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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' SUPPLEMENTAL BRIEF

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INTRODUCTION

The Complaint in this securities fraud action swept broadly, naming over forty defendants (and various spouses). Lewis and Roca, Keith Beauchamp, and Juliet Lim are defendants in this action because (1) Lewis and Roca sent a letter on behalf of its clients conveying their "desire to fully cooperate with the [Arizona Corporation] Commission's investigation," and (2) drafted a standard description concerning the status of a governmental investigation for review by another law firm that had been retained to draft a private placement memorandum. (*See* Third Amended Complaint ("**Complaint**") App. 1 ¶¶ 13, 115, 150, 151, 212, App. 2 Complaint Ex. G.)[1] Under Petitioner Sell's construction of the Arizona Securities Act, A.R.S. §§ 44-1801 to 2126 (the "**ASA**")—predicated entirely on *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)—such ordinary course representation is enough to expose law firms who represent those being investigated by the Arizona Corporation Commission (the "**Commission**") to massive liability.

Since *Davis*, however, the Legislature has told our courts to construe our securities statutes in accord with "substantially similar provisions in the federal

[1] The Third Amended Complaint (without exhibits), Exhibit G to the Complaint, and pertinent statutes are included in Lewis and Roca et al.'s Separate Appendix to Supplemental Brief ("**App.**").

securities laws of the United States." 1996 Ariz. Legis. Serv. Ch. 197, § 11(C) (S.B. 1383) (App. 3). Since *Davis*, this Court has recognized the importance of "consistency in the application of the law" governing securities regulation and construed our parallel statutes "to be harmonious with the United States Supreme Court"—even when that requires overruling prior precedent. *Gunnison*, 127 Ariz. at 112, 618 P.2d at 606. Since *Davis*, the United State Supreme Court has made clear that the federal counterpart to A.R.S. § 44-1991 does not include a private right of action for aiding and abetting securities fraud. *See Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 167 (1994). The Court should now overrule *Davis*.

PERTINENT BACKGROUND*

In April 2002, Mathon Fund I began soliciting short-term loans from investors, the proceeds of which were used to make short-term loans to borrowers. (Complaint ¶¶ 73, 77.) In June 2003, Round Valley Capital, LLC, an entity affiliated with Mathon Fund I, retained the Philadelphia law firm Wolf, Block, Schorr and Solis-Cohen LLP ("**WolfBlock**") to provide advice on "licensing and structural issues related to Mathon Fund I." (*Id.* ¶¶ 65, 97.) In a July 2, 2003 memorandum, WolfBlock opined that Mathon Fund I's bridge loan program was exempt from federal securities registration requirements under the "bona fide note

* For the Court's convenience, the cases and statutes cited in this brief include hyperlinks to Westlaw.

exemption," but recommended that a new entity solicit investments through a private placement memorandum ("**PPM**"). (*Id.* ¶ 102 & Ex. G.)

Round Valley Capital followed WolfBlock's advice. In September and October 2003, WolfBlock prepared drafts of a PPM for the new entity, which was to be known as Mathon Fund, LLC. (Complaint ¶¶ 141.) On November 21, 2003, Mathon Fund, LLC was formed, (*id.* ¶ 5), and the PPM was issued on November 25, 2003. (*Id.* ¶ 130 & Ex. J.) Investments in Mathon Fund were solicited between November 2003 and April 2005, at which time the Commission filed a receivership action. (*Id.* ¶73.)

The Commission began an investigation of Mathon Fund I in mid-2003 which was later expanded to include Mathon Fund. (*Id.* ¶ 106.)[2] In early October 2003, Round Valley Capital and its affiliates retained Lewis and Roca in connection with that investigation. (*Id.* ¶¶ 63, 107.) During October 2003, Lewis and Roca attorneys represented three individuals during Examinations Under Oath conducted by the Commission. (*Id.* ¶ 107.)

Following these Examinations, Lewis and Roca attorney Keith Beauchamp sent a letter to Commission attorney John Proper which described "the steps that

[2] The ACC has the statutory authority to conduct investigations to determine whether a violation of the Arizona Securities Act has occurred (A.R.S. § 44-1822); issue subpoenas requiring the giving of testimony and the production of records (A.R.S. § 44-1823); issue cease and desist orders (A.R.S. § 44-2032); seek the appointment of a conservator or receiver (A.R.S. § 44-2011); seek injunctive relief (A.R.S. § 44-2013); and refer matters for criminal prosecution (A.R.S. § 44-2032).

