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22 ARIZONA SUPERIOR COURT

23 MARICOPA COUNTY

24 The State of Arizona *ex rel.*
25 Mark Brnovich, Attorney General,

26 Plaintiffs,

27 v.

28 Google LLC, a Delaware Limited Liability
Company,

Defendant.

No. CV2020-006219

**GOOGLE LLC'S MOTION TO
DISMISS**

(Assigned to the Hon. Timothy
Thomason)

ORAL ARGUMENT REQUESTED

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1 Pursuant to Arizona Rule of Civil Procedure 12(b)(6), Defendant Google LLC
2 (“Google”) respectfully moves to dismiss the Complaint for failure to state a claim on which
3 relief can be granted. This motion is supported by the following Memorandum of Points and
4 Authorities.

5 MEMORANDUM OF POINTS AND AUTHORITIES

6 I. INTRODUCTION

7 Attorney General Mark Brnovich (the “AG”) brings this action under a statute that
8 seeks to protect Arizona consumers from being lured into purchases on the basis of
9 misrepresentations. But the Complaint concerns all *but* consumer fraud. The only products
10 Google allegedly sold to Arizona consumers are smartphones, and the Complaint fails to
11 allege a single deceptive practice connected to those sales.

12 The AG promises the Arizona public that he will “enforce the law as it is, not as you
13 want it to be.”¹ Yet by filing this action, the AG seeks to unilaterally amend the state’s
14 consumer-fraud statute, morphing it into the kind of privacy legislation now under
15 consideration by the legislators Arizonans elected.

16 The Arizona Consumer Fraud Act (“ACFA”) regulates deceptive practices in
17 connection with the sale of merchandise in Arizona. The Complaint alleges no such thing.
18 Apparently aware that he has not identified any misrepresentation connected to the sale or
19 advertisement of a Google smartphone, the AG also alleges Google has deceived consumers
20 through the “sale” of items such as its apps, operating system and Chrome browser. But
21 those products are not sold to Arizona consumers as the statute requires; they are free.
22 Finally, the AG attacks Google’s offer of an ad platform to businesses and others who
23 advertise through Google. Yet he fails to allege that any buyers of ad placements were
24 deceived in any way, let alone that they are Arizona consumers. Finally, the scope of the
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26
27 ¹ Maria Polletta, *Arizona’s Attorney General Race Has Drawn National Attention. Here’s*
28 *Why*, *azcentral* (2018), available at
<https://www.azcentral.com/story/news/politics/elections/2018/10/09/arizona-attorney-general-election-mark-brnovich-january-contreras-face-off/1432940002/>.

1 claim is limited by the AFCA’s one-year statute of limitations, and thus any surviving claim
2 should be substantially curtailed.

3 Accordingly, this Court should enforce the law as it is—not as the AG wants to
4 rewrite it—and dismiss the Complaint for failure to state a claim under the ACFA.

5 **II. FACTUAL BACKGROUND**

6 Google is a technology company recognized for a broad range of products and
7 services, including its well-known search engine and services. Compl. ¶ 15.² Millions of
8 individuals worldwide, including those in Arizona, rely on Google’s products and services on
9 a daily basis. *Id.* ¶ 10. Google takes their trust seriously. Even as it continues to develop an
10 expanding range of services for users, Google has fostered an open, self-critical internal
11 environment that respects its users and continuously seeks to improve their experience. This
12 process drives the innovation users expect from Google.

13 **A. Google’s Products and Services**

14 Google offers popular services such as Google Search, Maps, YouTube, various
15 Google apps, the Chrome browser and the Android operating system, all for free. Compl.
16 ¶ 2. Additionally, Google has offered tangible devices such as the Google Pixel and Google
17 Nexus phone families. *Id.* ¶ 23.

18 Each of Google’s mobile telephone devices comes with the Android operating system
19 and Google’s proprietary suite of apps installed prior to the user’s purchase. *Id.* ¶¶ 24, 27.
20 Android is also a popular operating system among third-party device manufacturers
21 (“OEMs”), such as Samsung. *Id.* Because the Android operating system is freely available,
22 open-source software, OEMs are able to alter the version of Android they choose to install
23 on a device. *Id.* ¶¶ 28–29. Many OEMs prefer to install Google’s licensed version of
24 Android, however, which contains the full suite of Google apps, collectively called “Google
25 Mobile Services.” *Id.* ¶ 30.

26
27 ² Google draws these facts from the Complaint and the documents attached thereto.
28 Although Google contests many of these allegations, Google treats them as true for purposes
of this motion to dismiss. *See Cullen v. Auto-Owners Ins. Co.*, 218 Ariz. 417, 419 (2008).

