No. 20-35359

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AMAZON.COM, INC. and A2Z DEVELOPMENT CENTER, INC.,

Appellants,

v.

B.F. and A.A., minors, by and through their guardian JOEY FIELDS, et al,

Appellees.

Appeal from an Order of the United States District Court
for the Western District of Washington
Case No. 2:19-cv-910, Hon. Richard A. Jones

OPENING BRIEF OF APPELLANTS AMAZON.COM, INC. AND A2Z DEVELOPMENT CENTER, INC.

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, Amazon.com, Inc. states that it has no parent corporation and that no publicly held corporation owns 10% or more of its stock. As of January 1, 2020, a2z Development Center, Inc. was merged into Amazon.com Services LLC, which is wholly owned by Amazon.com, Inc.

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INTRODUCTION

The nominal Plaintiffs in this case are children who enjoy the benefits of Amazon's voice-activated Alexa service by interacting with Alexa-enabled devices purchased, registered, activated, and made available to Plaintiffs by their parents. This case will decide whether those same parents—who admit they agreed to and are bound by Amazon's terms in order to activate their families' Alexa-enabled devices—may circumvent those contractual terms, which require arbitration, by suing in their children's names. Equity and fundamental fairness say they cannot. Plaintiffs intentionally use the Alexa service that their parents set up for them, sharing their parents' accounts and using voice commands (as expected and intended for a voice-activated service) to access a wide range of entertaining and informative features. Having accepted these benefits with their parents' knowledge and approval, Plaintiffs are equitably estopped from avoiding the terms that were a precondition to that service.

In the course of installing up to a dozen devices in their homes, the parents expressly consented to voice recording, which is essential to translate voice instructions for computer processing. They also agreed to accept responsibility for all activities under their accounts, acknowledged that persons under the age of 18 can use Amazon services only with the involvement of a parent or guardian, and agreed to arbitrate all claims related to the Alexa service. Plaintiffs do not dispute

that these agreements were a necessary precondition for their households to receive the Alexa service. And they concede that the arbitration agreements are enforceable and prohibit the parents from bringing their own lawsuit in court.

Plaintiffs, for their part, allege that they "regularly" "directly interacted with" the Alexa service through their parents' accounts. Some Plaintiffs received devices for their own rooms, and in some cases named for them (e.g., "Julie's Echo"). Devices are customized with "Kid Skills" that their parents approved. Plaintiffs personally speak the "wake word," generally "Alexa," to engage the devices and obtain the many benefits of the service: e.g., games, music, help with homework, entertainment, and myriad other applications. Plaintiffs' voice commands are recorded as part of the necessary and intended function of the Alexa service. In supervising their children's use of the Alexa service, the parents may review all recordings in their households and delete those recordings at will. Yet now, those parents are attempting to avoid their agreements with Amazon by suing in their children's names, alleging that the children have not personally consented to the recording of commands to Alexa. Plaintiffs assert wiretap claims that the parents could not assert, seeking windfall statutory damages awards on a class-wide basis.

Equitable estoppel prevents this gambit. It is a shield against the inequity that would otherwise result from manipulation of parties to avoid the obligation to arbitrate. Estoppel "precludes a party from claiming the benefits of a contract while

simultaneously attempting to avoid the burdens that contract imposes." *See Townsend v. Quadrant Corp.*, 173 Wash. 2d 451, 461 (2012) (en banc) (quoting *Mundi v. Union Sec. Life Ins. Co.*, 555 F.3d 1042, 1045–46 (9th Cir. 2009)). It requires a person, of any age, to arbitrate when that person "knowingly exploit[s] the agreement containing the arbitration clause despite having never signed the agreement." *Mundi*, 555 F.3d at 1046; *see also Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171, 1179 (9th Cir. 2014). Critically here, the Ninth Circuit recognizes the doctrine of "direct benefits estoppel," *Nguyen*, 763 F.3d at 1179, which compels a nonsignatory to arbitrate where she "'knowingly exploits' the benefits of the agreement and receives benefits flowing directly from the agreement." *Id.*

Direct-benefits estoppel applies here: with their parents' knowledge and blessing, Plaintiffs affirmatively invoke "Alexa" to engage the Alexa service their parents set up for them. Plaintiffs, indeed, the entire family, receive precisely the same benefit flowing from the contract as do the parents—i.e., use of the Alexa service. Yet the Plaintiffs and their parents seek to avoid the corresponding burdens of the contract that enabled their families' benefits.

Equity cannot tolerate this result. The very people who knowingly approve of and supervise their children's use may not avoid the obligation to arbitrate by suing on their children's behalf. "[T]he law intends the privilege of infancy simply as a shield to protect the infant from injustice and wrong, and not as a sword to be

used to the injury of others." *Wise v. Truck Ins. Exch.*, 11 Wash. App. 405, 408–09 (1974) (alteration in original) (citation omitted). Bringing suit in the names of minors cannot obscure these families' intentional sharing of their Amazon accounts, the Alexa service, its benefits, and, as a result, its obligations.

On an undisputed record, the district court erred in denying arbitration. It wrongly held that a plaintiff cannot "knowingly exploit" a contract unless she sues on it. That view is far too narrow. Indeed, every other court that has considered direct-benefits estoppel for shared use of online services by intimate family members has compelled arbitration. This includes claims brought by sons, daughters, brothers, spouses, partners, and fiancés of account holders, several involving the Alexa service—all rejecting the artificial objection that the account is in the name of another family member. Thus, while this case presents a question of first impression to any court of appeal, all lower courts, other than the one below, have uniformly agreed that equitable estoppel applies to intimate family members who intentionally share the benefit of online accounts—the only fair result.

The Court should reverse and direct the district court to order arbitration in accordance with the applicable agreements.

JURISDICTIONAL STATEMENT

The district court had jurisdiction under the Class Action Fairness Act, 28 U.S.C. §§1332(d)(2) and (5)(B). This is a proposed class action in which: (1) the

combined claims of the putative class exceed $5,000,000; (2) Amazon and at least one class member are domiciled in different states; and (3) there are at least 100 proposed class members. ER465–67; ER480–83.

On April 9, 2020, the district court adopted United States Magistrate Judge Michelle L. Peterson's report and recommendation ("Report," ER005–27) denying Amazon's motion to compel arbitration. ER001–04. Amazon timely noticed its appeal on April 22, 2020. ER047; Fed. R. App. P. 4(a)(1)(A). This Court has jurisdiction under 9 U.S.C. §16(a)(1)(B), which provides for immediate interlocutory appeal of a denial of a motion to compel arbitration. *See Cox v. Ocean View Hotel Corp.*, 533 F.3d 1114, 1117 (9th Cir. 2008).

STATEMENT OF THE ISSUES

Whether Plaintiffs, in a suit brought on their behalf by their parents, are equitably estopped from circumventing the arbitration agreements entered by their parents, where those agreements were a precondition to activating the Alexa service that their families shared, and where Plaintiffs, with their parent-account holders' knowledge and approval, regularly obtained the myriad benefits of that service by directing voice commands and requests to their families' Alexa-enabled devices?

STATEMENT OF THE CASE

The facts are undisputed. In the proceedings below, Plaintiffs submitted no evidence, leaving Amazon's submissions uncontroverted.

A. Alexa is a service that lets users send instructions by speaking instead of typing.

Amazon operates the Alexa Voice Service, which allows users to access services and features by using voice commands. ER301 ¶¶2–3. The ability to speak to a device replaces the need to type on a keyboard, click a mouse, or touch a screen. Alexa users can speak requests to listen to music, ask for the weather or jokes, control TVs or other appliances, access third-party services such as Spotify, play games, get recipes, set timers and calendar reminders, and much more. *Id*; *see also* ER558-600.

To provide a voice command to the Alexa service, a user must first speak a "wake word" (typically "Alexa"). ER301 ¶¶2–3. For example, the user could say "Alexa, play The Rolling Stones" or "Alexa, what's tomorrow's weather?" *Id.*; *see also* ER464. When the device detects the wake word, it transmits the command that follows to the Alexa service in the cloud for processing and to generate a response. ER062; ER469 ¶28. The specific computer applications that enable certain of these functions are called "Alexa Skills." ER301 ¶3.

Amazon offers Alexa through devices like its Echo and Echo Dot smart speakers, as well as through mobile applications for the iOS and Android operating

systems. ER301 ¶2; ER559 ¶2. The photos below show the Echo and the Echo Dot, respectively:

Appellants' Motion to Take Judicial Notice ("RJN"), Exh. B; ER467–68 ¶20, n.3 (incorporating by reference website containing images).

B. Amazon clearly conveys to users that Alexa must make and use voice recordings for the service to work.

Because Alexa works with users' voices rather than a keyboard or touch-screen, the creation of a voice recording is essential to convert commands into

machine-readable text that a computer can process. Plaintiffs acknowledged throughout their complaint that this recording of Alexa interactions is part of Alexa's normal, intended operation:

- "Alexa is a natural-language processing system. Alexa 'listens' to people's verbal communications and responds to those communications in a simulated human voice." ER468 ¶23.
- "Alexa Devices are designed to record and respond to communications immediately after an individual says a wake word (typically "Alexa" or "Echo")." ER469 ¶27.
- "If the wake word is recognized, the Alexa Device records the ensuing communication..." ER469 ¶28.
- "Most people believe that when they speak to an Alexa-enabled device, it converts their voice into a set of digital computer instructions. They expect that this digital query is sent over the internet for processing, that a digital response is returned, and that the device then converts the response into Alexa's voice." ER464:6–9.

These admissions aside, there is nothing secretive about the fact that Alexa interactions are recorded, or how. For example, when Plaintiffs' parents first signed into the Alexa mobile application or website, as required to activate the service, they were taken to a "Welcome to Alexa!" page. It informed them that "Amazon

processes and retains audio, interactions, and other data in the cloud to provide and improve our services ... By tapping 'Continue', you agree to Amazon's Conditions of Use and all the terms found here." ER304–05 ¶7 (blue hyperlinks in original; emphasis added). The hyperlinked terms, in turn, reinforced that the parents agreed that the Alexa Service would make and keep voice recordings, pointing to instructions for deleting those recordings if desired:

> **1.3 Voice Services.** You control Alexa with your voice. Alexa streams audio to the cloud when you interact with Alexa. ***Alexa processes and retains your voice input*** and other information, such as your music playlists and your Alexa to-do and shopping lists, in the cloud to respond to your requests and improve our services. ***Learn more about these voice services including how to delete voice recordings associated with your account.***

ER385–86 (emphases added).

