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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

ANDREA BARTZ, CHARLES GRAEBER,
and KIRK WALLACE JOHNSON,

Plaintiffs,

v.

ANTHROPIC PBC,

Defendant.

Case No. 3:24-cv-05417-WHA

Action Filed: August 19, 2024

**DEFENDANT ANTHROPIC PBC'S MOTION
FOR AN ORDER PERMITTING
INTERLOCUTORY APPEAL PURSUANT TO
28 U.S.C. § 1292(B) OR, IN THE
ALTERNATIVE, MOTION FOR LEAVE TO
FILE MOTION FOR RECONSIDERATION**

Hearing Date: August 28, 2025

Hearing Time: 8:00 a.m.

Judge: Honorable William H. Alsup

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NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD: PLEASE TAKE NOTICE THAT, on August 28, 2025, at 8:00 a.m., or as soon thereafter as may be heard, Defendant Anthropic PBC (“Anthropic”) will and hereby does move this Court (1) for an order certifying this Court’s June 23, 2025 order denying in part Anthropic’s motion for summary judgment (ECF No. 231, or the “Order”) for interlocutory appeal pursuant to 28 U.S.C. § 1292(b), or (2) in the alternative, pursuant to Federal Rule of Civil Procedure 54(b) and Northern District of California Civil Local Rule 7-9, for leave to file a motion for reconsideration. This motion is based on this Notice of Motion and Motion, Memorandum of Points and Authorities, the papers on file in this action, and such other and further evidence or argument that the Court may consider.

STATEMENT OF RELIEF SOUGHT AND ISSUES TO BE DECIDED

Anthropic requests that the Court certify the Order for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). Alternatively, Anthropic seeks leave to file a motion for reconsideration of the Order, for the reasons set forth below.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The Court should certify its Order for interlocutory appeal under 28 U.S.C. § 1292(b). The Order addresses novel and consequential legal questions about the proper fair-use standard in the context of copyright-infringement challenges to groundbreaking generative artificial intelligence (“AI”) technology. Courts in this District have already diverged on those questions, and the answers to them will have significant implications for this case and the many other pending cases involving copyright challenges to large language models (“LLMs”). *See, e.g., Denial et al. v. OpenAI, Inc. et al.*, No. 25-cv-05495 (N.D. Cal. June 30, 2025); *Bird v. Microsoft Corp.*, No. 25-cv-05282, (S.D.N.Y. June 24, 2025); *In re Mosaic LLM Litig.*, No. 24-cv-01451 (N.D. Cal. Mar. 8, 2024); *Nazemian v. NVIDIA Corp.*, No. 24-cv-01454 (N.D. Cal. Mar. 8, 2024); *Authors Guild v. OpenAI Inc.*, No. 23-cv-08292 (S.D.N.Y. Sept. 19, 2023), MDL No. 3143; *In re Google Generative AI Copyright Litig.*, No. 23-cv-03440 (N.D. Cal. July 11, 2023); *Kadrey v. Meta Platforms, Inc.*, No. 23-cv-03417, (N.D. Cal. July 7, 2023); *Tremblay v. OpenAI, Inc.*, No. 25-cv-03482 (S.D.N.Y.

1 June 28, 2023), MDL No. 3143.

2 In particular, the Order raises two “controlling question[s] of law as to which there is
3 substantial ground for difference of opinion” and for which “an immediate appeal . . . may
4 materially advance the ultimate termination of the litigation.” 28 U.S.C. § 1292(b). First, the Order
5 presents the question whether fair use is analyzed based on the defendant’s ultimate purpose in
6 copying a copyrighted work or instead may be parsed into separately analyzed constituent steps.
7 This Court sought to deconstruct Anthropic’s conduct into separate constituent “uses,” including
8 by asking whether Anthropic “immediately” transformed the copyrighted works and “immediately”
9 deleted them. Order at 21. The Court then concluded that a supposed preliminary step—
10 downloading books from “pirate” websites to be retained in a general-purpose library—was not
11 compatible with a fair use of those books to train an LLM. *Id.* at 1, 9. But just two days later,
12 Judge Chhabria adopted the opposite approach in a very similar case, viewing Meta’s downloading
13 of books in light of Meta’s ultimate objective of LLM development, and deeming that copying fair
14 use. *See Kadrey v. Meta Platforms, Inc.*, No. 23-cv-03417 (N.D. Cal. June 25, 2025), ECF No. 598
15 (“*Kadrey Op.*”). Resolving this dispute over the proper mode of analysis is critically important to
16 the outcome of this and the many other pending copyright challenges to LLMs. This Court should
17 obtain guidance from the Ninth Circuit on the issue now instead of holding a trial that may need to
18 be redone under a different legal framework—or may not be necessary at all.

19 Second, the Order raises a question about the significance of a defendant’s initial acquisition
20 of a copyrighted work from an unauthorized source—here, “pirate sites.” Order at 18. This Court
21 expressed its “doubts that any accused infringer could ever meet its burden of explaining why
22 downloading source copies from pirate sites *that it could have purchased or otherwise accessed*
23 *lawfully* was itself reasonably necessary to any subsequent fair use.” *Id.* (emphasis in original). By
24 contrast, Judge Chhabria concluded that Meta’s unauthorized downloading of “books from shadow
25 libraries”—including, again, some of the same Internet sources that Anthropic drew from—did not
26 undermine Meta’s fair use defense because “the whole point of fair use analysis is to determine
27 whether a given act of copying was unlawful.” *Kadrey Op.* at 19; *see id.* at 10-11. Those diverging
28 views have profound implications for this case and others like it because most if not all of the

1 leading AI companies developing LLMs are accused of engaging in the same downloading of books
2 from unauthorized online sources. *See, e.g.*, Defs.’ Mot. for Partial Summ. J. at 6, 8, *Kadrey v.*
3 *Meta Platforms, Inc.*, No. 23-cv-03417 (N.D. Cal. Mar. 24, 2025), ECF No. 489 (explaining that
4 Meta used “Books3” and “LibGen” as datasets for training its models); Consolidated Class Action
5 Compl. ¶ 119, *Authors Guild v. OpenAI Inc.*, No. 23-cv-08292 (S.D.N.Y. June 13, 2025), ECF No.
6 456 (alleging that OpenAI used “books downloaded from LibGen to train its models”). It is
7 important that the Ninth Circuit resolve this disagreement now so that the correct legal framework
8 governs pending and future copyright challenges to generative AI technology.

