No. _____

In The
Supreme Court of the United States

SCOTT A. SELDIN,

Petitioner,

v.

THEODORE M. SELDIN, STANLEY C. SILVERMAN, MARK SCHLOSSBERG,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in affirming the district court's dismissal of a narrow statutory trust accounting action, which was based on findings made in arbitration, on the ground the rule of mandate is a jurisdictional bar to the action rather than an issue reviewed under the more flexible law of the case doctrine.

2. Whether the court of appeals erred in failing: (a) to determine the arbitrator exhausted his power under the *functus officio* doctrine and was not authorized to alter his earlier ruling denying jurisdiction under state trust laws and allow the court action to proceed; or, alternatively: (b) to adopt an exception to the *functus officio* doctrine applied by other courts of appeals permitting the court to remand the jurisdictional question to the arbitrator for clarification.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioner Scott A. Seldin ("Scott") states he is an individual.

RELATED CASES

Seldin v. Seldin, Case No. 8:16-cv-372, United States District Court for the District of Nebraska, order entered December 6, 2016.

Seldin v. Seldin, No. 17-1045, United States Court of Appeals for the Eighth Circuit, opinion filed January 2, 2018.

Seldin v. Seldin, Case No. 8:16-cv-372, United States District Court for the District of Nebraska, order entered November 14, 2018.

Seldin v. Seldin, No. 18-3679, United States Court of Appeals for the Eighth Circuit, opinion filed September 22, 2019.

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PETITION FOR WRIT OF CERTIORARI

Scott respectfully prays the Court issue a writ of certiorari to the United States Court of Appeals for the Eighth Circuit to review the opinion decided on October 28, 2019.

OPINIONS BELOW

The Eighth Circuit issued its opinion on August 22, 2019, and denied panel rehearing on October 28, 2019.

BASIS FOR JURISDICTION

The Eighth Circuit issued its opinion on August 22, 2019 (App. 1-2). On October 28, 2019, the Eighth Circuit denied panel rehearing (App. 25). Scott files this petition within 90 days of the order denying rehearing as required by Supreme Court Rules 13(1) and (3). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

None.

STATEMENT OF THE CASE

A. Basis for Scott's Petition

Scott's petition for certiorari requests the Court resolve a deeply divided split of authority in the courts of appeals on a fundamental issue of jurisdiction when applying the "rule of mandate" following an appeal. Scott further petitions the Court to resolve a separate split of authority in the courts of appeals when applying the *functus officio* doctrine to an arbitration award, an issue this Court has not visited in over 150 years.

Scott is one of the beneficiaries of a large children's trust in which two of the trustees who are family members (Ted and Stan) engaged in self-dealing, as shown in a business arbitration involving some of the same parties. The arbitrator denied jurisdiction over the personal trust dispute and Scott initiated this action. After an initial dismissal, the Eighth Circuit reversed the district court's order with instructions. On remand, the district court found it did not have authority to hear Scott's case based on the mandate of the Eighth Circuit. Upon further appeal, the Eighth Circuit summarily affirmed the district court's order.

The arbitrator's order denying jurisdiction should have allowed Scott's personal statutory trust accounting claim to proceed in court for other reasons as well. The arbitrator exhausted his power under the *functus officio* doctrine and had no power to alter his earlier ruling denying his jurisdiction under Nebraska trust laws. The arbitrator's ruling should have allowed Scott's court action to proceed or, alternatively, at

minimum, permitted Scott to seek clarification from the arbitrator, a remedy allowed in multiple circuits but not in the Eighth Circuit and elsewhere. The end result is Scott was denied a trust accounting of the children's trust despite findings made by the Arbitrator showing Ted and Stan had misappropriated substantial assets.

B. Factual Background

1. The Parties and MSCM Trust

Scott is a real estate entrepreneur, manager and developer who helped build on a highly successful commercial real estate business founded by his now 92-year-old father, Millard Seldin ("Millard") (8th Cir. App. 48-50). Millard invited his brother, Theodore M. Seldin ("Ted") and brother-in-law, Stanley C. Silverman ("Stan") also to join the business (8th Cir. App. 19-20).