Round Valley Capital, LLC, Mathon Management, LLC, and Mathon Fund I, LLC have voluntarily taken while the current investigation is in progress." (*Id.* ¶ 115 & Ex. G.) The October 28, 2003 letter closed by conveying Lewis and Roca's clients' "desire to fully cooperate with the Commission's investigation . . . . ." (*Id.* Ex. G at 2.) The Third Amended Complaint alleges that Lewis and Roca really sent the letter "to forestall aggressive enforcement action by" the Commission. (*Id.* ¶ 115.)

On November 24, 2003, at the request of Francomano and Karpook (the law firm that had taken over from WolfBlock the drafting of the PPM), Lewis and Roca drafted a paragraph describing the status of the Commission investigation, which Francomano and Karpook included in the November 25, 2003 PPM for Mathon Fund. (*Id.* ¶ 150, 151 & Ex. K.) Lewis and Roca's representation of Round Valley Capital and related entities ended after the Commission filed its receivership action in April 2005. (*Id.* ¶ 190.)

In 2007, Sell filed this action against Lewis and Roca and the other law firms and accountants who had represented any of the other defendants. The remaining professional defendants have now all settled. Sell continues to pursue a claim for negligent misrepresentation against Lewis and Roca, which is predicated on the description of the Commission investigation that Lewis and Roca gave to

Francomano and Karpook for its use in drafting the Mathon Fund PPM. (*Id.* ¶¶ 150-153, 237.)

ARGUMENT

The ASA contains no cause of action for aiding and abetting. This Court should not judicially write into the ASA that which the Legislature chose to omit.

I. The Foundation Upon Which This Court Decided Davis Is Gone

In light of *Davis*'s own rationale, this Court's subsequent precedent, and recent United State Supreme Court precedent, the Court should overrule *Davis.*

A. In Davis, the Court Followed Federal Precedent Concerning the Federal Counterpart to A.R.S. § 44-1991 to Find an Implied Cause of Action for Aiding and Abetting Securities Fraud Under the ASA

After the enactment of the Federal Securities Exchange Act (the "**Federal Act**"), several federal courts held that the Federal Act includes an implied private cause of action for aiding and abetting violations of the Act. *See Davis*, 123 Ariz. at 331-32, 599 P.2d at 784-85 (citing cases). In 1979, and within this context, this Court perfunctorily held that the ASA likewise recognizes aiding and abetting liability because (1) the Federal Securities Exchange Act recognizes such liability, and (2) the text of the pertinent Arizona statute "is almost identical" to the corresponding federal statute:

> A defendant who aids and abets another's violation respecting the use of manipulative or deceptive devices in the sale of stock, in violation of the Federal Securities Exchange Act, is liable as a principal. *Securities Exchange Commission v. Scott Taylor & Co.*, 183 F.Supp. 904 (S.D.N.Y. 1959). ***As we have stated, A.R.S. s 44-1991 is almost identical to the***

> ***provisions of s 77q of the 1933 Securities Act***. We, therefore, see no reason why one who aids and abets another in violating A.R.S. s 44-1991 should not also be held liable as a principal.

Id. at 784 (emphasis added).[3] In reaching this conclusion, the Court considered neither the ASA's actual language nor the Arizona Legislature's intent. Rather, the Court deferred to the federal courts' interpretation of the federal counterpart to § 44-1991.

B. In *State v. Gunnison*, the Supreme Court Partially Overruled *Davis* and Adopted the General Principle That This Court Will, Absent Good Reason to Do Otherwise, Interpret the ASA in Accord with Similar Provisions of the Federal Securities Act

A year after deciding *Davis*, the Court explicitly adopted a general policy of construing the ASA in accord with the United States Supreme Court's interpretation of the Federal Act's similar provisions: "[u]nless there is a good reason for deviating from the United States Supreme Court's interpretation, we will follow the reasoning of that court in interpreting sections of our statutes which are identical or similar to federal securities statutes." *Gunnison*, 127 Ariz. at 112-13, 618 P.2d at 606-07. As *Gunnison* recognized, "it is helpful, for consistency in the application of the law [governing securities regulation], to be harmonious with the United States Supreme Court." *Id.* at 112, 618 P.2d at 606.