9 Alternatively, if this Court does not certify its Order for interlocutory appeal, it should grant
10 Anthropic leave to move for reconsideration of the Order. The Order should be reconsidered
11 because it overlooks that, even taking the record facts in the light most favorable to Plaintiffs, there
12 is no evidence that Anthropic acquired books “to create a central, general-purpose library” separate
13 from the use of those books for LLM training. Order at 19. Plaintiffs never asserted any “general-
14 purpose library” theory, so Anthropic had no opportunity to respond to it. The Court should give
15 Anthropic that opportunity now. And in this rapidly evolving area of law, the conflicting opinion
16 in *Kadrey*, although not binding on this Court, also provides an independent basis for
17 reconsideration.

18 **II. BACKGROUND**

19 **A. Factual Background**

20 Anthropic is an AI company that develops LLMs, and its product is called Claude. ECF
21 No. 119-5 (“Kaplan Decl.”) ¶ 6. LLMs are text-based generative AI models trained on extremely
22 large volumes of data to develop a functional understanding of how language works, so that they
23 can generate completely new text. *Id.*; *see* Order at 26. Claude is a versatile LLM that assists with
24 various tasks, including writing computer code, drafting professional emails, and analyzing
25 business data. Kaplan Decl. ¶¶ 20-22. Developing LLMs like Claude requires an almost
26 unimaginably voluminous and diverse set of data, which allows LLMs to generalize beyond
27 specific inputs and produce creative and useful outputs. *Id.* ¶¶ 38, 40. Indeed, many trillions of
28 words were required to train Claude, and that scale is a technological necessity. *Id.* ¶ 39; *see* Order

1 at 26. Thus, developing LLMs is why Anthropic collected an astronomical body of data composed
2 of a wide variety of source materials, from the Internet, to computer code, to books. Kaplan Decl.
3 ¶¶ 45-53. And in 2021, when Anthropic first started developing LLMs, it downloaded certain
4 books datasets, such as “Books3” and “LibGen,” that were available only on the Internet. *Id.* ¶¶
5 48-50. Nothing in the record suggests that the Internet sources that offered the books datasets
6 profited from Anthropic’s downloading.

7 Anthropic starts the process of LLM development by building a computational model
8 capable of learning patterns in language and concepts from enormous data sets. *Id.* ¶ 35. Anthropic
9 then processes the massive amounts of data that it has obtained by deduplicating portions that
10 appear repeatedly, converting the remaining characters to tokens, and translating the tokens into
11 “vectors,” or mathematical representations of how words relate to other words. *See id.* ¶¶ 54-59.
12 Anthropic also assesses the quality and utility of datasets to ensure that they are suitable for training.
13 Claude then trains on the translated data by adjusting the model’s weights and biases based on
14 vector inputs as it learns more about how humans use words and concepts in writing. *Id.*

15 **B. Procedural Background**

16 Plaintiffs filed this putative class action in August 2024, alleging that Anthropic infringed
17 their copyrights by using their books in the training corpus for Claude. ECF No. 1 (Compl.) ¶¶ 68-
18 74; *see* ECF No. 70 (FAC) ¶¶ 72-78. This case was one of many recent putative copyright class
19 actions filed by authors against major AI companies, including OpenAI, Meta, Microsoft, and
20 others. *See supra* at 3 (citing cases). Anthropic moved for summary judgment on the ground that
21 its use of Plaintiffs’ works was fair under Section 107 of the Copyright Act, 17 U.S.C. § 107. ECF
22 No. 119-7.

23 The record before the Court at summary judgment was that Anthropic used Plaintiffs’
24 books—among millions of other works—to create training data for its LLMs, including Claude.
25 *Id.* at 2-10. Anthropic argued that its use of Plaintiffs’ books was fair because it was profoundly
26 transformative, *id.* at 11-16, and because Claude never produced copies of Plaintiffs’ books as an
27 output, *id.* at 7. Plaintiffs’ Opposition agreed that Anthropic downloaded the books at issue in order
28 “to train its large language models” and never claimed that Anthropic used the downloaded books

1 to build a “library.” ECF No. 157-2 (“MSJ Opp.”) at 1. Plaintiffs nonetheless contended that
2 Anthropic’s downloading of Plaintiffs’ books from unauthorized Internet sources was “a standalone
3 act of infringement,” notwithstanding Anthropic’s transformative use of those books. *Id.* at 6.
4 Plaintiffs did not argue that Anthropic downloaded and stored books for any purpose other than
5 training its LLMs. *See id.* To the contrary, Plaintiffs contended that, “like most technology
6 companies, Anthropic’s ‘research’ [on training LLMs] drove its commercial development” and
7 “commercially released Claude model.” *Id.* at 15 n.8.

8 On June 23, 2025, the Court issued an order granting in part and denying in part Anthropic’s
9 summary-judgment motion. The Court found that the copies of Plaintiffs’ works “used to train
10 specific LLMs were justified as a fair use” because “[t]he technology at issue was among the most
11 transformative many of us will see in our lifetimes.” Order at 30 (emphasis omitted). The Court
12 explained that “using copyrighted works to train LLMs” generates “new text” that is
13 “quintessentially transformative” and “different” from the original. *Id.* at 13-14. And the Court
14 further determined that the majority of the other fair use factors likewise favored finding that
15 Anthropic had fairly used Plaintiffs’ works to train LLMs. *Id.* at 30.

16 But the Court also concluded that the record, taken in the light most favorable to Plaintiffs,
17 indicated that Anthropic may have used Plaintiffs’ works for another purpose, distinct from LLM
18 training—namely, “creat[ing] a central, general-purpose library.” *Id.* at 19. Because Plaintiffs had
19 not asserted any such “library” use, the theory that Anthropic stored the books data it downloaded
20 from the Internet in a “library” never arose during the summary judgment proceedings.
21 Accordingly, Anthropic never had the opportunity to rebut the theory.

