In the

United States Court of Appeals

for the

Eighth Circuit

Case No. 05-1974

STONERIDGE INVESTMENT PARTNERS, LLC,

Plaintiff-Appellant,

- v. -

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

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
THE HONORABLE CHARLES A. SHAW (No. 02-01186)

OPPOSITION BRIEF OF DEFENDANT-APPELLEE SCIENTIFIC-ATLANTA, INC.

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SUMMARY OF THE CASE AND REQUEST FOR ORAL ARGUMENT

In Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164 (1994) ("Central Bank"), the Supreme Court unequivocally held that there is no private cause of action for "aiding and abetting" liability under Section 10(b) of the Securities Exchange Act of 1934 and SEC Rule 10b-5. The District Court faithfully applied this precedent and correctly held that Plaintiff-Appellant Stoneridge Investment Partners LLC ("Plaintiff") failed to state a claim against Defendant-Appellee Scientific-Atlanta, Inc. ("S-A") as a matter of law because its allegations amounted to nothing more than a claim for aiding and abetting. Plaintiff posits an untenable "scheme" theory, which in effect asks this Court to ignore Central Bank and its progeny. The District Court properly rejected Plaintiff's attempt to avoid Central Bank by merely characterizing classic "aiding and abetting" allegations as prohibitive "conduct" under subparts (a) and (c) of SEC Rule 10b-5, and its well-reasoned decision should be affirmed. S-A believes that this matter can be decided without oral argument. However, if the Court grants Plaintiff's request for oral argument, S-A requests an equal opportunity to be heard (i.e., 30 minutes).

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and this Circuit's Rule 26.1A, the undersigned counsel for S-A hereby certifies that S-A is not a subsidiary of any other corporation, and that no publicly held corporation owns 10% or more of its stock.

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JURISDICTIONAL STATEMENT

S-A agrees with Plaintiff's statement of jurisdiction.

STATEMENT OF THE ISSUES PRESENTED

1. Did the District Court correctly hold that Plaintiff's claims against S-A fail to state a claim for primary liability under any subpart of SEC Rule 10b-5 and Section 10(b) of the Securities Exchange Act of 1934 because they are barred by the Supreme Court's decision in Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164 (1994), which held that there is no private right of action for aiding and abetting claims? See, e.g., id.; Wright v. Ernst & Young LLP, 152 F.3d 169 (2d Cir. 1998); In re Dynegy, Inc. Sec. Litig., 339 F. Supp. 2d 804 (S.D. Tex. 2004); In re Homestore.com, Inc. Sec. Litig., 252 F. Supp. 2d 1018 (C.D. Cal. 2003).

2. Did the District Court correctly hold that Plaintiff's filing of a Second Amended Complaint to add more detail regarding the same business transaction would have been futile because the Court's dismissal Order was not based on an assessment of the prior Complaint's particularity, but rather on the holding that Plaintiff, in light of Central Bank, could provide no set of facts that would support a cognizable claim against S-A under any subpart of SEC Rule 10b-5? See, e.g., MM&S Financial, Inc. v. Nat'l Ass'n of Securities Dealers, Inc., 364 F.3d 908 (8th Cir. 2004); Wiles v. Capitol Indem. Corp., 280 F.3d 868 (8th Cir. 2002); Briehl v.

Gen. Motors Corp., 172 F.3d 623, 629 (8th Cir. 1999); Dorn v. State Bank of Stella, 767 F.2d 442 (8th Cir. 1985).

3. Did the District Court correctly hold that there were no grounds to reconsider its prior dismissal Order because Plaintiff failed to show any manifest errors in the application of controlling law? See, e.g., Broadway v. Norris, 193 F.3d 987 (8th Cir. 1999); Atkinson v. Prudential Prop. Co., Inc., 43 F.3d 367 (8th Cir. 1994); In re Zimmerman, 869 F.2d 1126 (8th Cir. 1989).

STATEMENT OF THE CASE

A. RELEVANT PROCEDURAL HISTORY

As an afterthought eight months after filing its initial complaint for primary violations under the securities laws against Charter and its former officers and directors, Plaintiff, a Charter investor, added S-A -- a separate public company that did business with Charter -- under an aiding and abetting theory. (See Plaintiff's Amended Consolidated Class Action Complaint ("Amended Complaint" or "Am. Compl."), ¶¶ 1, 34, Joint Appendix ("App.") at A-41, A-48.) Plaintiff alleged that Charter undertook several means to artificially inflate its financial results over a two-year time period. One method allegedly employed by Charter was Charter's manipulation of its internal accounting treatment of marketing support agreements it had with S-A and Motorola, Inc., who were equipment suppliers to Charter. (Am. Compl. ¶¶ 7-8, App. A-42 – A-43.) Based on this allegation, Plaintiff

purported to assert a cause of action against S-A under Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), and SEC Rule 10b-5(a)-(c), 17 C.F.R. § 240.10b-5, for aiding and abetting the fraud on Charter's shareholders which had allegedly been committed by Charter. (See Am. Compl. ¶¶ 195-98, App. at A-105 – A-106.)

Plaintiff's Amended Complaint is based exclusively on public statements attributed only to Charter regarding Charter's financial results. (See, e.g., Am. Compl. ¶¶ 95-145, App. at A-73 – A-91.) Plaintiff does not allege that S-A drafted any of the purported misleading statements, nor is it alleged to have had any involvement in the contents of Charter's public statements, control over their circulation, or the ability or duty to independently verify their accuracy. Moreover, Plaintiff does not allege that S-A, a third party vendor, had any involvement in or control over the internal accounting decisions made by Charter and its outside auditors. The Amended Complaint also does not allege any misstatement or omission by S-A to Charter's shareholders. Indeed, even Plaintiff has abandoned any claim that S-A may be liable for Charter's misstatements under Rule 10b-5(b). (See Pl.'s Br. at 5 n.3.)

Plaintiff now stresses that its claims against S-A -- a supposed scheme "to commit a misstatement" -- are based on "conduct," which it argues is covered by subparts (a) and (c) of Rule 10b-5. (See Am. Compl. ¶¶ 7-9, App. at A-42 – A-43.)

Plaintiff, however, does not allege that it relied on S-A's alleged "scheme" in making its investment decision. Rather, as noted above, Plaintiff alleges only that it relied on Charter's alleged misstatements and omissions in making its investment decision. (See, e.g., Am. Compl. ¶¶ 196, App. at A-105 – A-106.)

On September 9, 2003, S-A filed its Motion to Dismiss the Amended Complaint ("S-A's Motion" or "S-A's Mot.") on the grounds that Plaintiff's claims were barred by the Supreme Court's decision in Central Bank, which held that "'there is no private aiding and abetting liability under § 10(b).'"[1] (See, e.g., S-A's Mot. at 2, App. at A-116 (quoting Central Bank, 511 U.S. at 191).) On October 12, 2004, District Court Judge Charles A. Shaw entered an Order granting S-A's Motion, holding that Plaintiff's claims were nothing more than claims for aiding and abetting liability, which are prohibited by Central Bank. (See October 12, 2004 Memorandum and Order ("Oct. Op.") at 8, App. at A-417.)

