No. 11-1069

IN THE
Supreme Court of the United States

SPOT RUNNER, INC., *et al.*,
Petitioners,
v.
WPP LUXEMBOURG GAMMA THREE SARL,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

Rather than meeting the Petition on its terms, the Brief in Opposition focuses on an issue Petitioners did not raise. The question Petitioners presented is not one of jurisdiction. It regards the *procedures* used by the district court to permit a plaintiff to immediately appeal a 12(b)(6) dismissal instead of taking advantage of its opportunity to amend. The Ninth Circuit below endorsed the entry of a judgment of dismissal without prejudice to facilitate the appeal. This new and troubling procedure is in tension with the approaches of other courts of appeals—and warrants review by this Court—not because there was no appellate jurisdiction here, but because the uncorrected judgment allowed WPP to re-file the same claims it was appealing. When this tension and finality concern is brought into focus, the rest of the Opposition falls apart.

I. THE NINTH CIRCUIT'S DECISION ADDS TO CONFUSION ON THE PROPER PROCEDURE FOR ELECTIVE APPEALS OF 12(B)(6) DISMISSALS

WPP acknowledges that there are "administrative and procedural variations" and "differences" among the circuits about how a plaintiff may appeal when it chooses to stand on its pleadings rather than amending claims dismissed with leave to amend. Opp. 1, 16; *see generally* Pet. 9-11.

The "varia[nt]" and "differen[t]" procedures followed by the courts of appeals create undeniable confusion in this area. In some circuits, plaintiffs need only wait until after the deadline set by the district court for filing an amended complaint. *See* Pet. 9-10. At this point, when the 12(b)(6) "dismissal

becomes one with prejudice" and the case is "indubitably over in the district court," *Otis* v. *City of Chicago*, 29 F.3d 1159, 1164, 1166 (7th Cir. 1994), the plaintiff may proceed with its appeal. In other circuits, to appeal from a dismissal with leave to amend, plaintiffs must explicitly disclaim any intent to amend. *See* Pet. 10. Such a disclaimer, coupled with expiration of the period for amendment, has "the effect of dismissing the improperly pleaded claims with prejudice." *Shapiro* v. *UJB Fin. Corp.*, 964 F.2d 272, 278 (3d Cir. 1992). Still other circuits permit plaintiffs to appeal only after entry of a formal judgment of dismissal. *See* Pet. 10-11. Before the decision below, the Ninth Circuit's cases followed this latter approach, and required that the judgment dismiss the claims at issue "with prejudice." *Edwards* v. *Marin Park, Inc.*, 356 F.3d 1058, 1064 (9th Cir. 2004); *Omstead* v. *Dell, Inc.*, 594 F.3d 1081, 1085 (9th Cir. 2010).

The Ninth Circuit's decision below exacerbates this confusion. It abandoned the position staked out in *Edwards* and *Omstead*, and sanctioned a procedure that allows the plaintiff to forgo amendment, state its intent to appeal, and obtain a formal judgment of dismissal *without prejudice* to facilitate that appeal. That judgment improperly permits the plaintiff to have it both ways: to pursue the appeal, and also "to seek an adjudication of the same issue at another time in the same or another forum." *Concha* v. *London*, 62 F.3d 1493, 1507 (9th Cir. 1995). By adopting this approach, the Ninth Circuit tilled new ground in a field already marked by confusion, and where certainty is critical.

WPP's attempts to dispel this confusion, and to suggest that the question is unworthy of this Court's review, are not persuasive.

1. Initially, WPP relies on a straw man. It repeatedly casts the question presented as one of appealability under 28 U.S.C. § 1291. *E.g.*, Opp. 6-7. Review is unwarranted, WPP insists, because the Ninth Circuit had appellate jurisdiction, making the decision below consistent with other cases cited in the petition where the order or judgment of a district court was held to be appealable. *Id.* at 13.

But that is not the question Petitioners have presented, or the source of the inter-circuit confusion Petitioners identified. Petitioners did not argue below or before this Court that the judgment was inadequate to support appellate jurisdiction. The question Petitioners did present is *procedural,* rather than jurisdictional: May a district court properly facilitate a Plaintiff's election to forgo amendment and appeal a 12(b)(6) dismissal by entering a judgment of dismissal *without prejudice*?