22 Nonetheless, the Court proceeded to analyze Anthropic’s supposed “retain[ing]” of “copies
23 in its central library” as an independent “use” subject to a separate fair-use analysis. *Id.* at 14. The
24 Court rejected Anthropic’s argument that it should “look[] only at the ‘ultimate use’” of the copies
25 rather than “a series of atomized acts of ‘infringement’ distinct from that overall purpose.” *Id.* at
26 22 (citation omitted). The Court thus parsed what it viewed as several discrete steps of Anthropic’s
27 conduct: “download[ing] over seven million pirated copies of books”; “retain[ing] pirated copies
28 even after deciding it would not use them or copies from them for training its LLMs ever again”;

1 and then assembling “a central library of all the books in the world,” which could be “available for
2 any number of further uses.” *Id.* at 18-19. The Court also emphasized that the downloaded copies
3 were stored, rather than “immediately transformed” and “immediately deleted.” *Id.* at 21. The
4 Court therefore concluded that the parties would “have a trial on the pirated copies used to create
5 Anthropic’s central library.” *Id.* at 31.

6 C. *Kadrey* Order

7 Two days after this Court’s Order, Judge Chhabria issued an order in *Kadrey v. Meta*
8 *Platforms, Inc.*, granting Meta’s cross-motion for partial summary judgment and denying plaintiffs’
9 cross-motion for partial summary judgment. As here, *Kadrey* concerned whether the training of a
10 generative AI model constituted fair use. *Kadrey* Op. at 1. And as here, the court in *Kadrey*
11 confronted whether fair use protects companies that “feed copyright-protected materials into their
12 models—without getting permission from the copyright holders or paying them for the right to use
13 their works for this purpose.” *Id.* Indeed, Meta had downloaded some of the same book datasets
14 from some of the same so-called “shadow libraries” as Anthropic, including “Books3” and
15 “LibGen.” *Id.* at 10-11. Yet unlike the Court here, Judge Chhabria found that fair use doctrine
16 protected Meta from liability for infringement. *Id.* at 40.

17 Judge Chhabria’s analysis diverged from this Court’s in two respects pertinent to this
18 Motion. First, Judge Chhabria concluded that Meta’s conduct must “be considered in light of its
19 ultimate, highly transformative purpose: training Llama,” Meta’s LLM. *Id.* at 21. He therefore
20 rejected the plaintiffs’ contention that “Meta’s downloading of the plaintiffs’ books” from
21 unauthorized sources “must be considered wholly separately from” Meta’s “use of the books to
22 train Llama.” *Id.* And he emphasized that even if “only *some* of [Meta’s] copies were used for
23 LLM training,” they all “had the ultimate purpose of LLM training,” including the copies made to
24 “see whether the books in the database made for good training data.” *Id.* at 21-22 (emphasis added).

25 Second, Judge Chhabria concluded that Meta’s “download[ing] the books from shadow
26 libraries” rather than “start[ing] with an ‘authorized copy’ of each book” did not “give[] [the
27 plaintiffs] an automatic win.” *Kadrey* Op. at 19. He explained that “[t]o say that Meta’s
28 downloading was ‘piracy’ and thus cannot be fair use begs the question because the whole point of

1 fair use analysis is to determine whether a given act of copying was unlawful.” *Id.* His reasoning
2 therefore diverges from this Court’s suggestion that even a highly transformative “ultimate use”
3 may not adequately justify initial unauthorized copying. *Kadrey Op.* at 21 (disagreeing with page
4 18 of this Court’s Order).

5 **III. THE COURT SHOULD CERTIFY THE ORDER FOR INTERLOCUTORY**
6 **APPEAL BECAUSE IT PRESENTS NOVEL QUESTIONS ABOUT FAIR USE**

7 Anthropic requests that the Court certify its Order for interlocutory appeal under 28 U.S.C.
8 § 1292(b). Section 1292(b) allows a non-final order to be certified for interlocutory appeal when
9 it “involves a controlling question of law as to which there is substantial ground for difference of
10 opinion” and when “an immediate appeal from the order may materially advance the ultimate
11 termination of the litigation.” *Id.* The Ninth Circuit employs a “flexible approach” under Section
12 1292(b) to avoid “undesirable consequences,” such as “unnecessary, protracted litigation and a
13 considerable waste of judicial resources.” *Reese v. BP Exploration (Alaska) Inc.*, 643 F.3d 681,
14 688 n.5 (9th Cir. 2011). This Court has certified questions under Section 1292(b) to prevent “vast
15 amount[s] of resources” from “being consumed” before the legal “ground rules” are established.
16 *Sonos, Inc. v. Google LLC*, 591 F. Supp. 3d 638, 649 (N.D. Cal. 2022) (Alsup, J.).

17 This case presents a novel and important legal issue dividing the courts: the standard for
18 assessing whether the use of copyrighted works, obtained as large datasets from specific sources
19 on the Internet, to train generative AI tools is fair use under the Copyright Act. Two specific
20 questions of law warrant immediate appellate review. The first is whether fair use is analyzed
21 based on the defendant’s ultimate purpose in using a copyrighted work or instead parsed into
22 separately analyzed constituent steps. Because this Court engaged in such parsing, it treated
23 Anthropic’s downloading, storage, and retention of books datasets as isolated acts, and emphasized
24 that Anthropic did not immediately transform the datasets or immediately delete them. But none
25 of those issues would have mattered if the Court had focused only on Anthropic’s ultimate use—
26 LLM training. Under that approach, Anthropic’s actions would be recognized as interconnected
27 parts of a single transformative use.

28 The second controlling question of law is whether a defendant’s acquisition of a copyrighted

1 work from a third party that distributed it without permission strongly weighs against the
2 availability of the fair use defense even if the use is otherwise fair. This Court’s denial of summary
3 judgment on that basis lacks doctrinal support because the entire premise of fair use is that the
4 particular acts of copying at issue were unauthorized, yet nonetheless fair. Nor is there any
5 principle that a third party’s unauthorized copying and distribution—in which the defendant played
6 no part—should taint the defendant’s subsequent transformative use.

7 This Court has previously certified similarly novel legal questions of nationwide
8 significance. *See, e.g., Sonos*, 591 F. Supp. 3d at 649; *Regents of the Univ. of Cal. v. DHS*, 279 F.
9 Supp. 3d 1011, 1049 (N.D. Cal. 2018) (Alsup, J.). And courts have specifically permitted Section
10 1292(b) interlocutory appeals following the resolution of an important fair use issue, including in
11 one of the principal decisions upon which this Court’s Order relied. *See Am. Geophysical Union*
12 *v. Texaco Inc.*, 60 F.3d 913, 915 (2d Cir. 1994); *see also Thomson Reuters Enter. Centre GmbH v.*
13 *ROSS Intel. Inc.*, 20-cv-00613 (D. Del. May 23, 2025), ECF No. 804; *Lenz v. Universal Music*
14 *Corp.*, 815 F.3d 1145, 1150 (9th Cir. 2016). Interlocutory review is likewise warranted here.