Judge Shaw, having reviewed the allegations, held that (1) S-A did not make "a representation to Charter's investors nor participated in the drafting of statements Charter made to its investors," and (2) Charter's investors did not rely on S-A's alleged deceptive scheme to defraud. (Oct. Op. at 9-11, 14, App. at A-

[1] S-A also moved to dismiss Plaintiff's Amended Complaint on the grounds that it (1) failed to satisfy the mandatory and heightened pleading requirements of the Private Securities Litigation Reform Act ("Reform Act"), 15 U.S.C. § 78u-4 et seq.; and (2) failed to plead with particular facts a "strong inference" that S-A acted with scienter. (See, e.g., S-A's Mot. at 15-25, App. at A-120 – A-139.) Those grounds support dismissal independent of Central Bank. (See id.)

418 – A-420, A-423.) The District Court determined that there was no precedent for "holding a business partner to a corporation, such as [S-A], liable to the investors of that corporation for securities fraud" and that "it 'appears beyond doubt that the [P]laintiff can prove no set of facts in support of [its] claims [against S-A] which would entitle [it] to relief.'" (Oct Op. at 3, 14, App. at A-412, A-423 (internal citations omitted).)

On October 26, 2004, Plaintiff moved for reconsideration of Judge Shaw's Order and submitted a proposed Second Amended Consolidated Class Action Complaint ("Second Amended Complaint"), which it sought the Court's permission to file. In the Second Amended Complaint, Plaintiff attempted to add "new" allegations purportedly based on discovery it received pursuant to its settlement with Charter. (See Pl.'s Br. at 5.) The Second Amended Complaint did not, however, present any new claims or theories of liability, but instead provided only additional alleged detail that supposedly corroborated the prior iteration of these same allegations.

On December 20, 2004, the District Court denied Plaintiff's request to file a further amendment and/or for reconsideration. The District Court held that "amending the complaint would be futile" because the amended allegations, which did not supply the missing elements necessary for a Section 10(b) claim, still amounted to nothing more than "aiding and abetting" allegations foreclosed by

Central Bank under the reasoning of his October 12 Opinion. (December 20, 2004 Memorandum and Order ("Dec. Op.") at 11, App. at A-454.) The Court also held that Plaintiff had failed to come forward with the type of exceptional circumstances that could possibly justify reconsideration of its prior opinion. (See Dec. Op. at 8-11, App. at A-451 – A-454.)

B. STATEMENT OF THE FACTS

As a threshold matter, because the statements found in Plaintiff's Brief at pages 10 through 16 come directly from Plaintiff's rejected Second Amended Complaint, they are not properly before this Court.[2]

S-A is headquartered in Lawrenceville, Georgia and is a leading supplier of transmission networks for broadband access to the home and digital interactive subscriber systems for video, high speed Internet, and voice over IP networks. The Company's customers include Charter and other top cable and telecommunications system operators and programmers. During the relevant time period, Charter purchased "digital set-tops" from S-A, which are units typically placed on top of a television set to enable the user to access digital cable television and other digital services. S-A's digital set-tops are utilized by cable subscribers to enable their television sets to function as digital home terminals for two-way interactive TV, such as, for example, video-on-demand, data, and telephony.

[2] As demonstrated infra, Plaintiff's claims are barred under Central Bank under either the Amended Complaint or the Second Amended Complaint.

In 1998, S-A began to ship these newly-developed digital set-tops and other digital network equipment that would replace the analog set-tops and equipment that had been sold by the Company for many years. By 2000, the digital set-top was still a relatively new product, and cable operators, like Charter, marketed its new features to prospective and existing cable customers. Accordingly, advertising agreements were not uncommon between cable operators, who wanted new subscribers, and their equipment suppliers, who wanted to sell the necessary equipment that would be driven by subscriber growth.

According to Plaintiff's Amended Complaint, S-A allegedly entered into a marketing support agreement with Charter at Charter's request whereby Charter would pay additional sums for each set-top box purchased from S-A and S-A would return this money to Charter in the form of marketing support for advertising. (See Am. Compl. ¶¶ 7, 75-81, App. at A-42, A-67 – A-69.) The transaction, if properly accounted for, would have resulted in no net economic benefit to either party. (See Am. Compl. ¶¶ 77, 80-81, App. at A-67 – A-69.)

Along with other disclosures of accounting errors, Charter ultimately announced that it had failed to properly account for this transaction with S-A. (See Am. Compl. ¶¶ 146-65, App. at A-91 – A-97.) Plaintiff does not dispute that S-A's accounting treatment for this agreement was proper, nor does Plaintiff dispute that it was possible for Charter to have accounted for the agreement properly on its

books. (See Am. Compl. ¶¶ 80-81, App. at A-68 – A-69.) Indeed, Plaintiff alleges that Charter consulted with its auditor and received instructions as to the appropriate treatment. (See id.) Plaintiff alleges, however, that Charter falsely represented to its auditor that it had compiled with all of the previously discussed requirements. (See id.)

ARGUMENT

A. Summary Of Argument.

On appeal, Plaintiff concedes that it cannot state a claim against S-A under Rule 10b-5(b) for making an allegedly false or misleading statement because S-A made no statements to Charter's investors and had no duty to speak to these investors. Plaintiff's Complaint, however, is based on a variety of public statements made exclusively by Charter. Plaintiff also acknowledges it relied only on Charter's statements in making the decision to invest in Charter stock.

Nevertheless, Plaintiff wrongly argues that S-A can be liable for Charter's statements because S-A, solely by entering into the marketing support transaction, provided assistance to Charter's misrepresentation of the accounting treatment Charter gave to that transaction. Central Bank squarely held, however, that there can be no private cause of action against the assisting party under such circumstances.

Plaintiff's attempt to characterize its claims against S-A as being "conduct-based" under Rule 10b-5(a) and (c) cannot salvage these claims. Numerous courts have rejected similar attempts by plaintiffs to use Rule 10b-5(a) and (c) to assert claims based on a third-party's purported participation in a "scheme to make a misstatement." Such attempts have been rejected where, like here, the gravamen of the claim is another party's misstatements and the third-party had no involvement with those statements.

Further, under any subpart of Rule 10b-5, a plaintiff cannot state a claim for primary liability unless all of the necessary elements have been met as to each defendant. Plaintiff here has not pled, inter alia, (1) any deceptive or manipulative act committed by S-A, (2) that was in connection with the purchase or sale of Charter stock, and (3) on which Plaintiff relied. Plaintiff's failure to plead as to S-A the necessary elements of a claim for primary liability under Rule 10b-5(a) or (c) provides an independent basis for dismissal of these claims. This Court should affirm the dismissal of these claims.

Any further amendments by Plaintiff to add more "detail" would have been futile and were properly rejected by the District Court. The lower court's dismissal Order was not based on any assessment of the Amended Complaint's particularity, but rather on the fact that Plaintiff's theory of liability was insufficient as a matter of law under Central Bank. Accordingly, more supposed detail on the

circumstances of the marketing support agreement could not cure the defect on which the dismissal was based. In other words, the proposed amendment did not supply elements that were necessary to state a Section 10(b) claim, but rather only fleshed out prior allegations that were, and remain, insufficient.

The District Court also correctly exercised its discretion in refusing to reconsider its dismissal Order. The two cases from other jurisdictions presented by Plaintiff were found to be distinguishable by the District Court. Indeed, the District Court had previously considered and rejected a prior opinion from the same case. Also, the additional detail Plaintiff sought to add through a further amendment did not present any grounds for reconsideration because, as discussed above, these new allegations would not have altered the outcome. Therefore, this Court should find that the District Court properly exercised its discretion in refusing to allow further futile amendments or to reconsider its prior dismissal ruling. [3]

B. The District Court Correctly Found That *Central Bank* Bars Plaintiff's Claims.

Central Bank conclusively bars Plaintiff's attempted claims. Central Bank's prohibition against aiding and abetting claims applies with equal force to all subsections of Rule 10b-5. See Wennerman v. Brown, 49 F. Supp. 2d 1283, 1288

[3] S-A incorporates by reference as if fully set forth herein the description of the standard of review for this appeal from the brief filed this same day by Defendant-Appellee Motorola, Inc.

