Opinion issued August 25, 2022

In The

Court of Appeals

For The

First District of Texas

NO. 01-20-00239-CV

CONTROL & APPLICATIONS LLC HOUSTON F/K/A VMONITOR LLC, RASHED SAIF JABER AL SUWAIDI, JUAN CARLOS MARQUES MONTEJANO, AND HUSSAN SUHEIL, Appellants

V.

RAED ABDALLAH AND ALI ABDALLAH, Appellees

On Appeal from the 133rd District Court
Harris County, Texas
Trial Court Case No. 2015-23671

MEMORANDUM OPINION

Within one year after Raed and Ali Abdallah (Raed and Ali) executed an agreement to sell their minority membership interests in vMonitor LLC (vMonitor) to Horizon Energy, LLC (Horizon), a company owned by vMonitor's majority

interest holder Rashed Saif Jaber Al Suwaidi (Rashed), Rashed and the other vMonitor interest holders, Juan Carlos Marques Montejano (Carlos) and Hussan Suheil (Sami) (collectively, with Rashed and Horizon, "appellants"), negotiated a deal to sell vMonitor for more than four times the value used to calculate the price for Raed's and Ali's membership interests. Alleging appellants orchestrated a scheme to obtain their interests at a low price, Raed and Ali sued appellants for fraud and breaches of fiduciary duty. After a bench trial, the trial court entered a judgment for Raed and Ali, finding in their favor on all theories of liability and awarding them actual damages against appellants, jointly and severally, and exemplary damages against Rashed only.[1]

In nine issues on appeal, appellants challenge the legal and factual sufficiency of the evidence supporting the trial court's various liability and damages findings. We affirm.

Background

Raed and Ali, brothers, were minority members of vMonitor, a United Arab Emirates (UAE) limited liability company that marketed automation and control systems used by upstream and midstream oil-and-gas production, storage, and transportation companies. Raed developed the technology and began the enterprise

[1] Although the trial court's judgment awards Raed and Ali relief against Horizon, Horizon is omitted from the case style.

in its original form in 1999, which evolved for ten years through reorganization and capitalization until it was acquired by a company operated by Rashed.[2] After the acquisition, vMonitor was formed as a closely held company under UAE law.

Inside vMonitor

Raed and Ali each had the right to an 8.33% membership interest in vMonitor, but neither held his interest in his own name.[3] Instead, their interests were legally owned and held in trust by Sami, vMonitor's Chief Operating Officer (COO), who, through the sum of his own interest and Raed's and Ali's interests, controlled 25% of vMonitor and was its second-largest interest holder behind Rashed, the majority interest holder. In total, vMonitor's membership interests were held by its executive officers as follows:

Rashed	51%	Chairman
Sami	25%	COO
Carlos	18%	Chief Executive Officer (CEO)
Hans Niederlander (Hans)[4]	6%	Chief Financial Officer (CFO)

[2] The acquiring company, Control & Applications Emirates, is not a party to this litigation.

[3] Raed and Ali did not hold interests in their own name because they were not present for vMonitor's incorporation in the UAE, which the parties agree was a legal requirement for domestic corporations of that country.

[4] Hans is not a party to this litigation.

vMonitor's formation documents required "a majority vote of Shareholders representing 80 per cent [sic] of the capital of the Company" to affect "any change in the equity structure of the Company . . . , including the admission of new Shareholders[.]"

Raed and Ali served, respectively, as vMonitor's chief technology and science officers, and, in those roles, were responsible for the development of hardware and software products. Raed also sat on vMonitor's Board of Directors.[5] Although they have been involved in business ventures and were officers of vMonitor, neither Raed nor Ali have a background in finance.

vMonitor's members shared the goal of maximizing their interests by growing the company to sell it. Not long after vMonitor was formed, Carlos and Sami discussed with more than one company the possibility of acquiring or investing in vMonitor. In April 2011, Sami began discussions with Honeywell for the purchase of vMonitor. The next month, Carlos and Sami met with Saad Bargach of Lime Rock Partners, a private equity firm, to discuss Lime Rock's possible interest in investing in vMonitor. Neither discussion ultimately bore fruit. Although discussions continued into Spring 2012, Honeywell decided not to tender an offer for vMonitor. Lime Rock also decided against investing in vMonitor. As to Lime Rock, Bargach

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[5] The Board of Directors consisted of five members: Rashed, Carlos, and Hans were each entitled to appoint one director, and Sami was entitled to appoint two directors.

explained that its financial modeling had assigned a value of between $25 million and $30 million to vMonitor. When Carlos and Sami insisted at the meeting that vMonitor was worth twice as much (or between $50 and $60 million) and indicated they would not negotiate based on a lower valuation, Lime Rock declined the transaction. Neither Raed nor Ali was present for these discussions.

Meanwhile, throughout 2011 and into 2012, tension grew within vMonitor due, in some measure, to Sami and Raed's deteriorating relationship. In addition, as reflected in the minutes of a February 2012 board meeting attended by Raed and Ali,[6] vMonitor did not meet performance expectations in 2011. Bookings for 2011—which represented future revenue-generating contracts—were down from the previous year. The company had earned lower net profits: although fixed costs increased from 2010 to 2011, revenue did not. vMonitor's value was not discussed at the board meeting, but Raed took away from the meeting that the company's financial condition was dire.

The sale of Raed's and Ali's interests

In March 2012, Carlos approached Abraham Shiera (Shiera)—one of vMonitor's customers in Venezuela and Colombia—about buying an interest in vMonitor. In an email, Carlos wrote to Shiera:

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[6] Ali was not a board member but sometimes attended board meetings to provide product-development updates.

> I am waiting for a chance to see you to propose the [vMonitor] matter but first I wanted to have Rashed's blessing. I have talked it over with him briefly and right off the bat it sounds good to him.
>
> I wanted to propose that if your group doesn't want to join for less than 100%, you personally, or however you want, would join with 25 which would take 9 from Raed Abdallah, 9 from Ali Abdallah and 9 from mine. . . .
>
> I can get the package for you at a very good price. We'll talk about it.

Carlos sent a second email shortly after the first with further information about the proposed transaction:

> I forgot to tell you that the reason that I have argued for you to enter into [vMonitor] is that we can invade Venezuela and Colombia (which would raise [vMonitor's] value) and that you could continue to send us orders in any event I have made it clear that you will not be a financial partner at all, which we would establish firmly in writing. Alright, I need to see you to tell you about the plans for [vMonitor]. Right off the bat, I am going to try to get the sales agreement letters from Raed and Ali because I want them anyway. Please treat this very discrete which I know you will.

To Carlos's first email, Shiera responded: "OK. Let's try to get together in person." And to Carlos's second email, Shiera responded: "Sure."

In April 2012, Carlos asked Raed to meet him in Abu Dhabi. Because the request was unusual and Carlos did not give a reason for the meeting, Raed asked Sami if he knew what Carlos wanted to discuss. Sami told Raed that Carlos had an offer from Shiera to buy an interest in vMonitor, and that he had decided to sell his own interest to Shiera for $1 million.

At the meeting, Carlos confirmed for Raed that Shiera wanted to buy into vMonitor and that he and Sami planned to sell their interests. Purportedly because Shiera wanted a "larger percentage" of vMonitor, Carlos proposed a sale of 25 to 33% of the membership interests, including Raed's and Ali's interests.[7] Carlos stated the value of Raed's and Ali's 8.33% interests would be $1.1 million each, based on Shiera's determination that vMonitor had a value of $13.2 million. According to Raed, Carlos also signaled that there was more than one reason why now was the time to exit vMonitor: Carlos was investigating potential embezzlement within the company which, if discovered by Rashed, might provoke Rashed to dissolve the company. In addition, the company needed a large cash infusion to grow but Rashed was unwilling to bring on more investors, and Rashed did not intend to sell his controlling interest, which eliminated the possibility of a sale of the entire company at a higher price.

