SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Civil Division

DISTRICT OF COLUMBIA,

Plaintiff,

v.

GOOGLE LLC,

Defendant.

Case No. 2022 CA 000330 B
Judge Robert R. Rigsby

ORDER

Before the Court is Google LLC's ("Defendant") *Motion to Dismiss*, filed on May 23, 2022. the Court finds good cause to **DENY** the request.

BACKGROUND

Defendant is a Delaware limited liability company, with its principal place of business in Mountain View, California. Motion to Dismiss ("MTD") at 3. Defendant provides consumers with a broad range of products and services, including hardware devices, applications ("apps"), and web-based services. Each of Defendant's smartphones comes with the Android operating system ("Android OS") and access to Defendant's apps available for download without payment, including, Search, Maps, Chrome, and Assistant. Defendant offers many apps on both Android and Apple iOS devices like iPhones. Defendant also offers a number of free, web-based services, such as Gmail and Chrome. MTD at 3. Defendant collects data about consumers when they use Google products and uses that data in advertising ventures. Opp. at 1. Defendant does this by tracking customers' locations, and personal preferences, then sells ads from third party advertisers targeted to those customers. Opp. at 18.

When a user creates a Google account, the user is offered uniform settings across all Defendant's goods and services, irrespective of device settings. Location History ("LH") is an account feature that, when enabled, periodically saves a user's location to create a map of where he or she traveled. Web & App Activity ("WAA") is another feature that saves a log of details for the user about their previous searches. MTD at 3. In many cases, Defendant has continued recording users' movements even after they have set privacy controls to block this tracking. Opp. at 1. Plaintiff alleges a number of specific instances: (1) that Defendant continues to store an consumers' location information after they disable location-related Google Account settings, and after they sign out of their Google Accounts; (2) that Defendant has failed to disclose all the location data they collect when users enable location related Google Account settings; (3) continuing to target ads to users' location when they have disabled an "ads personalization" setting on their Google Account; and finally (4) continuing to derive users' location when they have disabled location related settings on their mobile device. Opp. at 3.

Anyone who purchases an Android OS device, sets up a Google account, uses Defendant's proprietary software, or downloads Defendant's apps must agree to and comply with Defendant's Terms of Service. Defendant provides a list on its website clarifying all of these services subject to its Terms of Service, including but not limited to those in the Complaint. Defendant informs users that a "broad range of services" is subject to the Terms of Service and that "by using our services, you're agreeing to these terms." MTD at 4. As Defendant informs its users, the Terms of Service "define Google's relationship with you as you interact with our services" and "reflect the way [Defendant]'s business works, the laws that apply to our company, and certain things we've always believed to be true." MTD. At 5. The Terms of Service requires

that disputes relating to the use of Defendant's services be resolved in California based on California law. MTD at 5. In addition to incorporating the Terms of Service, the Google Store Sales Terms governing purchases from the online store as well as the terms governing Google Play and YouTube also require users to agree to forum in California and the application of California law. MTD at 5.

Defendant publicly posts information on a variety of topics (including how to adjust location settings and location sharing settings) in a variety of formats, including *inter alia* on help pages, disclosure statements, terms of service, and pop-up alerts. MTD at 3-4. The individuals with responsibility for Defendant's user settings at issue here, such as for the LH and WAA services, reside and conduct their work outside the District. Defendant's Ad Personalization ("GAP") settings and related disclosures are managed by a team also based outside of the District. MTD at 4. The individuals with responsibility for Defendant's location-related Android settings reside and work outside of the District. MTD at 4. Defendant has never operated any physical retail store in the District through which it has sold devices which are at issue in the Complaint. However, Defendant does maintain a corporate office in the District which performs work unrelated to the Complaint. MTD at 4. Additionally, Defendant does have products which are advertised and can be bought in the District. Opp. at 6.

STANDARD OF LAW

I. 12(b)(2)

In the Complaint, "plaintiff bears the burden of establishing personal jurisdiction over each defendant." *Daley v. Alpha Kappa Alpha Sorority, Inc.*, 26 A.3d 723, 727 (D.C. 2011) (citing *Holder v. Haarmann & Reimer Corp.*, 779 A.2d 264, 269 (D.C. 2001)). A court may

exercise personal jurisdiction over a non-resident defendant if jurisdiction is authorized by statute and the exercise of jurisdiction is consistent with due process. *Kissi v. Hardesty*, 3 A.3d 1125, 1129 (D.C. 2010). Personal jurisdiction may be established under the District of Columbia's long arm statute, codified in the District of Columbia Code §13-423. *Daley*, 26 A.3d at 727.

