APPENDIX TABLE OF CONTENTS

Court of Appeal, Second Appellate District, Division Eight - No. B269734

S243265

IN THE SUPREME COURT OF CALIFORNIA

En Banc

SUPREME COURT
FILED

AUG 30 2017

Jorge Navarrete Clerk

Deputy

RICK BOBERTZ et al., Plaintiffs and Appellants,

v.

CUSHMAN & WAKEFIELD OF CALIFORNIA, INC., et al., Defendants and Respondents.

The petition for review is denied.

CANTIL-SAKAUYE

Chief Justice

COURT OF APPEAL – SECOND DIST.
FILED
ELECTRONICALLY
Jun 13, 2017
JOSEPH A. LANE, Clerk
slewis Deputy Clerk

Filed 6/13/17

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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.

* * * * * *

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.

---

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

---

[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

---

[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

---

[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

---

[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

---

[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]

[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]

---

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

[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

---

[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]

---

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

---

[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.

---

[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

---

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.

PROOF OF SERVICE

I am over the age of 18 and not a party to the within action. I am employed in the County of Los Angeles, State of California by Cole Pedroza LLP. My business address is 2670 Mission Street, Suite 200, San Marino, California 91108.

On the date stated below, I served the document entitled: **PETITION FOR REVIEW** by placing true and correct copies thereof in sealed envelopes addressed to the parties as follows:

SEE ATTACHED SERVICE LIST

By United States Postal Service – I am readily familiar with the business's practice for collecting and processing of correspondence for mailing with the United States Postal Service. In that practice correspondence would be deposited with the United States Postal Service that same day in the ordinary course of business, with the postage thereon fully prepaid, in San Marino, California. The envelope was placed for collection and mailing on this date following ordinary business practice.

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

Executed this 20th day of July 2017, at San Marino, California.

Sara Mazzeo

SERVICE LIST

Robert M. Dawson, SBN 81790 (robert.dawson@nortonrosefulbright. com) Norton Rose Fulbright US LLP 555 South Flower Street 41st Floor Los Angeles, CA 90071 Tel.: (213) 892-9200 Fax: (213) 892-9494	*Counsel for Defendants and Respondents* CUSHMAN & WAKEFIELD OF CALIFORNIA, INC. and CRAIG D. TILSON
Jason K. Fagelman (*Pro Hac Vice*) (jason.fagelman@nortonrosefulbright .com) Norton Rose Fulbright US LLP 2200 Ross Avenue Suite 3600 Dallas, TX 75201 Tel.: (214) 855-8000 Fax: (214) 855-8200	*Counsel for Defendants and Respondents* CUSHMAN & WAKEFIELD OF CALIFORNIA, INC. and CRAIG D. TILSON
CLERK Court of Appeal 2nd Appellate District, Division 8 300 South Spring Street 2nd Floor, North Tower Los Angeles, CA 90013	COURT OF APPEAL
CLERK Los Angeles County Superior Court 111 North Hill Street Los Angeles, CA 90012 For: Hon. William F. Fahey	TRIAL COURT

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 11/20/15	DEPT. 69
HONORABLE WILLIAM F. FAHEY JUDGE	P. HORTON DEPUTY CLERK
HONORABLE JUDGE PRO TEM	ELECTRONIC RECORDING MONITOR
Deputy Sheriff	Reporter

2:00 pm	BC501104 RICK BOBERTZ ET AL VS GRIFFIN CAPITAL CORPORATION ET	Plaintiff Counsel NO APPEARANCES Defendant Counsel

NATURE OF PROCEEDINGS:

RULING ON SUBMITTED MATTER

Court's Order Granting Motion for Summary Judgment issued and filed November 19, 2015 is incorporated herein by reference and summarized below.

IT IS ORDERED that the Motion for Summary Judgment is Granted and plaintiffs' action against C & W is dismissed with prejudice.

Notice by C & W.

