2023 WL 3239886 (Cal.Super.) (Trial Order)
Superior Court of California,
Department 304.
San Francisco County

BAMA COMMERCIAL LEASING, LLC, Plaintiff,
v.
UBER TECHNOLOGIES, INC., et al., Defendants.

No. CGC-19-579763.
January 20, 2023.

Order on Defendant Uber Technologies, Inc.'s Demurrer to Fourth Amended Complaint

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Ethan P. Schulman, Judge.

***1** Defendant Uber Technologies, Inc.'s Demurrer to Fourth Amended Complaint came on for hearing on January 11, 2023. Having considered the papers and pleadings on file in the action, and the argument of counsel presented at the hearing, the Court hereby sustains Defendant's demurrer to the third, fourth, fifth, and sixth causes of action of the Fourth Amended Complaint without leave to amend.

BACKGROUND

Following the Court's order sustaining in part and overruling in part Defendant Uber Technologies, Inc.'s ("Uber") demurrer to the Third Amended Complaint, Plaintiff BAMA Commercial Leasing, Inc. ("BAMA") filed the operative Fourth Amended Complaint ("4AC") on October 12, 2022. [1] BAMA alleges as follows. BAMA is a car financing company founded in 2015. (4AC ¶ 1.) BAMA was created by the founders of another entity, Auto Trakk, LLC, for the specific purpose of leasing vehicles to Uber drivers. (*Id.* ¶ 9.) BAMA offered leases for late model cars to persons who would not ordinarily qualify to lease such a car, allowed those leases to be paid on a weekly basis, allowed the leases to be transferred, and allowed for termination on two weeks' notice. (*Id.* ¶ 10.)

In the spring of 2015, BAMA launched a pilot program in Boston to lease cars to Uber drivers. (*Id.* ¶ 16.) On June 16, 2015, BAMA and Uber entered into a three-year contract, the "Vehicle Financing Agreement" ("Agreement"), to formalize their business relationship. (*Id.* ¶ 11 & Ex. A, § 9.1.) Pursuant to the Agreement, Uber agreed to refer "Leads" to BAMA for the prospective purchase of their vehicles under the vehicle financing program. (*Id*.) The Agreement also contained provisions addressing confidential information, Uber's obligation to remit Uber drivers' lease payments to BAMA, exclusivity, and marketing. (*Id.* ¶¶ 12-13.)

Prior to executing the Agreement, as early as July 14, 2014, Uber had initiated plans to create its own vehicle leasing company, Xchange. (*Id.* ¶ 15.)[2] From February 2015 to April 2015, Uber did not inform BAMA of its plans to enter the leasing market and made representations to the contrary such as Uber not being able to have cars in its inventory that would compete with BAMA's business model and encouraging BAMA to expand. (*Id.* ¶ 18.) In April 2015, Uber decided to use Xchange to enter the car leasing market by "providing a product that copied BAMA's short term transferrable leasing program." (*Id.* ¶ 17.) "Uber also decided that BAMA would be a short term solution to Uber's desire to facilitate leases to prospective Uber drivers until Uber's UFS/Xchange entity was up and running." (*Id.* ["Uber 'likely needed BAMA through 2015."'].) "Uber never disclosed this business plan to BAMA." (*Id*.)

***2** On April 3, 2015, an Uber employee attended a meeting with BAMA and San Francisco Toyota "under the false pretext of facilitating the San Francisco Toyota dealership as a partner dealer for BAMA's program." (*Id.* ¶ 19.) However, Uber actually intended to "learn BAMA's process so that it could improve UFS/Xchange's leasing program." (*Id*.) "Uber frequently used its access to BAMA data to improve its competitive position adverse to BAMA." (*Id.* ¶ 20.)

On May 13, 2015, Uber contacted BAMA "with vague information regarding Uber's existing plans to roll out its own leasing business that raised no alarm bells for BAMA" and assured BAMA "that it 'wouldn't change anything' with the BAMA/Uber relationship." (*Id.* ¶ 22.) Uber repeatedly assured BAMA "that Uber would not be offering what BAMA was offering, and would be focused on used cars." (*Id.* ¶ 24.) These representations came at a time when BAMA and Uber were negotiating a three-year agreement requiring BAMA to secure large sale funding to purchase cars. (*Id.*) "Uber denied BAMA the ability to make an informed decision about how it should proceed—such as whether it should go forward with the Agreement, or seek different terms including the exclusivity provision." (*Id.*) "Following execution of the Agreement on June 16, 2015, BAMA needed to secure large-scale funding for the purchase of additional cars for Uber drivers." (*Id.* ¶ 25.) On the same day, Uber "assured both BAMA and BAMA's potential funders that Uber was committed to an ongoing partnership with BAMA, and attested to the success of the vehicle financing program that BAMA had rolled out to date." (*Id.* ¶ 26.) In an attempt to secure that funding from Uber, BAMA provided Uber with confidential information, including business

projections, financial statements, onboarding processes, transfer processes, maintenance tracking, and fleet management plans. (*Id.* ¶ 28.) Uber ultimately declined to provide BAMA funding. (*Id.*)

In June 2015, Uber eliminated the 2,500 monthly mileage cap in response to feedback from BAMA lessees "to better differentiate itself from BAMA." (*Id.* ¶ 20) The "True Xchange Program," which Uber actively and intentionally concealed, was for Uber to:

> (1) operate in a substantially similar manner to BAMA, but (2) at a lower price. Unlike BAMA, which was intended to be a for profit business, Uber intended that UFS/Xchange would, (3) at best, break even, with the idea that Uber would make money on the rideshare side of the business. Uber intended for UFS/Xchange to be (4) **the** option nationally for Uber's ride share drivers interested in car leases.

