IN THE SUPREME COURT
STATE OF GEORGIA

EDIBLE IP, LLC Plaintiff-Appellant v. GOOGLE, LLC Defendant-Appellee.	Case No. S21G0798

PLAINTIFF-APPELLANT EDIBLE IP, LLC'S

PRINCIPAL BRIEF

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TABLE OF CONTENTS

INTRODUCTION 1

SUMMARY OF THE ARGUMENT 3

STATEMENT OF FACTS AND PROCEEDINGS BELOW 4

I. Edible Owns Associated Goodwill And Other Rights In The Business Name "Edible Arrangements" 4

II. Without Permission, Google Auctions Off Edible's Property To Competitors And Keeps The Profits 5

III. Regarding The Trial Court's Alternative Holding, Edible Never Entered Any Agreement With Google, And Its Licensee Did Not (And Could Not) Enter The Agreement On Its Behalf 6

IV. The Trial Court Signed Google's Proposed Order, And The Court of Appeals Erroneously Affirmed 7

ENUMERATION OF ERRORS 8

ARGUMENT 8

I. The Complaint States A Claim For Each Count Alleged 8

A. Georgia Law Unequivocally Protects Edible's Intangible Property In Its Business Goodwill And Reputation 9

B. Because Edible Has The Right To Exclude Google From Profiting From Its Intangible Property, Edible Alleges Every Element Of Its Property Claims 13

1. Edible States A Claim For Civil Theft Under O.C.G.A. § 16-8-2 13

2. Edible States A Claim For Conversion 18

3. Edible States A Claim For Money Had And Received...... 19

C. Contrary To Google's Arguments, Neither The First Amendment Nor Federal Trademark Law Immunize Google's Misconduct 20

1. The Trial Court's Order Violates Federal Trademark Law And Binding Georgia Precedent 21

2. The First Amendment Does Not Protect Google's Appropriation And Sale Of Edible's Intangible Business Property 23

II. The Trial Court's Alternative Grounds Were Error And Do Not Justify Dismissal 25

A. Edible Cannot Be Forced To Arbitrate Claims It Never Agreed To Arbitrate.. 25

1. The Trial Court Clearly Erred By Applying A Presumption Of Arbitrability When Determining The Existence Of An Agreement 25

2. Applying The Proper Standard, Edible Cannot Be Forced To Arbitrate When It Entered No Arbitration Agreement 25

a. No Other Entity Could Waive Edible's Right To A Jury Trial 25

b. Georgia Law Forecloses The Order's Reliance On Apparent Agency And Estoppel 27

B. The Trial Court's Personal Jurisdiction Conclusion Is Based On The Same Contract That Edible Never Entered, And It Is Error 28

C. The Communications Decency Act Does Not Immunize Google For Its Own Tortious Conduct 29

D. Edible's Claims Are Not Time Barred 30

CONCLUSION 30

INTRODUCTION

This case applies long-standing legal principles to new technology. For centuries, the law has recognized that a business possesses valuable property in its "good will." As this Court said, "[g]ood will is the favor which the management of a business wins from the public, and the probability that old customers will continue their patronage and resort to the old place." *NAACP v. Overstreet*, 221 Ga. 16, 29 (1965) (citations omitted). Plaintiff Edible IP, LLC ("Edible") has spent decades building this valuable goodwill in the name "Edible Arrangements." Defendant Google, LLC ("Google") has developed technology to take that goodwill from Edible and sell it for Google's own profit.

Google sells advertising triggered by keywords that users type into its search engine. Google prices that advertising by auctioning off keywords to the highest bidder. When those keywords are non-proprietary terms like "shoes," or "Mother's Day gifts," Google's business may comply with the law. But when Google reaps higher prices by auctioning off the name "Edible Arrangements," it unlawfully profits from Edible's intangible property interest in its goodwill and reputation. These auctions are quite literally the purchase and sale of Edible's goodwill—the "favor it has won from the public." This goodwill is exactly what Google sells, and it is exactly what Edible's competitors seek to purchase.

Georgia law recognizes that goodwill is property from which Edible has the right to exclude others. As this Court said in *Kay Jewelry Co. v. Kapiloff*, "good will and reputation of a business is as much an asset as its physical properties." 204 Ga. 209, 215 (1948). Just like any other property, goodwill can be stolen. As this Court noted in a similar context, the law recognizes the "straightforward [rationale] of preventing unjust enrichment by the theft of good will. No social purpose is served by having the defendant get free some aspect of the plaintiff that would have market value and for which he would normally pay." *Martin Luther King, Jr., Ctr. for Soc. Change, Inc. v. Am. Heritage Products, Inc. ("King")*, 250 Ga. 135, 141 (1982) (quotation marks and citations omitted).

As the U.S. Supreme Court put it, when Google appropriates Edible's intangible property and sells it as its own, it is "endeavoring to reap where it has not sown…and appropriating to itself the harvest of those who have sown." *Int'l News Serv. v. Associated Press*, 248 U.S. 215, 239–40 (1918). The law has never condoned that conduct. Edible's Complaint states a claim under Georgia common law and the plain language of Georgia's theft statute, which expressly protects "intangible" property from any taking, "regardless of the manner in which the property is taken or appropriated." O.C.G.A. §§ 16-1-3(13) & 16-8-2.

The Court of Appeals declined to apply this straightforward law to this new conduct, and it instead re-wrote the Complaint to say that Google merely sells advertising and that its online business is akin to product placement in a retail store. Opinion at 5–6. That holding is not true as a matter of fact, and it is incorrect as a matter of law.

