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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
WESTERN DIVISION

- - -

HONORABLE DEAN D. PREGERSON, DISTRICT JUDGE PRESIDING

SOFTWARE FREEDOM CONSERVANCY,	)	
INC.,	)	
	)	
Plaintiffs,	)	
	)	
	)	
	)	No. SACV 21-01943-JLS
vs.	)	
	)	
	)	
VIZIO, INC., et al.,	)	
	)	
Defendants.	)	

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REPORTER'S TRANSCRIPT OF PROCEEDINGS  
*PLAINTIFF'S MOTION TO REMAND TO ORANGE COUNTY SUPERIOR COURT*  
*[14]*

LOS ANGELES, CALIFORNIA  
FRIDAY, MAY 13, 2022

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OFFICIAL COURT REPORTER  
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A P P E A R A N C E S

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I N D E X

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LOS ANGELES, CALIFORNIA; FRIDAY, MAY 13, 2022

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(COURT IN SESSION AT 10:35 A.M.)

THE COURTROOM DEPUTY: Calling item number two,  
SACV 21-01943-JLS: *Software Freedom Conservancy, Inc. v. Vizio, Inc., et al.*

Counsel, please state your appearances.

MR. SCHLAFF: It's John Schlaff from the Law Offices of Vakili and Leus, and I'm appearing on behalf of Software Freedom Conservancy.

MR. WILLIAMS: Good morning, Your Honor. Michael Williams on behalf of Quinn Emanuel on behalf of defendant Vizio.

THE COURT: Good morning. All right. We're here on the plaintiff's motion to remand and the defendant's motion to dismiss. Obviously, they are intertwined, but I am going to focus for purposes of oral argument and any questions I may have on the motion to remand today. So with that, it's plaintiff's motion, and we'll begin with plaintiff's counsel. And, again, I just may have a few questions, because it is a little bit unusual. There have been an a few decisions -- related decisions, but let me hear more.

MR. SCHLAFF: Your Honor, this is John Schlaff. First, I'd like to point out that as we mentioned in our

1 papers, although, it is our motion, it is their burden  
2 to establish their right to be here. This is clearly  
3 not appropriately brought before the federal court. The  
4 rights that are at issue here are rights that are  
5 uniquely available through contract rather than  
6 copyright. We are seeking specific enforcement of a  
7 provision of the agreement. There's no mechanism under  
8 the copyright law for such specific enforcement. This  
9 is not like any of the cases that they've cited in their  
10 favor, and there are a few things in several of the  
11 cases that they've cited in their favor, which actually  
12 show the error in their argument, particularly, in  
13 *Jacobsen II*, they actually quote language in  
14 *Jacobsen II* at page 17 of their opposition. And they  
15 point out that in *Jacobsen II*, the Court says that the  
16 test for whether something is exclusively within the  
17 ambit of copyright, that you have to demonstrate  
18 that there -- that -- that there are not rights or  
19 remedies available under the Copyright claims that are  
20 not otherwise available under the copyright law.  
21 Clearly, we have remedies that we're seeking through the  
22 contract action. And all of the remedies that we're  
23 seeking through the contract action, in fact, are  
24 remedies that really are not available to us under the  
25 copyright law.



1 the last ten pages, the only cause of action would be  
2 for breach of contract, because reading a book does not  
3 violate any right protected by copyright law. And  
4 before that, the -- in -- in quoting that hypothetical,  
5 the MDY court says to recover for copyright infringement  
6 based on a breach for license agreement, the copying  
7 must exceed the scope of the defendant's license, and  
8 the copyright owner's complaint must be grounded in the  
9 exclusive right of a copyright. So if it goes to the  
10 actual copying, then there -- there's some -- then that  
11 is within the ambit of copyright, but if you're seeking  
12 remedies afterwards that involve a state court remedy  
13 like specific performance, copyright has no exclusive  
14 hold. This is an extra right, and this is a clear extra  
15 right case. The -- the --

16 THE COURT: Your papers are very good. And  
17 I've read them. And so I mean, if there's something  
18 else you'd like to highlight, I'll let you do it,  
19 otherwise, I will go ahead and turn to counsel for  
20 defendant.

