NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

DAVID A. COLTON, as Trustee, etc., Plaintiff and Appellant, v. ALAN S. PEKARCIK, as Trustee, etc., et al., Defendants and Respondents.	G048830 (Super. Ct. No. 30-2011-00479077 consol. with 30-2011-00479083) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Kirk H. Nakamura, Judge. Affirmed.

Weintraub | Tobin, Gary A. Waldron, Jacob C. Gonzales; O'Melveny & Myers, Michael G. Yoder and Adam Levine for Plaintiff and Appellant.

Callahan & Blaine, Daniel J. Callahan, Marc P. Miles, Jill A. Thomas; Cadden & Fuller, Thomas H. Cadden and John Taylor for Defendants and Respondents.

* * *

Through his wholly-owned company, plaintiff and appellant David A. Colton, as Trustee of the Colton Family Trust dated September 17, 1991 (Colton), formed a limited partnership that owned and managed office buildings. Defendants and Respondents Alan S. Pekarcik, as Trustee of the Alan Steven Inc. Profit Sharing Trust (Pekarcik), and Michael Anthony Hefner, as Trustee of the Michael Anthony Hefner Profit Sharing Trust (Hefner; collectively we refer to Pekarcik and Hefner as Defendants), purchased shares in the limited partnership as an investment. Approximately 15 years later, Colton offered to liquidate Defendants' interests by purchasing their shares.

Although they thought Colton's offer may have been a little less than the shares were worth, Defendants decided to accept the offer because they believed Colton could assess accurately the value of the shares, and they expected to receive a little less than their true value because there was no public market for the privately held shares. Shortly after accepting the offer, however, Defendants learned the shares may have been worth four times what Colton offered. Accordingly, Defendants returned the unopened envelopes containing Colton's payments and rescinded their agreements to sell Colton their shares.

Colton sued Defendants to specifically enforce the agreements. Following a four-day bench trial, the trial court entered judgment for Defendants. The trial court's statement of decision identified several grounds for denying Colton specific performance, including (1) the purchase price was not "fair, just, and reasonable" because it "was, at most, 48%" of the shares' actual value; (2) Colton came to court with unclean hands because he misrepresented the value of the shares and failed to disclose material information about the partnership's operations; (3) Defendants were mistaken as to the shares' actual value when they accepted Colton's offer; and (4) Defendants properly rescinded their agreements with Colton.

As explained below, we affirm the trial court's judgment because substantial evidence supports its finding Defendants properly rescinded the agreements. Because we affirm the trial court's judgment based on Defendants' rescission of the agreements, we do not address the additional grounds the court provided for its decision.

I

FACTS AND PROCEDURAL HISTORY

The Colton Company buys and manages commercial real property through investment funds that held title to each portfolio of office buildings it purchased. Colton is the Colton Company's sole owner. One of the funds the Colton Company formed is the Provider Fund, L.P. (Provider Fund), a limited partnership that holds title to 13 office buildings in Orange County. The Colton Company is the Provider Fund's general partner with the exclusive power to manage the Provider Fund's properties. In addition to the limited partnership interests in the Provider Fund, the Colton Company also sold tenant in common interests in the Provider Fund's individual office buildings. These investors were not limited partners in the Provider Fund, but rather joint owners with the Provider Fund in one or more individual properties. A separate agreement with the tenant in common investors gave the Colton Company the exclusive power to manage the properties.

The Colton Company formed the Provider Fund in 1995 with the intent to hold the properties for five to seven years, and then sell them at a profit. The governing documents gave the Colton Company sole discretion to determine when to sell the Provider Fund's properties. Based on market conditions, the Provider Fund did not sell its properties during the anticipated time period and continued to own them throughout this litigation. Over the years, the Provider Fund periodically has distributed profits to the limited partners totaling more than 95 percent of each limited partner's initial investment, but those distributions significantly decreased in the years leading up to this lawsuit.

Defendants are licensed real estate brokers with more than 25 years' experience in commercial real estate. In 1997, they bought limited partnership interests in the Provider Fund. Pekarcik paid $50,000 for a 0.50 percent interest and Hefner paid $25,000 for a 0.25 percent interest.