There is confusion on this question because the circuits have adopted different procedures and forms of judgment for carrying out such elective appeals. And the decision below amplifies the confusion, not because the Ninth Circuit exercised appellate jurisdiction over the non-prejudicial judgment, but because it failed to *correct* the judgment on Petitioners' cross appeal. That error sets the Ninth Circuit at odds with other circuits on a finality concern that may arise even where a case is held to be appealable: the need to bind the plaintiff to the dismissed claims and prevent it from re-filing those claims.

The distinction between the re-filing risks that flow from the novel judgment below and broader appealability concerns is well illustrated by WPP's own cited authority. In *Schering-Plough Healthcare*

Products, Inc. v. *Schwarz Pharma, Inc.*, 586 F.3d 500, 507 (7th Cir. 2009) (cited in Opp. at 13), the Seventh Circuit exercised appellate jurisdiction because the dismissal, while without prejudice, was "conclusive in practical effect." But the Court also considered a cross-appeal arguing that "the dismissal should have been with prejudice." *Id.* at 506. Judge Posner explained that the without-prejudice dismissal allowed "a similar case [to] be filed in the future," and the defendant thus had "a significant interest in the preclusive effect of a judgment in its favor." *Id.* This language identifies precisely why the judgment below invites re-filing mischief.

Other § 1291 cases described in the petition and discussed in WPP's Opposition were not cited by Petitioners to suggest that there was no appellate jurisdiction here. Rather, Petitioners addressed these cases because they bear on the proper procedure when a plaintiff seeks an elective appeal of a 12(b)(6) dismissal with leave to amend. Critically, none of the cases cited by WPP or Petitioners endorse the procedural approach followed below, which permits a plaintiff to take an elective appeal of a dismissal while retaining the ability to re-file the appealed claims. A prime example is *Moya* v. *Schollenbarger*, 465 F.3d 444, 450-51 (10th Cir. 2006), the case featured by WPP. Far from "expressly permit[ting] the exact procedure" adopted below (Opp. 10-11), the Tenth Circuit construed the district court's dismissal without prejudice to bear many of the hallmarks of a prejudicial dismissal. Among other things, the district court "did not intend to allow for amendment" or to "otherwise continue the proceedings in the district court." 465 F.3d at 454.

The concern with re-filing recognized in cases like *Schering-Plough* is palpable here. And it is a concern

that applies regardless of whether a district court dismisses individual claims or the entire action without prejudice.

2. WPP next argues that the approach blessed by the Ninth Circuit below "would have been proper according to the requirements of any circuit" (Opp. 17), and that Petitioners have not cited any authority to the contrary (*id.* at 7). This is wrong.

WPP attempts, for example, to reconcile the procedure approved below with the approach of the Second and Third Circuits, which requires a plaintiff to disclaim any intent to amend before proceeding with an appeal of a 12(b)(6) dismissal with leave to amend. *See* Opp. 13-15. But the disclaimer contemplated by the Second and Third Circuits operates as an "an irrevocable election . . . to stand or fall on the amended complaint in its present form." *DiVitorrio* v. *Equidyne Extractive Indus., Inc.*, 822 F.2d 1242, 1249 (2d Cir. 1987). It has the "effect of dismissing the improperly pleaded claims with prejudice." *Shapiro*, 964 F.2d at 278.

By contrast, here, WPP expressly requested entry of a "judgment of dismissal without prejudice" at the same time as it purported to "stand upon the existing pleading and appeal." Dist. Ct. Dkt. No. 75. The requested judgment left WPP "free to seek an adjudication of the same issue at another time in the same or another forum." *Concha,* 62 F.3d at 1507. WPP's statement before the district court was *not* an irrevocable election to stand on the complaint as pleaded, and the resulting judgment does not carry the force of a with-prejudice dismissal. Nothing in the judgment would stop WPP from re-filing its claims and generating duplicative litigation or piecemeal appeals. It therefore cannot be

"consistent" with the approach of the Second or Third Circuit. *Contra* Opp. 14.

Nor can WPP distinguish the Third Circuit's clear language in *Shapiro* on the ground that it "merely interpret[s] what the district court [in that case] intended to do." Opp. 14. The Third Circuit has construed *Shapiro* as establishing generally that such dismissals have the effect of a dismissal with prejudice. *Williams ex rel. Faison* v. *United States Penitentiary*, 377 F. App'x 255, 256 n.2 (3d Cir. 2010). Nothing in *Booth* v. *Churner*, 206 F.3d 289 (3d Cir. 2000) (cited in Opp. at 14), is inconsistent with this rule.