15 **A. Interlocutory Review Is Warranted to Determine Whether Fair Use Is**
16 **Analyzed by Reference to the Defendant’s Ultimate Use of a Copyrighted Work**
17 **or by Parsing the Defendant’s Use into Subsidiary Steps**

18 The first controlling question of law justifying interlocutory review is whether courts should
19 analyze fair use by reference to the defendant’s ultimate purpose in using a copyrighted work or
20 instead by parsing the defendant’s use into subsidiary steps. That legal question is important and
21 novel, has divided courts in this District, and materially affects the outcome of this case.

22 **Controlling question of law:** This Court’s Order presents “question[s] of law.” 28 U.S.C.
23 § 1292(b). Because “[f]air use is a mixed question of law and fact,” *Harper & Row Publishers,*
24 *Inc. v. Nation Enters.*, 471 U.S. 539, 560 (1985), courts aim to “break” the “question into its
25 separate factual and legal parts,” *Google LLC v. Oracle Am., Inc.*, 591 U.S. 1, 24 (2021). The
26 question here—whether to analyze the defendant’s ultimate purpose or instead seek to assess each
27 subsidiary step—is a “legal part[.]” of the fair-use inquiry. *Id.* That is so because answering the
28 question requires the court “to expound on the law” and “elaborat[e] on [the] broad” fair use “legal
standard.” *U.S. Bank Nat’l Ass’n v. Vill. at Lakeridge, LLC*, 583 U.S. 387, 396 (2018).

1 That legal question is also “controlling.” 28 U.S.C. § 1292(b). A question is controlling
2 when its resolution “on appeal could materially affect the outcome of the litigation in the district
3 court,” *In re Cement Antitrust Litig.*, 673 F.2d 1020, 1026 (9th Cir. 1981), even if it will not
4 necessarily “determine[] who will win on the merits,” *Kuehner v. Dickinson & Co.*, 84 F.3d 316,
5 319 (9th Cir. 1996). Here, the Court analyzed Anthropic’s conduct as multiple subsidiary steps,
6 rather than focusing on Anthropic’s ultimate purpose of using the works to develop its LLMs. *See*
7 Order at 22. The Court therefore parsed what it viewed as distinct acts: Anthropic’s initial copying
8 of works from online “pirate” websites; its supposed storage of books in a “central library”; its
9 training of LLMs; and its supposed retention of books after their use for training. *See id.* at 19.
10 And within that piecemeal analytical framework, the Court placed great weight on whether
11 Anthropic “immediately” transformed the downloaded books and “immediately” discarded them.
12 *Id.* at 21. After breaking up Anthropic’s conduct into what it viewed as discrete steps, the Court
13 concluded that books downloaded from “pirated sources” and stored in a “central library” were not
14 fairly used in the course of LLM development. *Id.* at 24.

15 If the Court had instead adopted Anthropic’s argument that it should “look[] only at the
16 ‘ultimate use’” of the downloaded works—namely, developing the LLMs—then the outcome
17 would have likely been different. *Id.* at 22; *cf. Kadrey Op.* at 21. Anthropic’s framing accords with
18 Section 107’s text, which refers to “the purpose . . . of the use,” without directing courts to
19 deconstruct the defendant’s use into constituent steps. 17 U.S.C. § 107. Under that framing,
20 Anthropic’s actions were all interconnected, necessary elements in pursuit of the single purpose of
21 LLM development—which this Court recognized as “among the most transformative” uses “many
22 of us will see in our lifetimes.” Order at 30. Likewise, if only the ultimate use of the copyrighted
23 works (LLM development) is legally relevant, then it does not matter whether Anthropic
24 immediately used the books for training, whether it immediately discarded them thereafter, or
25 whether “every book” became part of the LLM training corpus. *Id.* at 19. Indeed, neither the Ninth
26 Circuit nor Supreme Court has considered promptness of a defendant’s use and deletion of
27 copyrighted work in this manner. *See Sony Computer Ent., Inc. v. Connectix Corp.*, 203 F.3d 596,
28 598 (9th Cir. 2000) (finding fair use where the defendant “repeatedly copied Sony’s copyrighted

1 [material] during a process of ‘reverse engineering,’” without asking whether the defendant
2 discarded the material). Thus, if the Court had viewed Anthropic’s ultimate purpose as dispositive,
3 then Anthropic likely would have prevailed on its fair use defense.¹

4 The Court’s emphasis on subsidiary steps (rather than ultimate use) also led it to focus on
5 Anthropic’s supposed creation of a “central library of texts,” which it compared to “any university
6 or corporate library.” Order at 20. In so doing, the Court misapplied the Second Circuit’s decision
7 in *Texaco*. There, the court found no fair use when a company library “circulated one copy” of a
8 journal issue and “invited all the [company] researchers to make their own photocopies” so that
9 they could have the articles “readily available [to read] in their own offices.” *Texaco*, 60 F.3d at
10 918-19. The court reasoned that the company’s photocopying was not “a transformative use of the
11 copyrighted material” because it did not “add[] something new, with a further purpose or different
12 character.” *Id.* at 923 (citation omitted). Here, in stark contrast, Anthropic acquired, stored, and
13 organized books not so that they could be used for their original purpose of being read, but rather
14 so that they could be used for the transformative purpose of developing LLMs. Importantly,
15 Anthropic is an AI company—not a library, or even a more general technology company that might
16 put the works to some other use. And nothing in the record supports the conclusion that any
17 Anthropic employee read a single one of the books at issue. Thus, unlike the company in *Texaco*,
18 Anthropic has no “research” objective that requires consuming the books as ordinary reading
19 material; it has only the transformative objective of developing LLMs. *Id.* at 924. Further, in
20 *Texaco*, the scientists had created no other “work of authorship,” *id.*—just a plainly non-
21 transformative photocopy of the original journal. In contrast, here, Anthropic directly employed
22 the books in a “further fair use,” Order at 21-22, to create a highly transformative work of its own—
23 Claude. If the Court had appropriately focused on Anthropic’s ultimate purpose in using the books,
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26 ¹ To be sure, if Anthropic were to subsequently use retained works for purposes *other* than LLM
27 development activities—such as allowing its employees to “borrow” those works for reading—
28 then those separate uses would be subjected to their own fair use analysis. *Cf.* Order at 28 (noting
that if an LLM produced “an[] exact cop[y]” of a copyrighted work, that “would be a different
case” that Plaintiffs “remain free to bring . . . in the future should such facts develop”). But
Anthropic’s only use of the downloaded works is for developing LLMs.