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[3] Article 13 of the ASA, A.R.S. §§ 44-1991 to 44-2000 covers fraudulent practices under the ASA, with A.R.S. § 44-1991 defining "Fraud in the purchase or sale of securities." *See* A.R.S. § 44-1991. Article 14, A.R.S. §§ 44-2001 to 44-2005, sets forth the civil remedies for violations of Article 13, including A.R.S. § 44-1991.

In light of that guiding principle, this Court overruled one of its earlier decisions to ensure the continued consistency with the high Court's interpretation of § 44-1991's federal counterpart. Specifically, in *Greenfield v. Cheek*, 122 Ariz. 57, 593 P.2d 280 (1979), the Court approved Division One's interpretation of the requisite scienter requirement for a violation of A.R.S. § 44-1991(2), and "reaffirmed" that "position" in *Davis*. *Gunnison*, 127 Ariz. at 112, 618 P.2d at 606. In reaching this conclusion, our courts "relied upon the United States Supreme Court case of *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 96 S.Ct. 1375, 47 L.Ed.2d 668 (1976) which interpreted the federal counterpart of A.R.S. s 44-1991, 15 U.S.C. s 77q(a), s 17(a) of the 1933 Act." *Id.*

However, a subsequent United States Supreme Court case, *Aaron v. Securities & Exchange Commission*, 446 U.S. 680, 696 (1980), then held that scienter was ***not*** an element of the federal counterpart because the statute "is devoid of any suggestion whatsoever of a scienter requirement." *Gunnison*, 127 Ariz. at 113, 618 P.2d at 607 (quoting *Aaron*, 446 U.S. at 696). Noting that although "not bound by the interpretation placed by the United States Supreme Court on the federal statute," the Court adopted that court's more recent interpretation to ensure "consistency in the application of the law." *Id.* at 112, 618 P.2d at 606. The Court further overruled "[a]nything to the contrary" in *Davis* and *Greenfield v. Cheek*. *Id.* In other words, this Court revised its own prior

interpretation of A.R.S. § 44-1991 to remain consistent with the United States Supreme Court's more recent interpretation of our statute's federal counterpart. *Cf. Gunnison*, 127 Ariz. at 114, 618 P.2d at 608 (Holohan, V.C.J., concurring) (noting that "the majority of the court prefers, for sake of uniformity, to accept the federal position," and joining "the majority in holding that scienter is not required in civil cases brought for violation of subsection 2 of A.R.S. s 44-1991.").

C. In *Central Bank*, the United States Supreme Court Held That There Is No Private Cause of Action for Aiding and Abetting Securities Fraud Under the Federal Counterpart to A.R.S. § 44-1991

After *Gunnison* partially overruled *Davis* in light of *Aaron*, the United States Supreme Court also undermined the foundation for *Davis*'s conclusion that § 44-1991 includes a private right of action for aiding and abetting securities fraud. *See Central Bank*, 511 U.S. at 167. *Central Bank* explained that in contrast to other statutes creating aiding and abetting liability, the federal counterpart to § 44-1991 did not in fact have any language indicating that Congress intended to create such a private right of action. *Id.* at 176 (other statutes show "Congress knew how to impose aiding and abetting liability"). Accordingly, the Court reasoned, if "Congress intended to impose aiding and abetting liability," it presumably would have used words like "'aid' and 'abet' in the statutory text." *Id.* at 176-77. Given that Congress did "not include giving aid to a person who commits a manipulative or deceptive act" in the statute, the Court correctly recognized that it could not

interpret the statute as though it included the missing language. *Id.* at 177-78 ("We cannot amend the statute to create liability for acts that are not themselves manipulative or deceptive within the meaning of the statute."). In light of that holding, the foundation underlying *Davis* is gone.

