No. 05-1974

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

STONERIDGE INVESTMENT PARTNERS, LLC,

Plaintiff - Appellant,

v.

SCIENTIFIC-ATLANTA, INC. and MOTOROLA, INC.,

Defendants - Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
CIVIL ACTION NO. 4:02-CV-01186 CAS

BRIEF OF APPELLEE MOTOROLA, INC.

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SUMMARY OF THE CASE AND REQUEST FOR ORAL ARGUMENT

In its Amended Consolidated Class Action Complaint for Violation of the Federal Securities Laws (the "Complaint" or "Amended Complaint"), Stoneridge Investment Partners, LLC ("Stoneridge") alleged that Charter Communications Inc. ("Charter") violated the securities laws by making material misrepresentations in press releases and public filings with the SEC. It also made the novel claim that Motorola, Inc. ("Motorola"), an independent public company with no duty of disclosure to Charter investors, is liable for Charter's misstatements because it entered into contracts with Charter that Charter misrepresented in its public statements. The District Court dismissed the Complaint, concluding that it alleged only aiding and abetting securities fraud and was therefore barred by *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994).

That conclusion was correct. There is no allegation that Motorola made any false public statements concerning the transactions with Charter, nor is there any allegation that any Charter investor relied on anything that Motorola said. Thus, as the District Court concluded, no matter how characterized by Stoneridge, its claim against Motorola was for aiding and abetting Charter's alleged violations of the securities laws. That conclusion can be affirmed without oral argument, but if the Court grants Plaintiff's request for oral argument, Motorola requests an amount of time equal to that granted to Plaintiff.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and 8th Cir. R. 26.1A, the undersigned attorney of record for Defendant-Appellee Motorola, Inc. certifies that there exist the following parent companies or publicly held companies owning more than ten percent (10%) of its stock: None.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Federal Cases

Federal Statutes

Federal Regulations

Federal Rules

Other Authorities

JURISDICTIONAL STATEMENT

Motorola agrees with Stoneridge's Statement of Jurisdiction.

STATEMENT OF THE ISSUES

1. Whether a corporation that made no public statement on which investors relied can nevertheless be found liable in a private action under Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act") based on another's alleged fraudulent statement. *See Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994); *Chiarella v. United States*, 445 U.S. 235 (1980); *Ziemba v. Cascade Int'l, Inc.*, 256 F.3d 1194 (11th Cir. 2001); *Wright v. Ernst & Young LLP*, 152 F.3d 169 (2d Cir. 1998).
2. Whether a private plaintiff can transform a claim against a corporation that allegedly aided and abetted another's alleged misstatement into an actionable claim under Section 10(b) of the Exchange Act by characterizing it as a "scheme to defraud" in violation of Rules 10b-5(a) and (c) promulgated under the Exchange Act. *See Central Bank*, 511 U.S. 164; *In re Dynegy, Inc. Sec. Litig.*, 339 F. Supp. 2d 804 (S.D. Tex. 2004).
3. Whether the District Court properly exercised its discretion in denying Stoneridge's motion for leave to amend the Complaint and in denying Stoneridge's motion for reconsideration. *See, e.g., Moses.com Sec., Inc. v.*

Comprehensive Software Sys., Inc., 406 F.3d 1052 (8th Cir. 2005); *COMSAT Corp v. St. Paul Fire & Marine Ins. Co.*, 246 F.3d 1101 (8th Cir. 2001).

STATEMENT OF THE CASE

Stoneridge filed its initial complaint in the District Court on August 5, 2002. That initial complaint did not name Motorola or Scientific-Atlanta, Inc. ("SA") as a defendant. One year later, on August 5, 2003, Stoneridge filed the Amended Complaint at issue in this appeal. That Amended Complaint added Motorola and SA as defendants. J.A. 15.[1]

The District Court's Decision The Motions to Dismiss

Motorola moved to dismiss the Complaint on October 1, 2003. J.A. 19. SA filed a similar motion. J.A. 17. The District Court received extensive briefing on these motions and, on October 12, 2004, granted Motorola's and SA's motions to dismiss. J.A. 28.

In its Memorandum and Order, the District Court noted that each of the allegations in the Complaint focused on alleged false public statements made by Charter that were relied on by Charter investors. J.A. 418, 423. Based on its review of the Complaint, the District Court found no allegations that Motorola or

[1] "J.A. ___" refers to pages of the Joint Appendix filed in this appeal on June 15, 2005.

SA made any false statements or had any direct role in the preparation of any of Charter's allegedly false statements:

> Plaintiffs do not assert that Scientific-Atlanta or Motorola made any statement, omission or action at issue or that plaintiffs relied on any statement, omission or action made by either of them … [or] were responsible for, or were involved with the preparation of Charter's allegedly false or misleading financial statements; Charter's allegedly improper internal accounting practices; or the allegedly false or misleading public statements made by Charter and its former executives. Plaintiffs also do not allege that any of the allegedly misleading statements … were made, seen, or reviewed by Scientific-Atlanta or Motorola.

J.A. 418.

