factual context—a case that also includes a claim for breach of warranty under California's Song-Beverly Consumer Warranty Act, Civil Code § 1790 *et. seq.* often referred to as the "lemon-law."

The Opinion is completely consistent with this Court's *repeated* recognition that a plaintiff can sue for both fraud and breach of contract. (*Robinson Helicopter Co., Inc. v. Dana Corp*. (2004) 34 Cal.4th 979, 989-990; *Erlich v. Menezes* (1999) 21 Cal.4th 543, 551-552; *Lazar v. Superior Court* (1996) 12 Cal.4th 631, 648-649.) Likewise, this Court has specifically noted that fraud damages can be recovered for fraudulent inducement because that conduct violates a duty that is *independent* of the contract. (*Robinson Helicopter, supra,* 34 Cal.4th at pp. 989-990.) There's no reason for review here.

Nissan notes that in *Rattagan v. Uber Technologies* (No. S272113), this Court accepted a certified question from the Ninth Circuit as to whether fraudulent concealment claims are barred by the economic loss rule. (Pet. 7-9.) Although the facts of *Rattagan* involve only fraud in the *performance* of a contract, the certified question posed to this Court asks broadly whether fraudulent concealment is an exception to the economic loss rule. The certified question in *Rattagan* does not distinguish

fraudulent concealment in the inducement of the contract versus fraudulent concealment during the performance of the contract. On this basis, Nissan suggests that this Court's eventual opinion in *Rattagan* might not reach the issue of fraudulent inducement by concealment. (Pet. 9.) Nissan further notes that the Court issued a grant-and-hold order in *Kia Am., Inc. v. Superior Court*, No. S273170 ("*Spellman*"), a case involving a fraudulent inducement claim in the lemon-law context. (Pet. 7.) Nissan urges the Court to grant review or, at least, a grant-and-hold here, so as to reach the issue that the Court may not reach in *Rattagan* and also because the Court has already issued a grant-and-hold in *Spellman* (another fraudulent inducement case in the lemon-law context).

But again, there's no split in California appellate case law as to whether fraudulent inducement is outside the economic loss rule. The Court is addressing fraudulent concealment in *Rattagan* because the Ninth Circuit asked it to do so, based on the Ninth Circuit's observation that federal district courts were all over the map on the issue. (See Motion for Judicial Notice [MJN] Ex. A [Certification Order, pp. 6-7 ["The district courts have reached opposite conclusions" on "whether fraudulent concealment… constitutes independent tortious conduct, warranting an exception to the economic loss rule"].) But the unavoidable reality remains: There's no split whatsoever in *California* appellate authority. Thus, while the Court will have to reach the fraudulent inducement point in *Rattagan* to fully answer Ninth Circuit's broad question there, the Court will be

doing so as a response to confusion in the *federal* courts who have misread *Robinson Helicopter* as creating a limited exception for fraudulent inducement only when based on an intentional misrepresentation. There's no need to grant review of the issue since the Opinion in this case follows California appellate case law, provides clear guidance for the state's superior courts, and there's no contrary published appellate authority whatsoever that would require this Court to weigh in.[1]

To the extent that the Court issued a grant-and-hold order in *Spellman* on the ground that the Ninth Circuit's question in *Rattagan* was broad enough to encompass fraudulent inducement as well as fraud committed during contract performance, that grant-and-hold order was issued *before* the defendant in *Rattagan* (Uber Technologies) filed its answering brief conceding that well-established California law dictates that *all* fraudulent inducement claims are outside the economic loss rule. (See MJN, Ex. B [Uber's Answering Brief in *Rattagan*, pp. 20, 27, 44, 55, fn. 11].) This reflects, again, that California law is already entirely consistent on the fact that fraudulent inducement claims are outside the economic loss rule. Granting review in the instant case is utterly unnecessary. Simply put: The landscape for this Court's consideration as to whether to issue a grant-and-hold order here as it did in *Spellman* is now different, because the *Rattagan* parties both agree that fraudulent inducement is

[1] To the extent that there are inconsistent rulings in the state *trial* courts, the Opinion aptly remedies that confusion.

decidedly outside the economic loss rule. There is no reason to hold the instant matter (or *Spellman*) while awaiting *Rattagan*.