The trial court went even further, signing an order that Google drafted to grant itself absolute immunity from Georgia's theft statute and other property laws. Thus, the trial court held that federal trademark law and the First Amendment somehow prevent Georgia from applying its common law and theft statute to Google's sales of intangible property. As the Court of Appeals recognized, that is not the law. Moreover, none of the trial court's alternative rulings justify dismissal. Accordingly, this Court should hold that Edible has stated a claim and remand the case to the trial court for discovery.

SUMMARY OF THE ARGUMENT

Edible's claim is simple. It owns valuable intangible property associated with the trade name "Edible Arrangements." The law protects its right to exclude others from trading on that name and its associated good will for profit. The Complaint alleges that when Google auctions off that name and the associated business goodwill, Google violates Edible's rights to exclude others from its property and appropriates the value of Edible's goodwill for itself. As a matter of fact, this is an illegal taking, and Edible can introduce evidence within the framework of the Complaint to prove each cause of action.

STATEMENT OF FACTS AND PROCEEDINGS BELOW

I. Edible Owns Associated Goodwill And Other Rights In The Business Name "Edible Arrangements."

Over the last two decades, Edible and its licensees have created enormous value in the business name "Edible Arrangements." V1/39–41. Beginning with a few small shops, the founder of the Edible Arrangements business created the idea of selling cut fruit designed to look like flowers. V1/39. The business has expanded exponentially, growing its reputation and goodwill through the hard work and investment of thousands of small-business owners and the careful management of its intellectual property. V1/39–41.

Thousands of Edible Arrangements' franchisees, including dozens in Georgia, have built the business's goodwill by working to maintain the quality and reputation of the brand. V1/41–42. Thus, the name "Edible Arrangements" has become widely known and carries valuable goodwill. V1/42.

While Edible has licensed use of the name "Edible Arrangements" to a franchisor (and ultimately many franchisees), it owns the goodwill and other property associated with the brand, including the federally registered (and incontestable) trademark and service mark "EDIBLE ARRANGEMENTS," and the state statutory and common law rights to use the name. V1/40–41. Edible has the exclusive right to license this name for another's use. V1/43–44.

Edible's goodwill generates business because consumers seek out "Edible Arrangements" by name. V1/44. When a consumer enters "Edible Arrangements" in an internet search engine, this is a direct manifestation of Edible's goodwill and the result of decades of successful business. *Id.*

II. Without Permission, Google Auctions Off Edible's Property To Competitors And Keeps The Profits.

Google is the world's dominant internet search engine. V1/44–45. When a user inputs a search, Google's algorithms provide relevant results. V1/45. Google calls the result of these algorithms its "organic" search results. *Id.*

Google also posts advertisements with its "organic" search results. Google gets paid for the ads but not the "organic" results. V1/45–46. As part of this advertising, Google sells "keywords" that trigger advertisements on the search results page for those terms. V1/46–48. For example, Google sells non-proprietary terms, like "shoes," "mother's day gift," or "mesothelioma." V1/48.

Google sells these "keywords" through an automated auction. Advertisers bid by identifying the amount they will pay to associate their ad with the particular term. V1/46–47. The value of the keyword as a search query drives the price. V1/47. Google markets keywords to maximize its profit. V1/47–48.

The problem arises when Google stops selling only non-proprietary terms and begins selling property that it has no right to sell—including the name "Edible Arrangements" and the associated goodwill. Google offers to sell the name "Edible

Arrangements" to third parties, and in fact sells the name and important aspects of its associated goodwill to Edible's direct competitors. V1/48. However, the value of "Edible Arrangements" as a search query is derived ***exclusively*** from the goodwill created by the business and owned by Edible. V1/49. A user only Googles "Edible Arrangements" because of the favor that Edible has won in the marketplace. Both Google and its third-party advertisers know this. *Id.*

The purchaser in this transaction is not just purchasing "advertising space." Indeed, Google's generic advertising space in response to a random search is essentially worthless. *Id.* When Google sells the term "Edible Arrangements," Google's customer is seeking to purchase—and Google is seeking to sell—precisely the goodwill and consumer relationship that causes a consumer to seek "Edible Arrangements" by name when in the market for Edible's products. V1/48–49. Thus, the Complaint alleges that the transaction is the purchase and sale of Edible's goodwill; that goodwill is the consideration, and that it defines the price in the keyword auction. Google keeps proceeds of the sale, and Edible receives nothing for the value of its property. *Id.*

III. Regarding The Trial Court's Alternative Holding, Edible Never Entered Any Agreement With Google, And Its Licensee Did Not (And Could Not) Enter The Agreement On Its Behalf.

There is no evidence that Edible entered into any arbitration agreement or forum selection clause with Google. Edible conducts no business other than licensing its intellectual property rights and has never contracted with Google. V2/433–34. The only alleged arbitration agreement involves "Edible Arrangements, LLC," a different entity. V2/268–70. These entities perform different functions and have always been separate and distinct. V2/434, 436.

As the trial court noted, Edible Arrangements, LLC is merely a licensee of Edible. V1/9. As a licensee, Edible Arrangements, LLC is not authorized to act on Edible's behalf beyond the specific scope of its license agreement. V2/434–35. Edible Arrangements, LLC is ***not*** Edible's ***agent***. Nothing gives Edible Arrangements, LLC any power to enter an agreement on Edible's behalf, to waive any of Edible's jury trial rights, or to otherwise act for Edible. *Id.*

IV. The Trial Court Signed Google's Proposed Order, And The Court Of Appeals Erroneously Affirmed.

On October 4, 2019, the trial court signed Google's proposed order granting its motion to compel arbitration and dismissing the Complaint. V1/6–33. On January 29, 2021, the Court of Appeals affirmed the trial court's Order. In its Opinion, the Court of Appeals did not reach the trial court's arbitration or personal jurisdiction rulings, and instead held only that Complaint did not a state a claim as a matter of law. This Court granted certiorari on July 20, 2021.