(*Id.* ¶ 21 (emphasis in original); see *id.* ¶ 46.) "Had BAMA known the true UPS/Xchange Program, it would not have executed the Agreement nor continued on with the business relationship—particularly one that precluded it from offering its product to other rideshare companies." (*Id.*; see *id.* ¶¶ 24 ["Uber's decision to roll out a leasing company, which it intended to be **the** leasing option, and view that BAMA was a stop gap program undoubtedly changed the BAMA/Uber relationship as BAMA would never have a fair chance to succeed in the marketplace." (emphasis in original)], 25 [priced in a way to break even], 36 [had Uber "disclosed the truth about UFS/Xchange … and Uber's short term expectation for BAMA, BAMA would have extricated itself from the Agreement—in particular, the exclusivity provision—and discontinued its efforts to obtain financing for the BAMA business until and unless it could establish a relationship with other rideshare companies."].)

***3** On July 2, 2015, BAMA's car dealers informed BAMA that Uber was launching a similar leasing program for new cars. (*Id.* ¶ 29.) BAMA contacted Uber to discuss Xchange. (*Id.*) Uber "vaguely acknowledged that [it] was planning on releasing its own program." (*Id.*) Uber misrepresented that its leasing program would focus on used cars and that it "would only offer new car leases if BAMA has problems scaling on new vehicles." (*Id.*)

On My 30, 2015, Uber formally unveiled the Xchange program, which it referred to in a press release as a pilot program that is complimentary to BAMA. (*Id.* ¶ 31.) Concerned that this would adversely affect its ability to attract lessees, BAMA reached out to Uber. (*Id.* ¶ 32.) Uber assured BAMA that Uber needed BAMA and was an important part of Uber's business plans going forward. (*Id.*) Uber told BAMA that Xchange would be used for drivers that could not qualify for BAMA's leases. (*Id.*) In August 2015, Uber continued to assure BAMA that it "still had a long term need for BAMA's services and encouraged BAMA to go forward in attempting to secure large scale funding for its business." (*Id.* ¶ 34.) Pursuant to the Agreement and based on Uber's

representations, BAMA secured large scale funding and implemented its leasing program for Uber drivers. (*Id.* ¶ 37.)

In the Spring of 2016, Uber began to delay Leads to BAMA by 120 hours and limit marketing of BAMA's product to prospective Uber drivers. (*Id.* ¶¶ 41-44.) By December 2016, "Uber decided to run BAMA out of business in order to avoid its contractual obligation to provide drivers for BAMA's cars during the pendency of the cars' lease (or until BAMA sold the car) upon termination of the Agreement." (*Id.* ¶ 47.) Uber then began delaying Leads to BAMA by seven to ten days. (*Id.*) In January 2017, Uber stopped marketing BAMA's lease program completely and removed BAMA from its "Vehicle Solution" webpage. (*Id.*) In November 2017, Uber stopped withholding lease payments from drivers' earnings. (*Id.* ¶ 51.)

BAMA alleges six causes of action: (1) Breach of Contract; (2) Breach of the Covenant of Good Faith and Fair Dealing; (3) Fraud-Intentional Misrepresentation; (4) Fraud-Concealment; (5) Fraud-Promissory Fraud; and (6) Fraud-Negligent Misrepresentation. (*Id.* ¶¶ 52-121.)

Uber now demurs to the third, fourth, fifth, and sixth causes of action. (Demurrer, 2-3.) Uber argues BAMA fails to state facts sufficient to constitute a cause of action. (*Id.*) Additionally, Uber asserts BAMA's claims are barred by the statute of limitations and the economic loss rule. (*Id.*) BAMA opposes the demurrer.

LEGAL STANDARD

A demurrer lies where "the pleading does not state facts sufficient to constitute a cause of action." (Code Civ. Proc, § 430.10(e).) A demurrer admits "all material facts properly pleaded, but not contentions, deductions, or conclusions of fact or law." (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) The complaint is given a reasonable interpretation, reading it as a whole and its parts in their context. (*Id.*) The Court accepts as true, and liberally construes, all properly pleaded allegations of material fact, as well as those facts which may be implied or reasonably inferred from those allegations; its sole consideration is whether the plaintiff's complaint is sufficient to state a cause of action under any legal theory. (*O'Grady v. Merchant Exchange Prods., Inc.* (2019) 41 Cal.App.5th 771, 776-777.)

DISCUSSION

I. BAMA's Negligent Misrepresentation Claim Is Barred By The Economic Loss Rule.

***4** Uber asserts the economic loss rule bars BAMA from recovering losses related to Uber's performance of contractual obligations. (Opening Brief, 6, 17-18; see Reply, 10.) Uber contends

that if it "breached obligations to BAMA under the Agreement, such as marketing, referring Leads, handling confidential information, or any of the other purported contractual breaches pleaded in the 4AC, BAMA cannot style those breaches as fraud to obtain tort remedies beyond those allowed by contract law or the Agreement (including the Agreement's Limits of Liability)." (Opening Brief, 6; see *id.* at 18.)

"Economic 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 Helicopter Co., Inc. v. Dana Corp.* (2004) 34 Cal.4th 979, 988, quoting *Jimenez v. Superior Court* (2002) 29 Cal.4th 473, 482 (cleaned up).) The economic loss rule provides that "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.) The rule also "functions to bar claims in negligence for pure economic losses in deference to a contract between litigating parties." (*Id.*) "Not all tort claims for monetary losses between contractual parties are barred by the economic loss rule. But such claims are barred when they arise from – or are not independent of – the parties' underlying contracts." (*Id.* at 923.) In addition, the California Supreme Court has held that the economic loss rule does not bar a parallel tort claim where (1) a defendant makes "affirmative misrepresentations on which a plaintiff relies"; and (2) those misrepresentations "expose a plaintiff to liability for personal damages independent of the plaintiff's economic loss." (*Robinson Helicopter*, 34 Cal.4th at 993.) The guiding principle is that "[a] breach of contract remedy assumes that the parties to a contract can negotiate the risk of loss occasioned by a breach … [but] a party to a contract cannot rationally calculate the possibility that the other party will deliberately misrepresent terms critical to that contract." (*Id.* at 992-993.)

