Case No. S_____

IN THE SUPREME COURT OF CALIFORNIA

SOBITA DHITAL, et al.,

Plaintiffs and Appellants,

v.

NISSAN NORTH AMERICA, INC.,

Defendant and Respondent.

PETITION FOR REVIEW

After a Decision of the Court of Appeal,
First Appellate District, Case No. A162817

Appeal from the Superior Court of Alameda County
Case No. RG190009260 (The Honorable Richard Seabolt)

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ISSUE PRESENTED

Having accepted the 9th Circuit's certification request in *Rattagan v. Uber Techs., Inc.* (Cal. Feb. 9, 2022) No. S272113), this Court has already recognized the need to resolve recurring questions about California's economic-loss rule barring tort damages for claims that are at bottom disputes over a breach of contract, and the scope of an exception to that rule where fraudulent inducement to enter into the contract is alleged. This Court has also granted review, on a grant-and-hold basis, in *Kia Am., Inc. v. Superior Court (Spellman)* (Cal. Apr. 20, 2022) No. S273170, which presents that legal question in the context of the contractual relationship between auto manufacturers and owners seeking repairs under a vehicle warranty:

> Does California's economic-loss rule bar tort claims alleging that a vehicle manufacturer failed to disclose facts relating to the same malfunction that is the subject of an express-warranty claim?

In crafting the economic-loss rule over 65 years ago, this Court explained that it was intended to appropriately allocate the risks of economic harm between manufacturers and consumers in the warranty context, and noted that this allocation should not change absent affirmative conduct by the manufacturer. (*Seely v. White Motor Co.* (1965) 63 Cal.2d 9, 18–19.) Consistent with that reasoning, almost 20 years ago this Court addressed the economic-loss rule in a product case involving both contract and fraud

claims, and it created a limited exception for claims involving specifically pleaded affirmative misrepresentations. (*Robinson Helicopter Co., Inc. v. Dana Corp.* (2004) 34 Cal.4th 979.) *Robinson Helicopter* noted the unique harm that the alleged misrepresentations caused to the plaintiff who purchased mechanical parts from the defendant: when selling to customers its own wares that incorporated the defective parts, the plaintiff was exposed to third party liability and regulatory discipline—a harm far greater than the disappointed expectation of receiving defect-free parts from the defendant. (*Id.* at p. 991.)

Plaintiffs in recent years have flooded the courts with hybrid lemon-law/fraud cases, asserting both a failure to live up to a vehicle's warranty and a tort—fraud—in connection with the sale of the vehicle. In such cases, plaintiffs do not plead specific affirmative misrepresentations, only vague "concealment" of information about the vehicle that manufacturers knew but the customers buying cars from dealers did not. Lower courts have been deeply divided as to whether the economic-loss rule permits tort damages in such cases, or whether the plaintiffs are limited to contractual remedies for breach of warranty and the generous statutory remedies (including penalties for willful breaches and one-way attorney-fee shifting).

This Court in *Rattagan* will consider whether claims for fraudulent concealment are "exempted from the economic loss

rule." (*Rattagan v. Uber Techs., Inc.* (Cal. Feb. 9, 2022) No. S272113.) This case involves the same question, but provides an opportunity to directly address the First District's reasoning in declining to apply the economic loss rule in a lemon law case: the Court of Appeal created an absolute exception to the economic-loss rule where a plaintiff labels a concealment claim as "fraudulent inducement." In *Rattagan,* the concealment issue is not framed in a way that will likely resolve the recurring issue of statewide importance that the Court of Appeal addressed in this case, and that issue will therefore continue to be subject to continued dispute and confusion unless review is granted here.

INTRODUCTION AND SUMMARY OF ARGUMENT

The economic-loss rule—which this Court created in a case involving a vehicle covered by an express warranty—provides that if a buyer's expectations in a product have been frustrated because the product is not working properly, the buyer is generally limited to contract remedies. If the product caused *physical* injury, tort claims are available. But if the only injury is *economic*, and especially if the only injury is to the value of the malfunctioning product, important public policy concerns justify limiting a plaintiff to any contract remedies he or she may have.

That rule is implicated here—and in an increasing number of cases—because uninjured plaintiffs who would be more than compensated by a warranty claim have decided that is not enough,

and now also pursue common-law fraudulent-omission claims in hopes of recovering punitive damages.

Here, for example, Sobita Dhital and Daniel Newman alleged that their Nissan Sentra developed transmission problems during the warranty period and that there were two unsuccessful repairs under warranty. There was nothing unusual about their Song-Beverly Act warranty claims. But they also alleged, on information and belief, that Nissan knew the problems would develop and that, if they did, Nissan would be unable to fix them, but failed to disclose this alleged knowledge before (and after) the sale; its failure to disclose this knowledge, they allege, was fraud.

But everyone who buys a vehicle knows there is a chance something may go wrong with it. As this Court recognized in *Seely*, the point of an express warranty is to allocate that risk between buyer and seller according to the conditions set forth in the warranty. If a vehicle develops a problem that can't be fixed, then the warranty may have been breached. The problem will not arise in every vehicle—far from it. But plaintiffs increasingly argue that every such case *necessarily* involves fraud because the manufacturer had a duty to disclose all information regarding the vehicle's *potential* for future performance problems of all kinds, and "concealed" that information by failing to volunteer it. They contend they learned of the "fraud" only when the vehicle

malfunctioned—the same malfunction on which they base the warranty claim.

This strategy has been deployed by thousands of plaintiffs suing automakers over alleged "defects" that—if they manifested at all—caused no personal injuries and harmed only the value of the product. Plaintiffs assert only the vaguest fraud claims, and seek the same compensatory damages for fraud as for breach of warranty. In addition to a statutory civil penalty for warranty claims, such plaintiffs also seek punitive damages predicated on the improperly included fraud claims, which often render settlement efforts futile. This greatly increases the burden on the courts as well as on defendants. Such cases have been filed *en masse* in recent years. Cases that should settle early linger on instead, and trials that should last hours instead last for weeks.

To date, this case is the first time that a California appellate court has substantively addressed whether the economic-loss rule applies in cases like this one. In *Robinson*, this Court crafted a narrow exception to the rule allowing fraud claims to proceed only if (1) based on "affirmative misrepresentations" that (2) caused harm "independent of the plaintiffs' economic loss." (*Robinson, supra*, 34 Cal.4th at p. 993.) This Court made clear the exception it was articulating was "narrow" and subject to the requirement that fraud be pleaded with particularity. (*Ibid.*)

Here, Plaintiffs allege that when they bought the Sentra, Nissan provided an express warranty promising to repair defects during the warranty period. After more than two years without any problems, they claim their Sentra malfunctioned during the warranty period and the malfunction was not successfully repaired within a reasonable number of attempts. Plaintiffs sued in March 2019 asserting claims for breach of warranty, seeking damages and civil penalties under the Song-Beverly Act. They also asserted a fraud-by-concealment claim, premised on Nissan failing to disclose the potential for the same malfunction to Plaintiffs. After several rounds of demurrers on the fraud claim and related motions to strike punitive damages, the trial court ruled that the economic-loss rule applied and, on that basis, sustained Nissan's demurrer and granted its motion to strike without leave to amend.

This did not affect Plaintiffs' Song-Beverly causes of action, which offered a more-than-adequate remedy. But rather than pursue those causes of action, Plaintiffs voluntarily dismissed them all with prejudice so they could appeal immediately in hopes of reinstating the fraud claim. The trial court therefore entered judgment in favor of Nissan on all causes of action.

Plaintiffs appealed, and the Court of Appeal reversed, holding that Plaintiffs had alleged a fraudulent-inducement-by-concealment claim with sufficient particularity, and that such a claim is not barred by the economic-loss rule regardless of whether

it is based on an affirmative misrepresentation or a mere failure to disclose the existence of a potential future malfunction.

The First District's refusal to consider the inherent differences between affirmative and omission-based fraud conflicts with the holdings and reasoning of multiple opinions by this Court and other Courts of Appeal that recognize that consumers' expectations about products are governed by affirmative statements in warranties. (See, e.g., *Santana v. FCA US, LLC* (2020) 56 Cal.App.5th 334, 345–46 [Fourth District holding "[t]he very existence of a warranty presupposes that some defects may occur."]; *Daugherty v. Am. Honda Motor Co.* (2006) 144 Cal.App.4th 824, 838 [Second District holding that the "only expectation buyers could have had about the F22 engine was that it would function properly for the length of Honda's express warranty"]; *Bardin v. DaimlerChrysler Corp.* (2006) 136 Cal.App.4th 1255, 1270 [Fourth District holding that use of less durable materials despite the availability of better materials did not violate public policy in the absence of affirmative misrepresentations or promises to the contrary].)

As discussed, that distinction has been recognized since this Court crafted the economic-loss rule in *Seely*, and was further recognized by the limited exception to that rule carved out in *Robinson*. This is because, among other reasons, the risk of mere economic loss caused by a defect is fairly charged to consumers and

can be shifted only based on affirmative conduct—either the manufacturer's contractual agreement to accept it (e.g., through a warranty) or by some affirmative misrepresentation, specifically pleaded. Allowing it to be shifted by vaguely pleaded omission claims would—and in fact has—opened the floodgates to litigation just as this Court foresaw in *Robinson*.

The First District's decision here is also contrary to many others in state and federal trial courts on nearly identical facts, including several decisions in defendants' favor by the Hon. André Birotte Jr., who has presided over more than a thousand cases in multidistrict litigation involving similar hybrid claims. (See, e.g., *In re Ford Motor Co. DPS6 PowerShift Transmission Prods. Liab. Litig. (Altamirano-Torres)* (C.D. Cal. Sept. 2, 2020) 483 F.Supp.3d 838, 842–50 [holding economic-loss rule barred fraud claims].) Even following the First District's decision here, trial courts remain in conflict about its effect and expressly await guidance from this Court. (Compare *Salcedo v. Nissan N. Am., Inc.* (C.D. Cal. Nov. 2, 2022) 2022 WL 16705004, *1 fn. 1, *5, adopted as final ruling, 2022 WL 16706599; *Johnson v. Ford Motor Co.* (L.A. Super. Ct. Nov. 21, 2022) No. 21STCV14998, 2022 WL 17361617, *1 with *Flier v. FCA US LLC* (N.D. Cal. Nov. 8, 2022) 2022 WL 16823042, *6.) While some trial courts have held in plaintiffs' favor, the conflicting decisions—and the sheer number of cases in which such

decisions must be made—underscore the need for guidance by this Court.

