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IN 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.	No. CV2020-006219 **STATE'S RESPONSE TO GOOGLE'S MOTION FOR SUMMARY JUDGMENT** Assigned to the Hon. Timothy Thomason **(COMPLEX CALENDAR)**

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I. INTRODUCTION

The issue before the Court is whether Google's deceptive and unfair acts and practices are "in connection with" the sale or advertisement of merchandise under the Arizona Consumer Fraud Act ("CFA"). The CFA's language covers Google's deceptions, and the facts show that Google's conduct is "in connection with" the sale and advertisement of merchandise, including selling hardware and software to consumers. *See* p. 14-29 *infra*. To hold that *no sale occurs* when a user trades data for services, or that Google's use of user data is not in connection with a sale or advertisement of merchandise, would be inconsistent with the statutory text and case law, ignores the billions of dollars Google has earned from Arizonan data, and would require creating an exception that is not in the CFA.

II. GOOGLE'S MOTION FAILS GIVEN THE FULL ISSUES IN THIS CASE

There are multiple reasons why Google's Motion cannot justify summary judgment. Google contends (Mot. at 1:2–13, 7:20–26) the only "transactions" at issue are initial sales of Android phones and Google apps, but neither the CFA nor the State's theories are so limited. While the State alleges deceptive sales of Nexus and Pixel phones (and Android devices), Google's deceptive conduct also includes its ongoing transactions where it provides services (*e.g.*, search results) in exchange for user data, and Google misrepresents when and how it acquires users' location data in exchange for its services. Google then monetizes that deceptively acquired data by matching users with targeted advertisements, which are sales *and* advertisements.

Google's Motion also does not challenge the State's allegations regarding (1) omissions (rather than actions), (2) practices of omissions, and (3) unfair acts and practices. As the Court noted when it denied Google's motion to dismiss, the State alleges Google makes unlawful omissions regarding location tracking during the setup of Android phones, Compl. ¶ 22(a), and when advertising its devices and software to consumers, *Id.* ¶ 22(c). Google does not disclose its location tracking practices to consumers when advertising its phones. SSOF ¶ 44. Google likewise fails to disclose the nature and extent of its location tracking in connection with the sale and advertising of Android phones or its other apps and services. A party's intent for a consumer to rely upon an omission is a factual inquiry, *State ex rel. Horne v. AutoZone, Inc.*, 229 Ariz. 358,

362 ¶15 (2012) (*AutoZone*), and Google does not challenge that element in its Motion. The State's allegations concerning Google's violation of the Omissions clause are unopposed. The same is true for a practice of omissions, *id.* ¶ 14, and unfair conduct.

Google's Motion also overlooks key parts of the Court's prior rulings. In denying Google's motion to dismiss, the Court acknowledged the State set forth a variety of ways Google's conduct—and its omissions—are "in connection with" the sale or advertising of merchandise. *See, e.g.*, 9/25/20 Minute Entry at 3-4.[1] The Court noted: "Whether or not the deception was actually in connection with the sale or advertising of merchandise presents a factual question." *Id.* at 9. Google's Motion does not disprove any facts alleged in the Complaint—it just makes the same *legal* arguments in the guise of a summary judgment motion. Indeed, the State's Complaint cites and encloses extensive evidence (including Google's sworn testimony and documents), all of which substantiate facts that survived Google's motion to dismiss. In denying the State's partial MSJ, the Court emphasized these issues involved questions of fact. *See, e.g.*, 1/20/21 Minute Entry at 10, ¶ 3 (whether conduct was deceptive is a fact question); 11 (whether Google's LH and WAA disclosures were deceptive is a fact question); 15, ¶ 2 (whether Google's apps are sold is a "factual inquiry that cannot be resolved on a motion for summary judgment"); 16, ¶ 3 (whether the sale of ads is in connection with Google's deception "[a]t a minimum, . . . is a factual inquiry"); 18 ¶ 1 (whether setting up a Google account after buying a device is "in connection with" is a fact question). For all of these reasons, Google's Motion should be denied.

III. FACTUAL BACKGROUND

A. Google is an advertising business that monetizes its users' location information.

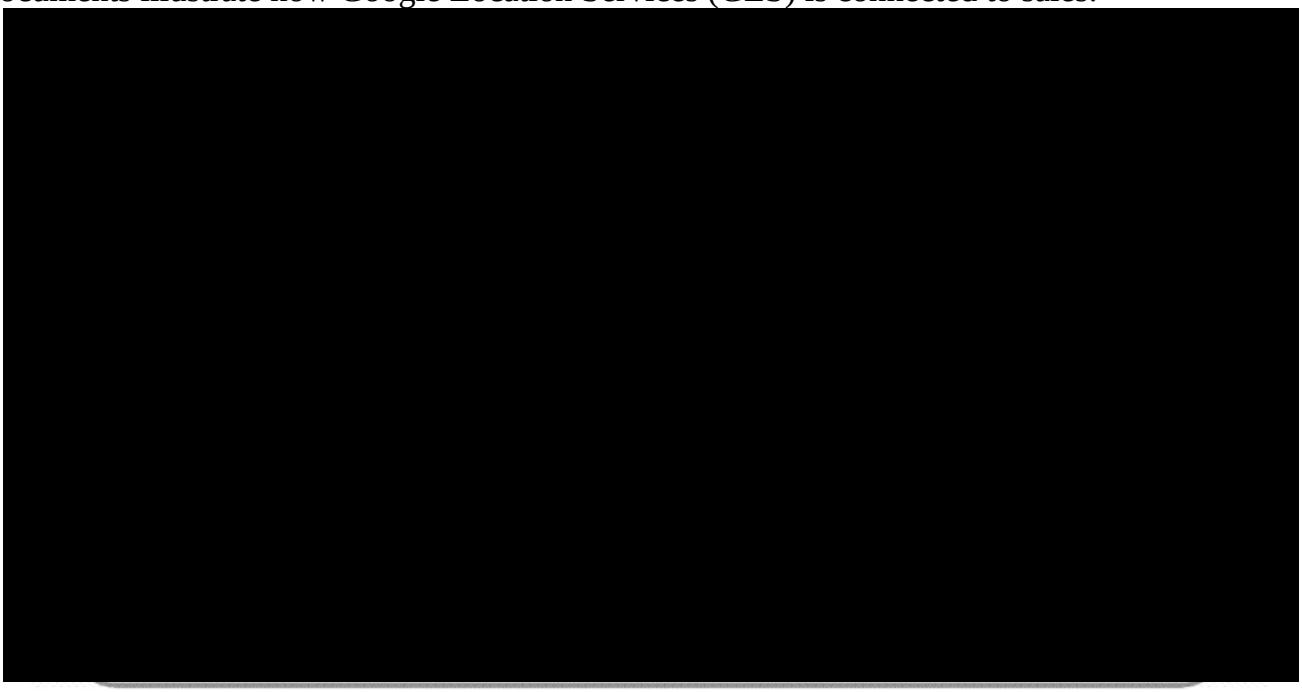
Google uses purportedly "free" services, as well as software embedded in Android devices, to (1) gather data about users and (2) target ad placements to those users. Google's revenue model depends on both of these steps. Google profits as advertisers bid more to appear higher and in more relevant search results. *See* SSOF ¶¶ 1–2.

1. Location has tremendous value to Google.

Google contends that its software, apps and services cost no *money*. But none of these is

[1] "In connection with" means a relationship, association, or involvement. *See* Section IV(B)(1).

"free." Even setting aside the fact that Google's OS and apps are sold with the Android devices, Google uses its apps to collect user *data*, which is a valuable form of *consideration*. Acknowledging this, Google's VP of Product for Ads, Jack Menzel, testified that products like Search and Maps are only "free" because Google can display ads to users. SSOF ¶¶ 3–5, 32, 42. Google frames its data acquisition as a means of providing users with better services, SSOF ¶ 5, but tells advertisers that it tracks user location data to better place their ads. SSOF ¶ 6. Internal documents illustrate how Google Location Services (GLS) is connected to sales:



SSOF ¶ 7. The above shows [redacted] including [redacted] creating [redacted] and [redacted] in the form of [redacted] through [redacted] *Id.*; *see also* SSOF ¶ 8 (Google location systems provide location for Ads); SSOF ¶ 9 (location from WAA is used to geo-target ads, and is [redacted]; SSOF ¶ 10 (geo-targeting is an [redacted]); SSOF ¶ 11 (user location [redacted]). Only in this litigation does Google argue that its location collection has no connection to its services.

