UNITED STATES DISTRICT COURT

DISTRICT OF NEW MEXICO

STATE OF NEW MEXICO *EX REL.* HECTOR BALDERAS, ATTORNEY GENERAL,

The State,

v.

TINY LAB PRODUCTIONS, *et al.*,

Defendants.

Case No. 1:18-cv-00854-MV-KBM

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GLOSSARY

Android Advertising ID ("AAID") (16 C.F.R. § 312.2; Compl. ¶ 51) – A Persistent Identifier consisting of a unique, alphanumeric string assigned to an individual device—and the individual who uses that device—in order to track and profile the user, and to serve her with targeted advertising.

Application ("App") (Compl. ¶ 2) – A video game designed for mobile devices.

Application Programming Interface ("API") (Compl. ¶ 112) – A synonym for SDK (see definition below).

Children's Online Privacy Protection Act ("COPPA") – 15 U.S.C. §§ 6501, *et seq*.

Developer (Compl. ¶ 12) – Entity responsible for creating an App.

Device Fingerprint (16 C.F.R. § 312.2; Compl. ¶ 53) – A Persistent Identifier (*see* definition below) consisting of individual pieces of data about a specific device, including details about its hardware—such as the device's operating system (*e.g.*, Apple or Android), the type of device (*e.g.*, iPhone, Galaxy, iPad)—and details about its software, such as its operating system (*e.g.*, iOS or Android). This data can also include other detailed information, such as the network carrier (*e.g.*, Sprint, T-Mobile, AT&T), whether the device is connected to Wi-Fi, and the "name" on the device.

Geolocation (16 C.F.R. § 312.2) – A type of "Personal Information" under COPPA (defined below) "sufficient to identify street name and name of a city or town[.]"

International Mobile Equipment Identity ("IMEI") (16 C.F.R. § 312.2; Compl. ¶ 52) – A Persistent Identifier, in the form of a fixed, unique 15-digit serial number that is used to route calls to one's phone and reflects information about the origin, model, and serial number of the device. A device has one fixed IMEI.

IP Address (16 C.F.R. § 312.2) – A Persistent Identifier (*see* definition below) enumerated under COPPA.

Persistent Identifier (16 C.F.R. § 312.2) – A data point "that can be used to recognize a user over time and across different Web sites or online services. Such persistent identifier includes, but is not limited to, a customer number held in a cookie, an Internet Protocol (IP) address, a processor or device serial number, or unique device identifier[.]"

Personal Information (16 C.F.R. § 312.2) – "[I]ndividually identifiable information about an individual collected online, including: **(1)** A first and last name; **(2)** A home or other physical address including street name and name of a city or town; **(3)** Online contact information as defined in this section; **(4)** A screen or user name where it functions in the same manner as online contact information, as defined in this section; **(5)** A telephone number; **(6)** A Social Security number; **(7)** A persistent identifier that can be used to recognize a user over time and across different Web sites or online services. Such persistent identifier includes, but is not limited to, a customer number held in a cookie, an Internet Protocol (IP) address, a processor or device serial number, or unique device identifier; **(8)** A photograph, video, or audio file where such file contains a child's image or

voice; **(9)** Geolocation information sufficient to identify street name and name of a city or town; or (**10)** Information concerning the child or the parents of that child that the operator collects online from the child and combines with an identifier described in this definition."

Software Development Kit ("SDK") (Compl. ¶ 5) – Third-party code embedded in apps that facilitates data exchange and other transactions (*e.g.*, behavioral advertising).

Website or online service directed to children (16 C.F.R. § 312.2) – "In determining whether a Web site or online service, or a portion thereof, is directed to children, the Commission will consider its subject matter, visual content, use of animated characters or child-oriented activities and incentives, music or other audio content, age of models, presence of child celebrities or celebrities who appeal to children, language or other characteristics of the Web site or online service, as well as whether advertising promoting or appearing on the Web site or online service is directed to children. The Commission will also consider competent and reliable empirical evidence regarding audience composition, and evidence regarding the intended audience."

I. INTRODUCTION

The State of New Mexico brings this action to protect the privacy of children as they play video games on their mobile devices ("apps"). Specifically, the State seeks to prevent Defendants Google LLC and AdMob Google Inc. (collectively, "Google") and the other Defendants[1] from surreptitiously observing children as they play online, tracking them across their devices and the Internet. This is undertaken to unlawfully profile and target those children with behavioral advertising, to monitor their engagement with advertisements over time, and to manipulate those children to play apps more often and for longer periods.

Google operates two interrelated services that are at issue in this litigation. First, Google's mobile advertising unit AdMob Google embeds its advertising coding or software development kit ("SDK" or "AdMob SDK") in numerous apps directed to children (including those developed by Defendant Tiny Lab Productions ("Tiny Lab" or the "Developer Defendant")), (referred to as "Gaming Apps" or "Tiny Lab Apps") to track, profile, and target children while they play Tiny Lab Apps on their mobile devices. The AdMob SDK operates substantially the same as the SDKs developed by the Other SDK Defendants and therefore Google's conduct in operating its SDK is the subject of the same three counts as the Other SDK Defendants (Counts I, II, and IV). In Count I, the State, as empowered by the U.S. Congress, enforces the provisions of the Children's Online Privacy Protection Act ("COPPA") that prohibit the tracking, profiling, and targeting that Google and the Other SDK Defendants engage in while children play the Tiny Lab Apps. In Count II, as empowered by the New Mexico Legislature, the State brings claims under the New Mexico Unfair Practices Act predicated on those same COPPA violations. In Count IV, in its role as *parens*

[1] Twitter, MoPub, Inc., AerServ LLC, InMobi Pte Ltd., AppLovin Corporation, and ironSource USA (the "Other SDK Defendants"). (Compl. ¶¶ 13-18.).

patriae to protect the general welfare of children, the State brings the common law claim of intrusion upon seclusion predicated on the same conduct.

Second, Google operates the "Family" section of its online market for apps, the Google Play Store. Google characterizes the Family section as helping "parents easily find . . . family-friendly apps and games throughout the store." (Compl. ¶ 199) Yet Google knowingly made misleading representations to parents who browsed the Family section, by including and marketing Tiny Lab Apps that were not compliant with COPPA and that were not privacy protective. Specifically, Google represented that the Tiny Lab Apps were suitable for play by children—despite knowing that the Tiny Lab Apps unlawfully collect children's Personal Information in violation of COPPA. This conduct is the focus of the UPA claims in Count III.

