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THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA, *ex rel.* MARK BRNOVICH, Attorney General, Plaintiff, v. GOOGLE LLC, a Delaware limited liability company, Defendant.	Case No: CV2020-006219 **STATE'S MOTION FOR PARTIAL SUMMARY JUDGMENT** Assigned to the Hon. Timothy Thomason (**COMPLEX CALENDAR**) ****ORAL ARGUMENT REQUESTED****

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I. INTRODUCTION

Undisputed facts show that Google employs widespread deceptive acts and practices to obtain its users' location data in connection with its advertising business. As a matter of law, this violates the Consumer Fraud Act ("CFA"), A.R.S. §§ 44-1521 to -1534.

Though it purports to be a technology company, from a revenue perspective Google is an advertising company. Because Google's collection of its users' location data is fundamental to its massive advertising revenue, it goes to great lengths to obtain this data. The State's pre-suit investigation uncovered an operation breathtaking in scale. Google collects its users' location data via a multitude of settings and sources that its own engineers admit "feels like it is designed to make things possible, yet difficult enough that people won't figure it out." [SOF ¶ 127].

When the Associated Press reported that Google's representation "[w]ith Location History off, the places you go are no longer stored" was false, Google faced an international scandal. ██████████████████████████████████████. [SOF ¶ 131]. Internally, Google executives rushed to assemble what they called an "'Oh Shit' meeting," and Google ████████████████ called for "constant" updates. [SOF ¶¶ 139–40]. ████████████████████ ██████████████████████████████████████ removed the statement only when caught red-handed. Worse yet, the false statement was only a small part of Google's massive, multi-year operation designed to obtain and monetize user location data through deceptive acts and practices. Indeed, ██ ██ ████████████████████████████████. [SOF ¶¶ 59–62].

Google made deceptive and false statements, repeatedly and habitually omitted material information, and made it harder to access settings in order to get users to hand over location data that Google then used to sell and serve advertisements of merchandise. Although the State alleges many other deceptive and unfair practices, the instant Motion focuses on Android devices from 2015–April 2019 and three of Google's most important location-related settings: Location History, Web & App Activity, and the Location Master. As to the issues raised here, the facts are undisputed, and this Court should grant partial summary judgment on liability.

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II. FACTUAL BACKGROUND

A. Google is an Advertising Company.

Google is primarily an advertising company. In 2018, for instance, Google made $136 billion in revenue, of which $116 billion (85%) came from advertising. [SOF ¶ 3]. ████████ ██ [SOF ¶ 4]. ████ ██ [SOF ¶ 5]. ████ ████████████████████████████. [SOF ¶ 6]. Google allows advertisers to ████████ ████████████████████████████ and enables them to geo-target an area as granular as "a small radius around your business" or as large as "cities, states, or entire countries." [SOF ¶ 7]. ████████████████████████████████ ████████████████ [SOF ¶ 8]. ████████████████████████████████ ██ [SOF ¶ 9]. ██ ██ ████████████████████████████. [SOF ¶ 11].

B. Android

Android is a Google-sponsored operating system that can run on smartphones, computers, tablets and other devices. [SOF ¶ 15]. ████████████████████████ ████████████████. [SOF ¶ 16]. ████████████████████ ██. [SOF ¶ 17].

Android is technically an open-source software, meaning that anyone can modify the source code and install it on a compatible device. Such modifications are called Android "forks." [SOF ¶ 18]. While third-party device manufacturers ("OEMs") are theoretically free to pre-install any Android fork on their phones, the vast majority of Android phones sold in the U.S. have Google's version. [SOF ¶ 19]. ████████████████████████ ██

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████████████████████████████████████.[1] [SOF ¶ 20]. Google has a large incentive to do this: its own version of Android contains Google Mobile Services ("GMS"), which makes it easier for Google to collect location information from users. [SOF ¶ 21]. ████████████

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████████████████████████. [SOF ¶ 22].

C. Google's Relevant Settings.

Google's products and services include a complicated web of interrelated settings that implicate Google's collection, storage and use of user location data. These settings fall into three categories: (i) account-level, (ii) device-level and (iii) app-level. Account-level settings are those that apply to a user's entire Google Account and cover all activity associated with that Account, regardless of device. [SOF ¶ 23]. Device-level settings are those that are specific to a given hardware device, like a smartphone or tablet. [SOF ¶ 24]. App-level settings are settings specific to a particular app. [SOF ¶ 25]. The settings at issue in this Motion include Location History ("LH"), Web & App Activity ("WAA"), and the Location Master ("LM").

