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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 RESPONSE TO GOOGLE LLC'S MOTION TO DISMISS** Assigned to the Hon. Timothy Thomason (**COMPLEX CALENDAR**) ****ORAL ARGUMENT SET FOR 9/25/2020 AT 10:30 A.M.****

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INTRODUCTION

Plaintiff State of Arizona *ex rel.* Mark Brnovich, Attorney General ("the State") hereby responds to the Motion to Dismiss ("Motion") filed by Defendant Google LLC ("Google"). The Consumer Fraud Act ("CFA"), A.R.S. §§ 44-1521 *et seq.*, declares deceptive or unfair acts or practices in connection with the sale or advertisement of merchandise to be unlawful. *Id.* § 44-1522(A). And it empowers the Attorney General ("AG") to investigate and bring actions seeking remedies on behalf of the State for such unlawful conduct. *E.g.*, *id.* §§ 44-1528(A), -1531.

Here, the Complaint details "Google's widespread and systemic use of deceptive and unfair business practices to obtain information about the location of its users, including its users in Arizona, which Google then exploits to power its lucrative advertising business." Complaint for Injunctive and Other Relief ("Compl.") ¶1. Simply stated, Google has employed willfully deceptive and unfair acts, practices, and omissions to mislead its users regarding their ability to opt-out of Google's pervasive and omnipresent collection of their location information. *Id.* ¶¶7–10. Google's conduct was undertaken with the purpose, and has had the effect, of enhancing its ability to collect this incredibly valuable information—a primary driver of Google's over one hundred billion dollars in advertising revenue per year, hundreds of millions of which comes from ads displayed to Arizona consumers. *Id.* ¶¶4–6, 11. In both its character and its sheer scale, Google's alleged conduct is a paradigmatic example of the types of "deceptive or unfair act[s] or practice[s]" that the Legislature, through the CFA, made unlawful. A.R.S. § 44-1522(A).

Google's Motion is without merit. ***First***, the Complaint states multiple valid theories related to "the sale or advertisement of merchandise," and the Motion is wrong to argue that the only "sales" are of Google's own Nexus and Pixel smartphones. ***Second***, Google's unlawful acts are "in connection with" the sale or advertisement of merchandise. ***Third***, the Complaint sufficiently alleges "intent that others rely" for the concealment, suppression, and omission theories. ***Fourth***, Google's REDAC conduct toward other hardware manufacturers (*i.e.* original equipment manufacturers or "OEMs"), and in selling and serving advertisements, is relevant to the CFA. ***Fifth***, Google's statute of limitations ("SOL") defense is baseless. ***Finally***, if the Court does grant full or partial dismissal, it should be with leave to amend.

LEGAL STANDARD

Google's Motion may be granted only if "as a matter of law [] plaintiff[] would not be entitled to relief under any interpretation of the facts susceptible of proof." *Coleman v. City of Mesa*, 230 Ariz. 352, 356 ¶8 (2012) (citation omitted). The Court "must assume the truth of all well-pleaded factual allegations and indulge all reasonable inferences from those facts." *Id.* ¶9.

Google is incorrect (at 5) that the heightened pleading standard in Rule 9(b) applies to CFA actions bought by the AG. *See, e.g.*, *FTC v. Med. Billers Network, Inc.*, 543 F. Supp. 2d 283, 314–15 (S.D.N.Y. 2008) (rejecting application of the particularity requirement to public consumer fraud actions); *State ex rel. Brady v. Publishers Clearing House*, 787 A.2d 111, 117 (Del. Ch. 2001) (particularity requirement did not apply to a state consumer fraud action).[1] Google relies (at 5) solely on two private CFA cases, but those do not apply to actions by the AG. Moreover, even if the Court were to start requiring the State to plead consumer fraud claims with particularity, this would not apply to the claims for "unfair" acts and practices. *See Windy City Metal Fabricators & Supply, Inc. v. CIT Tech. Fin. Servs.*, 536 F.3d 663, 670 (7th Cir. 2008) (unfair practices need only meet the Rule 8(a) notice pleading standard). Finally, the State's detailed complaint satisfies Rule 9(b), were it to apply here.

FACTUAL BACKGROUND

Google is a technology company that specializes in Internet-related products and services, including advertising technologies, search, cloud computing, and other software and hardware. Compl. ¶15. Google's principal business, however, is selling advertisements and displaying them to users. *Id.* ¶¶2–3. Google's advertising revenues are driven by the company's collection of detailed information about its users, including information about where those users are located, which allows Google to demand higher prices for advertisers to target users. *Id.* ¶5.

