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SUPREME COURT OF ARIZONA

JAMES C. SELL, Trustee of the Participating Trust established under Debtors' First Amended Joint Plan of Reorganization dated 7-7-06 in U.S. Bankruptcy Case No. 05-27993-PHX-GBN, on behalf of the Trust's Participating Investors,

Petitioner,

v.

THE HONORABLE J. RICHARD GAMA, Judge of the SUPERIOR COURT OF ARIZONA, in and for the County of MARICOPA,

Respondent Judge,

RUSSELL L. SEWELL and ANN SEWELL, husband and wife; et al.,

Real Parties in Interest, Respondents.

Arizona Supreme Court
No. CV-12-0211-PR

Court of Appeals Division One
No. 1 CA-SA 12-0105

Maricopa County Superior Court
No. CV2007-005734

RESPONDENTS' RESPONSE TO AMICUS BRIEFS OF ARIZONA CORPORATION COMMISSION AND MORTGAGES LTD. INVESTORS

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INTRODUCTION

The amicus brief of the Arizona Corporation Commission ("**Commission**") and amicus brief of Mortgages Ltd. Investors (the "**MLI**") confirm the Court should overrule *State v. Superior Court* ("***Davis***"), 123 Ariz. 324, 599 P.2d 777 (1979), *partially overruled by State v. Gunnison*, 127 Ariz. 110, 618 P.2d 604 (1980). Consistent with *Davis*, the Commission candidly (and correctly) acknowledges (at 6) that "[t]he Act does not expressly provide for a cause of action against a secondary actor for aiding and abetting the primary violation of the Act by another person." The Commission then proceeds to argue (at 6) why the absence of any express cause of action "is not dispositive of . . . whether an implied cause of action exists." But the Commission's reasons for why "an implied cause of action" nevertheless exists cannot escape the Legislature's explicit declaration that "[n]othing in this act creates or ratifies any implied private right of action . . . ." (Respondents' Appendix to Supplemental Brief ("**App.**") Tab 3 (Ariz. Legis. Serv. Ch. 197 (S.B. 1383) ("**1996 Amendments**") § 11(B).) Simply put, the theory that the Court may write into the ASA "any implied right of action" is foreclosed by the ASA itself. *Cf. Hayes v. Cont'l Ins. Co.*, 178 Ariz. 264, 273, 872 P.2d 668, 677 (1994) ("It is, after all, easy enough for the legislature to state that a certain statute does or does not create, preempt, or abrogate a private right of action.").

The MLI, in contrast, make no effort to defend the implied cause of action recognized in *Davis*. Instead, they argue that the express provisions of A.R.S. §§ 44-1991 and 44-2003—with words like "directly or indirectly" and "participated in or induced"—encompass what historically has been thought of as aiding and abetting liability. In other words, the MLI ask the Court to simply enforce the express terms of A.R.S. §§ 44-1991 and 44-2003, which they claim encompasses liability that could also be characterized as aiding and abetting liability. Unfortunately for the MLI, their argument for liability under the express terms of these statutes ignores the procedural posture of this case. In addition to asserting an aiding and abetting claim (Count Two), Petitioner also asserted a claim predicated on Lewis and Roca's express liability under A.R.S. § 44-1991 (Count One). In connection with Count One, the superior court considered the express language of both §§ 44-1991 and 44-2003, and dismissed Count One "[b]ecause Lewis and Roca did not 'participate in or induce' the unlawful sale or purchase of securities as is required for liability under A.R.S. § 44-2003." (Respondents' Supplemental Appendix "("**Supp. App.**") Tab 12 (April 17, 2008 ruling) at 20-21.) Accordingly, while the MLI's argument may have some bearing on whether the Superior Court properly dismissed Count One, it has no bearing on whether the Superior Court correctly dismissed Count Two. Moreover, the MLI's

contention that the ASA's statutory language can be stretched into the aiding and abetting liability recognized in *Davis* fails on its merits.[1]