Google is an intermediary: it provides services to users and, in doing so, connects those users with ads from advertisers through those services. *See* SSOF ¶ 12, Alessandro Acquisti,

Curtis Taylor, and Liad Wagman, *Economics of Privacy*, J. Econ. Lit. 2016, 442, 457 (2016) (companies like Google, Facebook, and Amazon "act as intermediaries, selling advertising space to advertisers on one end and providing services and products to users on the other"). Location matters on both sides of this transaction, as Google needs user location to serve geo-targeted ads, which covers [redacted] SSOF ¶ 13; *see also* SSOF ¶¶ 14–18 (describing Google's incremental revenue from its geo-targeting advertising business). Google's internal presentations exalt the revenues sourced from user location. SSOF ¶¶ 19–20.

Indeed, Google even prompts advertisers to geo-target its users, touting that doing so can boost an ad campaign's value. SSOF ¶ 21. Advertisers can bid more to show their ads more frequently to users in certain locations. SSOF ¶ 22. Or they can "radius target," which increases their bid when a user is within a certain radius of a business. *Id.* Google even reports to advertisers the efficacy of their geo-targeted ads. SSOF ¶ 23. And for some advertisers, Google itself selects the geo-targets, directly exploiting the user location data it collects. SSOF ¶ 24.

Location data is used for nearly all of Google's ad services, and Google admits in internal documents that location *drives* its ad revenue. *See* SSOF ¶ 25 ([redacted]. Location is [redacted] and better location signals result in [redacted] SSOF ¶ 26. With location playing such an important role in Google's business model, Google [redacted] SSOF ¶ 27 ([redacted]). Google will not stop until its knowledge about users is *perfected*:

[redacted]

SSOF ¶ 28. Given the backlash if Google told users that it compulsively catalogs every aspect of their lives, it instead chooses deceit.

2. Google uses deceptive and unfair practices to collect location data.

When consumers buy an Android device, it comes pre-loaded with functions that Google

uses to track the consumers' location. SSOF ¶ 29. This includes sensors in the device, as well as settings that are either part of the users' Google account or the Android OS (*e.g.*, Location History (LH), Web & App Activity (WAA), WiFi, and WiFi Scanning). *Id.* Some of these "Settings" (*e.g.*, WAA) are pre-enabled, meaning that, by default, Google uses them to collect location data. SSOF ¶ 54. When consumers purchase Android devices, they receive a device "configured to provide Google with the ability to collect, store and exploit a user's location information through the software on the device." SSOF ¶ 36. And because any Android device offering Google Mobile Services (GMS) (which includes popular Google apps) *must* use Google's version of Android, most Android devices are sold with the infrastructure Google uses to exploit location data. *Id.*

In addition to device sensors and Android settings, Google also collects, stores and exploits location data whenever users interact with Google's apps, products and services. SSOF ¶ 31. Google's IPGeo services enable "nearly all transactions with Google products or services [to] become an opportunity for Google to collect and exploit the user's location information—even if the user has disabled the location related settings." *Id.* One Google engineer explains, [redacted] *Id.* Another internal service at Google known as [redacted] aggregates location data to determine the user's best known location. SSOF ¶ 32. [redacted] and IPGeo cannot be disabled—[redacted]. SSOF ¶ 31. That location information is used for geo-targeting ads, even when device location and ad personalization are off. SSOF ¶¶ 31–32. Google puts in place this hidden scheme *before* users buy or interact with Google's products and services. SSOF ¶ 32.

B. <u>Google is involved in various types of sales and advertising of merchandise.</u>

The State alleges several theories in which Google's deceptive and unfair conduct (and omissions) are "in connection with" the sale or advertising of merchandise. *E.g.*, Compl. ¶¶ 22–26. For illustrating the "connection" to Google's unlawful conduct, this Response emphasizes three examples: (1) sales of Google's apps and services in exchange for users' data; (2) sales and advertisements of Android smartphones (both hardware and pre-loaded apps and software); and

(3) sales of "transactions" through Google's two-sided platform (services jointly and simultaneously consumed by consumers and advertisers, which are both sales and advertisements of merchandise under the CFA). These are not just one-time sales, but rather an ongoing series of transactions.

1. Google engages in ongoing sales of its services in exchange for a user's data.

Google provides apps and services (*e.g.*, Search, Maps, Assistant) to users.[2] In exchange, users agree to certain terms for collecting some personal data each time they use the services. SSOF ¶ 33. This type of transaction—*i.e.*, trading data for services—is a discrete type of business. *See, e.g.*, SSOF ¶ 34 (Ex. 12) Acquisti, *supra* at 448; (Ex. 48) P. Schwartz, *Property, Privacy and Personal Data*, 117 Harv. L. Rev. 2055, 2071 (2004). Each search (or other interaction where Google collects data) by a user is a sale, whereby Google provides a service and receives data in exchange. This is how service providers can "make money while not charging for their products." Schwartz, *supra*, at 2071; *see also* SSOF at ¶¶ 3–5, 32 ([redacted]). These are not "free" services, but rather trades for valuable consideration. SSOF ¶ 35. [redacted] SSOF ¶ 42 (emphasis added).

2. Google sells and advertises Android devices and pre-loaded software.

As explained above and in the Nielson Declaration, Google develops a proprietary version of the Android OS which pre-loads Google software on the device.[3] SSOF ¶ 36. As part of the set-up process in connection with purchasing an Android device, a user must either create an account or sign into a pre-existing account to meaningfully use the device. SSOF ¶ 37. During account set-up, Google presents users a choice to toggle certain location settings on or off, like LH and WAA. *Id.* Android devices have various settings that apply to the account-, device-, or app-level. *Id*. For example, LH and WAA are account-level settings, device location is a device-level setting, and location runtime permissions are app-level settings. *Id*. Google admits users

[2] Google's services are also offered on iOS devices. *See* SSOF ¶ 30.
[3] References to "Android" will be to Google's proprietary version.

must agree to its Store Sales Terms before buying a Nexus or Pixel device. SSOF ¶ 38. Its privacy policy and help pages are made available to users at all times during this process, including when purchasing a device. SSOF ¶ 39.

3. Google sells "transactions" between users and advertisers, which also involve the advertisement of merchandise.

As discussed above in Section III(B)(1), Google deals directly with users on an ongoing basis when selling its services in exchange for data. Consumers also play a necessary role in Google's ad business, which itself constitutes a sale under the CFA. As both the State's and Google's economists explain, Google's advertising business operates as a two-sided platform. SSOF ¶¶ 40–42. On one side, users receive services from Google such as apps (*e.g.*, Search, Maps) or the Android OS. *Id.* These services transfer location data to Google. *See* Section III(A)(2). In the meantime, on the other side of the platform, Google also sells advertising services, promising it can deliver ads to users in specific locations. SSOF ¶¶ 21–22. With Google's help, advertisers geo-target their ads, and Google delivers ads to users, relying on the location data it took from those users. SSOF ¶¶ 2, 6, 7, 9. While this process seems complex, it occurs in real time as a user interacts with Google's services. Through this two-sided platform model, Google offers no-charge services to users while earning billions in revenue from advertisers. SSOF ¶¶ 3–5.

Google's exchanges with users and advertisers are part of a single, congruent sale. The U.S. Supreme Court has emphasized that such two-sided platforms are "best understood as 'suppl[ying] *only one product*'—*transactions*" which is "*jointly consumed*" by the supplier's customers on both sides of its "two-sided transaction." *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2286 & n.8 (2018) (emphasis added). According to Google Chief Economist Hal Varian, [redacted] *See* SSOF ¶¶ 40, 42 (Ex. 53) Varian, Hal R., *The Economics of Internet Search*, Rivista di Politica Economica, p. 179 (2006); *see also* (Ex. 54) Rysman, Marc, *The Economics of Two-Sided Markets*, Journal of Economic Perspectives, Vol. 23, No. 3, Summer 2009, 125, 125, 128. Any unfair or deceptive conduct in connection with this two-sided platform is very much connected to the sale and advertisement of merchandise to users—who are needed for the platform to function at all. SSOF ¶ 41.