1 **B. Location Data**

2 It is no secret that many of Google’s apps and services rely on user location data.
3 Google makes this clear through numerous disclosures and within Google’s apps and services
4 themselves. Indeed, Google Maps can provide navigation only if it knows where the user is
5 in real time. *See* Compl. ¶ 80. But navigation is not the *only* context in which users find it
6 useful to allow Google to use their location data. Location data is critical to helping users
7 locate nearby services they are searching for, *id.* ¶ 38, choosing to share real-time location
8 with loved ones, *id.*, filtering out advertisements from geographically distant merchants, *id.*
9 ¶ 97, locating the nearest WiFi access point, *id.* ¶ 72, and countless other uses as varied as
10 finding a date or the nearest bus stop.

11 The Complaint identifies Google’s location settings at three levels: (i) account-level,
12 (ii) device-level, and (iii) app-level. *Id.* ¶ 34. Account-level settings allow users to make
13 changes to their Google account. *Id.* ¶ 36. Device-level settings are specific to a device. *Id.*
14 ¶ 35. App-level settings allow users to make changes relating to a specific Google App,
15 which do not impact a particular device or account. *Id.* ¶ 37.

16 **Device level.** The most precise source of location information can be a device’s GPS
17 function, which uses satellite data to pinpoint a device’s location. *See id.* ¶ 38. WiFi access
18 points may provide another means of supplementing location data. *See id.* The AG refers to
19 these functions as “Device Location” or the “Location Master.” *See id.* Users with Location
20 Master turned on for their device may also separately choose whether to allow Google to
21 estimate the device’s location based on WiFi access points near the device. *See id.* ¶ 72. The
22 WiFi Scanning functionality permits users to scan for nearby networks and their comparative
23 strength. It may be used to help infer their location in relation to those access points, which
24 can supplement the device’s GPS data. *Id.* ¶¶ 38, 71 n.7, 72. Finally, IP addresses provide
25 another method of inferring a device’s general location. Like phone numbers or postal codes,
26 IP addresses are assigned in blocks to geographic areas. *Id.* ¶ 90.

27 **Account level.** For Google account holders who have opted into the Location
28 History account feature, which has always been off by default, Google permits the user to see

1 a history of where they have been with their opted-in devices. *Id.* ¶ 38. And where users
2 keep Web & App Activity (“WAA”) enabled, user location is used to provide the most
3 relevant responses to user queries (*e.g.*, searching “restaurants near me”). *See id.* ¶¶ 38, 61.
4 Although Supplemental Web & App Activity (“sWAA”) is an additional setting identified in
5 the Complaint, it is not alleged to collect location data. *See id.* ¶¶ 38, 106 n.13, 61 (alleging
6 sWAA collects Chrome, website, and app data).

7 **App level.** App-level settings allow users to make changes relating to a specific
8 Google App, which do not impact a particular device or account. *Id.* ¶ 37.

9 **C. Google’s Privacy Policy**

10 The AG attaches Google’s Privacy Policy to his Complaint. There, Google publicly
11 discloses these sources of location data, as well as how it uses location data. Compl. Ex. 72
12 (GOOG-GLAZ-00000718). Google plainly discloses that “we collect information about
13 your location when you use our services, which helps us offer features like driving directions
14 for your weekend getaway or showtimes for movies playing near you.” *Id.* The policy also
15 describes how a user’s “location can be determined with varying degrees of accuracy”
16 depending on the source. *Id.* The policy clearly informs the reader that Google may use a
17 device’s GPS, IP address, “[s]ensor data from [a] device,” and “[i]nformation about things
18 near [a] device, such as Wi-Fi access points, cell towers, and Bluetooth-enabled devices.” *Id.*
19 Google also explains why it may use these features: to provide services and fulfill user queries,
20 to improve existing services and develop new ones, and to personalize user experience—
21 which includes personalizing advertisements. *Id.* (GOOG-GLAZ-00000719–20).

22 **D. Google Ad Services**

23 Google offers many of its products and services to users free of charge, supported by
24 ad revenue. Compl. ¶ 26. One of the ways Google improves the ads a user sees is by
25 offering the option to see personalized ads based on the user’s inferred interests through the
26 Google Ads Personalization setting. *See id.* The AG suggests that this setting principally
27 concerns location data. *See id.* ¶ 38. It does not. As explained in Google’s privacy policy, Ad
28 Personalization seeks to ensure users see advertisements geared toward products and services

1 they may be interested in. *Id.* ¶ 97, Ex. 245 (GOOG-GLAZ-00000719). For example, if a
2 user has been actively using Google to search for and experience content related to mountain
3 bikes, Ads Personalization would promote advertisements for mountain bikes rather than
4 irrelevant products that are of no assistance to the user. *See id.* Google also offers ad services
5 to retailers. *Id.* ¶ 6. The retailers selling mountain bikes use Google’s ad services to place ads
6 on Google apps and websites. *Id.* ¶ 9(e). If a user disables the Google Ads Personalization
7 setting, they will see ads based on their current search or unidentified browser characteristics.