The Provider Fund's governing documents grant the Colton Company discretion to repurchase the partnership interests of limited partners for its own account. When it received requests from limited partners to liquidate their interests, the Colton Company often would send offers to all limited partners to purchase their partnership shares. These offers would be made on a first-come, first-serve basis, and the price offered was based on a percentage of the limited partner's initial investment. For example, in April 2003, the Colton Company offered to repurchase partnership shares for 135 percent of their initial cost, and, in November 2006, it offered to repurchase shares for 200 percent of their initial cost. The Colton Company assigned to Colton the right to repurchase these shares in his own name.

In February 2011, Colton offered to repurchase all the shares of the limited partners for 150 percent of their initial cost, which equated to an offer to purchase Pekarcik's shares for $75,000 and Hefner's shares for $37,500. The offer included a general release of all claims relating to the Provider Fund. At trial, Colton and the Colton Company conceded their offer was *not* based on a valuation of the Provider Fund's properties or the Provider Fund itself, but rather merely constituted an "arbitrary number" without any connection to the Provider Fund's true value. Colton testified he made the offer for those investors who wanted liquidity, and he believed the shares were worth more than the amount he offered.

Defendants did not know whether Colton's offer fairly reflected the value of their interests in the Provider Fund, so they attempted to value the Provider Fund's properties using their commercial real estate expertise and the limited information they had about the Provider Fund. Based on their "crude" or "ballpark" valuation, Defendants thought their shares may be worth more than Colton offered, but they were uncertain because they lacked information necessary to perform an accurate valuation. Pekarcik testified he thought the offer was based on a "little" or "slight discount" of 10 to 20 percent because that was common when investors sought to liquidate limited partnership shares for which no public market existed.

On February 22, 2011, Defendants met with Colton and the Colton Company's chief financial officer to see if Colton would increase his offer. When Defendants asked Colton if he thought the offer was fair, he responded, "it was pretty good, based on today's market, with other investors not even getting any of their equity back, or little to none." Colton also told them it was a take it or leave it offer for those investors who needed liquidity.

Hefner testified Colton refused to increase the offer because he said "that was the value of [Hefner's] share." Hefner also testified Colton explained he had to adjust the offer to account for the interests the tenant in common investors held in the Provider Fund's properties and the 30 percent profit share to which the Colton Company was entitled under the governing documents. Colton and the Colton Company's chief financial officer testified they did not make any statements or representations about the value of Defendants' shares during the meeting, which ended with Defendants saying they would need to think about the offer.

Following the meeting, Pekarcik had conversations with two other investors in the Provider Fund who also were real estate brokers, Bob Smith and George Roudanez. Smith said Pekarcik "might" be accepting "a little less" than his shares were worth if he accepted Colton's offer, but Smith declined to discuss the matter further because he did a lot of business with Colton. Roudanez similarly told Pekarcik he did not think the offer was for "a fair value," but he did not provide any details.

After these discussions, Pekarcik phoned Colton and again asked him to increase the offer. When Colton refused, Defendants decided to accept the offer because they believed Colton, as the Provider Fund's general manager, was in the best position to determine the Provider Fund's worth. On February 22, 2011, Hefner signed and returned Colton's offer; Pekarcik signed and returned the offer on February 25, 2011. Before doing so, Defendants added a provision conditioning their acceptance on Colton paying them in cash by March 11, 2011. Colton initialed the cash payment term Defendants added and faxed a copy to the two investors to confirm his acceptance.

A few days after signing the offer, Pekarcik had a second conversation with Roudanez about the value of the Provider Fund's shares. Roudanez again told Pekarcik the offer sounded low, but this time he suggested Pekarcik talk to an attorney at the law firm of Cadden & Fuller to get more information. Pekarcik had spoken with an attorney from that firm a couple months earlier, and the attorney told him the firm was investigating whether to file a lawsuit against Colton and the Colton Company over the Provider Fund and other investments. Pekarcik followed Roudanez's advice and contacted an attorney at Cadden & Fuller, who told Pekarcik his firm had recently uncovered more information about the Provider Fund, and concluded the shares may be worth four times the amount Colton offered.

