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December 27, 2021

The Honorable Chief Justice of California and Associate Justices of the
California Supreme Court
Ronald Reagan State Office Building
300 South Spring Street, 3rd Floor
Los Angeles, CA 90013

Re: *Rattagan v. Uber Technologies, Inc.*
Supreme Court No. S272113
Ninth Circuit Order Certifying Question (Rule 8.548(f))

Honorable Justices:

The undersigned attorneys urge this Court to accept the Ninth Circuit's
December 6, 2021 Order Certifying a Question of California Law:

Are claims for fraudulent concealment exempted from the economic loss
rule?

This is a prime example of why the certified-question procedure was
adopted and should be used:¹

¹ In its first case to accept certification, this Court explained the benefits of the procedure: It "(i) allows federal courts to avoid mischaracterizing state law (thereby avoiding a misstatement that might produce an injustice in the particular case and potentially mislead other federal and state courts until the state supreme court finally, in other litigation, corrects the error); (ii)

- The question is significant for all Californians who enter contracts, including but not limited to consumers who all too often have been fraudulently induced to purchase products that the manufacturers know, but conceal, are defective.

- The question has been answered in contradictory fashion among many dozens of lower courts, both state and federal, leaving the outcome for litigants to the luck of the draw—and often, as in the present *Rattagan* case, out of court.

- The question is one that this Court in *Robinson Helicopter Co., Inc. v. Dana Corp.* (2004) 34 Cal.4th 979, 991 (*Robinson Helicopter*) expressly reserved for future resolution but has yet to answer in the ensuing 17 years, even as lower courts struggle in case after case to predict what this Court might answer.

Once the Court accepts certification of the question, we would urge the Court to answer that the economic loss rule has no place in a tort action for fraudulent concealment in the same way this Court determined it has no place in the context of fraudulent misrepresentation – a difference without a practical distinction in terms of the resulting deceit perpetrated. Manufacturers may disagree on how the question should be answered, but they, too, want and deserve a definitive answer from this Court.

We now briefly explain the background of the question and demonstrate its significance and the urgent need for guidance from this Court.

strengthens the primacy of the state supreme court in interpreting state law by giving it the first opportunity to conclusively decide an issue; (iii) avoids conflicts between federal and state courts, and forestalls needless litigation; and (iv) protects the sovereignty of state courts.” (*Los Angeles Alliance For Survival v. City of Los Angeles* (2000) 22 Cal.4th 352, 360-361.)

A. The Certified Question Explained.

1. The Economic Loss Rule.

The economic loss rule is court-made. It is intended to preserve the (at best, theoretical) notion that in entering contracts, the parties can allocate the known risks of non-performance between themselves. Damages for unforeseen risks ordinarily are reserved for tort cases. (Civ. Code, § 3300; *Quigley v. Pet, Inc.* (1984) 162 Cal.App.3d 877, 887 [“The measure of damages for breach of contract is limited to those losses which might reasonably be foreseen by the parties”].) “Quite simply, the economic loss rule ‘prevent[s] the law of contract and the law of tort from dissolving one into the other.’” (*Robinson Helicopter*, *supra*, at p. 988.)

In cases involving a contract, tort damages are permitted where “a breach of duty directly causes physical injury; for breach of the covenant of good faith and fair dealing in insurance contracts; for wrongful discharge in violation of fundamental public policy; or *where the contract was fraudulently induced* ‘[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.’” (*Id.* at pp. 989-990, internal citations omitted, italics added.)

The question now is: Should it matter whether the fraudulent inducement of contract is accomplished by affirmative misrepresentation or by fraudulent concealment?

Many trial courts interpret this Court’s decision in *Robinson Helicopter* as carving out fraudulent *concealment* from the articulated exceptions to the economic loss rule since that case only dealt with fraudulent misrepresentation.

