Clerk of the Superior Court
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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2020-006219 01/21/2022

HONORABLE TIMOTHY J. THOMASON

CLERK OF THE COURT
N. Johnson
Deputy

STATE OF ARIZONA, et al.

v.

GOOGLE L L C

BRUNN W ROYSDEN III

JEAN JACQUES CABOU

SIMONA AGNOLUCCI
JOSHUA D ANDERSON
LORI ARAKAKI
MICHAEL S CATLETT
ALEXIS E DANNEMAN
MICHAEL ESHAGHIAN
BENEDICT Y HUR
KEVIN D NEAL
PETER A PATTERSON
KENNETH NOEL RALSTON
GUY RUTTENBERG
BARRY C SCHNEIDER
CHRISTOPHER M SLOOT
DAVID H THOMPSON
JUDGE THOMASON

RULING

Google LLC ("Google") has moved for summary judgment on the Arizona Consumer Fraud Act ("ACFA" or the "Act") claim brought by the Attorney General of the State of Arizona

(the "AG" or the "State"). The Court has considered the Motion, Response and Reply,[1] along with the arguments of counsel.[2]

INTRODUCTION

The State accuses Google of misleading consumers about how and when it collects location information from various settings. Google has moved for summary judgment. Google's Motion argues that the alleged fraud or deceit was not made in connection with the sale or advertisement of merchandise, a requirement under the ACFA.

Google markets several devices to consumers online through the Google Store website, including smartphones. Google claims that its marketing of these devices has never concerned Google's handling of users' location data, or the functionalities at issue in this litigation: Location History ("LH"), Location Reporting, Location Sharing, Web & App Activity ("WAA"), Supplemental WAA ("sWAA"), WiFi, WiFi Scanning, Bluetooth Scanning, Device Location, Google Location Accuracy, app-level permissions, or Ad Personalization.

Google also offers dozens of apps to users, which are pre-installed on devices "free" of charge, including Maps, Translate, YouTube and Gmail. These apps collect user location data. Google points out that the State does not allege that these apps were deceptively marketed.

[1] The State has moved to strike Google's Response to the plaintiff's Controverting Statement of Facts ("Controverting Response"). Google's Controverting Response consists of 16 single-spaced pages purporting to controvert the State's contravention of Google's Statement of Facts. The Controverting Response is in addition to the 51 single-spaced pages Google filed in Response to plaintiff's Separate Statement of Facts. Thus, Google submitted the equivalent of over 100 double-spaced pages trying to convince the Court there is no factual dispute here. The submission of this vast amount of material was, for the most part, completely unhelpful to the Court. Moreover, submitting reams of material hardly supports Google's contention that there are no issues of material fact.
The State is correct that Rule 56(c) does not authorize the filing of the Controverting Response. The Court further notes that Rule 5.2(b)(1)(F) requires that, with limited exceptions, all documents filed with the Court must be double-spaced. Statements of fact and controverting statements are no exception. The Court is, however, reluctant to strike Google's Controverting Response in this instance. The Court likely would have granted leave to Google to submit the Controverting Response, had it asked for leave to do so, as it should have. As such, the State's Motion to Strike is denied. The Court admonishes the parties to follow the rules in future submissions.

[2] The State improperly cited three new cases in the slide show presented at oral argument. None of the cases really help the State. In fact, the *Norman Gershman* case was completely mis-cited by the State. The State provided a quote from the case that ostensibly denied summary judgment. In reality, just the opposite occurred: "Given this statutory limitation, it is clear that post-sale representations which are not connected to the sale of advertisement of the vehicle do not constitute consumer fraud under the Act. Therefore, Burton is entitled to summary judgment as to Count V of the Complaint based upon any alleged post sale representations." *Norman Gershman's Things to Wear, Inc. v. Mercedes-Benz of N. Am., Inc.,* 558 A.2d 1066,1074 (Del. Super. Ct. 1989), *aff'd on other grounds*, 596 A.2d 1358 (Del. 1991).

Google's primary argument is that the matters that the State complains about occur after the purchase of merchandise. Google contends that the collection, storage and use of location data fundamentally concern only post-sale conduct, unconnected to the bargaining process attendant to the purchase of merchandise. This post-sale conduct is, according to Google, not actionable under the ACFA.

For example, LH is a retrospective record of where users go with their devices, after users purchase them, set them up, create and sign into their Google accounts on the devices, opt into LH and use the devices. WAA is likewise a retrospective record of users' interaction with Google products, after users purchase and set up devices, then use them to interact with Google's products. Google argues that none of this conduct is connected to the sale or advertisement of merchandise.

The State contends, on the other hand, that there are multiple reasons why Google's Motion should be denied. For example, the State alleges that Google did engage in deceptive sales of Nexus and Pixel phones and Android devices. Specifically, the State asserts that Google programed the devices before they were sold with the ability to track user location data and did not tell users that the tracking settings could not be disabled.

Google's deceptive conduct is also alleged to include ongoing transactions, where Google provides services (search results through apps) in exchange for user data. Google allegedly misrepresents when and how it acquires and uses users' location data, it obtains in exchange for its search services. Google then allegedly monetizes the allegedly deceptively acquired data by matching users with targeted advertisements. The State argues there are fact questions about whether Google's allegedly deceitful conduct occurred in connection with consumer sales.

SUMMARY OF THE STATE'S FACTUAL ALLEGATIONS

The State's Allegation that Google Collects and Monetizes User Location Data

The State alleges that Google's deception is in connection with the sale or advertisement of merchandise in several different respects. Google allegedly uses purportedly "free" apps and other services, as well as software embedded in Android devices, to (1) gather data about users and (2) target ad placements to those users. Google profits, as advertisers bid more to appear "higher" in search results and in more relevant search locations.

The State contends that Google's deceptive and unfair practices and omissions enable it to collect user location data. For example, when a consumer buys an Android device, it comes pre-loaded with functions "configured to provide Google with the ability to collect, store and exploit a user's locations information through the software on the device." These functions include sensors in the device, as well as settings that are either part of the users' Google account or the Android

OS (e.g., LH, WAA, WiFi and WiFi scanning). Some of the settings, such as WAA, are pre-enabled; by default, Google uses them to collect location data.

