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4 UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
5 AT SEATTLE

6 KAELI GARNER, *et al.*,

7 Plaintiffs,

8 v.

9 AMAZON.COM, INC., *et al.*,

10 Defendants.

Cause No. C21-0750RSL

ORDER GRANTING IN  
PART DEFENDANTS'  
MOTION TO DISMISS

11 This matter comes before the Court on defendants' "Motion to Dismiss First Amended  
12 Consolidated Complaint" (Dkt. # 63) and a "Request for Judicial Notice" in support of that  
13 motion (Dkt. # 64). Plaintiffs allege that (1) Amazon's Alexa devices record, permanently store,  
14 use, and transmit to third parties (including human reviewers) communications in the absence of  
15 a wake word and (2) plaintiffs reasonably expected that the devices would respond to a question  
16 or command only if the wake word were used and that, in doing so, the question or command  
17 would be stored only long enough to process the communication and generate a response.  
18 Plaintiffs further allege that Alexa devices are fully capable of functioning without the need to  
19 record, store, and/or share voice recordings. The named plaintiffs either live in a household with  
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1 an Alexa device they registered themselves (“registered users”) or live in a household with an  
2 Alexa device that was registered by someone else (“unregistered users”).

3 In the pending motion to dismiss, defendants assert (a) that Washington law governs the  
4 claims of registered users, all of whom agreed to Amazon’s Conditions of Use, (b) that all  
5 claims brought by registered users under other states’ laws must be dismissed in favor of  
6 Washington law, and (c) that the registered users have consented to the recordings at issue in the  
7 First Amended Consolidated Complaint and cannot plausibly allege a violation of Washington’s  
8 wiretap law. With regards to unregistered users, defendants argue that they impliedly consented  
9 to the voice recordings under Washington law<sup>1</sup> because they knew or should have known the  
10 way Alexa works and because the recordings to which plaintiffs object are inherent in the  
11 technology plaintiffs used. Defendants seek dismissal of plaintiffs’ Washington Consumer  
12 Protection Act claims for failure to plausibly allege an unfair or deceptive practice or injury to  
13 business or property, dismissal of the Federal Wiretap Act claims because defendants were the  
14 intended recipients of the communications, and dismissal of the Federal Stored Communications  
15 Act claims for failure to plausibly allege that Alexa is an electronic communication service, that  
16 the recordings are in electronic storage, or that they were divulged to a third party.

17 The question for the Court on a motion to dismiss is whether the facts alleged in the  
18 complaint sufficiently state a “plausible” ground for relief. *Bell Atl. Corp. v. Twombly*, 550 U.S.

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20 <sup>1</sup> Defendants do not explain why Washington law applies to the claims of unregistered users and  
21 have not sought dismissal of the claims brought by unregistered users under other states’ wiretapping  
laws.

1 544, 570 (2007). In the context of a motion under Rule 12(b)(6) of the Federal Rules of Civil  
2 Procedure, the Court must “accept factual allegations in the complaint as true and construe the  
3 pleadings in the light most favorable to the nonmoving party.” *Manzarek v. St. Paul Fire &*  
4 *Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008) (citation omitted). The Court’s review is  
5 generally limited to the contents of the complaint. *Campanelli v. Bockrath*, 100 F.3d 1476, 1479  
6 (9th Cir. 1996). “We are not, however, required to accept as true allegations that contradict  
7 exhibits attached to the Complaint or matters properly subject to judicial notice, or allegations  
8 that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences.”  
9 *Daniels-Hall v. Nat’l Educ. Ass’n*, 629 F.3d 992, 998 (9th Cir. 2010).

10 To survive a motion to dismiss under Rule 12(b)(6), a complaint must allege  
11 “enough facts to state a claim to relief that is plausible on its face.” [*Twombly*,  
12 550 U.S. [at 570]. A plausible claim includes “factual content that allows the court  
13 to draw the reasonable inference that the defendant is liable for the misconduct  
14 alleged.” *U.S. v. Corinthian Colls.*, 655 F.3d 984, 991 (9th Cir. 2011) (quoting  
15 *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). Under the pleading standards of Rule  
16 8(a)(2), a party must make a “short and plain statement of the claim showing that  
17 the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). . . . A complaint “that  
18 offers ‘labels and conclusions’ or ‘a formulaic recitation of the elements of a cause  
19 of action will not do.’” *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 555).  
20 Thus, “conclusory allegations of law and unwarranted inferences are insufficient  
21 to defeat a motion to dismiss.” *Adams v. Johnson*, 355 F.3d 1179, 1183 (9th Cir.  
2004).