Raed told Carlos that he and Ali were open to the deal but wanted a higher price—specifically, $1.25 to $1.4 million based on a higher, $15- to $17-million valuation of vMonitor. Carlos's responded: "Sorry guys, . . . [Shiera] is talking about

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[7] Raed and Ali claimed that Carlos approached Shiera about the sale of their membership interests without their permission. Appellants, however, claimed that Carlos knew Raed and Ali were looking to exit the company and viewed a potential sale to Shiera, someone who had previously expressed an interest in vMonitor, as a win-win.

3.3M$ for 25% and 4.4M$ (4.39M$ exactly) for 33%." After discussing with Ali, Raed confirmed that they were interested in selling to Shiera for the proposed price.

But a final deal with Shiera never materialized, and the parties have differing views as to why. Raed and Ali claimed appellants fabricated the Shiera offer to convince them of the low value of their interests and obtain their commitment to sell, as evidenced by the lack of documentation of any negotiation between Carlos and Shiera and Shiera's written deposition responses denying he made any offer to purchase membership interests in vMonitor or had any desire to obtain such interests.[8] For their part, appellants claimed Shiera was hostile toward vMonitor and that his denials lacked credibility because Shiera had pleaded guilty to fraud charges in connection with a foreign bribery scheme.

When the Shiera sale did not occur, Carlos proposed that Rashed, through his company Horizon, buy Raed's and Ali's shares based on the same valuation. Because Carlos told him that Rashed was going to honor the same agreement, Raed understood that Carlos and Sami still planned to sell their interests at the previously negotiated price. However, Carlos testified that he did not sell his interests to Rashed, even though he told Raed that he had planned to sell to Shiera, because there was no requirement for him to sell once the need to pull together enough interests to

[8] The parties disputed whether additional correspondence between Carlos and Shiera demonstrated Shiera's interest in vMonitor or regarded an unrelated transaction.

give Shiera a substantial stake in vMonitor dissolved. In the discussions regarding Horizon's potential purchase of Raed's and Ali's interests, Rashed's lack of interest in selling the entire company was reiterated.

After negotiating the structure of the sale, non-compete terms for their exit from vMonitor, and an additional earn-out payment for revenue vMonitor had earned but not yet collected, Raed and Ali signed Membership Interest Purchase Agreements ("Purchase Agreements") for the sale of their respective interests to Horizon. Although effective October 1, 2012, the Purchase Agreements were not executed by Raed and Ali until October 14 and 15, respectively, or by Carlos (as CEO of vMonitor) and Rashed (for Horizon) until October 12. The agreed purchase price for Raed's and Ali's interests was $1.1 million each, payable in four installments between November 29, 2012 and November 7, 2013. In addition, Raed and Ali each received a $275,000 earn-out payment in December 2013.

In return for this compensation, Raed and Ali agreed to "settle[], waive[], release[] and give[] up any and all rights, claims and causes of action that [they had] or may have against vMonitor of any kind or character . . . based on actions or omissions occurring in the past and/or present, whether known or unknown . . . ." However, the Purchase Agreement provided that it was not a waiver or release of "any rights, claims, or causes of action that may arise from acts or omissions occurring after the date [the Purchase Agreements were] executed." The Purchase

Agreements acknowledged Raed and Ali were advised by vMonitor to consult with an attorney.

The subsequent sale of vMonitor

Before Raed's and Ali's Purchase Agreements were fully executed, but after their effective date, Sami began discussions with Rockwell Automation ("Rockwell") about its interest in vMonitor's business and a potential acquisition. In an email to Sami, dated October 15, 2012, Rockwell's director of business development wrote:

> Thanks again for attending CLRT [a conference]. I'm glad that we had a chance to sit down with Joe and review your business. Joe mentioned that he had an opportunity to follow up 1 on 1 with [sic] again later that day.
>
> Looking forward to see [sic] where this all goes.

The same day, Sami responded:

> . . . . I thought our meeting with Joe was great and that was what I was hoping we could accomplish by leveraging each other's strengths and services for a better reach for both. I appreciate and respect what Rockwell brings to the table and I know we can go above and beyond what we have done together so far especially when we bring [vMonitor's] know how into the mix.
>
> I did have a follow up with Joe, and he did mention that this will be something to pursuit [sic], low profile, with you only being the person aware of this.
>
> I did have a brief discussion with my chairman [Rashed] and the perception is great, I will be in the ME the end of this month for 2 weeks

> and will have a more detailed discussion, which I will share with you upon my return. . . .

Raed and Ali were not aware of these discussions with Rockwell.[9]

Rockwell signed a nondisclosure agreement with vMonitor in November 2012, meetings on due diligence began in December 2012, and financial information was exchanged in early 2013. By May 2013, Carlos, Sami, and Rashed had negotiated a $60-million valuation from Rockwell—more than four times the valuation used for the sale of Raed's and Ali's interests. But Rockwell was not the only company to show interest in an acquisition of vMonitor. Similar exchanges occurred with Dover Corporation during the same time frame, resulting in a $70-million valuation from Dover.

Ultimately, an agreement was reached with Rockwell on October 3, 2013 to sell vMonitor for a total of $59,762,000. According to Raed, once it became apparent that a sale of vMonitor was in the making, Carlos called and asked Raed not to sue based on his representation that Rashed had no interest in selling the entire company. During the call, Carlos told Raed that the purchase price for vMonitor was the same "exit price" Raed and Ali had received for their membership interests. Carlos acknowledged this was a lie.

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[9] At the time they executed the Purchase Agreements, Raed and Ali were no longer actively involved with vMonitor: Ali resigned in August 2012, and Raed, though still employed, was in the process of resigning and no longer "actively work[ed] from day-to-day in the company."

The lawsuit

Raed and Ali filed suit, alleging claims for breach of fiduciary duty and fraud based on an alleged scheme to obtain their membership interests at an artificially low price. They alleged that Rashed (as majority shareholder), Carlos (as CEO), and Sami (as the holder of their interests) breached fiduciary duties of "loyalty and utmost good faith [and] candor," including the duty to refrain from self-dealing, in connection with the sale of their interests. They further alleged that appellants committed fraud by failing to disclose Carlos's and Sami's opinion that vMonitor was worth between $50 and $60 million in May 2011, as they expressed at the Lime Rock meeting, and then fabricating an offer from Shiera to purchase Raed's and Ali's interests based on a much lower value, while at the same time misrepresenting that Rashed would not sell his interests and, therefore, vMonitor could not be sold as an enterprise for a higher price than Raed's and Ali's minority interests would separately command. In addition, Raed and Ali pleaded that appellants were jointly and severally liable under aiding-and-abetting and civil-conspiracy theories, and they sought exemplary damages.

vMonitor asserted counterclaims against Raed and Ali for breach of contract and promissory estoppel, alleging that Raed and Ali's suit breached the Purchase Agreements and their promise not to sue vMonitor.

After a six-day bench trial, the trial court rendered judgment in favor of Raed and Ali on their own claims for fraud and breach of fiduciary duty and vMonitor's counterclaims. As to liability, the trial court found:

1. All appellants committed fraud against Raed and Ali;

2. Rashed and Sami breached fiduciary duties owed to Raed and Ali;

3. Rashed, Sami, Carlos, and Horizon aided and abetted the breaches of fiduciary duty by assisting, encouraging, and participating in the breaches;

4. All appellants engaged in a civil conspiracy in connection with the fraud and breaches of fiduciary duties; and

5. vMonitor should take nothing on its counterclaims for breach of contract and promissory estoppel.

The trial court awarded Raed and Ali $7,206,349.20 as "actual damages" against appellants, jointly and severally, and an additional $1,441,269.84 each in exemplary damages against Rashed.

The trial court issued extensive findings of fact and conclusions of law in support of its judgment.[10] The trial court's findings include determinations of witness credibility—namely, that Raed and Ali were credible but Carlos, Sami, and Rashed were not.

[10] The findings and conclusions on review are the trial court's amended findings and conclusions issued March 19, 2020.