Finally, if the Court were to grant review at all in the instant case, it should be only on a grant-and-hold basis, and the Court should specifically order that the Opinion remains both citable *and binding* in the interim. Again, as a straightforward application of well-settled law to a new factual context, the Opinion brings clarity to the law. It should remain binding on lower courts.

ARGUMENT

I. The Court Of Appeal Held That The Economic Loss Rule Does Not Bar A Claim That Nissan Fraudulently Induced Plaintiffs To Buy A Car By Intentionally Concealing Known Safety Defects.

Plaintiffs alleged that Nissan fraudulently induced them to purchase a car, based on the following:

- Nissan distributed over a half million vehicles equipped with defective continuously variable transmissions (CVTs), including Plaintiffs' vehicle.
- The CVT transmission is defective; it causes sudden, hard shaking, and a complete failure to function.
- The defect creates a serious safety risk to the car's occupants, as well as people in nearby cars, and pedestrians.
- Nissan knew about the safety defect before Plaintiffs purchased their cars, from premarket testing, consumer

complaints, and other sources, but continued to market and sell the knowingly defective cars.

● Nissan intentionally concealed the defect from Plaintiffs, intending to deceive them into buying their car.

● The defect is a material fact that a reasonable consumer would consider when deciding whether to purchase or lease a vehicle equipped with a CVT transmission. (See Opn. 3-4.)

Nissan demurred, arguing that the economic loss rule bars fraudulent inducement claims. (Opn. 5-6.)

After the trial court sustained the demurrer, the Court of Appeal reversed. (Opn. 6, 20.) It held that "under California law, the economic loss rule does not bar plaintiffs' claim here for fraudulent inducement by concealment." (Opn. 17.) In so holding, the court carefully examined this Court's holding in *Robinson Helicopter, supra,* 34 Cal.4th 979.

The Opinion reasoned:

● *Robinson Helicopter* recognized that among the contexts where "tort damages have been permitted in contract cases" is where "the contract was fraudulently induced." (Opn. 9-10.)

● The fraudulent-inducement exception applied to this case based on the facts sufficiently alleged in the operative complaint. (Opn. 10-11.) Indeed, to conclude otherwise would be to ignore *Robinson Helicopter*'s statement that fraudulent inducement is exempted from the economic loss rule. (Opn. 11.)

● *Robinson Helicopter* addressed the fraud claims presented in that case, which involved a fraud "that occurred

during the performance of a contract" (Opn. 11, original emphasis.)

- *Robinson Helicopter* did not hold that fraud claims must be based only on misrepresentations, as opposed to omissions. (Opn. 11.) Rather, *Robinson Helicopter* expressly *refrained* from considering concealment-based claims. (Opn. 12 & fn. 4.)

- *Robinson Helicopter*'s *reasoning* "affirmatively places fraudulent inducement by concealment outside the coverage of the economic loss rule." (Opn. 13.) Specifically: *Robinson Helicopter* made clear that for fraudulent inducement and other pre-*Robinson Helicopter* economic loss rule exceptions, "the duty that gives rise to tort liability is either completely independent of the contract or arises from conduct which is both intentional and intended to harm." (Opn. 14.) "[T]hat independence is present" in fraudulent inducement claims, "because a defendant's conduct in fraudulently inducing someone to enter a contract is separate from the defendant's later breach of the contract or warranty provisions that were agreed to." (*Ibid.*) Fraudulent inducement is based on *presale* conduct; "that is distinct from Nissan's alleged subsequent conduct in breaching its warranty obligations." (Opn. 15.)

- *Robinson Helicopter*'s discussion of fraud in the *performance* of a contract—the type of fraud at issue there—"was not a narrowing or limitation of the existing exception for fraudulent inducement claims or a requirement that all inducement claims must be supported by allegations of affirmative misrepresentations." (Opn. 15.)

