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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

RICK BOBERTZ et al., Plaintiffs and Appellants, v. CUSHMAN & WAKEFIELD OF CALIFORNIA, INC., et al., Defendants and Respondents.	B269734 (Los Angeles County Super. Ct. No. BC501104)

APPEAL from a judgment of the Superior Court of Los Angeles County, William F. Fahey, Judge. Affirmed.

Gartenberg Gelfand Hayton, Edward Gartenberg, Milena Dolukhanyan; Cole Pedroza, Curtis A. Cole and Cassidy C. Davenport for Plaintiffs and Appellants.

Norton Rose Fulbright, Robert M. Dawson and Spencer Persson for Defendants and Respondents.

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Appellants,[1] investors in a real estate securities offering, appeal the trial court's grant of summary judgment in favor of respondents Cushman & Wakefield of California, Inc. (Cushman), and Cushman employee Craig Tilson. Tilson prepared an appraisal of the property underlying the securities for the mortgage lender. Appellants allege that they relied on the valuation from that appraisal, excerpted in the offering documents for the securities, when they decided to invest. They further claim that the valuation significantly overrepresented the true value of the property, and that they lost money as a result. We hold that appellants have failed to present evidence raising a triable issue of material fact that they justifiably relied on the valuation, or that respondents aided and abetted breaches of duty by the seller of the securities, Griffin Capital Corporation (Griffin). We therefore affirm the judgment.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

1. The appraisal

In 2006, Griffin sought to purchase a commercial property in the City of Industry with a car dealership as a tenant. Griffin applied for a loan from Barclays Capital Real Estate Inc. (Barclays) to finance the purchase. Barclays, at Griffin's recommendation, engaged Cushman to prepare an appraisal, and Cushman assigned Tilson to the task. Griffin provided various documents and other information to Tilson, and received a draft of the appraisal when it was complete.

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[1] Appellants are Rick Bobertz, Claudia Bowman, Maria Cirillo, Peter Desmond, Lary Hanshaw, Adrianne Luban, Jeffrey Luban, Chiaka D. Patterson, Lewis H. Shaeffer, Donna Stephens, Unverzagt Farms, Bill Whitehead and Lynn A. Worthington.

The appraisal report was 80 pages long, including the transmittal letter and addenda. It valued the property at $22.5 million. It noted in three places that the valuation was based on a proposed but unsigned lease from the tenant car dealership. The report referred to the lease as an "extraordinary assumption," which it defined per the Uniform Standards of Professional Appraisal Practice as "an assumption, directly related to a specific assignment, which, if found to be false, could alter the appraiser's opinions or conclusions."[2] (See The Appraisal Foundation (2016-2017) Uniform Standards of Professional Appraisal Practice, p. 3.)

Tilson reached the $22.5 million figure by dividing the expected annual net income from the proposed lease by a "capitalization rate" derived through analysis of comparable car

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[2] Appellants in their briefing repeatedly interpret "extraordinary assumption" as having its common meaning, that is, an assumption that is out of the ordinary (and, by implication, improper). For example, appellants claim that "Tilson knew [the proposed lease] was an 'extraordinary' amount, meaning far more than fair market value," and that Cushman "knew that an appraisal based on an 'extraordinary assumption' had a more nefarious purpose." As the appraisal report itself makes clear, and the Uniform Standards of Professional Appraisal Practice confirm, "extraordinary assumption" is a term of art that simply refers to an assumption that may yet prove false, thus affecting the appraiser's opinion. Nothing about the term, used appropriately as it was here, suggests an excessive or otherwise improper valuation. We also note that appellants have not asserted that the lease that was ultimately signed (see *post*) differed at all from the unsigned lease considered for the appraisal; this belies an implication that the "extraordinary assumption" was somehow unrealistic.

dealerships and other sources. The report also applied two other appraisal methods, resulting in valuations of $20.9 million and $22.8 million, but stated that it gave the most weight to the $22.5 million figure, as it was based on the appraisal method "typically" used for investment properties.

The appraisal also included sales history for the property and comparable properties, noting that the subject property had been sold a year and a half earlier for $8.3 million. It also listed property tax information and assessed value, income figures for the prospective tenant, and disclosures and disclaimers stating, among other things, that the appraisal should "be used in whole and not in part," and that the report was intended only for the use of Barclays and other specified classes of persons or entities involved with the mortgage loan.