Google also collects, stores and exploits location data whenever users interact with Google's apps, products and services. Services such as IPGeo and Oolong collect and exploit location data, even if the user has disabled the location related settings. The State alleges that consumers are not told that they cannot prevent the collection of location information, even if they disable certain location settings.

Google Locations Services (GLS) creates profits through advertisements. Google offers consumers various location services through its apps. In exchange, consumers provide location information to Google, which is used to target advertising. Google "connects" users with ads from advertisers through the services it provides. The State contends that location data is used for nearly all of Google's ad services. Google admits that location information drives its advertising revenue.

The State's Contention That Google Is Involved in Various Types of Sales and Advertising of Merchandise

The State urges several reasons why Google's deceptive and unfair conduct and omissions are "in connection with" the sale or advertising of merchandise.[3] Three examples the State discusses in its Response are (1) sales and advertisements of Android smart phones, including pre-loaded apps and software; (2) sales of Google's apps and services, in exchange for users' data; and (3) "transactions" involving the sales of targeted advertising through Google's "two-sided platform".[4]

[3] Google's assertion in the Reply that the State's omission theory is untimely is not well taken. Google has long known alleged omissions were a theory in the case. Google even addressed the issue in its Motion to Dismiss at page 13. Further, the Court addressed the omission allegations in the September 25, 2020 ruling on Google's Motion to Dismiss, stating that "the State contends that the Complaint includes numerous allegations to the effect that Google knew that users would rely on the concealment or suppression of material information concerning Google's interference with their ability to control or limit Google's collection of location information."

[4] Google claims that this theory was not pled in the Complaint and cannot be used to defeat summary judgment. A fair reading on the Complaint, however, reflects that this theory was pled. Paragraph 22 of the Complaint contains a non-exhaustive list of the ways in which Google's alleged conduct was "in connection with" a sale. For example, in paragraph 22(d), the State alleged that "Google sells ad placements (i.e., "merchandise") to third parties for consideration (Google's principal business), which advertisements are powered by the fruits of the deceptive and unfair acts and practices alleged herein relating to collection of user location data. Google's acts, practices, representations, and omissions when selling ad placements to purchasers of such ad placements are thus in connection with the sale of merchandise." Although the Complaint does not use the term "two-sided platform," that is the theory being described.

Google's other claim, that various arguments made by the State about Google apps were not pled, is similarly misplaced. For example, the Complaint alleges in paragraph 22 that devices came preloaded with apps that deceptively

First, Google sells smart phones. Google developed a proprietary version of the Android OS, which pre-loads Google software on its devices and other Android devices.[5] As part of the set-up process, a user must either create an account or sign into a pre-existing account to use many of the features on the device. During account set-up, Google presents users a choice to toggle certain location settings "on" or "off." Users must agree to Google's Store Sales Terms before buying a device.

Second, Google provides apps and services (Search, Maps, etc.) to users. In exchange, users agree to certain terms for collecting some personal data. The State contends that this "transaction" is a trade of data for services. Each search by a user is a sale, whereby Google provides a service and receives data in exchange. The State contends that this is an exchange of valuable consideration on an ongoing basis.

Finally, Google's advertising business operates as a two-sided platform. On one side, users receive services through use of Google apps, and Google receives user location data. On the other side, Google sells advertising services, promising it can deliver ads to users in specific locations. The State contends that Google's exchanges with a user on the one side, and an advertiser on the other side, are part of a single, congruent sale.

Google's Alleged Deception and Omissions

The State contends that, when Google's apps and Android devices are sold and advertised, Google does not accurately inform the consumer how it collects, stores and exploits location data. For example, Google allegedly fails to disclose that it will collect and exploit that data, no matter what the consumer wants. Various settings do not actually stop Google from doing so, even though the consumer is led to believe that they do.

The State also contends that Google issues misleading disclosures online. These disclosures are available to users before they purchase an Android device, set up a Google account or download Google apps. For example, the State claims that Google deceptively stated on its public "Help" page that "[w]ith Location History off, the places you go are no longer stored." [6]

Google's Privacy Policy (until May of 2018) made no mention of WAA's connection to location. Users setting up a Google account never received any disclosure that WAA collects location data. The State claims that this was a deceptive omission.

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collected location data. Further, the State has long contended that Google's apps were not "free," but were sold in exchange for location data, as that theory was discussed in the Court's January 20, 2021 ruling at pages 14-15.

[5] Google's services are also offered on iOS (Apple) devices.

[6] Google's Privacy Policy has always informed users that Google collects and uses location data when users interact with Google apps and services.

Users were given the option to disable Location Master ("LM"). The State claims that, in this context, "off" does not actually mean "off." Rather, Google takes user location data, irrespective of how the users' settings are placed. The State claims this is also a deceptive omission.

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. In reality, the apps have the ability to by-pass the users' preferences and obtain location information anyway. The State contends that this is also deceptive.

SUMMARY JUDGMENT STANDARD

The burden of proof on a consumer fraud claim is the preponderance of evidence. *Dunlap v. Jimmy GMC of Tucson, Inc.,* 136 Ariz. 338, 343-44 (App. 1983). In deciding 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, ¶ 13 (2003). Summary judgment is appropriate when there are no genuine issues of fact and the moving party is entitled to judgment as a matter of law. *Orme School v. Reeves,* 166 Ariz. 301, 305 (1990). If any issue of material fact exists, upon which reasonable people might reach different conclusions, summary judgment is not appropriate. *Id.* at 306. Even if no factual dispute exists, summary judgment is inappropriate when reasonable jurors could draw conflicting inferences from the circumstances. *Northern Contracting Co. v. Allis–Chalmers Corp.,* 117 Ariz. 374, 377 (1977).

THE APPLICABLE LAW REGARDING THE "IN CONNECTION WITH" A SALE OR ADVERTISEMENT REQUIREMENT

The Complaint contains a single claim alleging a violation of the ACFA. The Act addresses only deceptive or unfair practices employed "in connection with" the sale or advertisement of merchandise. A.R.S. § 44-1522(A).

