

**IN THE SUPREME COURT OF
THE STATE OF GEORGIA**

EDIBLE IP, LLC,

Appellant,

v.

GOOGLE LLC,

Appellee.

Case No. S21G0798

BRIEF OF APPELLEE GOOGLE LLC

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INTRODUCTION

The appeal of Edible IP, LLC (“Edible”) is baseless. Edible’s defective and deficient claims for “theft” and “conversion” of a trade name are premised on the uniformly rejected premise that trade names and trademarks grant unlimited exclusionary rights akin to real property. As the Court of Appeals recognized, Edible’s “[c]reative pleading” ineffectively attempts to leverage trademark rights without any allegation of consumer confusion. The Court of Appeals was correct: long-established Georgia law confirms that confusion is the sole wrong that trademark rights protect against. Its decision not to upend over a century of established trademark law, and not to interpret Georgia law to directly conflict with the First Amendment, should be affirmed.

Alternatively, this Court should affirm based on any of the four additional bases the trial court identified for dismissing Edible’s complaint. First, Edible is bound by an arbitration agreement that its corporate agent acceded to, and Edible may not subversively plead its way out of arbitration. Second, Edible is bound by a forum selection clause in the same agreement, and thus should have filed any lawsuit against Google in California. Third, Edible’s claims are precluded by the Communications Decency Act, 47 U.S.C. § 230. Fourth, Edible’s claims are time-barred, because they originated in 2011, but Edible did not bring suit until 2018. Any and all of these reasons warrant affirmation of the decisions below.

APPELLEE’S STATEMENT OF BACKGROUND FACTS

I. GOOGLE’S ADVERTISING PROGRAM

Google is a Delaware limited liability company that operates a popular and well-known internet search engine. R-9; R-44-45. Google monetizes its search engine by selling advertising services to third parties. R-46. One of those services, referred to in Edible’s complaint as “keyword advertising,” allows third parties to place ads that may appear (or “trigger”) on Google’s search results page when consumers search for certain keywords. *Id.*¹ While Google may suggest certain keywords, the choice of which keywords to bid on in the hopes of triggering an ad resides with the advertisers. R-46-48.

Far from being a “new technology” (Br. 1), Google’s advertising program is more than 20 years old, and “Edible Arrangements” has been used as a keyword by third party advertisers since at least 2011. R-46, 49. Edible’s complaint, filed in December 2018, disclaims “any ... relief for any consumer confusion,” based on Edible’s trade name or trademark. R-51.

II. EDIBLE’S ADVERTISING AGREEMENT WITH GOOGLE

Edible, acting through its agent Edible Arrangements LLC (“Edible

¹ Edible does not accurately describe the operation of Google’s search engine or advertising program. *See* R-132. But Edible’s errors do not meaningfully change the analysis of its claims.

Arrangements”)² has advertised on Google since 2014 using the “Edible Arrangements” trade name. R-10; R-243-44. Like all Google advertisers, Edible Arrangements agreed to Google’s Terms of Service (“Google’s Terms”). R-10; R-243-44. Those terms included both arbitration and forum selection clauses, as well as a representation that Edible Arrangements had bound to the Terms “each third party, ... for which [it] advertises” and its affiliates—i.e., Edible. R-243-244; R-247-253.³ Edible Arrangements was given a chance to “opt out” of the arbitration agreement, but it did not. R-244; *see also* R-247.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY HELD THAT EDIBLE FAILED TO STATE A CLAIM

A. Google Has Not “Taken” Anything from Edible.

The Court of Appeals correctly recognized that Google’s advertising

² As used herein, Edible Arrangements includes its predecessor entities: Edible International, LLC, Edible Arrangements International, LLC, and Edible Arrangements International Inc. *See* R-268-69. Edible and Edible Arrangements are operated as a single enterprise by Tariq Farid, who was Edible’s declarant at the trial court, and is the signatory on Edible Arrangements’ corporate filings. *See* R-433-436; R-285; R-288; R-291.

³ “In ruling on [Google’s] motion to compel arbitration, the trial court was permitted to make factual determinations from evidence outside the pleadings.” *Kindred Nursing Centers Ltd. P’ship v. Chrzanowski*, 338 Ga. App. 708, 715 (2016) (citing O.C.G.A. § 9-9-6 (a)). By contrast, the trial court did not look to affidavits in connection with Google’s motion to dismiss. *See* R-7-8.

program “has not taken Edible IP’s trade name or sold it for profit. Rather, Google auctioned off the opportunity to advertise on the results page produced when an individual types the keyword phrase ‘Edible Arrangements’ into the Google search bar.” Slip Op. 5. Contrary to Edible’s suggestion that the Court of Appeals “adopt[ed] Google’s facts” (Br. 8), the Court of Appeals’ description of Edible’s claims is taken straight from the complaint, which alleges that Google allows advertisers to “bid” on which search terms will cause their ads to “trigger.” *See* R-46. Paying for ad *placement* is not theft. As the Court of Appeals recognized, choosing to place an ad on the search results page when a user searches for “Edible Arrangements” is no different than choosing to place two products next to each other on the same store shelf—both forms of promotion merely encourage comparison shopping, much the same as advertisements placed near competitors’ brick and mortar locations. Slip Op. 5-7.

Giving its argument a new spin before this Court, Edible now insists that Google’s advertisers are “not just purchasing ‘advertising space’” (Br. 6), but instead are purchasing Edible’s “good will.” Br. 9-13. This new argument fails as well, because any theft of “good will” must be predicated on consumer confusion, and Edible’s complaint expressly disclaims any reliance on consumer confusion. *See* R-51.

