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ARIZONA SUPERIOR COURT

MARICOPA COUNTY

STATE OF ARIZONA, *ex rel.* MARK BRNOVICH, Attorney General,

Plaintiff,

vs.

GOOGLE LLC, a Delaware limited liability company,

Defendant.

Case No. CV 2020-006219

GOOGLE LLC'S RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

LODGED UNDER SEAL
(Assigned to the Hon. Timothy Thomason)

TABLE OF CONTENTS

		Page
I.	INTRODUCTION	1
II.	FACTUAL BACKGROUND	2
A.	Device Location Services	2
B.	Location History	3
C.	Web & App Activity	4
D.	Location and Advertising	4
E.	Google's Disclosures Regarding LH & Web & App Activity	5
III.	LEGAL STANDARD	6
IV.	ARGUMENT	6
A.	The AG Has Failed to Connect Any Alleged Deception to a Sale or Ad	6
1.	The AG's Theory of Nexus to Smartphones Has No Basis in Fact or Law	6
2.	The AG Reaches Even Further in His Failed Attempt to Create a Nexus to Ads	8
B.	Google's Disclosures Were Not Deceptive	9
1.	Legal Standards Governing Deceptive Conduct Under the ACFA	9
2.	Google's LH Disclosures Were Not Misleading to Any Reasonable Consumer Under the Circumstances	10
a.	Google's LH Disclosures Are Clear And Accurate	10
b.	The AG Omits the Circumstances in Which a User Would View the Disclosure and Asks for Inferences in His Favor	12
3.	Google Did Not Conceal WAA's Storage of Location Data	14
4.	The AG's Location Master Device Setting Theory Involves No Deception	16
V.	CONCLUSION	17

TABLE OF AUTHORITIES

Page(s)

CASES

Andrews v. Blake,
205 Ariz. 236 (2003) 6, 7

Aspinall v. Philip Morris Cos.,
813 N.E.2d 476 (Mass. 2004) 10

Contreras v. Nationstar Mortg. LLC,
No. 16-cv-00302, 2019 WL 688198 (E.D. Cal. Feb. 19, 2019) 8

Enriquez v. U.S. Collections W. Inc.,
No. CV-15-01863-PHX, 2016 WL 7240718 (D. Ariz. Dec. 15, 2016) 10

Freeman v. Time, Inc.,
68 F.3d 285 (9th Cir. 1995) 10

FTC v. AMG Capital Management, LLC,
910 F.3d 417 (9th Cir. 2018) 12

FTC v. Cyberspace.com LLC,
453 F.3d 1196 (9th Cir. 2006) ..... passim

FTC v. Gill,
265 F.3d 944 (9th Cir. 2001) 9

FTC v. Johnson,
96 F. Supp. 3d 1110 (D. Nev. 2015) 12, 13, 15

FTC v. Publishers Bus. Servs., Inc.,
821 F. Supp. 2d 1205 (D. Nev. 2010) 14

Gonzales v. Arrow Fin. Servs., LLC,
660 F.3d 1055 (9th Cir. 2011) 10

In re Insulin Pricing Litig.,
No. 17-cv-699, 2020 WL 831552 (D.N.J. Feb. 20, 2020) 8

Isham v. Gurstel, Staloch & Chargo, P.A.,
738 F. Supp. 2d 986 (D. Ariz. 2010) 9

Johnson v. Earnhardt's Gilbert Dodge, Inc.,
212 Ariz. 381 (2006) 6

Madsen v. W. Am. Mortg. Co.,
143 Ariz. 614 (App. 1985) 9, 10

TABLE OF AUTHORITIES
(continued)

Page(s)

Maurizio v. Goldsmith,
230 F.3d *518* (2d Cir. 2000) 10

Monachelli v. Hortonworks, Inc.,
225 F. Supp. 3d 1045 (N.D. Cal. 2016) 15

Orme Sch. v. Reeves, 166 Ariz. 301 (1990) 12

Rinehart v. GEICO,
No. CV-19-01888-PHX, 2019 WL 6715190 (D. Ariz. Dec. 10, 2019) 7, 9

State Farm Fire & Cas. Co. v. Amazon.com Inc.,
No. CV-17-01994-PHX, 2018 WL 1536390 (D. Ariz. Mar. 29, 2018) 8

Sullivan v. Pulte Home Corp.,
231 Ariz. 53 (App. 2012), *vacated on other grounds*, 232 Ariz. 344 (2013) 8

Sutter Home Winery, Inc. v. Vintage Selections, Ltd.,
971 F.2d 401 (9th Cir. 1992) 17

Watts v. Medicis Pharm. Corp.,
239 Ariz. 19 (2016) 8

Zlotnick v. Premier Sales Grp., Inc.,
480 F.3d 1281 (11th Cir. 2007) 10

STATUTES

A.R.S. § 44-1522 9

A.R.S. § 44-1522(A) 6

RULES

Arizona Rules of Civil Procedure Rule 56(a) 6

I. INTRODUCTION

Google goes to great lengths to provide its users with clear, simple, visually appealing privacy disclosures, along with the ability to customize their settings so that users can enjoy the services that matter most to them the way they want to use them. Doing so requires a balancing: Google makes pages informative without presenting too much information at once. Google discloses the information that is most important to users directly, while giving the user an opportunity to learn more on other pages.[1] This is precisely the type of conduct the ACFA is meant to encourage.

