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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

NICHOLAS C. SMITH-WASHINGTON, JOYCE MAHONEY, JONATHAN AMES, MATTHEW HARTZ, and **JENNY LEWIS** on behalf of themselves and all others similarly situated,

Plaintiffs,

vs.

TAXACT, INC., an Iowa corporation,

Defendant.

Case No. 3:23-CV-830-VC

Assigned for all purposes to Hon. Vince Chhabria

DECLARATION OF JULIAN HAMMOND IN SUPPORT OF PLAINTIFFS' MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT

Courtroom: 4, 17th Floor
Hearing Date: November 21, 2024
Hearing Time: 2:00 p.m.

I, Julian Hammond, declare as follows:

1. I am a member in good standing of the Bar of the State of California and admitted to practice before all California federal courts. I am the founding shareholder of the law firm HammondLaw, P.C. ("HammondLaw"). HammondLaw, along with Keller Postman LLC ("Keller Postman"), is Class Counsel for Plaintiffs and the Settlement Classes in the above-captioned matter.

2. I make this declaration based on personal knowledge and, if called as a witness, I could and would testify competently to the matters set forth herein.

3. I submit this declaration in support of Plaintiffs' Motion for Final Approval of Class Action Settlement.

4. The parties' Class Action Settlement Agreement and Release identifies the National Consumer Law Center ("NCLC") as the parties' chosen cy pres recipient.

5. The NCLC is a nationwide organization which addresses myriad issues affecting American consumers. It describes itself as being "at the center of a national network of legal aid lawyers, private attorneys, elder advocates, housing counselors, pro-consumer policymakers and enforcement officials, and other allies who use NCLC's expertise to fight for consumers on the front lines, day in and day out."

6. Among the issues addressed by the NCLC which are relevant to the Class Members' claims in the instant case are: advocacy for consumer protection regulation; work to protect state consumer protective statutes prohibiting deceptive practices; and, work to oppose mandatory arbitration clauses and class action waivers in consumer contracts.

7. The NCLC also convenes a major annual symposium – the Consumer Rights Litigation Conference and Class Action Symposium – at which more than 60 training courses are provided to consumer advocates covering all major areas of consumer law.

8. Given that the instant action is a consumer protection action with a nationwide class, the NCLC, with its focus on consumer protection, is an appropriate cy pres recipient.

9. Neither Plaintiffs nor any attorney or employee at HammondLaw has any relationship with the NCLC.

10. In their Preliminary Motion for Approval, Plaintiffs estimated the expected redeemed value of in-kind relief at $5.8 million. This estimate, made before the claims rate was known, assumed that 9-10% of customers returning to file their taxes with TaxAct would redeem their in-kind relief. Now that Plaintiffs know the number of Authorized Claimants, they estimate the expected redeemed value of in-kind relief by assuming that 20-25% of Authorized Claimants will take advantage of the in-kind relief provided for by the Settlement Agreement (423,754 x $59.99 x 20-25% = $5.1-$6.4 million). It is reasonable to assume that a significantly higher percentage of Authorized Claimants will take advantage of in-kind relief as they are the Class Members who have chosen to file a claim form and showed an interest in the relief obtained for the Class. This estimated redemption rate is also supported by the fact that when Authorized Claimants begin their tax return process, and enter their Social Security number into the TaxAct platform, they will receive a pop-up alerting them to their complimentary Xpert Assist which they will be able to add to their account and use immediately.

11. Attached as **Exhibit 1** is a true and correct copy of TaxAct, Inc.'s Opening Brief filed with the Third Circuit Court of Appeal in *Kirkham v. TaxAct, Inc.,* No. 24-1515.

12. Attached as **Exhibit 2** is a true and correct copy of TaxAct, Inc.'s Reply Brief filed with the Third Circuit Court of Appeal in *Kirkham v. TaxAct, Inc.,* No. 24-1515.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on October 11, 2024.

/s/ Julian Hammond
Julian Hammond

EXHIBIT 1

No. 24-1515

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

MATTHEW SESSOMS,
on behalf of himself and all others similarly situated, *Plaintiff-Appellee, and*

JAMES KIRKHAM, *Plaintiff,*

v.

TAXACT, INC.,
Defendant-Appellant.

Appeal from the United States District Court for the
Eastern District of Pennsylvania
Case Number 2:23-cv-03303
The Honorable Judge Wendy Beetlestone

BRIEF OF DEFENDANT-APPELLANT TAXACT, INC. AND VOLUME I OF THE JOINT APPENDIX

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

No publicly held corporation holds 10% or more of TaxAct, Inc.'s stock. TaxAct, Inc. is wholly owned by TaxAct Holdings, Inc. Neither company is publicly traded.

July 3, 2024,

Respectfully submitted,
/s/Eamon P. Joyce
Eamon P. Joyce

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INTRODUCTION

This arbitration-related appeal arises in the last-filed of four putative class actions brought by consumers that used TaxAct's services to prepare and file tax returns. TaxAct has a Terms of Service and License Agreement ("Terms of Service" or "Terms") to which a filer must assent to use TaxAct's services. Those Terms contain a broad arbitration agreement (the "Arbitration Agreement"). Notwithstanding that Arbitration Agreement, TaxAct users have filed four court cases premised on virtually identical allegations that TaxAct purportedly shared confidential tax return information with third-party advertising platforms through the use of tracking technologies. In the first-filed action, *Smith-Washington v. TaxAct, Inc.*, Case No. 3:23-cv-00830-VC (N.D. Cal.), and in the face of TaxAct's pending motion to compel arbitration, the parties reached a nationwide class settlement following a mediation in which counsel for Appellee Matthew Sessoms—whose case was filed six months after *Smith-Washington*—declined to participate. In April 2024, the Northern District of California granted preliminary approval of that settlement, which facially encompasses Sessoms' claims and the putative classes he seeks to represent.

While the parties' motion for preliminary approval of the nationwide class settlement was pending in *Smith-Washington*, the district court here ruled on TaxAct's motion to stay the claims of Appellee Sessoms and his co-Plaintiff, James Kirkham, in favor of arbitration pursuant to 9 U.S.C. § 3. Although the district court correctly granted TaxAct's motion as to Plaintiff Kirkham—who is not a party to this appeal—it denied the motion as to Sessoms. It is undisputed that Sessoms filed with the United States government and the Commonwealth of Pennsylvania two years of individual and a year of joint tax returns using TaxAct's services. There is also no dispute that to use TaxAct's services a user must assent to the Terms of Service containing the Arbitration Agreement. Nonetheless, the district court concluded that Sessoms was not bound by the Terms.

Based solely on a flimsy "blame my spouse" defense that Sessoms concocted in a declaration submitted in opposition to arbitration, the court concluded that Sessoms was not bound by the arbitration agreement because he had not personally agreed to the Terms. Rather, the court held that (i) it was Sessoms' spouse who supposedly had created an account in Sessoms' name and filed individual returns for him alone

before they were married, and (ii) Sessoms' spouse used TaxAct's services to file joint returns on his behalf. Having found that Sessoms was not bound by the Terms, the court denied TaxAct's requested stay in favor of arbitration.

This was error for two principal reasons. *First*, even crediting Sessoms' self-serving declaration contending that only his spouse used TaxAct's services—albeit allegedly to register an account in Sessoms' name alone and, at his behest, to prepare and file two years of tax returns on behalf of Sessoms individually (as opposed to jointly with her)—Sessoms still is bound to the Terms through multiple contract doctrines applicable to non-signatories. Specifically, two forms of agency—actual and apparent—as well as equitable estoppel and the third-party beneficiary doctrines each bind Sessoms to the Terms containing the arbitration provision. That is because there is no dispute that Sessoms' spouse (Krysta)[1] acted on his behalf, and for his benefit, in using TaxAct's services to file two years of his individual tax returns and then ultimately their joint tax returns. Moreover, despite attempting to repudiate his

[1] TaxAct refers to Matthew Sessoms as "Sessoms" and Krysta Sessoms as "Krysta" to avoid ambiguity.

contractual obligations with TaxAct, Sessoms relies on both the benefits he received as a result of TaxAct's services and the Terms themselves to assert his claims.

Second, TaxAct's records, which Sessoms does not dispute, show that Sessoms created an account under his name with his own personal information, verified that account using his own mobile phone and email address, and filed two years of individual tax returns, all the while explicitly consenting to the Terms at multiple junctures. Despite this evidence, the district court denied TaxAct's motion to compel solely because it credited conclusory (and highly suspicious, because contradicted by undisputed documentary evidence) statements in Sessoms' declaration claiming that he had never used TaxAct's services and instead that "Krysta Sessoms, who is now my wife, created an account with Tax Act, which she used to file a tax return for me for the 2020 Tax Year" and repeatedly did so for him in subsequent years. JA176 ¶¶ 4, 7. That self-serving declaration fails to address, and thus leaves undisputed, all the evidence that TaxAct introduced regarding Sessoms' use and verification of his TaxAct account. Moreover, the Texas Supreme Court and other courts applying the Texas Uniform Electronic

Transactions Act have held that such declarations are insufficient to contest having assented to an electronic arbitration agreement where the movant identifies security procedures like those TaxAct utilized to confirm that Sessoms was in fact who he electronically said he was—*e.g.*, requiring him to register with his Social Security number and to verify his account by responding to messages sent to *his* mobile phone and email address.

At the very least, the district court should have permitted discovery of Sessoms before relying on his untested declaration to effectively grant summary judgment to Sessoms on the issue of arbitration.

For these reasons and as detailed below, this Court should reverse the district court's denial of TaxAct's arbitration motion as to Sessoms.

STATEMENT OF JURISDICTION

The district court had subject matter jurisdiction under 28 U.S.C. § 1331, because Sessoms brought causes of action pursuant to 26 U.S.C. §§ 6103 and 7431(a)(2) and other sections of the Internal Revenue Code. It also had jurisdiction under the Class Action Fairness Act, 28 U.S.C. §§ 1332(a), (d)(2)(A).

This Court has appellate jurisdiction pursuant to 9 U.S.C.

§ 16(a)(1)(A), (C) ("An appeal may be taken from—(1) an order— . . . refusing a stay of an action under section 3 of this title [or] denying a petition . . . to order arbitration to proceed. . . .").

STATEMENT OF THE ISSUES PRESENTED ON APPEAL

I. Whether the district court erred in denying TaxAct's arbitration motion because (A) there is undisputed record evidence that established Sessoms is bound by the Terms of Service, which contain the Arbitration Agreement, under the doctrines of agency (actual and apparent), equitable estoppel, and third-party beneficiary, or (B) Sessoms consented to Terms and the Arbitration Agreement therein as a direct signatory. JA5-9, JA22-31; JA4.

II. Alternatively, whether the district court erred by denying TaxAct's arbitration motion outright and effectively granting summary judgment for Sessoms—notwithstanding that the parties were in the midst of discovery that the court required to proceed in the face of Tax Act's motion and TaxAct was on the brink of deposing Sessoms and his spouse—by relying on Sessoms' self-serving and untested declaration rather than awaiting the conclusion of discovery. JA4; JA22-31.

STATEMENT OF RELATED CASES AND PROCEEDINGS

This matter has not been before this Court previously.

Smith-Washington v. TaxAct, Inc., No. 2:32-cv-00830-VC (N.D. Cal.) arises from essentially the same controversy as this action. Because the *Smith-Washington* court granted preliminary approval of the parties' nationwide class settlement, that case does not involve issues that are substantially the same, similar, or related to an issue pertinent to this appeal (absent settlement, *Smith-Washington* too involved issues concerning the arbitrability of TaxAct users' claims).

Hartz v. TaxAct, Inc., No. 1:23-cv-04591-MMR (N.D. Ill.) and *Pitts v. TaxAct, Inc.*, No. 23-cv-05516-LDH-CLP (E.D.N.Y.) also arose from the same controversy as this action. TaxAct also moved to compel arbitration and stay proceedings in those cases, but those courts did not have an opportunity to rule on TaxAct's motions. Both cases were voluntarily dismissed without prejudice.[2]

[2] The *Hartz* plaintiff's claims were incorporated into a second amended complaint in *Smith-Washington*. No. 2:32-cv-00830-VC, Dkt. 117 (N.D. Cal. Feb. 20, 2024). (TaxAct uses "Dkt. __" to refer to entries on a court's ECF docket.)

STATEMENT OF THE CASE

A. Relevant Facts

1. To use TaxAct's services, users must accept the Terms.

TaxAct is a tax preparation software company that provides do-it-yourself tax preparation software services to individual taxpayers and businesses. TaxAct's customers can access free and paid tax filing products through TaxAct's website or through downloadable software that can be installed on one's own computer. TaxAct permits individual taxpayers to file joint tax returns. *See* JA70 ¶ 5, JA78 ¶ 21, JA124-26. A TaxAct account is necessary to access and use TaxAct's services. *See* JA70 ¶ 5, JA81-85, JA88-123.

TaxAct presents every visitor to or user of TaxAct's website, online and offline tax return preparation products, and filing services with TaxAct's Terms of Service, which are publicly available on TaxAct's website at https://www.taxact.com/legal-notice. *See*, *e.g.*, JA69 ¶ 3, JA74 ¶¶ 8-9. A hyperlink to the Terms appears in the footer of every page on TaxAct's website. JA74 ¶¶ 8, 9.

The Terms provide: "You may not use the Services until you have read and agreed to this Agreement. By using the Services, you indicate your unconditional acceptance of this Agreement. If you do not accept this

Agreement, you must terminate your use of the Services." JA130. The Terms further provide: "You acknowledge and agree that [you] are solely responsible for all content, data, and information submitted by your user identification into the Service, including, without limitation, content, data, and information relating to third parties." JA131. Moreover, the Terms contain the Arbitration Agreement—which is included in a section entitled "Dispute Resolution; Binding Arbitration"—that states, *inter alia*, "**You and TaxAct agree that any dispute arising out of or related to these Terms or our Services is personal to you and TaxAct and that any dispute will be resolved solely through individual arbitration and will not be brought as a class arbitration, class action or any other type of representative proceeding**." JA133; *see also* JA75 ¶ 11 (discussing same).[3]

TaxAct users are required to affirmatively acknowledge their consent to the Terms when they create a TaxAct account and again prior to filing their tax returns. JA69 ¶ 3, JA74 ¶ 6, JA77 ¶ 17.

[3] The Arbitration Agreement provides users with "the right to opt out of binding arbitration within thirty (30) days of the date you first accepted the terms of this Section by sending an email to arbitration@taxact.com." JA133; *see also* JA70 ¶ 13.

2. After using Sessoms' personal information to register and verify an account and agreeing to TaxAct's Terms of Service, user "blakesessoms" electronically filed Sessoms' individual tax returns for 2020 and 2021 using TaxAct.

On February 22, 2021, an account on TaxAct's website was created with the username "blakesessoms"—"Blake" is Sessoms' middle name, as the Sessoms' public marriage record shows[4]—using, *inter alia*, (i) Sessoms' name; (ii) Sessoms' Social Security Number; (iii) Sessoms' email address; (iv) Sessoms' home address; and (v) Sessoms' phone number. *See* JA84; JA71 ¶ 5(a). To create this account and register to use TaxAct's services, the user had to accept TaxAct's Terms of Service by affirmatively checking a required checkbox to assent to a provision that read: "I [*i.e.*, Matthew Sessoms] agree to the TaxAct Terms of Service & Terms of Use [hyperlinked], and have read and acknowledge the Privacy Statement [hyperlinked]." JA74 ¶ 6; JA128; JA130-33; *see also* JA71 ¶ 5(a).

[4] *See* Westmoreland County, Pa., *Public Records*, Book 0340, Page 15184, License No. 2022-1647 (reflecting marriage license issued on December 15, 2022 for marriage of "Sessoms, Matthew, Blake" and "Roberts, Krysta, Dawn"), *available at* https://countyfusion2.kofiletech.us/countyweb/disclaimer.do; *see also* JA143-49 ("Matthew B. Sessoms" tax return); JA150-52 ("Krysta D. Sessoms").

Within four minutes of registering, the registrant verified possession of and access to Sessoms' mobile phone and email account by responding to automated messages that TaxAct sent via each medium. *See* JA85 ("User blakesessoms verified mobile verification code"; "User blakesessoms verified the email [REDACTED]"). Immediately thereafter, the user "[c]reate[d] [a tax] Return" for Tax Year 2020 and, six minutes later, added Sessoms' Tax Identification Number ("TIN"). JA84; *see* JA72 ¶ 5(b); JA87.

On March 17, 2021, the same account electronically filed via TaxAct's services Sessoms' *individual* federal and state tax returns—that is, returns for Sessoms *alone*, not a for spouse or any dependents—for tax year ("TY") 2020. *See* JA84; JA70-73 ¶ 5; JA87 ("TaxAct Account Information – blakesessoms": reflecting that for "TaxYear 2020," an individual return was "EFiled" with the "Name On Return" being "Matthew Sessoms" and the TIN ending in "0512"). To electronically file Sessoms' individual tax returns for Tax Year 2020, the user—as upon registration—had to again accept TaxAct's Terms of Service by affirmatively checking a required checkbox to assent to a provision that read: "I [*i.e.*, Matthew Sessoms] agree to the terms and conditions

[hyperlinked]." JA71 ¶ 5(a); JA135; *see* JA77-78 ¶¶ 17, 19; JA144; JA140.

On March 7, 2022, after again verifying Sessoms' email and mobile phone using an automated verification code sent by TaxAct to Sessoms, JA83-84, user blakesessoms electronically filed Sessoms individual return for the 2021 tax year. JA83; JA87 ("TaxAct Account Information – blakesessoms": reflecting that for "TaxYear 2021," an individual return was "EFiled" with the "Name On Return" being "Matthew Sessoms" and the TIN ending in "0512"). To electronically file that return, the user had to yet again accept TaxAct's Terms of Service by affirmatively checking a required checkbox to assent to a provision that read: "I [*i.e.*, Matthew Sessoms] agree to the terms and conditions [hyperlinked], and have read and acknowledge the Privacy Statement [hyperlinked]." JA71 ¶ 5(a); JA136; *see* JA77-78 ¶¶ 17, 19; JA145; JA141.

Furthermore, to file these returns in Sessoms' name via TaxAct's services, the user had to submit a range of information unique to Sessoms, including his full name, Social Security number or individual taxpayer identification number, date of birth, state-issued ID number (with issuance location, date, and expiration date), home address, mobile number, email address, occupation, adjusted gross income ("AGI"), and a

self-created PIN (also known as a "Self-Select PIN"[5]). *See* JA73 ¶ 5(g), JA78; JA144-49; JA151-52.

Additionally, to electronically submit the individual tax returns for both Tax Year 2020 and Tax Year 2021, the user had to input Sessoms' self-created PIN and date of birth at the "Sign and submit your return" screen and acknowledge the following language: "Under penalty of perjury I [*i.e.*, Matthew Sessoms] declare that I have examined this return and accompanying schedules and statements, and to the best of my knowledge and belief, they are true, and correctly list all amounts and sources of income I received during the tax year" and "I [*i.e.*, Matthew Sessoms] am signing by entering my Self-Select Pin information below." *See* JA135-36.

After electronically filing that second individual return for Sessoms, user "blakesessoms" periodically used TaxAct's Services in the months that followed. JA82-83. For example, the user signed in on a trusted device and printed a return on March 24, 2022, and, on January

[5] The individual could select "any 5-digit number except all zeros." JA135-36; JA154-55; *see* JA78 ¶ 21.

30, 2023, the user verified a mobile verification code sent to Sessoms' phone and created a return for Tax Year 2022. JA83.

3. After verifying Krysta's and Sessoms' personal information and agreeing to TaxAct's Terms of Service, Krysta Sessoms electronically filed their joint tax returns for 2022 using TaxAct.

On February 8, 2023, Sessoms' spouse, Krysta, filed a joint tax return for herself and Sessoms for Tax Year 2022 using *her* own TaxAct account. JA73 ¶ 5(f)-(g); JA8;, JA125-26. To electronically file the couple's joint return, Krysta acknowledged TaxAct's Terms of Service by affirmatively checking a required checkbox to assent to a provision that read: "I agree to the terms and conditions [hyperlinked], and have read and acknowledge the Privacy Statement [hyperlinked]." JA71 ¶ 5(a), JA77-78 ¶¶ 17, 20-21; JA154.

To file the joint tax return, Krysta had to submit a range of information unique to *both* herself and Sessoms, including each of their full names, Social Security numbers or individual taxpayer identification numbers, dates of birth, state-issued ID numbers (with issue location, date, and expiration date), home address, mobile numbers, email addresses, occupations, AGIs, and Self-Select PINs. *See* JA151-52; JA78 ¶ 21 (discussing requirement that a filing spouse must input a Self-Select

PIN for both himself or herself and the non-filing spouse); JA154 (illustrating same).

To electronically submit the joint tax return for Tax Year 2022, Krysta had to input each of Sessoms' and her Self-Select PINs and dates of birth at the "Sign and submit your return" screen and acknowledge the following language: "Under penalty of perjury I declare that I have examined this return and accompanying schedules and statements, and to the best of my knowledge and belief, they are true, and correctly list all amounts and sources of income I received during the tax year" and "I am signing by entering my Self-Select Pin information below." JA154.

B. Procedural History

James Kirkham filed his complaint against TaxAct on July 25, 2023 in the Court of Common Pleas in Philadelphia County as a putative class action on behalf of Pennsylvania residents. JA34 (Dkt. 1). TaxAct timely removed the action to the United States District Court for the Eastern District of Pennsylvania on August 24, 2023. *Id.* TaxAct then promptly moved to compel arbitration and stay proceedings against Kirkham on September 29, 2023. *See* JA36 (Dkt. 21). On October 17, 2023, before the court could rule, Plaintiffs amended the complaint to add Sessoms as a

plaintiff and putative class representative. *See* JA43-66. TaxAct again moved to compel arbitration and stay proceedings against Kirkham and Sessoms on November 10, 2023. *See* JA37 (Dkt. 30).