Edible’s disclaimer of confusion dooms its “good will” argument because a

trademark or trade name owner only loses good will if a consumer is confused about the source of the product or service the consumer purchased. *See, e.g. Pearl Optical, Inc. v. Pearle Optical of Ga., Inc.*, 218 Ga. 701, 704 (1963) (“[T]he general public is and might be deceived and misled into confusing the business and services of the defendant with that of the plaintiffs ... [and] **as [a] result** the plaintiffs’ good will and reputation are now and would, in the future, be diluted and whittled away to the unjust enrichment of the defendant.”) (emphasis added). Absent confusion, merely using a trademark or trade name does not deprive the mark’s owner of good will. *E.g. Limitless Worldwide, LLC v. AdvoCare Int’l, LP*, 926 F. Supp. 2d 1248, 1254 (D. Utah 2013) (where “there is not a likelihood of confusion [then] any damage to reputation or loss of goodwill will be minimal”); *see also* R-40 (alleging that Edible received recognitions and awards (and thus good will) even years after Google’s advertising program began).

Having failed to allege either confusion or any facts from which a loss of good will could be inferred, Edible tries to revive its claims by mining 19th-century case law for out-of-context quotes about “good will.” Br. 9-11. Edible’s most relevant citations merely confirm that loss of good will associated with a trademark or trade name *requires* consumer confusion.⁴ Its remaining authorities discuss

⁴ *See* Br. 9-11 (citing *Avery v. Meikle*, 81 Ky. 73, 105 (1883) (reasoning that a company producing plows would not intentionally copy the mark of a competitor making inferior plows, because that would “run the risk of confusion with inferior

neither the appropriation of good will nor trademarks or trade names.⁵

Unable to show any loss of good will in the absence of consumer confusion, Edible shifts gears by citing right of publicity decisions for the proposition that “Georgia law protects exclusive rights in intangible property.” Br. 11 (citing *Martin Luther King, Jr., Ctr. for Soc. Change, Inc. v. Am. Heritage Prod., Inc.*, 250 Ga. 135 (1982); *Pavesich v. New England Life Ins. Co.*, 122 Ga. 190 (1905); and

plows”); *Partridge v. Menck*, 1847 WL 4112 (N.Y. Ch. 1847) (trademark infringement requires the defendant’s mark “be likely to deceive and impose upon his customers”); *Bininger v. Clark*, 1870 WL 7479 (N.Y. Sup. Ct. 1870) (“The defendant closely imitates the name of the late firm with the plain intent of diverting any trade that followed the late firm”); *Kay Jewelry Co. v. Kapiloff*, 204 Ga. 209, 213 (1948) (“The ultimate wrong under all these theories of relief is that there will be a confusion on the part of the public”); *Richter v. Richter*, 202 Ga. 554, 558 (1947) (requiring “the name [be] used to deceive or mislead the public so as to palm off the goods”); *Reis v. Ralls*, 250 Ga. 721, 724 (1983) (“the buyers are knowingly using a confusingly similar name”); *Gano v. Gano*, 203 Ga. 637, 639 (1948) (liability existed where defendant copied a trade name “for the purpose of deceiving the public into thinking that the businesses of the plaintiffs and the defendants were the same”); Br. 22 (citing *McLean v. Fleming*, 96 U.S. 245, 251 (1877) (“no trader can adopt a trade-mark, so resembling that of another trader, as that ordinary purchasers, buying with ordinary caution, are likely to be misled”)).

⁵ See Br. 9-11 (citing *Washburn v. Nat’l Wall-Paper Co.*, 81 F. 17, 19 (2d Cir. 1897) (dispute over how depreciation of corporate assets was calculated); *Chittenden v. Witbeck*, 15 N.W. 526, 527 (1883) (disposition of partnership assets after the death of a partner); *Peabody v. Norfolk*, 98 Mass. 452, 461 (1868) (trade secret misappropriation); *NAACP v. Overstreet*, 221 Ga. 16, 29, 142 S.E.2d 816, 827 (1965) (conspiracy to intimidate and harass customers of a business); *Bowers v. Fulton Cty.*, 221 Ga. 731, 734 (1966) (eminent domain condemnation) *Int’l News Service v. Assoc. Press*, 248 U.S. 215 (1918) (no discussion of good will; instead discussing doctrine of “hot news” misappropriation that has not been recognized in Georgia, and “INS itself is no longer good law.” *Barclays Capital Inc. v. Theflyonthewall.com, Inc.*, 630 F.3d 876, 894 (2d Cir. 2011)).

Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562 (1977)).⁶ But the only “intangible property” examined in those cases is a natural person’s right to publicize their name and likeness—and publicity is “an aspect of privacy” unique to natural persons. *Cabaniss v. Hipsley*, 114 Ga. App. 367, 377 (1966). “A corporation, partnership or unincorporated association has no personal right of privacy.” Restatement (Second) of Torts § 652I (1977); *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950) (“corporations can claim no equality with individuals in the enjoyment of a right to privacy”); *see also Bd. of Regents of the Univ. Sys. of Georgia v. The Atlanta J.*, 259 Ga. 214, 217 (1989) (distinguishing between “a *personal* right to privacy” and “a *corporate* preference for privacy”) (emphasis in original). Unlike the plaintiffs in Edible’s right of publicity cases, Edible is not a natural person and has no corresponding “intangible rights” in publicity or privacy. Edible has lost nothing.

B. Having Lost Nothing, Edible Cannot State a Claim.

Having lost no good will and lacking a right to publicity in the first instance, Edible has not identified *anything* “taken” by Google under Georgia law. As the Court of Appeals held, that is fatal to Edible’s claims. Slip Op. 6-8.

⁶ Edible did not raise misappropriation or right of publicity claims in either of the courts below; accordingly, separate from rejecting it on the merits, this Court may hold that Edible waived any reliance on the right of publicity. *See Syntec Indus., Inc. v. Godfrey*, 269 Ga. 170, 172 (1998).