As to fraud, the trial court found that Carlos and Sami used Shiera as "a straw man purchaser" to represent to Raed and Ali that vMonitor's value was less than Carlos and Sami themselves believed it to be. In addition, the trial court found that Carlos and Sami, individually and as agents of the other appellants, misrepresented, among other things, that:

- Shiera had valued vMonitor in the range of $13 million;
- Carlos and Sami had agreed to sell their interests to Shiera based on that valuation; and
- Rashed did not intend to sell his interest in the near future, thus eliminating the possibility that vMonitor could be sold whole at a higher price, but that Rashed had determined Shiera's valuation was fair and reasonable and was willing to purchase Raed's and Ali's interests for the same price.

The trial court determined that Raed and Ali justifiably relied on these misrepresentations and sustained injury as a result.

As to the eventual sale of vMonitor to Rockwell, the trial court found that several transactional milestones occurred while Raed and Ali were still the beneficial owners of their membership interests. Specifically, the trial court found that during the period of beneficial ownership (from October 13-14, 2012 until at least October 3, 2013):

- Sami met with Rockwell to review vMonitor's business;
- vMonitor entered into a nondisclosure agreement with Rockwell to facilitate the sharing of certain confidential or proprietary information;

- vMonitor received from Rockwell a preliminary, non-binding indication of its interest in acquiring vMonitor for $60 million; and
- Rashed, Carlos, and Sami, together with Hans, entered into an agreement with Rockwell for the sale of vMonitor.[11]

Rockwell ultimately paid $59,762,000 for vMonitor and its assets.

Sufficiency Standards of Review

Appellants challenge the legal and factual sufficiency of the evidence to support the trial court's judgment in favor of Raed and Ali. The standard of review for legal and factual sufficiency challenges is the same whether a judge or jury served as the factfinder. *See Ifiesimama v. Haile*, 522 S.W.3d 675, 683 (Tex. App.—Houston [1st Dist.] 2017, pet. denied). In reviewing the legal sufficiency of the evidence, we consider "'whether the evidence presented at trial would enable reasonable and fair-minded people to reach the verdict under review.'" *Puntarelli v. Peterson*, 405 S.W.3d 131, 134 (Tex. App.—Houston [1st Dist.] 2013, no pet.) (quoting *City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex. 2005)). We credit favorable evidence if a reasonable factfinder could and disregard contrary evidence unless a reasonable factfinder could not. *Id.* We must consider the evidence in the light most favorable to the challenged finding, indulging every reasonable inference that supports that finding, but we may not disregard evidence that allows only one

[11] The trial court found that at some time before Rockwell purchased vMonitor, Horizon transferred the membership interests it received from Raed and Ali to Rashed because Rashed, not Horizon, was a party to the Rockwell sale.

inference. *Id.* at 135. If the evidence falls within the zone of reasonable disagreement, we may not substitute our judgment for that of the factfinder. *Id.* at 134. The factfinder is the sole judge of the credibility of the witnesses and the weight to give to their testimony. *Id.* at 135; *see Zenner v. Lone Star Striping & Paving, L.L.C.*, 371 S.W.3d 311, 315 (Tex. App.—Houston [1st Dist.] 2012, pet. denied).

In reviewing the factual sufficiency of the evidence, we consider all the evidence supporting and contradicting the finding. *Puntarelli*, 405 S.W.3d at 135 (citing *Plas-Tex, Inc. v. U.S. Steel Corp.*, 772 S.W.2d 442, 445 (Tex. 1989)). We will set aside the verdict only if the finding is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. *Id.* (citing *Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986)).

We review the trial court's conclusions of law de novo. *Daniel v. Falcon Interest Realty Corp.*, 190 S.W.3d 177, 184 (Tex. App.—Houston [1st Dist.] 2005, no pet.); *see Reliance Nat'l Indem. Co. v. Advance'd Temps., Inc.*, 227 S.W.3d 46, 50 (Tex. 2007) ("Appellate courts review legal determinations de novo, whereas factual determinations receive more deferential review based on the sufficiency of the evidence."). We will independently evaluate the trial court's conclusions to determine their correctness, and we will uphold conclusions on appeal if the judgment can be sustained on any legal theory supported by the record. *Daniel*, 190 S.W.3d at 184.

Fraud

The trial court found in Raed's and Ali's favor on their common law fraud claim against appellants. In its fact findings, the trial court identified seven false statements that are the basis for its judgment. Specifically, the trial court found, under the clear-and-convincing-evidence standard, that vMonitor, Horizon, and Rashed, "through their agents Carlos and [Sami,]" and Carlos and Sami individually, falsely represented that:

1. "[Shiera], in a third-party arms-length analysis, had placed a value on vMonitor in the $13,000,000 range and was interested in purchasing Raed['s], Ali['s], Carlos['s,] and [Sami's] interests[.]"

2. "Carlos and [Sami] had already agreed to sell their ownership interest in vMonitor to [Shiera] at the $13,000,000 valuation[.]"

3. "If Rashed found out that [Sami] was embezzling from vMonitor . . . , Rashed would dissolve vMonitor thereby making it, and their ownership interests, worthless[.]"

4. "Rashed had no intention of selling his interest [in vMonitor] at any time in the near future and therefor[e] a sale of the entire company (which would make everyone's interest more valuable) was not going to happen any time soon[.]"

5. "Future revenue projections for vMonitor were down and now was the time to exit the company[.]"

6. "Rashed determined . . . based on [Shiera's] previous offer, that $13,000,000 was a fair and reasonable valuation of vMonitor[.]"

7. "Rashed, based on [Shiera's] previous offer, authorized Carlos to make an offer to Raed and Ali that Horizon, Rashed's company, was willing to purchase their interests in vMonitor at a $13,000,000 valuation."

Appellants argue that the misrepresentations identified by the trial court cannot sustain the judgment because (1) the statements the trial court found false were not actionable as fraud or not made (issue six); (2) even if the statements were actionable, Raed and Ali could not justifiably rely on them (issue two); and (3) any actionable statements are attributable to Carlos only, and thus are not a basis for liability against any other appellant (issue five). We address these issues as necessary for the disposition of the appeal. *See* TEX. R. APP. P. 47.1.

A. Material misrepresentations

Taking appellants' issues out of order, we begin with the sixth issue challenging the first element of fraud, which requires proof of a misrepresentation of material fact.[12] *See Exxon Corp. v. Emerald Oil & Gas Co.*, 348 S.W.3d 194, 217 (Tex. 2011) (setting out fraud elements); *see also Transp. Ins. Co. v. Faircloth*, 898 S.W.2d 269, 276 (Tex. 1995); *Trenholm v. Ratcliff*, 646 S.W.2d 927, 930 (Tex. 1983). Appellants argue the evidence was not legally or factually sufficient to

[12] Although our discussion of appellants' sixth issue focuses on one element of fraud, fraud requires proof of additional elements. "A plaintiff seeking to prevail on a fraud claim must prove that (1) the defendant made a material misrepresentation; (2) the defendant knew the representation was false or made the representation recklessly without any knowledge of its truth; (3) the defendant made the representation with the intent that the other party would act on that representation or intended to induce the party's reliance on the representation; and (4) the plaintiff suffered an injury by actively and justifiably relying on that representation." *Exxon Corp. v. Emerald Oil & Gas Co.*, 348 S.W.3d 194, 217 (Tex. 2011).

establish the first element of fraud because the misrepresentations found by the trial court were either not actionable or not made.

A representation is material if "a reasonable person would attach importance to [it] and would be induced to act on the information in determining his choice of actions in the transaction in question." *Italian Cowboy Partners, Ltd. v. Prudential Ins. Co. of Am.*, 341 S.W.3d 323, 337 (Tex. 2011). "Whether a statement is an actionable statement of 'fact' or merely one of 'opinion' often depends on the circumstances in which a statement is made." *Faircloth*, 898 S.W.2d at 276. Relevant circumstances include "the statement's specificity, the speaker's knowledge, the comparative levels of the speaker's and the hearer's knowledge, and whether the statement relates to the present or the future." *Id.* "Pure expressions of opinion are not representations of material fact, and thus cannot provide a basis for a fraud claim." *Italian Cowboy*, 341 S.W.3d at 337–38; *Faircloth*, 898 S.W.2d at 276. But an opinion may be actionable if: "(1) the speaker expresses the opinion with knowledge that it is false, (2) the speaker has superior knowledge and should have known that the other party was justifiably relying on the speaker's superior knowledge, or (3) the statement of opinion is so intertwined with other misstatements of fact that the representation as a whole amounts to a false representation of fact." *Allen v. Devon Energy Holdings, L.L.C.*, 367 S.W.3d 355, 370 (Tex. App.—Houston [1st Dist.] 2012, pet. granted, judgm't vacated w.r.m.)