TaxAct also separately requested that the court stay proceedings, including discovery, while the motion to arbitrate remained pending. JA 35 (Dkt. 15 at 4-5), JA36 (Dkt. 21 at 12-13), JA37 (Dkt. 30 at 24-26). Indeed, this Court—consistent with published decisions by its sister circuits—previously has vacated an order directing parties to proceed with discovery during the pendency of a motion to compel arbitration, reasoning that doing otherwise "may unnecessarily subject [parties] 'to the very complexities, inconveniences and expenses of litigation that they determined to avoid.'" *Klepper v. SLI, Inc.*,45 F. App'x 136, 139 (3d Cir. 2002) (unpublished) (citing *Suarez-Valdez v. Shearson Lehman/Am. Express, Inc.*, 858 F.2d 648, 649 (11th Cir. 1988)); *see*, *e.g.*, *CIGNA HealthCare v. Kaiser*, 294 F.3d 849, 855 (7th Cir. 2002) ("refusal to stay discovery . . . until the issue of arbitrability is resolved puts the cart before the horse"). Nonetheless, at a pretrial conference in September 2023, the district court required the parties to go forward with discovery. *See* JA 35 (Dkts. 8, 17).

Three months later, on February 12, 2024, the district court denied without prejudice TaxAct's second arbitration motion after holding, *sua sponte*, that Texas law applied based on its reading of the choice-of-law provision in the Terms—despite both sides having briefed the motion under Pennsylvania law. JA67-68.[6] By the time the district court denied TaxAct's second arbitration motion without prejudice, the parties in *Smith-Washington* had reached a settlement in principle for a nationwide class settlement that would encompass all of Kirkham's and Sessoms' claims. *See Smith-Washington*, No. 2:32-cv-00830-VC, Dkt. 106 (N.D. Cal. Jan. 10, 2024). As a result, TaxAct moved to stay this action in its entirety on February 21, 2024, JA40 (Dkt. 64), which the district court summarily denied during a status hearing two days later without setting forth any reasoning and without an opposition brief even having been filed. JA40 (Dkt. 66). Consequently, TaxAct continued to pursue arbitration and engage in discovery.

[6] The district court's invocation of the Terms' choice-of-law provision is puzzling given its ultimate determination that Sessoms had not agreed to the Terms. In any event, as TaxAct showed in its original motion, Pennsylvania contract law would have led to the same result of Sessoms being bound to the Terms and the Arbitration Agreement contained therein. *See* JA37 (Dkt. 30 at 17-23).

On February 16, 2024, after the denial of its second arbitration motion without prejudice, TaxAct filed its third arbitration motion, which gives rise to this appeal. *See* JA39 (Dkt. 55). As with the prior two arbitration motions, TaxAct contended that all of Plaintiffs' claims are subject to arbitration as Plaintiffs consented to the Terms of Service, which contain the Arbitration Agreement.

As to Sessoms, TaxAct showed that he was bound to the Terms of Service containing the Arbitration Agreement (1) because TaxAct's records show that Sessoms registered for and verified a TaxAct account, used TaxAct's services, and directly assented to the Terms and (2) even if he was a non-signatory, through Krysta's use of the services on his behalf and at his behest, which included assent to the Terms. *See id.* (Dkt. 55 at 6-7). Sessoms opposed arbitration on the basis that he purportedly had not agreed to the TaxAct Terms of Service. *See* JA41 (Dkt. 70 at 12-27). Sessoms did not dispute that registering for TaxAct or using TaxAct's services to submit a tax return requires one to click on the box assenting to the Terms of Service containing the Arbitration Agreement. *Id.*

Instead, Sessoms submitted a self-serving declaration contending that he did not register for TaxAct or submit the individual tax returns

for himself. *See* JA175-78. He claimed that Krysta, whom he later married, did both: "In February 2021, Krysta Sessoms, who is now my wife, created an account with TaxAct, which she used to file a tax return for me for the 2020 Tax Year." JA176 ¶ 4.[7] In his declaration, Sessoms admitted that he "understood that [Krysta] was preparing [his] tax return" and that he "gave Krysta permission to prepare [his] tax return." *Id.* ¶¶ 5-6. He added that he "had no preference or concern [as] to what service she used—whether that be TaxAct or one of its competitors or even [whether] it was an online service." *Id.* ¶ 5.

Sessoms represented that Krysta then prepared and submitted his Tax Year 2021 and their joint Tax Year 2022 tax returns using TaxAct's services. *Id.* ¶¶ 4, 8. Sessoms also argued that his spouse's purported action of registering an account in Sessoms' own name and filing returns for *him* alone could not be used to bind him to the Terms of Service that were essential to his spouse's ability to (supposedly) register the account in his name and (allegedly) submit the individual returns in question. See JA41 (Dkt. 70 at 22-32); *see also* JA176-77 ¶¶ 5-7, 16-17. He likewise

[7] Sessoms' declaration incorrectly refers to his spouse, "Krysta," JA176 ¶¶ 4, 6, as "Krystan" several times, *id.* ¶¶ 5, 7.

argued that her preparation and filing of their joint return using her own account did not bind him. *See* JA41 (Dkt. 70 at 22-32). But Sessoms' declaration did not state that he placed any limitations on Krysta's authority to prepare and file tax returns on his behalf. *See* JA175-78. For example, Sessoms did not claim that he had specifically advised Krysta that she could not agree to any particular contractual terms, including the Terms or the Arbitration Agreement. *See id.*

The court granted TaxAct's motion as to Kirkham but denied it as to Sessoms. JA29-31; JA4. As to both Plaintiffs, the district court agreed that, by virtue of the delegation clause in the Terms' Arbitration Agreement, the court's analysis was limited to whether each Plaintiff assented to the Arbitration Agreement. JA12-14. The district court further held—again, endorsing TaxAct's position—that the Arbitration Agreement was supported by adequate consideration. JA16-17. And the court found that the evidence unequivocally showed that Kirkham, by registering for TaxAct and using its services, agreed to the Terms and therefore the arbitration provision therein. JA20-22.[8] Accordingly, the

[8] Having concluded that the Arbitration Agreement was supported by adequate consideration, the district court concluded Kirkham is bound to the Terms because "TaxAct provided Kirkham with sufficiently

court required arbitration of Kirkham's claims. JA4., JA29-30.

As to Sessoms, however, the district court denied the motion. JA30-31; JA4. Relying on no more than Sessoms' declaration—and notwithstanding that discovery remained underway and that TaxAct was on the verge of deposing Sessoms and his spouse—the court categorically denied arbitration of Sessoms' claim (*i.e.*, this time omitting the "without prejudice" annotation the court had used in its February 2024 ruling). *See* JA22-29; *cf.* JA67-68. It held that Sessoms could not have personally assented to the Terms because of his declaration's claims "that he never used TaxAct's software and never granted his wife the authority to enter into an agreement to waive his right to a jury trial or proceed via a class action." JA22; *see* JA22-23 (discussing record through lens of Federal Rule of Civil Procedure 56).

The district court also held that, assuming only Krysta used TaxAct's services on Sessoms' behalf and only she agreed to its Terms, Sessoms was not bound to the Terms by the agency, equitable estoppel, or third-party beneficiary doctrines. JA22-29. Specifically, the court held

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conspicuous notice of its Terms of Service for him to be bound," and he took action in affirmatively checking a box acknowledging and consenting to the Terms. JA20-22.

that Sessoms was not bound by (1) either actual or apparent agency, because "the facts necessary to determine whether there is an agency relationship are in genuine dispute," JA27-29; (2) equitable estoppel, because his claims arise from general obligations imposed by state law that can stand independently of the Terms, JA23-24; and (3) the third-party beneficiary doctrine, because the Terms purportedly did not contain an "unmistakable manifestation of the parties' intent" to benefit Sessoms, JA25-27.

TaxAct timely filed its Notice of Appeal on March 18, 2024. JA1-3. Pursuant to *Coinbase, Inc. v. Bielski*, 599 U.S. 736 (2023), the district court issued an order on March 19, 2024 staying Sessoms' case during the pendency of this appeal. JA179. On April 29, 2024, the court in *Smith-Washington* granted preliminary approval of a nationwide class settlement, which if finally approved will extinguish Sessoms' claims unless he opts out, and will in any event preclude this case from proceeding as a class action (as the absent members of Sessoms' putative class will have their claims released). No. 3:23-cv-00830-VC, Dkt. 132 (N.D. Cal. Apr. 30, 2024). The *Smith-Washington* final approval hearing is scheduled for November 21, 2024. *Id.*

C. Rulings Presented for Review

TaxAct appeals from the March 15, 2024 Opinion, JA5-31, and Order, JA4, of the Eastern District of Pennsylvania (Beetlestone, J.) denying a stay of Sessoms' claims pending arbitration pursuant to U.S.C. § 3.

SUMMARY OF THE ARGUMENT

I. The district court erred in holding that Sessoms did not agree to arbitrate his claims. The evidence in the record establishes that Sessoms was bound to the Terms, which contain the Arbitration Agreement, for multiple reasons.

A. First, even assuming that Sessoms himself never personally used TaxAct, he is bound to the Terms, and therefore the Arbitration Agreement contained therein, through Krysta's consent to the Terms on his behalf. Under case law interpreting the Federal Arbitration Act ("FAA"), the FAA's requirement of a "written agreement for arbitration" is satisfied where an arbitration provision is made enforceable against a third party under state contract law. *Arthur Anderson LLP v. Carlisle*, 556 U.S. 624, 629-31 (2009). This Court has therefore recognized that an arbitration clause may be enforced by or against non-signatory parties under agency, equitable estoppel, and third-party beneficiary doctrines.

White v. Sunoco, Inc., 870 F.3d 257, 262-63 (3d Cir. 2017). Here, Sessoms is bound to the Terms by all three of those doctrines as a matter of Texas law (which the district court held governed contract formation here).

To begin, Sessoms is bound to the Terms under the agency doctrines of actual and apparent authority. As to actual authority, Sessoms admits he expressly gave Krysta authority to prepare and file his individual taxes and their joint taxes in any manner she wished—including via "an online service." *See Jackson v. World Wrestling Ent., Inc.*, 95 F.4th 390, 393 (5th Cir. 2024) (holding as a matter of Texas agency law that nephew who purchased tickets for his uncle as a gift bound the uncle to the online terms requiring arbitration). The record contains no indication that Sessoms placed *any* limitations on Krysta's authority, let alone instructed her that she could not agree to arbitrate. Additionally, Krysta had apparent authority to agree to the Terms on Sessoms' behalf. From TaxAct's perspective, not only was Krysta acting with Sessoms' permission and at his behest, but she was also acting *as Sessoms himself*, and there is no record evidence that Sessoms ever conveyed to TaxAct any limitation on Krysta's authority.

Further, Sessoms is independently bound to the Terms via

equitable estoppel and as a third-party beneficiary. As to estoppel, it is uncontested that Sessoms repeatedly received the benefits of TaxAct's services—most notably, the filing of his tax returns for multiple years. This fact is fatal to Sessoms' efforts to resist arbitration; as the Texas Supreme Court summarized last year, "[l]itigants who seek direct benefits from a contract subject themselves to its terms, including any arbitration clause within that contract." *Taylor Morrison of Tex., Inc. v. Ha*, 660 S.W.3d 529, 531 (Tex. 2023) (per curiam). Similarly, Sessoms is bound to the Terms as a third-party beneficiary; the Terms expressly apply to "information relating to third parties," and, particularly given the nature of joint tax filings, Sessoms is precisely the type of non-signatory that the Terms envision.

B. Second, the evidence also establishes that Sessoms did, in fact, agree to TaxAct's Terms through his personal use of the Services. The record establishes, for instance, that Sessoms created an account under his name with his own personal information, verified the account with *his own* phone and email address, and filed his individual tax returns, all the while explicitly consenting to the Terms at multiple junctures. The district court erred in crediting Sessoms' declaration

stating that he had never used TaxAct's services over the uncontroverted documentary evidence of what actually occurred, including TaxAct's security procedures that confirm a filing user's identity. Not only does his declaration leave undisputed the substantial evidence that TaxAct relied on in support of its motion, but it also flies in the face of settled Texas law regarding electronic consent. *See*, *e.g.*, *Aerotek, Inc. v. Boyd*, 624 S.W.3d 199, 205-06 (Tex. 2021) (rejecting plaintiff's self-serving declaration challenging assent to arbitration provision given that defendant employed "security procedures" similar to those of TaxAct to register an account).

II. Even if the district court was correct that a genuine dispute of triable fact precluded all of these issues from being decided in TaxAct's favor on the current record, the court should have at least denied TaxAct's arbitration motion without prejudice to renewal after discovery was completed. The district court instead effectively granted summary judgment *for Sessoms* on the arbitration question when, at the very least, a trial on arbitrability would be needed before any ruling in Sessoms' favor.

STANDARD OF REVIEW

"[This Court] review[s] de novo rulings on motions to compel arbitration." *Gov't Emps. Ins. Co. v. Mount Prospect Chiropractic Ctr., P.A.*, 98 F.4th 463, 467 (3d Cir. 2024).

A summary judgment standard governs where, as here, a court considers evidence beyond the pleadings in ruling on arbitration. *Guidotti v. Legal Helpers Debt Resol., L.L.C.*, 716 F.3d 764, 776 (3d Cir. 2013); *see also Sapp v. Indus. Action Servs., LLC*, 75 F.4th 205, 210 (3d Cir. 2023).

ARGUMENT

I. The District Court Erred in Holding That Sessoms Was Not Bound by the Terms and Therefore Is Not Required to Arbitrate.

Based solely on Sessoms' declaration—in which he admitted that he gave his spouse permission to prepare and file his tax returns, including by using "an online service," but contended that he *silently* did not authorize her to agree to arbitration—the district court denied TaxAct's motion as to Sessoms. JA22-29. The district court erred in concluding that TaxAct's Terms, which include the Arbitration Agreement, do not bind Sessoms.

A. Even if Sessoms Did Not Himself Use TaxAct's Services and Personally Agree to the Terms, He Is Bound to the Terms and the Arbitration Agreement Therein for Each of Several Independent Reasons.

Even accepting the district court's (counter-factual) surmise that Sessoms himself never used TaxAct's services and did not personally agree to the Terms, *but see infra* § I.B, he is nevertheless bound by the Terms, including their arbitration provision, for each of four reasons under contract law. *See generally Arthur Anderson*, 556 U.S. at 630-31 (discussing binding third parties to arbitration); *White*, 870 F.3d at 261-62 (applying and discussing *Arthur Anderson*). Sessoms is bound because of two distinct agency doctrines—actual authority and apparent authority—as well as through equitable estoppel, and also because he was a third-party beneficiary of Krysta's (supposed) actions in using TaxAct's services (including filing both Sessoms' individual taxes as well as the couple's subsequent joint returns).

1. Sessoms Is Bound to the Terms Because His Spouse, Krystal, Was an Agent With Actual and Apparent Authority to Bind Him.

The district court correctly recognized that "agency may bind a non-signatory to an arbitration agreement." JA27 (quoting *In re Kellogg Brown & Root, Inc.*, 166 S.W.3d 732, 738 (Tex. 2005)). But the court erred

as a matter of law in holding that agency principles do not bind Sessoms to the Terms. *See id.*; *see also* JA28 (stating "the facts necessary to determine whether there is an agency relationship are in genuine dispute"). In actuality, the undisputed facts show that Sessoms is bound through his spouse/agent's (a) actual and (b) apparent authority. *See*, *e.g.*, *Jackson*, 95 F.4th at 393 (applying Texas law agency principles and finding that nephew who bought tickets for his uncle bound the uncle to the arbitration agreement applicable to the use of the tickets).

"An agency relationship, which can be formed by oral agreement between the parties or simply by the parties' conduct, entitles the agent to act on the principal's behalf with the same force and effect as if the principal had performed the act himself." *Cmty. Health Sys. Pro. Servs. Corp. v. Hansen*, 525 S.W.3d 671, 697 (Tex. 2017). An agent can bind the principal through either actual or apparent authority, which "are both created through conduct of the principal communicated either to the agent (actual authority) or to a third party (apparent authority)." *Protect Env't Servs., Inc. v. Norco Corp.*, 403 S.W.3d 532, 540 (Tex. App. 2013). Each strain of authority—each independently supporting reversal here—is discussed in turn.

a. Sessoms Is Bound by Actual Authority.

Sessoms is bound to the Terms by the actual authority he conferred on Krysta. "[T]o prove actual authority . . ., there must be evidence that either (1) the principal intentionally conferred authority on another to act as its agent, or (2) the principal intentionally, or by a want of due care, allowed another to believe that the agent possessed authority to act as the principal's agent." *Id.* "In determining whether a party had actual authority to act for another, [courts] examine the words and conduct by the principal to the alleged agent regarding the alleged agent's authority to act for the principal." *Id.* (collecting cases).

Here, Sessoms' own words establish that he granted Krysta actual authority to prepare and file his tax returns, including consenting to the Terms on his behalf. Sessoms' declaration states that he "gave Krysta[, his now-spouse,] permission to prepare [his] tax returns." JA176 ¶ 6; *see id.* ¶ 5 (Sessoms "understood that she was preparing [his] tax return"). Moreover, Sessoms broadly delegated to Krysta the authority regarding how to do so, stating that he "was not physically present" as she prepared the returns and he "had no preference or concern [as] to what service she used—whether that be TaxAct or one of its competitors or even [whether]

it was an online service." *Id.* ¶ 5. Nowhere does Sessoms claim that he *told*—or otherwise indicated to—*Krysta* that there were *any* limitations on her authority to prepare and file Sessoms' returns. *See* JA175-78.[9] Sessoms conferred on Krysta this wide latitude even though tax return services—whether brick and mortar or online—frequently require contracting, and that such contracts often include arbitration provisions, as they have for decades. *See generally*, *e.g.*, *H & R Block, Inc. v. Haese*, 992 S.W.2d 437, 438-39 (Tex. 1999) (per curiam) (arbitration provision introduced by tax preparer in 1998); *Baumeister v. Reagan*, No. 02-12-00276-CV, 2013 WL 530976, at *3 (Tex. App. Feb. 14, 2013) (discussing accountant's arbitration agreement with its clients); Jeffrey H. Dasteel, *Consumer Click Arbitration: A Review of Online Consumer Arbitration Agreements*, 9 Year Book on Arb. & Mediation 1, 10 (2017) (finding "47.5% of the 200 websites we reviewed included binding arbitration in their terms and conditions").

[9] Instead, if Sessoms' declaration is to be believed, he conferred even more authority on Krysta throughout the process. That is, for Krysta to have prepared and submitted a return on Sessoms' behalf, he would have had to provide her with a large amount of personal information and tax return information. *Supra* at 14-15; JA71-73; JA78; JA82-85, JA144-49.

Based on these undisputed facts, Krysta therefore had actual authority as a matter of law. Indeed, the record concerning the authority Krysta possessed here exceeds what has been held sufficient for summary judgment in other Texas law agency cases. In *Jackson*, for instance, the Fifth Circuit found agency and required arbitration pursuant to online terms that accompanied a nephew's purchase of wrestling tickets for his uncle. *See* 95 F.4th at 393. There, the court held that even though "[the nephew] was not acting subject to [the uncle's] authorization or control when he purchased the tickets as a surprise gift, he did act as [the uncle's] agent when [the uncle] allowed [the nephew] to present the ticket on [the uncle's] behalf for admittance to the stadium." *Id.* The Fifth Circuit explained that "[a]ccepting the arbitration agreement—a required condition for [the uncle] to enter the event—was well within [the nephew's] implied authority as [the uncle's] agent to gain his entry into the stadium." *Id.*; *see also id.* ("Event attendees routinely purchase and present tickets on behalf of family and friends, and in doing so, accept the required terms and conditions.").[10]

[10] This Court should grant special deference to the Fifth Circuit's interpretation of Texas state law. Doing so is consistent with other federal courts of appeals' holdings that where a court of appeals has,

So too here, where Krysta's actual authority to act on Sessoms' behalf is even clearer. Sessoms expressly made Krysta his agent with respect to tax return preparation, including use of an "online service." JA176 ¶ 5. And accepting the Terms was a "required condition for" preparing and submitting the returns on Sessoms' behalf, and accordingly "was well within [Krysta's] implied authority" as his express agent. *See Jackson*, 95 F.4th at 393; *see also*, *e.g.*, *Mid-Am. Supply Corp. v. Truist Bank*, 660 F. Supp. 3d 594, 601 (E.D. Tex. 2023) (granting summary judgment where agent "was explicitly authorized to open the Account," and thus "every transaction made in the Account was 'properly payable'"); *Houston Cas. Co. v. Certain Underwriters at Lloyd's London*, 51 F. Supp. 2d 789, 800-01 (S.D. Tex. 1999) (holding as a matter of law that agent's representations were "made within the scope of its actual

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under *Erie*, predicted the law of a state within its circuit, "the federal courts of other circuits should defer to that holding, perhaps always, and at least in all situations except the rare instance when it can be said with conviction that the pertinent court of appeals has disregarded clear signals emanating from the state's highest court pointing toward a different rule." *Factors Etc., Inc. v. Pro Arts, Inc.*, 652 F.2d 278, 283 (2d Cir. 1981); *accord Mellon Bank, NA v. Ternisky*, 999 F.2d 791, 796 (4th Cir. 1993) (applying same rule and "[t]herefore . . . defer[ring] to the Third Circuit's interpretation of Pennsylvania law"); *Dawn Equip. Co. v. Micro-Trak Sys., Inc.*, 186 F.3d 981, 988-89 & n.3 (7th Cir. 1999); *Abex Corp. v. Md. Cas. Co.*, 790 F.2d 119, 125 (D.C. Cir. 1986).

authority" where "[e]ven if it is accepted that [the agent's] authority was limited to obtaining a reinsurance policy that fully followed the settlements of the underlying policy, surely it is the case that representations regarding the terms and conditions of precisely that underlying policy are authorized") (cleaned up), *aff'd*, 252 F.3d 1357 (5th Cir. 2001); *Polland & Cook v. Lehmann*, 832 S.W.2d 729, 738 (Tex. App. 1992) ("An agent's authority is presumed to be coextensive with the business entrusted to his care. He may perform such acts as are necessary and proper to accomplish the purpose for which the agency was created.") (cleaned up).

