Nos. 15-56871, 15-56872

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RICHARD ALAN SCHOENFELD, an individual,
Defendant-Appellant,
v.
THOMAS PEREZ, Secretary, United States
Department of Labor,
Plaintiff-Appellee.

On Appeal from the United States District Court for the
Central District of California
Case Nos. 12-cv-00618, 12-cv-02220
The Honorable Judge S. James Otero

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

STATEMENT OF JURISDICTION........ 1

STATEMENT OF THE ISSUES........ 1

STATEMENT OF THE CASE........ 3

I. Factual History 3

A. Mr. Schoenfeld's Fiduciary Role Under Tomco's ERISA-Covered Plan........ 3

B. Sale of Tomco to TAP Holings, LLC. 4

C. Mr. Schoenfeld's Unauthorized Transfer of Plan Funds to Tomco. 4

II. Procedural History........ 6

A. The Secretary's ERISA Action 6

B. Parties' Arguments and the District Court's First Judgment 7

1. Cross-Motions for Summary Judgment 7

2. The District Court's First Judgment 8

3. Restoration of Plan Losses and Injunctive Release........ 10

III. The District Court's Post-Judgment Order........ 11

IV. Mr. Schoenfeld's Appeal of the First Judgment 12

V. This Court's Remand on the Issue of Defalcation 13

TABLE OF CONTENTS-(continued):

VI. Parties' Post-Remand Arguments and the District Court's Second Judgment 14

SUMMARY OF THE ARGUMENT 17

ARGUMENT 19

I. THE DISTRICT COURT CORRECTLY APPLIED THE "LAW OF THE CASE" DOCTRINE AND DID NOT ABUSE ITS DISCRETION 19

A. Standard of Review 19

B. "Law of the Case" Bars Mr. Schoenfeld's Attempts to Re-Litigate the Injunctive Relief from the First Judgment 19

C. The District Court Did Not Abuse Its Discretion Because None of the Exceptions to the "Law of the Case" Doctrine Applies 24

II. INJUNCTIVE RELIEF IS NOT MOOT. 31

CONCLUSION 39

STATEMENT OF RELATED CASES
CERTIFICATE OF COMPLIANCE
CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

Federal Cases:

Beck v. Levering,
947 F.2d 639 (2d Cir. 1991) 38

Bell v. City of Boise,
709 F.3d 890 (9th Cir. 2013) 36 n.6

Brock v. Crapanzano,
CA No. 84-1899, 1986 WL 15752 (S.D. Fla. Jul 23, 1986) 38

Brock v.Lindemann,
689 F. Supp.678 (N.D.Tex. 1987), rev'd on other grounds,
853 F.2d 1298 (5th Cir. 1988) 38

Bullock v. BankChampaign, N.A.,
133 S. Ct. 1754 (2013) ..... passim

Chao v. Merino,
452 F.3d 174 (2d Cir. 2006) 38

Cholla Ready Mix, Inc. v. Civish,
382 F.3d 969 (9th Cir. 2004) 28

Church of Scientology of Cal. v. United States,
506 U.S. 9 (1992) 31

Cty. of Los Angeles, v. Davis,
440 U.S. 625 (1979) 33,35

Diouf v. Napolitano,
634 F.3d 1081 (9th Cir. 2011) 34

Donovan v. Cunningham,
716 F.2d 1455 (5th Cir. 1983) 30,33

Eichman v. Fotomat Corp.,
880 F.2d 149 (9th Cir. 1989) 28, 29

Federal Cases-(continued):

F.T.C. v. Affordable Media,
179 F.3d 1228 (9th Cir. 1999) 34

Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.,
528 U.S. 167 (2000) 35

Gonzalez v. Arizona,
677 F.3d 383 (9th Cir. 2012) (en banc), aff'd sub. nom.,
133 S. CT. 2247 (2013) 19

GoPets Ltd. v. Hise,
657 F.3d 1024 (9th Cir. 2011) 27

Herman v. S. Carolina Nat. Bank,
140 F.3d 1413 (11th Cir. 1998) 30, 33

In re Cellular 101, Inc.,
539 F.3d 1150 (9th Cir. 2008) 20

In re Di Giorgio,
134 F.3d 971 (9th Cir. 1998) 31

In re U.S.,
791 F.3d 945 (9th Cir. 2015) 36

Ind. Towers of Washington v. Washington,
350 F.3d 925 (9th Cir. 2003) 26

Jachetta v. United States,
653 F.3d 898 (9th Cir. 2011) 26

Jimenez v. Franklin,
680 F.3d 1096 (9th Cir. 2012) 20

Johnson v. Bd. of Ed.,
457 U.S. 52 (1992) (per curiam) 23

Johnson v. Couturier,
572 F.3d 1067 (9th Cir. 2009) 35, 37

Federal Cases-(continued):

Katsaros v. Cody,
744 F.2d 270 (2d Cir. 1984) 38

Kesselring v. F/T Arctic Hero,
95 F.3d 23 (9th Cir. 1996) 20

Knox v. Service Employees,
132 S.Ct. 2277 (2012)... 31, 35, 36

Macheca Transp. Co. v. Philadelphia Indem. Ins. Co.,
737 F.3d 1188 (8th Cir. 2013) 20, 21

Martin v. Feilen,
965 F.2d 660 (8th Cir. 1992) 38

McCormack v. Herzog
788 F.3d 1017 (9th Cir. 2015) 36 n.16

Microsoft Corp. v. Motorola, Inc.,
795 F.3d 1024 (9th Cir. 2015) 31

Milgard Tempering Inc. v. Selas Corp. of Am.,
902 F.2d 703 (9th Cir. 1990) 24

Mills v. Green,
159 U.S. 651 (1895) 31

Minidoka Irrigation Dist. v. Dep't of Interior of U.S.,
406 F.3d 567 (9th Cir. 2005) 30

Munoz v. Imperial Cty.,
667 F.2d 811 (9th Cir. 1982) 20, 23

Norman-Bloodsaw v. Lawrence Berkeley
Lab., 135 F.3d 1260 (9th Cir. 1998)..36

O'Guinn v. Lovelock Corr. Ctr.,
502 F.3d 1056 (9th Cir. 2007) 26, 27

Federal Cases-(continued):

Powell v. McCormack,
395 U.S. 486 (1969) 32

Riha v. Int'l Tel. & Tel. Corp.,
533 F. 2d 1053 (8th Cir. 1976) 23

Rosemere Neighborhood Ass'n v. U.S. Envtl. Prot. Agency,
581 F.3d 1169 (9th Cir. 2009) 32

S. Pac. Transp. Co. v. Pub. Util. Comm'n of State of Or.,
9 F.3d 807 (9th Cir. 1993) 33

S.E.C. v. Koracorp Indus., Inc.,
575 F.2d 692 (9th Cir. 1978) 30, 33

Schering Corp. v. Illinois Antibiotics Co.,
89 F.3d 357 (7th Cir. 1996) 21

Sea-Land Serv., Inc. (Pac. Div.) v. Int'l Longshoremen's & Warehousemen's Union, Locals 13, 63, & 94,
939 F.2d 870 (9th Cir. 1991) 32, 33

Sec'y of Labor v. Fitzsimmons,
805 F.2d 682 (7th Cir. 1986) (en banc) 30, 33

Shaver v. Operating Eng'rs Local 428 Pension Tr. Fund,
332 F.3d 1198 (9th Cir. 2003) 15, 33

Solis v. Hutcheson,
No. 1:12-CV-236-EJL, 2012 WL 2151525 (D. Idaho June 13, 2012)......... 11. 38

Thomas v. Bible,
983 F.2d 152 (9th Cir. 1993) 19

U.S. ex rel. Lujan v. Hughes Aircraft Co.,
243 F.3d 1181 (9th Cir. 2001) 22

United States v. Alexander,
106 F.3d 874 (9th Cir. 1997) 17, 20, 25 n.11

Federal Cases-(continued):

