

**IN THE SUPREME COURT
STATE OF GEORGIA**

EDIBLE IP, LLC,

Plaintiff-Appellant

v.

Case No. S21G0798

GOOGLE, LLC,

Defendant-Appellee.

PLAINTIFF-APPELLANT EDIBLE IP, LLC'S

REPLY BRIEF

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The issue before the Court is narrow: whether Google can auction off Edible's business property and keep the profits. The law has long prohibited the appropriation and sale of someone else's intangible property, and that law applies to Google. To avoid this conclusion, Google argues that Edible has no right to prevent Google from selling its property in absence of "consumer confusion."

Google is wrong. First, there is no basis for importing trademark infringement's confusion requirement into Edible's claims here because, as Google concedes, that law does not preempt the completely separate law Edible invokes. The First Amendment also does not require confusion, as the U.S. Supreme Court has held. And both this Court and the U.S. Supreme Court have held that the First Amendment does not immunize the appropriation of another's goodwill for profit. Indeed, no law permits Google to sell Edible's property for profit. Because Google cannot support its extreme position, this Court should reverse.

After seeking affirmance on the merits, Google also asks this Court to address the alternative rulings that Google drafted for the trial court. Unpersuaded, the Court of Appeals did not even acknowledge these arguments. This Court should reverse the trial court in its entirety and remand the case for discovery.

REPLY ARGUMENT

I. The Court Should Reverse Because Georgia Law Does Not Require "Confusion" To Hold Google Liable For Selling Edible's Goodwill Without Permission.

Google does not contest that Edible owns the trade name “Edible Arrangements” and all its associated goodwill, or that Google reaps enormous profits by mining the value of that property and selling it without permission. Instead, Google seeks dismissal on the radical theory that Edible has *no rights at all* to prevent the sale of its property in the absence of “consumer confusion.” Google’s argument makes this an easy case because no authority supports it.

A. Trademark Law Does Not Require “Consumer Confusion” Outside Of Trademark Claims And Does Not Eliminate Edible’s Exclusive Right To Prevent Unauthorized Sale Of Its Property.

Google cites trademark cases to claim that Edible has “lost nothing,” because “any theft of ‘good will’ must be predicated on consumer confusion.” Resp. 4, 3–7. Google restates this point as a matter of trademark law, claiming that “*confusion* is the sole wrong that trademark rights protect against.” Resp. 1, 12–16 (emphasis added). This ignores both the facts and the law.

Initially and fundamentally, this appeal does not involve trademark infringement claims. Historically, the most common way to take another’s goodwill is to pass off one’s products or services as theirs—*i.e.* traditional trademark infringement. Resp. 12–13 (collecting cases). But Edible challenges something different and simpler: Google’s direct sale of its proprietary name and goodwill to competitors.

As the Complaint alleges, a Google search for “Edible Arrangements” is a

manifestation of Edible’s goodwill, and when Google sells that term to a competitor, the value in that transaction is the goodwill itself. Pr. Br. 17. This is a more direct taking than “palming off” because Google does not bother with a competing product—it merely auctions Edible’s goodwill to others and pockets the value of Edible’s name and reputation in the market. In this context, Google’s claim that Edible must allege confusion makes no sense.

Indeed, Georgia Courts have held, repeatedly, that the law will compensate an owner for the taking of goodwill even without consumer confusion. *See, e.g., Martin Luther King, Jr., Ctr. for Soc. Change, Inc. v. Am. Heritage Prods., Inc.* (“King”), 250 Ga. 135, 141 (1982) (theft of goodwill with no confusion); *NAACP v. Overstreet*, 221 Ga. 16, 29 (1965) (alleged loss of goodwill from protests outside business). As an additional example, in *Department of Transportation v. Arnold*, the court addressed property taken by eminent domain. 243 Ga. App. 15, 16–17 (2000). There, the “business operated on [the] location ha[d] a particular ‘good will,’ an intangible property interest peculiar to the land, identified only with that location in the minds of clients.” *Id.* The government had to pay the owner for the “‘good will’ associated with the business at that location” because the owner “had...irrevocably lost something of value....” *Id.* No confusion required.