21 MR. SCHLAFF: Well, I'd like to reserve a few  
22 minutes to whatever they say, but beyond that....

23 THE COURT: Yes, you may do that.

24 MR. SCHLAFF: But I'm here for your questions,  
25 Your Honor.

1           THE COURT: All right. So, Mr. Williams, how  
2 is this not a -- the sort of extra element? How does  
3 this not go beyond copyright law?

4           MR. WILLIAMS: Sure. Thank you, Your Honor.

5           This is, in fact, a textbook case of artful  
6 pleading where the plaintiffs are trying to avoid  
7 federal jurisdiction under the Copyright Act. The --  
8 the fact is and the MDY case, I believe, is very  
9 significant to this case. It makes clear that if the  
10 condition -- if it's a condition that's violated and  
11 that condition relates to an exclusive right under the  
12 Copyright Act, then there's a claim for copyright  
13 infringement. If it's only a covenant which is just a  
14 promise, then the claim is for breach of contract.  
15 Here, the Court issue is the language in the general  
16 public license that talks about the source code  
17 provision. That is contained within a section of the  
18 license that makes clear that it is a condition. The  
19 condition clearly states that if you want to copy,  
20 distribute or modify the software, all of which are  
21 exclusive rights under the Copyright Act, you must do  
22 these things, and namely, provide a copy of the source  
23 code. The license goes on to say that if you don't  
24 comply, your license is terminated, your rights are  
25 gone, and -- and you have no right to copy, distribute

1 or otherwise modify the software. That is a -- a  
2 typical claim to copyright infringement. And how do  
3 we know this? Well, the creator of the GPLs -- the free  
4 software foundation -- makes clear in its frequently  
5 asked questions, who has the power to enforce the GPL.

6 THE COURT: Well, isn't -- I mean, but  
7 that's -- they're frequently asked questions. The  
8 answer isn't really binding on the court. Isn't it  
9 their just informal way of saying, we hold the  
10 copyright, and we enforce under the copyright law?

11 MR. WILLIAMS: Well, it I think is instructive.  
12 It's also -- it makes the license itself, which the  
13 Court -- obviously, is a critical piece here -- the  
14 license itself makes clear that it only covers  
15 activities involving copying, distribution and  
16 modification. Each of those activities are exclusive  
17 rights under the -- under the Copyright Act. So the  
18 question is --

19 THE COURT: So let me -- let me just ask this  
20 question very directly: If there is a third party  
21 beneficiary under the contract, how would that third  
22 party beneficiary ever enforce the right to receive the  
23 source code, if that's provided for in the agreement?

24 MR. WILLIAMS: Well, I don't believe there is a  
25 third-party beneficiary under the --

1 THE COURT: Well, that would be for the state  
2 court really to decide, right?

3 MR. WILLIAMS: Well, it would, however --

4 THE COURT: I'm asking more abstractly.

5 MR. WILLIAMS: Sure.

6 THE COURT: If there's a -- if there is a right  
7 under the contract that the third-party beneficiary can  
8 enforce the right to receive code, if it's framed that  
9 way, how could they enforce it under the copyright law?

10 MR. WILLIAMS: They can't. And that assumes  
11 that they have a right to receive the code, and that  
12 sort of puts the cart before the horse, because what  
13 we're talking about here is, this is a license that has  
14 a clear condition. If you want a copy -- if you want  
15 the right to copy, distribute and modify the software,  
16 you have to do these things. If you don't do that, you  
17 have stepped outside of the license. License  
18 terminates, and you're liable for copyrighting. That's  
19 distinct --

20 THE COURT: But I think you're getting that --  
21 the idea that this condition means that it's only  
22 enforceable via copyright by an overly broad reading of  
23 MDY. I -- I tend to agree with the plaintiff that MDY  
24 wasn't saying that you may not sue for breach of  
25 contract in those circumstances where you may be able to

1 sue for copyright infringement.