ENUMERATION OF ERRORS

This Court granted certiorari to determine whether the trial court erred in dismissing the Complaint. The answer is yes: the trial court erred and the Court of Appeals erroneously affirmed. Ga. Const., Art. VI, § VI, ¶ 5 provides jurisdiction.

ARGUMENT

I. The Complaint States A Claim For Each Count Alleged.

The Court of Appeals Opinion and the trial court's Order ignore long-standing property law that guarantees a remedy for violations of property rights. The Court of Appeals ruling (a) erroneously adopts Google's facts and creates an absolute exception to Georgia's property protections for Google's claimed "advertising," and (b) rules that there is no "deprivation" for purposes of theft or conversion even though Google is in fact selling the intangible property at issue and keeping the proceeds. Both conclusions violate O.C.G.A. § 9-11-12(b)(6) and ignore the fundamental nature of the property rights at issue.

While the Court of Appeals was ultimately wrong, it was wise to abandon the more sweeping reasoning that Google wrote for the trial court. That Order erases Georgia's property protections by declaring that federal trademark law and the First Amendment prohibit Georgia from regulating Google's activity. Customer confusion is not an element of any of Edible's claims. But by accepting Google's argument that there can be no liability for stealing intangible property without it, the trial court effectively granted Google immunity from the Georgia law that protects business property. Once again, that is not the law.

A. Georgia Law Unequivocally Protects Edible's Intangible Property In Its Business Goodwill And Reputation.

As the Complaint alleges, Edible owns the trademark, trade name, and other aspects of the goodwill associated with the name "Edible Arrangements." V2/43. While trademark law provides some protection for Edible, that is not the end, or even the beginning, of Edible's property rights. The common law has long-protected goodwill as a form of intangible property. More than a century ago, it was "abundantly settled by authority" that goodwill "is property." *Washburn v. Nat'l Wall-Paper Co*., 81 F. 17, 20 (2d Cir. 1897).[1]

[1] *See also, e.g*, *Chittenden v. Witbeck*, 15 N.W. 526, 534 (Mich. 1883) ("[G]ood-will" is "the favor which the [business] has won from the public" and "[t]his [goodwill] is, no doubt, of great value…."); *Avery & Sons v. Meikle & Co.*, 81 Ky. 73, 86–87 (Ky. 1883) ("When a workman or manufacturer has, by skill, care, and fidelity, manufactured a good article, it becomes of the utmost importance…that its origin and ownership should be known,...and his reputation is thereby built up, it is to him the most valuable of property rights."); *Bininger v. Clark,* 60 Barb. 113, 115 (N.Y. Gen. Term 1870) ("The good will of a business firm is an important part of its property, and will be protected by a court of equity...."); *Peabody v. Norfolk*, 98 Mass. 452, 457 (1868) ("If a [person] establishes a business and makes it valuable by his skill and attention, the good will of that business is recognized by the law as property"); *Partridge v. Menck,* 2 Barb. Ch. 101, 103 (N.Y. Ch. 1847) ("[Complainant] is entitled to protection against any other person who attempts to pirate upon the good will of the complainant's friends, or customers, or of the patrons of his trade or business….").

This Court similarly has explained that the "good will and reputation of a business is as much an asset as its physical properties." *Kay Jewelry Co. v. Kapiloff*, 204 Ga. 209, 215 (1948). And "[t]he trade name of a partnership is a part of its good will and is an asset of the firm…subject to sale as any other firm property." *Richter v. Richter*, 202 Ga. 554, 556–57 (1947).

As every law student learns, a fundamental aspect of property ownership is the right to exclude others from exploiting it. In *Bowers v. Fulton County*, this Court wrote that "[t]he term property comprehends not only the thing possessed, but also…means the rights of the owner in relation to land or a thing; the right of a person to possess, use, enjoy, and dispose of it, and the corresponding right to exclude others from the use." 221 Ga. 731, 737 (1966) (citation omitted).

The owner's right to exclude also applies to intangible property like trade names and business goodwill. As this Court summarized in *Reis v. Ralls*, "[a]s the symbols of a business's reputation and good will, trade names, trademarks and service marks employed to identify distinctly, by meaning or association, one's business, products or services are generally regarded as a species of ***intangible property capable of exclusive ownership and entitled to legal protection from encroachment.*** " 250 Ga. 721, 722 (1983) (emphasis added, citation omitted). Similarly, "[t]here can be no doubt…but that a corporation has the ***exclusive right*** to the use of its own name…." *Gano v. Gano*, 203 Ga. 637, 639 (1948) (emphasis added).

