No. 26-2818

In the United States Court of Appeals for the Ninth Circuit

ALANNA ZABEL,
Appellant,
v.
LAUREN SANCHEZ; THE COLLECTIVE BOOK STUDIO LLC;
SIMON & SCHUSTER LLC,
Appellees.

On Appeal from the United States District Court
for the Central District of California
Case No. 2:25-cv-05558-MEMF-E

BRIEF FOR APPELLANT ALANNA ZABEL

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TABLE OF CONTENTS

Page

Table of Authorities iii

Introduction 1

Jurisdictional Statement 6

Issues Presented 6

Rule 28-2.5 Statement 7

Statutory Authorities 8

Statement of the Case 8

A. Factual Background 8

B. Procedural History 10

Summary of the Argument 17

Argument 21

I. The Two-Dismissal Rule Never Triggered 21

A. The State-Court Dismissal Cannot Count Because Zabel's Copyright Claim Could Never Have Been Brought in State Court 23

B. The January 2025 Dismissal Was Effected by Court Order, Not by Notice 25

C. The January 2025 Dismissal Was Not Voluntary Because It Was Compelled by Another Party 29

D. The Rule Does Not Apply to Claims That Did Not Exist When the Prior Actions Were Dismissed 32

II. Even If the Rule Triggered, the Bar Does Not Reach Collective or Simon & Schuster 35

A. Only a Defendant Actually Substantially the Same As One Previously Dismissed May Invoke the Bar 35

B. An Author, A Publisher, And A Distributor Are Not Substantially The Same Defendant 37

C. The District Court's "Danger of Harassment" Rationale Has No Limiting Principle 40

D. At Minimum, The Relationship Finding Cannot Be Made At The Pleading Stage 42

Conclusion 43

Statement of Related Cases 44
Certificate of Compliance 45
Certificate of Service 46
Addendum 47

TABLE OF AUTHORITIES

Page(s)

Cases

American Cyanamid Co. v. Capuano,
381 F.3d 6 (1st Cir. 2004) 37

ASX Inv. Corp. v. Newton,
183 F.3d 1265 (11th Cir. 1999) 22, 26

Carter v. Clark County,
253 F. App'x 638 (9th Cir. 2007) 42

Commercial Space Mgmt. Co. v. Boeing Co.,
193 F.3d 1074 (9th Cir. 1999) ..... passim

Cooter & Gell v. Hartmarx Corp.,
496 U.S. 384 (1990) 21

Finch v. Block Inc.,
No. CV-25-04247-PHX-JJT (D. Ariz. Feb. 4, 2026) 31

Frank v. United Airlines, Inc.,
216 F.3d 845 (9th Cir. 2000) 34

Gardiner v. A.H. Robins Co.,
747 F.2d 1180 (8th Cir. 1984) 28

Howard v. City of Coos Bay,
871 F.3d 1032 (9th Cir. 2017) 34

Lake at Las Vegas Invs. Grp., Inc. v. Pac. Malibu Dev. Corp.,
933 F.2d 724 (9th Cir. 1991) ..... passim

Lee v. City of Los Angeles,
250 F.3d 668 (9th Cir. 2001) 42

Lucky Brand Dungarees, Inc. v. Marcel Fashions Group, Inc.,
590 U.S. 405 (2020) 34

Manning v. South Carolina Department of Highway & Public Transportation,
914 F.2d 44 (4th Cir. 1990) 36

Marrese v. American Academy of Orthopaedic Surgeons,
470 U.S. 373 (1985) 24

Media Rights Technologies, Inc. v. Microsoft Corp.,
922 F.3d 1014 (9th Cir. 2019) 19, 33, 34

Murray v. Sevier,
145 F.R.D. 563 (D. Kan. 1993) 37

Ogden Allied Security Services, Inc. v. Draper & Kramer,
137 F.R.D. 259 (N.D. Ill. 1991) 37

Pension Tr. Fund v. Triple A Mach. Shop, Inc.,
942 F.2d 1457 (9th Cir. 1991) 24

Petrella v. Metro-Goldwyn-Mayer, Inc.,
572 U.S. 663 (2014) 19, 32

Poloron Prods., Inc. v. Lybrand Ross Bros. & Montgomery,
534 F.2d 1012 (2d Cir. 1976) 31

Rhoades v. Avon Products, Inc.,
504 F.3d 1151 (9th Cir. 2007) 7

Rose Court, LLC v. Select Portfolio Servicing, Inc.,
119 F.4th 679 (9th Cir. 2024) ..... passim

Sealey v. Branch Banking & Trust Co.,
693 F. App'x 830 (11th Cir. 2017) 36

Shaver v. Barrett Daffin Frappier Turner & Engel, L.L.P.,
593 F. App'x 265 (5th Cir. 2014) 36

St. Clair Intellectual Property Consultants, Inc. v. Samsung Electronics Co.,
291 F.R.D. 75 (D. Del. 2013) 37, 42

Taylor v. Sturgell,
553 U.S. 880 (2008) 40, 41

Statutes

17 U.S.C. § 106 ..... 38, 41

28 U.S.C. § 1331 6

28 U.S.C. § 1338(a) ..... passim

Cal. Civ. Proc. Code § 425.16 11

Rules

Fed. R. Civ. P. 41(a) ..... passim

Other Authorities

9 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2368 (3d ed. 2008) 22

Restatement (Second) of Judgments § 26 (1982) 24

INTRODUCTION

Federal Rule of Civil Procedure 41(a)(1)(B) addresses a specific abuse. A plaintiff ordinarily may dismiss an action by notice and walk away without prejudice. But when a plaintiff repeatedly brings the same claim and twice invokes that unilateral right, the two-dismissal rule converts the second notice into an adjudication on the merits. The Rule protects defendants from the costs and harassment of serial litigation. It is narrow because its consequence is severe: a procedural filing extinguishes a claim no court has adjudicated.

This case presents the opposite of the abuse the Rule was designed to prevent. Pro se plaintiff Alanna Zabel filed two actions that ended at their inception, before Defendant Lauren Sánchez Bezos appeared, answered, or defended either one. The first lasted eight days. Zabel filed it in state court, learned that federal courts have exclusive jurisdiction over copyright claims, and promptly dismissed it to proceed in the proper forum. Sánchez Bezos hired Bird Marella, a nationally prominent law firm. Zabel did not hire anyone.

The second action ended after Bird Marella threatened Zabel—then actively prosecuting her case in federal court—with an anti-SLAPP motion carrying one-way fee exposure. Bird Marella gave Zabel a deadline: if she did not dismiss her complaint by January 16, 2025, it would file the anti-SLAPP motion. As the deadline approached, the Palisades fires erupted over southern California, forcing Zabel to

twice evacuate her home. She asked Bird Marella for a short stay in light of her litigation inexperience and the declared state of emergency. Bird Marella refused. She asked the court for a stay. The court did not rule. Overwhelmed by this "anti-SLAPP" concept she was unfamiliar with and realizing she needed to both catch her breath and find a lawyer, she submitted a "Request for Dismissal" and informed Bird Marella that she would need to refile. The court considered that request, found good cause, adjudicated a pending motion, and entered an order dismissing the action without prejudice. Several months later, Zabel returned to federal court with counsel—now in the right forum and now bringing only one count for infringement under the Copyright Act.

But in the order now on appeal, the district court treated the two prior actions as an adjudication of her copyright claim on the merits, and extended that supposed adjudication far beyond anything Zabel previously dismissed. It barred claims against Collective Book Studio and Simon & Schuster, even though Zabel had never sued either company before. It also barred claims arising from sales and displays that occurred only after the prior actions had ended. The court thus extinguished every claim against every Defendant—including claims that had never been brought, against Defendants who had never been sued—without deciding whether Zabel stated a valid copyright claim.

Rule 41 does not permit that result.

* * *

To begin, the two-dismissal rule never triggered. That is true for four independent reasons, each of which alone requires reversal.