The District Court, therefore, read Stoneridge's Complaint essentially to

liable to Charter's investors on the basis that they engaged in a business transaction that Charter purportedly improperly accounted for." J.A. 418-19. The District Court concluded that Stoneridge's claims against Motorola and SA thus "amount to claims for aiding and abetting liability under § 10(b) and Rule 10b-5. Under any subsection of those provisions, plaintiffs claims … are barred by the Supreme Court's decision in *Central Bank*." J.A. 417.

The District Court further concluded that, because Motorola and SA made no public statements themselves and were, at most, silent with respect to Charter's allegedly fraudulent public statements, these two companies could not properly be found liable for securities fraud under Section 10(b) "as plaintiffs have not alleged

that Scientific-Atlanta or Motorola had any duty to Charter's investors. *See Chiarella v. United States*, 445 U.S. 222, 235 (1980) (there can be no liability for fraud under Section 10(b) absent a duty to speak)." J.A. 419.

Finally, the Court reviewed existing authority where other plaintiffs had attempted to maintain Rule 10b-5 claims in more or less similar circumstances, including *In re Enron Corp. Securities, Derivative & ERISA Litigation*, 235 F. Supp. 2d 549 (S.D. Tex. 2002), a decision upon which Stoneridge relied heavily. J.A. 421-23. The Court cited the numerous cases uniformly holding that secondary actors in situations similar to Motorola and SA here could not be found to have violated Section 10(b) in light of *Central Bank*. J.A. 418-20. The District Court then rejected Stoneridge's reliance on *Enron*, concluding that "[t]his Court does not find *Enron* on point" because "*Enron* held that § 10(b) liability may only be imposed for secondary actors who have created a document containing a misrepresentation upon which investors relied." J.A. 423. The District Court found that the Complaint in this case contained no such allegation as to Motorola or SA. J.A. 423.

The District Court's Decision – Stoneridge's Motions for Reconsideration and to Amend

On October 27, 2004, Stoneridge moved: (1) for reconsideration of the District Court's decision dismissing its claims and (2) for leave to amend its Complaint to add so-called "new" facts. J.A. 29, 231. The parties extensively

briefed these issues. On December 20, 2004, the District Court denied both motions. J.A. 31.

In its motion, Stoneridge claimed that two decisions "subsequent to briefing" should lead the Court to reconsider its dismissal of the Complaint. J.A. 245. The Court concluded that these "new" cases (which had, in fact, been decided before the Court's dismissal of the Complaint and had not been called to the Court's attention by Stoneridge prior to the decision on the motion) would not have led to a different result. J.A. 453. As to the motion for leave to amend, Stoneridge claimed that "new" evidence that Stoneridge had secured in discovery in connection with a settlement with other parties provided further support for the claims against Motorola and SA. J.A. 244. Motorola and SA pointed out that the "new" facts related primarily to the issue of *scienter* – an issue that did not form the basis for the dismissal of the Complaint – and, in any event, were "merely minor reworkings of the same allegations in the prior complaint." J.A. 450. The District Court agreed, concluding that "amending the complaint would be futile" and, therefore, denied Stoneridge's motion for leave to amend. J.A. 454.

On February 16, 2005, the District Court entered a final judgment pursuant to Fed. R. Civ. P. 54(b) as to Stoneridge's claims against Motorola and SA. J.A. 32. Stoneridge noticed this appeal on March 7, 2005. J.A. 33.

ver 100,000 customers who were no longer paying their bills." J.A. 42; *see also* J.A. 53-61. Second, according to the Complaint, Charter improperly capitalized labor costs that should have been expensed and improperly recognized up front all revenues from the launch of new program channels instead of deferring some of the revenue. J.A. 61-66.

The only allegations in the Complaint relating to Motorola and SA concern two agreements, each entered into with Charter in the fourth quarter of 2000. J.A. 67-69. According to the Complaint, prior to the fourth quarter of 2000, Charter and Motorola had entered into contracts under which Charter would

purchase digital converter boxes. J.A. 67. According to the Complaint, in the fourth quarter of 2000, "Charter agreed to pay … Motorola an additional $20 for each digital converter so long as [Motorola] repaid the same amount to Charter in the form of 'advertising.'" J.A. 67. With respect to these agreements (and similar ones between Charter and SA), the Complaint then made certain allegations as to "defendants" without differentiating among Charter, Charter's officers and directors, Motorola, or SA. J.A. 67-68. For example, the Complaint vaguely alleged that "defendants exploited such transactions by fraudulently accounting for them in such a way as to significantly and artificially inflate Charter's operating cash flow … by treating the 'payments' from Scientific-Atlanta and Motorola as 'revenues' when in fact they were simply the return of Charter's own monies." J.A. 67-68 (emphasis added).