The Opinion also observed that in the Restatement's view, the economic loss rule does not bar fraud claims *at all*. (Opn. 17, fn. 6.) The Restatement reasons that the economic loss rule is designed to prevent tort liability from interfering with parties' contractual allocations of risk, and that "'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.'" (*Ibid.*) Accordingly, fraud liability doesn't *interfere* with contract relationships—it *protects* "the integrity of the contractual process and sometimes furnishes useful remedies that the law of contract does not as readily provide.'" (*Ibid.*) The Opinion noted that *Robinson Helicopter* agreed: "'A party to a contract cannot rationally calculate the possibility that the other party will deliberately misrepresent terms critical to that contract.' [Citation.] No rational party would enter into a contract anticipating that they are or will be lied to." (Opn. 13, citing *Robinson Helicopter*, *supra*, 34 Cal.4th at p. 933.)

II. Review Should Be Denied.

A. California Law Is Consistent; There Is No Split In Authorities As To Whether Fraudulent Inducement Is Outside The Economic Loss Rule, And To The Extent There Was Any Absence Of Clarity About The Applicability Of That Settled Law In The Lemon-Law Context, The Opinion Settles The Issue Nissan Proposes.

Nissan argues that review is necessary to secure uniformity on whether the economic loss rule bars fraud by concealment

claims in *warranty* cases, because there is disagreement among trial courts on the issue. (Pet. 7-8.) But no further guidance beyond the Opinion is necessary because to the extent that the uniform appellate authority holding that a plaintiff can recover for both fraudulent inducement and breach of contract was unclear as to lemon-law plaintiffs, the Opinion settles the issue: The economic loss rule does *not* bar fraudulent inducement in that context, *too*. The published Opinion is sufficient to settle the issue, because *there is no other California appellate decision reaching a different conclusion*.

The other warranty cases that Nissan cites did not involve the economic loss rule, much less hold that the rule bars claims for fraudulent inducement by concealment. Specifically:

Seely v. White Motor Co. (1965) 63 Cal.2d 9 (Pet. 25-26) was about whether tort damages were available for economic loss under the doctrine of *strict liability*, not intentional fraud. (*Id.* at pp. 12-19; see also *Jimenez v. Superior Court* (2002) 29 Cal.4th 473, 482 ["As we stressed in *Seely*, recovery under the doctrine of strict liability is limited solely to 'physical harm to person or property"].) *Seely* also pre-dates the Song-Beverly Act, which was specifically intended to expand remedies for consumers, and which expressly provides that "where the provisions of the Commercial Code conflict with the rights guaranteed to buyers of consumer goods under the provisions of this chapter, the provisions of this chapter shall prevail." (Civ. Code, § 1790.3.) Likewise, those remedies are cumulative and *shall not be construed as restricting any remedy that is otherwise available*."

(Civ. Code, § 1790.4, italics added.) Any rule that the existence of a Song-Beverly warranty precludes, as a threshold question on the pleadings, a consumer from pursuing tort remedies for fraud would turn the consumer-protection statute on its head.

Santana v. FCA US, LLC (2020) 56 Cal.App.5th 334 (Pet. 13, 37-39) reversed a jury verdict because the court found that *there was insufficient evidence at trial* that the manufacturer was aware of the defect before it sold the car—i.e., because the plaintiff failed to prove an element of fraudulent inducement. (*Id.* at pp. 345-346.) *Santana* did not discuss the economic loss rule, much less hold that it barred the fraud claim as a matter of law. But what *Santana* did hold, in the context of apportionment of attorney fees for the fee-bearing Song-Beverly Act claim and non-fee-bearing common law fraud claims is that while the existence of the defect is "at the core of both causes of action," neither of the claims stem "from the defect per se" since "[i]n the case of fraud, the harm stems from the deception [a]nd in the case of the Song-Beverly Act, it stems from the failure to honor the warranty." (*Id.* at p. 351.) Thus, while there is overlap of the [s]ame essential facts, [d]ifferent conduct gives rise to the harm." (*Ibid.*) In other words, *Santana undermines* Nissan's position here insofar as it recognizes that fraudulent inducement is an entirely separate harm caused by a manufacturer in vehicle defect breach of warranty cases: The fraud occurs prior to sale, while breach of warranty occurs long after sale (at the earliest after the second repair attempt).