The lack of such guidance prompted the Ninth Circuit to certify the question, "Under California law, are claims for fraudulent concealment exempted from the economic loss rule?" (*Rattagan v. Uber Techs., Inc.* (9th Cir. Dec. 6, 2021), 19 F.4th 1188, 1193.) This Court agreed to answer that question.

The First District's analysis here involves the question posed in *Rattagan* but applies it in a more common scenario involving purported fraudulent inducement, noting that *Robinson* "left undecided whether concealment-based claims are barred by the economic loss rule." (*Dhital v. Nissan N. Am.* (2022) --- Cal.Rptr.3d ---, 2022 WL 14772909, *7 (*Dhital*).) The court concluded that "[w]hat follows from [*Robinson Helicopter's*] analysis, however, is that *concealment-based* claims for fraudulent inducement are not barred by the economic loss rule." (*Ibid.,* emphasis added.) This Court should grant Nissan's petition and take this case along with *Rattagan*. (See *Zurba v. FCA US LLC* (C.D. Cal. Nov. 10, 2022) No. 5:21-cv-01824, 2022 WL 7363073, *7 fn. 2 [noting this Court's acceptance of *Rattagan* did not affect analysis because *Rattagan* does not involve fraudulent inducement].)

STATEMENT OF THE CASE

Nissan North America, Inc., the petitioner, is the defendant in the case below. Sobita Dhital and Daniel Newman are the plaintiffs and respondents.

Plaintiffs bought a 2013 Nissan Sentra in November 2012 and alleged it developed problems because of a "defective continuously variable transmission[ ] ('CVT')." (Second Am. Compl., 1 AA 18–19 [¶¶ 8, 11, 17].)[1] The 2013 model year was the first in which Nissan equipped vehicles with the CVT. (*Ibid.*)

Plaintiffs alleged that the CVT design could cause performance problems and might pose a safety risk. (*Id.* at 19–23.) They further alleged, "[u]pon information and belief," that Nissan "was aware, or should have been aware," of "the CVT defect" in Plaintiffs' Sentra sometime before November 4, 2012, the date Plaintiffs bought it—and well before any malfunction occurred. (*Id.* at 18, 20, 21.) Plaintiffs alleged Nissan had received unspecified "complaints" about other CVT-equipped Sentras "since at least October 2012"—only a month before Plaintiffs' purchase—but cited no examples. (*Id.* at 23 [¶ 45].) And though the SAC cited various technical service bulletins (TSBs) Nissan issued over the years, even the earliest TSB relating to the 2013 Sentra post-dated Plaintiffs' purchase. (*Id.* at 21–25.) Plaintiffs introduced no

[1] Fact citations are to the record on appeal, by volume and overall page number.

evidence of the percentage of Sentras that actually malfunctions as a result of any condition of the CVT.

Plaintiffs did not have any issues at all with the Sentra for more than two years. In February and March 2015, however, they took the vehicle in for repair of transmission problems, which they allege failed to correct the problems. (SAC, 1 AA 28–29.) They sued Nissan for failing to repurchase or replace the Sentra after having failed to repair the transmission. (*Ibid.*)

After the trial court sustained demurrers to the fraud claim (and granted a motion to strike punitive damages) based on the economic-loss rule, Plaintiffs voluntarily dismissed with prejudice their statutory lemon law claims under the Song Beverly Act so they could appeal immediately in hopes of reinstating the fraud and punitive-damages claims. (2 AA 673.) The trial court entered judgment in favor of Nissan on all causes of action. (2 AA 678–681.)

Plaintiffs appealed. On October 26, 2022, the First District reversed, holding the economic-loss rule did not bar Plaintiffs' fraud claim. It held fraudulent-inducement claims are generally outside the scope of the economic-loss rule, and also rejected Nissan's argument that Plaintiffs did not adequately plead their fraud claim, which was "a ground for demurrer not reached by the trial court." (Opinion of Oct. 26, 2022 [Exh. A].)

The economic-loss-rule holding was premised on this Court's discussion of fraudulent-inducement claims in *Robinson*, which

the Court of Appeal described as recognizing "an existing exception to the economic loss rule." (*Id.* at pp. 13-14.) The Court of Appeal held that Plaintiffs' fraud claim was based on presale fraudulent concealment to induce the sale of the Sentra (*Id.* at pp. 15.) Specifically, the Court of Appeal held plaintiff sufficiently pleaded around the economic loss rule by alleging that:

> the CVT transmissions installed in numerous Nissan vehicles (including the one plaintiffs purchased) were defective; Nissan knew of the defects and the hazards they posed; Nissan had exclusive knowledge of the defects but intentionally concealed and failed to disclose that information; Nissan intended to deceive plaintiffs by concealing known transmission problems; plaintiffs would not have purchased the car if they had known of the defects; and plaintiffs suffered damages in the form of money paid to purchase the car.

(*Id.* at pp. 17–20; see also *id.* at pp. 2–5 [quoting Plaintiffs' allegations about alleged defect and alleged fraud].)

No petition for rehearing was filed regarding the Court of Appeal's October 26, 2022 decision, which became final on November 25, 2022. As a result, this Petition is timely filed on or before December 5, 2022.

GROUNDS FOR REVIEW

I. This Court should grant review to secure uniformity of decision as to an important legal question: Does the

economic-loss rule bar fraud-by-concealment claims in warranty cases?

Review is justified under Rule 8.500(b) because—as this Court's acceptance of the Ninth Circuit's certified question in *Rattagan* and its grant of review in *Spellman* demonstrate—the question presented here is an important one on which lower courts are deeply divided.

Thousands of lemon-law cases similar to this one have been filed in recent years, and more are being filed all the time. Other manufacturers now also face similar proceedings in coordinated proceedings involving hundreds of cases. (See, e.g., *Nissan N. Am. Warranty Cases*, *supra*, JCCP No. 5059 [involving fraud and warranty claims regarding allegedly defective transmissions]; *Ford Motor Warranty Cases*, JCCP No. 4856 [same]; *In re Ford Motor Co. DPS6 PowerShift Transmission Prods. Liab. Litig.* (*Altamirano-Torres*), *supra*, 483 F.Supp.3d at 842–50 [addressing issue in federal MDL proceeding involving more than 1,000 cases].) The parties have cited dozens of rulings involving the economic-loss rule in such cases, many more are likely pending, and the rulings are inconsistent, even after the Court of Appeal's decision here.

A. Dozens of federal courts have addressed the issue, most holding the rule does apply.

In the federal MDL mentioned above, the court held that the economic-loss rule bars fraud claims nearly identical to those alleged here. (*In re Ford Motor Co. DPS6 PowerShift Transmission Prods. Liab. Litig. (Hobart*) (C.D. Cal. Mar. 29, 2021) No. 2:18-ML-02814-AB, 2021 WL 1220948, at *1, 4; *Altamirano-Torres*, *supra*, 483 F.Supp.3d at 842–50.) Judge Birotte has reached the same conclusion in cases against other manufacturers too. (*Clark v. Am. Honda Motor Co., Inc.* (C.D. Cal. Mar. 25, 2021) No. CV 20-03147-AB, 2021 WL 1186338, at *10.)

Most federal district courts agree that the economic-loss rule bars fraud claims similar to those asserted here:

- *Salcedo*, *supra*, 2022 WL 16705004, at *5;
- *Tilahun v. Nissan N. Am., Inc.* (C.D. Cal. Aug. 16, 2022) No. 21-CV-09326-AB-JC, 2022 WL 3591068, at *3–4;
- *Petersen v. FCA US LLC* (C.D. Cal. July 8, 2021) No. CV 21-1386-DSF, 2021 WL 3207960, at *3–5;
- *Kum v. Mercedes-Benz USA, LLC* (N.D. Cal. June 30, 2021) No. 20-CV-06938-CRB, 2021 WL 2682336, at *2 & n.4;
- *Goldstein v. Gen. Motors LLC* (S.D. Cal. Feb. 3, 2021) No. 3:19-CV-1778-JLS, 2021 WL 364140, at *9–10;
- *Bui v. Mercedes-Benz USA, LLC* (S.D. Cal. Jan. 25, 2021) No. 20-CV-1530-CAB, 2021 WL 242936, at *3–4;

- *Drake v. Toyota Motor Corp.* (C.D. Cal. Nov. 23, 2020) No. 2:20-CV-01421-SB-PLA, 2020 WL 7040125, at *12;
- *Macias v. Fiat Chrysler* (C.D. Cal. Aug. 13, 2020) CV 17-2314, 2020 WL 4723976, *1–2;
- *Kelsey v. Nissan N. Am.* (C.D. Cal. July 15, 2020) No. CV 20-4835-MRW, 2020 WL 4592744, at *3;
- *Sloan v. General Motors LLC* (N.D. Cal. Apr. 23, 2020) No. 16-CV-07244-EMC, 2020 WL 1955643, at *23–24;
- *Ponzio v. Mercedes-Benz USA, LLC* (D.N.J. Mar. 11, 2020) 447 F.Supp.3d 194, 236–37 [applying California law];
- *Mosqueda v. Am. Honda Motor Co., Inc.* (C.D. Cal. Mar. 6, 2020) 443 F.Supp.3d 1115, 1133–34;
- *Hsieh v. FCA US LLC* (S.D. Cal. Feb. 20, 2020) 440 F.Supp.3d 1157, 1161–62;
- *Zagarian v. BMW of N. Am., LLC* (C.D. Cal. Oct. 23, 2019) No. CV 18-4857-RSWL-PLA, 2019 WL 6111731, at *3;
- *Hammond v. BMW of N. Am., LLC* (C.D. Cal. June 26, 2019) No. CV 18-00226-DSF, 2019 WL 2912232, at *3.