2 MR. WILLIAMS: But the problem with that  
3 argument, Your Honor, and I believe their reply brief  
4 essentially says that a party could elect between  
5 copyright infringement or a breach of contract. That is  
6 entirely inconsistent with the very concept of  
7 preemption, because if a party can elect a -- either  
8 based upon the same conduct -- here it's the failure to  
9 comply, alleged failure to comply with the source code  
10 bridge. If they can either elect a copyright claim or a  
11 breach of contract claim, those rights are equivalent.  
12 You can't have the breach of contract claim based upon  
13 the same underlying misconduct.

14 THE COURT: So let me -- let me ask about the  
15 hypothetical that was raised in the case that  
16 Mr. Schlaff just identified -- the one about reading the  
17 last ten pages. So let's say that -- that the copyright  
18 holder says, you may make one copy, but you may not read  
19 the last ten pages. If you do, your -- your  
20 copyright -- your rights terminate. Are you saying that  
21 because -- because they say that's a condition --  
22 whatever condition they put, that becomes exclusive then  
23 at that point?

24 MR. WILLIAMS: No, Your Honor. And MDY makes  
25 that point very clear. MDY says that one, it has to be

1 breached of a condition of the license, and that  
2 condition must relate to an exclusive right under the  
3 Copyright Act. Here, the condition that is being  
4 violated, the source code provision, relates  
5 specifically to the copying distribution and  
6 modification of the software. So it meets the MDY  
7 standard that says there has to be a nexus. You  
8 can't -- and MDY is a --

9 THE COURT: Well, but the hypothetical he gave,  
10 it created a nexus. In other words, any condition that  
11 the copyright holder places can be tied to, and if you  
12 don't do -- if you do X or don't do X, this agreement  
13 terminates. Well, that's a condition then. You  
14 can't -- you -- you no longer have the right to  
15 distribute or copy if you don't do X.

16 MR. WILLIAMS: So, Your Honor, MDY specifically  
17 addresses this issue, and it's at 629 F.3d -- let's see,  
18 the pin cite appears to be 940, 941. It says, "Here the  
19 terms of use, Section 4, contains certain restrictions  
20 that are grounded in Blizzard's exclusive rights of  
21 copyright and other restrictions that are not. For  
22 instance, term of use Section 4(d) forbids creation of  
23 derivative works based on *World of Warcraft* without  
24 Blizzard's consent. A player who violates this  
25 prohibition would exceed the scope of their license and

1 violate one of Blizzard's exclusive rights under the  
2 copyright. In contrast, term of use force 4(C) (ii)  
3 prohibits a player's disruption of another player's game  
4 experience. A player might violate this prohibition  
5 while playing the game by harassing another player with  
6 unsolicited instant messages. Although, this conduct  
7 may violate the contractual covenant with Blizzard, it  
8 would not violate any of Blizzard's exclusive rights of  
9 copyright." And it goes on to say, "Were we to hold  
10 otherwise, Blizzard -- or any other software copyright  
11 holder -- could designate any disfavored conduct during  
12 software use as copyright infringement, by purporting to  
13 condition the license on the player's abstention from  
14 the disfavored conduct. The rationale would be that  
15 because the conduct occurs while the player's computer  
16 is copying the software code into RAM in order for it to  
17 run, the violation is copyright infringement. This  
18 would allow software copyright owners far greater rates  
19 than Congress has generally confirmed under the  
20 Copyright Act claim." So, again, it addressed that.  
21 It's that the condition has to be tied to the exclusive  
22 right. If it is, that's copyright infringement. And  
23 here, the condition that if you want you to copy, modify  
24 or distribute the software, you must comply with it.  
25 You must make the source code available upon request.

1 That's tied to the exclusive rights of the copyright  
2 owner to copy, distribute or modify the software.

3 THE COURT: All right.

4 MR. WILLIAMS: If -- if there was some other --  
5 and that's the -- the concern here is that there are no  
6 cases -- and I would have gone through them -- and I can  
7 distinguish them that -- that say -- that address the  
8 issue that say a copyright holder could simply choose,  
9 based upon the same conduct, whether to pursue copyright  
10 infringement or breach of contract. There are cases  
11 that say you have a copyright infringement claim for  
12 exceeding the scope of the license, and you have a  
13 breach of contract claim for violation of some other  
14 covenant, and there are cases that plaintiff cites  
15 that -- that deal with that. The *Effects* case from the  
16 Ninth Circuit -- the case that Judge Kozinski offered,  
17 that didn't hold that the parties can simply elect. It  
18 said there was -- in that case there was no written  
19 license agreement. So the question was, is there an  
20 implied license. If there's no implied license to use,  
21 the -- the copyrighted material, then there's copyright  
22 infringement. If there is an implied license, then your  
23 remedy is left to breach of contract. So all of the  
24 cases fall under the same rubric of whether the issue  
25 involved is a condition that's tied to an exclusive