On March 9, 2011, while Pekarcik continued to seek information about the value of his shares, Colton delivered cashier checks in sealed envelopes to Defendants for the full amount of the offer. Neither Defendant opened the envelopes because they were concerned the shares may be worth significantly more than Colton offered. After hearing Cadden & Fuller believed the shares were worth four times the amount Colton offered, Defendants decided to rescind their agreements to sell Colton their shares (hereinafter, the Agreements). On March 23, 2011, Pekarcik and Hefner sent letters to Colton returning his checks in the unopened envelopes and rescinding the Agreements. These letters also included a letter from Cadden & Fuller explaining the basis for the rescission.

In May 2011, Colton filed separate lawsuits against Pekarcik and Hefner to specifically enforce the Agreements. The trial court consolidated the two actions and conducted a four-day bench trial. The court entered judgment for Pekarcik and Hefner.

The court also issued a statement of decision identifying several reasons for its decision to deny Colton specific performance, including (1) the price Colton offered was not "fair, just, and reasonable" because it represented, "at most, 48% of the actual value of [Defendants'] limited partnership shares in [the] Fund"; (2) Colton was not entitled to the equitable remedy of specific performance because he breached his fiduciary duties as the Provider Fund's general partner when he failed to disclose material information, including the substantial amount of money the Provider Fund held in reserves, the unauthorized fees the Colton Company took for operating the Provider Fund, and other information about the Provider Fund's operations and value that its governing documents required Colton to disclose; (3) Defendants mistakenly believed Colton based his offer on a reasonable valuation of the Provider Fund's assets, rather than an arbitrary number unrelated to the Provider Fund's value; (4) Colton misrepresented and concealed the value of Defendants' shares; (5) Defendants' "consent was 'not real or free'" because of Colton's misrepresentations and concealments about the value of the shares; and (6) Pekarcik and Hefner rescinded the Agreements by returning the checks in the unopened envelopes with a letter explaining the basis for the rescission.

II

DISCUSSION

A. *Colton Waived His Claim the Trial Court Erred in Concluding Defendants Rescinded the Agreements*

The trial court offered several grounds for denying Colton's requests for specific performance, including its conclusion Colton could not enforce the Agreements because Defendants had rescinded them. Rescission is a "'retroactive termination'" of a contract. (*Nmsbpcsldhb v. County of Fresno* (2007) 152 Cal.App.4th 954, 959 (*Nmsbpcsldhb*); Civ. Code, § 1688.)[1] "[It] extinguishes the contract [citation], terminates further liability, and restores the parties to their former positions by requiring them to return whatever consideration they have received." (*Sharabianlou v. Karp* (2010) 181 Cal.App.4th 1133, 1145 (*Sharabianlou*).) A contract that has been validly rescinded therefore cannot be specifically enforced. (See § 1692 ["When a contract has been rescinded in whole or in part, any party to the contract may seek relief based upon such rescission by . . . (b) asserting such rescission by way of defense . . ."].) Accordingly, rescission constitutes an independent ground supporting the trial court's judgment.

Colton's opening brief, however, fails to address the trial court's decision to deny specific performance based on Defendants' rescission of the Agreements. In his reply, Colton argues the trial court erred in finding Defendants validly rescinded the Agreements because Defendants waived the right to rescind by accepting Colton's payments under the Agreements with "'full knowledge of facts which would warrant [rescission],'" and the record lacks substantial evidence establishing Defendants' right to rescind based on either a mistake or misrepresentation about the value of their shares. Colton waived these arguments by waiting until the reply brief to raise them, and providing no explanation for doing so.[2] (*Flores v. Department of Corrections &*

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1 All statutory references are to the Civil Code.