[1] It is perfectly logical to require particularity for private consumer-fraud claims, which require reliance and individual harm. The State, however, is only required to prove (1) an unfair or deceptive act or practice (2) in connection with the sale or advertisement of merchandise. *RAJI (Civil) Comm'l Torts Instrs. 21 Consumer Fraud (Elements of Claim)* cmt. 4 (2017). The State is alleging unlawful acts and practices to which hundreds of thousands or millions of Arizona consumers were subjected. And it is empowered to remedy unlawful conduct "whether or not any person has in fact been misled, deceived or damaged thereby." *See* A.R.S. § 44-1522(A).

The tactics used by Google to surveil users' locations, and thus increase its ad revenue, include willfully deceptive and unfair acts and practices within the meaning of the CFA. *Id.* ¶7. Google's deceptive conduct with respect to location tracking was initially exposed by the August 2018 publication of an Associated Press ("AP") article titled "Google tracks your movements, like it or not." *Id.* ¶8. The AG thereafter opened an investigation into Google, which revealed that Google's deceptive and unfair conduct REDACTED [redacted]. *Id.* ¶¶9–10.

The Complaint details Google's deceptive and unfair conduct, which includes: (1) even though it told users that with the Location History setting off, "the places you go are no longer stored," it still collected location information through other settings and apps, (2) it concealed that location data was collected through the "Web & App Activity" setting, (3) REDACTED [redacted] (4) REDACTED [redacted] (5) it maintained a misleading and confusing array of settings related to location tracking that made it difficult if not impossible for users to understand when Google would collect location data, (6) [redacted] (7) it failed to disclose that Google apps that had been denied permission to access location data could still obtain such data from other apps, (8) it maintained a confusing and misleading presentation of WiFi scanning and WiFi connectivity settings that failed to disclose that REDACTED [redacted] (9) it presented location-based ads to users after they had opted out of ad personalization, and maintained two separate settings relating to location-based advertising that users find confusing, (10) REDACTED [redacted] and (11) REDACTED [redacted]. *Id.* ¶¶8, 9 161.

ARGUMENT

I. THE COMPLAINT STATES A VALID CLAIM ON WHICH RELIEF CAN BE GRANTED

Before turning to the specifics of Google's attempts to rewrite the CFA contrary to its plain language, it is helpful to review the wide range of conduct that the CFA declares unlawful and charges the AG to address. The CFA outlaws:

> [t]he act, use or employment by *any person* of *any deception*, *deceptive or unfair act or practice*, fraud, false pretense, false promise misrepresentation, or concealment, suppression or *omission of any material fact* with intent that others rely on such concealment, suppression or omission, *in connection with the sale or advertisement of any merchandise* whether or not any person has in fact been misled, deceived or damaged thereby . . . .

A.R.S. § 44-1522(A) (emphasis added). Thus, as relevant here, the CFA expansively declares unlawful the use by "any person" of "any" deceptive or unfair act or practice, or concealment or omission (with requisite intent) of "any" material fact, "in connection with" the sale or advertisement of "any" merchandise. These terms "are obviously quite broad and are not subject to restrictive interpretation because the [CFA] is generally to be considered remedial in nature." *People ex rel. Babbitt v. Green Acres Trust*, 127 Ariz. 160, 164 (App. 1980), *superseded by statute on other grounds*; *see also Powers v. Guaranty RV, Inc.*, 229 Ariz. 555, 561 ¶23 (App. 2012) (noting the "broad remedial purpose of the CFA"). And the expansive scope of § 44-1522(A) is buttressed by the CFA's equally expansive definitions of "advertisement," "merchandise," "person," and "sale." *See* A.R.S. § 44-1521.

The statutes thus make clear that the CFA provides the State with power to address a wide variety of conduct, *Madsen v. W. Am. Mortg. Co.*, 143 Ariz. 614, 618 (App. 1985), and meaningfully supplements common law remedies such as breach of contract and fraud. *See State ex rel. Horne v. AutoZone, Inc.* (*AutoZone I*), 227 Ariz. 471, 477–78 ¶15 (App. 2011) (citing Arizona cases stating the CFA is "broader in scope" and a violation is "more easily shown" than common law fraud), *vacated in part on other grounds*, (*AutoZone II*), 229 Ariz. 358 (2012).