"[T]he California Supreme Court's decision in *Robinson* precludes the application of the economic loss rule to any intentional affirmative fraud action where the plaintiff can establish that the fraud exposed the plaintiff to liability." (*County of Santa Clara v. Atlantic Richfield Co.* (2006) 137 Cal.App.4th 292, 328.) Here, BAMA's fraud claims are independent of BAMA's breach of contract claim. BAMA alleges Uber breached the Agreement by: (1) using or permitting BAMA's confidential information be accessed or used for Xchange; (2) disclosing BAMA's confidential information to persons involved in Xchange; (3) taking advantage of BAMA's financial condition and confidential financial information; (4) failing to refer or timely refer Leads to BAMA; (5) failing to remit weekly payments to BAMA; and (6) failing to market BAMA's lease program. (4AC ¶ 55.) Although there is some overlap regarding Leads, BAMA's fraud claims are not solely premised on Leads. Rather, BAMA's fraud claims are based on alleged misrepresentations by Uber regarding the nature of Xchange in relation to BAMA and funding. Therefore, BAMA's fraud claims are not barred by the economic loss rule and Uber's demurrer is overruled on this ground.

"[A] negligent misrepresentation claim paralleling a contract claim that prays only for economic damages will be barred by the economic loss rule unless the plaintiff alleges both that the defendant made an affirmative representation, and that the defendant's misrepresentation exposed the plaintiff to independent personal liability." (*Crystal Springs Upland School v. Fieldturf USA, Inc.* (N.D. Cal. 2016) 219 F.Supp.3d 962, 970.) BAMA impliedly concedes the economic loss rule applies to the sixth cause of action for negligent misrepresentation. (See Opposition, 17.) Accordingly, the Court sustains Uber's demurrer as to the sixth cause of action without leave to amend.

II. Fraudulent Misrepresentation Claim (Third Cause of Action)

***5** To state a claim for fraud based on an intentional misrepresentation, a plaintiff must plead: "(1) a misrepresentation, (2) with knowledge of its falsity, (3) with the intent to induce another's reliance on the misrepresentation, (4) actual and justifiable reliance, and (5) resulting damage." (*Orcilla v. Big Sur, Inc.* (2016) 244 Cal.App.4th 982, 1007.) Uber places the elements of misrepresentation and reliance at issue. (Opening Brief, 8-15.)

"The law is well established that actionable misrepresentations must pertain to past or existing material facts. Statements or predictions regarding future events are deemed to be mere opinions which are not actionable." (*Cansino v. Bank of America* (2014) 224 Cal.App.4th 1462, 1469 (citation omitted); *Neu-Visions Sports, Inc. v. Soren/McAdam/Bartells* (20090) 86 Cal.App.4th 303, 308 ["The law is quite clear that expressions of opinion are not generally treated as representations of fact, and thus are not grounds for a misrepresentation cause of action."].)

"A plaintiff establishes reliance when the misrepresentation or nondisclosure was an immediate cause of the plaintiff's conduct which altered his or her legal relations, and when without such misrepresentation or nondisclosure he or she would not, in all reasonable probability, have entered into the contract or other transaction." (*Hoffman v. 162 North Wolfe LLC* (2014) 228 Cal.App.4th 1178, 1193 (cleaned up).) The plaintiff must show that the reliance was reasonable by showing that (1) the matter was material in the sense that a reasonable person would find it important in determining how he or she would act and (2) it was reasonable for the plaintiff to have relied on the misrepresentation." (*Id.* at 1194.)

A. Misrepresentation

Uber argues each alleged misrepresentation concerns future events, consists of non-actionable opinions, or is too vague to be relied upon. (Opening Brief, 5, 8-13.) BAMA opposes on the ground that "[t]he alleged misrepresentations are actionable because they address Uber's present intent and plans concerning UFS/Xchange and BAMA." (Opposition, 6; see *id.* at 9.) The Court finds

the purported representations at issue are not actionable as they concern future events, are vague, directly contradicted by other allegations, or inadequately pled. They are insufficient to transform what is, at root, a claim for breach of contract and/or for breach of the implied covenant of good faith and fair dealing into a fraud claim. Further, BAMA could not have actually and justifiably relied on the alleged misrepresentations, given its conceded knowledge when they were made and the express provisions of the written Agreement it entered into.

1. Statements Made By Uber Prior To Execution Of The Agreement.

BAMA's allegations include one alleged misrepresentation made by Uber prior to execution of the Agreement. BAMA alleges that by April 2015, Uber intended to create a separate nationwide entity (UFS, later renamed Xchange) offering a substantially similar product that would unfairly compete with BAMA, but not be profitable, and would "be '**the** option nationally."' (4AC ¶ 62 (emphasis in original).) However, it alleges that on May 13, 2015—about one month before entering into the Agreement—Uber told BAMA that Xchange "wouldn't change anything with the BAMA/Uber relationship." (*Id.* ¶ 63.)

As BAMA concedes, it knew about UFS/Xchange prior to executing the Agreement. (4AC ¶ 23 [on May 13, 2015, Uber provided BAMA with "information regarding Uber's existing plans to roll out its own leasing business"]; *id.*, Ex. G [BAMA "understood the logic" and "proposed that Uber just buy BAMA."].) Moreover, BAMA and Uber entered into a short-term agreement for a three-year term. (*Id.* at Ex. A § 9.1.) The Agreement includes a section titled, "BAMA - UBER RELATIONSHIP," which states that "BAMA hereby agrees to become *an* automotive financial source to qualifying Uber Partners through its Participating Dealers for the term of this Agreement." (*Id.* at Ex. A § 2.1 (emphasis added).) The Agreement did not contemplate that BAMA would be *the* sole automotive financial source, nor does BAMA allege it believed it would be *the* exclusive leasing option for Uber drivers.[3] This is consistent with the one-way exclusivity provision, which limited BAMA's business relationships with Uber's competitors, but placed no such limitations on Uber. (*Id.* at Ex. A § 13.1.)[4] BAMA did not negotiate a reciprocal exclusivity provision.