Edible’s first claim, “theft of personal property,” O.C.G.A. § 16-8-2, requires Google to “depriv[e]” Edible of its property, with “deprive” defined as “withhold[ing the] property of another permanently or temporarily; or . . . dispos[ing] of the property so as to make it unlikely that the owner will recover it.” O.C.G.A. § 16-8-1 (1). Similarly, Edible’s second claim, common law conversion, requires “the unauthorized assumption and exercise of right of ownership over personal property of another, contrary to the owner’s rights.” *Williams v. The Georgia Dep’t of Corr.*, 338 Ga. App. 719, 722 (2016) (quoting *Pro. Energy Mgmt., Inc. v. Necaise*, 300 Ga. App. 223, 227 (2009)). As discussed *supra* Section I.A, Google has not “deprived” Edible of its trade name or good will, nor has Google “exercised ownership” over the same. Referencing the name of a business (other than in a manner that causes confusion) is not an “exercise of ownership” any more than mentioning a business in a guidebook or article. The Court of Appeals thus correctly affirmed the dismissal of those claims.

Edible’s third claim, money had and received, requires the defendant to have “received money which the plaintiff *ex aequo et bono* is entitled to recover and which the defendant is not entitled to retain.” *Eastside Carpet Mills, Inc. v. Dodd*, 144 Ga. App. 580, 580 (1978). But, as the Court of Appeals correctly recognized (Slip Op. 8-9), Google’s advertising program merely sells advertising space to its customers, and Google is entitled to retain proceeds from the legitimate sale of that

advertising space to which Edible has no claim. *See Eastside Carpet*, 144 Ga. App. at 580 (bank was entitled to retain proceeds from loan used to purchase stolen property, because providing a loan is a compensable service); *see also* T-44-46 (trial court asking Edible’s counsel “[h]ow is [Edible] deprived of anything as a result of [Google’s advertising program]?”). The two authorities Edible cited do not support a contrary result: neither decision examined money received in exchange for services actually performed.⁷

Edible’s fourth claim, an alleged violation of Georgia’s RICO statute, requires Edible to successfully plead underlying, predicate claims. *See* O.C.G.A. § 16-14-3(8)(A). Because its other claims fail, so too does its RICO claim. *See J. Kinson Cook of Georgia, Inc. v. Heery/Mitchell*, 284 Ga. App. 552, 560 (2007) (“JKCI has failed to establish claims of fraud and conversion, upon which its Georgia RICO claims are predicated. It follows that the Georgia RICO claims alleged by JKCI fail as a matter of law.”). The Court of Appeals correctly affirmed the dismissal of Edible’s entire complaint.

C. The Court of Appeals Correctly Interpreted the Civil Theft Statute.

Edible separately argues that the Court of Appeals improperly limited

⁷ *See* Br. 19-20 (citing *Jasper Sch. Dist. v. Gormley*, 184 Ga. 756, 756 (1937) (claim for repayment of bank loan where payments were not made when due); *Haugabook v. Crisler*, 297 Ga. App. 428, 429 (2009) (attorney failed to perform services and instead “concocted a steady stream of lies claiming that the suit was progressing”)).

Georgia’s theft statute, O.C.G.A. § 16-8-2, by looking beyond the statute’s “plain language.” Br. 17-18 (citing *Mays v. State*, 351 Ga. App. 434, 436 (2019), *Clarke v. State*, 167 Ga. App. 402, 403 (1983), and *Stubbs v. State*, 193 Ga. App. 342, 343 (1989)). Google agrees that the statute is unambiguous, but Edible fails to recognize that this exact statute has been interpreted narrowly before. *E.g. Clarke v. State*, 317 Ga. App. 471, 473 (2012) (clarifying that “OCGA § 16-8-2 is not designed to punish a simple breach of contract”). In any event, Edible’s argument fails both because it is inconsistent with the legislative history, and because it violates Georgia’s canons of statutory construction.

Edible has asserted a claim for civil theft, arising under O.C.G.A. § 51-10-6, which incorporates the elements of O.C.G.A. § 16-8-2. *See* R-51. O.C.G.A. § 51-10-6 was introduced in the legislature “as the Civil Shoplifting Act,” drafted in “an effort to lessen the[] burdens for retailers ... [by] giv[ing] merchants a statutory method to pursu[e] a civil remedy against those who damage or steal personal property.” *See* D. Johnson, *Injuries to Personalty; Provide Remedy for Owners of Intentionally Damaged or Stolen Property*, 5 Ga. St. U. L. Rev. 503 (1988); *see* Ga.L. 1988, pp. 404-408. This Court should reject Edible’s attempt to convert this targeted effort into a sweeping statute that criminalizes the mere use of trademarks. *See Transportation Ins. Co. v. El Chico Restaurants, Inc.*, 271 Ga. 774, 775 (1999) (this Court may “look to the clear legislative history” to interpret a statute).

Moreover, if the legislature had contemplated that O.C.G.A. § 51-10-6 could be read to include any commercial use of another's trade name, it would have had no reason to enact O.C.G.A. 16-9-93.1, which specifically addressed unauthorized use of trade names through a computer network. However, O.C.G.A. 16-9-93.1, which is predicated on the same expansive mere-use-of-trademark premise Edible advocates, was held unconstitutional in *American Civil Liberties Union of Georgia v. Miller*, 977 F. Supp. 1228 (N.D. Ga. 1997), *affirmed sub. nom. American Civil Liberties Union of Georgia v. Barnes*, 168 F.3d 423 (11th Cir. 1999). Citing the First Amendment, *Miller* ruled (and the Eleventh Circuit affirmed) that O.C.G.A. § 16-9-93.1 was unconstitutional because it criminalized the use of trademarks and trade names “regardless of whether a speaker has any intent to deceive or whether deception actually occurs.” *Miller*, 977 F. Supp. at 1232. That is *exactly* what Edible now seeks to criminalize: the use of a trade name without any real or intended confusion or deception. *See* R-51 (Edible's complaint disclaiming “any ... relief for any consumer confusion”). The Court of Appeals was therefore correct in rejecting Edible's interpretation of O.C.G.A. § 16-8-2; Edible's construction would expand criminal liability beyond what the Constitution allows.