Case law confirms that the CFA reaches broad ranges of deceptive and unfair conduct that would not necessarily support actions under the common law. Conduct is considered

"deceptive," for example, so long as it has "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 (citation omitted). The meaning and impression of representations "are to be taken from all that is reasonably implied, not just from what is said," and in assessing such representations, "the test is whether the least sophisticated [consumer] would be misled." *Id.* If "the capacity to mislead" is present, the "[t]echnical correctness of the representations is irrelevant." *Id.*; *Arizona v. Volkswagen AG*, 193 F. Supp. 3d 1025, 1028 (D. Ariz. 2016); *Cheatham v. ADT Corp.*, 161 F. Supp. 3d 815, 826–27 (D. Ariz. 2016).[2]

The Legislature also rejected a restrictive conception of the relationship that must be shown between that conduct and covered transactions. The only limitation the CFA places on the types of deceptive or unfair conduct that are prohibited is they be made "in connection with" the sale or advertisement of merchandise. "In connection with" is a capacious formulation, and nothing in that formulation requires 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). This straightforward reading of "in connection with" comports with the CFA's purpose as "a broadly drafted remedial provision designed to eliminate unlawful practices in merchant-consumer transactions." *Madsen*, 143 Ariz. at 618.

Google does not seriously deny that its deceptive behavior with respect to location tracking and data, as alleged here, constitutes deceptive and unfair conduct within the meaning of the statute. Google's Motion is instead premised on its contention that the Complaint does not adequately allege that its deceptive conduct took place "in connection with" the "sale" or "advertisement" of "merchandise." Google is wrong.

[2] Google points to bills introduced in the 2020 legislative session as evidence that the CFA does not apply here. Motion at 6. "That a bill failed to reach the house floor for a vote indicates little, if anything, about legislative intent." *Safeway Stores, Inc. v. Indus. Comm'n of Ariz.*, 152 Ariz. 42, 48 (1986). On top of this, Google fails to recognize the CFA's provisions "are in addition to all other causes of action, remedies and penalties available to this state." A.R.S. § 44-1533(A).

A. The "Sales" and "Advertisements" of "Merchandise" Here Extend Well Beyond the Sale of Google's Pixel and Nexus Smartphones

According to Google, its Nexus and Pixel smartphones are the only relevant "merchandise" "sold" or "advertised" to Arizona consumers. Motion at 7–10; Compl. ¶22a. While these phones (and Google-manufactured tablets) are examples of merchandise sold or advertised in Arizona, the attempt by Google to limit the scope of the case to them ignores both the plain allegations of the Complaint and the plain language of the CFA.

1. Google Uses Deceptive And Unfair Acts And Practices Toward Arizona Consumers In Connection With Selling Ad Placements to Third Parties And Advertising Third Parties' Merchandise

The Complaint squarely alleges that among the merchandise sold by Google are "ad placements" to third parties, which advertisements "are powered by the fruits of the deceptive and unfair acts and practices . . . relating to collection of user location data." Compl. ¶22d; *see also id.* ¶164 (discussing Google's ad sales and the enormous revenue and profit Google derives from them). Such sales of advertising services clearly constitute "sales" of "merchandise" under the CFA. *See* A.R.S. § 44-1521(5) (defining "merchandise" as "*any* objects, wares, goods, commodities, *intangibles*, real estate *or services*") (emphasis added); *id.* § 44-1521(7) (defining "sale" to include "any sale, offer for sale or attempt to sell any merchandise for any consideration"); *see also Woods*, 176 Ariz. at 148–49 (finding information about credit cards was merchandise); *Villegas v. Transamerica Fin. Servs., Inc.*, 147 Ariz. 100, 102 (App. 1985) (finding money was merchandise); *Flower World of Am., Inc. v. Wenzel*, 122 Ariz. 319, 321–22, (App. 1978) (noting that CFA "broadly defines merchandise").

Google suggests that these transactions do not count because they were not made with the users of Google devices or services who were the victims of Google's deceptive and unfair conduct. Motion at 9 & n.4. Of course, the user is part of the advertising transaction—the whole point is to connect an advertiser's ad with a user's eyeballs—and Google is simply the paid middleman. But on top of this, the plain language of the CFA prohibits "**the 'use'** of any [deceptive or unfair act or practice] in connection with the sale [or advertisement] of merchandise." *Powers*, 229 Ariz. at 560 ¶17 (emphasis added). Google cannot dispute the State

alleges it engages in deceptive and unfair acts and practices to surreptitiously collect its users' valuable location data. *See supra* p. 3. And it further alleges Google "use[s]" the unlawfully obtained location data in connection with selling to third parties the service of showing their paid advertisements of merchandise to Google's users based on location. Compl. ¶22d.[3]

Relatedly, the Complaint also straightforwardly alleges the "use" of the location data that is collected through Google's unfair and deceptive acts and practices in connection with the "advertisement" of merchandise. Compl. ¶22f. Advertisers rely on Google being able to target users in certain locations and to determine through location tracking whether an ad click is followed by a store visit. *Id.* REDACTED . *Id.* ¶144.