(citing *Faircloth*, 898 S.W.2d at 267–77); *see also Trenholm*, 646 S.W.2d at 930. "Special or one-sided knowledge may help lead to the conclusion that a statement is one of fact, not opinion." *Italian Cowboy*, 341 S.W.3d at 338; *see also Faircloth*, 898 S.W.2d at 276 (including "comparative levels of the speaker's and the hearer's knowledge" among relevant circumstances in determining whether statement is one of fact or opinion).

In addition, statements regarding future events typically are non-actionable in fraud. *Allen*, 367 S.W.3d at 370 (noting statements regarding future events typically fall into two categories—predictions and promises to perform—and generally are not actionable because future is not ascertainable); *see also Trenholm*, 646 S.W.2d at 930. But there are also exceptions to this rule. Predictions of future events are actionable if the speaker purports to have special knowledge of facts that will occur or exist in the future. *Trenholm*, 646 S.W.2d at 930. Statements promising future performance also are actionable in fraud if the speaker has no intention of performing when he makes the statement. *Formosa Plastics Corp. USA v. Presidio Eng'rs & Contractors, Inc.*, 960 S.W.2d 41, 48 (Tex. 1998).

Appellants contend that none of the seven statements the trial court found false was actionable as fraud.[13] We disagree. Beginning with the first two statements—

[13] In the section of their brief addressing whether these statements "were not made or are not actionable," appellants also argue that certain of the statements cannot be a basis for fraud because Raed and Ali "knew the statements were not true by the time

related to the Shiera offer to purchase an interest in vMonitor—we conclude these are statements concerning past or present facts: Shiera "had placed a value on vMonitor in the $13,000,000 range," Shiera "was interested in purchasing" interests in vMonitor, and Carlos and Sami "had already agreed to sell their own . . . interests in vMonitor." Thus, they were actionable. *See Faircloth*, 898 S.W.2d at 276 (including "whether the statement relates to the present or the future" as among relevant circumstances upon which classification of statement as actionable or non-actionable depends).

The same is true of the sixth and seventh statements identified by the trial court related to Rashed's decision to buy Raed's and Ali's interests. These are also statements of past or present fact: Based on Shiera's previous offer, Rashed "determined that $13,000,000 was a fair and reasonable valuation of vMonitor" and "authorized Carlos to make an offer to Raed and Ali . . . to purchase their interests in vMonitor" for the same price.

Relying on case law generally providing that opinions of monetary value are not actionable, appellants argue these statements fall outside the scope of what can

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they sold their interests to Horizon" or "there [were] 'red flags' destroying any reasonable belief in the statement." We construe these arguments as challenges to the fourth element of fraud—requiring proof that the plaintiff suffered an injury by actively and justifiably relying on the defendant's representation—rather than the first element. *See Exxon Corp.*, 348 S.W.3d at 217. Accordingly, we address them in our justifiable-reliance analysis below.

be considered fraud because they are an opinion on vMonitor's value. *See, e.g.*, *Faircloth*, 898 S.W.2d at 276 ("[A]n expression of opinion about monetary value is not a representation of fact which gives rise to an action for fraud."); *Fossier v. Morgan*, 474 S.W.2d 801, 803 (Tex. App.—Houston [1st Dist.] 1971, no writ) ("Ordinarily, a representation of market value of a commodity is merely an opinion that cannot be made the basis of a recovery for fraud and deceit."). This argument ignores Raed's and Ali's specific theory of fraud, which was that the statements found by the trial court operated together as a scheme to use "the fictional Shiera offer as a lure" to obtain Raed's and Ali's commitment to sell their interests for a low price. Raed and Ali claimed that Carlos "sweetened the deal" by making "dire predictions" for members who did not sell. Once Raed and Ali committed to the low valuation of vMonitor and their interests, "the Shiera 'offer' disappeared" and Rashed stepped up as the majority interest holder to "save the day" and ensure that Raed and Ali "received the benefit of the supposed bargain that Shiera had reneged on." The import of the sixth and seventh statements was not just an estimation of vMonitor's value, but that Rashed endorsed the value purportedly proposed by Shiera. Considered alongside the representations that Carlos and Sami had agreed to sell their interests for the same price, a reasonable implication is that the majority of vMonitor's other members endorsed the value Shiera purportedly assigned to vMonitor. The sixth and seventh statements thus cannot be viewed in isolation as a

pure expression of monetary value, particularly given the trial court's other findings, based on the weight and credibility of the evidence, that Shiera never made an offer to purchase any membership interest in vMonitor. *See Trenholm*, 646 S.W.2d at 930 (opinion based on facts known to be false may be actionable).

Turning to the fourth and fifth statements, we note they are mixed statements of opinion and fact. *See Allen*, 367 S.W.3d at 372 (describing statements that combine expressions that are factual in nature with expressions of opinion as "mixed statement of fact and opinion"). As to the fourth statement, whether "Rashed had no intention of selling his interest" was factual in nature, while the assessment that a sale of the company would not "happen any time soon" was a prediction. Similarly, as to the fifth statement, whether "future revenue projections for vMonitor were down" was factual in nature, while the assessment that "now was the time to exit the company" was an opinion. At least the factual portions of these statements were actionable, and, as described above, were material to the scheme found by the trial court to obtain Raed's and Ali's shares at an artificially low price.

We agree with appellants, however, that the third statement found by the trial court—that "[i]f Rashed found out that [Sami] was embezzling from vMonitor . . . , Rashed would dissolve vMonitor thereby making it, and the[] ownership interests, worthless"—could not serve as a basis for fraud. As appellants

argue, this is an opinion predicting a future event, which generally is not actionable. *See Trenholm*, 646 S.W.2d at 930.

Another reason this statement may not serve as a basis for fraud is that there was legally insufficient evidence it was made. Raed and Ali point to testimony from Raed and Carlos. Raed testified as follows about his discussion with Carlos in their Abu Dhabi meeting:

> [Carlos] mentioned . . . that the company required lots of cash injection . . . to grow. He said he is tired of all the headaches in the company and he doesn't want to continue with the company anymore.
>
> The outlook for 2012 is not as what was discussed before. He mentioned that if . . . Rashed . . . ever [found] out what's taking place within the company, he is going to shut it down and we will all have nothing.

Although this testimony indicates that Carlos expressed an opinion that Rashed might be provoked to dissolve vMonitor by something happening within the company, it does not identify embezzlement by Sami as the potential provocation.

Likewise, the identified testimony from Carlos is unavailing. On cross-examination, Carlos was asked whether he told Raed "there was an embezzlement going on with Christian in a company called Loan Star," not with Sami. No further testimony identifying "Christian" or explaining the alleged scheme involving "Loan Star" was elicited. Carlos responded:

> There were so many ups and downs with Raed and embezzlement and thousand things were going on with the company with Raed and Sami. I will not call that a hook. I will call that a responsibility.

> There is one that most probably Raed . . . did not pull out. There's one way for me to [sic] Raed what I'm telling him that I'm conducting a full investigation of this, but let's keep it . . . on a low profile so far.

Although this testimony might support that Carlos represented to Raed there was an ongoing internal investigation of embezzlement, it again does not reference embezzlement by Sami.

Still the absence of evidence of a representation that Sami was embezzling does not compel a decision setting aside the trial court's fraud findings because, as set out above, the other six statements were actionable as fraud. *See Daniel*, 190 S.W.3d at 184 (reviewing court should uphold the judgment if it can be sustained on any legal theory supported by record). Because other misrepresentations found by the trial court were actionable as fraud, we hold the evidence was legally and factually sufficient to establish the first element of Raed and Ali's fraud claim.

Accordingly, we overrule appellants' sixth issue.