**2. *Robinson Helicopter* Leaves Dangling The Question
Whether The Rule Applies To Actions For
Fraudulent Concealment.**

The specific holding in *Robinson Helicopter* was that the economic loss rule did *not* bar a claim for economic losses in a case of fraudulent inducement by *affirmative misrepresentations* in the course of performance of the contract. The Court explained that affirmative misrepresentations constitute a tort independent of the contract pursuant to which they were made. (*Id.* at p. 991.)

But then, apparently responding to arguments made in that particular case, the Court left for another day the question of whether the economic loss rule should apply in cases of fraudulent inducement by *concealment of a material fact*. (*Ibid.* [“we need not address the issue of whether [the defendant’s] intentional concealment constitutes an independent tort”].)

This should be that day.

**B. It’s Not Just This Case; The Question Matters To All
Californians Who Enter Contracts.**

The instant case involves an attorney suing the company which retained him to represent the company in Argentina. The attorney alleges that in contracting for his services, the company fraudulently concealed its intent to ignore its obligations to promptly comply with Argentine law, resulting in civil and criminal allegations against the attorney and damage to his reputation. The federal district court applied the economic loss rule because there was a contract involved, and it dismissed his action.

However, the question certified by the Ninth Circuit has significance far beyond these specific circumstances. In particular, the question has profound implications for all California consumers and manufacturers. The question frequently arises in actions brought by consumers against manufacturers who conceal known defects in the products they sell to

consumers. By barring claims for economic losses resulting from these fraudulently induced purchases, and since economic losses are often the principal injuries suffered, consumers may well be out of court and without a remedy for being lied to. By excepting affirmative misrepresentation from the economic loss rule, but not intentional concealment, one party may engage in deceit and avoid liability for it so long as they stay quiet about material facts, but incur liability if they open their mouth and affirmatively state a material fact that isn't true. The result is the same in either circumstance: injury for a contract that never would have been entered into had the truth been known by the other party. This promotes a chilling effect on full disclosure since a party would be far better off simply not disclosing anything at all.

**C. This Court Left Open The Question; Now, The Court
Should Provide The Answer For All Concerned.**

What did this Court intend in *Robinson Helicopter* by leaving for another day the question whether the economic loss rule bars fraudulent concealment claims? We submit that, contrary to what some courts have read into the Court's dictum, the economic loss rule was never intended to bar a cause of action for fraudulent inducement to contract, as in the present *Rattagan* case.

Fraudulent inducement is an *independent* wrong, a tort that occurs before the contract has been signed and that is entirely separate from whether or not there has been a breach of the terms of the contract. Tort damages—including damages for fraud—are not limited by foreseeability; fraud damages include all harm proximately caused by the tortious conduct. (Civ. Code, §§ 1709, 3333; *Erlich v. Menezes* (1999) 21 Cal.4th 543, 550.) “[C]ontract remedies alone do not address the full range of policy objectives underlying the action for fraudulent inducement of contract. In pursuing a valid fraud action, a plaintiff advances the public interest in punishing intentional misrepresentations and in deterring such misrepresentations in the future.” (*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 646.) The

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

Furthermore, it should not matter whether the fraudulent inducement was accomplished by way of affirmative misrepresentation or by intentional concealment of material facts. Either way, under California law, fraud is fraud, and fraudsters are liable for the full consequences of their frauds, unconstrained by an economic loss rule that courts created for pure contract cases. Indeed, Civil Code section 1572 *expressly contemplates* that fraudulent inducement claims can arise in connection with the formation of a contract based on intentional concealment: “Actual fraud” consists of the following act “committed by a party to the contract, or with his connivance, with intent to deceive another party thereto, or to induce him to enter into the contract 3. The suppression of that which is true, by one having knowledge or belief of the fact.” (See also Civ. Code, § 1710 [deceit includes “suppression of a fact, by one who is bound to disclose it, or who gives information of other facts which are likely to mislead for want of communication of that fact”].)