1 right under the contract -- under the license. And if  
2 so, your remedy is copyright. Otherwise, to allow them  
3 to convert to a breach of contract claim would violate  
4 the very purpose behind preemption, is to not allow  
5 state law claims to interfere with what Congress has  
6 decided to be the exclusive rights. And, again, because  
7 this is a case of artful pleading, the court can  
8 properly look at extrinsic evidence. And in their --  
9 you know, I do want to address, they claim that -- you  
10 know, our reference to the correspondence with them is  
11 somehow inadmissible settlement discussions, but they  
12 referenced their demand letter to us in their complaint,  
13 none of which says it's for settlement purposes.

14 THE COURT: Regardless of inadmissibility, I'm  
15 not sure of relevance though. I mean, I don't decide  
16 what the Copyright Act means and whether it falls within  
17 an exclusive copyright provision based on pre-litigation  
18 arguments of one side or the other.

19 MR. WILLIAMS: Understood, Your Honor, but it  
20 demonstrates, we believe, the disingenuous nature of  
21 their position, and so they -- leading up to this,  
22 they -- they've agreed with all of our positions. I  
23 mean, Exhibit 2, the Williams' declaration -- which is  
24 their demand letter -- is entirely consistent with the  
25 arguments we've laid out as to why these claims are in

1 effect. It's -- Vizio has failed to comply with this  
2 particular source code provision; they instantly  
3 terminated all our rights, which then leads to give rise  
4 to a claim for copyright infringement. That is their  
5 position. That shows that what they've now put in to  
6 state court is an artful pleading way to try to avoid  
7 federal preemption, because they recognize they don't  
8 have the ability to bring a copyright claim, because  
9 they're not the copyright holders. They're trying to  
10 greatly expand the law here and -- and basically do away  
11 with the preemption argument, because they're staying  
12 the same conduct. It's not just an essential element.  
13 It has to be an essential element that transforms the  
14 nature of the claim, but the conduct here is identical.  
15 They're saying we failed to comply with the source code  
16 provision, and, therefore, we're liable for breach of  
17 contract, but if that's the condition to the license  
18 that relates to the copying and modification of  
19 distribution of the software --

20 THE COURT: But -- but what is your limitation  
21 on what relates to the copying right or distribution of  
22 the software? In other words, what you're saying is a  
23 copyright holder could enter into a licensing agreement  
24 that conditions anything on, if you violate -- if you  
25 violate this term of the contract, you -- you are going

1 outside the scope of the -- of your license. They could  
2 say that about anything, correct? You -- you are not  
3 entitled to modify or distribute, unless you comply with  
4 all of these different terms, and they could be along  
5 the lines of the ones identified in MDY. What -- how is  
6 it that other than by -- by proclamation, you know,  
7 the -- this is tied to distribution? I mean, the -- as  
8 the plaintiffs -- as the plaintiff points out, the right  
9 they are seeking is greater -- it's greater  
10 distribution. In other words, it's essentially the  
11 opposite of what is typically protected under copyright  
12 law. And it's -- in their view, whether correctly or  
13 incorrectly -- to benefit them as third parties to a  
14 contract. And so they can't bring it as a copyright  
15 claim. The nature of the claim is one that is contrary  
16 to exclusive rights under the copyright. So you're  
17 saying simply by the fact that the copyright holder has  
18 linked it to distribution, means that -- that that's it;  
19 that you can't meet the standard of an extra element  
20 that changes the nature of the action.