Ted and Stan separately agreed, along with a third individual, to serve as trustees of a children's trust (defined as "MSCM Trust") established by Millard for his three children, including Scott (8th Cir. App. 1243). The MSCM Trust was massive, including 43 investment properties and assets located across the United States (8th Cir. App. 1200-03).

2. Separation Agreement

Business disputes arose between Millard and Scott (referred to as "Arizona Seldins" below) on one hand, and Ted and Stan ("Omaha Seldins") on the

other hand, and they entered into a Separation Agreement for the purpose of separating certain business "Properties" and "Entities" (8th Cir. App. 114-15, 1244). The Separation Agreement provides for arbitration of business disputes (8th Cir. App. 149-50, 1244). The MSCM Trust was a personal, not a business, matter and is not identified in the Separation Agreement (8th Cir. App. 114).

3. State Court Litigation

After Ted and Stan had *ex parte* contacts with the original arbitrator, Scott and other Arizona Seldins commenced litigation in Nebraska state court seeking judicial remedies including common law accounting of commercial real estate projects (8th Cir. App. 1-13).

The state court found the claims were "business dealings" to be decided in arbitration (8th Cir. App. 302-03). The MSCM Trust was not mentioned in the state court litigation (8th Cir. App. 215-68, 316-41, 356-88, 1244-45).

4. Arbitration

a. Ted and Stan's Self-Dealing

During arbitration, the arbitrator ("Arbitrator") found Ted and Stan engaged in significant self-dealing against Scott and other Arizona Seldins (8th Cir. App. 70, 731-48, 798-801). The arbitration did not include a statutory trust accounting, but the Arbitrator's findings show assets of the MSCM Trust were negatively

impacted in a substantial way (8th Cir. App. 70, 724-42, 791-95). Scott's losses in the ten-year period of the MSCM Trust's existence could be staggering (8th Cir. App. 1243-44).

b. Motion on Arbitrator's Jurisdiction

After the Arbitrator made findings proving Ted and Stan misappropriated MSCM Trust assets, Scott filed a motion in the arbitration to determine whether the Arbitrator had "jurisdiction" to order a trust accounting under Nebraska trust law (8th Cir. App. 84). The Arbitrator denied the motion and no accounting of the MSCM Trust was ordered in the business arbitration (8th Cir. App. 92).

5. Final Award and District Court Action

The Arbitrator entered a Final Award, incorporating his prior orders including his order denying Scott's motion regarding jurisdiction under Nebraska trust laws (8th Cir. App. 1245).

Scott filed a complaint in the district court against Ted and Stan (the latter now deceased) as trustees of the MSCM Trust, seeking a narrow statutory trust accounting order for the MSCM Trust pursuant to Neb. Rev. Stat. § 30-3890(b)(4) (8th Cir. App. 1-13, 1245). Scott's complaint cited the Arbitrator's findings establishing Ted and Stan's self-dealing in support of his claim (8th Cir. App. 1-13).

Scott's siblings, who are beneficiaries of the MSCM Trust but not parties to the arbitration, sought leave to intervene in the action, which was denied (8th Cir. App. 1243-45). Ted filed a motion to dismiss for lack of subject matter jurisdiction (8th Cir. App. 94-95). The district court purported to refer the case back to the Arbitrator, but without any request or instructions and stated "[t]he case is otherwise dismissed" (8th Cir. App. 1238).

6. Scott's First Appeal to the Eighth Circuit

The Eighth Circuit reversed the district court, noting the Final Award had been entered and finding the district court erred in granting a Rule 12(b)(1) motion (App. 6-13). The Eighth Circuit further added, "the district court may hear a challenge to the enforcement of the arbitration award, but may not consider whether the state court's order to arbitrate accounting claims was appropriate" (App. 12). The Eighth Circuit's mandate called "for further proceedings consistent with [the] opinion" (App. 13).