Notwithstanding this conscious attempt to lump all defendants together, the Complaint makes clear that it was **Charter's** fraudulent accounting decisions relating to **Charter's** financial statements that lie at the heart of Stoneridge's claims against SA and Motorola. J.A. 68-69. For example, the Complaint alleges that, prior to entering into the agreements with Motorola and SA, "defendant Kalkwarf [Charter's Chief Financial Officer] discussed the concept [of the agreements] with defendant Arthur Andersen … ," Charter's independent auditor. J.A. 68. According to the Complaint, Arthur Andersen advised Charter that there

was a legitimate way to account for the anticipated transactions with Motorola and SA. J.A. 68. The Complaint then alleges that Charter thereafter lied to Arthur Andersen about the transactions with Motorola and SA to get the fraudulent accounting result Charter desired. J.A. 68-69. The Complaint states:

> Arthur Andersen counseled that Charter could recognize the advertising fees as revenues if the additional payments for the converter boxes and the advertising were (i) at fair market value, (ii) unrelated to one another, and (iii) negotiated at least a month apart. In late August 2000, defendant Kalkwarf advised Arthur Andersen that Charter would fulfill those conditions. **In September 2000 Kalkwarf falsely told Arthur Andersen that the advertising and supply contracts with Scientific-Atlanta and Motorola had been negotiated by two separate departments at Charter a month apart from one another.**

J.A. 68 (emphasis added). The Complaint alleges that "Arthur Andersen accepted the explanations provided by Kalkwarf … ." J.A. 69.

The Complaint then alleges that Charter included this false accounting in its public financial statements. J.A. 73-91. The Complaint states that these misrepresentations in Charter's public statements as to the agreements with Motorola and SA, as well as the other frauds alleged in the Complaint, "would tend to induce a reasonable investor to misjudge the value of the Company's [Charter's]

99. Thus, according to the Complaint, the misrepresentations acted as a "fraud-on-the-market" and reliance by Charter's investors on the misrepresentations may be "presum[ed]." J.A. 99.

SUMMARY OF ARGUMENT

The District Court properly dismissed the Complaint against Motorola based on *Central Bank*'s holding that "there is no private aiding and abetting liability under Section 10(b)" and that a secondary actor that is alleged to have facilitated another party's commission of securities fraud may **not** be sued in a private class action. *Central Bank*, 511 U.S. at 191. Stoneridge's Complaint alleged only that Motorola entered into a business transaction with Charter that facilitated Charter's ability to fraudulently recognize revenue in the financial statements that Charter issued to the public. This is a classic charge of "aiding and abetting" another's alleged fraud and is squarely covered by *Central Bank*.

Plaintiff's claim is not saved by alleging that Motorola's conduct was a

fraud" that is actionable because it violated subsections (a) or (c) of Rule 10b-5. As set forth below, the Supreme Court has made clear that, in order for conduct to be actionable under Rule 10b-5, the conduct must violate the enabling statute, Section 10(b) of the Exchange Act. That statute does not reach every "fraud" or "scheme to defraud." Instead, the statute "prohibits **only** the making of a material misstatement (or omission) **or** the commission of a manipulative act." *Central Bank*, 511 U.S. at 177 (emphasis added).

This is a "misstatement" case.[2] For Motorola to be liable under Section 10(b), it must have made a "misstatement" on which Charter shareholders relied in connection with the purchase or sale of a security. The Section 10(b) claim against Motorola plainly fails because Motorola made no "misstatement" on which any shareholder of Charter could possibly have relied. The Section 10(b) claim against Motorola also fails because, as set forth below, Motorola had no duty to speak to Charter shareholders and, therefore, may not be sued by them for what amounts to nothing more than its silence in the face of Charter's alleged fraud. Finally, as set forth below, to adopt the argument advanced by Stoneridge would simply revive aiding and abetting liability under a different name, thereby eviscerating *Central Bank* and disregarding the fact that Congress expressly refused to amend the Exchange Act to permit private litigants to sue for aiding and abetting after *Central Bank* was decided.

For each of these reasons, the District Court properly dismissed the Complaint, and this Court should affirm the judgment of the District Court. In addition, as set forth below, the District Court properly exercised its discretion in

[2] The term "manipulation" as used in Section 10(b) has been defined (as set forth below) as a "term of art" to include market rigging practices such as wash sales, matched orders or rigged prices that artificially affect market activity. The Complaint does not – and could not properly – allege "manipulation" within the meaning of Section 10(b) against Motorola.

denying motions for leave to amend the Complaint and for reconsideration, and this Court should affirm that ruling.

ARGUMENT

STANDARD OF REVIEW

This Court reviews a District Court's grant of a motion to dismiss for failure to state a claim under Fed. R. Civ. P. 12(b)(6) *de novo*. *Moses.com Sec., Inc. v. Comprehensive Software Sys., Inc.*, 406 F.3d 1052, 1062 (8th Cir. 2005).

This Court reviews a District Court's denial of a motion to amend a complaint filed after dismissal for abuse of discretion. *Briehl v. Gen. Motors Corp.*, 172 F.3d 623, 629 (8th Cir. 1999). Although leave to amend is given liberally when a motion to amend is made before the court rules, a plaintiff who moves to amend after dismissal (as Stoneridge did here) "must bear the consequences of waiting to address the court's rulings post-judgment." *Id.*

This Court reviews the denial of a motion for reconsideration for an abuse of discretion. *COMSAT Corp. v. St. Paul Fire & Marine Ins. Co.*, 246 F.3d 1101, 1105 (8th Cir. 2001); *Hagerman v. Yukon Energy Corp.*, 839 F.2d 407, 413-14 (8th Cir. 1988).