1. Location History and Web & App Activity.

Both LH and WAA are account-level settings. [SOF ¶ 26]. Google describes LH as a setting that "saves a private map . . . of where the user goes with his or her signed-in devices, even when the user is not using a Google service." [SOF ¶ 27]. "Opting in to Location History allows Google to build a user's Timeline . . . of the places the user's devices have been and to provide more personalized features across Google products and services . . . ."[2] [SOF ¶ 28]. ████

██. [SOF ¶ 30].

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██ [SOF

¶ 31]. ██

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[1] In this Motion, "Android" refers to Google's version of Android that Google causes to be pre-installed, unless otherwise indicated by context.
[2] Timeline is a user-facing product that allows users to view and manage the location data collected by LH. [SOF ¶ 29].

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1   ██████████████████████████████████. [SOF ¶ 32]. ████████████

2 ██████████████████. [SOF ¶ 33]. █████████████████████████████

3 █████████████████████████████████████ [SOF ¶ 33].

WAA is another account-level setting "that stores a user's Google activity data to My Activity . . . in their Google Account."[3] [SOF ¶ 34]. "The user location information that is saved as a result of Web & App Activity . . . is collected and stored in a user's Google Account when the user is engaging with a Google product and has Web & App Activity enabled. For example, when a user uses Google Search or Google Maps to search for 'restaurant,' Google collects the search term as well as information about that activity, including IP address and location information, so that the search results returned to the user will show nearby restaurant options." [SOF ¶ 36]. ██████████████████. [SOF ¶ 37].

WAA stores a user's location data, ███████████████████████. [SOF ¶¶ 38–39]. "Implicit user location information █████████████████ does not tell Google where a user's device is located, but through user inputs, Google may infer that a user is either interested in a place or that the user might be at a place. . . . For example, if a user conducts a Google Search for 'Eiffel Tower' Google may infer that the user may like to see information for places near Paris, and Google can then use that inference to provide localized recommendations about those places." [SOF ¶¶ 40–41]. On the other hand, explicit user location information refers to "information about where a device is located" derived from a variety of sensors such as ████

████████████████████████. [SOF ¶ 42]. ███████████████████

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████████████. [SOF ¶¶ 39–43]. █████████████████████

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█████████ [SOF ¶ 44].

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████████████████████████. [SOF ¶ 45]. ██████████████████

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[3] My Activity is a user-facing product that allows users to view and manage the data (including location data) saved by WAA. [SOF ¶ 35].

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████████████████████████████████████ [SOF ¶ 46]. Before 2015, the location data stored by WAA was coarsened to "approximately a neighborhood-sized area with a sufficient number of unique users." [SOF ¶ 47]. But in 2015, Google began storing precise WAA location data, namely precise latitude/longitude—the same precision with which LH location data is saved. [SOF ¶ 48]. This saving of precise location lasted until April 2019 when Google reverted to storing coarser location. [SOF ¶ 49].

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████████████████████████████████████. [SOF ¶ 50].

2. The Location Master.

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████████████████████████████. [SOF ¶ 51]. ████████████████

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████████████████████████████. [SOF ¶ 52]. ██████████

████████████████. [SOF ¶ 53].

III.   LEGAL STANDARD

Summary judgment is appropriate where there are no genuine issues of material fact and the moving party is entitled to a judgment as a matter of law. *Orme School v. Reeves*, 166 Ariz. 301, 305 (1990). The burden of proof for establishing a violation of the CFA is a preponderance of the evidence. *Dunlap v. Jimmy GMC of Tucson, Inc.*, 136 Ariz. 338, 343–44 (App. 1983).

The CFA "is a broadly drafted remedial provision designed to eliminate unlawful practices in merchant-consumer transactions." *Madsen v. W. Am. Mortgage Co.*, 143 Ariz. 614, 618 (App. 1985); *see also* State's Resp. to MTD at 5–6 (collecting and discussing cases). The CFA prohibits (i) "[t]he act, use or employment by any person[4] of any deception, deceptive or unfair act or practice, fraud, false pretense, false promise, misrepresentation," (the "Act Clause")

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[4] "Person" includes a business entity or association. A.R.S. § 44-1521(6). Google is a Delaware limited liability company.