7. District Court and Appeal on Remand

On remand, the district court dismissed Scott's complaint *sua sponte* without requiring Ted to file an answer or motion (App. 3-5). Bound by Eighth Circuit precedent requiring strict compliance with the mandate on remand, the district court found it did not have "authority" (jurisdiction) to hear Scott's statutory trust accounting claim:

> The Court finds [precedent] does not provide *authority* for the pursuit of an accounting claim in the face of the Eighth Circuit's express directive to this Court.

(App. 4) (emphasis added).

On further appeal, the Eighth Circuit summarily affirmed the district court's order (App. 1-2). Scott filed a motion for panel rehearing, but the Eighth Circuit denied Scott's motion without comment (App. 25). This left Scott (and his siblings) without a statutory trust accounting of the MSCM Trust in any forum (App. 1-2).

REASONS FOR GRANTING THE WRIT

A. Summary of the Argument

Scott requests the Court grant his petition for certiorari to resolve: (1) a deeply divided split of authority in the courts of appeals relating to jurisdiction when applying the rule of mandate following an appeal; and (2) a separate split of authority in the courts of appeals when applying the *functus officio* doctrine to an arbitration award, the latter issue the Court has not visited in more than 150 years.

B. Law of the Case and Mandate Rule

1. Circuit Split on Whether Jurisdiction is Invoked

Justice Oliver Wendell Holmes observed the "law of the case, as applied to the effect of previous orders

on the later action of the court rendering them in the same case, merely expresses the *practice* of courts generally to refuse to reopen what has been decided, *not a limit to their power*." *Messenger v. Anderson*, 225 U.S. 436, 444 (1912) (Holmes, J.) (emphasis added). This Court repeated Justice Holmes' view in *Castro v. United States*, 540 U.S. 375, 384 (2003) (quoting *Messenger*); *see also Arizona v. California*, 460 U.S. 605, 618 (1983) ("law of the case is an amorphous concept").

Several courts of appeals, albeit recognizing a circuit split, have found law of the case addressed in *Castro* does "not implicate the rule of mandate doctrine." *United States v. Thrasher*, 483 F.3d 977, 982 (9th Cir. 2007) (noting "circuits appear to be split four to four on the issue").

As explained by the Ninth Circuit, "[c]ourts have not been consistent in describing the mandate doctrine. We have said the doctrine is 'similar to, but broader than, the law of the case doctrine.'" *United States v. Thrasher*, 483 F.3d at 982 ("If a district court errs by violating the rule of mandate, the error is a *jurisdictional* one.") (emphasis added).

"By contrast, several of our sister circuits have described the rule of mandate doctrine as nothing more than a specific application of the 'law of the case' doctrine." *United States v. Thrasher*, 483 F.3d at 982 (quoting *Piambino v. Bailey*, 757 F.2d 1112, 1120 (11th Cir. 1985)). *See also In re Marshall*, No. SA CV 01-0097-DOC, 2017 WL 4581681, at *2 (C.D. Cal. May 2, 2017), *aff'd*, 754 F. App'x 566 (9th Cir. 2019) ("[U]nless and

until the Supreme Court resolves the circuit split on the rule of mandate, this Court is bound by the Ninth Circuit's *jurisdictional* application of the doctrine.") (emphasis added).

The Ninth Circuit summarized a "four to four" circuit split on this issue thirteen years ago:

"We have described our mandate as limiting the district court's '*authority*' on remand, *which is jurisdiction language*. . . . Several of our sister circuits have also considered the mandate as jurisdictional." *United States v. Thrasher*, 483 F.3d at 982 (citing *Seese v. Volkswagenwerk, A.G.*, 679 F.2d 336, 337 (3d Cir. 1982) ("jurisdictional") (emphasis added); *Tapco Prods. Co. v. Van Mark Prods. Corp.*, 466 F.2d 109, 110 (6th Cir. 1972) ("jurisdictional")). "Other circuits, however, have reached a different conclusion, holding that their mandates are not jurisdictional." *Id.* (citing *United States v. Matthews*, 312 F.3d 652, 657 (5th Cir. 2002); *Tronzo v. Biomet, Inc.*, 236 F.3d 1342, 1349 (Fed. Cir. 2001); *United States v. Gama-Bastidas*, 222 F.3d 779, 784 (10th Cir. 2000); *United States v. Bell*, 988 F.2d 247, 251 (1st Cir. 1993)).