2 At oral argument, Colton raised two additional challenges to the trial court's rescission ruling: (1) Defendants' waived the right to rescind because they did not plead rescission as an affirmative defense or otherwise raise it at trial, and (2) Defendants unilaterally inserted the court's rescission ruling into the third draft of the statement of decision without the court's approval and over Colton's objection. Colton, however, forfeited these arguments by waiting until oral argument to raise them. (*Acquire II, Ltd. v. Colton Real Estate Group* (2013) 213 Cal.App.4th 959, 975, fn. 9 ["""We do not consider arguments that are raised for the first time at oral argument"""].) Moreover, oral comments by the trial court and draft decisions may not be used to impeach the trial court's final statement of decision. (*Shaw v. County of Santa Cruz* (2008) 170 Cal.App.4th 229, 268.)

Rehabilitation (2014) 224 Cal.App.4th 199, 204-205 (*Flores*) ["The appellant's claims of error must be presented in his or her opening brief; 'points raised for the first time in a reply brief on appeal will not be considered, absent good cause for failure to present them earlier'"]; *Browne v. County of Tehama* (2013) 213 Cal.App.4th 704, 720, fn. 10 ["'Points raised for the first time in a reply brief will ordinarily not be considered, because such consideration would deprive the respondent of an opportunity to counter the argument'"].)

We will consider Colton's challenge that the record lacks substantial evidence establishing Defendants' *right* to rescind the Agreements. Although it does not do so in the context of the trial court's rescission ruling, Colton's opening brief nonetheless challenges the trial court's finding Defendants were mistaken or mislead about the value of their shares. But we decline to consider Colton's argument Defendants waived their right to rescind the Agreements or otherwise failed to properly exercise that right because Colton's opening brief does not raise those issues in any context.[3]

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[3] We nonetheless note Colton's argument Defendants waived their right to rescind lacks merit. Waiver of the right to rescind requires a party to accept benefits under the contract with "full knowledge of facts" that would justify rescinding the contract. (*Palmquist v. Palmquist* (1963) 212 Cal.App.2d 322, 331.) Uncertainty, suspicion, or a belief founded upon inconclusive circumstances is not "full knowledge of facts" establishing a waiver of the right to rescind. (See *Union Pacific R.R. Co. v. Zimmer* (1948) 87 Cal.App.2d 524, 532; *Schaub v. Schaub* (1945) 71 Cal.App.2d 467, 480.)

As stated above, Defendants suspected Colton's offer was a 10 to 20 percent discount off their shares' actual value, but the trial court found the amount Colton offered was at least a 52 percent discount. Nothing in the record shows Defendants had full knowledge of the magnitude of the discount required to support a waiver. Moreover, Defendants returned everything they received from Colton under the Agreements, and he does not contend the two weeks that elapsed between his delivery of the checks and Defendants returning them prejudiced him in any way. (§ 1693 ["A party who has received benefits by reason of a contract that is subject to rescission and who in an action or proceeding seeks relief based upon rescission shall not be denied relief because of a delay in restoring or in tendering restoration of such benefits before judgment unless such delay has been substantially prejudicial to the other party"].)

Colton contends he did not waive the issue because Defendants raised rescission in their respondents' brief, and he merely responded to Defendants' arguments in his reply brief. Colton misconstrues the controlling authorities. Of course, an appellant is entitled to use his or her reply brief to respond to the respondents' arguments. But the arguments raised in the reply brief must relate to claims of error the appellant initially raised in the opening brief. A respondent pointing out the appellant's opening brief failed to challenge an independent ground for the trial court's judgment does not authorize the appellant to challenge that ground for the first time in the reply. (See *Flores*, *supra*, 224 Cal.App.4th at pp. 204-205; *Chicago Title Ins. Co. v. AMZ Ins. Services, Inc.* (2010) 188 Cal.App.4th 401, 427-428.)