First, the state action is not a prior dismissal of the Copyright Act claim. Rule 41(a)(1)(B) counts a prior action only if it was "based on or including the same claim," and under this Court's test, a claim is the same only if it could have been raised in the earlier action. Zabel's Copyright Act claim could not have been raised in California state court because Congress has given federal courts exclusive jurisdiction over copyright claims. The state case was an eight-day pro se wrong turn into a courthouse Congress had closed to this claim. Treating that dismissal as the first strike against a federal copyright action ignores the Rule's same-claim requirement.

Second, the January 2025 dismissal is not the kind of dismissal Rule 41(a)(1)(B) counts. Under Rule 41(a)'s plain text, the two-dismissal rule attaches to a notice of dismissal, *i.e.*, a self-executing paper by which a plaintiff ends a case without any court action. A different subsection, Rule 41(a)(2), covers instances in which the court dismisses at the plaintiff's request. It is Rule 41(a)(2) that covers the January 2025 dismissal here, and it is not a close call. Zabel filed a "Request for Dismissal"; the court in the prior action considered the request, found good cause,

vacated all dates and deadlines, resolved a pending motion, and dismissed by order. If Zabel's filing had been a Rule 41(a)(1) notice, the case would have ended the moment she filed it and the court would not have had jurisdiction to consider, grant, deny, or order. The district court's contrary ruling collapses Rule 41(a)(1) and Rule 41(a)(2) and contradicts their plain text.

Third, the January 2025 dismissal was not voluntary within this Court's definition of that term. Zabel was progressing with her case until opposing counsel imposed the only operative date in the litigation, backed it with the threat of a mandatory one-way fee award, refused a brief stay, and left an unrepresented plaintiff to choose between mandatory-fee exposure and dismissal. A rule intended to prevent plaintiffs from abusing unilateral dismissals cannot become the instrument of the pressure that procured dismissal.

Fourth, no dismissal can extinguish claims that did not yet exist when the previous actions were dismissed. Copyright law treats every new reproduction, distribution, sale, and display as a new wrong giving rise to a new claim. The operative complaint alleges that Defendants continued selling and displaying the challenged book for months after the prior actions ended and continue doing so today. Those later claims were never dismissed twice. Many were never dismissed at all. Yet the judgment below bars them forever. Zabel brought a claim for

injunctive relief that has never been adjudicated, but the district court effectively granted Defendants immunity to continue the very conduct the complaint challenges.

* * *

Even if the Rule had triggered, it could not reach Collective or Simon & Schuster. This Court permits a defendant never previously sued to invoke the bar only when it is "substantially the same" as a dismissed defendant. Every recognized application involves a relationship with legal architecture—ownership, succession, agency, or control—that makes the new defendant effectively the old one under another name.

No such relationship is alleged here. Collective and Simon & Schuster are companies accused of their own conduct: publishing, distributing, and publicly displaying the challenged book. They received separate cease-and-desist letters prior to publication. The district court nevertheless deemed them substantially the same as Sánchez Bezos—a human being with no agency relationship to the corporate Defendants. The court reasoned that the claims involve overlapping issues and proof, but that rationale eliminates the relationship requirement entirely. If overlapping proof is enough, every publisher, printer, bookstore, and retailer becomes the same defendant as the author whose work it carries.

* * *

This appeal asks that Rule 41 be applied according to its text, its purpose, and this Court's precedents—and that Zabel be permitted, for the first time, to have her claim heard on the merits. The judgment should be reversed.

JURISDICTIONAL STATEMENT

The district court had subject-matter jurisdiction under 28 U.S.C. §§ 1331 and 1338(a) over Zabel's claim under the Copyright Act, 17 U.S.C. § 501 et seq. The district court entered a final judgment dismissing the action with prejudice on March 25, 2026. ER-4, ER-16.

Zabel filed a timely notice of appeal on April 24, 2026, within thirty days of entry of judgment as required by Federal Rule of Appellate Procedure 4(a)(1)(A). ER-204. This Court has appellate jurisdiction under 28 U.S.C. § 1291.

ISSUES PRESENTED

1. Whether Rule 41(a)(1)(B)'s two-dismissal rule applies even though the first dismissed action was a state-court suit that could not have included the federal copyright claim brought here, the second dismissal was effected by court order rather than by notice, the second dismissal was compelled by another party, and some of the claims had never been dismissed at all.

2. Whether a bar arising from dismissals of actions against Sánchez Bezos alone can reach Collective Book Studio and Simon & Schuster—strangers to the

dismissed actions with no alleged agency or corporate relationship to her—on the ground that they are substantially the same defendant.

RULE 28-2.5 STATEMENT

Issue 1 was raised in Zabel's opposition to the motion to dismiss, which contested the two-dismissal rule's application to this action. ER-38–43 (Opposition at 7–12). The district court ruled on it, holding the Rule's requirements satisfied and the action barred. ER-10–14.

Issue 2 was raised in Zabel's opposition, which contended that neither Collective nor Simon & Schuster is substantially the same as Sánchez Bezos. ER-43 (Opposition at 12). The district court ruled on it, holding both Defendants "substantially the same" as Sánchez Bezos. ER-15–16.

Both issues present purely legal questions resolved in a Rule 12(b)(6) dismissal. This Court reviews each de novo. *See Rhoades v. Avon Prods., Inc*., 504 F.3d 1151, 1156 (9th Cir. 2007) (Rule 12(b)(6) dismissals are reviewed de novo); *Lake at Las Vegas Invs. Grp., Inc. v. Pac. Malibu Dev. Corp*., 933 F.2d 724, 725 (9th Cir. 1991) ("A district court's dismissal on res judicata grounds is subject to de novo review.").

STATUTORY AUTHORITIES

The pertinent statutes and rules are reproduced in the addendum.

STATEMENT OF THE CASE

Alanna Zabel wrote and registered *Dharma Kitty Goes to Mars*, a children's book about a girl who loves science and is unintentionally launched into space with her cat. Two years later, Lauren Sánchez Bezos, Zabel's former private yoga client and close friend, authored *The Fly Who Flew to Space*, a competing children's book that the operative complaint alleges copied Zabel's work.[1] Collective Book Studio published it, and Simon & Schuster distributed it. No court has decided whether those allegations are true. The only question on appeal is whether Rule 41(a)(1)(B)'s two-dismissal rule extinguished Zabel's copyright claims before any court could reach them.

A. Factual Background

Zabel is a yoga instructor and the author of seventeen children's books. *See* ER-184 ¶ 37. Among them is *Dharma Kitty Goes to Mars*, published in 2022 and registered with the Copyright Office: the story of Pratya, a girl who loves science and is unintentionally launched into space with her pet cat. ER-185 ¶ 42; ER-187 ¶ 54; ER-198 ¶ 88 (registration).

[1] At the time this lawsuit was filed, Mrs. Sánchez Bezos was known as Lauren Sanchez, the name reflected in the case caption. She married Jeff Bezos in June 2025 and is now known as Lauren Sánchez Bezos. *See* ER-78.

Zabel met Sánchez Bezos around 2006, when Sánchez Bezos began attending the private yoga classes Zabel taught at the home of two television hosts. ER-181 ¶ 22. Sánchez Bezos then engaged Zabel to teach private sessions in her own homes in Beverly Hills and Malibu, and the two "became close friends": Sánchez Bezos invited Zabel to private parties and events and to her home in Mexico. ER-181 ¶ 23. During the friendship, Zabel gifted Sánchez Bezos several of the children's books Zabel had written. ER-181 ¶ 24. The friendship grew close enough that Sánchez Bezos shared personal confidences with Zabel. ER-182 ¶¶ 25–26.