2. Google Uses Deceptive And Unfair Acts And Practices In Connection With the Sale of Other Merchandise

The Complaint also alleges that Google's unfair and deceptive conduct is in connection with the "sale" of other merchandise—smartphones manufactured by third-party OEMs that run Google's proprietary Android versions ("forks") and Google's suite of apps. Compl. ¶22b. Google concedes (at 14) that many Android devices sold by other OEMs come with Google's operating system and apps that are "pre-install[ed] . . . long before" they are purchased, thus confirming that Google's products and services are included with what has been sold to the consumer for consideration. The fact these devices are "sold" by other OEMs does not mean that Google may escape responsibility for its deceptive conduct in connection with such sales.

Notably, the CFA makes it unlawful for "any person" to employ deceptive or unfair conduct in connection with the sale of merchandise. A.R.S. § 44-1522(A). If the Legislature had

[3] Google also suggests that because the State does not allege that its sales of advertisements occurred in Arizona, such sales or advertising are not "subject to the [CFA]." Motion at 9. But the Complaint clearly alleges both that Google's deceptive and unfair conduct collected location data from consumers in Arizona, Compl. ¶¶22, 163, and that Google generates hundreds of millions of dollars from location-based ads shown to consumers in Arizona. *Id.* ¶¶11, 17, 164. There are thus sufficient contacts for the State to regulate Google's conduct toward Arizona users. *See, e.g.*, *State ex rel. Corbin v. Goodrich*, 151 Ariz. 118, 124 (App. 1986) (concluding CFA applied to Michigan entity that conducted business in Arizona).

intended to impose liability only on the direct seller, it could easily have done so. *See Woods*, 176 Ariz. at 149 ("[Section] 44–1522 forbids deceptive acts 'in connection with the sale' of any merchandise regardless of whether the deceiver is the seller."); *see also Watts*, 239 Ariz. at 28 ¶31 (CFA "does not expressly require a direct merchant-consumer transaction").[4]

Even apart from the sale of phones, Google's apps, software, and programs themselves are sold to users within the meaning of the CFA despite ostensibly being "free" because there is an exchange of consideration in the form of data collection from users. *See* Compl. ¶26; A.R.S. § 44–1521(7). Google argues that if "a user has bargained with Google by agreeing to give her location data, she has consented to Google's collection of the data and cannot have been deceived." Motion at 8. Thus, Google believes, "[e]ither there was no consideration, or there was no deception." *Id.* Google is wrong. The Complaint alleges that consumers exchange consideration with Google by agreeing to terms and conditions regarding the possible use and collection of location (and other) information in connection with the operation of apps, software, or programs. At the same time, the Complaint alleges REDACTED [redacted] *See, e.g.*, Compl. ¶¶44, 49, 53, 61, 69, 78, 81, 85, 89. It simply does not follow from the fact that a user may agree to Google's collection of user data under certain conditions that Google has the right to deceive the user, and engage in unfair conduct, relating to the user's ability to control such data collection.

3. The Complaint Also Adequately Alleges "Advertisement" Of Google's Own Software and Hardware, *i.e.* Merchandise

The Complaint also adequately alleges the "advertisement" of Google's merchandise. The CFA broadly defines "advertisement" to include "the attempt by publication, dissemination, solicitation or circulation, oral or written, to induce directly or indirectly any person to enter into any obligation or acquire any title or interest in any merchandise." A.R.S. § 44-1521(1); *see*

[4] *Cf. Conway v. CitiMortgage, Inc.*, 438 S.W.3d 410, 416 (Mo. 2014) ("in connection with" in Missouri Act did not require "'a direct contractual relationship'" with the consumers at outset).

Villegas, 147 Ariz. at 102 (advertisement within meaning of CFA includes oral negotiations between merchant and consumer); *see also Fanning v. FTC*, 821 F.3d 164, 171 (1st Cir. 2016) (statements on "About Us" page of website were sufficient to trigger liability under FTC Act). This definition encompasses Google's representations to potential consumers of its products and services, particularly when those products and services are part of a transaction to purchase a smartphone (manufactured by Google or a third-party OEM).

While Google complains that the Complaint lacks detail regarding "actual public-facing advertisements made to induce purchases of [its] products or ad placements," Motion at 9, the Complaint specifically alleges that Google advertises "its own Android devices," "software that is part of the Android operating system," and "Google apps that it causes to be included on Android devices sold by other manufacturers to consumers in Arizona." Compl. ¶22a–c. Moreover, the Complaint alleges that "Google markets . . . its ad business to potential and actual buyers of its advertisements," and that Google advertises "various software services to Arizona consumers, either directly or indirectly" including "the Android operating system, Google-authored apps, Google Accounts, and Google web browsers.'" *Id.* ¶25. Notably, the Complaint quotes a statement on Google's help page that "[w]ith Location History off, the places you go are no longer stored." This alone is actionable in the context of consumers purchasing phones running Google's Android forks or Google apps and services regardless of the operating system. *See Fanning*, 821 F.3d at 171; *see also* Compl. ¶22a–c. Such public materials, designed to place Google's products and services in a favorable light in the minds of consumers and potential consumers, clearly satisfy the statute's broad definition of "advertisements."