The scope of these rulings varies, as does the analysis. And, of course, the end result varies; as the Court of Appeal acknowledged, federal district courts have diverged on this issue (Ex. A at pp. 16–17 [acknowledging "differing views taken by courts that have considered this issue."].)

Nissan believes most federal courts have held that the economic-loss rule does apply, but the decisions are far from uniform. Also, as the citations above show, Nissan is by no means

the only manufacturer or distributor facing the kind of hybrid warranty/fraud actions described here. The First District's decision has not resolved this divergence; trial courts are awaiting this Court's answer to the question. (Compare *Salcedo*, *supra*, 2022 WL 16705004, *1 fn. 1, *5, [ruling that *Dhital* "does not change the Court's analysis" and, pending guidance by the California Supreme Court, "the Court will adhere to the seemingly majority case law in this district finding that Plaintiff's fraudulent omission claim is barred by the economic loss rule."] with *Flier*, *supra*, 2022 WL 16823042, *6 [finding *Dhital* "persuasive"; noting "[i]f the California Supreme Court reaches a different conclusion on the applicability of the economic loss rule, FCA may bring another motion as to Plaintiffs' fraud by omission claim."].)

B. Even more state trial courts have addressed the issue, many holding the rule applies.

Even more state trial judges have been required to consider the economic-loss rule in vehicle warranty cases. Again, many have held that the rule bars the pleaded fraud claims (See, e.g., *Johnson*, *supra*, 2022 WL 17361617, *1; *Matthews v. General Motors, LLC* (Riverside Cty. Super. Ct. Feb. 9, 2021) No. RIC2001646, 2021 WL 7162260**;** *Garcia v. Kia Motors Am., Inc.* (Orange Cty. Super. Ct. Oct 14, 2020) Case No. 30-2019-01117071-CU-BC-CJC, 2020 WL 10319927; *Macias v. FCA US LLC* (L.A. Super. Ct. Jan. 28, 2021) Case No. 18STCV06452, 2021 WL

2774220; and *Gonzales v. Kia Motors Am., Inc.* (L.A. Super. Ct. Jan. 27, 2022) No. BC709917, 2022 WL 327627.) Many others reach similar results. But as with the federal decisions, the scope and analysis vary, and many state trial courts (e.g., *Spellman*) have also held that the rule does not apply. As with the cited federal decisions, these are only examples, and there are more than a thousand other pending similar cases in which the issue has not yet been addressed.

Further, the First District's decision does not resolve this question in a manner that would avoid the cost and expense that would be incurred by courts and parties in litigating and resolving this fundamental legal question. At best, it simply punts the issue to summary judgment and trial without providing guidance to trial courts. (Exh. A at p. 15, fn. 5 [recognizing there is a "possibility" that a fraudulent inducement claim would still be barred by the economic-loss rule "depending on the evidentiary record developed at summary judgment or trial"].)

In short, the issue of how the economic-loss rule should apply in vehicle-warranty cases has arisen repeatedly in recent years. It remains pending in many cases, and will recur in future cases until this Court provides guidance. As discussed below, Nissan believes the *Robinson* exception to the rule for affirmative misrepresentations that cause harm independent of the decreased value of the subject of the contract (here, a vehicle) should not be

expanded to encompass contract-dependent disputes pleaded as fraud-by-omission claims such as those alleged here, including where a plaintiff couches those claims as "fraudulent inducement." Regardless of the result, the issue presented is an important one worthy of review, and one in which uniformity of decision is sorely needed.

II. The economic-loss rule limits tort liability between contracting parties except in narrow circumstances.

A. The remedy for frustrated expectations in the value of a product is "in contract alone."

The economic-loss rule provides that "[w]here a purchaser's expectations in a sale are frustrated because the product he bought is not working properly, his remedy is said to be in contract alone, for he has suffered only 'economic' losses." (*Robinson*, *supra*, 34 Cal.4th at 988 (quoting *Neibarger v. Universal Cooperatives, Inc.* (Mich. 1992) 486 N.W.2d 612, 615.) The doctrine hinges on a distinction between transactions involving the sale of goods that fail to meet the buyer's economic expectations and "those involving the sale of defective products to individual consumers who are injured in a manner which has traditionally been remedied by resort to the law of torts." (*Ibid.* [also quoting *Neibarger*].)

A buyer who has suffered only "economic loss due to disappointed expectations" is therefore generally required to seek recovery under contract law, not tort law. (*Ibid.*) "Economic loss"

means "damages for inadequate value [received], costs of repair and replacement of the defective product or consequent loss of profits—without any claim of "personal injury or damages to other property...." (*Ibid.* [quoting *Jimenez v. Sup. Court* (2002) 29 Cal.4th 473, 482].)

That basic dichotomy—requiring purely economic damages to be sought in contract and permitting recovery in tort only where the losses involve personal injury or harm to other property—dates back to this Court's decision in *Seely*, which involved a defective vehicle covered by a warranty. (*Seely*, *supra*, 63 Cal. 2d 9.) There, the Court noted that tort law had been expanding to deal with the problem of injuries caused by defective products. (*Id.* at 15–16.) But the Court refused to expand it further to cover situations that involved only economic loss. Expanding tort liability was appropriate in physical injury cases because of the severe consequences to the injured party and because the risk could be insured against and then "distributed among the public [through increased prices] as a cost of doing business." (*Id.* at 18–19 [citation omitted].) But "[t]hat rationale in no way justifies requiring the consuming public to pay more for their products so that a manufacturer can insure against the possibility" that some customers might incur a purely economic loss because its products failed to meet expectations. (*Id.* at 19.) Recovery for economic loss was therefore limited to contract law. (*Ibid.*)

The U.S. Supreme Court later agreed with *Seely*, adopting its rationale in admiralty cases. (*East River S.S. Corp. v. Transamerica Delaval, Inc.* (1986) 476 U.S. 858, 871–875.) "When a product injures only itself[,] the reasons for imposing a tort duty are weak and those for leaving the party to its contractual remedies are strong." (*Id.* at 871.) The Supreme Court agreed that where the harm is limited to economic loss, "warranty law sufficiently protects the purchaser by allowing it to obtain the benefit of its bargain." (*Id.* at 873.)

This Court reaffirmed the goal of preserving the distinction between tort and contract in *Robinson*, where the Court reiterated that "the economic loss rule prevents the law of contract and the law of tort from dissolving one into the other." (*Robinson*, *supra*, 34 Cal.4th at 988 [quote cleaned up].) Thus, "where a purchaser's expectations in a sale are frustrated because the product he bought is not working properly, his remedy is said to be in contract alone...." (*Ibid.*)

B. *Robinson* created a narrow exception for fraud.

After *Seely*, courts disagreed as to whether the economic-loss rule should apply to *fraud* claims between contracting parties. None of these courts, however, were addressing the issue in lemon-law vehicle warranty cases. Nor did *Robinson* involve such facts, but it did involve an allegedly defective product. (See 34 Cal.4th at 984–993.) The plaintiff (a helicopter manufacturer) alleged that

the defendant (a component supplier) issued false certificates of conformity to design specifications for the steel used in a helicopter clutch—conformance required to qualify the helicopter as "airworthy" under federal law. (*Ibid.*) The Court held that because the certificates were fraudulent representations *independent of the contract* between the manufacturer and supplier, and because they exposed the plaintiff to liability for personal injuries to third parties (from potential crashes) and actual economic harm resulting from a FAA investigation and recall, the fraud claim fell outside the economic-loss rule. (*Id.* at 991.)

This Court was careful to point out that it was creating a "narrow" exception "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 plaintiffs' economic loss." (*Id.* at 993.) This was in response to arguments that a broad exception for fraud claims would "open the floodgates to future litigation" in contract cases. (*Ibid.*) The Court said it did not think this would happen because its holding was "narrow in scope and limited to a defendant's affirmative misrepresentations on which a plaintiff relies and which expose a plaintiff to liability for personal damages independent of the plaintiff's economic loss," and because it believed it could trust lower courts to enforce the requirement that fraud claims be pleaded with particularity. (*Ibid.*)

Here, Plaintiffs have insisted that even before *Robinson* the economic-loss rule did not apply to claims like theirs. But neither *Robinson* nor any other California appellate case has ever *considered* claims like theirs, notwithstanding Plaintiffs' insistence that they are pursuing a claim for "fraudulent inducement." *Robinson* considered, for the first time, application of the economic-loss rule to affirmative fraud claim between contracting parties, and it created a limited, narrow exception that must be met before such claims can proceed. Those conditions should apply to Plaintiffs' claim here. As discussed below, merely labeling a claim "fraudulent inducement" should not be enough to evade the rule. The Court of Appeal should have affirmed the trial court's order because (1) Plaintiffs' fraud-by-concealment claim is not independent from their warranty claims, and (2) they did not assert any claim based on specifically pleaded affirmative intentional misrepresentations, as *Robinson* requires.

III. The Court of Appeal should have affirmed the trial court's order sustaining Nissan's demurrer and striking the punitive damages claim.

In automotive cases where plaintiffs allege only that the vehicle they bought was not worth what they paid for it, the economic-loss rule should limit them to express-warranty claims.

For example, in *Altamirano-Torres*, Judge Birotte recognized that "a plaintiff cannot assert tort claims based on a

product not performing as promised—that is simply an economic loss recoverable [only] in a contract-based action." (483 F.Supp.3d at 848.) The court noted that "the foundation of Plaintiff's claim is that his expectations about the vehicle were frustrated because it did not work properly as Ford promised it would." (*Ibid*.) Put another way, the claim "derive[d] from Ford's alleged breach of its warranty obligation to fix or replace the vehicle if it is defective." (*Ibid*.) The economic-loss rule therefore barred tort claims. (See also, e.g., *Macias v. Fiat Chrysler* (C.D. Cal. Aug. 13, 2020) No. CV 17-2314, 17-1823, 17-2267, 2020 WL 4723976, *1 [holding economic-loss rule means "a buyer doesn't have a tort claim if all she wants is a contract-style recovery (such as restitution or rescission of the parties' agreement) if a product didn't live up to its billing"]; *Kelsey v. Nissan N. Am*. (C.D. Cal. July 15, 2020) No. CV 20-4835-MRW, 2020 WL 4592744, *3–5 [collecting cases holding rule bars fraud claims in "run-of-the-mill Song-Beverly Act warranty breach actions"].) As noted above, many state trial courts have reached the same conclusion.