C. How Google deceives users.

Google uses a deceptive and unfair maze of settings and tools to collect, store and exploit its users' location data. Google's Motion does not challenge the deceptions, and so for the purposes of this Response, the existence of deceptive acts and practices should be a given. *See* 10/7/21 Hr'G Tr. at 4:9, 6:9 (noting the motion only challenges the "in connection with" element). Still, a short description of some of those acts, practices, and omissions is helpful for understanding their connection to the sales and advertising of merchandise.[4]

1. Google omits accurate information about location tracking in its advertisements.

When Google's apps and Android devices are sold and advertised, Google does not accurately inform users how it collects, stores and exploits their location data. For example, it fails to disclose that it will collect and exploit that data no matter what, and that various settings don't actually stop Google from doing so. SSOF ¶ 44. As Dr. Nielson explains, while consumers think they are buying an Android device, they are actually getting a device that Google uses to track their location—with much of that functionality built into the device. SSOF ¶ 36. Similarly, through Google's inescapable IPGeo and [redacted] IPGeo functions, "nearly all transactions with Google products or services become an opportunity for Google to collect and exploit the user's location information—even if the user has disabled the location related settings." SSOF ¶ 31.

This conduct is actionable under both the Act and Omission clauses of the CFA. *See AutoZone*, 229 Ariz. at 361–62 ¶ 14–15 (application of CFA's Act and Omission clauses). Because consumers pay money for Android devices, Google cannot dispute such pre-purchase practices and omissions are "in connection with" the sale or advertisement of merchandise.

2. Google affirmatively deceives users about its Location History settings.

Google's deceptive and unfair conduct often comes in the form of misleading disclosures that Google presents to users online, available 24/7. SSOF ¶ 39. Google makes these disclosures available to users before they purchase an Android device, set up a Google Account or download Google apps. *Id.* Moreover, the misleading disclosures are available to users at all times during their use of Google's services (the users' ongoing transactions with Google). In other words,

[4] For more details on Google's other deceptive practices, please see SSOF at ¶¶ 64–70, 78–81.

Google is constantly deceiving users through its disclosures. *See* SSOF ¶¶ 39, 43. For example, until the AP article in 2018, Google represented on its public help page, "[w]ith Location History off, the places you go are no longer stored." SSOF ¶ 45, *see also* SSOF ¶ 44–46 (telling Android users that LH was the only setting relevant to "the places your device has been"). This was not true. Before May 2019, even if LH was off, Google would still store a user's *precise* location using other location services, like WAA. SSOF ¶ 47. Even after May 2019, users could not prevent Google from saving their locations. *See infra* Section II(c)(4).

That LH defaults to "off" does not narrow the scope of consumers for whom this is a false representation—for example, a consumer who never enables LH would reasonably conclude the places they go are not stored since their LH setting has always been "off." SSOF ¶ 52 ([redacted]). Likewise, if a user disables LH before connecting that account to a new phone, the consumer would expect Google to stop collecting location information. *See* SSOF ¶ 50. Google employees knew this statement about LH was false and openly discussed it. *See* SSOF ¶¶ 48–49.

3. Google deceives users by not explaining WAA's relationship to location.

When downloading an app or engaging in a Google service, a user is presented with Google's privacy policy (also accessible at all times online), which, as late as May 25, 2018, made no mention of WAA's connection to location. SSOF ¶ 53. Users setting up a Google account before 2018 never received a disclosure that WAA collects location data from their new device, *id.*, despite WAA being on by default. SSOF ¶ 54. Moreover, users who download apps from the Google Play store didn't receive a disclosure that WAA collects location data when using that app or service. SSOF ¶ 55. Google knew that users were confused by this narrative, SSOF ¶¶ 48–52, and even its employees were shocked when they learned WAA tracked location. SSOF ¶ 56.

4. Google deceptively and unfairly exploits "coarsened" location data.

Users are given the option to disable their device's Location Master ("LM") so that Google would no longer collect or use any location information. But for Google, "off" does not mean "off." Rather, "off" means Google will still acquire location, but that data will be "coarsened." SSOF ¶ 57. Google takes user location no matter what users' settings are—even though it presents

the option of turning off location settings during device setup. *See* SSOF ¶ 58. Users have no control over the location data taken from certain sources, like IP addresses, which Google uses to serve ads. *Id.* That Google will *always* track user location, regardless of the settings they employ, is omitted from Google's disclosures. SSOF ¶¶ 33, 57–61. Google knows this policy (called "Off Means Coarse") defies user expectations, but still maintains the policy today. SSOF ¶¶ 59–61.

5. Google deceptively and unfairly collects location data through runtime settings.

Google represents to its users that when they are acquiring or interacting with apps, they can prevent the specific apps from obtaining location information through "runtime" settings. SSOF ¶ 67. But in reality, the apps have the ability to by-pass the users' preferences and obtain location information anyway. SSOF ¶¶ 68–70. Google has long been aware of this [redacted] yet has taken no steps to correct it. SSOF ¶ 68.

6. Google's omissions constitute a deceitful "practice" under the CFA.

The Arizona Supreme Court recognized that when a seller engages in "a habitual action and something more than an accumulation of a number of individual instances of conduct," this meets the definition of a "practice," which can be subject to the Act Clause of the CFA. *AutoZone*, 229 Ariz. at 361–62 ¶ 14. The above sections represent only a sample of Google's wrongful conduct,[5] and demonstrate Google developed deceptive (and unfair) *practices* toward users.

IV. LEGAL ARGUMENT

Google's unfair and deceptive conduct violates the CFA. Section IV(A) discusses some of the sales and advertisements of merchandise at issue here. Section IV(B) explains that "in connection with" is broadly construed to encompass Google's conduct. And as explained in Section IV(C), under any reasonable construction of the CFA, Google's deceptive acts and practices are "in connection with" the sales or advertisements of merchandise.[6]

[5] For other examples of Google's deceitful and unfair behavior, *see* SSOF ¶¶ 64–66 (designing user interface to deceive users into giving their location data); SSOF ¶¶ 78–81 (tricking users by obtaining location from ULR, sWAA, and WiFi, and targeting ads when Ads Personalization is off).

[6] Under Rule 56(a), Google bears a "heavy" burden of presenting "sufficient undisputed admissible evidence to establish its entitlement to judgment." *Wells Fargo Bank, N.A. v. Allen*, 231 Ariz. 209, 213 ¶ 17 (App. 2012). All reasonable inferences are drawn in the State's favor. *Id.* This burden never shifts, and the State can also successfully defend against the motion by showing a dispute of material facts on the issue. *Rhoads v. Harvey Pubs.*, 131 Ariz. 267, 269 (App. 1981).

The legal framework proposed by Google is wrong, but preliminarily, it is important to emphasize that extensive evidence supports a finding that Google's deceptive and unfair conduct is "in connection with" the sale or advertisement of merchandise under any plausible reading of the CFA. The State has laid out multiple types of pre-sale deception related to the various types of transactions in this case.[7] For example, Google's false disclosures are made available to users before and during the time of sale. SSOF ¶ 39. Likewise, Google's deceptive scheme to collect and exploit location information is programmed into the devices and software before the users' purchase or interaction with Google. SSOF ¶¶ 29, 32. And its Off Means Coarse policy completely unravels any of the user's pre-sale bargaining by tracking users no matter what their settings are. Even under its strained construction of "in connection with," Google's acts and omissions are pre-sale and part of the bargaining process.

A. <u>Google engages in multiple types of sales and advertisements of merchandise.</u>

1. The CFA makes clear a "sale" is "for any consideration," not just money.

Google's Chief Economist testified that [redacted] SSOF ¶ 42. The State agrees. The CFA's definition of "sale" covers "any sale, offer for sale or attempt to sell any merchandise for any consideration." A.R.S. § 44-1521(7).[8] Consideration includes "any benefit to the promisor or detriment to the promisee," *Best Choice Fund, LLC v. Low & Childers, P.C.*, 228 Ariz. 502, 513, ¶ 41 (App. 2011), *as amended* (Jan. 6, 2012) (internal citations omitted), and does not necessarily require a monetary exchange, *see Keg Restaurants Ariz., Inc. v. Jones*, 240 Ariz. 64, 76, ¶ 43 (App. 2016). Arizona courts have held that the CFA protects consumers even when consideration other than money is exchanged. *See Villegas v. Transamerica Fin. Serv. Inc.*, 147 Ariz. 100, 102 (App. 1985).

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[7] Google claims the State cannot raise "new theories." (Mot. at 10), but they are not new and in any event Google mistakenly invokes a principle that applies after the close of discovery. Google's case (*Hallgren*) relies on *Pickern v. Pier 1 Imports (U.S.), Inc*, 457 F.3d 963, 968–69 (9th Cir. 2006) to make its point, but that case is limited to situations where a party raises new factual assertions *after the close of discovery*. *See Lynn v. Invitae Corp.*, 466 F. Supp. 3d 1038, 1042 (D. Ariz. 2020). In that same opinion, Judge Tuchi also calls out the irony of a moving party citing lack of disclosure for a theory it identified in its own motion. The same logic applies here—discovery hasn't closed and Google is well-aware of the State's theories.