Under the ACFA, a "sale" is "any sale, offer for sale or attempt to sell any merchandise for any consideration…" A.R.S. § 44-1521(7). "Advertisement" is any oral or written statement "to induce…any person to enter into any obligation or acquire any title or interest in any merchandise." A.R.S. § 44-1521(1). "Merchandise" includes "intangibles and services." A.R.S. § 44-1521(5). Thus, the statute requires a sale of merchandise, or at least an offer or attempt to sell merchandise, and consideration.[7] An exchange of any type is not sufficient. There must be a sale. Gratuitous transfers are not covered. Arizona courts have held that the Act covers situations where

[7] The Act applies "whether or not any person has in fact been misled, deceived or damaged thereby…" A.R.S. § 44-1522(A). Even though it is not necessary to establish actual deception, the State argues that Google did in fact deceive users.

consideration, other than money, is exchanged. *Villegas v. Transamerica Fin. Serv. Inc.*, 147 Ariz. 100, 102 (App. 1985).[8]

The Act is "designed to eliminate unlawful practices in merchant-consumer transactions." *Madsen v. Western American Mortgage Co.*, 143 Ariz. 614, 618 (App. 1985). The Act, however, does not require a "direct merchant-consumer transaction." *Watt v. Medicis Pharm. Corp.*, 239 Ariz. 19, 28, ¶ 31 (2016). Rather, the ACFA encompasses conduct "regardless of whether the deceiver is the seller." *State ex rel. Woods v. Sgrillo*, 176 Ariz. 148, 149 (App. 1993). The Act extends liability to any person who "uses" the misrepresentations in connection with the sale of merchandise. *Powers v. Guaranty RV, Inc.*, 229 Ariz. 555, 561, ¶ 19 (App. 2012).

The scope of the ACFA is broad and remedial; it is thus not subject to restrictive interpretations. *People ex rel. Babbitt v. Green Acres Trust*, 127 Ariz. 160, 164 (App. 1980) *superseded by statute on other grounds, as recognized in State ex rel. Corbin v. Pickrell*, 136 Ariz. 589 (1983). Accordingly, the State contends that the Act, and in particular the "in connection with" language, should be read broadly.

Any actionable deceptive practice must be "in connection with" the sale or purchase of merchandise. A.R.S. § 44-1522. The phrase, "in connection with," is not defined in the statute. There is limited guidance on its meaning in Arizona case law.

Arizona courts have, in other contexts, construed the word "connection" to mean a "relationship" or "association." *State v. Bews*, 177 Ariz. 334, 336 (App. 1993). 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).[9]

Determining whether a deceptive practice has a sufficient connection to a sale is generally a fact question. *See, e.g., Sgrillo*, 176 Ariz. at 149;[10] *State ex re. Miller v. Cutty's Des Moines Camping Club, Inc.*, 694 N.W.2d 518, 525-27 (Iowa 2005); *see also McGrath v. Zenith Radio Corp.*, 651 F.2d 458, 466 (7th Cir.), *cert. denied*, 454 U.S. 835 (1981) (question of fact as to whether promises made in connection with employment were in connection with the purchase or

[8] In *Villegas*, the defendant mortgage company told plaintiff it would either foreclose on an existing deed of trust or provide plaintiff a new loan. 147 Ariz. at 102. Defendant did not tell plaintiff the new loan would cost twice as much as the first. The court concluded that the offer of a loan could constitute a sale or advertisement under the Act. *Id.*

[9] The Merriam-Webster Dictionary defines "connection" as "causal or logical relation or sequence." "Connection." *Merriam-Webster.com Dictionary*, Merriam-Webster, https://www.merriam-webster.com/dictionary/connection. Accessed 3 Jan. 2022.

[10] In *Sgrillo*, the court reversed summary judgment in favor of defendants on the ACFA claim, finding that, if defendants' acts were found to be in connection with the sale of a service to provide low interest credit cards to consumers, the conduct would be covered under the Act.

sale of a security).[11] As will be explained below, the general rule applies here; it will be up to the fact finder to determine if the alleged deception at issue here was sufficiently connected to a sale.

One federal decision, applying the Act, noted that the alleged deception must generally be "part of the bargaining process." *Rinehart v. Gov't Emps. Ins. Co.,* No. CV-19-01888-PHX-DLR, 2019 WL 6715190, at * 4 (D. Ariz. Dec. 10, 2019). In *Rinehart*, however, the court held that representations at issue, which were made after the consumer had selected GEICO to perform the repair service, did not induce the consumer's original decision to select GEICO and were not alleged to have been connected to any pre-sale conduct. *Id.* In addition, although the court discussed "in connection with," the claim was flawed because plaintiff could not establish reliance, which was an element of the private claim brought in that case. *Id.* Reliance is not an element of the claim brought by the State here.

Google has cited cases where other courts have dismissed claims predicated on statements concerning "actions taken on behalf of merchandise previously purchased." *E.g., Contreras v. Nationstar Mortg. L.L.C.,* No 2:16-CV-00302-MCE-EFB, 2019 WL 688198, at *4 (E.D. Cal. Feb. 19, 2019) (applying ACFA). In *Contreras,* the court rejected the consumer's argument that every charge of an inflated inspection fee was an actionable "sale" and dismissed the claim with leave to amend. *Id*. *Devore v. Nationstar Mortg. LLC,* No. CV-14-08063-PCT-DLR, 2015 WL 12426151, at *8 (D. Ariz. Mar. 11, 2015), involved misrepresentations made in connection with the modification of the repayment schedule for an existing debt. The court dismissed the ACFA claim because the misstatements did not relate to "the sale or advertisement of merchandise, but instead to modifying the payment schedule for merchandise previously purchased." *Id.* The court noted that plaintiffs failed to plead the sale or advertisement of services because the only payments they made were arrears payments already owed on the existing note. The monies were not paid as consideration for loan restructuring services. *Id*.[12]

Contreras and *Devore* are not dispositive here. In those cases, the plaintiffs were not able to identify any tie or connection between post sale conduct and pre-sale conduct. Google has admitted that post sale conduct can be actionable if there is some tie or connection to a sale of a device or service.