Daugherty v. American Honda Motor Co., Inc. (2006) 144 Cal.App.4th 824 and *Bardin v. DaimlerChrysler Corp.* (2006) 136 Cal.App.4th 1255 (Pet. 13, 37-39) held that the plaintiffs' allegations did not show fraud or an unfair practice within the meaning of the Unfair Competition Law or Consumer Legal Remedies Act. Nothing in the opinions establishes that defendants become immune from fraudulent-inducement-by-concealment claims just because they've succeeded in the inducement and neither case touches on the economic loss rule.

The decisions Nissan cites from other states (Pet. 32-34) are inapposite: They apply versions of the economic loss rule that *Robinson Helicopter* has already rejected. (See *Milan Supply Chain Solutions, Inc. v. Navistar, Inc.* (Tenn. 2021) 627 S.W.3d 125, 148 [describing California as adopting a "broad" fraud exception, as opposed to the "narrow or limited fraud exception" that permits only claims where fraud is "'extraneous to the contract,' not 'interwoven with the breach of contract'"; "Although the narrow fraud exception remains viable in Wisconsin and Michigan, it has not been adopted by as many jurisdictions as the broad fraud exception"'].)

Many of the federal and state *trial* courts that have found fraudulent concealment claims were barred by the economic loss rule rely on a view that because *Robinson Helicopter* allowed a claim based on affirmative misrepresentations (in the context of fraud in the performance of the contact), that is the *only* kind of

fraud claim exempt from the economic loss rule.[2] As the Opinion highlights (Opn. 10-12 & fn. 4), that misreads *Robinson Helicopter*.

Robinson Helicopter clearly said that existing case law put fraudulent inducement claims *outside* the economic loss rule. (34 Cal.4th at pp. 989-990.) *Robinson Helicopter* then considered a different type of fraud claim—fraud in the *performance* of a contract. (*Id.* at pp. 990-991.) As to fraud in the performance, *Robinson Helicopter* held that an affirmative misrepresentation claim was not barred. (*Id.* at pp. 990-993.) *Robinson Helicopter* deemed that holding sufficient to affirm the judgment, and so expressly *did not reach* whether the plaintiff's fraudulent performance by concealment claim was also outside the economic loss rule. (*Id.* at p. 991.) *Robinson Helicopter,* thus, did not bar fraud claims for everything other than affirmative misrepresentations. It stated that fraudulent inducement claims

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[2] E.g., *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 a for a claim for fraud by omission"); *In re Ford Motor Co. DPS6 Powershift Transmission Products Liability Litigation* (C.D. Cal., Mar. 29, 2021, No. CV1801893ABFFMX) 2021 WL 1220948, at *4 ("*Robinson Helicopter* excepted only fraudulent misrepresentation claims from the operation of the economic loss rule, and did not except fraudulent omission claims like the one pled here"). Nissan, whose counsel is the same counsel in these Ford MDL cases, relies heavily on the federal district court's misunderstanding and erroneous application of *Robinson Helicopter*.

are *not* barred, that fraudulent misrepresentation in performing the contract claims are *not* barred, and it left open the status of fraudulent concealment claims in performing the contract.

And, recent published appellate authority is consistent with this Court's jurisprudence recognizing that fraudulent inducement is separate from breach of contract. *Anderson v. Ford Motor Co.* (2022) 74 Cal.App.5th 946 held that punitive damages for fraudulent inducement by concealment and/or violation of the Consumer Legal Remedies Act and civil penalties under the Song-Beverly Act could both be recovered by an injured consumer because they are independent wrongs. (See *id.* at p. 966-967, *rev. denied* May 11, 2022.)

Despite Nissan's counsel's concurrent representation of Ford Motor Company, Nissan makes no mention of *Anderson*. Instead, Nissan makes the same baseless argument again here—that, according to Nissan, a plaintiff cannot allege "fraudulent conduct (an alleged concealment of the risk that the car will malfunction, and warranty repairs will fail) that is necessarily intertwined with breach of contract (failure to repair the car under warranty), and the harm that allegedly resulted is indistinguishable." (Pet. 35.) Nissan's premise—that the claims of fraud and breach of warranty are indistinguishable—is wrong under the case law that Nissan chooses to ignore.

In sum, the Opinion does not create a split in authorities. It simply clarifies already existing, well-settled law—and applies that law to a new context, holding that fraudulent inducement of contract is outside of the economic loss rule in the context of

breach of warranty under consumer protection statutes. There is no need for "further guidance," as Nissan contends, because the published Opinion is already all the guidance that is needed. The Court should deny review.