***6** In light of this background, the alleged statement that Uber's rollout of Xchange "wouldn't change anything with the BAMA/Uber relationship" is at best a general statement of opinion or forecast of future events, not an actionable misrepresentation. "Any future market forecast must be regarded not as fact but as prediction or speculation." (*Cansino*, 224 Cal.App.4th at 1470.) Such a vague prediction as to the effect of a new business on the parties' future business relationship is not a statement that BAMA could interpret as factual or upon which it could have reasonably relied. Moreover, any representations about Xchange and the BAMA-Uber relationship made prior to executing the Agreement were extinguished by the Agreement's integration clause. (*Id.* at Ex. A §

16.2 ["This Agreement constitutes the entire understanding between the Parties, and supersedes all prior agreements and negotiations, whether oral or written. There are no other agreements between the Parties, except as set forth in this Agreement."].)

2. Financing and Funding.

BAMA alleges that around June 18, 2015, Uber stated that it "was interested in providing large scale financing to BAMA to facilitate its acquisition of vehicles necessary to perform the services contemplated by the Agreement." (4AC ¶ 64.) BAMA also alleges on July 30, 2015, Uber stated it "still thinks there is a long term need for the BAMA product" and expressed a willingness to assist BAMA with funding. (*Id.* ¶ 67.) BAMA alleges on the same day, Uber stated it "needed BAMA long term … and that BAMA was an important part of Uber's business plans going forward." (*Id.* ¶ 68.)

These allegations are vague on their face and cannot serve as the basis for a misrepresentation claim. A generalized "interest" in providing financing, representations that Uber "still thinks there is a long term need" for BAMA's services, or expressing a willingness to help with funding are not actionable because they are not affirmative misrepresentations that pertain to past or existing material facts. A statement by one party that it has an "interest" in providing financing to another, in an unspecified amount and on unspecified terms, is not an actionable promise that it will do so. A communication that "establishes nothing more than a willingness to consider future loan applications … does not establish a fraudulent promise to make a loan." (*Conrad v. Bank of America* (1996) 45 Cal.App.4th 133, 156; see also *Cansino*, 224 Cal.App.4th at 1470 [holding that a representation that a home would appreciate in value was a prediction about the future and thus could not support a fraud claim]; *Neu-Visions*, 86 Cal.App.4th at 308 [holding that an accountant's representation to a developer that the title to the property was not a problem in securing financing because the owner of the property would have obtained clear title to the property prior to the funding of any financing for the project was a prediction about future facts that thus could not support a misrepresentation claim].) "The representation must ordinarily be an affirmation of *fact*.... When it is boiled down, [appellants] have essentially alleged a claim based on an implied false promise. To our knowledge, however, no such tort has been recognized by California law." (*Lonely Maiden Productions, LLC v. GoldenTree Asset Management, LP* (2011) 201 Cal.App.4th 368, 375 (cleaned up)]). [5] Even if construed as affirmative representations, moreover, they are far too vague to be enforced (e.g., what is a "long term need" in the context of a three-year agreement? What percentage of Uber's vehicle leasing business constitutes "an important part" of its business plans?). (See also *Hoffman,* 228 Cal.App.4th at 1198 [agreeing with the trial court's finding that the representation "No problem. We'll take care of it" regarding trespassing vehicles was too vague to be enforced].) 3. Lessees. BAMA alleges that around June

18, 2015, after the Agreement was entered into, Uber told BAMA that it would not cherry pick the best lessees. (4AC ¶ 65 & Ex. H ["Xchange won't be cherry picking the people we want to lend to."].) BAMA alleges that on July 30, 2015, and on a subsequent call shortly thereafter, Uber also represented it would not engage in cherry picking. (*Id.* 168.)[6] The alleged representations are insufficiently certain to be construed as an affirmative promise, and in any event, BAMA fails to allege that they were false when they were made. Nor can BAMA allege that it actually and justifiably relied on the representations, particularly in light of other allegations in the 4AC, including the absence of contractual restrictions in the Agreement on Uber's ability to refer leads to Xchange and to other third parties.

***7** BAMA alleges that "by August 3, 2015, Uber commenced implementing a program whereby BAMA would not receive a Lead until UFS/Xchange had an opportunity to turn them down. (Exh. L.)[7] By at least March of 2016, Uber reduced this cherry picking process to writing." (*Id.* ¶ 40.) BAMA alleges that under this process, Uber would accept applications from drivers and if those drivers did not qualify for Xchange, then those drivers would be referred to other financing programs such as BAMA, Westlake, Exeter, Flexdrive, and Enterprise. (See *id.* ¶ 41.) BAMA also alleges that Uber delayed referring Leads to BAMA and that "Uber's delay of Leads to give UFS/Xchange first bite of the apple was the epitome of cherry picking." (*Id.*) BAMA alleges that around the time Uber allegedly made the statements about cherry picking in 2015, it was "instantaneously" referring Leads to BAMA. (*Id.* ¶¶ 16, 40.) It alleges that Uber did not begin delaying leads until the Spring of 2016, considerably later. (*Id.* ¶ 41.) Thus, the 4AC is devoid of any allegations that those statements were in fact false *at the time Uber made the statements.* (See *Hooked Media Group, Inc. v. Apple Inc.* (2020) 55 Cal.App.5th 323, 331 ["Broken promises regarding future conduct may be actionable as promissory fraud, but only if the promisor did not actually intend to perform at the time the promise was made."]; *Magpali v. Farmers Group* (1996) 48 Cal.App.4th 471, 481 ["A promise of future conduct is actionable as fraud only if made without a present intent to perform."].)

Moreover, BAMA fails to define "cherry picking" or to distinguish between its complaints. Uber getting a first bite at the apple is distinct from Uber picking the "best" (presumably most creditworthy) lessees for Xchange. The 4AC is devoid of any allegations that this process actually resulted in cherry picking by Uber, that only the best applicants were being approved for financing through Xchange, that Uber represented it would send Leads to BAMA first, or that BAMA saw a change in the quality of its applicants. To the contrary, it appears BAMA also contacted lessees who applied and were approved for financing through Xchange. (See *id.* at Ex. M ["we think this is really confusing the Uber driver partners that have been approved for Xchange Leasing but get a call from BAMA."].)