Miller also demonstrates that Edible's argument improperly ignores “the canon of constitutional doubt,” which holds that “if a statute is susceptible of more than one meaning, one of which is constitutional and the other not, [this Court]

interpret[s] the statute as being consistent with the Constitution.” *Premier Health Care Invs., LLC v. UHS of Anchor, L.P.*, 310 Ga. 32, 48 (2020). That canon controls, because Edible’s proposed construction of O.C.G.A. § 16-8-2 would render the theft statute unconstitutional. *Miller*, 977 F. Supp. at 1232.

II. EDIBLE SEEKS TO UPEND OVER A CENTURY OF ESTABLISHED TRADEMARK AND FIRST AMENDMENT LAW

A. Under Georgia Law Trademarks and Trade Names Provide Only Limited Property Rights.

Even if the Court of Appeals’ analysis of Georgia theft law was somehow incorrect (and it is not), Edible’s claims are still doomed by a century of established Georgia trademark law. Edible’s argument for “theft” or “conversion” of a trade name depends on the unsupported assumption that “[t]he owner’s right to exclude ... applies to intangible property like trade names.” Br. 10. However, as this Court explained as early as 1937, trade names are protected “not [because] there is property acquired ... in the name but to prevent fraud and deception.” *Atlanta Paper Co. v. Jacksonville Paper Co.*, 184 Ga. 205, 212 (1937); accord *Multiple Listing Serv., Inc. v. Metro. Multi-List, Inc.*, 225 Ga. 129, 133 (1969) (quoting *Atlanta Paper*); see also *Prestonettes, Inc., v. Coty*, 264 U.S. 359, 368 (1924) (a trademark “does not confer a right to prohibit the use of the word or words ... [a] trade-mark only gives the right to prohibit the use of it so far as to

protect the owner's good will against the sale of another's product as his.’). Thus, a trade name grants a *limited* property right to protect against consumer confusion or deception—not an unlimited property right restricting all use of a word or phrase.⁸

The limited nature of trademark and trade name property rights is not unique to Georgia. Courts across the country have recognized that “[a] trademark owner has at best a quasi-property right in his mark, and can only prevent its use so as to maintain a confusion-free purchasing public.” *Hyperheal Hyperbarics, Inc. v. Shapiro*, 404 F. Supp. 3d 953, 966 (D. Md. 2019). Thus, “you can own a trade name, you can own a trademark, you can own a service mark, **but you cannot own a word.**” *Id.* (emphasis added); *see also United States v. Mongol Nation*, 370 F. Supp. 3d 1090, 1122–23 (C.D. Cal. 2019) (“The ‘property rights’ or protections accorded a trademark owner can only be understood in the context of trademark law and its purposes.”); *Ritter v. Farrow*, 388 Wis.2d 421, 435 (Ct. App. Wis. 2019) (“[T]rademarks are not ordinary property interests.”). This is not a new idea; as a leading trademark commentator has recognized, if trademark or trade name liability could be imposed without “likelihood of confusion” then “over 100

⁸ Contrary to Edible’s argument, neither Google nor the Court of Appeals suggested Georgia common law has been “preempt[ed]” by the federal Lanham Act or O.C.G.A. § 10-1-371, *et seq.* *See* Br. 21-22 (citing *Matal v. Tam*, 137 S. Ct. 1744, 1753 (2017) and *Diedrich v. Miller & Meier & Assocs. Planners, Inc.*, 254 Ga. 734, 736 (1985)). *Atlanta Paper* supports Google’s argument, and the Court of Appeals’ decision, and it pre-dates both the Lanham Act and O.C.G.A. § 10-1-371.

years of trademark law would be discarded.” J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition*, § 25:9.5 (5th ed. 2019).

None of the Georgia trademark or trade name cases cited by Edible are to the contrary: they all require a showing of consumer confusion. *See, supra* Section I.A at n.4. Unable to find any Georgia trademark authorities supporting its position, Edible cites an assortment of cases that discuss *other* forms of property—not trademarks or trade names.⁹ Whatever rights may be attendant to those forms of property cannot change this Court’s uniform and long-standing precedent that trademarks and trade names protect only against consumer confusion; they do not provide Edible with an absolute right to prevent someone else from using a word. *See Atlanta Paper*, 184 Ga. at 212; *Multiple Listing Serv.*, 225 Ga. at 133.

⁹ *See* Br. 11 (citing *International News*, 248 U.S. 215 (discussing the “hot news” doctrine)); Br. 14-16 (citing *Brown v. State*, 177 Ga. App. 284 (1985) (theft of services); *Carpenter v. United States*, 484 U.S. 19 (1987) (confidential information); *State v. Meeks*, 309 Ga. App. 855 (2011) (drugs); *Wynehamer v. People*, 13 N.Y. 378 (1856) (liquor); *State v. Cecil*, 145 Wash. App. 1014 (2008) (credit card numbers, social security numbers, and PINs); *Collins v. State*, 946 P.2d 1055 (1997) (security codes); *State v. Perkins*, 639 N.E.2d 833 (1994) (combination to a safe); *Automated Drawing Sys., Inc. v. Integrated Network Servs., Inc.*, 214 Ga. App. 122 (1994) (computer program); *Nat’l Sur. Corp. v. Applied Sys., Inc.*, 418 So. 2d 847 (Ala. 1982) (computer program); *State v. Nelson*, 842 A.2d 83, 84 (2004) (photographs)); Br. 18-19 (citing *Taylor v. Powertel, Inc.*, 250 Ga. App. 356 (2001) (charges on a phone bill); *Levenson v. Word*, 294 Ga. App. 104 (2008) (assets of a decedent’s estate); *Trotman v. Velociteach Project Mgmt., LLC*, 311 Ga. App. 208 (2011) (teaching materials); *Jones v. Turner Broad. Sys., Inc.*, 193 Ga. App. 768 (1989) (business plan for a television show); *Deere & Co. v. Miller-Godley Auction Co.*, 249 Ga. App. 797 (2001) (grain drill and tractor)).