B. That The Court Agreed To Decide The Ninth Circuit's Certified Question In *Rattagan* Does Not Militate In Favor Of Granting Review.

Nissan notes that the Court agreed to answer the Ninth Circuit's certified question in *Rattagan v. Uber Technologies* (No. S272113)—namely, whether claims for fraudulent concealment are "exempted from the economic loss rule." (Pet. 7-9, 15.) Nissan urges review because, according to Nissan, this Court's eventual opinion in *Rattagan* might not reach the issue of fraudulent inducement by concealment. (See Pet. 9.)

But the fact that the Court is addressing fraudulent concealment in *Rattagan* does not militate in favor of granting review here. This is so for multiple reasons.

First, as shown, the law is well-settled that fraudulent inducement is outside of the economic loss rule. While the question that the Ninth Circuit certified in *Rattagan* is broadly stated in terms of fraudulent concealment, without distinguishing because concealment to induce a contract versus concealment during a contract, the defendant in that case, Uber Technologies, agrees—at multiple times throughout its answering brief—that fraudulent inducement is an exception to the economic loss rule. (MJN, Ex. B [Uber's Answering Brief in

Rattagan, pp. 10, 20, 21, 27, 44, 55 fn. 11].) While that exception applies whether the fraud is committed by concealment or misrepresentation, Uber Technologies concedes that fraudulent inducement by concealment is excepted. (*Ibid*.)

Rattagan involves fraudulent concealment that occurred during the *performance* of a contract—a factual scenario that is distinct from that here. Given the *Rattagan* parties' recognition that fraudulent inducement in either form is clearly excepted from the economic loss, as is fraudulent misrepresentation during the contract, the only *actual* area of controversy is as to whether fraudulent concealment committed during the performance of a contract is outside the scope of the economic loss rule—and that's the *only* question that *Robinson Helicopter* actually left open. All other questions relating to the applicability of the economic loss rule—including whether the economic loss rule applies to fraudulent inducement claims—should, frankly, be a no-brainer, as evidenced by the fact that the defendant in *Rattagan* filed an answering brief conceding that "fraudulent inducement claims are already subject to a recognized exception to the economic loss rule." (MJN, Ex. B [Uber's Answering Brief in *Rattagan*, p. 55, fn. 11; see also *id*. at pp. 20, 7-28, 44.) There is no confusion on the point.

Second, the reason that the Court is addressing fraudulent concealment in *Rattagan* is because, as the Ninth Circuit observed in its certification order "[t]he district courts have reached opposite conclusions" on "whether fraudulent concealment… constitutes independent tortious conduct,

warranting an exception to the economic loss rule." (See MJN, Ex. A [Certification Order, pp. 6-7].) In other words, the *federal courts* apparently need this Court's guidance on how the economic loss rule operates. But the fact that federal district courts are confused on the issue doesn't mean that published California appellate case law is. Quite the contrary, published appellate authority in California and this Court's jurisprudence are utterly consistent with each other, and the Opinion abolishes any inconsistent interpretations as to the exemption for fraudulent inducement from the economic loss rule. There is no reason to grant review.

Nissan notes that the Court issued a grant-and-hold order in *Spellman*, which presents the applicability of the economic loss rule in a fraudulent inducement claim involving auto manufacturers and owners. (Pet. 7.) Nissan argues that the fact that the Court issued that grant-and-hold order means that the Court recognizes that "the question presented here is an important one on which lower courts are deeply divided." (Pet. 19.) Not so. The Court issued a grant-and-hold in *Spellman* presumably on the ground that the Ninth Circuit's certified question in *Rattagan* is broadly stated enough to encompass both fraudulent inducement and fraud during contract performance. But that grant-and-hold order was issued before the defendant in *Rattagan* (Uber Technologies) filed its answering brief *agreeing* that California law is entirely clear and entirely settled that *all* fraudulent inducement claims are outside the economic loss rule.

(See MJN, Ex. B [Uber's Answering Brief in *Rattagan*, pp. 20, 27, 44, 55, fn. 11].)