B. *The Trial Court Properly Found Defendants Rescinded the Agreements Based on a Mistake of Fact Concerning the Value of Their Shares*

1. Governing Legal Principles Regarding Rescission

A party may rescind a contract if his or her consent was given by mistake. (§ 1689, subd. (b)(1); see §§ 1566 ["A consent which is not free . . . may be rescinded by the parties . . ."], 1567 ["An apparent consent is not real or free when obtained through [¶] . . . [¶] . . . Mistake"].) "Mistake of fact is a mistake, not caused by the neglect of a legal duty on the part of the person making the mistake, and consisting in: [¶] 1. An unconscious ignorance or forgetfulness of a fact past or present, material to the contract . . . ." (§ 1577; *Donovan v. RRL Corp.* (2001) 26 Cal.4th 261, 278 (*Donovan*).) "[A] party may rescind a contract on the ground of unilateral mistake, where the mistake '"is known to the other contracting party and is encouraged or fostered by that party." [Citation.]' [Citation.]" (*Erickson v. Aetna Health Plans of California, Inc.* (1999) 71 Cal.App.4th 646, 658-659; *Merced County Mut. Fire Ins. Co. v. State of California* (1991) 233 Cal.App.3d 765, 772.)

"A significant error in the price term of a contract constitutes a mistake regarding a basic assumption upon which the contract is made, and such a mistake ordinarily has a material effect adverse to the mistaken party. (See, e.g., *Elsinore* [*Union etc. Sch. Dist. v. Kastorff* (1960)] 54 Cal.2d [380,] 389 [7 percent error in contract price]; *Lemoge Electric v. County of San Mateo* (1956) 46 Cal.2d 659, 661-662 [6 percent error]; [*M. F.*] *Kemper* [*Const. Co. v. City of L. A.* (1951)] 37 Cal.2d [696,] 702 [28 percent error]; *Brunzell Const. Co. v. G. J. Weisbrod, Inc.* (1955) 134 Cal.App.2d 278, 286 [20 percent error]; Rest.2d Contracts, § 152, com. b, illus. 3, p. 387 [27 percent error].)" (*Donovan*, *supra*, 26 Cal.4th at p. 282 [32 percent error].) Colton does not dispute a significant mistake in the value of the property to be sold constitutes a mistake of fact warranting rescission.

We review the trial court's factual findings on whether a mistake of fact exists under the substantial evidence standard. "'To the extent the trial court drew conclusions of law based upon its findings of fact, we review those conclusions of law de novo. [Citation.]' [Citation.]" (*ASP Properties Group v. Fard, Inc.* (2005) 133 Cal.App.4th 1257, 1266 (*ASP Properties*).)

Under the substantial evidence standard, "'we must consider all of the evidence in the light most favorable to the prevailing party, giving it the benefit of every reasonable inference, and resolving conflicts in support of the [findings]. [Citations.] [¶] It is not our task to weigh conflicts and disputes in the evidence; that is the province of the trier of fact. Our authority begins and ends with a determination as to whether, on the entire record, there is *any* substantial evidence, contradicted or uncontradicted, in support of the judgment. Even in cases where the evidence is undisputed or uncontradicted, if two or more different inferences can reasonably be drawn from the evidence this court is without power to substitute its own inferences or deductions for those of the trier of fact, which must resolve such conflicting inferences in the absence of a rule of law specifying the inference to be drawn. . . . [Citations.]' [Citation.] . . . 'The ultimate test is whether it is reasonable for a trier of fact to make the ruling in question in light of the whole record.' [Citation.]" (*ASP Properties*, *supra*, 133 Cal.App.4th at p. 1266, original italics.)

2. Substantial Evidence Supports the Trial Court's Decision

Colton contends the trial court erred in concluding Defendants properly rescinded the Agreements based on a mistake regarding the value of the shares because Defendants knew the shares were worth more than Colton's offer. According to Colton, Pekarcik conceded he knew Colton's offer constituted a "discount" off the shares' actual value and also that Cadden & Fuller told him the shares may be worth four times the amount of Colton's offer *before* he accepted it. We do not find the contention persuasive. Substantial evidence supports the trial court's finding Defendants mistakenly valued their shares, and Colton misconstrues and overstates the evidence he cites to show there was no mistake.