In its Motion to Dismiss Counts II and IV, Google simply joins and incorporates the arguments set forth in the Joint SDK Defendants' Motion to Dismiss. In response, the State incorporates the arguments set forth in the response to the Joint SDK Defendants' Motion, filed contemporaneously herewith.

As to the alleged COPPA violations (Count I), Google principally argues that it lacked actual knowledge that Tiny Lab Apps were directed to children. Yet this is readily contradicted by the numerous allegations in the Complaint demonstrating that Google intentionally collected and affirmatively processed, analyzed, and commercially exploited information showing the child-directed nature of the Tiny Lab Apps. The Complaint more than plausibly alleges not only that, due to its own concrete information, Google knew that Tiny Lap Apps were child-directed and that children were playing them, but also that Google *used* that actual knowledge for commercial exploitation of the children as they played.

As to the alleged UPA violations (Count III), Google argues that the Complaint does not identify knowing misrepresentations made by Google while operating the Google Play Store, and

that it is immune from suit pursuant to the Communications Decency Act ("CDA"). Both arguments fail. The State plausibly alleges how Google knowingly represented to parents that the Tiny Lab Apps were suitable for children, despite knowing that they unlawfully tracked children in violation of COPPA, and further alleges Google is liable for its *own* actions, not those of third parties, therefore placing the claims outside of the ambit of the CDA.

For the foregoing reasons, Google's Motion should be denied.

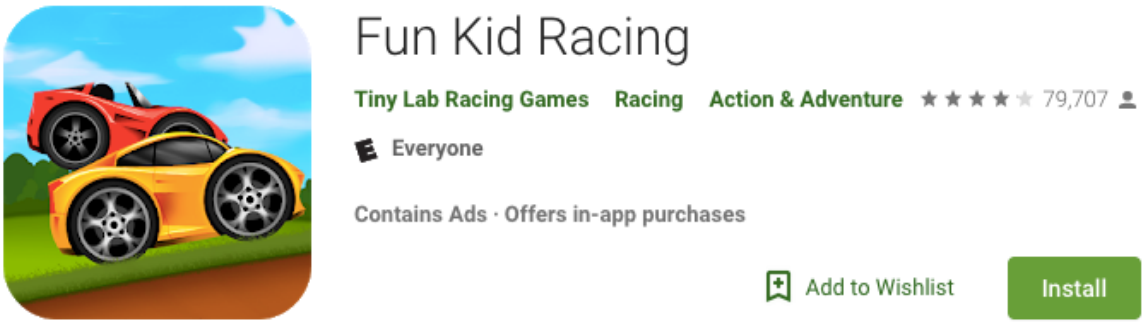
II. STATEMENT OF THE FACTS

The State's concurrently-filed Opposition to the Joint SDK Defendants' Motion to Dismiss ("SDK Opposition Brief" or "SDK Opp.") describes the State's detailed allegations about how Google AdMob and the other SDK Defendants embed their respective advertising SDKs in the Tiny Lab Apps to surreptitiously collect children's Personal Information and use that Personal Information to track, profile, and target those children online. SDK Opp. at 2-6. The State incorporates and cites to that discussion herein.

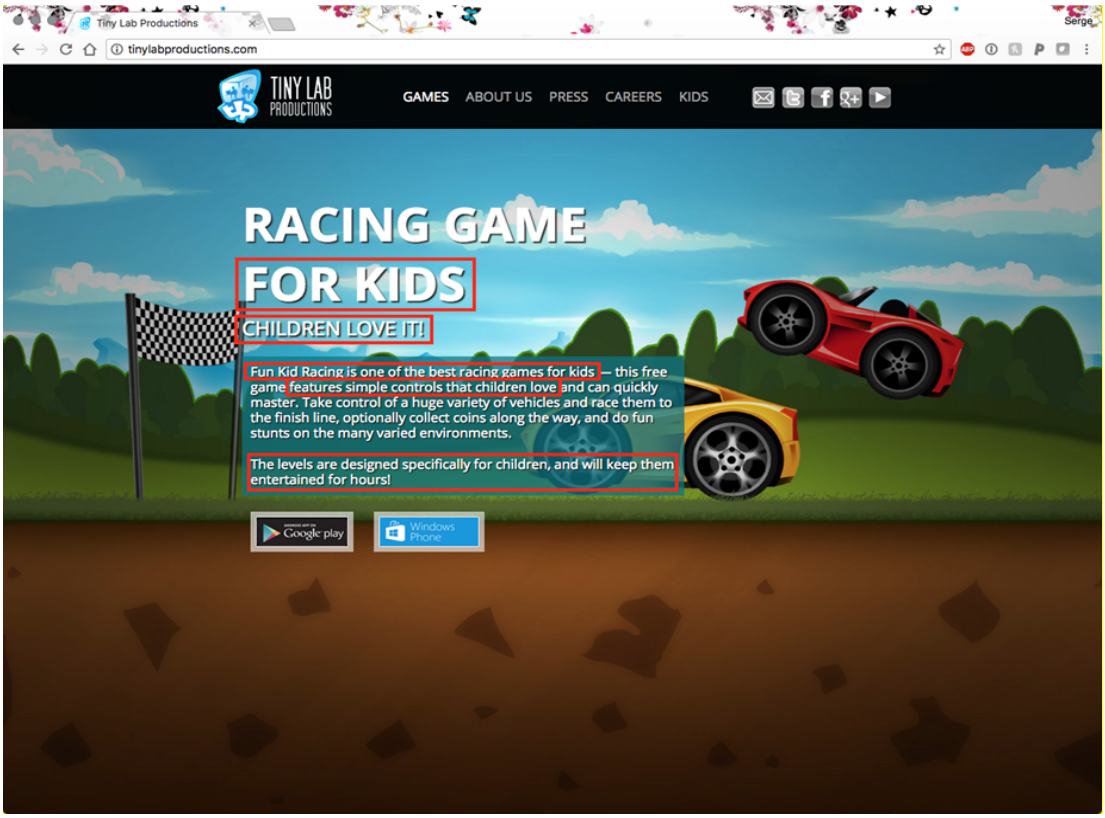
A. Tiny Lab Develops "Kid-Friendly Games For Toddlers."