Thus, the law protects intangible property to ensure that businesses maintain the exclusive use of the value they create. For example, in *International News Service v. Associated Press*, the U.S. Supreme Court confirmed the AP's legal right to exclude a competitor from using new technology to sell the news AP had gathered. 248 U.S. 215, 239–40 (1918). After the AP gathered and published news on the east coast, the competing service telegraphed that news to the west coast, where it still had value as "fresh" news, and printed it in its own papers. The Supreme Court held that the defendant could not take and exploit this intangible property, which "has been acquired by complainant as the result of organization and the expenditure of labor, skill, and money, and which is salable by complainant for money." *Id.* at 239. As the Court stated, the "defendant in appropriating it and selling it as its own is endeavoring to reap where it has not sown, and by disposing of it to newspapers that are competitors of complainant's members is appropriating to itself the harvest of those who have sown." *Id.*[2]

This Court has also held that Georgia law protects exclusive rights in intangible property. In *King*, the Court considered whether Dr. King's heirs could

[2] That property rights arise from productive creation traces to the foundations of our law. *See, e.g.*, John Locke, *Two Treatises of Government* 245–46 (1690) (property arises from the application of human labor); *see also supra* at 9 n.1.

enjoin the unauthorized sale of commemorative busts using his name and likeness. 250 Ga. 135 (1982). In surveying cases regarding the exclusive ownership of intangible property, the Court noted that Georgia was the first to recognize a common law right to prevent advertisers from exploiting a person's image for profit without his consent. *Id*. at 138 (citing *Pavesich v. New England Life Ins. Co.,* 122 Ga. 190 (1905)). The opinion also approvingly quotes the U.S. Supreme Court's "straight-forward rationale" for protecting the right to publicity by "preventing unjust enrichment by the ***theft of good will***. No social purpose is served by having the defendant get free some aspect of the plaintiff that would have market value and for which he would normally pay." *Id*. at 141 (quoting *Zacchini v. Scripps-Howard Broad. Co*., 433 U.S. 562, 576 (1977)) (emphasis added). Applying that rationale, the Court held that Georgia law allowed Dr. King's heirs to protect his "name and likeness" from those who would appropriate it "without consent and for financial gain of the appropriator." *Id*. at 143.

The cause of action for "appropriation" recognized in *King* relies on the same property analysis applicable here: "Unlike [certain other torts]…the interest protected in the appropriation cases is…a ***proprietary one, in the exclusive use of the plaintiff's name*** and likeness as an aspect of his identity." *Id.* at 142 (emphasis added). Further, "the measure of damages…is the value of the appropriation to the user." *Id.* at 143. Edible alleges the same thing here: Google is appropriating for its own financial gain the value of Edible's property, in violation of Edible's right to exclusive use of the value it has created.

B. Because Edible Has The Right To Exclude Google From Profiting From Its Intangible Property, Edible Alleges Every Element Of Its Property Claims.

1. Edible States A Claim For Civil Theft Under O.C.G.A. § 16-8-2.

Edible's claim for civil theft, under O.C.G.A. § 51-10-6, requires only an allegation that Google violated Georgia's criminal theft statutes. The theft by taking statute applies to the taking of any property "regardless of the manner in which the property is taken or appropriated." O.C.G.A. § 16-8-2. The gravamen of theft by taking is the taking of another's property against their will. *Stull v. State*, 230 Ga. 99 (1973). The relevant questions, then, are whether the subject is "property," and whether the defendant has wrongfully taken it.

First, the theft statute's definition of "property" is as broad as possible and expressly includes intangible property: "'Property' means ***anything of value***, including but not limited to real estate, ***tangible and intangible personal property***, contract rights, services, choses in action, and other interests in or claims to wealth…." O.C.G.A. § 16-1-3(13) (emphasis added).

As discussed above, business goodwill is one of the most valuable and well-developed species of intangible property. *Supra* at 9–12. Thus, by its plain terms, the statute protects it. This conclusion comports with many courts in Georgia and elsewhere that have recognized that intangible property may be stolen. *See, e.g.*, *Brown v. State*, 177 Ga. App. 284 (1985) (services were property under theft-by-taking statute); *Carpenter v. United States*, 484 U.S. 19, 25 (1987) ("intangible nature" of property "does not make it any less 'property' protected by the mail and wire fraud statutes"); *An-Hung Yao v. State*, 975 N.E.2d 1273, 1281 (Ind. 2012) (theft of trademarks).

The theft statute couples its broad definition of "property" with a broad definition of how property may be "taken." As the Court of Appeals noted in *State v. Meeks*, the "theft by taking statute contains the catch-all phrase '***regardless of the manner in which the property is taken or appropriated***,' which renders the statute broad enough to encompass theft by conversion, theft by deception or ***any other of the myriad, and even yet-to-be-concocted, schemes for depriving people of their property***." 309 Ga. App. 855, 860 (2011) (emphasis added).

Here, the Complaint specifically alleges how Google takes and exploits Edible's property, by selling it to other people and keeping the profits, all in violation of Edible's exclusive rights to the property. V2/48–50, 52–53. The Court of Appeals recharacterized these allegations as mere advertising that does not amount to appropriation, and the trial court held that Google did not "take" Edible's property because Edible continued to use it. Opinion at 5–6; V1/24–25. But as the U.S. Supreme Court stated in *United States v. Carpenter*, this type of thinking "misse[s] the point." 484 U.S. at 26.

In *Carpenter*, the defendant was convicted of mail and wire fraud for taking confidential information in violation of a newspaper's property right to maintain its exclusive use. Just as Google says here, the *Carpenter* defendant argued "that [he] did not interfere with [the newspaper's] use of the information or did not publicize it and deprive the [newspaper] of the first public use of it." *Id.* But the Supreme Court recognized that ***news***, "however little susceptible of ownership or dominion in the absolute sense," is the "stock in trade" of the newspaper business and is "gathered at the cost of enterprise, organization, skill, labor, and money, and to be distributed and sold to those who will pay money for it, as for any other merchandise." *Id.* (citation omitted). The relevant point, therefore, was that "***the business had a right to decide how to use [the information] prior to disclosing it to the public***." *Id.* (emphasis added).