In other words, everyone other than Nissan agrees that California law is already consistent in recognizing that fraudulent inducement claims are outside the economic loss rule. Without any split of appellate authorities and against the backdrop of totally consistent case law and statutory authority, there is no possible basis for review in the instant case.

C. Nissan's Attacks On The Opinion Are Unwarranted.

Nissan's petition includes myriad attacks on the Opinion and argues that the economic loss rule must *always* bar fraudulent inducement by concealment claims. A full refutation is beyond the scope of this Answer, where the question is just whether there is a review-worthy issue. But the Opinion is easily correct under well-established existing law. Among other things:

- The Opinion correctly holds that fraudulent inducement is independent of any contract/warranty breach: Fraudulent inducement occurs *before* any contract is formed or warranty obligations attach. (Opn. 14; cf. *Anderson v. Ford Motor Co.* (2022) 74 Cal.App.5th 946, 963, 967 [affirming recovery of punitive damages for fraudulent inducement by concealment (and violation of the Consumer Legal Remedies Act) and a Song-Beverly civil penalty because punitive damages were based on pre-sale conduct, while civil penalty was based on post-sale failure to comply with warranty obligations].)

- The economic loss rule's *purpose*—separating the law of contracts from the law of torts—does not apply to fraudulent inducement claims because deceiving someone into entering a contract in the first place is a separate tort that cannot be condoned, as Nissan would have it. As this Court explained a decade *before Robinson Helicopter*, fraudulent inducement "is *not* a context where the 'traditional separation of tort and contract law' [citations] obtains. To the contrary, *this area of the law traditionally has involved both contract and tort principles and procedures*." (*Lazar, supra,* 12 Cal.4th at p. 645, italics added.) Neither *Robinson Helicopter* nor *Lazar* limited the economic-loss-rule exception to inducement by misrepresentations, as opposed to by concealment.

- *Robinson Helicopter's reasoning* dictates that fraudulent inducement claims are outside the economic loss rule regardless whether the fraud was by concealment or by omission. The Court reasoned that valid fraud suits further California's interest in "preserving a business climate free of fraud and deceptive practices," but Nissan disagrees that such a climate is necessary. Fraud falls into the category of conduct """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."" (34 Cal.4th at p. 992, ellipsis in *Robinson Helicopter*.) 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.) And indeed, Nissan's rule—which would *create* a comprehensive shield from tort

liability for manufacturers of consumer products when those manufacturers successfully dupe a consumer into buying a car (or other consumer product) by concealing material information—would be particularly bad policy in light of recent cases illustrating that fraud is a serious problem in the automotive industry.[3] Yet Nissan dedicates five pages of its petition to the proposition that manufacturers should enjoy absolute immunity from liability for concealing known defects because anything short of that would "burden courts"—completely ignoring Nissan's own role in selling the unsafe and defective vehicles to unwitting buyers. (See Pet. 37-41.)

- As *Robinson Helicopter* explained, 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

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[3] See, e.g., *In re Volkswagen 'Clean Diesel' Marketing, Sales Practices, and Products Liability Litigation* (N.D.Cal., Oct. 25, 2016, MDL No. 2672 CRB (JSC)) 2016 WL 6442227 [consent decree related to Volkswagen's having secretly installed defeat devices in certain engines to cheat emissions tests and deceive regulators]; *Anderson, supra*, 74 Cal.App.5th at pp. 963, 967, 979 [affirming fraud judgment against Ford, following trial where internal emails revealed, among other inculpatory statements, that Ford's warranty program supervisor admitted that "[w]e unfortunately exceeded our own cylinder pressure specs" and "recommend[ed] we delete these emails" to avoid facing a class action].

should not, be expected to anticipate fraud and dishonesty in every transaction.'" (*Ibid.*) Accordingly, fraud claims do not implicate the economic loss rule's purpose—protecting the parties' allocation of risk.

- The Restatement agrees: 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." (Rest.3d Torts, Liability For Economic Harm, § 9, com. a.) For that reason, the Restatement limits the economic loss rule to negligence claims—it does not view the rule as barring fraud claims at all.