[11] Both parties have cited various federal and state decisions from other jurisdictions, which of course are not binding on this Court. The Court has considered these cases; some of them will be discussed below. The Court has also considered the Australian decision cited by the State, but given it very little weight. That case involved an Australian statute, materially different from the ACFA. The decision has little, if any, persuasive authority.

[12] The State argues that *Devore, Contreras* and other cases cited by Google are inapplicable because they involved private actions under the ACFA, not claims brought by the AG. The distinction between private actions and State actions is significant, however, only to the issue of whether proof of actual consumer deception is required. The statutory language on the "in connection with" element is the same, irrespective of whether the claim is an AG claim or a private cause of action.

The State contends that the plain language of the ACFA prohibits "the 'use' of any [deceptive or unfair act or practice] in connection with the sale [or advertisement] of merchandise." *Powers*, 229 Ariz. at 561, ¶ 19. The ACFA broadly prohibits deceptive or unfair practices undertaken "in connection with" the sale or advertisement of merchandise. A.R.S. § 44-1522(A). By its plain terms, "[t]his is a broad phrase that goes beyond the moment of sale." *Sands v. Bill Kay's Tempe Dodge, Inc*., No. 1 CA-CV 13-0051, 2014 WL 1118149, *4, ¶ 17 (Ariz. App. Mar. 20, 2014). According to the State, the statute does not necessarily require that the unlawful conduct precede, or directly cause or induce, the transaction. Conduct that occurs prior to or after the consumer's acceptance of merchandise can be actionable. *Dunlap v. Jimmy GMC of Tucson, Inc., 136 Ariz. 338, 342 (App. 1982).*

The State also argues that Google's contention that the deception must be part of the "bargaining process" is not in the statute. In fact, limiting the Act to deception that occurs only in the bargaining process would, according to the State, essentially insert a reliance element, which is not an element under the Act.

The discussion about the "bargaining process" in *Rinehart* is certainly contrary to plaintiff's position. *Rinehart* did not, however, necessarily preclude a finding that post-sale conduct was actionable, if such conduct had some connection to pre-sale activity. Moreover, *Rinehart* is a federal district court decision, not binding on this Court.

The legislature did not choose to use the word "induce," or any similar wording, in § 44-1522(A). The terms of the Act are broad and are "not subject to restrictive interpretation because the Act is generally to be considered remedial in nature." *Green Acres,* 127 Ariz. at 164. Indeed, Arizona courts have rejected the notion that the Act is limited solely to pre-sale representations. *State ex re. Brnovich v. 6635 N. 19th Ave. Inc.*, No. 1 CA-CV 15-0550, 2016 WL 7368620, at *4, ¶ 17 (Ariz. App. Dec. 20, 2016). In *6635 N. 19th Ave*, the landlord argued that "in connection with" "necessarily limits application of the CFA to [the landlord's] pre-lease representations." *Id*. The court found "no legal support for [this] argument." *Id.* The court cited two earlier decisions that allowed ACFA claims based on post-sale deceptive conduct. *Schmidt v. Am. Leasco*, 139 Ariz. 509, 511 (App. 1983); *Howell v. Midway Holdings, Inc.*, 362 F. Supp. 2d 1158, 1164-65 (D. Ariz. 2005).

In *Schmidt*, the court held that conduct involving the ongoing provision of services under a contract was actionable under the ACFA. 139 Ariz. at 511. After purchasing an RV from defendant, plaintiff entered into a leasing arrangement with defendant to defray the purchase payments. The leasing agreement required defendant to obtain security deposits from renters and perform certain maintenance. Later, plaintiff learned that defendant was not maintaining the vehicle or repairing damage caused by renters. Plaintiff was charged for repairs that should have been covered by security deposits under the terms of the lease agreement. The court upheld the

judgment in favor of plaintiff on the consumer fraud claim because defendant's deceptive practices involved the sale of services under the lease agreement. *Id*. *Schmidt* supports the theory that the use of apps is a consumer "sale" because it involves the ongoing provision of services.

*Howell i*nvolved an ACFA claim based on lessor's alteration of a lease agreement after lessees signed it. The court held there was a fact question whether the alteration of the lease after signing was deceptive conduct covered under the Act. 362 F. Supp. 2d at 1164-65.

In *Dunlap,* the Court of Appeals applied the Act to statements that occurred "prior to, as well as after" the consumer "accept[ed] delivery," which was after the parties signed a binding contract that contained a "disclaimer." 136 Ariz. at 342. The Court of Appeals affirmed a jury verdict in that case, noting that representations were made to the plaintiff before and after the acceptance of delivery. *Id.*

Applying a similar statute, the Iowa Supreme Court rejected the notion that only pre-sale conduct is governed by the statute. *Miller*, 694 N.W.2d at 525-26 (citing cases from other jurisdictions holding the same). In *Miller*, the State's attorney general brought a consumer fraud action on behalf of consumers who had purchased membership interests in a recreational campground. The membership interests obligated the campers to pay club dues in perpetuity. Many years after the sales of the membership interests, the club begin an aggressive campaign to collect dues from members who had not paid dues for years.

The Iowa Supreme Court noted that there was no "bright-line temporal limit" and that the phrase "in connection with" did not mean "prior to" or "at the time of" the sale. *Id.* at 527-28. The Iowa Court concluded that there could be a nexus between the development of the campground and the collection campaign nearly two decades later, if, for example, the trier of fact found that the developer established the scheme at the outset, when memberships were being sold. *Id.* at 528-29. Thus, in keeping with the policy of interpreting the statute liberally, the court held that the attorney general only needed to show "some relation or nexus" between the unfair practice and the sale. *Id.* at 526.

The *Miller* decision concluded that "(t)he State should get its day in court." *Id.* at 528. Similarly, the trier of fact could find some nexus between the sale of merchandise and Google's post sale practices. *See also Showpiece Homes Corp. v. Assurance Co. of Am.*, 38 P.3d 47, 58 (Colo. 2001) (holding that Colorado's deceptive practices act applied to an insurer's post-sale unfair or bad faith conduct).