ARGUMENT

I. The MLI's Argument Is Relevant Only to the Superior Court's Dismissal of Count One, and in Any Event Lacks Merit Because the Aiding and Abetting Liability Recognized in *Davis* Is Far Broader Than Anything Recognized in the ASA

In their amicus brief, the MLI make no effort to defend the implied right of action recognized in *Davis*. They instead contend that defendants like Lewis and Roca may be held liable for what they describe broadly as "aiding and abetting" under the express provisions of A.R.S. §§ 44-1991 and 44-2003. However, whether Lewis and Roca may be held liable under the express language of these statutes was resolved in a different order than the one before the Court. Accordingly, the amicus brief is irrelevant to the issue presented. Moreover, the actual text of the ASA nowhere includes aiding and abetting liability. The MLI's contention to the contrary rests on taking a few select words from the ASA out of context, and ignoring that in context the actual language is far narrower than the aiding and abetting claim recognized in *Davis*.

[1] This Response does not address the amicus brief filed by Public Justice, P.C. Any response to that brief will be timely filed in a separate response.

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A. The MLI's Amicus Brief Is Relevant Only to an Order Not Before the Court

It is axiomatic that in any appeal, including a special action, the appellate court's review "is limited to the rulings specified in the notice of appeal." *Ruesga v. Kindred Nursing Centers W., L.L.C.*, 215 Ariz. 589, 599 ¶ 38, 161 P.3d 1253, 1263 (App. 2007) (citing cases and noting rule applies to special actions). Indeed, it would be particularly inappropriate in the context of a special action for an *amicus curiae* to collaterally attack an order not even before the Court. That is, however, what the MLI's amicus brief seeks to do.

Although ignored by the MLI, the aiding and abetting cause of action *Davis* recognized was ***not*** a claim based on the express language of A.R.S. §§ 44-1991 and 44-2003. In *Davis*, as in this case, the Complaint included counts for both statutory violations (Count I) and aiding and abetting those statutory violations (Count II). *Davis* first considered Count I, and held that it stated a claim because of the "induce[ment]" theory alleged: "***The theory of Count I*** is clearly that the misrepresentations and omissions . . . ***induced the plaintiffs*** to become depositors in the Associations. As such, a cause of action, ***pursuant to s 44-1991***, is properly stated against these defendants. ***A.R.S. s 44-2003***." *Davis*, 123 Ariz. at 331, 599 P.2d at 784 (emphasis added).

After resolving Count I, *Davis* considered Count II, explaining that "[t]here are three prerequisites to a finding that one has aided and abetted a securities law

violation," including "a necessary contribution to the underlying scheme by the person charged." *Id.* Because the Court had already considered the defendants' liability under the express provisions of §§ 44-1991 and 44-2003, Count II ***necessarily*** involved something other than liability under those express provisions.

In this case too Plaintiffs separately alleged claims based on the ASA's express statutory provisions (Count One), as well as a claim for aiding and abetting violations of those statutes (Count Two). (*See* Supp. App. Tab 11 (Second Amended Complaint) at 40-41 ¶¶ 202-215; App. Tab 1 (Third Amended Complaint) at 54-56 ¶¶ 203-216.) Indeed, in Count Two, Plaintiff referenced A.R.S. § 44-2003(A), ***not*** as the basis of liability for aiding and abetting itself, but rather as the basis for holding defendants "jointly and severally liable for aiding and abetting . . ." (Supp. App. Tab 11 (Second Amended Complaint) at 41 ¶ 215; App. Tab 1 (Third Amended Complaint) at 56 ¶ 216.) Therefore, the claim at issue in this case (as in *Davis*) is not one predicated on any violation of § 44-1991 or § 44-2003 ***itself***—the claim the MLI ask the Court to recognize. Rather, it is the separate claim for aiding and abetting alleged violations of § 44-1991 ***by others***.