CLERK'S CERTIFICATE OF MAILING

I, the below-named Executive Officer/Clerk of the above-entitled court, do hereby certify that I am not a party to the cause herein, and that on this date I served the minute order dated 11-20-15 upon each party or counsel named below by placing the document for collection and mailing so as to cause it to be deposited in the United States mail at the courthouse in Los Angeles, California, one copy of the original filed/entered herein in a separate sealed envelope to each address

MINUTES ENTERED
11/20/15
COUNTY CLERK

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 11/20/15 | DEPT. 69

HONORABLE WILLIAM F. FAHEY JUDGE | P. HORTON DEPUTY CLERK

HONORABLE JUDGE PRO TEM | ELECTRONIC RECORDING MONITOR

Deputy Sheriff | Reporter

2:00 pm BC501104

RICK BOBERTZ ET AL
VS
GRIFFIN CAPITAL CORPORATION ET

Plaintiff Counsel
NO APPEARANCES
Defendant Counsel

NATURE OF PROCEEDINGS:

as shown below with the postage thereon fully prepaid, in accordance with standard court practices.

Dated: November 20, 2015

Sherri R. Carter, Executive Officer/Clerk

By: P. Horton
P. HORTON

NORTON, ROSE, FULBRIGHT US LLP
Robert M. Dawson
555 S. Flower Street, 41st Floor
Los Angeles, CA 90071

MINUTES ENTERED
11/20/15
COUNTY CLERK

BOBERTZ V. GRIFFIN CAPITAL CORP., et al.
BC 501104
November 19, 2015

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT

The history of this litigation has been summarized in this Court's Order of March 4, 2015 which denied a motion for determination of good faith settlement. Thereafter, plaintiffs dismissed the Griffin Capital defendants. Trial is now set for January 11, 2016.

In the meantime, the remaining defendants, Cushman and Wakefield and Craig Tilson ("C & W") have filed their Motion for Summary Judgment/Adjudication ("Motion"). These defendants argue, *inter alia*, that they had no fiduciary relationship with plaintiffs, plaintiffs lack standing, plaintiffs' claims are time-barred, and plaintiffs did not justifiably rely on the C & W appraisal report at issue.

In their Opposition, plaintiffs respond that the C & W value opinion is actionable and it was forseeable that third parties would rely on it. Plaintiffs also argue that "27 pages" of the C & W appraisal were included in Griffin Capital offering documents. Plaintiffs contend that the statute of limitations did not begin to run until "mid-2012," less than one year before the complaint was filed.

In support of their respective positions, each side has filed extensive evidence, including declarations, deposition excerpts and exhibits. In addition, each side has filed evidentiary objections on which this Court has ruled in orders dated November 19, 2015. Based upon the admissible evidence, the following facts are undisputed.

In 2006, former defendant Griffin sought to purchase a piece of commercial property which had a car dealership as a tenant. To finance the purchase, Griffin applied for a loan from Barclays Capital Real Estate. Barclays then hired C & W to provide an appraisal of the property. Defendant Tilson was the C & W employee who prepared the appraisal. Barclays instructed Tilson as to the parameters of the appraisal. Griffin also provided input to Tilson.

The 60 page appraisal was submitted to Barclays on August 31, 2006. C & W opined that the property had a market value of $22.5 million. The appraisal contained several restrictions as to its use, including that it was to be used by Barclays to assist in financing the property, it was "to be used in whole and not in part," and that, if the appraisal was to be included in any offering material, it was for informational purposes only and C & W disclaimed liability to any third party.

In addition, the cover letter from C & W to Barclays specifically noted that the appraisal "was prepared for Barclays Capital and is intended only for its specified use. It may not be distributed to or relied upon by any other persons or entities without the written permission of Cushman & Wakefield of California, Inc."

Barclays then agreed to provide a $15.6 million loan. During this same time period, Griffin solicited tenant-in-common investors through financial advisors employed by broker dealers. Griffin provided a September 8, 2006 "Confidential Supplement," which the parties have agreed to call the "Offering Documents." [1] Nowhere in the Offering Documents is there a reference to C & W. Instead, the Offering Documents state:

"we have not obtained an independent appraisal with respect to the value of the Interests being offered. Pursuant to the Appraisal Report, which was obtained by the lender to arrange financing, the Property has a market value of $22,500,000."

According to plaintiffs, Griffin "inserted 27 pages" of the C & W appraisal into the Offering Documents. *See* Complaint, par. 62. But plaintiffs have not provided any evidence as to which pages were included in the appraisal. When asked at the hearing for a proffer, plaintiffs' counsel was unable to advise the Court as to the portions of the C & W appraisal which supposedly were included. When further asked to specify the misrepresentations of C & W which are found in the offering documents, plaintiffs' counsel could point only to the opinion as to the fair market value of the property.[2]

No plaintiff requested a copy of the appraisal before he/she signed the purchase agreement. No plaintiff spoke with any C & W employee. In signing the purchase agreements, each plaintiff admitted that he/she was a "sophisticated experienced investor" and was not relying "in any way on any representations, statements, agreements, warranties, studies, reports, descriptions, guidelines or other information or material furnished by seller or its representatives." Before they signed their purchase agreements, the Offering Documents had advised plaintiffs that there was substantial risk involved in this investment, including becoming

---

[1] Plaintiffs' Ex. 2 and defendants' Ex. K.