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or "concealment, suppression or omission of any material fact with intent that others rely on such concealment, suppression or omission" (the "Omission Clause"); (ii) "in connection with the sale or advertisement of any merchandise." A.R.S. § 44-1522(A); *see also RAJI (Civil) Comm'l Torts Instrs. 21 Consumer Fraud (Elements of Claim)* cmt. 4 (2017) (recognizing State need only prove these two elements).

The term "deception" in the CFA includes "representations that have a 'tendency and capacity' to convey misleading impressions to consumers even though interpretations that would not be misleading also are possible." *Madsen*, 143 Ariz. at 618. That tendency and capacity is determined from the perspective of the "least sophisticated reader" in light of "all that is reasonably implied, not just from what is said." *Id.* Moreover, "[t]echnical correctness of the representations is irrelevant if the capacity to mislead is found." *Id.*; *see also* State's Resp. to MTD at 6 (collecting cases). Consistent with this, "[a] solicitation may be likely to mislead by virtue of the net impression it creates even though [it] also contains truthful disclosures." *FTC v. Cyberspace.com, LLC*, 453 F.3d 1196, 1198 (9th Cir. 2006); *see also Donaldson v. Read Magazine, Inc.*, 333 U.S. 178, 188 (1948) (stating "[a]dvertisements as a whole may be completely misleading although every sentence separately considered is literally true").[5]

While courts must find an intent that others rely in connection with conduct analyzed under the Omission Clause, if the concealment, suppression or omission was "routine and repeated," such conduct falls under the Act Clause, meaning that no finding of intent beyond intent to do the act is required. *State ex rel. Horne v. AutoZone, Inc.*, 229 Ariz. 358, 361–62 ¶14 (2012) (*AutoZone II*) ("[A] finder of fact could well find a practice subject to the Act Clause."); *see also State ex rel. Babbitt v. Goodyear Tire & Rubber Co.*, 128 Ariz. 483, 486 (App. 1981) (only intent under Act Clause is intent to do the act).

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[5] In construing the CFA, "courts may use as a guide" federal decisions interpreting the FTC Act, A.R.S. § 44-1522(C), and federal courts uniformly conclude that acts or practices that create a deceptive net impression violate the FTC Act. *See, e.g., Fanning v. FTC*, 821 F.3d 164, 170 (1st Cir. 2016); *Indep. Directory Corp. v. FTC*, 188 F.2d 468, 470 (2d Cir. 1951); *Am. Home Prods. Corp. v. FTC*, 695 F.2d 681, 687 (3d Cir. 1982); *FTC v. E.M.A. Nationwide, Inc.*, 767 F.3d 611, 631 (6th Cir. 2014); *Nat'l Bakers Servs., Inc. v. FTC*, 329 F.2d 365, 367 (7th Cir. 1964); *FTC v. Brown & Williamson Tobacco Corp.*, 778 F.2d 35, 39–40 (D.C. Cir. 1985).

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IV. ARGUMENT

A. Google Engaged in Deceptive Acts and Practices.

The Court should grant partial summary judgment that from 2015 to April 2019, for Android devices, Google violated the CFA through its deceptive acts and practices surrounding its LH, WAA, and LM settings. As established below, Google's acts and practices toward users of its services and products were false and deceptive warranting summary judgement under highly persuasive case law. *See supra* n.5 (discussing § 44-1522(C)).[6] Although Google's wrongdoing extends beyond the timeline and conduct described here, this Motion focuses on the areas where Google's deceptive acts and practices are established by undisputed evidence.

1. Google Made False Statements to Users Regarding LH.

From 2015 to April 2019, Google's consistent and repeated public disclosures both falsely stated that with LH off "the places you go are no longer stored" and also created a deceptive net impression that WAA did not relate to location tracking.