- The Court of Appeal correctly rejected Nissan's claim that Plaintiffs failed to plead their claim with sufficient particularity. (Opn. 17-20; Pet. 37.) Plaintiffs alleged that a defective CVT transmission caused their car to shake violently and to pause before accelerating; that "[t]he transmission defect creates a serious safety risk"; that Nissan "knew about transmission defects" and "the attendant safety problems" and had a duty to disclose them; but that Nissan failed to do so. (1 AA 19-20, 26.) The complaint alleged that Nissan recognized issues with the CVT in July 2012, and that Nissan had received complaints of transmission defects in Sentras specifically by October 2012—four months, and one month, respectively, before Plaintiffs bought their car. (1 AA 23, 25.) Plaintiffs' appellate briefing also detailed more specific allegations that Plaintiffs

could add, if the existing allegations were deemed insufficient. (Plaintiffs' Reply Brief 41-44.) Nissan's quibbles with the allegations, and that Plaintiffs introduced no *evidence* of the percentage of transmissions that malfunctioned, are not well-taken—this case is at the *demurrer* stage, when Plaintiffs' allegations must be credited.

- The Court of Appeal also correctly determined that a car manufacturer has a duty to disclose material problems where the complaint alleges that the plaintiff bought a car from a Nissan dealership, that Nissan backed with an express warranty, and that the dealership was an authorized agent for purposes of sale of the Nissan vehicles. (Opn. 18-19.)

In addition, Nissan argues that the Court should grant review because the Opinion failed to grapple with the fact that "consumers' expectations about products are governed by affirmative statements in warranties." (Pet. 13.) But not all warranty claims involve allegations of fraudulent conduct. This case involves a sub-species of breach of warranty cases that are brought under California's consumer protection regime, known as the Song-Beverly Consumer Warranty Act, Civil Code § 1790 et. seq., that *also* include factual support for fraudulent inducement claims. While it may be true, as Nissan argues, that " '[t]he very existence of a warranty presupposes that some defects may occur,'" (Pet. 37-38), the warranty is intended to address those statistical anomalies that cannot be avoided on an assembly line; most cars never, or rarely, have any problem, but not every car is perfect. The warranty does not "presuppose," however, that

Nissan will knowingly put defective products into the stream of commerce in the hopes that, at some time in the future, the necessary repairs might be developed and implemented if they are cost-effective for Nissan—using consumers as guinea pigs for testing.

Finally, Nissan argues that "[p]laintiffs have flooded the courts with hybrid lemon-law/fraud cases." (Pet. 8.) This is not remotely true in comparison to the number of cars purchased annually in California. And any increase in cases is necessarily a result of Nissan (and other manufacturers) flooding California with cars with known defective issues, such as transmissions and engines—and Nissan argues here for a free pass for doing it. No one suggests that auto manufacturers must disclose results of internal testing data or other trade secrets as Nissan absurdly suggests (Pet. 39). But if Nissan knows that its cars have a high propensity for transmission problems that will affect the use and safety of their cars (i.e., multiple lines of Nissan cars over numerous years contain the defective CVT transmission), then Nissan should either wait to sell the car until Nissan has a handle on the problems or warn consumers so as to give consumers a choice—not to be blindsided. Despite these perfectly reasonable options, Nissan insists that it should be able to continue defrauding consumers into purchasing unsafe, defective products without disclosure. Nissan argues against such reasonable measures because, in its view, its customers are not intelligent enough to understand a disclosure that a vehicle has a propensity of exhibiting significant transmission problems. (See

Pet. 39 [arguing that disclosing information to consumers about failure rates and consumer complaints "would be an exercise in futility because there can be no reasonable expectation that consumers would actually review, consider and understand that disclosed information before purchasing"].)

Nissan suggests that the economic loss rule bars the doors of the courthouse to *all* claims for fraudulent inducement of contract. But no published California appellate case law supports Nissan's radical position. There is no basis for review.

III. At Most, This Case Should Be A Grant-And-Hold Pending The Decision In *Rattagan V. Uber*, And Should Remain Binding In The Meantime.

If the Court grants review at all here, it should be only a grant-and-hold—the Court should decline Nissan's urging of a straight grant of review, and instead simply grant review and defer determining whether to order briefing in the instant case until *Rattagan* is decided. And, the Court should direct that the Opinion remains binding in the meantime.