(D. Utah 1999). Thus, regardless of the particular subpart involved, Central Bank prohibits claims against a secondary actor based on purported assistance it allegedly provided to another defendant -- when it is the other defendant who is accused of actually making false or misleading statements to investors.

Plaintiff originally sought to bring claims against S-A under all three subparts of Rule 10b-5, including the misguided allegation -- now abandoned -- that S-A "made materially misleading statements to Charter investors . . . and thereby violated . . . Rule 10b-5(b)." (Am. Compl. ¶ 197, App. at A-106.) As the District Court correctly found, and as Plaintiff now concedes, S-A made no public statements about Charter on which Plaintiff could have relied, S-A is not alleged to have had any involvement in Charter's preparation of such statements, and S-A had no duty to speak to Charter's investors about this separate company. (See Oct. Op. 12 at 9-10, App. at A-418 – A-419.) For all these reasons, there can be no cognizable claim against S-A for "making" any allegedly false or misleading statements under subpart (b) of Rule 10b-5. (See Oct. Op. at 10, App. at A-419.) Plaintiff does not appeal that determination by the District Court, which is consistent with the standards developed by other courts applying Central Bank.

For example, the Second Circuit has developed a "bright line" test whereby "a secondary actor cannot incur primary liability under [Rule 10b-5] for a statement not attributed to that actor at the time of its dissemination." Wright v.

Ernst & Young LLP, 152 F.3d 169, 175 (2d Cir. 1998). The Ninth Circuit relies on a "substantial participation" test, which requires "substantial participation or intricate involvement" of the secondary actor in the preparation of the allegedly misleading statement. Howard v. Everex Sys., Inc., 228 F.3d 1057, 1061 n.5 (9th Cir. 2000).[4] Although the Eighth Circuit has not yet considered this issue, District Courts in this Circuit have applied the Second Circuit's bright line test. See In re Rural Cellular Corp. Sec. Litig., No. Civ. 02-4893PAMRLE, 2004 WL 67651, at *7 (D. Minn. Jan. 9, 2004) (holding that, under Central Bank, the auditor defendant could "only be liable for the allegedly false or misleading statements that it actually made."). This unpublished opinion is attached hereto as Exhibit A.

Under any of the standards developed by courts applying Central Bank, S-A cannot be liable for the statements made by Charter on which Plaintiff's Amended Complaint is based. No public statement on Charter was ever attributed to S-A and S-A did not participate in the drafting of these statements. These facts are not disputed by Plaintiff. Plaintiff instead alleges that it relied on and was harmed only by the internal accounting decisions of Charter and the related alleged

[4] See also Ziemba v. Cascade Int'l, Inc., 256 F.3d 1194, 1207 (11th Cir. 2001) (rejecting plaintiff's attempt to hold law firm and accountants liable as primary violators where none of the alleged misstatements or omissions was attributed to either defendant); Anixter v. Home-Stake Productions Co., 77 F.3d 1215, 1226 (10th Cir. 1996) (holding that Central Bank precludes liability for secondary actors unless they "themselves make a false or misleading statement (or omission) that they know or should know will reach potential investors.").

misrepresentations issued solely by Charter. (See, e.g., Am. Compl. ¶ 7, App. at A-42 – A-43; Am. Compl. ¶ 8, App. at A-43.)

In light of the above, Plaintiff has stated its intention to pursue on appeal only those purported claims against S-A under Rule 10b-5(a) and (c). (See, e.g., Pl.'s Br. at 5 n.3.) As the District Court correctly held, however, Plaintiff fails to state a claim for primary liability against S-A under any subpart of Rule 10b-5. (See Oct. Op. at 8, App. at A-417.) Plaintiff attempts to recover for S-A's alleged participation in a "scheme" to assist another company -- Charter -- in Charter's efforts to issue misstatements to Charter shareholders. There is no such primary cause of action under the federal securities laws. Such conduct, if it occurred, would, at best, amount only to the aiding and abetting of another defendant's violation of the securities laws, which is not a viable claim under Central Bank.[5] The District Court's decision to dismiss the claims against S-A should be affirmed.

[5] See, e.g., In re Bristol-Myers Squibb Sec. Litig., 312 F. Supp. 2d 549, 554-55, 559 (S.D.N.Y. 2004) (rejecting under Central Bank plaintiffs' attempt to hold Bristol-Myers liable for statements made by its business partner, ImClone Systems, because such claims were "addressed to the wrong defendant."); In re Homestore.com, Inc. Sec. Litig., 252 F. Supp. 2d 1018, 1041 (C.D. Cal. 2003) (rejecting under Central Bank plaintiffs' theory that outside business partners or vendors could be liable under Rule 10b-5 for alleged "scheme" to assist another company in making misstatements or omissions to its investors).

1. The District Court Properly Rejected Plaintiff's Theory of Scheme Liability Under Rule 10b-5 (a) and (c).

As noted above, when the Supreme Court rejected aiding and abetting liability for private actions, it did not confine its analysis to claims asserted under subsection (b) of Rule 10b-5. Wenneman, 49 F. Supp. 2d at 1288 n.2. Accordingly, "subsections (a) and (c) . . . do not create a short cut to circumvent Central Bank's limitations on liability for a secondary actor's involvement in [allegedly] preparing misleading documents." In re Lernout & Hauspie Sec. Litig., 230 F. Supp. 2d 152, 175 (D. Mass. 2002) ("Lernout I").[6]

The District Court properly followed other well-reasoned decisions that rejected similar attempts, as here, to avoid the impact of Central Bank by characterizing a secondary actor's alleged conduct as participation in a "scheme" or practice which supposedly operates as a fraud in violation of subsections (a) or (c) of Rule 10b-5. In its opinion, the District Court discussed one such case -- In re Homestore.com, Inc. Sec. Litig., 252 F. Supp. 2d 1018 (C.D. Cal. 2003). (See Oct. Op. at 10-11, App. at A-419 – A-420.)

[6] When Congress drafted the Reform Act, the Supreme Court's decision in Central Bank and its effect on private lawsuits and SEC enforcement actions was discussed. See Homestore.com, 252 F. Supp. 2d at 1038. Congress, however, declined to legislate an express private right of action for aiding and abetting securities fraud. It only authorized the SEC to bring civil enforcement actions against those who aid and abet violations of the federal securities laws. See id.; see also 15 U.S.C. § 78t(e).

Under analogous facts, the Homestore.com Court held that certain third-party vendors and business partners could not be primarily liable under Section 10(b) where the plaintiff failed to allege that it had relied on any statements made by those defendants or on the purported "scheme" in which the defendants allegedly participated. 252 F. Supp. 2d at 1041-42. Thus, like Central Bank, Homestore.com discussed the essential element of reliance for any Section 10(b) and Rule 10b-5 claim and the fact that its absence is the hallmark of prohibited aiding and abetting claims:

> [a]ny person or entity, including a lawyer, accountant, or bank, who employs a manipulative device or makes a material misstatement (or omission) on which a purchaser or seller of securities relies may be liable as a primary violator under 10b-5, assuming all of the requirements for primary liability under Rule 10b-5 are met.