This action focuses on Google's engagement with and marketing of the Tiny Lab Apps, which are promoted and styled as fun, free, kid-friendly games. (Compl. ¶ 30.) Tiny Lab's CEO describes the apps as "easy and kid-friendly games for toddlers" and, accordingly, marketed them in the "Family" section of the Google Play Store with an "Everyone" rating. (*Id.* ¶¶ 31, 119, 195.) Google does not now dispute that the Tiny Lab Apps, which have names like "Fun Kid Racing," "Happy Easter Bunny Racing," and "Run Cute Little Pony Race Game," are directed toward children. *See generally* Google Mot.; (*see also* Compl. ¶¶ 3, 12, 31, 100 and Ex.1 thereto.) Tiny Lab has at least two websites: both advertise the Tiny Lab Apps as directed to "kids." At https://www.tinylabkids.com/, the website proclaims, "keep your kids entertained for months." (*Id.* ¶ 100 (Figure 3).) At http://tinylabproductions.com/, Tiny Lab features its most popular

Gaming App – Fun Kid Racing – and describes it as a "racing game for kids" that "children love" with skill levels "designed specifically for children." (*Id.* (Figure 4).)



(Compl. ¶ 31, Figure 1 - (picture of the Fun Kid Racing app as advertised in the Google Play Store, as of August 8, 2018))



(Compl. ¶ 100, Figure 4)

Tiny Lab's CEO acknowledged that difficulties in causing toddlers to make in-app purchases meant that Tiny Lab needed to monetize these children by collecting Personal

Information and serving them targeted ads. (*Id.* ¶ 196.) To make money, Tiny Lab turned to online advertising companies like Google to provide it with in-app targeted advertising, powered by the coding in those companies' SDKs, which work seamlessly, and beneath the surface of the App's gameplay, to secretly track the child players and serve them targeted advertising. (*Id.* ¶¶ 5, 15, 34, 67-74). In so doing, the SDK Defendants acquired the children's Personal Information, (as the term is defined under COPPA (*see infra*, Section IV(B))), without first obtaining the verifiable consent of the children's parents. (*Id.* ¶¶ 5, 15, 34, 67-74.)

B. Forensic Analysis Demonstrates Google's SDK Collects and Uses Children's Personal Information While They Play the Tiny Lab Apps.

Google's SDK is designed for the same purpose as those developed by the other SDK Defendants to: (1) surreptitiously acquire Personal Information about each child user of the Apps; (2) use that information for profiling and advertising purposes; and (3) target the child with behavioral advertising, monitor their engagement with advertisements over time, and/or to manipulate the child to play the app more often and for longer periods. (*Id.*)

To display ads to children via the Tiny Lab Apps, Google's embedded SDK communicates with, or "makes a call" to, Google's servers (for example, googleads.g.doubleclick.net), and requests that an ad be shown to a particular child while she is playing the game. (*Id.* ¶ 67.) Forensic testing shows that Google's AdMob SDK behaves similarly in each of the Tiny Lab Apps in which it is embedded. (*Id.* ¶ 72.)

In this way, Google receives the child's Personal Information, including Persistent Identifiers. A "Persistent Identifier" is a data point "that can be used to recognize a user over time and across different Web sites or online services." (*Id.* ¶ 25 (citing 16 C.F.R. § 312.2).) Persistent Identifiers collected, used, and disclosed by Google include Android Advertising IDs ("AAIDs") (*Id.* ¶ 68), International Mobile Equipment Identities ("IMEIs") (*Id.*), the "Device Fingerprint" (*Id.* ¶ 79), and IP addresses, which enables identifying the child's location and the child's device, as

well as cross-device tracking (*Id*. ¶ 70). Google also receives GPS geolocation data which is Personal Information that provides Google with street-level accuracy into a child's location (*Id*. ¶ 69).

As set forth more fully in the SDK Opposition Brief, the Personal Information collected by Google (and the Other SDK Defendants), in the form of Persistent Identifiers and geolocation, is the critical currency for online tracking, monitoring, and behavioral targeting. SDK Opp. at. 3-4; (*see also* Compl. ¶¶ 50-54, 56, 73-74, 108, 122-38, 141, 144-54.) This Personal Information is recognized throughout the online advertising industry (and among all Defendants) as the ideal data to be used to personally identify individuals—here, children—and to follow each of them across time and across the Internet for commercial exploitation. (*Id.*)

C. Google Marketed the Tiny Lab Apps as Safe for Children Through Their Inclusion in the Family Section of Its Google Play Store, Despite Knowing That the Tiny Lab Apps Illegally Tracked and Targeted Those Children.

Google marketed the Tiny Lab Apps (among many others) as suitable for children in the Family section of its Google Play Store. (*Id*. ¶¶ 7, 31, 109, 112-114, 197-201, 231-41.) As a prerequisite for being included in the Family section, Google required all such apps to be part of the "Designed for Families" ("DFF") program. (*Id*. ¶ 112.) Google represented that, to be accepted in the DFF program, apps must be suitable for children, including by being COPPA-compliant. (*Id*. ¶ 112.) Google presented the apps in its Family section (including the Tiny Lab Apps) as being suitable for children, despite knowing that many such apps (including the Tiny Lab Apps) were unlawfully tracking and profiling children. (*Id*. ¶¶ 7, 31, 109, 112-114, 197-201, 231-41.)

1. Google Markets the Family Section of its Google Play Store as a Safe Place for Families to Find Age-Appropriate Apps for Kids.

When Google announced the roll-out of the DFF program in April 2015, it promoted the Family section as a place where parents can find safe, age-appropriate games for their children:

> There are thousands of Android developers creating experiences for families and children — apps and games that broaden the mind and inspire creativity. These developers, like PBS Kids, Tynker and Crayola, carefully tailor their apps to provide high quality, age appropriate content; from optimizing user interface design for children to building interactive features that both educate and entertain.
>
> Google Play is committed to the success of this emerging developer community, so today we're introducing a new program called Designed for Families, which allows developers to designate their apps and games as family-friendly. Participating apps will be eligible for upcoming family-focused experiences on Google Play that will help parents discover great, age-appropriate content and make more informed choices.[2]

On its DFF website for app developers, Google states that "[i]f you've built great apps designed for kids or families, the family discovery experience on Google Play is a great way to surface them to parents."[3] Further, Google highlights that under the DFF program,

> The Family button on Apps and Games Home points to an enhanced discovery experience for parents looking for family appropriate content. The Family section includes uniquely merchandised content, family specific categories, and age-based browsing. Apps in the Designed for Families program receive this additional visibility on top of their existing categories, rankings, and reviews elsewhere on the Google Play Store.[4]

As Google explains, being included in the Family section of the Google Play Store:

> expands the visibility of your family content on Google Play, helping parents easily find your family-friendly apps and games throughout the store. Other features create a trusted environment that empowers parents to make informed decisions and engage with your content.