Moreover, and decisively, the superior court ***dismissed*** Plaintiff's express claims under A.R.S. §§ 44-1991 and 44-2003 in a ruling not presently before the Court. (Supp. App. Tab 12 (April 17, 2008 ruling) at 20-21.) In that ruling, the Superior Court (Judge Barton) found that Lewis and Roca had no liability under

§ 44-1991, and ultimately dismissed Count One "[b]ecause Lewis and Roca did not 'participate in or induce' the unlawful sale or purchase of securities as is required for liability under A.R.S. § 44-2003." (*Id.* at 20-21.) The decision was reaffirmed when the Superior Court (Judge Rayes) denied Plaintiff's motion for reconsideration. (Supp. App. Tab 14 (November 12, 2008 ruling) at 2.) Therefore, the entirety of MLI's argument—that § 44-2003's "participate in or induced" language exposes Lewis and Roca to liability for aiding and abetting—is foreclosed by an Order not before the Court. Any argument that the Superior Court erroneously dismissed Count One because the express language in §§ 44-1991 and 44-2003 is as broad as the MLI claim must be left for another day.[2]

B. The MLI's Contention That the Express Provisions of §§ 44-1991 and 44-2003 Include Aiding and Abetting Liability Is Also Meritless

On the merits, the Court should reject the MLI's request to import on a wholesale basis the (allegedly) modern separate and distinct concept of aiding and

[2] Plaintiff included in his Third Amended Complaint all claims that had been dismissed from the Second Amended Complaint by the trial court's April 17, 2008 ruling. In opposing a motion to dismiss filed by the Glauser and Lewis and Roca Defendants, Plaintiff stated that he had re-alleged the dismissed claims only to preserve the claims for appeal; he then went on to ask the trial court to reconsider its decision to dismiss Counts One and Two. (Supp. App. Tab 13 (Response to Glauser and Lewis and Roca Defendants' Motion to Dismiss Various Counts From Third Amended Complaint and Motion for Reconsideration of 4-17-08 Ruling re Dismissal of Counts 1 and 2) at 2-14.) On November 17, 2008, the trial court (Judge Rayes) denied Plaintiff's motion as to Count One but granted it as to Count Two. (Supp. App. Tab 14 (November 12, 2008 ruling).) As noted elsewhere, the trial court (Judge Gama) subsequently entered summary judgment on Count Two.

abetting liability into the ASA. With respect to § 44-1991, the MLI characterize its "directly or indirectly" language as uniquely broad, but § 44-1991's federal counterpart, 15 U.S.C. § 77q, includes the identical "directly or indirectly" language. Section 44-1991 is, as this Court has repeatedly emphasized, "almost identical" to 15 U.S.C. § 77q. *Davis*, 123 Ariz. 331, 599 P.2d at 784. To construe it differently would thus require the Court to disregard the Legislature's directive to construe our securities statutes in accord with "substantially similar provisions in the federal securities laws of the United States." (App. Tab 3 (1996 Amendments) § 11(C).)

Moreover, the MLI's contention that § 44-1991 can itself provide a basis for aiding and abetting liability takes language out of context and ignores the ASA's structure. Section 44-1991 defines the fraudulent conduct prohibited, and applies "in connection with a transaction or transactions within or from this state involving an offer to sell or buy securities, or a sale or purchase of securities . . . ." A.R.S. § 44-1991(A). It is only in connection with such transactions that one may not "directly or indirectly" engage in a list of prohibited acts and omissions. *Id.* Sections 44-2001 and 44-2202 then set forth private causes of action for a § 44-1991 violation, providing remedies for rescission and damages, respectively. *See Grand v. Nacchio*, 225 Ariz. 171, 174 ¶ 12, 236 P.3d 398, 401 (2010) ("the ASA

explicitly provides for a private cause of action for violations of § 44–1991 in § 44–2001(A)"); A.R.S. § 44-2002.

In this case and others, aiding and abetting claims are asserted for allegedly providing substantial assistance to others who "directly or indirectly" engaged in securities fraud. For example, and as explained above, the claim in this case is one for aiding and abetting violations of § 44-1991 ***itself***. Consequently, whatever the reach of § 44-1991's language, the very concept of an aiding and abetting claim involves whether one may ***also*** be held liable for aiding and abetting ***another's*** violation of § 44-1991. Invoking § 44-1991's "indirectly" language cannot, as a matter of law or logic, answer that question. *Cf. Central Bank of Denver N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 176 (1994) (noting that the argument that "directly or indirectly" language creates aiding and abetting liability suffers from a "basic flaw" because "aiding and abetting liability extends beyond persons who engage, even indirectly, in a proscribed activity; aiding and abetting liability reaches persons who do not engage in the proscribed activities at all, but who give a degree of aid to those who do.").