In 2008, Sánchez Bezos told Zabel about a helicopter flight on which a fly remained stuck to the windshield outside the helicopter for the entire trip. ER-182 ¶ 27. The two discussed Zabel helping Sánchez Bezos write a children's book based on that experience. ER-182 ¶ 27. In 2009, Sánchez Bezos signed a non-disclosure agreement with Zabel's company and introduced Zabel to her business manager to pursue a partnership, including in children's books. See ER-182 ¶ 28. Those plans stalled when the friendship ended in a falling out, after which Zabel informed Sánchez Bezos that she would no longer work for her. ER-183–84 ¶¶ 32–34.

In September 2024, Collective Book Studio published *The Fly Who Flew to Space*, a children's book authored by Sánchez Bezos about a fly who travels to space, and Simon & Schuster distributed it. ER-187 ¶ 57; ER-200–01 ¶¶ 98–99. The

operative complaint alleges, scene by scene, that the book copies *Dharma Kitty Goes to Mars*. ER-191 ¶ 66.

B. Procedural History

1. Zabel Sues in State Court and Dismisses Eight Days Later, Before Any Response

Proceeding without counsel, Zabel first sued Sánchez Bezos, and only Sánchez Bezos, in the Los Angeles County Superior Court in September 2024. ER-104. The complaint asserted three California-law claims: intentional infliction of emotional distress, "theft of intellectual property," and an idea-submission claim. ER-104–17. It asserted no claim under the Copyright Act, over which federal jurisdiction is exclusive. 28 U.S.C. § 1338(a).

Shortly after she filed, an attorney who had seen the complaint informed Zabel that she could not present her copyright claim in state court and that she could "simply dismiss the state court claim and refile in federal court." ER-179 ¶ 12. Eight days after filing, before Sánchez Bezos responded in any way, Zabel dismissed the action "in order to pursue her claim in federal court, as required." ER-179 ¶ 13; ER-118–19. After a lawyer who reviewed Zabel's evidence told her that he "undoubtedly" believed that Sánchez Bezos "did what [Zabel] claim[ed]," but warned that she would use "Jeff Bezos' money" to "drag this out in court to bleed [Zabel] of time and resources," and suggested that Zabel proceed pro se, she decided it would not be rational to retain counsel. *See* ER-162.

2. Zabel Refiles in Federal Court, Bird Marella Threatens a Fee-Shifting Motion, and the Court Dismisses by Order

In December 2024, Zabel refiled in the Central District of California, again against Sánchez Bezos alone and again pro se, this time asserting infringement under the Copyright Act along with state-law claims. ER-121. Now in the right court, Zabel set about prosecuting her case: on January 7, she issued a third-party subpoena to Collective Book Studio. ER-153–57.

But Zabel's pro se efforts were immediately derailed. On January 9, she met and conferred with Sánchez Bezos's counsel, the Los Angeles litigation firm Bird, Marella, Rhow, Lincenberg, Drooks & Nessim, LLP. During the call, Bird Marella threatened to file an anti-SLAPP motion directed at the state-law claims. ER-14; ER-36; ER-163. Zabel contemporaneously described "tactical threats of burying Plaintiff with legal fees and Anti-Slapp fines." ER-163; *see also* Cal. Civ. Proc. Code § 425.16(c)(1) (entitling a prevailing anti-SLAPP defendant to a mandatory award of attorneys' fees). No defendant had appeared, and the court had set no schedule. The only operative date in the case was Bird Marella's. Zabel had until January 16, the firm told her, to say whether she would dismiss the case, or else the firm would file the anti-SLAPP motion. ER-160; ER-180; ER-14.

The threat required Zabel to make an immediate legal judgment she was not equipped to make. To lawyers, "anti-SLAPP" names a specialized procedural motion. To an unrepresented copyright plaintiff still "learning what all she needed

to do," ER-180 ¶ 16, the ominous all-caps acronym sounded dangerous. And it created the possibility of further financial loss. Bird Marella informed her that if she fought and lost, she could be made to pay the other side's attorneys' fees—during a time she could not rationally afford a lawyer even for herself. And the threat came in the middle of two emergencies at once: Southern California was in a state of emergency from the wildfires, from which Zabel had evacuated, and that week her beloved pet suffered seizures and a stroke and nearly died. ER-179 ¶ 15; ER-159–61.

Within hours of the meet and confer, and having received a second mandatory evacuation notice from the City of Los Angeles, Zabel emailed Bird Marella that she would seek a stay of two to three weeks "while I figure out my living situation and deal with this state of emergency." ER-167; ER-180 ¶ 16. The next day, the firm refused: "We do not agree to a stay." ER-167; ER-180 ¶ 16. Its email acknowledged what the docket showed: "it is clear to us that you are taking steps to progress this litigation." ER-167. As the operative complaint puts it, Sánchez Bezos "not only refused to agree to the short extension during this state of emergency, she increased the pressure," threatening the anti-SLAPP motion and its fees, and "thus pressured Zabel to file a dismissal a second time." ER-180 ¶ 17.

Zabel, still without counsel, then asked the court for time. On January 12, while Sánchez Bezos still had not appeared, Zabel filed an ex parte motion under

Rule 6(b) to stay all deadlines and obligations for four weeks. ER-158–69. The court did not rule.

On January 14, with Bird Marella's January 16 date two days away and her request for a stay unanswered, Zabel submitted a California Judicial Council form titled "Request for Dismissal." ER-170–72. Her objective, the complaint reports, was to find counsel "to assist her with her copyright infringement claim." ER-180 ¶ 18. The form asked the court, through its clerk, to dismiss the action without prejudice: "TO THE CLERK: Please dismiss this action." ER-171.

The court in the prior action did not treat that request as self-executing. On January 16, the court entered an order reciting that it had "considered Plaintiff's Request for Dismissal" and found "good cause therefor"; it vacated all dates and deadlines, denied the pending ex parte motion as moot, and ordered: "The court DISMISSES the action without prejudice." ER-175. The record does not indicate that any defendant even appeared during the action's thirty-four days.

The operative complaint alleges what the pressure was for: Sánchez Bezos pressured Zabel to dismiss a second time on the belief that Rule 41 "would prevent Zabel from refiling her claim once she found counsel." ER-180 ¶ 19.

3. Now Represented, Zabel Files This Action

Six months after the prior federal action ended, and now represented by counsel, Zabel filed this action. ER-205. The First Amended Complaint contains one

count, infringement under the Copyright Act, but alleges distinct infringing conduct by each Defendant: Sánchez Bezos copied Zabel's work (ER-200 ¶ 97); Collective Book Studio published it and publicly displayed it through a flip-book video on YouTube (ER-200 ¶ 98); and Simon & Schuster distributed it and publicly displayed it on amazon.com (ER-201 ¶ 99).

The complaint also alleges that the infringement did not stop. By July 2025, long after the September 2024 state dismissal and the January 2025 federal dismissal, the book "remain[ed] available" for purchase and "remain[ed] an infringing work." ER-198 ¶ 84. The complaint alleges that "Defendants continue to infringe," and that each infringing copy, sale, license, and display gives rise to liability. ER-199 ¶¶ 91, 93.

Defendants moved to dismiss under Rule 12(b)(6), contending that the two prior dismissals made the second one "an adjudication on the merits" under Rule 41(a)(1)(B) and that res judicata therefore barred this action against all three Defendants. ER-68–98. They supported the motion with a request for judicial notice of the prior actions' filings and dismissal papers. ER-99–103. Zabel opposed, arguing that Rule 41(a)(1)(B) was never triggered and that Collective Book Studio and Simon & Schuster could not invoke prior dismissals of actions that never named them. ER-32–67.

4. The District Court Dismisses the Action With Prejudice Without Reaching the Merits

On March 25, 2026, the district court granted the motion and dismissed the action with prejudice. ER-4, ER-16.

The court counted the September 2024 state-court dismissal as the first dismissal of the same claim because the state and federal actions arose from the same alleged copying. ER-11. It did so even though the state complaint asserted no Copyright Act claim and state courts lack jurisdiction over Copyright Act claims. See 28 U.S.C. § 1338(a).