I. THE DISTRICT COURT CORRECTLY CONCLUDED THAT STONERIDGE'S ALLEGATIONS CONSTITUTED CLAIMS OF AIDING AND ABETTING BARRED UNDER *CENTRAL BANK*

The District Court's conclusion that Stoneridge's Complaint against Motorola should be dismissed was correct for several reasons.

First, the District Court correctly held that Motorola could not be found liable for a violation of Section 10(b) or Rule 10b-5 because Motorola did not make any of the statements in issue. In reaching this conclusion, the District Court's analysis was squarely in line with every Court of Appeals that has considered this question.

In *Anixter v. Home-Stake Production Co.*, 77 F.3d 1215 (10th Cir. 1996), for example, the Tenth Circuit held that *Central Bank* precluded liability for secondary actors under Section 10(b) unless they "themselves make a false or misleading statement or omission that they know or should know will reach potential investors." *Id*. at 1226. Similarly, in *Ziemba v. Cascade International, Inc.*, 256 F.3d 1194 (11th Cir. 2001), the Eleventh Circuit rejected the plaintiff's attempt to hold a law firm and accountants liable as primary violators where none of the alleged misstatements or omissions were attributable to either defendant. *Id*. at 1213. In *Wright v. Ernst & Young LLP*, 152 F.3d 169 (2d Cir. 1998), the Second Circuit took a similar position, holding that "[i]f *Central Bank* is to have any real meaning, a defendant must actually make a false and misleading statement." *Id*. at 175 (internal quotation marks omitted). The Second Circuit reasoned that the plaintiff's attempt to hold an accountant primarily liable under Section 10(b) could not be permitted because to do so "in spite of [the accountant's] clearly tangential role in the alleged fraud would effectively revive aiding and abetting liability under

a different name and would therefore run afoul of the Supreme Court's holding in *Central Bank*." *Id*. at 175 (internal quotation marks omitted). The Second Circuit concluded that "because § 10(b) and Rule 10b-5 focus on fraud made in connection with the sale or purchase of securities, a defendant must 'know or should know' that *his* representation would be communicated to investors." *Id*. at 175 (emphasis in original).

The Sixth Circuit came to the same conclusion in *Fidel v. Farley*, 392 F.3d 220, 235-36 (6th Cir. 2004). There, a private plaintiff claimed that a company's auditor should be primarily liable under Section 10b-5 in failing to obtain updated financial information from a company prior to the company's issuance of certain offering documents and a registration statement, both of which included unaudited data. *Id*. at 226. Because the auditor had not made any statement in connection with the registration statement or the offering documents, the Sixth Circuit held that the auditor could not be liable under Section 10(b) or Rule 10b-5: "holding [the auditor] liable for either its alleged implicit endorsement of the unaudited financial figures or for its failure to insist on a correction to these figures would effectively revive aider and abettor liability in contravention of [*Central Bank*]." *Id.* at 235. In short, because the auditor did not make the misstatement, it could not be liable under Section 10(b). *Id.*

The District Court's opinion was squarely in line with these consistent decisions. Motorola entered into two contracts with Charter in the fourth quarter of 2000. J.A. 67. Charter lied to its independent auditors about the contracts in order to account for the agreements improperly. J.A. 68-69. Charter then issued public statements containing the improper accounting for the Motorola transactions (as well as the improper accounting for the SA transactions, customer cancellations, labor costs and program revenue unrelated to the Motorola transactions). J.A. 74-91. Charter's investors then relied to their detriment on the improper statements made by Charter. J.A. 99.

As the District Court made clear, there is no allegation in the Complaint that Motorola had anything to do with this alleged scheme other than entering into the transactions with Charter. J.A. 418. There are no allegations that Motorola made any false statement to Charter's investors concerning those agreements; that Motorola participated in any allegedly fraudulent statements made by Charter; or, indeed, that Motorola participated in deciding how Charter would account for the contracts or in the preparation of the fraudulent financial statements described in the Complaint. J.A. 418-19, 423.

Thus, assuming for purposes of this appeal that everything Stoneridge said in the Complaint about Motorola is true, the most that can be said is that Motorola assisted Charter in its fraudulent scheme. As such, Motorola's alleged conduct

here expressly meets the definition that these courts consistently have applied in defining "aiding and abetting";[3] there really is no other fair or reasonable way to define Motorola's alleged conduct. The District Court correctly held that this kind of claim is barred under *Central Bank*.