In this case, the Attorney General ("AG"), based largely upon a 2018 press article, claims a statement made by Google about its Location History setting misled users about other settings. Although he moves for partial summary judgment ("MSJ"), the AG has not come close to meeting his burden because the disclosures are in fact accurate and no reasonable consumer would find them misleading. Nor can he meet his burden as to the remaining elements of the claim.

First, the tenuous connection between any alleged deception and a sale or advertisement hardly supports summary judgment. A review of the evidence—rather than the AG's characterization of it—only confirms the lack of nexus between any alleged disclosures and the sale or advertisement of merchandise.

Second, the AG cannot show a deceptive act or practice. The AG's heavy reliance on case law concerning "net impressions" is a faltering attempt to get ahead of the obvious response: Google has made, and continues to make, accurate and fulsome disclosures of its data collection practices. The AG relies almost exclusively on taking out of context an isolated disclosure about Location History ("LH"), a specific Google Account setting, that is accurate in and of itself. He ignores everything Google tells its users about the ways it uses location data, and baselessly claims that this isolated disclosure *might* lead a user to believe that LH is the *only*

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[1] *See* Declaration of Joshua Anderson in Support of Google's Opposition to MSJ ("Anderson Decl."), Ex. K (Privacy Policy). In addition, Google provides videos that help users understand how location information helps Google offer more useful search results. https://www.youtube.com/watch?v=AhvkIr2pghE&list=PL590L5WQmH8dpP0RyH5pCfIaDEdt9nk7r&index=3

Google setting that has anything to do with location data. On this basis, according to him, users are misled into believing a wholly separate Google Account setting, Web & App Activity ("WAA"), would not save any location data.

This theory fails for numerous reasons. Most fundamentally, the two Google Account settings are separate: they are distinctly enabled, can each be disabled separately, and have always been introduced to users with distinct disclosures that adequately apprise the users of their respective functions, including use of location data in each. A user who sees Google disclosures as they are presented in real life on their devices—not as the AG presents them in his complaint or MSJ—would understand the difference and distinguish between them. Moreover, the Court must view the disclosures in context and in the light most favorable to Google. Even if the Court were to draw inferences in favor of the AG, the AG ignores the impact of Google's numerous and clear disclosures to users about its use of location data across various services, as well as updates to its disclosures during the relevant period, which eliminates his theories of liability.

Third, the AG claims Google "deceptively designed" its user interface by moving the placement of the Location Master device-level setting. The AG cites no evidence, or even a cognizable theory, about how a user could possibly be deceived or misled because a setting on an Android device is placed in a separate location. There is no evidence Google made any representations to consumers about the Location Master toggle on Android devices at all.

The Court should thus deny summary judgment.

II. FACTUAL BACKGROUND

A. Device Location Services

There is nothing unique about smart devices such as mobile phones and tablets using location. Such devices all run using an operating system, such as Android, Apple's iOS, Microsoft's Windows, or Blackberry OS. (Google's Statement of Facts in Opposition ("GSOF") GSOF ¶ 1).[2] These operating systems have proprietary location providers that

[2]Google will timely file a motion to seal its Statement of Facts and supporting evidence in accordance with the procedures the Special Master set forth in his Orders of October 19 and November 2, 2020.

obtain raw data from device sensors such as GPS, accelerometers, WiFi signals, and other sources like IP addresses. (*Id.*). Those sensors generate a location for the device. (GSOF ¶ 2). The inputs an operating system uses to generate device location vary based on the permissions of the user's device. (GSOF ¶ 3). On Android devices, a user can customize their location settings to suit their needs, or use the device's main location setting, which the AG calls the "Location Master." (GSOF ¶ 4). If device location is off, device-level location signals like WiFi, GPS, or Bluetooth are not used to generate device location. (GSOF ¶ 5).

The location information collected by the operating system's location provider is made available depending on users' permissions for other services on the device, such as apps like Lyft or Instacart. (GSOF ¶ 6). An app may request location data from a device and, assuming the user has granted permission to share that information with the app or service, the location provider provides the location data. (GSOF ¶ 7).

With permission, the applications and services on a device use location data in a variety of ways. As one example, if a user chooses to utilize Google Maps for directions and has granted location permission to the app, the app receives location information from the operating system and queries how best to get from the user's current location to the destination. (GSOF ¶ 8). As another example, if a user were to search "restaurants near me," their search query would use location information to attempt to determine what "near me" means to the user, and to provide relevant results. (GSOF ¶ 9).