These cases match Georgia law providing a trade name owner a right of “exclusive” ownership, like *Gano v. Gano*, 203 Ga. 637, 639 (1948), and *Reis v.*

Ralls, 250 Ga. 721, 722 (1983), and the right to exclude others from taking and selling intangible property without any confusion requirement. *See, e.g.*, Pr. Br. 10–11 (collecting cases); Resp. 6 n.5 (cases enforcing goodwill rights in non-infringement contexts).¹ When Google sells Edible’s goodwill, it violates exclusive ownership rights **and** unjustly enriches itself, regardless of confusion. Pr. Br. 9–13.

Google seeks to evade *King* by arguing that a corporation has no right of publicity. But Edible asserts no such claim. Based on the “straightforward [rationale] of preventing unjust enrichment by the theft of good will,” this Court held that the owner of goodwill may exclude others from taking it and selling it. 250 Ga. at 14. *King* thus confirmed that Georgia law (a) protects an owner’s name and goodwill, and (b) prevents unjust enrichment, without regard to confusion.²

Google never directly addresses this law and, instead, incorrectly assumes that trademark law is the **only** source of the property rights at issue. Resp. 5. But the existence of trademark infringement claims that turn on confusion does not imply an exclusive remedy or require confusion before Edible can pursue its other

¹ *Accord, e.g., Slater v. Slater*, 67 N.E. 224, 225 (N.Y. 1903) (rights to proceeds from sale of trade name goodwill “unaffected” by confusion requirements).

² Google tries to sidestep *International News Service v. Associated Press*, 248 U.S. 215 (1918) (“*INS*”) by claiming that, “*INS* itself is no longer good law.” Resp. 6 n.5 (citing *Barclays Capital Inc. v. Theflyonthewall.com, Inc.*, 650 F.3d 876, 894 (2d Cir. 2011)). But *Barclays* merely notes that the *Erie* doctrine eliminated most federal common law. *INS*’s principle remains: one may not appropriate another’s intangible business property and “reap where it has not sown.” 248 U.S. at 239–40.

claims. And while Google’s cases cite “consumer confusion” (mostly as harm in the context of an injunction),³ *not one case* supports Google’s sweeping claim that an owner has no protectable property rights without it. Put simply, trademark infringement cases that turn on confusion can easily coexist with Edible’s additional right to control the sale of its property.

Edible’s independent Georgia law claims, therefore, would not “upend” any trademark law. Resp. 1, 12–19. Google concedes that federal trademark law does not preempt these claims, *id.* 13 n.8, and Georgia’s trademark and unfair competition statutes expressly preserve them. *See* Pr. Br. at 21.⁴

In addition, even as a matter of trademark law, Google is wrong to say that “confusion in the sole wrong” it addresses. Resp. 1. “[F]rom its earliest

³ *See* Resp. 4–6 (citing *Pearl Optical, Inc. v. Pearle Optical of Ga., Inc.*, 218 Ga. 701, 704 (1963), and *Limitless Worldwide, LLC v. AdvoCare Int’l, LP*, 926 F. Supp. 2d 1248, 1254 (D. Utah 2013)). Google’s cite to *Atlanta Paper Co. v. Jacksonville Paper Co.*, and related cases is similar. Resp. 12–13. That case turns on a statute’s intent requirement, and the quoted dicta concerns “[t]he principle on which courts of equity proceed in restraining the simulation of names.” 184 Ga. 205, 211–12 (1937). *Multiple Listing Services, Inc. v. Metro Multi-List* quotes the same passage in dicta. 225 Ga. 129, 133 (1969). *Prestonettes, Inc. v. Coty* reversed an injunction that prohibited a seller from referencing a product as an ingredient. 264 U.S. 359 (1924). Of course, that is not what Edible alleges, and none of these cases negate an owner’s right to protect its property from unlicensed sale.