Second, the Supreme Court held in *Central Bank* that "[a] plaintiff must show reliance on *the defendant's* misstatement or omission to recover under 10b-5." 511 U.S. at 180 (emphasis added). The Court held that the requirement to prove reliance precluded a Rule 10b-5 claim against someone who did not make the statement in question but was alleged only to have aided and abetted another's violation:

> Were we to allow the aiding and abetting action proposed in this case, the defendant could be liable without any showing that the plaintiff relied on the aider and abettor's statements or actions. *See also Chiarella*, 445 U.S. at 228 . . . (omission actionable only where duty to disclose arises from specific relationship between two parties). Allowing plaintiffs to circumvent the reliance requirement would disregard the careful limits on 10b-5 recovery mandated by our earlier cases.

[3] The same result would follow from the slightly different test applied by the Ninth Circuit. That Circuit permits a third party to be held primarily liable for misrepresentations made by others – but only if the third party is alleged to have substantially participated in the preparation of the specific misrepresentations in issue. *In re Software Toolworks Inc. Sec. Litig.*, 50 F.3d 615 (9th Cir. 1994). Once again, there is no such allegation as to Motorola in this case.

nor could there be one – that

Motorola had any duty to speak with regard to Charter shareholders. Thus, under

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[4] As the Tenth Circuit explained: "[t]he critical element separating primary from aiding and abetting violations is the existence of a representation, either by statement or omission, made by the defendant, that is relied upon by the plaintiff. Reliance only on representations made by others cannot itself form the basis of liability." *Anixter*, 77 F.3d at 1225.

Central Bank and *Chiarella*, as the District Judge correctly held, Stoneridge has no Section 10(b) or Rule 10b-5 claim against Motorola.

In sum, for a variety of reasons, the District Court's dismissal of the Complaint under *Central Bank* was correct. It is interesting that the only authority Stoneridge cites against this overwhelming weight of authority are decisions by the District Courts in the *Enron* and *Global Crossing* litigations. But, these decisions do not mandate a contrary result in this case. As the District Court noted, *In re Enron Corp. Securities, Derivative & ERISA Litigation*, 235 F. Supp. 2d 549 (S.D. Tex. 2002) ("*Enron I*"), held that "§ 10(b) liability may only be imposed for secondary actors who have created a document containing a misrepresentation upon which investors relied." J.A. 423. The District Court came to the same conclusion in *In re Enron Corp. Securities, Derivative & ERISA Litigation*, 310 F. Supp. 2d 819 (S.D. Tex. 2004) ("*Enron II*"), finding that Merrill Lynch was alleged to have issued "numerous analysts' reports and recommendations containing false and misleading statements about Enron's financial condition, as part of the purported [Enron] Ponzi scheme." *Id.* at 829. Thus, the *Enron* decisions actually support the District Court's holding here that Motorola could only be primarily liable if it made an "actual statement." Unlike the defendants in *Enron*, there is no allegation in the Complaint that Motorola "created a document" containing the misrepresentations about the agreements alleged in this case.

Rather, those misrepresentations were made by Charter and, as we have noted above, only after Charter lied to its independent auditor about the transactions. J.A. 68.

The other District Court decision upon which Stoneridge primarily relies, *In re Global Crossing, Ltd. Securities Litigation*, 322 F. Supp. 2d 319 (S.D.N.Y. 2004) ("*Global Crossing*"), also supports affirmance of the District Court's judgment since it involved another situation where a defendant made an actionable public statement. *See id*. at 330-31. The *Global Crossing* court allowed a claim based on a "scheme" theory to proceed against Global Crossing's outside auditor based on allegations that the auditor was the "chief architect and executor" of the alleged scheme at Global Crossing, and that, as auditor, the defendant had issued public statements in the form of the audit opinion. *Id*. at 336. That is not the case here –there is no allegation that Motorola made any statements. J.A. 418.

Cutting through the rhetoric in Stoneridge's brief, what is really going on is that Stoneridge is essentially asking the Court to disregard *Central Bank* and its progeny because, as Stoneridge says in its brief, "[t]his is not the time to narrow the reach of the securities laws." Br. of Appellant at 18. This was also the theme used by the Government in *Arthur Andersen LLP v. United States*, -- U.S. --, 125 S. Ct. 2129 (2005), in which the Government argued in favor of a "broad" reading

of a federal criminal statute in light of the highly publicized circumstances relating to the collapse of Enron.

In *Arthur Andersen*, the Supreme Court rejected this argument and reversed a conviction that was not consistent with a plain reading of the statute at issue. *Id.* at 2134-36. So too here. The question in this case is not whether to "narrow" or "broaden" the scope of the securities laws or to determine whether *Central Bank* is or is not good public policy. In fact, after *Central Bank*, the SEC attempted to persuade Congress in the context of consideration of what became the Private Securities Litigation Reform Act to amend Section 10(b) to permit private claims for aiding and abetting. The SEC argued that Congress should "fully restore the aiding and abetting liability eliminated in the Supreme Court's Central Bank of Denver opinion." S. Rep. No. 104-98 at 48 (1995), *reprinted in* 1995 U.S.C.C.A.N. 679, 727. Congress declined to do so, and, while it gave the SEC authority to bring civil actions for alleged aiding and abetting, it specifically declined to do so as to private plaintiffs because "private aiding and abetting liability actions under [§] 10(b) would be contrary to S. 240's goal of reducing meritless securities litigation." S. Rep. No. 104-98 at 19.