Id. at 1039 (quoting Central Bank, 511 U.S. at 191) (emphasis added and in original). "[N]o matter how a 'scheme' is defined, Central Bank dictates that only those participants who commit 'primary violations' of the securities laws may be held liable; those who merely facilitate or participate cannot." Id. at 1038.

In Homestore.com, like here, the plaintiff purportedly suffered damages through reliance on another defendant's false or misleading statements and not through reliance on the alleged "scheme" in which the secondary actors supposedly participated. Id. at 1041. The Homestore.com Court found that "the scheme [wa]s

one step removed from the injured party . . . [and] was not complete until the statement was made." Id. Under these circumstances,

> what plaintiff alleges is a scheme to make a deceptive statement or material omission. Yet the principal "wrong" alleged under the rule is the statement, not the scheme. Therefore, it is appropriate to require defendants in this case to be connected in some material way to the drafting of the statements made to the investing public.

Id. (emphasis added). Because no such connection had been pled, the claims were due to be dismissed. Id. The District Court properly recognized that Plaintiff's claims suffer from the same deficiencies. (See Oct. Op. at 10-11, App. at A-419 – A-420.) Like Homestore.com, "[b]ecause [P]laintiff did not (and cannot) sufficiently allege that [S-A] substantially contributed to [Charter's] statements, it cannot state a claim against [S-A] for damages resulting from reliance on [Charter's] statements or material omissions." 252 F. Supp. 2d at 1041.

Other decisions since Homestore.com have reached similar conclusions. For example, In re Bristol-Myers Squibb Sec. Litig., 312 F. Supp. 2d 549, 554-55, 559 (S.D.N.Y. 2004), involved, inter alia, an attempt by plaintiffs to hold Bristol-Myers liable for statements made by another company, ImClone Systems, in which Bristol-Myers was an investor. The court found that any claims against Bristol-Myers for statements made by ImClone were barred by Central Bank. See id. at 559 ("In Central Bank, the Supreme Court established unequivocally that a § 10(b) claim is not actionable unless the defendant is accused of making the false or

misleading statements at issue.") (emphasis in original). Thus, the court concluded that, "to the extent Plaintiffs complain about allegedly false statements made by ImClone . . . , that complaint is addressed to the wrong defendant." Id. (emphasis added); see also SEC v. Pimco Advisors Fund Mgmt. LLC, 341 F. Supp. 2d 454, 467 (S.D.N.Y. 2004) (finding that there can be no claim for primary liability for alleged participation in a scheme where the core allegations related to the publication of material misrepresentations not made by or attributed to the defendant at issue).

Plaintiff's criticisms of decisions like Homestore.com are unavailing. (See Pl.'s Br. at 31-35.) Plaintiff focuses on the Homestore.com Court's observation that, "in every post[-]Central Bank case . . . where an 'outsider' has been held liable as a primary violator, that outsider had some type of special relationship with the corporation, i.e., accountant, auditor, etc." 252 F. Supp. 2d at 1039; see also Pl.'s Br. at 31-35. This comment refers to decisions cited earlier in the opinion where courts had sustained claims against "outsiders" to a corporation "if those persons substantially and directly participated in the creation of false or misleading statements to the investing public." Homestore.com, 252 F. Supp. 2d at 1039.

In summarizing these cases, the Homestore.com Court observed that such standards had been met primarily in the context of claims against auditors, who are recognized to have a special relationship with their public company clients,

including but not limited to, potential involvement in the preparation of its clients' public statements. See id. at 1038-39. The point was that this type of opportunity to "substantially and directly" participate in the drafting of another company's public disclosures was more likely to arise in the context of the auditor-client relationship. See id.

Homestore.com, thus, did not purport to adopt a new "special relationship" test as Plaintiff suggests. (See Pl.'s Br. at 31-35.) Homestore.com merely acknowledged certain practical realities -- namely, that most outside individuals or entities with whom a company comes in contact in the ordinary course of business will not have the type of relationship with that company or its shareholders from which claims of primary liability may possibly arise. This is consistent with Central Bank, which noted that certain types of secondary actors (such as accountants, lawyers, and banks), who possess distinctive relationships with their corporate clients that often involve the preparation of their clients' public statements, may be potentially subject to claims of primary liability under Section 10(b), but only if all the necessary elements of such claims are met. See Central Bank, 511 U.S. at 191. Here, the necessary elements of a primary violation have not been pled against S-A.

2. Plaintiff Has Not Pled The Necessary Elements Of Primary Liability Under Rule 10b-5(a) or (c).

Plaintiff's shift in focus to subsections (a) and (c) of Rule 10b-5 cannot save its claims. Plaintiff has not pled all of the necessary elements of a claim for primary liability under subparts (a) or (c), conclusively demonstrating that its claims are non-actionable aiding and abetting claims.

(a) Plaintiff Has Not Pled That S-A Committed Any Deceptive Or Fraudulent Acts.

Subparts (a) and (c) of Rule 10b-5 prohibit "any device, scheme, or artifice to defraud" or an "act, practice, or course of business which operates or would operate as a fraud or deceit." 17 C.F.R. § 240.10b-5. However, Plaintiff's Amended Complaint alleges only the existence of a marketing support agreement with respect to S-A. (See, e.g., Am. Compl. ¶ 7, App. at A-42.) Plaintiff concedes that this type of agreement can be accounted for properly -- as S-A did on its books. (See Am. Compl. ¶¶ 80-81, App. at A-68 – A-69.) Further, Plaintiff alleges no efforts by S-A to misrepresent this transaction to Charter shareholders -- it alleges that Charter misrepresented it. (See id.) This is a necessary prerequisite to claims under subparts (a) or (c). See Central Bank, 511 U.S. at 177-78 ("We cannot amend [Section 10(b)] to create liability for acts that are not themselves manipulative or deceptive within the meaning of the statute."). Aiding and abetting claims are designed to "reach[] persons who do not engage in the

proscribed activities at all, but who give a degree of aid to those who do." Id. at 176. Because the only conduct alleged against S-A -- an agreement for marketing support -- is not prohibited by the statute, the claim asserted is one of aiding and abetting the allegedly prohibited conduct of other parties, which is prohibited by Central Bank. Id.

Plaintiff's speculation that S-A "knew" Charter intended to use the marketing support agreement to artificially inflate its reported financial results does not save their Amended Complaint. (See, e.g., Am. Compl. ¶ 196, App. at A-105.) These allegations confuse "the distinction drawn in Central Bank between primary violators and aiders/abettors based on conduct with the separate issue of scienter." SEC v. U.S. Environmental, Inc., 155 F.3d 107, 111 (2d Cir. 1998). In reaching its conclusion that aiding and abetting claims were excluded, the Supreme Court in Central Bank did not in any way rely on the level of scienter that would be applicable or, like the District Court here, even whether scienter had been properly alleged. See id. For this reason, "even aiding and abetting claims premised upon a showing of intent are barred . . . [because] [t]he statutory text, not the level of scienter, was the determinative issue in Central Bank . . . ." Dinsmore v. Squadron, Ellenoff, Plesant, Sheinfeld & Sorkin, 135 F.3d 837, 844 (2d Cir. 1998). Whether the defendant "was a primary violator rather than an aider and abettor turns on the nature of his acts, not on his state of mind when he performed them."

U.S. Environmental, 155 F.3d at 111; see also Hart v. Internet Wire, Inc., 145 F. Supp. 2d 360, 368 (S.D.N.Y. 2001). Accordingly, conclusory allegations of a shared intent by S-A and Charter to mislead Charter's investors cannot create a cause of action under the federal securities laws against S-A.