⁴ Georgia trademark law “does not affect unfair trade practices otherwise actionable at common law or under other statutes....” O.C.G.A. § 10-1-372(c). And Georgia’s unfair competition statutes “guarantee[]” that “[n]othing in this part shall adversely affect the rights or the enforcement of rights in trademarks or service marks acquired...at common law.” O.C.G.A. § 10-1-452.

beginnings..., trademark law has had the *dual goals of both protecting property* in a trademark and protecting consumers from confusion and deception.” 2 McCarthy on Trademarks § 2:22 (5th ed.) (emphasis added). And both federal and state trademark dilution laws permit claims “regardless of the presence or absence of actual or likely confusion.” 15 U.S.C. § 1125(c). That dilution law is “not motivated by an interest in protecting consumers.” *McHugh Fuller Law Grp., PLLC v. PruittHealth, Inc.*, 300 Ga. 140, 144 (2016). The law has always protected an owner’s property interest in goodwill associated with a trade name, and binding Georgia law confirms this protection exists *in addition to* any public confusion concerns. *Diedrich v. Miller & Meier & Assocs. Planners, Inc.*, 254 Ga. 734, 736 (1985); Pr. Br. 22.

In the end, trademark law recognizes that a property owner has rights independent of consumer confusion, and it does not reduce or eliminate those rights. Holding Google liable for violating Georgia’s other laws through its unauthorized sales will not implicate any of the dangers articulated in Google’s cases or by Professor McCarthy’s (unbinding) commentary about imposing trademark liability without confusion. Resp. 13–14.

B. The First Amendment Does Not Require Confusion Or Otherwise Allow Google’s Unauthorized Sale Of Edible’s Property.

With trademark law as no barrier, Google argues that enforcing Georgia law would violate the First Amendment. As an initial matter, the U.S. Supreme Court,

in *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 576 (1977), and this Court, in both *King* and *Pavesich v. New England Life Insurance Co.*, 122 Ga. 190 (1905), have rejected the idea that the First Amendment protects the appropriation of goodwill for purely financial gain. Pr. Br. 12, 23. Given that these are Edible’s claims, those cases foreclose Google’s arguments entirely.

Smith v. Wal-Mart Stores, Inc. shows Google’s error. 537 F. Supp. 2d 1302 (N.D. Ga. 2008). There, Wal-mart sought to prevent someone from selling shirts criticizing Wal-Mart, with phrases that incorporated portions of its trademarks. The court held that the shirts were editorials and/or artistic parodies protected by the First Amendment. *Id.* Here, Google is not parodying, editorializing, nor even speaking at all. It is just selling property that it does not own, and the First Amendment does not protect Google’s desire to “reap where it has not sown.” See Pr. Br. 11 (exclusive use of intangible property applies to speech and news).

Google also cites dicta in *McHugh Fuller Law Group* for the proposition that the First Amendment requires trademark law’s alleged “confusion” requirement. 300 Ga. at 144. In fact, that dicta recognizes that any consumer confusion test is limited to “trademark *infringement* law,” *id.*, and that the plaintiff may “seek relief under some other statutory or common law cause of action,” *id.* at 148–49. As discussed, this case raises no First Amendment concerns because Edible does not challenge the “reference” to its name, nor competitive advertising;

it challenges Google’s unlicensed sale of Edible’s name and goodwill to increase that advertising’s value and Google’s profits. Pr. Br. 23.

In any event, the U.S. Supreme Court has rejected Google’s far more extreme argument that the First Amendment requires consumer confusion before an owner may exclude another from commercially exploiting its name. The *SFAA* case establishes that the government may enforce an exclusive right to use a word *without confusion* even at the cost of expressive content. 483 U.S. 522, 540–41(1987); Pr. Br. 23–24. Rather than take on that authoritative precedent, Google dismisses it as a special case. Resp. 15–16. But if the First Amendment permits the statute in *SFAA*, it permits enforcing Georgia law here.