At the very least, Sessoms' actions—giving Krysta unfettered authority to file his tax returns, including by using online services—certainly "allowed [Krysta] to believe that [she] possessed authority to" accept TaxAct's terms. *Protect Env't Servs.*, 403 S.W.3d at 540.

The district court committed reversible error in holding otherwise. The court's sole basis for finding a "genuine dispute" as to whether Krysta was Sessoms' agent was reliance on Sessoms' statement in his declaration that he "did not grant [Krysta] authority to enter into any agreements on [his] behalf or to waive [his] right to a jury trial or to

participate in a class action." JA176. But that misapprehends the required inquiry. The proper analysis focuses on the "words and conduct by the principal toward the agent." *Protect Env't Servs.*, 403 S.W.3d at 540. Here, nothing in his declaration—or anywhere else in the record—suggests that Sessoms said or did anything *toward* Krysta to limit her authority. To the contrary, the type of authority he bestowed—as in *Jackson*—carried with it the implied ability to take measures to effectuate the delegated responsibilities of preparing and submitting his tax returns. *See also Houston Cas.*, 51 F. Supp. 2d at 800 (a principal "cannot escape liability on the basis that it did not authorize [the agent's] specific representations") (emphasis omitted); *id.* ("[T]he proper question is not whether the principal authorized the specific wrongful act; if that were the case, principals would seldom be liable for their agents' misconduct. Rather, the proper inquiry is whether the agent was acting within the scope of the agency relationship at the time of committing the act.") (quoting *Celtic Life Ins. Co. v. Coats*, 885 S.W.2d 96, 99 (Tex. 1994)).

Consistent with this reasoning, when a principal through want of "ordinary care . . . clothes an agent with the indicia of authority" the agent exercises, the principal is bound to those actions. *See Protect Env't*

Servs., 403 S.W.3d at 540; *Houston Cas.*, 51 F. Supp. 2d at 800-01 ("'Since the principal has selected the agent to act in a venture in which the principal is interested, it is fair, as between him and a third person, to impose upon him the risk that the agent might exceed his instructions.'") (quoting *Standard Distribs. v. F.T.C.*, 211 F.2d 7, 15 (2d Cir. 1954) (Hand, J.)). In short, the onus was on Sessoms to limit the unbridled authority he granted to Krysta. He neglected to do so.

Finally, even if the law were not clear that the burden fell on Sessoms to limit the powers he delegated to Krysta, the court erred in crediting Sessoms' declaration on this point. The bare statement that Sessoms did not "grant . . . authority to enter into any agreements on my behalf or to waive my right to a jury trial or to participate in a class action" is a legal conclusion. This Court has emphasized that "the affiant must ordinarily set forth facts, rather than opinions or conclusions. An affidavit that is essentially conclusory and lacking in specific facts is inadequate to satisfy the movant's burden." *Maldonado v. Ramirez*, 757 F.2d 48, 51 (3d Cir. 1985) (internal citations omitted). Whether Sessoms granted Krysta the authority to agree to the Terms is exactly the question that was before the district court and is now before this Court, and the

answer must be based on an assessment of Sessoms' actual, contemporaneous words and conduct—not magic words in a declaration prepared with the assistance of counsel years after the fact. As such, the Court should disregard that statement in Sessoms' declaration.

Because the undisputed record evidence shows that Krysta had actual authority to agree to the Terms, including their arbitration provision, reversal is required. Paraphrasing the Fifth Circuit, "[a]n individual who permits a third party to [prepare and file tax returns] on his behalf is bound by the terms and conditions governing the [preparation and filing of] th[ose] [returns]." *Jackson*, 95 F.4th at 392.

b. Sessoms Is Bound by Apparent Authority.

Even absent actual authority, reversal is required because Krysta also had apparent authority to serve as Sessoms' agent. Apparent authority "arises *either* from (1) a principal knowingly permitting an agent to hold himself out as having authority, *or* (2) a principal's actions which lack such ordinary care as to clothe an agent with the indicia of authority, thus leading a reasonably prudent person to believe that the agent has the authority he purports to exercise." *Reliant Energy Servs., Inc. v. Cotton Valley Compression, L.L.C.*, 336 S.W.3d 764, 784 (Tex. App.

2011) (emphasis added). As noted *supra* at 28-29, apparent authority is assessed from the perspective of the third party; that is, courts "examine the conduct of the principal and the reasonableness of the third party's assumptions regarding authority." *Id.*

Here, the undisputed facts establish that a reasonably prudent person would conclude that Sessoms authorized Krysta to act as his agent in dealing with TaxAct, including assenting to the Terms on his behalf. First, recall that Sessoms told Krysta to file his tax returns without giving her any limiting instructions. Sessoms, by his own admission, recognized that this might involve Krysta using "an online service" like TaxAct.

Next, as a direct result of Sessoms' actions, Krysta allegedly then created an account in Sessoms' name as user "blakesessoms"—a user who, from TaxAct's perspective, *was* Sessoms because Sessoms made no efforts to indicate otherwise to TaxAct. The user provided only Sessoms' name, Social Security number, email, phone number, address, and other personal info, and then filed tax returns in only Sessoms' name using his personal information for two consecutive years. Moreover, the user verified the account using Sessoms' own phone and email address—not

Krysta's. Thus even assuming only Krysta, not Sessoms himself, was the one to actually prepare and file the returns on Sessoms' behalf—*but see infra* § I.B—a reasonable person in TaxAct's position would understand that Krysta had apparent authority to act on Sessoms' behalf. *See Walker Ins. Servs. v. Bottle Rock Power Corp.*, 108 S.W.3d 538, 551 (Tex. App. 2003) (finding apparent authority in light of record showing, *inter alia*, agent's "role as an intermediary to facilitate communications between [counterparty] and [the principal]," and "[principal's] endorsement of [agent's] efforts" insofar as the principal "knew [that its counterparty] was dealing with [the agent] and using [that individual] as an intermediary and 'point man'").

The district court, however, cast apparent authority aside, stating that "[b]eyond the fact that Krysta created an account on its website in her husband's name, TaxAct has not pointed the Court to any sufficiently clear 'acts of participation, knowledge, or acquiescence by' her husband to carry its burden of proving her apparent authority to bind her husband to the 2020 Terms of Service." JA29 (citing *Ins. Co. of N. Am. v. Morris*, 981 S.W.2d 667, 672 (Tex. 1998)). Even assuming what the district court identified is insufficient to establish apparent authority, the district

court's summary does not accurately reflect the record summarized above. Sessoms went well beyond merely allowing Krysta to create the "blakesessoms" registration; he necessarily provided her with the extensive personal information she needed to file his tax returns, he repeatedly verified the account using his phone and his email address or allowed Krysta to do so, and he further provided verification using a unique identifier number, and provided a host of personal information (*e.g.*, Social Security number, AGI) in order to submit the returns. *See*, *e.g.*, *supra* at 10-14; JA82-85. Thus, the district court also erred by failing to find apparent authority on this record.

2. Sessoms Independently Is Bound to the Terms Based on Equitable Estoppel.

The district court further erred in concluding that equitable estoppel principles do not bind Sessoms to the Terms and therefore allowing him to avoid the Arbitration Agreement. *See* JA23-24.

As the Texas Supreme Court has recently summarized, "[l]itigants who seek direct benefits from a contract subject themselves to its terms, including any arbitration clause within that contract." *Taylor Morrison*, 660 S.W.3d at 531. Put simply, "a non-signatory plaintiff seeking the benefits of a contract is estopped from simultaneously attempting to

avoid the contract's burdens, such as the obligation to arbitrate disputes." *Id.* at 533. In *Taylor Morrison*, the court recognized that "[a] nonsignatory can seek the benefits of a contract either by suing based on the contract, or by conduct that 'deliberately seeks and obtains substantial benefits from the contract itself.'" *Id.* (citations omitted).

Both species of benefits apply to Sessoms here, and thus the district court's decision rejecting estoppel should be reversed. *First*, Sessoms is bound by the Terms because he repeatedly sought and obtained substantial benefits from the Terms themselves. That is, by using TaxAct's services, Sessoms, through Krysta, prepared and filed two tax years' worth of individual returns and another year of joint returns with his spouse. *See*, *e.g.*, JA73 ¶ 5(g), JA78 ¶¶ 20-21; JA82-85, JA87; JA125-126; 144-149, JA 154. Only the Terms allowed Sessoms to avail himself of the benefits of those services; as detailed above, TaxAct predicates preparation of tax returns and filing of such returns using its platform on acceptance of the Terms. JA130.

Based on these undisputed facts, Texas's equitable estoppel doctrine forecloses Sessoms from asserting that the Terms are inapplicable to him. In *Taylor Morrison*, for example, although only one

individual in a family (Mr. Ha) signed a purchase agreement that contained an arbitration provision, *see* 660 S.W.3d at 531-32, the Texas Supreme Court held that his spouse and three minor children were also bound by the agreement through estoppel, *see id.* at 532-33. In doing so and reversing the denial of a motion to compel arbitration of the other family members' claims, the court emphasized that it "has repeatedly applied direct-benefits estoppel in situations in which nonsignatory family members lived in the home that was the subject of the suit." *Id.* (discussing prior decisions). The court held that estoppel applied irrespective of "whether Mrs. Ha and the children sued on Mr. Ha's purchase agreement," reasoning that "regardless of whether they asserted contract claims, Mrs. Ha and the children are nevertheless bound to the arbitration provision through direct-benefits estoppel for a different reason: Mrs. Ha and the children lived in the home at issue." *Id.*

Similarly, applying *Taylor Morrison*, the Texas Court of Appeals recently held that estoppel applied to bind a child to the arbitration provision in his parents' agreement with a trampoline park. *See Pearland Urban Air, LLC v. Cerna*, --- S.W.3d ---, No. 14-23-00090-CV, 2024 WL 479478, at *3 (Tex. App. Feb. 8, 2024). The court reasoned "[b]y entering

the premises . . . and participating in the services and activities, [the child] benefitted from the agreement in a way that equitably binds him to its terms including the arbitration provision." *Id.*

All the same principles apply here. Regardless of whether Sessoms' claims are directly based on the Terms, he benefitted from the very TaxAct services that were the subject of the Terms—the preparation and filing of his tax returns for multiple years. *See Taylor Morrison*, 660 S.W.3d at 533; *In re Weekley Homes, L.P.*, 180 S.W.3d 127, 132-33, 135 (Tex. 2005) (stating that "[a] nonparty cannot both have his contract and defeat it too" and holding that a non-signatory was bound to arbitrate her personal injury claim against a home builder even though that claim was not expressly based on the sales contract); *Pearland Urban Air,* 2024 WL 479478, at *3.[11] Furthermore, there is no question that Sessoms was aware of and accepted these benefits. That is, there is no indication that

[11] The district court did not address this ground for estoppel at all, but instead erroneously treated estoppel as if (as discussed *infra*) it applied *only* where a claim was directly predicated on the Terms. *See* JA23-24 (suggesting estoppel cannot apply where "claims can stand independently of the underlying contract"); JA24 (rejecting estoppel because plaintiff did not bring "claims for breach of contract or breach of warranty"); *contra Taylor Morrison*, 660 S.W.3d at 533 (estoppel applied to plaintiffs "regardless of whether they asserted contract claims").

he tried to amend these returns or filed any other tax returns during this period; instead, he relied on the ones prepared and filed via TaxAct.

Second, estoppel applies because Sessoms' claims spring from and rely upon the Terms. While Sessoms does not assert a breach of contract claim, his causes of action are predicated on supposed duties that flow from the contractual relationship between Tax Act and its tax return clients. *See* JA56 ¶¶ 63-64. That is, he alleges that "TaxAct had a duty to disclose *to its tax return preparation clients* the nature, significance, and consequences of their collection, treatment and disclosure of taxpayer tax return information." *Id.* ¶ 63 (emphasis added). Again, without the Terms, which enabled use of the services, neither the duty nor the underlying claims would exist. *See Craddick Partners, Ltd. v. EnerSciences Holdings, LLC*, No. 11-15-00014-CV, 2016 WL 3920024, at *2 (Tex. App. July 14, 2016) (holding that estoppel required non-signatory to arbitrate its claims sounding in negligent misrepresentation, negligence, and tortious interference, notwithstanding that plaintiff argued that its "claims . . . arise from general obligations imposed by law—not the Sales Agreement"); *id.* at *3 (explaining, for example, that the negligent misrepresentation "claim not only 'makes reference to or

presumes the existence' of the Sales Agreement, but also relies on it for viability"); *id.* (plaintiffs failed to identify anything that "would have obliged the [defendants]" to comply with the duties that were the subject of suit).

Furthermore, Sessom's Pennsylvania wiretap claim and his tax law claims involve factual questions of consent to TaxAct's disclosure of personal information to third parties. *See*, *e.g.*, JA61 ¶ 83 ("Plaintiffs . . . did not validly consent to having their electronic communications intercepted by TaxAct and shared with Meta, Google, and other third parties."), JA46 ¶ 16, JA61-62 ¶¶ 83, 85 (complaining about lack of authorization and consent). But that subject is inextricable from the consents embedded in TaxAct's Privacy Policy (also referred to as the "Privacy Notice"), which is incorporated into the Terms—a point that Kirkham never contested below. JA133 (including "**Privacy Policy**" as a discrete section and stating "Please refer to https://www.taxact.com/privacy-policy for TaxAct's Privacy Policy.").

The district court incorrectly held that because Sessoms' claims somehow exist independently of the Terms, estoppel did not apply. *See* JA23-24. But that does not square with *Craddick* or the fundamentals of

Sessoms' claims. Absent the Terms, which alone allowed TaxAct's services to be used, Sessoms' state wiretapping law and federal tax law claims could not exist because those claims depend on the services having been used. In other words, without use of the services, there would have been no personal information received by TaxAct, let alone allegedly shared with third parties. And, as just shown, the issue of consent that Sessoms raises in his complaint depends on interpretation and application of the Terms and privacy policies incorporated therein.

For all these reasons, this Court should reverse the district court's decision rejecting estoppel as a basis for binding Sessoms to the Terms.[12]

3. The Terms Also Separately Bind Sessoms as a Third-Party Beneficiary of the Use of TaxAct's Services.

Finally, the district court erred in holding that Sessoms was not bound to the Terms under the third-party beneficiary doctrine. *See* JA24-

[12] In cases involving agency, as here, Texas courts also apply similar estoppel principles under the rubric of "ratification." *See*, *e.g.*, *Walker Ins. Servs.*, 108 S.W.3d at 552 & nn.8-9; *id.* at 552 (finding that "[e]ven if we assume [individual] was not an authorized or apparent agent of [principal], . . . the evidence shows that [principal] accepted and ratified [agent's] efforts."); *id.* at 552 n.9 ("although ratification of the act of a stranger will not create an agency relationship, it does bind the ratifier to the specific transaction that is ratified"). Here, Sessoms continued to ratify use of TaxAct's services, which required agreeing to the Terms, by accepting the filing of his individual tax returns and joint returns.

26. The district court failed to do so despite properly recognizing that Texas law allows binding a non-signatory to a contract, including an arbitration agreement, under a third-party beneficiary theory. *See* JA24 (collecting cases). It correctly recognized that a third party is bound "so long as 'the parties to the contract intended to secure a benefit to that third party and entered into the contract directly for the third party's benefit.'" *Id.*; *see also City of Houston v. Williams*, 353 S.W.3d 128, 145 (Tex. 2011) ("[t]he agreement need not state 'third-party beneficiary' or any similar magic words"). But the court failed to properly apply those principles to the Terms.

The Terms explicitly contemplate benefits to third parties, including those in Sessoms' position, in two distinct provisions.

First, the Terms provide that users must "acknowledge and agree that [they] are solely responsible for all content, data, and information submitted by your user identification . . . *including, without limitation, content, data, and information relating to third parties*." JA131 (emphasis added). Thus, the Terms explicitly contemplate the entry of third-party data, which is necessary for the filing of any joint tax return as well as any individual tax return prepared on behalf of a non-

signatory.

Second, not surprisingly given the mundane practice of preparing and filing joint returns and the benefits that domestic tax law often affords married individuals filing jointly, the Terms also clearly contemplate joint tax return filings. Specifically, they require that a user affirmatively agree to "a limited, nonexclusive, nontransferable, non-sublicensable, revocable license to access and use the Services for [their] personal purposes . . . to prepare *one valid and complete tax return* . . . ." JA130 (emphasis added). In other words, TaxAct, through the Terms, clearly allows a user to file a return on behalf of a third party such as a spouse, meaning that it envisaged a benefit to a non-signatory filer. The same is true for Krysta, who clearly intended to use the Services to file on Sessoms' behalf—and indeed, according to Sessoms' declaration, twice filed *solely* on his behalf (and then again on behalf of both of them). That is sufficient under Texas law. *See*, *e.g.*, *Palma v. Verex Assurance, Inc.*, 79 F.3d 1453, 1457-58 (5th Cir. 1996) (finding a homeowner-borrower to have third-party beneficiary status under Texas law).

The district court was simply wrong to suggest that TaxAct's position would amount to a "significant change in Texas law." JA27 n.5.

The court likewise was wrong to assert that the Terms make no "unmistakable manifestation" of an intent to benefit a third-party filer, including a spouse. *See* JA27.

Williams, which the district court cited, illustrates the court's errors. *See* 353 S.W.3d 128. There, the Texas Supreme Court held that firefighters were third-party beneficiaries of contracts between their union and the City of Houston even though they were not specifically mentioned in the contracts. *Id.* at 146. Noting that "the Union was required by its duty of representation to seek benefits for the Firefighters in the agreements", the court found that the contracts made "this purpose plain" by providing certain benefits—*e.g.*, salary and leave—that inured to the benefit of the firefighters, and also because the benefits were "not offered to the world at large as a general beneficence, but [were] limited to the Firefighters." *Id.* This case is similar. The Terms specifically contemplate *joint* filings under a single user's account, and the only purpose of such a scheme would be to benefit the non-filing individual, *i.e.*, the third party. There is nothing "incidental" about the benefit that individuals such as Sessoms received—a joint filing is central to the federal and Pennsylvania tax framework and to the services that Tax Act

offers that purposefully benefit the individuals on the combined tax return, and no one else. *See id*. at 145.

B. Alternatively, This Court Should Hold That Sessoms, Through His Own Actions, Agreed to the Terms.

As discussed *supra* at 18-19, TaxAct originally moved for arbitration based on substantial documentary evidence that *Sessoms himself* used TaxAct's services and assented to the Terms. That is, TaxAct's records show that Sessoms registered for a TaxAct account (username "blakesessoms") in his own name and using his own personal data, verified that account with his mobile phone and email address, and used TaxAct's Services to file two years of individual tax returns, thus personally agreeing to the Terms several times over many years. Without challenging the authenticity or veracity of any of those records, Sessoms mounted a "blame my spouse" defense, via declaration, to try to evade the natural and obvious conclusion that he had assented to the Terms.

Based on Sessoms' declaration's conclusory claim "that he never used TaxAct's software", the district court found that Sessoms did not assent to the Terms. JA22; JA23 (Sessoms "says it was his wife, Krysta—not him—who handled the account"). The district court contended that this outcome was supported by the Texas Uniform Electronic

Transactions Act, JA23, which governs how and when an electronic signature is attributable to an individual. Tex. Bus. & Com. Code § 322.009. The district court erred in relying on the declaration and § 322.009 to reject TaxAct's showing that Sessoms agreed to the Terms.

At the threshold, this Court has repeatedly recognized that "conclusory, self-serving affidavits are insufficient to withstand a motion for summary judgment" as a matter of federal procedural law. *E.g.*, *Kirleis v. Dickie, McCamey & Chilcote, P.C.*, 560 F.3d 156, 161 (3d Cir. 2009) (citation omitted); *see e.g.*, *Jackson v. SEPTA*, No. 21-2671, 2023 WL 195156, at *3 (3d Cir. Jan. 17, 2023) (rejecting reliance on declaration at summary judgment because "all of the statements from the declaration . . . are either conclusory [or] contrary to the facts"); *Dicent v. Kaplan Univ.*, 758 F. App'x 311, 313-14 n.5 (3d Cir. 2019) (per curiam) (affirming grant of arbitration motion, finding non-movant's "conclusory, self-serving affidavits are insufficient").