The court then counted the January 2025 dismissal as the second qualifying dismissal, ER-11, even though that filing was captioned a "Request for Dismissal," asked the clerk to dismiss the action, and was followed by a court order stating that the court had "considered Plaintiff's Request for Dismissal," found "good cause," vacated all dates and deadlines, denied Zabel's pending extension request as moot, and dismissed the action without prejudice, ER-174–75.

The court held that Zabel's January 2025 dismissal was "voluntary" because Zabel "had the choice to respond to the anti-SLAPP motion and adjudicate the matter": if she prevailed, the court reasoned, she would owe no fees. ER-12–13.

The court then extended the two-dismissal bar to Collective Book Studio and Simon & Schuster, Defendants Zabel had never previously sued. It acknowledged that Zabel "did not allege any direct agency relationship" among the three, and it identified no ownership, control, succession, or other corporate relationship connecting the two companies to Sánchez Bezos. ER-15. It nonetheless deemed them "substantially the same" as Sánchez Bezos, reasoning that the claim against them involves the same issues and proof as the claim against her. ER-15–16.

The court dismissed the entire action, including claims based on publication, distribution, sale, and display alleged to have continued after the first dismissal and after the second. ER-16; ER-198 ¶ 84; ER-199 ¶¶ 91, 93. It expressly declined to reach the question whether *The Fly Who Flew to Space* infringes Zabel's copyright. ER-16 n.6.

The judgment thus extinguished every claim against every Defendant—including two Defendants Zabel had never previously sued, and including alleged infringement postdating both prior actions—without any court ever passing on the sufficiency or merits of Zabel's copyright claim.

Zabel timely appealed. ER-204.

SUMMARY OF THE ARGUMENT

Rule 41(a)(1)(B)'s two-dismissal rule is an "exception to the rule" that voluntary dismissals are without prejudice. *Lake*, 933 F.2d at 727.[2] It applies only when a plaintiff twice dismisses the same claim through qualifying voluntary notices. When those requirements are satisfied, the second notice operates as an adjudication on the merits. Because those requirements are not satisfied here, the judgment should be reversed.

I. Most fundamentally, the Rule never triggered. That is true for four independent reasons, each alone requiring reversal.

First, the trigger requires a prior dismissal of an action "based on or including the same claim," Fed. R. Civ. P. 41(a)(1)(B), and under this Court's precedent, a claim is the same only if it "could have been or was raised in the preceding action." *Rose Court, LLC v. Select Portfolio Servicing, Inc.*, 119 F.4th 679, 686 (9th Cir. 2024). The first dismissed action was a state-court suit, and Congress closed the state courthouse to this claim: "No State court shall have jurisdiction over any claim for relief arising under any Act of Congress relating to … copyrights." 28 U.S.C. § 1338(a). The copyright claim was not raised in the state action and could not have been. The district court quoted *Rose Court*'s test and applied only its first half.

[2] Unless otherwise noted, all internal citations, quotations, and brackets are omitted.

Second, the trigger counts only a dismissal by notice—a self-executing filing that "itself closes the file" and leaves the court "no role to play." *Commercial Space Mgmt. Co. v. Boeing Co.*, 193 F.3d 1074, 1077 (9th Cir. 1999). Zabel's January 2025 dismissal unambiguously was nothing of the kind. She filed a "Request for Dismissal"; the district court considered the request, found good cause, vacated the case's deadlines, denied a pending application as moot, and ordered the action dismissed. That is dismissal "at the plaintiff's request" "by court order" under Rule 41(a)(2), not a self-executing notice under (a)(1). Had the request truly been an (a)(1) notice, the court would have "los[t] jurisdiction" the moment it was filed, making everything it did two days later impossible. *Commercial Space*, 193 F.3d at 1076. The opinion below never even mentions that Rule 41(a)(2) exists.

Third, the January dismissal was not voluntary under this Court's governing definition. "[T]he term 'voluntary' in Rule 41 means that the party is filing the dismissal without being compelled by another party or the court." *Lake*, 933 F.2d at 726. The district court held that Zabel was not compelled because she retained the formal option to litigate the threatened anti-SLAPP motion. But every litigant facing pressure from an adversary retains the abstract option to continue litigating. If that formal choice defeats compulsion, *Lake*'s express recognition of compulsion "by another party" has no application.

The record instead shows an unrepresented plaintiff actively prosecuting her case until opposing counsel gave her a one-week deadline to decide whether to dismiss her complaint—or else face a threatened anti-SLAPP motion carrying mandatory, one-way attorneys' fees—then refused her request for a short stay in the middle of a declared state of emergency. ER-167. The complaint alleges the pressure had a purpose: to procure a second dismissal "with the belief that [Rule 41] would prevent Zabel from refiling her claim once she found counsel." ER-180 ¶ 19. A rule that exists to prevent abuse of the plaintiff's dismissal right should not be made the instrument of that abuse.

Fourth, the two-dismissal rule cannot extinguish claims that did not exist when the prior actions were dismissed. Copyright law treats each new reproduction, distribution, sale, and display as a new wrong giving rise to a discrete claim. *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663, 671 (2014). Consistent with that separate-accrual rule, this Court has held that claim preclusion does not bar copyright claims based on infringing sales occurring after an earlier action was filed—even when the earlier action was voluntarily dismissed with prejudice. *Media Rights Technologies, Inc. v. Microsoft Corp.*, 922 F.3d 1014, 1023–25 (9th Cir. 2019).

Here, the operative complaint alleges that Defendants continued selling and displaying the challenged book for months after both prior actions ended. Those later

claims were not raised in the prior actions because they did not yet exist, so were never dismissed twice. Many were never dismissed at all. Yet the district court dismissed the entire action with prejudice, effectively granting Defendants perpetual immunity for future conduct involving the challenged book.

Rule 41 prevents repetitive litigation of twice-dismissed claims. It does not extinguish claims before they exist. At minimum, the judgment must be reversed as to all infringing conduct postdating the prior dismissals.

Each of these defects independently defeats the Rule's trigger and requires reversal as to every Defendant.

II. Even if the Rule had triggered, it could not bar Zabel's claims against Collective Book Studio or Simon & Schuster, who she had never previously sued. "Generally, only defendants named as a party in the prior two dismissed actions may invoke the two-dismissal rule." *Rose Court*, 119 F.4th at 688. A defendant never previously sued may invoke the Rule only when it is "substantially the same" as a dismissed defendant. *Id*. That exception requires a qualifying relationship between the defendants. *Lake* applied it to a wholly owned subsidiary and partnership of the dismissed parent. 933 F.2d at 728. *Rose Court* applied it to a principal whose agent had previously been sued over the principal's own loan. 119 F.4th at 688.

Collective and Simon & Schuster have no comparable relationship with Sánchez Bezos. No agency, ownership, control, succession, or other corporate

relationship is alleged. They are separate commercial actors accused of their own conduct: Collective published and displayed the challenged book; Simon & Schuster distributed and displayed it.

The district court nevertheless deemed the companies substantially the same as Sánchez Bezos because the claims against them involve overlapping issues and evidence. That reasoning collapses the defendant-relationship requirement into the same-claim requirement. It also has no limiting principle. If shared proof makes separate defendants substantially the same, every printer, distributor, bookstore, and retailer becomes the same defendant as the author whose work it carries. Nothing in *Lake* or *Rose Court* permits that result.

ARGUMENT

I. The Two-Dismissal Rule Never Triggered

The baseline rule is that voluntary dismissals are without prejudice. Fed. R. Civ. P. 41(a)(1)(B); *see also Rose Court*, 119 F.4th at 685 (a plaintiff's voluntary dismissal is "[g]enerally" without prejudice). Indeed, "state and federal procedural rules" in this country have long been "liberal" in allowing "dismissals or nonsuits as a matter of right until the entry of the verdict." *Rose Court*, 119 F.4th at 685 (quoting *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 397 (1990)).