II. Edible States A Claim For Each Cause Of Action.

A. Edible States A Claim For Theft Under O.C.G.A. § 16-8-2 And Conversion Under The Common Law.

With respect to theft and conversion, Google argues that it has not “taken” anything. First, Google has deprived Edible of its right to exclude others from selling its property, and this states claims for theft and conversion. Pr. Br. 16–19.

Moreover, Google cannot win a motion to dismiss—or this appeal—by rewriting Edible’s Complaint. It argues that “[r]eferencing 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.” Resp. 8. Of course, the Complaint does not challenge Google’s “reference” to “Edible

Arrangements.” The Complaint alleges that Google directly sells Edible’s property then keeps the profits. “[A]n unauthorized sale of the property is itself an unlawful exercise of dominion” and violates Edible’s rights. *Williams v. Nat’l Auto Sales, Inc.*, 287 Ga. App. 283, 286 (2007); *see also* Pr. Br. 19.

Google’s analysis of O.C.G.A. § 16-8-2 is also flawed. Because Google agrees that the statute is unambiguous, this Court “need look no further” than “the words of the statute.” *Early v. Early*, 269 Ga. 415, 416 (1998). The Court must “presume that the General Assembly means what it says and says what it means.” *Ne. Atlanta Bonding Co. v. State*, 308 Ga. App. 573, 577 (2011). And the title of the bill also “cannot control the plain meaning of the body of the act.” *State v. Ware*, 282 Ga. 676, 678 (2007), *superseded by statute on other grounds*.

Here, the statute means what it says: it protects **all** property, including intangible property, from **any** misappropriation, no matter the form. O.C.G.A. § 16-8-2. The Complaint establishes that Google’s sale is an appropriation of Edible’s property. Pr. Br. 13–18. That should end the discussion.

Google’s strange citation of *American Civil Liberties Union of Georgia v. Miller*, 977 F. Supp. 1228 (N.D. Ga. 1997), as a lesson in statutory construction is also misplaced. The unconstitutional statute in that case prohibited the **use** of any name to falsely suggest legal authorization to a trademark or trade name, and the

Court determined it was significantly overbroad. *Id.* at 1232. That is not applicable to Google’s direct sale of property here, which does not implicate speech at all.

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

Google argues that it cannot be liable for money had and received because it allegedly received the money in return for advertising services. But that misses the point of the Complaint, which alleges that Google charges *more* for its advertising by selling the value of Edible’s goodwill as a fundamental aspect of the transaction. Google knowingly takes Edible’s property, sells it without permission, and keeps that additional revenue as proceeds to which it is not entitled. V1/55–56. This is precisely the type of inequity that money had and received is intended to address. *Eastside Carpet Mills, Inc. v. Dodd*, 144 Ga. App. 580, 580 (1978), is not to the contrary because, unlike this case, the “services” were not the actual unlawful appropriation itself. No case permits Google to reap where it has not sown, and money had and received provides the required equitable remedy.

III. Google’s Alternative Arguments, Ignored By The Appeals Court, Fail.

A. Google Waived Arbitration By Seeking A Merits Ruling.

Under Georgia law, if a party engages in conduct inconsistent with its request to arbitrate, it waives any such rights. *American Car Rentals, Inc. v. Walden Leasing, Inc.*, 220 Ga. App. 314, 316 (1996). Google asks this Court to affirm the Court of Appeals and issue a final ruling on the merits. Resp. 1. That is inconsistent with arbitration and waives any arbitration right. *See, e.g., Martin v.*

Yasuda, 829 F.3d 1118, 1125–26 (9th Cir. 2016) (“[F]iling a motion to dismiss on a key merits issue” waives arbitration) (collecting cases); *Hooper v. Advance Am. Cash Advance Ctrs. of Mo., Inc.*, 589 F.3d 917, 921–22 (8th Cir. 2009) (same) (collecting cases). The law does not allow Google to game the system by seeking a merits ruling in court if it is favorable but demanding arbitration if it is not. Google wants to have its cake and eat it too, and this Court should find that this conduct—in this Court—waives any arbitration request.⁵

B. Edible Never Agreed To Arbitrate.

Acknowledging that Edible never entered any alleged contract, Google bases its arbitration claims on a supposed agent, claiming that Edible Arrangements, LLC (“EA, LLC”) somehow bound Edible to its contract.