Edible cites three out-of-state decisions for the proposition that trademarks and trade names may be “converted,” or otherwise infringed, without a showing of consumer confusion. Each is readily distinguishable. First, *An-Hung Yao v. State*, 975 N.E.2d 1273 (Ind. 2012), (Br. 14), examined counterfeit *physical goods*, not the sort of abstract “theft” of a name that Edible alleges here. See 975 N.E.2d at 1275 n.1 (“toy replicas that look like real guns”). Moreover, the *An-Hung Yao* court’s recitation of the charging documents makes clear that the state actually alleged consumer confusion. *Id.* at 1278 (charging that defendant created goods “in such a manner that [they] purported to have been made by another person.”). Because Edible disclaimed confusion, *An-Hung Yao* cannot support Edible’s claim.

Second, in *English & Sons, Inc. v. Straw Hat Restaurants, Inc.*, 176 F. Supp. 3d 904 (N.D. Cal. 2016), (Br. 19), the plaintiffs were alleged to “convert” a trademark “by registering ownership with the U.S. Patent and Trademark Office.” *Id.* at 923. Thus, the trademark was not “converted” simply by being used (as Edible alleges here); rather the ownership of the trademark was fraudulently *transferred* by filing false documents with the trademark office. *Id.* Edible’s complaint contains no similar allegations that Google fraudulently went to the trademark office and tried to switch the ownership of Edible’s marks.

Third, *San Francisco Arts & Athletics, Inc. v. U.S. Olympic Committee*, 483 U.S. 522 (1987), (Br. 24), examines an act of Congress granting the United States

Olympic Committee (“USOC”) unique statutory rights in the OLYMPICS term that were expressly recognized to “differ[] from the normal trademark protection[s].” 483 U.S. at 531. Under that special statute, which applied only to that one term, “the USOC need not prove that a contested use is likely to cause confusion, and an unauthorized user of the word d[id] not have available the normal statutory defenses.” *Id.* That deviation from standard trademark law was permitted because “in the special circumstance of the USOC, Congress ha[d] a broader public interest in promoting, through the activities of the USOC, the participation of amateur athletes from the United States in ‘the great four-yearly sport festival, the Olympic Games.’” *Id.* at 537. Protecting the “Olympic” term is also a requirement of participation in the games. *Id.* at 533-34 (the Olympic Charter requires member countries protect “the Olympic flag, symbol, flame, and motto from unauthorized use”). Thus the *San Francisco Arts & Athletics* court actually *distinguished* normal trademark and trade name rights—the only kind of rights Edible alleges—from the *sui generis* rights granted by Congress to the USOC. Because Congress has passed no special statute granting Edible equivalent rights in “Edible Arrangements,” *San Francisco Arts & Athletics*’s highly fact-specific ruling does not salvage Edible’s claims.

B. The First Amendment Precludes Edible’s Claims.

For Edible to prevail, it would need to overcome not only the stare decisis

barrier of a century of established trademark law, but also the First Amendment. As this Court recently recognized in *McHugh Fuller Law Group, PLLC v. PruittHealth, Inc.*, “[t]rademark infringement law’s likelihood-of-consumer-confusion test mitigates potential conflicts between trademark protection and the First Amendment” that would exist if trademark rights were absolute exclusionary rights. 300 Ga. 140, 144 (2016); *see id.* at 148 (“trademark mark law does not impose a blanket prohibition on referencing a trademarked name in advertising”); *cf. San Francisco Arts & Athletics*, 483 U.S. at 531-34 (recognizing special compelling, government interest in the OLYMPIC term justified Congress’ express statutory grant of supra-normal rights for that term). Edible attempts to escape *McHugh Fuller* by arguing “Edible does not attack Google’s mere ‘reference’ to its [trade name] ... [i]nstead Edible complains that Google ... actually sells Edible’s [trade name.]” Br. 23. This is not only inaccurate (the name is not “sold” to anyone, it’s used as a targeting mechanism), but also a distinction without a difference; First Amendment protection is not confined to philanthropies.

In *Smith v. Wal-Mart Stores, Inc.*, 537 F. Supp. 2d 1302 (N.D. Ga. 2008), Wal-Mart brought trademark dilution claims against an individual who sold t-shirts that criticized Wal-Mart using parts of the Wal-Mart mark, such as “‘Walocaust,’ ‘Wal-Qaeda’ and ‘Freedom-Hater-Mart.’” *See id.* at 1316. Wal-Mart argued, as Edible does here, for a distinction between First Amendment “speech” and “sales.”

Id. at 1340. But the court properly rejected that argument (along with Wal-Mart’s claims), explaining that t-shirts bearing messages are protected by the First Amendment, “and they do not lose their protection by being sold rather than given away.” *Id.* (internal quotation omitted).

Contrary to Edible’s arguments, the Supreme Court has repeatedly recognized that “commercial use” or “selling” (Br. at 23) do not obviate First Amendment protection. *See, e.g., Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 761 (1976) (“[s]peech ... is protected even though it is carried in a form that is ‘sold’ for profit”); *see also Brown v. Entertainment Merchants Ass’n*, 564 U.S. 786, 790 (2011) (“video games qualify for First Amendment protection”); *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 580 (2011) (First Amendment protected sale of pharmaceutical records for marketing purposes). Georgia courts that have considered the issue are in accord. *See Valencia v. Universal City Studios LLC*, 2014 WL 7240526, at *8 (N.D. Ga. Dec. 18, 2014) (rejecting as “unconvincing” an argument that “any First Amendment protection ... is incomplete because [defendants’] films are, in fact, sold in the commercial marketplace”); *Bergen v. Martindale-Hubbell, Inc.*, 248 Ga. 599, 599 (1981) (rejecting argument that commercial directory was “entitled to a lesser degree of protection in that it is commercial speech”). A contrary holding “would empower the Government to prohibit newspapers from running editorials

or opinion pieces ... so long as the newspapers were owned by corporations—as the major ones are.” *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 373 (2010) (Roberts, C.J., concurring).