Nothing about Plaintiffs' case here makes it any different. They do not claim damages for physical injury, only that they were allegedly harmed because they would not have purchased the vehicle. (SAC ¶¶ 160–62, 1 AA 40–41.) The economic-loss rule, therefore, limits them to contract claims—specifically, their express-warranty claims. On such facts, both sets of claims

ultimately "derive[ ] from [the manufacturer's] alleged breach of its warranty obligation to fix or replace the vehicle if it is defective." (*Altamirano-Torres*, *supra*, 483 F.Supp.3d at 848.) Plaintiffs have not alleged facts showing their claims qualify for *Robinson's* narrow exception, and this Court should reject their argument, accepted by the Court of Appeal, that any claim re-framed as one for "fraudulent inducement" is immune to the economic-loss rule.

A. Plaintiffs did not allege the fraud caused them any "independent" harm.

To take advantage of the exception to the economic-loss rule, a plaintiff must allege facts showing that the fraud caused harm that was "independent" of the economic loss that allegedly resulted from the breach of contract. (See *Robinson*, *supra*, 34 Cal.4th at 991 [citing *Erlich v. Menezes* (1999) 21 Cal.4th 543, 553–554], 993 [describing harm as "personal damages independent of the plaintiff's economic loss."].) Plaintiffs alleged no facts showing they suffered any harm other than the "monies paid towards the purchase of the Subject Vehicle"—*i.e.*, the allegedly defective product "harmed only itself"—and thus are not seeking recovery for an independent harm. (*Ibid.*; SAC ¶¶ 160–62, 1 AA 40–41.)

Nor should plaintiffs be able to avoid this result by arguing that the economic-loss rule is irrelevant because their claims are for "fraudulent inducement"—the argument the Court of Appeal

accepted. (See, e.g., Ex. A at p. 17.) The Court of Appeal cited a brief discussion in *Robinson* of instances where "tort damages have been permitted in contract cases," including "where the contract was fraudulently induced" and that "in each of these cases, 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." (*Id.* at pp. 9–10, quoting *Robinson, supra,* 34 Cal.4th at pp. 989–990.) Based on that brief comment, the Court of Appeal stated that "[t]he reasoning in *Robinson* affirmatively places fraudulent inducement by concealment outside the coverage of the economic loss rule"—apparently in all cases. (*Id.* at pp. 13–14.) But as the Court of Appeal recognized, whether or not fraudulent concealment by concealment should be barred by the economic-loss rule was not even before this Court in *Robinson*. (See *id.* at p. 11 [fraud claims in *Robinson* "involve[ed] alleged fraud…that occurred *during the performance* of a contract"], emphasis in original.) As a result, it is not authority for the proposition on which the Court of Appeal relied. (*Geiser v. Kuhns* (2022) 13 Cal.5th 1238, 1252 [to extent part of prior opinion suggested proposition, "it is not controlling because that issue was not presented in" the prior case and "cases are not authority for propositions not considered"].)

More importantly, whether a claim can be characterized as "fraudulent inducement" is not determinative. The question is

whether the tort and contract claims are truly independent. (See *Robinson*, *supra*, 34 Cal.4th at p. 991 [holding rule did not bar fraud claims "because they were independent of Dana's breach of contract"].) That should depend not on labels, but on the nature of the claims and the alleged harm. Other courts have held that even where the alleged presale fraud was affirmative, if the alleged fraud involved only the "quality or character" of warranted goods, then the rule may still apply because such a promise cannot be meaningfully separated from the promises made in the warranty:

> The fraudulent representations alleged by plaintiff concern the quality and characteristics of the software system sold by defendants. These representations are indistinguishable from the terms of the contract and warranty that plaintiff alleges were breached. Plaintiff fails to allege any wrongdoing by defendants independent of defendants' breach of contract and warranty. Because plaintiff's allegations of fraud are not extraneous to the contractual dispute, plaintiff is restricted to its contractual remedies....

(*Huron Tool and Eng'g Co. v. Precision Con'g Servs., Inc.* (Mich. App. 1995) 532 N.W.2d 541, 546 [emphasis added].)[2] Under those circumstances, the harm caused by the false promise is the same harm the warranty was intended to address. (*Cf. Santana v. FCA US, LLC* (2020) 56 Cal.App.5th 334, 345 ["The very existence of a warranty presupposes that some defects may occur."]. The harm

[2] As noted above, *Robinson* relied on Michigan law (though not *Huron Tool*) to reach its holding. (*Robinson*, *supra*, 34 Cal.4th at p. 988 (quoting *Neibarger v. Universal Cooperatives, Inc.* (Mich. 1992) 486 N.W.2d 612, 615.)

and the underlying claims are intertwined, not independent. (See also, e.g., *Altamirano-Torres*, *supra*, 483 F.Supp.3d at 849 [holding that because alleged fraud "overlaps with Ford's alleged breach of its warranty obligations," it is not sufficiently independent to avoid economic-loss rule if it occurred at the time of sale].)

A number of other courts, some very recently, have similarly recognized that even a fraudulent inducement claim is not necessarily immune from an economic-loss-rule challenge under these circumstances. (See, e.g., *Milan Supply Chain Sols. Inc. v. Navistar Inc.* (Tenn. 2020) 627 S.W.3d 125, 153–155 [holding economic-loss rule bars fraudulent inducement claims based on pre-contract misrepresentations and nondisclosures about quality, reliability, and character of goods]; *Hinrichs v. Dow Chem. Co.* (Wis. 2020) 937 N.W.2d 37, 46–48 [economic-loss rule bars fraudulent inducement claims based on misrepresentations involving "quality and characteristics" (effectiveness) of adhesive]; *HealthBanc Int'l, LLC v. Synergy Worldwide, Inc.* (Utah 2018) 435 P.3d 193, 196–198 [economic-loss rule bars fraudulent inducement claims based on misrepresentations involving ownership of rights expressly warranted in contract]; *New London Tobacco Mkt., Inc. v. Kentucky Fuel Corp.* (6th Cir. 2022) 44 F.4th 393, 415 ["Under Kentucky law, a party cannot recover for both breach of contract and fraudulent inducement. So both the economic-loss doctrine and choice-of-remedies rule bar New London from recovering any fraud damages."].)

The argument for applying the rule is even stronger in cases where the alleged presale fraud is only a seller's *omission* of a potential that a problem with the product sold might someday malfunction. That is especially true where, as here, what the defendant allegedly omitted was its knowledge that if a malfunction occurred, it could not be repaired under the contract that requires it—that is, the manufacturer's alleged knowledge that it would likely breach the warranty contract. *That* "fraudulent inducement" claim cannot possibly be independent of the contract.

Indeed, all the vehicle-warranty cases cited above rejected efforts to avoid the economic-loss rule by recasting breach-of-warranty allegations as a presale "fraudulent inducement" claim. As the *Macias* court put it, where consumers contend they "were duped into the deals by an unscrupulous manufacturer that allegedly failed to disclose important information about the car"—before the sale—"the overwhelming majority of district court decisions resoundingly conclude that the nature of the 'fraud' claims in these types of actions are, in substance, contract-type cases that don't justify tort relief." (*Macias*, *supra*, 2020 WL 4723976, at *1–2.) Those courts have it right.

If asserting that fraud was "in the inducement" was enough to avoid the economic-loss rule, there would not be much left of the rule. "Virtually any time a contract has been breached, the party bringing suit can allege that the breaching party never intended

to meet its obligations." (*Oracle USA, Inc. v. XL Global Services, Inc.* (N.D. Cal. July 13, 2009) No. C 09-00537-MHP, 2009 WL 2084154, at *7 [dismissing promissory-fraud claim]; see *Soil Retention Prods., Inc. v. Brentwood Indus., Inc.* (S.D. Cal. Feb. 23, 2021) No. 3:20-cv-02453-BEN, 2021 WL 689914, at *12–14 [dismissing fraud claims based on alleged pre-contract representations].) Here too, accepting an argument like Plaintiffs', especially when based on such conclusory fraud allegations, would seriously undermine the policies the economic-loss rule embodies.

Unfortunately, here the Court of Appeal only superficially analyzed Plaintiffs' allegations, concentrating on the timing rather than the nature of their fraud allegations. (See Ex. A at p. 14 [expressing view that a fraudulent inducement claim is necessarily independent from the contract "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…"].) Respectfully, this ignores the actual nature of the claims here: Plaintiffs are alleging 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. This shows the tort and contract claims overlap, and the Court of Appeal's holding to the contrary exalted form over substance. Where a plaintiff alleges

no harm resulting from the "fraudulent inducement" that is independent of the harm resulting from the breach of warranty, the tort claim should fail.

B. Plaintiffs pleaded no affirmative intentional misrepresentations.

The claims fail for another reason, however: Plaintiffs' fraud claim is not based on "affirmative intentional misrepresentations of fact" that they pleaded at all, much less with the particularity *Robinson* requires. (*Robinson*, *supra*, 34 Cal.4th at 991.) This Court discussed this requirement in response to the argument that a broad exception for fraud claims would "open the floodgates to future litigation" in cases involving a contract. (*Id.* at 993.) The Court said it did not believe this would happen because its holding was narrow and limited to specifically pleaded "affirmative misrepresentations":

> 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. In addition, "[i]n California, fraud must be pled specifically; general and conclusory allegations do not suffice.... We trust the trial courts of this state to enforce this pleading requirement.

(*Id.* at 993.) The claims in cases like this one do not involve misrepresentations, specifically pleaded or otherwise.

C. Allowing vague omissions-based "inducement" claims to go forward will burden courts and impose enormous liability on warrantors.