This case involves the same analysis. The goodwill associated with "Edible Arrangements" is "the stock in trade" of Edible's business, "gathered at the cost of enterprise, organization, skill, labor and money." *Id.* Edible sells this property through licenses "to those who will pay money for it." *Id.* And rather than license Edible's property, Google simply takes it and sells it to Edible's competitors. By violating Edible's property rights, Google's conduct is just another "[newly] concocted scheme for depriving [Edible] of [its] property" that constitutes theft under Georgia law. *Meeks*, 309 Ga. App. at 860.

Further, the trial court's holding that there was no "deprivation" violates both law and logic. Like *Carpenter*, many other authorities hold that a victim "may be deprived of his property…without its being seized or physically destroyed, or taken from his possession." *Wynehamer v. People*, 13 N.Y. 378, 433 (N.Y. 1856). And many cases affirm theft convictions where defendants only deprived victims of the right to exclusive control. Examples include copying someone's social security number or their debit card PIN. *See, e.g.*, *State v. Cecil*, No. 35979-1, 2008 WL 2428517 (Wash. Ct. App. June 17, 2008) (credit card, social security number, and PIN); *Collins v. State*, 946 P.2d 1055 (Nev. 1997) (security access codes); *State v. Perkins*, 639 N.E.2d 833 (Ohio. Ct. App. 1994) (safe combination).

Similarly, where a person copies a photograph or a computer program—and leaves the original with the victim—that still constitutes theft. Thus, in *Automated Drawing Systems, Inc. v. Integrated Network Services., Inc.*, the Court of Appeals affirmed a civil theft claim against defendants who profited by selling unlicensed copies of appropriated software source code to their customers. 214 Ga. App. 122, 122–24 (1994), *overruled on other grounds by Lyman v. Cellchem Int'l, Inc.*, 300 Ga. 475, 479 (2017); *see also Nat'l Surety Corp. v. Applied Sys., Inc.*, 418 So. 2d 847, 849–50 (Ala. 1982) (computer program). Similarly, in *State v. Nelson*, 842 A.2d 83 (N.H. 2004), a defendant scanned copies of photographs and returned the originals. The court affirmed the conviction because he had violated the victim's "right to exclude others from possessing, using and enjoying a particular item of property." *Id.* at 86. Google does the same here by depriving Edible of its exclusive right to control who may sell its name and profit on its goodwill.

The Court of Appeals avoided this conclusion by creating its own facts. Opinion at 5–7. On this motion to dismiss, the Complaint must be taken as true and all doubts resolved in Edible's favor. *Fritz v. Shadwich*, 312 Ga. App. 906, 906 (2011). But regardless of the standard, the Court of Appeals is simply incorrect.

As discussed above, Google is not merely selling advertising. When Google auctions off the name "Edible Arrangements," the value exchanged in that transaction is the sale of Edible's goodwill, reputation, and access to Edible's customers that have sought out Edible Arrangements by name. *Supra* at 6. At worst, the precise nature of this transaction is a question of fact for a jury that cannot be resolved against Edible on this motion.

Finally, the Court of Appeals incorrectly held that applying Georgia's theft statute to Google's sale of Edible's property would "improperly broaden criminal liability." Opinion at 7. While "a criminal statute must be construed strictly against criminal liability," such construction may only occur if the statute "***is susceptible to more than one interpretation***…." *Mays v. State*, 351 Ga. App. 434, 436 (2019) (emphasis added). If a criminal statute is not ambiguous, it may not "be construed *in favor* of [a defendant] beyond its literal and obvious meaning." *Clarke v. State*, 167 Ga. App. 402, 403 (1983).[3] The statute's plain language applies to Google's conduct because it applies to "anything of value, including…tangible and intangible personal property…," O.C.G.A. § 16-1-3(13), and "regardless of the manner in which the property is taken or appropriated," O.C.G.A. § 16-8-2. The Court of Appeals' narrowing of these unambiguous statutes to save Google from civil liability is therefore error. [4]

2. Edible States A Claim For Conversion.

Under Georgia law, "[a]ny distinct act of dominion and control wrongfully asserted over another's personal property, in denial of his right or inconsistent with his right, is a conversion of such property." *Taylor v. Powertel, Inc.*, 250 Ga. App. 356, 358 (2001). "[I]t is not necessary that the defendant assert any right of ownership over the property; it is sufficient if the defendant wrongfully assumes dominion over the property inconsistent with the owner's right." *Levenson v. Word*, 294 Ga. App. 104, 106 (2008) (citation omitted).

As discussed above, Edible's intangible property rights, including the right to control its property and exclude others from it, can be taken. *See, e.g.*, *Trotman*,

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[3] *See also, e.g.*, *Stubbs v. State*, 193 Ga. App. 342, 343 (1989) ("Penal laws should be construed strictly, but they should not be so construed as to defeat the obvious intention of the General Assembly.") (citation omitted).

[4] Both the trial court and the Court of Appeals rely exclusively on the dismissal of the theft count to dismiss Edible's RICO claim. V1/27. Because the theft analysis is incorrect, there is no basis for dismissing the RICO claim.

311 Ga. App. at 213 ("intangible teaching materials on the laptop" were converted); *Jones*, 193 Ga. App. 768 (conversion of idea for TV show); *see also English & Sons, Inc. v. Straw Hat Rests., Inc.*, 176 F. Supp. 3d 904, 921 (N.D. Cal. 2016) (permitting conversion of trademarks and trade names).

When Google auctions off the term "Edible Arrangements" and sells some portion of Edible's goodwill, this is an act of "dominion" and "conversion" of Edible's property. In *Deere & Co. v. Miller-Godley Auction Co.*, the Court of Appeals held it was "clear…that an auctioneer [like Google] exercises an act of dominion over the property he auctions when he sells the property. This is especially true considering the fact that an auctioneer [like Google] receives a monetary benefit from selling the property." 249 Ga. App. 797, 799 (2001); *see also supra* at 14–17 (discussing "taking" of right to exclusive use).