This "Learn more" hyperlink connects to the "Alexa and Alexa Device FAQs," a webpage that Plaintiffs' complaint incorporated by reference. ER062–90; ER470 ¶31 & n.11. These FAQs similarly explain Alexa's recording:

> **What happens when I speak to Alexa?**
>
> When you speak to Alexa, ***a recording of what you asked Alexa is sent to Amazon's cloud*** where we process your request and other information to respond to you. For example, when you ask "Alexa, play top hits on Amazon Music" ***we use the recording*** of your request and information from Amazon Music to play top hits.

ER062 (at Q3) (emphases added). The FAQs also describe how the recordings are

used, and how users can access and at any time delete their past recordings. ER063–65 (at Q9: "How are my voice recordings used?"; Q10: "How do my voice recordings improve Alexa?"; and Q6: "Can I review and delete my voice recordings?").

C. The parents set up Alexa devices specifically for the Plaintiffs' use.

Plaintiffs are children whose parents are prosecuting this action as their guardians. ER465–66 ¶¶1–12. (One Plaintiff turned 18 during this action and is now pursuing her claims in her own name. ER141 ¶3.) All allege they have "used" in their home, or that their home "contained," between one and a dozen Amazon Echos, Echo Dots, or other Alexa devices. ER472–80 ¶¶42–111; *see also* ER558–600. Plaintiffs did not dispute that "Plaintiffs' parents (or other account holders in the home) agreed to Amazon's terms and conditions as part of setting up the Alexa-enabled devices" (ER007), and that Plaintiffs used Alexa through these same accounts (ER010).

All Plaintiffs claim that they "directly interacted with an Alexa Device." ER472–79 ¶¶45, 51, 57, 63, 69, 75, 81, 87, 93, 99, 105, 111. All used their household Alexa devices "regularly" (or, at a minimum, "on several occasions") for a variety of helpful and entertaining purposes, including helping with homework, checking the weather, playing games, listening to jokes, listening to trivia, setting timers, playing music, and controlling their TVs. ER472-80 ¶¶45, 57, 63, 69, 99, 105, 111;

see also ER476–78 ¶¶75, 81, 87, 93; ER558–600. Plaintiffs and their households enabled their devices to perform as many as 70 different Alexa Skills. ER573–74 ¶51; ER558–600.

Plaintiffs do not contend that their use of Alexa lacks their parents' knowledge and consent. Nor could they. Some parents even dedicated Echo devices for their children's use, placing those devices in their children's rooms, *e.g.*, ER564 ¶19, or naming them for their children so as to distinguish them from other Echo devices in the home, for example "Boy's," "Charlotte's Room," "Jimmy's Echo Dot," and "Emma's Echo Dot." *Id.*; ER575 ¶54; ER577 ¶63.[1] In some instances, the devices were registered immediately after Christmas, reflecting that they were likely holiday gifts. ER563–66 ¶¶16, 21–22, 27; ER575 ¶55; ER577–78 ¶¶64–65 (showing devices registered to four families between December 25 and December 28).

The Alexa Skills selected in Plaintiffs' households include applications of interest to the entire family and a range of ages. ER558–600. For example, the O'Neil family's Echo has skills like "CNN Flash Briefing," "Pandora," and "Sleep and Relaxation Sounds," but also "Teen Jeopardy," "State Capital Game," and "4AFart." ER562–63 ¶13. At the Burris's home 64 different skills were activated

[1] The sealed portion of the record shows that these devices reflect the true names of the Plaintiffs. This brief substitutes "Charlotte," "Jimmy," and "Emma," for those names to preserve the confidentiality of the sealed materials.

on the family's eleven separate Alexa devices. Those skills include "NPR," "Nag My Kids," "Official Harry Potter Quiz," "SAT Word of the Day," "Farty Pants," as well as a number of defined "Kid Skills"—which are applications explicitly designed for children under 13 years old and require enhanced consents from parents (discussed below). ER566–67 ¶30. The Starling family, which named one of their Alexa devices the "Kitchen Dot," enabled dozens of different Kid Skills, like "Disney Sing-Along," "Hey Arthur," and "You and the Beanstalk." ER572 ¶47; ER573–74 ¶51. Plaintiffs' use of their households' Alexa devices is neither accidental nor incidental; it is pervasive, it is encouraged by the parents, and it includes kid-centered services that the parents approved. And there is no allegation or evidence that Plaintiffs' use has stopped: the record reflects devices still named for children, still using Kid Skills months after this suit was filed. ER566–67 ¶30; ER580–81 ¶76.

D. The parents agreed to supervise Plaintiffs' use and consented to recording.

To activate Alexa-enabled devices for their households, Plaintiffs' parents first had to register each device with Amazon and "link" the device to their respective Amazon accounts. ER010; *see also* ER302–09. Once registered, each device allowed family members in the household to access the Alexa service through that linked Amazon account. ER007; *see also* ER065-67 (at Q12 through Q14); ER144 ¶26; ER302-03 ¶¶4-6; ER308 ¶13; ER469 ¶25. The undisputed facts show that

every parent agreed to supervise Plaintiffs' access to the parents' Amazon accounts and Plaintiffs' use of the Alexa devices; they agreed to "accept responsibility for all activities that occur" under their accounts; and they agreed that anyone under 18 can use Amazon services only with the involvement of a parent or guardian. ER010; ER331–32 ("Your Account").

As noted above, several parents also expressly approved of Plaintiffs' use of Kid Skills designed for children under 13. ER566–67 ¶30; ER573–74 ¶51; ER580–81 ¶76. A device will not process a Kid Skill unless the parent has consented to additional terms and conditions through the Alexa app. ER308–09 ¶14; ER318–19. Amazon notifies the parent of information that will be collected when using Kid Skills. *Id.* The parent must verify his identity and then expressly click "I agree" to consent to the following:

> **Parental Consent**
>
> Please carefully review the information below by scrolling to the end.
>
> Children's privacy is important to us. We offer some services intended for children, and in some cases we may know a child is using our services... In these situations, children may share and we may collect personal information that requires verifiable parental consent... We collect, use, and disclose this information as described in our Children's Privacy Disclosure...

Id. "Children's Privacy Disclosure" hyperlinks to Amazon's public disclosure of the information collected about Kid Skills. *Id.*

E. The parents agreed to arbitrate all disputes concerning the Alexa service.

Plaintiffs conceded below that, as a precondition to activating the Alexa service for their households, "Plaintiffs' parents agreed to Amazon's [Conditions of Use], Alexa Terms [of Use], and arbitration provision when they created their Amazon accounts and registered the Alexa-enabled devices that Plaintiffs used." ER010; *see also* ER008; ER545; ER302 ¶4. Amazon's general Conditions of Use provide:

> **DISPUTES. Any dispute or claim relating in any way to your use of any Amazon Service, or to any products or services sold or distributed by Amazon or through Amazon.com will be resolved by binding arbitration, rather than in court**, except that you may assert claims in small claims court if your claims qualify. The Federal Arbitration Act and federal arbitration law apply to this agreement.

ER321 ¶4; ER334–35 ("Disputes") (emphasis in original). And the separate Alexa Terms of Use, focused on the Alexa service, provide:

> **Disputes/Binding Arbitration. Any dispute or claim arising from or relating to this Agreement or Alexa is subject to the binding arbitration, governing law, disclaimer of warranties, limitation of liability, and all other terms in the Amazon.com Conditions of Use. By using Alexa, you agree to be bound by those terms.**

ER324 ¶11; ER387 §3.6 (emphasis in original).

Plaintiffs' parents, as account holders, agreed to these terms to register any Alexa-enabled device for their families' use. ER302 ¶4; ER560 ¶6; *see also* ER469

¶25. Plaintiffs do not dispute that, if the guardian parents asserted identical claims on behalf of themselves, those agreements would bar a lawsuit and require arbitration. ER009–10. Notably, Plaintiffs conceded below that their legal guardians were bound to arbitrate with Amazon even if their other parent (the named guardian's spouse) or another household member had registered the devices at issue. *See id.*[2]

F. The proceedings below.

1. Plaintiffs' claims.

Parent Alison Hall-O'Neil filed this putative class action on behalf of Plaintiff "C.O." on June 11, 2019. ER499–500. On July 8, 2019, the complaint was amended to add other Plaintiffs and guardian parents. The amended complaint alleged claims under the wiretapping laws of eight states. ER483–95. Plaintiffs seek to represent sub-classes of minors in each state "who used Alexa on a household Alexa device" but did not personally install the Alexa application. ER480–82 ¶¶114–21.[3] As Alexa

[2] While most families used an Amazon account of the guardian parent to register the household's devices (ER560 ¶7; ER563-64 ¶¶14, 18; ER567-68 ¶¶31, 35; ER572 ¶46; ER574 ¶52; ER578 ¶69), in some cases it was the account of another family member, such as the guardian's spouse (ER570 ¶41; ER583 ¶83) or the guardian's mother (Plaintiff's grandmother). ER581 ¶77 & n.3. For simplicity, and because Plaintiffs have not differentiated, this brief refers to all accounts as "parents' accounts."

[3] After the magistrate judge recommended denying Amazon's motion to compel arbitration, but before the district judge ruled, claims of five plaintiffs were voluntarily dismissed, and three new plaintiffs were added in a Second Amended Complaint. ER141 ¶¶1–13. These included plaintiff "R.A.," who added a new cause

has been installed by millions of households, the putative classes potentially number in the millions. Plaintiffs claim no actual injury from their intentional interactions with Alexa (nor could they); rather, they (or, more precisely, their parents, who by law control the litigation) seek windfall statutory damages of up to $5,000 per recording or $1,000 per day. *E.g.*, ER484–95 ¶¶141, 167, 180, 206, 219, 232; ER161 ¶154.