Because Plaintiffs did not plead any affirmative misrepresentations with particularity, the economic-loss rule should have applied. Instead, a vague and conclusory claim for "concealment"—actually only a pure-omission claim—survived. But concealment must also be pleaded with particularity under California law. Concealment claims should be barred on these facts as particularly illustrated here, where allowing conclusory and vague allegations in fact has opened the floodgates to unnecessary litigation.

In *Seely*, this Court explained that its new rule was based on the risks appropriately allocated to manufacturers and consumers where "the law of warranty governs the economic relations between the parties":

> A consumer should not be charged at the will of the manufacturer with bearing the risk of physical injury when he buys a product on the market. He can, however, be fairly charged with the risk that the product will not match his economic expectations ***unless the manufacturer agrees that it will.***

Id. (emphasis added). In other words, an *affirmative* statement by a manufacturer may shift the burden so that the ELR does not apply, but an omission does not.

Another Court of Appeal decision has already explained why, in the automotive context, allegations of a failure to disclose a defect at the time of sale are *not* independent of the warranty

because "[t]he very existence of a warranty presupposes that some defects may occur." (*Santana*, *supra*, 56 Cal.App.5th at pp. 345–46; see also *Hodges v. Apple, Inc.* (N.D. Cal. Dec. 19, 2013) No. 13–cv–01128–WHO, 2013 WL 6698762, *7 [agreeing that "manufacturers' warranties…address the inescapable reality that there will always be some non-conforming parts in any manufacturing run."].) The Court of Appeal here declined to follow *Santana* without discussion in a brief footnote simply because it found *Santana's* discussion to be "brief." (Ex. A, at p. 19 fn. 7.) But *Santana* recognized that a claim based on presale *concealment* of a defect in this context is necessarily intertwined with the vehicle warranty:

> ***The very existence of a warranty presupposes that some defects may occur***. Thus, the occurrence of a few defects that, so far as the record reveals, were all fixable, and mostly involved vehicles Santana did not own, is not enough to demonstrate an intent to conceal a defect in the TIPM. ***Santana would need evidence that, prior to Santana's purchase of the vehicle, Chrysler was aware of a defect in the TIPM that it was either unwilling or unable to fix.*** There was no such evidence.

(*Santana*, *supra*, 56 Cal.App.5th at pp. 345–46 [emphasis added].) This is consistent with other authority limiting a consumer's reasonable expectations, and a manufacturer's disclosure obligations, to the terms of the warranty in the absence of other affirmative statements. (See, e.g., *Daugherty*, *supra*, 144 Cal.App.4th at p. 838 [holding that the "only expectation buyers could have had about the F22 engine was that it would function properly for the length of Honda's express warranty"]; *Bardin*,

supra, 136 Cal.App.4th at p. 1270 [holding that use of less durable materials to make more money did not violate public policy in the absence of affirmative misrepresentations or promises to the contrary].

It is always the case that automobile manufacturers may have knowledge that consumers may not have about the failure rates or existence of warranty claims or complaints about components in its vehicles. (See, e.g., *Daugherty*, *supra*, 144 Cal.App.4th at p. 830.) How, then, can manufacturers and warrantors comply with a duty to disclose where their knowledge is alleged based solely on "the result of premarket testing and consumer complaints" (Ex. A, at p. 19)? To avoid potential liability for concealment, must manufacturers and warrantors then disclose to every potential consumer the result of all testing and all consumer complaints for each of thousands of vehicle components that exist at the time each of their automobiles are sold to end consumers? Even if they could and did so, it 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.

In contrast, applying warranty law is consistent with the realities of the marketplace and California provides sufficient remedies and enforcement mechanisms to protect consumers. For example, California's Song-Beverly Act "is strongly pro-consumer." (*Murillo v. Fleetwood Enterprises, Inc.* (1998) 17 Cal.4th 985, 990.) It provides the consumer who has been damaged by a denial

of warranty obligations to "bring an action for the recovery of damages and other legal and equitable relief." (Civ.Code, § 1794, subd. (a).) If the consumer prevails, "the buyer shall recover damages and reasonable attorney's fees and costs, and may recover a civil penalty of up to two times the amount of damages." (Civ.Code, § 1794, subd. (e)(1).)

This Court has recognized that applying "the rules of warranty" prevents a manufacturer from liability "for damages of unknown and unlimited scope." (*Seely*, *supra*, 63 Cal.2d at p. 17.) Similarly, this Court has recognized the concern that exceptions to the economic-loss rule could "open the floodgates to future litigation," but believed its holding there would not do so because it was "narrow in scope and limited to a defendant's affirmative misrepresentations on which a plaintiff relies and which expose a plaintiff to liability for personal damages independent of the plaintiff's economic loss" and that trial courts would enforce the specific-pleading requirements for affirmative fraud. (*Robinson*, *supra*, 34 Cal.4th at p. 993.) Extending potential fraud and punitive damages liability to a warrantor for every potential defect that might arise during the life of a vehicle based on conclusory allegations eviscerates the law of warranty.

This case highlights the difficulty in relying on a specific-pleading standard in the concealment context that would avoid swallowing the economic-loss rule entirely and impose potential

tort liability for every case regardless of the scope of warranties for potential defects. The Court of Appeal's ruling also conflicts with public policies based on the reasonable expectations of consumers when purchasing a vehicle with express warranties and imposes an unworkable and ineffective standard on warrantors and manufacturers of complex products like automobiles.

* * *

To the extent a plaintiff alleges economic harm only because a manufacturer or warrantor *failed to disclose* something, the overlap with a related warranty claim is clear. For example, plaintiffs in these auto cases typically allege not just that the manufacturer failed to disclose a problem, but that it failed to disclose its alleged *inability to repair* the problem if the car malfunctioned—directly implicating the express warranty. (See, e.g., SAC ¶¶ 77 1 AA 30 [alleging Nissan "intended for Plaintiffs to rely on those misrepresentations to conceal the fact that the defective CVT transmission could not be repaired."].) This shows why a fraud claim based only on non-disclosure should be particularly susceptible to the economic-loss rule.

CONCLUSION

The legal issue presented here is an important one on which uniformity of decision is lacking, as shown by the many inconsistent trial court rulings to date, the hundreds of other pending cases that present nearly identical issues, and the certifications by the Ninth Circuit asking for this Court's guidance.

This Court should grant Nissan's petition and review this case along with *Rattagan* and *Spellman*. This case would be a good additional vehicle for review, given the relatively unusual facts in *Rattagan* and the fact that, unlike *Spellman*, the Court of Appeal has published an opinion that expressly recognizes is subject to this Court's guidance in *Rattagan*. Alternatively, the Court should grant this petition and hold the case pending its decision in *Rattagan*, or grant and transfer the case back to the Court of Appeal.

December 2, 2022

Respectfully submitted,

SHOOK, HARDY & BACON L.L.P.

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CERTIFICATE OF COMPLIANCE

I certify that, apart from those portions that may be excluded by rule, the text of this brief contains fewer than 8400 words as counted by Microsoft Word, the program used to create it.

December 2, 2022 */s/ Andrew L. Chang*
Andrew L. Chang

EXHIBIT A

Filed 10/26/22

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

SOBITA DHITAL et al., Plaintiffs and Appellants, v. NISSAN NORTH AMERICA, INC., Defendant and Respondent.	A162817 (Alameda County Super. Ct. No. RG19009260)

Plaintiffs Sobita Dhital and Daniel Newman sued defendant Nissan North America, Inc. (Nissan), alleging the transmission in a 2013 Nissan Sentra they purchased was defective. In their operative second amended complaint (SAC), plaintiffs asserted statutory claims under the Song-Beverly Consumer Warranty Act (Song-Beverly Act) (Civ. Code, § 1790 et seq.) and a common law fraud claim alleging that Nissan, by fraudulently concealing the defects, induced them to purchase the car.

The trial court sustained Nissan's demurrer to the fraudulent inducement claim (the fourth cause of action in the SAC) without leave to amend, holding the claim was barred by the "economic loss rule" discussed in *Robinson Helicopter Co., Inc. v. Dana Corp.* (2004) 34 Cal.4th 979 (*Robinson*). The court also granted an accompanying motion to strike plaintiffs' request for punitive damages. Plaintiffs dismissed their remaining claims with prejudice, and the court entered judgment for Nissan.

Plaintiffs appeal, contending the court erred by applying the economic loss rule to bar their fraudulent inducement claim. Nissan argues the court correctly applied the economic loss rule. Nissan alternatively urges this court to affirm on the ground plaintiffs did not plead the fraudulent inducement claim with sufficient particularity, a ground for demurrer not reached by the trial court.

We conclude that, under California law, the economic loss rule does not bar plaintiffs' fraudulent inducement claim. We also reject Nissan's argument that plaintiffs did not adequately plead a claim for fraudulent inducement. We therefore reverse the judgment entered in favor of Nissan and remand for further proceedings on plaintiffs' fraudulent inducement claim.[1]

I. BACKGROUND

A. *The SAC: Plaintiffs' Allegations About the Allegedly Defective Transmission and Nissan's Alleged Fraud*

"Because this matter comes to us after the trial court sustained the defendant's demurrer, 'we must, under established principles, assume the truth of all properly pleaded material allegations of the complaint in evaluating the validity' of the decision below." (*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 635.)

In the SAC, plaintiffs alleged that, on November 4, 2012, they purchased a new 2013 Nissan Sentra from a Nissan dealership in San Leandro. On three occasions in 2015, plaintiffs took the car to an authorized Nissan repair facility because of transmission problems, including stalling, jerking, and lack of power. They eventually decided to stop using the car due

[1] We grant plaintiffs' unopposed request that we take judicial notice of (1) a brief filed in the Supreme Court in *Robinson*, and (2) a California superior court order discussing the economic loss rule.

to their concern it posed a risk to their safety and the safety of others, because "[u]ncertain and unpredictable performance of a vehicle's engine and transmission can result in sudden and unexpected movements or stalling that greatly increase the risk of a motor vehicle accident."