II. Since *Davis* the Legislature Has Clarified That the Court Should Follow *Central Bank* in Its Interpretation of the ASA

Just as this Court revised its interpretation of the ASA's scienter requirement in light of more recent United States Supreme Court authority, it should now revise its interpretation of whether the ASA includes aiding and abetting liability in light of *Central Bank.* In sum, *Gunnison*, *Central Bank*, and the text and legislative history of the ASA all demonstrate the Court should now overrule *Davis*'s holding that "one who aids and abets another in violating A.R.S. s 44-1991" may "also be held liable as a principal." *Davis*, 123 Ariz. at 331, 599 P.2d at 784.

A. The Language of the ASA and the Legislature's Directives in the 1996 Amendments Confirm the Court Should Construe the ASA in Accord with *Central Bank*

In 1996, in the wake of *Central Bank* and following a general overhaul of the federal securities laws, *see* the Private Securities Litigation Reform Act of 1995, Pub. L. 104-67, 109 Stat. 737, the state legislature enacted the Private Securities Litigation Reform Act, 1996 Ariz. Legis. Serv. Ch. 197 (S.B. 1383) (the "**1996 Amendments**"). There are at least three aspects of this legislation which confirm the Court should construe § 44-1991 in accord with *Central Bank*.

First, the language of § 44-1991(A) tracks the language of both 15 U.S.C. § 77q and SEC Rule 10b-5 (17 C.F.R. 240.10b-5). *Cf. Davis*, 123 Ariz. at 331, 599 P.2d at 784 ("The provisions of A.R.S. s 44-1991 are almost identical to the antifraud provisions of the 1933 Securities Act."). Unsurprisingly, then, just as "the language of Section 10(b) does not in terms mention aiding and abetting," *Central Bank*, 511 U.S. at 175 (internal quotation marks and citation omitted), the ASA likewise lacks any language indicating the Legislature intended to include aiding and abetting liability. Yet the Arizona Legislature, like Congress, "knew how to impose aiding and abetting liability when it chose to do so." *Id.* at 176. *E.g.*, A.R.S. § 20-463 (violation to "[a]ssist" or "abet . . . another person" in committing insurance fraud). Accordingly, this Court should likewise presume that the omission of such aiding and abetting language from the ASA "was intentional." *Ballesteros v. Am. Standard Ins. Co. of Wis.*, 226 Ariz. 345, 349 ¶ 15, 248 P.3d 193, 197 (2011) (when the legislature includes a provision in some statutes, but not in others, it "indicates that the omission . . . was intentional.").

Second, in the 1996 Amendments the Legislature declared that "[n]othing in this act creates or ratifies any implied private right of action [or] determines whether or in what circumstances aiding and abetting liability exists under title 44, chapter 12, Arizona Revised Statutes." 1996 Amendments § 11(B). Having chosen not to "create[s] or ratif[y] any implied private right of action," *id.*, it would

be inappropriate to construe the ASA as having in fact created such an implied right of action.

Third, and decisively, the Legislature has now directly instructed Arizona courts to follow federal interpretations when construing the ASA: "It is the intent of the legislature that in construing the [ASA], the courts may use as a guide the interpretations given by the . . . federal or other courts in construing substantially similar provisions of the federal securities laws of the United States." *Id.* § 11(C). This Court, which has likewise recognized the importance of "consistency in the application of the law [governing securities regulation]," *Gunnison*, 127 Ariz. at 112-13, 618 P.2d at 606-07, should not turn a blind eye to the Legislature's explicit directive.

B. Sell's Arguments for Why the Legislature Really Intended to Include Aiding and Abetting Liability in the ASA Do Not Withstand Scrutiny

Notwithstanding the above, Sell maintains that the Legislature really intended the ASA to include a claim for aiding and abetting securities fraud. Tellingly, however, Sell does not identify any language in the ASA that, when properly construed, demonstrates the Legislature's intent to create aiding and abetting liability. Rather, Sell argues that because the ASA is allegedly "broader than the Federal Act" (Pet. at 10) in various ***other*** respects, the Court should construe the ASA as including aiding and abetting liability. In other words, Sell is

asking this Court to construe the ASA as including aiding and abetting liability notwithstanding the lack of ***any*** direct textual support (ambiguous or otherwise) for that position. That is an argument that defies this Court's most basic principles of statutory construction. *See, e.g.*, *Parrot v. Daimler Chrysler Corp.*, 212 Ariz. 255, 257 ¶ 7, 130 P.3d 530, 532 (2006) (when "'a statute is clear and unambiguous,'" the Court applies "'its plain language' to find the legislature's intent and do[es] 'not engage in other means of statutory interpretation.'" (quoting *Kent K. v. Bobby M.*, 210 Ariz. 279, 283 ¶ 14, 110 P.3d 1013, 1017 (2005)). Moreover, most of the differences to which Sell points are not in fact material differences from the Federal Act as explained in the Squire Defendants' Response to Petition for Review at 8-12.

