**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

## REPLY BRIEF FOR APPELLANT ALANNA ZABEL

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## INTRODUCTION

Bird Marella is awfully hard on a pro se litigant for a law firm that rests a central argument on a hallucination. When she was pro se, plaintiff Alanna Zabel made a pleading mistake by filing in a forum that lacked jurisdiction over her central claim. The operative complaint, whose allegations must be accepted as true, alleges that when Zabel refiled in the correct forum, Bird Marella schemed to leverage her mistake into a procedural victory through Rule 41's two-dismissal rule. The district court rewarded Bird Marella's gamesmanship with a dismissal that is irreconcilable, many times over, with Rule 41's text and this Court's cases.

Bird Marella now seeks to avoid the merits of this appeal too by asserting waiver, but it misunderstands waiver law so badly that it hallucinates a quotation it attributes to this Court that says the exact opposite of this Court's caselaw. *Compare* Answering Br. 29 (hallucinating that "'a new theory *in support* of an issue' is forfeited if it was not raised below"); *with Singh v. Garland*, 118 F.4th 1150, 1165 (9th Cir. 2024) (new "theories" can be advanced on appeal to support "issues" raised below). Appellees concede that both issues presented in this appeal were raised below. They are preserved.

On the merits, the two-dismissal rule never triggered for four independent reasons.

*First*, the rule counts a prior dismissal only if that action was "based on or including the same claim," Fed. R. Civ. P. 41(a)(1)(B), and a claim is "the same" only if it shares a common set of facts "and" it "could have been" raised in the earlier action, *Rose Court, LLC v. Select Portfolio Servicing*, 119 F.4th 679, 686 (9th Cir. 2024). It is undisputed that Zabel's Copyright Act claim could not have been raised in her state-court action. Appellees respond (at 38) by reading *Rose Court*'s two-part test as having only one part, insisting candidly that "[w]hether the claim 'could have' been brought under the law [is] irrelevant." That is an argument for the en banc Court, not a three-judge panel.

*Second*, the two-dismissal rule counts only a dismissal when the plaintiff enters a unilateral "notice" that deprives the district court of any role, and here Zabel filed a "Request" for dismissal that the district court "considered," found supported by "good cause," and granted by "ORDER[]." ER-175. Appellees concede (at 45) that unilateral notices are "self-executing and effective immediately upon their filing," and that is not how anyone treated this dismissal.

*Third*, the rule counts only a "voluntary" dismissal, and a dismissal is not voluntary when the plaintiff is "compelled by another party." *Lake at Las Vegas Investors Grp. v. Pac. Malibu Dev. Corp.*, 933 F.2d 724, 726 (9th Cir. 1991) (quotation marks omitted). Bird Marella compelled the second dismissal by imposing an exploding deadline during a declared emergency, misrepresenting a

local rule to a pro se plaintiff to manufacture a false sense of urgency, and allegedly scheming to spring a two-dismissal rule trap she was unaware of. Appellees respond (at 23) only by stating that Sánchez Bezos was "defend[ing] herself against claims asserted against her." That explains none of these facts.

*Fourth*, the two-dismissal rule cannot extinguish claims that did not exist when the earlier actions were dismissed. Zabel's complaint alleges infringing sales and displays continuing into 2025, each a "discrete 'claim'" that no prior dismissal could have reached. *Petrella v. Metro-Goldwyn-Mayer*, 572 U.S. 663, 671 (2014). Appellees' response is that the complaint does not actually allege this, but they are simply wrong.

The district court also erred by sweeping in the corporate Defendants, who were absent from the prior actions, even though they are not substantially the same person as the human Defendant and are joined only by arm's-length contract. Appellees offer a radical new test that "does not require any particular form of relationship" at all. Answering Br. 47 (emphasis omitted). Their test would make Best Buy "substantially the same" person as Apple whenever there is overlapping exposure—effectively insulating distinct actors from liability for their own independent conduct. This Court's cases require ownership, control, or agency. Two entities that have merely "worked with" each other, Answering Br. 52, are not "substantially the same" person on any plausible understanding of those words.

*  *  *

Appellees cast Zabel's search for a forum to hear her claims as "harassment," but it is Bird Marella that began harassing Zabel before Sánchez Bezos had even been served. And Sánchez Bezos allegedly acted to "exact revenge" on Zabel, ER-195, years after their relationship, and the partnership they had been discussing, fell apart, ER-181–83. If anything is ongoing here, it is the continuing infringement of Zabel's intellectual property, for which she seeks redress and injunctive relief. ER-200–201.

The Federal Rules "reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive," *Foman v. Davis*, 371 U.S. 178, 181–82 (1962) (quotation marks omitted), and they "provide maximum opportunity for each claim to be decided on its merits rather than on procedural technicalities," *BLOM Bank SAL v. Honickman*, 605 U.S. 204, 213 (2025) (quotation marks omitted); *see also* Fed. R. Civ. P. 1. That codified purpose controls the outcome here.