B. Location History

LH is an optional account-level setting that, when enabled, allows a user to save a history of the places she goes with her mobile device and view that history on a Timeline. (GSOF ¶ 10). The LH setting is off by default, but a user can opt in to this product if she wants a record of the places she goes displayed in her Timeline in her Google account. (GSOF ¶ 11). For example, a vacationer may want to remember the sites he saw, or a consultant may want a record of the companies she visited. (GSOF ¶ 12). LH also allows for personalized maps, recommendations based on places the user has visited, and traffic updates when a user is signed into his or her Google Account, has opted into LH, and has enabled it

for that device. (GSOF ¶ 13).

The data LH receives depends on the settings a user has on his or her phone. (GSOF ¶ 14). For example, it may include location data derived from device inputs such as WiFi scans and GPS. (GSOF ¶ 15). And if the user disables their Location Master, LH receives no location data from the device. (GSOF ¶ 16). Conversely, a user who has enabled LH may later disable it (because she no longer wants a record of where she's been shown in her private Timeline) without disabling Location Services on the operating system (because, for example, she still wants her Lyft car to be able to find her). (GSOF ¶ 17).

Google does not share personally identifiable LH data with any third parties (GSOF ¶ 18). A user's LH data is used to enhance the user experience across Google services. With LH enabled, for instance, Google Maps may offer users notifications about traffic accidents on their usual routes, enabling them to leave early in order to arrive at their destination on time. (GSOF ¶ 19). By enabling LH to compile a private map of locations, travelers could check their Timeline to confirm the places they had visited that day. (GSOF ¶ 20).

C. Web & App Activity

Web & App Activity ("WAA") is another account-level setting that, if enabled, saves a user's activity on Google's products and services, for example a user's Google searches, which may or may not have a location component. (GSOF ¶ 21). A search for "President Abraham Lincoln" may not have a location component, while a search for "best pizza" or "when to take out the recycling" would attempt to infer the user's location to provide more useful search results. (GSOF ¶ 22). When WAA is enabled, both queries would be saved to a user's account, whether or not LH was separately enabled.

D. Location and Advertising

Geography is a necessary and important component of advertising for all advertisers, ad sellers, and users. (GSOF ¶ 23). Advertisers have finite advertising budgets, so a tire shop in Clovis, California, likely could not invest in marketing to drivers in Bangor, Maine. (GSOF ¶ 24). While Google allows businesses who use its services to limit the geographic scope of their marketing, this use is subject to substantial privacy restrictions. (GSOF ¶ 25). For

instance, Google does not provide any individual user's location data to third parties for use in serving ads. (GSOF ¶ 26). Nor does Google serve ads to a precise location; location data used by Google for advertising purposes is aggregated, anonymized, and coarsened so that it does not reflect an individual's location. (GSOF ¶ 27). As an example, suppose a user submits a Search query for "restaurants near me." As discussed above, the query to the Google search server may contain location data from a variety of inputs available from the device that may or may not be accurate; information from that query is processed by internal Google services to arrive at a best estimate of the location from which that query originated. (GSOF ¶ 28). No matter how precise the data that came with the query, Google's internal services will provide only a privacy-safe generalized location of three square miles in which at least 1,000 individuals have been in the past 21 days. (GSOF ¶ 29). This means that advertisers do not have access to Google users' precise location data and advertisers are not able to serve ads to users based on any location data finer than this generalized location. (GSOF ¶ 30).

E. Google's Disclosures Regarding LH & Web & App Activity

Google makes numerous disclosures to users about location data, beginning with the Privacy Policy and an entire page devoted specifically to Google's location technologies and including more specific, contextual disclosures specific to services like LH and WAA. During the relevant time period, users would see a disclosure that LH "creates a private map of where you go with your signed-in devices even when you aren't using a specific Google service." (GSOF ¶ 31). Similarly, users would also see a disclosure that WAA "[s]aves your activity on Google sites and apps, including associated info like location . . . ." (GSOF ¶ 32). Similar disclosures were also available throughout the relevant time period. (GSOF ¶ 33).

Google's privacy policy has always informed users that Google collects and uses location data when users interact with Google Apps and services. (GSOF ¶ 34). Unlike some privacy policies, Google's is simple and informative, providing users with pictures, short embedded videos, bullet points and links to help users understand the policy. (GSOF ¶ 35). Google's Help and Support pages were yet another source of information that explained that LH compiled a "map" of the device locations while WAA saved user interactions with

Google services, including location-related services like Maps. (GSOF ¶ 36).