[8] "Merchandise" includes "any objects, wares, goods, commodities, intangibles, real estate, or services." *Id.* § 44-1521(5).

Both legal and non-legal dictionary definitions of "consideration" confirm this. *See Consideration*, *The American Heritage Dictionary of the English Language* (5th ed. 2020) (defining "consideration" as "7. *Law* Something promised, given, or done that has the effect of making an agreement a legally enforceable contract."); *Consideration*, *Black's Law Dictionary* (11th ed. 2019) ("1. Something (such as an act, a forbearance, or a return promise) bargained for and received by a promisor from a promisee; that which motivates a person to do something, esp. to engage in a legal act."). And a sale of information is a "sale" under the CFA.[9]

2. Google's provision of products and services are "sales" under the CFA.

Google's Motion does not seriously dispute what constitutes a "sale." Indeed, Google engages in numerous "sales" of merchandise to Arizonans, including the sales of services, objects, goods, and intangibles. The Court's Order denying Google's motion to dismiss (pp. 3–4) acknowledges the State has alleged that multiple types of sales and advertising are "connected to" Google's challenged acts and omissions—and most of those are unchallenged here by Google. The State will focus on just a few examples below to illustrate how they are "connected to" Google's deceptive and unfair conduct and omissions.

a. Google exchanging its services for user data constitutes a "sale."

As explained in Sections III(A)(1) and (B)(1), Google collects personal data from users in exchange for its apps and services. *See* SSOF ¶ 33, Ex. 45 ("When you use our services, you're trusting us with your information. . . . We collect information to provide better services to all our users – . . . like which ads you'll find most useful."); Schwartz, *supra*, at 2056–57 (personal information is an important currency and corporate asset to companies); *see also* Acquisti, *supra*, at 444 (personal data has "obvious and substantial economic value" that can be used for advertising). Each use of a Google service (like Search) is a sale under the CFA: the user receives a service (*i.e.*, "merchandise") in exchange for personal data (*i.e.*, "consideration"). *See* SSOF

[9] *See State ex. rel. Woods v. Sgrillo*, 176 Ariz. 148, 149 (App. 1993). In *Sgrillo*, the defendant sold information to consumers about low interest credit cards (which it then provided to credit card suppliers) and argued (like Google) the sale of information did not fall within the CFA's scope. *Id.* at 148–49. Rejecting this argument, the court found that "[t]he broadly remedial purposes of the CFA should not be defeated by niggling distinctions unrelated to the protection of consumers by the elimination of fraud." *Id.* at 149. The defendant's actions were made "in connection [to a] sale" even if "their acts were in the aid of a sale by another entity." *Id.*

¶ 42 (Google's advertising model is a [redacted]), *see also Calhoun v. Google LLC*, 526 F. Supp. 3d 605, 631-32 (N.D. Cal. 2021) (holding that Google's terms of service establish an actionable contract between users and Google).

b. The sale of Android devices for money is a "sale" under the CFA.

As detailed in Section III(B)(2), Arizona consumers purchase Google's devices and, in exchange, Google provides the product. Further, sale of other Android devices—even if not made by Google—still constitutes a sale for purposes of the CFA as Google provides the software with which the user interacts and which Google uses to deceptively and unfairly collect location data. A "sale" need not be made *by the defendant*. The CFA encompasses conduct "regardless of whether the deceiver is the seller." *Sgrillo*, 176 Ariz. at 149. The State expressly alleges this point (which the Court acknowledged in denying Google's motion to dismiss, 9/25/20 Minute Entry at 3–4 ¶ b), and Google does not challenge it here.

c. Google's sale of transactions is a sale under the CFA.

As discussed in Section III(B)(3), Google is a matching business. It provides merchandise to users in exchange for money and data, and then it also sells ad placements (also "merchandise") to third parties and displays those ads to its users. This exchange constitutes one cohesive transaction, which falls within the scope of the CFA. *See Ohio*, 138 S. Ct. at 2286 & n.8 (2018) (describing the two-sided platform as "'only one product'—transactions"). Google promises advertisers that it can place geo-targeted ads for them. On the other side of the transaction, Google offers services in exchange for the user's location information. With this information in hand, Google can now serve the geo-targeted ad, fulfilling its obligation to advertisers and role as a two-sided platform. SSOF ¶ 41. But Google only fulfills this promise (to the tune of billions in revenue) by deceiving users into giving their location data. This process is one "sale" for purposes of the CFA. The CFA covers the "use" of deceptive or unfair acts and practices—precisely what Google is doing here. *See Powers v. Guar. RV, Inc.*, 229 Ariz. 555, 561 ¶ 19 (App. 2012).

3. The ads Google shows users are "advertisements" under the CFA.

Google operates its platform in connection with the advertisement of merchandise. The CFA forbids any unlawful practice "in connection with the . . . advertisement of any merchandise."

A.R.S. § 44-1522. "'Advertisement' includes 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). Google publishes materials that induce the purchase of merchandise.

Google insists its advertising platforms should somehow be exempted from the purview of the CFA, but it fails to contend with the fact that the very next section after § 44-1522 makes clear that Google does not qualify for such an exemption. Namely, § 44-1523, titled "exemptions," provides that the CFA shall not cover an owner, publisher, or operator when it "has no knowledge of the intent, design, or purpose of the advertiser." *See also Powers*, 229 Ariz. at 561 ¶¶ 20–21 (discussing § 44-1523). Google does not argue that its geo-targeting advertising platform qualifies for this exemption, nor could it make such an argument. Google does not merely have knowledge, but actually facilitates the deceptive and unfair acts and practices of collecting user data and then using that data to target ads to particular users. SSOF ¶¶ 21-24. Under the well-established canon of *expressio unius*, Google is not exempt from the CFA.[10]

B. <u>The CFA covers Google's deceptive and unfair acts, practices, and omissions.</u>

1. Under the CFA, "in connection with" means "related to."

The CFA broadly prohibits the "[t]he act, use or employment . . . of *any* deception, deceptive or unfair act or practice . . . or concealment, suppression or omission . . . in connection with the sale or advertisement of *any* merchandise." A.R.S. § 44-1522(A) (emphasis added). Deceptive or unfair acts or practices are "in connection with" the sale or advertisement of merchandise if they have some relationship, association or involvement.

While not in a CFA case, Arizona courts construe the word "connection" to mean a relationship or association. *See State v. Bews*, 177 Ariz. 334, 336 (App. 1993) ("'connection' is defined as 'a relationship or association in thought.'"); *see also 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) (interpreting §44-1522(A) as "go[ing] beyond the moment of sale" and relying on *Bews*,

[10] For the same reason, Google's concern (Mot. at 13) about subjecting small advertisers to liability falls flat. Media outlets are not liable under the CFA as long as they meet § 44-1523. *See Powers*, 229 Ariz. at 561 ¶¶ 20–21.

177 Ariz. at 336, and other cases that "broadly constru[e] 'in connection with'").[11] As discussed below in more detail, Arizona (and other) courts also reject the notion that "in connection with" categorically excludes post-sale conduct.

Common dictionary definitions similarly confirm that "connection" requires only a logical relationship. The American Heritage Dictionary defines "in connection with" as "[i]n relation to; with respect to; concerning." *Connection, The American Heritage Dictionary of the English Language* (5th ed. 2020). That dictionary similarly defines "in relation to" as "[i]n reference to; in connection with: *This letter from the bank is in relation to your mortgage*." *Relation, The American Heritage Dictionary of the English Language* (5th ed. 2020). Thus, under the plain language of the term, a letter from a bank about a mortgage is "in connection with" the mortgage, even though the mortgage itself was entered into at an earlier time. "[N]o legal legerdemain should be used to change the meaning of simple English words so that the resulting interpretation conforms the statute to the sociological and economic views of judges or lawyers." *Kilpatrick v. Superior Court*, 105 Ariz. 413, 421 (1970).

Google contends (Mot. at 8) that § 44-1522 focuses on the "bargaining process," but that phrase appears nowhere in the statute. Indeed, limiting the CFA to deception that occurs only in the bargaining process would be tantamount to inserting a "reliance" element. Such a result is contrary to the express language of the statute, which applies "whether or not any person has in fact been misled." A.R.S. § 44-1522(A). Reliance is not an element of claims brought by the AG on behalf of the State. *People ex rel. Babbitt v. Green Acres Tr.*, 127 Ariz. 160, 168 (App. 1980).