Plaintiffs alleged Nissan manufactured or distributed more than 500,000 vehicles in the United States that were equipped with defective continuously variable transmissions (CVT's), including plaintiffs' Sentra and other Sentras for model years 2013 through 2017. The SAC alleged: "The CVT is defective in that it causes hesitation from a stop before acceleration; sudden, hard shaking during deceleration; sudden, hard shaking and violent jerking (commonly known as 'juddering' or 'shuddering') during acceleration; and complete failure to function, each and all of which prevent a CVT-equipped vehicle from operating as intended by the driver, especially during acceleration from a complete stop." The SAC continued: "This transmission defect creates unreasonably dangerous situations while driving and increases the risk of a crash when trying to accelerate from a stop; at low speeds when drivers intend to accelerate to merge with highway traffic; and when attempting to drive uphill. The transmission defect creates a serious safety risk that can lead to accidents, injuries, or even death to the driver, the vehicles' occupants, other drivers, and pedestrians."

As to Nissan's knowledge that the transmissions were defective, plaintiffs alleged in part that Nissan "knew or should have known about the safety hazard posed by the defective transmissions before the sale of CVT-equipped vehicles from premarket testing, consumer complaints to the National Highway Traffic Safety Administration ('NHTSA'), consumer complaints made directly to Nissan and its dealers, and other sources which drove Nissan to issue Technical Service Bulletins acknowledging the

transmission's defect. Nissan should not have sold, leased, or marketed the CVT-equipped vehicles without a full and complete disclosure of the transmission defect, and should have voluntarily recalled all CVT-equipped vehicles long ago."

In their statutory claims under the Song-Beverly Act (the first, second, and third causes of action in the SAC), plaintiffs alleged Nissan breached express and implied warranties and failed to repair the car within a reasonable period of time. In the common law fraud claim that is at issue in this appeal (the SAC's fourth cause of action, entitled "Fraudulent Inducement—Concealment"), plaintiffs alleged in part that "[Nissan] and its agents intentionally concealed and failed to disclose facts relating to the defective transmission"; Nissan had exclusive knowledge of the defect and did not disclose that information to plaintiffs; "Nissan intended to deceive [plaintiffs] by concealing the known issues with the CVT transmission in an effort to sell the [car] at a maximum price"; "[Nissan] fraudulently induced [plaintiffs] to enter into a contract they would not have entered into but for [Nissan's] concealment of the defective nature of the CVT transmission"; if plaintiffs had known of the defect, they would not have purchased the car; and plaintiffs suffered damages in the form of money paid to purchase the car.

Plaintiffs alleged the defect and the resulting "[u]ncertain and unpredictable performance" of the transmission increased the risk of an accident and thus placed them at risk of physical harm. But as the trial court later noted, plaintiffs did not allege the defect caused any personal injury or any damage to property other than the car.

In the SAC's prayer for relief, plaintiffs sought special and actual damages, rescission of the purchase contract and restitution of all amounts

paid, "diminution in value," incidental and consequential damages, civil penalties, punitive damages, prejudgment interest, and attorney fees.

B. *Procedural Background*

Prior to the filing of the SAC, the court (Hon. Jo-Lynne Q. Lee) (1) sustained, with leave to amend, Nissan's demurrers to the claims for fraudulent inducement—concealment in plaintiffs' original and first amended complaints, and (2) granted, also with leave to amend, Nissan's motion to strike the punitive damages requests in those complaints.

In its demurrer to the fraud claim in plaintiffs' original complaint, Nissan did not contend the economic loss rule barred the claim, arguing on other grounds that plaintiffs had not stated a cause of action. But the trial court requested supplemental briefing on the economic loss rule and sustained the demurrer (with leave to amend) on the basis of that rule, concluding in part that "[t]he only injury identified by Plaintiffs is that they have purchase[d] a vehicle they would not have otherwise bought if they knew of its alleged defects. Such an injury is insufficient to overcome the economic loss rule."

In its order addressing Nissan's motion to strike portions of plaintiffs' original complaint, the court declined to strike certain passages throughout the complaint that Nissan had alleged were irrelevant, but granted the motion (with leave to amend) as to the punitive damages allegations. The court concluded the complaint did not include sufficient allegations to support a claim for punitive damages against a corporation, stating "the allegations in the Complaint are insufficient to establish that 'the advance knowledge and conscious disregard, authorization, ratification or act of oppression, fraud, or malice [is] on the part of an officer, director, or managing agent of the corporation.' ([Civ. Code,] § 3294, [subd.] (b).)"

Plaintiffs filed the SAC in January 2020. Nissan again demurred to the claim for fraudulent inducement—concealment (the fourth cause of action in the SAC) and moved to strike portions of the SAC, including the punitive damages allegations. In its demurrer, Nissan argued plaintiffs' fraud claim was barred by the economic loss rule and was not pleaded with sufficient specificity. Nissan contended in its motion to strike that the SAC's allegations supporting corporate liability for punitive damages were still insufficient, and that plaintiffs had not adequately pleaded a fraud claim that would support an award of punitive damages. A hearing on the demurrer and the motion to strike was set for May 2020, but the matter was taken under submission without hearing because plaintiffs did not contest the tentative ruling against them.

The court (Hon. Richard Seabolt) sustained the demurrer to the fraud cause of action, this time without leave to amend. The court held the fraud claim was barred by the economic loss rule because plaintiffs did not allege the defective transmission in their car caused any personal injury or any damage to property other than the car. The court concluded plaintiffs' claim did not fall within "the 'narrow' exception to the economic loss rule" discussed by the Supreme Court in *Robinson* (a decision we discuss in pt. II.B., *post*), because (1) the claim rests on alleged concealment, rather than affirmative misrepresentations, and (2) plaintiffs did not "plausibly allege 'damages independent of [their] economic loss.' "

The court also granted, without leave to amend, the motion to strike the punitive damages allegations. It reasoned that plaintiffs do not have a viable fraud claim that would support an award of punitive damages, and that such damages are not an available remedy for plaintiffs' remaining claims under the Song-Beverly Act. It also explained that the FAC's

allegations remained insufficient to establish ratification by a senior corporate official as required to support a claim for punitive damages against a corporation (Civ. Code, § 3294, subd. (b)).

Following the court's ruling, plaintiffs dismissed their remaining claims with prejudice, and the court entered judgment for Nissan in April 2021.

Plaintiffs appealed.

II. DISCUSSION

A. *Standard of Review*

" 'In reviewing an order sustaining a demurrer, we examine the operative complaint de novo to determine whether it alleges facts sufficient to state a cause of action under any legal theory.' [Citation.] ' " ' "We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. . . . We also consider matters which may be judicially noticed." . . . Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context.' " ' " (*Mathews v. Becerra* (2019) 8 Cal.5th 756, 768.) " 'In considering a trial court's order sustaining a demurrer without leave to amend, " 'we review the trial court's result for error, and not its legal reasoning.' " ' [Citation.] We ' "affirm the judgment if it is correct on any theory." ' " (*Munoz v. Patel* (2022) 81 Cal.App.5th 761, 771.)

Similarly, " '[t]he standard of review for an order on a motion to strike punitive damages allegations is de novo. [Citation.] "In passing on the correctness of a ruling on a motion to strike, judges read allegations of a pleading subject to a motion to strike as a whole, all parts in their context, and assume their truth." ' " (*Kaiser Foundation Health Plan, Inc. v. Superior Court* (2012) 203 Cal.App.4th 696, 704.)

We review the court's denial of leave to amend for abuse of discretion. (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.) "[W]e must

decide whether there is a reasonable possibility the plaintiff could cure the defect with an amendment. [Citation.] If we find that an amendment could cure the defect, we conclude that the trial court abused its discretion and we reverse; if not, no abuse of discretion has occurred. [Citation.] The plaintiff has the burden of proving that an amendment would cure the defect." (*Ibid.*)

B. *The Economic Loss Rule*

As noted, the trial court sustained Nissan's demurrer to plaintiffs' claim for fraudulent inducement—concealment on the ground it was barred by the economic loss rule. We conclude the economic loss rule does not bar plaintiffs' fraud claim.[2]

The economic loss rule provides that, "[i]n general, there is no recovery in tort for negligently inflicted 'purely economic losses,' meaning financial harm unaccompanied by physical or property damage." (*Sheen v. Wells Fargo Bank, N.A.* (2022) 12 Cal.5th 905, 922 (*Sheen*).) For claims arising from alleged product defects, "[e]conomic loss consists of ' " ' "damages for inadequate value, costs of repair and replacement of the defective product or consequent loss of profits—without any claim of personal injury or damages to other property . . . ." ' " ' " (*Robinson*, *supra*, 34 Cal.4th at p. 988.)

The *Sheen* court noted the economic loss rule "has been applied in various contexts. First, it carries force when courts are concerned about imposing ' "liability in an indeterminate amount for an indeterminate time to

[2] We note that, in *Rattagan v. Uber Technologies, Inc.* (9th Cir. 2021) 19 F.4th 1188, 1193 (*Rattagan*), the United States Court of Appeals for the Ninth Circuit certified to the California Supreme Court the following question: "Under California law, are claims for fraudulent concealment exempted from the economic loss rule?" (Cal. Rules of Court, rule 8.548.) The California Supreme Court granted the Ninth Circuit's request for certification, and the case is currently pending. (*Rattagan v. Uber Technologies*, request for certification granted Feb. 9, 2022, S272113.)

an indeterminate class.' " (*Sheen*, *supra*, 12 Cal.5th at p. 922, quoting *Southern California Gas Leak Cases* (2019) 7 Cal.5th 391, 414.)

Second, "[i]n another recurring set of circumstances, the rule functions to bar claims in negligence for pure economic losses in deference to a contract between litigating parties." (*Sheen*, *supra*, 12 Cal.5th at p. 922, citing *Robinson*, *supra*, 34 Cal.4th at p. 988, and other cases.) The Restatement states this form of the economic loss rule as follows: "[T]here is no liability in tort for economic loss caused by negligence in the performance or negotiation of a contract between the parties." (Rest.3d Torts, Liability for Economic Harm, § 3; see *Sheen*, *supra*, at p. 923.)