III. LEGAL STANDARD

Rule 56(a) of the Arizona Rules of Civil Procedure permits the court to award summary judgment only if "there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law." Ariz. R. Civ. P. 56(a); *Johnson v. Earnhardt's Gilbert Dodge, Inc.*, 212 Ariz. 381, 385 (2006). In reviewing a motion for summary judgment, the court "must view the facts and reasonable inferences therefrom in the light most favorable to the party opposing the motion." *Andrews v. Blake*, 205 Ariz. 236, 240 (2003).

IV. ARGUMENT

The AG sought adjudication on liability with respect to Android devices between 2015 and April 2019, but his primary theory focuses on a single out-of-context disclosure about LH that the AG concedes was not something Android users would see during device setup. In any event, that disclosure was and remains accurate. The AG's arguments to the contrary require shearing the disclosure from the context in which users would have seen it and assuming users would hold the view of location data that is most favorable to the AG's case. There is no support in either fact or law for the AG's approach. The Court need not reach that question, however, because the AG has offered no evidence to connect any alleged deception to the sale or advertisement of merchandise. The Court should deny summary judgment on this basis alone.

A. The AG Has Failed to Connect Any Alleged Deception to a Sale or Ad

1. The AG's Theory of Nexus to Smartphones Has No Basis in Fact or Law

Liability under the ACFA requires that a deceptive act or practice occur "in connection with" the sale or advertisement of merchandise. A.R.S. § 44-1522(A). But the AG presents no evidence that Google deceptively marketed Android devices or otherwise induced consumers to purchase Android devices. His sole theory of nexus between alleged deception and devices relies on something altogether different: users opting to set up Google Accounts *after* purchasing a device. (MSJ at 17 ("As part of the Google Account setup process, Google presents users a choice to toggle certain account-level settings, including WAA and LH.")).

This theory of post-sale nexus is a nonstarter because, as this Court has already noted, courts have limited actionable representations to those occurring "bargaining" process. *Rinehart v. GEICO,* No. CV-19-01888-PHX, 2019 WL 6715190, at * 4 (D. Ariz. Dec. 10, 2019). And no court has upheld liability on the basis of purely post-sale representations or conduct untethered to any pre-sale statements. (*See* Order re Mot. Dismiss at 9) (pointing out that "[t]he cases relied on by the State actually involved a pre-sale misrepresentation or omission[]").

Even if it were legally cognizable, the AG's nexus theory fails factually because the AG has not alleged any misleading disclosures during account set-up. Indeed, the disclosure that the AG alleges misleads users—"with Location History off, the places you go are no longer stored"—is not even alleged by the AG to have been seen by users during account set-up. To the contrary, the AG's own allegations show that this disclosure is on a Help Center page—not part of account setup at all. (SOF 54).

The only prompts that the AG alleges as being part of the account set process, are not shown to be objectionable. He points only to statements indicating that users could enable or disable WAA or LH when setting up their accounts. (SOF 145). Nowhere does the AG show that whatever "prompts" or "disclosures" Google may have made in the account setup process were in any way misleading.

In any event, even if the AG had a legal basis for his nexus theory and had identified misstatements made during the account set-up process, there still would be no nexus because Google account set-up is not even required when using a new device. The AG claims a Google Account is required "to use the[] device in any meaningful way." (MSJ at 17). Not only does the argument fail to take into account those with preexisting Google accounts, the argument is nothing more than the AG's characterization of the evidence. But the Court must draw inferences in Google's favor, not the AG's. *Andrews*, 205 Ariz. at 240. And in fact, some Android devices include no Google services and therefore have no need for a Google account. (GSOF ¶ 37). The AG's remaining theory of liability focuses on the location of a device-level setting on Android phones. The AG concedes that users could not interact with this toggle in setting up a device. (MSJ at 13). A user's interaction with this toggle is

unconnected to the sale of a device, and is instead "action[] taken on behalf of merchandise previously purchased," and outside the scope of the ACFA. *Contreras v. Nationstar Mortg. LLC,* No. 16-cv-00302, 2019 WL 688198, at *4 (E.D. Cal. Feb. 19, 2019) (applying the ACFA).

2. The AG Reaches Even Further in His Failed Attempt to Create a Nexus to Ads

Failing to establish a nexus between the alleged deception and the Android devices that are the subject of the MSJ, the AG attempts to create a nexus with third-party ads for third-party products. As the Court observed in ruling on Google's Motion to Dismiss, no court has read the ACFA so expansively. (Order re Mot. Dismiss at 9). And, in fact, the Arizona Court of Appeals in *Sullivan v. Pulte Home Corp.* rejected that the word "advertisement" could stand alone in the ACFA untethered to any sale between the parties. 231 Ariz. 53, 61 (App. 2012), *vacated on other grounds*, 232 Ariz. 344 (2013). While the Arizona Supreme Court has held that the ACFA does not require a *direct* transaction between the parties, *Watts v. Medicis Pharm. Corp.*, 239 Ariz. 19, 28 (2016), courts have nonetheless continued to require a direct misstatement in connection with a sale—either from the defendant or of the defendant's products. *State Farm Fire & Cas. Co. v. Amazon.com Inc.*, No. CV-17-01994-PHX, 2018 WL 1536390, at *5 (D. Ariz. Mar. 29, 2018) (dismissing subsequent buyer's action where defendant made no direct misrepresentation to plaintiff); *In re Insulin Pricing Litig.*, No. 17-cv-699, 2020 WL 831552, at *5 (D.N.J. Feb. 20, 2020) (same).