The MLI's § 44-2003 argument fares no better. Section 44-2003 specifies the parties against whom the private causes of action defined in the ASA may be brought: "any person, including any dealer, salesman or agent, who made, participated in or induced the unlawful sale or purchase . . ." A.R.S. § 44–

2003(A); *cf. Grand*, 225 Ariz. at 174 ¶ 13, 236 P.3d at 401 ("The private right of action recognized in § 44–2001(A) may be pursued against 'any person, including any dealer, salesman or agent, who made, participated in or induced the unlawful sale or purchase.'") (quoting A.R.S. § 44–2003(A)). Structurally, "§ 44-2003 is a ***limitation*** on the private civil remedy, not a stand-alone basis for liability." *Grand*, 222 Ariz. at 504, ¶ 18, 217 P.3d at 1209 (holding that § 44-2003 limited a claim for secondary "control" liability under § 44-1999) (emphasis added). Thus, by its plain language and structure § 44-2003 does not subject one person to liability on the basis of ***another person's violation of § 44-1991***. It also does not extend liability to anyone providing "a necessary contribution to the underlying scheme," *Davis*, 123 Ariz. at 331, 599 P.2d at 784, or to "any person who knowingly provides substantial assistance to another person" who violates that act. (App. Tab 4 (S.B. 1383 – Initial Drafts) at 11 § 10.) Simply put, it is not the aiding and abetting claim recognized in *Davis*.

Yet the Legislature knew full well how to create such aiding and abetting liability long before the 1951 Act. In 1919, for example, the Legislature gave ***the Commission*** the power to pursue claims against any person who "***aids or abets [another] in the violation of any provision of this act*** . . . ." *Haddad v. State*, 23 Ariz. 105, 109-110, 201 P. 847, 849 (1921) (quoting Section 8 of 1919 act relating to transportation) (emphasis added). Therefore, the MLI's contention (at 8) that

the Legislature would not have used similar "aid or abets" language had it intended to give the Commission (or private parties) similar power under the ASA is flat wrong.

In addition to the structural flaws with the MLI's § 44-2003 argument, the persons against whom § 44-2003 actually authorizes actions is at best a ***subset*** of those who would fall within the reach of any aiding and abetting claim recognized. The definitions of "participated in or induced" set forth in *Standard Chartered PLC v. Price Waterhouse*, 190 Ariz. 6, 21-22, 945 P.2d 317, 332-33 (App. 1997), and approved by this Court in *Grand*, 225 Ariz. at 175 ¶ 21, 236 P.3d at 402, confirm this is so. As those cases explained, "participate" means "'to take part in something (an enterprise or activity) . . . in common with others,' or 'to have a share or part in something.'" *Grand*, 225 Ariz. at 175 ¶ 21, 236 P.3d at 402 (quoting *Standard Chartered*, 190 Ariz. at 21, 945 P.2d at 332). "[I]nduce" is synonymous with "persuade" and "prevail." *Standard Chartered*, 190 Ariz. 6, 21-22, 332-33. The actual words in § 44-2003 are thus far narrower than the MLI contend. And, nothing suggests the ordinary meaning of these words changed in recent years.

Moreover, the MLI repeatedly ignore that the requisite participation and inducement must be in connection with "the sale," *Grand*, 225 Ariz. at 175, ¶ 22, 236 P.3d at 402, not in connection with some ***other*** aspect of the alleged fraudulent

scheme. (*Cf.* App. Tab 4 at 11 § 10 (extending liability to "any person who knowingly provides substantial assistance to another person ***in violation of any provision*** of this chapter.") (emphasis added).) And that difference matters. Assuming arguendo that one could allege that sending a letter to the Commission could under certain circumstances qualify as some form of aiding and abetting, no one could credibly contend that by sending the letter volunteering their clients' cooperation Lewis and Roca took part in or induced any "unlawful sale or purchase." A.R.S. § 44–2003(A).

