

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

BENNETT WILCOSKY, MICHAEL
GUNDERSON, and MICHAEL
GUNDERSON as next friend of E.G., a
minor, each individually, and on behalf
of all others similarly situated,

Plaintiffs,

v.

AMAZON.COM, INC. and
AMAZON.COM SERVICES, INC.,

Defendants.

No. 19-cv-05061
Judge Franklin U. Valderrama

MEMORANDUM OPINION AND ORDER

Digital assistants are a part of everyday modern life. Based on voice recognition technology, they tell us the weather forecast, play our favorite song, or assist in the preparation of a meal. Digital assistants listen to and respond to users' voice commands.

Bennett Wilcosky (Wilcosky), Michael Gunderson (Gunderson), and Michael Gunderson as next friend of E.G., a minor, (E.G.; collectively, Plaintiffs) sued Amazon.com, Inc. and Amazon.com Services, Inc. (collectively, Defendants or Amazon), individually and on behalf of a putative class of similarly situated individuals the Circuit Court of Cook County, Illinois. Amazon removed the case from the Circuit Court of Cook County to this Court pursuant to the Class Action Fairness

Act (CAFA), 28 U.S.C. § 1332(d)(2). R. 1, Removal Notice.¹ Plaintiffs assert that Amazon's Alexa device, a digital assistant, has recorded and stored their voiceprints—a biometric identifier—without their consent, in violation of the Illinois Biometric Information Privacy Act (BIPA), 740 ILCS 14/1 *et seq.* R. 1-1, Compl.

In response to a Court² order, the parties submitted memoranda on whether Plaintiffs have alleged an injury-in-fact sufficient to establish standing under Article III: Plaintiffs argue against standing and request that the Court remand their claims to state court (R. 44, Pls.' Standing Memo.) whereas Defendants argue Article III is satisfied (R. 45, Defs.' Standing Memo.). For the reasons described below, the Court agrees with Defendants that it has subject matter jurisdiction over the case.

Defendants have moved the Court to Compel Arbitration and Dismiss Plaintiffs' Complaint, or in the Alternative, Stay Claims pursuant to Federal Rule of Civil Procedure 12(b)(3).³ R. 16, Mot. Compel Arb. For the reasons set forth below, the Court grants in part and denies in part Defendants' Motion to Compel Arbitration.

¹Citations to the docket are indicated by "R." followed by the docket number and, where necessary, a page or paragraph citation.

²This case was previously assigned to Judge Gettleman, who ordered the parties to file briefs addressing Article III standing on February 19, 2020. R. 35. The case was reassigned to Judge Kness on April 27, 2020 (R. 38), who ordered that the parties still file the requested briefs despite the reassignment (R. 43). The case was reassigned to Judge Valderrama on September 28, 2020. R. 54.

³Defendants simultaneously moved to dismiss Plaintiffs' claims for lack of personal jurisdiction and for failure to state a claim. R. 19, Mot. Dismiss. As discussed below, the Court denies the Motion to Dismiss as moot as to Bennett Wilcosky and Michael Gunderson. The Court terminates the Motion to Dismiss without prejudice as to Michael Gunderson as next friend of E.G., a minor, with leave to refile as described below, *see infra* Conclusion.

Background

Amazon operates the “Alexa” voice based virtual assistant.⁴ Compl. ¶ 1. Alexa listens to users, records users’ voices, and responds to the users’ voice commands using speech and voice recognition technology. *Id.* ¶ 4. Alexa uses the users’ voice recordings to answer the users’ questions and fulfills the users’ requests. *Id.* Amazon offers Alexa services through several means, including Amazon’s Echo Smart speakers and Fire tablets, as well as various third-party devices. *Id.* ¶ 3. Amazon retains every voice recording created by the user and any individual who happens to be speaking near the Alexa device. *Id.* ¶ 6. The Alexa device transmits all oral communications it records to Amazon’s servers. *Id.* ¶ 28. Amazon then indefinitely stores copies of all recordings on its own servers for continued use and analysis. *Id.*

Amazon does not inform Alexa users in writing that Alexa is collecting biometric information or biometric identifiers. Compl. ¶ 29. Nor does Amazon inform bystanders—people who speak in the vicinity of Alexa devices but do not own Alexa devices or have Alexa accounts—in writing that Alexa is collecting biometric information or biometric identifiers. *Id.* ¶ 30.