Google owns and maintains a number of webpages purporting to inform consumers regarding its various location-related settings, including a webpage titled "Manage or delete your Location History." For years, Google used that page to inform consumers that "[w]ith Location History off, the places you go are no longer stored." [SOF ¶ 54]. ▮▮▮▮▮▮▮▮▮▮▮▮

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[SOF ¶¶ 38–50]. ▮▮▮▮▮▮▮▮▮▮▮▮▮▮▮▮▮▮▮▮▮▮▮▮▮▮▮▮▮▮▮▮▮▮▮▮

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Compounding this misrepresentation, Google's disclosures include a page titled "Manage your Android device's location settings," where Google explains that it "has a number of location-based services," but falsely lists only LH as the setting relevant to "the places your

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[6] Federal decisions interpreting the FTC Act have granted summary judgment on deceptiveness. *E.g.*, *FTC v. AMG Capital Mgmt., LLC*, 910 F.3d 417, 422–23 (9th Cir. 2018) (affirming summary judgment under deceptive net impression theory); *Cyberspace.com*, 453 F.3d at 1198–202 (affirming summary judgment notwithstanding disclosures where mailers "created the deceptive impression that . . . check was simply a refund or rebate rather than an offer for services"); *Fanning*, 821 F.3d 164, 170–72 (affirming FTC summary decision that reputation website gave overall net impression that its content was user-created when most pages were automatically generated); *see also CFPB v. Gordon*, 819 F.3d 1179, 1192–93 & n.7 (9th Cir. 2016) (that defendant ceased certain deceptive statements does not prevent summary judgment).

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device has been." [SOF ¶ 56]. Today, Google still deceptively states that if users want to "stop sharing your location with Google," they can do so by "changing your settings, but Google may still suggest a location based on your IP address, recent locations, or Location History"—with no mention that Google tracks and saves location data using WAA. [SOF ¶ 57]. Earlier versions of this page—including one within the relevant time period—do not even have that disclosure; instead, they merely explain how to "Turn your location on or off," "Check and update your location," and "Troubleshoot location problems." [SOF ¶ 58].

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██. [SOF ¶¶ 59–63]. ████

██████████████████████████████████████. [SOF ¶ 62]. ████████████

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█████████████████████ [SOF ¶¶ 64–65; *see also* SOF ¶¶ 66–68].

During the State's investigation, ████████████████████████████████████

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[SOF ¶ 55]. Yet, Google *still* tries to hide this and other information about how it collects and uses location data. *See, e.g.*, Google's Proposed Redacted Compl. ¶¶ 9(b), 30, 59–60, 66–67.

2. Google Created the Deceptive Net Impression That WAA Is Unrelated to Location.

At least until April 2019 (when Google contends it stopped saving precise location data via WAA), Google engaged in deceptive practices to hide its use of WAA to store location data for advertising purposes. Again, Google's deceptive practices go far beyond the WAA setting, but this motion focuses on WAA because the relevant facts are undisputed.

Google's deceptive practices concerning the WAA setting began at the onset of its relationship with its customers: ██████████████████████████████████

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████████████████████████████████████. [SOF ¶ 69]. ████████████████████

██. [SOF ¶ 70].

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████████████████████████. [SOF ¶ 71]. Further, until about September 2019, Android

users could not even directly access the WAA setting on their devices. [SOF ¶¶ 72–73]. Instead,

a user would have to navigate to settings, then follow a link to his Google Account, then

navigate down to WAA. [SOF ¶ 74]. These practices were all the more deceptive because of

Google's (i) repeated false and deceptive statements about the impact of turning LH off, (ii)

practice of repeatedly failing to otherwise inform consumers that WAA collects precise location

data; and (iii) practice of defaulting WAA to "on." *See AutoZone II*, 229 Ariz. at 361–62 ¶14

("routine and repeated" omissions are properly analyzed under the Act Clause of the CFA).

Google's affirmative disclosures were also deceptive as to WAA's relationship with

location. In a page titled "Control how your activity across the web is saved & used," Google

explains that WAA "Make[s] it easier for you to see and control activity that's saved to your

account and how it's used" and "Let[s] Google use this activity to show you more relevant ads

on our services and on websites and apps that partner with us." [SOF ¶ 76]. It does not disclose

any connection to location tracking or storage. [SOF ¶ 77]. In another section on the same page

titled "Details about activity & ads," Google says the following: "Information about your

activity helps us make our services faster, smarter, and more useful. For example, if you search

for 'mountain bikes,' you may see an ad for sports equipment when you're browsing a site that

shows ads served by Google." [SOF ¶ 78].[7] But Google does not connect this example with the

WAA setting. Further, consistent with Google's practice of concealing WAA's relationship to

location, there is no disclosure that WAA stores a user's *precise* location.