If accepted, Edible’s proposed speech versus commerce distinction could be used to silence for-profit critics, such as newspapers that publish and sell critical articles. Such a distinction “would raise profound First Amendment issues” that cannot be justified here. *McHugh Fuller*, 300 Ga. at 148. Consistent with *McHugh Fuller*, 300 Ga. at 144, this Court should reject Edible’s novel claims for “trademark theft” and “conversion” as precluded by the First Amendment.

III. THE TRIAL COURT CORRECTLY DISMISSED EDIBLE’S COMPLAINT ON MULTIPLE ALTERNATIVE GROUNDS

Even if this Court determines that the Court of Appeals’ reasoning was erroneous, its decision should still be affirmed based on the trial court’s alternative holdings. *See City Of Gainesville v. Dodd*, 275 Ga. 834, 835 (2002) (“This Court will affirm the judgment of a lower court so long as it is right for any reason, even if it is based upon erroneous reasoning.”) (internal quotation marks, citation omitted). Here, four alternative grounds justify affirming dismissal.

A. The Trial Court Correctly Ordered Edible to Arbitration.

1. *Edible’s Agent Bound Edible To Google’s Terms.*

The trial court correctly compelled all of Edible’s claims to arbitration. *See*

Samaca, LLC v. Cellairis Franchise, Inc., 345 Ga. App. 368, 373 (2018) (“it was not error to dismiss the suit with prejudice” where “all of the issues” were compelled to arbitration); *Simmons Co. v. Deutsche Fin. Servs. Corp.*, 243 Ga. App. 85, 90 (2000) (same). Both of Edible’s counter arguments fail.

First, Edible contends that the trial court improperly applied a “presumption of arbitrability” to find that Edible was bound by Google’s Terms. Br. 25. That is incorrect: the word “presumption” does not even appear in the trial court’s order. *See* R-6-33. Rather, the trial court cited to Georgia’s “clear public policy in favor of arbitration.” R-7. As Edible’s own cited authority explains, the “policy favoring arbitration is not ... the same as applying a presumption of arbitrability.”

Bickerstaff v. SunTrust Bank, 332 Ga. App. 121, 129 (2015), *rev’d*, 299 Ga. 459 (2016) (cited at Br. 25). Moreover, Edible never identifies any evidentiary gap that the trial court supposedly relied on a “presumption” to overcome. *See* Br. 25.

Second, Edible argues that its agent, Edible Arrangements, could not bind it to an arbitration agreement. Br. 25-28. That is also incorrect. Edible authorized Edible Arrangements both to use the “Edible Arrangements” mark and to enter into sublicensing agreements with franchisees (R-11-12; R-446-447), and that created a limited scope agency. *See Pincus Bros. v. Footwear Mktg. Assocs., Inc.*, 1992 WL 78818, at *6 (E.D. Pa. Apr. 9, 1992) (granting right to sublicense trademark created agency relationship with respect to use of the trademark); *accord Larball*

Pub. Co. v. CBS Inc., 664 F. Supp. 704, 707 (S.D.N.Y. 1987) (company that granted sublicenses for copyright owners acted as their agent). Edible Arrangements was acting within the scope of that agency when it agreed to Google’s Terms, including the arbitration clause, in order to advertise Edible’s brand. *See* R-243-244. Edible was thus also bound by Edible Arrangements, because the latter was merely acting “within the scope of [its] agency.” *Triad Health Mgmt. of Georgia, III, LLC v. Johnson*, 298 Ga. App. 204, 207 (2009).¹⁰

The trial court cited and relied on both *Pincus* and *Larball*, but Edible does not address either case. Instead, Edible cites inapposite authority that does not address trademarks, trade names, or corporate relationships, but instead examines family members admitting relatives to nursing homes. *See* Br. 26-27. As the trial court correctly recognized, those decisions are not relevant to a sophisticated corporate enterprise like Edible, which has over 1200 storefronts and uses a shell company to sublicense its trademarks. *See* R-11-12; R-39; R-268-270.

Moreover, each of the nursing home cases cited by Edible may be readily

¹⁰ Further, Google’s Terms include a binding arbitration clause applicable to “all disputes and claims between Google and Customer or between Google and Advertiser,” as well as any claims brought by the “respective affiliates and parent companies of Customer or Advertiser.” R-250-252. Therefore, even if Edible were not an “Advertiser” (which it is), Edible would still be contractually bound by the arbitration provision as an “affiliate” of Edible Arrangements. *See* R-314 (public filing by Edible claiming that Edible and Edible Arrangements are “affiliated company[ies]”).

distinguished. The *Poole*, *Alexander*, and *McKean* decisions found no evidence in the record that could create an agency relationship. *Ashburn Health Care Ctr., Inc. v. Poole*, 286 Ga. App. 24, 26 (2007) (agency argument was made “without any supporting citations to the record”); *United Health Servs. of Georgia, Inc. v. Alexander*, 342 Ga. App. 1, 3 (2017) (the parties “had never actually discussed the daughter making decisions for her mother”); *McKean v. GGNSC Atlanta, LLC*, 329 Ga. App. 507, 510 (2014) (“The appellees have not presented any evidence of words or conduct” that could create “apparent authority”). But the record before the trial court below included evidence that Edible authorized Edible Arrangements to execute licensing agreements on its behalf (R-11-13) pursuant to an express contract (T-41), and that Edible confirmed this agency relationship in court filings over more than a decade. R-295; R-314; R-330; R-349. Edible never explains why agency law does not apply on the record presented.