In re Livent, Inc. Noteholders Sec. Litig., 174 F. Supp. 2d 144, 149 (S.D.N.Y. 2001), is relevant on this point. The plaintiffs in that case brought claims against a bank that had been involved in a transaction with Livent that Livent allegedly failed to report properly on its books and in its public statements. Id. The plaintiffs argued that the bank "knew" Livent intended to commit accounting fraud using this transaction due to the existence of "secret side letters" exchanged between the parties. Id. Relying on Central Bank, the Livent Court held that "such assistance and participation in a securities law violation [of another party, in this instance, Livent's alleged violation], without more, would not suffice to establish primary liability under § 10(b)." Id. Thus, the fact that the bank supposedly "knew" of the fraudulent intent of Livent could not convert the bank's "assistance" into a cognizable claim under Section 10(b). See id.[7] Here, if Charter had accounted for the marketing support transaction properly on its books, its

[7] The Livent Court ultimately found that the bank could be held liable under Section 10(b), but only because, unlike S-A, it had made separate public misrepresentations of its own to Livent investors "in connection with" the purchase or sale of Livent securities. Livent, 174 F. Supp. 2d at 150-51, 154-55. The bank had solicited class members to purchase Livent notes without disclosing what it allegedly knew about Livent's accounting practices. Id.

investors would not have suffered any injury related, arguendo, to the only "conduct" alleged against S-A -- its being a contract party to the marketing support agreement. Plaintiff, thus, was not harmed by the existence of this agreement, but by Charter's allegedly false reporting of it.

(b) S-A's Alleged Conduct Was Not "In Connection With The Purchase Or Sale Of Any [Charter] Security."

Section 10(b) and all of the subparts of Rule 10b-5 likewise require that the alleged wrongful conduct must be "in connection with the purchase or sale of any security." 17 C.F.R. § 240.10b-5; 15 U.S.C. § 78j. Indeed, Central Bank observed that Section 10(b) "imposes private civil liability on those who commit a manipulative or deceptive act in connection with the purchase or sale of securities." 511 U.S. at 166 (emphasis added).

Here, S-A neither bought nor sold Charter securities and is not alleged to have had any connection or involvement with the transactions by which Plaintiff or other putative class members became investors in Charter. The marketing support agreement involved digital set-top boxes, not the sale of Charter stock.

A commercial transaction unconnected to the purchase or sale of a security cannot fall within Section 10(b) simply because the party standing on the other side of the transaction was a public company whose stock was purchased and sold by investors from time to time. Such a result would extend the scope of liability far beyond the text of the statute. Section 10(b) was not designed to nor should be

interpreted so broadly as to convert every allegation of common-law fraud that happens to involve securities into a putative Section 10(b) claim. See, e.g., SEC v. Zandford, 535 U.S. 813, 820 (2002); see also Marine Bank v. Weaver, 455 U.S. 551, 556 (1982) ("Congress, in enacting the securities laws, did not intend to provide a broad federal remedy for all fraud.").

Plaintiff cites to several cases discussing Rule 10b-5(a) and (c), which it claims support the theory of possible conduct-based primary liability. (See, e.g., Pl.'s Br. at 22-23.) The cases cited by Plaintiff are easily disposed of. In each, the defendant had personally employed a purported fraudulent device or scheme that was clearly "in connection with the purchase or sale of a security," unlike here:

- SEC v. Zandford, 535 U.S. 813, 824-25 (2002) (broker sold customer's securities without permission and without disclosing intent to misappropriate proceeds). In Zandford, the Supreme Court specifically enforced the need to find a connection between the alleged fraudulent conduct and the purchase or sale of a security. The Zandford Court held that "[t]he securities sales and respondent's fraudulent practices were not independent events . . . . Rather, [the broker's] fraud coincided with the sales themselves . . . . [E]ach sale was made to further [the broker's] fraudulent scheme; each was deceptive because it was neither authorized by, nor disclosed to, the [clients]." Id. at 820-21 (emphasis added).

- U.S. v. O'Hagan, 521 U.S. 642, 659 (1997) (holding that secretly using misappropriated confidential information for trading purposes violates Section 10(b)).

- Affiliated Ute Citizens of Utah v. United States, 406 U.S. 128 (1972) (finding that defendants, who owed a duty to investors and made direct misrepresentations to investors, could also be liable under Rule 10b-5(a) and (c) because they executed plaintiffs' stock sales on which they stood to personally profit and were also purchasers of the same stock on their

own behalf and on behalf of other accounts they solicited, set up, and on which they received commissions).

- Superintendent of Ins. v. Bankers Life & Casualty Co., 404 U.S. 6, 9-10 (1971) (misleading investor into selling treasury bonds on erroneous belief that it would receive the proceeds from the sale).

- Sante Fe Indus., Inc. v. Green, 430 U.S. 462, 477 (1977) (noting that "manipulation" is a term of art when used in connection with the securities markets and "refers generally to practices, such as wash sales, matched orders, or rigged prices, that are intended to mislead investors by artificially affecting market [trading] activity.") (emphasis added).

- SEC v. U.S. Environmental, Inc., 155 F.3d 107, 112 (2d Cir. 1998) (finding broker defendant qualified as primary violator "by effecting the very buy and sell orders that artificially manipulated [the company's] stock price upward.") (emphasis added).

The agreement between S-A and Charter is not, and has not been alleged to be, "in connection with the purchase or sale" of Charter stock. All of the cases cited by Plaintiff in support of conduct-based liability under subparts (a) or (c) are, therefore, inapplicable.

In re Dynegy, Inc. Sec. Litig., 339 F. Supp. 2d 804 (S.D. Tex. 2004), not mentioned by Plaintiff is, however, on point. There, the court faced claims for alleged violations of Rule 10b-5(a) and (c) against Citigroup in its capacity as an investment banker and advisor to Dynegy, Inc. Id. at 914-15. Citigroup was alleged to have structured, funded, and executed (1) off-balance sheet transactions that allegedly disguised a loan to Dynegy as an equity interest investment and (2)

circular gas contracts that allowed Dynegy to report overstated cash flow from operations and understated tax liability. See id.

The court dismissed these claims because they did not amount to claims of primary liability under subparts (a) or (c). Id. at 916. The court noted that the "plaintiffs in this case do not allege any facts showing that Citigroup's allegedly manipulative and deceptive acts coincided with sales of Dynegy securities," a reference to the "in connection with" requirement. Id. The court likewise found that the complaint failed to identify any "manipulative" conduct on the part of Citigroup and that plaintiffs claimed that Dynegy alone improperly reported the transactions on its financial statements. Id. For these reasons, the court concluded that, under Central Bank, "plaintiffs cannot invoke subsections (a) and (c) of Rule 10b-5 to circumvent Central Bank's limitations on liability for a secondary actor's involvement in the preparation of false and misleading statements." Id. The District Court properly reached the same result here.

(c) Plaintiff Cannot Satisfy The Mandatory Requirement Of Reliance.

Plaintiff's theory of scheme liability also fails because Plaintiff cannot plead reliance. Reliance or transaction causation is a necessary element of any Section 10(b) and Rule 10b-5 claim. See, e.g., Ferris, Baker Watts, Inc. v. Ernst & Young, LLP, 395 F.3d 851, 854 (8th Cir. 2005) (noting that there are four mandatory

elements to claims under Section 10(b) and Rule 10b-5, including "causation, often analyzed in terms of materiality and reliance.").