2. The investment

After receiving the appraisal, Barclays agreed to provide a $15.6 million loan. Meanwhile, Griffin offered tenant-in-common interests to investors to fund the purchase of the property. Griffin disseminated documents describing the offer (the offering documents) to potential investors or their broker-dealers. The offering documents listed the $22.5 million valuation, noting that the figure came from an "Appraisal Report . . . obtained by the Lender to arrange financing," and that Griffin "ha[d] not obtained an independent appraisal with respect to the value of the Interests being offered." The offering was limited to investors meeting "certain accredited standards" and with either a net worth of $1 million or annual income of several hundred thousand dollars. Investors could not purchase the securities directly; instead, each investor would be required to "form a single-member limited liability company, the sole asset and activity of which is to acquire and hold [his or her] Interest."

Appellants, having reviewed the offering documents, purchased the securities through specially formed limited liability companies (LLC's) as required by Griffin. Appellants claim they collectively invested approximately $9.1 million, with individual investors contributing between $197,000 and $950,000. None of the appellants prior to investing read a copy of the appraisal report or communicated with Cushman or Tilson about the appraisal. All claimed, however, that the valuation listed in the offering documents was "important" to them in their decision to invest.

Griffin purchased the property and leased it to the car dealership. At first, the dealership performed on its lease. But by late 2008, the car dealership had stopped making its lease payments, and soon thereafter went out of business. The property was sold in foreclosure in 2010 at a significant loss.

3. Proceedings below

On February 13, 2013,[3] appellants filed a complaint in Los Angeles Superior Court against Cushman and Tilson as well as Griffin and its CEO, Kevin Shields, alleging intentional and negligent breach of fiduciary duty, constructive fraud, fraud and deceit, and negligent misrepresentation. Appellants further alleged that the various defendants were liable as conspirators or

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[3] The statute of limitations was a significant issue below and in the parties' briefs on appeal. Because we resolve this appeal on other grounds, we omit the facts relevant to that issue.

aiders and abettors.[4] Appellants alleged that the defendants had inflated the value of the property in order to persuade appellants to invest in the securities. Specific to Cushman and Tilson, appellants alleged that the appraisal was "inaccurate and misleading . . . and in violation of clear industry rules and practices." For example, appellants alleged that respondents wrongly relied on the unsigned lease in determining value, failed to properly account for the increase in value from the $8.3 million sale a year and a half earlier, used inaccurate building cost data and inappropriate comparable properties, and used an improper valuation method.

Griffin and Shields settled with appellants and were dismissed from the lawsuit. Cushman and Tilson filed a motion for summary judgment or, in the alternative, summary adjudication. After submission of papers and a hearing, the trial court granted the motion on various grounds discussed further below. Appellants timely appealed.

STANDARD OF REVIEW

"The purpose of the law of summary judgment is to provide courts with a mechanism to cut through the parties' pleadings in order to determine whether, despite their allegations, trial is in fact necessary to resolve their dispute." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843.) "[T]he party moving for summary judgment bears the burden of persuasion that there is no triable issue of material fact and that he is entitled to judgment as a matter of law." (*Id.* at p. 850.) "Once the [movant] has met that burden, the burden shifts to the [party opposing the

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[4] Appellants also alleged violations of the Business and Professions Code and Corporations Code against Griffin and Shields.

motion] to show that a triable issue of one or more material facts exists as to the cause of action . . . ." (Code Civ. Proc., § 437c, subd. (p)(1) & (2); see *Aguilar, supra*, at p. 850.) A triable issue of material fact exists when "the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Aguilar, supra*, at p. 850.)

"On appeal from summary judgment, we review the record de novo and must independently determine whether triable issues of material fact exist. [Citations.] We resolve any evidentiary doubts or ambiguities in favor of the party opposing summary judgment." (*Nealy v. City of Santa Monica* (2015) 234 Cal.App.4th 359, 370-371.) "We must affirm the judgment if it is correct under any theory of law applicable to the case." (*Modern Development Co. v. Navigators Ins. Co.* (2003) 111 Cal.App.4th 932, 938.)

A party may also move for summary adjudication on individual causes of action. (*Blue Shield of California Life & Health Ins. Co. v. Superior Court* (2011) 192 Cal.App.4th 727, 732.) "The rules applicable to summary judgments apply equally to motions for summary adjudication." (*Ibid.*)

DISCUSSION

The trial court granted summary judgment as to all claims and summary adjudication as to particular claims on the basis that appellants had exceeded the applicable statutes of limitations; respondents had no fiduciary duty to appellants; appellants lacked standing; respondents' valuation was a nonactionable opinion; respondents did not intend appellants to rely on their opinion; appellants' reliance on the opinion was not reasonable; and appellants did not have the requisite knowledge of Griffin's breach of duty to support liability under an aiding and abetting theory.