The AG's final attempt to create a nexus between the alleged deception and sale is to suggest that location information is valuable to advertisers. (MSJ at 17). In support, the AG cites a statement discussing a reduction in users with the Location Services enabled after a design reconfiguration, and an observation that "precise" user location can support revenue. (SOF 147). Not only is it irrelevant to the nexus analysis if advertisers believe location data is valuable, the evidence does not even support the assertion. It shows, at most, that location data could generally impact revenue—of which Google has many sources. It does not show a nexus between a Location setting and any sale or advertisement, much less the "bargaining process" of a sale. *Rinehart*, 2019 WL 6715190, at * 4.

B. Google's Disclosures Were Not Deceptive

The AG offers a tangle of assertions regarding unrelated settings and design features and argues that, when viewed together, they convey a misleading "net impression" about location data. It is easy enough to throw a hodgepodge of cherry-picked statements, disclosures, and deposition testimony into a complaint or MSJ to say that, as structured, they are confusing. But Google users are not interacting with the AG's complaint when dealing with Android devices. They are dealing with the settings and disclosures as they appear and are accessible on the user's device, and with disclosures on Google's support pages to which they are directed from their devices.

These disclosures provide users with the information that they need to make informed decisions about each setting. The AG, however, rends Google's disclosures, and even design choices, from their surrounding circumstances. He then asks the Court to view what remains in the light most favorable to his theory, and to draw inferences in his favor despite deliberately omitting the context. This is plainly inappropriate on summary judgment.

1. Legal Standards Governing Deceptive Conduct Under the ACFA

There is little authority in Arizona interpreting what it means for an act or practice to be "deceptive" under the ACFA. The ACFA states, however, that Arizona courts may look to interpretations of the FTC Act as a guide. A.R.S. § 44-1522. In order to be deceptive under the FTC Act, a representation is deceptive if it "(1) . . . is likely to mislead consumers acting reasonably under the circumstances (2) in a way that is material."*FTC v. Cyberspace.com LLC*, 453 F.3d 1196, 1199 (9th Cir. 2006); *FTC v. Gill*, 265 F.3d 944, 950 (9th Cir. 2001); *see also Isham v. Gurstel, Staloch & Chargo, P.A.*, 738 F. Supp. 2d 986, 995 (D. Ariz. 2010) (holding "the alleged falsity of a statement must actually distort the consumer's perception"). A misrepresentation is material if a reasonable person would consider it important such that it would impact a user's conduct regarding a product. *Cyberspace.com*, 453 F.3d at 1200.

The AG claims the applicable standard is whether the "least sophisticated consumer" would be deceived. (MSJ at 6) (citing *Madsen v. W. Am. Mortg. Co.*, 143 Ariz. 614, 618 (App. 1985)). That is incorrect. The court in *Madsen* pulled this standard from then-valid FTC

cases. *Id.* In the 35 years since *Madsen*, however, the FTC Act standard has evolved from an "ignoramus" standard to the reasonable-consumer standard outlined above. *Aspinall v. Philip Morris Cos.*, 813 N.E.2d 476, 487 (Mass. 2004) (collecting federal authorities). Accordingly, courts interpreting similar state consumer-fraud laws with FTC harmonization provisions have considered whether the representation is likely to mislead a consumer acting reasonably under the circumstances. *Id.* (applying Massachusetts law); *Maurizio v. Goldsmith*, 230 F.3d 518, 522 (2d Cir. 2000) (applying New York law); *Freeman v. Time, Inc.*, 68 F.3d 285, 289 (9th Cir. 1995) (applying California law); *Zlotnick v. Premier Sales Grp., Inc.*, 480 F.3d 1281, 1283 (11th Cir. 2007) (applying Florida law). But even if the "least sophisticated consumer" standard still applies, and it does not, this standard "preserv[es] a quotient of reasonableness and presume[s] a basic level of understanding and willingness to read with care." *Enriquez v. U.S. Collections W. Inc.*, No. CV-15-01863-PHX, 2016 WL 7240718, at *3 (D. Ariz. Dec. 15, 2016) (alterations in original) (applying Fair Debt Collection Practices Act) (quoting *Gonzales v. Arrow Fin. Servs., LLC*, 660 F.3d 1055, 1062 (9th Cir. 2011)).