The Ninth Circuit's new procedure is equally in tension with the Seventh Circuit's approach. *Contra* Opp. 13. In the Seventh Circuit, plaintiffs may appeal a conditional dismissal once the time to satisfy the condition has expired, because at that point the "case is *indubitably over* in the district court." *See Otis*, 29 F.3d at 1166 (emphasis added). Subsequent Seventh Circuit cases apply this general principle in the context of dismissals for failure to state a claim, holding that plaintiffs may appeal after the time period for amendment has expired, because the lapsed deadline converts the dismissal into one "with prejudice." *See McDonald* v. *Household Int'l, Inc.*, 425 F.3d 424, 427 (7th Cir. 2005) ("[T]his case is finished as far as the district court is concerned, and the dismissal for all practical purposes is now one with prejudice"); *accord Johnson* v. *Schoen*, 2011 WL 245569, at *1 (S.D. Ill. Jan. 26, 2011).

This procedure cannot be reconciled with the procedure adopted by the Ninth Circuit below. In the Seventh Circuit, the plaintiff appeals only after obtaining the functional equivalent of a dismissal

"with prejudice", rendering the case "indubitably over." 29 F.3d at 1166. Under the Ninth Circuit's new procedure, the plaintiff may obtain a dismissal *without* prejudice to facilitate its appeal, a judgment which leaves it free to pursue the same claims on appeal and in a different forum. *See Concha,* 62 F.3d at 1507.

That these cases analyzed the judgments at issue in the context of determining appellate jurisdiction does not diminish the discord on the question presented. If a form of judgment is not appealable for § 1291 purposes, it follows *a fortiori* that a district court abuses its discretion by entering that judgment to facilitate an elective 12(b)(6) appeal. The essential point is that the form of judgment affirmed by the Ninth Circuit is at odds with the various procedural frameworks set up by the other circuits to address this situation. The "administrative / procedural differences" between the circuits are not only "relevant" to this petition (*contra* Opp. 16), they bring into focus the anomalous nature of the Ninth Circuit's approach.

WPP is also incorrect when it argues that Petitioners "fail to cite a single case from any circuit holding" that the judgment below "is improper." Opp. 6-7. In *John's Insulation, Inc.* v. *L. Addison and Associates, Inc.*, 156 F.3d 101, 107 (1st Cir. 1998) (emphasis added) (cited at Pet. 21), the First Circuit explained in a related context that "the *proper* course of action is not to delay the proceedings, but to file a motion for voluntary dismissal *with prejudice*, stating explicitly that the purpose is to seek immediate review of the interlocutory order in question." Indeed, the Ninth Circuit itself recognized below that "the *proper* course of action where a plaintiff elects to not amend their complaint and immediately appeal is

an order of dismissal *with prejudice*." App. 36a (emphasis added); (cited at Pet. 12-13). The Court's prior decision in *Edwards* made this clear, directing that when a plaintiff facing a 12(b)(6) dismissal "elect[s] not to amend," a district court "should . . . enter[] a final judgment dismissing all claims with prejudice, and allow[] the case" to be appealed "in that posture." 356 F.3d at 1064. Although WPP casts *Edwards* as merely affirming a district court's discretion to dismiss with or without prejudice (*see* Opp. 15), that decision expressly cabined the discretion of district courts in this area.[1]

3. Finally, WPP argues that the variation among circuits does "not warrant this Court's review" because "[i]t is common for the circuits to have their own rules," and "[t]hese variations do not create confusion because, of course, litigants know what circuit they are in and follow the rules accordingly." Opp. 17. But this logic could be applied to bar review of *any* disagreement between the circuits on an issue of federal procedure—even where, as here, it is one of profound importance to the efficient administration of justice. *See* Pet. 13-16. The Court's certiorari jurisdiction is intended to resolve such "variations" between the federal circuits, not to ignore them. *See*

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[1] Nor does it matter that *Omstead*, which followed the same approach, grounded its prejudicial dismissal in Rule 41(a)(1). Regardless of whether the dismissal is characterized as one under Rule 12(b)(6) or Rule 41(a), the appeal is voluntary; the plaintiff could have amended its complaint, but instead stood on its pleading and immediately appealed. Either way, a with-prejudice dismissal is necessary to avoid allowing the plaintiff multiple bites at the apple. *Cf.* App. 35a (standard of review "does not change under either rule").