As discussed below, we hold that appellants do have standing, but summary judgment was proper because they have not raised triable issues as to either justifiable reliance or aiding and abetting. Because these conclusions dispose of all of appellants' claims, we do not reach the other bases for the trial court's judgment. (See *Dore v. Arnold Worldwide, Inc.* (2006) 39 Cal.4th 384, 393.) Nor do we address appellants' challenges to the trial court's evidentiary rulings, as they are not relevant to our holding. Our silence as to any issue should not be interpreted as implicit acceptance of the arguments of any party.

1. Standing

The trial court ruled that appellants lacked standing to bring their claims, and the claims instead should have been brought by the LLC's through which appellants purchased their interests in the property. We disagree with the trial court.

To have standing, a "person invoking [the] judicial process must have a real interest in the ultimate adjudication, having suffered . . . 'an injury of sufficient magnitude reasonably to assure that all the relevant facts and issues will be adequately presented.' " (Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2016) ¶ 2:2, p. 2-2, quoting *Blumhorst v. Jewish Family Services of Los Angeles* (2005) 126 Cal.App.4th 993, 1001.)

The trial court based its ruling on *PacLink Communications Internat., Inc. v. Superior Court* (2001) 90 Cal.App.4th 958 (*PacLink*). In *PacLink*, members of an LLC alleged that the LLC's assets had been fraudulently transferred, leaving the LLC insolvent and depriving the plaintiffs of the benefit of their ownership interests. (*Id.* at pp. 961-962.) The Court of Appeal, reversing on writ review the trial court's overruling of a demurrer, stated that "the essence of plaintiffs' claim is that the assets of [the LLC] were fraudulently transferred without any compensation being paid to the LLC. . . . The injury was essentially a diminution in the value of their membership interest in the LLC occasioned by the loss of the company's assets." (*Id.* at p. 964, citation & fn. omitted.)

The *PacLink* court cited " ' "a general rule that a corporation which suffers damages through wrongdoing by its officers and directors must itself bring the action to recover the losses thereby occasioned, or if the corporation fails to bring an action, suit may be filed by a stockholder acting derivatively on behalf of the corporation." ' " (*PacLink, supra*, 90 Cal.App.4th at p. 965.) On this basis, the court held that the plaintiffs could not bring a personal cause of action against the defendants. (*Ibid.*) "In determining whether an individual action as opposed to a derivative action lies, a court looks at 'the gravamen of the wrong alleged in the pleadings.' " (*Ibid.*) In that case, "the gravamen of the wrong alleged [was] an injury to [the LLC] (fraudulent transfer of its assets) which resulted incidentally in an injury to plaintiffs (diminution in the value of their ownership interest)." (*Ibid.*) Because the injury was sustained by the LLC, " 'it was for the [LLC] to institute and maintain a remedial action.' " (*Id.* at p. 966.)

In the case here, the trial court cited *PacLink* and noted that appellants' "investments were made through LLC's. In such a case, the damages suffered constitute an injury to the company, and the individual stockholder or member may not maintain an action in his own right."

We disagree with this conclusion. The misrepresentations and other breaches of duty alleged by appellants were not directed at the LLC's, but at appellants personally, and the alleged injuries were suffered by appellants as well. The parties do not dispute that the LLC's were created by Griffin on appellants' behalf solely for the purpose of the investment transaction. In other words, appellants only formed the LLC's in order to purchase the securities Griffin was offering. Thus, when appellants allege that they purchased their investments in reliance on defendants' misrepresentations, they are also alleging that they formed the LLC's on the basis of those misrepresentations. The alleged injury was not a diminution of value in the LLC's, but the fact that appellants were deceived into forming and funding the LLC's in the first place in order to purchase an allegedly overvalued investment. This is distinguishable from *PacLink*, where the alleged malfeasance did not involve formation of the LLC or the plaintiffs' initial investment, but mismanagement of and injury to the assets of an existing LLC. (*PacLink, supra*, 90 Cal.App.4th at pp. 964-965.)

Under these circumstances, we hold that appellants have standing to assert their claims.