B. Google's Deceptive and Unfair Practices Are "In Connection With" the Sale of Merchandise

Google next argues that the Complaint fails to allege a sufficient "nexus" between its deceptive and unfair conduct and the sale of any merchandise. Motion at 10–13. According to Google, the only types of deceptive conduct that are actionable under the CFA are statements or acts made *prior* to the sale of merchandise that were made in order to *induce* the purchase of the merchandise. *See id.* at 10–11. As an initial matter, Google ignores that the Complaint does

allege both direct Google-consumer transactions (including sales involving Google smartphones, software, and apps) and deceptive and unfair conduct by Google that induced or attempted to induce such transactions (including deceptive statements made in Google's publicly accessible materials such as help pages and policy documents). *See, e.g.*, Compl. ¶¶22–25, 58, 62, 63, 72, 73, 80, 87, 97, 129. But even leaving those points aside, Google's nexus argument cannot be reconciled with the CFA's plain language and case law.

The CFA broadly prohibits deceptive or unfair practices undertaken "in connection with" the sale or advertisement of merchandise, A.R.S. § 44-1522(A), and, by its plain terms, "[t]his is a broad phrase that goes beyond the moment of sale." *Sands v. Bill Kay's Tempe Dodge, Inc.*, 1 CA-CV 13-0051, 2014 WL 1118149, at *4 ¶17 (Ariz. Ct. App. Mar. 20, 2014) (mem. decision) (citing *State v. Bews*, 177 Ariz. 334, 336 (App.1993) (defining "in connection with" as "a relationship or association in thought" in the context of a criminal proceeding)); *see also The Muecke Co., Inc. v. CVS Caremark Corp.*, No. CV V-10-78, 2012 WL 12535439, at *22 (S.D. Tex. Feb. 22, 2012) (concluding "'arising out of' and 'in connection with' have been given broad meanings under Arizona law" and collecting cases). Nothing in that language, or any other language in the CFA, requires that the unlawful conduct precede, cause, or induce the transaction at issue.

Courts interpreting the CFA have rejected the narrow reading of the language proffered by Google here. In *Dunlap v. Jimmy GMC of Tucson, Inc.*, the Court of Appeals held the CFA applies "prior to, as well as after, [the consumer's] acceptance of delivery [of the merchandise]." 136 Ariz. 338, 342 (App. 1983); *see also Howell v. Midway Holdings, Inc.*, 362 F. Supp. 2d 1158, 1164–65 (D. Ariz. 2005) (allowing CFA claim to proceed when premised on alleged alteration of lease agreement after it had been signed); *State ex rel. Brnovich v. 6635 N. 19th Ave., Inc.*, No. 1 CA-CV 15-0550, 2016 WL 7368620, at *4 ¶17 (Ariz. Ct. App. Dec. 20, 2016) (mem. decision) (finding "no legal support" for argument that "in connection with" language limits application of CFA to defendant's pre-lease representations); *Schmidt v. Am. Leasco*, 139

Ariz. 509, 511 (App. 1983) (allowing claim to proceed when premised on post-sale leasing).[5]

Similarly, the U.S. Supreme Court has expansively interpreted "in connection with" as that term is employed in the federal securities laws addressing deceptive securities transactions. *See, e.g.*, *United States v. O'Hagan*, 521 U.S. 642, 655–56 (1997); *Superintendent of Ins. v. Bankers Life & Cas. Co.*, 404 U.S. 6, 12–13 (1971). In *O'Hagan*, the Court held that when a fiduciary misappropriates confidential information from one party and then uses that information to sell securities to or purchase securities from a different party, his deceptive conduct is "in connection with" a securities transaction:

> This element is satisfied because the fiduciary's fraud is consummated, not when the fiduciary gains the confidential information, but when, without disclosure to his principal, he uses the information to purchase or sell securities. The securities transaction and the breach of duty thus coincide. This is so even though the person or entity defrauded is not the other party to the trade, but is, instead, the source of the nonpublic information.

521 U.S. at 656. A virtually identical analysis applies here, where Google, through the deceptive and unfair conduct alleged in the Complaint, tricks consumers out of their confidential location information and then profits from that deception through its advertising practices. Google's unlawful conduct is "consummated" when it uses its users' location information to advertise merchandise or to sell advertisements of merchandise. Just as in *O'Hagan*, Google's unlawful conduct and the transactions that allow it to profit from that conduct "coincide."