Here, the district court invoked Rule 56 and credited Sessoms' self-serving "blame my spouse" declaration. *See* JA22-23. Yet, the declaration never addresses how Krysta, *inter alia*, could have verified an account registered in Sessoms' name and with his personal information by using

Sessoms' phone and email address; used a PIN personally assigned to Sessoms that was required to file his taxes; or obtained the personal data for Sessoms necessary for Krysta to file Sessoms' individual returns on his behalf. Moreover, to the limited extent that the declaration tries to set forth "facts,"[13] it is akin to a sham declaration. For instance, Sessoms states on the one hand that "[i]n February 2021, Krysta Sessoms, who is now my wife, created an account with TaxAct, which she used to file a tax return for me for the 2020 Tax Year," JA176 ¶ 4, that he "gave [her] permission to prepare my tax returns," *id.* ¶ 6, and that "[m]y wife Krystan [*sic*] used TaxAct again to prepare my tax returns for the 2021 and 2022 Tax Years," *id.* ¶ 7. But, on the other hand, Sessoms says that he "was not aware [Krysta] had [created a TaxAct account] to the best of [his] recollection." *Id.* ¶ 9. And the latter claim not only does not reconcile with the former, but it is incredible given that Sessoms' own *personal* phone and email address were used multiple times to verify the TaxAct account registered in his name, with his Social Security number and his

[13] The declaration is largely laden with legal conclusions. For example, Sessoms' claims that he "never agreed to arbitrat[e]" and that the Terms are "unfair and unconscionable" are legal conclusions that must be disregarded. JA177.

other personal data. Thus, under Rule 56, the district court should have disregarded Sessoms' self-serving statements as both "conclusory" and "contrary to the facts."[14]

Even if the declaration could be treated as evidence fit for consideration under Rule 56, it would not salvage Sessoms' position as a matter of law. Rather, the declaration's claims about lack of assent fail under Texas substantive law—namely, the Uniform Electronic Transactions Act (the "Act") and the case law applying it. The district court raised the Act *sua sponte*, contending that it confirmed Sessoms' lack of assent. *See* JA23 (citing Tex. Bus. & Com. Code § 322.009). That is wrong. The Act instead confirms that Sessoms is bound to arbitrate his claims.

The district court emphasized § 322.009(a)'s language that "[a]n electronic record or electronic signature is attributable to a person *if it was the act of the person*." JA23 (emphasis original). The court insisted that this meant that any electronic record could not be attributed to

[14] Even if Sessoms' declaration were sufficient to rely upon for Rule 56 purposes, it at most would serve as a basis for requiring further evidentiary proceedings—not for *denying* arbitration and effectively granting summary judgment for Sessoms. *See infra* § II.

Sessoms because Krysta allegedly created the TaxAct account in Sessoms' name and then "handled the account." JA22-23.

But the district court ignored that § 322.009(a) goes on to explain that the "act of the person may be shown in any manner" including the "efficacy of any *security procedure* applied to determine the person to which the electronic record or electronic signature was attributable." Tex. Bus. & Com. Code § 322.009(a) (emphasis added); *see also id.* § 322.009(b) (allowing consideration of the "context and surrounding circumstances at the time of [the electronic record's] creation, execution, or adoption"). The district court also overlooked the Act's definition of "security procedure" as any "procedure employed for the purpose of verifying that an electronic signature, record, or performance is that of a specific person," including "the use of algorithms or other codes, identifying words *or numbers*, encryption, *or callback or other acknowledgment procedures*." *Id.* § 322.002(13) (emphases added); *see Aerotek,* 624 S.W.3d at 205 (qualifying "security procedures may include requiring personal identifying information—such as a social security number or an address—to register for an account").

This provision is dispositive too. Whereas the district court ignored these provisions and TaxAct's security procedures, they show that Sessoms is bound to his electronic signature on the record here. As detailed above, it is undisputed that Sessoms' own personal mobile phone and email account were each used for two-factor authentication of Sessoms' TaxAct account on multiple occasions, and that TaxAct required significant amounts of information, including Sessoms' Social Security Number, address, and personalized PIN, to create an account in Sessoms' name and file his individual tax returns. These are precisely the types of "security procedure[s]"—more specifically "callback or other acknowledgment procedures"—that make electronic actions attributable to an individual under the Act, just as Texas courts have held.

For instance, in *Aerotek*, the Texas Supreme Court applied the Act to reverse the denial of a motion to compel arbitration that the lower court, as here, premised on alleged signatories' "simple denial that [they] signed [a] record" assenting to arbitration. 624 S.W.3d at 200; *see id.* ("each [plaintiff] submitted a sworn declaration . . . denying that he had ever seen, signed, or been presented with the [arbitration agreement]"). The court found the arguments of the parties resisting arbitration

foreclosed under the Act because the individuals had to access "a unique hyperlink" provided to them by email, and had to correctly enter their "user ID, password, and security-question combination" to verify the accounts. *Id.* at 201, 205-06, 208 ("Aerotek's evidence showing the security procedures its hiring application used to verify that a candidate electronically signed his [arbitration agreement] was uncontroverted. To enter the application, a candidate was required to create for himself a unique identifier, a user ID, a password, and security questions, all unknown to Aerotek."). As such, the court compelled arbitration, notwithstanding the nonmoving parties' claims that they had not assented to the agreement. *See id.* at 209 ("Mere denials do not suffice.").

Many subsequent decisions applying the Act are to the same effect. *See*, *e.g.*, *CHG Hosp. Bellaire, LLC v. Johnson*, 644 S.W.3d 188, 189 (Tex. 2022) (per curiam) (reversing denial of arbitration); *Rush Truck Ctrs. of Tex., L.P. v. Mendoza*, 676 S.W.3d 821, 828, 830 (Tex. App. 2023) (rejecting challenge to arbitration because of "the efficacy of the security procedures utilized in the transaction," where party resisting arbitration had created a username with "his email address, and a password of his choice" to obtain the documents in question); *H-E-B, LP v. Saenz*, No. 01-

20-00850-CV, 2021 WL 4733460, at *6 (Tex. App. Oct. 12, 2021) (holding party was bound by agreement where paperwork was sent to employee's own email address and individuals had unique identification numbers).

Indeed, in *H-E-B*, the Texas Court of Appeals rejected a "wasn't me" defense similar to the one that Sessoms advances. There, despite the plaintiff's assertion that another individual had, on her behalf, completed the paperwork that required her to arbitrate, the court found the plaintiff bound by the arbitration provision because the

> [p]aperwork could not be created without unique, secret credentials, and therefore [plaintiff's paperwork], completed electronically, can be attributed to her. Therefore, the completion of the forms is considered her act, even if [the third party] helped her physically input the information into the computer and without regard to whether she personally saw or read the electronic forms.

2021 WL 4733460, at *6; *see id.* at *5 ("According to [plaintiff], [the third party] input all the information, and she did not press a single key. [Plaintiff] said that [the third party] asked her for personal information, which she provided."). Here too, the security procedures that TaxAct used—including Sessoms' verification of his own mobile phone and email address in response to TaxAct's inquiries—bind Sessoms to the Terms.

Thus, even if this Court considered Sessom's declaration for Rule 56 purposes, reversal still would be required because the record shows assent to the Terms under Texas's Uniform Electronic Transactions Act.

II. In the Alternative, This Court Should Vacate and Remand the District Court's Order as to Sessoms for Further Proceedings on TaxAct's Motion.

Finally, even if the district court correctly found that outstanding fact disputes precluded compelling arbitration (and it did not), the court nonetheless erred because it should have made any denial of arbitration without prejudice (as it had with its prior arbitration denial). That is, the district court should have at least waited for the completion of discovery limited on arbitrability and, if necessary, held a trial on that issue before making a final determination on whether arbitration should be compelled. Instead, the district court effectively granted summary judgment *for Sessoms* on TaxAct's motion, which obviously is error on this record.

In this Circuit, the proper procedure following a denial of arbitration due to fact disputes is well established: "if the plaintiff has responded to a motion to compel arbitration with additional facts sufficient to place the agreement to arbitrate in issue, then the parties

should be entitled to discovery on the question of arbitrability before a court entertains further briefing on the question." *Guidotti*, 716 F.3d at 776 (cleaned up). Then, "[a]fter limited discovery, the court may entertain a renewed motion to compel arbitration, . . . judging the motion under a summary judgment standard." *Id.* And "[i]n the event that summary judgment is [still] not warranted because the party opposing arbitration can demonstrate, by means of citations to the record, that there is a genuine dispute as to the enforceability of the arbitration clause, the court may then proceed summarily to a trial." *Id.* (cleaned up); *see also* 9 U.S.C. § 4 (providing for trials on arbitrability).

Guidotti, which similarly involved an appeal from a denial of a motion to compel arbitration, provides a good example of how this works in practice. There, this Court found that "a genuine issue of material fact remain[ed] regarding the agreement to arbitrate," so arbitration could not yet be compelled. 716 F.3d at 780. This Court then remanded for additional discovery on arbitration, holding that "the District Court should not have denied the Appellants' motion to compel arbitration without first allowing limited discovery and then entertaining their

motion under a summary judgment standard." *Id.*[15]

This Court has repeatedly hewed to this approach, requiring discovery when fact disputes preclude compelling arbitration. *See, e.g.*, *Robert D. Mabe, Inc. v. OptumRX*, 43 F.4th 307, 330 (3d Cir. 2022) ("[V]acat[ing] the District Court's order [denying a motion to compel arbitration] in part and remand[ing] to allow the parties to conduct discovery limited to the issue of arbitrability" so that the appellant "will then have an opportunity to file a new motion"); *MZM Constr. Co. v. N.J. Bldg. Laborers Statewide Benefit Funds*, 974 F.3d 386, 407 (3d Cir. 2020) (stating that the district court should "apply a summary judgment standard [to a renewed motion to compel arbitration] after limited discovery is complete"); *SBRMCOA, LLC v. Bayside Resort, Inc.*, 707 F.3d 267, 272 (3d Cir. 2013) (remanding because "additional discovery is warranted" on arbitrability).

The district court departed from these principles by seemingly making a final determination that Sessoms was not bound by the

[15] This Court further explained: "If, after presentation of the evidence uncovered during discovery, a genuine dispute of material fact remained, the Court then should have submitted to a jury (if either party demanded one) the factual question of" arbitrability." *Id.*

arbitration clause, relying solely on the dubious Sessoms declaration in the face of contrary documentary evidence already in the record and before relevant discovery, including the depositions of Sessoms and Krysta, could be completed. The district court stated that it was denying the motion to compel as to Sessoms because "his assent to the 2020 Terms of Service is subject to multiple disputes of material fact." JA29. Although the district court initially appeared to recognize that "limited discovery should be allowed" on arbitrability questions subject to factual disputes, it nonetheless ultimately stated, without qualification, that "Sessoms Is Not Bound by His Wife's Assent to the 2020 Terms of Service." JA11, JA22. And, in contrast to its prior order, the district court did not state that TaxAct's motion with respect to Sessoms was denied "without prejudice." JA67-68; *but cf.* JA27 ("Nor, *at this juncture*, on the arguments offered up by TaxAct, can agency law bind Sessoms.") (emphasis added).

Any denial of TaxAct's motion with prejudice to further attempts to compel Sessoms to arbitration was error. As explained above, if a court finds that genuine issues of fact preclude compelling arbitration, it should allow for the completion of limited discovery on arbitrability and

then permit a renewed motion to compel. *See Guidotti*, 716 F.3d at 776, 780 (vacating denial of motion to compel). And if genuine issues of fact remain even *after* the completion of arbitration-related discovery, then the district court must summarily proceed to trial on arbitrability. *See id.*

Here, discovery on arbitrability was still in progress at the time of the district court's decision. Indeed, TaxAct was on the verge of taking Sessoms' and Krysta's depositions, which would have allowed it to test Sessoms' claims concerning his supposed non-use of TaxAct's services and the authorizations he gave to Krysta. Thus, at a minimum, this Court should, as in *Guidotti*, vacate the district court's denial to allow for further discovery and proceedings limited to the issue of arbitrability. At the very least, even as the record now stands, there would need to be a trial on arbitrability; there is no basis for effectively granting summary judgment *for Sessoms* on that issue, as the district court did here. Vacatur is required as a result.

CONCLUSION

The Court should reverse the district court's order denying a stay of Sessoms' claims pending arbitration. Alternatively, at a minimum, the Court should vacate the district court's order denying TaxAct's motion to

compel arbitration and stay proceedings as to Sessoms' claims and remand for further proceedings on the question of contract formation.

July 3, 2024

Respectfully submitted,

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COMBINED CERTIFICATIONS

1. I am a member of the bar of the United States Court of Appeals for the Third Circuit. 3d Cir. L.A.R. 28.3(d).

2. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 12,749 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

3. On this day, I served a copy of this opening brief and joint appendix on opposing counsel, electronically through this Court's electronic filing system.

4. The text of the electronic brief is identical to the text in the paper copies. 3d Cir. L.A.R. 31.1(c).

5. The Crowdstrike v 7.15.18511.0 detection program has been run on this file and no virus was detected. 3d Cir. L.A.R. 31.1(c).

6. 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 proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook font.

July 3, 2024

/s/ Eamon P. Joyce
Eamon P. Joyce

No. 24-1515

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

MATTHEW SESSOMS, on behalf of himself and all others similarly situated,
Plaintiff-Appellee, and

JAMES KIRKHAM, *Plaintiff*,
v.

TAXACT, INC.,
Defendant-Appellant.

Appeal from the United States District Court for the
Eastern District of Pennsylvania
Case Number 2:23-cv-03303
The Honorable Judge Wendy Beetlestone

JOINT APPENDIX VOLUME I OF II
JA1 – JA31

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

JAMES KIRKHAM and MATTHEW SESSOMS, on behalf of themselves and all others similarly situated, Plaintiffs, v. TAXACT, INC., Defendant.	:	Civil Action No.: 2:23-CV-3303-WB **ECF CASE**

NOTICE OF APPEAL

Notice is given that Defendant TaxAct, Inc., pursuant to 9 U.S.C. § 16(a), hereby appeals to the United States Court of Appeals for the Third Circuit from the Opinion (Dkt. No. 79) and Order (Dkt. No. 80) dated March 15, 2024 of the United States District Court for the Eastern District of Pennsylvania. Specifically, TaxAct appeals the district court's denial of its motion to compel arbitration and stay proceedings as to the claims asserted by Plaintiff Matthew Sessoms.

Dated: March 18, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, James W. Ducayet, certify that on this 18th day of March 2024, I caused the foregoing Notice of Appeal to be filed on the Court's ECF system where it is available for viewing and downloading.

/s/ James W. Ducayet
James W. Ducayet

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JAMES KIRKHAM et al., **Plaintiffs,**	**CIVIL ACTION**
v.	
TAXACT, INC., **Defendant.**	**NO. 23-3303**

ORDER

AND NOW, this 15th day of March, 2024, upon consideration of TaxAct's Amended Motion to Compel Arbitration and Stay Proceedings (ECF No. 55), Plaintiff's Response in Opposition thereto (ECF No. 70), and TaxAct's Reply in Support (ECF No. 73), **IT IS HEREBY ORDERED** that Defendant's Motion is **GRANTED IN PART** and **DENIED IN PART** as follows:

1. TaxAct's Motion for a Stay with respect to Kirkham's claims is hereby **GRANTED**.

    a. In that TaxAct's operative Terms of Service requires arbitration be held in Dallas County, Texas, and "9 U.S.C. § 4 does not permit a district court to enter an order compelling arbitration outside the district where it sits," *Henry ex rel. BSC Ventures Holdings, Inc. Emp. Stock Ownership Plan v. Wilmington Tr. NA*, 72 F.4th 499, 504 n.5 (3d Cir. 2023), *cert. denied sub nom. Wilmington Trust, N.A. v. Marlow*, No. 23-122 (U.S. Oct. 16, 2023), TaxAct's Motion to Compel Arbitration with respect to Kirkham is accordingly **DENIED WITHOUT PREJUDICE**.

2. TaxAct's Motion with respect to Sessoms' claims is hereby **DENIED**.

BY THE COURT:

/s/Wendy Beetlestone, J.

WENDY BEETLESTONE, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JAMES KIRKHAM et al. **Plaintiffs,** **v.** **TAXACT, INC.,** **Defendant.**	**CIVIL ACTION** **NO. 23-3303**

OPINION

Plaintiffs James Kirkham and Matthew Sessoms have sued the tax preparer company TaxAct, Inc. ("TaxAct"), alleging, on behalf of two classes of similarly situated customers, that the company shared their confidential personal information with Meta and Google, in violation of federal tax law, 26 U.S.C. §§ 6103, 7431(a)(2), and Pennsylvania's Wiretapping and Electronic Surveillance Control Act, 18 Pa. C.S. § 5701 *et seq.* Relying on the Federal Arbitration Act ("FAA"), 9 U.S.C. § 2 *et seq.*, TaxAct moves to compel individual arbitration and/or stay this case in reliance on its Terms of Service and License Agreement, which requires disputes "arising out of or related to these Terms or our Services" to be resolved in arbitration.

I. BACKGROUND

A. Plaintiffs' Interactions with TaxAct's Website

Plaintiffs allege, relying in part on reports prepared by the Federal Trade Commission and several members of Congress, that TaxAct used "'pixels'—a piece of code that can be installed on websites and which can send massive amounts of user data to technology companies—to intercept and disclose tax return information to Meta and Google." The pixels, in turn, are used to "allow[] advertisers to measure the performance of their websites and advertising campaigns and build an audience base for future targeted advertising." According to the Amended Complaint, TaxAct confirmed to Congress that it has been using Meta's pixel since

2018 and Google's equivalent tool since approximately 2014.

Kirkham alleges that he used TaxAct to prepare his 2020 tax-year tax returns. Although he recalls clicking a checkbox on one screen—which, per a screenshot produced by TaxAct, says: "I agree to the TaxAct Terms of Service & Terms of Use"—Kirkham "did not understand" accepting the Terms of Service "to be the function of the checkbox. At no time did TaxAct's website present TaxAct's terms and conditions to me. Nor did it explain . . . that I was agreeing to the terms and conditions or arbitration, let alone the significance of the arbitration agreement." TaxAct has produced evidence that Kirkham in fact checked a box indicating his acceptance of the Terms of Service twice during that tax year: once when he created an account, and again before he filed.

Sessoms, on the other hand, says that he never used TaxAct himself. He says that his wife Krysta created an account on TaxAct's website and used it to file his tax return for the 2020 tax year. Although he "gave Krysta permission to prepare my tax returns, I did not grant her authority to enter into any agreements on my behalf or to waive my right to a jury trial or to participate in a class action." Sessoms insists that he has never logged onto TaxAct's website and that he has never used the website to prepare tax returns. Thus, he "ha[s] never seen TaxAct's terms and conditions or any other document that may contain an arbitration provision," let alone agreed to them. TaxAct has produced evidence showing that Sessoms's tax returns were filed through its website for the 2020 and 2021 tax years; the Sessoms family filed a joint return via TaxAct in 2022.

TaxAct's account creation page, as of 2020, required customers to provide an email address, cell phone number, username, and password, and included a checkbox towards the bottom of the screen, in the same-size font as was used to tell users where to enter their

identifying information, indicating that they "agree to the TaxAct Terms of Service & Terms of Use, and have read and acknowledge the Privacy Statement." Both "TaxAct Terms of Service & Terms of Use" and "Privacy Statement" are written in blue, as opposed to black, and function as hyperlinks to the respective documents. Similarly, before submitting one's return, a customer must enter certain identifying information and indicate, by checking a box, that they "agree to the terms and conditions." Thus, someone accessing a TaxAct account would have agreed to the Terms of Service multiple times: once when it was created, and again for each subsequent tax filing. "[T]erms and conditions" is presented in the same small font as the other headings on the page but is in blue and is underlined. It, too, is a hyperlink to the Terms of Service.

B. The 2020 Terms of Service

The iteration of TaxAct's Terms of Service that were in effect when the Kirkham and Sessoms tax returns were filed through the website (the "2020 Terms of Service") provided that customers "may not use the Services until you have read and agreed to this Agreement. By using the Services, you indicate your unconditional acceptance of this Agreement. If you do not accept this Agreement, you must terminate your use of the Services." Acceptance gives a user "a limited, nonexclusive, nontransferable, non-sublicensable, revocable license to access and use the Services for your personal purposes."

Among the conditions laid out in the Terms of Service is an arbitration provision, which customers are advised, in bold, to "read . . . carefully because it requires you to arbitrate certain disputes and claims with TaxAct and limits the manner in which you can seek relief from us." The arbitration provision requires that, "[e]xcept for small claims disputes in which you or TaxAct seek to bring an individual action in small claims court . . . or disputes in which you or TaxAct seeks injunctive or other equitable relief for the alleged unlawful use of intellectual property," customers agree to have "all disputes arising out of or relating to these Terms or our

Services . . . be resolved through confidential binding arbitration . . . in accordance with the Streamlined Arbitration Rules and Procedures . . . of the Judicial Arbitration and Mediation Services ("JAMS"), which are . . . *hereby incorporated by reference*." The JAMS rules, in turn, require the arbitrator to: (1) "resolve disputes about the interpretation and applicability of these Rules and conduct of the Arbitration Hearing;" and, (2) adjudicate "[j]urisdictional and arbitrability disputes, including disputes over the formation, existence, validity, interpretation or scope of the agreement under which Arbitration is sought. . . . The Arbitrator has the authority to determine jurisdiction and arbitrability issues as a preliminary matter." Moreover, the arbitration provision requires customers to "agree that any [such] dispute . . . is personal to you and TaxAct and that any dispute will be resolved solely through individual arbitration and will not be brought as a class arbitration, class action or any other type of representative proceeding." The "validity and performance of" the 2020 Terms of Service is "governed by Texas law (without reference to choice of law principles) and applicable federal law."

Customers were advised that they could "opt out of binding arbitration within thirty (30) days of the date you first accepted the terms of this Section by sending an email to [TaxAct]. In order to be effective, the opt-out notice must include your full name and clearly indicate your intent to opt out of binding arbitration." It is undisputed that neither Kirkham nor Sessoms did this.