Plaintiffs claim that they did not agree to have their voices recorded when they used Alexa in their homes. ER465. But they acknowledge that recording is indispensable to convert voice commands into instructions that a computer can act upon. For that reason, Plaintiffs' claims do not focus on the initial recording of their commands to the Alexa service. Rather, Plaintiffs complain that Amazon *retains* the recordings, "then analyzes and uses these voice recordings" and provides them to Amazon personnel in order to make improvements to the Alexa service. *See* ER483–95 ¶¶129–232; ER140. Amazon publicly discloses this use (including in its

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of action for violation of California's wiretapping law. R.A. previously had pending a putative class action for California minors in the Central District of California, where he alleged that his father gave him an Echo Dot "as a Christmas gift" and that his "father set up Plaintiff's Echo Dot shortly after Christmas 2018." *R.A. v. Amazon.com, Inc.*, Case No. 2:19-cv-06454, Dkt. 42 ¶¶47–48 (C.D. Cal. Sep. 18, 2019). R.A. dismissed the California action to join this one after the magistrate's recommendation to deny arbitration. *See id.*, Dkt. 45. Amazon has reserved below its right to move to compel R.A. and the other new plaintiffs to arbitration. *See* ER106 n.1.

FAQs)—just as it discloses the ability of users, including the parents, to review and delete any voice recording at any time through the Alexa App or website. ER062–65.[4]

The state wiretapping statutes at issue prohibit the interception and recording of communications without the consent of the participants. *See* Fla. Stat. §934.03(2)(d) (2020); 720 Ill. Comp. Stat. 5 / 14-2(a)(1) (2020); Md. Cts. & Jud. Proc. §10-402(c)(3) (2020); Mass. Gen. Laws ch. 272, §99(B)(4) (2020); Mich. Comp. Laws §750.539c (2020); N.H. Rev. Stat. §570-A:2(I) (2020); 18 Pa. Cons. Stat. §5704(4) (2020); Wash. Rev. Code §9.73.030(1)(a)-(b) (2018); *see also* Cal. Penal Code §632 (2020). If these statutes in fact apply to the Alexa service at all (*see* n.4, *supra*), to support their claims Plaintiffs must prove both that they did not consent to recording, and that their parents' agreements with Amazon—explicitly consenting to recording and committing to supervise their children's use of Alexa—are invalid or ineffective.

[4] Plaintiffs filed the Second Amended Complaint while the motion to compel arbitration was pending. ER139–80. As directed by the district court, Amazon filed its motion to dismiss, in which it contends that the wiretapping statutes do not apply to commands that the Plaintiffs directed to Amazon as part of their intentional use of the Alexa service. ER095–133. Amazon also contends that the wiretap statutes do *not* provide any cause of action for retention or use of a recording, only for an initial recording itself. *See, e.g., Kearney v. Kearney*, 95 Wash. App. 405, 412 (1999).

2. The district court denied Amazon's motion to compel arbitration.

Amazon filed its motion to compel arbitration on September 12, 2019, supported by declarations from four employees. ER543–44. Plaintiffs submitted no evidence in opposition.

The magistrate judge issued the Report on October 21, 2019, recommending denial of the motion. ER005–27. The Report acknowledged that the guardian parents each agreed to arbitrate when they registered Alexa devices and allowed the Plaintiffs to use the Alexa-enabled devices through the parents' accounts. ER009–10. At the hearing, the magistrate judge stated she was "troubled by the parents agreeing to these terms and then circumventing the consent issue by suing on behalf of their children." ER214.

But on the specific question of whether the Plaintiffs are also bound by their parents' arbitration agreements, the magistrate judge recommended finding that they were not. The Report recognized that Washington law has "adopted the analysis of the Ninth Circuit" on equitable estoppel of nonsignatory plaintiffs. ER020. Yet the Report rejected entirely the doctrine of direct-benefits estoppel, holding that Plaintiffs' suing over the benefits they received from Amazon's performance of the contract was not enough. ER023. Instead, the Report recommended ruling that no plaintiff could ever "knowingly exploit" a contract through receipt of benefits flowing from it, but rather only does so if the plaintiff brings a claim under the

contract or relating directly to it. ER024. In addition, the Report recommended that the intimate family relationship between Plaintiffs and their parents was only relevant to another ground for estoppel that typically applies to signatories (and therefore not Plaintiffs), the "intertwined/close relationship" test. ER015.

On April 9, 2020, the district court adopted the magistrate's Report over Amazon's objections. ER548; ER001–04. The court walked back the magistrate's rejection of direct-benefits estoppel, stating it was "not clear that the 'direct benefits' test applies to arbitration provisions governed by Washington law." ER003. Regardless, the district court ruled that even if the test applies, Plaintiffs' use of their household's Alexa devices through accounts shared with their parents was at most only an *indirect* benefit from their parents' agreement with Amazon. *Id*. The district court also adopted the magistrate judge's reasoning that the intertwinement of the claims with the contract and the close relationship of the parties are relevant only when a nonsignatory attempts to compel arbitration. ER003–04.

3. The district court stayed the case pending appeal based on conflict between its interpretation of this Court's estoppel precedent and the contrary conclusion in *Tice*.

Amazon noticed this appeal on April 22, 2020, ER047, and moved to stay. ER555. On May 15, 2020, the magistrate judge recommended granting the stay. That recommendation relied in part on the split of authority this case created with *Tice v. Amazon.com, Inc.*, 2020 WL 1625782 (C.D. Cal. Mar. 25, 2020), *appeal*

pending Ninth Cir. Case No. 20-55432, where a sister court compelled arbitration of virtually identical claims relating to a plaintiff's use of the Alexa service through an intimate family member's account. ER033–35. The recommendation noted that the court's ruling and *Tice* "appear to raise a conflict in law regarding the treatment of equitable estoppel," and that nothing in its ruling or *Tice* "explains the basis for the conflict even though both courts considered the same conduct." ER035. The recommendation noted that the *Tice* court's "analysis appears derivative of [the Ninth Circuit's] decisions in *Comer* and *Mundi*, authority that was also considered by this Court." *Id*. On June 30, 2020, the district judge adopted the recommendation and stayed all proceedings pending this appeal. ER028–29.

SUMMARY OF THE ARGUMENT

Equitable estoppel prevents parents who enter into an agreement in order to obtain a service for their households' benefit, and who permit their children to exploit the benefits of that agreement, from suing on their children's behalf to evade that agreement's obligations.

1. Under Washington law—which governs here and follows the law of this Circuit—a plaintiff must arbitrate where she "knowingly exploits the agreement containing the arbitration clause despite having never signed the agreement." *Mundi*, 555 F.3d at 1046; *accord Comer v. Micor, Inc.*, 436 F.3d 1098, 1101 (9th Cir. 2006). Under the "direct benefits estoppel" doctrine, "a non-signatory

to an arbitration agreement may be compelled to arbitrate where the nonsignatory 'knowingly exploits' the benefits of the agreement and receives benefits flowing directly from the agreement." *Nguyen*, 763 F.3d at 1179. Plaintiffs here, by invoking their household Alexa service, knowingly obtain the same benefits that their parents, the account-holders, intended that they share: the ability to use and enjoy the families' Alexa service.

2. Courts applying Washington law, like others following this Court's precedent, have routinely compelled arbitration for intimate family members who obtain a direct benefit from the performance of a contract containing an arbitration provision. *See, e.g.*, *Townsend*, 173 Wash. 2d at 461–62 (equitable estoppel barred children from avoiding arbitration agreements that their parents entered with homebuilder where they "received the benefit of the bargain in the transaction with [the builder] to the same extent as their parents"). This includes several cases where nonsignatory plaintiffs used products or services through Amazon, and then sought to avoid the agreements to arbitrate that their family members entered to obtain those benefits. *See Payne v. Amazon.com, Inc.*, 2018 WL 4489275, at *7 (D.S.C. July 25, 2018) (holding nonsignatory fiancé estopped from avoiding obligation to arbitrate claims related to allegedly defective glasses purchased on Amazon); *Nicosia v. Amazon.com, Inc.*, 384 F. Supp. 3d 254, 272–273 (E.D.N.Y. 2019) (compelling arbitration for husband who used shared Amazon account under wife's name),

affirmed on other grounds, 2020 WL 2988855 (2d Cir. Jun. 4, 2020); *Amazon.com Alexa Cases*, Judicial Council Coordinated Proceeding No. 5069, RJN Exh. A ("the *JCCP*") (compelling arbitration for users who accessed Alexa services through shared household accounts in the name of intimate family members); *accord Tice*, 2020 WL 1625782, at *3 (same outcome under California law, as to wife who accessed Alexa service through account under husband's name). All decisions considering the issue, with the exception of the court below, have recognized that family members who share a household account subject to an arbitration agreement cannot avoid the obligation to arbitrate.

3. The district court's order, by rejecting the direct-benefits rule and limiting estoppel to only where a non-signatory sues on a contract, applies the doctrine far too narrowly. Here, the parents agreed to arbitrate as a requirement to set up the Alexa service and provide it to their children. With their parents' approval and supervision, the Plaintiffs have regularly and intentionally taken advantage of the service through their parents' accounts. The parents now sue over the service received—both before and after filing this lawsuit—and which has been performed as set forth in the contract. Equity does not tolerate circumventing these contractual obligations by bringing an action on Plaintiffs' behalves through the very parents who agreed to arbitrate and approved of their use of the Alexa service.

STANDARD OF REVIEW

This Court reviews a denial of a motion to compel arbitration based on equitable estoppel *de novo*. *Mundi*, 555 F.3d at 1044 & n.1 (citing *Cox*, 533 F.3d at 1119); *accord Kramer v. Toyota Motor Corp.*, 705 F.3d 1122, 1126 (9th Cir. 2013).[5]

ARGUMENT

The Federal Arbitration Act (FAA), 9 U.S.C. §§1 *et seq.*, reflects the "emphatic federal policy in favor of arbitral dispute resolution." *KPMG LLP v. Cocchi*, 565 U.S. 18, 21 (2011) (per curiam) (citation omitted). Its "purpose is to give preference (instead of mere equality) to arbitration provisions." *Mortensen v. Bresnan Commc'ns LLC*, 722 F.3d 1151, 1160 (9th Cir. 2013).