Stoneridge is now trying to do through the back door what the private securities bar or the SEC could not do through the front door at Congress. This is improper. This is a case of alleged aiding and abetting by Motorola. There simply

is no private cause of action for this kind of alleged conduct. The District Court properly saw the claim for what it was, and dismissed it under *Central Bank*.

II. THE DISTRICT COURT CORRECTLY CONCLUDED THAT STONERIDGE'S ATTEMPT TO CHARACTERIZE THE CASE AS BEING MAINTAINED UNDER RULES 10b-5 (a) AND (c) DID NOT CHANGE THE CONCLUSION THAT STONERIDGE'S ALLEGATIONS WERE BARRED UNDER *CENTRAL BANK*

Stoneridge argues in its brief to this Court that the claims in the case "are predicated on Rule 10b-5(a) and (c) that expressly impose liability for employment of any scheme or artifice to defraud or fraudulent act or course of business." Br. of Appellant at 16-17. As Stoneridge sees it, *Central Bank* applies only to alleged violations of Rule 10b-5(b) prohibiting "false statements," and under Stoneridge's interpretation, anyone who can be alleged to have participated in any way in a "scheme or artifice to defraud" or a fraudulent "act" or "course of business" may be sued under Rule 10b-5.

The problem with this argument is that it disregards the express language used by the Supreme Court in *Central Bank*. In *Central Bank*, the Supreme Court made clear that, in interpreting Rule 10b-5, "the text of the statute controls our

U.S. at 173. "[T]he private plaintiff may not bring a 10b-5 suit against a defendant for acts not prohibited by the text of § 10(b) *Id*.[5] The Court

[5] This holding was not the first time the Supreme Court had made this principle clear. *See, e.g., Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 472 (1997)("[T]he

held that "the text of the 1934 Act does not itself reach those who aid and abet a 10(b) violation." *Id*. at 177. In other words, the Supreme Court in *Central Bank* was not interpreting subsections (a), (b) or (c) of Rule 10b-5 when it held that there was no aiding and abetting liability. It was interpreting Section 10(b), the enabling statute. As the Court explicitly held, "[i]t is inconsistent with settled methodology in § 10(b) cases to extend liability beyond the scope of conduct prohibited by the

Id.; *see also United States v. O'Hagan*, 521 U.S. 642, 651 (1997) ("Liability under Rule 10b-5 . . . does not extend beyond conduct encompassed by § 10(b)'s prohibition"); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 214 (1976) ("[D]espite the broad view of the Rule [10b-5] advanced . . . its scope cannot exceed. . . 10(b)").

Section 10(b) "prohibits only the making of a material misstatement (or omission) or the commission of a manipulative act" in connection with the purchase or sale of a security. *Central Bank*, 511 U.S. at 177. Clearly, Stoneridge's Complaint in this case is based on the allegation that Charter made fraudulent misstatements in nearly two dozen different public pronouncements made over an approximately forty-one-month period. Equally clear is the fact that the "misstatement" prong of Section 10(b) provides no basis for a claim against

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language of the statute must control the interpretation of the Rule"); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 214 (1976).

Motorola, since Motorola made no misstatements to Charter investors in connection with the purchase or sale of Charter's securities.

The "manipulation" prong of Section 10(b) also does not provide a basis for a claim against Motorola (and we note that this part of Section 10(b) is not alleged in the Complaint or advanced in Stoneridge's brief as a basis for finding liability against Motorola). The term "manipulation" as used in Section 10(b) is, according to the Supreme Court, "'virtually a term of art' when used in connection with

Santa Fe Indus., 430 U.S. at 476 (quoting *Ernst & Ernst*, 425 U.S. at 199). Section 10(b) uses the term "manipulation" "in a technical sense" to "refer[] generally to practices such as wash sales, matched orders or rigged prices, that . . . mislead investors by artificially affecting market activity." *Santa Fe Indus.*, 430 U.S. at 476-77. Thus, a claim for "manipulation" requires "practices in the marketplace" which essentially have the effect of "tampering with the price" of securities. *Hundahl v. United Benefit Life Ins. Co.*, 465 F. Supp. 1349, 1360 (N.D. Tex. 1979); *see also Schreiber v. Burlington Northern, Inc.*, 568 F. Supp. 197, 202 (D. Del. 1983) ("Manipulation essentially constitutes artificial acts of stimulative trading designed to mislead investors into believing there was a heavy demand for the stock" (internal quotation marks omitted)); *Nutis v. Penn Merchandising Corp.*, 610 F. Supp. 1573, 1577 (E.D. Pa. 1985); *Billard v. Rockwell Int'l Corp.*, 526 F. Supp. 218 (S.D.N.Y. 1981). The acts alleged by Stoneridge in the Complaint

against Motorola do not constitute "manipulation" as that term is used in Section 10(b).