The Terms of Service also noted that TaxAct "reserves the right, at any time, to change the terms of this Agreement" but promised to "provide . . . notice of such changes, such as by sending an email, posting a notice on the Services or updating the date at the top of this Agreement." Such changes "will not amend or modify the terms for any prior tax year unless the terms expressly indicate prior year terms are also amended or modified." Continuing to use

TaxAct's website, the Terms of Service warn, will "confirm . . . acceptance of the[ir] then-current version." Finally, the Terms of Service also include an integration clause, providing that they "set forth TaxAct's . . . entire liability and your exclusive remedy with respect to the Services, comprise a complete statement of the agreement between you and TaxAct regarding the subject matter thereof, and supersede any prior understandings with regards to such subject matter."

II. LEGAL STANDARD

The Federal Arbitration Act provides that "[a] written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity . . . ." 9 U.S.C. § 2. "A party aggrieved by the alleged failure . . . of another to arbitrate . . . may petition any United States district court which, save for such agreement, would have jurisdiction . . . for an order directing that such arbitration proceed in the manner provided for in such agreement." *Id.* § 4.

The FAA "reflects an 'emphatic federal policy in favor of arbitral dispute resolution.'" *KPMG LLP v. Cocchi*, 565 U.S. 18, 21 (2011) (per curiam) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985)); *accord Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983) (acknowledging the "liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary"). Pursuant to that "liberal" policy, "courts must place arbitration agreements on an equal footing with other contracts . . . and enforce them according to their terms." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011) (citations omitted).

That principle reaches even delegation clauses—agreements to arbitrate "'gateway'

questions of 'arbitrability,' such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy," *Rent-A-Ctr. W., Inc. v. Jackson*, 561 U.S. 63, 68-69 (2010) (citations omitted)—so long as "there is clea[r] and unmistakabl[e] evidence that they did so," *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944 (1995) (quoting *AT & T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 649 (1986)). That is because "[a]n agreement to arbitrate a gateway issue is simply an additional, antecedent agreement the party seeking arbitration asks the federal court to enforce, and the FAA operates on this additional arbitration agreement just as it does on any other." *Rent-A-Ctr.*, 561 U.S. at 69.

"Deciding whether arbitration is required is a two-step process: in the first step, the court determines whether 'there is an agreement to arbitrate,' and then in the second step, the court decides whether 'the dispute at issue falls within the scope of that agreement.'" *Jaludi v. Citigroup*, 933 F.3d 246, 254 (3d Cir. 2019) (quoting *Century Indem. Co. v. Certain Underwriters at Lloyds, London*, 584 F.3d 512, 523 (3d Cir. 2009)). The first step is a question of state contract law. *Id.* (citation omitted).

When evaluating a motion to compel arbitration, the appropriate evidentiary standard that is to be applied depends on the pleadings. "[W]hen it is apparent, based on the face of a complaint, and documents relied upon in the complaint, that certain of a party's claims are subject to an enforceable arbitration clause, a motion to compel arbitration should be considered under a Rule 12(b)(6) standard without discovery's delay." *Guidotti v. Legal Helpers Debt Resol., L.L.C.*, 716 F.3d 764, 776 (3d Cir. 2013) (internal quotation marks and citation omitted). On the other hand, if either: (1) "the motion to compel arbitration does not have as its predicate a complaint with the requisite clarity to establish on its face that the parties agreed to arbitrate;" or, (2) "the opposing party has come forth with reliable evidence that is more than a naked

assertion . . . that it did not intend to be bound by the arbitration agreement, even though on the face of the pleadings it appears that it did," the summary judgment standard found in Federal Rule of Civil Procedure 56 applies, and limited discovery should be allowed. *Id.* at 774 (internal quotation marks and citations omitted). In other words, where a "district court's order compelling arbitration is in effect a summary disposition of the issue of whether or not there had been a meeting of the minds on the agreement to arbitrate," the summary judgment standard is appropriate. *White v. Sunoco, Inc.*, 870 F.3d 257, 262 (3d Cir. 2017) (quoting *Flintkote Co. v. Aviva PLC*, 769 F.3d 215, 219 (3d Cir. 2014)).

Here, Kirkham and Sessoms argue, among other things, that there had been no meeting of the minds regarding arbitrability because of how TaxAct presented its terms of service to them. Thus, per *White* and *Guidotti*, Rule 56's summary judgment standard is appropriate.[1] *Id.* Considering the above, the Court will grant TaxAct's motion only if it shows "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "By its very terms, this standard provides that the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). "A genuine issue is present when a reasonable trier of fact, viewing all record evidence, could rationally find in favor of the non-moving party in light of his burden of proof." *Doe v. Abington Friends Sch.*, 389 F.3d 252, 256 (3d Cir. 2007) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-26 (1986)). "Material facts are those that could affect the outcome of the proceeding." *Roth v. Norfalco*

[1] Both parties submitted several exhibits in support of their briefs on TaxAct's Motion to Compel Arbitration, and the Court both provided notice to the parties that Rule 56 would apply and gave them an opportunity to file any additional exhibits, *Guidotti*, 716 F.3d at 775 n.6.

LLC, 651 F.3d 367, 373 (3d Cir. 2011). In making these determinations, the court must view the facts and draw all reasonable inferences in the light most favorable to the non-moving party. *See Anderson*, 477 U.S. at 255.

III. DISCUSSION

Both Kirkham and Sessoms argue that, notwithstanding the FAA's strong presumption in favor of arbitrability, TaxAct's motion should be denied because neither of them ever formed a valid contract with the company.

A. The Court's Review Is Limited by the Delegation Clause.

Because the arbitration provision incorporates the JAMS rules in full, it includes those rules' delegation clause whereby the arbitrator must adjudicate "[j]urisdictional and arbitrability disputes, including disputes over the formation, existence, validity, interpretation or scope of the agreement under which Arbitration is sought." This provision considerably narrows, but does not eliminate, the Court's review of Plaintiffs' arguments.

The FAA requires that, "*before* referring a dispute to an arbitrator, the court determine[] whether a valid arbitration agreement exists." *Henry Schein, Inc. v. Archer and White Sales, Inc.*, 139 S. Ct. 524, 530 (2019) (emphasis added); *see* 9 U.S.C. § 4 (requiring district courts to compel arbitration only "upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue"). At the same time, the FAA also instructs courts to enforce the terms that private parties have agreed to. *Concepcion*, 563 U.S. at 339. The Supreme Court has held that this rule applies with equal force to delegation clauses even if, like the one at issue here, they provide that an arbitrator is to decide the validity or formation of an arbitration agreement. *Rent-A-Ctr.*, 561 U.S. at 68-72.

The Third Circuit resolved the obvious tension between these two principles in *MZM Construction Company, Inc. v. New Jersey Building Laborers Statewide Benefit Funds*, 974 F.3d

386 (3d Cir. 2020). There, a construction company and a labor union had agreed to a simple, one-page agreement to govern hiring for a project. *Id.* at 392. The agreement incorporated by reference a preexisting collective bargaining agreement, which required employers to make financial contributions to the appellee funds. *Id.* at 392-93. The collective bargaining agreement also included an arbitration agreement, which in turn included a delegation clause providing that "[t]he Arbitrator shall have the authority to decide whether an Agreement exists, where that is in dispute." *Id.* at 393. A disagreement arose over whether the construction company was complying with its payment obligations, and the funds unilaterally scheduled arbitration. *Id.* When the construction company sued to enjoin the arbitration, it argued that there was fraud in the execution of the employment agreement that incorporated by reference the collective bargaining agreement, so the arbitration agreement contained therein (including the delegation clause) did not bind the company. *Id.*

The district court sided with the construction company and enjoined arbitration, *id.* at 394, and the Third Circuit affirmed, holding that, "unless the parties clearly and unmistakably agreed to arbitrate questions of contract formation in a contract *whose formation is not in issue*, those gateway questions are for the courts to decide," *id.* at 402 (emphasis added). There, the formation of an agreement to delegate arbitrability to an arbitrator was at issue because "[l]ack of assent to the container contract"—the employment agreement—"necessarily implicates the status of the arbitration agreement" and "the container contract and the arbitration provision depend on the same act"—formation of the employment agreement—"for their legal effect." *Id.* at 400 (citation omitted). "That is no less true when the container contract includes or incorporates a delegation provision." *Id.* (citation omitted).

Plaintiffs raise the same sort of arguments attacking the 2020 Terms of Service here.

Both Kirkham and Sessoms contend that they never formed an agreement to arbitrate with TaxAct because they never validly agreed to the 2020 Terms of Service. Moreover, the arguments that they raise—that the arbitration agreement is illusory for lack of consideration, and that they never assented to its terms—attack both their agreement to the container contract (the 2020 Terms of Service) and the arbitration delegation clause contained therein. The agreements "depend on the same act[s]" for their validity. *Id.* (citation omitted). Because they have placed "in issue" the "formation" of an agreement to delegate the issue of arbitrability to an arbitrator, *id.* at 402, whether Plaintiffs and TaxAct formed an agreement to arbitrate is properly before the Court.[2]

B. TaxAct Has Not Waived its Arbitrability Argument

Kirkham and Sessoms contend that positions taken by TaxAct in *Smith-Washington v. TaxAct, Inc.*, No. 23-cv-830 (N.D. Cal. filed Feb. 23, 2023), a similar putative class action filed in the Northern District of California, foreclose its efforts to arbitrate here. Specifically, in *Smith-Washington*, TaxAct has preliminarily agreed to a class action settlement. Plaintiffs view is that, in doing so, TaxAct has "relinquished any right that it may have to arbitration" not only against the putative nationwide class at issue there, but also the putative Pennsylvania class at issue here.

But TaxAct's conduct, both here and in California, belies that view. The Supreme Court

[2] On the other hand, Plaintiffs' additional arguments that they have raised previously regarding the enforceability of the arbitration agreement, *e.g.*, that the arbitration agreement as a whole is procedurally and substantively unconscionable, do not specifically challenge the validity of the delegation provision and thus fall within the province of the arbitrator. *Rent-A-Ctr.*, 561 U.S. at 68-72. Unlike their arguments attacking the existence of an agreement to arbitrate, these arguments do not go to the formation of the agreement to arbitrate and, in turn, the delegation provision. *See generally Bowles v. OneMain Fin. Grp.*, L.L.C., 954 F.3d 722, 725 (5th Cir. 2020) (treating a "procedural unconscionability objection" as going "to the enforceability of the Arbitration Agreement and not its formation"); Restatement (Second) of Contracts § 208 (Am. L. Inst. 1981) (describing unconscionability as a reason for "a court [to] refuse to enforce the contract," not a reason to hold that no contract was formed).

has held that, as in other contexts, waiver rules for arbitration agreements are the same as for any other contract. *Morgan v. Sundance, Inc.*, 596 U.S. 411, 417 (2022). Thus, in arbitration as elsewhere, "[w]aiver . . . 'is the intentional relinquishment or abandonment of a known right.'" *Id.* (quoting *United States v. Olano*, 507 U.S. 725, 733 (1993)). "In analyzing whether waiver has occurred, a 'court focuses on the actions of the p[arty] who held the right' and is informed by the 'circumstances and context of *each case*.'" *White v. Samsung Elecs. of Am., Inc.*, 61 F.4th 334, 339 (3d Cir. 2023) (emphasis added) (footnote omitted) (first quoting *Morgan*, 596 U.S. at 417; and then quoting *Gray Holdco, Inc. v. Cassady*, 654 F.3d 444, 451 (3d Cir. 2011)).

In *White*, the Third Circuit held that Samsung had "evince[d] a preference for litigation over arbitration" when it "clearly sought to have this case dismissed by a court on the merits. Only after it was apparent that further litigation would be required, and it could not get the case fully dismissed before discovery, did Samsung attempt to arbitrate the remaining claim." *Id.* at 340. TaxAct's conduct in this case looks little like Samsung's in *White*. True, TaxAct moved to stay the case arguing that Kirkham and Sessoms are members of the *Smith-Washington* nationwide class (ECF No. 64 at 4), but the company has not pursued the same merits-based resolution of the case that the Third Circuit relied on to find waiver in *White*. Instead, TaxAct consistently has maintained that Plaintiffs' claims are subject to arbitration. It asserted in the parties' discovery plan that it "believe[d] that Plaintiff agreed to arbitrate any claims on an individual basis" (ECF No. 14 at 2). And, since then, TaxAct has filed three motions to compel arbitration (ECF Nos. 21, 30, 55), and never moved to dismiss the case on the merits.

Moreover, although the Third Circuit's directive to focus on the particularities of "each" case implies an individual analysis that can be understood to limit the effect of TaxAct's conduct in the *Smith-Washington* litigation in the waiver inquiry here, *White*, 61 F.4th at 339 (citation

omitted); *accord Chun Ping Turng v. Guaranteed Rate, Inc.*, 371 F. Supp.3d 610, 620 (N.D. Cal. 2019) (quoting *Bischoff v. DirecTV, Inc.*, 180 F. Supp.2d 1097, 1113 (C.D. Cal. 2002)) ("[T]o hold that defendant can no longer assert its right to compel arbitration simply because it did not assert that right in another case is absurd."), to the extent that TaxAct's conduct in the California case is relevant, for the reasons set forth below, it does not support a finding of waiver either. There, TaxAct moved to stay proceedings pending arbitration just days after the case was removed to federal court. Motion to Stay Proceedings Pending Arbitration at 1, *Smith-Washington v. TaxAct, Inc.*, No. 23-cv-830 (N.D. Cal. Mar. 2, 2023) (ECF No. 12). Indeed, the arbitration question has not been addressed in *Smith-Washington*, as all deadlines have been stayed as settlement negotiations proceed. Order Granting Stipulation for Stay Pending Preliminary Approval Submission, *Smith-Washington* (N.D. Cal. Jan. 10, 2024) (ECF No. 107). Thus, TaxAct has not waived its argument that Kirkham and Sessoms must pursue their claims in arbitration.

C. The Arbitration Agreement is Supported by Adequate Consideration

Kirkham's and Sessoms's first contract-based argument is that the 2020 Terms of Service is unenforceable for lack of consideration.

Under Texas law,[3] a contract (including, of course, an agreement to arbitrate) is formed by: "(1) an offer; (2) an acceptance in strict compliance with the terms of the offer; (3) a meeting of the minds; (4) each party's consent to the terms; and (5) execution and delivery of the contract with the intent that it be mutual and binding." *Franco v. Ysleta Indep. Sch. Dist.*, 346 S.W.3d 605, 608 (Tex. App. 2009) (citation omitted). Moreover, "[a]n agreement to arbitrate, like other

[3] In reliance on the arbitration agreement's statement that its "validity and performance . . . shall be governed by Texas Law (without reference to choice of law principles), and applicable federal law," the arbitration agreement is to be interpreted according to that state's law (*see* ECF No. 52 at 1).

contracts, must also be supported by consideration." *Lizalde v. Vista Quality Markets*, 746 F.3d 222, 225 (5th Cir. 2014) (quoting *Mendivil v. Zanios Foods, Inc.*, 357 S.W.3d 827, 31 (Tex. App. 2012)). "As it relates specifically to arbitration agreements," the general rule is that '[m]utual agreement to arbitrate claims provides sufficient consideration to support an arbitration agreement,'" with some exceptions not applicable here. *Id.* (quoting *In re 24R, Inc.*, 324 S.W.3d 564, 566 (Tex. 2010) (per curiam)). A different rule applies, however, "when an arbitration clause is part of an underlying contract." *In re AdvancePCS Health L.P.*, 172 S.W.3d 603, 607 (Tex. 2005) (per curiam). There, "the rest of the parties' agreement provides the consideration." *Id.*; *accord Sam Houston Elec. Coop., Inc. v. Berry*, 582 S.W.3d 282, 292 (Tex. App. 2017); *In re Lyon Fin. Servs., Inc.* 257 S.W.3d 228, 233 (Tex. 2008) (citation omitted).

Here, the arbitration provision is not a standalone contract between Plaintiffs and TaxAct. The 2020 Terms of Service, which contains many provisions setting forth the contractual terms between TaxAct and its users as well as the arbitration provision at issue, is supported by mutual obligations and forbearances. *In re AdvancePCS Health*, 172 S.W.3d at 607. Specifically, pursuant to the 2020 Terms of Service, users receive access to TaxAct's services in exchange for their being bound by the conditions contained therein, changes to which they must accept in order to continue to avail themselves of those services. In that the arbitration provision was "but one part of a larger underlying contract," *Berry*, 582 S.W.3d at 292—because users needed to check only one box to assent to the entirety of the agreement's terms—the rest of the 2020 Terms of Service provide the necessary consideration for the arbitration provision. Therefore, the Court will not deny TaxAct's Motion to Compel Arbitration on this ground.[4]

[4] Kirkham and Sessoms cite *Nelson v. Watch House International, L.L.C.*, 815 F.3d 190 (5th Cir. 2016), for the proposition that, even where an arbitration agreement is part of a larger contract, it can still be void if one party can amend it unilaterally. But "state courts are the ultimate expositors of state law." *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975) (citations omitted). And the Texas Supreme Court has not carved out this exception. *In re AdvancePCS*

D. Only Kirkham Assented to the Arbitration Agreement.

Having concluded that the arbitration agreement is supported by adequate consideration, the next question is whether Kirkham and Sessoms assented to the 2020 Terms of Service, and in turn, the delegation clause and arbitration provision contained therein. It is not in genuine dispute that Kirkham checked the box agreeing to these terms. The question instead is whether, under these circumstances, that action was sufficient to bind him to the 2020 Terms of Service.

i. Principles Governing Assent on the Internet

The proper standard against which to evaluate Plaintiffs' interactions with TaxAct's website flows from whether the 2020 Terms of Service are characterized as a "clickwrap" or "browsewrap" agreement. A "clickwrap" agreement is one whereby "a website presents users with specified contractual terms on a pop-up screen and users must check a box explicitly stating 'I agree' in order to proceed." *Berman v. Freedom Fin. Network, LLC*, 30 F.4th 849, 856 (9th Cir. 2022) (citing *Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171, 1175-76 (9th Cir. 2014)); *accord StubHub, Inc. v. Ball*, 676 S.W.3d 193, 200 (Tex. App. 2023); *In re Online Travel Co. (OTC) Hotel Booking Antitrust Litig.*, 953 F. Supp.2d 713, 719 (N.D. Tex. 2013) ("*In re OTC*"). That process makes sure that customers "click on an acceptance *after* being presented with terms and conditions." *James v. Glob. TelLink Corp.*, 852 F.3d 262, 267 (3d Cir. 2017) (emphasis added). "Structured properly, a clickwrap agreement would conclusively demonstrate notice and acceptance of the agreement's terms. And a customer on notice of contract terms available on the internet website is bound by those terms." *Ball*, 676 S.W.3d at 200 (citation omitted); *see also Berman*, 30 F.4th at 856 (citing *Meyer v. Uber Techs., Inc.*, 868 F.3d 66, 75 (2d Cir. 2017)).

Health, 172 S.W.3d at 607. Therefore, to the extent that *Nelson*, persuasive authority, holds otherwise, the Court will defer to the rule expounded in Texas's highest court.

On the other hand, browsewrap agreements, "in which a website offers terms that are disclosed only through a hyperlink and the user supposedly manifests assent to those terms simply by continuing to use the website," are more suspect "because consumers are frequently left unaware that contractual terms were even offered, much less that continued use of the website will be deemed to manifest acceptance of those terms." *Berman*, 30 F.4th at 856 (citation omitted); *Ball*, 676 S.W.3d at 200-01; *see also Fteja v. Facebook, Inc.*, 841 F. Supp.2d 829, 837 (S.D.N.Y. 2012) (treating Facebook's terms of use as neither "a true browsewrap license" nor "a pure-form clickwrap agreement").

In line with this distinction, website owners generally have two options to show that a user assented to their terms of service: (1) they can show that the user "ha[d] actual knowledge of the agreement;" or, (2) they can show the user was on "inquiry notice" to the terms by "provid[ing] reasonably conspicuous notice of the terms to which the consumer will be bound" and getting "unambiguous[] . . . assent to those terms" through "some action, such as clicking a button or checking a box." *Berman*, 30 F.4th at 856 (citations omitted).