"The United States Supreme Court has held that a litigant who is not a party to an arbitration agreement may invoke arbitration under the FAA if the relevant state contract law allows the litigant to enforce the agreement." *Kramer*, 705 F.3d at 1128 (citing *Arthur Anderson LLP v. Carlisle*, 556 U.S. 624, 632 (2009). A party may seek to compel arbitration of nonsignatories to an arbitration agreement under

[5] In *Nguyen*, this Court stated that it "review[s] the denial of a motion to compel arbitration *de novo*." 763 F.3d at 1175. But the Court then cited a non-arbitration-related case and stated that it was "reviewing the district court's decision for abuse of discretion." *See id.* at 1179 (citing *Kingman Reef Atoll Invs., LLC v. United States*, 541 F.3d 1189, 1195 (9th Cir. 2008)). In any event, this appeal raises claims of legal error on an undisputed record. Under abuse of discretion review, "a district court abuses its discretion when it makes an error of law." *See United States v. Hinkson*, 585 F.3d 1247, 1261 (9th Cir. 2009) (en banc).

several contract law principles, including "1) incorporation by reference; 2) assumption; 3) agency; 4) veil-piercing/alter ego; and 5) estoppel." *Comer*, 436 F.3d at 1101 (quoting *Thomson–CSF, S.A. v. Am. Arb. Ass'n*, 64 F.3d 773, 776 (2d Cir. 1995)). The relevant principle here is equitable estoppel.[6]

"Equitable estoppel is a shield." *Jablon v. United States*, 657 F.2d 1064, 1068 (9th Cir. 1981). It "precludes a party from claiming the benefits of a contract while simultaneously attempting to avoid the burdens that contract imposes." *Mundi*, 555 F.3d at 1045–46 (quoting *Wash. Mut. Fin. Grp., LLC v. Bailey*, 364 F.3d 260, 267 (5th Cir. 2004)); *accord Comer*, 436 F.3d at 1102. Equitable estoppel is "grounded on notions of fair dealing and good conscience and is designed to aid the law in the administration of justice where injustice would otherwise result." *Reliance Ins. Co. v. Woodward-Clyde Consultants*, 243 F. App'x 674, 675 (3d Cir. 2007).

Courts "do not apply equitable principles rigidly, but rather circumspectly, because they are grounded in fairness." *Janvey v. Alguire*, 847 F.3d 231, 242 (5th Cir. 2017) (internal quotations and citations omitted). As this Court has put it, "parties should only be estopped if their 'own conduct renders assertion of those rights contrary to equity.' The 'linchpin' for equitable estoppel is fairness." *Kramer*,

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[6] One other Circuit has held that despite its discussion of "traditional state-law principles," the Supreme Court in *Arthur Andersen* did not intend to displace earlier cases applying federal common law contract principles to disputes over arbitration. *See Grand Wireless, Inc. v. Verizon Wireless, Inc.*, 748 F.3d 1, 11–13 (1st Cir. 2014).

705 F.3d at 1133-34 (denying arbitration motion where "the inequities that the doctrine of equitable estoppel is designed to address are not present") (internal citations omitted). The law governing the ability to disavow minors' contractual obligations echoes this refrain. "[T]he law intends the privilege of infancy simply as a shield to protect the infant from injustice and wrong, and not as a sword to be used to the injury of others." *Wise*, 11 Wash. App. at 408–09 (alteration in original) (citation omitted).

The Ninth Circuit has recognized two related types of equitable estoppel in the arbitration context. First, a nonsignatory plaintiff, as here, may be compelled to arbitrate her claims if she "knowingly exploits the agreement containing the arbitration clause despite having never signed the agreement." *Mundi*, 555 F.3d at 1046 (quoting *E.I. DuPont de Nemours & Co. v. Rhone Poulenc Fiber & Resin Intermediates, SAS*, 269 F.3d 187, 199, 200 (3d Cir. 2001)); *see also Townsend*, 173 Wash. 2d at 461–462. Second, a signatory may be required to arbitrate a claim with a nonsignatory where the subject matter of the dispute is intertwined with the contract providing for arbitration, and the nonsignatory has a "close relationship" with the other party to the contract. *Id*. at 1046 (citing *DuPont*, 269 F.3d at 199). The first type requires arbitration here, where the Plaintiffs knowingly received the benefits flowing from the agreement their parents entered to obtain the Alexa service for them.

I. EQUITABLE ESTOPPEL REQUIRES THE PLAINTIFFS TO ARBITRATE THEIR CLAIMS AGAINST AMAZON

While this case presents a question of first impression in this or any other Circuit, every trial court previously has held that family members using a shared household account are estopped from denying the arbitration agreement their intimate family member entered in order to secure the service.[7] The district court is the only court to decline to enforce an arbitration agreement against nonsignatories in these circumstances.

To reach this outlying result, the district court disregarded the Ninth Circuit standard, according to which courts apply "knowing exploitation" estoppel when the plaintiff *either* (i) expressly brings claims for relief on the contract *or* (ii) receives direct benefits flowing from the contract. The magistrate judge concluded that Washington law does not recognize "direct benefits estoppel," and the district court found the question "unclear." But both recognized that Washington adopts Ninth Circuit equitable estoppel standards, and the Ninth Circuit plainly recognizes direct-benefits estoppel.

[7] *Nicosia v. Amazon.com, Inc.*, 2020 WL 2988855 (2nd Cir. Jun. 4, 2020), presented a similar issue, but the Second Circuit declined to address it. It instead compelled arbitration on the alternative ground that plaintiff had assented to the arbitration agreement by continuing to use his wife's Amazon account after becoming aware that his use was subject to the agreement.

In *Nguyen*, this Court defined "the direct benefits estoppel doctrine" as compelling arbitration where "a nonsignatory 'knowingly exploits' the benefits of the agreement and receives benefits flowing directly from the agreement." 763 F.3d at 1179. No decision by any Washington court has rejected or parted from the Ninth Circuit standard. Applying it here, the district court should have compelled arbitration.

A. Equitable estoppel compels arbitration for those who exploit a contract by intentionally receiving its direct benefits.

Plaintiffs do not dispute that Washington law, which governs the Amazon terms, also governs this motion. ER011. And the district court repeatedly acknowledged, in three separate orders (ER002, ER020, ER034–35), that Washington arbitration estoppel jurisprudence follows federal cases, including the Ninth Circuit's decisions in *Mundi*, *Comer*, and *Nguyen*. *See also Townsend*, 173 Wash. 2d at 461 (discussing *Comer* and *Mundi*); *Satomi Owners Ass'n v. Satomi, LLC*, 167 Wash. 2d 781, 811 n.22 (2009) (en banc) (quoting *Comer*, 436 F.3d at 1101); *Payne*, 2018 WL 4489275, at *6 (Washington law) (discussing *Comer* and *Mundi*). No decision in Washington ever rejected or parted from these Ninth Circuit standards, which the district court also previously acknowledged govern in Washington. *E. W. Bank v. Bingham*, 992 F. Supp. 2d 1130, 1133 (W.D. Wash. 2014) (Jones, J.) ("Washington courts would apply the same standard recited in *Mundi*.").

Washington is not alone in following Ninth Circuit law; the other states in the Circuit have largely done the same. *See Tice*, 2020 WL 1625782, at *2 (C.D. Cal. March 25, 2020) (California law) (applying *Comer* and *Mundi*); *Hofer v. Emley*, 2019 WL 4575389, at *7–8 (N.D. Cal. Sept. 20, 2019) (California law) (applying *Comer*); *Bridge v. Credit One Fin.*, 2016 WL 1298712, at *2 (D. Nev. Mar. 31, 2016) (Nevada law) (applying *Comer* and *Mundi*); *World Grp. Secs., Inc. v. Allen*, 2007 WL 4168572, at *3 (D. Ariz. Nov. 20, 2007) (Arizona law) (applying *Comer*); *Legacy Wireless Servs., Inc. v. Human Capital, L.L.C.*, 314 F. Supp. 2d 1045, 1056 (D. Or. 2004) (Oregon law) ("[C]ourts generally have required a showing that the nonsignatory obtained a direct benefit from the underlying contract, that is, a benefit flowing directly from the agreement.") (collecting cases) (internal citations and quotations omitted); *Legacy Carbon LLC v. Potter*, 2017 WL 3710787, at *4, 6–8 (D. Haw. Aug. 28, 2017) (Hawaii law) (discussing direct-benefits estoppel doctrine from *Comer* and *Nguyen*).

While *Nguyen* provides this Circuit's most recent explanation, direct-benefits estoppel traces back at least to *Am. Bureau of Shipping v. Tencara Shipyard S.P.A.*, 170 F.3d 349, 353 (2d Cir. 1999), which the district court itself cited. ER003. *Tencara* involved nonsignatory yacht owners' claims against a vessel certification bureau with whom they had no contract. A shipbuilder had contracted with the bureau to certify the vessel, in an agreement requiring arbitration. The owners then

used the certification to obtain lower insurance rates and the ability to sail under the French flag. The Second Circuit reversed, for clear error, the denial of a motion to compel arbitration, holding that a nonsignatory "is estopped from denying its obligation to arbitrate when it receives a 'direct benefit' from a contract containing an arbitration clause." *Id.* The owners had affirmatively used the certification; without it "registration would have been practically impossible." *Id.* It was therefore "patent that on the actual facts the Owners received direct benefits" and were "required to arbitrate their claims." *Id.* In short, *Tencara* enforced equitable estoppel against nonsignatory plaintiffs regardless of any claim on the contract.

In decisions that trace back to *Tencara*, this Circuit has also recognized that a party can "knowingly exploit" an agreement containing an arbitration clause, thus triggering estoppel, in two different ways. The first is where a plaintiff expressly relies on the contract to bring a claim. *Comer*, 436 F.3d at 1101. The second is where the plaintiff seeks "otherwise to take advantage of" the agreement (*id.* at 1102) or, as *Nguyen* expressed it, "knowingly exploits the benefits of the agreement and receives benefits flowing directly from the agreement." 763 F.3d at 1179 (internal quotations omitted).

In *Comer*, the Court considered a motion to compel arbitration against a nonsignatory plaintiff who was a "passive participant" in an ERISA plan, based on the arbitration agreement between the plan's trustee and an investment advisor. 436

F.3d at 1102. There was no allegation the plaintiff received advice under the contract or even communicated with the investment management firm. The Court declined to apply equitable estoppel because the plaintiff "did not seek to enforce the terms of the management agreements, *nor otherwise to take advantage of* them." *Id.* (emphasis added). This clearly indicates that one need not "enforce" a contract to have "exploited" it for purposes of triggering estoppel if one has sought to take advantage of it otherwise—as Plaintiffs' affirmative use of their families' Alexa services has here. This Court merely declined to "shoehorn Comer's status as a passive participant in the plans into his 'knowing[] exploit[ation]' of" the agreements. *Id.* (alternations in original).