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[7] Other versions produced by Google of this same page (none were produced with metadata
indicating their dates) replace the "mountain bike" example with the following: "For example,
when you let Google know your location, you won't get ads for stores in other regions." [SOF
¶ 79]. To the extent this statement was made during the relevant time period, its vague and
indirect nature fails to tie WAA (which remains nameless in the heading or subsequent text)
specifically to location storage.

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During its investigation, the AG asked Google to identify any disclosure during the set-up process for accounts created before 2018 that WAA collects user location data. [SOF ¶ 80]. Tellingly, in its sworn response, Google pointed to a screenshot that makes no mention of the WAA setting, much less the fact that it stores *precise* location information. [SOF ¶ 81].

Indeed, where Google did directly reference WAA's relationship with location, it was in hard-to-find spots and only in vague terms that did not disclose WAA's storage of *precise* location. For example, Google buries a reference to WAA's relationship with location in a page titled "See & control your Web & App Activity." [SOF ¶ 82]. Even here, a user has to find the relevant page, scroll down to a link called "Info about your searches & more" (facially, nothing to do with location), expand that link, then see that Google subtly stated that WAA "saves information like: . . . Your location." [SOF ¶ 83]. Similarly, ████████████████████, when pausing LH, users were shown text that stated, "[W]hen you pause Location History, places you go with your devices will stop being added to your Location History map"—with no mention of WAA at all. [SOF ¶ 84]. ██

██ [SOF ¶ 85].[8] In neither of these instances did Google disclose that WAA saves ██████ location data (*i.e.*, ■ ████████████) or location data ████████████████████████. [SOF ¶ 88].

As late as November 30, 2018, even Google's Privacy & Terms page did not disclose that WAA saves location data. [SOF ¶ 90]. Instead, Google misleadingly explained, "if you type in 'Eiffel Tower', we infer that you may like to see information for places near Paris, and we can then use that to provide recommendations about those local places to you." [SOF ¶ 91]. Again, Google did not connect that disclosure with the WAA setting, and it said nothing of the ██████ and *precise* location information saved by WAA. Indeed, the vast majority of information on the page (before Google changed it after November 2018) was regarding *LH's* collection of location data [SOF ¶ 92]—leaving users with the deceptive net impression that only LH, and not WAA,

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[8] ████████████████, Google presents six paragraphs of text when a user paused LH. [SOF ¶ 86]. In the middle of this wall of small text—and visible only after the user scrolls down—Google states that "location data may be saved as part of activity on Search and Maps when your Web & App Activity setting is on." [SOF ¶ 87].

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stored their precise location data. And again, these disclosures are particularly misleading when coupled with Google's statement that "With Location History off, the places you go are no longer stored," discussed above. *AMG Capital Mgmt.*, 910 F.3d at 422–23 (9th Cir. 2018) (affirming summary judgment under deceptive net impression theory, where web-based program required user to understand "densely packed text" and then take "affirmative action").

Google also changed the precision with which it stores location via WAA (*see supra*, discussing coarse storage before 2015, then precise storage for at least four years thereafter, then reverting to coarse storage in April 2019)—also without informing users of these changes. ████

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██ [SOF ¶ 93]. Notably, however, Google did not make "any changes to the privacy policy, terms and conditions, help desk or help center website . . . that reflected the change." [SOF ¶ 94]. Rather, the only way users would have been able to see the change is if they happened to open the My Activity tool and notice that the data was suddenly more precise. [SOF ¶ 95].

In sum, Google made false statements (*i.e.*, "With Location History off, the places you go are no longer stored."), misrepresented its settings (*i.e.*, by implying that LH was the only setting that stored a user's precise location), and routinely and repeatedly omitted material facts (*i.e.*, that WAA collected a user's ████████ and precise location information)—all of which added up to deceptive practices by Google to obtain as much user location information as it could for the purpose of ever more ad revenue. *See AutoZone II*, 229 Ariz. at 361–62 ¶14 ("routine and repeated" omissions are properly analyzed under the Act Clause of the CFA, which does not include an element of intent that others rely on omissions).

3. Google Designed Its User Interface to Deceptively Influence Users to Keep Location On and ████████████████████████████████████.

Google's deceptive practices were not isolated only to the account-level settings of LH and WAA. Rather, Google also deceptively designed its user interface ("UI")—████████████

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██ [SOF ¶ 96]. █████████████

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████████████████████████████. [SOF ¶ 97]. ██████████████████████████

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██████████████████████████ [SOF ¶ 98].