Edible contends *Smith* and *Coleman* examined “broad” powers of attorney (Br. 26), but that is incorrect. The *Smith* court examined a “health care power of attorney” that “was limited to decisions related to health care” and not “contractual or negligence claims.” *Life Care Centers of America v. Smith*, 298 Ga. App. 739, 741 (2009). Edible failed to submit its contract with Edible Arrangements to the trial court (T-41), but it seems safe to assume that its trademark licensing agreement did not restrict Edible’s agency to a “health care power of attorney”—or

its ability to promote Edible's marks. Finally, *Coleman* found no evidence that the principal authorized any agency at all. *Coleman v. United Health Servs. Of Ga., Inc.*, 344 Ga. App. 682, 684 (2018). This is manifestly different from the record here, which includes ample evidence that Edible Arrangements is authorized to contract on Edible's behalf regarding the "Edible Arrangements" brand name. *See* R-295; R-314; R-330; R-349.

Amidst its mischaracterization of nursing home decisions, Edible does not even attempt to distinguish this Court's decision in *Home Materials, Inc. v. Auto Owners Insurance Co.*, 250 Ga. 599, 601 (1983), which Google relied on extensively before the courts below. *See* R-137-138. In *Home Materials*, an insurance company contracted with an agent to sell insurance policies, and the agent then represented to a customer that the customer's policy had been renewed when it had not been. 250 Ga. at 599-600. The insurance company argued that it was not bound by its agent's representations because it had not agreed to the renewed contract. *Id.* But this Court rejected that argument, finding that an agency relationship was created by the insurance company's authorization of the agent to sell insurance policies, and the company was thus bound by its agent's representations. *Id.* at 600-01.

Just like the insurance company in *Home Materials*, Edible has an express contract with Edible Arrangements that authorized the latter to contract for use of

the “Edible Arrangements” brand. *See* T-41; R-295; R-314; R-330; R-349.

Therefore, when Edible Arrangements represented that it had bound Edible to Google’s Terms (R-243-244), Edible was so bound—no different from the insurance company in *Home Materials*.

2. *Edible Misstates Georgia Agency And Estoppel Law.*

Edible’s grant of an express agency to Edible Arrangements is dispositive on the issue of arbitration; however, Edible complains about the trial court’s alternative holdings that Edible Arrangements was an “apparent agent” and that Edible is estopped from avoiding arbitration. Edible’s arguments misstate the law.

Citing *Hinely v. Barrow*, 169 Ga. App. 529 (1984), Edible argues that no apparent agency was created because “[t]here is no evidence that Google *relied on*, or even was aware of, any of Edible’s alleged conduct.” Br. 27 (emphasis in original). But *Hinely* does not require evidence of reliance; it merely concludes that a “close, familial relationship” does not create an apparent agency. 169 Ga. App. at 530 (rejecting apparent agency argument where “as support for his claim that his ex-wife had acted as Barrow’s agent, the appellant pointed only to the close, familial relationship enjoyed by his ex-wife and Barrow”).

The correct standard for apparent agency is that it arises “if the servant [is] in any way held out as having authority, or so placed as to give that impression to the public.” *Thomas v. Smith*, 91 Ga. App. 508, 510 (1955). In *Thomas*, an off-

duty employee was found on his employer’s premises, wearing a uniform, and interacting with customers. *Id.* at 508-509. This Court ruled that the employee was an apparent agent—without requiring evidence of “reliance” by any customer. *Id.*

Here, as in *Thomas*, Edible has held out Edible Arrangements as its agent to the public at large, obviating any need for evidence of “reliance.” For more than a decade, Edible alleged in public court filings that Edible Arrangements is authorized to enter into intellectual property licensing agreements *on behalf of* Edible. *See* R-295; R-314; R-330; R-349. Edible Arrangements functions just as the “uniformed employee” in *Thomas*, right down to its “Edible Arrangements” “name tag” bearing the trade name. Edible’s own actions have thus created an apparent agency.

Edible also challenges the trial court’s determination that Edible is estopped from resisting arbitration under a “direct benefits” analysis, arguing that “estoppel only operates to prevent *a signatory* to an arbitration agreement from avoiding its obligations [and] only applies to a *nonsignatory* if it seeks to enforce the contract containing the arbitration clause.” Br. 28 (emphasis in original). None of Edible’s cited authority—*Older Homes, LLC v. Iverson*, 300 Ga. App. 332 (2009), *Helms v. Franklin Builders, Inc.*, 305 Ga. App. 863 (2010), and *LaSonde v.*

CitiFinancial Mortgage Co., 273 Ga. App. 113 (2005)—contains such language or limits estoppel in the manner Edible suggests.

Rather, “[p]arties may become bound by the terms of a contract ... by the acceptance of benefits under the contract.” *Comvest, L.L.C. v. Corp. Sec. Grp., Inc.*, 234 Ga. App. 277, 280 (1998); *see also Autonation Financial Services Corp. v. Arain*, 264 Ga. App. 755, 757 (2003). In *Comvest*, the plaintiff sought to avoid arbitration by arguing that it never signed the agreement at issue; meanwhile, the defendant signatory sought to enforce the arbitration clause. *Comvest*, 234 Ga. App. at 278-79. Applying the acceptance of benefits test, the Court of Appeals sided with the signatory and compelled the plaintiff to arbitrate because it accepted the benefits of the agreement, even if the plaintiff did not sign the agreement. *Id.* at 279-80. Thus, as a matter of Georgia law (and contrary to Edible’s argument), a signatory to an arbitration agreement may compel a nonsignatory to arbitration if the nonsignatory has accepted benefits under the relevant agreement. *Id.*

Here the record demonstrates that Edible accepted substantial benefits from Edible Arrangements’ contract with Google, because the advertising purchased by Edible Arrangements “inures to the benefit of [Edible as] the licensor-owner of the mark.” McCarthy, § 18:52 (5th ed. 2019); *see also Beach Mart, Inc. v. L&L Wings, Inc.*, 784 F. App’x 118, 128 (4th Cir. 2019) (“it is black letter law that a licensee’s use of a mark inures to the benefit of the licensor”); *Pearl Optical*, 218

Ga. at 703 (1963) (plaintiff who “expended large sums of money for advertising ... create[s] good will”); R-44; R-49 (referring to “massive marketing investments” in Edible Arrangements name, resulting “goodwill” that is “owned by Edible IP”). Having accepted the benefits of Edible Arrangements’ contract with Google, Edible is estopped from avoiding its arbitration commitment.