## ARGUMENT

### I. The Two-Dismissal Rule Never Triggered.

The two-dismissal rule converts a voluntary dismissal into an adjudication on the merits when the plaintiff has already dismissed, by unilateral "notice," an earlier action "based on or including the same claim." Fed. R. Civ. P. 41(a)(1). Appellees defend a judgment that disregarded that limitation at every turn.

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

In *Rose Court*, this Court held that a claim is "the same" for two-dismissal purposes only when "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 (emphasis added). Appellees concede (at 41) that Zabel "did not bring a 'Copyright Act' claim in state court," and federal statute is clear that she could not have, 28 U.S.C. § 1338(a).

Appellees insist (at 38) that "[w]hether the claim 'could have' been brought under the law [is] irrelevant," but that flatly contradicts *Rose Court*. "Rather than dealing with this precedent," Appellees "virtually ignore it." *Haaland v. Brackeen*, 143 S. Ct. 1609, 1631 (2023).

*Rose Court*'s "could have been … raised" phrase was no accident—the Court expressly imported claim-preclusion doctrine into the Rule 41(a)(1) "same claim" analysis, 119 F.4th at 686, and claim preclusion does not apply when the first action was jurisdictionally barred, "even where [the second action] arises from the same factual circumstances as the initial action," *Harris v. County of Orange*, 682 F.3d 1126, 1133 (9th Cir. 2012) (quotation marks omitted); *see also, e.g.*, *Media Rts. Techs. v. Microsoft*, 922 F.3d 1014, 1020 (9th Cir. 2019) ("could have been raised"). And in announcing the test, this Court cited another circuit that used identical language for an identical test. *See Jian Yang Lin v. Shanghai City Corp.*, 950 F.3d

46, 50 (2d Cir. 2020) ("could have been raised in state court"). Appellees' only comment about *Rose Court*'s "could have been raised" phrase is that it "align[s] Rule 41 with the breadth of the res judicata test," Answering Br. 38, which is precisely Zabel's point.

Grasping for straws, Appellees argue (at 40) that *Rose Court* asks only if the second and third actions are based on the same claim and asks a different question about the first action. That is not colorable. The two-dismissal rule can trigger only if the first action is based on the "same claim" as the second action. Fed. R. Civ. P. 41(a)(1)(B). And *Rose Court* holds unambiguously that res-judicata principles apply to that question: "for purposes of the two-dismissal rule," "a subsequent claim *is the same as* a previously dismissed claim" only if it "could have been or was raised in the preceding action." 119 F.4th at 686 (emphasis added). The "could have been" phrase applies to the question whether two claims are "the same," which is the question Rule 41(a)(1)(B) asks about the first two claims.

Appellees' observation (at 40) that "only the dismissal of the second action has preclusive effect" attacks a strawman. Of course it is the second action that precludes the third—no one thinks that the two-dismissal rule triggers through a single action alone. Zabel's point is that the second action's preclusive effect is contingent on a prior dismissal of the same claim, and *Rose Court* asks whether the first and second actions are based on the same claim by reference to preclusion law.

The doctrinal rule Appellees seek turns arbitrarily on the order in which the prior two actions are filed. Suppose a plaintiff dismisses a claim with the same nucleus of facts in two federal actions, one in a court with jurisdiction and one without. Appellees' theory springs the bar if the jurisdictionless action comes first, but no bar arises if the order in which the two suits are filed is reversed. That makes no sense.

Appellees invoke *Lake* (at 37–38), but that case supports Zabel. In *Lake*, this Court held that an action filed by an unregistered corporation nonetheless counted as a strike—but only after canvassing state law to determine that the registration bar was a waivable "[l]ack of capacity to sue," not a jurisdictional defect. 933 F.2d at 726. The "answer" to the two-dismissal question turned on whether lack of capacity to sue is a problem of "jurisdiction" or rather an "affirmative defense." *Id.* Only because it "is an affirmative defense" did the prior action count. *Id.* The *Lake* Court would not have asked that question if it did not matter.

Appellees argue (at 40–41) that Zabel's position produces "contradictory outcomes," but they misunderstand Zabel's position. Appellees imagine a scenario in which Zabel asserted a Copyright Act claim in the first action, and assert that under Zabel's position the claim both would be raised but could not have been raised. That is wrong because a claim nominally asserted in a court Congress stripped of jurisdiction is not actually raised.

Appellees observe (at 42–43) that Zabel's reading will require courts in cases like this one to "assess the prior actions for jurisdictional viability," but assessing whether the prior actions are based on the "same claim" is what Rule 41(a)(1)(B)'s text demands, and claim preclusion has managed with this exact competency limit for a century. Appellees say (at 42) that the inquiry may be "fact-intensive," but that is more likely of *Rose Court*'s first condition, same-set-of-facts, which they embrace.