The Missouri Supreme Court, also applying a similar statute, held that enforcing the terms of an ongoing contract was conduct "in connection with" the initial sale. *Conway v. Citimortgage Inc.*, 438 S.W.3d 410, 416 (Mo. 2014). *Conway* held that alleged unfair actions by a mortgage

servicer in enforcing terms of a mortgage loan were actions taken "in connection with" the loan. The Missouri court reasoned that a mortgage loan creates a long-term relationship in which the borrower and the lender have continuing duties, including making and collecting payments, which extend for years. Thus, 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. A party's right to collect a loan is part of that sale and is, therefore, 'in connection with' the loan." *Id.* at 415.

A.R.S. § 44-1522(C) provides that "it is the intent of the legislature, in construing [the Act], 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 Federal Trade Commission ("FTC") cases cited by the State do not impose strict temporal limits tied directly to a sale. *See, e.g., 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 "[c]onsumers could not reasonably have avoided this injury" because defendants' repeated post-purchase misrepresentations "hindered the free exercise of informed consumer decision-making"); *F.T.C. v. Hispanic Global Way, Corp.,* No. 14-22018-CIV, 2014 WL 12531538, at *2 (S.D. Fl. 2014) (defendant's post-sale conduct was covered by the FTC Act, even though "[d]efendants already had the consumer's money for the purchase price payment").

A fairly recent amendment to the Act supports an expansive interpretation of "in connection with," as adopted by other jurisdictions. In 2013, the Act was amended to cover "unfair act(s) or practice(s)." 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." 2013 AZ H.B. 2396 (NS). The legislative history explains that adding "unfair" practices "expands" the ACFA's reach to cover "any unfair act or practice." *Id.*

Google cites decisions construing a Maryland consumer protection statute that required deception "in connection with." *E.g., Luskin's v. Consumer Protection Division,* 726 A.2d 702, 713 (Md. 1999); *Pucci v. Annapolis Sailyard, Inc.,* No. JKB-10-2968, 2011 WL 3793762, at *1 (D. Md. Aug. 24, 2011). The Maryland cases, however, are only somewhat helpful to the interpretation of the ACFA because the Maryland statute has a materiality element, which the AFCA does not. These cases emphasized the absence of materiality.[13]

[13] In *Luskin's,* the Maryland Supreme Court noted that a practice is "deceptive," in accordance with FTC authorities, if it misleads a consumer in a "material way." 726 A.2d at 713. In other words, it must impact the consumer's choice of a product. *Id.* That decision, however, did not deal with the "in connection with" element and instead addressed materiality. In *Pucci,* the court dismissed claims based on purely post-sale statements, reasoning that such statements could not have affected the plaintiff's choice of a product. *Pucci,* however, also emphasized the materiality requirement, which is not an element under the ACFA. There, plaintiffs alleged that, after the contract of sale had been finalized and the product had been ordered, defendant made misrepresentations about the extent of the damages

In the context of federal securities law, post-sale conduct, unconnected with the conduct of a sale, is generally not actionable. *See Gavin v. AT&T Corp.,* 464 F.3d 634, 639 (7th Cir. 2006) (something happening after a transaction to make it less worthwhile is not connected with the original sale) *Gavin* also noted, however, that "[i]f what happens is traceable to something that occurred before the sale," it would still be "in connection with" the sale.

The United States Supreme Court has held that deception, one step removed from the sale of securities, is nonetheless "in connection with" a sale. *S.E.C. v. Zandford*, 535 U. S. 813, 815 (2002). The defendant in *Zandford* argued that his post sale conversion of funds was not "in connection with" the sale of securities. The Supreme Court rejected that position, because the defendant's actions were part of the "fraudulent scheme" and "the sales are properly viewed as a 'course of business.'" *Id.* at 820-21. The Ninth Circuit has also construed the Securities Litigation Uniform Standards Act broadly, explaining that "in connection with" simply requires more than a tangential relationship. *Madden v. Cowen & Bo.*, 576 F. 3d 957, 966 (9th Cir. 2009).

DISCUSSION

Introduction

The essence of Google's position is that the fraud alleged by the State was not part of the bargaining process. *See Rinehart,* 2019 WL 6715190 at *4. In other words, there was no alleged deception during the process of any consumer buying Google products, including smartphones. Rather, according to Google, the alleged deception occurred after the sale transactions were complete. Google argues that the subsequent act of setting up an account and/or using an app cannot be characterized as being "in connection" with the sale of a previously purchased device. Google also points out that users are not even required to set up an account, rendering the connection between the alleged deception and the purported sales even more tenuous.

There is some appeal to Google's argument. The Act was intended to address, at least primarily, situations where an Arizona consumer is misled while purchasing or leasing merchandise. Statements or omissions that occur after the sale or lease arguably have no impact on the consumer's purchasing decision.

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which would result if plaintiffs reneged on their agreement. The court found plaintiffs had not alleged that any misrepresentation induced them to enter into the contract of sale and that defendant's post-sale conduct was not material to plaintiffs' purchase decision. *See also Shreve v. Sears, Roebuck & Co.,* 166 F. Supp. 2d 378, 417-18 (D. Md. 2001). In *Shreve*, the court affirmed the grant of summary judgment on the consumer protection claim, where alleged misrepresentations in an owner's manual were not the basis of the consumer's bargain because the consumer did not read the manual until after the purchase was made. The court focused on materiality and did not address the "in connection with" element. The court also noted there was no evidence defendant was aware of the alleged product defect; thus, the appropriate claim was for breach of the implied warranty of merchantability.

The ACFA is fairly straightforward. It is customarily a very simple process to determine whether some alleged deceit falls within the Act.

Here, however, the analysis is far from simple. The State's contention that Google's alleged deception is in connection with the sale or advertising of merchandise is, at times, somewhat strained. The fact the State spent 29 pages trying to explain why this case falls within the Act demonstrates the difficulty in trying to establish that conduct that was not directly part of a consumer transaction falls within the Act.

The Court, however, is ultimately convinced that the weight of authority supports the notion that the Act is not limited solely to specific actions taken at or before the purchase or sale of merchandise. The phrase "in connection with" does not have a clear temporal limitation. "In connection with" does not necessarily refer only to the conduct that occurs before or at the time of the sale.