One such change to the Android UI was a change to the Quick Settings ("QS") panel on Android KitKat (the version released around 2013) in Q2 of 2014. [SOF ¶ 99]. This panel becomes visible when a user pulls down from the top of the screen on an Android device. [SOF ¶ 100]. It includes toggles for various popularly used settings. [SOF ¶ 101]. ████████████████

██. [SOF ¶ 102].

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███. [SOF ¶ 103]. ███████

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[SOF ¶ 104]. ██

██. [SOF ¶ 105].

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██████████. [SOF ¶ 106 (█████████████████████████████████████

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██. [SOF ¶¶ 107–

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████████████████████████ [9] [SOF ¶ 109].

But Google did not stop there. ████████████████████████████████

██ [SOF ¶ 111]. ██████████

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█████ . ██

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████ . [SOF ¶ 112]. ██

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███ . [SOF

¶ 113]. ██

███████████████████████████████████████ [SOF ¶ 114], █████████████

███████████████████████████████████████ . For example, ████████

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██████████████████████████████████ . [SOF ¶ 115]. ████████████████

████████████████████████ . [SOF ¶ 116; *see also* SOF ¶¶ 117–19 (████████████

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████████████████████████████████████)]. ████████████████████

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███████████████████████ . [SOF ¶ 120]. ██████████████████████████

███ . [SOF ¶ 121].

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[9] ██
████████████████████████████ [SOF ¶ 110].

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[SOF ¶ 122]. ██

████████████████████████████████████. [SOF ¶ 123]. ████████████

████████████████████████████████████. [SOF ¶ 124 (████████

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██)].

   Indeed, undisputed evidence shows that the LM setting—█████████████

███—actually causes deception. ██████████████████████████

████████████████████. [SOF ¶ 125 (████████████████

██),

¶ 126 (███

████████████████████), ¶ 127 ("The current UI *feels* like it is designed to

make things possible, yet difficult enough that people won't figure it out.")]. Google's deceptive

act ████████████████████████████ only compounded this confusion, as there is

evidence that ███

████████████████████. [SOF ¶ 128 ("I **thought** I had location tracking turned off

on my phone. However the location toggle in the quick settings was on. So our messaging

around this is enough to confuse a privacy focused Google-SWE. That's not good.")].

4. Users Were Actually Deceived by Google's Practices.

   Evidence of actual deception, or of Google users' reliance on Google's deceptive

practices, is not necessary in CFA actions brought by the State. *People ex rel. Babbitt v. Green*

Acres Tr., 127 Ariz. 160, 168 (App. 1980), *superseded on other grounds*. "Although proof of

actual deception is unnecessary to establish a violation . . . , such proof is highly probative to

show that a practice is likely to mislead consumers . . . ." *Cyberspace.com*, 453 F.3d at 1201

(cleaned up); *accord E.M.A. Nationwide*, 767 F.3d at 633; *AMG Capital Mgmt.*, 910 F.3d at

425. The evidence shows that Google, in fact, deceived its users.

   On August 13, 2018, the Associated Press reported that Google continued collecting

location data via WAA even when LH was off. [SOF ¶ 129]. ████████████████████

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███████████████████████. [SOF ¶ 130]. ██████████████████████████

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████████████. [SOF ¶ 131]. Amidst the fallout, Google updated its LH help page to remove the

disclosure "With Location History off, the places you go are no longer stored." [SOF ¶ 132].

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███████████████████████████. [SOF ¶ 133].

In internal discussions regarding the AP report, Google's own employees acknowledged

Google's deceptive practices surrounding LH and WAA. [SOF ¶ 134 ("Although I know it

works and what the difference between 'Location' and 'Location History' is, I did not know that

Web and App activity had anything to do with location. Also seems like we are not very good at

explaining this to users."), ¶ 135 ("Indeed we aren't very good at explaining this to users. Add

me to the list of Googlers who didn't understand how this worked an [sic] was surprised when I

read the article . . . we shipped a [user interface] that confuses users. . . . "), ¶ 136 ("The

complaint in this article is that if you have Web and App Activity enabled and the location

toggle enabled, then your search history entries contain your approximate location at the time

you made a query. It's also not possible to remove them by clearing your location history, which

is counter-intuitive – you have to clear your search history instead."), ¶ 137 ("Definitely

confusing from a user point of view if we need googlers [to] explain it to us.") ¶ 138 ("I agree

with the article. Location off should mean location off, not except for this case or that case."),

¶¶ 139–40 ("[C]omms and policy are looking for an update on where we are in terms of fixing

'location history' fixes and having one single place to turn off instead of 3.")].