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

When a plaintiff wants to voluntarily dismiss a complaint before the defendant has responded, Rule 41(a) leaves the plaintiff with a choice. The plaintiff can voluntarily dismiss unilaterally via a Rule 41(a)(1) "notice," which keeps the decision with the plaintiff but counts toward the two-dismissal rule. Alternatively, under Rule 41(a)(2), the plaintiff can "request" a dismissal "by court order," "on terms that the court considers proper." That request gives the court supervisory power, the tradeoff goes, but is not a two-dismissal strike. The Rule's text establishes this dichotomy unambiguously. *Compare* Fed. R. Civ. P. 41(a)(1) (titles "By the Plaintiff" and "Without a Court Order"); *with* Fed. R. Civ. P. 41(a)(2) (title "By Court Order" and governing dismissals prompted by the plaintiff's "request").

The two-dismissal rule checks the plaintiff's power to dismiss unilaterally with an (a)(1) notice, but that guardrail has no work to do under (a)(2), under which

the district court exercises jurisdiction over whether and on what terms dismissal occurs. *See* Zabel Br. 27; *Wellfount Corp. v. Hennis Care Centre of Bolivar*, 951 F.3d 769, 774 (6th Cir. 2020). Here, for example, had the district court believed a plaintiff was abusing process, it could have denied Zabel's request and kept the case; dismissed the action with prejudice; or conditioned dismissal on payment of attorney fees or other terms to prevent prejudice. *See* Fed. R. Civ. P. 41(a)(2). It did not hold that belief.

Zabel chose the court-supervised path that would not count as a strike, and the district court exercised the jurisdiction that protects against harassment. Zabel did not submit a "notice," Fed. R. Civ. P. 41(a)(1); she made a "request," Fed. R. Civ. P. 41(a)(2). And the district court acted on the filing as an (a)(2) request, not an (a)(1) unilateral notice—the court "considered" the request, found "good cause," and entered an "ORDER[]" dismissing the action. ER-175.

Appellees dispute virtually none of this. Appellees acknowledge (at 45) that (a)(1) dismissals are "self-executing and effective immediately upon their filing" and "deprive[] the district court of jurisdiction to do anything but complete the administrative tasks of terminating the case." They simultaneously concede (at 46) that here the court did more than that—it responded to Zabel's filing by entering "an order" based on its "finding of 'good cause.'" And they concede (at 44) that Zabel's filing "was a document entitled 'Request For Dismissal.'" *Compare* C.D. Cal. Form

CV-09 (titled "Notice of Dismissal" and directing the court to "TAKE NOTICE" that "[t]his action is dismissed").

Despite all those concessions, Appellees insist that Zabel's filing actually was a unilateral dismissal because "[a]ll that is required is that the intent to dismiss is clear." Answering Br. 44; *id.* at 45 (the filing "manifested Zabel's desire for her claim to be dismissed"). That is not a plausible reading of Rule 41(a)'s text. A plaintiff intends to dismiss under both (a)(1) and (a)(2)—that is the entire point of both of them. Rule 41(a)(2), after all, governs instances when dismissal occurs "at the plaintiff's request." The fact that the plaintiff intends dismissal says nothing about whether the dismissal was noticed unilaterally.

Appellees emphasize (at 44) that the state-court form Zabel used is addressed to a clerk, but the form lists the court's options as "Dismissal entered as requested," "Dismissal entered," or "Dismissal not entered as requested for the following reasons *(specify)*." ER-171. A form that leaves it to the court to decide whether to enter the dismissal is not "self-executing and effective immediately" and does not "deprive[] the district court of jurisdiction to do anything but complete the administrative tasks of terminating the case." Answering Br. 45. The form is what its title says it is: a "Request." And any ambiguity about how the form should be characterized must be resolved in Zabel's favor. *See Hebbe v. Pliler*, 627 F.3d 338,

342 (9th Cir. 2010) (this Court "construe[s] *pro se* filings liberally" and holds them to "less stringent standards than formal pleadings drafted by lawyers").

Appellees argue (at 45) that the request was necessarily an (a)(1) notice because it was filed before Sánchez Bezos responded, but that ignores Rule 41(a)'s text and this Court's caselaw. Rule 41(a) is divided into two subsections based on whether the dismissal is "By the Plaintiff" "Without a Court Order" or instead is "By Court Order." The division is not based on whether the defendant has responded. Whether the defendant has responded is indeed relevant because once that happens the plaintiff no longer can dismiss unilaterally. But before it happens, the plaintiff can choose—nothing in the text places (a)(2) off limits prior to the defendant's response. And the federal courts "give the Federal Rules of Civil Procedure their plain meaning." *Pavelic & LeFlore v. Marvel Entm't Grp.*, 493 U.S. 120, 123 (1989).

*Lake*, moreover, directly rejects Appellees' argument. In that case the plaintiff had previously filed two Rule 41(a)(1) notices, and the district court dismissed under the two-dismissal rule. 933 F.2d at 725. The plaintiff lost on appeal. Although the two prior dismissals occurred prior to any answer or summary-judgment motion, this Court explained that to avoid the two-dismissal rule the plaintiff "could have … filed a motion with the court to have its case voluntarily dismissed pursuant to Rule 41(a)(2)." *Id.* at 727. That is, in substance, exactly what Zabel did.