United States v. Arreguin,
735 F.3d 1168 (9th Cir. 2013) 20, 23

United States v. Cote,
51 F.3d 178 (9th Cir. 1995) 21

United States v. Estrada-Lucas,
651 F.2d 1261 (9th Cir. 1980) 20, 30

United States v. Henry,
472 F.3d 910 (D.C. Cir. 2007) 20, 21

United States v. Jingles,
702 F.3d 494 (9th Cir. 2012) 25

United States v. Laerdal Mfg. Corp.,
73 F.3d 852 (9th Cir. 1995) 30

United States v. Larson,
302 F.3d 1016 (9th Cir. 2002) 32

United States v. Lewis,
611 F.3d 1172 (9th Cir. 2010) 28

United States v. Miller,
594 F.3d 172 (3d Cir. 2010) 20

United States v. Ross,
372 F.3d 1097 (9th Cir. 2004) 29

United States v. V-1 Oil Co.,
63 F.3d 909 (9th Cir. 1995) 37

United States v. W.T. Grant Co.,
345 U.S. 629 (1953) 33, 36 n.16

United States v. Wallace,
573 F.3d 82 (1st Cir. 2009) 27

Federal Cases-(continued):

United States v. Wright,
716 F.2d 549 (9th Cir. 1983) 20, 23

USA Petroleum Co. v. Atl. Richfield Co.,
13 F.3d 1276 (9th Cir. 1994) 27

Whitfield v. Tomasso,
682 F. Supp. 1287 (E.D.N.Y. 1988) 38

Federal Statutes:

Bankruptcy Code:

11 U.S.C. § 1300 5

11 U.S.C. § 523(a)(4).. passim

Judicial and Judiciary Procedures:

28 U.S.C. § 157(d) 1

28 U.S.C. § 1291 1

28 U.S.C. § 1331 1

Federal Statutes-(continued):

Employee Retirement Income Security Act of 1974, (Title I)
as amended, 29 U.S.C. § 1001 et seq..:

Section 2, 29 U.S.C. § 1001 1

Section 403(c)(1), 29 U.S.C. § 1103(c)(1).. 8, 9 n.3

Section 404(a)(1)(A)(i), 29 U.S.C. § 1104(a)(1)(A)(i) 8

Section 404(a)(1)(B), 29 U.S.C. § 1104(a)(1)(B) 8, 8 n.2

Federal Statutes-(continued):

Section 406(a)(1)(B), 29 U.S.C. § 1106(a)(1)(B) 9, 9 n.5

Section 406(a)(1)(D), 29 U.S.C. § 1106(a)(1)(D)............................... 8, 9, 9 n.4

Section 406(b)(1), 29 U.S.C. § 1106(b)(1) 9, 9 n.6

Section 406(b)(2), 29 U.S.C. § 1106(b)(2) 9, 10 n.7

Section 411, 29 U.S.C. § 1111 .... 25, 25 n.11, 26, 26 n.13

Miscellaneous:

Fed. R. Civ. P. 60(b) 11, 13

STATEMENT OF JURISDICTION

The District Court had jurisdiction over the underlying actions under 28 U.S.C. § 1331 and 28 U.S.C. § 157(d). Pursuant to 28 U.S.C. § 1291, this Court has jurisdiction to review the District Court's final judgment entered on November 6, 2015.

STATEMENT OF THE ISSUES

The District Court found that Mr. Richard Schoenfeld committed serious breaches of his fiduciary duties in violation of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001 et seq., ordered him to restore the monetary losses to the affected pension plan caused by his violations, and permanently enjoined him from acting as a fiduciary to any ERISA plan. The District Court also ruled that the monetary judgment against Mr. Schoenfeld was not dischargeable under the Bankruptcy Code. In his prior appeal to this Court, Mr. Schoenfeld only appealed the District Court's decision on dischargeability and the preclusive effect of his prior bankruptcy plan. Because of the intervening Supreme Court decision in Bullock v. BankChampaign, N.A., 133 S. Ct. 1754, 1757 (2013), which clarified the operative standard for dischargeability under the Bankruptcy Code, this Court vacated the judgment and remanded solely for consideration of Bullock by the District Court. ER 66-67. On remand, the District Court held that Bullock and this Court's mandate only concerned the Bankruptcy

Code and did not affect the District Court's separate findings that Mr. Schoenfeld committed serious ERISA violations that warranted monetary and injunctive relief under ERISA. The District Court did not need to reach the bankruptcy issues because a co-defendant paid Mr. Schoenfeld's debt to the plan, and it reissued the injunctive relief under ERISA from its first decision. In this second appeal, Mr. Schoenfeld now belatedly seeks to reverse the District Court's prior judgment permanently enjoining him from serving as a fiduciary to ERISA plans. The questions presented are:

1. Whether the District Court correctly applied the "law of the case" to reissue its prior judgment that permanently enjoined Mr. Schoenfeld from serving as a fiduciary to any ERISA-covered employee benefit plan after Mr. Schoenfeld had failed to challenge this judgment in his prior appeal.
2. Whether a co-defendant's repayment of plan losses caused by Mr. Schoenfeld's fiduciary breaches mooted the injunctive relief that permanently enjoins Mr. Schoenfeld from service as an ERISA fiduciary.

STATEMENT OF THE CASE

I. Factual History.

A. Mr. Schoenfeld's Fiduciary Role Under Tomco's ERISA-Covered Plan.

Mr. Schoenfeld is a certified public accountant who holds a degree in business administration with concentrations in accounting and finance. SER 59-60.[1] In 1986, Tomco Auto Products Inc. ("Tomco") hired Mr. Schoenfeld as its Treasurer and Controller. Id. at 59. In 1993, Mr. Schoenfeld was promoted to Executive Vice President and Chief Operating Officer, and on October 1, 2004, Mr. Schoenfeld was promoted to President of Tomco. Id. at 12. Tomco sponsored an ERISA-covered individual account pension plan that invested in employer stock, the Tomco Auto Products Inc. Employee Stock Ownership Plan (the "Plan"). Id.

From the Plan's inception in 1995 until 2006, Mr. Schoenfeld was the named fiduciary, trustee, and member of the committee that administered the Plan. Id. at 1, 60, 80. The governing Plan documents permitted Mr. Schoenfeld to direct the investments of the Plan's assets, but explicitly forbade Mr. Schoenfeld from using "any part of the principal or income" for "purposes other than the exclusive benefit of the [Plan] Participants or their beneficiaries." Id. at 142.

[1] "ER" refers to the Excerpts of Record, followed by the page number. "SER" refers to the Supplemental Excerpts of Record.

B. Sale of Tomco to TAP Holdings, LLC

In 2004, Tomco initiated negotiations to sell Tomco to TAP Holdings, LLC ("TAP"). Id. at 88. Both TAP and Tomco intended Mr. Schoenfeld to be TAP's President, and to maintain his annual salary, which exceeded $172,900. Id. at 88-89, 127.

The sale of Tomco to TAP occurred on November 5, 2004. ER 127. The Asset Purchase and Sale Agreement listed liabilities that TAP would assume, including expenses "incurred in the ordinary course of business." SER 159, 167. TAP defined these expenses and stipulated that before the sale closed, Tomco would "not incur any indebtedness for borrowed money." Id. at 164.

C. Mr. Schoenfeld's Unauthorized Transfer of Plan Funds to Tomco.

On October 1, 2004, Schoenfeld wrote a $100,000 check from the Plan to Tomco' general account. Id. at 37. According to Schoenfeld, he transferred Plan funds in order to cover Tomco's operating expenses, including executive and employee payroll. Id. at 37, 103-04. Mr. Schoenfeld did not investigate whether Tomco's owners or officers could have supplied funds to meet Tomco's business expenses and did not think to apply for a bank loan. Id. at 125-26.

On October 22, 2004, Mr. Schoenfeld used Tomco funds, not his own funds, to replace the $100,000 without interest. Id. at 93. Next, on November 1, 2004, Mr. Schoenfeld withdrew another $42,000 from the Plan, again transferring this

amount to Tomco, and on the following day, withdrew an additional $30,000 from the Plan and deposited the money into Tomco's account. ER 126-27.