Under Central Bank, primary liability under Rule 10b-5 requires "a manipulative device or . . . a material misstatement (or omission) on which a purchaser or seller of securities relies . . . assuming all of the [other] requirements for primary liability under Rule 10b-5 are met." 511 U.S. at 191 (emphasis added and in original). "[B]ecause § 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." Wright, 152 F.3d at 175 (emphasis added and in original; internal citations omitted).

Plaintiff has not pled that it relied on anything S-A said or did. In fact, Plaintiff does not dispute that it relied solely on the statements of Charter and the effect it claims those statements had on Charter's stock price. (See, e.g., Am. Compl. ¶ 172, App. at A-99.) This is fatal to its claims. See, e.g., Dinsmore, 135 F.3d at 839, 843 (investors' conspiracy claims barred by Central Bank where they did not allege they relied on, and admitted they "were entirely unaware" of, law firm's alleged misstatements to others that supposedly delayed the revelation of another defendant's "Ponzi scheme"); Bristol-Myers, 312 F. Supp. 2d at 559 n.4 ("[A] claim alleging fraud based on statements made by a third party could not

survive . . . because it failed to allege reliance on any misstatements by the named defendant, as required."); In re Rent-Way Sec. Litig., 209 F. Supp. 2d 493, 505 (W.D. Pa. 2002) (outside auditor not liable for company's quarterly filings under Rule 10b-5(a) & (c) because company alone issued statements and "the allegations simply do not permit an inference that [p]laintiffs relied upon any 'device,' 'scheme,' 'artifice,' [or] 'act,' . . . employed or engaged in by [the auditor] such that a Rule 10b-5 claim could be established."). As the District Court correctly noted in dismissing the Amended Complaint, "'[r]eliance only on representations made by another cannot itself form the basis of liability.'" (Oct. Op. 9, App. at A-418 (quoting Anixter v. Home-Stake Production Co., 77 F.3d 1215, 1225 (10th Cir. 1996).)

The two District Court opinions cited by Plaintiff regarding the issue of reliance are contrary to Central Bank. See In re Enron Corp. Sec. Litig., 310 F. Supp. 2d 819 (S.D. Tex. 2004) ("Enron II"); In re Lernout & Hauspie Sec. Litig., 236 F. Supp. 2d 161 (D. Mass. 2003) ("Lernout II"). Both of these decisions failed to require the plaintiffs to plead reliance on the secondary actor's conduct or statements. Under Central Bank, there is no exception to the requirement of pleading reliance simply because a plaintiff chooses to sue multiple defendants whom it claims participated together in an alleged "scheme." See, e.g., Dinsmore, 135 F.3d at 843 ("[W]here the requirements for primary liability are not

independently met, they may not be satisfied based solely on one's participation in a conspiracy in which other parties have committed a primary violation.") (emphasis in original).[8]

Plaintiff's discussion of the "fraud-on-the-market" theory from Basic Inc. v. Levinson, 485 U.S. 224 (1998), is also irrelevant. (See Pl.'s Br. at 34.) Under that theory, only "publicly available information and misleading statements" released to the market could have influenced the price of Charter's securities. (Id.) For this reason, general reliance on the market price for Charter securities, although potentially relevant to supply reliance on Charter's statements, is insufficient to demonstrate reliance as to S-A, which made no public statements regarding Charter. Thus, the essential element of reliance does not exist here, which requires dismissal under Central Bank. See 511 U.S. at 180 ("Allowing plaintiff to circumvent the reliance requirement [through aiding and abetting claims] would disregard the careful limits on 10b-5 recovery mandated by our earlier cases.").[9]

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[8] Plaintiff's reliance on Harris v. Union Elec. Co., 787 F.2d 355 (8th Cir. 1986), is similarly unavailing. That case did not even involve putative claims of "scheme" liability against a third-party vendor or supplier. The discussion of reliance or causation from that case cited by Plaintiff arose in the context of the plaintiffs' claims against a bond issuer for failure to adequately disclose certain call-protection rights in the company's prospectus for a bond issuance. Id. at 367. The facts of that case are different from those at issue here.

[9] Plaintiff's Brief also cites to the amicus brief filed by the SEC in the Homestore.com case. The SEC has not filed an amicus brief in this case.

3. The District Court Properly Declined To Follow The Enron And Global Crossing Cases.

The District Court correctly was not persuaded by In re Enron Corp. Sec., Derivative, & ERISA Litig., 235 F. Supp. 2d 549 (S.D. Tex. 2002) ("Enron I"). Enron I is not the law of this jurisdiction and is contrary to the holding in Central Bank. Indeed, subsequent decisions from that same District have declined to embrace its incorrect view of potential secondary actor liability. See Dynegy, 339 F. Supp. 2d at 915-16.

As the District Court correctly observed here, Plaintiff's claims would, however, fail even under the marginal view espoused in Enron I. First, the test adopted in Enron I requires that the defendant "create" or participate in the creation of the misrepresentation. See 235 F. Supp. 2d at 587. Under this test, to be liable, S-A would need to have drafted or participated in the drafting Charter's public filings and press releases that are alleged to be false and misleading. This did not occur. (See Oct. Op. at 12-14, App. at A-421 – A-424.)

Second, to the extent that the Enron I Court, contrary to Central Bank, said that a secondary actor could be held primarily liable under Rule 10b-5(a) and (c) under a "conspiracy" type claim, the court made clear that such liability would only attach if the defendant "commit[ted] a key act that itself violated § 10(b) and Rule 10b-5." 235 F. Supp. 2d at 590 n.31 (emphasis added). Here, Plaintiff does not allege that the marketing support transaction itself violated Section 10(b) or

Rule 10b-5, only that Charter's accounting of the transaction and reporting of those results was securities fraud.[10]

There are also other important distinctions between Enron I and this case that further support the District Court's conclusion that Enron I was not on point. (See Oct. Op. at 12-14, App. at A-421 – A-424.) For example, several of the third-party banks held liable in Enron I were alleged to have possessed detailed non-public information about Enron's finances due to their long-standing and unique roles as lenders to that company. See, e.g., Enron I, 235 F. Supp. 2d at 638-49, 652-54, 696-701. In contrast, as stated in the District Court's Order, Plaintiff has not alleged that S-A possessed any non-public information about Charter's financials or its accounting practices. (See Oct. Op. at 13, App. at A-422.) Thus, S-A had neither the duty nor ability to verify the accuracy of Charter's public statements. (See id.)

Also, several of the bank defendants in Enron I allegedly made their own material misrepresentations about Enron in analyst reports and SEC filings, which were disseminated to the investing public. See, e.g., Enron I, 235 F. Supp. 2d at 638-49, 653-54, 697-702. In addition, even under the Enron I Court's reasoning,

[10] S-A also respectfully disagrees with the assumption in Enron I that the "fraud-on-the-market" presumption would automatically apply to claims under subparts (a) and (c). See 235 F. Supp. 2d at 693. The failure to examine this issue in detail is likely due to the fact that, unlike here, many of the secondary actor defendants in Enron I were also accused of having made their own misrepresentations directly to Enron investors.

third-parties who merely transacted business with Enron were not held liable. See id. at 703-06 (granting motion to dismiss as to Lehman Brothers, Bank of America, and Kirkland & Ellis).[11]

In re Global Crossing, Ltd. Sec. Litig., 322 F. Supp. 2d 319 (S.D.N.Y. 2004), is also distinguishable. Global Crossing involved a supposedly fraudulent accounting scheme that was literally created by Global Crossing's outside auditor, Arthur Andersen. Andersen allegedly tried to market the scheme to other prospective clients via a "White Paper." Id. at 335-37.