1 it would not have separately analyzed Anthropic’s supposed “library” use at all.²

2 ***Difference of opinion:*** A “substantial ground for difference of opinion” also exists as to the
 3 proper resolution of the controlling legal question here. 28 U.S.C. § 1292(b). That requirement is
 4 met “where novel and difficult questions of first impression are presented” or “where reasonable
 5 jurists might disagree on an issue’s resolution.” *Reese*, 643 F.3d at 688 (cleaned up); *see Sonos*,
 6 591 F. Supp. 3d at 649 (certifying question where “reasonable minds may differ” about the “ground
 7 rules” for pleading “infringement”).

8 Jurists can reasonably disagree—and, indeed, have disagreed—over whether fair use in the
 9 context of LLM training should be analyzed by reference to ultimate purpose or broken up into
 10 subsidiary steps. In *Kadrey*, Judge Chhabria maintained that all of Meta’s copying of books from
 11 the Internet must “be considered in light of its *ultimate*, highly transformative purpose: training [the
 12 LLM].” *Kadrey Op.* at 21 (emphasis added). Because all relevant copies “had the ultimate purpose
 13 of LLM training,” Judge Chhabria found them all to be protected by fair use doctrine, even if “only
 14 some” were actually “used for [LLM] training.” *Id.* at 21-22. This reasoning cannot be reconciled
 15 with this Court’s focus on subsidiary steps rather than “ultimate use.” Order at 22. Moreover, in
 16 Judge Chhabria’s view, even copies made simply “to see whether the books in the database made
 17 for good training data” were “a reasonable first step towards training an LLM.” *Kadrey Op.* at 22.
 18 He further observed that “even if Meta did download some copies that weren’t ultimately used for
 19 training, fair use doesn’t require that the secondary user make the lowest number of copies
 20 possible.” *Id.* (citing *Connectix*). And he never considered whether Meta had retained copyrighted
 21 books after using them for training. Judge Chhabria’s reasoning cannot be squared with this Court’s
 22 concern that “[n]ot every copy [Anthropic made] was even necessary nor used for training
 23 LLMs”—which undergirded its conception of a separate “central library” use. Order at 21-22.

24 Contrary to the Court’s suggestion, Order at 19-20, *Andy Warhol Foundation for the Visual*
 25 *Arts, Inc. v. Goldsmith*, 598 U.S. 508 (2023), does not resolve the question in Plaintiffs’ favor. In

26 _____
 27 ² At the summary judgment hearing, this Court stated that it was “not sure *Texaco* is on point.”
 28 MSJ Tr. at 67. The Court explained that whereas in *Texaco*, the relationship between the copied
 journals and “some transformative future product . . . was so attenuated that you could not say that
 that was fair use, [i]n our case there was a direct use of these products to create and train this
 artificial intelligence machine learning.” *Id.* Anthropic agrees with this statement.

1 *Warhol*, the Supreme Court observed that “[t]he same copying may be fair when used for one
2 purpose but not another,” noting that the copyrighted photograph at issue “has been used in multiple
3 ways.” *Id.* at 533. But the original photograph in *Warhol* was copied to multiple distinct ends—
4 from creating an illustration, to creating 15 further works, to licensing one of those further works
5 to a magazine. *Id.* at 534. Here, the asserted uses—downloading books, storing the books data,
6 training the LLMs on the data, and retaining the data for future training—are all interconnected
7 steps. As noted, Anthropic is an AI company that develops and researches LLMs; it has no other
8 mission or product to which Plaintiffs’ books are plausibly relevant.

9 Ninth Circuit precedent likewise does not support Plaintiffs’ position. This Court relied on
10 *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007), and *Kelly v. Arriba Soft Corp.*,
11 336 F.3d 811 (9th Cir. 2003), but those cases found fair use, emphasizing that—as here—the
12 defendant search engines put the plaintiff’s “thumbnail images” to a “significant transformative
13 use.” *Perfect 10*, 508 F.3d at 1168; *see also Kelly*, 336 F.3d at 819. The Ninth Circuit did not ask
14 whether the images were “deployed immediately” or “immediately deleted.” Order at 21. Nor did
15 it suggest that the defendants’ uses were unfair simply because they had “download[ed]” the
16 plaintiffs’ images onto a “server” and stored them in a “database” before using them. *Kelly*, 336
17 F.3d at 815. And in *Connectix*, the court found fair use while deeming it irrelevant that the
18 defendant may have “ma[d]e more intermediate copies” than “necessary” and “repeatedly copied”
19 material to “find out how the Sony PlayStation worked.” 203 F.3d at 598, 605. This Court, in
20 contrast, found it significant that “[n]ot every copy was even necessary” to train LLMs, Order at
21 22—without considering how Anthropic could have known which book datasets were useful for
22 training without assessing them to “find out,” just as the defendant did in *Connectix*. 203 F.3d at
23 598.

24 The “novel and difficult” legal issue here will recur in the many pending copyright
25 challenges to generative AI tools. *Reese*, 643 F.3d at 688; *see supra* at 3 (listing cases). As this
26 Court recognized, LLM development involves multiple steps, including cleaning the data,
27 translating it into a tokenized copy, and uncovering “contingent statistical relationships” through
28 an “iterative” process. Order at 6. A copyrighted work therefore cannot be “immediately” used to

1 train an LLM, in part because it takes time to amass and assess the amount of diverse data required
2 to train a model. Additionally, because techniques for processing data are quickly improving, LLM
3 developers may store raw data for further processing as advanced techniques develop, as well as to
4 run experiments comparing old and new methods to determine which results in a more capable
5 LLM. And both before and after training, data must be stored and organized in some location. In
6 addition, defendants who immediately deleted training data would run the risk of spoliation
7 accusations by potential plaintiffs. In other words, in *all* copyright challenges to generative AI
8 tools, plaintiffs could seek to parse the process of LLM training into constituent steps and argue a
9 lack of “immediate” use. The acceptance or rejection of such arguments could well shape the
10 outcome in this entire line of industry-defining cases.