The transfer of Plan assets to Tomco continued after the sale of Tomco's assets on November 4, 2004. Id. at 169. Four days later, Mr. Schoenfeld transferred an additional $25,000 from the Plan to Tomco, which was used for payroll and vendor expenses. Id. at 127-28. On February 25, 2005, Schoenfeld used TAP funds to replace $50,000 of the misappropriated Plan assets. Id. at 128. No evidence regarding the transfers that Mr. Schoenfeld made shows a debt to the Plan or a repayment schedule, and no evidence exists that Tomco put up any security or offered any consideration for the Plan funds. SER 21.

Throughout these unauthorized transactions, the officers of Tomco never had "formal discussions" about what would happen if Tomco and TAP failed to close the sale. Id. at 154.

On or about October 11, 2005, Mr. Schoenfeld, TAP, and the former owners of Tomco finally entered into an agreement which obligated TAP to repay the misappropriated Plan funds. ER 96, 98-107. Afterwards, Mr. Schoenfeld urged TAP to repay the remaining misappropriated Plan funds. Id. at 143. TAP did not pay, and as a result, $47,000 was left unpaid. SER 33.

On February 3, 2011, Mr. Schoenfeld filed for bankruptcy under Chapter 13 of the Bankruptcy Code, 11 U.S.C. § 1300, et seq. ER 39 (citing to Bankr. C.D.

Cal. Case No. 2:11-bk-14816-WB). On November 10, 2011, a bankruptcy judge confirmed Mr. Schoenfeld's Chapter 13 plan. Id.

II. Procedural History.

A. The Secretary's ERISA Action.

On January 17, 2012, the Secretary of Labor ("Secretary") filed an adversary complaint with U.S. Bankruptcy Court for the Central District of California, seeking a judgment that Mr. Schoenfeld's liability of $69,511.36 (principal plus interest) to the Plan caused by his ERISA violations is not dischargeable because this debt arose from "defalcation while acting in a fiduciary capacity" under section 523(a)(4), 11 U.S.C. § 523(a)(4). SER 171-77. On July 23, 2012, the U.S. District Court for the Central District of California ("District Court") consolidated the ERISA and nondischargeability actions. ER 188 (describing docket entry 60).

On January 24, 2012, the Secretary also sued Mr. Schoenfeld and Tomco in the District Court. Id. at 182. The Secretary alleged that Mr. Schoenfeld breached numerous fiduciary obligations under ERISA when he transferred assets from the Plan to Tomco's operating account for Tomco's business expenses. Id.

B. Parties' Arguments and the District Court's First Judgment.

1. Cross-Motions for Summary Judgment.

On September 17, 2012, Mr. Schoenfeld filed for partial summary judgment on the nondischargeability issue under the Bankruptcy Code, claiming that he lacked the culpability required to establish "defalcation" and that the transfers from the Plan to Tomco had benefited Plan participants. See ER 137-45. The District Court denied Mr. Schoenfeld's motion because the Ninth Circuit did not "require culpability before conduct is considered to be defalcation." SER 31. In addition, the District Court specifically found that Mr. Schoenfeld "did not know precisely how the Plan funds were used by Tomco, and thus . . . [could] not plausibly assert that the fund transfers were primarily for the benefit of the [Plan] Participants." Id. at 32.

On October 26, 2012, the Secretary filed a motion for summary judgment on his claim that by transferring Plan assets to Tomco, Mr. Schoenfeld breached his fiduciary duties under ERISA and engaged in prohibited transactions. As relief, the Secretary sought an order: 1) permanently enjoining Mr. Schoenfeld from violating ERISA and from serving as a fiduciary to any ERISA-covered employee benefit plan; and 2) requiring Mr. Schoenfeld to restore the monetary losses to the Plan caused by his fiduciary breaches, among other relief.

2. The District Court's First Judgment.

On January 31, 2013, the District Court held that Mr. Schoenfeld breached multiple fiduciary duties under ERISA ("First Judgment"). Id. at 12-21. First, Mr. Schoenfeld "violated the clear statutory language" of ERISA section 404(a)(1)(A)(i), 29 U.S.C. § 1104(a)(1)(A)(i), which requires a fiduciary to "discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and . . . for the exclusive purpose of providing benefits to participants and their beneficiaries," by using Plan funds to benefit parties other than Plan participants or beneficiaries. Id. at 15-16. The court also held that Mr. Schoenfeld acted disloyally under section 404(a)(1)(B), 29 U.S.C. § 1104(a)(1)(B), when he commingled Plan assets with Tomco property and failed to consider alternative sources of funding to pay Tomco's debts.[2] Id. at 16-17.

Mr. Schoenfeld also violated three other provisions of ERISA when he transferred Plan funds to Tomco: (1) section 403(c)(1), providing that the exclusive purpose of Plan assets is to provide benefits to Plan participants and beneficiaries,

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[2] "[A] fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and . . . with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims." 29 U.S.C. § 1104(a)(1)(B).

29 U.S.C. § 1103(c)(1);[3] (2) section 406(a)(1)(D), prohibiting transfer of any Plan assets to any employer whose employees are covered by the Plan, 29 U.S.C. § 1106(a)(1)(D);[4] and (3) section 406(a)(1)(B), prohibiting the "lending" of Plan funds to such employers, 29 U.S.C. § 1106(a)(1)(B).[5] Id. at 17-20.

Mr. Schoenfeld "clearly engaged in self-dealing" in violation of ERISA section 406(b)(1), 29 U.S.C. § 1106(b)(1), because he used the Plan funds to pay Tomco's executive compensation, including his own compensation.[6] Id. at 20. Moreover, even if the transfers are characterized as "loans" by Mr. Schoenfeld rather than just improper transfers of Plan assets to Tomco and its executives, Schoenfeld violated 406(b)(2), 29 U.S.C. § 1106(b)(2), when he acted on both

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[3] Apart from exceptions not relevant here, "the assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan." 29 U.S.C. § 1103(c)(1).

[4] "A fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect . . . transfer to, or use by or for the benefit of a party in interest, of any assets of the plan." 29 U.S.C. § 1106(a)(1)(D).

[5] "[A] fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect . . . lending of money or other extension of credit between the plan and a party in interest." 29 U.S.C. § 1106(a)(1)(B).

[6] "A fiduciary with respect to a plan shall not -- deal with the assets of the plan in his own interest or for his own account." 29 U.S.C. § 1106(b)(1).

sides of the transactions involving plan assets as "the lender and as the borrower."[7] When he authorized the transfer transaction from the Plan to Tomco, Mr. Schoenfeld failed to execute any agreement or obtain any collateral to secure repayment of the Plan's funds, and did not set an interest rate. Id. at 21 n.6. On January 31, 2013, the District Court also entered a default judgment against Tomco.[8] ER 202.

3. Restoration of Plan Losses and Injunctive Relief

Based on these violations, the District Court found Mr. Schoenfeld liable to the Plan for $69,511.36. SER 26-27. The District Court also concluded that Mr. Schoenfeld could not discharge this debt in bankruptcy because his breaches of fiduciary duties constituted "defalcation" under Bankruptcy Code section 523(a)(4), 11 U.S.C. § 523(a)(4). Id. at 22. The District Court did not make a specific finding as to his mental state for culpability to commit defalcation.[9]

In light of Mr. Schoenfeld's "serious misconduct," the District Court also permanently enjoined Mr. Schoenfeld from serving as an ERISA fiduciary in the

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[7] "A fiduciary with respect to a plan shall not -- in his individual or in any other capacity act in any transaction involving the plan on behalf of a party (or represent a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries." 29 U.S.C. § 1106(b)(2).

[8] Tomco was also not a party to the first appeal nor a party to this current appeal.

[9] At the time the District Court issued its decision, this Court did not require a showing of gross recklessness or intentional misconduct to find that a debtor's breach constituted defalcation. SER 63.

future. Id. at 59 (citing Solis v. Hutcheson, No. 1:12-CV-236-EJL, 2012 WL 2151525, at *6 (D. Idaho June 13, 2012)). The District Court also agreed to appoint an independent fiduciary to manage Plan assets, instructing the Secretary to file a motion proposing an individual to appoint. ER 213.