B. Justifiable reliance

Appellants' second issue challenges the legal and factual sufficiency of the evidence of another fraud element—that the plaintiff actively and justifiably relied on a material misrepresentation. *See Emerald Oil & Gas*, 348 S.W.3d at 217. Before we consider appellants' specific arguments on reliance, we address Raed's and Ali's response that appellants had the burden to prove actual reliance on their part was "extremely unlikely." We disagree.

In support, Raed and Ali cite *Grant Thornton LLP v. Prospect High Income Fund*, 314 S.W.3d 913 (Tex. 2010), and *Haralson v. E.F. Hutton Group, Inc.*, 919 F.2d 1014 (5th Cir. 1990). Neither case imposes on the defendant a burden to negate the reliance element of the plaintiff's fraud claim. In *Grant Thornton*, for example, the Texas Supreme Court instructed that courts considering justifiability "must inquire whether, given a fraud plaintiff's individual characteristics, abilities, and appreciation of facts and circumstances at or before the time of the alleged fraud[,] it is extremely unlikely that there is actual reliance on the plaintiff's part." 314 S.W.3d at 923 (quotation omitted). And the Court held that "a person may not justifiably rely on a misrepresentation if 'there are "red flags" indicating such reliance is unwarranted.'" *Id.* (quoting *Lewis v. Bank of Am. NA*, 343 F.3d 540, 546 (5th Cir. 2003)).

While the Court's instruction and holding flesh out the reliance element, they do not shift the burden of proof in fraud cases. After *Grant Thornton*, both the Texas Supreme Court and this Court have routinely recognized reliance as an element a fraud plaintiff must prove. *See, e.g.*, *Emerald Oil & Gas*, 348 S.W.3d at 217 (listing justifiable reliance as element "[a] plaintiff seeking to prevail on a fraud claim must prove"); *Italian Cowboy*, 341 S.W.3d at 337 (same); *Spencer & Assocs., P.C. v. Harper*, 612 S.W.3d 338, 347 (Tex. App.—Houston [1st Dist.] 2019, pet. denied) (same). The same is true for the Fifth Circuit's opinion applying Texas law in

Haralson, 919 F.2d at 1025–26. It speaks of justifiable reliance as a burden on fraud plaintiffs, not defendants. *See id.* Accordingly, we reject Raed's and Ali's contention that it was appellants' burden to negate reliance, rather than their burden to prove it.

Having so concluded, we return to appellants' first argument that there was no evidence, or factually insufficient evidence, that Raed and Ali actually relied on the representations related to the purported Shiera offer (and Carlos's and Sami's intentions to sell to Shiera) because, by the time they committed their interests to Horizon, Raed and Ali knew the Shiera offer would not result in a sale. *See Mayes v. Stewart*, 11 S.W.3d 440, 451 (Tex. App.—Houston [14th Dist.] 2000, pet. denied) ("Actual knowledge is inconsistent with the claim that the defrauded party has been deceived, and it negates the essential element of reliance . . . ."); *see also Anglo-Dutch Petroleum Int'l, Inc. v. Case Funding Network, LP*, 441 S.W.3d 612, 631 (Tex. App.—Houston [1st Dist.] 2014, pet. denied) (reliance justified when party does not have "actual knowledge of the representation's falsity").

Appellants' argument again ignores the nature of Raed and Ali's theory of fraud. Whether Raed and Ali knew Shiera had reneged on an offer to purchase an interest in vMonitor before they agreed to sell their interests to Horizon is not the controlling question. As stated above, the actionable representation was that Shiera, a third-party, made an offer at all and, in connection with that offer, had valued vMonitor in the $13-million range in a purported arms-length negotiation. And it

was further represented that Carlos and Sami were willing to sell based on that valuation. Raed's and Ali's decision to sell to Horizon at the agreed-upon price was therefore influenced by the proposed terms of the Shiera offer, and the representations made in connection therewith cannot be viewed in the vacuum appellants suggest. As Raed and Ali argue, "[n]o change in position affected [their] belief that such a deal had, at one time, been offered. The only information that would have impacted their reliance on the Shiera offer as genuine was knowledge that it had never happened."

Still, appellants assert that "statements about one sale [cannot] serve as the basis for fraud related to a second sale to another party [because] the statement is too remote to the events to support a fraud claim." In support, appellants cite to our sister court's opinion in *Allen v. Allen*, 751 S.W.2d 567 (Tex. App.—Houston [14th Dist.] 1988, writ denied). But *Allen* is not on point for the cited principle. There, the plaintiff sued her former husband to establish her ownership in certain overriding royalty interests due her under a settlement agreement incident to their divorce. *Id.* at 569. She also pleaded fraud and conspiracy causes of action against her husband and several oil-and-gas corporations. *Id.* The jury made findings favorable to the plaintiff as to certain overriding royalty interests and fraud. *Id.* In the portion of the opinion appellants rely on, the court considered whether the evidence was factually insufficient to support the plaintiff's damages, including the jury's finding that the

husband's fraud caused the plaintiff a monetary loss of $40,000. *Id.* at 574. After noting that the plaintiff received damages for her failure to receive royalty payments on her contract claim under the settlement agreement, the court observed: "In an apparent effort to prove some tort damages for fraud, [the plaintiff] testified that her home has been posted for foreclosure sale, she could not pay her credit card bills and she was unable to afford proper medical care. She also testified generally to a change in her lifestyle." *Id.* at 574. The court then held that "such events are too remote to be proximately caused by the fraud found by the jury, and they constitute no evidence of any recoverable actual damages attributable to fraud." *Id.* Accordingly, *Allen* addressed the remoteness of the claimed damages in the causal chain; it did not address whether a plaintiff's knowledge of the of falsity of a representation precludes reliance on the representation.[14] Moreover, the evidence of the Shiera offer does not suffer from the same lack of proximity because the Shiera offer was part and parcel of the fraudulent scheme found by the trial court.

Appellants next argue that Raed and Ali could not justifiably rely on the statements related to revenue projections since Raed and Ali were officers in vMonitor, saw financial statements at the February 2012 board meeting, and had

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[14] To the extent appellants citation to *Allen* could be read as raising a challenge to causation, we conclude that issue has not been adequately briefed, as there is no discussion or citation of evidence specific to causation. *See* TEX. R. APP. P. 38.1(i) (requiring appellant's brief to "contain a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record").

access to vMonitor's other financial information. In support, appellants cite *Grant Thornton*'s "red flags" impediment to justifiable reliance. *See* 314 S.W.3d at 923. In that case, investors claimed to have justifiably relied on certain representations when purchasing bonds from a corporation. *Id.* The Court held the investors' reliance was not justifiable because, before the acquisition, their senior portfolio manager learned the corporation lost its primary source of funding and was financially at risk. *Id.* Before reaching this conclusion, the Court noted that the portfolio manager was "an experienced bond investor" who held a finance degree and MBA and who ultimately admitted the purchases "reflected a substantial risk."[15] *Id.*

We note first that appellants have not identified, nor have we found, anything in the financial information presented at the February 2012 board meeting or in other documents available to Raed and Ali that would have raised a red flag that appellants

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[15] In adopting the "red flags" impediment to justifiable reliance in *Grant Thornton*, the Court was persuaded by the Fifth Circuit's decision in *Lewis v. Bank of America NA*, which analyzed the justifiable-reliance element as follows:

> Lewis, an individual with both a business background and familiarity with retirement accounts, should have viewed this series of events as a red flag warranting further investigation of the tax consequences of the loan transaction. Viewing the circumstances in their entirety, including Lewis's access to professional accountants, the amount of money involved in the transaction, and the ambiguous nature of [the defendant's] "assurance," Lewis's decision to enter into the transaction without undertaking additional investigation into its tax consequences was not justifiable.

343 F.3d 540, 547 (5th Cir. 2003).

believed vMonitor's value was substantially greater than the $13 million Shiera allegedly proposed so as to leave the trial court's justifiable-reliance finding wholly unsupported or against the overwhelming weight of the evidence. The message from the February 2012 board meeting was that vMonitor was not meeting its goals due to decreased bookings, rising costs, and lower revenues. While there was testimony that projections for 2012 were more optimistic, even appellants' valuation expert expressed concern for the degree of optimism warranted. It would be an odd result to conclude the evidence compels a conclusion that Raed and Ali, who do not have financial backgrounds equivalent to appellants' expert, should have viewed the financial data as a "red flag" that vMonitor was worth more than Shiera proposed when an expert did not.

