IN THE CIRCUIT COURT OF CLEBURNE COUNTY, ARKANSAS
CIVIL DIVISION

STATE OF ARKANSAS, *ex rel.*
TIM GRIFFIN, ATTORNEY GENERAL

PLAINTIFF

CASE NO. 12CV-24-149

PDD HOLDINGS INC. F/K/A
PINDUODUO INC.; AND WHALECO INC.
D/B/A TEMU **DEFENDANTS**

PLAINTIFF'S RESPONSE IN OPPOSITION TO
DEFENDANTS' MOTION TO DISMISS
PLAINTIFF'S AMENDED COMPLAINT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

I. INTRODUCTION

Defendants, PDD Holdings, Inc., f/k/a Pinduoduo, Inc., and Whaleco, Inc., d/b/a Temu (collectively "Temu"), have moved to dismiss the Plaintiff's Amended Complaint. In its motion, Temu argues the facts rather than the law, as if its motion was a trial before a fact-finder. But Temu's motion is not a trial or a motion for summary judgment. Rather, this Court must determine only whether the State's Amended Complaint pleads a basis for relief in ordinary and concise language.

Temu's arguments against the facts are not only procedurally improper, but also unsupported. In Temu's original motion to dismiss, Temu argued to the Court that it should not consider the State's allegations because they relied on the Grizzly Report, which Temu claimed had ulterior motives. Temu's argument is irrelevant now. The State has exposed Temu's privacy-invasive design and deployment of its app through its own independent, empirically-verifiable and empirically-verified forensic investigation. In its Amended Complaint, the State alleges, based on its own independent investigation, that Temu is designed to siphon user's personal information without their knowledge or consent, and that it actually *does* the things it was designed to do. The Court should reject Temu's invitation to ignore not only the Amended Complaint's well-pled allegations, but also the motion-to-dismiss standard that has been the cornerstone of Arkansas law for decades. Under that standard, this Court must take the State's allegations as true. The Amended Complaint states claims upon which relief may be granted in ordinary and concise language as required by the Arkansas Rules of Civil Procedure. That should end the Court's analysis, and this Court should deny Temu's motion to dismiss.[1]

[1] Because Temu dropped its prior assertion that Defendant PDD Holdings Inc., f/k/a Pinduoduo Inc., is not a proper party to this action, questions of personal jurisdiction are no longer before this Court. The only live issue is whether the State's claims are sufficiently pled under Rule 12(b)(6) of the Arkansas Rules of Civil Procedure.

II. FACTUAL AND PROCEDURAL BACKGROUND

Rather than repeat the factual and procedural background from the first round of briefing, the State will outline the facts that have transpired since Temu's original motion to dismiss. The State incorporates its factual recitation from its response in opposition to Temu's original motion to dismiss.

Temu urges the Court to ignore the Rule 12(b)(6) standard on motions to dismiss and view the Amended Complaint in the light most favorable to *Temu* rather than Plaintiff. Moreover, Temu revisits arguments that are only relevant to the State's original complaint. *See, e.g.*, Def. Br. at p. 8. That is neither the correct standard of review nor the issue that this Court must decide.

At the hearing on Temu's original motion to dismiss on April 29, 2025, this Court "invit[ed] the Attorney General's office to reframe this complaint" to make the pleading "more factually stout without [the Court] having to stretch to read facts into conclusions." Def. Ex. 1 at 114:14–21. That is precisely what the State has done.

On May 29, 2025, the State filed its Amended Complaint. Am. Compl. at p. 1. The State removed any allegation as to the Temu app's functionality that was not directly supported by its own, robust forensic analysis. Every allegation as to Temu's functionality within the Amended Complaint is the product of a detailed, independent analysis of Temu's code, conducted exclusively at the behest of the State.[2] Some of these well-pled allegations in the Amended Complaint include,