The Sixth Circuit's decision in *Wellfount v. Hennis Care Centre of Bolivar* is instructive. The court, in "agree[ment] with [its] sister circuits," held that "a plaintiff may seek a court-ordered dismissal at any point after filing its complaint." 951 F.3d at 774. Like Appellees here, the defendant argued that a district court "must construe any request for voluntary dismissal as a notice of dismissal if the defendant has yet to serve an answer or motion for summary judgment." *Id.* at 772. The Sixth Circuit rejected that argument because "no provision mandates that a plaintiff forgo the use of Rule 41(a)(2) if she is eligible to file a notice of dismissal under Rule 41(a)(1)." *Id.* at 773. This understanding respects the two-dismissal rule's purpose, the Sixth Circuit explained, because the plaintiff's (a)(2) request "is subject to review by the district court" and "may be conditioned on whatever terms the district court deems necessary to offset the prejudice the defendant may suffer." *Id.* at 774 (quotation marks omitted).

The Eleventh Circuit reached the same holding in *Cunningham v. Whitener*, on facts closely tracking those here. 182 F. App'x 966 (11th Cir. 2006) (per curiam). The court rejected Appellees' argument that because "the defendants had not answered or filed for summary judgment, the district court should have treated the motion as a Rule 41(a)(1) notice." *Id.* at 970 n.2. That would construe the plaintiff's motion "in a manner inconsistent with" his election of subsection (a)(2). *Id*. Many other courts have similarly allowed (a)(2) court-adjudicated dismissals prior to the

defendant's answer or summary-judgment motion. *See, e.g.*, *Sutton Place Development v. Abacus Mortgage Investment*, 826 F.2d 637, 640 (7th Cir. 1987); *Weinstein v. 440 Corp.*, No. 23-13807, slip op. at 7–10 (11th Cir. July 25, 2025); *Newby v. Bush*, 321 F. App'x 8 (D.C. Cir. 2009).

On the dispositive fact that the district court exercised jurisdiction over the dismissal, Appellees say (at 46) merely that the court's good-cause finding was "surplusage" because the court "had no discretion not to dismiss." But that begs the question. The court's good-cause finding would indeed be ultra vires had Zabel entered a unilateral (a)(1) notice, but it was not ultra vires if she requested dismissal under (a)(2). Appellees therefore assume the conclusion they set out to prove. As Appellees tell it, Zabel's filing was an (a)(1) dismissal because the district court had no discretion, and the district court had no discretion because it was an (a)(1) dismissal. That is as circular as they come.

Appellees' citations do not help them. In *Williams v. Ezell*, the Fifth Circuit construed a dismissal motion as an (a)(1) notice to *protect* the plaintiff because there was "no question that plaintiffs were acting pursuant to" (a)(1). 531 F.2d 1261, 1263 (5th Cir. 1976). Here, by contrast, there is no question that Zabel made a "request" for dismissal via "court order" under (a)(2). The substance-over-form line Appellees rely on (at 46) has always served to preserve a plaintiff's right to walk away, never to spring a two-dismissal bar. *See, e.g.*, *Janssen v. Harris*, 321 F.3d 998, 1000 (10th

Cir. 2003). And Appellees argue (at 44) that "it does not matter what label the plaintiff attaches to a second voluntary dismissal," *Commercial Space*, 193 F.3d at 1076, but that concerned the plaintiff's "without prejudice" label, not whether the dismissal came under (a)(1) or (a)(2).

At bottom, Appellees seek the with-prejudice consequence that the court on the scene deliberately withheld. The automatic bar is a blunt instrument for the (a)(1) world because no judge is in the loop to sort abuse from good faith. Here a judge was in the loop and made the call.

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

The two-dismissal rule is an affirmative defense, *see* Fed. R. Civ. P. 8(c)(1) ("res judicata"), and an affirmative defense "cannot be considered at the motion-to-dismiss stage" unless the defense's success is "obvious" from the face of the complaint or judicially noticeable materials. *Bolden-Hardge v. California State Controller*, 63 F.4th 1215, 1228 (9th Cir. 2023). A dismissal is not voluntary when "compelled by another party." *Lake*, 933 F.2d at 726 (quotation marks omitted). It is not obvious from the face of the complaint or noticed materials that the second dismissal was not compelled by another party. If anything, the complaint points the other way: it alleges that Sánchez Bezos endeavored to "manufacture a Rule 41 bar" by "pressur[ing] Zabel to dismiss the second case." ER-180 (¶ 19).

Appellees respond (at 28) that "there is no evidence" on the question, but that is exactly their problem. The second dismissal itself was judicially noticed, but whether the dismissal was compelled turns on Bird Marella's conduct, which is not on the docket. If the district court wished to reach the question, the path was to convert to summary judgment with notice and a chance for Zabel to introduce compulsion evidence. Zabel is not challenging the district court's exclusion of evidence, *contra* Answering Br. 27; she is arguing that the court's pleading-stage dismissal was premature.