8 **E. The Attorney General’s Allegations**

9 After a lengthy investigation, the AG brought this action asserting a single cause of
10 action under the ACFA, which forbids the use of deceptive or unfair acts in connection with
11 the sale or advertisement of merchandise. A.R.S. § 44-1522(A).

12 The AG’s allegations center on Google’s clearly and accurately disclosed use and
13 collection of users’ location data in free products, rather than any deceptive statements or
14 practices in the sale or advertisement of Google’s products and services. *See* Compl. ¶ 161.
15 Without pointing to any specific deception, the AG vaguely contends that Google confuses
16 users about what location data it collects through various apps, settings and web searches. *Id.*
17 ¶¶ 42–49. Despite the one-year statute of limitations, the AG’s investigation covers irrelevant
18 disclosures over the course of more than 10 years. *See, e.g., id.* ¶¶ 23 (identifying device
19 released January 2010), 135 (discussing 2012 communications regarding prior version of
20 Android), 113 (discussing changes to version of Android released in 2013). The AG does not
21 specify which challenged practice was in place at any given time, what made the practice
22 deceptive at that time and what “sale or advertisement of merchandise” is connected to the
23 so-called deception. *See id.*

24 **III. LEGAL STANDARDS**

25 **A. Motion to Dismiss**

26 In evaluating a motion to dismiss under Arizona Rule of Civil Procedure 12, only well-
27 pled factual allegations enjoy the presumption of truth; “mere conclusory statements are
28 insufficient.” *Cullen*, 218 Ariz. at 419. Nor does the court accept as true “allegations

1 consisting of conclusions of law, inferences or deductions that are not necessarily implied by
2 well-pleaded facts, unreasonable inferences or unsupported conclusions from such facts, or
3 legal conclusions alleged as facts.” *Jeter v. Mayo Clinic Ariz.*, 211 Ariz. 386, 389 (App. 2005).

4 Where, as here, the plaintiff alleges misrepresentations or fraud, his pleadings are
5 subjected to a heightened pleading standard. Ariz. R. Civ. P. 9(b); *Steinberger v. McVey ex rel.*
6 *Cty. of Maricopa*, 234 Ariz. 125, 141 (App. 2014) (affirming dismissal of ACFA claim for failure
7 to meet Rule 9(b)’s particularity requirement). The plaintiff must allege with specificity “the
8 who, what, when, where, and how’ of the misconduct charged.” *Grismore v. Capital One Fin.*
9 *Servs. Corp.*, No. CV-05-2460-PHX-SMM, 2006 WL 8440793, at *6 (D. Ariz. June 9, 2006)
10 (dismissing ACFA claim).

11 **B. The Arizona Consumer Fraud Act**

12 In 1967, the Arizona Legislature passed H.B. 114 to enact the ACFA. According to
13 Attorney General Darrell Smith, who testified in favor of H.B. 114 before the House
14 Committee on Commerce and Industry, the law sought “to stop the fraud that now exists in
15 the selling of many goods to the consumer” *Hearing on H.B. 114 Before the H. Comm. on*
16 *Commerce & Indus.*, 28th Leg., 1st Sess. (Ariz. Feb. 8, 1967). Since that time, courts have
17 continued to recognize that the central purpose of the ACFA is “to provide injured
18 consumers with a remedy to counteract the disproportionate bargaining power often present
19 in consumer transactions.” *Waste Mfg. & Leasing Corp. v. Hambicki*, 183 Ariz. 84, 88 (App.
20 1995).

21 While the ACFA is broad, it does not purport to govern all consumer relations. The
22 power to further regulate other aspects of commercial relationships, particularly in the realm
23 of consumer privacy, remains with the Legislature. And, as it happens, the Legislature is
24 currently considering two bills that could govern the collection and handling of users’
25 geolocation data if enacted. Both H.B. 2729 and S.B. 1614, currently pending before the
26 Legislature, govern consumer personal data, including location data. H.B. 2729 & S.B. 1614,
27 54th Leg., 2d Sess. (Ariz. 2020). Each bill mandates particular disclosures and processes for
28 handling and deleting user data upon request. *See id.*