If the Legislature wanted to limit the CFA to conduct occurring as part of the "bargaining process," it could have. The Legislature freely uses the term "induce" elsewhere in the CFA—the first provision defines "advertisement" as "the attempt . . . *to induce directly or indirectly any person to enter into any obligation*." A.R.S. § 44-1521(1) (emphasis added). The Legislature did not include such a limitation in §44-1522(A), which confirms it did *not* intend that narrower scope here. *See, e.g., Ballesteros v. Am. Standard Ins. Co. of Wisc.*, 226 Ariz. 345, 349 ¶ 15 (2011)

[11] This decision issued before 1/1/2015 and is not precedential under AZ Supreme Ct. R. 111(c). But it shows that another court has borrowed the definition from *Bews* for purposes of construing "in connection with" in the CFA.

("That the legislature included this requirement in some statutes, but not in [another], indicates that the omission of any such requirement . . . was intentional.").

2. Even if the CFA requires more than a tangential relationship, it contains no exception where parts of a scheme are post-sale or one-step removed.

Google tries to focus on whether conduct is pre- or post-sale, but that is not the correct framework for analyzing the CFA. Google has invented a bright-line rule not in the statute, which it now asks the Court to adopt. To evade the CFA, Google contends that any conduct is immune from the CFA—no matter how related the conduct is to the sale or advertising of merchandise—so long as the conduct occurs after the sale. Google is mistaken.

First, Google identifies no statutory language that limits the CFA to only pre-sale conduct, much less the bargaining process. *Green Acres Tr.*, 127 Ariz. at 164 ("The terms of this provision are obviously quite broad and are not subject to restrictive interpretation because the Act is generally to be considered remedial in nature."), *superseded by statute on other grounds*; *Madsen v. W. Am. Mortg. Co.*, 143 Ariz. 614, 618 (App. 1985) (CFA "is a broadly drafted remedial provision designed to eliminate unlawful practices in merchant-consumer transactions"). The relevant inquiry is simply whether the challenged conduct is "in connection with" a sale or advertising of merchandise—not whether it is pre-sale or part of a bargaining process.[12]

Second, Arizona courts have rejected the notion that the CFA is limited to pre-sale representations. In *State ex rel. Brnovich v. 6635 N. 19th Ave., Inc.*, No. 1 CA-CV 15-0550, 2016 WL 7368620, ¶ 17 (Ariz. Ct. App. Dec. 20, 2016) (mem. decision),[13] the court rejected the same argument advanced here by Google—*i.e.*, that "in connection with" limits the CFA to pre-sale representations. In that case, the AG sought to enforce pre-complaint discovery as part of an investigation of a landlord. The landlord advertised clean apartments, but an inspection revealed that the units were in disrepair. *Id.* ¶ 4. The landlord tried to limit the discovery by arguing that the "in connection with" language "necessarily limits application of the CFA to [the landlord's]

[12] Google's motion advocates for the proposition it can mislead Arizona consumers however it wants after a user downloads an app. *See* Mot. at 14–17. A shocking claim, particularly because Google can update the behavior of any of its services without notifying users.

[13] This decision is being cited for persuasive value pursuant to Ariz. Supreme Court Rule 111(c).

pre-lease representations." *Id.* ¶ 17. The court found "no legal support for [this] argument." *Id.* Indeed, the *19th Ave.* court cited two earlier Arizona decision for the contrary position. *Id.* (citing *Schmidt v. Am. Leasco*, 139 Ariz. 509, 511 (App. 1983) (consumer fraud under CFA found in post-sale leasing arrangements, based on billing recreational vehicle owner for damages that should have been paid by renters) and *Howell v. Midway Holdings, Inc.*, 362 F. Supp. 2d 1158, 1164–65 (D. Ariz. 2005) (consumer fraud under CFA based on lessor's alteration of lease agreement after lessees signed it)).

Similarly, in *Dunlap v. Jimmy GMC of Tucson, Inc.*, the court applied the CFA to statements that occurred "prior to, *as well as after*" the consumer "accept[ed] delivery," which was *after* they signed a binding contract that contained a "disclaimer." 136 Ariz. 338, 342 (App. 1983) (emphasis added). The Dunlaps bought an RV, but complained of several problems after delivery. *Id.* at 340. Before accepting delivery, they were assured that all problems would be remedied. *Id.* After accepting delivery, they discovered additional problems, which they were again assured would be fixed—which did not happen. *Id.* The Dunlaps brought a CFA claim and prevailed at a jury trial, and the district court denied the defendant's JNOV. *Id.* at 339–40. The Court of Appeals affirmed, specifically noting that representations were made to the plaintiff before and *after* the acceptance of delivery, and that the jury could have determined that those representations were in connection to a sale. *Id.* at 342.[14]

As explained above, the phrase "in connection with," as used in the CFA, "is a broad phrase that goes beyond the moment of sale." *Sands*, 2014 WL 1118149, at *4 ¶ 17. Unfair and deceptive conduct is prohibited under the CFA, so long as it is "connected" to the sale or advertising of merchandise. There is no categorical exception for "post-sale" deception.

[14] The Court referenced *Dunlap*, *Schmidt*, and *Howell* in its order denying Google's Motion to Dismiss (at 9) as only involving pre-sale misrepresentations. A close read of these cases, however, reveals that post-sale (or post-service) misrepresentations were also held to support a violation. For example, in *Howell*, the plaintiffs "clarified" that their ACFA claim was based defendant's alteration of the Lease Agreement "after they signed it." 362 F. Supp. 2d at 1164. In that same order denying Google's Motion to Dismiss (at 8), the Court cited *Dunlap*, noting "Conduct that occurs prior to or after the consumers acceptance of merchandise can qualify." Similarly, this Court identified *Sands* as only involving misrepresentations made before completion of the sale. But additional misrepresentations were made after the plaintiff wished to proceed upon inspecting the vehicle and learning of the repairs needed. 2014 WL 1118149, at *1.

Third, contrary to Google's suggestion (Mot. at 14), the CFA "does not expressly require a direct merchant-consumer transaction." *Watts v. Medicis Pharm. Corp.*, 239 Ariz. 19, 28 ¶ 31 (2016). It encompasses conduct "regardless of whether the deceiver is the seller." *Sgrillo*, 176 Ariz. at 149. In this vein, "[t]he CFA does not limit liability to the originator of a misrepresentation. Rather, it broadly extends liability to any person who 'uses' the misrepresentation in connection with the sale of merchandise." *Powers*, 229 Ariz. at 561, ¶ 19.

Thus, even when the deceptive or unfair act is one step removed from the transaction, Arizona courts consider the act "in connection with" a sale or advertising. In *State of Arizona v. Valley Delivery*, Superior Court Judge Mikitish held that a company that gathers data from consumers for use in a transaction with a third party could be liable under the CFA. Minute Entry, CV 2020-002880 *2–3 (May 22, 2020); SSOF ¶ 71. The defendant left fake missed-delivery tags at Arizona homes, which prompted consumers to call and provide personal information. *Id.* The defendant then gave that information to other companies for marketing. *Id.* The defendant moved to dismiss, arguing its practices were not covered by the CFA because its door tags did not induce any person to acquire merchandise. *Id.* The court denied the motion, holding that the door tags were "in connection with" a sale or advertisement of merchandise:

> [The tags were] left for the purposes of gathering information which, in turn, is given to telemarketers for the purpose of contacting individuals to buy services or products. While the tags themselves do not advertise a product or service, they are only one step removed.

Id. The same logic should apply here. Google's deceptions are, at most, only "one step removed" from the sale and advertising of merchandise, and the CFA applies with full force.

In the context of federal securities law, the U.S. Supreme Court has also held that deception one step removed from the sale of securities is nonetheless "in connection with" with a sale. In *S.E.C. v. Zandford*, the defendant sold his customer's securities and used the proceeds for his own benefit without the customer's knowledge. 535 U.S. 813, 815 (2002). The defendant argued that because his sales of securities were perfectly lawful, his post-sale conversion of funds was not "in connection with" the sale of securities and therefore outside the scope of Rule 10(b)-5. *Id.* at 820. Rejecting that argument, the Supreme Court explained that the defendant's manipulative conduct

was part of a "fraudulent scheme," and "the sales are properly viewed as a 'course of business.'" *Id.* at 820–821. Because the statute was intended to be "construed not technically and restrictively, but flexibly to effectuate its remedial purpose," the defendant's "fraud coincided with the sales themselves" as "each sale was made to further [the defendant's] fraudulent scheme." *Id.* at 819–20 (internal citations omitted). Similarly, Google employs a fraudulent scheme as part of a "course of business," which it put in place before any sales to or transactions with consumers. *See* SSOF ¶¶ 29, 32, 39. It deceptively harvests user location data, which it then uses to sell advertising placements. Just like in *Zandford*, this relationship satisfies the "in connection with" element.