[2] Plaintiffs Opposition also asserts that 27 pages of the appraisal were "copied and pasted" into the offering documents. But no evidence is presented in support of this "fact" by either plaintiffs or defendants. Defendants' UMF 50 merely repeats plaintiffs' claim.

jointly and severally obligated on the Barclays loan in the event of a default.[3]

The property was acquired in 2006 with the $15.6 million loan from Barclays and additional amounts raised from investors, including from plaintiffs.[4]

In late 2008, the car dealership stopped paying its property taxes, exposing plaintiffs to this liability as owners. By early 2009, the dealership had stopped making its lease payments. Plaintiffs were no longer being paid distributions on their investments and were deprived of revenue with which to pay the Barclays loan. On March 3, 2009 Bobertz, a very sophisticated investor, communicated with his fellow investors and recommended the hiring of legal counsel. On March 4, 2009, Bobertz advised his fellow investors that he had learned that Griffin had concealed material facts regarding the assignment of a guarantee. Bobertz characterized this discovery as "2 big pieces of information." Bobertz has also admitted that by June 2009 he had received "some lawsuit documents" and was concerned that he "might lose [his] entire investment."

The car dealership went out of business in early 2009. Sometime in 2010 the property was resold for a fraction of the 2006 purchase price.

Based on these facts, C & W argues that the statute of limitations on all claims expired long before this case was filed on February 13, 2013. C & W relies on case authority which holds that the limitations period begins once a plaintiff has notice or information sufficient to put a reasonable person on inquiry, *i.e.*, "that someone has done something wrong to her." *See, e.g., Clark v. Baxter Healthcare Corp.*, 83 Cal. App. 4th 1048, 1055 (2000).

In response, plaintiffs first make the argument that their claims did not arise "until damage has occurred." The Opposition fails to suggest a date for that event. But plaintiffs' declarations suggest that they were not damaged until they received expert opinions in 2012. However, "it is the fact of damage, rather than the amount, that is the relevant consideration." *Hydro-Mill Co., Inc. v. Hayward, Tilton & Rolapp Ins.*, 115 Cal. App. 4th 1145, 1161 (2004).

---

[3] Under the section "Risks Related to Financing of the Property," plaintiffs were advised that "We expect that the Tenants in Common will be jointly and severally liable for the Loan, so that, upon an uncured event of default, the Lender could exercise its remedies against one, several or all Tenants in Common."

[4] The total amount raised from investors is in dispute, but apparently it was in the millions.

Here, as a result of the dealership's actions in late 2008 and early 2009, as set forth above, plaintiffs knew and understood that they were exposed to significant financial liabilities and had lost their cash flow. Further evidence of this knowledge is found in Bobertz' emails which noted the distinct possibility of bankruptcy for the car dealership and suggested that a new dealership had to be found. Bobertz noted the "the likely scenario: without a tenant [Barclays] will sell the loan for $5-6 million (a guess is $0.33 on the dollar)." This of course would trigger plaintiffs' joint and several liability on a $15.6 million loan. Clearly plaintiffs knew they had suffered appreciable harm by early 2009.

Plaintiffs next argue that the "delayed accrual rule" tolled the relevant statutes of limitations. The complaint contains a number of allegations regarding "fraudulent concealment," but by Griffin and not C & W. However, plaintiffs' evidence about Griffin's concealments and "lulling" statements in early 2009 is largely inadmissible hearsay as to which this Court has sustained defendants' objections.