1 **IV. ARGUMENT**

2 To state a claim under the ACFA, the AG must show (1) a deceptive or unfair act or
3 practice, or an omission of material fact with intent for a consumer to rely thereon; (2) in
4 connection with the sale or advertisement of merchandise. A.R.S. § 44-1522(A). While the
5 AG goes to great lengths to create the illusion of deceptive conduct, he fails to show any
6 such deception or any connection to the sale of merchandise. The only merchandise the AG
7 alleges Google sold or advertised to Arizona consumers are the Nexus and Pixel smartphones.
8 There are, however, no allegations remotely suggesting that any of the conduct alleged in the
9 Complaint induced any Arizona consumer to buy a Nexus or Pixel smartphone. For example,
10 there are no allegations that the battery does not last as long as advertised or that the camera’s
11 lenses fall short of the identified specifications. Instead, the AG’s Complaint compiles a
12 patchwork of alleged statements that have nothing to do with deceiving an Arizona consumer
13 into buying anything.

14 Setting aside these mischaracterizations of Google’s business practices, the ACFA
15 simply does not cover *post-sale* conduct like software updates or a user’s app usage. Even
16 assuming the ACFA covered this conduct, the AG’s allegations—which are an
17 undifferentiated amalgamation of matters spanning 10 years—fall well outside the one-year
18 limitations period.

19 **A. The Only Merchandise “Sold” or “Advertised” to Arizona Consumers**
20 **were the Nexus and Pixel Smartphones**

21 The ACFA concerns only deceptive or unfair practices occurring in connection with
22 the *sale or advertisement* of merchandise. A.R.S. § 44-1522(A). The only merchandise alleged to
23 have been sold by Google to an Arizona consumer are Google Nexus and Pixel smartphones.

24 Besides Google smartphones, the Complaint identifies as merchandise (1) free items
25 (apps, websites, Google Accounts, Google Chrome, and the Android operating system (“Free
26 Items”)) and (2) ad placements. Compl. ¶ 159. Even if the definition of “merchandise” in the
27
28

1 ACFA were broad enough to encompass each of these items,³ *see* A.R.S. § 44-1521(5), none
2 of these things were “sold” within the meaning of the statute.

3 **1. The Complaint Alleges No “Sale” of the Free Items**

4 The ACFA defines a “sale” as “any sale, offer for sale or attempt to sell any
5 merchandise for any consideration” A.R.S. § 44-1521(7). The Complaint alleges,
6 however, that users do not buy Google’s Apps, Chrome or the Android operating system.
7 Compl. ¶ 26 (noting that Google software is free to users). There is no sale.

8 Recognizing that a user does not purchase any of these Free Items, and that there is
9 no “sale” within the meaning of the statute, the AG asserts that users provide their location
10 data as consideration for the use of Google software and websites and that therefore these
11 free items are “sold.” Compl. ¶ 26. As a legal matter, there are at least two fatal flaws with
12 this approach. *First*, even if the AG properly alleged consideration—which he does not—
13 consideration alone is not enough. There must still be a sale under the statute. Not every
14 exchange supported by consideration is a “sale.” A.R.S. § 44-1521(7); *see also, e.g., Demasse v.*
15 *ITT Corp.*, 194 Ariz. 500, 507 (1999) (analyzing consideration for contract of employment);
16 *Amex Distrib. Co. v. Mascari*, 150 Ariz. 510, 516 (App. 1986) (noting importance of
17 consideration in covenant not to compete). *Second*, the allegation that users exchange location
18 data for the Free Items flies in the face of the AG’s contention that Google users do not
19 know Google collects their location data. To the extent that the AG does allege that a user
20 has bargained with Google by agreeing to give it her location data, she has consented to
21 Google’s collection of the data and cannot have been deceived. If the user can choose not to
22 provide Google with location data, as the AG also alleges (*e.g.*, ¶ 38), then it is not valid
23 consideration. *Valdiviezo v. Phelps Dodge Hidalgo Smelter, Inc.*, 995 F. Supp. 1060, 1066 D. Ariz.
24 1997) (“A contract is not supported by consideration where one of the parties has made . . . a
25 promise that leaves the choice of performance entirely to the promisor.”). Either there was
26 no consideration, or there was no deception. The AG cannot have it both ways.

27 _____
28 ³ For example, “Google Accounts” are merely antecedent to accessing Google products and services and are not “merchandise” under the ACFA.