2. Google's LH Disclosures Were Not Misleading to Any Reasonable Consumer Under the Circumstances

The AG's first theory concerns language on a Google help page saying that with LH off, "the places you go are no longer stored." He alleges it was false because WAA, if enabled, stored other data, some of which related to a user's location. In fact, the disclosure was accurate, and the AG's assertions to the contrary require conflating the data that LH collected—*i.e.*, the places users go—with all other conceivable data about location, including the data collected by WAA about users' interactions with Google services. There would be no reason for a user to assume that the LH help center page—which concerned only LH—applied to any other Google setting, feature or product. The AG is not entitled to an inference that users would make these errors.

a. Google's LH Disclosures Are Clear And Accurate

An important detail here, ignored in the MSJ, is that LH is an *optional* setting that is *off* by default unless users affirmatively opt in. (GSOF ¶ 11). Because it is an optional setting,

Google provides detailed disclosures specific to that product to users who consider opting in. (GSOF ¶ 38). These disclosures are on top of the general disclosures regarding location data that Google provides. In its privacy policy, for example, Google tells users it will collect and process information about the user's "actual location," including data from sensors like GPS, WiFi, nearby devices, and other information like IP addresses. (GSOF 39).

In contrast to these more general disclosures that apply to many Google products and services, Google introduced LH to users as having a specific purpose. Unlike the disclosures that discuss the collection of location data when the user interacts with Google services, Google told users that LH would save where users go with their device whether or not they were interacting with Google. (GSOF ¶ 40). For example, a user on vacation who wanted to remember each museum and restaurant she visited in Rome could do so simply by enabling LH and keeping her phone with her. Google could then create a map and a list of where she had been. (*See* Ex. 16 at 157; GSOF ¶ 41). After the trip, she could disable the LH setting, and she would be informed that "places you go with your devices will stop being added to your Location History map." (*Id.* at 151; GSOF ¶ 42).

This disclosure was true. LH stops collecting location when it is turned off—no new places are added to the user's Timeline. (GSOF ¶ 43). And nothing about WAA changes the accuracy of this disclosure.[3] WAA *does not* save the places the user goes on the user's Timeline or otherwise store continuous data about where users go with their devices; it instead records data regarding users' interactions with Google products or services while signed into their Google accounts. (GSOF ¶ 44). Those interactions may, but need not, have location-related data associated with that interaction. (GSOF ¶ 45). And Google discloses that it collects this data in the ordinary course. (GSOF ¶ 46). A user who is not signed into their Google Account, or who has disabled WAA, or who is signed in but does not interact with any Google product or service, will have no data from that period saved to WAA, whether or not location data is saved to LH for users who have opted in. (GSOF ¶ 47).

[3]In addition, as we describe in section IV.B.3 infra, independent of the LH pages, the WAA disclosures during the relevant time period also described the collection and storage of location information when users engage with Google products and services.

These facts, among many others, distinguish this case from *FTC v. AMG Capital Management, LLC*, 910 F.3d 417 (9th Cir. 2018). There, the defendant lender's loan documents contained a prominent, TILA-mandated box purporting to set forth the "total of payments" including finance charges. *Id.* at 422. This was untrue. Unless a user followed instructions buried in "densely packed" fine print, the user's actual payment would be far higher. *Id.* at 422–23.Thus, the users had to take affirmative action to obtain the terms the document presented as a default. *Id.* at 423. Here, by contrast, there is no dispute that Google's disclosures regarding its default data collection practices are accurate. Even assuming the LH disclosure was inaccurate, users would be required to take affirmative steps to first *enable*, then *disable*, the LH setting before they could conceivably be misled. Further undermining the AG's theory, in the course of both enabling and disabling LH, users would have seen further contextual disclosures that further explain LH's function. Even by ignoring these facts, the AG fails to show that no reasonable factfinder could find in Google's favor. *See Orme Sch. v. Reeves*, 166 Ariz. 301, 309 (1990). Summary judgment should be denied.

b. The AG Omits the Circumstances in Which a User Would View the Disclosure and Asks for Inferences in His Favor

The factual premise underlying the AG's theory is flawed as stated above, but the legal premise is as well. First, the inquiry is whether the disclosure is "likely to mislead consumers acting reasonably *under the circumstances*." *See Cyberspace.com*, 453 F.3d at 1199 (emphasis added). The AG bases his entire theory on a single webpage without regard to the other disclosures users would see before and after getting there. The Court cannot understand "the circumstances" under which users would see and understand the disclosure by viewing the page in isolation. Rather, to determine whether a user would misunderstand Google's accurate LH disclosure, the Court must consider how users would come to the disclosure. *FTC v. Johnson*, 96 F. Supp. 3d 1110, 1122 (D. Nev. 2015) ("[I]n order to fairly present the 'net impression' of the [defendant's] sites, and to understand their effect on a consumer, the Court must endeavor to describe the information delivered to the consumer, and how it is delivered, as they make their way from the landing page to the order page and place their order.").