The long arm statute provides that:

> (a) A District of Columbia court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a claim for relief arising from the person's
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> (1) transacting any business in the District of Columbia;
> (2) contracting to supply services in the District of Columbia;
> (3) causing tortious injury by act or omission in the District of Columbia;
> (4) causing tortious injury by act or omission outside the District of Columbia if he regularly does or solicits business, engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed, or services rendered, in the District of Columbia;
> (5) having an interest in, using or possessing real property in the District of Columbia;
> (6) contracting to insure or act as surety for or on any person, property, or risk, contract obligation or agreement located, executed or to be performed within the District of Columbia at the time of contracting, unless the parties otherwise provide in writing...

D.C. Code § 13-423(a)(1)-(6).

"When considering personal jurisdiction, the Court need not treat all of the plaintiffs' allegation as true. Instead, the Court 'may also receive and weigh affidavits and other relevant matter to assist in determining the jurisdictional facts.'" *FC Investment Group, LC, v. IFX Markets, Ltd.*, 479 F. Supp.2d 30, 35 (D.D.C. 2007) (quoting *Jung v. Assoc. Amer. Med. Coll.*, 300 F. Supp.2d 119, 127 (D.D.C. 1998)).

II. 12(b)(6)

A motion to dismiss pursuant to Rule 12(b)(6) challenges the legal sufficiency of a complaint. *See Luna v. A.E. Eng'g Servs., LLC*, 938 A.2d 744, 748 (D.C. 2007). A plaintiff's complaint must contain a short and plain statement of the claim for relief, such that the complaint "puts the defendant on notice of the claim against him." *Sarete, Inc. v. 1344 U St. Ltd. P'Ship*, 871 A.2d 480, 497 (D.C. 2005); *see* Super. Ct. R. Civ. P. 8(a). A complaint must, at a minimum, contain a short and plain statement of the claim showing that the plaintiff is entitled to relief. Super. Ct. Civ. R. 8(a)(2).

When considering a motion to dismiss, the Court must accept as true all of the allegations put forth in the Complaint, and construe all facts and inferences in favor of the non-moving party. *See Murray v. Wells Fargo Home Mort.*, 953 A.2d 308, 316 (D.C. 2008). Dismissal for failure to state a claim upon which relief can be granted is warranted only when it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim. *See id.* However, the allegations in the Complaint must be sufficient to "raise a right to relief above a speculative level." *Clampitt v. Am. Univ.*, 957 A.2d 23, 29 (D.C. 2008) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). Additionally, the Complaint must provide more than mere labels and legal conclusions couched as fact. *See Grayson v. AT&T Corp.*, 980 A.2d 1137, 1144 (D.C. 2009). The Complaint need not include "detailed factual allegations," but must include "more than an unadorned, the defendant-unlawfully-harmed-me accusation." *Mazza v. House Craft, LLC*, 18 A.3d 786, 790 (D.C. 2011).

ANALYSIS

I. Personal Jurisdiction

Defendant alleges that this Court lacks personal jurisdiction in this matter under District of Columbia Civil Rule ("Rule") 12(b)(2). A court may assert personal jurisdiction over a nonresident defendant where service of process is authorized by statute and where the service of process so authorized is consistent with due process. *Mouzavires v. Baxter,* 434 A.2d 988, 990 (D.C.1981). The Supreme Court has determined that The Due Process Clause requires (1) the "litigation results from alleged injuries that 'arise out of or relate to'" activities that (2) the defendant "purposefully directed" to residents of the forum. *Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 472-73 (1985). If a lawsuit arises from a defendant's purposeful availment of the forum, a court considers "whether the assertion of personal jurisdiction would comport with 'fair play and substantial justice.'" *Id.* at 476.