Next, plaintiffs' Opposition does not even suggest, let alone provide evidence, that C & W "concealed" some fraud or made lulling statements. Instead, the Opposition simply argues that a "defendant by concealing his fraud, would effectively block recovery by the plaintiff because of the intervention of the statute of limitation." Plaintiffs have cited no case which holds that lulling statements by one defendant, if there was such evidence, tolls the statute of limitations as to another defendant.[5]

Regardless, plaintiffs acknowledge that once a party is put on inquiry notice, he has a duty to investigate. But plaintiffs then suggest that the existence of a fiduciary relationship may obviate the requirement to investigate, because facts "may not incite suspicion." Again, plaintiffs do not contend that they had a fiduciary relationship with C & W.[6] But even assuming *arguendo* that there was a fiduciary relationship between plaintiffs and Griffin, and Griffin made lulling statements to plaintiffs, plaintiffs ignore the fact that they had *actual evidence* of material fraudulent omissions by Griffin by early 2009. Plaintiffs have provided no authority for the proposition that the statute of limitations is tolled under these circumstances.

In sum, plaintiffs were on inquiry notice in the first part of 2009 and no later than by March 4, 2009 when they had evidence of material misrepresentations and/or omissions by Griffin.

---

[5] *Hobbs v. Bateman, Eichler*, 164 Cal. App. 3d 174 (1985) is not on point.

[6] See *infra*.

C & W argues that all of plaintiffs' causes of action have a statute of limitations of three years or less, thereby rendering the February 13, 2013 complaint completely time-barred. Plaintiffs claim that their second cause of action for 'breach of fiduciary duty - negligent conduct" has a four year statute. But this cause of action is based on deceit. *See* Complaint, par. 159-160. Accordingly, the three year statute of limitations applies. *Fuller v. First Franklin Financial Corp.*, 216 Cal. App. 4th 955, 963 (2013) ("catchall" four year statute does not apply). Defendants are entitled to summary adjudication as to each cause of action on their statute of limitations defense.

Separately and alternatively, defendants are entitled to summary adjudication because they had no fiduciary relationship with plaintiffs, the named plaintiffs have no standing, C & W's one alleged false statement, as to the value of the property, was a non-actionable opinion, there is no evidence that C & W intended for plaintiffs to rely on its opinion, and any reliance by plaintiffs on this opinion was not reasonable.

First, plaintiffs' Opposition does not even dispute, and thereby concedes, defendants' argument that there is no fiduciary relationship between plaintiffs and C & W. Defendants are entitled to summary adjudication on plaintiffs' first, second and third causes of action.

Second, without a duty to plaintiffs, C & W cannot be found liable on a "conspiracy" theory. *See, e.g., Applied Equip. Corp. V. Litton Saudi Arabia Ltd.*, 7 Cal. 4th 503, 514 (1994) (a conspiracy theory is viable only where a party "already owes a duty"). Summary adjudication is granted on this issue.

Third, plaintiffs admit that their 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. *PacLink Communications, Int'l, Inc. v. Superior Court*, 90 Cal. App. 4th 958, 965 (2001). Plaintiffs' attempt to distinguish this case, and their citation to out-of-state and unpublished decisions, is unpersuasive. Summary adjudication as to each cause of action is also proper on this basis.

Next, defendants are correct that opinions, including regarding matters of value, are generally not actionable. *See Neu-Visions sports Inc. v. Soren/McAdam/Bartells*, 86 Cal. App. 4th 303, 308 (2008) (an actionable misrepresentation must be made about past or existing facts). Plaintiffs do not really dispute this, but instead argue that appraisers' opinions of value can be actionable by third parties who rely on the opinion, *citing Soderberg v. McKinney*, 44 Cal. App. 4th 1760 (1996).

However, *Soderberg* did not address the general rule which makes opinions non-actionable. Instead, the opinion focused on the unique facts of that case where the investor had actually received, reviewed and relied upon the entire appraisal. Moreover, the appraiser intended the appraisal to reach and influence "a particular person or persons, known to him ... and [who would] foreseeably take some action in reliance upon it." *Id.* at 1769. Based upon those specific facts, the Court of Appeal held that summary judgment was improper.

On the other hand, where there is no evidence that an appraiser intended to supply information to an investor to influence his decision to buy property, summary judgment is properly granted. *See Willemsen v. Mitrosilis*, 230 Cal. App. 4th 622 (2014) (appraisal was prepared for lender and disclaimed any liability to "unauthorized third parties," even though appraiser knew name of intended borrower).[7]

Willemsen, not *Soderberg*, controls in this case. Here, there is no evidence that C & W knew the names of Griffins' prospective investors, including plaintiffs in this case. And there is no evidence that any plaintiff received, reviewed or relied upon the entire C & W appraisal or, for that matter, on any part of the appraisal other than the opinion of value. Further, there is no competent evidence that C & W intended that its appraisal should reach prospective investors in this project.