The two-dismissal provision is an "exception to the rule." *Lake*, 933 F.2d at 727. The text of Rule 41(a)(1)(B) provides that "if the plaintiff previously dismissed

any federal- or state-court action based on or including the same claim, a notice of dismissal operates as an adjudication on the merits." Fed. R. Civ. P. 41(a)(1)(B). Courts are careful to avoid counting dismissals "falling outside of the language of Rule 41(a)(1)." *Lake*, 933 F.2d at 727.

The exception exists to "curb abuses" of the plaintiff's unilateral dismissal power. *Rose Court*, 119 F.4th at 685; *see also ASX Inv. Corp. v. Newton*, 183 F.3d 1265, 1268 (11th Cir. 1999) ("[T]he primary purpose of the 'two dismissal' rule is to prevent an unreasonable use of the plaintiff's unilateral right to dismiss an action prior to the filing of the defendant's responsive pleading."); *Lake*, 933 F.2d at 727–28 (citing "the danger of harassment" as the mischief the two-dismissal rule addresses); 9 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2368 (3d ed. 2008) ("This two dismissal rule … was intended to prevent delays, costs, and harassment."). That purpose matters because here Zabel's path was procedural correction: a wrong forum, a request for dismissal after opposing counsel expressed its belief that several of her claims were improper, and then the first counseled copyright complaint. Sánchez Bezos cannot seriously claim harassment when in neither action was she forced to incur the burdens of litigation—the record contains no indication that she ever even appeared.

Rose Court identifies four requirements before the two-dismissal rule applies. The plaintiff must voluntarily dismiss an action in state or federal court; thereafter

voluntarily dismiss a second action pending in federal court; the two dismissals must concern the same claim; and the plaintiff must seek to raise the twice-dismissed claim again in federal court. 119 F.4th at 685.

The Rule text and *Rose Court* doctrinal test are unsatisfied for four reasons, each of which independently compels reversal.

A. The State-Court Dismissal Cannot Count Because Zabel's Copyright Claim Could Never Have Been Brought in State Court

Rose Court adopted a preclusion-based same-claim test; preclusion has always included the jurisdictional-competency limit; state courts lack jurisdiction over Copyright Act claims; therefore the state dismissal cannot be one of two dismissals of the Copyright Act claim.

The Rule asks whether the prior dismissal involved "the same claim." Fed. R. Civ. P. 41(a)(1)(B). *Rose Court* held that a later claim is the same only if it "arises from the same set of facts as the first action and the claim could have been or was raised in the preceding action." 119 F.4th at 686. The test is conjunctive. It requires both factual overlap "and" a claim that could have been raised in the earlier case. *Id.*

That second requirement is ordinary preclusion law. *Rose Court* adopted the transactional approach because "the two-dismissal rule is analogous to the res judicata inquiry." *Id.*; *see also id.* at 690 (Collins, J., concurring in part and concurring in the judgment) ("I agree with the majority that, in addressing whether two dismissed suits involve 'the same claim' under Rule 41(a)(1)(B) … we should

evaluate the relationship between those two previously dismissed actions by reference to the relevant preclusion principles."). And preclusion law does not bar claims the first court lacked power to hear. Claim preclusion does not apply when the plaintiff was "unable to rely on" the claim because of "limitations on the subject matter jurisdiction of the courts." Restatement (Second) of Judgments § 26(1)(c). The Supreme Court has applied that jurisdictional-competency limit. *Marrese v. Am. Acad. of Orthopaedic Surgeons*, 470 U.S. 373, 382–83 (1985). This Court has done the same: "a state court judgment cannot act to bar claims over which federal courts have exclusive jurisdiction." *Pension Tr. Fund v. Triple A Mach. Shop, Inc*., 942 F.2d 1457, 1460 (9th Cir. 1991).

Here, Zabel's Copyright Act claim could not have been raised in California Superior Court. Congress made federal jurisdiction exclusive: "No State court shall have jurisdiction over any claim for relief arising under any Act of Congress relating to … copyrights." 28 U.S.C. § 1338(a). Zabel's state-court complaint therefore pleaded California claims: intentional infliction of emotional distress, "theft of intellectual property," and an idea-submission claim. ER-104–17. It did not and could not assert a Copyright Act claim.

Appellees' reading treats "same claim" as "same facts." *Rose Court* rejected that shortcut. It required both the same factual nucleus "and" a claim that could have

been raised in the prior action. 119 F.4th at 686. A Copyright Act claim could not have been raised in California Superior Court.[3]

The district court never confronted that limit. It cited *Rose Court*'s preclusion framework, ER-11, but applied only the factual-overlap half of the test. The district court asked whether the claims arise from the same set of facts, and then declared that "[t]herefore" the same-claim requirement "is satisfied." ER-11. The court did not ask whether the Copyright Act claim could have been brought in California state court. *Rose Court* requires that question.

B. The January 2025 Dismissal Was Effected by Court Order, Not by Notice

The January 2025 dismissal also cannot count under Rule 41(a)(1)(B) because it was effected by court order. Zabel filed a request for dismissal; the court in the prior action considered it, found good cause, vacated deadlines, denied a pending extension motion as moot, and dismissed by order. ER-174–75. That is a Rule 41(a)(2) dismissal, not a Rule 41(a)(1) notice.

Rule 41(a) governs voluntary dismissals, and it divides them into two kinds under (a)(1) and (a)(2). "Rule 41(a)(1) dismissals" and "Rule 41(a)(2) dismissals"

[3] *Rose Court*'s jurisdictional-competency requirement leaves Rule 41's reference to a "state-court action" with ordinary force. State-court dismissals count when the relevant claim could have been brought in state court—which is to say, in the vast run of cases: contract, tort, property, and every claim within concurrent jurisdiction. Copyright is different because Congress closed the state courthouse to the claim.

have "different language and purpose" and should not be "conflate[d]." *Commercial Space*, 193 F.3d at 1080.

The first of the two subsections, Rule 41(a)(1), is titled "By the Plaintiff" and its subdivision (A) is titled "Without a Court Order." The second, Rule 41(a)(2), is titled "By Court Order." The titles state a dichotomy: dismissal by the plaintiff without a court order under (a)(1), and dismissal by court order under (a)(2).

The subsections' text describes the different acts their titles name. Under Rule 41(a)(1)(A), "the plaintiff may dismiss an action without a court order by filing … a notice of dismissal." This "notice" of dismissal asks no one for anything. It "itself closes the file," and "the court has no role to play." *Commercial Space*, 193 F.3d at 1077. Indeed, "once a notice of voluntary dismissal is filed, the district court in which the action is pending loses jurisdiction." *Id.* at 1076. An (a)(1) dismissal "is effective on filing." *Id.* at 1077; *see also id.* at 1078 n.4 (an (a)(1) dismissal is "self-executing").

Under (a)(2), by contrast, an action is dismissed "at the plaintiff's request" "by court order." Fed. R. Civ. P. 41(a)(2). Unlike an (a)(1) dismissal, "a Rule 41(a)(2) dismissal requires court approval." *Commercial Space*, 193 F.3d at 1078; *see also ASX*, 183 F.3d at 1268 ("Although dismissal under Rule 41(a)(2) is … at the plaintiff's instance, the actual dismissal is by the court and therefore does not implicate the Rule 41(a)(1) two dismissal rule."); *Lake*, 933 F.2d at 727 (endorsing

the principle that a dismissal accomplished by motion is not counted, "because to do so would expand the exception to the rule that voluntary dismissals are without prejudice").

Rule 41's structure explains why the two-dismissal bar is tied to noticed dismissals, not court-ordered dismissals. A Rule 41(a)(1) notice is unilateral: the plaintiff acts alone and the court has no role. The two-dismissal bar is the Rule's protection against repeated unilateral use of that power. Rule 41(a)(2) is different. There the plaintiff requests dismissal, but the court decides whether and on what terms dismissal will occur. Because the court is involved, the Rule does not need the same automatic abuse-prevention device. The court's supervision is the safeguard.