21 MR. WILLIAMS: Your Honor, it's no different  
22 than the example you just gave, which is, if the  
23 copyright holder said, you could make one copy of this,  
24 and no more. That's tied -- that condition is tied to  
25 copying which is the copyright holder's exclusive right

1 to control. If -- this is not about the terms of use.  
2 The GPLs do not say you can -- you can't use this  
3 software to do A, B, C and D and that's a condition of  
4 the -- of the license. Here, it's saying, if you want  
5 to make a copy or you want to distribute it, you have to  
6 do this. They're intertwined with the exclusive rights  
7 under the Copyright Act. So if, for example, you know,  
8 there's some other provision in the contract that says,  
9 you know, you agree -- and that's why the cases they  
10 cite, the *Altera* case from the Ninth Circuit is readily  
11 distinguishable, because there it dealt with the right  
12 to use the software which is not an exclusive right  
13 under the Copyright Act. And it distinguished that from  
14 the right to reproduce.

15 THE COURT: What if the copyright holder were  
16 to tie use of the software to distribution? In other  
17 words, if you use it in the following prohibited ways,  
18 your distribution rights end. You can't distribute it  
19 to the extent you have distribution rights. You can't  
20 copy it. What if they tie it to use? If you use it in  
21 the way that we don't authorize, you can't distribute.

22 MR. WILLIAMS: Your Honor, I would have to know  
23 what the actual language, because it comes down to the  
24 contract interpretation, but if -- again, as the  
25 Ninth Circuit has said, if it is -- if there's a nexus

1 between the -- an exclusive right and a condition, then  
2 it's copyright infringement. So if -- you know, I'd  
3 have to see -- I mean, because again, *Altera* and *MDY*  
4 dealt with terms of use that were violations of the --  
5 of the agreement, but because they were used and not the  
6 right to copy or distribute -- which are exclusive  
7 rights -- the court found that they were only covenants.  
8 So, again, I mean, it comes down to a question of how is  
9 this -- I mean, it would -- it would essentially undo  
10 any, you know, the *MDY* decision to say, that, well, I  
11 mean, if you put any limitation on the ability to copy  
12 or distribute or modify, then that is -- that meets the  
13 standard then. And that's exactly what the court in  
14 *Jacobsen II* -- I mean, again, think about it in a sense  
15 that there is no -- that what -- there is no extra  
16 element. I mean, here, the elements are identical.  
17 They haven't identified what the -- how this element  
18 transforms the nature of the claim. I mean, that's a  
19 significant issue here, because --

20 THE COURT: I'll give you one more minute, and  
21 then I'll give plaintiff a couple of minutes in  
22 response, and then we need to move on to the next one.

23 MR. WILLIAMS: Okay. So, Your Honor, I think  
24 that -- again, looking at the cases that they have cited  
25 in their reply -- we have, for example, the *Crispin* case

1 that talks about, you know, there, the breach of  
2 contract claim was based on a different term than the  
3 copyright infringement claim. Vizio's position is not  
4 that you can never have a case which a breach of  
5 contract claim and a copyright claim coexist, but you  
6 can't have a case where the breach of contract claim and  
7 the copyright infringement claim are based on the  
8 identical conduct, because at that point, they're  
9 equivalent and under Section 301, the state law claim is  
10 preempted. And we -- and, again, I believe that the --  
11 the language of this license agreement makes it clear  
12 that you terminate, you go outside, you exceed the  
13 scope, that gives rise to the claim for copyright  
14 infringement. That's how you determine if this is a  
15 copyright case or a contract case. We believe it  
16 clearly is a -- a copyright case, and they have artfully  
17 pled around it. And their positions in prior  
18 litigation -- and even with us previously is -- is  
19 indicative of the fact that this is an artful pled  
20 complaint.