Building on *Comer*, in *Mundi* the Court considered whether a signatory plaintiff's claim that an insurer breached its policy was "intertwined" with a separate contract for a home equity line of credit that contained an arbitration agreement. 555 F.3d at 1044. *Mundi* held that "even though the insurance was purchased in order to repay the loan," the legal claims at issue "did not in any other way" involve the loan. *Id.* *Mundi* did not address "knowing exploitation," other than to say it did not concern "the precise situation we face." *Id.* at 1046. Nor did *Mundi* in any way suggest that a person could "knowingly exploit" a contract *only* by suing to enforce it; to the contrary, *Mundi* cited and reaffirmed *Comer*.

Both *Comer* and *Mundi* relied on *DuPont* for the equitable estoppel standard, which, in turn, derived it from *Tencara*. *DuPont* recognized that the "knowingly exploit" test generally "involve[s] non-signatories who, during the life of the contract, have embraced the contract despite their non-signatory status but then, during litigation, attempt to repudiate the arbitration clause in the contract." 269 F.3d at 200. Such exploitation "during the life of the contract" cannot possibly envision only a lawsuit on the contract. *DuPont* concerned a nonsignatory corporation's claims for fraud and breach of an oral agreement that related to, but "occurred much later in time" than, a written contract containing an arbitration clause. *Id*. at 191. The Third Circuit declined to apply equitable estoppel because it found "no evidence" that the nonsignatory had embraced the written contract during its term or that it "*received any direct benefit under*" the contract. *Id*. at 200 (emphasis in original). *DuPont* marked an important distinction between nonsignatories who receive direct benefits under a contract containing an agreement to arbitrate (and are thus bound) and those who receive only indirect benefits. *Id*. (comparing *Tencara*, 170 F.3d at 353 (direct benefits sufficient), and *Thomson-CSF*, 64 F.3d at 779 (indirect benefits insufficient)).

Other Circuits likewise recognize direct-benefits estoppel. *E.g.*, *Everett v. Paul Davis Restoration, Inc*., 771 F.3d 380, 384 (7th Cir. 2014) (reversing lower court order vacating arbitration award as to nonsignatory spouse and co-owner of

LLC formed to operate franchise, who received "direct benefit" from franchise agreement with arbitration provision; "Ms. Everett received the same benefits as her husband, which included benefitting from trading upon the name, goodwill, reputation and other direct contractual benefits of the franchise agreement."); *Deloitte Noraudit A/S v. Deloitte Haskins & Sells*, 9 F.3d 1060, 1064 (2d Cir. 1993) (holding nonsignatory estopped from avoiding arbitration because it "knowingly accepted the benefits" under the agreement "through its continuing use of the name 'Deloitte'" as an affiliate of an international association that was a signatory); *Blaustein v. Huete*, 449 F. App'x 347, 350 (5th Cir. 2011) (affirming district court's application of direct-benefits estoppel; "A non-signatory can 'embrace' a contract containing an arbitration clause in two ways: (1) by knowingly seeking and obtaining 'direct benefits' from that contract; or (2) by seeking to enforce the terms of that contract or asserting claims that must be determined by reference to that contract.") (quoting *Noble Drilling Servs., Inc. v. Certex USA, Inc.*, 620 F.3d 469, 473 (5th Cir. 2010), and collecting cases); *Bouriez v. Carnegie Mellon Univ.*, 359 F.3d 292, 295 (3d Cir. 2004) (recognizing direct-benefits estoppel doctrine, but finding it inapplicable; "A person may also be equitably estopped from challenging an agreement that includes an arbitration clause when that person embraces the agreement and directly benefits from it.").

The history of the doctrine makes clear that a nonsignatory can "knowingly exploit" either by seeking to enforce the contract or by accepting benefits from its performance. This is both the teaching of the cases and common sense: if anything, "receiv[ing] benefits flowing directly from the agreement," *Nguyen* 763 F.3d at 1179, is surely the more common manner of exploiting a contract.

B. Plaintiffs are estopped from challenging arbitration because they exploited their parents' Alexa service agreements.

1. Every previous decision on the issue has applied equitable estoppel to bind intimate family members who share accounts.

Every other court that has considered the question has applied direct-benefits estoppel or its equivalent to compel arbitration of claims brought by plaintiffs who have exploited the contract of an intimate family member and sue over the contract benefits they received. This is true of both the cases applying Washington law, *see Payne*, 2018 WL 4489275 at *7; *Nicosia*, 384 F. Supp. 3d at 274–275, and the law of other jurisdictions in this Circuit. *Hofer*, 2019 WL 4575389, at *6–7; *Tice*, 2020 WL 1625782, at *2–3; *Bridge*, 2016 WL 1298712, at *3 (compelling son who used mother's credit account to arbitrate TCPA claims); *see also Montoya v. Comcast Corp*, 2016 WL 5340651, at *5 (E.D. Cal. Sep. 23, 2016) (nonsignatory users of cable subscription—with no family relationship to subscriber—bound to arbitrate because they "knowingly exploited Defendant's service and therefore accepted its terms by accepting the benefits of service").

With respect to the Alexa service, two other courts addressing nearly identical claims have compelled intimate family members to arbitration. In *Tice*, the plaintiff's husband had set up the Alexa device and agreed to the Alexa Terms. 2020 WL 1625782 at *1. Plaintiff intentionally used her husband's Alexa account and then sued Amazon for recording without consent. *Id*. Applying California law, and citing *Mundi*, the district court held: "Just as her husband would be bound to arbitrate claims relating to his voluntary use of Alexa, Plaintiff must adhere to the Alexa [Terms of Use] for claims directly related to her voluntary usage." *Id*. at *3. The court noted that "arbitration agreements are enforced with regularity against nonsignatories" on the strength of preexisting relationships, including spouse and parent/child. *Id.*

The same result obtained in the *Amazon.com Alexa JCCP*, which had combined eight Alexa recording cases before Hon. Brad Seligman of the Alameda Superior Court. *See JCCP* Order, RJN Ex. A. Applying Washington law, that court held that a wife, a child, and a partner of registrants of Alexa devices were bound by the arbitration provisions governing their households' Alexa service. The court followed *Comer*, *Nguyen*, and *Townsend* in applying "direct benefits estoppel": "even before the [plaintiffs] could use the Alexa service, the owner of the device had to register the product and agree to Alexa's Terms, which contains an arbitration clause. Therefore, it follows that the [plaintiffs] took advantage of the underlying

contract when they intentionally called out 'Alexa' to use the Alexa service." *Id*. at 8. The plaintiffs were not entitled to "embrace[] the contract despite their non-signatory status but then, in litigation, attempt to repudiate the arbitration clause in the contract." *Id.* at 7. The *JCCP* court rejected the analysis of the court below as an unreasonably narrow application of equitable estoppel. *Id.* at 6.

2. Plaintiffs, at their parents' instigation, knowingly exploit the Alexa Terms and their parents' Amazon accounts by using their family's Alexa service.

Applying the same principles, the Plaintiffs here must arbitrate their claims because each of them, with their parents' encouragement and supervision, "knowingly exploits the benefits of" the Alexa service contract their parent has with Amazon "and receives benefits flowing directly from" that contract. *See Nguyen*, 763 F.3d at 1179.

First, the Plaintiffs *knowingly* exploit the *benefits of the agreement*. *Id.* They know they are using the Alexa service when they invoke the wake word "Alexa" to activate the service. *See JCCP* Order, RJN Ex. A at 8. Plaintiffs are not passive participants, as in *Comer*. When a Plaintiff asks Alexa for "help with math questions" (ER479-80 ¶111; *see also* ER148 ¶48), he knows that he is engaging Alexa, and he knows Alexa is providing the response. Plaintiffs' receipt of the benefits of the agreements are in fact more "knowing" than in many other cases where estoppel applied. Plaintiffs do not merely receive or use a product that a

family member has purchased through Amazon, *Payne*, 2018 WL 4489275, at *6, or join a single rental car ride. *Hofer*, 2019 WL 4575389, at *7. Plaintiffs' use of the Alexa service has been deliberate and ongoing; each time they use it they invoke the name of the service itself.

Second, the benefit the Plaintiffs receive *flowed from the agreement*. *See Nguyen*, 763 F.3d at 1179. The benefit received is Amazon's performance of the agreement itself by responding to Plaintiffs' commands. Further, each Plaintiff obtains the games, music, homework help, and more that they select only because, as a precondition, a family member has agreed to supervise their use and to arbitrate resulting disputes with Amazon. Without these agreements, their household's access to the Alexa service would not merely be "practically impossible," *Tencara*, 170 F.3d at 353, but literally so.

Third, the contractual benefit is *direct.* The evidence reflects not only that Alexa is shared through a household account, but that their parents registered devices under those accounts named for children, installed in their rooms, and customized with skills for the uses they want. Plaintiffs are unlike transitory visitors who interact with a service while in the home. And the specific benefit that Plaintiffs are exploiting is the exact benefit their signatory parents receive—use of the Alexa service. *See infra*, Argument § II.A. It is Amazon's performance of the contract, by delivery of the very service Plaintiffs requested and that their parents set up for them,

which the parents now challenge on Plaintiffs' behalf. With both Plaintiffs and their parents having "embraced the contract despite [Plaintiffs'] non-signatory status," there is no right "during litigation, [to] attempt to repudiate the arbitration clause." *DuPont*, 269 F.3d at 200.