A. Long-Arm Statute

Plaintiff asserts that Defendant's conduct violates four sections of the District of Columbia long arm statute. Opp. at 12. First, Section 13-423(a)(1) which authorizes jurisdiction over companies that "transact [ ] any business" in the District of Columbia. Second, Section 13-423(a)(2) which authorizes jurisdiction over companies that "contract [ ] to supply services in the District of Columbia." Third, Section 13-423(a)(3), which authorizes personal jurisdiction over a defendant who "caus[es] tortious injury in [the District of Columbia] by an act or omission in [the District of Columbia.]." Moreover, the Plaintiff is alleging the tortious injury in this case would be the violation of the Consumer Protection Procedures Act ("CPPA") because violations of this act "effect tort-like injuries." Opp. at 12. Finally, Plaintiff alleges that Google is also

subject to Section 13-423(a)(4), which authorizes jurisdiction over a defendant who causes tortious injury in the District of Columbia by acts of omissions "outside" the District of Columbia when it "regularly does or solicits business, engages in any other persistent course of conduct, or derives substantial revenue from [ ] services rendered" in the District of Columbia.

The District of Columbia's long-arm statute pertaining to specific jurisdiction "is coextensive with the reach of personal jurisdiction permitted under the Due Process Clause." *Harris v. Omelon,* 985 A.2d 1103, 1105 n.l (D.C. 2009) (citation omitted). Where a plaintiff "relies exclusively on a theory of specific jurisdiction," purposeful availment is only jurisdictionally relevant where the causes of action arise out of or relate to the contacts with the forum. *Triple Up Ltd. v. Youku Tudou Inc.,* 235 F. Supp. 3d 15, 22 (D.D.C. 2017). Therefore, the long-arm statute analysis will be analogous to the due process analysis, and for that reason, the Court will now move on to the due process analysis.

B. Minimum Contacts

In order to satisfy the personal jurisdiction requirements, the Court must determine that the standards for due process are met. Defendant asserts that (1) Plaintiff's allegations do not arise from Defendant's contacts with the District of Columbia, (2) none of the alleged activities reflects purposeful availment to the laws of the District of Columbia, and (3) exercising personal jurisdiction over Defendant would not be consistent with fair play and substantial justice. MTD at 7.

1. Arise From Defendant's Contacts

The Defendant asserts that Plaintiff does not plead any factual allegations that demonstrate Defendant's conduct 'arises out of' its contacts with the District of Columbia. *See*

Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414 nn.8-9 (1984). In order for a claim to 'arise out of' a defendant's contacts with the forum, there must be a discernible relationship between the claim and the defendant's forum activities. *Shoppers Food Warehouse v. Moreno,* 746 A.2d 320, 329 (D.C. 2000); *see also Walden v. Fiore*, 571 U.S. 277, 284 (2014) ("the defendant's suit-related conduct must create a substantial connection with the forum state."). Additionally, *Bristol-Myers Squibb Co. v. Sup. Ct.*, says that regularly occurring sales of a product in a State do not justify the exercise of jurisdiction over a claim that is unrelated to those sales. 137 S. Ct. 1773, 1781 (2017) (citations omitted); *Asahi Metal Indus. Co. v. Sup. Ct.*, 480 U.S. 102, 112 (1987) ("awareness that the stream of commerce may or will sweep the product into the forum State does not convert the mere act of placing the product into the stream into an act purposefully directed toward the forum State").

Plaintiff introduces cases that have interpreted this standard. In *Ford Motor Co. v. Montana Eighth Jud Dist. Ct.*, the court determined that the defendant was subject to personal jurisdiction for a products liability claim in a state in which it did not manufacture the products, because the defendant advertised, sold, and serviced the products in that state. 141 S. Ct. 1017 (2021). *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, allowed for jurisdiction of a non-resident defendant who sold subscriptions over the internet to residents of the forum state. *Zippo,* 952 F. Supp. 1119, 1126 (W.D. Pa. 1997). *Gather Inc. v. Gatheroo,* also allowed for jurisdiction over a non-resident defendant who offered free services over the internet, and had "several Massachusetts users who accepted terms and conditions." *Gather, LLC,* 443 F. Supp. 2d 108, 118 (D. Mass. 2006).

Defendant likens their actions to *GTE New Media Servs., Inc. v. BellSouth Corp.*, which stipulates that personal jurisdiction "cannot be based solely on the ability of District residents to access the defendants' websites." 199 F.3d 1343, 1394 (D.C. Cir. 2000). The Defendant also asserts that *Peluzzo v. Leiboff*, is relevant here because their website, such as the defendant in that case, is available to anyone in the world, and does "little more than make information available to those that are interest." MTD at 9 (quoting) *Peluzzo*, 2004 WL 2926252 (D.C. Super. Ct. Dec. 13, 2004).