The test for justifiable reliance is whether Raed's and Ali's "individual characteristics, abilities, and appreciation of the facts and circumstances" at the time of the fraud should have revealed to them that the representations about the poor health of the company were false. *Grant Thornton*, 314 S.W.3d at 923. We conclude that the evidence, viewed in the appropriate light, was legally and factually sufficient to support the trial court's finding that the test for justifiable reliance was satisfied. Although Raed founded vMonitor in its original form and was an officer of the company in its later form, he did not have a financial background. In contrast to Rashed, Carlos, and Sami, he and Ali were not charged with the company's

operation or fiscal management; rather, they were responsible for product development as science and technology officers. Rashed testified at trial that it was his goal with Carlos and Sami to handle the financial decision making so that Raed and Ali could focus on the company's product—its technology. As described by Rashed, everyone had a role in the company: Rashed provided financing; Carlos, as CEO, ran the daily affairs of the company; Sami, as COO, was responsible for business development and creating a market for the company; Raed was the chief scientist responsible for software; and Ali was responsible for the hardware.

Accordingly, we overrule appellants' second issue.[16]

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[16] We do not reach appellants' fifth issue, wherein appellants argue that even if the misrepresentations were actionable and justifiably relied on, the misrepresentations can be attributed to Carlos only and therefore are not a basis for fraud findings against the other appellants. Embedded within this argument is appellants' contention that there was no pleading or proof of agency to support the trial court's finding that appellants are jointly and severally liable for Carlos's statements. Although Raed and Ali dispute the absence of agency pleadings and proof, we need not decide this issue. Even assuming appellants are correct that the misrepresentations are attributable to Carlos only, for the reasons stated below, we will affirm the trial court's finding that appellants engaged in a civil conspiracy, which was another basis for holding appellants jointly and severally liable for Carlos's fraud. *See Greenberg Traurig of N.Y., P.C. v. Moody*, 161 S.W.3d 56, 90 (Tex. App.—Houston [14th Dist.] 2004, no pet.) (noting "each conspirator is responsible for all acts done by any of the conspirators in furtherance of the conspiracy," and that "[a] finding of civil conspiracy further imposes joint and several liability on all conspirators for actual damages resulting from acts in furtherance of the conspiracy"); *see also* TEX. R. APP. P. 47.1.

Conspiracy

The trial court concluded that appellants conspired with one another to defraud Raed and Ali and as to the breaches of fiduciary duty by Rashed and Sami. In their eighth issue, appellants argue that Raed's and Ali's derivative conspiracy claim fails because (1) there was no underlying tort, and (2) there was no evidence of a meeting of the minds.

In civil conspiracy, the plaintiff seeks to hold a defendant vicariously liable for an injury caused by another who has acted in combination with the defendant for a common purpose. *Agar Corp. v. Electro Circuits Int'l, LLC*, 580 S.W.3d 136, 140–41 (Tex. 2019) (recognizing civil conspiracy is theory of vicarious liability, not independent tort). A civil conspiracy claim is sometimes used by a plaintiff as a basis for establishing joint and several liability among several defendants, some of whom may not have committed a tort by their own conduct. *See Carroll v. Timmers Chevrolet, Inc.*, 592 S.W.2d 922, 925–26 (Tex. 1979); *Greenberg Traurig of N.Y., P.C. v. Moody*, 161 S.W.3d 56, 90 (Tex. App.—Houston [14th Dist.] 2004, no pet.). A proven civil conspiracy means each conspirator is responsible for all acts done by any of the conspirators in furtherance of the conspiracy. *See Akin v. Dahl*, 661 S.W.2d 917, 921 (Tex. 1983) ("[O]nce a civil conspiracy is found, each co-conspirator is responsible for the action of any of the co-conspirators which is in furtherance of the unlawful combination."); *see also Carroll*, 592 S.W.2d at 925;

Greenberg Traurig, 161 S.W.3d at 90. A finding of civil conspiracy imposes joint and several liability on all conspirators for actual damages resulting from acts in furtherance of the conspiracy. *See Carroll*, 592 S.W.2d at 925–26; *Greenberg Traurig*, 161 S.W.3d at 90.

A civil conspiracy involves a combination of two or more persons to accomplish an unlawful purpose or a lawful purpose by unlawful means. *Juhl v. Airington*, 936 S.W.2d 640, 644 (Tex. 1996). Conspiracy is a derivative tort because "a defendant's liability for conspiracy depends on participation in some underlying tort for which the plaintiff seeks to hold at least one of the named defendants liable." *Tilton v. Marshall*, 925 S.W.2d 672, 681 (Tex. 1996). That is, "[t]he 'gist of a civil conspiracy' is the injury that is intended to be caused." *Triplex Commc'ns, Inc. v. Riley*, 900 S.W.2d 716, 720 (Tex. 1995) (quoting *Schlumberger Well Surveying Corp. v. Nortex Oil & Gas Corp.*, 435 S.W.2d 854, 856 (Tex. 1968)). To that end, a civil conspiracy requires a meeting of the minds on the object or course of action.[17] *Massey v. Armco Steel Co.*, 652 S.W.2d 932, 934 (Tex. 1983). Proof of a joint intent

[17] Although our analysis focuses primarily on one element of civil conspiracy, i.e., a meeting of the minds, the Texas Supreme Court held that an action for civil conspiracy has five elements: "(1) two or more persons; (2) an object to be accomplished; (3) a meeting of the minds on the object or course of action; (4) one or more unlawful, overt acts; and (5) damages as the proximate result." *Massey v. Armco Steel Co.*, 652 S.W.2d 932, 934 (Tex. 1983); *see also BP Auto., L.P. v. RML Waxahachie Dodge, L.L.C.*, 448 S.W.3d 562, 573 (Tex. App.—Houston [1st Dist.] 2014, no pet.).

to engage in the conduct that resulted in the injury, without more, does not establish a cause of action for civil conspiracy. *Juhl*, 936 S.W.2d at 644. "[T]he parties must be aware of the harm or wrongful conduct at the inception of the combination or agreement." *Triplex Commc'ns*, 900 S.W.2d at 719.

Here, there is an initial question whether appellants adequately briefed their civil conspiracy challenges. *See ERI Consulting Eng'rs, Inc. v. Swinnea*, 318 S.W.3d 867, 880 (Tex. 2010) ("The Texas Rules of Appellate Procedure require adequate briefing."); *Fredonia State Bank v. Gen. Am. Life Ins. Co.*, 881 S.W.2d 279, 284–85 (Tex. 1994) (holding appellate court has discretion to deem issues waived due to inadequate briefing); *see also* TEX. R. APP. P. 38.1(i) ("The [appellant's] brief must contain a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record."). Appellants addressed Raed's and Ali's civil conspiracy and aiding-and-abetting claims together in their opening brief under a heading asserting that these "derivative claims fail because there is not an underlying tort." The entirety of appellants' opening-brief argument reads:

> All derivative claims require an underlying tort. *Tri v. J.T.T.*, 162 S.W.3d 552, 556 (Tex. 2005); *Harris Cty. v. Ramirez*, 581 S.W.3d 423, 430 n.2 (Tex. App.—Houston [14th Dist.] 2019, no pet.). The evidence is legally and factually insufficient to support a finding of either fraud or breach of fiduciary duty, such that the derivative claims must also fail.
>
> [T]he evidence is . . . factually and legally insufficient to support a knowing and substantial assistance in the underlying wrongful acts. The only evidence [Raed and Ali] have is the ownership by [a]ppellants of

> stock in and their collective efforts for vMonitor, which is not substantial assistance in a wrongful act.
>
> At best, [Raed and Ali] have woven together a patchwork of acts consistent with a lawful purpose—[Raed and Ali] desiring to sell their interest in vMonitor, differences of opinion on the value of the interest, growth and positive financial results for vMonitor after their exit, and a buyer thirteen months later. That is not enough for a conspiracy, or for the creation of a claim for aiding and abetting breach of a fiduciary duty.