What this means is that there is no basis in this case to argue that the conduct in issue here by Motorola – which is aiding and abetting that cannot violate Section 10(b) – can nevertheless be a violation of subparagraphs (a) and (c) of Rule 10b-5 as a "scheme to defraud." To accept this argument would both disregard and eviscerate *Central Bank*.[6] Thus, the attempt by Stoneridge to misuse subparagraphs (a) and (c) to essentially disregard Section 10(b) and create a broad liability for any "scheme to defraud" was correctly rejected by the District Court. *See In re Dynegy Sec. Litig*., 339 F. Supp. 2d 804, 916 (S.D. Tex. 2004) ("Under *Central Bank* the aid that Citigroup provided Dynegy [in structuring misreported transactions] is not actionable under § 10(b), and plaintiffs cannot invoke subsections (a) and (c) of Rule 10b-5 to circumvent *Central Bank*'s limitations on liability for secondary actor's involvement in the preparation of false and misleading statements"); *Wenneman v. Brown*, 49 F. Supp. 2d 1283, 1288 (D. Utah 1999) ("*Central Bank* applies with equal force to subsections (a), (b) and (c) of

[6] This leaves a lot of room for Rule 10b-5 since "schemes to defraud" that involve misstatements, omissions where there is a duty to speak, or "manipulations," as that term is defined, plainly are covered by the Rule.

Rule 10b-5"); *In re Lake States Commodities, Inc*., 936 F. Supp. 1461 (N.D. Ill. 1996); *Stack v. Lobo*, 903 F. Supp. 1361 (N.D. Cal. 1995).

Stoneridge argues that the Supreme Court's decision in *SEC v. Zandford*, 535 U.S. 813 (2002), essentially holds that Section 10(b) reaches the conduct of any actor who participates in something called a "scheme to defraud." *Zandford* involved a claim against a broker who sold securities to the plaintiff with the express intention of misappropriating the proceeds. Stoneridge argues that *Zandford* allows a claim to proceed based on a "scheme to defraud" without the need for a misstatement because the Supreme Court "was not troubled by the defendant's lack of any misstatement." Br. of Appellant at 23. In making this argument, Stoneridge conveniently disregards the fact that the Supreme Court in *Zandford* held that, as a fiduciary, the broker defendant had a duty to speak to the customer and that the failure of the broker to speak constituted a material omission on which plaintiff relied in connection with the purchase of a security. 535 U.S. at 823. According to the *Zandford* Court, the broker could be found to have violated Section 10(b) because:

> [The broker] was only able to carry out his fraudulent scheme without making an affirmative misrepresentation because the Woods trusted him to make transactions in their best interest without prior approval. . . . [A]ny distinction between omissions and misrepresentations is illusory in the context of a broker who has a fiduciary duty to her clients.

Id. at 822-23.

Thus, the broker in *Zandford* could be sued for a "scheme to defraud" under Rule 10b-5 because she had committed a classic violation of Section 10(b) – making a material omission where she had a duty to speak. *Zandford* is thus consistent with both *Central Bank* and *Chiarella* that silence by a secondary actor is actionable under Section 10(b) where the secondary actor has a duty to speak. As the District Court held here: "Nor can these defendants be held liable for any purported omissions as plaintiffs have not alleged that Scientific-Atlanta or Motorola had any duty to Charter's investors [citing *Chiarella*]." J.A. 419.

In sum, Stoneridge's argument that subsections (a) or (c) of Rule 10b-5 somehow get around *Central Bank* does not work. As the District Court held, "[u]nder any subsection" of Rule 10b-5, Stoneridge's claim is barred. J.A. 417.

III. THE DISTRICT COURT CORRECTLY DENIED STONERIDGE'S MOTION FOR LEAVE TO AMEND THE COMPLAINT AND FOR RECONSIDERATION

The District Court correctly denied Stoneridge's motion for reconsideration and motion for leave to amend.

First, this Court will affirm a District Court's denial of leave to amend a complaint absent abuse of discretion. *See Wiles v. Capitol Indem. Corp*., 280 F.3d 868, 871 (8th Cir. 2002). A District Court does not abuse its discretion in denying leave to amend where the proposed amendment has "merely restated" the claim in

the original complaint and "would fail as a matter of law for the same reasons," *id*.; *see also Briehl v. Gen. Motors Corp*., 172 F.3d 623, 629 (8th Cir. 1999) (affirming District Court denial of leave to amend where proposed amendment did not cure defects in dismissed complaint), or where such amendment is otherwise futile, *Miss. River Revival, Inc. v. City of Minneapolis*, 319 F.3d 1013, 1018 (8th Cir. 2003) (District Court did not abuse its discretion where state court decision rendered amendment "futile").

With respect to Stoneridge's motion to amend, the District Court correctly concluded that the effort would be "futile." The so-called "new" information Stoneridge wished to add to the Complaint had nothing whatsoever to do with the basis for the Court's dismissal of the Complaint. Stoneridge's "new" facts

scienter. J.A. 239-44; *see also* J.A. 242 (alleging "[f]urther evidence of the Vendor Defendants' fraudulent mindset"). But the District Court in its dismissal of the Complaint expressly did not reach the question of whether Stoneridge met the heightened pleading requirements for *scienter* under the federal securities laws that Motorola had also raised in its motion to dismiss. According to the District Court: "[a]s the Court finds that plaintiffs' claims are precluded as to Scientific-Atlanta and Motorola as a matter of law, the Court need not address the sufficiency of the Amended Complaint as to these defendants."