3. Other courts persuasively reject Google's argument.

a. Other States' cases and the 2013 "unfairness" amendment to § 44-1522(A).

Courts around the country have rejected attempts to impose a temporal restriction into acts like the CFA. For example, the Iowa Supreme Court—interpreting a statute that is similar to Arizona's law[15]—expressly rejected the notion that only pre-sale conduct is governed by their CFA. *State ex rel. Miller v. Cutty's Des Moines Camping Club, Inc.*, 694 N.W. 2d 518, 525–26 (Iowa 2005). The Iowa Court began by noting that, like Arizona's law, its CFA does not define "in connection with." *Id.* It then rejected the bright-line rule Google advances here:

> [W]e point out that nothing in the Act places a bright-line temporal limit upon the Act's purview, as the [defendant] contends. The Act merely requires the activity be "in connection with," not "prior to" or "at the time of," the sale of the merchandise. Nothing in the phrase "in connection with" constrains the Act's scope to only those business practices occurring prior to or at the time of the sale.

Id. The court refused to "judicially superinscribe" a temporal limit into the act, which "would not only violate well-established canons of statutory interpretation, but also conflict with the liberal interpretation we must give the statute." *Id.* at 526. It concluded that the Iowa CFA encompasses post-sale acts, and it cited courts across the country holding the same.[16] *Id.* at 526–27 (including

[15] The Arizona Supreme Court cited the Iowa CFA as similar to Arizona's, and followed the Iowa Supreme Court for construing another aspect of the CFA. *AutoZone*, 229 Ariz. at 363 ¶ 22.

[16] Even the dissent in *Miller* rejected a bright-line rule, acknowledging "there may be instances in which events occurring subsequent to the sale or lease of merchandise are so preordained by the sale or lease transaction that they warrant action under" the CFA. *Id.* at 531 (Ternus, J., dissenting). Here, the evidence shows that Google's deceptive and unfair conduct is very much "preordained"—it is programmed into merchandise by Google *before* sales to consumers.

Delaware, Ohio, Colorado, Illinois, Texas, and Washington cases, and noting contrary statutes only forbid fraud, not unfair practices); *see also Showpiece Homes Corp. v. Assurance Co. of Am.*, 38 P.3d 47, 58–59 (Colo. 2001) (holding that Colorado's CFA applies to post-sale activity because the statute makes no temporal limitation).

Further confirming the absence of any temporal restriction is a 2013 amendment, which added "unfair act or practice" to the CFA. *See* 2013 Ariz. Sess. Laws ch. 143 § 4 (1st Reg. Sess.). In doing so, the Legislature intended to "track[] the standard applicable in federal law and in most other states."[17] The legislative history explains that adding "unfair" would "expand" the CFA's reach to cover "all forms of practice which are unfair or deceptive to users."[18] Thus, the Legislature wanted to broadly cover unfair conduct without any bright-line limitations, consistent with federal and other states' laws. *See State v. Patel*, 251 Ariz. 131, 139 ¶ 31 (2021) ("[l]egislative materials . . . underscore[] the motivation for and goal of the legislation"). Again, the Legislature has never and did not limit "in connection with" only to pre-sale conduct.

Construing Arizona's CFA consistently with federal and most other states' laws, there is no exception for post-sale conduct. *See e.g.*, *Miller*, 694 N.W.2d at 527 (placing a temporal limitation would "eviscerate" the act's protection against unfairness) (collecting cases); *In re Sw. Sunsites, Inc.*, 105 F.T.C. 7, *113 (1985) *aff'd*, 785 F.2d 1431 (9th Cir. 1986) (finding unfairness where consumers "continue[d] paying substantial amounts for land under their purchase agreements . . . through a variety of continuing misrepresentations" and noting "[t]here can be no benefit to society from the dissemination of misrepresentations that induce consumers to continue making payments that they might very well have terminated if they had not been misinformed"); *F.T.C. v. Hispanic Global Way, Corp.*, No. 14-22018-CIV, 2014 WL 12531538, at *2 ¶ II(J) (S.D. Fl. 2014) (defendant's post-sale conduct was punishable by the FTC Act, even though "[d]efendants already had the consumer's money for the purchase price payment"); *Orkin Exterminating Co., Inc. v. F.T.C.*, 849 F.2d 1354, 1357, 1365, 1368 (11th Cir. 1988) (upholding

[17] Floor Amendment, https://www.azleg.gov/legtext/51leg/1R/adopted/2396SHOOTER1025.pdf. "The CFA was based on legislation developed by the Council on State Government's Committee on Suggested State Legislation." *AutoZone*, 229 Ariz. at 363 ¶ 22.

[18] *See Suggested State Legislation*, Vol. XXVI, at C-4 https://www.azleg.gov/legtext/51leg/1r/summary/h.hb2396_concurrefusememo.pdf.

an FTC order that punished Orkin for unilaterally increasing fees years after bargaining process).

Google fails to contend with the "unfair" language in the CFA. It tries (Mot. at 8) to restrict "in connection with" to "the bargaining process" by arguing such a limitation is "implicit in what it means for a practice to be 'deceptive' in the first instance." But an "unfair" practice need not be "deceptive" to fall within the purview of the CFA. Google fails to explain how its overly restrictive definition could be reconciled for "unfairness" claims. The State alleges both deceptive *and* unfair conduct. The "unfair" acts are not addressed by Google's Motion.

b. FTC cases.

The Legislature also intended the CFA to work in tandem with the FTC Act and directed courts to use the FTC's interpretation of the FTC Act as guidance. SSOF ¶ 82. The Council of State Governments, *Suggested State Legislation*, Volume XXVI, at A-71 (1967) at C-5; *see also* A.R.S. § 44-1522(C) ("[i]t is the intent of the legislature, in construing subsection A, that the courts may use as a guide interpretations given by the federal trade commission and the federal courts to 15 United States Code §§ 45, 52, and 55(a)(1)"). The FTC has brought cases for deceitful data collection practices, confirming that Google's activities are well within the purview of the CFA. *See, e.g.*, SSOF ¶ 72 (Compl. ¶¶ 32–34, *FTC v. VIZIO, Inc.*, Case No. 2:17-cv-00758 (D.N.J. Feb. 6, 2017) (alleging that sharing sensitive television viewing data without consent is unfair); SSOF ¶ 73 (Compl. ¶¶ 4–18, 35-36, *Lenovo*, FTC Docket No. C-4636 (Dec. 20, 2017) (alleging that pre-installation of software to deliver ads, without "adequate notice or informed consent," is unfair). The FTC has also stepped in to stop abuse of location tracking by companies seeking to geotarget ads. *See* SSOF ¶ 74 (Compl. ¶¶ 22–38; 51–54, *United States v. inMobi Pte Ltd.*, No. 3:16-cv-3474 (N.D. Cal. June 22, 2016) (alleging defendant engaged in deceptive practices when it tracked users' locations to serve geotargeted ads without adequate disclosures); *see generally* SSOF ¶ 75 (Compl. *Goldenshores Techs., LLC*, FTC Docket No. C-4446 (Mar. 31, 2014) (alleging that an app engaged in unfair and deceptive practice by tracking user location and transferring information to advertisers, without adequate disclosures to users)).

c. Australia decision.

Earlier this year, an Australian court rejected the precise arguments Google advances here,

finding that Google's deceptive LH and WAA disclosures satisfy a similar "in connection with" element. The Australian Competition and Consumer Commission ("ACCC") sued Google for violating a number of consumer fraud statutes. *See* SSOF ¶ 76 (*ACCC v. Google LLC*, 2021 FCA 367 (NSD 1760 of 2019)). Google contended that its representations could not be "in connection with the promotion or supply of goods or services" because its statements were only made to users "who had already purchased, and commenced to use their Pixel phones." *ACCC*, ¶ 339. The Australian court rejected that argument, explaining "the words 'in connection with' are of wide import" and "do not imply a necessary temporal limitation that the representations occur before or at the time of supply of goods or services." *Id.* ¶ 340. The court held Google's conduct was "in connection with" the supply of the phones and the "services provided by and through those phones via the pre-installed software." *See* SSOF ¶ 76 (for this and other international cases involving Google's location harvesting practices).