11 ***Materially advance the litigation:*** Finally, an interlocutory appeal will “materially advance
12 the ultimate termination of the litigation” by providing guidance on the proper approach to fair use.
13 *See* 28 U.S.C. § 1292(b). This factor does not insist on “a final, dispositive effect on the litigation,”
14 so long as an appeal could move the ball forward toward resolution. *Reese*, 643 F.3d at 688. If the
15 Ninth Circuit were to adopt Anthropic’s view that the ultimate purpose of developing the LLM is
16 what matters, then it would be legally irrelevant whether Anthropic took the supposed initial step
17 of assembling a “central library” of data or the later step of retaining copies that may later be needed
18 for further training. In that circumstance, summary judgment should be granted for Anthropic in
19 full, averting the need for a trial. And where “a different outcome in the court of appeals would
20 *end* the litigation,” an interlocutory appeal will plainly “advance the ultimate termination of the
21 litigation.” *Estate of Amaro v. City of Oakland*, No. C 09-01019, 2010 WL 669240, at *15 (N.D.
22 Cal. Feb. 23, 2010) (Alsup, J.) (emphasis added). Moreover, even if the Ninth Circuit were to adopt
23 a position other than Anthropic’s, it would provide helpful guidance on the proper fair-use standard
24 and minimize the chance that any trial will have to be redone, thus “materially advanc[ing] the
25 ultimate termination of the litigation.” 28 U.S.C. § 1292(b).

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1 **B. Interlocutory Review Is Warranted to Determine Whether a Defendant’s**
2 **Acquisition of a Copyrighted Work From an Unauthorized Source Counsels**
3 **Strongly Against Fair Use, Even if the Defendant’s Ultimate Use of that Work**
4 **Is Transformative**

5 The Court’s Order raises a second controlling legal question that also warrants immediate
6 review: whether a defendant’s initial acquisition of a copyrighted work from a third party who
7 distributed the work without permission counsels strongly against fair use—even if the defendant’s
8 ultimate use of that work is transformative. This Court and Judge Chhabria offered divergent
9 approaches to that issue, and its resolution will materially affect the disposition of this and the many
10 similar pending cases.

11 *Controlling question of law:* This Court’s Order presents a “question of law” about how a
12 defendant’s initial acquisition of a copyrighted work from an unauthorized source affects the fair
13 use analysis. 28 U.S.C. § 1292(b). Section 107 of the Copyright Act references neither the means
14 of acquisition nor the source of the copyrighted work as relevant fair-use factors. *See* 17 U.S.C.
15 § 107. And the Ninth Circuit has found fair use even when the defendant copied images from
16 websites that had themselves distributed those images “without authorization.” *Perfect 10*, 508
17 F.3d at 1157. Nonetheless, the Court “doubts that any accused infringer could ever meet its burden
18 of explaining why downloading source copies from pirate sites” was “reasonably necessary to any
19 subsequent fair use.” Order at 18. Thus, the Court’s analysis raises the legal question of what
20 effect making an initial copy from an unauthorized source—here, the so-called “pirate libraries,”
21 Order at 3—has on the fair use analysis.

22 This legal question is “controlling” because it “could materially affect the outcome of the
23 litigation.” *In re Cement Antitrust Litig.*, 673 F.2d at 1026. Although the Court stated that it “need
24 not decide this case on th[e] rule” that an initial acquisition of copyrighted work from an
25 unauthorized source is “inherently” infringing, that “rule” will weigh heavily on further
26 proceedings in this case. Order at 18-19. Indeed, if the Court ultimately adopts that rule, then
27 Anthropic’s fair use defense could fail even if Anthropic disproves the notion of a “general-purpose
28 library” (as it believes it will upon more fulsome development of an evidentiary record). *Id.* at 30.
That prospect suffices to make the legal issue “controlling.” 28 U.S.C. § 1292(b); *see Kuehner*, 84

1 F.3d at 319 (issue can be controlling even if it will not necessarily “determine[] who will win on
2 the merits”).

3 ***Difference of opinion:*** Reasonable jurists may disagree—and, indeed, have disagreed—
4 about the significance of initial acquisitions of copyrighted work from third-party sources that
5 distributed the work without permission. Two days after this Court’s ruling, Judge Chhabria
6 granted summary judgment to Meta on the plaintiffs’ infringement claim despite “the fact that Meta
7 downloaded the [plaintiffs’] books from shadow libraries and did not start with an ‘authorized copy’
8 of each book.” *Kadrey Op.* at 19. Judge Chhabria explained that “[t]o say that Meta’s downloading
9 was ‘piracy’ and thus cannot be fair use begs the question because the whole point of fair use
10 analysis is to determine whether a given act of copying was unlawful.” *Id.* And he noted that the
11 plaintiffs there—like Plaintiffs here—“ha[d] not submitted any evidence” suggesting that “Meta’s
12 act of downloading propped up these libraries or perpetuated their unlawful activities.” *Id.* at 21.
13 Judge Chhabria’s reasoning conflicts with this Court’s suggestion that a defendant may not be able
14 to prove fair use after “downloading source copies from pirate sites.” Order at 18.³

15 Notably, this disagreement about the significance of unauthorized acquisition in the fair use
16 analysis closely tracks related precedent addressing what role, if any, bad faith plays in the fair use
17 framework. In both *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994), and *Google*, the
18 Supreme Court “expressed some skepticism about whether bad faith has any role in a fair use
19 analysis,” reasoning that “[c]opyright is not a privilege reserved for the well-behaved.” *Google*,
20 593 U.S. at 32 (citation omitted); *see also Campbell*, 510 U.S. at 585 n.18. Most recently, in
21 *Warhol*, the Court cast further doubt on the relevance of bad faith by “h[olding] squarely that it is
22 not the ‘subjective intent’ of a copyist that counts, but the ‘objective . . . use’ of the copy.” Order
23 at 20 n.5 (quoting *Warhol*, 598 U.S. at 544-45). Thus, this Court correctly observed that the Ninth
24 Circuit “has not yet reappraised how bad faith (or good faith) figures in fair use after *Warhol*” and
25

26 ³ This Court also observed that “[t]here is no decision holding or requiring that pirating a book that
27 could have been bought at a bookstore was reasonably necessary to writing a book review.” Order
28 at 18-19. Here, however, as the Court itself noted, “the volume of text required to train an LLM is
monumental,” *id.* at 26—and no market currently exists for that quantity of digital books.
Moreover, writing a book review does not require making a full copy of the book, whereas it is
undisputed that LLM development necessarily does.