18 *Benavidez v. Cty. of San Diego*, 993 F.3d 1134, 1144–45 (9th Cir. 2021). If the complaint fails  
19 to state a cognizable legal theory or fails to provide sufficient facts to support a claim, dismissal

1 is appropriate. *Shroyer v. New Cingular Wireless Servs., Inc.*, 622 F.3d 1035, 1041 (9th Cir.  
2 2010).

3 Having reviewed the memoranda, declarations, and exhibits submitted by the parties and  
4 having heard the arguments of counsel, the Court finds as follows:

#### 5 **A. Request for Judicial Notice**

6 When ruling on a motion to dismiss under Fed. R. Civ. P. 12(b)(6), the Court's review is  
7 generally limited to the allegations of the complaint, documents attached to or incorporated by  
8 reference into the complaint, and matters of judicial notice. *United States v. Ritchie*, 342 F.3d  
9 903, 907 (9th Cir. 2003). Defendants assert that the First Amended Consolidated Complaint  
10 expressly references and/or is based upon three documents found on their website (the "Alexa  
11 and Alexa Device FAQs," the "Alexa Terms of Use," and "Alexa, Echo Devices, and Your  
12 Privacy") and a survey published on [www.researchgate.net](http://www.researchgate.net) entitled "Privacy Attitudes of Smart  
13 Speaker Users." They request that the Court take judicial notice of the same.

#### 14 **1. Incorporation by Reference**

15 A document that is not physically attached to a complaint may nevertheless be  
16 incorporated by reference into a complaint "if the plaintiff refers extensively to the document or  
17 the document forms the basis of the plaintiff's claim." *Ritchie*, 342 F.3d at 908. Mere reference  
18 to a document in the complaint is not sufficient: rather, the document must be integral to or form  
19 the basis of plaintiff's claims. *Id.* at 908-09. In addition, the document's authenticity must not be  
20 in question and there must be no disputed issues as to the document's relevance. *Coto Settlement*

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1 *v. Eisenberg*, 593 F.3d 1031, 1038 (9th Cir. 2010) (citations omitted). The authenticity of the  
2 four documents is not disputed, and defendants concede that the handful of references to those  
3 documents is not “extensive.”<sup>2</sup> The issue, then, is whether the FAQs, Terms of Use, Your  
4 Privacy document, and Privacy Survey serve as the basis for plaintiff’s claims.

5         Although the references to the FAQs, the Terms of Use, and the Privacy Notice are few  
6 and far between, they play an important function in the First Amended Consolidated Complaint,  
7 offered to bolster plaintiffs’ allegations that Amazon failed to adequately disclose how Alexa  
8 works and to show what Amazon does with a user’s communications. Whether Amazon  
9 misrepresented or omitted key facts or whether it failed to announce in an effective manner that  
10 it records, stores, and reviews communications occurring near Alexa are critical elements of the  
11 First Amended Consolidated Complaint for which plaintiffs rely, at least in part, on Amazon’s  
12 public-facing documents. As was the case in *Coto Settlement*, these facts suggest that the  
13 documents are integral to at least some of plaintiffs’ claims and can be considered on a motion  
14 to dismiss. 593 F.3d at 1038.

15         With regards to the Privacy Survey, there are very limited references to the document  
16 and, while plaintiffs incorporate certain statements contained therein into the First Amended  
17 Consolidated Complaint, they in no way vouch for the accuracy of the entire document. Nor do  
18 their claims depend on the Privacy Survey itself. Rather, the survey is cited to support plaintiffs’  
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20         <sup>2</sup> Plaintiffs chose not to raise their relevance objection in their opposition to the request for  
21 judicial notice. The relevance of the documents is therefore considered when discussing the claims  
asserted.

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