2. Direct liability for fraud and negligent misrepresentation

Appellants assert that the trial court erred in granting summary adjudication for respondents on appellants' claims for fraud and negligent misrepresentation. We disagree.

The elements of fraud are (1) misrepresentation, (2) knowledge of falsity, (3) intent to defraud, (4) justifiable reliance, and (5) resulting damage. (*Ryder v. Lightstorm Entertainment, Inc.* (2016) 246 Cal.App.4th 1064, 1079.) The elements of negligent misrepresentation are "(1) the misrepresentation of a past or existing material fact, (2) without reasonable ground for believing it to be true, (3) with intent to induce another's reliance on the fact misrepresented, (4) justifiable reliance on the misrepresentation, and (5) resulting damage." (*Apollo Capital Fund LLC v. Roth Capital Partners, LLC* (2007) 158 Cal.App.4th 226, 243.)

The trial court granted summary adjudication for respondents on both claims on the basis that appellants had not provided evidence that they justifiably relied on the valuation in the offering documents. Normally, whether reliance was justified is a question of fact. (*Hoffman v. 162 North Wolfe LLC* (2014) 228 Cal.App.4th 1178, 1194.) "But the issue 'may be decided as a matter of law if reasonable minds can come to only one conclusion based on the facts.' " (*Ibid.*) "[I]n such instances where the absence of justifiable reliance is one of law, summary judgment or summary adjudication is an appropriate vehicle." (*Ibid.*; see *Hinesley v. Oakshade Town Center* (2005) 135 Cal.App.4th 289, 300-303 (*Hinesley*).)

We agree with the trial court that, on the record before us, as a matter of law appellants could not have justifiably relied on the valuation in the offering documents.[5] Like the trial court, we base our conclusion on the undisputed fact that none of the appellants actually saw respondents' appraisal report. Nor is there evidence that any appellant communicated with

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[5] The sole representation by respondents that appellants purport to have relied on is the valuation. We do not address whether appellants could reasonably have relied on other portions of the offering documents, or other representations by Griffin or others, in deciding to invest.

respondents, directly or indirectly, about the appraisal (or anything else). Hence, appellants were relying on an excerpted number isolated from any context, without regard to the basis for the valuation, any assumptions on the part of the appraiser, or any disclosures, disclaimers or caveats.[6]

Under the circumstances, this was manifestly unreasonable. The offering documents made clear, immediately

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[6] Appellants asserted below, and respondents' did not dispute, that in addition to the valuation, some 27 pages of the 80-page appraisal report were copied into the offering materials. These pages are not relevant to our analysis. Appellants did not claim in their declarations to have relied on these pages, and indeed did not identify for the trial court (or this court) which pages had been copied, much less explain how those pages had any significance to their investment decision.

Based on our own comparison of the appraisal report and the offering documents, the copied pages consist of descriptions and economic analyses of the Los Angeles area, the City of Industry, and the neighborhood where the property at issue was located; market analysis of the local automobile retail industry; a description of the property at issue and its improvements; and a zoning description. The pages do not contain any information specific to the valuation: for example, there is no information about the purchase history of the property or comparable properties; no income figures for the prospective tenant; no information about how the valuation was derived; no information about the assumptions upon which the valuation was based; and no disclosures or disclaimers indicating for what parties and purposes the appraisal was intended (all of which were in sections of the appraisal report *not* included in the offering documents). The pages therefore provided no basis for appellants justifiably to rely on the valuation in the absence of the full appraisal report.

before listing the valuation, that the valuation was not a standalone figure but part of a separate "Appraisal Report," defined a page earlier as "the Complete Appraisal of Real Property prepared by Cushman and Wakefield of California, Inc. . . . , an independent real estate services firm engaged by the Lender." Appellants had no basis to believe that all pertinent information from that separate report, prepared by an entity independent of Griffin, was included in the offering documents, nor could they even be sure that Griffin had accurately conveyed the valuation.