Here, Zabel's filing falls on the Rule 41(a)(2) side of the line, and it is not a close call. She made a "request"—indeed, her filing bears the very word in its title: "Request for Dismissal." ER-170; *see also Commercial Space*, 193 F.3d at 1078 ("how the plaintiff itself characterized the dismissal" is relevant). And a "court order" effectuated the dismissal—indeed, the court's ruling bears those very words too: "ORDER" in its caption, and "[t]he court DISMISSES the action" in its decree. ER-174, ER-175.

The court's response was judicial, not ministerial. Its order recited that the court had "considered Plaintiff's Request for Dismissal" and found "good cause therefor." ER-175. And while a self-executing notice leaves nothing to consider and

no cause to find, the order vacated the case's dates and deadlines and adjudicated a pending motion, denying Zabel's ex parte application for an extension as moot. ER-175. It cannot conceivably be argued that Zabel's request "itself close[d] the file" and that "the court ha[d] no role to play." *Commercial Space*, 193 F.3d at 1077. No one thought that Zabel's Request for Dismissal made dismissal "effective on filing." *Id*.

Indeed, if Zabel's request had been a "notice of voluntary dismissal" under (a)(1), the court in the prior action would have "los[t] jurisdiction." *Id.* at 1076. It would have been unable to "consider[]" the request, find "good cause therefor," and adjudicate pending motions. ER-175; *see Commercial Space*, 193 F.3d at 1076 (after (a)(1) notice the district court may not decide even "whether the [notice] is with prejudice or without prejudice"); *id*. at 1078 ("the district court lacks jurisdiction to do anything about it"). This Court has cited with approval a sister circuit that invalidated a district court's mere entry of a "So Ordered" notation on an (a)(1) dismissal. *Id.* at 1077 n.4 (citing *Gardiner v. A.H. Robins Co.*, 747 F.2d 1180, 1190 (8th Cir. 1984)). Here the court did far more than that. The conclusion that Zabel's Request for Dismissal was an (a)(1) notice cannot be reconciled with the record.

The district-court opinion never even mentions that (a)(2) exists. It failed to recognize that there is a "difference between a Rule 41(a)(1) dismissal and a Rule 41(a)(2) dismissal." *Commercial Space*, 193 F.3d at 1078. This oversight caused

clear error—district courts are not "allow[ed]" to "treat a Rule 41(a)(1) dismissal the same as a Rule 41(a)(2) dismissal." *Id*.

C. The January 2025 Dismissal Was Not Voluntary Because It Was Compelled by Another Party

The January 2025 dismissal also fails the voluntariness requirement. *Rose Court* states that the two-dismissal rule applies only when the plaintiff "voluntarily" dismissed the prior actions. 119 F.4th at 685. *Lake* explains what that means: "the term 'voluntary' in Rule 41 means that the party is filing the dismissal without being compelled by another party or the court." 933 F.2d at 726.

Lake's definition has two disjuncts: compulsion by the court, and compulsion by another party. The district court's approach erased the second. It reasoned that Zabel had a formal choice to oppose the threatened anti-SLAPP motion, litigate, and avoid fees if she prevailed. ER-12–13. But every litigant always has the abstract choice to keep fighting. If that were enough, no dismissal would ever be compelled by another party. *Lake*'s phrase would do no work.

The record here does not reflect ordinary motion pressure. Zabel was a pro se litigant who had already shown she did not understand forum rules: she filed in state court, then corrected course in eight days when someone told her copyright belongs in federal court. In January 2025, she was again trying to navigate procedure without counsel. A major firm representing a deep-pocketed defendant gave her a deadline backed by anti-SLAPP fee exposure. She was in the middle of evacuation chaos and

a documented personal emergency. She did not ignore the issue; she asked for a short pause. The firm refused. The court did not rule. So she did the only thing she understood would stop the immediate pressure: she dismissed to find counsel.

The record shows the ultimatum doing its work. In early January 2025, Zabel was prosecuting her case: she issued a third-party subpoena on January 7, and opposing counsel acknowledged that she was "taking steps to progress this litigation." ER-153–57 (subpoena); ER-167 (acknowledgment). Then counsel gave her a one-week deadline to figure out whether to dismiss a pleading, under threat of motion practice carrying mandatory fee exposure. ER-160; ER-14. She responded, in the middle of layered emergencies, by seeking some breathing room to ensure she got it right. ER-167. Her opposing counsel responded: "We do not agree to a stay." ER-167. On January 14, two days before the date that opposing counsel had set, she submitted her request for dismissal in order to "find counsel to assist her with her copyright infringement claim." ER-180 ¶ 18; ER-170–72.

If *Lake*'s party-compulsion inquiry is to have any meaning, it must ask whether the adversary's conduct made dismissal the only realistic way to avoid the immediate consequence the adversary had created. That inquiry is satisfied here. For Zabel, waiting meant facing the very fee exposure the firm had invoked. Amending meant doing, without counsel and on the firm's one-week clock, the careful legal

analysis for which she had requested time. Dismissing was the only realistic way for this pro se plaintiff to stop the immediate pressure and obtain counsel.

The complaint, whose allegations are taken as true, alleges that Bird Marella pressured Zabel to dismiss a second time "with the belief that [Rule 41] would prevent Zabel from refiling her claim once she found counsel." ER-180 ¶ 19. And where "the purpose behind the 'two dismissal' exception would not appear to be served," courts "should be most careful not to construe or apply the exception too broadly." *Poloron Prods., Inc. v. Lybrand Ross Bros. & Montgomery*, 534 F.2d 1012, 1017 (2d Cir. 1976); *cf. Finch v. Block Inc.*, No. CV-25-04247-PHX-JJT (D. Ariz. Feb. 4, 2026) (declining to apply two-dismissal rule where doing so would create manifest injustice from a pro se litigant's procedural misunderstanding). A rule built to stop plaintiffs from abusing their dismissal right should not be read to consummate a defendant's alleged scheme to procure a dismissal and then spring the Rule as a trap.

At minimum, the district court should not have decided the voluntariness question without evidence. Whether an adversary's conduct rises to compulsion is a question answered case by case, on the facts: *Lake* itself resolved the voluntariness question not by announcing a categorical test but by examining the alternatives actually available to the dismissing plaintiff. 933 F.2d at 727. Here, the district court struck evidence that Bird Marella misstated a local rule to a pro se plaintiff in order

to manufacture a false sense of urgency, ER-7 n.2; *see also* ER-64–65, and the excluded evidence illustrates why voluntariness could not be resolved against Zabel on the pleadings.

D. The Rule Does Not Apply to Claims That Did Not Exist When the Prior Actions Were Dismissed

Rule 41(a)(1)(B) is claim-specific. It does not impose a general litigation disability. It applies only when "the two dismissals concerned the same claim" and the plaintiff seeks to raise the "twice-dismissed claim" again in federal court. *Rose Court*, 119 F.4th at 685. An infringing copy, sale, license, or display that occurred after the September 2024 state dismissal was not dismissed twice. It did not exist when the first action ended, could not have been raised there, and no later dismissal can make it a claim that "the two dismissals concerned." *Id.*

That conclusion follows from copyright law and preclusion law alike. Copyright infringement accrues act by act. Under the separate-accrual rule, "when a defendant commits successive violations, the statute of limitations runs separately from each violation." *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663, 671 (2014). "Each time an infringing work is reproduced or distributed, the infringer commits a new wrong," and each wrong gives rise to a discrete claim that accrues when the wrong occurs. *Id.* This Court has applied that rule in the preclusion context: "For purposes of claim preclusion, the separate-accrual rule means that a new cause of action for copyright infringement accrued each time [the defendant] sold an

allegedly infringing product." *Media Rts. Techs., Inc. v. Microsoft Corp.*, 922 F.3d 1014, 1023 (9th Cir. 2019).