B. The Trial Court Correctly Dismissed Edible’s Complaint for Lack of Personal Jurisdiction.

The trial court correctly determined that it lacked personal jurisdiction over Edible’s complaint because the forum selection clause in Google’s Terms required Edible to file its claims against Google in California. *See Alcatraz Media, LLC v. Yahoo! Inc.*, 290 Ga. App. 882, 882 n.1 (2008) (“[f]orum selection clauses address personal jurisdiction”). Edible does not, and cannot, deny that Google’s Terms contain a valid forum selection clause; instead, Edible reiterates its argument that it is not bound by Google’s Terms. Br. 28. However, as discussed *supra* in Section III.A, Edible was bound to Google’s Terms by its agent, Edible Arrangements; or alternatively, Edible is estopped from avoiding Google’s Terms because Edible accepted the benefits of Edible Arrangements’ contract with Google. Either way, Edible cannot avoid the forum selection clause, and dismissal was proper.

C. The Communications Decency Act Precludes Edible’s Claims.

Edible argues that the trial court erred in determining that Google is immunized from liability by the Communications Decency Act (“CDA”), 47 U.S.C. § 230. Citing *Maynard v. Snapchat, Inc.*, 346 Ga. App. 131 (2018), Edible contends that the CDA only applies to “third party conduct” and thus should not apply to Edible’s claims. Br. 29.

Edible’s argument ignores the language of its own complaint, which alleged that Google’s third-party advertisers decide which keywords to bid on. *See* R-46. In other words, as Edible alleged, the “Edible Arrangements” trade name would not “trigger” advertisements to appear on Google if third parties did not select “Edible Arrangements” for their keyword bids. *Id.* This is dispositive because Edible admits that the CDA immunizes computer service providers, like Google, from the conduct of third parties using those computer services. Br. 29. Thus, the trial court properly held that the CDA immunizes Google from liability. R-27-30; *see also Internet Brands, Inc. v. Jape*, 328 Ga. App. 272, 274–75 (2014); *Jurin v. Google Inc.*, 695 F. Supp. 2d 1117, 1123 (E.D. Cal. 2010) (holding that the CDA immunizes Google from liability based on its advertising program).

D. The Trial Court Properly Found Edible’s Claims to Be Time-Barred.

Although Edible’s 2018 complaint admits the complained-of activity began “in earnest” no later than 2011 (R-49), Edible argues the trial court erred in holding

that Edible’s claims are time barred. Br. 30. Edible attempts to excuse its seven-year delay by arguing that every time a Google customer bids on a keyword “a new cause of action arises.” *Id.* This is incorrect. *See, e.g., Logan v. Tucker*, 224 Ga. App. 404, 406 (1997) (“in the absence of personal injury, the continuing tort theory does not apply in actions involving ... conversion”); *Cochran Mill Associates. v. Stephens*, 286 Ga. App. 241, 249 (2007) (rejecting plaintiff’s argument that “a new RICO cause of action accrued each time appellant suffered injury from [appellee’s] theft or conversion”). Indeed, the very case Edible relies upon, *Leon Jones Feed & Grain, Inc. v. General Business Services, Inc.*, 175 Ga. App. 569, 570 (1985), limited its reasoning to causes of action regarding “alleged professional negligence,” *id.* at 570, which Edible did not allege.

Edible’s claims are thus bound by the relevant statutory periods running from the 2011 accrual date Edible pled in its complaint. *See* R-49. Because a four-year statute of limitations applies to Edible’s claims for conversion, theft, and money had and received, those claims expired in 2015. *See* O.C.G.A. § 9-3-32 (four-year period for claims relating to deprivation of personal property); *Rigby v. Flue-Cured Tobacco Co-op.*, 327 Ga. App. 29, 39 (2014) (four-year period for money had and received claim); *see also Logan*, 224 Ga. App. at 406. With its predicate claims time-barred, Edible’s RICO claim also falls. *See J. Kinson Cook*, 284 Ga. App. at 560 (RICO claim fails if the torts underlying the claim fail).

Edible argues that its RICO claim is still viable because the 2015 amendments to O.C.G.A. § 16-14-8, extended the statute of limitations until “five years after the conduct [at issue] ... terminates.” Br. 30. Even assuming that language was intended to allow RICO claims premised on time-barred predicate acts (a proposition for which Edible presents no authority), Edible’s argument is foreclosed by *Glock, Inc. v. Harper*, 340 Ga. App. 65, 67 (2017), which explains that the 2015 amendments to O.C.G.A. § 16-14-8 do not apply to RICO claims that accrued “before the July 1, 2015 revision of the statute of limitation.” Edible’s inexplicable seven-year delay prior to filing suit dooms all of its claims.

CONCLUSION

For the foregoing reasons, Google respectfully requests that this Court affirm the decisions of both the Court of Appeals and the trial court below.

Respectfully submitted, this 13th day of September 2021.

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CERTIFICATE OF SERVICE

I hereby certify that I have, on this day, served the foregoing **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 service all parties of record. By prior agreement of the parties, mail service is not required, and the parties were served prior to filing by e-mail as follows:

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