For example, Google's Privacy Policy explains that Google may collect information about users' location, including IP address, GPS, and other device sensor data. (GSOF ¶ 48). These disclosures are made to users regardless of whether a user enables or disables LH in her account. The same technologies page the AG claims created a deceptive "net impression" about LH and WAA explained that LH is a setting "that saves where you go with every device where your account is signed-in to give you personalized maps . . . and more." (GSOF ¶ 49). A user who opted into LH would see a disclosure that LH "creates a private map of where you go with your signed-in devices," and that it "saves where you go with your devices" "even when you aren't using a specific Google service." (GSOF ¶ 50). A user who seeks out the support page at issue here would reasonably understand the Help Center page concerning LH is specific to that unique product, and would not necessarily describe all location or location-adjacent settings that they may come into contact with through a smart phone.

The AG may argue that these disclosures when a user turns *on* LH are irrelevant because the supposed deception occurs when users turn the setting *off*. Such an objection would not aid him. *First*, because LH is off by default, any user who sought to turn off the setting necessarily opted in at some point and would have been exposed to the disclosures and explanations above. These disclosures are thus relevant to determine what a reasonable user would believe "under the circumstances." *See Cyberspace.com*, 453 F.3d at 1199; *Johnson*, 96 F. Supp. 3d at 1122. *Second*, the support page itself is not the site at which users disable LH. Instead, it directs them to other locations with further disclosures regarding LH. (GSOF ¶ 51). No part of these disclosures suggested that Google would cease its default data collection practices, including with regard to location data, for any other purposes.

Ignoring these relevant circumstances, the AG asks the Court to assume that users understand the phrase "the places you go" in the way that favors his theory. But this, too, is error. The Court must view the evidence in the light most favorable to Google, and summary judgment is inappropriate where consumers may reasonably understand a disclosure in the way advanced by the defendant. *See Johnson*, 96 F. Supp. 3d at 1136–37 (reviewing the evidence in light most favorable to defendant and finding summary judgment inappropriate

where users could reasonably understand defendant's disclosure in the way advanced by defendant). Here, not only would users reasonably understand Google's LH disclosure as specific to that feature, it would be unreasonable for users to believe that disabling LH would prevent Google from storing any kind of location data, as the AG suggests. *See FTC v. Publishers Bus. Servs., Inc.*, 821 F. Supp. 2d 1205, 1223 (D. Nev. 2010) (holding that a misrepresentation is not misleading simply because it could be unreasonably misunderstood).

3. Google Did Not Conceal WAA's Storage of Location Data

The AG next claims that Google deceived users by insufficiently disclosing that WAA might collect location data. But Google's disclosures about WAA during the relevant time period informed users of the information that Google would save: "[WAA] stores your searches and other things you do on Search, *Maps* and other Google services, *including your location and other associated data*." (GSOF ¶ 52).[4] Any reasonable user would understand that WAA stored location information because the disclosure explicitly told them so, and also clearly informed users that WAA would save user activity on apps like Google Maps, which necessarily implicates location data. (*See id.*). Indeed, in setting up an account, users received a disclosure that, when they interacted with Google products like YouTube or Google Maps, Google may process their location information and associate it with their Google Account. (GSOF ¶ 53). This disclosure linked the individuals to the My Account page, which included the controls for WAA. (*Id.*). Even without the disclosure, the AG will be hard pressed to prove that users do not understand that Google uses their location when running search queries that magically identify the phone number of the Starbucks around the corner rather than one in Seattle.

The AG also suggests Google deceived users by failing to explain that WAA could collect "explicit" or "precise" data. (MSJ at 10). But a user is "deceived" if they are led to

[4] Citing SOF ¶¶ 69–70, the AG claims "Google's account-opening disclosures made no mention that Google uses WAA to store location data." (MSJ at 8–9). The cited evidence offers no support. The testimony concerned *Android* setup *without* creating a Google Account. (*See* Responses to SOF ¶¶ 69–70). The deponent confirmed that disclosures in setting up a Google Account *did* include information about location data. (*See* Response to SOF ¶ 69).

believe something that is contrary to the truth. *See Monachelli v. Hortonworks, Inc.*, 225 F. Supp. 3d 1045, 1054 (N.D. Cal. 2016). The AG contends Google made *no* disclosures about location data with respect to WAA. How, then, could users have formed an impression—either true or false—about the precision of that data? In reality, as discussed above, Google's disclosures *did* indicate to users that location data could be among the activity saved. (GSOF ¶ 54). For example, the disclosure that Google Maps activity could be saved would have informed reasonable consumers that the precise geolocation information on which Google Maps relies would be saved. (*See id.*). The AG also points to a Google disclosure about location data that actually informs the user that Google may collect "explicit location information." (GSOF ¶ 55).[5]