At bottom, then, the MLI's argument reduces to the claim that ***some*** of the words found in the ASA (like "participate") match some of the words historically used to describe joint and several liability under the common law. (*See*, *e.g.*, MLI Brief at 5 ("At common law, the prevailing standard for joint-and-several liability in fraud cases was *knowing participation* in the fraud.").) But the fact that "participating" ***when used in conjunction with different words not found in the ASA*** may have been used to describe some forms of common law liability that could also be characterized as aiding and abetting has no bearing on the ASA.[3]

[3] The MLI's request that the Court declare that the express provisions of §§ 44-1991 and 44-2003 are coextensive with the separate and distinct claim pursued by Sell—a claim they contend (at 7) did not "attract[] attention" until ***after*** the 1951 Act—is also jurisprudentially problematic. If liability under the ASA is limited to the Act's express language, as it should be, courts should construe the meaning of the language and whether it proscribes particular conduct in the context of particular disputes. To import on a wholesale basis all of the jurisprudence

C. In Their Motion to Leave, the MLI Mischaracterize Other States' Law on Aiding and Abetting

In their motion for leave, the MLI contend that "aiding and abetting securities violations [is the law] . . . in nearly every other state" (MLI's Motion for Leave to File Amicus Brief at 1 n. 2), suggesting that every state has adopted aiding and abetting liability similar to that imposed in *Davis*. This is incorrect. While it is true that most states impose some form of secondary liability, most states do so through statute, and not through a judicially-created remedy as in Arizona. Jennifer J. Johnson, *Secondary Liability for Securities Fraud: Gatekeepers in State Court*, 36 Del. J. Corp. L. 463, 466 (2011) (explaining that "there is a robust tradition of aiding and abetting liability ***in most state blue sky statutes***" (emphasis added)). Most of these state statutes "are modeled generally on the 1956 Uniform Securities Act, as amended in 1958, or the 2002 USA," *id.* at 475 (emphasis added), neither of which Arizona has adopted.[4] These states impose

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accompanying aiding and abetting claims when the Legislature (1) knew full well how to create aiding and abetting liability with plain language yet chose not to do so, (2) considered and declined adopting a narrower claim for aiding and abetting liability in 1996, and (3) has now directed the Court to construe our provisions in harmony to their federal counterpart would involve the worst kind of judicial activism.

[4] *See Ariz. Corp. Comm'n v. Media Prods., Inc.*, 158 Ariz. 463, 466, 763 P.2d 527, 530 (App. 1988) (explaining that a section of Uniform Securities Act corresponding to the ASA was "not analogous"); Richard G. Himelrick, *Turning 60: Bud Jacobson, Earl Hastings, and Arizona's 1951 Securities Act*, ARIZ. ATT'Y, December 2011 at 22, 24 (explaining that the ASA was adopted before the Uniform Securities Act was completed).

"express liability for secondary actors" by statute, rather than imposing judicially implied secondary liability. *Id.* at 480, n.89 (citing only Arizona as an example of a state that has judicially created an implied aiding and abetting liability). Such secondary liability statutes in these states generally create specific categories of secondary liability, rather than impose blanket aiding and abetting liability. *See id.* at 480-84. These other states' statutes, which mirror sections of the ASA that are not at issue in this case, impose forms of liability such as control person liability, *see id.* at 480-81, *compare* Unif. Sec. Act § 509(g)(1) (2002) and Unif. Sec Act § 410(c) (amended 1958) *with* A.R.S. § 44-1999; brokers-dealers and issuer-employees liability, *see* Johnson, *supra*, at 481, *compare* Unif. Sec. Act §§ 509(g)(3)-(4) (2002), Unif. Sec. Act § 410(b) (amended 1958), *with* A.R.S. § 44-2003(A); and liability to other persons who "materially aid" in the transaction, *see* Johnson, *supra*, at 482-84; *compare* Unif. Sec. Act §§ 509(g)(3)-(4) (2002), Unif. Sec. Act § 410(c) (amended 1958) *with* A.R.S. § 44-2003(A).