The plaintiffs in Global Crossing were able to state a claim against Andersen because the court found they had successfully alleged Andersen "was intimately involved in all of [Global Crossing's] accounting functions, and that it directly participated in the creation of the misleading 'pro forma' numbers that concealed these practices from investors." Id. at 336 (emphasis added). Thus, it was Andersen's alleged role as "chief architect and executor" of the schemes that "le[ft] no doubt as to its potential liability as a primary violator under section 10(b)." Id.

[11] Plaintiff's reliance on Enron II adds nothing new. (Pl.'s Br. at 26-28.) Not surprisingly, the court employed in that case the same analysis of Rule 10b-5(a) and (c) claims against Merrill Lynch that it had used previously in Enron I. See Enron II, 310 F. Supp. 2d at 827. Also, the court had previously acknowledged plaintiffs' allegations that Merrill Lynch possessed detailed, non-public information about Enron's finances, which it purportedly received as a result of the banking services it performed. See Enron I, 235 F. Supp. 2d at 649-51. The court also noted that plaintiffs claimed Merrill Lynch made its own misrepresentations to Enron investors in its analyst reports. Enron II, 310 F. Supp. 2d at 829. There are no such allegations here. (See Dec. Op. at 9-11, App. at A-452 – A-454.)

There are no such allegations here. The District Court, therefore, correctly found that Global Crossing is inapposite. (See Dec. Op. at 10-11, App. at A-453 – A-454.)

Also, S-A respectfully disagrees with the Global Crossing Court's decision to apply concepts from so-called "market manipulation" cases outside the specific factual context in which they were developed, i.e., where a connection exists between the defendant's conduct at issue and the purchase or sale of stock, unlike here. 322 F. Supp. 2d at 336-37. Global Crossing is not itself a market manipulation case, but inappropriately incorporated standards developed in such cases.[12]

"Market manipulation" is defined as "'[t]he illegal practice of raising or lowering a security's price by creating the appearance of active trading.'" Global Crossing, 322 F. Supp. 2d at 336 (internal citations omitted and emphasis added). Market manipulation decisions, therefore, necessarily involve individuals or entities, who through their own actions of either purchasing or selling securities, (e.g., wash sales, matched orders, or rigged pricing) seek to artificially inflate the target company's stock price. See Sante Fe Indus., Inc. v. Green, 430 U.S. 462,

[12] See, e.g., Global Crossing, 322 F. Supp. 2d at 329-30 (citing In re Initial Pub. Offering Sec. Litig., 241 F. Supp. 2d 281 (S.D.N.Y. 2003); In re Blech Sec. Litig., 961 F. Supp. 569 (S.D.N.Y. 1997)).

476-77 (1977).[13] No analogous conduct has been alleged here or was alleged in Global Crossing. The Global Crossing Court, thus, overlooked the mandatory "in connection with" requirement and the necessary element of reliance by investors on a defendant's alleged conduct.

Plaintiff also cites to Quaak v. Dexia S.A., 357 F. Supp. 2d 330 (D. Mass. 2005), which was issued by the same court and arose out of the same fact pattern as the Lernout II decision, 236 F. Supp. 2d 161. As discussed previously, the court in both Lernout II and Quaak, contrary to the requirements of Central Bank, found that a claim for primary liability could be pled under Rule 10b-5(a) and (c), even though the plaintiffs had not pled reliance on either the statements or the conduct of the secondary actor defendant.

The other post-Central Bank decisions cited by Plaintiff all pertain to whether a corporate officer can be primarily liable for the alleged conduct of his or her company and, thus, have no application to the present facts. See, e.g., SEC v.

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[13] Global Crossing cited to Initial Pub. Offering and Blech. In Initial Pub. Offering, the underwriter defendants were alleged to have created an artificial demand in the aftermarket purchasing of certain Initial Public Offerings ("IPO") by conditioning share allocation in the IPO upon the requirement that customers also agree to purchase additional shares in the aftermarket at pre-arranged, escalating pricing. 241 F. Supp. 2d at 311, 360. Similarly, in Blech, the defendants were alleged to have manipulated the market for certain securities where (1) the purchase of shares was made with the understanding that the shares would be resold or (2) the funds were provided by the defendants to pay for the purchases or were made from accounts under defendants' control without the knowledge or authorization of the account holder. 961 F. Supp. at 576.

First Jersey Sec., Inc., 101 F.3d 1450, 1471-72 (2d Cir. 1996); In re Salomon Analyst AT&T Litig., 350 F. Supp. 2d 455, 474 (S.D.N.Y. 2004); In re Scholastic Corp. Sec. Litig., 252 F.3d 63, 75-76 (2d Cir. 2001); In re AOL Time Warner, Inc. Sec. & "ERISA" Litig., MDL Docket No. 1500, 2004 WL 992991 (S.D.N.Y. May 5, 2004). The District Court properly was not persuaded by these authorities.

C. The District Court Did Not Err In Refusing To Allow Plaintiff's Futile Amendment.

The District Court correctly denied Plaintiff's request to file a Second Amended Complaint, which was purportedly designed "to add additional allegations detailing the role and knowledge of [S-A] in the [alleged] fraudulent scheme." (Dec. Op. at 11, App. at A-454.) The Court's dismissal Order did not, however, turn in any respect on any perceived lack of detail in the Amended Complaint concerning S-A's alleged state of mind or the details of the circumstances of the marketing support agreement. Rather, it was based on the finding that, under Central Bank, "plaintiff['s] claims are precluded . . . as a matter of law." (Oct. Op. at 14, App. at A-423 (emphasis added).)

The District Court correctly observed that there was no "need [to] address the sufficiency of the Amended Complaint on [S-A]." (Id.) For this reason, any attempt to add supposed new or more detailed allegations that address the circumstances of the agreement or to bolster claims that S-A possessed the requisite fraudulent intent or "scienter" are wholly irrelevant to the District Court's

prior decision. If the amendment cannot cure and does not even address the legal question on which dismissal was based, the proposed amendment is, by definition, futile.

Accordingly, when Plaintiff sought leave to amend post-dismissal,[14] the District Court correctly observed that adding more detail that merely rehashed the prior theory of liability would be futile, given that its prior Order was not based on any supposed lack of detail. (See Dec. Op. at 11, App. at A-454.) Indeed, applying Central Bank, the District Court previously found that "it 'appears beyond doubt that the [P]laintiff can prove no set of facts in support of [its] claims [against S-A] which would entitle [it] to relief.'" (Oct. Op. 12 at 3, App. at A-412 (citing Conley v. Gibson, 355 U.S. 41, 45 (1957).) The Court recognized that there was no legal precedent whatsoever for "holding a business partner to a corporation, such as [S-A] liable to investors of that corporation for securities fraud." (Oct. Op. at 14, App. at A-423.)