Even some defendants have sought this Court’s answer to the certified question. Most recently, the issue was raised in this Court in a petition for review by a defendant, Ford Motor Company. In *Ford Motor Warranty Cases [Ford v. Superior Court]* (No. B313865, S271091, rev. denied Dec. 1, 2021), Ford sought review of the summary denial of its writ petition proffering the same question as proffered by the Ninth Circuit here: 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? (Petition, p. 8.) Ford represented to this Court that “there has been a dramatic surge recently in lawsuits asserting both contract and tort claims,” and “the issue presented here has affected thousands of cases already and continues to be raised by new filings.” (*Id.*, at p. 44.) And Ford noted that in Ford’s case and others, the trial courts, too, have specifically acknowledged a need for a definitive answer to the question and have certified the question for interlocutory review pursuant to Code of Civil Procedure section 166.1.

In short, the State needs a definitive answer from this Court.

D. Dozens Of Lower Courts—State And Federal—Have Reached Contradictory Conclusions On The Applicability Of The Economic Loss Rule To Fraudulent Inducement Claims.

Because of the question left open in *Robinson Helicopter*, lower courts have struggled as to its answer, implications and application. The result is, and has been, mass confusion.

Many federal courts have correctly found, as we urge this Court to find, that actions for fraudulent inducement – regardless of which variety – are *not* barred by the economic loss rule. (See *Hannibal Pictures, Inc. v. Sonja Productions LLC* (9th Cir. 2011) 432 Fed.Appx. 700, 701 [economic loss rule does not preclude fraudulent inducement]; *Precise Aerospace Manufacturing, Inc. v. MAG Aerospace Industries, LLC* (9th Cir. 2019) 789 Fed.Appx. 572, 575 [recognizing fraudulent inducement exception, but intent was not shown]; *Arechiga v. Ford* (C.D.Cal., Apr. 23, 2018, No. SACV 17-01915 AG (DFMx)) 2018 WL 5904283, at *4 [fraudulent inducement by misrepresentation or omission not barred by the economic loss rule]; *Finney v. Ford Motor Company* (N.D.Cal., June 4, 2018, No. 17-cv-06183-JST) 2018 WL 2552266, at *9 [economic loss rule does not bar fraudulent inducement claims, but bars fraud in the *performance of a contract*]; *Joli Grace, LLC v. Country Visions, Inc.* (E.D.Cal., Nov. 30, 2016, No. 2:16-1138 WBS EFB) 2016 WL 6996643, at *9, fn. 6 [agreeing that the California Supreme Court held that “the economic loss rule does not preclude recovery for fraudulent inducement”]; *Lee v. Federal Street L.A., LLC* (C.D.Cal., May 3, 2016, No. 2:14-cv-06264-CAS(SSx)) 2016 WL 2354835, at *8 [“[F]raudulent inducement is a well-recognized exception to the economic loss rule.”]; *United Guar. Mortg. Indem. Co. v. Countrywide Financial Corp.* (C.D.Cal. 2009) 660 F.Supp.2d 1163, 1188 [“[I]t has long been the rule that where a contract is secured by fraudulent representations, the injured party may elect to affirm

the contract and sue for fraud.”]; *J2 Cloud Services, Inc. v. Fax87* (C.D.Cal., Nov. 18, 2016, No. 13-05353 DDP (AJWx)) 2016 WL 6833904, at *4 [claim not barred by rule because promissory fraud was adequately alleged]; accord, *R Power Biofuels, LLC v. Chemex LLC* (N.D.Cal., Mar. 29, 2017, No. 16-CV-00716-LHK) 2017 WL 1164296, at *6; *Bentham v. Bingham Law Group* (S.D.Cal., Nov. 15, 2013, No. 13cv1424-MMA (WVG)) 2013 WL 12186171, at *12, [“the economic loss doctrine does not bar Bentham’s claim for fraudulent concealment”]; *Herring Networks, Inc. v. AT&T Services, Inc.* (C.D.Cal., July 25, 2016, No. 2:16-cv-01636-CAS-AGR) 2016 WL 4055636, at *14 [rejected economic loss rule to concealment and intentional misrepresentation because “defendants’ tortious conduct is separate and apart from the alleged breach of contract.”]; *Pacific Contours Corporation v. Fives Machining System, Inc.* (C.D.Cal., Oct. 29, 2018, No. SACV 18-00413-DOC (JDEx)) 2018 WL 6204579, at *7 [fraudulent inducement is an exception to the economic loss rule.]