Even if the alleged representation that Uber would not "cherry pick" Leads concerned past or existing material facts, were sufficiently clear to be enforced, or constituted a promise made without intent to perform at the time the promise was made, BAMA could not have justifiably relied on it because the Agreement placed no restrictions on Uber's ability to compete with BAMA (or other companies) for leasing opportunities. To the contrary, as discussed above, BAMA was aware when it entered into the Agreement of Xchange and of other third-party companies that were contracting with Uber (and therefore competing with BAMA) for vehicle finance opportunities. Nothing in the Agreement required Uber to refer Leads exclusively to BAMA, nor did it require Uber to refer a particular number or type of Leads to BAMA, or to refer Leads within any particular timeframe. Under the circumstances, as a matter of law, BAMA could not have justifiably relied on the vague statement that Uber would not "cherry pick" Leads. (See, e.g., *Dore v. Arnold Worldwide, Inc.* (2006) 39 Cal.4th 384, 393-394 [employee who signed letter stating his employment was at will and terminable at any time as a matter of law defeated any contention that he reasonably understood employer to have promised him long-term employment]; *Hadland v. NN Investors Life Ins. Co.* (1994) 24 Cal.App.4th 1578, 1589 [party's reliance on oral statements that were "patently at odds with the express provisions of the written contract" was unjustified as a matter of law].)

***8** For these reasons, BAMA's attempt to analogize its claims to *Huy Fong Foods, Inc. v. Underwood Ranches, LP* (2021) 66 Cal.App.5th 1112, which it characterizes as "remarkably similar," fails. In that case, a pepper farmer sued the manufacturer of a pepper-based hot sauce for breach of contract and fraud. The parties had done business together for many years pursuant to oral contracts. With the manufacturer's suggestion and encouragement, the farmer invested millions of dollars in acquiring additional acres of property on which to grow peppers. It made these investments because the manufacturer assured it that it would continue to purchase the peppers into the future, and "was going to take all the product [the farmer] would produce." (*Id.* at 1117; see also *id.* at 1121 [same].) "[The] manufacturer expressly told [the farmer] numerous times that [it] would purchase all the peppers [the farmer] could produce." (*Id.* at 1124.) Unbeknownst to the farmer, the manufacturer had long planned to cut its ties to the farmer and was planning to form a company that would purchase peppers from other farmers; having done so, it contracted with that company to buy all its chili peppers from it and breached the contract to purchase the farmer's 2017 harvest just days after making it.

The trial court affirmed the jury's finding of fraud based on affirmative representation, stating that the jury could reasonably conclude that the manufacturer had no intention of keeping the promises when they were made, pointing to a variety of factors including its long-held plans to cut ties to the farmer, its campaign to hire away the farmer's chief operations officer, and its broken promise to use video footage of the farmer's harvesting and sorting operations for its personal use only, instead using that video for the benefit of other competing farmers. (*Id.*) It also found "overwhelming"

evidence that the parties were in a confidential relationship that extended over 28 years in which they trusted each other and shared financial information. (*Id.* at 1122.)

BAMA's allegations in this case have almost nothing in common with *Huy Fong Foods*. Unlike that case, BAMA does not allege that Uber made *any* express promises to it, such as promising to refer all Leads to it, to refer the "best" Leads to it, to refer a particular number or percentage of Leads, or to refer Leads within a particular period of time. Unlike that case, the parties did not do business for decades pursuant to oral agreements; rather, they entered into a single short-term written agreement. (Cf. *id.* at 1122 ["Perhaps the most compelling evidence of a confidential relationship is that for many years the parties entered into transactions involving tens of millions of dollars without formal written contracts."].) And unlike that case, the parties did not have a confidential relationship; to the contrary, they expressly disclaimed any such relationship in their Agreement. (See 4AC, Ex. A § 2.2.)

4. Xchange's Relationship To BAMA.

BAMA alleges that around June 18, 2015, Uber told BAMA that Xchange was complementary to BAMA and Xchange would co-exist with BAMA. (4AC ¶ 65.) BAMA alleges that on July 2, 2015, Uber stated Xchange would provide "protection for when 'hiccups' to BAMA's business occur." (*Id.* ¶ 66.) BAMA alleges further that on July 30, 2015 and on a phone call shortly thereafter, Uber represented: (1) it intended for Xchange to supplement BAMA's business by providing leases to potential Uber drivers who did not qualify for BAMA's program; and (2) Xchange would be limited to certain markets. (*Id.* ¶ 68.) These alleged representations, like those discussed above, are far "too vague to be taken as fact." (*ComputerXPress, Inc. v. Jackson* (2001) 93 Cal.App.4th 993, 1013; see also *Conrad*, 45 Cal.App.4th at 156.) Moreover, BAMA's allegations are directly contradicted by other allegations in the 4AC; therefore, the representations, on their face, could not have been false at the time they were made. (4AC ¶¶ 65-66, 68.)

There are no allegations Xchange was *not* complementary to BAMA or did not co-exist with BAMA. Rather, Uber's internal correspondence demonstrates Uber intended for BAMA and Xchange to be complementary and co-exist. (See 4AC ¶ 31 [on July 30, 2015, Uber formally unveiled the Xchange program, which it referred to in a press release as a pilot program that is complementary to BAMA] & Ex. B ["there's probably enough complimentary business for UFS and BAMA"; "there's enough need from our core business that both UFS and BAMA could coexist or at least have some overlap to still fill BAMA cars."], Ex. L ["Are there better / complementary ways to work together?"].)