1 *Google*, Order at 20-22 & n.5, while Judge Chhabria likewise noted that “[t]he law is in flux about
2 whether bad faith is relevant to fair use,” *Kadrey* Op. at 19.

3 This issue of initial copying from an unauthorized source—whether or not viewed through
4 the lens of bad faith—carries significant implications for the many pending copyright cases
5 involving generative AI technology, as well as for copyright law more broadly. The entire premise
6 of these cases is that technology companies trained their LLMs on copyrighted content absent the
7 rightsholders’ authorization. The fair use analysis should focus on the copies made by Anthropic,
8 not copies made by third parties over whom Anthropic had no control. Whether the rightsholders
9 authorized an unrelated third party to make a predicate “pirate” copy of the works should not taint
10 the defendant’s subsequent transformative use. Nor is it enough to say that the defendant’s copying
11 was unauthorized because that is an inherent feature of a fair use inquiry. If a contrary position
12 were widely adopted, then LLM training by any company that downloaded works from third-party
13 websites like LibGen or Books3 could constitute copyright infringement—even though, as this
14 Court correctly recognized, LLM training is “exceedingly transformative.” Order at 9.

15 ***Materially advance the litigation:*** Resolving this legal issue now “may materially advance
16 the ultimate termination of the litigation.” 28 U.S.C. § 1292(b). If Anthropic is correct that initial
17 unauthorized downloading of books from third-party websites should not preclude its fair use
18 defense (as Judge Chhabria held)—and in fact, should play little if any role in the analysis—then
19 judgment will likely be warranted for Anthropic given its highly transformative use of those works
20 to train its LLMs. That result would avert a trial that may be unnecessary or that will have to be
21 redone under the correct legal standard. The Court and the parties should obtain Ninth Circuit
22 guidance before a trial moves forward.

23 **IV. ALTERNATIVELY, THE COURT SHOULD PERMIT ANTHROPIC TO SEEK**
24 **RECONSIDERATION OF THE ORDER**

25 Alternatively, the Court should grant Anthropic leave to move for reconsideration of the
26 Order. Anthropic has shown the requisite diligence by filing this motion only 21 days after this
27 Court’s Order and 19 days after Judge Chhabria’s order in *Kadrey*. See Civil L.R. 7-9(b). It also
28 meets the substantive requirements for reconsideration. See *id.* 7-9(b)(2)-(3). The Order failed to

1 consider the material fact that the record does not support (nor did Plaintiffs argue) that Anthropic
2 downloaded books to create a “general-purpose library” separate from LLM development. And
3 the Order necessarily could not have considered the subsequently issued *Kadrey* opinion.
4 Accordingly, leave to seek reconsideration is warranted.

5 **A. The Order Manifestly Failed to Consider the Absence of Record Evidence that**
6 **Anthropic Downloaded Books to Create a General-Purpose Library Unrelated**
7 **to LLM Training**

8 The Order “manifest[ly] fail[ed]” to “consider material facts,” L.R. 7.9(b)(3), showing that
9 the record does not support the Court’s conclusion that Anthropic downloaded and retained books
10 to create a “general-purpose library of works for various uses for which the company might have
11 of them,” Order at 30. Instead—and as Plaintiffs have acknowledged, *see* MSJ Opp. at 1—the
12 record allows only one inference: that Anthropic downloaded and retained books to develop LLMs.
13 In particular, it is a matter of undisputed fact that when Anthropic first started developing LLMs in
14 2021, it obtained datasets composed of books from the Internet “as there were no other sources of
15 books datasets available that were *suitable to train LLMs*.” Kaplan Decl. ¶ 48 (emphasis added).
16 It is further undisputed that “datasets of books” then became “part of [Anthropic’s] training corpus
17 for its LLMs.” *Id.* ¶ 47. And it is still further undisputed that “the collection of a massive amount
18 of data”—including the books downloaded from the Internet—is a critical first step in “[t]he
19 iterative, multi-step LLM training process.” *Id.* ¶ 38.

20 Specifically, once data is collected, it must be “assembled into the training corpus” and
21 “processed” prior to training. *Id.* ¶ 54. Among other things, the data must be “filter[ed]” to
22 eliminate “low-quality” and “toxic” content and “to ensure the model aligns with human ethical
23 standards.” ECF No. 122-33 (MSJ Ex. 32) at 8. The data must also be converted into computer
24 code called “tokens” and then further converted into “‘vectors,’ which are mathematical
25 representations of how words relate to other words.” Kaplan Decl. ¶¶ 55-56. Only at that point
26 can LLM training begin—and such training involves “on the order of a million billion billion
27 repeated mathematical calculations,” through which “the model adjusts the weights based on the
28 vector inputs . . . as it learns more about how humans use words and concepts in writing.” *Id.* ¶ 56.
Again, all of these facts were undisputed. Accordingly, the record establishes, as a matter of

1 undisputed fact, that Anthropic acquired and stored books for the sole purpose of developing LLMs.

2 This Court nonetheless hinged its Order on what it found to be a potential conclusion
3 viewing the evidence in the light most favorable to Plaintiffs: that Anthropic acquired and stored
4 books to “[c]reat[e] a permanent, general-purpose library,” separate from the purpose of LLM
5 training. Order at 9. In so doing, the Court failed to address all of the undisputed facts discussed
6 above and instead relied principally on incomplete portions of deposition testimony from Anthropic
7 Vice President Tom Turvey. *Id.* at 3-5. As an initial matter, the portions of Turvey’s testimony
8 that this Court quoted addressed only the books that Anthropic purchased and scanned—not the
9 ones at issue here that Anthropic downloaded from the Internet. MSJ Opp. Ex. 22, at 145-146 (“We
10 were *purchasing* books . . . for the purpose of data acquisition that would help inform our . . .
11 products.”) (emphasis added). In fact, Turvey did not join Anthropic until 2024, and he initiated
12 the book scanning project years after Anthropic had downloaded the books datasets from Internet
13 sources in 2021 and 2022—so he had no firsthand knowledge of Anthropic’s acquisitions from
14 those sources. *See* ECF No. 123-2 (“Turvey Decl.”) ¶ 13. Therefore, none of Turvey’s statements
15 about his purposes in acquiring used books in 2024 have *any* bearing on Anthropic’s purpose in
16 *downloading* books from the Internet years earlier.