The divide between the circuits has only deepened over time, including during the past year. *See Webb v. Davis*, 940 F.3d 892, 897 (5th Cir. 2019) ("To be sure, the mandate rule that the respondent asserts as jurisdictional is not jurisdictional at all—it is a discretionary rule that can be set aside in certain circumstances."); *Rochow v. Life Ins. Co. of N. Am.*, 737 F.3d 415, 422 (6th Cir. 2013), *reh'g en banc granted,*

opinion vacated (Feb. 19, 2014), *on reh'g*, 780 F.3d 364 (6th Cir. 2015) ("'[T]he mandate rule is a rule of policy and practice, not a jurisdictional limitation.'").

The Eighth Circuit aligns with those circuits finding the rule of mandate to be jurisdictional. *Bethea v. Levi Strauss & Co.*, 916 F.2d 453, 454 (8th Cir. 1990) ("Because the *district court lacked jurisdiction* to enlarge Bethea's rights and was bound to execute the clear *mandate* of the Eighth Circuit, we reverse. . . . [T]he discretionary law of the case doctrine does not apply." (emphasis added)); *Pearson v. Norris*, 94 F.3d 406, 409 (8th Cir. 1996) ("On remand, the district court 'is *without power* to do anything which is contrary to either the letter or spirit of the mandate construed in light of the opinion of [the appellate] court deciding the case.'" (emphasis added)) (citation omitted); *compare Klein v. Arkoma Prod. Co.*, 73 F.3d 779, 784 (8th Cir. 1996) ("The law of the case doctrine prevents relitigation of a settled issue. . . .").

As distinct from law of the case, the "mandate rule prevents re-litigation in the district court not only of matters expressly decided by the appellate court, but also precludes re-litigation of issues *impliedly resolved* by the appellate court's mandate." *Yick Man Mui v. United States*, 614 F.3d 50, 53 (2d Cir. 2010) (emphasis added).

2. Application of Rule of Mandate and Law of the Case

The determination of whether the rule of mandate creates a jurisdictional bar to Scott's statutory trust

accounting claim under Neb. Rev. Stat. § 30-3890(b)(4) or, alternatively, should be reviewed under the more flexible law of the case doctrine is of major consequence in this appeal. It is the difference between affording Scott justifiable relief and requiring unwarranted dismissal of his complaint without a motion or answer on remand.

The district court was bound by Eighth Circuit precedent to treat the mandate from the Eighth Circuit as jurisdictional and, as a result, the district court found it was without "authority" to allow Scott to proceed with a statutory trust accounting claim pursuant to Neb. Rev. Stat. § 30-3890(b)(4) (App. 1318-19). *See Bethea v. Levi Strauss & Co.*, 916 F.2d at 454 ("district court lacked jurisdiction . . . and was bound to execute the clear mandate of the Eighth Circuit"); *cf. United States v. Thrasher*, 483 F.3d at 982 ("We have described our mandate as limiting the district court's '*authority*' on remand, *which is jurisdiction language*. . . .") (emphasis added).

The mandate rule, when applied as a jurisdictional bar, proved fatal to Scott's request for a *statutory trust* accounting of the MSCM Trust. The Eighth Circuit's mandate barred the district court from considering whether the state court's order to arbitrate *common-law* accounting claims (for example, over Ted's business management of apartment complexes) was appropriate, but the district court found it also was precluded from litigating Scott's "pursuit of an accounting claim" on a personal matter involving the MSCM Trust under Neb. Rev. Stat. § 30-3890(b)(4), an

issue which had not been pled in the state court litigation or included in the Separation Agreement, but one the district court found was resolved by the Eighth Circuit's mandate (8th Cir. App. 256-59, 1318-19).

Application of law of the case doctrine leads to a different result. This Court has commented that law of the case is an "amorphous concept" or "practice" that merely "posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *Arizona v. California*, 460 U.S. at 618; *Messenger v. Anderson*, 225 U.S. at 444.