Moreover, the offering documents stated, again immediately prior to listing the valuation, that the appraisal "was obtained by the Lender to arrange financing," and Griffin "ha[d] not obtained an independent appraisal with respect to the value of the Interests being offered." Appellants presented no evidence that they otherwise had been told that they could rely on the valuation in making their investment decision (certainly not by respondents, with whom they never communicated). Thus, there was no basis for appellants to assume without further inquiry that the valuation was appropriate for their purposes.[7]

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[7] There could conceivably be circumstances, such as in a straightforward residential real estate purchase, in which a buyer could reasonably rely on an appraisal prepared for the lender without evaluating the full report. But appellants themselves acknowledge the transaction at issue here was not "a simple offer to sell real estate," but a "complex offering of tenant-in-common securities relating to an income generating asset." The sophistication of the transaction is amply demonstrated by the requirements that the securities be purchased through LLC's, and that the investors be both accredited and have significant

Hinesley, supra, 135 Cal.App.4th 289, an opinion by Chief Justice Cantil-Sakauye when she was serving on the Third District Court of Appeal, is instructive. In *Hinesley*, the plaintiff sued a commercial landlord for fraud and rescission, alleging that he had leased space in a shopping center in reliance on the landlord's misrepresentation that three popular chain stores would be leasing space nearby. (*Id*. at pp. 291-292.) The Court of Appeal affirmed summary judgment in favor of defendant on the element of justifiable reliance. (*Id*. at pp. 303-304.) Central to the court's holding was a disclaimer in the signed lease stating that " 'Lessee does not rely on the fact nor does Lessor represent that any specific Lessee of [*sic*] type or number of Lessees shall during the term of this Lease occupy any space in the Shopping Center.' " (*Id*. at p. 300, italics omitted.) The court acknowledged that the landlord "could not contractually insulate itself from its own fraud by this language," but "[t]he clause should have put Hinesley on notice to ask further questions," and was "certainly a factor [citation] to consider in determining whether" the plaintiff justifiably relied on the landlord's representations. (*Id*. at p. 302.)

The court noted that, despite the contractual language serving as a "red flag, or at least a yellow flag, in front of" the plaintiff, the evidence showed that he did *not* ask further questions or take any further action in relation to his purported concern about the other tenants. (*Hinesley, supra*, 135 Cal.App.4th at pp. 302-303.) The court recognized that the plaintiff had no "independent obligation to question [the landlord]

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wealth. That complexity made it all the more unreasonable to rely on an out-of-context valuation in making an investment decision.

or to tell him that the status of the other tenants' leases was important to his decision and the timing of his own lease." (*Id*. at p. 303.) But "[i]n the complete absence of any actions taken to question, clarify, or confirm the contractual status of the three cotenants, to notify his attorney of the representations or to modify [the contractual disclaimer], Hinesley could not justifiably rely on his understanding of the representations and gestures made by [the landlord]."[8] (*Ibid.*)

Here, as in *Hinesley*, the language in the offering documents "put [appellants] on notice to ask further questions" (*Hinesley, supra*, 135 Cal.App.4th at p. 302) because the language made clear that the valuation was excerpted from a longer independent report prepared for purposes other than informing appellants' investment decision. The absence of evidence that appellants sought "to question, clarify, or confirm" the valuation (*id.* at p. 303), or take the obvious step of requesting the full

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[8] The concepts of actual reliance and justifiable reliance overlap in *Hinesley*, as the plaintiff's conduct made the court question whether he relied on his landlord's representations at all: "Hinesley's failure to make such inquiries, discuss such factors or express his intentions when those issues would have been natural and reasonable in the situation is persuasive evidence of Hinesley's state of mind. It is evidence *he was not in fact relying* on the presence of these tenants in deciding to execute this commercial lease." (*Hinesley, supra*, 135 Cal.App.4th at p. 303, italics added.) Similarly, in this case it is a fair question whether appellants actually relied on the valuation, given they never requested the appraisal report or took any other action indicating a particular interest in that aspect of the offering documents. But given our holding, we need not resolve this.

appraisal, undercuts their assertion that they justifiably relied on the valuation.

Appellants in their briefing offer very little argument on the issue of justifiable reliance. They assert that their declarations claiming "that the appraisal valuation was an important factor in their decisions to invest" create a triable issue of material fact. Appellants suggest a jury could reasonably infer "that plaintiffs acted reasonably in relying on an appraisal presented to them by their broker as accurate and that was accepted by Barclay's [*sic*] Bank to justify a $15.6 million loan." Appellants also argue that it was reasonable for them to rely on respondents' appraisal "given [Cushman's] experience in the industry" and the fact that "a market-leading appraisal company was identified in the offering by name."