1 **2. The Complaint Alleges No Sale of Ads to Arizona Consumers**

2 The *only* sales alleged with any clarity—to say nothing of the specificity Rule 9(b)
3 requires—concern Android devices (*e.g.*, Nexus and Pixel devices) and ad placements. *See*
4 Compl. ¶ 22(a), (d). Google provides an advertising platform to businesses to help them sell
5 their products—*e.g.*, Nike can place ads on Google when a user searches for “running shoes.”
6 But even as to ad placements, the Complaint fails to allege that these ad placements were sold
7 to any users, or that any such sales occurred in Arizona and were thus subject to the ACFA.
8 *See id.* ¶ 22(d); *Bruce Church, Inc. v. United Farm Workers of Am.*, 169 Ariz. 22, 28 (App. 1991) (“a
9 state may not regulate conduct in another state that may be legal in that second state”).⁴

10 **3. The Complaint Does Not Allege Any Advertisement of**
11 **Merchandise**

12 Similarly, the complaint fails to allege any “advertisements” of Google merchandise
13 with any level of specificity. The ACFA defines the term “advertisement” as any attempt by
14 oral or written statements “to induce . . . any person to enter into any obligation or acquire
15 any title or interest in any merchandise.” A.R.S. § 44-1521(1). In other words, there must be
16 an affirmative statement to induce a purchase. *See id.*

17 Aside from the naked assertion that Google “advertises” its products in ad placements,
18 Compl. ¶ 22, the AG makes little effort to identify actual public-facing advertisements made
19 to induce purchases of these products or ad placements. *See Cullen*, 218 Ariz. at 419
20 (conclusory statements fail to meet even notice pleading standard). Instead he dredges out-
21 of-context statements from Google’s help pages and privacy policies that have nothing to do
22 with marketing merchandise to users. Compl. ¶¶ 52, 80, 87, 129, Exs. 8, 36, 72. Even further
23 removed from the marketing of merchandise, the AG seeks to pass off as public
24 advertisement material drawn from an internal draft of a slideshow marked “Confidential +
25 Proprietary.” Compl. ¶ 87, Ex. 239.⁵ Needless to say, this internal draft can hardly be

26 ⁴ As discussed in greater detail in Part D.2, *infra*, the AG failed to show any deceptive
27 or unfair conduct in connection with the sale of ads to merchants. Any claim based on these
28 sales of ad services would thus fail even if the AG alleged that any such sale occurred in
Arizona and even if the merchants were considered “consumers.”

⁵ The confidential designation of this document is difficult to miss, and the document

1 described as an “advertisement.” *See id.* The AG thus fails to identify any advertisement of
2 merchandise with any level of particularity.

3 **B. There Is No Nexus Between the Alleged Misrepresentation and the Sale**
4 **of Merchandise**

5 Consistent with its purpose to protect consumers against being induced into
6 transactions on the basis of misrepresentations, the ACFA requires that any deceptive act or
7 omission be “in connection with” the sale or purchase of merchandise. A.R.S. § 44-1522.
8 Courts have thus required that the alleged deception occur as “part of the bargaining process.”
9 *Rinehart v. GEICO*, No. CV-19-01888-PHX-DLR, 2019 WL 6715190, at *4 (D. Ariz. Dec. 10,
10 2019). Similarly, courts have dismissed claims predicated on statements concerning “actions
11 taken on behalf of merchandise previously purchased.” *Contreras v. Nationstar Mortg. LLC*, No.
12 2:16-cv-00302-MCE-EFB, 2019 WL 688198, at *4 (E.D. Cal. Feb. 19, 2019) (applying
13 ACFA); *accord Sullivan v. Pulte Home Corp.*, 231 Ariz. 53, 60 (App. 2012) (subsequent
14 purchasers of goods were not within scope of the ACFA), *vacated in part on other grounds*, 232
15 Ariz. 344 (2013); *Devore v. Nationstar Mortg. LLC*, No. CV-14-08063-PCT-DLR, 2015 WL
16 12426151, at *8 (D. Ariz. Mar. 11, 2015).

17 The AG largely ignores the nexus requirement, asserting in conclusory fashion that
18 Google’s location-data practices are connected to the sale of merchandise because users
19 purportedly consent to certain settings in their post-sale use of their devices.

20 **1. There Is No Misrepresentation Alleged in Connection with the**
21 **Sale or Advertisement of a Nexus or Pixel Smartphone.**

22 As explained above, the only sale of merchandise that the AG has identified is the sale
23 of Google’s Nexus and Pixel smartphones. But despite the AG’s filing a 45-page complaint
24 with over 1,200 pages of exhibits, there is not a single allegation explaining what false

25 has no relevance to Google’s public-facing statements as the AG suggests. The AG’s choice
26 to include this and a host of other internal documents is indicative of the AG’s bad-faith use
27 of confidential material to improperly gain leverage over Google. *See People ex rel. Babbitt v.*
28 *Herndon*, 119 Ariz. 454, 456 (1978) (cautioning the AG from using ACFA cases “for an
improper purpose such as to harass or put pressure on the investigated party to settle a
collateral dispute”).