(Compl. ¶ 199.) Google represents that all apps featured in the Family section must meet specific criteria related to privacy guidelines set by Google, including that the apps be appropriate for children under 13 and that the apps (and any embedded SDKs) operate in a COPPA-compliant

[2] Declaration of David Slade in Support of the State's Request for Judicial Notice ("Slade Decl."), Ex. A.
[3] Slade Decl., Ex. B.
[4] *Id*.

manner. (Compl. ¶ 112.) Google allegedly enforces these criteria by reviewing each app submitted for marketing in the Family section "to verify that it meets the Designed for Families program requirements,"[5] and "reserves the right to reject or remove any app determined to be inappropriate for the Designed for Families program." *Id*.

2. Google Knew That the Tiny Lab Apps in the Family Section of its Google Play Store Contained Its AdMob SDK, Which Collected Children's Personal Information to Serve Targeted Ads.

Despite allowing the Tiny Lab Apps in DFF and promoting them in the Family section of the Google Play Store, Google knew that the Tiny Lab Apps collected children's Personal Information. (Compl. ¶¶ 7, 109-21, 205, 231-41.) Google was particularly well-positioned to know this because its AdMob SDK was embedded in the Tiny Lab Apps and was collecting this Personal Information. (*Id*. ¶¶ 5, 15, 34, 67-74.) However, Google kept the Tiny Lab Apps in the Family section of the Google Play Store without alerting parents to the surreptitious data gathering of its SDK. (*Id*. ¶¶ 7, 109-21, 205, 231-41.)

3. In Spring 2018, After Privacy Researchers Informed Google That Tiny Lab Apps in the Family Section of the Google Play Store Were COPPA-Violative, Google "Concluded" that They Did Not Violate COPPA.

In Spring 2018, security researchers at the University of California, Berkeley, informed Google that it was improperly marketing thousands of COPPA-violative apps as appropriate for children in the Family section of its Google Play Store. (*Id.* ¶¶ 110-11.) The privacy researchers explained that the problem was widespread across thousands of apps Google accepted into the DFF program, identifying 2,667 apps that appeared child-directed in nature, but were miscategorized as "mixed audience," thereby "allowing COPPA-prohibitive behavioral advertising." (*Id*. ¶ 114.) The researchers presented Google with a case study of 84 of the Tiny Lab

[5] Slade Decl., Ex. A.

Apps, with 75 million downloads worldwide, as an object lesson in COPPA-violative behavior. (*Id*.)

In response, Google claimed that: (1) it had no mechanism to detect and prevent COPPA-violative behavior in the DFF program "at scale;" and (2) it required more information on appropriate "heuristics" to support the conclusion that the Tiny Lab Apps were child-directed. (*Id.* ¶ 115.) But the researchers demonstrated this was a fallacy: First, Google could easily "replicate [their] infrastructure to do the exact same type of testing at scale," including specific, multiple mechanisms that Google could use to detect COPPA-violative behavior in the DFF program at scale. (*Id.* ¶ 116.) Second, regarding appropriate "heuristics," the researchers showed that Google could easily determine (1) whether the app's name, description, or developer included the words "children," "kids," "baby," etc. and (2) whether the description of the game on a given developer's website addressed parents. (*Id.* ¶ 117.) As detailed below (*see* § V.A.2.a, *infra*), the name of and content in Tiny Lab's own website would have underscored the value of the proposed methodology.

Google ignored and denied its misconduct, stating—with no support or analysis and despite direct evidence to the contrary—that none of the Tiny Lab Apps were directed to children, and none were violating COPPA "in anyway" [*sic*]:

> Unfortunately, after a thorough investigation of each of the apps that you highlighted in your research paper, our policy teams did not come to the same conclusion that any of these 84 Tiny Lab Productions apps were violating COPPA in anyway and we do not considered [*sic*] these apps to be designed primarily for children, but for families in general.

(*Id.* ¶ 118.) In other words, Google chose to do nothing to prevent the illegal collection and use of children's Personal Information for targeted advertising in child-directed apps because it concluded that (1) apps with names like Fun Kid Racing, Happy Easter Bunny Racing, and Run Cute Little Pony Game (and graphics such as those in the figures above) were not "designed

primarily for children," and (2) it was unaware of any COPPA-violative behavior in these apps, even though Google's advertising SDK was embedded in the apps, and actively collecting Personal Information from children in those apps. (*Id.*)

4. On the Same Day This Action Was Filed, Google Reversed Course and Removed All Tiny Lab Apps from the Google Play Store.

Google misleadingly claims—with no evidence or support—that "prior to the filing of this Complaint in September 2018, Google terminated Tiny Lab's Google Play Store account and removed the Tiny Lab Apps after determining that Tiny Lab was not in compliance with Google Play policies." Mot. at 9-10. However, Google neglects to inform the Court that it did so on September 11, 2018—the same day this action was filed. Slade Decl., Ex C. The following day, Google also admitted that its "thorough investigation" into the child-directed nature of Tiny Lab Apps such as Fun Kid Racing and Run Cute Little Pony Game was not sound, and that its conclusions about the same were "made in error." *Id.*, Ex. D. However, although Google removed the Tiny Lab Apps from its Google Play Store on September 11, 2018, the 75 million Tiny Lab Apps that children downloaded still reside on children's mobile devices.[6]

III. LEGAL STANDARD

To survive a Rule 12(b)(6) motion to dismiss, a plaintiff must allege facts sufficient to state a plausible claim for relief. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, (2007). The Court must accept all well-pleaded allegations as true and must view them in the light most favorable to the plaintiff. *Smith v. United States*, 561 F.3d 1090, 1098 (10th Cir. 2009). A claim is facially plausible if the plaintiff pleads facts sufficient for the Court to reasonably infer that the defendant

[6] In its introduction, once again venturing beyond the facts in the Complaint, Google notes that the State "never contacted Google prior to filing this lawsuit" and that had the State done so, Google "would have explained . . . how [it] complies with COPPA." Mot at 3-4. As explained herein, Google was not complying with COPPA. Further, COPPA includes no pre-suit notification requirement.

is liable for the alleged misconduct. *Ashcroft v. Iqbal*, 556 U.S. 662, 678, (2009). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id*.

IV. COPPA: Background and Requirements

A. COPPA Prohibits Operators of Online Services Like Google from Collecting Children's Personal Information Without Verifiable Parental Consent.