Plaintiff alleges that Defendant's practice of collecting location data without the consent of District of Columbia consumers happens in the District of Columbia, as well as the use of location data to target location-based advertising to these customers. Opp. at 9. Defendant asserts that any statements or actions regarding the Complaint were done outside of the District of Columbia and were not directed at the District of Columbia specifically in any way. MTD at 8.

In order to adjudicate this matter, the Court must look to Defendant's cases. This action is different than *Peluzzo* and *GTE New Media*, because the Complaint is not related to a passive website for users can interact. It is one in which users are being actively tracked and targeted by the website. Essentially, Defendant is not only operating an interactive website, but also actively engaging the consumers at their locale, by deliberately tracking their movements. This pushes the scope of activity from a more passive interactive option to an engaging contact with the consumer's location.

Moreover, Defendant also asserts that this case is similar to *Bristol-Myers Squibb* and *Asahi Metal* in that the consumers' conduct here has unilaterally connected the Defendant to the District. However, that logic shortchanges the Defendant's active tracking of the consumers. The

advertising, selling of products (through intermediaries), and aggressive interactivity of the Defendant's conduct makes this more similar to *Ford* than to the Defendant's previously mentioned cases. Moreover, *GTE New Media* and *Peluzzo* delt with websites that "did little more than make information available to those that are interested." *Peluzzo* 2004 WL 2926252 (D.C. Super. Ct. Dec. 13, 2004). According to the facts plead here, this action is not about website information available to interested users, but about websites actively taking information from users.

The Court finds that Defendant's actions arise from its contacts with the District of Columbia. Defendant's actions of actively tracking consumers who are located in the District of Columbia. Despite Defendant's argument that the misrepresentations would have to be made by California employees, and that fact creates no nexus with the District of Columbia. The Court disagrees. In this case Defendant was aware that users in the District of Columbia were tracked and targeted with ads due *specifically* to their location.

2. Purposeful Availment

The second prong of the due process analysis tests whether or not the defendant has purposefully availed themselves to the laws of the forum. According to *Burger King*, the "purposeful availment requirement ensures that a defendant will not be hauled into a jurisdiction solely as a result of random, fortuitous, or attenuated contacts, or of the unilateral activity of another party or a third person." *Burger King*, 471 U.S. at 475 (quotations and citations omitted). The Due Process Clause provides "a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit[.]" *Holder v. Haarmann & Reimer*

Corp., 779 A.2d 264, 270 (D.C. 2001) (quotations omitted); *see Ford Motor Co. v. Montana Eighth Jud Dist. Ct.*, 141 S. Ct. 1017, 1025 (2021) (corporation can "'structure its primary conduct' to lessen or avoid exposure to a given State's courts" (brackets and citation omitted)). Specifically, forum selection clauses are also taken into account when determining availment. *Burger King*, 471 U.S. at 478.

Defendant asserts that the forum selection clause imbedded in its Terms of Service agreement, which stipulates that litigation is to occur in California, precludes a finding of personal jurisdiction in any other forum when the suit relates to users and regarding the products and features relevant in this case. MTD at 11. Defendant goes on to say that it has "structured its primary conduct so as to not subject itself to liability anywhere its goods or services are sold or used, lest it would face specific jurisdiction in *every* state for *any* claim." MTD at 11.

Plaintiff asserts that this point is "factually incorrect and legally irrelevant." Opp. at 7. Plaintiff cites *Ford* and *Zippo* to say that "a company [cannot] avoid the law and courts of a locality where it transacts substantial business by unilaterally imposing a forum selection clause." Opp. at 7. Moreover, Plaintiff also contends that it is not a party to the Defendant's Terms of Service agreement, and thus the clause is not relevant. Opp. at 7. Plaintiff cites *EEOC v. Waffle House Inc.*, in support of this argument, a case which determined that an arbitration agreement between an employer and employee did not bar the EEOC from seeking relief. 534 U.S. 279, 294, 297-98 (2002).

First the Court must address the forum selection clause. While *Burger King* does allow for the forum selection clauses to be used as evidence of purposeful availment, it is not the end-all-be-all. In *Burger King* specifically, the parties were in a franchise relationship and had many

other connections to the forum state than merely a forum selection clause. Moreover, Defendant does not even offer the forum selection clause as evidence of a contract between the parties, just as evidence of purposeful availment only to California law. MTD Reply at 4; see *Ford Motor Co. v. Montana Eighth Jud Dist. Ct.*, 141 S. Ct. 1017, 1025 (2021) (corporation can "structure its primary conduct to lessen or avoid exposure to a given State's courts") (cleaned up). Accordingly, the Court will only view it as evidence in that light.