The conduct alleged is not a defendant merely "defend[ing] herself against claims asserted against her." Answering Br. 23. Every defendant defends herself; defendants generally do not impose short deadlines on a pro se plaintiff during declared emergencies backed by threat of an anti-SLAPP motion, acknowledge an evacuation order and refuse a stay in the same breath, misstate a local rule to a pro se plaintiff to manufacture a false sense of urgency before the complaint has even been served, and scheme to spring a two-dismissal rule trap. *See* Zabel Br. 29–32; ER-64–65 (Bird Marella falsely representing to Zabel pre-service that the local rules, which obligate a *movant* to "contact opposing counsel" before filing a motion, C.D. Cal. L.R. 7-3, obligated *her* to meet and telling her that she "cannot refuse" to meet on Bird Marella's timing); ER-167 (refusing stay); ER-180 (¶ 19) (alleging that Sánchez Bezos pressured Zabel to dismiss "with the belief that [Rule 41] would

prevent Zabel from refiling her claim once she found counsel" to "manufacture a Rule 41 bar").

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

An infringing act postdating the state-court dismissal cannot possibly have been dismissed twice because it did not exist when the first action was dismissed. *See Media Rights*, 922 F.3d at 1021 ("[C]laim preclusion does not apply to claims that were not in existence and could not have been sued upon … when the allegedly preclusive action was initiated."). Appellees do not deny this. With nowhere to turn on separate-accrual doctrine, Appellees focus instead (at 34, 36) on an argument that Zabel's complaint does not plead post-dismissal violations. But that effort fails by a long shot.

Under the separate-accrual rule, "[e]ach time an infringing work is reproduced or distributed, the infringer commits a new wrong," and "[e]ach wrong gives rise to a discrete 'claim' that 'accrue[s]' at the time the wrong occurs." *Petrella*, 572 U.S. at 671. The Copyright Act enumerates a list of the copyright owner's exclusive rights, which include sale, distribution, and public display. 17 U.S.C. § 106(3) (sale and distribution), (5) (display). And "[a]nyone who violates any of the[se] exclusive rights … is an infringer of the copyright." *Id*. § 501(a).

Appellees say (at 34), incredibly, Zabel did not "allege that a *new* act of copying, selling, or distribution of the allegedly infringing work occurred after her

First Action was dismissed," but she alleged that repeatedly. Filed in July 2025, the complaint alleges that the book "is" "being sold at online retailers such as Amazon.com" and "is" "being publicly displayed through a 'flip video.'" ER-188 (¶ 58). The complaint alleges that "[a]s of the date of this Complaint, [the] book remains available for purchase." ER-198 (¶ 84). The complaint alleges that "Defendants continue to infringe." ER-199 (¶ 93). The complaint even pleads separate accrual: "Each … sale, license, or display of the infringing work … constitutes a separate claim." ER-199 (¶ 91). And the complaint seeks injunctive relief, a remedy to prevent new acts. ER-201.

That exceeds the pleading bar with much room to spare. Federal Rule of Civil Procedure 8(a)(2) requires only "a short and plain statement of the claim" in order to "give the defendant fair notice of what the … claim is and the grounds upon which it rests." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). A complaint, therefore, "does not need detailed factual allegations." *Id*. And the court draws "all reasonable inferences" in the plaintiff's favor. *In re Tracht Gut, LLC*, 836 F.3d 1146, 1150 (9th Cir. 2016). Appellees act as though the complaint were required to include an itemized ledger of each post-dismissal sale with dates and invoices. *See, e.g.*, Answering Br. 30 (demanding that Zabel show "*which* acts of copying, sale, distribution, or display occurred and *when*"). That is not how pleading works.

Appellees observe that "[s]eparately accruing harm should not be confused with harm from past violations that are continuing," Answering Br. 35 (quoting *Petrella*), but Zabel alleges the former. Appellees concede (at 35) that "sales occurr[ing] after the filing of the earlier action … constitute[] separately accruing acts," and that is exactly what Zabel alleges, *e.g.*, ER-188 ¶ 58 (book "is being sold at online retailers").

Appellees truncate (at 35) a treatise passage quoted in *Media Rights*, but that passage supports Zabel. In full, the opinion says:

> Because those claims arose after [the plaintiff] filed the operative complaint in [the first action] and [the plaintiff] could not have sued on them when it filed [the first action], they are not precluded here. The leading treatise on civil procedure agrees: "Events that are related in origin and nature may nonetheless involve such clear separations or discontinuities as to create separate causes of action without room for dispute. The easiest circumstances occur when the second action draws on facts or seeks remedies that simply could not have been asserted in the first action." 922 F.3d at 1024 (citations omitted).

The treatise would call this an "eas[y]" case because Zabel draws on facts that "could not have been asserted in the first action," such as that Defendants sold, distributed, and displayed the infringing book in Summer 2025.