In addition, the parents' involvement here makes it far more inequitable to deny arbitration. Segregating the children's role from the parents' raises artificial distinctions. These families each benefit from their shared access to Alexa. Whether they set up music lessons for their kids or online access, the parents themselves benefit when their children receive the services that parents choose to provide. The parents were, of course, responsible for deciding if, when, and how their minor children could use Alexa. *Cf.* Wash. Rev. Code §26.09.002 (2018) ("[p]arents have the responsibility to make decisions and perform other parental functions necessary for the care and growth of their minor children"); Wash. Rev. Code § 26.09.004(e) (2018) (parental duties include "[e]xercising appropriate judgment regarding the child's welfare, consistent with the child's developmental level and the family's social and economic circumstances"). The parents, in setting up the devices they provided their children, specifically agreed with Amazon to use their authority to supervise their children's use, which includes the ability to listen to and delete any recordings at any time—including any recordings that this action asserts should not be retained. *E.g.*, ER322 ¶5; ER385-86 §1.3; *see also* ER302-09 ¶¶4-14. Amazon

is entitled to rely on the parents' assurance that they would be responsible for their children's use, and that use of their accounts would be pursuant to its governing terms. *Cf.*, *Nicosia*, 384 F. Supp. 3d at 274. Yet those same parents now disavow any responsibility for the devices they registered, using their children's minority as a sword, not a shield.

The district court's order discounts the obvious equities applicable when family members share the benefits of a single account. As *Nicosia* explained, "the entire purpose of an 'account' on a platform like Amazon is to assume virtual personhood—to enter into contracts and, crucially, to *remain bound* by the contracts to which it has previously, and with due authority, agreed." 384 F. Supp. 3d at 272 (emphasis in original). If the validity of an account holder's agreements "waxed and waned depending on the identity of the human user behind the screen"—or the family member commanding an Echo device through the account—"it would impose a cloud of uncertainty over any contract formed over the internet." *Id.* If an account holder's agreement "can be circumvented when it is a third party (i.e., the Plaintiff)," as opposed to the account holder, who uses the account, it would allow any individual to avoid the terms required to obtain a service simply by using someone else's account, undermining the principles governing online commerce. *Id.* at 271. "Common sense dictates that this could not possibly be the rule." *Id.* at 272; *see also id.* at 274–275 (compelling arbitration based on equitable estoppel for

shared use of account, applying Washington state law, and citing *Townsend*, 173 Wash. 2d at 461, among other cases).

Nor is there anything unfair about holding family members who choose to use an account to the terms that enabled it. Like Alexa, families share Netflix, Spotify, Google Nest, and numerous other online services. To require each family member to consent to terms before selecting a movie, playing a song, or turning up the heat would be nonsensical. Once an intimate family member affirmatively takes the benefits of the service procured for their household, holding her to the governing terms is fundamentally fair. To rule otherwise would allow those who take the benefit to shirk the burdens, in effect, sheering off the "linchpin" of the law of estoppel. *Cf. Kramer*, 705 F.3d at 1133.

Finally, there is no possible claim that arbitration is not a fair or adequate remedy. *See AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 352 (2011) (enforcing class action waiver in arbitration agreements). Reinforcing that point, Plaintiffs' counsel has simultaneously filed thousands of individual AAA arbitrations against Amazon asserting the same claims raised here (ER044 ¶3; *see also* ER036–37), over 24,000 as of this brief. Thousands are by claimants who, like Plaintiffs, used the Alexa service through another person's Amazon account and then voluntarily commenced arbitrations under its governing terms. Equitable estoppel prevents the gamesmanship that Plaintiffs and their parents are attempting here: they

are not entitled to circumvent arbitration obligations by artificially manipulating the parties in suit when, and if, it serves the strategic objectives of Plaintiffs' counsel.

In sum, this Court can and should order Plaintiffs to arbitration, holding that Plaintiffs are knowingly exploiting a contract through receipt of its direct benefits, as they: (1) are intimate family members sharing a household with the account holder; (2) are authorized and intended users of the shared account, for whose benefit the service was procured; (3) affirmatively call out the name of the service ("Alexa"), intending to receive its ongoing benefits; and (4) have sued based on the contractual benefits they and their parents received, which have been performed just as set forth in the contract. These factors, alone, warrant estoppel. But in addition, the equities are even more compelling because the parents set up the devices for the Plaintiffs, have supervisory responsibility for the Plaintiffs' use, agreed with Amazon to exercise that supervision, and yet sue in the name of their children in an attempt to vitiate their own agreements. Refusing to hold Plaintiffs to the arbitration provisions of those agreements would diverge from this Court's estoppel standards and every case that has applied those standards.

3. Neither the Plaintiffs nor their parents disavowed the benefits of the agreement after filing suit.

That the parents brought this lawsuit on behalf of minors does not permit them to escape arbitration here. *See G.G. v. Valve Corp.*, 2017 WL 1210220, at *3 (W.D. Wash. Apr. 3, 2017), *vacated on other grounds*, 799 F. App'x 557 (9th Cir. 2020).

In *Valve*, this Court affirmed an order that minors proceed in arbitration under their online game agreements, rejecting their argument to invalidate the agreement on public policy grounds. *Id.* The Court affirmed the trial court's finding that:

> Under Washington law, contracts with minors are valid unless the minor disaffirms the contract within a reasonable time after attaining the age of majority. In order to disaffirm a contract, "the statute requires the minor to restore to the other party all money and other property received by him by virtue of the contract and remaining within his control." In short, in order for the contract to be invalid, the minor cannot continue to benefit from the contract after disaffirming the contract.

Id. (internal citations omitted). Because the minor plaintiffs in *Valve* "continue to use Defendant's content and services," they remained bound to their agreement to arbitrate. *Id.*

The same rationale requires arbitration here. Neither the parents who accepted the Alexa terms and set up the devices for their children, nor their children on whose behalf they sued, have effectively disavowed the receipt of benefits that bind them to the agreement by estoppel. Plaintiffs have never alleged that they stopped using the Alexa service they "regularly" used as of the filing of the complaint, nor that their parents—who control Plaintiffs' use—have stopped them. The evidence of record is that, as of the motion to compel arbitration three months after this action was filed, the Alexa devices were still named for the children and still deployed Kid Skills, and there is no record of cessation of the Plaintiffs' use since. ER564 ¶19; ER575 ¶54; ER566–67 ¶30; ER580–81 ¶76. As in *Valve*, the Plaintiffs cannot

escape the consequence of a contract by virtue of their minority where Plaintiffs—and the parents who accepted the Alexa terms to provide its benefits to their children—"continue to benefit from the contract." 2017 WL 1210220 at *3; *see also Nicosia*, 2020 WL 2988855 and note 7, *supra* (Second Circuit holds husband who "continued to avail himself of Amazon's services" through his wife's account after learning of arbitration agreement to be "bound by the agreement to arbitrate").

C. The district court erred in ruling that Washington's acceptance of direct-benefits estoppel is uncertain.

The district court erred in failing to recognize the doctrine of direct-benefits estoppel. While the district judge found it "not clear" whether the doctrine exists in Washington, as discussed above, Washington follows the Ninth Circuit. Until the magistrate's Report below, no case had ever held direct-benefits estoppel was not the law in Washington, and there is no reason to conclude that Washington has suddenly diverged from this Court on that doctrine.

1. *Townsend* did not reject the doctrine of direct-benefits estoppel.

The district court's error was premised on a misreading of *Townsend*. *Townsend* sent to arbitration all claims by nonsignatory children who, with their signatory parents, sued a builder for torts of negligence, fraud, unfair business practices, and for breach of warranty. It applied the familiar rule that "equitable estoppel may require a nonsignatory to arbitrate a claim if that person, despite never

having signed the agreement, 'knowingly exploits' the contract in which the arbitration agreement is contained." 173 Wash. 2d at 461 (citing *Mundi*, 555 F.3d at 1046, and quoting *Comer*, 436 F.3d at 1101, and *DuPont*, 269 F.3d at 199). It reasoned that equitable estoppel barred the children from avoiding arbitration where they "*received the benefit* of the bargain in the transaction with [the builder] *to the same extent as their parents*"—namely, use of the defective homes—and "can be said to be knowingly exploiting the terms of the contract." *Id.* at 460–62 (emphasis added). Thus, *Townsend* supports the proposition that a non-signatory's receipt of the same benefit as the signatory triggers direct-benefits estoppel.

The *Townsend* lead opinion also explained an alternative rationale by which the children had exploited the contract: namely, that "the parents and children are referred to collectively as the 'plaintiffs' and they present eight identical causes of action... two [of which] relate directly" to the contract. *Id.* at 461, 462 n.3. Thus, in one paragraph, the *Townsend* case discussed both means of "knowingly exploiting" a contract, i.e., by suit on the contract, which covered two of the children's causes of action, and by receiving the benefit of the contract, which covered the six tort and statutory claims. The district court, adopting Plaintiffs' argument below, relied on this paragraph as limiting application of the "knowingly exploit" prong of estoppel to when a nonsignatory sues under a contract. ER023. But nothing in *Townsend* suggests that suing on the contract is the *only* way to exploit a contract, or that one

cannot also exploit a contract by receiving direct benefits under it. The district court's reading of *Townsend* as rejecting estoppel in its entirety when a party "receives benefits flowing directly from the agreement," *Nguyen*, 763 F.3d at 1179 or "otherwise take[s] advantage of the agreement," *Comer*, 436 F.3d at 1102, would sever Washington law from the Ninth Circuit precedent that it otherwise follows. Nothing in *Townsend* suggests that break.

Even the *Townsend* dissent, which the district court did not address, would not preclude direct-benefits estoppel as a basis for binding a nonsignatory. *See* 173 Wash. 2d at 465 (Stephens, J. dissenting). It merely stated the position that there was "no sufficient factual basis" for applying equitable estoppel to the children's claims in that case, based on its determination that the builder owed the children "an independent duty that does not arise from the purchase and sale agreement." *Id.* No comparable "independent duty" exists here. There is no dispute that agreement to Amazon's terms, including the consent to recording, was a precondition to accessing the Alexa service. The state wiretapping claims that Plaintiffs assert make lack of consent an essential element.[8] They thus directly implicate the agreements between Amazon and members of Plaintiffs' households. In other words, Plaintiffs cannot

[8] *See*, *e.g.*, Wash. Rev. Code §9.73.030(1)(a)-(b) (proof of lack of consent is an element of plaintiff's affirmative case under Washington wiretap law); *see also State v. Townsend*, 147 Wash. 2d 666, 675 (2002); *State v. Racus*, 7 Wash. App. 2d 287 (2019).

prevail on their claims without proving that the contracts that enabled the service are insufficient to create consent.