Next, the Court must determine if there is purposeful availment of the Defendant's actions in the District of Columbia specifically. The Defendant asserts that it "has structured its primary conduct in a way so as to purposefully avail itself of jurisdiction solely in California." MTD at 11. However, the *Burger King* standard as cited by the Defendant is in place to "ensure that a defendant will not be hauled into a jurisdiction solely as a result of random, fortuitous, or attenuated contacts, or of the unilateral activity of another party or a third person." *Burger King*, 471 U.S. at 475 (quotations and citations omitted). This means that while Defendant may attempt to avail itself of only one jurisdiction, they still may be liable in others.

In this case the actions in the District of Columbia were likely not fortuitous or unilateral, they were done with full knowledge that the Defendant had users in the District of Columbia, all the while actively tracking their locations. Moreover, despite the Defendants assertion that *Ford* does not control here, it does shed light on the contacts necessary for purposeful availment in other states. Notably, in *Ford* the Supreme Court stated that contacts with the forum "did not depend on a strict causation-only approach that would ask whether the manufacturer originally sold in each forum State the particular vehicle involved in the accident, or whether the manufacturer designed and manufactured the vehicle in the forum State; rather, it would be

sufficient if the suits related to manufacturer's contacts with forum States." *Ford*, 141 S. Ct. at 1026. This creates a lower bar than the Defendant asserts. Here, the Defendant's contacts with the District of Columbia are related to the tracking and disclosures surrounding that tracking of customers in their specific locations. Therefore, under the *Ford* paradigm, there is specific jurisdiction surrounding the Defendant's specific conduct of tracking of District of Columbia users.

3. Exercising Personal Jurisdiction Would Be Consistent with Fair Play and Substantial Justice

The final prong in the due process analysis is to determine if asserting jurisdiction in the District of Columbia would "offend traditional notions of fair play and substantial justice." *International Shoe Co.,* 326 U.S. 310, 316-17 (1945) (citations omitted). Defendant asserts that jurisdiction would violate this standard because most of the key witnesses are located outside of the District of Columbia, the comparative interest the Plaintiff. has to California in deciding this case is substantially lower, and a finding jurisdiction would not promote judicial economy due to the fact that there are similar suits alive in other jurisdictions currently. MTD at 12; MTD Reply at 8. In response, Plaintiff asserts that the availability of witnesses is of minor concern to a company as large as the Defendant, the Plaintiff has a significant interest in enforcing its own laws, and that the judicial economy argument is frivolous because the interests of the judicial system would be best served by allowing District of Columbia courts to adjudicate District of Columbia law claims. Opp. at 10-12. In *Harris v. Omelon*, the Court laid out the three part standard for evaluating this prong of the due process test: "[(1)] District's interest in providing its residents with a means to redress grievances caused by out-of-state parties, [(2)] the benefit of

contacts with the state against the consequences of those contacts, and [(3)] the burden of litigation on the out-of-state party." 985 A.2d 1103 (D.C. 2009).

In this case, the Court finds that exercising jurisdiction would not violate notions of fair play and substantial justice. Defendant is a national corporation that already employs over 400 people in the District of Columbia. Compl. at 19; Ex. A, Shirey Aff., Att. 4 at 76. The mere fact that witnesses are located out of state would not be enough to violate this standard. Defendant brings up *Brunson v. Kalil & Co.*, where the case was dismissed because "documents, records, and witnesses" the plaintiff would rely on to prove its claims were outside the District of Columbia. 404 F. Supp. 2d 221, 238 (D.D.C. 2005). But that case is not applicable, because *both* parties were not residents of the District of Columbia and the interests of the District of Columbia in presiding over the case was "considerably diminished" by that fact. *Id.* at 238.

Moreover, relating to prong two of the *Harris* standard, Plaintiff is suing to enforce District of Columbia law, and for that reason the District of Columbia court has a significant interest in the case. Additionally, Defendant brings up that California has a larger interest in addressing this case, because users and the company have agreed to litigate there. However, it is well established that the Plaintiff is not a user, but an Attorney General seeking to enforce local law. Finally, relating to prong three of the *Harris* standard, the issue of judicial economy is of lower importance overall, because this Court is being asked to evaluate District of Columbia law, not the validity or similarity of claims in other jurisdictions, and for that reason the only place where District of Columbia law can be evaluated is in the District of Columbia.