Google's contrary reading of the CFA improperly seeks to limit its scope to merely replicating elements of the common law tort of fraud in the inducement. There is no support for Google's attempt to rewrite the statute, which "is designed to root out and eliminate" a broad range of both deceptive *and* unfair merchant conduct. *See Green Acres Trust*, 127 Ariz. at 164.

Google bases its restrictive interpretation of the CFA primarily on three unreported federal district court opinions, two of which rejected, with little analysis, claims relating to

[5] Cases interpreting similar consumer fraud laws in other states also support this conclusion. *See, e.g.*, *State ex rel. Miller v. Cutty Des Moines Camping Club, Inc.*, 694 N.W.2d 518, 526–27 (Iowa 2005) (collecting cases); *see also Cozetti v. Madrid*, No. S-15117, 2017 WL 6395736, at *9 (Alaska Dec. 13, 2017) (unpublished); *Pack & Process, Inc. v. Celotex Corp.*, 503 A.2d 646, 658 (Del. Super. Ct. 1985); *Jackson v. Barton*, 548 S.W.3d 263, 270–71 (Mo. 2018); *Virgin Islands v. Takata Corp.*, 67 V.I. 316, 389 & n.270 (V.I. Super. Ct. June 19, 2017).

allegedly unlawful conduct undertaken by loan servicers in connection with previously-made loans, and the third of which rejected, with little analysis, a claim premised on a car repair shop's alleged misrepresentations after the plaintiff had selected it.[6] The conclusory analyses in these decisions cannot overcome the plain language of the CFA or the overwhelming authority discussed above confirming the capacious scope of that language. Put simply, had the Legislature intended to limit the CFA to fraud in the bargaining process, it would have used very different language than the expansive "in connection with" language it elected to employ.

Google also relies on *Sullivan v. Pulte Home Corp.*, 231 Ariz. 53, 61 (App. 2012), *vacated in part*, which held only that the implied private right of action recognized under the CFA does not extend to claims raised by subsequent purchasers of merchandise when that merchandise is resold to another consumer. Notably, in a decision issued after *Sullivan*, the Arizona Supreme Court squarely rejected the proposition that the "in connection with" language of the CFA requires "a direct merchant-consumer transaction." *Watts*, 239 Ariz. at 28 ¶31. But regardless of whether *Sullivan* was correctly decided, its holding limiting the ability of subsequent purchasers to bring a private action under the CFA has no bearing in this case, which is brought by the AG on behalf of the State and involves deceptive and unfair conduct that has deceived, misled, and confused the *original* consumers and users of Google's products and services, including during setup of the phones. And the binding decision of *Dunlap*, which makes clear that the CFA applies "prior to, as well as after, [the consumer's] acceptance of delivery [of the merchandise]," 136 Ariz. at 342, conclusively shows that the Complaint states a CFA claim regarding the disclosures during the setup of Google's pre-installed services.

C. The State Alleges Google's Omissions Are Made with the Requisite Intent

Google argues that the State's claims concerning Google's omission of material facts regarding its location collection practices must be dismissed because the Complaint does not allege "with any specificity that Google omitted any material fact with the intent to induce

[6] Motion at 10 (citing *Contreras v. Nationstar Mortg. LLC*, 2019 WL 688198, at *4 (E.D. Cal. 2019), *Devore v. Nationstar Mortg. LLC*, 2015 WL 12426151, at *8 (D. Ariz. 2015), and *Rinehart v. GEICO*, 2019 WL 6715190, at *4 (D. Ariz. Dec. 10, 2019)).

reliance thereon." Motion at 13. But the Complaint includes numerous allegations to the effect that Google knew and intended that users would rely on the concealment or suppression of material information concerning Google's interference with their ability to control or limit Google's collection of location information. For example, Google [redacted] *See, e.g.*, Compl. ¶¶57, 114, 126–27. Moreover, Google knew that consumers who believed they had turned off location tracking would not understand that Google was using other surreptitious tools to track their location. *See, e.g.*, *id.* ¶¶43–44, 49, 53, 61, 69, 78, 81, 85, 89. And Google [redacted]. *See, e.g.*, *id.* ¶110 [redacted]; *see also id.* ¶¶82–83, 111, 115, 123, 125. One cannot fairly read the Complaint and come away with any understanding other than that the State has adequately alleged that Google's suppression and concealment of its location tracking conduct was designed to confuse and mislead consumers in order to increase its collection of such incredibly valuable data.

Ultimately, however, the Court need not reach this issue at this stage. As Google concedes, Motion at 13, the Complaint's allegations regarding Google's omissions largely track its separate allegations concerning Google's deceptive and unfair practices, for which intent that others rely is not required. The inclusion of these parallel allegations was appropriate, as repeated omissions of material information can also amount to an actionable "practice" under the CFA. *See AutoZone II*, 229 Ariz. at 361–62 ¶14 (where a defendant "repeatedly" omitted information, "a finder of fact could well find a practice subject to the Act Clause"). Here, the State has alleged repeated conduct by Google to keep material information about its location tracking practices from consumers. These allegations support both the State's "omission" claims (for which intent that others rely is required) and its "practice" claims (for which such intent is not required).