Plaintiffs point to *dicta* in *Soderberg* which suggests that liability may be found where the appraiser knows that a recipient of the appraisal intends to transmit the information to a distinct "group or class of persons." *Id.* at 1769. But plaintiffs have no admission from C & W or any direct evidence that C & W knew that its appraisal would go to Griffin's investors or be used in the Offering Documents.

Plaintiffs attempt to rely on the deposition testimony of Shields to suggest that C & W knew that the appraisal would be used by Griffin in its offering. But a fair reading of Shields' testimony shows that he has no personal knowledge of this fact. Instead, in carefully worded answers, Shields makes such statements as "they were aware of the fact that we intended to extract the market information and place it in the supplement, yes." This is an inadmissible conclusion. Shields then states, "I know this is nuanced ... so it was more of a statement, 'this is what we intend to do." But then Shields admits "it may not have been me that asked the question, or made the statement." When asked "do you know if anyone from Griffin Capital ever informed Cushman & Wakefield that Griffin Capital intended to excerpt documents for the TIC offering," Shields answered "I – I don't recall specifically on this offering." Shields' conclusory testimony

---

[7] Plaintiffs' Opposition does not cite or attempt to distinguish *Willemsen*.

has no evidentiary value and the *Soderberg dicta* does not help plaintiffs.[8]

The Opposition also argues that the so-called "Reliance Provision" of the appraisal expands the universe of intended users to include Barclays "assigns," which somehow would include plaintiffs. But this is not a proper reading of this provision and the Opposition cites no authority to support the argument that plaintiffs could somehow stand in the shoes of the lender.

Plaintiffs have failed to provide evidence that they relied on the C & W appraisal, which they did not receive. Nor have plaintiffs provided any evidence that it was *reasonable* for them to have relied on the $22.5 million opinion of value from an unknown source. *See, e.g., OCM Principal Opportunities Fund, LP v. CIBC World Markets Corp.*, 157 Cal. App. 4th 835, 863-64 (2007) (to maintain a fraud cause of action a plaintiff must show actual and reasonable reliance). The Opposition makes only a cursory argument that C & W has failed to show that each plaintiff had the requisite "knowledge, education and experience" to negate reasonable reliance.

In fact, plaintiffs' investment experience and knowledge are not reasonably in dispute. Each plaintiff signed purchase agreements where they specifically represented that they were "sophisticated, experienced investors." Moreover, according to plaintiffs, they each also had the advice of a broker-dealer in making their investment decision. *See* Opposition at 3. The Offering Documents each plaintiff received were detailed and thorough. The Offering Documents also made clear that this investment was extremely risky and that no independent appraisal of the property had been obtained. Nevertheless, plaintiffs decided to invest, no doubt because of the high yields they hoped to receive.

No plaintiffs' declaration even attempts to provide facts as to why it was reasonable to rely on an opinion of value where the appraisal itself is not provided, the author of the appraisal is not identified, the basis of the valuation is not stated and even the dates of the valuation and appraisal are not stated. No declaration provides facts as to why an independent appraisal was not requested or obtained. The Opposition does not present any real argument as to why plaintiffs' reliance was reasonable, but instead simply says this is a "question of fact."

However, it is settled in California that reasonable reliance can be decided as a matter of

---

[8] As a result, summary adjudication is also proper as to plaintiffs' aiding and abetting theory. There is no evidence that C & W knew that plaintiffs would receive the appraisal, let alone evidence that the valuation would be taken out of context and used in the Offering Documents. *See, e.g., Casey v. U.S. Bank Nat'l Assoc.*, 127 Cal. App. 4th 1138, 1145 (2005) ("knowledge is the crucial element").

law where "reasonable minds can come to only one conclusion based on the facts." *Moua v. Pittullo*, 228 Cal. App. 4th 107, 113, n. 5 (2014). Here, the facts presented overwhelmingly show that any reliance by plaintiffs on the untethered $22.5 million value figure was unreasonable. Summary adjudication is granted on this basis as to causes of action 3, 4 and 5. Accordingly, good cause having been shown,

IT IS ORDERED that the Motion for Summary Judgment is Granted and plaintiffs' action against C & W is dismissed with prejudice.

Notice by C & W.