1 statement Google made to consumers to induce them to purchase a Nexus or Pixel
2 smartphone. Accordingly, the Complaint should be dismissed.

3 **2. The Complaint Alleges Purportedly Deceptive Acts *After* a Sale**

4 Rather than identify any alleged deception in connection with the sale of a Nexus or
5 Pixel smartphone, the AG focuses on statements relating to the Free Items, such as features
6 of Android, Chrome and Google apps. Because there is no allegation that the features of the
7 Free Items were either sold or advertised, there can be no nexus to any such sale. Indeed,
8 only one of the Complaint's 167 paragraphs concerns the relation of any purportedly
9 deceptive act or practice to the sale of *any* merchandise, and it concerns only the sale of *devices*
10 prior to any of the purported misstatements. Compl. ¶ 22(b). But even if the AG were to
11 allege that the Free Items were "sold" as part of the Nexus and Pixel smartphones, the
12 Complaint still states no nexus between any supposedly deceptive act and a sale because the
13 alleged conduct occurred after the smartphones were sold.⁶ Specifically, Paragraph 22
14 vaguely states that Google's location practices are related to the sale of merchandise because
15 users purportedly select certain location settings *after* purchasing them. In other words, the
16 AG does not even pretend that Google induced the purchase of its products or services
17 through representations made or relied upon prior to a purchase. That alone is a sufficient
18 basis to dispose of the AG's claim.

19 Even under the AG's convoluted theory, he cannot meet the "in connection with"
20 requirement of the ACFA because the sole nexus between any alleged deceptive conduct
21 relating to the Free Items and the sale or advertisement of smartphones must have occurred
22 *after* the sale of the smartphones. Indeed, not only does the alleged nexus occur only after a
23 sale, but each and every one of the alleged deceptive practices concerns only forward-looking
24 conduct that further attenuates any allegedly wrongful conduct from the "bargaining process."
25

26
27 ⁶ Should the AG contend that there was a separate "sale" of the Free Items, this
28 separate sale is nowhere identified in the Complaint, nor is any deceptive or unfair conduct
alleged in relation to that sale.

1 Rinehart, 2019 WL 6715190, at *4; Contreras, 2019 WL 688198, at *4; Devore, 2015 WL
2 12426151, at *8.

- 3 • **Location History:** The Location History service is off by default for new accounts
4 and new devices, and only collects location data *after* the user has purchased and used
5 her device, signed in to her Google account, and opted in to using the feature. *See*
6 Compl. ¶ 9.
- 7 • **Web & App Activity & Supplemental Web & App Activity:** WAA allegedly
8 records user location data in connection with Google searches and limited app use
9 *after* users purchase and begin to use their devices while signed in to their Google
10 Account. *See* Compl. ¶¶ 38, 161(n). A second setting, sWAA, is nowhere alleged to
11 collect location data. *See id.* ¶¶ 38, 106 n.13.
- 12 • **WiFi Scanning and Connectivity:** WiFi settings, which the AG alleges are
13 deceptive, may assist in inferring location of a user’s device based on proximity to
14 access points known to Google—all *after* that user has purchased and set-up her
15 phone. *Id.* ¶¶ 71 n.7, 72.
- 16 • **App-level Permission:** The AG asserts that Google permits apps to share location
17 data. Compl. ¶¶ 79–86; *id.* ¶ 161(l). Even if true, this theory requires that the user
18 already have purchased and set up her phone, installed apps and selected permissions.
19 *Id.* ¶¶ 79–86.
- 20 • **Location Master/Device Location:** The AG contends that the Location Master
21 (GPS function) is misleading. But even if it allowed Google to infer a user’s location,
22 it would do so *after* she has bought and set up her phone, and connected to a known
23 WiFi access point. *Id.* ¶ 91.
- 24 • **System Updates:** The AG contends that Google’s system updates are misleading.
25 Compl. ¶¶ 105–09; *id.* ¶ 161(f). These allegations concern updates to pre-existing user
26 devices or accounts; they have nothing to do with the purchase of any merchandise.
- 27 • **User Interface:** The AG alleges that Google altered location prompts and menu
28 layouts to make it more difficult to understand location settings. Compl. ¶ 161(h).

1 These allegations concern conduct over a period of years to update the layout that
2 users see and interface with when using devices *after* purchasing them. *See id.*

- 3 • **Ad Personalization:** The AG contends that a user who opts out of Ad
4 Personalization may nonetheless see ads based on her general location. Compl.
5 ¶¶ 96–109, 161(p). These allegations concern the user’s viewing of advertisements
6 during her post-sale use of her device.