Recognizing the vulnerability of children in the Internet age, Congress enacted COPPA expressly to protect children's privacy while they are connected to the Internet. (Compl. ¶ 6.) Under COPPA, "[i]t is unlawful for an operator of a website or online service directed to children, or any operator that has actual knowledge that it is collecting personal information from a child, to collect personal information from a child in a manner that violates the regulations prescribed under [the statute]." 15 U.S.C. § 6502(a). An "operator" must, *inter alia*, "[o]btain verifiable parental consent prior to any collection, use, and/or disclosure of personal information from children." 16 C.F.R. § 312.3(b); *see also* 16 C.F.R. § 312.5.

B. Under COPPA, "Personal Information" Includes "Persistent Identifiers" and "Geolocation Information."

COPPA restricts collecting, using, and disclosing "Personal Information," which includes not only familiar, "pre-Internet" data points like names, physical addresses, telephone numbers, and social security numbers, but also personal information most commonly used to track, profile, target, and monetize children and others on the Internet. The State alleges that Google collects, uses, and discloses: (1) "persistent identifier[s] that can be used to recognize a user over time and across different Web sites or online services," including but not limited to "a customer number held in a cookie, an Internet Protocol (IP) address, a processor or device serial number, or unique device identifier;" and (2) "geolocation information sufficient to identify street name and name of a city or town." 16 C.F.R. § 312.2; (Compl. ¶¶ 67-74.)

C. COPPA Allows the Collection of Personal Information Without Parental Consent Under a Narrow Exception Not Present Here.

Under a very narrow exception—not argued in the instant Motion but argued in the companion SDK Motion and incorporated by reference into Google's Motion—Persistent Identifiers may be collected without parental consent only when "an operator collects a persistent identifier and no other personal information and such identifier is used for the sole purpose of providing support for the internal operations of the Web site or online service." 16 C.F.R. § 312.5(c)(7). Importantly, this exception is limited to Persistent Identifiers and does not apply to geolocation. *Id.* In turn, "[s]upport for the internal operations of the Web site or online service means" only "activities necessary to" accomplish seven narrow tasks. 16 C.F.R. § 312.2. One such task—raised as an affirmative defense in the SDK Defendants' Motion—is "serv[ing] contextual advertising on the Web site or online service." *Id.* The State alleges that Google and the other Defendants served behavioral advertising and not contextual advertising. (Compl. ¶ 104.) Accordingly, this exception is not relevant or applicable. SDK Opp. at 10-11.

D. "Websites or Online Services Directed to Children" Under COPPA

COPPA states that:

> In determining whether a Web site or online service, or a portion thereof, is directed to children, the [Federal Trade Commission (or "FTC")] will consider its subject matter, visual content, use of animated characters or child-oriented activities and incentives, music or other audio content, age of models, presence of child celebrities or celebrities who appeal to children, language or other characteristics of the Web site or online service, as well as whether advertising promoting or appearing on the Web site or online service is directed to children. The Commission will also consider competent and reliable empirical evidence regarding audience composition, and evidence regarding the intended audience.

16 C.F.R. § 312.2. One must "look to the totality of the circumstances to determine whether a site or service is directed to children (whether as its primary audience or otherwise)." 78 Fed. Reg.

3972, 3984. "[N]o single factor will predominate over another in this assessment" (*Id.*), and the FTC has rejected the notion that all factors must be present, stating that "the Commission will look at the overall character of the site [or service]—and not just the presence or absence of one or more factors—in determining whether a website [or service] is directed to children." 64 Fed. Reg. 59888, 59893.

E. "Actual Knowledge" Under COPPA

The term "actual knowledge" is not defined in COPPA, either in the statute or in the regulations. Recognizing that "[k]nowledge, by its very nature, is a highly fact-specific inquiry," the FTC did not establish a bright line rule for its "actual knowledge" standard and instead stated that the standard "will likely be met in most cases when: (1) A child-directed content provider…directly communicates the child-directed nature of its content to the other online service; or (2) a representative of the online service recognizes the child-directed nature of the content." 78 Fed. Reg. 3972, 3978. Importantly, the FTC also "[did] not rule out that an accumulation of other facts would be sufficient to establish actual knowledge," emphasizing the importance of weighing the evidence "carefully on a case-by-case basis." *Id.*

V. ARGUMENT

A. The State's Complaint Plausibly Alleges That Google Violated COPPA Through the Operation of Its AdMob SDK Embedded in Tiny Lab Apps.

1. Google is Indisputably an "Operator" Subject to COPPA via Its AdMob SDK.

Google falsely contends that only Tiny Lab is an "operator" as defined by COPPA and that the State's "Complaint seeks to extend Tiny Lab's COPPA obligations to Google" by labeling the AdMob SDK as an "operator" as well. Mot. at 4, 14-15. Google is wrong: both Tiny Lab and Google's AdMob SDK are "operators," along with the Other SDK Defendants.[7] *See generally*

[7] The Other SDK Defendants chose not even to raise this frivolous argument in the SDK Motion to Dismiss.

SDK Opp. COPPA defines an "operator" as "any person who operates . . . an online service and who collects or maintains personal information from or about the users of or visitors to such . . . online service." 16 C.F.R. § 312.2. As detailed above and in the Complaint (¶¶ 5, 15, 34, 67-74), this is exactly what Google does via its AdMob SDK plug-in embedded in the Tiny Lab Apps.[8] Indeed, the FTC has stated explicitly that "the Rule covers a plug-in or ad network when it has actual knowledge that it is collecting personal information through a child-directed Web site or online service." 78 Fed. Reg. 3972, 3972.

2. The State Plausibly Alleges That Google Had Actual Knowledge That the Tiny Lab Apps Were Child-Directed and That It Was Collecting Personal Information From Children.