3. Edible States A Claim For Money Had And Received.

"An action for money had and received is founded upon the equitable principle that no one ought unjustly to enrich himself at the expense of another, and is maintainable in all cases where one has received money under such circumstances that in equity and good conscience he ought not to retain it, and *ex aequo et bono* it belongs to another." *Jasper Sch. Dist. v. Gormley*, 184 Ga. 756, 758 (1937).

The Complaint alleges that the proceeds from Google's auctions are derived from its improper sale of Edible's property. The Court of Appeals dismissed the claim based on its faulty mere "advertising" analysis. Opinion at 5–7. And the trial court's Order dismissed the claim based on alleged facts outside the Complaint—that Google purportedly provided services to the third parties who bought Edible's property. V1/26. Importantly, though, "[i]t is immaterial how the money may have come into the defendant's hands, and the fact that it was received from a third person will not affect his liability, if, in equity and good conscience, he is not entitled to hold it against the true owner." *Haugabook v. Crisler*, 297 Ga. App. 428, 432 (2009). Based on the Complaint's allegations, *see, e.g.*, V1/53, Google "is endeavoring to reap where it has not sown, and…is appropriating to itself the harvest of those who have sown." *Int'l News*, 248 U.S. at 239–40. Google cannot "in equity and good conscience" keep these proceeds, and a claim for money had and received must lie. *Gormley*, 184 Ga. at 758.

C. Contrary To Google's Arguments, Neither The First Amendment Nor Federal Trade Mark Law Immunize Google's Misconduct.

While the Court of Appeals ignored this analysis, the trial court dismissed Edible's claims based on Google's broad assertion that this intangible property may ***only*** be protected through trademark infringement claims or other claims asserting "consumer confusion." V1/17. That holding violates federal trademark law and binding Georgia precedent, and its erroneous First Amendment analysis would grant Google sweeping new immunity from theft (and other torts).

1. <u>The Trial Court's Order Violates Federal Trademark Law And Binding Georgia Precedent.</u>

The Order's conclusion that consumer confusion is required ignores that "the federal system of registration and protection does not preempt parallel state law protection, either by state common law or state registration…. In the vast majority of situations, federal and state trademark law peacefully coexist." *Matal v. Tam*, 137 S. Ct. 1744, 1753 (2017) (quotation marks and citation omitted).[5] State property claims persist alongside trademark law, including the claims that Edible brings here: theft, conversion, and money had and received. Without preemption, the only question is whether Edible pleads the elements of these state claims.

While consumer confusion is one reason to protect trade names and trademarks, it does not encompass all the property rights involved. Indeed, trademarks are but one way to protect the property rights in a business's goodwill. For example, *Hanover Star Milling Co. v. Metcalf* explains that under un-preempted pre-Lanham Act law, the fundamental "property right" at issue in trademark claims is the right to "the continued enjoyment of [one's] trade

[5] This is notably different than, for example, federal copyright law, which completely preempts "all legal or equitable rights that are equivalent," 17 U.S.C.A. § 301, and Georgia's Trade Secrets Act, which expressly supersedes "conflicting tort, restitutionary, and other laws of this state…." O.C.G.A. § 10-1-767(a).

reputation and the good will that flows from it, free from unwarranted interference by others," and that a trade mark is merely "an instrumentality" for protecting that right to goodwill. 240 U.S. 403, 412–13 (1916) (internal citation omitted); *accord McLean v. Fleming*, 96 U.S. 245, 252 (1877) ("Everywhere courts of justice proceed upon the ground that a party has a valuable interest in the good-will of his trade, and in the labels or trade-mark which he adopts to enlarge and perpetuate it."); *Goodwill*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("Because [a]…trademark or servicemark is a symbol of goodwill, **trademark infringement is *a form* of theft of goodwill**.") (emphasis added).

Similarly, this Court has held that Georgia common law protects a tradename owner not only for the public's benefit, but for the owner's own damages. In *Miller & Meier & Associates v. Diedrich*, "[p]laintiff claimed that defendants used its name and logo without authority and therefore infringed on plaintiff's rights to sole use thereof." 174 Ga. App. 249, 256–57 (1985). Defendant argued that, for misappropriation, the law provided no right to damages and could only enjoin improper use to protect the public. This Court rejected this: "[w]hen the law requires a person…to refrain from doing an act which may injure another…the injured party may recover for the breach of such legal duty if he suffers damage thereby." *Diedrich v. Miller & Meier & Assocs. Planners, Inc.*, 254 Ga. 734, 736 (1985) (quoting O.C.G.A. § 51-1-6). Edible seeks the same relief.

2. <u>The First Amendment Does Not Protect Google's Appropriation And Sale Of Edible's Intangible Business Property.</u>

The trial court also accepted Google's claims that Georgia law cannot regulate any of Google's alleged conduct—including the sale of someone else's property—because of the First Amendment. V1/17–18. That is not the law.

The Order cites *McHugh Fuller Law Group, PLLC v. PruittHealth, Inc.*, where this Court recognized "potential conflicts" between the First Amendment and trademarks. 300 Ga. 140, 144 (2016). *McHugh* states "[m]uch useful social and commercial discourse would be all but impossible if speakers were under threat of an infringement lawsuit every time they made reference to a person, company or product by using its trademark [or trade name.]" *Id.* at 148.