The AG makes much of the fact that some of these disclosures did not mention WAA by name. But that is a red herring. The gravamen of the AG's claim is that users would be unaware that Google might collect some form of location data with LH disabled. The fact is that Google disclosed its practice of collecting location data when users interacted with Google products or services, and it pointed users to precisely the page where Google identified WAA as a mechanism for that collection. (GSOF ¶ 57). There is nothing deceptive or misleading about this—much less deceptive in a material way. *See Cyberspace.com*, 453 F.3d at 1200–01. The AG's final theory is that Google created a deceptive "net impression" that WAA had no relationship with location in light of the single, out-of-context disclosure about LH that forms the basis of the AG's suit. This theory fails for the reasons discussed at length above. Specifically, Google accurately describes its data collection practices notwithstanding whether a user has enabled or disabled LH, and the AG is not entitled to the inference that consumers would unreasonably believe that disabling LH would end the storage of any and all location-related information. *See Johnson*, 96 F. Supp. 3d at 1137–38.

This theory fails for an additional reason. The AG seeks summary judgment with

[5]Though the AG characterizes this page as "Google's Privacy & Terms" page, the page itself shows it reflects a subset of the "Technologies" page. (GSOF ¶ 55). Google's actual Privacy Policy, the link to which appears on the "Technologies" page, further discloses that Google collects location information when users interact with Google's services. (GSOF ¶ 56).

respect to the time span between 2015 and April 2019. During that time, Google always disclosed to users that disabling LH would not prevent Google from collecting other location-related information. (GSOF ¶ 58). And it is undisputed that, since at least late 2018, the LH page at issue here explicitly mentioned that disabling LH *did not impact location-related data stored in WAA* or anywhere else. (*See* SOF ¶¶ 85, 87; GSOF ¶ 59). The AG seeks an injunction preventing Google from allegedly deceiving users. Accordingly, there is no factual basis to support the remedy the AG seeks here—injunctive relief—because the disclosures he seeks already have been made to consumers.

4. The AG's Location Master Device Setting Theory Involves No Deception

In his final theory, the AG claims Google "deceptively designed" its user interface by moving the placement of the Location Master device setting. The AG fails to identify how a user could possibly be deceived or misled—that is, led to believe something contrary to fact—because a toggle is placed in a different location. The theory is, unsurprisingly, unsupported by a single citation to authority.

Setting aside the complete lack of legal support, the AG does not even attempt to show any factual support for his claim that the location of the Location Master device setting deceives users. Rather, his two factual bases for alleged deceptions concern other matters entirely. First, the AG claims Google misled OEMs about the basis for moving the Location Master device setting. Second, he claims users are misled—not because of the location of the toggle—but because some might conflate the Location Master with LH. (MSJ at 13–14). Both theories fall flat.

[redacted] The AG has failed to show Google made

any untrue statement to OEMs; the argument fails even if representations made to third-party vendors were relevant under the ACFA. *Contra Sutter Home Winery, Inc. v. Vintage Selections, Ltd.*, 971 F.2d 401, 407 (9th Cir. 1992) (finding business's claim over defendant's conduct with third parties outside the scope of the ACFA),

Next, the AG claims the Location Master setting is misleading because users may conflate it with LH (MSJ at 14). But he does not explain what this has to do with the *location* of the setting. In his best effort, he points out that a Google employee looked to the Quick Settings panel to determine whether the Location Master was on. (*Id.*). The observation is meaningless. The employee looked at the Quick Settings panel because that is where the Location Master setting was located in April 2019. (GSOF ¶ 61). This is not evidence that a user would be unable to find the setting in any other location. (*See id.*).

Finally, the fact that Google made periodic changes to its user interface does not support the AG's entitlement to judgment—it undermines it. The AG has requested judgment that Google is liable for its "deceptive" design for the period between 2015 and April 2019. But the AG's own evidence shows that the Location Master was featured in his preferred location until the end of 2016 for Pixel phones, and even later for devices made by other manufacturers. (MSJ at 15). And by April 2019, the Location Master was apparently back in the AG's preferred part of Quick Settings menu. (GSOF ¶ 62). This precludes a finding of liability on this theory for the span between 2015 and April 2019.

V. CONCLUSION

The AG has brought a fatally flawed CFA claim that identifies no deceptive statements and no nexus to a sale. A look at Google's disclosures in context and as the user would see them demonstrates a clear, uncluttered and useful presentation of information. In racing to the Court to file this MSJ, the AG has pulled cherry-picked disclosures from their context, presented them in an undifferentiated tangle, and asked the Court to assume that Google users would be confused by the mess the AG himself created. The law, however, requires the Court to review the disclosures as reasonable consumers would encounter them—not as the AG presents them—and to draw inferences in Google's favor. The MSJ should be denied.

Dated: November 4, 2020

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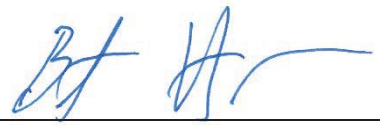
By: 

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