This argument fails because an agent may only bind its principal within the scope of its agency, Pr. Br. 25–26, and contrary to Google’s stated “facts,” no evidence of agency exists. One Google affidavit says that EA, LLC “appears to be affiliated” with Edible, V2/243, and the other shows that the entities are separate and distinct, V2/270. The only record evidence is testimony stating that EA, LLC is a limited licensee, not an agent.⁶ Google cites no contrary evidence and relies on

⁵ Because Google took this position for the first time in its Response, Edible could not have raised it before this Reply.

⁶ “While [EA, LLC’s] license agreement permits it to sublicense Edible IP’s intellectual property to its franchisees pursuant to a detailed set of conditions, [EA,

court filings—that Google never saw—that reference the same limited relationship. Resp. 22 (citing R-295; R-314; R-330; R-349).

Such a limited agency cannot permit EA, LLC to enter an arbitration agreement on Edible’s behalf. Pr. Br. 26 (collecting cases). Google’s criticism that Edible’s cases relate to nursing homes is beside the point; the same law applies to claims that a corporate entity has contracted on another’s behalf. Indeed, “[c]ourts do not lightly disregard the corporate entity even in deference to the strong policy favoring arbitration.” *Nicholas A. Califano, M.D., Inc. v. Shearson Lehman Bros. Inc.*, 690 F. Supp. 1354, 1355 (S.D.N.Y. 1988). And, “conclusory allegations of a general agency relationship...do not suffice to compel...unwilling non-signatories to arbitrate....” *AICO Int’l, E.C. v. Merrill Lynch & Co.*, 98 F. App’x 44, 46–47 (2d Cir. 2004); *see also Matson v. Noble Inv. Grp., LLC*, 288 Ga. App. 650, 658 (2007) (finding no agency even for related companies).⁷

Similarly, *Home Materials, Inc. v. Auto Owners Insurance Co.* recognizes that **apparent** authority exists only if “**the third party** dealt with the agent in

LLC] has no other authority to contract on behalf of Edible IP, to waive any of Edible IP’s rights, or to otherwise act on behalf of Edible IP.” V2/434–35.

⁷ *Pincus Brothers and Larball Publishing*, the foreign cases that Google cites, do not change this result. Resp. 20–21. They merely say that if a principal grants authority to sublicense intellectual property, the licensee is an agent **for that purpose**. They do not say that the licensee necessarily becomes an agent for all purposes, nor address arbitration or waiver of a jury trial. Georgia law requires specific authority, and Google presents no evidence of that here. Pr. Br. 11.

reliance upon the authority *apparently conferred upon it by the principal.*” 250 Ga. 599, 601 (1983) (emphasis added). There, the principal’s prior relationship with the third party justified the reliance. *Id.* In *Thomas v. Smith*, the plaintiff similarly relied on the principal’s actions allowing the employee on the premises while wearing a uniform. 91 Ga. App. 508, 509 (1955). By contrast, Google did not know Edible even existed, and no Edible conduct ever gave Google reason to believe Edible had authorized EA, LLC to do anything on its behalf. Pr. Br. 27.

Lastly, Google attempts to create a new species of “estoppel” that applies when a party “accept[s] benefits” from the relevant agreement. Resp. 25–27. But that cannot be the law because *Poole, Fountain*, and Edible’s other cases cited reject arbitration even though the plaintiff “received the benefits” of the relevant contract as a patient in the defendant’s nursing home. Pr. Br. 28. Google’s made-up “benefits” test would require the Court to overrule all of those cases.