The operative complaint alleges ongoing infringement on the face of the pleading. As of July 2025, the accused book "remain[ed] available for purchase and remain[ed] an infringing work." ER-198 (¶ 84). Defendants "continue to infringe Zabel's copyright" and, unless enjoined, "will continue to infringe." ER-199–200 (¶ 93). The complaint also identifies the defendant-specific acts: Sánchez Bezos copied or adapted the work and contributed to publication and distribution; Collective published and publicly displayed the work; Simon & Schuster distributed and publicly displayed it. ER-200–01 (¶¶ 97–99). And the complaint pleaded on the same separate-accrual understanding *Petrella* confirms: each infringing copy, sale, license, or display, the complaint asserts, "constitutes a separate claim." ER-199 (¶ 91).

The district court made the same mistake here that it made in applying § 1338: it quoted *Rose Court*'s conjunctive test, then applied only factual overlap. It asked whether the suits arose from the same transactional nucleus, but never asked whether the claims extinguished by its judgment had come into existence when the prior actions were dismissed. For infringement after September 2024, they clearly had not.

Ordinary preclusion principles confirm the point. Claim preclusion "does not apply to claims that accrue after the filing of the operative complaint" in the earlier

suit. *Howard v. City of Coos Bay*, 871 F.3d 1032, 1040 (9th Cir. 2017). It "does not bar claims that are predicated on events that postdate the filing of the initial complaint." *Lucky Brand Dungarees, Inc. v. Marcel Fashions Grp., Inc.*, 590 U.S. 405, 414 (2020). A prior judgment "cannot be given the effect of extinguishing claims which did not even then exist and which could not possibly have been sued upon in the previous case." *Id.*

The rule holds "even if [the claim] arises out of a continuing course of conduct that provided the basis for the earlier claim." *Frank v. United Airlines, Inc.*, 216 F.3d 845, 851 (9th Cir. 2000). *Media Rights* is especially instructive. There, the plaintiff voluntarily dismissed an earlier intellectual-property suit with prejudice, but this Court held that later copyright claims based on later sales survived. 922 F.3d at 1023–25. The Court rejected the argument that the first judgment immunized future infringements of the same copyright. Such a rule "would in effect immunize [the defendant] against all suits concerning infringements of the same copyright in a similar way." *Id.* at 1024–25. "This is not the law of claim preclusion." *Id*.

And it is not the law of Rule 41. The two-dismissal rule exists to prevent abuse of unilateral dismissals, not to grant defendants a continuing license to reproduce, distribute, sell, or display an allegedly infringing work after the first action ended. A rule that exists to "curb abuses" of the plaintiff's dismissal right, *Rose Court*, 119 F.4th at 685, cannot be read to license the defendants' ongoing conduct forever. At

minimum, the judgment must be reversed as to all claims predicated on conduct postdating the first dismissal.

II. Even If the Rule Triggered, the Bar Does Not Reach Collective or Simon & Schuster

The judgment below dismisses Collective Book Studio and Simon & Schuster—two defendants Zabel never sued before this action, let alone dismissed. The district court reached that result by treating overlap in the copyright claim as enough to make an individual author, a publisher, and a distributor "substantially the same" defendant. That cannot be reconciled with *Lake*, *Rose Court*, or ordinary English.

A. Only a Defendant Actually Substantially the Same As One Previously Dismissed May Invoke the Bar

"Generally, only defendants named as a party in the prior two dismissed actions may invoke the two-dismissal rule." *Rose Court*, 119 F.4th at 688. A defendant never named may invoke it only if it is "substantially the same as the defendant dismissed." *Id*.

That inquiry concerns the "relationship between the dismissed party and the party seeking to claim the benefit of the bar." *Lake*, 933 F.2d at 728. "[U]nrelated parties should not be allowed to claim the benefit of Rule." *Id*. The doctrine answers a specific type of scenario: for example, "the plaintiff named the wrong, but closely

related, entity," an error "typical of the type of error motivating voluntary dismissals under Rule 41(a)(1)." *Id*.

Lake held "only" that the "wholly-owned subsidiary and partnership in which that subsidiary is the general partner" could invoke two dismissals of the subsidiary's parent. *Id*. In *Rose Court*, the unnamed defendant was the noteholder whose loan servicer had been sued and dismissed; the two were "closely connected based on their agency relationship with respect to the loan." 119 F.4th at 688.

As these cases illustrate, courts apply the exception where the new defendant is, in substance, the previously dismissed defendant. In one case, the Fifth Circuit applied the bar for a corporate successor that was, in substance, the previously dismissed entity. *See Shaver v. Barrett Daffin Frappier Turner & Engel, L.L.P.*, 593 F. App'x 265, 275 (5th Cir. 2014) (unpublished) ("the same corporate entity"). In another, the Eleventh Circuit applied the bar for employees sued for "official actions they took as [the employer's] employees" and defended by the employer's own counsel. *See Sealey v. Branch Banking & Tr. Co.*, 693 F. App'x 830, 835 (11th Cir. 2017) (unpublished). The Fourth Circuit has applied the bar for a defendant the plaintiff and his counsel testified was the unnamed "Doe" sued the first time. *See Manning v. S.C. Dept. of Highway & Pub. Transp.*, 914 F.2d 44, 48 (4th Cir. 1990). The decision from which *Lake* drew the phrase is of a piece: the new defendant there "was the sole shareholder and registered agent of the dismissed corporate defendant

and had been named in the second dismissed action." *Lake*, 933 F.2d at 728 (citing *City of Raleigh v. College Campus Apartments*, 380 S.E.2d 163 (N.C. Ct. App. 1989), aff'd, 388 S.E.2d 768 (N.C. 1990)).

When the defendants were instead separate actors, on the other hand—even though connected by contract or commerce—courts have refused to apply the bar. The First Circuit for example, holds the Rule "not applicable unless the defendants are the same or substantially the same or in privity," and declined to apply it even though the prior and current suits concerned the same hazardous-waste site. *Am. Cyanamid Co. v. Capuano*, 381 F.3d 6, 17 (1st Cir. 2004). District courts are in accord. *See St. Clair Intell. Prop. Consultants, Inc. v. Samsung Elecs. Co.*, 291 F.R.D. 75, 78–79 (D. Del. 2013) (holding insufficient a "tenuous relationship" established only through a single individual connected to both companies); *Ogden Allied Sec. Servs., Inc. v. Draper & Kramer*, 137 F.R.D. 259, 261 (N.D. Ill. 1991) (similar); *Murray v. Sevier*, 145 F.R.D. 563, 567 (D. Kan. 1993) (the defendants' interests must be so interrelated that each represents the same legal right).

No court has done what the district court did here.

B. An Author, A Publisher, And A Distributor Are Not Substantially The Same Defendant

Zabel sued Sánchez Bezos alone in the state action and Sánchez Bezos alone in the first federal action. ER-104–17; ER-121. Collective and Simon & Schuster were named for the first time in this case, and they were named for their own

conduct: Collective allegedly published and publicly displayed the book, and Simon & Schuster allegedly distributed and publicly displayed it. Those allegations correspond to rights the Copyright Act makes independently actionable. 17 U.S.C. § 106(1), (3), (5); *see also* ER-187, ER-197, ER-200–01 (¶¶ 57, 81, 98–99).

The district court acknowledged that Zabel "did not allege any direct agency relationship between Sanchez, Collective, and Simon & Schuster." ER-15. No one contends that Collective or Simon & Schuster controls or is controlled by Sánchez Bezos. They are not aliases, successors, alter egos, subsidiaries, principals, agents, employers, employees, or representatives of the same legal right. They are separate participants in a publishing chain. The only connections the record discloses are the ordinary commercial arrangements by which any book reaches the market: an author, a publisher, and a distributor, linked by arm's-length contracts. No one using ordinary English would ever refer to these three defendants as substantially the same person.