But crucially, Edible does not attack Google's mere "reference" to its property, nor "speaking" a name. Instead, Edible complains that Google, without permission, actually sells Edible's property in its name and associated goodwill. Google's sale of Edible's property for its own profit is not speech and deserves no protection. Indeed, the U.S. Supreme Court, in *Zacchini*, 433 U.S. at 576 (1977), and this Court, in *Pavesich*, 50 S.E. at 80, have both rejected the idea that the First Amendment protects the appropriation of a property right for commercial use.

Further, even with respect to the "expressive, as opposed to purely commercial" use of a word, the U.S. Supreme Court has ruled that the First Amendment does not permit a party to encroach on another's right to exclusive control of its intangible property or the value that it has created in certain words. In *San Francisco Arts & Athletics, Inc. v. United States Olympic Commission (“SFAA”)*, the Court addressed a federal law granting the U.S. Olympic Commission exclusive use of the word “Olympic” and associated symbols. 483 U.S. 522, 535 n.12 (1987). This law did not require consumer confusion and provided no statutory defenses. *Id.* at 531. On a First Amendment challenge, the Court upheld the law and stated that “use of the word by other entities to promote an athletic event would directly impinge on the USOC’s legitimate ***right of exclusive use***,” and the “[plaintiff’s] expressive use of the word cannot be divorced from ***the value the USOC’s efforts have given to it***.” *Id.* at 540–41 (emphasis added). Moreover, the Court held that the “mere fact that the [plaintiff] claims an expressive, as opposed to a purely commercial, purpose does not give it a First Amendment right to appropriate to itself the harvest of those who have sown.” *Id.* at 541 (quotation and punctuation omitted).

SFAA is directly on point and forecloses Google’s argument for First Amendment immunity. The Georgia legislature has passed O.C.G.A. § 16-8-2, which protects all species of intangible property from theft. As held in *SFAA*, there is no First Amendment right to appropriate another’s valuable property for your own. *Id.* at 541; *see also Int’l News Serv.*, 248 U.S. at 239–40.

II. The Trial Court's Alternative Grounds Were Error And Do Not Justify Dismissal.

Entering Google's order, the trial court dismissed with a laundry list of alternative grounds. None of them persuaded the Court of Appeals. However, because they are within this Court's grant of certiorari, Edible addresses them here.

A. Edible Cannot Be Forced To Arbitrate Claims It Never Agreed To Arbitrate.

1. The Trial Court Clearly Erred By Applying A Presumption Of Arbitrability When Determining The Existence Of An Agreement.

The Order's "Legal Standards" repeatedly invokes a presumption in favor of arbitration. V1/7. But the controlling issue was whether Edible actually entered the relevant contract, and courts "only apply the presumption of arbitrability to the interpretation of contracts ***if we have already determined that, under [s]tate law, the parties formed a valid agreement to arbitrate***." *Bickerstaff v. SunTrust Bank*, 332 Ga. App. 121, 128–29 (2015) (emphasis added). Applying this presumption to the question of contract formation is reversible error. *See Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 303 (2010).

2. Applying The Proper Standard, Edible Cannot Be Forced To Arbitrate When It Entered No Arbitration Agreement.

Edible "cannot be required to submit to arbitration any dispute which [it] has not agreed…to submit." *AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 648 (1986). Here, there was simply no agreement to arbitrate.

a. No Other Entity Could Waive Edible's Right To A Jury Trial.

The Order acknowledged that Edible never entered an arbitration agreement with Google but held that a licensee bound Edible to arbitrate based on "traditional principles of agency law." V1/11 (citation omitted). That was error. Under Georgia law, a principal may only be forced to arbitrate if there is evidence that its agent had authority to make such an agreement. *Ashburn Health Care Ctr., Inc. v. Poole*, 286 Ga. App. 24, 26–27 (2007); *see also United Health Servs. of Ga., Inc. v. Alexander*, 342 Ga. App. 1, 4 (2017) (collecting cases).

Importantly, the alleged agent must have had specific authority to waive a jury trial on behalf of the principal. For example, in *Life Care Centers of America v. Smith*, the Court found no arbitration agreement because a daughter's "broad" power of attorney did not specifically cover the "power to sign away…[the] right to a jury trial." 298 Ga. App. 739, 741–42 (2009); *see also, e.g.*, *Coleman v. United Health Servs. of Ga., Inc.*, 344 Ga. App. 682, 683–86 (2018).

Here, there is no evidence that Edible Arrangements, LLC had any actual authority to contract on Edible's behalf beyond sublicensing its intellectual property. V1/12. In fact, Edible Arrangements, LLC did not have any such authority. V2/434–35. To paraphrase *Alexander*, "while the prior conduct of [Edible] may have authorized [Edible Arrangements, LLC] to [enter certain agreements regarding trademarks or franchisees], 'there is no evidence that [Edible]…gave [Edible Arrangements, LLC] express authority to enter into the arbitration agreement on [its] behalf.'" 342 Ga. App. at 4 (quoting *McKean v. GGNSC Atlanta*, 329 Ga. App. 507, 509 (2014)) (some punctuation omitted).

b. Georgia Law Forecloses The Order's Reliance On Apparent Agency And Estoppel.

The law and undisputed facts also doom the Order's reliance on "apparent agency." V1/12–13. In Georgia, "apparent authority…is created…when the statements or conduct ***of the alleged principal*** reasonably cause ***the third person to believe*** that the principal consents to have ***the act*** done on his behalf by the purported agent." *Hinely v. Barrow*, 169 Ga. App. 529, 530 (1984) (emphasis added); *accord, e.g.*, *Alexander*, 342 Ga. App. at 4 (collecting cases).