III. The District Court's Post-Judgment Order

On March 1, 2013, the Secretary moved to appoint Ms. Maribel Larios as independent fiduciary for the Plan, which Mr. Schoenfeld opposed. SER 1. After the Secretary replied to his opposition, Mr. Schoenfeld filed a "Request to Submit Supplementary Opposition." Id. In this request, Mr. Schoenfeld argued for the first time that his Chapter 13 bankruptcy plan confirmed by the bankruptcy court precluded the Secretary's underlying action for monetary damages in District Court under the doctrine of res judicata. Id. at 10. Mr. Schoenfeld never discussed how this argument related to the Secretary's motion for the appointment of Ms. Larios as the Plan's independent fiduciary. Id. at 9-11.

Finding that Mr. Schoenfeld had "ample opportunity" to assert res judicata during the litigation but had failed to do so, the District Court rejected his belated attempt to assert this preclusion defense and did not permit Mr. Schoenfeld to submit his post-judgment supplementary briefing. Id. at 7. The District Court also declined to grant Mr. Schoenfeld's request as a motion for relief from the judgment under Fed. R. Civ. P. 60(b) as he had not shown a change in law, emergence of

new facts, or that the court had failed to consider all of the material facts presented to it. Id.

IV. Mr. Schoenfeld's Appeal of the First Judgment

In his first appeal of the District Court's decisions, Mr. Schoenfeld made only two arguments.[10] He first argued that the District Court incorrectly granted summary judgment on the issue of nondischargeability because when Mr. Schoenfeld authorized the transfers at issue, he lacked the "culpable state of mind" required to establish defalcation under 11 U.S.C. § 523(a)(4). ER 52-57. Second, Mr. Schoenfeld claimed that because the Secretary did not object to confirmation of his Chapter 13 Plan, the Secretary was estopped from seeking to hold him liable in the District Court for monetary damages arising from his actions as a trustee of the Plan. Id. at 57-60. He did not challenge any other aspects of the District Court's decisions and judgment.

The Secretary countered that Mr. Schoenfeld acted with utter disregard of the clear risk and reality that his conduct would violate ERISA, and that his purported intent to replace missing funds was immaterial. Mot. to Take Judicial Notice Ex. 1 at 2-4. Because Mr. Schoenfeld acted with "gross recklessness in respect to [] the improper nature of the relevant fiduciary behavior," Bullock, 133

[10] Following the District Court's post-judgment order that he had waived any argument on res judicata, Mr. Schoenfeld did not amend his notice of appeal or file a new notice appealing the post-judgment order. ER 203-34.

S. Ct. at 1757, Mr. Schoenfeld acted with the culpable state of mind requisite for "defalcation" under 11 U.S.C. § 523(a)(4). Id.

Next, the Secretary argued that this Court did not have jurisdiction to review the res judicata effect of Mr. Schoenfeld's bankruptcy plan. Id. at 25-31. Mr. Schoenfeld did not raise a res judicata defense for more than a year of litigation, and therefore, the Secretary argued, he had waived his right to raise an affirmative defense on appeal. Id. at 26-27.

Thus, the only issue on appeal with regard to res judicata was the District Court's discretionary decision to deny Mr. Schoenfeld's request for supplemental briefing. The Secretary argued that the District Court did not abuse its discretion in this regard.

Lastly, the Secretary argued that because Mr. Schoenfeld did not amend his prior notice of appeal or file a new notice appealing the post-judgment order, this Court lacked jurisdiction to review the decision of the District Court to deny a constructive request for relief from the judgment under Fed. R. Civ. P. 60(b). See id. at 27.

V. This Court's Remand on the Issue of Defalcation

During the pendency of the appeal, the Supreme Court decided Bullock, clarifying the requisite intent to establish defalcation by a fiduciary under 11 U.S.C. § 523(a)(4). ER 175. Based on Bullock, this Court remanded the case for a

reassessment on defalcation, also noting that it "need not reach any of the other issues Schoenfeld raised on appeal." Id. at 176. On March 2, 2015, this Court vacated the District Court's judgment and remanded the decision for reconsideration in light of Bullock.

VI. Parties' Post-Remand Arguments and the District Court's Second Judgment

After the remand, on September 28, 2015, the District Court granted Mr. Schoenfeld's motion to authorize Tomco, through its workman's compensation insurance refund in the amount of $107,789.03 to "satisf[y] the monetary relief awarded in the First Judgment[.]" ER 12, 72-73. Accordingly, the District Court did not need to reconsider the dischargeability of Mr. Schoenfeld's monetary judgment on remand because Tomco paid Mr. Schoenfeld's debt to the plan. Id. at 7.

On remand, the Secretary argued that the District Court's prior decision and judgment that Mr. Schoenfeld breached his ERISA fiduciary duties remains the "law of the case," because they are unrelated to issues raised in Mr. Schoenfeld's appeal and this Court's remand decision. Mr. Schoenfeld only appealed two issues from the First Judgment: (1) whether his authorization of loans from the Plan constituted defalcation under the Bankruptcy Code; and (2) whether the District Court was estopped from holding Mr. Schoenfeld liable for any monetary amount by the bankruptcy court's decision. Neither Mr. Schoenfeld's appeal nor the Ninth

Circuit's vacatur and remand addressed the District Court's First Judgment and decision on Mr. Schoenfeld's ERISA violations, including the injunctive relief granted.

In urging the District Court to apply the "law of the case" to preclude the relitigation of previously decided issues that Mr. Schoenfeld did not appeal, the Secretary also argued that none of the exceptions to the "law of the case" applies: (1) the First Judgment was not clearly erroneous as no material dispute existed regarding Mr. Schoenfeld's multiple ERISA fiduciary violations; (2) no intervening change of law affects the finding of such violations; (3) the evidence had not changed with respect to the violations; (4) no changed circumstances impact or relate to whether the ERISA violations occurred; and (5) no manifest injustice would occur if the District Court followed the" law of the case" doctrine. ER at 24.

The Secretary asserted that the injunctive relief in the First Judgment is necessary to prevent future ERISA violations. Id. at 26 (citing Shaver v. Operating Eng'rs Local 428 Pension Tr. Fund, 332 F.3d 1198, 1203 (9th Cir. 2003) (holding that ERISA's plain language does not support the reasoning that fiduciaries are free to ignore their duties so long as they do not cause tangible harm)). The Secretary requested that the District Court re-issue its First Judgment with respect to the injunctive relief.

Mr. Schoenfeld opposed the reinstatement of the First Judgment but failed to respond directly to the Secretary's arguments. Id. at 6 ("Schoenfeld does not directly respond to the Secretary's contentions."). The District Court noted that Mr. Schoenfeld "implies that because he did not necessarily have a culpable state of mind, this Court should not re-issue the injunction preventing him from pursuing a future position as a trustee in an ERISA plan. He also contends that, because he paid monetary relief pursuant to the Court's First Judgment, the injunctive relief is moot." Id. at 18 (emphasis added). In his written statement, Mr. Schoenfeld only objects specifically to the reissuance of injunctive relief from the First Judgment on one ground:

> The Secretary has indicated his intention of pursuing certain injunctive relief against Mr. Schoenfeld in Case No. 12-00618. Specifically, the Secretary seeks to further enforce the following provision in the Judgment:
>
> > 2. Upon appointment of an Independent Fiduciary as set forth below, Defendant Schoenfeld shall be permanently enjoined and restrained from serving as a fiduciary to any ERISA-covered employee benefit plan in the future.
>
> Mr. Schoenfeld will oppose any such Motion on the ground that it is inconsistent with Section 411 of ERISA.

Id. at 28 (internal citations omitted).

On November 6, 2015, the District Court entered a judgment ("Second Judgment") in favor of the Secretary. First, the District Court concluded that

Bullock only concerns the Bankruptcy Code and not the ERISA violations committed by Mr. Schoenfeld, so this Court reversed only a "small part" of the First Judgment. Id. at 7. Thus, under the "law of the case" doctrine, this Court's decision only reverses the part of the First Judgment that Mr. Schoenfeld's debt was not dischargeable under the Bankruptcy Code. See id. at 7 (citing United States v. Alexander, 106 F.3d 874, 876 (9th Cir. 1997)). Accordingly, the District Court reissued the relief from the First Judgment in all other relevant respects, finding that "ERISA continues to permit injunctive relief for violations . . . and the Ninth Circuit did not disturb this aspect of the First Judgment." Id. at 19.