The district court reached the contrary conclusion by reading *Rose Court*'s sentence in halves and discarding the half that mattered. *Rose Court* found SPS and U.S. Bank substantially the same because they were "closely connected based on their agency relationship with respect to the loan, and the allegations against SPS implicated U.S. Bank's interests." 119 F.4th at 688. The district court quoted the "implicated interests" language but treated the agency relationship as optional. It

rested on its assertion that the allegations against Sánchez Bezos implicated Collective's and Simon & Schuster's interests because "they are all sued for the same copyright infringement claim." ER-15.

That collapses two separate requirements. Shared exposure to the same claim may bear on whether the claim is the same. It does not show that different defendants are substantially the same. *Rose Court*'s "implicated interests" language mattered because the dismissed defendant was the unnamed defendant's loan servicer and agent for the very loan at issue. Here, there is no comparable relationship.

The district court also relied on the cease-and-desist letters Zabel sent "to Sanchez, Collective, and Simon & Schuster," ER-15, but those show that she understood them to be three distinct actors requiring three distinct demands—the opposite of one entity under different names. And the district court's observation that a copyright owner "can transfer or license the right, like to a publisher or distributor," ER-16, describes nothing but the arm's-length commercial chain present in every publishing case. If a license from the alleged infringer were a qualifying relationship, every publisher, printer, and retailer in the chain of every infringing work would be "substantially the same" as its author.

If this Court affirms, the consequences will reach far beyond publishing. On the district court's logic, every defendant whose liability rests on a predicate

showing about someone else—the aider and abettor, the contributory infringer—becomes "substantially the same" as that someone else.

Nor would the damage stop at Rule 41. The two-dismissal rule is "analogous to the res judicata inquiry," *Rose Court*, 119 F.4th at 686, and preclusion law has never let a stranger claim the benefit of a judgment because proof overlaps. The Supreme Court unanimously refused to let an "identity of interests" and practical connection substitute for the established categories of party identity. *Taylor v. Sturgell*, 553 U.S. 880 (2008). The district court's logic would either upend preclusion law or create doctrinal inconsistency between Rule 41 and the preclusion law it incorporates.

C. The District Court's "Danger of Harassment" Rationale Has No Limiting Principle

The district court also reasoned that allowing claims against Collective and Simon & Schuster would create a "danger of harassment" to Sánchez Bezos because Zabel would need to prove Sánchez Bezos infringed before proving that Collective and Simon & Schuster infringed. ER-16. The premise confuses proof that the accused book infringes with proof that Sánchez Bezos is personally liable. While Zabel must prove that *The Fly Who Flew to Space* infringes *Dharma Kitty* to recover against Collective and Simon & Schuster, she need not obtain or even seek a judgment against Sánchez Bezos to establish Collective's liability for reproduction

or display, or Simon & Schuster's liability for distribution or display. The Copyright Act makes those acts independently actionable. 17 U.S.C. § 106(1), (3), (5).

The two-dismissal rule extends to an unnamed defendant when "the danger of harassment to the [prior defendant] continue[s] when the closely related [new defendant]" is sued. *Lake*, 933 F.2d at 728. Extension is warranted, in other words, when the new suit prolongs the abuse of the party already twice dismissed—when the unnamed defendant effectively is the dismissed defendant, the same economic actor under a corrected name.

That is worlds away from this case. Proving facts about Sánchez Bezos in a suit against her publisher and distributor does not summon her back as a defendant. She would face no claim, no liability, and no judgment. At most, Sánchez Bezos would remain factually relevant. But Rule 41 protects a twice-dismissed defendant from being sued again on a twice-dismissed claim; it does not confer a right never to be a witness, never to be mentioned, or never to have one's conduct serve as factual background in litigation against separate defendants.

The district court's approach would turn a narrow relationship-based exception into a broad claim-overlap bar. That is the kind of "amorphous balancing" that preclusion law rejects in favor of "crisp rules with sharp corners." *Taylor*, 553 U.S. at 899–901.

D. At Minimum, The Relationship Finding Cannot Be Made At The Pleading Stage

The pleading posture independently requires reversal. The two-dismissal rule is an affirmative defense, and the party invoking it bears the burden of showing that its requirements are satisfied. *See St. Clair*, 291 F.R.D. at 78–79 (the party invoking the rule bears the burden of proving the relationship). On a Rule 12(b)(6) motion, that defense may support dismissal only if it is established by the complaint and properly noticed materials. *See Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001).

And whether one defendant is "substantially the same" as another is a question of fact, to be proved by the party invoking the bar. In *Carter v. Clark County*, this Court reversed a two-dismissal rule dismissal for precisely these reasons: the district court had relied on a contract "presented outside of the pleadings," and even that contract "raise[d] material questions as to whether the parties are 'substantially the same.'" 253 F. App'x 638, 640 (9th Cir. 2007) (unpublished).

The record here is thinner still. The complaint alleges that Sánchez Bezos authored the book, Collective published and displayed it, and Simon & Schuster distributed and displayed it. It alleges no ownership, control, succession, alter ego, agency, or representative relationship that would make either company Sánchez Bezos under another name. The district court acknowledged that no direct agency relationship was alleged. ER-15. And no judicially noticed material fills that gap.

At minimum, if appellees believe some publishing contract, distribution agreement, license, indemnity, control right, or other relationship makes them substantially the same as Sánchez Bezos, that fact cannot be assumed against Zabel on the pleadings. The judgment dismissing Collective and Simon & Schuster should be reversed for that reason alone.

CONCLUSION

This Court should reverse.

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Respectfully submitted,

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STATEMENT OF RELATED CASES

Counsel for Appellant is not aware of any related case pending in this Court. *See* Ninth Circuit R. 28-2.6.

/s/ Michael J. Showalter
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CERTIFICATE OF COMPLIANCE

This brief complies with the word-count limit of Ninth Circuit Rule 32-1 because it contains 9,815 words, excluding the items exempted by Federal Rule of Appellate Procedure 32(f).

This brief complies with the type size and typeface requirements of Federal Rules of Appellate Procedure 32(a)(5) and (6) because it has been prepared in a proportionally spaced typeface using 14-point Times New Roman.

/s/ Michael J. Showalter
Michael J. Showalter

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit on June 15, 2026, using the Appellate Electronic Filing system. All registered case participants will be served via the Appellate Electronic Filing system.

/s/ Michael J. Showalter
Michael J. Showalter

ADDENDUM

Federal Rule of Civil Procedure 41(a)

(a) Voluntary Dismissal.

(1) By the Plaintiff.

(A) Without a Court Order. Subject to Rules 23(e), 23.1(c), 23.2, and 66 and any applicable federal statute, the plaintiff may dismiss an action without a court order by filing:

(i) a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment; or

(ii) a stipulation of dismissal signed by all parties who have appeared.

(B) Effect. Unless the notice or stipulation states otherwise, the dismissal is without prejudice. But if the plaintiff previously dismissed any federal- or state-court action based on or including the same claim, a notice of dismissal operates as an adjudication on the merits.

(2) By Court Order; Effect. Except as provided in Rule 41(a)(1), an action may be dismissed at the plaintiff's request only by court order, on terms that the court considers proper. If a defendant has pleaded a counterclaim before being served with the plaintiff's motion to dismiss, the action may be dismissed over the defendant's objection only if the counterclaim can remain pending for independent adjudication. Unless the order states otherwise, a dismissal under this paragraph (2) is without prejudice.

17 U.S.C. § 106. Exclusive Rights in Copyrighted Works

Subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

(1) to reproduce the copyrighted work in copies or phonorecords;

(2) to prepare derivative works based upon the copyrighted work;

(3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;

(4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;

(5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and

(6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

28 U.S.C. § 1338(a). Patents, plant variety protection, copyrights, mask works, designs, trademarks, and unfair competition

(a) The district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to patents, plant variety protection, copyrights and trademarks. No State court shall have jurisdiction over any claim for relief arising under any Act of Congress relating to patents, plant variety protection, or copyrights. …