II. The Commission's Argument That the Court Should Find an Implied Right of Action for Aiding and Abetting Ignores the Legislature's Declaration That No Implied Causes of Action Exist, and That the Differences Between the ASA and Federal Act Weigh Against Finding Such an Implied Claim

In contrast to the MLI, the Commission correctly recognizes that the ASA does not include any private right of action for aiding and abetting. The Commission's contention that the Court should nevertheless find that the ASA

includes an ***implied*** cause of action ignores the Legislature's directive to the contrary. Moreover, the differences the Commission notes between § 44-1991 and its federal counterpart weigh against finding any implied aiding and abetting claim.

In the 1996 Amendments, the Legislature clarified that "[n]othing in this act creates or ratifies any implied right of action . . . ." (App. Tab 3 (1996 Amendments) at 32 § 11(B).) At the same time, the Legislature directed the courts to construe our securities statutes in accord with "substantially similar provisions in the federal securities laws of the United States." (*Id.* at 12 § 11(C).) As explained in Lewis and Roca's Supplemental Brief, these directives leave room for but one conclusion: the time has come to overrule *Davis*.

To avoid the obvious implication of the 1996 Amendments, the Commission is forced to contend (at 3, 12) that the Legislature did not require "Arizona courts to *always* follow federal case law," and that "[s]ignificant differences between the Act and the federal Acts warrant a different conclusion than that reached by the Court in *Central Bank*." But the "differences" the Commission notes actually weigh in favor of overruling *Davis*.

The Commission notes (at 12-13) that, in contrast to its federal counterpart, § 44-1991 does not require "proof of reliance" or "scienter." But the fact that the ASA requires a ***lesser*** burden of proof to impose liability weighs in favor of not extending the scope of liability further without an explicit textual basis to do so. In

other words, precisely because the ASA lacks some of the protections afforded defendants under the Federal Act, it would be imprudent for the Court to further expand liability by way of judicial implication.

The Commission argues (at 13) that, in contrast to its federal counterpart, the ASA expressly provides for private causes of action for § 44-1991 violations, and broadly extends "civil liability to others in addition to the actual seller." But the fact that the Legislature has enumerated specific and broad private causes of action ***other than aiding and abetting*** strongly weighs against the Court writing into the Act a cause of action the Legislature chose to omit.

Lastly, the Commission (at 14) notes as a difference the Legislature's directive that the ASA is "not intended to limit any common law right of any person for acts involved in the sale of securities." But as the Lewis and Roca Defendants explained in their Supplemental Brief (at 14-15), that provision clarifies that the ASA does not limit any ***existing*** statutory or common law claims, like aiding and abetting common law fraud. Such a limiting provision cannot be construed to ***create*** a statutory claim for aiding and abetting a statutory violation of the ASA. Apparently, the Commission has no response to that argument.

In addition to the "differences" it points to, the Commission argues (at 14-18) that the Legislature chose not to eliminate aiding and abetting liability in connection with the 1996 Act, and that aiding and abetting claims remain an

important part of the Commission's enforcement efforts. As a threshold issue, whether the Commission may bring aiding and abetting claims is not an issue before the Court. However, the actual legislative history undercuts the Commission's position. As explained in the Supplemental Brief (at 13-14), the Legislature considered giving ***only*** the Commission the power to bring aiding and abetting claims, but ultimately concluded to not even go that far. The Commission says nothing about this fact, but the implication is obvious: to the extent the Commission would like the ASA to include even broader remedies than it already does, it should take those concerns to the Legislature. The Court should not, by way of judicial implication, create a cause of action far broader than one explicitly rejected by the Legislature.

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CONCLUSION

The Court should reject the arguments advanced by the MLI and the Commission because none show why the Court should not construe § 44-1991 in accordance with *Central Bank*.

RESPECTFULLY SUBMITTED this 31st day of October, 2012.

OSBORN MALEDON, P.A.

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