These arguments are unpersuasive. Appellants' declarations arguably create a triable issue as to whether they *actually* relied on the valuation listed in the offering documents, but they do not support an inference that such reliance was justified. Appellants' declarations all state something to the effect that the "valuation was important to [them] in [their] decision to purchase [their] TIC investment[s]," but offer no explanation as to why they did not request the full appraisal or even ask for further information about it. There is no evidence that any appellant had particular confidence in respondents, as none of the declarations indicate appellants at the time knew of Cushman, much less its experience or purported status as a market leader.[9] Nor do appellants profess any expertise in

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9 For this reason, it is immaterial that the trial court based its ruling in part on an incorrect finding that Cushman was not mentioned in the offering materials. Without evidence that appraisals that would allow them to deduce the contents of a full appraisal report based solely on the valuation figure (indeed, one would expect an investor familiar with appraisals *not* to rely on one sight unseen).

Appellants also overstate in claiming that the appraisal was "presented to them" by Griffin. Again, appellants did not receive the appraisal report, but only the valuation figure, qualified by warnings that it was prepared for the lender, with no independent appraisal having been done for the investment being offered. The fact that Griffin and Barclays may have relied on the valuation for their purposes, after receiving and presumably reviewing the full report, did not make it reasonable for appellants to rely on it for a different purpose without further inquiry.

Although appellants cite numerous cases discussing the liability of appraisers and similar entities, appellants do so to support the argument that appraisers may be liable for misrepresentation to third parties who did not directly contract with them, a question we need not and do not decide here. The cases do *not* address whether a person reasonably can rely on a valuation extracted from an appraisal report without reviewing the full report, and therefore are unavailing to appellants on that question.[10]

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reference to Cushman would have had significance for appellants and made it reasonable to rely on a valuation without the context of the full appraisal report, the fact that Cushman's name appears once in the offering materials lends no support to appellants' arguments.

10 In several of appellants' cited cases, the plaintiffs received or read the report at issue. (*Bily v. Arthur Young & Co.* (1992) 3

Thus, the trial court correctly granted summary adjudication in favor of respondents on appellants' claims for fraud and negligent misrepresentation.

Cal.4th 370, 377-378 & fn. 2 [plaintiffs received and relied on audit opinion]; *Public Employees' Retirement System v. Moody's Investors Service, Inc.* (2014) 226 Cal.App.4th 643, 671-672 & fn. 21 [plaintiffs relied on credit ratings they obtained from rating agencies' subscription websites]; *Fuller v. First Franklin Financial Corp.* (2013) 216 Cal.App.4th 955, 964-965 [plaintiffs were provided with allegedly misleading appraisal report]; *Soderberg v. McKinney* (1996) 44 Cal.App.4th 1760, 1771 [same].) In others, the courts did not reach the question of justifiable reliance (*Leko v. Cornerstone Bldg. Inspection Service* (2001) 86 Cal.App.4th 1109, 1120 [addressing whether building inspector owed a duty to third party purchasers of property]; *Slavin v. Trout* (1993) 18 Cal.App.4th 1536, 1538, fn. 1 [sole issue on summary judgment was statute of limitations]; *Foggy v. Ralph F. Clark & Associates, Inc.* (1987) 192 Cal.App.3d 1204, 1217 [appeal involved damages and collateral source rule]; *TC Rich, LLC v. Pacifica Chemical Incorporated* (C.D.Cal., Oct. 9, 2015, No. 2:15CV04878CASAGRX) 2015 WL 12532176, at *6 [case involved whether plaintiff was an intended beneficiary of an environmental assessment report]; *F.D.I.C. v. Frankel* (N.D.Cal., Nov. 29, 2011, No. 11-CV-03279-LHK) 2011 WL 5975262, at *4 [case involved whether plaintiff was a third party beneficiary in a claim against appraiser]). Others held that the opinions of value at issue were not actionable (appellants attempt to distinguish these cases). (*Willemsen v. Mitrosilis* (2014) 230 Cal.App.4th 622, 624 [no liability for negligent misrepresentation when appraiser did not intend to supply information to plaintiff to influence his decision to buy property]; *Graham v. Bank of America, N.A.* (2014) 226 Cal.App.4th 594, 607 [appraisal not a representation of fact on which plaintiff could rely]; *Neu-Visions Sports, Inc. v. Soren/McAdam/Bartells* (2000) 86 Cal.App.4th 303, 310 [opinion of future value by nonappraiser accountant not actionable].)