SUMMARY OF THE ARGUMENT

Over two years ago, the District Court ruled that Mr. Schoenfeld committed serious fiduciary breaches under ERISA that warranted injunctive relief, enjoining him from serving as an ERISA fiduciary in order to protect ERISA plan participants in the future. Mr. Schoenfeld waived his opportunity to appeal the District Court's decision and its finding that injunctive relief was warranted when he appealed that decision but raised only arguments concerning his bankruptcy. Under well-established and clear precedent, the District Court correctly applied the "law of the case" to bar Mr. Schoenfeld from now belatedly challenging the District Court's prior decision to grant injunctive relief. Before the District Court, Mr. Schoenfeld failed to argue that any of the three limited exceptions to "law of

the case" applies. Consequently, he has now waived this argument in this second appeal. Regardless, Mr. Schoenfeld presents no evidence or circumstance that justifies a deviation from the "law of the case" here.

Mr. Schoenfeld also argues that because his co-defendant satisfied the prior judgment and compensated the loss caused by Mr. Schoenfeld's fiduciary breaches, the separate injunctive relief barring him from future service as an ERISA fiduciary is now moot. He is wrong. First, Mr. Schoenfeld fails to cite any basis to overcome his heavy burden to establish mootness. Second, the injunctive relief is based on his prior fiduciary breaches and the public interest in protecting future ERISA participants. This relief is still effectual even if this Plan was compensated for its monetary loss. Moreover, Mr. Schoenfeld fails to establish that he would never serve as an ERISA fiduciary again. Absent the court's injunction, Mr. Schoenfeld is free to serve in such capacity again. Indeed, Mr. Schoenfeld remains unremorseful about his prior conduct and still questions the need for injunctive relief. These sentiments fully justify the continued need for an injunctive bar to protect ERISA plan participants.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY APPLIED THE "LAW OF THE CASE" DOCTRINE AND DID NOT ABUSE ITS DISCRETION.

A. Standard of Review

Application of the "law of the case" doctrine is generally reviewed for abuse of discretion. This doctrine precludes a court from "reconsidering an issue that has already been decided by the same court, or a higher court in the identical case." Alexander, 106 F.3d at 876 (citing Thomas v. Bible, 983 F.2d 152, 154 (9th Cir. 1993)); see also Gonzalez v. Arizona, 677 F.3d 383, 390 n.4 (9th Cir. 2012) (en banc), aff'd sub nom, Arizona v. Inter Tribal Council of Arizona, Inc., 133 S. Ct. 2247 (2013) ("Under the law of the case doctrine, a court will generally refuse to reconsider an issue that has already been decided by the same court or a higher court in the same case.").

B. "Law of the Case" Bars Mr. Schoenfeld's Attempts to Re-Litigate the Injunctive Relief from the First Judgment

Mr. Schoenfeld first argues against the application of the "law of the case" to the First Judgment's grant of injunctive relief. Mr. Schoenfeld's argument is contrary to well-established law. The District Court correctly denied Mr. Schoenfeld's belated attempt to re-litigate its prior decision to grant injunctive relief because Mr. Schoenfeld had waived any objections by not raising them in his prior appeal of the First Judgment. Specifically, the "law of the case" precludes a

court from "reconsidering an issue that has already been decided by the same court, or a higher court in the identical case." Alexander, 106 F.3d at 876 (citation omitted).

Under well-established law, "[w]hen a party could have raised an issue, in a prior appeal but did not, a court later hearing the same case need not consider the matter." United States v. Wright, 716 F.2d 549, 550 (9th Cir. 1983). This Court has reiterated this principle numerous times. See, e.g., United States v. Arreguin, 735 F.3d 1168, 1178 (9th Cir. 2013); Jimenez v. Franklin, 680 F.3d 1096, 1099-100 (9th Cir. 2012); In re Cellular 101, Inc., 539 F.3d 1150, 1155-56 (9th Cir. 2008); Kesselring v. F/T Arctic Hero, 95 F.3d 23, 24 (9th Cir. 1996) ("Since appellant failed to raise this issue in its first appeal, it is waived."); Munoz v. Imperial Cty., 667 F.2d 811, 817 (9th Cir. 1982) ("We need not and do not consider a new contention that could have been but was not raised on the prior appeal."). As the Eighth Circuit summarized, "[f]or over one hundred years, our court has repeatedly barred parties from litigating issues in a second appeal following remand that could have been presented in the first appeal." Macheca Transp. Co. v. Philadelphia Indem. Ins. Co., 737 F.3d 1188, 1194 (8th Cir. 2013) (citing authorities from multiple circuits) (emphasis added); see also, e.g., United States v. Miller, 594 F.3d 172, 178-79 (3d Cir. 2010); United States v. Henry, 472 F.3d 910, 913 (D.C. Cir. 2007); Schering Corp. v. Illinois Antibiotics Co., 89 F.3d

357, 358 (7th Cir. 1996). Mr. Schoenfeld did not raise any objections with respect to the permanent injunction in his prior appeal of the First Judgment. His prior appeal only concerned two issues related to the monetary judgment in bankruptcy and were both unrelated to the permanent injunction: the nondischargeability of his debt and whether the Secretary's failure to object to the confirmation of Mr. Schoenfeld's Chapter 13 Plan binds the Secretary with respect to monetary damages. ER 31-32. Consequently, Mr. Schoenfeld cannot now "litigat[e] . . . issues in a second appeal following remand that could have been presented in the first appeal." Macheca Transp. Co., 737 F.3d at 1194 (emphasis added).

Nor did this Court's decision in Mr. Schoenfeld's first appeal affect the District Court's decision to grant a permanent injunction. In this Court's prior decision to vacate and remand the First Judgment to the District Court, this Court specifically stated that its reason for the remand was that the District Court "did not have an opportunity to assess defalcation under Bullock." ER 67. Thus, as per this Court's order, the District Court was only required to reconsider the First Judgment to the extent that Bullock changed its initial determinations. "[A] district court could not revisit its already final determinations unless the mandate allowed it." United States v. Cote, 51 F.3d 178, 181 (9th Cir. 1995). This Court's mandate "does not apply to issues not addressed by the appellate court." U.S. ex rel. Lujan v. Hughes Aircraft Co., 243 F.3d 1181, 1186 (9th Cir. 2001).

On remand, the District Court considered Bullock to determine whether and how the First Judgment needed to be altered. In Bullock, the Supreme Court defined the requisite state of mind for "defalcation" under section 523(a)(4) of the Bankruptcy Code. Applying this new definition, the District Court found that the new standard in Bullock only affected the part of the First Judgment concerning the Bankruptcy Code on the issue of whether Mr. Schoenfeld's unauthorized transfers from the Plan constituted "defalcation" under section 523(a)(4). See ER 7. Nothing in Bullock was relevant to Mr. Schoenfeld's ERISA violations; accordingly, the District Court properly adhered to its prior decision and reissued its judgment holding Mr. Schoenfeld liable for his multiple ERISA violations and granting injunctive relief. Nothing in the subsequent proceedings on remand affected the District Court's prior judgment on the injunctive relief. Nor has Mr. Schoenfeld suggested any issues raised in the prior appeal or in Bullock that alter the District Court's grounds for injunctive relief.