The *Robinson* court explained: " ' " '[W]here a purchaser's expectations in a sale are frustrated because the product he bought is not working properly, his remedy is said to be in contract alone, for he has suffered only "economic" losses.' ". . .' [Citation.] The economic loss rule requires a purchaser to recover in contract for purely economic loss due to disappointed expectations, unless he can demonstrate harm above and beyond a broken contractual promise. [Citation.] Quite simply, the economic loss rule 'prevent[s] the law of contract and the law of tort from dissolving one into the other.' " (*Robinson*, *supra*, 34 Cal.4th at p. 988.)

The *Robinson* court also described instances where tort damages are permitted in contract cases.[3] " 'Tort damages have been permitted in contract

[3] Like the trial court and the parties, we will treat plaintiffs' statutory warranty claims under the Song-Beverly Act as the equivalent of contract claims for purposes of determining whether the economic loss rule applies to bar their (allegedly overlapping) fraud claim. But we note the assumption on which this approach to plaintiffs' claims rests—that the economic loss rule may be applied to statutory claims of this kind—is not one we necessarily accept, and nothing in this opinion should be read as passing on it. We note

cases where a breach of duty directly causes physical injury [citation]; for breach of the covenant of good faith and fair dealing in insurance contracts [citation]; for wrongful discharge in violation of fundamental public policy [citation]; or where the contract was fraudulently induced. [Citation.]' [Citation.] '[I]n each of these cases, 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.' " (*Robinson*, *supra*, 34 Cal.4th at pp. 989–990.)

Here, the fraudulent inducement exception to the economic loss rule applies. Plaintiffs allege that Nissan, by intentionally concealing facts about the defective transmission, fraudulently induced them to purchase a car. Fraudulent inducement is a viable tort claim under California law. "The elements of fraud are (a) a misrepresentation (false representation, concealment, or nondisclosure); (b) scienter or knowledge of its falsity; (c) intent to induce reliance; (d) justifiable reliance; and (e) resulting damage. [Citations.] Fraud in the inducement is a subset of the tort of fraud. It 'occurs when " 'the promisor knows what he is signing but his consent is induced by fraud, mutual assent is present and a contract is formed, which, by reason of the fraud, is voidable.' " ' " (*Hinesley v. Oakshade Town Center* (2005) 135 Cal.App.4th 289, 294–295; accord, *Geraghty v. Shalizi* (2017) 8 Cal.App.5th 593, 597.)

To hold, at the demurrer stage, that plaintiffs' fraud claim is barred by the economic loss rule, we would need to conclude, as Nissan urges us to do,

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that the Song-Beverly Act states the remedies available for violations are nonexclusive. The statute provides in pertinent part: "The remedies provided by this chapter are cumulative and shall not be construed as restricting any remedy that is otherwise available." (§ 1790.4; see *Anderson v. Ford Motor Company* (2022) 74 Cal.App.5th 946, 968, fn. 12 (*Anderson*).)

that (1) despite the Supreme Court's statement in *Robinson*, there is no exception to the economic loss rule for fraudulent inducement claims (or at least no exception that encompasses the claim plaintiffs allege in the SAC), or (2) plaintiffs have not adequately pleaded a claim for fraudulent inducement under California law (a question we address in pt. II.C., *post*). We reject both arguments and conclude the economic loss rule does not bar plaintiffs' claim.

Nissan contends that, under *Robinson*, fraud claims between contracting parties "can proceed only if they are truly independent of the contract and involve affirmative misrepresentations," and that plaintiffs' fraud claim (based on concealment) does not satisfy either condition. The trial court applied the same two requirements, holding plaintiffs' fraud claim was barred because it involved concealment (rather than affirmative misrepresentations) and because plaintiffs did not allege damages independent of their economic loss.

We do not agree with the trial court's and Nissan's reading and application of *Robinson*. *Robinson* did not hold that any claims for fraudulent inducement are barred by the economic loss rule. Quite the contrary, the *Robinson* court affirmed that tort damages *are* available in contract cases where the contract was fraudulently induced. (*Robinson*, *supra*, 34 Cal.4th at pp. 989–990.) The *Robinson* court then addressed the fraud claims that were presented in that case, involving alleged fraud (both affirmative misrepresentations and intentional concealment) that occurred *during the performance* of a contract—Dana, a supplier of helicopter parts (1) provided false "certificates of conformance" to the manufacturer (Robinson) stating the parts conformed to contractual requirements and

(2) allegedly concealed information about the parts. (*Id.* at p. 990; see *id.* at pp. 986–987.)

As to those claims, the court focused on Robinson's "fraud and misrepresentation claim based on Dana's provision of the false certificates of conformance." (*Robinson*, *supra*, 34 Cal.4th at p. 990.) The court concluded this tortious conduct "was separate from" Dana's breach of contract, which involved its provision of the nonconforming parts. (*Id.* at p. 991.) In addition, Dana's provision of faulty parts exposed Robinson to liability for personal damages if a helicopter crashed. (*Ibid.*) The court thus held that "the economic loss rule does not bar Robinson's fraud and intentional misrepresentation claims because they were independent of Dana's breach of contract." (*Ibid.*) And "[b]ecause Dana's affirmative intentional misrepresentations of fact (i.e., the issuance of the false certificates of conformance) are dispositive fraudulent conduct related to the performance of the contract," the court stated that "we need not address the issue of whether Dana's intentional concealment constitutes an independent tort."[4] (*Robinson*, at p. 991.)

The *Robinson* court explained that its holding was strongly supported by California's public policy favoring the punishment and deterrence of fraud. (*Robinson*, *supra*, 34 Cal.4th at pp. 991–992.) The court rejected Dana's

[4] Nissan is thus incorrect in asserting that the *Robinson* court "held" fraud claims involving affirmative misrepresentations are the only ones that survive the economic loss rule. Instead, the *Robinson* court did not reach the question whether the concealment claims presented in that case were independent of the contract claims. (*Robinson*, *supra*, 34 Cal.4th at p. 991.) For that reason, as noted, the Ninth Circuit recently concluded it was an open question whether fraudulent concealment claims are "exempted" from the economic loss rule under California law and certified that question to the California Supreme Court. (*Rattagan*, *supra*, 19 F.4th at pp. 1191–1193.)

argument that a breach of contract remedy was sufficient, noting that, while contracting parties generally can agree to allocate their risks, benefits, and obligations as they see fit, " '[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." (*Id.* at p. 993.)

Finally, the *Robinson* court noted its holding was "narrow," in part because it had only reached the question whether Robinson's affirmative misrepresentation claims were viable. (*Robinson*, *supra*, 34 Cal.4th at p. 993.) The court stated: "Nor do we believe that our decision will open the floodgates to future litigation. 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. In addition, '[i]n California, fraud must be pled specifically; general and conclusory allegations do not suffice. [Citations.]' . . . We trust the trial courts of this state to enforce this pleading requirement." (*Ibid.*)

Applying *Robinson* here (and cognizant that our Supreme Court may soon provide additional guidance), we conclude plaintiffs' claim for fraudulent inducement by concealment is not subject to demurrer on the ground it is barred by the economic loss rule. *Robinson* left undecided whether concealment-based claims are barred by the economic loss rule. What follows from its analysis, however, is that concealment-based claims for fraudulent inducement are not barred by the economic loss rule. The reasoning in *Robinson* affirmatively places fraudulent inducement by concealment outside the coverage of the economic loss rule. We now hold that the economic loss rule does not cover such claims. First, as discussed,

Robinson identified fraudulent inducement as an existing exception to the economic loss rule, before it proceeded to analyze the particular claims at issue in that case relating to fraud during the performance of a contract. (*Robinson*, *supra*, 34 Cal.4th at pp. 989–990.) For fraudulent inducement and the other existing exceptions listed in *Robinson*, " '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.' " (*Id.* at p. 990.)

In our view, that independence is present in the case of fraudulent inducement (whether it is achieved by intentional concealment or by intentional affirmative misrepresentations), 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. In *Anderson*, *supra*, 74 Cal.App.5th 946, the Court of Appeal contrasted these two types of conduct, although not in the context of determining the applicability of the economic loss rule. (*Id.* at pp. 966–967.) In *Anderson*, after purchasing a pickup truck that turned out to be defective, the plaintiffs sued Ford and prevailed at trial on both a Song-Beverly Act warranty cause of action and a cause of action for "fraud in the inducement—concealment." (*Id.* at p. 950.)

On appeal, Ford argued the plaintiffs could not recover both a statutory civil penalty under the Song-Beverly Act and punitive damages (the latter being based on the fraud claim and a claim under the Consumers Legal Remedies Act (CLRA) (Civ. Code, § 1750 et seq.)); Ford argued both awards were based on " 'substantially the same conduct.' " (*Anderson*, *supra*, 74 Cal.App.5th at pp. 950; *id.* at pp. 961, 966.) The appellate court disagreed and explained that "the punitive damages and statutory penalties were based

on different conduct that took place at different times. The punitive damages were based on conduct underlying the fraud/CLRA causes of action and took place before the sale. The civil penalty was based on defendant's postsale failure to comply with its Song-Beverly Act obligations to replace the vehicle or make restitution when reasonable attempts to repair had failed." (*Id.* at p. 966.)

Similarly, here, plaintiffs' fraudulent inducement claim alleges presale conduct by Nissan (concealment) that is distinct from Nissan's alleged subsequent conduct in breaching its warranty obligations. As Nissan notes, plaintiffs' SAC includes some allegations that do not fall neatly into one of these two categories. For example, in their fraudulent inducement cause of action, plaintiffs include some allegations about the failure of Nissan to make disclosures "on the date of each of the [postsale] repair attempts," in addition to alleging presale concealment. But at the pleading stage, we decline to hold plaintiffs' fraud claim (based in part on presale concealment) is barred by the economic loss rule.[5] And contrary to Nissan's view, we do not read *Robinson*'s discussion of the claims there involving fraud during contractual performance

[5] We do not preclude the possibility that, depending on the evidentiary record developed at summary judgment or trial, a fraudulent inducement claim could be found not to be independent of a plaintiff's contract or warranty claims. (See *Anderson*, *supra*, 74 Cal.App.5th at p. 967 [appellate court's determination as to which conduct supported plaintiffs' claims was "[b]ased on the pleadings and the trial evidence"]; *Santana v. FCA US, LLC* (2020) 56 Cal.App.5th 334, 345–346 [cited by Nissan; trial evidence did not show defendant intentionally concealed a defect prior to plaintiff's purchase of vehicle]; *Food Safety Net Services v. Eco Safe Systems USA, Inc.* (2012) 209 Cal.App.4th 1118, 1130–1132 [trial court properly relied on economic loss rule in granting summary judgment on fraudulent inducement claim in connection with contract to perform a study of food disinfection equipment; "[b]ecause Eco Safe's showing bore only on Food Safety's actual performance under the contract, it does not demonstrate fraudulent inducement"].)