In this case, the "alleged principal"—Edible—did nothing to cause Google—"the third person"—to believe that Edible Arrangements, LLC could enter an arbitration agreement on its behalf. There was no evidence that Google ***relied on***, or even was aware of, any of Edible's alleged conduct. Google's evidence shows that the alleged agreement was entirely automated and its records do not mention Edible at all. V2/243–44. So it appears that Google was unaware that Edible—the alleged principal—even existed. That dooms any argument for apparent authority because no Edible conduct ever effected Google. *See, e.g.*, *Poole*, 286 Ga. App at 26 (unknown facts could not support apparent authority); *Hinely*, 169 Ga. App at 530 (conduct of principal must "reasonably cause the third person to believe that the principal consents").

Finally, the Order incorrectly finds estoppel. In Georgia, estoppel only operates to prevent ***a signatory*** to an arbitration agreement from avoiding its obligations by bringing suit against a nonsignatory. *See, e.g.*, *Older Homes, LLC v. Iverson*, 300 Ga. App. 332, 338 (2009). That is inapplicable here because, of course, Edible is not a signatory to the alleged agreement.

Estoppel only applies to a ***nonsignatory*** if it seeks to enforce the contract containing the arbitration clause. *See Helms v. Franklin Builders, Inc.*, 305 Ga. App. 863, 866 (2010); *LaSonde v. CitiFinancial Mortg. Co.,* 273 Ga. App. 113, 114–15 (2005). Here, Edible's claims have nothing to do with the alleged Google contract and the doctrine does not apply.

B. The Trial Court's Personal Jurisdiction Conclusion Is Based On The Same Contract That Edible Never Entered, And It Is Error.

The trial court also concluded that Google's alleged form contract required Edible to bring its claims in California. However, forum selection clauses are "essentially no more than contractual provisions…." *Rice v. Champion Bldgs., Inc.*, 288 Ga. App. 597, 600 (2007). If the parties do not agree to a forum selection clause, there is no such clause to enforce. *See, e.g.*, *Noorani v. Sugarloaf Mills Ltd. P'ship of Ga.*, 308 Ga. App. 800, 804–05 (2011); *Apparel Res. Int'l, Ltd. v. Amersig Se., Inc.*, 215 Ga. App. 483, 485 (1994). Because Edible never entered into the contract, no forum selection clause applies.

Further, given (a) Google's extensive presence (and repeated commission of torts) in Georgia, (b) the fact that it is registered and authorized to do business here, and (c) that Edible served Google's registered agent here, personal jurisdiction clearly exists. *McCall v. Cooper Tire & Rubber Co.*, 355 Ga. App. 273, 275 (2020) ("[A] foreign corporation authorized to do business in this state is a Georgia resident for jurisdictional purposes.").

C. The Communications Decency Act Does Not Immunize Google For Its *Own* Tortious Conduct.

Another of Google's alternative grounds claims that the Communications Decency Act, 47 U.S.C. § 230(c)(1) ("CDA"), immunizes Google's conduct. However, the CDA only immunizes "providers of interactive computer services against liability arising from content created by third parties." *Maynard v. Snapchat, Inc.*, 346 Ga. App. 131, 133 (2018). Here, the Complaint does not challenge any third-party content that Google displays, nor any choices any third party makes; it targets only Google's own tortious conduct in selling Edible's property and keeping the proceeds. As the Court of Appeals held in *Maynard,* a technology company has no immunity for its own tortious conduct on its online platform. *Id.* at 135. Here, Edible seeks to hold Google liable for its own illegal sale of Edible's property with its auction system. It does not treat Google as the "publisher or speaker" of any third-party content.

D. Edible's Claims Are Not Time Barred.

The trial court also erred by dismissing based on any statute of limitations. Contrary to Google's analysis, this is not a case of a single tort that caused injury over time. V1/58. Each time it sells Edible's property, Google again commits conversion and theft by taking, and a new cause of action arises. *Leon Jones Feed & Grain, Inc. v. Gen. Bus. Servs., Inc.*, 175 Ga. App. 569, 570 (1985) ("[E]ach time Jones [erroneously] paid the sales tax…a cause of action accrued in favor of Jones and the…statute of limitation began to run.").

As to Edible's civil RICO claim, the Order applies the wrong statute. The correct statute of limitations is O.C.G.A. § 16-14-8, as amended in 2015, which permits an action to be commenced "until five years ***after the conduct in violation of a provision of this chapter terminates***." *Id.* (emphasis added). Because Google's conduct has never "terminate[d]," Edible's RICO claims are timely.

CONCLUSION

The common law and the General Assembly's clear statute protect the full range of personal property, including intangible business goodwill. The Complaint alleges that Google takes this property and sells it. That states a claim for each count and the Complaint cannot be dismissed under Rule 12(b)(6).

Respectfully submitted this 23rd day of August, 2021.

/s/ Jason J. Carter

CERTIFICATE OF SERVICE

I hereby certify that I have, this day, served the foregoing **PLAINTIFF-APPELLANT EDIBLE IP, LLC'S PRINCIPAL BRIEF** upon all counsel of record by filing a true and correct copy thereof with the Clerk of Court using the court's electronic filing system, which will electronically serve all parties of record. By prior agreement of the parties, mail service is not required, and the parties will be served by e-mail as follows:

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EXHIBIT A

SUPREME COURT OF GEORGIA
Case No. S21G0798

July 30, 2021

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

EDIBLE IP, LLC v. GOOGLE, LLC.

Upon consideration of the Appellant's motion for an extension of time to file opening brief in the above case, it is hereby ordered that the motion be granted. An extension is given until August 23, 2021, to file.

A copy of this order MUST be attached as an exhibit to the document for which an extension is received.

SUPREME COURT OF THE STATE OF GEORGIA
Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

, Clerk