II. Failure to State a Claim

When considering a motion to dismiss, the Court must accept as true all of the allegations put forth in the Complaint, and construe all facts and inferences in favor of the non-moving party. *See Murray v. Wells Fargo Home Mort.*, 953 A.2d 308, 316 (D.C. 2008). Dismissal for failure to state a claim upon which relief can be granted is warranted only when it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim. *See id.* However, the allegations in the Complaint must be sufficient to "raise a right to relief above a speculative level." *Clampitt v. Am. Univ.*, 957 A.2d 23, 29 (D.C. 2008) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). Additionally, the Complaint must provide more than mere labels and legal conclusions couched as fact. *See Grayson v. AT&T Corp.*, 980 A.2d 1137, 1144 (D.C. 2009). The Complaint need not include "detailed factual allegations," but must include "more than an unadorned, the defendant-unlawfully-harmed-me accusation." *Mazza v. House Craft, LLC*, 18 A.3d 786, 790 (D.C. 2011).

A. Count One: Defendant Engaged in Materially Unfair or Deceptive Conduct

In this case the Defendant is alleging that the Plaintiff has not made out the prima facie case for an unfair or deceptive conduct claim under the CPPA. In order to make a claim under the CPPA subsections (e) or (f) the Plaintiff must show: that the defendant engaged in an unfair or deceptive trade practice, whether or not any consumer is in fact mislead, deceived, or damaged, by (e) misrepresenting as to a material fact which has a tendency to mislead; (f) failure to state a material fact if such failure tends to mislead; or (f-1) to use innuendo or ambiguity as to a material fact, which has a tendency to mislead. D.C. Official Code, 2001 Ed. § 28–3904(e, f).

Defendant claims that Plaintiff has not pleaded a *material* misrepresentation or omission under subsection (e) or (f). MTD at 13. Under the CPPA, a fact is determined to be material if a

significant number of consumers would "attach importance" to it in determining a "choice of action" in a transaction. *Saucier v. Countrywide Home Loans,* 64 A.3d 428, 442 (D.C. 2013). Defendant asserts that the binding law defines material as being "relevant to [a] reasonable consumer's purchasing decision." Rose v. Wells Fargo Bank, NA., 73 A.3d 1047, 1054 (D.C. 2013). Moreover, Defendant also cites Grayson v. AT&T Corp. to suggest that "material" misrepresentation must be connected to some consumer transaction. *Grayson v. AT&T Corp.*, 15 A.3d 219 (D.C. 2011)

Applying these rules, the Court must determine if Defendant's alleged misstatements and omissions about the extent to which it tracks the whereabouts of its users are material to consumers. Accepting that the Plaintiff's allegation that these misstatements and misrepresentations are true—that the Defendant continues to record users' movements even after they have set privacy controls to block this, continuing to store and use consumers' location even after they sign out of their accounts, and failing to disclose all location data the Defendant collects when the users enable the location-related settings—the Court determines that the actions are material in nature because they would be relevant to a reasonable consumer's purchasing decision if given the choice. Opp. at 1.

Defendant asserts that the user's privacy concerns are not related to any sort of transaction and therefore cannot be considered material. The Plaintiff counters that the misrepresentations *would* relate to a transaction because the information (once discovered) would inform "whether and how to transact with [Defendant]'s products on a going-forward basis." Opp. at 15. The Court determines that this is enough to demonstrate materiality. Even under the standard cited by the Defendant a showing that a reasonable consumer "*would* consider

information... to be material to the decision to purchase," is all that is required to show materiality, not that a reasonable person specifically has considered the information material to the decision to purchase. *Grayson v. AT & T Corp.*, at 251-52 (D.C. 2011)(emphasis added).

Finally, the Defendant asserts that there was no evidentiary showing by the Plaintiff that privacy relating to location sharing would be important to a reasonable customer. MTD at 15-16. The Court finds that the evidence shown by the Plaintiff is enough to make a showing of what a reasonable person would do in this circumstance. Opp. at 15. There is no standard cited by either party as to what the definition of a reasonable customer would be in this circumstance. However, the Court has previously alluded to "showing basic common sense" when evaluating similar claims, thus the Court uses its discretion under the motion to dismiss standard which is: dismissal is warranted only where no "reasonable jury could conclude that the [fact] would be relevant" to a consumer. *Pearson v. Chung,* 961 A.2d 1067, 1075 (D.C. 2008); *Saucier v. Countrywide Home Loans,* 64 A.3d 428, 445 (D.C. 2013). Applying this standard, the Court determines that a reasonable person could find this information important.