Under the law of this Circuit, the District Court properly exercised its discretion in refusing to allow further futile amendments. See, e.g., MM&S Financial, Inc. v. Nat'l Ass'n of Securities Dealers, Inc., 364 F.3d 908, 910-12 (8th Cir. 2004) (affirming denial of motion to amend as futile where lower court had

[14] As this Court has recognized previously, a motion for leave to amend after dismissal is "inappropriate 'if the court has clearly indicated either that no amendment is possible or that dismissal of the complaint also constitutes dismissal of the action.'" Dorn v. State Bank of Stella, 767 F.2d 442, 443 (8th Cir. 1985).

found, inter alia, that no private cause of action against defendants existed under the federal securities laws); see also Briehl v. Gen. Motors Corp., 172 F.3d 623, 629-30 (8th Cir. 1999) (holding that district court properly denied further amendments where proposed amended pleading did not cure defects that led to dismissal of its predecessor). The proposed Second Amended Complaint did not present any new theory of liability as to S-A or add missing, essential elements to plead a primary violation. It merely sought to perpetuate the same untenable theory of "scheme" liability as its predecessor. No amount of detail through further amendments could have transformed S-A from its status of being a supposed "aider and abettor" of Charter into a primary violator of the federal securities laws. The District Court's decision to deny further amendments should be affirmed. See, e.g., Wiles v. Capitol Indem. Corp., 280 F.3d 868, 871 (8th Cir. 2002) (finding district court did not abuse discretion in denying motion to amend where proposed amended complaint "merely restated . . . prior conspiracy claim[s] and would fail as a matter of law for the same reasons as the original complaint.").[15]

[15] Moreover, as S-A argued before the District Court, any attempt by Plaintiff to augment its dismissed claims through confirmatory discovery authorized as part of Plaintiff's settlement with Charter must also be rejected as violating the discovery stay provisions of the Reform Act. See 15 U.S.C. § 78u-4(b)(3)(B); see also SG Cowen Sec. Corp. v. U. S. Dist. Court, 189 F.3d 909, 912-13 (9th Cir. 1999); Podany v. Robertson Stephens, Inc., 350 F. Supp. 2d 375, 378 (S.D.N.Y. 2004). Under the Reform Act, a plaintiff is not allowed to use discovery materials against

D. The District Court Properly Declined To Reconsider Its Order Granting S-A's Motion to Dismiss.

In the instant case, the District Court cannot be said to have abused its discretion in denying Plaintiff's Motion for Reconsideration. Reconsideration under Fed. R. Civ. P. 60(b) "is an extraordinary remedy." In re Zimmerman, 869 F.2d 1126, 1128 (8th Cir. 1989). Such relief is to be granted only in "[e]xceptional circumstances[, which] are not present every time a party is subject to potentially unfavorable consequences as a result of an adverse judgment properly arrived at." Atkinson v. Prudential Prop. Co., Inc., 43 F.3d 367, 373 (8th Cir. 1994) (internal quotation marks omitted); see also Arnold v. Wood, 238 F.3d 992, 998 (8th Cir. 2001). A district court has wide discretion in deciding whether or not to grant a motion under Rule 60(b). See Atkinson, 43 F.3d at 371.

Plaintiff claims that, in denying the Motion for Reconsideration, the District Court misinterpreted two cases that were decided after the briefing on the Motion to Dismiss, but before the District Court issued its dismissal Order. (See Pl.'s Br. at 36-37.)[16] The Court's decision not to reconsider its prior decision in light of these two cases cannot possibly be considered a "manifest error of law." First,

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a defendant, unless and until its complaint first survives that defendant's motion to dismiss, which did not occur here. See id.

[16] If Plaintiff thought these two decisions were relevant to the District Court's analysis of S-A's Motion to Dismiss, it had the opportunity to bring these decisions to the Court's attention before it issued the dismissal Order. Having failed to do so, Plaintiff should be estopped from arguing that the existence of these opinions presented grounds for reconsideration of the Court's prior ruling.

both decisions (Enron II and Global Crossing) were from outside the Eighth Circuit and were not binding authority on the lower court. Second, in its December Order, the District Court examined in detail both of these "new" cases and in a well-reasoned analysis properly found that they were distinguishable from the present circumstances. Further, neither decision could be fairly characterized as presenting any new or significant change in the law as Plaintiff labors to suggest. (See Pl.'s Br. at 36.) As discussed previously, Enron II applied the same reasoning as Enron I -- a case previously considered and properly rejected by the District Court in its dismissal Order.[17] Plaintiff had a full and fair opportunity to attempt to persuade the District Court to adopt Enron I and, thus, reconsideration on this basis would have been inappropriate. See Atkinson, 43 F.3d at 373.

Plaintiff also erroneously claims that the District Court failed to consider "newly uncovered facts" purportedly presented to it as part of the Motion for Reconsideration. (Pl.'s Br. at 5-6; see also id. at 37-38.) Plaintiff is apparently

[17] The District Court earlier found the line of authority memorialized in Homestore.com to be more persuasive than that found in the Enron cases. (See, e.g., Oct. Op. at 12-14, App. at A- 421 – A-423.) In the briefing on the Motion to Dismiss, Plaintiff attempted to convince the Court that it should follow the Enron I approach instead of the Homestore.com approach. The lower court disagreed. Plaintiff's desire to re-argue this same point was not a proper basis for reconsideration and does not now permit reversal of the lower court's decision. See, e.g., Broadway v. Norris, 193 F.3d 987, 990 (8th Cir. 1999) (noting that Rule 60(b) is "not a vehicle for simple reargument on the merits.").

referring to the additional allegations that it sought to submit in its proposed Second Amended Complaint. (See id.)

That argument similarly fails. Plaintiff overlooks the fact that the District Court's ruling on the Motion to Dismiss was rooted in matters of law and based exclusively on the allegations presented within the four corners of Plaintiff's Amended Complaint. (See Oct. Op. at 14, App. at A-423.) The District Court made no findings of fact and did not evaluate any evidence -- none of which would have been appropriate on a Rule 12(b)(6) motion to dismiss. The dismissal decision instead turned on the legal analysis that, from the face of the Amended Complaint, it was clear that Plaintiff could present no possible set of facts to support its claims against S-A. (See Oct. Op. at 3, App. at A-412.) Moreover, as explained above, the new supposed "facts" provided, at best, more detail as to the same untenable theory of "scheme" liability previously asserted by Plaintiff. Their consideration would not have changed the outcome here and, thus, did not provide a basis for reconsideration.

CONCLUSION

For the foregoing reasons, S-A respectfully requests that this Court affirm the decision of the lower court granting S-A's Motion to Dismiss with prejudice. S-A further requests that this Court also find that Plaintiff's Motion for

Reconsideration and/or Motion for Leave to Amend its Complaint were properly denied by the District Court.

Dated: August 15, 2005

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 8,953 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word Version XP in 14 point Times New Roman font.

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Dated: August 15, 2005

AFFIDAVIT OF SERVICE

DOCKET NOS. 05-1974
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Stoneridge Investment Partners, LLC.,

vs.

Scientific-Atlanta, Inc. and Motorola, Inc.
----------X
STATE OF MISSOURI)

COUNTY OF ST. LOUIS)

I, Richard H. Kuhlman, being duly sworn according to law and being over the age of 18, upon my oath depose and say that on August 15, 2005 I served the foregoing Opposition Brief for Defendant-Appellee Scientific-Atlanta, Inc. upon:

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via USPS Express Mail by depositing 2 copies of same, enclosed in a postpaid properly addressed wrapper, under the exclusive custody and care of the United States Postal Service, within the State of Missouri. In addition, I certify that I have provided each counsel above with a CD-ROM containing a digital version of the Opposition Brief for Defendant-Appellee Scientific-Atlanta, Inc. That .pdf file has been scanned for viruses and is virus free as provided by Eighth Circuit Rule of Appellate Procedure 28A.

Unless otherwise noted, copies have been sent to the court on the same date as above for filing via USPS Express Mail.

/s/Richard H. Kuhlman
Richard H. Kuhlman

Sworn to and subscribed
before me this 15th day of August, 2005.

_____
Notary Public
My Commission Expires:_____