Mr. Schoenfeld's broad argument that the "law of the case" doctrine never applies on remand when a higher court has vacated a judgment is without merit and contrary to well-established law. The two cases Mr. Schoenfeld cites in support are obviously inapposite. Both cases merely describe how the appellate courts' vacating of lower courts' opinions affected further proceedings in those cases. See Appellant Br. 20 (citing Johnson v. Bd. of Ed., 457 U.S. 52, 52 (1992)

(per curiam); Riha v. Int'l Tel. & Tel. Corp., 533 F.2d 1053, 1054 (8th Cir. 1976) (per curiam)). In Johnson, the Supreme Court identified subsequent developments that barred the application of the "law of the case" because the lower courts had failed to consider these subsequent developments. 457 U.S. at 52. In Riha, the Eighth Circuit ruled that post-judgment interest is calculated not from a vacated judgment but from a judgment on remand. 533 F.2d at 1055. Neither decision supports Mr. Schoenfeld's broad and unfounded argument that the "law of the case" never applies on remand when a court vacates a judgment. To the contrary, the fact that a prior judgment was reversed or vacated does not undermine the application of the "law of case" to issues district court had already decided prior to the appeal. E.g., Arreguin, 735 F.3d at 1178 (applying the "law of the case" to issues not appealed in the first appeal, which had affirmed in part, reversed in part, and remanded the prior decision); Wright, 716 F.2d at 550 (applying the "law of the case" doctrine to issues not appealed in the first appeal, which had reversed the prior district court decision); Munoz, 667 F.2d at 817 (applying the "law of the case" doctrine to issues not raised in the first appeal, which had vacated the prior district court judgment). Because Mr. Schoenfeld failed to object to the District Court's prior decision granting a permanent injunction during his first appeal, when he had an opportunity to do so, Mr. Schoenfeld is now barred by waiver and the "law of the case" from challenging the permanent injunction decision in this appeal.

C. The District Court Did Not Abuse Its Discretion Because None of the Exceptions to the "Law of the Case" Doctrine Applies

The District Court was generally bound to apply the "law of the case" doctrine. See Gonzalez, 677 F.3d at 390. Though Mr. Schoenfeld asserts that the application of the doctrine is discretionary, Appellant Br. at 21, a court's discretion not to apply the "law of the case" is limited to three exceptions: "(1) the decision is clearly erroneous and its enforcement would work a manifest injustice; (2) intervening controlling authority makes reconsideration appropriate; or (3) substantially different evidence was adduced at a subsequent trial." Gonzalez, 677 F.3d at 390 n.4. A failure to apply the doctrine of the "law of the case" absent one of these three requisite conditions constitutes an abuse of discretion. See Milgard Tempering Inc. v. Selas Corp. of Am., 902 F.2d 703, 715 (9th Cir. 1990) (reciting the three exceptions and stating that "[a] court properly exercises its discretion to reconsider an issue previously decided in only three instances"); see also Appellant Br. 18-19.

In reciting the exceptions to the "law of the case," Mr. Schoenfeld describes an outdated test with five separate exceptions.[11] See United States v. Jingles, 702

[11] Mr. Schoenfeld relies on an outdated five-part test: "A Court may have discretion to depart from the law of the case where: 1) the first decision was clearly erroneous; 2) an intervening change in the law has occurred; 3) the evidence on remand is substantially different; 4) other changed circumstances exist; or 5) a manifest injustice would otherwise result." Appellant Br. 19 (quoting Alexander, 106 F.3d at 876).

F.3d 494, 503 n.3 (9th Cir. 2012) (rejecting prior formulations of the exceptions, including the formulations cited by Mr. Schoenfeld that included "changed circumstances" and "manifest injustice" exceptions). Regardless, he waived any argument on appeal that these exceptions apply because he failed to present any arguments to the District Court that an exception had applied. In his post-remand objections below to reissuing the permanent injunction, he raised only one argument before the District Court. In the Parties' Joint Status Report to the District Court, Mr. Schoenfeld only argued that he opposed injunctive relief to the extent that it is inconsistent with ERISA section 411, 29 U.S.C. § 1111,[12] he did not raise any arguments concerning an exception to the "law of the case" doctrine.

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[12] 29 U.S.C. § 1111(a) states:

> No person who has been convicted of, or has been imprisoned as a result of his conviction of, robbery, bribery, extortion, [listing other crimes,] shall serve or be permitted to serve--
> (1) as an administrator, fiduciary, officer, trustee, custodian, counsel, agent, employee, or representative in any capacity of any employee benefit plan,
> (2) as a consultant or adviser to an employee benefit plan, including but not limited to any entity whose activities are in whole or substantial part devoted to providing goods or services to any employee benefit plan, or
> (3) in any capacity that involves decisionmaking authority or custody or control of the moneys, funds, assets, or property of any employee benefit plan,
>
> during or for the period of thirteen years after such conviction or after the end of such imprisonment . . .

ER 28 ("Mr. Schoenfeld will oppose any such Motion [to pursue injunctive relief] on the ground that it is inconsistent with Section 411 of ERISA."); see also Appellant Br. 8-9 (describing the Joint Status Report).

In this appeal, Mr. Schoenfeld has abandoned his argument with respect to ERISA section 411, so this argument is waived. See Ind. Towers of Washington v. Washington, 350 F.3d 925, 929 (9th Cir. 2003) ("we will not consider any claims that were not actually argued in appellant's opening brief").[13] By failing to argue any other objections to reissuing the injunctive relief before the District Court, any other such arguments raised for the first time on appeal are also waived. ER 155 ("Schoenfeld does not directly respond to the Secretary's contentions"); see, e.g., Jachetta v. United States, 653 F.3d 898, 906 (9th Cir. 2011) ("Because Jachetta failed to present his argument to the district court, it has been waived."); O'Guinn v. Lovelock Corr. Ctr., 502 F.3d 1056, 1063 n.3 (9th Cir. 2007) ("Because these arguments were not raised before the district court, they are waived."); USA Petroleum Co. v. Atl. Richfield Co., 13 F.3d 1276, 1286 (9th Cir. 1994) (same); GoPets Ltd. v. Hise, 657 F.3d 1024, 1033 (9th Cir. 2011) (same). Mr. Schoenfeld failed to argue any of the exceptions to the "law of case" applied despite his "heavy burden" to do so. See United States v. Wallace, 573 F.3d 82, 92 (1st Cir. 2009)

[13] Moreover, ERISA section 411, 29 U.S.C. § 1111, provides one statutory basis to bar service as a fiduciary based on criminal violations. Section 411 otherwise does not limit a court's discretion to issue an injunction based on facts and circumstances established in a civil case. See infra, at 39-40.

(noting the "heavy burden required to invoke an exception under the law of the case doctrine").

Even on appeal, Mr. Schoenfeld fails to establish that an exception to the "law of the case" applies. Mr. Schoenfeld attempts to invoke the third exception: "substantially different evidence was adduced at a subsequent trial," but his argument is composed of a single conclusory sentence.[14] Mr. Schoenfeld argues that "[t]he evidence on remand – a substantial premium on the balance due to the Plan paid through the efforts of Mr. Schoenfeld and the substantial injustice that would result from punishing his reasonable assumption that the owners of TAP would promptly reimburse the Plan as they were contractually required to do – constitute the requisite 'changed circumstances.'" Appellant Br. 21. This single conclusory statement does not satisfy Mr. Schoenfeld's heavy burden to establish an exception. See Cholla Ready Mix, Inc. v. Civish, 382 F.3d 969, 973 (9th Cir. 2004) ("'Nor is the court required to accept as true allegations that are merely

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[14] As noted earlier, Mr. Schoenfeld uses the outdated five-part test, and he relies on the outdated exceptions of other "changed circumstances" and "manifest injustice" that are no longer found in the current and binding test. For the same reasons identified in this section, Mr. Schoenfeld's arguments do not suggest any "changed circumstances" or "manifest injustice" that justifies a deviation from the "law of the case"; his arguments do not undermine the District Court's reason and basis for the injunctive relief. Under the current test, Mr. Schoenfeld is apparently invoking the third exception. Regardless, the other two exceptions to the "law of the case" do not apply. Mr. Schoenfeld identifies no basis or argument as to why the original judgment was "clearly erroneous" or caused manifest injustice or how any intervening decision affected the District Court's decision to grant a permanent injunction.

conclusory, unwarranted deductions of fact, or unreasonable inferences.'") (citation omitted); see also Appellant Br. 22 (conclusorily referencing "manifest injustice" without any reasoning).