"Whether a user has inquiry notice of a browsewrap agreement, in turn, depends on the design and content of the website and the agreement's webpage." *Nguyen*, 763 F.3d at 1177 (citation omitted). Thus, consumers have been held to not be on notice to "terms . . . located in text that would have become visible to [them] only if they had scrolled down to the next screen." *Specht v. Netscape Commc'ns Corp.*, 306 F.3d 17, 23 (2d Cir. 2002). Notice "printed in a tiny gray font considerably smaller than the font used in the surrounding website elements, and indeed in a font so small that it is barely legible to the naked eye" will not suffice either. *Berman*, 30 F.4th at 856-57. "On the other hand, 'where the website contains an explicit textual notice that continued use will act as a manifestation of the user's intent to be bound, courts have

been more amenable to enforcing browsewrap agreements.'" *James*, 852 F.3d at 267 (quoting *Nguyen*, 763 F.3d at 1177).

ii. How to Characterize the 2020 Terms of Service

Here, TaxAct's website contains some hallmarks of both browsewrap and clickwrap agreements. On the one hand, to create an account, a user must click a checkbox indicating: "I agree to the TaxAct Terms of Service & Terms of Use [hyperlinked], and have read and acknowledge the Privacy Statement [hyperlinked]." A user must check a similar box to file tax returns. Traditional browsewrap agreements do not elicit this assent from users. *Berman*, 30 F.4th at 856; *Ball*, 676 S.W.3d at 200-01. On the other hand, the terms themselves never appear via pop-up and must be accessed by affirmatively clicking the hyperlink to them. "Structured properly, a clickwrap agreement," *Ball*, 676 S.W.3d at 200, would "present[]" potential users "with the terms and conditions" before they assent, *James*, 852 F.3d at 267.

iii.Kirkham Assented to the 2020 Terms of Service

The Court need not decide now how to characterize the 2020 Terms of Service, however, because even if analyzed as a browsewrap agreement, TaxAct's 2020 Terms of Service are enforceable against Kirkham. If they are treated as a browsewrap agreement, to be bound by the 2020 Terms of Service, Kirkham: (1) must have received "reasonably conspicuous notice of the terms;" and, (2) must have taken "some action, such as clicking a button or checking a box, that unambiguously manifest[ed] his or her assent to those terms." *Berman*, 30 F.4th at 856. Because it is undisputed that Kirkham checked the box on TaxAct's website agreeing to the Terms of Service, only the first element is at issue here. *Id.*

TaxAct provided Kirkham with sufficiently conspicuous notice of its Terms of Service for him to be bound. To review, to create an account, Kirkham had to check a box indicating: "I agree to the TaxAct Terms of Service & Terms of Use, and have read and acknowledge the

Privacy Statement." The Terms of Service are marked in blue as typically indicates a hyperlink. The text is small but legible, is in the center of an uncluttered screen, and clearly indicates that checking the box constitutes assent to its terms.

This design is consistent with browsewrap agreements that have been enforced previously. "[I]t is permissible to disclose terms and conditions through a hyperlink" when "the fact that a hyperlink is present [is] readily apparent." *Id.* at 857. Although it is a best practice to underline or capitalize the linked text, highlighting in blue the hyperlink to the Terms in Service can help do that. *Id.*; *accord Meyer*, 868 F.3d at 78-79. Indeed, the notice provided here bears little in common with those found insufficient in *Berman* and *Nguyen*. TaxAct did not link to the Terms of Service "in a tiny gray font considerably smaller than the font used in the surrounding website elements." *Berman*, 30 F.4th at 846; *see also Checchia v. SoLo Funds*, 2023 WL 3868369, at *9 (E.D. Pa. June 7, 2023) ("Significantly, 'Terms & Conditions' is *not* hyperlinked to the Terms, nor does it appear in any special color, font, or format."). Nor did it dangle a hyperlink to the Terms of Service before its users without requiring that they click a button manifesting their assent to the conditions contained therein. *Nguyen*, 763 F.3d at 1178-79.

Pointing to *Berman*, a case primarily based on interpretations of California and New York law, Plaintiffs argue that "only if the user is explicitly advised that the act of clicking will constitute assent" can they be bound. 30 F.4th at 857. For one thing, it is doubtful that dispositive legal weight should be placed on this distinction given the increasing ubiquity of hyperlinks like the ones TaxAct included on its account formation screen. *See Fteja*, 841 F. Supp.2d at 839 (noting that "it is not too much to expect" regular internet users to "understand that the hyperlinked phrase 'Terms of Use' is really a sign that says 'Click Here for Terms of Use'"). Moreover, where, as here, TaxAct's services cannot be accessed without checking the

box indicating one's agreement to the 2020 Terms of Service, that is a distinction without a difference. *HealthPlanCRM, LLC v. AvMed, Inc.*, 458 F. Supp.3d 308, 333-34 (W.D. Pa. 2020) (collecting cases); *see also In re OTC*, 953 F. Supp.2d at 718-19 (treating a clickwrap agreement contained in a hyperlink as enforceable where "it was impossible to complete a transaction . . . in the absence of affirmative assent to the User Agreement"). TaxAct's website thus bears little resemblance to the one at issue in *Berman*. Finally, Kirkham's reliance on *Checchia*'s concern that a customer could be misled into thinking that the "Terms of Service" to which he had to agree there was something other than the terms and conditions containing the arbitration provision is misplaced here because in that case, "the 'Terms of Service' hyperlink had no identifier . . . and was not even the only 'Terms of Service' that appeared on the page." 2023 WL 3868369, at *9. Thus, Kirkham received reasonable notice of the 2020 Terms of Service, and he assented to the arbitration agreement contained therein.

iv. Sessoms Is Not Bound by His Wife's Assent to the 2020 Terms of Service

Whether Sessoms formed a contract with TaxAct presents separate questions because he says that only his wife Krysta used the website. TaxAct argues that: (1) that is not the case because he personally assented to TaxAct's 2020 Terms of Service just like Kirkham did; and, (2) even if he never used TaxAct's website, Sessoms nonetheless is bound to arbitrate his claims based on two contract law doctrines (equitable estoppel and third-party beneficiary) as well as agency law.

With respect to the first argument, this cannot be grounds for compelling arbitration here in that Sessoms has submitted a declaration maintaining that he never used TaxAct's software and never granted his wife the authority to enter into an agreement to waive his right to a jury trial or proceed via a class action. TaxAct seeks to undermine the veracity of that declaration by

providing back-end records showing that the person creating Sessoms's account agreed to the 2020 Terms of Service when it was created and when individual tax returns were filed through that account. Sessoms does not dispute that but says it was his wife, Krysta—not him—who handled the account. *See* Tex. Bus. & Com. Code § 322.009(a) ("An electronic record or electronic signature is attributable to a person *if it was the act of the person*." (emphasis added)). His "non-conclusory affidavit . . . based on personal knowledge and directed at a material issue, is sufficient to defeat" TaxAct's argument when analyzed in accordance with Rule 56 of the Federal Rules of Civil Procedure. *Lupyan v. Corinthian Colls. Inc.*, 761 F.3d 314, 320 (3d Cir. 2014) (citing *Kirleis v. Dickie, McCamey & Chilcote, P.C.*, 560 F.3d 156, 161-63 (3d Cir. 2009)); *see Guidotti*, 716 F.3d at 776.

a. Equitable Estoppel

Turning to TaxAct's equitable estoppel argument: "Federal and Texas state courts have recognized . . . that '[i]t does not follow . . . that under the [FAA] an obligation to arbitrate attaches only to one who has personally signed the written arbitration provision'; instead, under certain circumstances, principles of contract law and agency may bind a non-signatory to an arbitration agreement." *In re Kellogg Brown & Root, Inc.*, 166 S.W.3d 732, 738 (Tex. 2005) (citations omitted) (quoting *Fisser v. Int'l Bank*, 282 F.2d 231, 233 (2d Cir. 1960)); *see also R.J. Griffin & Co. v. Beach Club II Homeowners Ass'n*, 384 F.3d 157, 160-61 (4th Cir. 2004). Thus, the equitable estoppel doctrine—sometimes referred to as "direct benefits estoppel"—is that "a non-signatory plaintiff seeking the benefits of a contract is estopped from simultaneously attempting to avoid the contract's burdens, such as the obligation to arbitrate disputes." *In re Kellogg Brown & Root*, 166 S.W.3d at 739 (citations omitted). Texas courts, however, have construed this limitation narrowly. As relevant here, while "a non-signatory plaintiff may be compelled to arbitrate if it seeks . . . through the claim, to derive a direct benefit from the

contract containing the arbitration provision," where "a non-signatory's claims can stand independently of the underlying contract, then arbitration generally should not be compelled under this theory." *Id.* at 739-41.

This case presents exactly that scenario, so equitable estoppel does not bar Sessoms's claim. The Amended Complaint at its core alleges that TaxAct compromised Plaintiffs' privacy by allowing Google and Meta access to their personal data. Plaintiffs' claims are brought under a state wiretapping law and federal tax laws, not claims for breach of contract or breach of warranty. These claims "arise[] from general obligations imposed by state law, including statutes, torts and other common law duties," *In re Morgan Stanley & Co., Inc.*, 293 S.W.3d 182, 184 n.2 (Tex. 2009) (citations omitted)—here, an analogue to the tort of invasion of privacy, *see Huber v. Simon's Agency, Inc.*, 84 F.4th 132, 153 (3d Cir. 2023)—and thus Sessoms cannot be compelled to arbitrate them based on equitable estoppel principles.

b. Third-Party Beneficiary

TaxAct also argues that Sessoms, as a third-party beneficiary of his wife's agreement with the company, is bound by her assent to the arbitration provision. The third-party beneficiary doctrine provides that, "[l]ike other contracts, arbitration agreements may also be enforced by third-party beneficiaries, so long as 'the parties to the contract intended to secure a benefit to that third party and entered into the contract directly for the third party's benefit.'" *Jody James Farms, JV v. Altman Grp., Inc.*, 547 S.W.3d 624, 635 (Tex. 2018) (citation omitted) (quoting *In re Palm Harbor Homes, Inc.*, 195 S.W.3d 672, 677 (Tex. 2006)). The doctrine can be applied to compel third-party beneficiaries to arbitrate as well. *Carr v. Main Carr Dev., LLC*, 337 S.W.3d 489, 494-95 (Tex. App. 2011); *see also E.I. DuPont de Nemours and Co. v. Rhone Poulenc Fiber and Resin Intermediates, S.A.S.*, 269 F.3d 187, 195 (3d Cir. 2001).

The presumption is that "noncontracting parties are not third-party beneficiaries,"

Newman v. Plains All Am. Pipeline, L.P., 23 F.4th 393, 401 (5th Cir. 2022) (citing *Sharyland Water Supply Corp. v. City of Alton*, 354 S.W.3d 407, 420 (Tex. 2011)). Two conditions must be satisfied for that presumption to be overcome: (1) "the benefit must be more than incidental;" and, (2) the contracting parties must have "clearly and fully spelled out" their intent to benefit that party. *Jody James*, 547 S.W.3d at 635 (quotation omitted). "A court will not create a third-party beneficiary contract by implication." *MCI Telecomm. Corp. v. Tex. Utils. Elec. Co.*, 995 S.W.2d 647, 651 (Tex. 1999) (citation omitted). "Whether the third party intended or expected to benefit from the contract is irrelevant, because only the intention of the contracting parties in this respect is of controlling importance." *Jody James*, 547 S.W.3d at 635 (internal quotation marks and citation omitted); *accord Union Pac. R.R. Co. v. Novus Int'l, Inc.*, 113 S.W.3d 418, 422 (Tex. App. 2003) ("The intention to confer a direct benefit on a third party must be clearly and fully spelled out in the four corners of the contract . . . .").

Thus, in *City of Houston v. Williams*, the court held that firefighters who were not mentioned in contracts between their union and the city nonetheless were third-party beneficiaries because the contracts: (1) "ma[d]e [their] purpose" to benefit the firefighters "plain in their preambles;" and, (2) "directly guarantee[d] benefits to the Firefighters" that were "not offered to the world at large." 353 S.W.3d 128, 146 (Tex. 2011). On the other hand, in *Jody James*, an agent who sold a crop insurance company's policy to a farm could not claim third-party beneficiary status based on a federal statute's statement that the government "must 'encourage the sale of Federal crop insurance through licensed private insurance agents [who] shall be reasonably compensated from premiums paid by the insured.'" 547 S.W.3d at 635-36 (quotation omitted). And in *Newman*, a pipeline owner was not a third-party beneficiary of an arbitration agreement between a staffing company and the contractor that it hired to inspect its

pipelines because none of the relevant contracts "clearly and fully spell[ed] out that [the pipeline owner] could take legal action" in case of a breach and the employment relationship with the contractor was controlled exclusively by the staffing company. 23 F.4th at 397, 402-03. "Whatever [the pipeline owner's] expectations were, they are 'irrelevant.'" *Id.* at 402 (quoting *Jody James*, 547 S.W.3d at 635).

These cases illustrate that Texas courts have set a high bar for overcoming the presumption against third-party beneficiary status. Express reference to the parties' intent to benefit the third party is highly probative. *Williams*, 353 S.W.3d at 146. Reference to a generalized, aspirational intent to benefit a set of third parties as a class, *Jody James*, 547 S.W.3d at 635-36, as opposed to a specified third party or group of third parties, *Williams*, 353 S.W.3d at 146, is not enough to accord third-party beneficiary status. And there are plenty of instances in which contracting parties surely understood that a third party would benefit from their agreement where the presumption against finding that status nonetheless survived. *E.g.*, *Newman*, 23 F.4th at 402-03

Based on these principles, Sessoms was not a third-party beneficiary of the 2020 Terms of Service. Two contractual provisions arguably serve as a hook for conferring that status on Sessoms, but both fall short. First, the agreement accords a signatory "a limited, nonexclusive, nontransferable, non-sublicensable, revocable license to access and user the Services for [their] personal purposes . . . to prepare one valid and complete tax return . . . ." Because TaxAct offers customers the opportunity to file a joint tax return—an offer that Krysta Sessoms availed herself of—her husband arguably would be a beneficiary of that single return. Second, it makes clear that users must "acknowledge and agree that [they] are solely responsible for all content, data, and information submitted by your user identification . . . including, without limitation, content,

data, and information relating to third parties." TaxAct argues that this reference to "third parties" standing alone is enough to bind Sessoms. Texas law demands more. In *Williams*, the contracts at issue unambiguously identified the third-party beneficiary firefighters. 353 S.W.3d at 146. No similarly unmistakable manifestation of the parties' intent is present on the face of the 2020 Terms of Service. It is not enough that, as TaxAct phrases it, "Krysta obviously intended to benefit Matthew when she created an account under his name and filed his returns, both individually *on his behalf* . . . and then jointly." Once more, the intent to benefit a third party must be found within the four corners of the contract. *Union Pac. R.R. Co.*, 113 S.W.3d at 422. Here, it is not, so Sessoms cannot be bound to the 2020 Terms of Service as a third-party beneficiary of his wife's contract with TaxAct.[5]

c. Agency

Nor, at this juncture, on the arguments offered up by TaxAct, can agency law bind Sessoms. Like contract law, "agency may bind a non-signatory to an arbitration agreement." *In re Kellogg Brown & Root*, 166 S.W.3d at 738 (citations omitted). "Texas law does not presume agency, and the party who alleges it has the burden of proving it." *IRA Res., Inc. v. Griego*, 221 S.W.3d 592, 597 (Tex. 2007) (citation omitted).

"Authority to act on the principal's behalf and control are the two essential elements of agency." *Exxon Mobil Corp. v. Rincones*, 520 S.W.3d 572, 589 (Tex. 2017) (citations omitted).

[5] None of the cases that TaxAct cites illustrates a contrary principle, either because the extent of the third-party beneficiary doctrine was not analyzed or because the type of contractual relationship at issue shares little in common with this case. In *Nationwide of Bryan, Inc. v. Dyer*, the plaintiff-appellees conceded that the non-signatory spouse was a third-party beneficiary, so the parties' intent to benefit her was not decided by the court. 969 S.W.2d 518, 520 (Tex. App. 1998). In *Southwest Health Plan, Inc. v. Sparkman*, the plaintiff-appellee had purchased "health insurance coverage for himself and his son," a contractual relationship that, unlike the one between TaxAct and Krysta Sessoms, would unambiguously contemplate a benefit to a third party on the face of the insurance agreement. 921 S.W.2d 355, 356 (Tex. App. 1996). And in *In re Rangel*, the court held, without discussion or explanation of the contract's terms, that Juanita Rangel was bound to her husband Leon's agreement with Orkin Exterminating Company and the arbitration agreement contained therein because she was a third party beneficiary of the contract. 45 S.W.3d 783, 785, 787 (Tex. App. 2001). Reliance on this authority is, accordingly, a thin reed on which to hang a significant change in Texas law.

The agent thus "cannot bind a principal absent either actual or apparent authority." *Sanders v. Total Heat & Air, Inc.*, 248 S.W.3d 907, 913 (Tex. App. 2008). "Actual authority denotes that authority which the principal intentionally confers upon the agent, or intentionally allows the agent to believe he has, or by want of ordinary care allows the agent to believe himself to possess." *Lifshutz v. Lifshutz*, 199 S.W.3d 9, 22 (Tex. App. 2006) (citations omitted). The scope of an agent's actual authority comes from the "the principal's words and conduct relative to the agent." *Sanders Oil & Gas GP, LLC v. Ridgeway Elec.*, 479 S.W.3d 293, 302 (Tex. App. 2015) (citation omitted). On the other hand, "[a]pparent authority arises through acts of participation, knowledge, or acquiescence by the principal that clothe the agent with the indicia of apparent authority." *Ins. Co. of N. Am. v. Morris*, 981 S.W.2d 667, 672 (Tex. 1998) (citations omitted). "Only the conduct of the principal may be considered; representations made by the agent of his authority have no effect." *Lifshutz*, 199 S.W.3d at 22-23 (citations omitted). Although generally a question of fact, *Undavia v. Avant Med. Grp., P.A.*, 468 S.W.3d 629, 634 (Tex. App. 2015), where "the facts are uncontroverted or otherwise established, the existence of an agency relationship is a pure question of law," *Harding Co. v. Sendero Res., Inc.*, 365 S.W.3d 732, 742 n.24 (Tex. App. 2012) (citations omitted).

Here, the facts necessary to determine whether there is an agency relationship are in genuine dispute. First, whether Krysta Sessoms had actual authority to bind her husband to the 2020 Terms of Service is in genuine dispute. To be sure, Matthew Sessoms gave his wife permission to "prepare" his tax returns on his behalf. But the scope of the "permission" he "intentionally confer[red]" on her is hotly contested. *Lifshutz*, 199 S.W.3d at 22 (citation omitted). He is emphatic in his declaration that he "did not grant her authority to enter into any agreements on [his] behalf or to waive [his] right to a jury trial or to participate in a class action."

While Sessoms's "permission" that Krysta "prepare [his] tax returns" could implicitly grant her actual authority to assent to the 2020 Terms of Service on his behalf, a rational factfinder could conclude otherwise, so TaxAct, the party alleging the existence of an agency relationship, has not carried its burden. *Griego*, 221 S.W.3d at 597. Second, the scope of Krysta Sessoms's apparent authority is in genuine dispute as well. Beyond the fact that Krysta created an account on its website in her husband's name, TaxAct has not pointed the Court to any sufficiently clear "acts of participation, knowledge, or acquiescence by" her husband to carry its burden of proving her apparent authority to bind her husband to the 2020 Terms of Service. *Morris*, 981 S.W.2d at 672. The Court thus declines to hold that Sessoms assented to the arbitration agreement based on principles of agency law.

In sum, because his assent to the 2020 Terms of Service is subject to multiple disputes of material fact, the Court will deny TaxAct's Motion to Compel Arbitration as applied to Matthew Sessoms.

E. This Case Will Be Stayed in Part

Thus, at this stage, only Kirkham's claims must be arbitrated—per the 2020 Terms of Service, in Dallas County, Texas. The Third Circuit recently reaffirmed, however, "that 9 U.S.C. § 4 does not permit a district court to enter an order compelling arbitration outside the district where it sits." *Henry ex rel. BSC Ventures Holdings, Inc. Emp. Stock Ownership Plan v. Wilmington Tr. NA*, 72 F.4th 499, 504 n.5 (3d Cir. 2023), *cert denied sub nom. Wilmington Trust, N.A. v. Marlow*, No. 23-122 (U.S. Oct. 16, 2023). Thus, an Eastern District of Pennsylvania judge cannot order arbitration in Dallas County, Texas. At the same time, federal law unambiguously provides that, once the Court is "satisfied that the issue involved . . . is referable to arbitration under such an agreement," it "shall on application of one of the parties stay the trial of the action until such arbitration has been had . . . ." 9 U.S.C. § 3. Based on this

clear directive, the Court will stay Kirkham's claims but will deny TaxAct's Motion to Compel Arbitration.

While Sessoms's claims are not, on the record before the Court, subject to arbitration, there is an open question as to whether they should be stayed pending any arbitration of Kirkham's claims. Where, as here, some, but not all, parties are subject to an agreement ordering arbitration, the FAA does not require that the case be stayed. *Mendez v. Puerto Rican Int'l Cos., Inc.*, 553 F.3d 709, 712 (3d Cir. 2009) ("While Section 3 can reasonably be read to speak to situations in which the 'suit or proceeding' involves a non-arbitrable 'issue' between the parties as well as the arbitrable 'one,' we do not believe it can reasonably be read to resolve issues presented in situations involving a party who has not committed itself to arbitrate any issue before the court."). Instead, the scope of the stay is "within the discretion of the court." *Id.*; *Moses H. Cone*, 460 U.S. at 20 n.23. Courts applying *Mendez* have assessed:

> (1) whether a stay would unduly prejudice or present a clear tactical disadvantage to the non-moving party; (2) whether denial of the stay would create a clear case of hardship or inequity for the moving party; (3) whether a stay would simplify the issues and the trial of the case; and (4) whether discovery is complete and whether a trial date has been set.

Clouser v. Golden Gate Nat'l Senior Care, LLC, 2016 WL 4254268, at *2 (W.D. Pa. Aug. 10, 2016) (citing *Akishev v. Kapustin*, 23 F. Supp.3d 440, 446 (D.N.J. 2014)); *see also Congdon v. Uber Techs., Inc.*, 226 F. Supp.3d 983, 990 (N.D. Cal. 2016) (similar). TaxAct bears the burden of showing that a stay is proper. *Landis v. N. Am. Co.*, 299 U.S. 248, 255 (1936) ("[T]he suppliant for a stay must make out a clear case of hardship or inequity in being required to go forward . . . ."); *CTF Hotel Holdings, Inc. v. Marriott Int'l, Inc.*, 381 F.3d 131, 139 (3d Cir. 2004) ("The opposing party must state a clear countervailing interest to abridge a party's right to litigate.").