III. Duplicitive Nature of Count II

In the Plaintiff's Complaint, they allege that Defendant engaged in unfair trade practices. Defendant responds that this count is "duplicative of, and entirely consumed by" the Plaintiff's deceptive practices claim in Count One. MTD at 16. Defendant also alleges that if Count Two is not duplicative, it warrants dismissal for failure to state a claim of unlawful trade practice as specified by the CPPA. MTD at 17.

A. Count Two is Duplicative of Count One

Defendant claims that the basis for Count Two is the same as Count One, seeks the same form of relief, and relies on the same allegations regarding Defendant's location practices and disclosures. MTD at 16. The applicable rule of law is whether or not the allegation "stem[s] from identical allegations, that are decided under identical legal standards, and for which identical relief is available." *WMI Liquidating Tr. v. Fed Deposit Ins. Corp.*, 110 F. Supp. 3d 44, 59 (D.D.C. 2015); *Univ. Legal Servs., Inc. v. Dist. of Columbia*, 18-CV-0301 (KBJ), 2019 WL 1430045, at *l 1 (D.D.C. Mar. 30, 2019).

The Plaintiff responds that Count Two is premised on conduct that goes beyond Defendant's deceptive representations. Plaintiff points to examples, such as when users previously decline or disabled location-related controls, Defendant repeatedly prompted those users to enable them. Opp. 16; Compl. at 129. This is different conduct than the disclosures represented in Count One, which were contained on the Defendant's website, and in the Terms and Conditions Agreement. The Court finds that this conduct is enough to warrant a different allegation than Count One claims, because it is not related to the representations Defendant made, but rather the continuing action of pop up messages and the like. While the conflict will be resolved under identical legal standards—the CPPA—and relief may be identical, it requires all three elements of the previously mentioned *WMI Liquidating Tr*. Standard. Therefore, the Court finds that the allegations are not identical, and Count Two is not Duplicative of Count One.

B. Count Two: Failure to Plead Unlawful Trade Practice Under CPPA

Next, Defendant asserts that Count Two fails to state a claim, because the Plaintiff fails to plead that there has been any of the unlawful trade practice subsections of the CPPA. MTD at 17. As previously outlined, the prima facie case for a CPPA claim includes that the defendant

engaged in an unfair or deceptive trade practice, whether or not any consumer is in fact mislead, deceived, or damaged. D.C. Official Code, 2001 Ed. § 28–3904. Defendant supports its claim with a case *Hakki v. Zima Co.*, which states that a claim must allege either one of the practices enumerated in the CPPA or, other conduct prohibited by D.C. law. *Hakki v. Zima Co.*, No. 03-9183, 2006 D.C. Super. LEXIS 10, at *7 (D.C. Super. Ct. Mar. 28, 2006).

However, this argument is moot. The case in which Defendant relies upon is no longer good law, because it applied an older version of the CPPA. What's more the CPPA does not contain this language anymore. Therefore, there is no basis for this claim.

C. Count Two Fails to Plead Unfair Conduct

Next, the Defendant claims that the Plaintiff insufficiently plead that Count Two contains an "unfair" trade practice. The definition of what is considered an "unfair" trade practice under the CPPA, is in turn governed by the definition that the Federal Trade Commission ("FTC") uses in the FTC Act. 15 U.S.C.§ 45(a). *See* CPPA, § 28-390l(d). The FTC establishes that an act can be "unfair" if it is "(1) likely to cause substantial injury to consumers (2) which is not reasonably avoidable by consumers themselves and (3) not outweighed by countervailing benefits to consumers or to competition." *Yimam v. Myle Vape, Inc.*, No. 2019 CA 008050 B, 2020 D.C. Super. LEXIS 7, at *16-17 (D.C. Super. Ct. June 11, 2020); see 15 U.S.C. § 45(n). More specifically, the Defendant claims that the Plaintiff has failed to plead factual allegations as to any of the three factors. MTD at 18.

First, the Court must determine whether the Complaint alleges a substantial injury to consumers. Defendant claims that the Plaintiff fails to allege a substantial injury because there is no monetary harm resulting from the location tracking and subsequent targeted advertising.