7 Because each of these practices concern a user’s forward-looking conduct *after*
8 purchasing a smartphone and *after* allegedly selecting settings, each is too far attenuated from
9 the “bargaining process” to support a claim under the ACFA.⁷ *See Rinehart*, 2019 WL
10 6715190, at *4; *Contreras*, 2019 WL 688198, at *4; *Devore*, 2015 WL 12426151, at *8; *see also*
11 *Walker v. Gallegos*, 167 F. Supp. 2d 1105, 1108 (D. Ariz. 2001) (dismissing ACFA claim based
12 on post-sale conduct as “too attenuated from the underlying” sale).

13 C. The AG Fails to Allege Intent to Support the “Omission” Claims

14 To further give the appearance of substance, the AG duplicates nearly every allegation
15 of a deceptive practice and repackages it in the guise of a “omission” claim. Compl. ¶ 161(b),
16 (c), (e), (g), (i), (k), (l), (m), (o), (q), (s). For instance, the AG asserts that Google deceives
17 users by continuing to collect location data with Location History turned off, then claims
18 Google “conceals” that it continues to collect location data with Location History turned off.
19 Compl. ¶ 161(a), (b). The omission claims are thus largely duplicative and indistinct, but they
20 suffer from an additional problem. Specifically, nowhere does the AG allege with any
21 specificity that Google omitted any material fact with the intent to induce reliance thereon, as
22 is required for an omission claim under the ACFA. *See State ex rel. Horne v. AutoZone, Inc.*, 229
23 Ariz. 358, 361 (2012). The AG’s naked legal conclusion is insufficient. *See* Compl. ¶ 160;
24 *Cullen*, 218 Ariz. at 419. Even had the AG alleged intent, any omission would still lack any
25 nexus to the sale of merchandise, as discussed above.

26
27 ⁷ In addition to these claims about things Google allegedly did, the AG also complains
28 that Google didn’t do certain things. Compl. ¶ 161(r). This allegation, too, concerns only
post-sale conduct.

1 **D. Google’s Interactions with OEMs and Ad Purchasers Are Irrelevant**

2 The AG appears to contend that Google should be liable under the ACFA for its
3 interactions with device manufacturers and vendors who purchase its ad services. Compl.
4 ¶¶ 22, 161. These are even further removed from a user’s purchase of any Google product
5 and are too divorced from any sale of merchandise to support a claim. Even assuming the
6 AG had alleged any of the relevant conduct occurred in Arizona (he has not), *see Bruce Church*,
7 169 Ariz. at 28, the claim would still fail.

8 **1. No ACFA claim can be asserted on behalf of OEMs**

9 “The clear intent of [the ACFA] is to protect unwary buyers from unscrupulous
10 sellers.” *Sutter Home Winery, Inc. v. Vintage Selections, Ltd.*, 971 F.2d 401, 407 (9th Cir. 1992).
11 Here, the OEMs are neither alleged to be buyers nor targets of deceptive advertising, and
12 thus no claim may be asserted on their behalf. *See id.*; *Vantage Mobility Int’l Inc. v. Kersey*
13 *Mobility LLC*, No. CV-19-04684-PHX-JJT, 2020 WL 411188, at *9 (D. Ariz. Jan. 24, 2020)
14 (rejecting that the manufacturer of the product for sale could sue under ACFA). The AG’s
15 reliance on Google’s interactions with OEMs serves only to highlight the attenuation
16 between the alleged deceptive conduct and any user’s purchase of merchandise. As the AG
17 alleges, the OEMs pre-install Android and many Google apps on their devices long before a
18 user purchases the third-party device. Compl. ¶¶ 29-30, 142; *see State Farm Fire & Cas. Co. v.*
19 *Amazon.com*, No. CV-17-01994-PHX-JAT, 2018 WL 1536390, at *5 (D. Ariz. Mar. 29, 2018)
20 (dismissing ACFA claim of subsequent purchaser of merchandise where deception occurred
21 in prior transaction); *In re Gen. Motors LLC Ignition Switch Litig.*, No. 14-MD-2543 (JMF), 14-
22 CV-8317, 2017 WL 2664199, at *7 (S.D.N.Y. June 20, 2017) (downstream purchasers of
23 goods have no claim under ACFA); *In re Fluidmaster, Inc.*, 149 F. Supp. 3d 940, 960–61 (N.D.
24 Ill. 2016) (applying ACFA, noting that consumers who purchased home with defendant’s
25 merchandise previously installed would have no claim under ACFA).