17 Moreover, the complete transcript of Turvey’s testimony provides important context for his
18 assertions. For instance, Turvey explained that when he referred to a “research library” and “use
19 for research,” he was not discussing a research purpose separate from LLM training. MSJ Opp.
20 Ex. 22, at 145. Specifically, when asked what he meant by those phrases, Turvey said: “*Research*
21 *that we would conduct when we were building our LLM.*” *Id.* at 145 (emphasis added). And when
22 asked whether “*building a research library*” was “*one and the same*” as “*train[ing] LLMs*,” Turvey
23 responded: “*Yes.*” *Id.* at 145-146 (emphasis added). The complete record will not support a
24 conclusion that there was a separate “general-purpose library.”

25 The Court also relied on an exhibit to Plaintiffs’ class certification motion—not the
26 summary judgment record—for its “general-purpose library” theory. Order at 5. But the quoted
27 document is from 2024—well after Anthropic’s 2021-2022 acquisition of books datasets from
28 Internet sites—and thus addresses only Anthropic’s efforts to purchase and scan books into digital

1 form. *See* ECF No. 121-8 (“Pls. CC Ex. 12”) at 144507 (listing date as 7/17/24); *id.* at 144508
2 (listing date as 5/23/24). Indeed, the quoted document expressly refers to “purchas[ing]” and
3 “scanning” “the books.” *Id.* at 144508; *see id.* at 144509 (referring to “scanning costs”). In short,
4 the document has nothing to do with the only works relevant to this Motion—those downloaded
5 from Internet sites years earlier.

6 The Court also quoted a statement that Anthropic planned to “store everything forever”
7 because there was “no compelling reason to delete a book.” Order at 5. But that statement directly
8 followed a statement that “these books’ data would be used across all models”—that is, all LLMs—
9 and supports the proposition that the future storage was only for the purpose of LLM training. Pls.
10 CC Ex. 12 at 144509. Similarly, the Court quoted the phrase “general purpose” from that
11 document, Order at 5, but “general purpose” was used in the document to modify the word “model,”
12 not “library,” Pls. CC Ex. 12 at 144509. In fact, the quoted document never used the term “library”
13 at all. *See id.*

14 These issues regarding the interpretation of the evidence are particularly significant because
15 the Court did not have the benefit of briefing on a “general-purpose library” theory. Plaintiffs never
16 asserted such a theory; to the contrary, they consistently referred to the relevant “use” as “[u]sing
17 books to train LLMs.” MSJ Opp. at 15; *see, e.g., id.* (arguing that “the infringing copies are the
18 numerous copies of Plaintiffs’ books Anthropic made to train its LLMs”). Among other things,
19 Plaintiffs asserted that Anthropic downloaded books to “fuel its commercial mission” of “train[ing]
20 thousands—possibly millions—of LLMs.” *Id.* at 14-15. Plaintiffs also emphasized that Anthropic
21 “used each of Plaintiffs’ works to train a commercially released Claude model.” *Id.* at 15 n.8.
22 Nothing in Plaintiffs’ briefing asserts that Anthropic used the downloaded books for a supposed
23 “general-purpose library.” Order at 30. Because Plaintiffs never raised a general-purpose library
24 theory, Anthropic never had a chance to rebut that idea. This Court should grant Anthropic leave
25 to move for reconsideration so that it can now have that opportunity. *See Blair v. Rent-A-Center,*
26 *Inc.*, No. C 17-02335, 2019 WL 529292, at *3 (N.D. Cal. Feb. 11, 2019) (Alsup, J.) (granting
27 reconsideration where a factual “subtlety went unnoticed” in the Court’s prior order).
28

1 **B. The *Kadrey* Decision Constitutes an Intervening Change of Law**

2 The Court may grant leave to move for reconsideration based on the “emergence of . . . a
3 change of law occurring after the time of [its] order.” Civil L.R. 7-9(b)(2). In a “rapidly changing
4 area of the law,” reconsideration may be warranted even in the wake of merely persuasive
5 “developing case authority.” *Doe By & Through Doe v. Petaluma City Sch. Dist.*, 949 F. Supp.
6 1415, 1417 (N.D. Cal. 1996); *see, e.g., J.B. v. G6 Hospitality, LLC*, No. 19-cv-07848, 2021 WL
7 4079207, at *4 (N.D. Cal. Sept. 8, 2021) (reconsidering prior order because of two intervening
8 district court opinions reaching a contrary conclusion on an unsettled question under Section 230
9 of the Communication Decency Act). This case plainly arises in a rapidly changing area of the law.
10 Thus, the Court may regard the conflicting decision in *Kadrey* as an applicable change in law, even
11 though that decision is not controlling authority, and grant leave for Anthropic to move for
12 reconsideration on that basis.

13 **V. CONCLUSION**

14 Based on the foregoing, Anthropic respectfully requests that the Court certify its Order for
15 interlocutory appeal. Alternatively, Anthropic respectfully requests that the Court grant leave for
16 Anthropic to move for reconsideration of the Court’s Order.

17 Dated: July 14, 2025

COOLEY LLP

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By: /s/ Kathleen R. Hartnett
Kathleen R. Hartnett

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Attorneys for Defendant
Anthropic PBC

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CERTIFICATE OF SERVICE

I, Kathleen Hartnett, am the ECF user whose identification and password are being used to file the foregoing Defendant Anthropic PBC’s Motion for an Order Permitting Interlocutory Appeal Pursuant to 28 U.S.C. § 1292(b) or, in the Alternative, Motion for Leave to File Motion for Reconsideration.

Dated: July 14, 2025

By: /s/ Kathleen R. Hartnett
Kathleen R. Hartnett