Amazon provides its products and services, including Alexa, to users subject to Amazon’s Conditions of Use (COUs). R. 17-1, Buckley Decl. ¶ 3. A user must accept Amazon’s COUs in order to purchase products and services from or through Amazon, including purchasing an Alexa-capable device and/or registering an Alexa account.

⁴The following recitation of facts is excerpted from Plaintiffs’ Complaint (R. 1-1) and such facts are deemed to be true for the purposes of this motion. *See Bell v. City of Chi.*, 835 F.3d 736, 738 (7th Cir. 2016); *Tamayo v. Blagojevich*, 526 F.3d 1074, 1081 (7th Cir. 2008).

Id. No individual can be an Amazon user, including using Alexa, without first agreeing to Amazon’s COUs. *Id.* At the checkout page, a customer is asked to review and confirm their order by clicking a “Place your order button.” *Id.* ¶ 4. The check-out page states: “By placing your order, you agree to Amazon.com’s privacy notice, conditions of use and all of the terms found here.”⁵ *Id.*

Since August 2011, Amazon’s COUs have included an arbitration agreement with a class action waiver provision. Buckley Decl. ¶ 7. The arbitration provision in effect in 2014 provides, in part: “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” *Id.*

In addition to Amazon COUs, Amazon has Alexa Terms of Use (TOUs), for users of Alexa. Buckley Decl. ¶ 11. To set up an Alexa device, the user is prompted either to sign into his or her Amazon account or create a new account. *Id.* When signing in, the user is notified that by continuing in the process of activating Alexa, the user agrees to Alexa’s TOUs, which are hyperlinked. *Id.*

Section 3.6 of Alexa’s TOUs in effect on June 25, 2015, provided:

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.

Buckley Decl. ¶ 15 (citing *id.*, Exh. F, 2018 TOUs § 3.6; *id.*, Exh. H, 2019 TOUs § 3.6).

⁵On Amazon’s website, the underlined text provides a hyperlink to the full COUs. Buckley Decl. ¶ 4.

Wilcosky alleges that as of June 25, 2019, he had not and never had been a purchaser of any Alexa device, nor had he ever set up an Alexa account or downloaded the Alexa application. Compl. ¶ 36. Nevertheless, Wilcosky claims that his voice has been recorded without his consent by Alexa devices in Illinois numerous times. *Id.* ¶ 37. When Wilcosky spoke in proximity to an Alexa device while the Alexa device was recording, Amazon recorded and stored Wilcosky's voice in its databases and on its servers. ¶ 38.

Gunderson owns an Amazon Echo equipped with Alexa services. Compl. ¶ 46. Gunderson also claims that his voice has been recorded without his consent by Alexa devices in Illinois numerous times. *Id.* ¶ 47. Gunderson alleges that when he spoke in proximity to an Alexa device while the Alexa device was recording, Alexa recorded and stored Gunderson's voice in its databases and on its servers, without his consent. ¶¶ 48, 50.

E.G. is a minor who resides with her father, Gunderson. Compl. ¶ 55. E.G.'s voice has been recorded by Alexa devices on several occasions without her consent. *Id.* ¶ 56. When E.G. spoke in proximity to an Alexa device while the Alexa device was recording, Amazon recorded and stored E.G.'s voice in its databases and on its servers, without the consent or authorization of E.G.'s legally authorized representative. *Id.* ¶¶ 57, 60.

Plaintiffs filed suit against Defendants for violating BIPA, 740 ILCS 14/1 *et seq.* In their first cause of action, Plaintiffs allege that Amazon, through its "Alexa" voice-based virtual assistant, captured, collected, and stored their biometric

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