(Citations omitted.) The contention regarding the insufficiency of the evidence of "knowing and substantial assistance" seems to regard elements of aiding-and-abetting liability, not civil conspiracy. *See Immobiliere Jeuness Establissement v. Amegy Bank Nat'l Ass'n*, 525 S.W.3d 875, 882 (Tex. App.—Houston [14th Dist.] 2017, no pet.) (setting out aiding-and-abetting elements). None of the elements of conspiracy are specifically identified or argued in the opening brief, and there is no citation to the record or discussion of specific evidence. Conspiracy is only generically referenced in the final sentence of appellants' argument and mentioned in the one of the cases cited by appellants.

In their reply, however, appellants argue for the first time that the references to "knowing and substantial assistance" are arguments under the "meeting of the minds" element of conspiracy. Generally, however, an appellant may not avoid waiver in its opening brief by presenting an argument for the first time in its reply. *See In re Guardianship of Whitt*, 407 S.W.3d 495, 497 n.3 (Tex. App.—Houston [14th Dist.] 2013, no pet.). And even in their reply brief, there is no meaningful

discussion of conspiracy. *See* TEX. R. APP. P. 38.1(i) ("The [appellants'] brief must contain a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record.").

Even if appellants had adequately briefed their conspiracy challenge, it is not meritorious. Appellants argue that the evidence was insufficient to show a meeting of the minds to defraud Raed and Ali because:

> [T]here were two negotiations. In the first, Shiera only offered to pay $1,111,111 for each [Raed's and Ali's] interest and Raed accepted that offer. Shiera walked away from the deal. Rashed and Horizon did not participate in it. Later, Horizon paid $1.375 million for each [Raed's and Ali's] interest; the amount Raed initially demanded. Sami did not participate in the second negotiation and Carlos did only at the insistence of Raed.

This argument again rests on appellants' view that the "two negotiations" for the sale of Raed's and Ali's interests—first with Shiera and then with Rashed/Horizon—regard separate and distinct transactions. But as we have previously stated, the evidence supports the trial court's view that the two negotiations were part and parcel of one fraudulent scheme to convince Raed and Ali of the low value of their interests so that Rashed, through Horizon, could obtain them at a low price. The trial court could reasonably view the two negotiations in combination as involving all appellants in the scheme to obtain Raed's and Ali's interests at a low price.

Accordingly, we reject appellants' contention that there could be no meeting of the minds because there were two negotiations.

We overrule appellants' eighth issue.

Actual Damages

In their first issue, appellants challenge the legal and factual sufficiency of the trial court's award of $7,206,349.20 as "actual damages," which amount represents Raed's and Ali's percentage interests in vMonitor (8.33% each or 16.66% combined), multiplied by the price Rockwell agreed to pay for vMonitor in October 2013 ($59,762,000), minus the amount Raed and Ali received for their shares ($2,750,000). Underlying appellants' legal and factual sufficiency challenge are three primary assertions:

- Under Texas law, actual damages for fraud must be measured as of the time of the sale or fraud.
- Raed and Ali could not rely on the price Rockwell paid to purchase vMonitor, in its entirety, as evidence of the value of the membership interests they sold a year earlier.
- The only competent evidence of the value of Raed's and Ali's interests at the time they were sold—the testimony of appellant's business valuation expert Joshua Lynn—established that Raed and Ali received a fair value for their interests and, therefore, they were not damaged.

In analyzing these assertions, we are mindful of the deference given to the factfinder's discretion to fix appropriate and reasonable damage amounts. Under Texas law, "whether to award damages and how much is uniquely within the

factfinder's discretion." *Golden Eagle Archery, Inc. v. Jackson*, 116 S.W.3d 757, 772 (Tex. 2003); *MEMC Pasadena, Inc. v. Riddle Power, LLC*, 472 S.W.3d 379, 408 (Tex. App.—Houston [14th Dist.] 2015, no pet.). We are also mindful that the task of valuing a minority interest in a closely held company is particularly difficult. *See, e.g.*, *Hamm v. Comm'r of Internal Revenue*, 325 F.2d 934, 939–40 (8th Cir. 1963) (recognizing that since valuation is necessarily an approximation, it is not required that the value be one as to which there is specific testimony, provided that it is within range of figures that properly may be deduced from the evidence); *Lavene v. Lavene*, 372 A.2d 629, 633 (N.J. Super. Ct. App. Div. 1977) ("There are probably few assets whose valuation imposes as difficult, intricate[,] and sophisticated a task as interests in close corporations."); *Davis v. Comm'r of Internal Revenue*, 110 T.C. 530, 537 (T.C. 1998) ("The determination of the value of closely held stock . . . is a matter of judgment, rather than of mathematics."); *Maris v. Comm'r of Internal Revenue*, 41 T.C.M. (CCH) 127, 137 (T.C. 1980) ("[D]etermin[ing] the value of shares of stock in a closely-held corporation[] [is] a science which, to use [Sir] Winston Churchill's words, usually results in a 'gross terminal logical inexactitude.'").

A factfinder has broad discretion to award damages within the range of evidence presented at trial. *MEMC Pasadena*, 472 S.W.3d at 408; *see also Anderson v. Comm'r of Internal Revenue*, 250 F.2d 242, 249 (5th Cir. 1957) ("Valuation is, of

course, a question of fact. . . . It is not necessary that the value arrived at by the trial court could be a figure as to which there is specific testimony, if it is within the range of figures that may properly be deduced from the evidence."). There is no requirement that the evidence show precisely how the factfinder arrived at the specific amount awarded. *MEMC Pasadena*, 472 S.W.3d at 408; *see Mayberry v. Tex. Dep't of Agric.*, 948 S.W.2d 312, 317 (Tex. App.—Austin 1997, writ denied). When the evidence at trial supports a range of damages, an award within that range is an appropriate exercise of the factfinder's discretion, and we may not speculate on how the factfinder arrived at its award. *Vast Constr., LLC v. CTC Contractors, LLC*, 526 S.W.3d 709, 724–25 (Tex. App.—Houston [14th Dist.] 2017, no pet.). Nonetheless, the factfinder must have an evidentiary basis for its findings. *MEMC Pasadena*, 472 S.W.3d at 408.

Appellants contend that the only evidence of the value of Raed's and Ali's membership interests in vMonitor at the time they were sold was the testimony of Lynn, who opined that Raed and Ali received a "reasonable and fair price" for their shares. Lynn opined on (1) the enterprise value of vMonitor and (2) the value of Raed's and Ali's minority interests in vMonitor, both as of April 2012, when Raed and Ali agreed to the purchase price for their interests in a sale to Horizon. Lynn explained the difference between enterprise value and the fair market value of Raed's and Ali's membership interests as follows:

> [E]nterprise value is the value of an enterprise or a company as a whole at the 100 percent level. So if somebody, an investor or another company, wanted to acquire a company like vMonitor, they wanted to acquire 100 percent of the shares of the company, they would typically pay enterprise value or some derivative of enterprise value.
>
> When you're talking about ownership of individual equity interest in a company that are not 100 percent - - so for example, in this case we're talking about two interests that were 8.3 percent each - - you typically look at something called fair market value, which is what is the value that a willing buyer and a willing seller would negotiate without there being any compulsion to sell, what price would you expect to be negotiated for those shares?
>
> And there is a difference between fair market value of an individual block of shares and the enterprise value of the whole company. It's not necessarily the case that you can take the values of small ownership interests and add them all up and get to a 100 percent enterprise value because there are certain discounts that you have to consider when valuing small minority interests in a company like vMonitor.

According to Lynn, "[g]enerally, enterprise value is going to be higher than a fair market value of the individual ownership interests in the company."

Lynn further opined that, as of April 2012, vMonitor had an enterprise value of $32,892,481. To arrive at that figure, he used an "income approach" to valuation, "which is a calculation of the expected income that an investor could receive from owning the company." Lynn achieved his calculation by predicting the cash flow available to shareholders—the amount of cash the company was expected to generate on an annual basis after all cash expenses were paid—in successive years with reference to historical financial data and applying discounts for the present

value of money and other risk factors, such as a country risk-premium for the UAE and a size premium.