The trial court concluded Defendants mistakenly valued their shares based on the following findings: (1) Defendants accepted Colton's offer because "they believed that Colton had set the purchase price based upon a reasonable valuation of the assets of [the] Fund"; (2) the amount Colton offered for Defendants' shares was not based on a reasonable valuation of the Provider Fund or its assets; (3) Defendants relied on Colton, as the Provider Fund's general manager, to provide accurate information about the Provider Fund's operations and value; (4) Colton breached his fiduciary duty to disclose all material information about the value of Defendants' shares;[4] (5) Colton told

4 Colton contends he did not breach any fiduciary duty to refrain from self-dealing by purchasing Defendants' shares for his own account because the Provider Fund's governing documents explicitly authorized the Colton Company to repurchase partnership shares from limited partners for its own account, and the Colton Company assigned that repurchase right to Colton. This contention fails because the breach of fiduciary duty the trial court found was not Colton's purchase of the shares from Defendants, but rather his failure to disclose material information about the purchase to Defendants. Nothing in the Provider Fund's governing documents extinguished either

Defendants his offer was fair and reflected the value of their shares; and (6) the offer "was, at most, 48% of the actual value of [Defendants'] limited partnership shares in [the] Fund."

Substantial evidence supports each of these findings. The Colton Company's chief financial officer testified the Colton Company was the Provider Fund's general manager and assigned its repurchase rights under the Provider Fund's governing documents to Colton, Colton was the Colton Company's sole owner, and the Colton Company made the offer to the Defendants in Colton's name. Although they were experienced commercial real estate brokers, Defendants testified they relied on the managers of the many properties in which they invested to provide accurate information because the managers were the most knowledgeable persons about the properties they managed. Pekarcik testified he asked Colton if the offer was fair, and Colton responded, "it was pretty good, based on today's market." Similarly, Hefner testified Colton said he would not increase his offer because "that was the value of [Hefner's] share." In his testimony, Colton conceded he did not base his offer on a valuation of the Provider Fund or its properties, but instead merely selected an arbitrary number. Colton also conceded he knew the shares were worth more than he offered. Defendants' expert, Lars Platt, appraised the Provider Fund's properties well above Colton's offer, and the trial court found his testimony "very credible." Finally, Defendants presented evidence concerning "the percentage ownership of [the] Fund in each building, the cash reserves associated with each building, the deeds of trust against each building, and other relevant detail from which the Court could evaluate the value of the interests of the Defendants in [the] Fund."

Colton's or the Colton Company's fiduciary duty to disclose all material information to Defendants.

To overcome this evidence and the trial court's findings, Colton quotes Pekarcik's testimony acknowledging Colton's offer represented a "discount" from the shares' actual value, but Colton fails to fully and accurately quote Pekarcik's testimony. Pekarcik testified he thought Colton's offer represented a "little discount" or a "slight discount" of 10 to 20 percent, which he considered to be common when investors sell limited partnership shares for which no public market exists. Colton also fails to acknowledge Pekarcik further testified he would not have sold his shares if the discount from the actual value was significantly more than the 10 to 20 percent discount he anticipated. As stated above, the trial court found Colton's offer was, at most, 48 percent of the shares' actual value, representing a discount of at least 52 percent. Accordingly, Pekarcik's testimony about a "discount" fails to establish Defendants were not mistaken about the value of their shares when they accepted Colton's offer.[5]

To establish the purported absence of a mistake, Colton also cites Pekarcik's testimony regarding the timing of his meetings with Roudanez to show Cadden & Fuller told Pekarcik the shares may be worth four times Colton's offer *before* Defendants accepted it. Colton cites testimony in which Pekarcik stated Cadden & Fuller gave him its valuation of the shares before he accepted Colton's offer, but Colton ignores Pekarcik's answers to the follow up questions from Colton's counsel in which Pekarcik clarified his conversation with Roudanez and Cadden & Fuller about the shares' value occurred *after* he accepted Colton's offer. Moreover, on later questioning by his own counsel, Pekarcik further clarified he had two conversations with Roudanez—one before he accepted Colton's offer, during which Roudanez merely stated he thought the offer

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[5] Colton also argues his offer "expressly state[s] that the purchase price reflects a 'discount.'" (Bold omitted) Not so. The offer nowhere includes the word discount or in any way suggests the amount of the offer is less than the shares' actual value. To support this contention, Colton quotes an entirely different repurchase offer the Colton Company made five years earlier.

was low, and a second conversation after he accepted the offer, when Roudanez again stated he thought the offer was low and also suggested Pekarcik speak with Cadden & Fuller about the shares' value. Accordingly, the evidence shows Pekarcik accepted Colton's offer before he learned about the Cadden & Fuller valuation that led him to rescind the Agreements.