The State's Complaint provides detailed allegations demonstrating that Google had actual knowledge that the Tiny Lab Apps were child-directed and that children were playing them, and that Google used that knowledge for commercial exploitation. (Compl. ¶¶ 105-09, 211-14, 231-41.) Google obtained this knowledge through numerous sources, including: (1) direct communications from Tiny Lab to Google seeking the placement of child-directed ads (*Id.* ¶¶ 105-07; 211-14); (2) Google's recognition of the Tiny Lab Apps' child audience, manifested by its use of the Personal Information it received from the Tiny Lab Apps to serve child-oriented advertising (*Id.* ¶¶ 105-06, 108, 211-14); (3) Google's review and acceptance of the Tiny Lab Apps for marketing as "Family" apps on the Google Play Store (*Id.* ¶¶ 109, 112, 199-202, 205, 231-41); and (4) Google's independent, "thorough investigation" of *each* Tiny Lab App after researchers

[8] Google argues that it cannot be held liable under COPPA for its operation of the Google Play Store. *See* Mot. at 14 (§ II.B.). But the State does not bring a COPPA claim against Google for its operation of Google Play. For Google's bad acts related to the Google Play Store, the State only brings a claim under the UPA (Count III), not COPPA. (*See* Compl. ¶¶ 231-41 (Count III)). For Google's unlawful conduct involving its SDK, the State brings a COPPA claim (*id*. ¶¶ 207-16 (Count I); a separate UPA claim (*id*. ¶¶ 217-30) (Count II); and an intrusion upon seclusion claim (*id*. ¶¶ 242-51). Google's brief confuses the issue. *See* Mot. at 10 (acknowledging that the State seeks to hold Google liable for the actions of the Google Play Store only under the UPA, not COPPA).

provided concrete information that apps with titles like Fun Kid Racing, Happy Easter Bunny Racing, and Run Cute Little Pony Race Game are child-directed (*Id.* ¶¶ 110-21).

a. Google Had Actual Knowledge the Tiny Lab Apps Were Child Directed Through the Operation of Its AdMob SDK Embedded in the Tiny Lab Apps.

Google had actual knowledge, obtained through its AdMob SDK, that the Tiny Lab Apps were child-directed.[9] The FTC states that an SDK meets the "actual knowledge" standard when either "(1) A child-directed content provider . . . directly communicates the child-directed nature of its content to the [SDK]; or (2) a representative of the [SDK] recognizes the child-directed nature of the content." 78 Fed. Reg. 3972, 3978. The State satisfies either prong of this standard.

As to the first prong, the State plausibly alleges that Tiny Lab directly communicated "concrete information" about the child-directed nature of its content to Google every time its AdMob SDK made a call from a Tiny Lab App to Google's servers, to place a child-directed advertisement. (*See* Compl. ¶ 106.) Each time a Tiny Lab App made calls to Google's AdMob SDK, in order to place a targeted advertisement for children within a given app, Tiny Lab sent a "bundle ID" that identified the child-directed nature of the apps at issue by including, *inter alia*, the name of the developer ("Tiny Lab") and the name of the app (*e.g.*, "Fun Kid Racing," and "GummyBear and Friends Speed Racing"). (*Id.* ¶¶ 105-7; 211-14.) The call at issue sought placement of a child-directed advertisement. (*Id.* ¶¶ 107-08, 211-14.) Google cites the FTC FAQ website arguing that a list of app names (and nothing more) provided by a parents' organization does not trigger a "duty to investigate" the apps at issue (Mot. at 16, 19), but that FAQ is irrelevant to the facts of this action. *See* SDK Opp. at 8. Moreover, Google does not share with the Court that the FTC also states that if Google received additional "concrete information" that an app is

[9] The State incorporates by reference all arguments concerning actual knowledge from its SDK Opposition Brief. SDK Opp. at. 6-10.

child-directed, it possesses actual knowledge. FTC FAQ at Section D.11. Google gained that knowledge here, when it received the "bundle ID," requiring no further investigation as the names alone provide actual knowledge, telegraphing the child-directed nature of the content (*e.g.,* "Fun Kid Racing"). (*Id.* ¶ 107.) Further, these ad requests are sent with an *additional* instruction to place a content-appropriate (*i.e.,* child-directed) advertisement. (*Id.* ¶ 108, 211-14.) Knowing that one is being asked to place a child-directed advertisement in an app titled "Fun Kid Racing," on behalf of a party named "Tiny Lab," is more than enough "concrete information" that the app is child-directed. (*Id.*)

As to the second prong, Google "recognize[d] the child-directed nature of the content" of the Tiny Lab Apps each time it identified a particular child playing a Tiny Lab App, by exfiltrating Personal Information to track that child across time and devices to build a user profile that accounted for the user's age (among other things), so that Google could then serve that same child with targeted ads in what Google necessarily recognized as a child-directed app. (Compl. ¶¶ 34, 67-74, 105-6, 108, 212-14.) Otherwise, Google's child-targeting ad would not be targeted. Indeed, Google's multi-billion-dollar advertising business is premised on tracking, profiling, and segmenting individual users for targeted advertising (*Id.* ¶ 34), and the State plausibly alleges that Google's service of child-directed advertising demonstrates that Google recognized the child-directed nature of the Apps from which it collected Personal Information and later served its advertising. (*Id.* ¶¶ 34, 105-07, 211-14).

Google protests ignorance about the demographics of its target audience, but says the opposite to its advertising clients. Simply put, Google can either accurately identify audiences for advertisers (as it says it does to clients) or else it cannot (as its filings here imply). Google's disavowal of actual knowledge of the data it processes is akin to a large bank suggesting it does

not know when customers have insufficient funds, overdraft an account, or miss a loan payment. It is Google's business to know.

Google manifestly distorts the State's allegations. For example, Google tells the Court that the State "seeks to hold Google liable on the assertion that it *would have been* 'obvious and indisputable from a cursory review' of the Tiny Lab Apps that they 'were directed to children.'" Mot. at 19 (emphasis in original). In truth, the State alleges that Google actually knew this to be true from Personal Information collected from and analyzed by the AdMob SDK. (*See, e.g.,* Compl. ¶ 107 (describing "[t]he communications to and from Tiny Lab evidencing each SDK Defendant's [including Google AdMob] actual knowledge of the child-directed nature of Gaming Apps")); (*id.* ¶ 108 (describing "[e]ach SDK Defendant's own actions recognizing the child-directed nature of the Gaming Apps' content.")); (*id.* ¶ 213 ("Each SDK Defendant [including Google/AdMob] knew that it was receiving Personal Data (including Personal Information as that term is defined under COPPA) from the devices of children playing a Gaming App.") (emphasis added)).[10] If a defendant "really wishes to dispute the facts alleged in a complaint, a motion to dismiss surely isn't the proper way to go about it." *UTE Indian Tribe of the Uintah & Ouray Reservation v. Myton*, 835 F.3d 1255, 1261 (10th Cir. 2016) (Gorsuch, J.).[11]

[10] SDK Defendants are liable under COPPA when, as here, they have actual knowledge that they collect Personal Information from children. 78 Fed. Reg. 3972, 3973. It is therefore irrelevant that the FTC rejected a strict liability standard for SDKs. *See* Mot. at 16 (citing 78 Fed. Reg. 3972, 3975).