D. Google's Conduct Toward OEMs and Ad Purchasers Is Relevant

Google incorrectly argues (at 14) that its interactions with OEMs are irrelevant because the AG cannot assert claims on behalf of OEMs. But the Complaint alleges, *inter alia*, that Google engaged in deceptive and unfair conduct by REDACTED [redacted]. *See, e.g.*, Compl. ¶¶29, 161j. These allegations regarding Google's REDACTED are relevant to the CFA claim for two reasons.

First, REDACTED [redacted]. *See supra* pp. 7–8. The OEMs' phones included Google's proprietary version of Android and Google's suite of apps. The Complaint alleges that Google collects user location data through its software running on these third-party-manufactured smartphones, including through deceptive and unfair settings that Google controls and that the user activates during setup of these phones. *See* Compl. ¶22b.

Google's own case, *State Farm Fire & Cas. Co. v. Amazon.com Inc.* (cited in Motion at 14), *supports* the conclusion that the above allegations state a claim against Google under the CFA. No. CV-17-01994-PHX-JAT, 2018 WL 1536390 (D. Ariz. Mar. 29, 2018). The *State Farm* court noted that the Arizona Supreme Court in *Watts* held "[e]ven though the MediSAVE card [containing an alleged misrepresentation] was provided to [plaintiff] by her medical provider, and not [the defendant drug manufacturer], this still constituted a misrepresentation in connection with the sale of merchandise because it was given to her when she purchased the [prescription drug] from the pharmacy." *Id.* at *4–5 (citing *Watts*, 239 Ariz. at 28). Just like the MediSAVE card, representations and omissions regarding various Android and Google Account settings and services are provided to the consumer after purchase of the phone during setup; this states "an actionable claim under the CFA." *Id.*; *see also supra* pp. 10, 12 (explaining CFA applies *after* the consumer's acceptance of delivery of the merchandise).

Google's other federal cases (at 14) are inapposite. Unlike those cases, the instant case does not involve a private suit by a subsequent purchaser or a defendant that merely

manufactured a component that was integrated into a larger product. Instead, there is a direct relationship between Google and the Arizona consumers who use its software (including when pre-loaded on third-party smartphones), as illustrated by the fact that Google is interacting with and collecting location data from consumers starting the moment the phone is set up based on settings that Google controls and representations and omissions about those settings that Google makes. *See* Compl. ¶¶29–30.

Second, Google's alleged REDACTED [redacted] is strong circumstantial evidence of intent that its users rely on its concealment, suppression and omission of material facts, *see* A.R.S. § 44-1522(A), and its "willfulness," which triggers liability for civil penalties, *see id.* § 44-1531(A) (requiring the violator "knew or should have known" its conduct was of the nature prohibited by the CFA). Here, Google's alleged REDACTED [redacted]

Finally, Google also argues in passing (at 14–15) that there is no deceptive act relating to ad purchasers. Google cites no legal authority for this argument. In any event, Google's conduct related to selling the service of displaying ads and displaying the ads themselves is relevant to the CFA claim. *See supra* Part I(A)(1), (3). Moreover, for CFA actions brought by the AG, conduct is unlawful "whether or not any person has in fact been misled, deceived or damaged thereby," A.R.S. § 44-1522(A), further showing this argument completely lacks merit.

II. THE STATE'S CLAIM IS NOT SUBJECT TO A STATUTE OF LIMITATIONS

Google finally argues that the one-year limitations period codified at A.R.S. § 12-541(5) applies here. Motion at 15–16. But § 12-541(5) does not reference actions brought by the State, and another provision in the same chapter provides that "the state shall not be barred by the limitations of actions prescribed in this chapter." A.R.S. § 12-510. This is fatal to Google's argument, since it is settled law that statutes of limitations do not run against the State "unless the Legislature has expressly and definitely declared that they do." *E.g.*, *City of Phoenix v.*

Glenayre Elecs., Inc., 242 Ariz. 139, 143 ¶11 (2017) (quoting *City of Bisbee v. Cochise Cty.*, 52 Ariz. 1, 10 (1938)); *see Cheatham*, 161 F. Supp. 3d at 826 (citing § 12-541(5) for the proposition that "*[p]rivate actions* under the [CFA] are subject to a one-year statute of limitations") (emphasis added). Section 12-541 simply does not apply here.