On the other hand, defendants have convinced some courts to rule otherwise. (E.g., *In re Ford Motor Co. DPS6 PowerShift Transmission Products Liability Litigation (Hobart)* (C.D.Cal. Mar. 29, 2021, No. 2:18-ML-02814-AB) 2021 WL 1220948, at *1, 4–5; *In re Ford Motor Co. DPS6 Powershift Transmission Products Liability Litigation (Altamirano-Torres)* (C.D.Cal. 2020) 483 F.Supp.3d 838, 842–850; *Clark v. Am. Honda Motor Co., Inc.* (C.D. Cal. Mar. 25, 2021) No. CV 20-03147-AB, 2021 WL 1186338, at *10; *Catherine Petersen v. FCA US LLC* (C.D.Cal., July 8, 2021, No. CV 21-1386-DSF (Ex)) 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 & fn. 4; *Goldstein v. General Motors LLC* (S.D.Cal. 2021) 517 F.Supp.3d 1076, 1092–1093; *Hien Bui v. Mercedes-Benz USA, LLC* (S.D. Cal., Jan. 25, 2021, No. 20-CV-1530-CAB-WVG) 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/Hall/Bisto/Avina v. Chrysler* (C.D.Cal., Aug. 13, 2020, No. CV 17-2314) 2020 WL 4723976, *1–2; *Kelsey v. Nissan North America* (C.D.Cal., July 15, 2020, No. CV 20-4835 MRW) 2020 WL 4592744, at *2; *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. 2020) 447 F.Supp.3d 194, 236–237 [interpreting California law]; *Mosqueda v. American Honda Motor Company, Inc.* (C.D.Cal. 2020) 443 F.Supp.3d 1115, 1133–1134; *Hsieh v. FCA US LLC* (S.D.Cal. 2020) 440

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F.Supp.3d 1157, 1161–1163; *Zagarian v. BMW of North America, LLC*
(C.D.Cal., Oct. 23, 2019, No. CV 18-4857-RSWL-PLA) 2019 WL 6111731, at
*3; *Hammond v. BMW of North America, LLC* (C.D.Cal., June 26, 2019, No.
CV 18-00226-DSF) 2019 WL 2912232, at *3.)

The Court’s dictum in *Robinson Helicopter* has thus led to rampant
misunderstanding and confusion in both state and federal courts as to what
this Court would hold is the law of California on this question. That is
precisely what the certified-question procedure is for.

E. Conclusion: Accept The Certified Question.

It would be unfortunate if the Ninth Circuit reached the wrong result
on a question of California law, especially one as important as whether the
economic loss rule bars claims for fraudulent inducement of contract via
fraudulent concealment (as opposed to affirmative misrepresentation). This
is so not only for this case but for a myriad of other federal and state cases
presenting the identical issue. We urge the Court to accept certification.

Respectfully submitted,

December 27, 2021

GREINES, MARTIN, STEIN &
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Cynthia E. Tobisman

By /s/ Cynthia E. Tobisman

Cynthia E. Tobisman

PROOF OF SERVICE

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

On December 27, 2021, I served the foregoing document(s) described as: **LETTER SUPPORTING CERTIFICATION OF QUESTION TO SUPREME COURT** on the interested party(ies) in this action, addressed as follows:

United States Court of Appeals for the Ninth Circuit
The James R. Browning Courthouse
95 7th Street,
San Francisco, CA 94103

Requesting Court (California Rules of Court Rule 8.548)

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(X) I electronically filed the document(s) with the Clerk of the Court by using the TrueFiling system. Participants in the case who are registered TrueFiling users will be served by the TrueFiling system.

Executed December 27, 2021 at Los Angeles, California.

(X) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

/s/ Chris Hsu
Chris Hsu