Finally, even if greater pleading particularity were required (it is not), the remedy is leave to amend. "Dismissal without leave to amend" is "improper" unless it is "clear ... that the complaint could not be saved by any amendment." *Manzarek v. St. Paul Fire & Marine Ins.*, 519 F.3d 1025, 1031 (9th Cir. 2008) (quotation marks

omitted). Here, if the complaint needed more than the ongoing sales and displays it already alleges (it does not), Zabel could easily supply the particulars.

### E. Zabel's Arguments Are Properly Before the Court

Appellees have waiver law exactly backwards. Conceding that Zabel "challenged the application of Rule 41 [below]," Appellees argue that appellate courts "declin[e] to entertain arguments not presented to the district court." Answering Br. 16, 28. But "it is claims that are deemed waived or forfeited, not arguments." *United States v. Pallares-Galan*, 359 F.3d 1088, 1095 (9th Cir. 2004). A "new argument" in support of an existing claim is not waived. *Lebron v. National Railroad Passenger Corp.*, 513 U.S. 374, 378 (1995). Each of Zabel's arguments on appeal advances precisely the claim she pressed below. And even if any were forfeited (none was), each would be reviewable anyway because each is a purely legal question.

#### 1. Zabel's Arguments Are Preserved

"Once a federal claim is properly presented," the Supreme Court has held, "a party can make any argument in support of that claim." *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992). Parties "are not limited to the precise arguments they made below." *Id.* That is the Supreme Court's "traditional rule." *Singh*, 118 F.4th at 1165 (quoting Supreme Court). And it is reflected in this Court's Rule 28-2.5, which directs the appellant, "[a]s to each issue," to state where in the record "the issue"

was raised. Parties "present issues and claims for determination, not specific arguments or theories." *Singh*, 118 F.4th at 1165; *compare* Answering Br. 29 (objecting that Zabel's Rule 28-2.5 statement does not identify where she raised certain "theories"). Even when a litigant "expressly advised the district judge that it was not necessary to reach" "the particular argument presented on appeal," that argument is preserved so long as it is "an alternative argument to support [a] consistent claim." *Pallares-Galan*, 359 F.3d at 1094–95.

Appellees' contrary rule rests on a hallucination. Appellees argue that "'a new theory *in support* of an issue' is forfeited if it was not raised below," Answering Br. 29 ("emphasis added" by Appellees, they say), with those internal quotation marks purporting to quote this Court's decision in *Peterson v. Highland Music, Inc.*, 140 F.3d 1313 (9th Cir. 1998). The opinion does not contain the quoted phrase or anything like it. To the contrary, this Court has held precisely the opposite: it is "issues and claims" that must be preserved, not "theories." *Singh*, 118 F.4th at 1165.

The Supreme Court's leading cases show how far apart the arguments may be while falling under a single claim. In *Lebron v. National Railroad Passenger Corp.*, the Court held that "an argument that petitioner expressly disavowed before the lower courts" was not forfeited. *Pallares-Galan*, 359 F.3d at 1095. The case turned on whether Amtrak's conduct was state action for purposes of the First Amendment. In the lower courts, Lebron disavowed any contention that Amtrak was part of the

government and argued instead that Amtrak was so closely tied to the government that its conduct was attributable to it. *Lebron*, 513 U.S. at 378. After certiorari, he argued that Amtrak was part of the government. *Id.* The Court held that this was "not a new claim … but a new argument to support what has been his consistent claim: that Amtrak did not accord him the rights it was obliged to provide by the First Amendment." *Id.* at 379. And in *Yee v. City of Escondido*, the Court held that "the plaintiff preserved on appeal a Fifth Amendment *regulatory* taking argument because the plaintiff raised a Fifth Amendment *physical* taking argument." *Koi Design LLC v. Marron Lawyers, APC*, No. 23-55704, slip op. at 43 n.11 (9th Cir. Aug. 6, 2026) (citing *Yee*). That was true "even though the two arguments relied on entirely different doctrine and case law." *Id.* "What mattered, according to the Supreme Court, was that both are arguments in support of a Fifth Amendment takings claim." *Id.* This Court has followed suit. *E.g.*, *Weissburg v. Lancaster School District*, 591 F.3d 1255, 1259 n.3 (9th Cir. 2010) (because the plaintiffs "assert[ed] a claim for attorneys' fees" as prevailing parties, they were "free to make any argument in support of that claim on appeal").

Ultimately, the question is at what level of generality the term "claim" is defined, and the answer is that the level of generality is high. The *Lebron* Court described the "consistent claim" as: "Amtrak did not accord him the rights it was obliged to provide." 513 U.S. at 378–79. In *Yee*, similarly, the Court characterized

the claim as: "a Fifth Amendment takings claim." *Koi Design*, slip op. at 43 n.11. In *Weissburg*, the claim was: plaintiffs are prevailing parties. Appellees' logic would characterize the claim far more granularly: a claim that Amtrak was a state actor by attribution in *Lebron*; a physical taking claim in *Yee*. The Court rejected those narrow characterizations.