To determine the value of Raed's and Ali's respective 8.33% percent interests, Lynn applied discounts to vMonitor's enterprise value for the lack of control (25%) and lack of marketability (24.4%) represented by Raed's and Ali's minority interests. Applying these discounts, Lynn concluded the fair market value for vMonitor was $18.6 million. Then, applying Raed's and Ali's 8.33% ownership interests, Lynn concluded their shares should be valued at $1,550,000 million. Finally, according to Lynn, because Raed and Ali were each paid $1,100,000 million, plus a $275,000 earn out payment, for a total of $1,375,000, they received a "reasonable and fair price" for their shares. Considering there are "a lot of factors that come into play in coming to a final negotiation of an equity transaction," Lynn concluded the amount paid to Raed and Ali was "within a reasonable negotiating range." Thus, he opined: "[T]here is no evidence of economic damage in this case."

Lynn acknowledged that reasonable minds could differ about vMonitor's enterprise value. He also acknowledged that a company's enterprise value may be enhanced when the transaction represents a strategic acquisition for the purchaser. He explained:

> So a strategic acquisition of a company like vMonitor would mean that you have a strategic buyer or a potential strategic buyer who has looked at a company like vMonitor and said, you know, [i]n our hands as a potential buyer, there is some additional benefit that we may get from

> buying this company as opposed to another passive investor owning a right to the company because maybe we have products or service lines that are compatible with those of our target company or maybe it will help us to get into more markets or more geographic markets around the world.
>
> And so typically, if you have a situation where there is a strategic buyer, you can have a strategic premium placed on the value of the company. So a strategic buyer would typically pay more than what would be considered fair market value of the company which would apply to any number of potential investors.

Lynn, however, did not perform a strategic valuation of the company.

For their part, Raed and Ali acknowledge they did not present their own expert testimony to rebut Lynn's valuation opinions. But they contend such evidence was not necessary because other evidence supported the sum awarded by the trial court as damages and the trial court reasonably could reject the discounts applied by Lynn. We agree.

As stated, so long as there is a rational basis for the trial court's calculation, the trial court has broad discretion to award damages within the range of evidence presented at trial. *See Gulf States Utils. Co. v. Low*, 79 S.W.3d 561, 566 (Tex. 2002). Here, the trial court was entitled to consider all the evidence presented by the parties and accept the evidence it found was credible and reject the evidence it found was not credible. *See, e.g.*, *Nelson v. Najm*, 127 S.W.3d 170, 174 (Tex. App.—Houston [1st Dist.] 2003, pet. denied) (recognizing trial court's discretion in bench trial to accept or reject all or any part of witness's testimony). The trial court heard evidence

that vMonitor's corporate officers, including Carlos, valued the company at $50-60 million in May 2011. The trial court also heard evidence, including testimony from Carlos, that no significant events transpired that would have caused vMonitor's value to fluctuate from $50-60 million in 2011, to around $13 million in 2012 (as proposed in the purported Shiera offer) or $18.6 million (as concluded by Lynn), and back up to $59 million in October 2013. Carlos testified:

> Q. So when it's asked of you, What happened in the world of vMonitor between October of 2012 and October of 2013 which would justify the price going up fivefold, the answer is you don't know of anything that happened; isn't that true?
>
> A. I mean, other than the normal conduct of business, nothing happened.

Considering this evidence together, the trial court reasonably could decide that Lynn's decision to apply a 49.4% discount due to vMonitor's poor performance in 2011 should be ignored given the other evidence that the company's performance came back in line with projections in 2012, and there were no known financial or market changes during that period which would have caused the company to drop in value. Thus, giving appropriate deference to the trial court's calculation, we conclude there is legally and factually sufficient evidence to support the award of damages to Raed and Ali.

Accordingly, we overrule appellants' first issue.

Exemplary damages

In their ninth issue, appellants challenge the trial court's award of exemplary damages against Rashed. Appellants contend the award of exemplary damages cannot stand because there is not sufficient evidence of fraud, breach of fiduciary duty, or underlying damages. They also contend the evidence presented by Raed and Ali did not clear the "higher 'clear and convincing' hurdle, especially as to Rashed."

Based on our prior holdings in this opinion that the evidence is legally and factually sufficient to support Raed and Ali's cause of action for fraud and resulting damages, we reject appellants' first contention.[18] Regarding their second contention, we agree with appellants that an award of exemplary damages must be based on a higher degree of proof. *See* TEX. CIV. PRAC. & REM. CODE § 41.003(a)(1).

The Civil Practice and Remedies Code requires a plaintiff seeking recovery of exemplary damages resulting from fraud to establish the elements of fraud by clear and convincing evidence. *Id.* "Clear and convincing evidence" means "the measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established." *Id.*

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[18] Because the judgment can be sustained on Raed and Ali's fraud and conspiracy theories, we do not reach appellant's third, fourth, or seventh issues challenging the sufficiency of the evidence of the alternative fiduciary-duty and aiding-and-abetting claims. *See, e.g.*, *Madison v. Williamson*, 241 S.W.3d 145, 159 (Tex. App.—Houston [1st Dist.] 2007, pet. denied) (stating when party tries case on alternate theories and factfinder returns favorable findings on two or more theories, party has right to judgment on theory entitling it to greatest or most favorable relief).

§ 41.001(2). And here, the trial court expressly indicated that each of its findings necessary for an award of exemplary damages was based on clear and convincing evidence, not just a preponderance of the evidence.

But the trial court did not need to make the predicate findings specifically as to Rashed. As already stated, the evidence was legally and factually sufficient for the trial court to find not just fraud and resulting damages, but also that Rashed was a co-conspirator in the fraudulent scheme to persuade Raed and Ali to surrender their membership interests in vMonitor to him at a reduced price based on a non-existent, third-party transaction. In *Akin v. Dahl*, the Texas Supreme Court indicated that if, as here, the predicate conduct for the assessment of exemplary damages is included in the essential elements of a claim, and if, as here, one conspirator has been found liable as to that claim, a finding of the predicate for exemplary damages is not necessary as to the other conspirator. *See* 661 S.W.2d at 921–22. In *Akin*, a case involving malicious prosecution and exemplary damages based on allegations of malice, the Court wrote regarding co-conspirator liability:

> Malice is an element of malicious prosecution. The jury found that Gloria Akin acted with malice in prosecuting the guardianship and mental illness proceedings and that Ted Akin and Gloria Akin acted in a conspiracy in planning, instituting and maintaining the guardianship and mental illness actions. An unlawful act alone is not grounds for punitive or exemplary damages; more is required in the nature of an act which is wanton or malicious. In the present case, there was no issue presented to the jury inquiring as to malice on the part of Ted Akin. However, once a civil conspiracy is found, each co-conspirator is responsible for the action of any of the co-conspirators which is in

> furtherance of the unlawful combination. Therefore, each element of the cause of action of malicious prosecution is imputed to each co-conspirator. If the object of the conspiracy is an unlawful tort, such as negligence, which did not contain wanton behavior, malice, or their progeny as an element of the cause of action, then that additional finding would be necessary as to each co-conspirator against whom exemplary damages were sought. In the present case, however, malice is an essential element of the offense of malicious prosecution and a finding that Ted Akin conspired with Gloria Akin in conduct which amounts to malicious prosecution precludes the necessity of a specific finding of malice on the part of Ted Akin.

Id. (citations omitted). Thus, under *Akin*, each element of fraud based on Carlos's material misrepresentations, found by the trial court to be supported by clear and convincing evidence, was imputed to each conspirator, including Rashed. *See id.* Because fraud is a basis for exemplary damages, the award against Rashed is sustainable. *See id.*; *see also* TEX. CIV. PRAC. & REM. CODE § 41.003(a)(1).

We overrule appellants' ninth issue.

Conclusion

We affirm the trial court's judgment.

Amparo Guerra
Justice

Panel consists of Justices Landau, Guerra, and Farris.