3. Defendants Neither Waived Nor Released Their Claim They Were Mistaken and Mislead About the Value of Their Shares.

Colton next contends Defendants' claim they were mistaken or mislead about the value of their shares fails as a matter of law because they waived and released that claim. According to Colton, Defendants waived all defenses based on the value of the Provider Fund's shares because Defendants accepted Colton's payment of the purchase price. To support this contention, Colton cites several cases he characterizes as "[v]enerable authority" establishing the rule that acceptance of the agreed-upon consideration waives all defenses based on the adequacy of the consideration. (See *Peters v. Binnard* (1933) 219 Cal. 141, 150; *Nicholson v. Tarpey* (1886) 70 Cal. 608, 609; *J. J. Howell & Associates v. Antonini* (1954) 124 Cal.App.2d 388, 391; *Westwood Temple v. Emanuel Center* (1950) 98 Cal.App.2d 755, 759; *Hercules Glue Co. v. Littooy* (1938) 25 Cal.App.2d 182, 187; *Meridian Oil Co. v. Dunham* (1907) 5 Cal.App. 367, 369.) These cases do not apply here.

Adequate consideration is not a requirement to enforce a contract at law (1 Witkin, Summary of Cal. Law (10th ed. 2005) Contracts, § 205, p. 240), but it is an essential element of an equitable claim for specific performance (5 Witkin, Cal. Procedure (5th ed. 2008) Pleading, § 785, pp. 203-204). A challenge to the adequacy of consideration requires a court to determine whether the agreed-upon consideration is fair and reasonable under the circumstances. (*Meyer v. Benko* (1976) 55 Cal.App.3d 937, 945.) The cases Colton cites state the rule a defendant in a specific performance action waives all challenges to the adequacy of the agreed-upon consideration by accepting and retaining the consideration. Given the equitable nature of a specific performance claim, it would be unfair for a party to challenge the reasonableness of the agreed-upon consideration when the party accepted and kept the consideration. None of the cases Colton cites, however, involves a party who returned the consideration as part of his or her rescission of the underlying contract.

Here, Defendants returned the consideration they received, and therefore nothing in the foregoing cases would prevent Defendants from challenging the adequacy of the consideration. More importantly, they based their rescission on their mistaken belief about the value of their shares, not on the inadequacy of the consideration. Defendants' claim goes to the very existence of a contract and asks the court to determine whether they validly consented to the Agreements, not whether the transaction was fair and reasonable under the circumstances. Colton fails to cite any authority that equates a mistake of fact as to the value of a contract's subject matter, and the adequacy of the consideration. These are distinct legal concepts. If we accepted Colton's argument, a party would be unable to rescind a contract based upon a mistake, or even fraud, that he or she discovered after accepting payment under the contract. That is not the law. (See *Engle v. Farrell* (1946) 75 Cal.App.2d 612, 617-618 [when proper grounds exist, contracts may be rescinded even if they have been fully performed]; 1 Witkin, Summary of Cal. Law (10th ed. 2005) Contracts, § 933, p. 1028.)

Colton also contends Defendants released their right to rescind because the Agreements included a general release freeing Colton from all claims "in any way connected with the investment in the Fund." Not so. As explained above, rescission retroactively terminates a contract and restores the parties to their former positions. (*Sharabianlou*, *supra*, 181 Cal.App.4th at p. 1145; *Nmsbpcsldhb*, *supra*, 152 Cal.App.4th at p. 959; § 1688.) Accordingly, when Defendants rescinded the Agreements, they also rescinded the releases. A contracting party's statutory right to rescind a contract based on mistake or fraud would be meaningless if a general release applied.

III

DISPOSITION

The judgment is affirmed. Defendants shall recover their costs on appeal.

ARONSON, ACTING P. J.

WE CONCUR:

FYBEL, J.

IKOLA, J.