Here, Zabel's claim is that the two-dismissal rule never triggered. *See* Zabel Br. 6 (first issue presented is "[w]hether Rule 41(a)(1)(B)'s two dismissal rule applies"). Zabel's lead contention below was exactly that claim: "RULE 41 DOES NOT BAR PLAINTIFF'S CLAIM." ER-38. Appellees assert only that Zabel "advances on appeal three new *arguments*" in support of her claim that the two-dismissal rule never triggered. Answering Br. 28 (emphasis added). And they concede (at 28) Zabel "challenged the application of Rule 41," *i.e.*, she raised the claim she advances on appeal. That means their waiver argument loses.

Though waiver law does not require it, moreover, the specific arguments in support of Zabel's claim were raised or passed on below. *See Ahanchian v. Xenon Pictures*, 624 F.3d 1253, 1260 n.8 (9th Cir. 2010) (this Court's waiver rule "does not apply" even to a claim when the district court "addressed the merits").

*First*, the district court addressed *Rose Court*'s "could have been raised" condition, using those exact words, and ruled against Zabel. The court recognized that the two-dismissal rule can trigger only if "the two dismissals concerned the same

claim." ER-10. The court then held that "the two dismissals concerned the same claim." ER-11. The court quoted *Rose* Court's holding that the second claim is the same as the first if it "arises from the same set of facts" and "could have been or was raised" in the first action. ER-11. The court then misapplied that standard by ignoring the second condition, ER-11, and Zabel challenges that misapplication on appeal.

*Second*, the (a)(1)-versus-(a)(2) issue was before the district court. Zabel argued that the second dismissal was not a qualifying voluntary dismissal under (a)(1). ER-38–43. Defendants responded that, although Zabel's filing was "not headed 'Notice of Dismissal,'" it should be treated as an (a)(1) notice rather than a court-adjudicated dismissal anyway, citing cases on mislabeled "request[s] for dismissal." ER-24 n.6. The district court then ruled that the second dismissal was a unilateral notice under (a)(1). ER-9–13.

*Third*, Zabel raised the separate-accrual argument and the district court ruled on it. The factual predicate was raised by Zabel's complaint, which alleges infringing conduct continuing long after both prior dismissals. Zabel's opposition pressed the premise that the infringements are distinct acts, contending that each Defendant "is responsible for a different infringement." ER-43. And the district court ruled on the matter, dismissing the action even with respect to infringing acts postdating the dismissals.

### 2. Zabel's Arguments Are Purely Legal

The arguments are independently reviewable because they present pure questions of law. This Court reaches a forfeited issue when it "is purely one of law, does not affect or rely upon the factual record developed by the parties, and will not prejudice the party against whom it is raised." *Janes v. Wal-Mart Stores*, 279 F.3d 883, 888 n.4 (9th Cir. 2002). Here, Appellees are "not prejudiced because [they] briefed the merits of [each] argument on appeal." *Weissburg*, 591 F.3d at 1259 n.3. As Appellees acknowledge (at 57), the appellate record "is as complete as it would be before the lower court." And each argument concerns pure rule construction or pleading sufficiency.

Appellees assert (at 30) that the three arguments in question are not purely legal, but they never actually advance an argument to substantiate that assertion for any of the three. On separate accrual, they instead repeat (at 30) that Zabel's pleading is insufficiently specific. On jurisdictional competency, they revert (at 31) to the argument that Zabel "presents a new theory." On Rule 41(a)(2), they assert (falsely, at 33) that Zabel "argued the opposite below." None of these arguments concern whether Zabel's arguments are purely legal.

The arguments Appellees do make fail on their own terms. *First*, on separate accrual, Appellees observe (at 30) that Zabel's separate-accrual argument "rests on facts that were never developed," but they seem to forget that Zabel's complaint was

dismissed at the pleading stage. *Second*, on jurisdictional competency, Appellees assert (at 31) that Zabel conceded the issue below, but that is not remotely true. To the contrary, Appellees concede (at 33) that Zabel argued the "state court's lack of jurisdiction" below. *Third*, Appellees argue (at 33) that Zabel "adopted" the position that the second dismissal was an (a)(1) dismissal, but that is again simply false. They highlight Zabel's voluntariness argument, but the fact that the dismissal was compelled by a party does not conceivably mean that it had to be a unilateral notice.

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

While courts do not parse opinions like codified statutory law, an opinion's plain language controls. *See United States v. California Mobile Home Park Mgmt.*, 107 F.3d 1374, 1377 (9th Cir. 1997). And when this Court and others use the phrase "substantially the same," they mean what they say. *See Tennessee Valley Authority v. Hill*, 437 U.S. 153, 173 n.18 (1978) (rejecting "Humpty Dumpty" approach where a word "means just what I choose it to mean"). This Court's substantially-the-same doctrine is a principled effort to ensure that Rule 41(a)(1)'s text—which itself says nothing about "substantially the same"—is not circumvented by a plaintiff suing an entity that is essentially the same as another. *See* Zabel Br. 38–39.