***9** As to providing protections for "hiccups" to BAMA's business and leases to potential Uber drivers who did not qualify for BAMA's program, correspondence between BAMA and Uber

establishes BAMA's "[r]aunches [we]re constrained based on BAMA resources (launch resources, call center scaling, state-by-state licensing, and funding)." (*Id.* at Ex. E [UBER000078371].) Uber's representative, Andrew Chapin, emailed BAMA on July 2, 2015 stating:

> I will be candid though: the decision to only do used was largely predicated on the assumption that BAMA would have no problem scaling on new vehicles. Unfortunately that has not really panned out as you know. If we can't get something moving with you guys quickly we may be forced to fill the gap and offer the new car lease as well. I'd rather that not happen, but I am held accountable for the number of cars I put on the road and so I have to pursue all options to do that. I don't have the luxury of waiting unfortunately - I'm already taking a lot of heat from my executive team for the slow down in BAMA volume because I told them you guys would have no problem scaling. The whole point of developing our own lease product was to give ourselves protection for when hiccups like this happen.

(4AC Ex. J.) As alleged, the 4AC indicates BAMA was having difficulty scaling volume and Xchange would fill the gap in BAMA's resources.

Regarding Xchange operating in a limited market, as of May 2015, Uber's goal was "to make [Xchange] the option nationally." (4AC Ex. E [UBER000078374].) However, there is no indication in the 4 AC that Uber intended to do a nationwide rollout of Xchange rather than a limited or regional rollout. Uber stated in an internal presentation that "[m]any east coast cities could be a part of the initial wave most notably DC/Baltimore and/or Atlanta." (*Id.* at Ex. E [UBER000078374]; see *id.* at Ex. E [current focuses include "[a]ssessing state by state lending regulations to identify initial states for launch."].) However, "Boston and New York will likely be the only cities unable to participate in [the Xchange] program due to employment law concerns." (*Id.* at Ex. E [UBER000078373].) Additionally, Uber's plan was to launch BAMA or UFS for east coast regional markets such as Pittsburgh, Connecticut, and Providence. (*Id.* at Ex. E [UBER000078374].) Even if Uber did a nationwide launch of Xchange, such conduct was permitted under the Agreement's exclusivity provision. (See *id.* at Ex. A § 13.1.) Moreover, the phrase "limited market" is vague as it could refer to Xchange's geographical market or types of cars Xchange was offering (i.e., used cars).

5. Leads.

BAMA alleges on July 30, 2015 and on a phone call shortly thereafter, Uber misrepresented that it intended to provide Leads to BAMA. (4AC ¶ 68.) However, throughout the 4AC, BAMA alleges Uber *did* provide BAMA with Leads until 2017. (*Id.* ¶¶ 41, 47; compare *id.* ¶ 16 ["By early May [2015], Uber's lead referral to BAMA would occur instantaneously."]; see Reply, 6.) Therefore,

at the time Uber told BAMA it intended to provide Leads, Uber's statement regarding its future intentions was true. There is nothing in the 4AC to indicate otherwise.

Moreover, Leads are governed by the Agreement. (See 4AC Ex. A, §§ 3.1 ["During the term of this Agreement, with respect to each Uber Partner who expressly consents to the sharing of such information, Uber shall provide BAMA with information regarding each such Uber Partner for the purpose of: Referring leads received by Uber on its Uber Platform to BAMA."], 3.2 ["Subject to the terms and conditions of this Agreement and conditioned upon the express consent of the applicable Uber Partner, Uber agrees to refer Leads to BAMA for the prospective purchase of their vehicles under the Program."].) The Agreement is silent as to the number of Leads, types of Leads, or the timeframe within which Uber must refer Leads to BAMA. Any reliance by BAMA on a vague statement by Uber that it intended to provide Leads to BAMA would have been unreasonable, given that the Agreement imposed no obligations on Uber to provide any particular number of Leads or to do so within any specified period of time.

6. Used Vehicles

***10** BAMA alleges that on July 2, 2015, Uber represented that Xchange was focused on used cars. (4AC ¶ 66.) BAMA's allegation that Xchange was focused on used cars is supported in the 4AC. In particular, Uber's key representative, Andrew Chapin, emailed BAMA on July 2, 2015 stating:

> the focus is indeed on used cars. I will be candid though: the decision to only do used was largely predicated on the assumption that BAMA would have no problem scaling on new vehicles. Unfortunately that has not really panned out as you know. If we can't get something moving with you guys quickly we may be forced to fill the gap and offer the new car lease as well. I'd rather that not happen, but I am held accountable for the number of cars I put on the road and so I have to pursue all options to do that. I don't have the luxury of waiting unfortunately – I'm already taking a lot of heat from my executive team for the slow down in BAMA volume because I told them you guys would have no problem scaling. The whole point of developing our own lease product was to give ourselves protection for when hiccups like this happen.

(4AC Ex. J.) The 4AC establishes that Uber was focused on used cars, however, due to BAMA's difficulties in scaling volume, Uber would fill the gap by offering leases on new vehicles. As a result, the statement that Xchange was focused on used cars is not an actionable misrepresentation.

7. The Superior Knowledge Exception Does Not Apply.

BAMA invokes an exception to the general rule that statements or predictions regarding future events are not actionable, arguing that alleged misrepresentations regarding future events may be actionable when made by a party who possesses superior knowledge of the subject matter. (Opposition, 10.) BAMA argues it "alleges that Chapin possessed specialized and unique knowledge of this program as a whole (including its work with BAMA and other vendors), as well as the details of UFS/Xchange itself." (Opposition, 11.) Uber contends that "BAMA's theory would mean every business has to disclose all of its business plans since they are within Uber's specialized knowledge of itself." (Reply, 8.)

"[W]hen a party possesses or holds itself out as possessing superior knowledge or special information or expertise regarding the subject matter and a plaintiff is so situated that it may reasonably rely on such supposed knowledge, information, or expertise, the defendant's representation may be treated as one of material fact." (*Public Employees' Retirement System v. Moody's Investors Service, Inc.* (2014) 226 Cal.App.4th 643, 662.) Superior knowledge "contemplates more than the possession by one party to a bargain of a greater acumen that is possessed by the other party. The concept has been applied primarily in situations where assumed knowledge possessed by the party expressing the fraudulent opinion is a motivation to the other to enter into the transaction, or where the defendant has held himself out as particularly knowledgeable." (*Pacesetter Homes, Inc. v. Brodkin* (1970) 5 Cal.App.3d 206, 212.)