Further, *AutoNation Financial Services Corp. v. Arain* does not apply because it merely involves a non-signatory seeking to enforce the relevant agreement. 264 Ga. App. 755 (2003). And *Comvest, L.L.C. v. Corporate Securities Group, Inc.* is inapposite because it turns on the resisting party’s ratification of the arbitration agreement. 234 Ga. App. 277 (1998). Here, unlike *Comvest*, Google did not know Edible existed and neither party thought they had an agreement. Again,

this provides a stronger case for *denying* arbitration than the nursing home cases where the alleged principals had extensive relationships with the third party.⁸

C. The CDA Cannot Immunize Google’s Conduct.

Google’s CDA argument mischaracterizes Edible’s claims as targeting conduct by Google’s third-party advertisers, who “decide which keywords to bid on.” Resp. 28. But the Complaint challenges Google’s own conduct, and *Maynard v. Snapchat* prevents Google from shirking its liability by blaming its customers. In *Maynard*, the court addressed Snapchat’s “own conduct” in offering a “speed filter” that unreasonably encouraged third parties to speed. 346 Ga. App. 131, 136 (2018). Even though those third parties chose to speed (and to use Snapchat while driving), the CDA did not immunize Snapchat for providing the filter. *Id.* Here, the CDA cannot protect Google’s illegal sale of Edible’s property simply because a third-party decides to purchase the property that Google offers.

Google’s cases do not hold otherwise. In *Internet Brands, Inc. v. Jape*, the Court of Appeals addressed third party postings on a message board. 328 Ga. App. 272, 278 (2014). And in *Jurin v. Google Inc.*, the Eastern District of California addressed the *content* of Google ads, not Google’s unauthorized sale of another’s property as a keyword. 695 F. Supp. 2d 1117, 1123 (E.D. Cal. 2010).

⁸ Google’s personal jurisdiction claims rely on the same contract, and its Response makes no distinction between the two. Edible never entered that contract and never agreed to any forum selection clause. Pr. Br. 28.

D. Edible's Claims Are Timely.

Finally, no statute of limitations bars Edible's claims. As discussed, this is not a "continuing tort" because a new cause of action arises each time Google violates Edible's rights. Pr. Br. 30. Thus, while Edible may not recover for every invasion, it can recover for any injury suffered within the limitations period.

Additionally, as to Edible's RICO claim, Google's reliance on *Cochran Mill Associates v. Stephens*, 286 Ga. App. 241, 246 (2007), is misplaced because it applies a repealed limitations provision. See Pr. Br. 30; O.C.G.A. § 16-14-8.

Google misapprehends the retroactivity holding in *Glock, Inc. v. Harper*. 340 Ga. App. 65 (2017). While the amendment to O.C.G.A. § 16-14-8 did not retroactively revive claims that had expired under prior law, claims for which the limitations period had not yet run are different. In *McNeal Construction Co. v. Wilson*, this court held that for claims not yet barred "at the time the new statute of limitations was enacted," an amended statute "merely extend[s]" the limitations period. 271 Ga. 540, 542 (1999). Here, Google began selling the term "EDIBLE ARRANGEMENTS" in 2011. V1/58. The prior statute of limitations could not have expired by 2015 (when the General Assembly amended the law), and Edible's RICO claim remains timely under the new statute.

Respectfully submitted this 7th day of October, 2021.

/s/ Jason J. Carter

CERTIFICATE OF SERVICE

I hereby certify that I have, this 7th day of October, served the foregoing **PLAINTIFF-APPELLANT EDIBLE IP, LLC'S REPLY 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

September 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 Second Motion for an Extension of Time to File a Reply Brief in the above case, it is hereby ordered that the motion be granted. An extension is given until October 7, 2021, to file, and no other extensions will be granted.

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



SUPREME COURT OF GEORGIA
Case No. S21G0798

September 20, 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 a reply brief in the above case, it is hereby ordered that the motion be granted. An extension is given until September 30, 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