Appellees advance a radically different understanding of "substantially the same" that has nothing to do with whether the two entities are substantially the same. Reverse engineering a doctrinal test to fit their version of the facts, Appellees argue

(at 49, 52) that two entities are substantially the same when (a) they have "contractual arrangements" and (b) one entity's liability is contingent on the other's. That is not this Court's test.

All kinds of persons that no one thinks are remotely the same have contractual relationships. The Ninth Circuit is not substantially the same person as Thomson Reuters, for one example. If anything, a negotiated arm's-length contract demonstrates that two entities are different persons with divergent interests and differing roles. Appellees invoke (at 52) *Taylor v. Sturgell*'s "substantive legal relationship" exception to the ordinary preclusion rules, 553 U.S. 880, 894 (2008), but that is a term of art that clearly does not apply here. The Court defined the category as arising from "the needs of property law" and including "preceding and succeeding owners of property, bailee and bailor, and assignee and assignor." *Id.* (citing 2 Restatement of Judgments §§ 43-44, 52, 55); *see also id.* at 898 (demanding a "constrained approach to nonparty preclusion"). Every listed relationship is one of succession: the nonparty holds or has taken over the legal interest that was adjudicated, and is bound for that reason. Notably, the Restatement sections *Taylor* cites are the succession provisions; joint obligors and joint tortfeasors are handled in neighboring provisions and are conspicuously absent from *Taylor*'s list. And any license here conveyed rights to exploit *The Fly*, not Sánchez Bezos's defense to

Zabel's infringement claim, which is the interest the two-dismissal bar would adjudicate.

Similarly, many persons whose liability turns on a common element are not remotely the same. Two rival retailers that each sell the same defective product are both answerable to the injured buyer, yet neither is the other, and neither is the manufacturer. Best Buy is not substantially the same person as Apple. As Appellees' own case holds, "a copyright holder may exercise discretion in suing as many co-infringers as he chooses," and there is no "mandatory joinder." *Bouchat v. Bon-Ton Department Stores*, 506 F.3d 315, 328 (4th Cir. 2007). Derivative liability and identity of interests are not bases for preclusion. *Taylor*, 553 U.S. at 901.

The combination of common element and contractual relationship does not make anyone substantially the same either, notwithstanding Appellees' gerrymandered test to that effect. *See id.* (rejecting "preclusion based on identity of interests and some kind of relationship between parties and nonparties"). Following the ordinary meaning of the words "substantially the same," every one of this Court's cases deeming two entities "substantially the same" involves ownership, control, or agency. *See* Zabel Br. 35–37.

Appellees rely on *Bouchat*, but there the Fourth Circuit held a claim against licensees precluded because the licensor, which had actually litigated the prior claim, "virtually represented" the licensees. 506 F.3d at 327. Here, the corporate

Defendants are not passive licensees but independent, direct infringers liable for their own acts. ER-200–201 (¶¶ 98–99). In any event, in *Taylor* the Supreme Court "disapprove[d] the theory of virtual representation." 553 U.S. at 904. Appellees argue (at 3–4) that Zabel's position would "let[] any plaintiff reopen a twice-dismissed claim simply by naming a dismissed defendant's business partners in the next complaint," but that is fully consistent with the two-dismissal rule's purpose. The rule exists to protect Nvidia after Nvidia has been sued twice, not OpenAI.

Appellees are wrong on the facts too. They assert (at 48) that Zabel pleaded them as a single "interlinked enterprise," but Appellees—one of which is a human—are not even close to a single enterprise. *See* ER-15 (district court acknowledging no agency relationship). The corporate Defendants' liability is not, moreover, "*wholly contingent* on Sanchez's." Answering Br. 52. Theoretically, Sánchez Bezos could hold a personal license or could be dismissed for lack of personal jurisdiction or on a limitations defense. Zabel could settle with or dismiss Sánchez Bezos and press on against the other Defendants. At minimum, fact development on the sameness inquiry is necessary. *See* Zabel Br. 42–43 (citing *Carter v. Clark County*, 253 F. App'x 638, 640 (9th Cir. 2007)); *Bolden-Hardge*, 63 F.4th at 1228 (affirmative defense generally "cannot be considered" at pleading stage).

## III. This Court Should Remand For Merits Adjudication

Perhaps sensing their weakness on the issues presented, Appellees request (at 57) the "rare" step of "first instance appellate review" on the copyright merits. But this Court is "a court of review, not first view." *Haskell v. Harris*, 745 F.3d 1269, 1271 (9th Cir. 2014). Appellees' merits arguments are meritless, and Zabel has not had "the opportunity to fully brief those arguments." *Pritchard v. Blue Cross Blue Shield of Illinois*, 159 F.4th 646, 672 (9th Cir. 2025). This Court should remand for merits adjudication, or at minimum grant Zabel the opportunity for supplemental briefing on the issue.

## CONCLUSION

This Court should reverse.

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Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

This brief complies with the word-count limit of Ninth Circuit Rule 32-1 because it contains 6,970 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
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## CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing reply brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit on August 27, 2026, using the Appellate Electronic Filing system. All registered case participants will be served via the Appellate Electronic Filing system.

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