E. Gressman et al., *Supreme Court Practice* 242 (9th ed. 2007).

II. THE DECISION BELOW IS WRONG AND WILL HAVE PERVERSE CONSEQUENCES

1. To support its argument that the procedure sanctioned by the Ninth Circuit is not only permissible, but is "particularly appropriate" (Opp. 8), WPP repeats the same flawed analysis employed by the Ninth Circuit. It assumes that the *general* discretion of district courts with respect to whether to dismiss an action with or without prejudice necessarily permits non-prejudicial dismissals in this unique context—one where even the Ninth Circuit has recognized that a dismissal without prejudice is the "proper course of action." App. 36a; *see* Opp. 7.

Neither the Ninth Circuit nor WPP cite any authority justifying this logical leap. The discretion afforded district courts in deciding whether to dismiss with or without prejudice is not without limits. A district court's dismissal without prejudice constitutes an abuse of discretion if the court committed "a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors." *E.g.*, *Schilling* v. *White*, 58 F.3d 1081, 1083 (6th Cir. 1995).

Here, the procedural posture and the basic principle that an appealing plaintiff ought to be bound to the appeal establish that the district court erred. The district court clearly understood that WPP sought a judgment of dismissal for the sole purpose of appealing its federal claims, which were dismissed by the court under Rule 12(b)(6). *See* Dist. Ct. Dkt. No. 75. The court nevertheless acceded to WPP's request for a judgment of dismissal without

prejudice, which did not bind plaintiff to the appeal. *See* Pet. 13-18.

2. WPP dismisses as "unfounded" the concern that plaintiffs will use the Ninth Circuit's new procedure to game the system. Opp. 20. In particular, WPP contends that Rule 11 is a sufficient bulwark against such a strategy, because it would prevent the filing of identical claims to those that have already been dismissed. *See ibid.* That misses the point entirely. If affirmed on appeal, a prejudicial dismissal would terminate the dismissed claims, precluding "any possibility of ever obtaining a favorable determination on the merits." *Concha*, 62 F.3d at 1508. Petitioners here have been denied the benefit of such a dismissal; under the judgment, WPP retains the ability to amend its claims and re-file them in an amended complaint. This despite a published opinion *affirming* the 12(b)(6) dismissal of certain of WPP's federal securities claims.

Equally striking is the Ninth Circuit's instruction that its new procedure may be used to "temper[] the heightened pleading standards of the [Private Securities Litigation Reform Act]," presumably by allowing securities plaintiffs to appeal dismissed claims and then, if unsuccessful, revive them down the road if other "evidence come[s] to light." App. 38a. This statement is a perfect illustration of the mischief that the Ninth Circuit's new procedure threatens to unleash. Although WPP argues that this result would be consistent with the intent of the PSLRA (Opp. 20-21), that position ignores the history of that Act, *see, e.g.*, 141 Cong. Rec. H13699 (daily ed. Nov. 28, 1995) (PSLRA intended to forestall lawsuits filed based on the "hope that the discovery process might lead eventually to some plausible cause of

action," but without sufficient evidence to state a claim).

III. THIS CASE IS A SUITABLE VEHICLE FOR RESOLVING THE QUESTION PRESENTED

This case offers an appropriate vehicle for deciding the procedural question raised by Petitioners. Petitioners squarely presented this question to the Ninth Circuit, which directly addressed it and issued a decision adverse to Petitioners. *See* App. 35a-38a. The question is not "moot," as WPP suggests (Opp. 21), because this is a live controversy. The Ninth Circuit affirmed the dismissal of several of WPP's federal claims, but nonetheless upheld the district court's decision to dismiss those claims without prejudice. If Petitioners prevail on the question presented, those claims would be dismissed with prejudice on remand—thus preventing WPP from re-filing them.

Nor did Petitioners waive the argument raised before this Court by failing to raise it below, as WPP contends. Opp. 22-23. Petitioners' position here is the same one it advanced before the Ninth Circuit. Below, Petitioners filed a cross-appeal to challenge the form of judgment, and argued that the Ninth Circuit should "vacate the district court's erroneous judgment and direct the court, on remand, to enter a judgment of dismissal with prejudice." Opp. 22 (quoting Petitioners' Opening Brief and Answer Brief on Cross-Appeal). There is no daylight between that position and the arguments advanced in this petition.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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