6635 N. 19th Ave., Schmidt, Howell, Dunlap and *Miller* all support the notion that the Act can cover post sale conduct. "In connection with" itself is a broad phrase that it not limited to statements made at the time of the sale. *See Sands*, 2014 WL 1118149, *4, ¶ 17. A more expansive view is appropriate to carry out the legislature's intent that the Act cover "any unfair act or practice" in consumer sales transactions. Whether the deception here was in connection with the sale of merchandise is ultimately a fact question to be decided at trial. *See Sgrillo,* 176 Ariz. at 149.

The Complaint does allege deception as part of the process of selling and advertising Google products, including smartphones. The State's theory, at least in part, is that the deception about tracking a consumer's location permeates the consumer's experience with Google's products and apps. [14]The State alleges that devices come pre-loaded at the time of purchase with functions, including sensors and settings within the devices, which Google uses to track consumers' location. The State claims that, at a minimum, there were omissions during the "bargaining process," where Google failed to explain that locations can be tracked, through embedded sensors and pre-programed settings, even if the user turns "off" relevant tracking settlings. The State claims that Google acted deceptively in not explaining to consumers how tracking functions worked, leading consumers to incorrectly believe that they could control when they could be tracked.

Google admits that post sale deceit can be covered by the Act, if such conduct has some connection to the consumer purchasing transaction. The State contends that there is such a

[14] During oral argument Google pointed to a slide that the State was going to use at argument, but did not end up using. The slide was a "timeline of user purchase of Android phone." Google argued that the timeline actually demonstrates that any deceit was not in connection with the sale of a smartphone. As the State pointed out in the slide, however, "Google's deceptive disclosures" were "available to users at all times online."

connection here. The post-sale deceit at issue here does, at least arguably, have some connection to the omissions at the time of sale. Indeed, the post-sale deceit would not have been effective had Google honestly explained how its location tracking systems worked at the time of the original sale.

The State also alleges that the deceit is carried out, at least in part, through ongoing transactions, when consumers use Google apps on their devices. *See Conway*, 438 S.W.3d at 415. The consumer, in essence, provides location data in exchange for Google providing the consumer with information. The consumer is allegedly deceived by misleading statements and omissions, suggesting that location cannot be tracked when salient applications are "off."

The Court is constrained to construe the Act broadly, to encompass all consumer deception that is in some way related to the sale or advertising of merchandise. The collection and use of location information is a critical part of the advertising and selling of Google products. The entire "Google model" is, according to the State, dependent on obtaining accurate location history data, which is allegedly obtained in a deceptive manner.

As Google acknowledges, there is no statutory requirement that all of the deception occur at or before the sale of merchandise. Post-sale conduct can be actionable if that conduct has some relationship to pre-sale conduct. There is such a relationship here.

As noted above, the State contends that Google constructs its deceptive scheme in connection with three types of sales: sales of devices, continuous sales of apps and continuous sales of targeted advertising. The Court finds there are fact questions whether a sufficient nexus exists between Google's alleged deception and the sales of devices and use and "sale" of apps. The Court finds, however, that the State's theory about sales of matching advertising would not, standing alone, provide the basis of a claim. The fact that third party advertising does not give rise to a consumer fraud claim does not necessarily mean, however, that this topic is irrelevant at trial.

Nexus to the Sale or Advertisement of Preloaded Devices

The first type of sale is the sale of Google devices, such as Pixel and Nexus phones, and Android devices. According to the State, any deception relating to the sale of these devices is clearly in connection with the sale or advertising of merchandise.

According to the State, Google leads users to believe it will only collect or exploit their location data in certain ways before a consumer buys any service or device. Buyers are not told that they have little or no control over Google's ability to track location. Consumers are not told that there are sensors and settings built into the devices that can track location, even if the consumer disables certain location settings to try to stop such tracking. As such, many users justifiably

believe that they can control the ability of Google to track location. Users wishing to know the terms of these transactions, and understand how locations are tracked, are directed to disclosures concerning WAA, LH and other settings. These disclosures allegedly create a deceptive impression.

In essence, the State argues that Google failed to disclose to consumers purchasing Google products all relevant information about how Google tracks location information. The alleged omissions are direct parts of the bargaining process.

Whether Google can prove that consumers were deceived in connection with the initial purchase of devices is outside the scope of this Motion. The State has, however, alleged and presented evidence of deceptive conduct that is directly in connection with the initial sale of devices. *See Dunlap,* 136 Ariz. at 342. As such, Google is not entitled to summary judgment.

The State further alleges that the deception continues through users' set up of Google accounts after purchasing a device. According to the State, users of Android devices are required to set up a Google account to use even the basic features of the device. As part of the setup process, users are directed to the allegedly deceptive privacy policy and misleading LH and WAA disclosures. Although this process may happen after the completion of the strict "bargaining process," the alleged deception was allegedly "preordained" because it was programed into the devices before being sold to consumers.

Google argues, however, that, to the extent there was deception, it all occurred after the initial consumer transaction. Specifically, Google contends that there can be no deception until after the consumer purchases a device and interacts with the salient apps.

As noted above, however, post-sale conduct can be actionable if connected to pre-sale conduct. The alleged post sale deception at issue here is at least arguably related to Google's alleged deceptive failure to disclose its location tracking capabilities at the time of sale. Such deception could be found by a trier of fact to be "in connection with" the sale of merchandise. *See Miller,* 694 N.W.2d at 525.

In fact, the State argues that Google's deception of consumers extends from when Google first engages with users until a user engages with Google's services. According to the State, this wide-ranging course of deception is all "in connection with" the sale or purchase of the devices. Whether or not all the alleged deceptive practices are sufficiently tied to the sale is a fact question.

Google asserts that deception connected to the merchandise itself, the pre-programmed functions, is not actionable. The Act covers only deceptive sales, not deceptive merchandise.[15]

The pre-programmed functions, however, are simply part of the alleged deceptive sales. The State alleges that Google failed to honestly disclose how all of the functions on the merchandise work. As such, the State's claim is not that the merchandise is deceptive. Rather, Google's failure to accurately and fully disclose how the merchandise works is allegedly deceptive.