21 THE COURT: All right. Thank you.

22 Mr. Schlaff, I'll just give you another minute or so.

23 MR. SCHLAFF: Your Honor, first of all, this  
24 whole condition covenant thing that they're putting  
25 before Your Honor, they're importing from a series of

1 cases that are about a litigant trying to open the door  
2 to copyright, to enforce a right through copyright as  
3 opposed to breach of contract. In the *Sun Microsystems*  
4 case, for example, there's an attempt to go through  
5 copyright, because there's a -- at that time, there was  
6 presumption of irreparable harm, and they wanted that  
7 presumption. The cases that we've cited are under the  
8 Ninth Circuit about copyright and contract cases being  
9 able to coexist, are myriad. The *MDY* case talks --  
10 specifically says, contractual rights are much broader  
11 than the right under a copyright. Copyrights now --  
12 contract rights are broader. Their whole analysis  
13 ignores the extra element test, and it ignores the  
14 language that they, themselves quote that say an extra  
15 element is not only an extra element giving rise to  
16 the -- the cause of action, but an extra remedy.  
17 There's a remedy that you can't get through copyright.  
18 You can get it through state law cases. And  
19 there's simply nothing that supports their position.  
20 They've taken --

21 THE COURT: So are you -- so is the plaintiff  
22 conceding that this is a -- that there is a covenant  
23 condition distinction and that this is a condition?

24 MR. SCHLAFF: I don't think that there is a  
25 covenant condition distinction for whether or not you

1 can assert a contract cause of action. They're taking a  
2 distinction that that was -- that was written out in a  
3 series of cases that were about whether the plaintiff  
4 got to use the presumption of irreparable harm under --  
5 under copyright. And it might be -- that analysis might  
6 be pertinent to that kind of case, but it's irrelevant  
7 to this case.

8 THE COURT: All right. All right. I think I  
9 have enough information. And I appreciate the  
10 arguments, both in the papers and here today. I think  
11 that your papers were very good. So I appreciate that.  
12 And the matter will be taken under submission, and the  
13 Court's ruling will be posted on the docket.

14 MR. WILLIAMS: Your Honor, just as a  
15 housekeeping matter, you had mentioned the motion to  
16 dismiss. If the Court may recall, the parties that  
17 originally agreed to have the motion to dismiss and the  
18 remand motion set for, I believe it was June 3rd, and  
19 then the Court advanced the remand motion hearing to  
20 today. So our -- we have a reply brief that is due on  
21 the motion to dismiss next Friday, the 20th which is two  
22 weeks before that scheduled hearing. So I just wanted  
23 to clarify that that was on a separate track, based upon  
24 the stipulated court order?

25 THE COURT: Oh, I wasn't sure that we had done

1 it that way. So that was my fault, I suppose in  
2 introducing the case, because I thought that both were  
3 in front of me, but I focused on remand first for  
4 obvious reasons. One does not decide a motion to  
5 dismiss until one has decided remand. So when is your  
6 reply brief due?

7 MR. WILLIAMS: A week from today, the 20th.

8 THE COURT: All right. If I think that I need  
9 more time, I will -- I will let you know, and we'll move  
10 that; but for right now, I don't think anything else  
11 needs to take place on that.

12 MR. WILLIAMS: Okay. Thank you, Your Honor.

13 THE COURT: I mean, I don't have to change  
14 anything just yet. All right. Okay. Thank you, both.

15 MR. SCHLAFF: Thank you, Your Honor.

16 MR. WILLIAMS: Thank you, Your Honor.

17 (Whereupon, proceeding adjourned.)

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SOFTWARE FREEDOM CONSERVANCY, :  
INC. : No. SACV 21-01943-JLS  
vs. :  
VIZIO, INC., et al.

I, MARIA BUSTILLOS, OFFICIAL COURT REPORTER, IN AND FOR THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, DO HEREBY CERTIFY THAT PURSUANT TO SECTION 753, TITLE 28, UNITED STATES CODE, THE FOREGOING IS A TRUE AND CORRECT TRANSCRIPT OF THE STENOGRAPHICALLY REPORTED PROCEEDINGS HELD IN THE ABOVE-ENTITLED MATTER AND THAT THE TRANSCRIPT PAGE FORMAT IS IN CONFORMANCE WITH THE REGULATIONS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES. FEES CHARGED FOR THIS TRANSCRIPT, LESS ANY CIRCUIT FEE REDUCTION AND/OR DEPOSIT, ARE IN CONFORMANCE WITH THE REGULATIONS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES.

/s/ \_\_\_\_\_ 07/02/2022  
MARIA R. BUSTILLOS DATE  
OFFICIAL REPORTER

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