Google attempts to get around these clear authorities by arguing that the AG lacks authority to bring actions under the CFA "on behalf of the State." Motion at 15. But the AG has been bringing CFA actions in the name of the State for decades. And the CFA expressly states ***five different times*** that actions brought by the AG under the CFA are to obtain remedies for the State (including disgorgement, civil penalties, and attorneys' fees).[7] The Complaint seeks all of those remedies. *See* Compl. at p. 45 ¶¶A, C, E.

The Arizona Supreme Court has twice rejected Google's argument. In *In re Diamond Benefits Life Insurance Co.*, the Arizona Supreme Court held § 12-510 applied to a conversion action brought by a special deputy receiver appointed by the Director of Insurance for an insurance company in liquidation. 184 Ariz. 94, 96 (1995). The court reasoned, "the benefits of the action . . . run to the citizenry of the state as a whole, who, the legislature has determined, would suffer at the hands of an unregulated insurance industry." *Id.* at 98. The court has also held § 12-510 applied to an action by a taxpayer brought "in [the taxpayer's] own name." *Valley Bank & Trust Co. v. Proctor*, 47 Ariz. 77, 78–79 (1936) (interpreting Revised Code of 1928 § 107 (predecessor to A.R.S. § 35-213) and Revised Code of 1928 § 2056 (predecessor to A.R.S. § 12-510)).[8] This is because § 12-510's applicability does not turn on the caption of the case (i.e. whether "State of Arizona" is a plaintiff), but rather whether the rights sought to be vindicated are those of the sovereign. *See Valley Bank*, 47 Ariz. at 79 ("The money sought to be

[7] *See* A.R.S. §§ 44-1528(A)(3) (gross receipts or other benefits may "be disgorged and paid to the state"); -1531(A) (AG "may recover from the person on behalf of the state a civil penalty . . . ."); -1531.01(B)(1) ("any investigative or court costs, attorney fees or civil penalties recovered for the state by the attorney general"); -1533(A) ("[t]he provisions of this article are in addition to all *other* causes of action, remedies, and penalties available to this state" (emphasis added)); -1534 (AG "is entitled to recover costs, which . . . may include . . . attorney's fees for the services rendered, for the use of the state").

[8] *See also City of Phoenix*, 242 Ariz. at 143–45 ¶¶12, 14, 24 (recognizing that § 12-510 has been re-codified but its substance remains the same).

recovered was the state's money, and, if recovered, must be paid into the state treasury. The trial court was of the view that the limitation did not run because it was, in effect, an action for the state, and we agree that that conclusion was correct."); *see also City of Phoenix*, 242 Ariz. at 142–43 ¶¶10–11 ("[T]he *nullum tempus* doctrine generally 'applies not only to the state itself when suing in its own name, but to all of its subdivisions.'") (citation omitted).

The decision Google cites (at 15) to argue that the AG's authority to sue is "dependent upon specific statutory grants of power" itself provides an example of such a statutory grant that does *not* use the formulation Google suggests is required—i.e. "in the name of" or "on behalf of" the State. *See Ariz. State Land Dep't v. McFate*, 87 Ariz. 139, 144–45 (1960) (citing statute authorizing AG to "institute action" for recovery of escheats, A.R.S. § 41-193(C)). Here, § 44-1528(A) provides "the attorney general may seek and obtain in an action in a court of competent jurisdiction an injunction." The same subsection then lists additional remedies, including disgorgement to "be … paid to the state." *See* A.R.S. § 44-1528(A)(3). And, as explained above, four other statutes in the CFA similarly provide for court-ordered remedies to be paid to the state. *See supra* n.7. This is ample statutory authority for the AG to institute an action to obtain remedies for the State. *Goodrich*, 151 Ariz. at 122 ("The Attorney General … [is] authorized by statute to enforce the state's consumer protection laws…." (citing A.R.S. § 44-1528)).

III. THE STATE REQUESTS LEAVE TO AMEND IF ANY PART OF THE COMPLAINT IS DISMISSED

If the Court grants any part of Google's Motion, it should allow the State to amend its Complaint to address any deficiencies. There has been no prior dismissal of the Complaint in this case, and moreover Google has not shown in the Motion that amendment would be futile. *See* Ariz. R. Civ. P. 15(a)(2) ("Leave to amend must be freely given when justice requires."); *see also, e.g.*, *Uyleman v. D.S. Rentco*, 194 Ariz. 300, 303 ¶10 (App. 1999). The State should therefore have the opportunity to amend its complaint to cure any legal or factual deficiencies.

CONCLUSION

Google's Motion to Dismiss should be denied. If the Court grants any part of Google's Motion, it should allow the State leave to amend its Complaint to address any deficiencies.

RESPECTFULLY SUBMITTED August 24, 2020.

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**Pro hac vice* granted

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