3. Aiding and abetting

Although, as appellants acknowledge, respondents owed them no fiduciary duty, appellants alleged below that respondents were nonetheless liable for breach of fiduciary duty and constructive fraud under an aiding and abetting theory.[11] The trial court granted summary adjudication in favor of respondents on this theory, finding that appellants had not raised a triable issue that respondents knew of Griffin's intended wrongdoing. We agree with the trial court.[12]

Liability for aiding and abetting " 'may . . . be imposed on one who aids and abets the commission of an intentional tort if

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[11] We assume without deciding that Griffin owed a fiduciary duty to appellants, and that a party can be liable for aiding and abetting each of the torts alleged by appellants. Neither respondents in their briefing nor the trial court in its ruling addressed these issues.

[12] The trial court also granted summary adjudication on appellants' claims based on conspiracy. Appellants did not challenge this ruling in their opening brief on appeal, and only dispute it in their reply in order to argue that Griffin's alleged fraud should toll the statute of limitations as to its coconspirators, i.e., respondents. "Fairness militates against our consideration of any arguments an appellant has chosen not to raise until its reply brief . . . ." (*Reed v. Mutual Service Corp.* (2003) 106 Cal.App.4th 1359, 1372, fn. 11, declined to follow on another ground, *Haworth v. Superior Court* (2010) 50 Cal.4th 372, 382, fn. 6.) Regardless, we decide this appeal without reaching the issue of the statute of limitations, the only issue to which appellants directed their arguments concerning conspiracy. We also note that we have expressly held that nonfiduciaries such as respondents cannot conspire to breach duties by which they themselves are not bound. (*1-800 Contacts, Inc. v. Steinberg* (2003) 107 Cal.App.4th 568, 591-593.)

the person (a) knows the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other to so act or (b) gives substantial assistance to the other in accomplishing a tortious result and the person's own conduct, separately considered, constitutes a breach of duty to the third person.' " (*Fiol v. Doellstedt* (1996) 50 Cal.App.4th 1318, 1325-1326.) Appellants argue that respondents are liable under the first theory.

"Knowledge is the crucial element" of an aiding and abetting claim. (*Casey v. U.S. Bank Nat. Assn.* (2005) 127 Cal.App.4th 1138, 1145 (*Casey*).) *Casey* reviewed California precedent to conclude that liability for aiding and abetting "depends on proof the defendant had actual knowledge of the specific primary wrong the defendant substantially assisted." (*Ibid.*) Put another way, a party can be liable for aiding and abetting " 'only if he or she knew that a tort had been, or was to be, committed, and acted *with the intent of facilitating the commission of that tort*.' " (*Id.* at p. 1146, quoting *Gerard v. Ross* (1988) 204 Cal.App.3d 968, 983.)

In this case, the trial court, citing *Casey*, found "no evidence that [Cushman] knew that [appellants] would receive the appraisal, let alone evidence that the valuation would be taken out of context and used in the Offering Documents." On this basis, the court granted summary adjudication in favor of respondents.

Appellants concede that "knowledge that the primary wrongdoer's conduct constitutes a breach of duty" is a necessary element of aiding and abetting, but argue that there was evidence from which a reasonable jury could "infer that Cushman knew [appellants] would receive the appraisal and that the valuation would be taken out of context and used in the offering documents." Put another way, appellants argue that the evidence supported a reasonable inference that Cushman knew it was brought into the deal to justify an increased price on the property, and that Griffin would market securities related to the property based on that increased price.

We summarize appellants' characterization of the evidence in support of their argument:

1. Shields, the CEO of Griffin, testified in deposition that Cushman "w[as] aware of the fact that we intended to extract the market information and place it in the [offering documents]."[13] Shields also testified that Cushman was so notified on every tenant-in-common transaction Griffin was involved in, and it was "standard operating procedure" in the industry to include information from the appraisal in offering documents.

2. Griffin recommended Cushman to Barclays for the appraisal. Tilson, the appraiser, "worked directly with Griffin to obtain information for the appraisal," and Griffin provided it, including the asking price for the property, the purchase agreement, the proposed lease, and information on comparable properties.

3. E-mails and testimony showed that Griffin "anxiously awaited the appraisal that it helped Cushman construct," and Cushman sent Griffin a draft.

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[13] The trial court ruled that this testimony was "an inadmissible conclusion," a ruling to which appellants take exception. We need not address appellants' challenge; as discussed below, the testimony does not assist appellants even if it were admissible.

4. Griffin's senior vice president testified that Griffin had used Cushman on other appraisals, and he himself had reviewed 20 to 30 Cushman appraisals while working for Griffin.

5. The purchase agreement for the property between Griffin and the seller stated that the agreement might be assigned "in connection with a tenancy in common acquisition structure designated and administered by [Griffin] or agents thereof."