In this conclusory statement, Mr. Schoenfeld refers to two reasons; neither establishes the exception that "substantially different evidence was adduced at a subsequent trial." First, Mr. Schoenfeld refers to his "reasonable assumption that the owners of TAP would promptly reimburse the Plan as they were contractually required to do." This is "no[t] additional (much less 'substantially different') evidence [that] came to light." United States v. Lewis, 611 F.3d 1172, 1179 (9th Cir. 2010). Mr. Schoenfeld apparently argues that because he subjectively expected the TAP owners to reimburse the Plan, this long-standing subjective expectation is "new" evidence on remand. As stated, this alleged "reasonable expectation" existed before the First Judgment, so it is neither "new" nor "evidence" gathered on remand. Compare Eichman v. Fotomat Corp., 880 F.2d 149, 157 (9th Cir. 1989) (rejecting evidence available prior to initial judgment as "new evidence"); United States v. Ross, 372 F.3d 1097, 1106 n.7 (9th Cir. 2004) (same). His own long-standing subjective belief about the owners of TAP is not a basis to deviate from the "law of the case."

Second, Mr. Schoenfeld argues that a repayment to the Plan after the remand constitutes "new" evidence and a reason to deviate from the "law of the

case." He is mistaken. Co-defendant Tomco's repayment to the Plan satisfied the District Court's initial judgment that Tomco and Mr. Schoenfeld must compensate the Plan for losses caused by Mr. Schoenfeld's fiduciary violations. ER 154-55. After the remand, co-defendant Tomco utilized its refund to compensate the Plan for the monetary loss. Id. The Plan's subsequent balance after the remand and whether Mr. Schoenfeld or his co-defendant Tomco took actions in order to comply with the monetary component of the First Judgment are irrelevant to the District Court's initial decision and judgment that Mr. Schoenfeld committed a series of ERISA violations, and that he should not serve as an ERISA fiduciary in the future. SER 59. The evidence underlying this injunctive relief, including Mr. Schoenfeld's ERISA violations in the form of his imprudence and negligence in executing his fiduciary duties and his engagement in prohibited transactions, did not change on remand. No "new" evidence relevant to this finding was presented on remand, let alone "substantially different evidence." See United States v. Estrada-Lucas, 651 F.2d 1261, 1264 (9th Cir. 1980) ("Thus, we find no relevant change of circumstances which justified the judge's break with the law of the case . . ."); Minidoka Irrigation Dist. v. Dep't of Interior of U.S., 406 F.3d 567, 574 (9th Cir. 2005) (rejecting the application of this exception when more evidence was introduced but the evidence was not of a substantially different nature).

As the Secretary noted below, based on Mr. Schoenfeld's fiduciary breaches, the District Court granted a permanent injunction as necessary to prevent future ERISA violations in the public interest. SER 26-27; see also United States v. Laerdal Mfg. Corp., 73 F.3d 852, 857 (9th Cir. 1995) ("past illegal conduct gives rise to an inference that future violations may occur"); S.E.C. v. Koracorp Indus., Inc., 575 F.2d 692, 698 (9th Cir. 1978) (same). "The Secretary protects the public interest in 'prevent[ing] those who have engaged in illegal activity from causing loss to any future ERISA plan participants.'" Sec'y of Labor v. Fitzsimmons, 805 F.2d 682, 696 (7th Cir. 1986) (en banc) (emphasis in original) (quoting Donovan v. Cunningham, 716 F.2d 1455, 1462 (5th Cir. 1983)); see also Herman v. S. Carolina Nat'l Bank, 140 F.3d 1413, 1423, 1425 & n.19 (11th Cir. 1998). Compensation for the Plan's loss here does not obviate the basis for such injunctive relief.

Furthermore, the District Court issued separate and independent monetary and injunctive relief in its prior judgment. ER 178-80. Consequently, when the District Court issued its original judgment, the court had fully anticipated the possibility that the defendants would satisfy the monetary judgment and did not order the injunction to be lifted in that event. See Microsoft Corp. v. Motorola, Inc., 795 F.3d 1024, 1035 (9th Cir. 2015) (no deviation from "law of the case" based on new circumstances when trial court issued relief knowing or expecting those circumstances). No exceptions apply, so the District Court did not abuse its

discretion by applying the "law of the case" doctrine to the First Judgment's injunctive relief.

II. INJUNCTIVE RELIEF IS NOT MOOT

Second, Mr. Schoenfeld argues on appeal that the entire case, including the permanent injunctive relief, is now "moot" because his co-defendant Tomco satisfied the Plan's monetary loss. This Court reviews the district court's determination regarding mootness de novo. In re Di Giorgio, 134 F.3d 971, 974 (9th Cir. 1998). He misstates and misunderstands the law on mootness. A case "becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party." Knox v. Serv. Emps, 132 S. Ct. 2277, 2287 (2012) (internal quotation marks omitted) (emphasis added). "[I]f an event occurs while a case is pending on appeal that makes it impossible for the court to grant 'any effectual relief whatever' to a prevailing party, the appeal must be dismissed." Church of Scientology of Cal. v. United States, 506 U.S. 9, 12 (1992) (quoting Mills v. Green, 159 U.S. 651, 653 (1895)). Mr. Schoenfeld must satisfy a "heavy" burden in establishing the impossibility for the court to grant injunctive relief in this case. Rosemere Neighborhood Ass'n v. U.S. Envtl. Prot. Agency, 581 F.3d 1169, 1173 (9th Cir. 2009) ("The party alleging mootness bears a 'heavy burden' in seeking dismissal."); United States v. Larson, 302 F.3d 1016, 1020 (9th Cir. 2002) ("[W]e approach mootness cautiously and with care to ensure that the party

claiming the benefit of mootness . . . has carried its burden of establishing that the claim is moot."). Mr. Schoenfeld does not present any basis to suggest that the permanent injunctive relief in the public interest to prevent harm to future participants is now impossible for a court to grant or otherwise moot.

The only "event" Mr. Schoenfeld identifies as the basis for mootness is the fact that the Plans were compensated for its loss by Tomco, a liable co-defendant, pursuant to the District Court's original judgment. Appellant Br. 23-25. Mr. Schoenfeld is wrong that this constitutes "mootness." Mr. Schoenfeld does not explain how the satisfaction of the monetary portion of the judgment renders the permanent injunctive relief "moot" or ineffectual. "Where one of the several issues presented becomes moot, the remaining live issues supply the constitutional requirements of a case or controversy regardless of whether the remaining claims are secondary." Powell v. McCormack, 395 U.S. 486, 497, 499 (1969) (internal quotation marks and citation omitted); see also Sea-Land Serv., Inc. (Pac. Div.) v. Int'l Longshoremen's & Warehousemen's Union, Locals 13, 63, & 94, 939 F.2d 866, 870-71 (9th Cir. 1991) (employer's claim for injunctive relief against enforcement of arbitration awards not moot with regard to all of awards when dispute with regard to some became moot); S. Pac. Transp. Co. v. Pub. Util. Comm'n of State of Or., 9 F.3d 807, 810 (9th Cir. 1993). The permanent injunction bars Mr. Schoenfeld from serving in a fiduciary capacity to plans in

order to protect *any* future plan participants in the public interest. See Fitzsimmons, 805 F.2d at 696; Cunningham, 716 F.2d at 1462; S. Carolina Nat'l Bank, 140 F.3d at 1423, 1425 & n.19. The Secretary's public interest in deterrence still justifies this injunctive relief. Id. This injunctive relief is thus still "live" even if the monetary loss caused by his breach to this Plan is otherwise compensated. See Shaver, 332 F.3d at 1203 (requiring no showing of "loss" when seeking to "enjoin future misconduct" by fiduciaries); Koracorp Indus., 575 F.2d at 698 ("The fact that illegal conduct has ceased does not foreclose injunctive relief.").