Unlike the mandate rule, the law of the case doctrine is not a jurisdictional limit on the district court's power to hear Scott's "pursuit of an accounting claim" regarding the MSCM Trust under Neb. Rev. Stat. § 30-3890(b)(4). The law of the case doctrine, at most, should guide the district court in concluding the state court's order to arbitrate *common-law* accounting claims (e.g., relating to apartment properties) was appropriate, but it did not deprive the district court of *jurisdiction* to decide Scott's separate statutory trust accounting claim of the MSCM Trust.

C. *Functus Officio*

"Arbitrators exhaust their power when they make a final determination on the matters submitted to them. They have no power after having made an award to alter it; the authority conferred on them is then at an end." *Bayne v. Morris*, 68 U.S. 97, 99 (1863).

Since this Court's decision 150 years ago, the Eighth Circuit has expanded *Bayne* to recognize "two exceptions" to the *functus officio* doctrine, namely, "[1] mistakes evident on the face of the award and [2] for changes when the parties consent." *Legion Ins. Co. v. VCW, Inc*., 198 F.3d 718, 720 (8th Cir. 1999).

Several other courts of appeals have recognized a *third exception* to the *functus officio* doctrine, namely: [3] allowing an arbitrator to *clarify* an arbitration award when it is ambiguous. The Second Circuit recently summarized one side of the circuit split: "We join the Third, Fifth, Sixth, Seventh, and Ninth Circuits in recognizing an exception to *functus officio* where an arbitral award fails to address a contingency that later arises or when the award is susceptible to more than one interpretation." *Sterling China Co. v. Glass, Molders, Pottery, Plastics & Allied Workers Local No. 24*, 357 F.3d 546, 554 (6th Cir. 2004) (internal quotation marks omitted); *Brown v. Witco Corp.*, 340 F.3d 209, 219 (5th Cir. 2003) ("An arbitrator can . . . *clarify* or construe an arbitration award that seems complete but proves to be ambiguous in its scope and implementation.") (emphasis added); *Glass, Molders, Pottery, Plastics & Allied Workers Int'l Union v. Excelsior Foundry Co.*, 56 F.3d 844, 847 (7th Cir. 1995) (same); *Colonial Penn. Ins. Co. v. Omaha Indem. Co.*, 943 F.2d 327, 334 (3d Cir. 1991) ("[W]hen the remedy awarded by the arbitrators is ambiguous, a remand for *clarification* of the intended meaning of an arbitration award is appropriate.") (emphasis added); *McClatchy Newspapers v. Central Valley Typographical Union No. 46*,

686 F.2d 731, 734 n.1 (9th Cir. 1982) (same); *Gen. Re Life Corp. v. Lincoln Nat. Life Ins. Co.*, 909 F.3d 544, 548-49 (2d Cir. 2018). The Tenth Circuit also has recognized a "clarification exception" to the *functus officio* doctrine. *Kennecott Utah Copper Corp. v. Becker*, 186 F.3d 1261, 1271 (10th Cir. 1999) ("The clarification exception to the [*functus officio*] doctrine is well-settled.").

The Eighth Circuit, however, has refused to adopt what it characterizes as a "broad exception for 'allowing for an arbitrator to clarify an award.'" *Legion Ins. Co. v. VCW, Inc.*, 198 F.3d 718, 720 (8th Cir. 1999) ("VCW urges that we create an *additional exception* that would allow arbitrators to clarify a final award. . . . [W]e reject VCW's argument that this case falls within an exception to the *functus officio* doctrine."). The Eighth Circuit believes it is "absurd" to recognize the clarification exception because "[the] result would effectively grant an arbitration panel power to conduct appellate review of a federal district court decision." *Id.*[1]

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[1] The Eighth Circuit later reaffirmed *Legion Insurance*, noting "[t]he *functus officio* doctrine only applies . . . when an arbitration award is considered a final award." *SBC Advanced Sols., Inc. v. Commc'ns Workers of Am., Dist. 6*, 794 F.3d 1020, 1031 (8th Cir. 2015). Although not relevant for these purposes, the Eighth Circuit has noted in dicta in an "unusual case" where a party was "seeking to confirm a portion of the arbitrator's . . . award," that a "reviewing court may ask the arbitrator to clarify an award" in that specific circumstance. *Turner v. United Steelworkers of Am., Local 812*, 581 F.3d 672, 673-74, 676 (8th Cir. 2009) (emphasis added). *Turner* did not involve application of the *functus officio* doctrine or address its exceptions. *Id.* Scott's appeal was decided in the Eighth Circuit after entry of the Final Award, not merely after appeal of a "portion" of the award (App. 10).