4. Google's case law is distinguishable.

The State has alleged, with extensive evidence, that Google crafted deceptive and unfair practices and omissions before selling or advertising devices, services and other merchandise. The State further alleges that Google engages in on-going transactions with consumers, and that its deceptive and unfair conduct coincides with those transactions on an ongoing basis. Rather than contend with these facts, Google relies on cases that involve discrete transactions unconnected to any sale and that are otherwise distinguishable.

For example, Google cites *Rinehart*, where a consumer accused GEICO of violating the CFA by making two promises through a letter that was provided after the consumer chose to use GEICO's repair services. *Rinehart v. Gov't Emps. Ins. Co.*, No. CV-19-01888-PHX-DLR, 2019 WL 6715190, at *4 (D. Ariz. Dec. 10, 2019). The court held that the additional representations were unrelated to the consumer's original agreements with GEICO, and they were not alleged to be connected to any other sale or advertising of merchandise. Similarly, Google relies on *Devore*, where a consumer brought a CFA claim based on the bank's statements "in connection with efforts to modify the repayment schedule for an already existing debt." *Devore v. Nationstar Mortg. LLC*, No. CV-14-08063-PCT-DLR, 2015 WL 12426151, at *8 (D. Ariz. Mar. 11, 2015). The court

dismissed the claim because the statements did "not relate to the sale or advertisement of [a loan], but instead to modifying the payment schedule for [the loan] previously purchased." *Id.* Even if the "loan structure services" could be considered merchandise, the plaintiff failed to plead any sales or advertising or those services. *Id.* Neither case is instructive here.

Unlike these cases, Google's unfair and deceptive conduct predates, coincides with, and relates directly to the merchandise that Google sells and advertises. Even when Google's deceptive collection of location data occurs after (and before) the sale of the phone, that deceptive practice relates to pre-sale representations—it was preordained when Google pre-programmed software to effectuate its deceptive scheme. Unlike *Rinehart* and the other cases Google cites, Google also deceptively induces consumers to remain in a relationship where the consumer continues to provide consideration—payments or something else of value to the seller, namely data. Google is thus involved in continuous and on-going sales with consumers.

As discussed above, cases like *19th Ave.* and others from around the country like *Miller* emphasize that there is no temporal limit on CFA claims brought by the AG. Tellingly, *all* of the cases Google cites by involve a *private* plaintiff, not claims asserted by the AG. The distinction is important. For a CFA claim brought by the AG, deceptive or unfair practices are actionable "whether or not any person has in fact been misled, deceived or damaged thereby." A.R.S. § 44-1522(A); *see also Green Acres*, 127 Ariz. at 168 ("reliance or actual deception or damage is not a prerequisite to a consumer fraud action brought by the attorney general"). In contrast, when consumers assert an implied cause of action under the CFA, they must prove their own *reliance*. *Kuehn v. Stanley*, 208 Ariz. 124, 129 (Ct. App. 2004) (private plaintiff must prove "consequent and proximate injury resulting from the promise," and such injury only "occurs when a consumer relies . . . on false or misrepresented information"). When courts consider "in connection with" language in a private CFA claim, they focus on the "reliance" aspect—which is inapposite here.

For example, although *Rinehart* (cited by Google) mentions the "in connection with" element, the court mostly focuses on reliance, explaining that GEICO's statements were not 'in connection with" the earlier transaction because the misrepresentations "could not have induced Plaintiffs." *Rinehart*, 2019 WL 3715190 at *4. Similarly, in *Sullivan* (also cited by Google), the

court expressly premised its ruling on "the purpose of the implied private cause of action," explaining that, as subsequent purchase, the plaintiff "is not within the class of consumers intended to be protected by the implied private cause of action under the CFA." *Sullivan v. Pulte Home Corp.*, 231 Ariz. 53, 61 ¶ 38 (Ct. App. 2012), *vacated in part, Sullivan v. Pulte Home Corp.*, 232 Ariz. 344 (2013). Likewise, *Contreras* and *Devore* are also private right of action cases.

Ignoring the Iowa decision in *Miller* and similar cases, Google instead relies on Maryland case law, but those authorities do not advance Google's positions. As an initial matter, *Luskin's, Inc. v. Consumer Prot. Div.*, 726 A.2d 702, 713 (Md. 1999) does not deal with the "in connection with" element and, instead, holds that materiality is an element of affirmative consumer fraud. At best, *Luskin's* just confirms that Maryland's statute is different from Arizona's CFA, as the "Act" Clause of the Arizona CFA does not have a materiality element. *See* RAJI (Civil) CTI 21 (7th ed.) (2020); *see also AutoZone*, 229 Ariz. at 361 ¶¶ 10–12 (distinguishing between the Act and Omission Clause). Google also cites two other private actions from Maryland—*Shreve v. Sears, Roebuck & Co.*, 166 F. Supp. 2d 378, 417, 420 (D. Md. 2001) and *Pucci v. Annapolis Sailyard, Inc.*, No. CIV. JKB-10-2968, 2011 WL 3793762, at *1 (D. Md. Aug. 24, 2011)—both of which emphasize the "reliance" requirement that is not part of the AG's burden here.

In the same vein, Google primarily cites cases that involve discrete transactions, but other courts have emphasized that a temporal limitation is particularly ill-suited for the "in connection with" element when the allegations concern a continuing set of sales or transactions. For example, in *Conway v. Citimortgage Inc.*, 438 S.W.3d 410, 412 (Mo. 2014), a mortgage company wrongfully foreclosed on a home, which prompted the homeowners to sue under Missouri's CFA. *Id.* at 413. The mortgage company contended that its challenged conduct was outside the CFA because it occurred several years after the loan was bargained for and was post-sale activity. *Id.* The Missouri Supreme Court rejected that argument:

> [a loan] creates a long-term relationship in which the borrower and the lender continue to perform various duties . . . over an extended period of time. Because each party must continue to perform these duties for the life of the loan, the sale continues throughout the time the parties perform their duties.

Id. at 415; *accord Zandford*, 535 U.S. at 814 (identifying a "fraudulent scheme" as occurring

during the "course of business"). The framework of pre- and post- sale is not particularly helpful in the context of on-going transactions as alleged here.

Google (Mot. at 15) also quotes a passage from Judge Posner's decision in *Gavin v. AT & T Corp.*, 464 F.3d 634 (7th Cir. 2006), *as amended* (Sept. 11, 2006), which interprets "in connection with" from the Securities Litigation Uniform Standards Act (SLUSA). But *Gavin* does not support Google's proposed bright-line rule either. On the contrary, *Gavin* proposes a test—"[i]f what happens is traceable to something that occurred before the sale," it would still be "in connection with" the sale. *Id.* at 639. Applying Judge Posner's test to the facts here, Google's devices, apps and services do not unexpectedly start transmitting location data after consumers complete their transactions with Google. Rather, like the "defective engine block" described by Judge Posner, Google's devices, apps and services are pre-programmed to transmit data deceptively. Extensive evidence confirms that Google's conduct is "traceable" to the sales.

The Ninth Circuit construes the SLUSA more broadly, explaining that "in connection with" simply requires more than a tangential relationship. *See, e.g.*, *Madden v. Cowen & Co.*, 576 F.3d 957, 966 (9th Cir. 2009) ("a relationship in which the fraud and the stock sale coincide or are more than tangentially related.") Under this standard as well, the evidence strongly supports a finding that Google's deceptive conduct is "connected to" the sales alleged by the State.

Google's proposed legal framework is incorrect. Under any of the tests articulated in the case law, the evidence supports a finding that Google's deceptive conduct satisfies the "in connection with" element. Google's deceptive practices are programmed into devices, software, apps and services for engaging with consumers. SSOF ¶¶ 32, 39. Google also provides descriptive disclosures (including its false LH help center page) which are available to consumers at the time of sale. SSOF ¶¶ 39, 43. Further, Google and its users are constantly engaging in sales—each day, thousands of times in Arizona, users engage with Google's services, and Google (1) takes the data of users as consideration and (2) uses that data to profit by placing ads in front of those users. Through Google's deceptive location tracking mechanism, every interaction becomes an

opportunity for Google to collect and exploit user location data.[19] SSOF ¶¶ 31–32.

C. The evidence shows Google's deceptive and unfair practices are "in connection with" the sale and/or advertisement of merchandise.