Here, those factors counsel against staying Sessoms's case. Because the arbitration agreement waives class arbitration, federal court might be the only forum in which Sessoms can proceed via representative litigation. Staying the case thus would "present a clear tactical disadvantage" to Sessoms. *Clouser*, 2016 WL 4254268, at *2 (citation omitted). Moreover, depending on the issues reached in its ruling, the arbitrator's resolution of Kirkham's case might not necessarily be given preclusive effect in federal court, so a stay would not necessarily "simplify the issues" in Sessoms's case. *Clouser*, 2016 WL 4254268, at *2; *see CTF Hotel Holdings*, 381 F.3d at 139 (cautioning that, although there is "the potential for judicial efficiency . . . in possible collateral estoppel because the arbitrator could make determinations relevant to [the party not obligated to arbitrate its claims]'s federal claims . . . staying litigation for that reason effectively denies [that party] its contracted for day in court"); Charles Allen Wright & Arthur R. Miller, Federal Practice and Procedure § 4475.1 (3d ed. Apr. 2023 Update) (noting that "the freedom an arbitrator may feel to develop judicially recognized legal principles and . . . the brevity or lack of an arbitral opinion . . . provide excellent reasons for reticence in recognizing issue preclusion"). Because these factors weigh in favor of allowing the case to proceed, Sessoms's claims will not be stayed, and they will proceed on this Court's docket.

An appropriate order follows.

BY THE COURT:

/s/Wendy Beetlestone, J.

WENDY BEETLESTONE, J.

CERTIFICATE OF SERVICE

I hereby certify that on July 3, 2024, I caused the foregoing Brief of Defendant-Appellant TaxAct, Inc. and Volume I of the Joint Appendix to be electronically filed through this Court's CM/ECF system. I certify that all parties in the case are registered CM/ECF users and that service was accomplished by the CM/ECF system.

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EXHIBIT 2

No. 24-1515

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

MATTHEW SESSOMS,
on behalf of himself and all others similarly situated, *Plaintiff-Appellee, and*

JAMES KIRKHAM, *Plaintiff,*

v.

TAXACT, INC.,
Defendant-Appellant.

Appeal from the United States District Court for the
Eastern District of Pennsylvania
Case Number 2:23-cv-03303
The Honorable Judge Wendy Beetlestone

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INTRODUCTION

A user holding himself out as Matthew Sessoms repeatedly agreed to TaxAct's Terms in creating an account in Sessoms's name and filing years of his tax returns. TaxAct's brief showed that the Terms bind Sessoms, whether the user was Sessoms or his spouse, Krysta, acting at his behest.

Sessoms fails to rebut either showing. Among other things, Sessoms buries any discussion of Krysta's undisputed role as his agent until the very end of his brief, even though this is TaxAct's lead basis for reversal. Moreover, Sessoms does not respond to TaxAct's showing that multi-factor authentications using his email and phone constitute electronic signature under Texas's Uniform Electronic Transactions Act, thus binding him to the Terms. Even assuming that Krysta acted on his behalf, Sessoms ignores undisputed facts, including:

- Sessoms instructed Krysta to prepare and file his taxes without providing any limitations while specifically aware that she could use online services.
- Krysta, purporting to be Sessoms, created a TaxAct account in his name using his personal information.
- Sessoms provided Krysta with personal information necessary to file his individual and later joint returns.
- Sessoms had notice of TaxAct through multi-factor authentication messages.

- Agreeing to online terms of service is a routine aspect of using a commercial tax preparation service for filing one's taxes.

These facts confirm that Sessoms is bound under agency, estoppel, and third-party beneficiary doctrines.

The district court should be reversed.

ARGUMENT

I. Sessoms Is Bound by TaxAct's Terms.

A. Sessoms Is Bound by Agency Law.

Sessoms spends dozens of pages ducking the agency doctrines of actual and apparent authority, TaxAct's primary basis for reversal. His brief eventually touches agency in its final subsection, *see* Sessoms-Br.53-54, but has no good response. *See supra* pp.1-2 (noting undisputed facts relevant to agency); *infra* §I.A.1-2.

1. Krysta Had Actual Authority.

TaxAct showed that Krysta had actual authority through two avenues: (i) Krysta had implied authority to make agreements to carry out Sessoms's unrestricted directive to prepare and file his taxes; (ii) Sessoms's actions "intentionally" or "by want of due care allow[ed] [Krysta] to believe [s]he possesse[d]" authority. *2616 S. Loop L.L.C. v. Health Source Home Care, Inc.*, 201 S.W.3d 349, 356 (Tex. App. 2006); *see*

TaxAct-Br.28-40.

Sessoms does not respond to the second problem. Yet, Sessoms's unlimited direction to Krysta to file his taxes and full awareness that she could use an online service obviously would have led her "to believe that [she] possessed authority." *2616 S. Loop*, 201 S.W.3d at 356. Nothing suggests that Krysta believed she exceeded her authority. Rather, Krysta repeatedly used TaxAct, and Sessoms never protested. This alone requires reversal.

As for Krysta's implied authority, Sessoms does not dispute that agreeing to terms of service is a routine part of tax preparation services and that he knew Krysta might use one. That too should be dispositive. Nevertheless, Sessoms claims that authority is limited to whatever is strictly "necessary" to accomplish an agent's task, which agreeing to TaxAct's Terms was not. Sessoms-Br.57.

Sessoms is wrong on the law: "[e]very agency carries with it, or includes in it, as an incident, all the powers which are necessary ***or proper, or usual***, as means to effectuate the purpose for which it was created." *Jackson v. World Wrestling Ent., Inc.*, 95 F.4th 390, 393 (5th Cir. 2024) (emphasis added) (quoting *Cameron Int'l Corp. v. Martinez*,

662 S.W.3d 373, 377 (Tex. 2022)). The actual rule forecloses Sessoms's arguments. Agreeing to contractual terms is a "usual" part of online tax filing, as agreeing to terms of service in *Jackson* was a "routine[]" part of presenting a ticket for admission. *Id.*

Sessoms's attempts to distinguish *Jackson* fail. It is not meaningful that the *Jackson* "plaintiff knew that his nephew was presenting their tickets and he could have directed him not to." Sessoms-Br.59. Beyond knowledge, Sessoms expressly *directed* Krysta to file on his behalf and knew that could involve an online service. What matters is that both the *Jackson* plaintiff and Sessoms knew that someone was acting on their behalf. Indeed, *Jackson* found agency despite that plaintiff lacked notice that his nephew was agreeing to terms (including arbitration) because "notice to the agent is notice to the principal." 95 F.4th at 393. So Sessoms's alleged unawareness is irrelevant. Regardless, the record shows that Sessoms *had notice* that Krysta was using TaxAct, specifically, because he received TaxAct's communications requesting multi-factor authentication.

Sessoms also claims *Jackson* is distinguishable because Krysta "did not benefit Plaintiff Sessoms directly." Sessoms-Br.59. But he cites

nothing establishing a "direct benefit" requirement for agency. Nor does this make sense on its own terms. Sessoms obviously directly benefited when Krysta (supposedly) used TaxAct to prepare and file his taxes: he avoided criminal and civil liability for non-filing.

Sessoms's reliance (Sessoms-Br.56) on *Expro Americas, LLC v. Sanguine Gas Exploration, LLC*, 351 S.W.3d 915 (Tex. App. 2011), *confirms* Krysta's implied authority. That would-be principal "did not provide any restrictions or instructions" regarding the would-be agent. *Id.* at 922. The court explained that agreeing to indemnify subcontractors was not "an ordinary aspect of [the would-be agent's] duty of retaining services and equipment," *id.* at 923, distinguishing other cases on that basis (rather than applying an impractical rule of necessity). Had such an agreement been "an ordinary aspect" of the task, the outcome would have changed. Here, Sessoms *did* give Krysta explicit "instructions" to file his taxes, aware that she could use an online service, and cannot dispute that agreeing to terms of service is "an ordinary aspect" of filing online. *Id.*

Sessoms additionally argues that because he "did not require [Krysta] to 'specifically' use TaxAct's services," she lacked authority.

Sessoms-Br.58. But dispositive is that he imposed no *limitation*; "the proper question is not whether the principal authorized the specific … act." *Houston Cas. Co. v. Certain Underwriters at Lloyd's London*, 51 F. Supp. 2d 789, 800 (S.D. Tex. 1999), *aff'd*, 252 F.3d 1357 (5th Cir. 2001). Sessoms knew his instruction to Krysta would potentially (if not probably) result in using an online service like TaxAct, and he received and responded to TaxAct's multi-factor authentication requests. Sessoms's lack of restrictions demonstrates the *breadth* of Krysta's authority, not its absence.

Finally, Sessoms claims that "TaxAct had a duty to determine, not only the fact of agency but also its nature and extent." Sessoms-Br.60. Such a duty to inquire is spurious. *Actual* authority is determined by "the principal's words and conduct relative to the agent," not third-party inquiries. *Expro*, 351 S.W.3d at 921.

Regardless, any such duty would be satisfied. Sessoms ignores the facts: Krysta did not agree to the Terms as herself; she purported *to be* Sessoms after making an account on his behalf. *See* JA144-45. From TaxAct's perspective, it made an agreement with Sessoms.

It was not happenstance that Krysta held herself out as Sessoms.

Rather, TaxAct makes it clear that the person *whose taxes are being filed* must agree to the Terms. The user must affirm that they are that person: "I declare that … this return and accompanying schedules … accurately list all amounts and sources of income *I received*…." JA135 (emphasis added). That same person must then check a box next to "I agree to the [hyperlinked] terms and conditions." *Id.* The Terms also repeatedly refer to "your tax return," confirming that the counterparty is the filer, and make the user promise to not "misrepresent your identity." *E.g.*, JA130. Sessoms ignores these inconvenient facts.

Moreover, TaxAct took steps to verify that it was transacting with Sessoms or someone authorized to act for him. It required Sessoms's personal information, which Sessoms provided to Krysta, and multi-factor authentication. Sessoms does not dispute that his account was verified through email and text messages *sent to him*, not to Krysta.

Sessoms's cited cases do not help him. *See* Sessoms-Br.54-63. *Disney Enterprises, Inc. v. Esprit Financial, Inc.*, involved a contractor that falsely held itself out to third parties as having authority from Disney. But Disney *would have* been bound had Disney given the agent authority, regardless of the third-party inquiries. 981 S.W.2d 25, 30 (Tex.

App. 1998). In *Bridas S.A.P.I.C. v. Government of Turkmenistan*, the court applied "federal common law" (not Texas law) to conclude that an agent did not sign on behalf of a principal because "that fact [was not] clear on the face of the agreement." 345 F.3d 347, 352, 358 (5th Cir. 2003). Here, as explained, Sessoms was the named counterparty, so clearly Krysta was agreeing on his behalf. Regardless, *Texas* law holds that a contract need not mention a principal to bind it. *First Nat'l Acceptance Co. v. Bishop*, 187 S.W.3d 710, 714 (Tex. App. 2006).

2. Krysta Had Apparent Authority.

TaxAct also showed that Krysta had apparent authority because it is undisputed that Sessoms directed her to file his taxes, knew she could use an online service, gave her extensive personal information to file, and repeatedly authenticated his online account. *See* TaxAct-Br.37-40. Thus, Sessoms "either knowingly permitted an agent to hold himself out as having authority or showed such lack of ordinary care as to clothe the agent with indicia of authority." *Walker Ins. Servs. v. Bottle Rock Power Corp.*, 108 S.W.3d 538, 550 (Tex. App. 2003). The district court's claim that "[b]eyond the fact that Krysta created an account on its website in her husband's name, TaxAct has not pointed the Court to any sufficiently

clear 'acts of participation, knowledge, or acquiescence by' her husband" was incorrect. JA29.

Sessoms backs off the district court's rationale, but still argues that TaxAct must show that "Sessoms authorized [Krysta] to agree to TaxAct's Terms on Plaintiff Sessoms' behalf." Sessoms-Br.66. That, however, goes to *actual* (not *apparent*) authority. Sessoms's reliance on *Gaines v. Kelly*, 235 S.W.3d 179 (Tex. 2007), is unhelpful. *Gaines* affirms that apparent authority can be shown "by a principal's actions which lack such ordinary care as to clothe an agent with the indicia of authority, thus leading a reasonably prudent person to believe that the agent has the authority [she] purports to exercise." *Id.* at 182 (cleaned up).

Moreover, *Gaines* is distinguishable factually. It held that a mortgage broker who was a "middleman after negotiations had been completed," mainly as "an intermediary to deliver" and "receive" "documents," lacked apparent "authority to negotiate the terms of those documents." *Id.* at 183-84. Here, Krysta was the main conduit for the transaction, and Sessoms had "full knowledge" that he gave her extensive personal information (required by TaxAct), received texts and emails from TaxAct due to her actions, and then completed multi-factor

authentication. *Id.* at 182. Sessoms is left disregarding the record, claiming, *e.g.*, that TaxAct "made no effort to" verify the user. Sessoms-Br.66. But that ignores the precautions just stated. Sessoms never explains what else an online service could do.

Sessoms gave Krysta numerous indica of authority, tools that allowed her to use TaxAct and present herself as Sessoms. TaxAct *reasonably believed* that the user had authority to bind Sessoms to the Terms, just as the user bound him to the filing of his return. Sessoms never attempts to explain otherwise or even grapples with this standard.

B. Estoppel Doctrines Bind Sessoms.

TaxAct (Br.40-46) next showed that two strains of equitable estoppel bind Sessoms to the Terms. The first applies where the plaintiff "seeks and obtains substantial benefits from the contract" containing the arbitration clause (Sessoms benefitted from a completed/filed return). *Taylor Morrison of Tex., Inc. v. Ha*, 660 S.W.3d 529, 533 (Tex. 2023) (cleaned up). The second applies where suit is "based on the contract" (elements of Sessoms's claims depend on the contract). *Id.*

As to the first, Sessoms argues that he needed "actual knowledge of the contract" to trigger estoppel. Sessoms-Br.41. But in *Taylor Morrison*,

the Texas Supreme Court found estoppel without regard to whether non-signatories (the signatory's wife and children) had knowledge of the agreement's basic terms. 660 S.W.3d at 533; *see In re FirstMerit Bank, N.A.*, 52 S.W.3d 749, 755-56 (Tex. 2001) (similar). Although Sessoms attempts to distinguish *Taylor Morrison* on benefit (discussed *infra*) he says nothing about its foreclosure of the specific knowledge requirement he advocates.

Sessoms cites no Texas cases for his knowledge rule. He rests instead on three pre-*Taylor Morrison* Fifth Circuit cases. Two, however, were "governed by federal law," not Texas law. *See Noble Drilling Servs., Inc. v. Certex USA, Inc.*, 620 F.3d 469, 473 (5th Cir. 2010); *In re Lloyd's Reg. N. Am., Inc.*, 780 F.3d 283, 291 (5th Cir. 2015). The third exclusively follows federal common law cases without analysis, despite purportedly applying Texas law. *See IMA, Inc. v. Columbia Hosp. Med. City*, 1 F.4th 385, 391 (5th Cir. 2021). Simply put, this specific knowledge requirement does not exist under Texas law. *See Taylor Morrison*, 660 S.W.3d at 535 n.7 (criticizing the Fifth Circuit for viewing estoppel so narrowly).

Sessoms next argues against estoppel because his claims neither "arise solely from the contract" nor are "determined by reference to it."

Sessoms-Br.42-43 (quoting *Jody James Farms, JV v. Altman Grp.*, 547 S.W.3d 624, 637 (Tex. 2018)). But that is the test for the *other* kind of estoppel, suing based on contract (discussed *infra*). *Taylor Morrison* confirms that estoppel also applies based on "substantial benefits from the contract itself." 660 S.W.3d at 533. The Court expressly found estoppel "for a different reason" from whether the non-signatories "sued on [the] purchase agreement." *Id.*; *see In re Weekley Homes, L.P.*, 180 S.W.3d 127, 132 (Tex. 2005) (similar).

Sessoms tries to distinguish *Taylor Morrison* by insisting that he and Krysta are not "an integrated unit for factually intertwined … claims." Sessoms-Br.45 (quoting 660 S.W.3d at 534). Sessoms misreads *Taylor Morrison*. The Texas Supreme Court was clear that the holding did not turn on the familial relationship or intertwined facts. It held that the non-signatories' "occupancy of the home indicates that they accepted the benefits of [the] agreement and therefore may be compelled to arbitrate along with [the signatory]," emphasizing that "common occupancy *alone*" supported the result. 660 S.W.3d at 533 (emphasis added). Concerns about "splitting the family's claims" simply reinforced the result, "mak[ing] any other conclusion … especially odd." *Id.*

Sessoms is also wrong on the facts. He has claims based on submission of *joint tax returns*. Thus, Sessoms is part of a "family unit" with claims "factually intertwined" with a familial signatory. *Id.* at 531.

Faced with Texas precedent requiring arbitration, Sessoms is reduced to arguing that he only received an "indirect benefit." Sessoms-Br.46. That is absurd. To be clear, Sessoms benefitted directly from TaxAct's services, which included preparing a tax return and "electronic filing." JA130. Otherwise, Sessoms would have incurred the hassle of preparing his own return and criminal and civil liability if he didn't. That is why he asked Krysta to prepare and file his returns. To apply Sessoms's logic that "assistance" was the only direct benefit to contexts like "contracts to build homes," (*e.g.*, *Taylor Morrison*, *Weekley Homes*), Sessoms-Br.46, would mean that the construction labor and not the house is the only direct benefit. That is nonsense and not the law.

Finally, TaxAct additionally explained that Sessoms also "sued on the contract." TaxAct-Br.44-46. When Sessoms eventually addresses this (after improperly conflating it with the other estoppel ground) he says little. Noting he lacks breach of contract claims, Sessoms argues that it is not enough that they concern "questions of consent." Sessoms-Br.47.

That understates things. Sessoms attempts to establish the *elements* of his claims based on the alleged *absence* of privacy provisions in the Terms. His claims are "determined by reference" to the Terms. *Jody James Farms*, 547 S.W.3d at 637.

C. Sessoms Is Bound As a Third-Party Beneficiary.

TaxAct finally showed that Sessoms is bound as a third-party beneficiary, because the Terms (i) reference third-party data and (ii) clearly intended to cover the person (or persons, if a joint return) whose taxes were being prepared and filed. *See* TaxAct-Br.46-50.

Sessoms responds that TaxAct "selective[ly] edit[ed]" the Terms' phrase "for your personal purposes." Sessoms-Br.50. Not so. TaxAct simply stated that the Terms: "require that a user affirmatively agree to 'a limited, nonexclusive, nontransferable, nonsublicensable, revocable license to access and use the Services for [their] personal purposes.'" TaxAct-Br.48 (quoting JA130) (alteration original). "[T]heir" was clearly shorthand for the "user."

Moreover, Sessoms's argument about "your" misses the point. When Krysta allegedly filed Sessoms' individual returns, she *purported to be Sessoms*. *See, e.g.*, JA135, JA144. The parties clearly "intended to

secure a benefit to" Sessoms because Krysta held out Sessoms as the person with whom TaxAct was transacting. *Jody James Farms*, 547 S.W.3d at 635. Based on the "four corners," Sessoms was the "you" in the Terms; he was the named counterparty. *First Bank v. Brumitt*, 519 S.W.3d 95, 108 (Tex. 2017).

Indeed, as noted, TaxAct's website and Terms were designed so that the user agreeing to the Terms had to be the same person whose taxes were being filed. The person swearing that *their* tax return was correct had to agree to the Terms. JA135; *see* JA130-31 ("[y]ou agree that you are responsible for submitting accurate and complete information while preparing your tax return"). The Terms also make clear this person would benefit from TaxAct. *See, e.g.*, JA131 ("If you choose to file your return electronically" TaxAct will "transmit[] to the applicable federal or state taxing authority"). Sessoms may claim Krysta used TaxAct for him (while purporting to be him). *But see* JA130 (user may not "use the Services to … misrepresent your identity"). That Sessoms and Krysta's deception deviated from, if not violated, the Terms' intended operation cannot change that the Terms clearly intended to benefit Sessoms, the person whose taxes were filed.

Sessoms next claims that he cannot be a third-party beneficiary because the Terms "did not identify any [beneficiaries] specifically." Sessoms-Br.51. But Sessoms was the *named* counterparty. Regardless, "a contract need not expressly name an intended third-party beneficiary." *Wal-Mart Stores, Inc. v. Xerox State & Local Sols., Inc.*, 663 S.W.3d 569, 585-86 (Tex. 2023). Identifying a "specific, limited group of individuals" suffices. *Id.* The person whose tax return is being filed clearly fits; a "valid and complete tax return" is only of use to that taxpayer. *See City of Houston v. Williams*, 353 S.W.3d 128, 148 (Tex. 2011) ("In [a contract's] references to rates of pay, hours of work, and conditions of employment, this is a clear statement of an intent to benefit parties" other than signatories).

Sessoms further argues that, regardless of the parties' intent, the preparation and filing of his tax return was an "incidental" benefit. This again is absurd. The fact that his return was prepared and filed by TaxAct benefitted him more than anyone else. If the purpose of the Terms was not to benefit Sessoms through his tax return, it would have "had no purpose whatever." *Basic Cap. Mgmt. v. Dynex Com., Inc.*, 348 S.W.3d 894, 900 (Tex. 2011).

D. Sessoms Assented to the Terms.

TaxAct also showed that Sessoms assented to the Terms under Texas law.

First, TaxAct explained that there can be no genuine dispute that Sessoms actually used TaxAct and personally checked the box assenting to the Terms. TaxAct-Br.50-53. Sessoms claims that TaxAct "offers no evidence to this effect," Sessoms-Br.39, but this is false. Sessoms does not dispute the user created the account in his name, inputted copious amounts of *his* personal information (*e.g.*, Social Security number, AGI, and personalized PIN), filed his taxes for multiple years, and, most importantly, that Sessoms personally verified the account repeatedly. Sessoms makes no effort to explain away these undisputed facts.