26 **2. There is no deceptive act alleged relating to ad purchasers.**

27 Not only does the complaint fail to identify a single deceptive statement made to
28 buyers of ad placements, the theory does not make any sense. According to the Complaint,

1 ad purchasers want location data, which makes the ad placement more valuable. Even
2 accepting —solely for purposes of this motion—the AG’s allegation that Google
3 misrepresented its collection of user location data *to users*, no *ad purchaser* could have been
4 deceived by that. Buyers of ad placements have nothing to do with this action.

5 **E. The AG Ignores the Statute of Limitations.**

6 The Court should dismiss this action and require that the AG specify in any amended
7 pleading what actions, if any, he alleges Google has taken within the applicable limitations
8 period.

9 A one-year statute of limitations applies to claims under the ACFA. *See* A.R.S. § 12-
10 541(5); *Steinberger v. McVey ex rel. Cty. of Maricopa*, 234 Ariz. 125, 142 (App. 2014) (“A
11 consumer fraud claim must be filed within one year after the cause of action accrues.”);
12 *Alaface v. Nat’l Inv. Co.*, 181 Ariz. 586, 591 (App. 1994) (“As a liability created by statute, a
13 consumer fraud action must be initiated within one year after the cause of action accrues.”).
14 The AG fails to identify what violations he contends have occurred within the last year.
15 Instead, he presents a hodgepodge of disparate settings, functions and largely internal
16 statements spanning over 10 years.

17 The AG is likely to argue that this action is nonetheless timely because he has the right
18 to initiate proceedings on behalf of the State, and his claim is therefore exempt from statutes
19 of limitations. *See* A.R.S. § 12-510 (“the state shall not be barred by the limitations of actions
20 prescribed by this chapter.”). While “there are occasions on which the Attorney General may
21 initiate proceedings on behalf of the State, . . . these instances are dependent upon specific
22 statutory grants of power.” *Ariz. State Land Dep’t v. McFate*, 87 Ariz. 139, 144 (1960). Here,
23 the ACFA lacks any statutory authorization for the AG to bring an action on behalf of the
24 State. *See* A.R.S. § 44-1528.

25 The Legislature knows how to confer authority to act on behalf of the State; it has
26 done so in many other statutes. *See, e.g.*, A.R.S. §§ 12-2041 (permitting the AG to bring an
27 action “in the name of the state upon his relation”); 35-212 (stating “the attorney general
28 shall bring an action in the name of the state to enjoin [illegal acts]”); 40-253, -254 (allowing

1 the “the attorney general on behalf of the state” to take enforcement action). When it
2 enacted the ACFA, the Legislature only authorized the AG to act “on behalf of the state” in
3 one instance: “*if* a court finds that any person has willfully violated” the ACFA, the AG may
4 then petition the Court for civil penalties. A.R.S. § 44-1531(A) (emphasis added). But this
5 provision does not, by its terms, authorize the AG to initiate an action. That authority lies
6 elsewhere in the ACFA, permitting the AG to bring an action for an injunction, but there is
7 no language authorizing him to act on behalf of the State in doing so. A.R.S. § 44-1528.

8 The absence of such language from section 44-1528 was not inadvertent. As
9 originally enacted, section 44-1524 of the ACFA empowered the AG to investigate potential
10 violations only upon receipt of a consumer’s verified complaint. 1967 Ariz. Sess. Laws 316
11 (permitting AG investigation “[u]pon receipt of a verified written complaint”). Only after
12 such an investigation was the AG empowered to bring an action. *Id.* at 318 (“*Following an*
13 *investigation made pursuant to 44-1524, . . . [he] may [bring an action in the superior court]*”)
14 (emphasis added). Thus, the AG sought to protect the interests of consumer complainants,
15 not of the State. And while the Legislature has since amended the statute to broaden the
16 AG’s investigatory authority, *see* A.R.S. § 44-1524, it has never amended the remedial
17 provision to authorize an action brought in the State’s name. *See* A.R.S. § 44-1528.

18 The Court should not permit the AG to rely on A.R.S. § 12-510 to excuse his
19 undifferentiated presentation of events spanning over a decade. The plain text of the ACFA
20 confers upon him no authority to flout basic pleading standards by claiming the mantle of the
21 State. Like all other parties before the Court, the AG should be required to present the Court
22 with a timely pleading that provides fair notice of his claims and permits fair review by the
23 Court.

24 **V. CONCLUSION**

25 For the foregoing reasons, this Court should dismiss the Complaint.
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28

1 Dated: July 15, 2020

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15 Document electronically filed via
16 Maricopa County Superior Court E-File System
17 on July 15, 2020.

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