BAMA alleges Uber's Global Lead for Vehicle Solutions, Andrew Chapin, "possessed specialized and unique knowledge of this program as a whole (including its work with BAMA, Santander, Exeter and other third party leasing partners), as well as the details of UFS/Xchange." (4AC ¶ 48.) BAMA alleges it did not have knowledge of Uber's Vehicle Solutions Program, therefore, it relied on Uber's representations. (*Id.* ¶¶ 48-49.) BAMA also alleges "Uber made the decision to obfuscate the true nature of UFS/Xchange and its delay of Leads so that BAMA would blindly continue to provide cars to Uber's rideshare drivers, take out large scale loans, and expand its business." (*Id.* ¶ 50; see *id.* ¶ 49.)

***11** Here, both parties are sophisticated. To hold that a representative of a corporation could be charged with having superior knowledge about the corporation's business plans would render the general rule meaningless, as any representative of a corporation with knowledge of the corporation's business could be charged as having superior knowledge. More significantly, BAMA's contention that Uber owed it a duty to disclose its internal business plans for UFS/Xchange is effectively an attempt to state a claim for fraud by concealment. Such a claim is inconsistent with the provisions of the Agreement describing the parties' relationship as "entirely and solely commercial," acknowledging that BAMA "may have interests that differ from those of Uber," and stating that "any duties and obligations that a party hereto may have to the other party shall be limited to those duties and obligations specifically stated herein." (See, e.g., *Los Angeles Memorial Coliseum Com. v. Insomniac, Inc.* (2015) 233 Cal.App.4th 803, 832 [because a duty to

disclose "arises only from fiduciary or fiduciary-like relationships," and the facts alleged showed only a commercial relationship among the parties, plaintiffs failed to state a claim for fraud by concealment].) In addition, a number of the alleged representations, such as statements that "Uber needed BAMA" or that "BAMA was an important part of Uber's business plans going forward," are far "too vague to be taken as fact." (*ComputerXPress, Inc.*,93 Cal.App.4th at 1013; see also *Conrad,* 45 Cal.App.4th at 156.) Therefore, the exception to the general rule does not apply here.

III. Fraud – Concealment (Fourth Cause of Action)

To state a claim for fraudulent concealment, a plaintiff must plead: "(1) concealment or suppression of a material fact; (2) by a defendant with a duty to disclose the fact to the plaintiff; (3) the defendant intended to defraud the plaintiff by intentionally concealing or suppressing the fact; (4) the plaintiff was unaware of the fact and would not have acted as he or she did if he or she had known of the concealed or suppressed fact; and (5) plaintiff sustained damage as a result of the concealment or suppression of the fact." (*Hambrick v. Healthcare Partners Medical Group, Inc.* (2015) 238 Cal.App.4th 124, 162, quoting *Graham v. Bank of America, N.A.* (2014) 226 Cal.App.4th 594, 606.) Uber primarily challenges the duty to disclose. (Opening Brief, 5, 15-16.)

"To maintain a cause of action for fraud through nondisclosure or concealment of facts, there must be allegations demonstrating that the defendant was under a legal duty to disclose those facts." (*Los Angeles Memorial Coliseum Com.*, 233 Cal.App.4th at 831.) "[O]rdinarily, such a duty arises only from fiduciary or fiduciary-like relationships." (*Id.* at 832.) "A duty to disclose may arise from a confidential relationship. Where there exists a relationship of trust and confidence, it is the duty of one in whom the confidence is reposed to make a full disclosure of all material facts within his knowledge relating to the transaction in question and any concealment of a material fact is a fraud. A confidential relationship can exist even though, strictly speaking, there is no fiduciary relationship. A confidential relationship may be founded on moral, social, domestic, or merely a personal relationship." (*Huy Fong Foods,* 66 Cal.App.5th at 1122 (cleaned up).)

BAMA alleges Uber concealed eight material facts from BAMA:

> (1) that Uber viewed BAMA as a short term relationship through the end of 2015 or at a minimum as a bridge to get more rideshare drivers until UFS/Xchange was up and running; (2) that UFS/Xchange's implemented business plan was for it to be substantially similar to BAMA except that UFS/Xchange would charge less for the product than BAMA, (3) that the Xchange/UFS implemented business plan was not for the entity to be a profitable business, but instead for Uber to make money on Uber's rideshare trips, (4), that Uber's plan for UFS/Xchange was to make it **the** option nationally for rideshare drivers, (5)

> that after announcing UFS/Xchange, Uber initiated creeping Lead delays to allow Xchange to cherry pick the best prospective lessees, (6) that Uber was deceptively limiting its marketing efforts on behalf of BAMA so that UFS/Xchange could cherry pick the best prospective lessees; (7) that Uber used BAMA's information to obtain intel for its competing business UFS/Xchange, and (8) that Uber was using BAMA as a bridge to get more rideshare drivers until UFS/Xchange was up and running.

***12** (4AC ¶ 81 (emphasis in original).) BAMA alleges Uber had a duty to disclose because it had exclusive knowledge and control of the material facts. (*Id.* ¶ 82.)

BAMA contends in the 4AC that while "the Agreement disclaims any fiduciary duty between the parties throughout the course of their relationship—including both before and after the Agreement—Uber sought to create a relationship of trust and often referred to BAMA as its 'partner.'" (4AC ¶¶ 14, 86.) However, the Agreement also states that "neither Party is acting as an advisor, expert or otherwise, to the other, and such relationship between the Parties is entirely and solely commercial, based on arms-length negotiations." (*Id.* at Ex. A § 2.2(ii).) Significantly, it also states, "any duties and obligations that a party hereto may have to the other party shall be limited to those duties and obligations specifically stated herein." (*Id.* § 2.2(iii).) Thus, in the Agreement, the parties expressly disclaimed any duty of disclosure.