Second, TaxAct showed that Sessoms' undisputed provision of personal information and multi-factor authentication through *his* phone and email constituted a signature as a matter of law under Texas's Uniform Electronic Transactions Act, and therefore, established assent to the Terms. TaxAct-Br.53-58. Sessoms does not respond at all, thereby forfeiting the direct assent issue.

* * *

Finally, TaxAct showed that, at minimum, the district court should have allowed discovery and, if necessary, held a trial before conclusively ruling on arbitration. *See* TaxAct-Br.58-62. Sessoms does not dispute that the court erred in this respect or argue that *he* was entitled to summary judgment. *Compare* Sessoms-Br.66 (merely arguing "at this stage" TaxAct has not "establish[ed] as a matter of law" that arbitration is required).

II. Sessoms's Alternative Arguments Are Meritless.

Rather than primarily defending the district court's rationale for denying arbitration, Sessoms essentially pursues a cross-appeal. *See* Sessoms-Br.18-32. This fails too.

A. The Agreement Is Supported by Consideration and Is Not Illusory.

Below, Sessoms made a multi-step argument that the Terms containing the arbitration provision lack consideration and are therefore illusory. First, he claimed that Texas has adopted a special rule that requires one party's promise to arbitrate claims to be made in exchange for a mutual promise to arbitrate from the counterparty, even if the clause is part of a contract that otherwise provides consideration. Second,

he argued that, although TaxAct had made such a mutual promise to arbitrate, that promise was illusory. He is wrong at each step.

1. Texas Allows Arbitration Clauses to Be Supported by Normal Consideration.

The district court properly rejected Sessoms's argument at step one, because Texas does not (and under the Federal Arbitration Act could not) impose a special rule limiting the consideration that can support arbitration clauses. *See* JA16-17 n.4. The Texas Supreme Court holds that while "consideration" to support an arbitration contract "*may* take the form of bilateral promises to arbitrate …. when an arbitration clause is part of a larger, underlying contract, *the remainder of the contract may suffice as consideration for the arbitration clause*." *In re Palm Harbor Homes, Inc.*, 195 S.W.3d 672, 676 (Tex. 2006) (emphasis added); *accord In re Lyon Fin. Servs.*, 257 S.W.3d 228, 233 (Tex. 2008); *In re AdvancePCS Health L.P.*, 172 S.W.3d 603, 607 (Tex. 2005).

For example, the *AdvancePCS* court held that an arbitration clause was enforceable and "not illusory," even assuming that the other party's mutual promise was illusory when "considered alone," because "the rest of the parties' agreement provide[d] the consideration." *Id.* The consideration was "us[ing] PCS's services and network to obtain

reimbursements." *Id.* Thus, TaxAct's provision is equally enforceable.

On appeal, Sessoms does *not* dispute that the overall contract provided consideration, but instead invokes dicta from *Royston, Rayzor, Vickery & Williams, LLP v. Lopez*, 467 S.W.3d 494, 505 (Tex. 2016) to argue that a promise to arbitrate can only be supported by a non-illusory, mutual promise to arbitrate from the other party. *See* Sessoms-Br.19-20. But *Royston* did not overrule the Texas Supreme Court's repeated prior holdings "*sub silentio*," without explanation, let alone where the issue did not matter.[1] *See Nazari v. State*, 561 S.W.3d 495, 506 (Tex. 2018) ("Had we intended to overrule [precedent], we would have done so directly.").

Accordingly, Texas courts, while citing *Royston*, still hold that any otherwise adequate consideration from the contract suffices to trigger arbitration. *Sam Houston Elec. Coop., Inc. v. Berry*, 582 S.W.3d 282, 292 (Tex. App. 2017); *Amateur Athletic Union of the U.S., Inc. v. Bray*, 499 S.W.3d 96, 106-07 (Tex. App. 2016) (enforcing arbitration despite illusory counter-promise to arbitrate).

Likewise, the Eighth Circuit, applying Texas law, rejected a

[1] Whether the overarching contract provided consideration was irrelevant, because that contract included "mutually binding promises to arbitrate" that were "not illusory." *Id.* at 506.

Royston dicta-based argument like Sessoms's: "[w]e are confident that, if the Texas Supreme Court were directly confronted with the issue we now face, it would hold that any consideration of the usual kind is sufficient to support a promise to arbitrate." *Dickson v. Gospel for ASIA, Inc.*, 902 F.3d 831, 835 (8th Cir. 2018). It also recognized that interpreting *Royston* to require special consideration for arbitration would be preempted: "the [FAA] requires that states place arbitration agreements on an equal footing with other contracts … so requiring identical reciprocal promises only for arbitration agreements would be contrary to federal law." *Id.* (citation omitted).

As Sessoms does not dispute that the rest of the Terms provide consideration, the arbitration provision is not illusory.

2. Even Standing Alone, the Terms' Bilateral Promise to Arbitrate Is Not Illusory.

Additionally, Sessoms is wrong because, even in isolation, the Terms' promise to arbitrate cannot be unilaterally modified.[2] As *Royston* acknowledges, a bilateral arbitration clause is not "illusory" unless "the contract permits one party to legitimately avoid its promise to arbitrate,

[2] The district court agreed that TaxAct's promise was not illusory in denying Plaintiffs' reconsideration motion. Dkt.90.

such as by unilaterally amending or terminating the arbitration provision and completely escaping arbitration." 467 S.W.3d at 505.

TaxAct's Terms do not permit one party to do so. They provide "You and TaxAct agree that any dispute arising out of or related to these Terms or our Services is personal to you and TaxAct and that any dispute will be resolved solely through individual arbitration." JA133. They also state that if TaxAct seeks to modify the Terms, "TaxAct will provide you with notice of such changes, such as by sending an email" and that, post-notice, "[y]our ***continued use*** of the Services after any such changes ***will confirm your acceptance*** of the then-current version of this Agreement." JA131 (emphases added). The Terms then confirm that "[i]f you do not agree with any such changes, you must immediately discontinue your use of the Services." *Id.*

These provisions make clear that users (1) must *accept* any change, and (2) can *reject* TaxAct's modification by terminating use of services. A consumer could lock TaxAct into its promise to arbitrate by not further using the services. Thus, the Terms do *not* allow TaxAct to "*unilaterally* amend[] or terminat[e] the arbitration provision and completely escap[e] arbitration." *Royston*, 467 S.W.3d at 505 (emphasis added).

Sessoms never disputes that the notice and acceptance requirements allow users to reject modifications, therefore preventing TaxAct from unilaterally "avoid[ing] its promise to arbitrate." *Id.* Thus, the cases Sessoms cites (Br.21-23) requiring a so-called "savings clause" are inapposite. They did so only because those contracts provided a "unilateral right to terminate [an] obligation to arbitrate." *Nelson v. Watch House Int'l, LLC*, 815 F.3d 190, 193-94 (5th Cir. 2016). For example, *In re Halliburton* found a "savings clause" necessary because an employee's standalone arbitration contract provided that "the company retained the right to modify or discontinue the Program," without providing the employee an opportunity to reject. 80 S.W.3d 566, 569 (Tex. 2002); *see In re 24R, Inc.*, 324 S.W.3d 564, 567 (Tex. 2010) ("In *Halliburton*, an employer explicitly reserved the right to unilaterally modify or discontinue the dispute resolution program."). *Royston* reaffirms this: mutual promises to arbitrate were enforceable despite the absence of a savings clause because the contract "d[id] not allow either party to unilaterally escape or modify the obligation to arbitrate." 467 S.W.3d at 505-06.

Finally, Sessoms raises a new and wrong argument: *any* arbitration

provision (even those without unilateral modification rights) requires a "savings clause." Sessoms-Br.24 ("The district court stands alone in finding that an arbitration agreement lacking a *Halliburton*-type savings clause is mutually binding."). Preliminarily, Sessoms forfeited this argument. Below, Sessoms based illusoriness only on the (false) claim that "TaxAct [] has a unilateral right to amend the Terms of Service retroactively without advance notice." Dkt.70 at 7; *see DIRECTV, Inc. v. Seijas*, 508 F.3d 123, 125 n.1 (3d Cir. 2007) (arguments must be raised below for appellate preservation).

Sessoms's maximalist theory is also meritless. It makes no sense to say that a contract that can only be modified by notice and acceptance (*i.e.*, offer and acceptance) is illusory. That would render all contracts illusory. A savings clause, moreover, could make no difference since, in any contract, it *too* could be modified by offer and acceptance.

The case Sessoms invokes, *Carey v. 24 Hour Fitness, USA, Inc.*, 669 F.3d 202 (5th Cir. 2012), is limited to the employment context and cannot be reconciled with *Royston*'s subsequent holding that no savings clause is required if the contract "does not allow either party to unilaterally escape or modify the obligation to arbitrate." *Royston*, 467 S.W.3d at 505;

see Nelson, 815 F.3d at 194 n.3 (recognizing *In re 24R*, 324 S.W.3d 564, involved an "arbitration agreement [that] did not grant the employer a unilateral termination right such that a *Halliburton*-type savings clause was required").

Even pre-*Royston*, the Texas Supreme Court held that an employer's common law right to modify agreements with employees who "receive notice of the changes and accept them" "does not render the arbitration agreement illusory." *In re Dillard Dep't Stores, Inc.*, 198 S.W.3d 778, 782 (Tex. 2006). That unravels Sessoms's broad reading of *Carey* that would deem the requirements of "notice and acceptance" of a modification not "sufficient to make" an arbitration provision "non-illusory" without a savings clause. Sessoms-Br.25 (quoting *Carey*, 669 F.3d at 207). After all, there was no savings clause in *Dillard*.[3]

In short, because the Terms do not allow unilateral modifications to the arbitration provision, no savings clause was required. *See Ferron v. Precision Directional Servs.*, 2021 WL 6618657, at *4 n.9 (S.D. Tex.

[3] *Carey* sought to distinguish *Dillard* on the basis "there was no express reservation of Dillard's right to amend the arbitration agreement." 669 F.3d at 208 n.2. But such an "express reservation" should not matter unless it conflicts with the common-law rule by allowing modifications *without* notice and acceptance.

Sept. 21, 2021) (notice and acceptance requirements in modification provision made arbitration contract non-illusory); *Fat Butter, Ltd. v. BBVA USA Bancshares, Inc.*, 2010 WL 11646900, at *12-13 (S.D. Tex. April 13, 2010) (similar).[4]

B. TaxAct Did Not Waive Arbitration.

Sessoms claims that TaxAct waived the right to enforce the arbitration provision against him through its litigation conduct in another case where he is not a party. Sessoms-Br.28-32. This argument is meritless.

First, the waiver issue is delegated to the arbitrator. As TaxAct showed below, the parties' contract incorporated JAMS's arbitration rules, which delegate *any* dispute about jurisdiction and arbitrability to the arbitrator. *See* JA133; JA12; JAMS Streamlined Rule 8(a) ("Jurisdictional and arbitrability disputes" are delegated).

On appeal, Sessoms does not dispute that the JAMS Rules delegate

[4] *Harris v. Blockbuster Inc.*, 622 F. Supp. 2d 396 (N.D. Tex. 2009) (Sessoms-Br.23-25), by contrast, never addressed the impact of notice and acceptance provisions. Its delegation holding was also abrogated. *Arnold v. HomeAway, Inc.*, 890 F.3d 546 (5th Cir. 2018) (illusoriness under Texas law "is properly considered a validity challenge rather than a formation challenge" and is therefore properly delegated).

waiver but claims that "incorporation of an arbitrator's rules does not show a clear intent to arbitrate arbitrability." Sessoms-Br.15. This is irreconcilable with this Court's holdings that the incorporation of such rules containing a delegation clause "constitutes clear and unmistakable evidence that the [contracting] parties agreed to delegate arbitrability." *Richardson v. Coverall N. Am., Inc.*, 811 F. App'x 100, 103-04 (3d Cir. 2020); *accord Hernandez v. MicroBilt Corp.*, 88 F.4th 215, 219 (3d Cir. 2023); JA12. Sessoms has no rejoinder, citing only Texas state law but ignoring that delegation is not a question of contract *formation*, so federal law applies. *See First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944-45 (1995).

Nor is it relevant that Sessoms claims that his wife agreed in his name, because he is bound to the Terms just like a typical signatory. Neither the Terms themselves nor their incorporation of the JAMS Rules distinguishes between signatories and non-signatories. *See* JA133.

Regardless, Sessoms's waiver argument is meritless. Waiver occurs only if a party has "intentional[ly] relinquish[ed] or abandon[ed] ... a known right." *White v. Samsung Elecs. Am., Inc.*, 61 F.4th 334, 339 (3d Cir. 2023). To begin, one's litigation conduct can only waive the right to

arbitration in *that* case. "[T]o hold that defendant can no longer assert its right to compel arbitration simply because it did not assert that right in another case is absurd." *Bischoff v. DirecTV, Inc.*, 180 F. Supp. 2d 1097, 1113 (C.D. Cal. 2002); *see Turng v. Guaranteed Rate, Inc.*, 371 F. Supp. 3d 610, 620 (N.D. Cal. 2019). Moreover, "a defendant's attempt to settle a case with a plaintiff is not inconsistent with that defendant's right to arbitrate a separate case, even if the settlement is on a class basis (and overlaps the case that the defendant seeks to arbitrate)." *Hughes v. S.A.W. Ent., Ltd.*, 2019 WL 2060769 (N.D. Cal. May 9, 2019) (collecting cases). Litigating in one case implies nothing "intentional" beyond an intent to litigate *that* case.

Furthermore, Sessoms ignores TaxAct's conduct in *Smith-Washington*, which demonstrates that TaxAct did not "intentional[ly] relinquish" arbitration even *there*. *White*, 61 F.4th at 339. TaxAct promptly sought arbitration and its motion *remains pending* and is merely stayed pending disposition of a preliminarily-approved class settlement. If settlement falls through, the court will address arbitration. *Smith-Washington*, No. 23-cv-830-VC, Dkt.121-2, at 32-33 (N.D. Cal. Feb. 26, 2024). Thus, arbitration would only be avoided for those class

members whose claims are actually settled.

Notably, the prospect of arbitration was a *driver* of the settlement, so waiver makes no sense. Plaintiffs' approval motion said TaxAct's "pending motion to compel individual arbitration" presents the "most significant risk faced by Plaintiffs." *Id.*, Dkt.121 at 19 (emphasis added).

Sessoms's position would illogically require defendants to irrevocably waive arbitration just to preliminarily seek settlement approval. But "[t]o hold that a defendant waives its right to compel arbitration in one case by entering a judicial settlement in another case would create a disincentive to settle for any defendant facing multiple suits." *Lawrence v. Household Bank, N.A.*, 343 F. Supp. 2d 1101, 1113 (M.D. Ala. 2004); *see Carbajal v. H&R Block Tax Servs.*, 372 F.3d 903, 905 (7th Cir. 2004) (defendant did not waive the right to arbitration despite judicially-rejected class settlement that would have included the plaintiff).

Sessoms's reliance on *Hill v. Xerox Bus. Servs., LLC*, 59 F.4th 457, 477 (9th Cir. 2023), is misplaced. *Hill* did not involve settlement and found waiver based on conduct in the same proceeding. Moreover, *Hill*'s waiver test was whether a party's actions indicate "a conscious decision

to seek judicial judgment on the merits." *Id.* at 474 (cleaned up). *Settlement* is the antithesis of "judicial judgment on the merits."

C. The Terms Are Enforceable "Clickwrap."

Sessoms wrongly argues that TaxAct's "design choices in creating its website" make the Terms unenforceable. Sessoms-Br.32.

An enforceable "clickwrap" agreement exists under Texas law if there is a "requirement that users assent to contract terms by 'clicking' some form of 'I agree' or 'accept' button on a website to complete the transaction." *StubHub, Inc. v. Ball*, 676 S.W.3d 193, 200 (Tex. App. 2023); *see Fieldtech Avionics & Instruments, Inc. v. Component Control.com, Inc.*, 262 S.W.3d 813, 818 n.1 (Tex. App. 2008).

In Texas, clickwrap agreements are "routinely enforce[d]:" the movant is not "required to present evidence that [counterparty] had actual or constructive notice that he would be bound by the [] terms when creating the account or at least that the terms were reasonably conspicuous." *StubHub*, 676 S.W.3d at 201-02; *see*, *e.g.*, *Fieldtech*¸ 262 S.W.3d at 818 n.1; *Jia v. Nerium Int'l LLC*, 2018 WL 4491163, at *3 (N.D. Tex. Sept. 18, 2018) ("It is well established under Texas law that assent through an affirmative 'click' is sufficient to bind the parties."). Any sort

of heightened scrutiny (*e.g.*, whether "the terms were reasonably conspicuous") is reserved for agreements "other than [] clickwrap," such as "sign-in wrap" or "browsewrap." *StubHub*, 676 S.W.3d at 202.

Here, individuals had to check a box next to "I agree to the TaxAct Terms of Service & Terms of Use" to create an account, JA128, and again had to check a box next to "I agree to the terms and conditions," before filing, JA135. Each reference to the Terms was hyperlinked in blue font and the user had to click the box to proceed. *E.g.*, JA138. Since the Terms required clicking on the box "to complete the transaction," they are enforceable clickwrap under Texas law. *StubHub*, 676 S.W.3d at 200.

While noting the general Texas standard for assent, Sessoms cites *no online agreement cases applying Texas law*. Instead, he discusses Ninth Circuit cases applying other states' laws. *See*, *e.g.*, *Berman v. Freedom Fin. Network, LLC*, 30 F.4th 849, 856 (9th Cir. 2022); Sessoms-Br.14, 33-36. These cases are irrelevant. Regardless, TaxAct's website met their standard, as the district court correctly found. *See* JA20-22.

First, a website provides "reasonably conspicuous notice" when the terms were referenced in a hyperlink "marked in bright blue font and distinguished from the rest of the text" and when that hyperlink was

adjacent to whatever the user clicked on to provide assent. *See Oberstein v. Live Nation Ent., Inc.*, 60 F.4th 505, 516-17 (9th Cir. 2023) (notice containing hyperlink was "located directly on top of or below each action button").

Second, a user unambiguously manifests assent when the website "requires users to click on an 'I agree' box." *Keebaugh v. Warner Bros. Ent. Inc.*, 100 F.4th 1005, 1014 (9th Cir. 2024); *see Oberstein*, 60 F.4th at 513 (similar); *Berman*, 30 F.4th at 856 (assent where user "must check a box explicitly stating 'I agree'").

TaxAct met both benchmarks, even though they are not Texas law: users had to check a box next to a notice stating "I agree" to terms marked in a blue hyperlink.

Sessoms does not dispute most of this. Further, Sessoms fails to mention that the Ninth Circuit recently has consistently found assent when websites did less than TaxAct's. *See Keebaugh*, 100 F.4th at 1020-21 (no requirement to check "I agree" box); *Patrick v. Running Warehouse, LLC*, 93 F.4th 468, 477 (9th Cir. 2024) (similar); *Oberstein*, 60 F.4th at 515-17 (similar). Regardless, his challenges to TaxAct's website are narrow and pedantic.

Sessoms claims that the checkbox on the "Create Account" page is inadequate because it references the "Terms of Service & Terms of Use," whereas the Terms are titled "TaxAct Terms of Service and License Agreement." Sessoms-Br.37-38. The Ninth Circuit has rejected that very argument, finding assent despite "a typographical error" whereby the hyperlink stated "Terms of Use" but the document was called the "Terms of Service." *Keebaugh*, 100 F.4th at 1021 n.6. A "hyperlink[]" "written in a bright blue font, that distinguished them from the surrounding text," means that "notice [of the Terms] was reasonably conspicuous," however titled. *Id.* at 1018.

As for the checkbox on the filing screen, Sessoms claims this is insufficient because there are other so-called "terms" (*e.g.*, swearing to the returns) located lines above the checkbox. Sessoms-Br.38-39. But the Ninth Circuit holds that a clear hyperlink to terms puts the user on notice of the terms. *See Keebaugh*, 100 F.4th at 1018; *Oberstein*, 60 F.4th at 516. Thus, when a user checked the box next to notice stating "I agree," to the hyperlinked terms, she was on notice that she was agreeing to those terms, regardless of whether she also thought she swearing to the returns' accuracy.

Even under irrelevant non-Texas caselaw, TaxAct obtained assent.

CONCLUSION

The Court should reverse the order denying arbitration of Sessoms' claims. Alternatively, at a minimum, the Court should vacate and remand for further proceedings on the question of contract formation.

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Respectfully submitted,

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COMBINED CERTIFICATIONS

1. I am a member of the bar of the United States Court of Appeals for the Third Circuit. 3d Cir. L.A.R. 28.3(d).

2. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,486 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

3. On this day, I served a copy of this reply brief, electronically through this Court's electronic filing system.

4. The text of the electronic brief is identical to the text in the paper copies. 3d Cir. L.A.R. 31.1(c).

5. The Crowdstrike v 7.15.18511.0 detection program has been run on this file and no virus was detected. 3d Cir. L.A.R. 31.1(c).

6. 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 proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook font.

August 30, 2024

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CERTIFICATE OF SERVICE

I hereby certify that on August 30, 2024, I caused the foregoing Reply Brief of Defendant-Appellant TaxAct, Inc. to be electronically filed through this Court's CM/ECF system. I certify that all parties in the case are registered CM/ECF users and that service was accomplished by the CM/ECF system.

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