[11] In footnote 3 of its Brief (*see* Opp. at 6), Google improperly disputes the factual allegations in the Complaint, claiming that in "several" of the 91 Tiny Lab Apps, Google's SDK "operated in a manner that did not trigger child-directed COPPA obligations" during at least a "portion of [the apps'] existence." This is an implicit admission that for the vast majority of Tiny Lab Apps—91 minus "several"—Google's AdMob SDK operated in a manner that triggered COPPA obligations for *all* of the apps' existence (and the remaining "several" violated COPPA for all but a "portion" of their existence).

b. Google Also Had Actual Knowledge the Tiny Lab Apps Were Child-Directed Through Operating the Family Section of the Google Play Store.

As described above (*see* §§ II.A, C), 86 Tiny Lab Apps were submitted to Google as family-friendly and child-directed for inclusion in the Family section of the Google Play Store. After receiving that information, verifying that Tiny Lab Apps met the Designed for Families program requirements, and marketing each App in the Google Play Store's Family section, Google had actual knowledge that the each Tiny Lab App was child-directed, because Google introduced these apps into a digital marketplace it created for exclusively child-directed content.

First, Google notes that apps it approves for inclusion in the Google Play Store's Family section includes "primarily child-directed apps" (children under 13 are the primary audience) and "mixed-audience apps" (children under 13 are one of their audiences). Mot. 6 & 7. This distinction is irrelevant. The FTC has made clear: "If your service targets children as one of its audiences—even if children are not the primary audience—then your service is 'directed to children.'" FTC FAQ No. G.2. Because Google always agreed that the Tiny Lab Apps in its Play Store's Family section were either primarily child-directed or directed to children as one of their audiences, it always had actual knowledge that the Tiny Lab Apps were "directed to children" for purposes of COPPA. Regardless, as detailed above, the Tiny Lab Apps are primarily directed to children (or as Tiny Lab says, "toddlers" and "kids"). (Compl. ¶ 30.) Furthermore, as detailed herein (*see* § II.A), Google does not now dispute that the Tiny Lab Apps are actually primarily directed to children, and not for mixed audiences, and admits that it removed the Tiny Lab Apps from its Play Store for that reason. *See also* Slade Decl., Ex. D.

Second, while Google contends that it "is not privy to most of the information required to make a determination of whether an app is "directed to children" (Mot. at 17), the State plausibly alleges that Google is privy to that information. (Compl. ¶¶ 34, 105-07, 211-14. Google reviewed

and verified the information submitted by Tiny Lab for inclusion in the DFF Program and placement in the Family section of the Google Play Store. Slade Decl., Ex. A. Indeed, beyond all the data received by Google in the SDK and DFF context, simply to display and market the Tiny Lab Apps in the Family section of the Google Play Store, Google *has* to receive the following information: (1) the apps' names (*e.g.*, Fun Kid Racing, Happy Easter Bunny Racing and Run Cute Little Pony Race Game); (2) screen shots of the cartoonish apps, revealing their subject matter, visual content, and child-oriented game play; (3) suggested age ratings for the audiences (all Tiny Lab Apps were rated "E" for "everyone"); and (4) Tiny Lab's own description of the Tiny Lab Apps, including "This free game is made for 2 – 10 years children [*sic*]." *See, e.g.,* (Compl. ¶ 31); (*id.* figures 1 and 4). These are the indisputable data points that are evaluated when determining whether an app is child-directed (16 C.F.R. § 312.2) and any of these data points, in isolation or together, demonstrate that the Tiny Lab Apps are directed towards children. The Complaint plausibly alleges that Google possessed, was aware of, and displayed each of the above items of information, thus plausibly demonstrating Google's actual knowledge. Again, it simply chose not to *use* this knowledge to comply with COPPA.

c. Google Had Actual Knowledge That the Tiny Lab Apps Were Child-Directed Because Privacy Researchers Provided Concrete Information Showing This and Google "Thoroughly Investigated" Each and Every App.

As described above (*see* § II.C.3), Google acquired additional actual knowledge that the Tiny Lab Apps were child-directed during its lengthy communications with security researchers, who informed Google that the Tiny Lab Apps and numerous other apps in the Family section of the Google Play Store were COPPA-violative. Google concedes that it investigated the researchers' concerns, by tasking "policy teams" to conduct a "thorough investigation" into each Tiny Lab App. (Compl. ¶ 118.) Google cannot simultaneously contend that it "thoroughly" examined each Tiny Lab App but that it has no "actual knowledge" about their child-directed

nature, especially when Google later reversed course and removed all Tiny Lab Apps from the Google Play Store the day this action was filed. Slade Decl., Ex. C.

Finally, Google suggests that despite the extensive actual knowledge described above, Google can rely on the purported representations of Tiny Lab that it had complied with the requirements of COPPA. Mot. at 20-21. This argument fails, however, because the FTC expressly states that operators like Google cannot rely on acceptance or recitation of standard provisions and requirements in terms of services. FTC FAQ Section D.11. ("[A] website operator would not be deemed to have provided a specific affirmative representation if it merely accepts a standard provision in your Terms of Service stating that, by incorporating your code, the first party agrees that it is not child directed."). In other words, Google cannot use a form disclaimer as an excuse to ignore the concrete information in its possession—which it routinely acts on for commercial purposes—that demonstrates that the Tiny Lab Apps are child-directed.

B. The State Plausibly Alleges that Google Violated the New Mexico Unfair Practices Act By Its Operation of the Google Play Store.

1. The Complaint Plausibly Alleges Google Knowingly Made Misrepresentations Regarding the Suitability of the Tiny Lab Apps for Children in the Family Section of the Google Play Store.

To state a claim for an unfair or deceptive trade practice, a complaint must plead:

> [1] an 'oral or written statement, visual description or other representation that was either false or misleading.' [2] the false or misleading representation must have been 'knowingly made in connection with the sale, lease, rental or loan of goods or services in the extension of credit or ... collection of debts.' [3] the conduct complained of must have occurred in the regular course of the representer's trade or commerce. [4] the representation must have been of the type that 'may, tends to or does, deceive or mislead any person.'

Stevenson v. Louis Dreyfus Corp., 112 N.M. 97, 100, 811 P.2d 1308, 1311 (2011). "The 'knowingly made' requirement . . . is met if a party was actually aware that the statement was false

or misleading when made, or in the exercise of reasonable diligence should have been aware that the statement was false or misleading." *Id*.