The 4AC does not cure the defects identified in the Court's prior order. (See Aug. 18, 2022 Order, 9-10.) In particular, the allegations continue to reflect a commercial relationship between BAMA and Uber, which could not give rise to a duty of disclosure. (See *Hambrick*, 238 Cal.App.4th at 162-163 [allegations did not establish a duty to disclose a health service plan's relationship with another health service plan]; *Los Angeles Memorial Coliseum Com.*, 233 Cal.App.4th at 832 [finding the plaintiffs failed to state a claim for fraud by concealment when they alleged facts showing only a commercial relationship between the parties, and there was nothing alleged about the relationship that would give rise to fiduciary-duty like duties].)

IV. Promissory Fraud (Fifth Cause of Action)

Uber asserts BAMA's allegations as to promissory fraud "are too vague to allow a court to determine whether or not the purported promise was performed, or whether Uber intended to perform the promises when made." (Opening Brief, 5; see *id.* at 8.) The Court agrees.

"Promissory fraud requires proof of (1) a promise made regarding a material fact without any intention of performing it; (2) the existence of the intent not to perform at the time the promise was made; (3) intent to deceive or induce the promise to enter into a transaction; (4) reasonable

reliance by the promise; (5) nonperformance by the party making the promise; and (6) resulting damage to the promise." (*Missakian v. Amusement Industry, Inc.* (2021) 69 Cal.App.5th 630, 654 (cleaned up).) "In a promissory fraud action, 'the essence of the fraud is the existence of an intent at the time of the promise not to perform it.'" (*White v. Smule, Inc.* (2022) 75 Cal.App.5th 346, 359, quoting *Building Permit Consultants, Inc. v. Mazur* (2004) 122 Cal.App.4th 1400, 1414.)

BAMA's allegations as to promissory fraud are premised on the same alleged representations by Uber that serve as the basis for BAMA's intentional misrepresentation claim. (Compare 4AC ¶¶ 63-68 with *id.* ¶¶ 98-103.) As set forth above, the alleged promises are not actionable on multiple grounds. Furthermore, BAMA cannot plead Uber intended to deceive or promised to enter into a transaction when the parties executed the Agreement *before* Uber made the alleged promises. (Compare *Missakian*, *69* Cal.App.5th at 653 ["an action may lie where a defendant fraudulently induces the plaintiff to enter into a contract, by making promises he does not intend to keep."].)

CONCLUSION

***13** For the foregoing reasons, Uber's demurrer to the third, fourth, fifth, and sixth causes of action of the Fourth Amended Complaint is sustained without leave to amend.

IT IS SO ORDERED.

Dated: January 20, 2023

<<signature>>

Ethan P. Schulman

Judge of the Superior Court

Footnotes

1 BAMA lodged the 4AC conditionally under seal. Neither party moved to seal the 4AC. (See Cal. Rules of Court, rule 2.551.) Therefore, the Court directs the clerk to promptly transfer the unredacted version of the 4AC to the public file.

2 Xchange was also formerly known as Uber Financial Services or UFS. (See 4AC ¶ 15.)

3 As BAMA conceded at the hearing, it was aware when it entered into the Agreement that Uber had existing relationships with other companies offering similar vehicle leasing services to Uber's drivers.

4 "During the term of this Agreement, BAMA agrees that it shall not, directly or indirectly, market, promote, endorse, partner with, or otherwise enter into a business relationship with a Competitor of Uber, where 'Competitor' shall mean any individual or entity offering, providing, or otherwise enabling, directly or indirectly, an on-demand transportation product, service or platform." (Ex. A § 13.1.)

5 One case disagrees, suggesting that "[w]here the implied promise is certain enough to cause reasonable reliance, there is no reason it cannot be a proper basis for [a claim of] fraud." (*Huy Fong Foods, Inc. v. Underwood Ranches, LP* (2021) 66 Cal.App.5th 1112, 1124.) However, that language is dicta. As discussed below, in that case, "there was far more than an implied promise," since the cross-defendant "expressly told [the cross-complainant] numerous times that [it] would purchase all the peppers [cross-complainant] could produce." (*Id*.) BAMA does not allege that Uber made any such express promises.

6 Uber argues the alleged statements that Xchange would not cherry pick the best lessees and that Uber would not engage in adverse selection were not misrepresentations to BAMA as they were made in Uber's internal correspondence. (Opening Brief, 10; see *Mirkin v. Wasserman* (1993) 5 Cal.4th 1082, 1097 ["A representation made to one person with the intention that it shall reach the ears of another, and be acted upon by him, and which does reach him, and is acted upon by him to his injury, gives the person so acting upon it the same right to relief or redress as if it had been made to him directly."], quoting *Crystal Pier Amusement Co. v. Cannan* (1933) 219 Cal. 184, 188, *Henry v. Dennis* (1901) 95 Me. 24 (cleaned up).) Although Uber's internal correspondence is included as exhibits to the 4AC, however, BAMA also alleges that Mr. Chapin made the representation directly to BAMA. (4AC ¶¶ 65, 68(e).)

7 BAMA mischaracterizes Exhibit L as supporting this allegation. It consists of an internal email within Uber, entitled "BAMA discussion tomorrow," reflecting the author's characterization of the "ideal outcome" for Uber's discussions with BAMA. Under the first bullet point, it reflects the author's suggestion that Uber "[p]rovide credit facility for select markets where XCL cannot participate (e.g., Boston)" in order to maximize BAMA's resources and minimize Uber's capital requirements, based on the rationale that "XCL will win first look/priority in each market where BAMA and XCL co-exist. If a partner leases with BAMA, there is a strong likelihood they were turned down by XCL." (4AC, Ex. L.) Notably, there are no allegations in the 4AC as to the content or outcome of those discussions between Uber and BAMA.

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