The State has alleged more than just post-sale conduct. Moreover, the post-sale conduct has at least an arguable connection to conduct that was part of the sale process. Fact issues are raised; Google's Motion must be denied.

Nexus to the Sale or Advertisement of Apps

The second type of sale involves the consumer's ongoing use and interaction with Google's apps and services. According to the State, each time a consumer uses a Google service, like Search or Maps, there is a "sale." The consumer receives the use of the service (the merchandise) in exchange for personal location data (the consideration). Through deceptive disclosures, Google allegedly misleads users into believing that it will only collect and use tracking information data in certain ways and that users have control over what information is collected.

The State contends that these alleged ongoing transactions, which take place every time a consumer interacts with one of Google's apps, should be considered "in connection" with a sale, under a broad construction of the ACFA. *See Schmidt,* 139 Ariz. at 511; *Conway,* 438 S.W.3d at 415. Each time the user interacts with these apps and services, Google allegedly takes more than what users understood they bargained for. *See State ex re. Horn v. AutoZone, Inc.,* 229 Ariz. 358, 36-62, ¶ 14 (2012).

Google contends, however, that, because it provides use of its apps "free" of charge, the transactions are gratuitous and not actionable under the Act. The Act, however, applies to any sale of merchandise or services for "any consideration". A.R.S. § 44-1521(7). There is no requirement that a monetary fee be charged for a transaction to be actionable.

According to the State, Google's apps and services were not actually free; rather, they were "sold" to users, despite ostensibly being "free," because there was an exchange of consideration

[15] *Waste Mfg. & Leasing Corp. v. Hambicki,* 183 Ariz. 84, 88-89 (App. 1995), does not support Google here. In that case, the Court of Appeals held that the sale of all the assets of an existing business to another existing business was not a sale of merchandise under the Act. The Court held only that the sale of virtually all of the assets of a business was beyond the intended scope of the Act.

in the form of data collection from users. Providing location data, in exchange for use of apps or other servicers, can certainly be considered valuable consideration under the Act. *See Best Choice Fund, LLC v. Low & Childers, P.C.*, 228 Ariz. 502, 513, ¶ 41 (App. 2011), *as amended* (Jan. 6, 2012) ("'Consideration' is generally defined as 'any benefit to the promisor or detriment to the promisee.'"); *Calhoun v. Google LLC*, 526 F. Supp. 3d 605, 631-32 (N.D. Cal. 2021) (holding that Google's terms of service, including its privacy notice, formed an actionable contract between Google and the users).

Location information is clearly valuable to Google's business model, as Google uses the information to make targeted ad placements, for which advertisers pay a premium. Google's contention that providing location data is not valid consideration, because providing the information is optional, or because users are required to provide the information anyway, raises issues of fact that cannot be resolved on this Motion.

Google compares the provisions of its apps and services to free newspapers, broadcast radio and local television stations, which provide services free to consumers. The comparison is not apt. Freenewspapers and broadcast radio and television are financed through untargeted advertising.[16] Newspapers and broadcast radio do not condition their services on receiving something "back" from the consumer. In contrast, Google allegedly takes user location information in exchange for the use of its apps and services and uses that same information to direct advertising targeted toward specific users. This is arguably an exchange of consideration.

Google's contention that there is no consideration because providing location information is optional raises a fact question for trial. Whether or not providing location information is truly optional must be determined by the trier of fact.

Google also asserts that "not every exchange of consideration" is a "sale" under the Act and argues that "sale" should be limited to situations where property is transferred for a price.[17]

[16] Google's argument that the AG's own website is somehow comparable is a huge stretch and not remotely persuasive. The claim against Google is that it deceptively takes information from consumers and monetizes that information by selling targeted advertising. The operation of a government website that provides information about the AG's operations and services to citizens and other interested parties is in no way comparable, even if the website does track IP addresses of its visitors. The State is not taking information from "consumers" and using that information to make profit.

[17] The Texas case cited by Google turned on the issue of reliance. In *Doe v. Boys Clubs of Greater Dallas, Inc.*, 868 S.W.2d 942, 955 (Tex. App. 1994*), aff'd*, 907 S.W.2d 472 (Tex. 1995), the court affirmed the grant of summary judgment on the consumer protection claim, finding no evidence that the minor's grandmother relied on any statements about an investigation. Reliance is not an element of the claim here. Further, *Wheeler v. Sunbelt Tool Co.*, 537 N.E.2d 1332, 1346 (1989), has no relevance here. In *Wheeler*, the court dismissed the consumer fraud claim because the misrepresentation was not the proximate cause of the injury. The quote from *Wheeler* in Google's Reply, that a sale is

Google's argument is contrary to the notion that the Act is remedial and should be broadly construed. *Green Acres* 127 Ariz. at 164.

The Act broadly defines "sale" to mean "*any* sale" of "*any* merchandise for *any* consideration." A.R.S. § 44-1521(7) (emphasis added). "Sale" is not limited to a transfer of title. "Merchandise" includes "intangibles" and "services." A.R.S. § 44-1521(5).[18] As such, the Act can cover transactions involving the exchange of information or data for use of a service, as the State has alleged here.[19]

There is, at a minimum, an issue of fact as to whether use of the apps represents an exchange of consideration and, therefore, a sale. There is a tenable claim that the consumer is provided a service in exchange for information data. Therefore, there is a plausible claim that the exchange is in connection with the sale of merchandise.

Nexus to Sale of Third-Party Advertisements

The third type of sale alleged by the State involves Google's sale of targeted advertising to third parties. According to the State, Google makes money by selling advertising and providing that advertising to users of its apps and associated products. The advertising is targeted, based on a user's location. Advertisers bid more for targeted ad placements. The State essentially alleges that Google tricks consumers out of their confidential location information, and then profits from that deception, through its advertising practices. Accordingly, the State contends that the sale of ad placements to third parties based on deceptively obtained location data is part of the actionable deceit at issue.