Even the dissent in *Townsend* cited a Washington Supreme Court decision recognizing the familiar principle that a nonsignatory "who knowingly exploits a contract for benefit cannot simultaneously avoid the burden of arbitrating." 173 Wash. 2d at 464 (citing *Satomi*, 167 Wash. 2d at 811 n.22). *Satomi* expressly endorsed the same estoppel principles of *Comer* and *Mundi*, noting that "federal courts have held, and the Washington Court of Appeals has recognized, that '[n]onsignatories of arbitration agreements may be bound by the agreement under ordinary contract and agency principles.'" *Satomi*, 167 Wash. 2d at 811 n.22 (quoting *Comer*, 436 F.3d at 1101, and collecting other cases).

2. Additional Washington law decisions have applied, not rejected, direct-benefits estoppel.

Not a single case, pre- or post-*Townsend*, has held that the direct-benefits doctrine is not the law in Washington. To the contrary, every other federal district court case applying Washington law under *Townsend* recognizes that it did not abrogate direct-benefits estoppel in Washington.[9] *Payne* followed *Townsend* to estop

[9] The Report suggests that there are no cases, besides *Nicosia* and *Bridge*, "where equitable estoppel was applied to a nonsignatory plaintiff who had not also brought a contact [sic] claim." ER017. But at least four other cases discussed in this brief applied estoppel to purely tort or statutory claims: *Hofer*, 2019 WL 4575389, at *6 (negligence claim); *Montoya*, 2016 WL 5340651, at *5 (tort and statutory privacy

a nonsignatory plaintiff from litigating claims about defective glasses received from her fiancée. 2018 WL 4489275, at *6–7. *Payne* explained that there was "no meaningful difference between the receipt of an injurious house and the receipt of an injurious pair of glasses," and "conclude[d] that, like the children in *Townsend*, Harris is attempting to avoid the burden of arbitration while retaining the benefit of rights based on Payne's contract with Amazon." *Id.* at *7. Similarly, *Nicosia*, applying *Townsend*, held that a nonsignatory's tort claims were barred under direct-benefits estoppel where the plaintiff purchased products on a shared household Amazon account, in his wife's name. 384 F. Supp. 3d at 275. Because plaintiff "knowingly accepted the benefit of [his wife's] contractual relationship," application of direct-benefits estoppel prevented the agreement from being "circumvented when it is a third party" who brings suit for use of the account. *Id.*[10]

claims); *Tice*, 2020 WL 1625782, at *2–3 (statutory wiretap claim); *JCCP* Order, RJN Ex. A at 8 (statutory wiretap claims).

[10] In addition to a section titled "direct benefits estoppel," the *Nicosia* decision included a separate heading on "traditional estoppel," holding the husband independently estopped based on Amazon's reliance on his entry of information into his wife's account. *Id.* at 273–274. Its finding of two bases for estoppel does not undermine *Nicosia*'s reading of *Townsend* as embracing estoppel of the "direct-benefits" variety. The Report below, in its attempt to distinguish *Nicosia*, conflated these two separate bases. Replicating Plaintiffs' use of an ellipsis in their brief below, the Report used an ellipsis (ER025) to obscure the key distinction, included in italics here: "[t]he indelible feature of estoppel *as it has been traditionally defined,* is that one party has made a representation, upon which another party justifiably relies to [its] detriment." *Nicosia*, 384 F.Supp. 3d at 273 (emphasis added and

In another recent decision, *David Terry Inv. LLC-PRC v. Headwaters Dev. Grp. LLC*, 463 P.3d 117, 123 (Wash. Ct. App. 2020), a Washington appeals court held that a nonsignatory plaintiff was bound to arbitrate tort claims, including fraud, unjust enrichment and conversion, based on acceptance of benefits from the performance of a contract. *Id.* Plaintiff alleged that defendants induced him to invest and then failed to perform as promised and misused his proceeds. *Id.* He had not signed arbitration agreements "in his individual capacity but [sought] to recover monies he invested in the project" through his investment firm, which was also a named plaintiff. *Id.* The court, interpreting *Townsend*, estopped assertion of the tort claims. It noted the intertwinement of Plaintiff's claims with the contract, and held that "it would be inequitable for [plaintiff] to accept *the benefit of the contract, i.e., the promises made in the joint venture agreements*, while avoiding its burden, i.e., an agreement to arbitrate." *Id.* (emphasis added).

Other cases also recognize the direct-benefits doctrine under Washington law, albeit in instances of facts deemed insufficient to require its application. In *Stuart v. Korey*, 2017 WL 1496360, at *4 (W.D. Wash. Apr. 26, 2017), a signatory defendant invoked a mediation agreement with an arbitration clause against the nonsignatory director of an opponent. The court held that "the record does not support a finding"

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replacing ellipses in Report). *Nicosia* clearly supports application of direct-benefits estoppel.

that the director "personally *received a benefit from the Agreement*, as mediation was unsuccessful." *Id.* (emphasis added). In *Univera, Inc. v. Terhune*, the court applied the direct-benefits doctrine, holding that "a non-signatory must have either received a direct benefit *or* must have relied on the contract containing the arbitration clause." 2009 WL 3877558, at *2 (W.D. Wash. Nov. 18, 2009) (finding benefits received by individual officers of LLCs too remote); *see also Double D Trade Co., LLC v. Lamex Foods, Inc.*, 2009 WL 4927899, at *6 (W.D. Wash. Dec. 14, 2009) (following *Comer*, 436 F.3d at 1101, but finding "no evidence" the individual plaintiff "has sought to enforce the terms of the agreements *or* to take advantage of them") (emphasis added).

By contrast, the Report below relied on inapplicable cases to support its conclusion that equitable estoppel can apply only to contract claims. ER018–27. In *Powell v. Sphere Drake Ins. P.L.C.*, 97 Wash. App. 890, 894 (1999), the court did not address equitable estoppel at all. It simply held that a plaintiff who was not a party to an insurance agreement was not bound under its express terms; the defendant there did not assert any estoppel theory. *Id*. at 896. And *Madera W. Condo. Ass'n v. Marx/Okubo*, 175 Wash. App. 1032 (2013) (unpublished), did not even involve arbitration.[11] There, an architectural firm sought to enforce an attorneys' fees

[11] As an unpublished decision, *Madera* has "no precedential value" and is "not binding on any court." Wash. G.R. 14.1(a).

provision in its previous contract with a developer after defeating tort claims brought against it by a homeowners' association and its members (all nonsignatories). The court declined to bind the nonsignatories to pay fees where they had not sued on the agreement. But the case never presented or addressed the salient point here: whether the homeowners knowingly obtained a direct benefit from the agreement *other* than by suing on it.[12]

In sum, Washington case law both follows, and is completely consistent with, this Court's equitable estoppel precedent, including the doctrine of direct-benefits estoppel. The district court's rejection of the doctrine should be reversed.

II. THE DISTRICT COURT ERRED IN ITS OTHER REASONS FOR DECLINING TO APPLY EQUITABLE ESTOPPEL IN THIS CASE

The district court relied on two additional grounds in denying the motion to compel arbitration, but neither justifies declining to apply estoppel in this case.

[12] The remaining cases discussed in the Report did not address the "knowing exploitation" theory of equitable estoppel, much less direct-benefits estoppel; all involved *nonsignatory defendants* who sought to compel *signatory plaintiffs* to arbitrate. *See Loyola v. Am. Credit Acceptance LLC*, 2019 WL 1601362, at *6–7 (E.D. Wash. Apr. 15, 2019) (no equitable estoppel based on "intertwined" theory, but ordering arbitration based on assignment and agency); *McKee v. Audible, Inc.*, 2017 WL 4685039, at *14 (C.D. Cal. July 17, 2017) (no equitable estoppel where nonsignatory defendant sought to compel signatory plaintiff); *Joseph v. TrueBlue, Inc.*, 2015 WL 575289, at *2 (W.D. Wash. Feb. 11, 2015) (same); *SVN Cornerstone LLC v. N. 807 Inc.*, 199 Wash. App. 1010 (2017) (same).

A. The district court erred in its conclusion that Plaintiffs' invocation of the Alexa service provided only an "indirect" benefit.

The district judge's order included the fallback conclusion that Plaintiffs here received only an *indirect* benefit from Amazon's terms. ER003. This conclusion did not rely on any Washington authorities, and it misapplied the direct-benefits authorities, including *Tencara* and *Nguyen*.

As the intended users of the Alexa devices that their parents' set up for them, Plaintiffs alleged they "directly interacted with an Alexa device" (ER148–55 ¶¶48, 55, 62, 68, 75, 81, 88, 94, 100, 106, 112), thereby commanding and directly receiving performance of the agreement from Amazon. The benefits they receive—the ability to make queries and receive responses—is proximate, immediate, and specifically sought. Their benefits "flowing directly from the agreement," *Nguyen* 763 F. 3d at 1179, are nothing short of Amazon's performance of the agreement itself. As in *Tencara*, the benefits here were no less "direct" here for having flowed to a nonsignatory. As noted above, Plaintiffs' receipt of benefit would have been wholly impossible without the contract that enable the devices they used.

The court in *Hofer*, applying this Court's standard from *Comer* and *Nguyen*, easily found a "direct" benefit where the nonsignatory's benefits were identical to his family member's. *Hofer* held that the nonsignatory brother "knowingly received a direct benefit as a result of the agreement—the ability to travel as a passenger in a rental car to visit family for Thanksgiving." 2019 WL 4575389 *6. As here, "[t]he

benefit conferred on the [nonsignatory] is the exact benefit conferred on the signatory"—i.e., use of the service contracted. *Id.* The district court below erred in failing to acknowledge the identity of the benefits received by nonsignatories and signatories.

This contrasts to an "indirect" benefit, which results remotely, incidentally, or passively from the contract's formation or some continuing contractual relationship. *See id.*, citing *Comer*, 436 F.3d at 1102 (ERISA plan participant received only passive benefits of management services provided to trustee). Plaintiffs did not just receive, for example, a pasta properly prepared because a parent used an Alexa timer, or schoolbooks that their parents ordered through the Alexa service. By invoking "Alexa" themselves, Plaintiffs receive what *they* request whenever they want—their music, help with their homework, their games and jokes—in short, exactly the same core benefits as received by their parents through the same account.