A. At Most, Review Should Be On A Grant-And-Hold Basis.

If the Court is inclined to grant review at all, that review should at most be on a grant-and-hold basis in *Spellman* – again, even though that grant-and-hold decision was made by the Court before the Court had the benefit of knowing that the fraudulent inducement exception raised by *Spellman* would actually be conceded by defendant Uber Technologies in *Rattagan*. Because

the Ninth Circuit asked in *Rattagan* about "fraudulent concealment," without distinguishing between fraudulent concealment in *performing* a contract (the factual situation in *Rattagan*) and fraudulent concealment in *inducing* a contract (the situation here), this Court's eventual decision in *Rattagan* is inescapably going to address fraudulent inducement to fully answer the question posed.

By issuing a grant-and-hold, the Opinion in this case could be remanded to the Court of Appeal for reconsideration in light of *Rattagan*. And if this Court decides there is some issue as to fraudulent inducement lingering after its *Rattagan* opinion, it could order briefing at that stage. But it is unlikely there would be any review-worthy issue at all at that point, given that—as discussed above—California appellate authority uniformly holds that tort damages are available for fraudulent inducement. There is certainly no reason to order briefing now.

B. The Opinion Should Remain Precedential Pending Any Grant-And-Hold.

In the event that the Court were to issue a grant-and-hold, it should order that the Opinion is binding on lower courts while review is pending. Under California Rule of Court, rule 8.1115, the Court has discretion to issue such an order, where the Opinion is utterly consistent with all published case law and brings necessary clarity to both state and federal lower courts.

But really, the Court should just deny review, as granting review—even grant-and-hold review—is likely to prolong the trial

courts' inconsistencies, based on misinterpretations of this Court's *Robinson Helicopter* holding, which the Opinion now resolves. Indeed, this Court should deny review because the Opinion already says what this Court has previously said: a plaintiff can recover for both fraudulent inducement of contract and breach of that same contract. (See p. 7, *ante*.)

CONCLUSION

The Court should deny review. Alternatively, the Court should grant review only on a grant-and-hold basis and should order that the Opinion remains binding while review is pending.

Date: December 22, 2022

KNIGHT LAW GROUP LLP
Roger Kirnos
Christopher Swanson

GREINES, MARTIN, STEIN & RICHLAND LLP
Cynthia E. Tobisman
Alana H. Rotter

By /s/ Cynthia E. Tobisman
Cynthia E. Tobisman

Attorneys for Plaintiffs and Appellants SOBITA DHITAL and DANIEL NEWMAN

CERTIFICATION

Pursuant to California Rules of Court, rule 8.204(c)(1), I certify that this Answer to Petition for Review contains **5,876 words**, not including the tables of contents and authorities, the caption page, signature blocks, or this Certification page.

Date: December 22, 2022

/s/ Cynthia E. Tobisman
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 6420 Wilshire Boulevard, Suite 1100, Los Angeles, California 90048.

On December 22, 2022, I served the foregoing document described as: **Answer to Petition for Review** 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.

By Mail: I am "readily familiar" with this firm's practice of collection and processing correspondence for mailing. Under that practice, it would be deposited with United States Postal Service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than 1 day after date of deposit for mailing in affidavit.

Executed on December 22, 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.

Chris Hsu

Chris Hsu

SERVICE LIST

Via TrueFiling:

SHOOK HARDY & BACON LLP
Andrew L. Chang, Esq.
achang@shb.com
M. Kevin Underhill, Esq.
kunderhill@shb.com
Amir Nassihi, Esq.
anassihi@shb.com
555 Mission Street, Suite 2300
San Francisco, CA 94105

WILSON TURNER KOSMO LLP
Robert A. Shields, Esq.
rshields@wilsonturnerkosmo.com
402 W Broadway, Suite 1600
San Diego, CA 92101-8522

Attorneys for Defendant and Respondent
NISSAN NORTH AMERICA, INC.

Office of the Clerk
California Court of Appeal
First Appellate District
350 McAllister Street
San Francisco, CA 94102

Via US Mail:

Office of the Clerk
Alameda County Superior Court
Hon. Richard Seabolt
2233 Shore Line Drive
Alameda, CA 94501