In support of his argument, Mr. Schoenfeld cites to two inapposite cases, Appellant Br. 23, 25 (citing United States v. W.T. Grant Co., 345 U.S. 629, 633 (1953); County of Los Angeles v. Davis, 440 U.S. 625 (1979)). These two cases deal with a very different situation and a distinct legal question: whether a claim for injunction can survive a mootness challenge under the "voluntary cessation doctrine," which establishes "as a general rule, 'voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, i.e., does not make the case moot.'" Davis, 440 U.S. at 631 (emphasis added). Accordingly, under the cited "voluntary cessation doctrine," even if Mr. Schoenfeld had voluntarily ceased and renounced any service as an ERISA

fiduciary now and in the future, which he has not, this basis alone would not justify his mootness argument.[15]

The "voluntary cessation" doctrine is not applicable here because Mr. Schoenfeld never voluntarily ceased the conduct prohibited by the injunctive relief, which is his potential service to future ERISA plan or plan participants. The basis for relief here is not just his monetary injury to this particular Plan but rather the District Court's finding that Mr. Schoenfeld would be able to hurt future plans or plan participants based on his pattern of wrongful conduct. See F.T.C. v. Affordable Media, 179 F.3d 1228, 1238 (9th Cir. 1999). Whether a defendant is likely to repeat any wrongful conduct is the wrong standard for mootness, because relief is not moot if the defendant is still free to return to the illegal conduct absent court order. Id.; cf. Diouf v. Napolitano, 634 F.3d 1081, 1084 n.3 (9th Cir. 2011) ("absent action by this court" the alleged illegal action could reoccur, and the defendant "has offered no assurance that" the action will not reoccur). Absent court order, Mr. Schoenfeld would be free to manage ERISA plans. Accordingly, the District Court can and still must grant "effectual relief" to protect ERISA plan participants in the public interest so the case cannot be moot. See Knox, 132 S.Ct.

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[15] Mr. Schoenfeld has not conceded anything voluntarily. He challenged the Secretary's claims until a court issued judgment. Now he erroneously highlights his co-defendant's satisfaction of the monetary judgment as a voluntary cessation. Importantly, he never renounced voluntarily the subject of the injunction, which is his future service to ERISA plans as a fiduciary.

at 2287. The issuance of a permanent injunction was based on Mr. Schoenfeld's clear violations of ERISA. No one disputes that those breaches occurred. While Plan losses have been restored, the undisputed basis for injunctive relief remains as Mr. Schoenfeld has permanently lost the trust required to manage an employee benefit plan in the future. See Johnson v. Couturier, 572 F.3d 1067, 1077 (9th Cir. 2009) ("ERISA fiduciary duties [are] 'the highest known to the law.'") (citation omitted).

Even assuming arguendo that the voluntary cessation doctrine is applicable, Mr. Schoenfeld, as the party asserting voluntary cessation, must meet a "stringent" standard to assure the court that the wrongful behavior at issue, his future service as an ERISA fiduciary, will never reoccur. "A case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 189 (2000) (emphasis added). "The 'heavy burden of persua[ding]' the court that the challenged conduct cannot reasonably be expected to start up again lies with the party asserting mootness." Id. Mr. Schoenfeld must provide "absolutely clear" evidence that his service as an ERISA fiduciary, the wrongful behavior at issue, will not recur.[16] He has not.

[16] This Court has applied a "wariness of applying mootness under protestations of repentance and reform, especially when abandonment seems timed to anticipate suit, and there is probability of resumption.'" McCormack v. Herzog, 788 F.3d

In fact, to the contrary, Mr. Schoenfeld continues to insist in his voluntary cessation argument that the permanent injunction was not justified. See, e.g., Appellant Br. 25 ("In this matter, the original loans were made in good faith reliance on TAP's contractual obligation to reimburse Tomco's business expenses in the weeks prior to the closing.") (emphasis added). Mr. Schoenfeld's lack of remorse further justifies the need for a permanent injunction in this case. See Knox, 132 S. Ct. at 2287 (finding that parties had failed to assure actions will not reoccur because they still insist on the legality of their actions); In re U.S., 791 F.3d 945, 952 (9th Cir. 2015) (same); Norman-Bloodsaw v. Lawrence Berkeley Lab., 135 F.3d 1260, 1274 (9th Cir. 1998) (same).

Mr. Schoenfeld's conclusory statements downplaying the likelihood that he will commit ERISA violations in the future, Appellant Br. 22-23, are also an attempt to reference his views on the merits of the injunctive relief, which the District Court has already decided as "law of the case." Again, as with the prior arguments, Mr. Schoenfeld has not raised any merits arguments in objecting to the permanent injunction in this appeal or in his prior appeal. To the extent he is referencing the merits of the relief, these arguments have been waived, because he

1017, 1025 (9th Cir. 2015) (rejecting a series of executive actions to blunt the effect of a wrongful prosecution as alleged voluntary cessation of illegal action) (quoting W.T. Grant Co., 345 U.S. at 632 n.5); see also, e.g., Bell v. City of Boise, 709 F.3d 890, 901 (9th Cir. 2013) (rejecting city's special order to change police practices because it does not establish with "clarity" permanent voluntary cessation of alleged illegal actions).

failed to make such arguments in his prior appeal. See supra, at 27-29. He has also waived these arguments in this appeal by failing to properly argue them in his opening brief. See supra, at 29. Moreover, the standard of review for a grant or denial of injunctive relief is abuse of discretion. United States v. V-1 Oil Co., 63 F.3d 909, 913 (9th Cir. 1995) ("We review the grant of a permanent injunction for abuse of discretion"). Review for an "abuse of discretion" is "limited and deferential." Johnson, 572 F.3d at 1078 (internal citations omitted). An appellate court does not overturn a decision for abuse of discretion even if it "would have arrived at a different result if it had applied the law to the facts of the case." Id. at 1078-79.

The District Court has decided Mr. Schoenfeld committed serious fiduciary breaches, and Mr. Schoenfeld cannot challenge these findings. Based on these findings that he cannot dispute, the District Court decided that injunctive relief was justified. When permanently enjoining Mr. Schoenfeld from acting in a fiduciary capacity under ERISA, Mr. Schoenfeld does not dispute that the District Court based its decision on the correct legal standard to reach its unchallenged findings of fact and decisions on relief. Consistent with this decision, permanent injunctions have been ordered in a multitude of cases involving an ERISA fiduciary who was enjoined from serving as a fiduciary for an employee benefit plan in the future. E.g., Martin v. Feilen, 965 F.2d 660, 672 (8th Cir. 1992) (citing

Beck v. Levering, 947 F.2d 639, 651 (2d Cir. 1991); Whitfield v. Tomasso, 682 F. Supp. 1287, 1306 (E.D.N.Y. 1988); Brock v. Lindemann, No. CA3-84-1814-R (N.D. Tex. Jan. 29, 1987); Brock v. Crapanzano, CA No. 84-1899, 1986 WL 15752 (S.D. Fla. Jul 23, 1986)); see also Chao v. Merino, 452 F.3d 174, 185 (2d Cir. 2006) (district court did not abuse its discretion in entering a permanent injunction barring ERISA plan administrator, who breached her fiduciary duties by failing to take precautionary steps to prevent embezzlement of plan's funds, from ever again serving as fiduciary or service provider to any employee benefit plan); Katsaros v. Cody, 744 F.2d 270, 281 (2d Cir. 1984) ("ERISA grants the court wide discretion in fashioning equitable relief to protect the rights of pension fund beneficiaries); Hutcheson, 2012 WL 2151525, at *6 (relief may include " removal of the fiduciary[,] . . . [and a] permanent injunction against serving as a fiduciary" to any plan) (emphasis added). Mr. Schoenfeld presents no basis to overturn similar injunctive relief here.

CONCLUSION

For the foregoing reasons, the Secretary respectfully requests that this Court affirm the District Court's judgment imposing injunctive relief against Mr. Schoenfeld, permanently enjoining him from violating the provisions of Title I of ERISA and from serving as a fiduciary to any ERISA-covered employee benefit plan in the future.

DATED: July 15, 2016

Respectfully submitted,

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STATEMENT OF RELATED CASES

There are no other related cases.

DATED: July 15, 2016

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CERTIFICATION OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(c) and Ninth Circuit Rule 32-1, I hereby certify that the attached brief is proportionately spaced, has a typeface of 14 points, and contains 9,298 words.

DATED: July 15, 2016

/s/ Christine D. Han
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CERTIFICATE OF SERVICE

I hereby certify that on July 15, 2016, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF pacer NEXT/GEN System.

DATED: July 15, 2016

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