Sell also says it is "important" that A.R.S. § 44-2003(A) makes jointly liable "any person . . . who made, ***participated in or induced*** the unlawful sale or purchase . . . ." (Pet. at 10-11 (internal quotation marks omitted) (emphasis in original).) But § 44-2003(A) liability is not an issue before the Court, and the fact that the Legislature created a ***different*** private right of action provides no reason to write into the statute an aiding and abetting private right of action. Additionally, Sell's plea to construe the ASA broadly ignores that this Court has long recognized that policy reasons favoring a broad construction do not license the Court to rewrite legislation to include provisions omitted by the Legislature. *Serasio v.*

Sears, 58 Ariz. 522, 525, 121 P.2d 639, 640 (1942) (explaining that "'the supposed policy of the state cannot, in a judicial tribunal, prevail over the plain language of a statute'" (citation omitted)).

Sell's argument (Pet. at 12) that "the Legislature considered a 1996 amendment that would have eliminated the claim for aiding and abetting a violation of the ASA, but declined to pass such legislation," is misleading. The Legislature in fact contemplated amending the ASA to give ***the Commission*** the authority to bring enforcement actions against aiders and abettors of securities fraud:

> 44-2042. Assisting in violation; liability
> For purposes of any action brought by the Commission under this article, any person who knowingly provides substantial assistance to another person in violation of any provision of this chapter is in violation of the same provision to the same extent as the person to whom the assistance is provided.

S.B. 1383, § 10, 42d Leg., 2d Reg. Sess. (Ariz. 1996). To ensure the proposed extension of authority went ***only*** to the Commission, the amendment clarified that "[n]othing in this chapter creates a private right of action against a person who substantially assists another person in committing a violation of this chapter." *Id.* The final legislation omits this section entirely.

Accordingly, the legislative history relied upon by Sell actually shows that the Legislature considered giving ***only*** the Commission the power to bring aiding and abetting claims, ***but ultimately concluded to not even go that far***. Moreover,

to ensure this Court would not do what Sell asks it to do, the Legislature ultimately adopted language that is virtually identical to the language Sell admits "would have eliminated" aiding and abetting liability (Pet. at 12). *Compare* 1996 Amendments § 11(B) ("[n]othing in this act creates or ratifies any implied private right of action, [or] determines whether . . . aiding and abetting liability exists"), *with* S.B. 1383, § 10, 42d Leg., 2d Reg. Sess. (Ariz. 1996) ("Nothing in this chapter creates a private right of action against a person who substantially assists another person in committing a violation of this chapter."). The history relied upon by Sell thus confirms that construing the ASA to include aiding and abetting liability would, in effect, "amend the statute to create liability for acts that are not" prohibited by the statute—something this Court cannot do. *Central Bank*, 511 U.S. at 177-78.

Sell's reliance on A.R.S. § 44-2005, which provides that "[n]othing in this article shall limit any statutory or common law right of any person in any court for any act involved in the sale of securities," is likewise misplaced. (*See* Pet. at 12.) That provision makes clear 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*** "in this article" a statutory claim for aiding and abetting a statutory violation of the ASA. For the same reason, any suggestion that a common law aiding and abetting claim could encompass the ASA is

misplaced; there is no common law claim for aiding and abetting ***statutory*** violations. *See, e.g.*, *Mann v. GTCR Golden Rauner, LLC*, 483 F. Supp. 2d 884, 919 (D. Ariz. 2007) ("Plaintiffs' argument that section 876(b) of the Restatement provides a basis for imposing such liability misses the mark. Liability under that section is limited to those who aid and abet 'tortfeasors.' It does not apply to those who aid and abet statutory violations . . . .").