Consistent with the Eighth Circuit, the Eleventh Circuit, while "reserv[ing] judgment for another day on the viability or precise contours of *functus officio* as an independent, common law doctrine, determined 'contracting parties can ask an arbitrator to *clarify* or reconsider his decision *if* they mutually agree.'" *Int'l Broth. of Elec. Workers v. Verizon Florida*, 803 F.3d 1241, 1248 n.9, 1249, 1251 (11th Cir. 2015) (noting *functus officio* is consistent with and has the same effect as AAA Rule 40). The Seventh Circuit, while joining the majority view allowing arbitrator clarification, commented 25 years ago: "Today, riddled with exceptions, [the *functus officio* doctrine] is hanging on by its fingernails. . . ." *Glass, Molders, etc. Union v. Excelsior Foundry Co.*, 56 F.3d 844, 846 (7th Cir. 1995).

This Court in *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1416 (2019), recently addressed ambiguity in an analogous circumstance, observing a court cannot enforce an ambiguous arbitration agreement: "Like silence, ambiguity does not provide a sufficient basis to conclude that parties to an arbitration agreement agreed to 'sacrifice[] the principal advantage of arbitration.'" (quoting *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 348 (2011)).

The MSCM Trust does not have an arbitration clause and includes two beneficiaries and one trustee who were not parties to the Separation Agreement or arbitration (8th Cir. App. 1, 114, 840-54, 1243). Scott filed a motion in the arbitration asking the Arbitrator to clarify whether he had "jurisdiction" to enter an order under Nebraska trust laws (8th Cir. App. 80-91).

The Arbitrator *denied* Scott's motion relating to jurisdiction and, accordingly, a statutory trust accounting report of the MSCM Trust was never prepared in arbitration (8th Cir. App. 23, 61-62, 92).

The Arbitrator exhausted his power no later than when the Final Award was entered at which time he had *no power* to alter his earlier ruling denying jurisdiction under Nebraska trust laws. The Arbitrator's order denying jurisdiction should have been accepted by the lower courts. Scott's narrow request for a statutory accounting pursuant to Neb. Rev. Stat. § 30-3890(b)(4) should have been allowed to proceed in the district court.

Alternatively, the Court should remand this matter to the Arbitrator (or his replacement due to vacancy or otherwise) to clarify whether the Arbitrator has jurisdiction to perform a full review of the assets of the MSCM Trust and to order a *statutory trust* accounting of the MSCM Trust under Neb. Rev. Stat. § 30-3890(b)(4).

Unlike several other courts of appeals, the Eighth Circuit does not recognize the third exception to the *functus officio* doctrine allowing an arbitrator to clarify a final award, rendering that alternative unavailable to Scott on appeal in the Eighth Circuit. Accordingly, in the alternative, Scott requests this Court grant his petition for certiorari to resolve the conflict in the lower courts of appeals over whether an arbitrator may clarify a final arbitration award as an exception to the *functus officio* doctrine and then order the Arbitrator

to clarify whether the Arbitrator has jurisdiction to conduct such a review and perform a statutory trust accounting for Scott of the MSCM Trust under Neb. Rev. Stat. § 30-3890(b)(4).

Scott respectfully submits this request is a logical extension of *Lamps Plus* and will allow the Court to make clear that neither ambiguity in an arbitration agreement *nor in an arbitration award* is enforceable.

CONCLUSION

For these reasons, Scott respectfully requests the Court grant his petition for a writ of certiorari.

Dated this 24th day of January, 2020.

Respectfully submitted,

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