MTD at 18. Moreover, Defendant also claims that the harms are merely speculative, and therefore not substantial. MTD at 19. Defendant cites an FTC Policy Statement in which it says in "most cases a substantial injury involved monetary harm." FTC, *Policy Statement on Unfairness* (Dec. 17, 1980), www.ftc.gov/public-statements/1980/12/ftc-policy-statement-unfairness ("FTC Policy Statement"). Additionally, Defendant cites *LabMD, Inc. v. Fed Trade Comm'n,* in which the court denied that "privacy harm that may have affected [consumers'] reputations or emotions could constitute "tangible harm" or "substantial injury."" 678 F. App'x. 816, 820-21 (11th Cir. 2016).

Plaintiff asserts that monetary harm is not necessary to support an unfairness claim, and also that the FTC has recognized substantial injuries can result when large numbers of consumers are deprived of the ability to protect their personal information. Opp. at 17. The Plaintiff points to multiple examples where courts around the country have begun alluding to privacy rights violations as potential avenues for substantial injury claims. Opp. at 18; *see e.g., Cousineau v. Microsoft Corp.,* 992 F. Supp. 2d 1116, 1121-22 (W.D. Wash. 2012); *In re: Google Inc. Cookie Placement Consumer Priv. Litig.,* 934 F.3d 316, 325 (3d Cir. 2019); *In re Facebook, Inc. Internet Tracking Litig.,* 956 F.3d 589, 599 (9th Cir. 2020), *cert. denied sub nom. Facebook, Inc. v. Davis,* 141 S. Ct. 1684, 209 L. Ed. 2d 464 (2021). Specifically, the Third Circuit held that the Defendant injured consumers by "surreptitiously collect[ing] private data" in violation of promises not to do so. *In re: Google Inc. Cookie Placement Consumer Priv. Litig.,* 934 F.3d 316, 325 (3d Cir. 2019). Based on the trend of courts recognizing privacy rights as capable of receiving substantial injury, specifically the Defendant in this case being one of the violators for

similar tracking, the Court decides that there is enough of a showing of substantial injury to move forward.

Next, the Court must determine if the Complaint shows that customers could not reasonably avoid injury. Defendant asserts that the Plaintiff cannot make out an unfairness claim because consumers did not fully lack the ability to change their privacy settings, and thus could reasonably avoid the injury. MTD at 19. Defendant evidences its claim with *Davis v. HSBC Bank Nevada, NA.,* which determined that the test for 'reasonably avoid' is not whether subsequent mitigation was convenient or costless, but whether it was 'reasonably possible'". 691 F.3d 1152, 1168-69 (9th Cir. 2012).

Plaintiff contends that Defendant concealed the fact that it was still tracking consumers when they disabled the privacy settings, and for that reason they were reasonably unable to avoid the harm caused by tracking. Opp. at 20. Moreover, Plaintiff also points to evidence of one of Defendant's apps being difficult to change location settings as an example of the reasonability. *See* Compl. 108 (Google Maps "refuses to take No for an answer"). Ultimately, construing the allegations in favor of Plaintiff, Defendant's actions of frustrating attempts by users to disable location settings, and also the tracking after users disabled tracking is enough to withstand the summary judgement threshold. The Court concludes that Plaintiff has pleaded this element of the FTC standard.

Last, the Court must determine if the Complaint fails to plead any factual allegations demonstrating that the injury outweighs any countervailing benefits. Plaintiff claims that the privacy injury is substantial, and Defendant counters that if there is any injury, the benefits to consumers in terms of relevant ads and "more robust use of apps like Google Maps" outweigh

that injury. MTD Reply at 14. The standard for reviewing a claim of this prong is relatively low; in *FTC v. Amazon.com, Inc.,* the court allowed a claim to go forward where the plaintiff did not even contest this matter, and yet the court found that there was enough evidence in the overall pleadings to establish their claim. 71 F. Supp. 3d 1158, 1167 (W.D. Wash. 2014). In this case the plaintiff has established and supported their claim that there is an injury here. Therefore, the Court is satisfied that the Complaint demonstrates that harms to consumers are substantial, as previously discussed in this section. Moreover, the benefits of targeted ads are comparatively low when put up against privacy rights.

CONCLUSION

Accordingly, and based on the entire record herein, it is this the 31st day of August 2022, hereby

ORDERED that Google LLC's ("Defendant") *Motion to Dismiss* is **DENIED**.

SO ORDERED.

Robert R. Rigsby

Robert R. Rigsby, Associate Judge
Superior Court of the District of Columbia

Copies to *Counsel of Record* via CaseFileXpress