Sell's reliance on federal courts' deference to *Davis* is also misplaced. (Pet. at 13-14.) The cases Sell cites deferred to *Davis* pursuant to the general rule that federal courts will follow "the decisions of a state's highest court." *See Facciola v. Greenberg Traurig LLP*, 781 F. Supp. 2d 913, 924 (D. Ariz. 2011) ("We are bound to follow the decisions of a state's highest court in interpreting that state's law.") (internal quotation marks and citation omitted); *Wojtunik v. Kealy*, 394 F. Supp. 2d 1149, 1170 (D. Ariz. 2005) (explaining that although defendants "may be correct" that *Central Bank* should be followed in Arizona, "the Arizona Supreme Court's recognition in 1979 of a private right of action for aiding and abetting in the *State v. Superior Court* [*Davis*] case stands as the law currently controlling this issue."). Neither case provides any reason ***for this Court*** to not follow *Central Bank*.

III. The Court Should Not Depart from Established Federal Precedent and Create a Common Law Aiding and Abetting Claim for a Statutory Violation of the ASA

With (1) the foundation underlying *Davis* gone, and (2) it clear that the ASA does not include any aiding or abetting claim, the only remaining question is whether the Court should overrule *Davis* or instead adopt for the first time a common law claim for aiding and abetting a statutory violation of the ASA. In other words, although the Legislature enacted a statutory framework that balanced a variety of competing interests and policy choices that omitted aiding and abetting liability, should this Court, in effect, judicially write into the ASA that which the Legislature chose to omit? As set forth below, the answer to that question is clearly no.

As a threshold matter, Sell has not contended that the Court should create a common law claim for aiding and abetting securities fraud under the ASA, nor even raised that as an issue for review in the Petition. (*See* Pet. at 1.) Moreover, before the Court of Appeals Sell contended that the ASA recognized a claim for aiding and abetting violations of the statute, not that such a common law cause of action should be recognized or created. (*See* Petition for Special Action of the Trial Court's Grant of Summary Judgment regarding Aiding and Abetting Violations of the Arizona Securities at 2, 14 (framing the issues and arguing on the merits that the "Legislature intended the ASA to be broader than its federal

counterpart.").) Accordingly, whether to create a common law claim for aiding and abetting ASA violations is beyond the scope of the Petition.

More fundamentally, having this Court create a common law claim for aiding and abetting ASA violations is problematic for numerous reasons. First, some policy issues are "'best handled by legislatures with their comprehensive machinery for public input and debate.'" *Winsor v. Glasswerks PHX, L.L.C.*, 204 Ariz. 303, 310 ¶ 24, 63 P.3d 1040, 1047 (App. 2003) (citation omitted). This is such an issue. As *Central Bank* explained, "[s]econdary liability for aiders and abettors exacts costs that may disserve the goals of fair dealing and efficiency in the securities markets." 516 U.S. at 188. For example, such expansive liability may make it more difficult for "newer and smaller companies . . . to obtain advice from professionals," or result in increased costs to "the company's investors, the intended beneficiaries of the statute." *Id.* at 189.

Indeed, this case shows just how far aiding and abetting liability can go. If merely sending a letter conveying a client's "desire to fully cooperate with the Commission's investigation" can trigger significant exposure for a law firm, as in this case (Complaint Ex. G at 2), law firms like Lewis and Roca will have strong incentives to simply decline such representation (and thereby leave those under investigation without representation). Although other competing policy considerations may be advanced for aiding and abetting liability, gathering and

evaluating the vast quantities of information necessary to weigh the competing considerations in an area as complex as securities regulation is best left to the Legislature. *Mitchell v. Gamble*, 207 Ariz. 364, 373 ¶ 34, 86 P.3d 944, 953 (App. 2004) ("In the face of Arizona's extensive and elaborate statutory scheme, it is for the legislature, not this court, to weigh the policy considerations and determine whether any statutory change is appropriate or necessary.") For this reason, Sell's policy arguments (Pet. at 14) are better directed to the Legislature.