Google's deception of consumers extends far and wide—both at the beginning of its engagement with users (*i.e.*, marketing its apps, services, and devices) and when a user is engaging with Google's services and products. Indeed, Google constructs this deceptive scheme before any interactions with consumers. Its omissions and representations are connected to at least three types of "sales" under the CFA: the continuous sale of apps and services, sale of devices, and continuous sale of transactions matching users and advertisers. Google's deceptive and unfair acts are deeply intertwined with "sales" and advertising, and they are subject to the CFA.

1. Google deceives users in connection with ongoing sales of services.

Google's deceptive and unfair acts and practices are interwoven into its transactions with consumers. Each time a user transacts with Google (*e.g.*, by viewing a map or using an app), Google takes more than what users understood they bargained for, just as in *AutoZone*, where the absence of clear pricing created a triable issue. *See* 229 Ariz. at 362 ¶¶ 14–15. Consumers are also induced to stay in the merchant-consumer relationship and engage in further data-for-services sales through these deceptive acts and practices. *See 19th Ave.*, 2016 WL 7368620, at *4; *see also Sw. Sunsites*, 105 F.T.C. 7, *113; *Miller*, 694 N.W.2d at 525–26; *Conway*, 438 S.W.3d at 412.

Extensive evidence shows that Google's deception is connected to these sales. Google deceives users into handing over valuable consideration (location data) "in connection with" each "transaction" for services. *See* Section III(A)(1), *supra*. Even before they buy any service or device, Google leads users to believe it will only collect or exploit their location data in certain ways and that users can control this process. Those representations are untrue and, ultimately, choice over location tracking is an *illusion*. *See* Sections III(C)(1), (4). Similarly, users wishing to know the terms of their transaction with Google are directed to disclosures concerning WAA, LH and other settings that create a deceptive net impression and, in some cases, are downright

[19] For instance, when Google wanted to increase the use of LH, it [redacted] SSOF ¶ 62. This change resulted in [redacted] just by Google making one change to the way LH was presented. *Id.*

false in describing Google's tracking of location data.[20] *See* Section III(C). The settings the user activates, including LH, WAA, and others, are in connection with the transaction of data for services. SSOF ¶¶ 37, 58. Likewise, when users download or interact with an app (both of which are "sales" under the CFA), Google represents that it will honor runtime settings—which is untrue. SSOF ¶¶ 67–70. When users provide Google with their location data in exchange for Google's applications and services, they are deceived into believing they can control how Google takes this data.[21]

As explained, Google's misconduct is part of a scheme it sets up to mislead consumers even before they interact with Google. This is not just "post-sale" conduct, and no bright-line rule excludes this conduct from the CFA. At a minimum, determining whether the conduct and omissions are sufficiently "connected" is an issue to be decided by the trier of fact. *See S.E.C. v. Radius Cap. Corp.*, No. 2:11-CV-116-FTM-29, 2013 WL 298209, at *4 (M.D. Fla. Jan. 25, 2013) (denying defendants' summary judgment motion on Rule 10b-5 claim based on genuine issues of material fact as to whether the misrepresentations were "in connection with" sale of security).

2. Google deceives in connection with the sale and advertisement of devices.

Consumers are told (through representations, omissions and the existence of settings) that when they purchase Google's Pixel or Nexus phone or an Android device that they are acquiring a phone that they can control. They are mistaken. To use an Android device in any meaningful way, users must set up a Google account. *See* Section III(B)(2). As part of the set-up process, and in connection with the sale of the Android device, the user must either create or sign into his or her Google account. SSOF ¶ 37. As part of that process, Google also presents users a choice to toggle certain location settings on or off, like LH and WAA, and also cites to its privacy policy

[20] When the AP article exposed Google's deception regarding LH and WAA settings, [redacted] SSOF ¶ 77.

Google's claim that the State alleges a "hodgepodge of post-transaction conduct" (Mot. at 14:14, 15:10–17:23) is wrong. When Google infers a user's location using an IP address, tricks them into providing location through a deceptive setting or toggle, takes their location through an app when that app's permission is denied, or continues to use their location data when Ads Personalization is turned off and the user requests deletion of their data, each of these deceptive devices are used in connection with Google providing its "free" services. *See* SSOF ¶¶ 78–81. Users exchange some data for Google's services, and Google takes their data in connection with their use of the service. Each time this occurs is a sale/transaction, with Google taking more data than users understand.

and other disclosures. *See* Part III(B)(2). These disclosures made during the setup process are made in connection with the sale of the device. *See Dunlap*, 136 Ariz. at 342 (holding that representations made before and after delivery of a vehicle were made in connection with the sale); *Sands*, 2014 WL 1118149, at *4 ¶ 17. The affirmative representations made on the LH page, the non-disclosure of WAA's ability to track location, and the existence of the Off Means Coarse policy are thus all actionable under the CFA, as they represent acts, practices (as defined by *Autozone*, 229 Ariz. at 361–62 ¶ 14), and omissions that are related to the device's sale. *See generally* Section III(C). At the very minimum, these issues present a fact question for the factfinder.

In the ACCC litigation, the Australian court (at ¶ 101 of its Order (Ex. 115)) concluded that Google's representations, if made, were "'in connection with' the supply or promotion of the Android OS, the Pixel phone and various Google services." "Google represented that the Android OS had 'performance characteristics' which it did not have including that the Location History setting controlled whether Google would obtain personal data about a user's location and that if the setting was 'off' Google would not obtain personal data about a user's location from a linked device or use that data. Equivalent particulars were provided with respect to 'uses' and 'benefits' of the Android OS." *Id.* A reasonable trier of fact could reach same conclusion here.

3. Google's conduct is in connection with its sale of ad placements.

As shown in Section III(B)(3), Google's business model of connecting users and advertisers represents one "transaction." *Ohio*, 138 S. Ct. at 2286 & n.8 (two-sided platforms are "best understood as 'supplying *only one product*'*— the transaction*" which is "*jointly consumed*" by the supplier's customers on both sides of its "two-sided transaction") (emphasis added). This also involves sales, but also "advertisements" under the CFA, and Google does not qualify under the "exemptions" in § 44-1523. *See* Section IV(A)(3). And the CFA covers the "use" of the unlawful conduct. *Powers*, 229 Ariz. at 561 ¶ 19.

Extensive evidence—including Google's internal documents, testimony from its Chief Economist and expert opinions submitted by the State—show that Google's unfair and deceptive conduct and omissions are related to these on-going sales and advertising. *See* Section III(B)(3),

supra. Google's challenged acts and practices aren't just "in connection with" these transactions—they are a *necessary* component for them to occur in the first place. And it uses that information to engage with advertisers, promising advertisers it can put their ads in front of audiences the advertiser has geo-targeted (or which Google has geo-targeted for them). Google then returns to those tracked users (and even users who think they are untracked) and serves the ads, feeding Google's revenue model. This process represents a single congruent sale that the user is party to—the sale to the advertiser would not exist but for the taking of the location data, *i.e.*, Google's collection of location data is in connection with its sale of its advertising services.[22]

Based on its internal documents, Google understands the goods and services it provides are predicated on this exchange—which is why [redacted] of its ads have location targeting enabled. *See* Section III(A)(1). As part of its value proposition to advertisers, Google touts its ability to geotarget and invites them to take advantage of the location data it has harvested from users. *See* Section III(A)(1). If Google's Motion is granted, then Arizona consumers will be the only party left in the dark from this transaction, signaling to digital giants that the broad remedial protections of the CFA don't apply to them and that Arizonans do not need to be dealt with fairly.

V. CONCLUSION

What Google's Motion ignores is that Google is in the advertising business and that advertising produces the vast majority of the billions of dollars it makes every year. Google deceives users to give up location data that Google collects and then monetizes by selling direct advertising to the consumers whose data Google has taken. Google's deceptive acquisition of personal data to sell advertisements is an exchange for consideration. The Court must not establish a new bright-line exception, divorced from the CFA's text, that would ignore the modern reality of the world today and how Google uses data it has deceptively obtained from consumers to get advertisers to sell directly to these same consumers.

[22] As discussed at n.21, Google's post-sale arguments fail for this reason as well. When a user is deceived by Google's many deceptive technologies discussed in Google's Motion (at 15:10–17:23), Google uses this data to serve ads on that user when they use Google's services. As this all occurs in a single transaction, Google's deceptive collection of location is necessarily in connection with Google's sale of advertising services.

RESPECTFULLY SUBMITTED this 16th day of November, 2021.

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