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████████████. [SOF ¶ 141 (████████████████████████████████████

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███████████████). *see also* ¶ 142 (█████████████████████████████

██)]. ████████████████

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██████████. [SOF ¶ 143]. In short, not only were users of Google's products deceived by

Google's deceptive practices, but Google's own employees were, as well.

                                    *   *   *

The undisputed evidence confirms that Google engaged in deceptive acts and practices at

least from 2015 to April 2019 with respect to Android devices in collecting its users' location

information. These deceptive practices and acts included (i) making the false statement that

"[w]ith Location History off, the places you go are no longer stored," when in fact Google

continued to collect and store users' location information even when LH was off; (ii)

misrepresenting its settings by implying that LH was the only setting that stored a user's precise

location; (iii) creating the deceptive net impression that WAA did not relate to location; and (iv)

deceptively changing its UI to ████████████████████████████████

████████████████████. Google engaged in each of these acts and practices to deceive consumers

into unwittingly giving up their location data to drive up Google's profit.

B. Google's Deceptive Acts and Practices Were in Connection with Sales and Advertisements of Merchandise.

This Court should also grant partial summary judgment that the deceptive acts and

practices described in the previous section are in connection with the sale or advertisement of

merchandise. "In connection with" is to be read broadly, and it does not require that the

unlawful conduct precede, cause, or induce the transaction at issue. This language "does not

expressly require a direct merchant-consumer transaction," *Watts v. Medicis Pharmaceutical

Corp.*, 239 Ariz. 19, 28 ¶31 (2016), and encompasses conduct "regardless of whether the

deceiver is the seller," *State ex rel. Woods v. Sgrillo*, 176 Ariz. 148, 149 (App. 1993); *see also*

State's Resp. to MTD at 5-12 (collecting cases). Google's deceptive acts and practices described

above were "in connection with the sale or advertisement of . . . merchandise" in multiple ways.

See A.R.S. §§ 44-1521(1), (5), (7) (defining "advertisement," "merchandise," and "sale").

Google's deceptive acts and practices are in connection with the sale and advertisement

of Android devices—both its own devices (which it does not dispute are covered by the CFA)

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and OEM devices that license Android. *See* State's Resp. to MTD at 6–12. To use the Android devices they purchase in any meaningful way, users must set up a Google Account. [SOF ¶ 144]. ███

███████████████████████████████████████. [SOF ¶ 145]; *see Dunlap v. Jimmy GMC of Tucson, Inc.*, 136 Ariz. 338, 342 (App. 1983) (CFA applies "prior to, as well as after, [customers'] acceptance of delivery"). Additionally, Google's false and deceptive statements regarding LH and WAA are "in connection with" the sale or advertisement of Android phones. [SOF ¶¶ 55–58, 69–95]; *see Fanning*, 821 F.3d at 171 (statements on "About Us" page of website were sufficient to trigger liability under FTC Act).

Google's deceptive acts and practices are also in connection with the advertisement of merchandise and with the sale of merchandise (*i.e.*, Google's services of displaying advertisements of third-parties' merchandise to consumers in return for payment). As described above, ██

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██████████████████████████████████████. [*See also* SOF ¶¶ 33, 146 ("Google also uses user location information collected when Location History and Web & App Activity are enabled to provide advertising services to signed-in users.")]. Google thus "uses" deceptive acts and practices to obtain its users' location data, which, in turn, is "used" by Google to make its paid advertising services more attractive to third parties, since advertisers are now able to target potential customers based on the customers' location. [*E.g.*, SOF ¶ 147 (████████████

████████████████████)]; *see also* State's Resp. to MTD at 6–12; *Powers v. Guaranty RV, Inc.*, 229 Ariz. 555, 560 ¶17 (App. 2012) (CFA prohibits "*the 'use'* of any" deceptive or unfair act or practice) (emphasis added).

V. CONCLUSION

The State respectfully requests that the Court grant partial summary judgment that Google violated the CFA through its deceptive acts and practices surrounding its LH, WAA, and LM settings as described above in Android devices from 2015 to April 2019.

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Dated: August 25, 2020

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**Pro hac vice* granted

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