Second, and relatedly, creating a common law claim for aiding and abetting ASA violations would run contrary to other provisions deliberately included in the 1996 Amendments. For example, while leaving intact the joint and several liability provisions in the civil remedies section, the Legislature clarified that "[n]o person shall be deemed to have participated in any sale or purchase solely ***by reason of having acted in the ordinary course of that person's professional capacity*** in connection with that sale or purchase." A.R.S. § 44-2003(A) (emphasis added); *see also* the 1996 Amendments.[4] The expansive aiding and abetting liability argued for by Sell could expose those "act[ing] in the ordinary course of that person's professional capacity," A.R.S. § 44-2003(A), to liability—thereby eviscerating the protection the Legislature intended to give professionals.

[4] Section 44-2003 applies to "an action brought under section 44-2001, 44-2002 or 44-2032 . . . ." Sections 44-2001 and 44-2002, in turn, respectively provide civil remedies for a violation of "article 13 of this chapter" (which includes A.R.S. § 44-1991) and Section 44-1991.

Cf. Central Bank, 511 U.S. at 177-78 ("We cannot amend the statute to create liability for acts that are not themselves manipulative or deceptive within the meaning of the statute."). This Court, however, construes statutory provisions harmoniously. *Bilke v. State*, 206 Ariz. 462, 464 ¶ 11, 80 P.3d 269, 271 (2003) ("A statute is to be given such an effect that no clause, sentence or word is rendered superfluous, void, contradictory or insignificant.") (internal quotation marks and citation omitted). Accordingly, the Court should reject Sell's suggestion that the Legislature used invisible ink to write into one section a provision that undermines the carefully considered, clear statutory text found in another.

Third, it would undermine the value of "consistency in the application of the law" in connection with securities regulation. *Gunnison*, 127 Ariz. at 112, 618 P.2d at 606. Unsurprisingly, courts that have recognized aiding and abetting liability after *Central Bank* typically have done so only because of an express provision in their securities laws—and not invented such a claim out of whole cloth. *See, e.g., State ex rel. Goettsch v. Diacide Distribs., Inc.*, 561 N.W.2d 369, 374 (Iowa 1997) (Unlike Section 10(b) and Rule 10b-5, "Iowa Code section 502.503 does, however, have an aiding and abetting provision").[5] If Arizona is

[5] *Cf. Atlanta Skin & Cancer Clinic, P.C. v. Hallmark Gen. Partners, Inc.*, 463 S.E.2d 600, 605 (S.C. 1995) (no cause of action for aiding and abetting because South Carolina statute did not expressly provide for it); *Conn. Nat'l*

going to deviate from *Central Bank*, it should likewise be the Legislature, not our Courts, that pushes us in that direction. To do otherwise would disregard the Legislature's explicit intent that the courts "use as a guide the interpretations given by . . . the federal or other courts in construing substantially similar provisions in the federal securities laws of the United States." 1996 Amendments, ch. 197, § 11(C).

CONCLUSION

As it has in the past, the Court should construe § 44-1991 consistently with United States Supreme Court precedent, and overrule that portion of *Davis* that is to the contrary. No other result can be squared with *Gunnison*, the statute's text, or the Legislature's explicit directive to construe our securities statutes in accord with "substantially similar provisions of the federal securities laws of the United States." 1996 Amendments, ch. 197, § 11(C).

. . .

. . .

Bank v. Giacomi, 659 A.2d 1166, 1171, 1175-76 & n.25 (Conn. 1995) (no aider and abettor liability under Connecticut's Uniform Securities Act); *Eastside Vend Distribs., Inc. v. Coca-Cola, Enters., Inc.*, No. 24-C-04-003998, 2006 WL 1516012, at *4-7 (Md. Cir. Ct. May 8, 2006) (applying *Central Bank*'s reasoning and holding that "there is no aiding and abetting liability under the Maryland Antitrust Act") (unpublished trial court order); *see also Broadview Fin., Inc. v. Entech Mgmt. Servs. Corp.*, 859 F. Supp. 444, 453 (D. Colo. 1994) (after *Central Bank*, there is "no legal basis for aiding and abetting liability under Colorado's securities law or for an alternative interpretation of Colorado's securities law," and therefore "no aider and abettor liability exists under the [Colorado] Act").

RESPECTFULLY SUBMITTED this 19th day of October, 2012.

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