(and, within that category, permitting certain claims alleging affirmative misrepresentations but not reaching the viability of the accompanying intentional concealment claims) as 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. (*Robinson*, *supra*, 34 Cal.4th at pp. 989–991.)

As the parties note and as the Ninth Circuit outlined in *Rattagan*, *supra*, 19 F.4th at pp. 1191–1192, courts in other states have reached differing conclusions as to the scope of the economic loss rule and the extent to which it precludes fraud claims. (Compare, e.g., *Milan Supply Chain Solutions v. Navistar, Inc.* (Tenn. 2021) 627 S.W.3d 125, 153–154 [declining to adopt "a broad rule either extending the economic loss rule to all fraud claims or exempting all fraud claims from the economic loss rule," but holding fraudulent inducement claims are barred by the rule if the only misrepresentations concern the quality or character of the goods sold and the contract is "between sophisticated commercial business entities"], with, e.g., *Van Rees v. Unleaded Software, Inc.* (Colo. 2016) 373 P.3d 603, 608 [economic loss rule did not bar fraudulent inducement claims; "The court of appeals seemed concerned that if it did not affirm the dismissal of the tort claims in this case, the purposes underlying the economic loss rule would not be served, as tort law would swallow contract law. [Citation.] However, we also must be cautious of the corollary potential for contract law to swallow tort law."].)

Similarly (as also outlined by the parties and the Ninth Circuit), federal district courts applying California law have diverged on this point. (Compare, e.g., *White v. FCA US LLC* (N.D.Cal. 2022) 2022 U.S.Dist.LEXIS 146604, *9–*13 [under California law, fraudulent *inducement* claims fall within a well-recognized exception to the economic loss rule that is separate

from the additional exception discussed in *Robinson* for some fraudulent *performance* claims], with, e.g., *In re Ford Motor Co. DPS6 Powershift Transmission Products Liability Litigation* (C.D.Cal. 2020) 483 F.Supp.3d 838, 848–850 [under California law, claim for fraudulent inducement by omission was barred by economic loss rule]; see *Rattagan*, *supra*, 19 F.4th at pp. 1191–1192 [noting district courts have reached different conclusions as to whether the economic loss rule bars claims of fraudulent concealment].)

We acknowledge the differing views taken by courts that have considered this issue. But for the reasons we have discussed above, we conclude that, under California law, the economic loss rule does not bar plaintiffs' claim here for fraudulent inducement by concealment. Fraudulent inducement claims fall within an exception to the economic loss rule recognized by our Supreme Court (*Robinson*, *supra*, 34 Cal.4th at pp. 989–990), and plaintiffs allege fraudulent conduct that is independent of Nissan's alleged warranty breaches.[6] The trial court erred by sustaining Nissan's demurrer to plaintiffs' fraud claim on the ground it was barred by the economic loss rule.

C. *The Sufficiency of the Allegations in the SAC*

As an alternative ground for affirmance, Nissan argues plaintiffs did not plead their claim for fraudulent inducement by concealment with

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[6] We note the Restatement takes the view that the economic loss rule generally does not bar fraud claims (although it precludes most contract-related *negligence* claims). (Rest.3d Torts, Liability for Economic Harm, *supra*, § 9, com. a ["The economic-loss rule is meant to protect contractual allocations of risk against interference by the law of tort. Claims for fraud 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. . . . Liability in tort for fraud thus helps to protect the integrity of the contractual process and sometimes furnishes useful remedies that the law of contract does not as readily provide."]; see *id.*, § 3, com. d.)

sufficient specificity. The trial court did not reach this ground for demurrer. We conclude the claim is adequately pleaded.

"As with all fraud claims, the necessary elements of a concealment/suppression claim consist of ' "(1) misrepresentation (false representation, concealment, or nondisclosure); (2) knowledge of falsity (scienter); (3) intent to defraud (i.e., to induce reliance); (4) justifiable reliance; and (5) resulting damage." ' " (*Hoffman v. 162 North Wolfe LLC* (2014) 228 Cal.App.4th 1178, 1185–1186.) Suppression of a material fact is actionable when there is a duty of disclosure, which may arise from a relationship between the parties, such as a buyer-seller relationship. (*Id.* at pp. 1186–1187.) Fraud, including concealment, must be pleaded with specificity. (*Linear Technology Corp. v. Applied Materials, Inc.* (2007) 152 Cal.App.4th 115, 132.)

Plaintiffs alleged the above elements of fraud in the SAC. As we have discussed, plaintiffs alleged the CVT transmissions installed in numerous Nissan vehicles (including the one plaintiffs purchased) were defective; Nissan knew of the defects and the hazards they posed; Nissan had exclusive knowledge of the defects but intentionally concealed and failed to disclose that information; Nissan intended to deceive plaintiffs by concealing known transmission problems; plaintiffs would not have purchased the car if they had known of the defects; and plaintiffs suffered damages in the form of money paid to purchase the car.

In its short argument on this point in its appellate brief, Nissan argues plaintiffs did not adequately plead the existence of a buyer-seller relationship between the parties, because plaintiffs bought the car from a Nissan dealership (not from Nissan itself). At the pleading stage (and in the absence of a more developed argument by Nissan on this point), we conclude

plaintiffs' allegations are sufficient. Plaintiffs alleged that they bought the car from a Nissan dealership, that Nissan backed the car with an express warranty, and that Nissan's authorized dealerships are its agents for purposes of the sale of Nissan vehicles to consumers. In light of these allegations, we decline to hold plaintiffs' claim is barred on the ground there was no relationship requiring Nissan to disclose known defects.

Nissan also contends plaintiffs did not provide specifics about what Nissan should have disclosed. But plaintiffs alleged the CVT transmissions were defective in that they caused such problems as hesitation, shaking, jerking, and failure to function. The SAC also alleged Nissan was aware of the defects as a result of premarket testing and consumer complaints that were made both to NHTSA and to Nissan and its dealers. It is not clear what additional information Nissan believes should have been included.[7] We decline to hold (again in the absence of a more developed argument on this point) that plaintiffs were required to include in the SAC more detailed allegations about the alleged defects in the CVT. We conclude plaintiffs' fraud claim was adequately pleaded.

For the foregoing reasons, we will reverse the trial court's order sustaining Nissan's demurrer to the SAC's fourth cause of action (the claim for fraudulent inducement by concealment). We will also reverse the court's

[7] Nissan does note that, in *Santana v. FCA US, LLC*, *supra*, 56 Cal.App.5th at pp. 345–346 (an appeal after a jury verdict), the appellate court stated the evidence of fraudulent inducement presented at trial was insufficient, in part because there was no "evidence that, prior to Santana's purchase of the vehicle, Chrysler was aware of a defect in the [engine component at issue] that it was either *unwilling or unable to fix*." (Italics added.) We decline to hold, based on the *Santana* court's brief discussion and Nissan's reference to it, that it is essential for a plaintiff's allegations to include this language at the pleading stage.

order granting Nissan's motion to strike plaintiffs' punitive damages allegations, as the basis for that order was the court's conclusion that plaintiffs had not stated a viable fraud claim.[8]

III. DISPOSITION

The April 2021 judgment is reversed. The trial court's orders (1) sustaining Nissan's demurrer to plaintiffs' claim for fraudulent inducement by concealment (the fourth cause of action in the SAC), and (2) granting Nissan's motion to strike the SAC's punitive damages allegations, are reversed. The trial court is directed to enter a new order or orders overruling the demurrer and denying the motion to strike. The case is remanded for further proceedings on plaintiffs' claim for fraudulent inducement by concealment, plaintiffs having dismissed their other claims with prejudice. Plaintiffs shall recover their costs on appeal.

STREETER, J.

WE CONCUR:

POLLAK, P. J.
GOLDMAN, J.

[8] As noted, in its motion to strike filed in the trial court, Nissan also contended the SAC's allegations were not sufficient to support corporate liability for punitive damages. The trial court did not reach that question in striking the SAC's punitive damages allegations, and Nissan does not develop on appeal an argument that this court should affirm the striking of the punitive damages allegations on that alternative ground (touching on this point only briefly in a footnote). We decline to address this question.

Trial Court: Superior Court of California, County of Alameda

Trial Judge: Hon. Richard Seabolt

Counsel: Knight Law Group, Steve Mikhov, Christopher Swanson, Roger R. Kirnos; Greines, Martin, Stein & Richland, Cynthia E. Tobisman, Marc J. Poster, Alana H. Rotter for Plaintiffs and Appellants.

Shook, Hardy & Bacon, Amir Nassihi, M. Kevin Underhill for Defendant and Respondent.

Case No. S_____

IN THE SUPREME COURT OF CALIFORNIA

SOBITA DHITAL, et al.,

Plaintiffs and Appellants,

v.

NISSAN NORTH AMERICA, INC.,

Defendant and Respondent.

PROOF OF SERVICE

After a Decision of the Court of Appeal,
First Appellate District, Case No. A162817

Appeal from the Superior Court of Alameda County
Case No. RG190009260 (The Honorable Richard Seabolt)

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December 2, 2022

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PROOF OF SERVICE

I am over the age of 18 years and not a party to the within action. I am employed in the County of San Francisco, State of California. My business address is 555 Mission Street, Suite 2300, San Francisco, California 94105, my facsimile number is (415) 391-0281. On the date shown below, I served the following document(s):

- **PETITION FOR REVIEW**

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

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

Executed on December 2, 2022, at San Francisco, California.

Christopher J. Martinez