As stated above, Google's only challenge to the State's unfair or deceptive UPA claim is that "[t]he Complaint fails to identify any actual representation made by Google that the Tiny Lab Apps were compliant with COPPA." Mot. 23. This is demonstrably false. The State alleges that Google described the Family section of the Google Play Store as "a trusted environment that empowers parents to make informed decisions," that "help[s] parents easily find your family-friendly apps and games throughout the store." (Compl. ¶ 199) (emphasis added). Google also states that "Families and COPPA – Google Play offers a rich platform for developers to showcase trusted, high-quality and age appropriate content for the whole family." (*Id*. ¶ 121.)

Further, Google states that "[o]nly apps and games that are part of the Designed for Families program will show up in searches initiated from the Family section in Apps Home." (*Id*. at n. 150.) Participation in DFF requires "compl[iance] with applicable legal obligations relating to advertising to children," including a representation that *"*[a]ds displayed to child audiences do not involve interest-based advertising or remarketing*"* and *"*apps submitted to Designed for Families are compliant with COPPA (Children's Online Privacy Protection Rule) and other relevant statutes, including any APIs [(a synonym for SDKs)]." (*Id*. ¶ 201.)

Google claims that these representations do not mean that Google "separately verified that the Tiny Lab Apps were COPPA-compliant" (Mot. 24), but that mischaracterizes the State's allegations, which assert that Google knew the Tiny Lab Apps were not COPPA-compliant, both through its own COPPA-violative behavior and from the separate sources of concrete information it received from myriad sources detailed above (*see*, Section V.A.2, *supra*). Despite possessing this knowledge, Google represented that the Tiny Lab Apps were safe for children. (Compl. ¶¶ 231-41.) The Complaint plausibly alleges that these representations were misleading given that (1)

Google conveyed that apps in the Family section are privacy protective, COPPA-compliant, and appropriate for children (*i.e.*, that the Family section of the Google Play Store is a "trusted environment that empowers parents to make informed decisions") but (2) Google knew that none of these representations were true as to the Tiny Lab Apps. (*Id*. ¶¶ 67-74, 121, 199, 110-21, 201, 205, 231-41.) Accordingly, the State has plausibly alleged that Google knowingly made misrepresentations regarding the Tiny Lab Apps and the Family section of the Google Play Store. *Lohman v. Daimler-Chrysler Corp*., 142 N.M. 437, 444-45, 166 P.3d 1091, 1098-99 (2007) ("[D]eliberate concealment and nondisclosure" of a material fact is a "knowing misrepresentation" under the UPA); *Grassie v. Roswell Hosp. Corp*., 150 N.M. 283, 304, 258 P.3d 1075, 1096 (2011) (omission of material facts in advertising materials gives rise to UPA claim).

2. Google Is Not Immune From UPA Liability Under the Communications Decency Act ("CDA").

Google has no immunity under the CDA, 47 U.S.C. § 230, because the State seeks to hold Google accountable for its own misrepresentations and conduct, and not the actions of third parties using Google as a computer service. Broadly, the CDA preempts claims against a website (or "interactive computer service") if those claims seek to hold the website liable for content posted exclusively by a third party (an "information content provider"). *Id*. However, CDA immunity does not apply to claims arising from a website's own representations or conduct, like the State's UPA claim here, which alleges that Google itself made knowing misrepresentations regarding the content contained in the Family section of the Google Play Store. *See* § V.B.1, *supra*; *FTC v. Accusearch, Inc*., 570 F.3d 1187, 1197 (10th Cir. 2009); *see also Vision Sec., Ltd. Liab. Co. v. Xcentric Ventures, Ltd. Liab. Co*., No. 2:13-CV-00926, 2015 U.S. Dist. LEXIS 184007, at *6-8 (D. Utah Aug. 27, 2015) (allegations that defendant knowingly allowed false content to be posted on its website and "refused to remove the offensive content to promote its own [commercial interest]" precluded CDA defense); *Anthony v. Yahoo! Inc.*, 421 F. Supp. 2d 1257, 1263 (N.D.

Cal. 2006) (claims that defendant used expired or falsified profiles to market its online dating service were not preempted by CDA "[b]ecause [plaintiff] posits that Yahoo!'s manner of presenting the profiles – not the underlying profiles themselves – constitute fraud[.]")

Google's argument that the State "acknowledges that it was Tiny Lab—not Google—that made the warranties about the Tiny Lab Apps being COPPA-compliant" is wrong. Mot. at 24. Instead, the State's UPA claim against Google is based on Google's act of "market[ing] Gaming Apps as DFF compliant and, more broadly, as being suitable and safe for children." (Compl. ¶ 234; *see also, id.* ¶¶ 200, 232.) Under virtually identical circumstances, courts have rejected this CDA immunity argument. *Pirozzi v. Apple Inc.*, 913 F. Supp. 2d 840, 849 (N.D. Cal. 2012) ("Plaintiff's claims are not predicated *solely* upon Apple's approving and distributing Apps via its online App Store; Plaintiff also seeks to hold Apple liable for representations made by Apple itself.") (emphasis in original).

3. Google Fails to Address (and Thus Waives Its Opportunity to Challenge) the State's Separate "Unconscionable Trade Practices" UPA Claim.

Google does not challenge the State's "unconscionable trade practices" UPA claim, which is distinct from its "unfair trade practices claim" (*see* Compl. ¶ 236), and which does not require alleging misrepresentation. Instead, this distinct claim requires that an "act or practice in connection with the sale, lease, rental or loan, or in connection with the offering for sale, lease, rental or loan, of any goods or services, . . . that to a person's detriment: (1) takes advantage of the lack of knowledge, ability, experience or capacity of a person to a grossly unfair degree[.]" N.M. Stat. Ann. § 57-12-2(E). Google therefore has waived any argument it might make on this basis. *Genesee Cty. Emples. Ret. Sys. v. Thornburg Mortg. Sec. Tr.* 2006-3, 825 F. Supp. 2d 1082, 1224 n.39 (D.N.M. 2011) ("[A]rguments raised for the first time in a reply brief are generally deemed waived.") (quoting *United States v. Harrell*, 642 F.3d 907, 918 (10th Cir. 2011)).

C. Leave to Amend Should be Granted.

To the extent that any of Google's arguments are credited, the State seeks leave to address them in an Amended Complaint. *See Triplett v. Leflore Cty*., 712 F.2d 444, 446 (10th Cir. 1983).

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CERTIFICATE OF SERVICE

I certify that on this day, March 12, 2019, the foregoing was electronically filed with the Clerk of the Court using the CM/ECF System, which will send notification of such filing to all counsel of record via the CM/ECF System.

/s/ Allen Carney
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