The State does not claim that Google deceives or acts unfairly with regard to advertisers. Thus, the advertisers are not the people or consumers that are allegedly deceived. Nor is the State alleging that the ads themselves are deceptive. Rather, the State's theory is that Google deceives one group of people—users of its services—about the collection and use of their location data, and then uses that data to secure ad purchases from an entirely separate group of people—advertisers. According to the State, Google deceptively obtains location data and uses that data to sell

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a "transfer of title in exchange for consideration," is taken out of context. The quote concerned the warranty claim and had nothing to do with the consumer fraud claim. *Id.* at 1339.

[18] *Enyart v. Transamerica Ins. Co.*, 195 Ariz. 71, 78, ¶ 19 (App. 1998), cited by Google, is not helpful. *Enyart*, without discussion or citation to authority, stated only that a settlement agreement was not a sale under the Act. That conclusion has no application here.

[19] The cases Google cites have no relevance to the issue here. *Hickey v. Voxernet LLC*, 887 F. Supp. 2d 1125, 1130 (W.D. Wash. 2012), and *Wofford v. Apple, Inc.*, No. 11-CV-0034 AJB NLS, 2011 WL 5445054, at *2 (S.D. Cal. Nov. 9, 2011), stated that "free" software updates were not "sales." The question here is not whether free software updates are sales. Rather, the issue is whether an exchange of location information for Google's services provided in apps can constitute consideration for a sale under the Act.

advertising. As such, the deception is allegedly "in connection with" a sale of the advertising. *See Powers*, 229 Ariz. at 561, ¶ 19.

The State claims Google is a matching business. It matches users of its services with targeted third-party advertisers. This "two-sided platform" is, according to the State, one cohesive sale involving the consumer. The sale to the advertiser would not exist, but for the deceitful taking of the location data.

The State has not cited a single case in the consumer fraud or general fraud context that has adopted or even discussed the "two-sided platform" theory. The State relies solely on *Ohio v. Am. Express Co*., 138 S. Ct. 2274, 2286 & n.8 (2018), an antitrust case, in which the United States Supreme Court held that the two-sided market for credit card transactions should be analyzed as a single cohesive transaction to determine whether the credit card company's conduct had anticompetitive effects. The Supreme Court stated that two-sided platforms are "best understood as supplying only one product— transactions -- which is jointly consumed by a cardholder and a merchant." In the credit card market, the two-sided platform consists of the cardholder, who uses the payment card, and the merchant, who accepts the card as payment. *Id.*

In the credit card context, the customer and the merchant have direct interaction in the exchange of payment for goods and services. The credit card company facilitates the transaction.

Google does not, however, facilitate a transaction between a user and an advertiser. Device users use Google's apps to obtain desired information through the app, not to enter into a transaction with an advertiser.

Google contends that the State's position that sales to ad purchasers, temporally and factually removed from the deceptive practices concerning consumers, are not actionable. Google argues that the Act requires a direct misstatement in connection with a sale - either from the defendant or about the defendant's products.

Google cites *State Farm Fire & Cas. Co. v. Amazon.com Inc.*, No. CV-17-01994-PHX, 2018 WL 1536390, at *5 (D. Ariz. Mar. 29, 2018), which involved a claim by a subsequent buyer of a home who was not privy to the misrepresentations made to the original buyer. *Amazon*, however, is not directly instructive to the question here, which is whether Google's use of the deceptively obtained data to sell advertising to others is an essential, related part of a consumer transaction.

The State contends that there is a sufficient nexus because Google uses location information in advertising—albeit not advertising of its own products. The State submits that it is not possible to really separate the advertising sales from the alleged deceptive collection of location

data. The alleged deception is necessary, according to the State, to enable location data to be acquired, which is in turn essential to the sale of advertising to third parties.

Indeed, the deception is essential to Google's business model, as up to 95% of its ad business is targeted to location data. The revenue from the advertising allows Google to provide "free" services and apps. In other words, the deceptive collection of location data, through the provision of various apps and services, is integral to Google's business of selling targeted ad placements. One could not exist without the other. Therefore, according to the State, they both must be considered together as a single congruent transaction, in determining whether there has been deception in connection with a sale or advertising.

As the Court has previously stated, the notion that the requisite sale under the ACFA can be a sale to someone other than a consumer is counterintuitive. The purpose of the Act is to protect consumers.

As discussed above, the ACFA does not cover all deceit. Rather, it encompasses only deceit "in connection with" the sale or advertising of merchandise. The fact that Google uses location information, allegedly obtained by deceit, to sell advertising to advertisers, geographically and temporally removed from the consumer transaction, does not render the original consumer transaction to have been "in connection with" the sale or advertising of merchandise.

There is no support for the State's theory in the wording and intent of the Act. The wording of the statute expressly requires the use of deception "in connection with" a sale or advertising, irrespective of whether the claim is brought by the State or a private party. A.R.S § 44-1522(A). Although the Act is intended to be given broad application "to eliminate unlawful practices in merchant-consumer transactions", *Madsen*, 143 Ariz. 614 at 618, no court has expanded it to sales, not even alleged to be deceptive, to someone other than a consumer.

The Court finds that the State's "two-sided platform" theory is not legally or factually plausible in the context of a consumer fraud claim. There is an insufficient nexus between the alleged deceit of consumers and sale of advertising to third parties, as a matter of law.

The "two-sided" platform theory does not give rise to a consumer fraud claim. If there were no fraud or deceit in connection with the original sales to consumers or in connection with the use of apps, then clearly the "two-sided" platform theory would not give rise to a claim, because there would have been no fraud or deceit at all. A "sale" a third party, that involved no deceit, cannot give rise to a claim.

That does not necessarily mean, however, that the sale of advertising to third parties will not be admissible at trial. The sale of advertising to third parties is part of the entire "story" of why

and how Google (allegedly) engages in the deceit. As such, sales of advertising could be relevant at trial. The Court does not make any final ruling on admissibility at this time. Such a determination will have to await pre-trial and trial proceedings.

DISPOSITION

Google's Motion for Summary Judgment is granted in part and denied in part. The Motion is granted as to the State's theory that the sale of ad placements to third parties is connected to a consumer sale. The Motion is denied in all other respects. As noted above, the fact that the sale of advertising to third parties does not give rise to a consumer fraud claim does not necessarily mean that it is not relevant.