J.A. 423.[7] In short, as the District Court concluded, even if every "new" fact that Stoneridge sought to allege was true, allowing the amendment would be "futile" because every word of the District Court's opinion dismissing the Complaint would have remained unaffected.

It is also pertinent to note here, as defendant Motorola noted to the District Court, that the so-called "new" facts Stoneridge wished to add to the Complaint were not new but were, in fact, minor reworkings of the exact same allegations already made in the dismissed Complaint. Stoneridge alleged in the dismissed Complaint that Motorola knew or should have known about Charter's fraudulent intentions. J.A. 105-06. Stoneridge also already alleged in the dismissed Complaint that "Charter agreed to pay Scientific-Atlanta and Motorola an additional $20 for each digital converter so long as the suppliers repaid that same amount to Charter in the form of 'advertising'. Thus, the price increases paid by Charter and 'advertising' payments made by the vendor transactions with no economic substance." J.A. 67; *see also* J.A. 105-06.

Each of the supposedly "new" facts that Stoneridge asked the Court to be permitted to add to their Complaint was either already included in the Complaint or

[7] Motorola does not, however, waive the right to address that argument should this case reach the appropriate procedural juncture.

was simply a more specific version of the same allegation already in the document. For example:

- Stoneridge's "new" allegation that the additional amount to be paid for each set-top box was over and above the price in existing agreements between Motorola and Charter was already made at paragraphs 77 and 196 of the previous complaint. *Compare* J.A. 236 (first bullet point) *with* J.A. 67 and J.A. 105-06.
- Stoneridge's "new" allegation that Motorola was to receive an equivalent amount of advertising from Charter in return for the additional amounts paid for the set top boxes was already made at paragraph 77 and 196 of the previous complaint. *Compare* J.A. 236 (second bullet point) *with* J.A. 67 and J.A. 105-06.
- Stoneridge's "new" allegation that the transaction was structured in a way that the amounts paid between Motorola and Charter would be equal, regardless of the number of set-top boxes purchased by Charter, was already made at paragraphs 77 and 196 of the previous complaint. *Compare* J.A. 236 (third bullet point) *with* J.A. 67 and J.A. 105-06.

In sum, the District Court acted well within its discretion. Because Stoneridge's proposed complaint contained the same fatal flaws as their original

Complaint, the District Court correctly concluded that the amendment would be futile and appropriately denied Stoneridge's motion.

Second, as this Court has recognized, a motion for reconsideration should be granted only where a movant demonstrates "exceptional circumstances" justifying relief. *See Arnold v. Wood*, 238 F.3d 992, 998 (8th Cir. 2001); *In re Zimmerman*, 869 F.2d 1126, 1128 (8th Cir. 1989) (relief under Rule 60(b) is to be granted "only when exceptional circumstances prevent[] the moving party from seeking redress through the usual channels."). "'Exceptional circumstances' are not present every time a party is subject to potentially unfavorable consequences as a result of an adverse judgment properly arrived at." *Reynolds v. Condon*, 908 F. Supp. 1494, 1526 (N.D. Iowa 1995) (quoting *Atkinson v. Prudential Prop. Co., Inc*., 43 F.3d 367, 373-74 (8th Cir. 1994)).

Here, the District Court also acted well within its discretion in denying Stoneridge's motion for reconsideration. We have set forth above why the so-called "new" cases – *Enron II* and *Global Crossing* – did not call into question the District Court's decision to dismiss the Complaint. What is also significant to note is that, as with the supposedly "new" facts, there was nothing "new" about the decisions that Stoneridge cited in its motion for reconsideration. Both decisions were, in fact, available long before the Court's October 12, 2004 decision dismissing the Complaint and should have been promptly called to the District

Court's attention if Stoneridge believed they were pertinent. The "new" *Enron* decision that Stoneridge cited was issued on March 29, 2004 and the "new" *Global Crossing* decision that Stoneridge cited was issued on March 23, 2004. *See In re Enron Corp. Sec. Derivative & ERISA Litig*., 310 F. Supp. 2d 819 (S.D. Tex. 2004); *In re Global Crossing, Ltd. Sec. Litig*., 322 F. Supp. 2d 319 (S.D.N.Y. 2004). If Stoneridge truly believed that these decisions had something earthshaking to say, it should have submitted them as supplemental authority in a timely manner. Authority that existed long before the Court's decision could not be grounds for the District Court to reconsider its decision, and the District Court correctly rejected this motion.

CONCLUSION

For the foregoing reasons, Motorola respectfully requests that this Court affirm the judgment of the District Court in its entirety.

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE AND TYPE-STYLE REQUIREMENTS, AND VIRUS-SCAN REQUIREMENT

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a diskette and two copies of Appellee Motorola, Inc.'s brief were served by Federal Express (except as noted below) on this 15th day of August, 2005 on:

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