Indeed, to provide Plaintiffs these benefits *directly* is the reason their parents installed Alexa-enabled devices, placed them in their children's rooms, and customized them with Kid Skills. The parents did not dispute below that they activated the Alexa service for their children, not just for their own use. Nor could they; the child-focused skills disprove that. There is no direct benefit that the parents receive from the agreement that the Plaintiffs do not receive.

The district court's analysis of whether benefits are "direct" relied on caselaw that is factually inapplicable. ER003. The very reason *Nguyen* did not apply estoppel shows why estoppel does apply here. In *Nguyen*, this Court denied a website's motion to compel arbitration because the "browsewrap" at issue failed to elicit the nonsignatory plaintiff's assent, thus creating no agreement. 763 F.3d at 1179. Because there was no agreement in the first place, the plaintiff was "not the type of non-signatory contemplated by the [direct-benefits] rule." *Id.* *Nguyen* distinguished mere use of a website that could not form any agreement from other cases applying estoppel against "third parties who benefit from an agreement made between two primary parties." *Id.* By contrast, there is no dispute here that Amazon has valid underlying contracts with the parents, and Plaintiffs are "third parties who benefit from an agreement made between" their parents and Amazon to provide Alexa service to their homes. *See id.* As to indirect benefits, *Nguyen* stated only that the Court was "unable to find any case law holding that reliance on a contract's choice of law provision in itself constitutes a direct benefit" to a nonsignatory. *Id.* (internal quotation marks omitted). But Plaintiffs here knowingly receive the full benefit of those contracts, not merely an incidental benefit like the ability to invoke a choice of law provision.[13]

[13] The district court also relied on *MAG Portfolio Consult v. Merlin Biomed Grp.*, 268 F.3d 58 (2d Cir. 2001). But the commercial dispute in *MAG Portfolio* is entirely distinguishable from the family use here. The *MAG Portfolio* claimant was in

In short, Plaintiffs' benefit is "indirect" only in the sense that they are not signatories to the contract that obtained Alexa service for their households. That cannot be the test for determining whether a nonsignatory is estopped, otherwise no nonsignatory would ever be estopped under the direct-benefits test; the rule would swallow the exception. Every court to discuss the issue has held that persons who received the same household services as their contracting family members received a direct benefit. *Hofer*, 2019 WL 4575389, at *6, *Payne*, 2018 WL 4489275, at *7, *Nicosia*, 384 F. Supp. 3d at 274–75, and *JCCP* Order, RJN Ex. A at 8. This Court should hold the same.

B. The district court erred by discounting Plaintiffs' close family relationship and their claims' connection with the contract.

Finally, a signatory may be required to arbitrate with a nonsignatory where the subject matter of the dispute is intertwined with the contract providing for arbitration, and the nonsignatory has a "close relationship" with the other party to the contract—i.e., where the facts meet the "intertwined/close relationship" test. *See*

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arbitration with a prior partner who had bought out the claimant's interests in return for a future profit share. The claimant sought to compel arbitration against the prior partner's new affiliates that were purportedly created to evade the profit share agreement. *See id.* at 61–63. Equitable estoppel was denied because, assuming the new non-signatory entities were *not* alter egos of the prior partner, there was "no relationship" between them, and because the benefit to the owner of the prior partner "would not flow... from the agreement itself [*i.e.*, a direct benefit], but from his ability to evade the intent of the agreement." *Id.* at 63. The court vacated and remanded for the trial court to determine whether the new entities were alter egos permitting piercing of the corporate veil. *Id.* at 65.

Mundi, 555 F.3d at 1046. The district court discounted the intertwinement and close relationships here (ER003), following this Court's precedent that, *standing alone*, those two factors may allow a nonsignatory to compel arbitration against a signatory, but not vice versa. *Id*. But that was not a reason to disregard those facts entirely.

The reason that signatories and nonsignatories are treated differently for estoppel purposes involves basic contract principles. When a party has already agreed to arbitrate under a contract, it is equitable to compel it to arbitrate closely related claims against closely related parties; otherwise an arbitration between the signatories alone could be ineffective, thwarting the federal policy in favor of arbitration.[14] Where a nonsignatory has not agreed to arbitrate at all, courts have held that these rationales, while potentially relevant, are less compelling and therefore, generally, insufficient alone to compel arbitration.[15]

But where a nonsignatory plaintiff has *also* exploited the agreement, either by suing under it or enjoying its direct benefits, exclusion of these factors from any equitable consideration does not make sense. That exploitation by a nonsignatory

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[14] *E.g.*, *Comer*, 436 F.3d at 1101 (describing how "*signatories* have been required to arbitrate claims brought by nonsignatories 'at the nonsignatory's insistence because of the close relationship between the entities involved'") (quoting *DuPont*, 269 F.3d at 199) (emphasis in original).

[15] *E.g.*, *Rajagopalan v. NoteWorld, LLC*, 718 F.3d 844, 847 (9th Cir. 2013) (per curiam) (declining to allow "a *non-signatory* defendant to invoke equitable estoppel against a signatory plaintiff" as non-signatory lacks basis to invoke arbitration rights under agreement to which they are not parties) (emphasis added).

already provides a circumstance under which courts agree it may be fair to compel the nonsignatory to arbitration, as equity prevents both "claiming the benefits of a contract while simultaneously attempting to avoid the burdens." *Mundi*, 555 F.3d at 1045–46. Whether to apply equitable estoppel requires a fact-specific inquiry as to whether a plaintiff's "own conduct renders assertion of those rights contrary to equity." *Kramer*, 705 F.3d at 1133. Where a plaintiff has received a direct benefit flowing from the contract, the plaintiff's close relationship to the signatory makes estoppel even more equitable; and the same is true where the plaintiff asserts claims intertwined with issues involving the contract. *See J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A.*, 863 F.2d 315, 320–321 (4th Cir. 1988) (compelling arbitration against nonsignatory); *Montoya*, 2016 WL 5340651, at *4–5 (enforcing arbitration provision in subscriber agreement against nonsignatories who lived in house that received cable service, considering both "knowingly exploited" and "intertwined/close relationship" tests).

The nexus between the arbitration clause and Plaintiffs' legal claims justifies estopping Plaintiffs from denying arbitration. It was impossible for the parents to purchase, register, and set up, or for anyone to use, their household's Alexa-enabled devices without agreeing to Amazon's terms. The agreements explicitly authorize recording of Alexa commands. And they assign responsibility for minors' use to the parents, who could also listen to and delete recordings at any time. ER322 ¶5.

Further, Plaintiffs' claims require them to prove the affirmative element that recordings were made by Amazon "without consent," an element that, in the first instance, depends on the effectiveness and interpretation of the contract terms. Claims this intertwined with a contract that agreed to arbitration warrant estoppel—far more, for an example, than a TCPA claim alleging the service provider should not have phoned the plaintiff to advertise.

Plaintiffs' close relationship with their parents also provides a compelling equitable consideration, not just in the general sense of familial relations, but with respect to the conduct at issue in the case. The parents set up these devices in their homes for their children's use, simultaneously giving Amazon the consent required for installation. The parents then brought this suit as guardians on their children's behalf—exercising the same power of consent for their children to instigate and control the litigation. And here they seek to disavow their own admittedly binding arbitration agreements to seek class-wide statutory damages. As the magistrate judge noted, it is natural to be troubled by parents strategically circumventing their arbitration agreements by suing in the names of their children. ER214.

These facts distinguish this case from *Brown v. Comcast Corp.*, 2016 WL 9109112 (C.D. Cal. Aug. 12, 2016), on which the district court relied. ER015 n.4; ER024. *Brown* declined to apply estoppel to compel arbitration of TCPA claims by a cable subscriber's short-term roommate, who "presumably us[ed] the services at

some point." *Id.* at *7. Describing the visitor's use as "passive" and "too far removed from the agreement," the *Brown* court declined to create a rule that "every time a person uses services such as cable or Internet at another person's residence, no matter how long the use was, he or she should be bound to the underlying service agreement in perpetuity..." *Id*. at *8. There need be no quarrel with that ruling on the facts of that case. The *Brown* plaintiff (1) was not an intimate family member, and only a transitory member of the household; (2) was not an intended user of the shared account for whose benefit the service was procured; (3) used the service at most incidentally and not on any proactive or ongoing basis; and (4) did not sue based on the contractual benefit he received (i.e., cable television), but rather over unwanted marketing phone calls that were *not* the contracted-for service.

The district court ignored these factual differences and relied on *Brown* to opine that "absurd results" could follow if "even a casual visitor to a residence could be bound by an agreement without notice because any use of those services could constitute receipt of a direct benefit." ER023–24; *see also* ER004. Those are not the facts here, where this Court can compel arbitration with no danger of creating an overbroad rule. Plaintiffs are not casual visitors to their own homes. They are part of an intimate family household for whose benefit the parents contracted to activate the Alexa service. Plaintiffs repeatedly invoked the service just as intended, and

with their parents' encouragement—including by naming Echo devices after their Plaintiff children, approving of Kid Skills, and placing the devices in their rooms.

CONCLUSION

This is precisely the type of case for which equitable estoppel is designed: a party who has agreed to arbitrate in order to obtain a service, and then attempts to use a proxy to bring claims to avoid arbitration. After the parents set up the Alexa service for their children's use, they together received the benefits of the children being able to call out "Alexa" and use the family's service. The district court's order denying Amazon's motion to compel arbitration should be reversed and the case remanded with instructions to compel arbitration of Plaintiffs' claims.

August 3, 2020

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STATEMENT OF RELATED CASES

Amazon identifies the following case related to this action: *Amazon.com, Inc. and A2Z Development Center, Inc. v. Hayley Tice*, United States Court of Appeals for the Ninth Circuit, Case No. 20-55432.

Tice is related to this appeal because it raises "the same or closely related issues." Fed. R. App. P. 28-2.6(b). The factual and legal issues to be determined in both actions on these subjects are the same or closely related, as are the specific issues on appeal concerning the circumstances under which a plaintiff user of a family member's Amazon account must arbitrate claims regarding Amazon services. The magistrate judge below noted that "the split in decisions between [the order appealed in this case] and *Tice* appears to raise a conflict in law regarding the treatment of equitable estoppel … [and] nothing in the [o]rder or *Tice* explains the basis for the conflict even though both courts considered the same conduct." ER035.

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that:

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,976 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word Times New Roman 14-point font.

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