Even accepting for the sake of argument appellants' characterization of the evidence, we agree with the trial court that appellants have not raised a triable issue as to respondents' knowledge of Griffin's alleged breach of duty. As the trial court noted, after testifying that Cushman "was aware" of Griffin's intent to use excerpts from the appraisal, Shields admitted that he "d[id not] recall specifically on this offering" whether anyone from Griffin ever so informed Cushman. Thus, there was no actual evidence as to this particular transaction of any communication between Griffin and Cushman or Tilson that might support an inference that respondents knew that Griffin intended to present excerpts of the appraisal to appellants (or anyone else) for any purpose, wrongful or otherwise.

Appellants argue that, even absent evidence of respondents' specific knowledge as to this transaction, a jury could infer respondents' knowledge based on Shields's testimony that Griffin informed Cushman on *every* tenant-in-common transaction that portions of the appraisal would be used in the offering documents. But this generalized statement, without more, does not support an inference that respondents knew of Griffin's alleged scheme. Appellants offered no evidence regarding these other transactions, such as what precisely Griffin had told Cushman, what information was excerpted from the appraisals, whether valuations were excerpted without any qualifying assumptions or other context, whether the other transactions were comparable to the one at issue here, or whether anyone at Cushman involved in the current transaction had been involved in the earlier transactions (and thus would be aware of Griffin's purported common practice). Without this additional information, at best a jury could reasonably infer that some Cushman employees (not necessarily the ones involved in the transaction here) were aware that Griffin as a general matter excerpted unspecified portions of appraisals to include in offering documents in unspecified transactions; a reasonable jury could not infer, however, that respondents knew what portions Griffin intended to excerpt in this case, how those excerpts would be presented, or that Griffin would use those excerpts in a misleading way in breach of its duties to appellants.

Appellants' other evidence is similarly unavailing. Evidence that Griffin had a history of working with Cushman, selected Cushman to conduct the appraisal, provided information to include in the appraisal, and was anxious to receive a copy of the appraisal, does not support an inference of wrongdoing or knowledge of wrongdoing in the absence of evidence that any of this conduct was out of the ordinary in this particular industry or for these particular parties. The reasonable inference to draw is that Griffin was involved in the appraisal effort because it wanted a sufficiently high valuation to justify the loan it was hoping to receive from Barclays. Nothing in Griffin's conduct would suggest anything different to respondents.

Similarly, the fact that the 43-page purchase agreement for the property includes a clause 18 pages in stating that the agreement "may" be assigned "to one or more persons or entities in connection with a tenancy in common acquisition structure" hardly even supports an inference that respondents were aware that Griffin intended the property for a securities offering, much less any inference that respondents were aware of what Griffin would do with the appraisal.[14]

If all appellants had to show was that respondents were aware that Griffin would use portions of the appraisal in its offering documents, the evidence presented may have been sufficient to create a triable issue of material fact (although, again, the evidence presented does not suggest that the Cushman employees involved in this particular appraisal knew even this much). But to prevail on summary judgment, appellants had to create a triable issue that respondents "had actual knowledge of the specific primary wrong" at issue (*Casey, supra*, 127 Cal.App.4th at p. 1145), that is, actual knowledge that Griffin

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[14] Appellants note elsewhere in their briefing that the appraisal report contained numerous provisions restricting dissemination of the report beyond Barclays and other specified recipients or classes of recipients. Appellants argue this indicates Cushman knowingly aided and abetted Griffin's purported scheme "because prospective investors would never learn that Respondents' appraisal of the overinflated asking price was based on the 'extraordinary assumption' of the $135,000 monthly lease payment." Appellants' argument suggests that respondents, through their prohibitions on dissemination, were somehow hinting that Griffin should provide the valuation to appellants while holding back information putting the valuation in context. This is implausible, as those same prohibitions necessarily would include the valuation as well—nowhere does the language suggest that respondents approved dissemination of some specified portions of the report but not others.

would use respondents' work product in a way that would deceive appellants or others to whom Griffin owed a duty. We agree with the trial court's conclusion that appellants did not do so; therefore summary adjudication of their aiding and abetting theory was proper. This disposes of appellants' remaining claims for breach of fiduciary duty and constructive fraud.

DISPOSITION

The judgment is affirmed. Respondents are entitled to their costs on appeal.

FLIER, J.

WE CONCUR:

BIGELOW, P. J.

GRIMES, J.