[2] For example, the State avers that it "examined publicly-available code of both the Temu app and its predecessor, the Pinduoduo app, and focused on the ways in which each app has code and functionality overlay. Independent of any code overlay between Temu and Pinduoduo, the State conducted both static and dynamic analysis of the Temu app over time. This means that the State has reviewed both what the Temu app is designed to do and how it operates when used by account holders." Am. Compl. at ¶¶ 12–13. Critically, the Amended Complaint clarifies that the factual allegations about "the technical design, functionality, and features of the Temu app" are based on findings of the State's own independent forensic investigation of the publicly-available app code and are not merely recitations of the findings of the Grizzly Report or any other third-party analysis. *Id.* at ¶ 14.

but are not limited to, how Defendants (1) intentionally employ code that *actually* enables Temu to recompile itself once it has been downloaded onto an individual's device (Am. Compl. ¶¶ 80–86); (2) omit data-collection practices from its app manifest file (*id.* ¶¶ 87–92); (3) coded the Temu app to determine whether it is being analyzed by security researchers to obscure its privacy-invasive practices (*id*. ¶¶ 94–100); (4) obscure Temu's code to prevent an observer from finding malicious code that Temu imported, wholesale, from the banned Pinduoduo app (*id.* ¶¶ 101–103; 111–115); (5) encrypt its transmissions from the Temu app to Temu's servers at a level that is not seen in comparable apps or platforms (*id*. ¶¶ 104–110), for the purpose of sneaking users' personal information in the "deeper layers of encrypted data to Temu's servers…that is never disclosed to the user" (*id.* ¶ 110); (6) use code-based exploits that are considered hallmarks of malware in the industry to prod a phone's potential vulnerabilities and therefore gather even more sensitive information from the individual (*id*. ¶¶ 124–130); and (7) access a phone's microphone and camera (*id*. ¶ 123).

Beyond describing *how* Temu collects information from users without their consent and *how* Temu attempts to obscure this conduct, the State also identifies *what* Temu takes, describing specific items of sensitive data that the Temu app harvests. For example, the State explains how Temu takes location information from users, which identifies their precise (as opposed to approximate) geolocation. *Id.* ¶¶ 117–122. The State also explains how Temu acquires lists of all the apps installed on a user's device even though Apple and Google forbid this conduct. *Id*. ¶¶ 131–135. Beyond acquiring a list of apps the user has, Temu accesses a device's "centralized registry of [a] user's online accounts." *Id*. ¶¶ 136–138. Temu also acquires other data that both uniquely identifies a given user and further allows Temu to track that user across the Internet and even across the globe (given their use in geolocating individuals). *Id*. ¶¶ 139–143.

Despite this independent assessment of material facts within Temu's code, Temu's motion inexplicably continues to argue against the credibility of the Grizzly Report, which does not form any basis of the State's Amended Complaint. Temu attempts to reintegrate allegations into the State's Amended Complaint that are not within the four corners of the amended pleading. *See, e.g.*, Def. Br. at p. 12 (stating that "[t]hese allegations likewise parrot the Grizzly Report" and then citing to Temu's own extraneous exhibit submitted in support of its motion to dismiss, *not* the State's amended complaint). The fact that the State's own investigation corroborates the allegations in the Grizzly report is hardly the victory that Temu makes it out to be. Instead, it shows that Temu's earlier attempts to sow doubt in the Court's mind as to the veracity of the State's original complaint were as unfounded and misleading then as they are today.

Beyond Temu's attempts to fight the facts in the Complaint, Temu also makes unsupported and irrelevant inferences as to the State's decision to remove its claim under the Personal Information Protection Act, Ark. Code Ann. § 4-110-101 et seq. (the "PIPA"). *Compare* Compl. at ¶¶ 71–81 *with* Am. Compl. Temu incorrectly asserts that in removing a claim under the PIPA, the State's averments regarding the connections between Temu and the Chinese Government are now irrelevant, Def. Br. at p.3, when in fact the opposite is true. The State has not withdrawn any allegations regarding the Chinese Government's ability to access the data siphoned by the Temu app and instead has bolstered its allegations with Defendants' own statements acknowledging that users risk being subject to China's data laws. Am. Compl. ¶¶ 185–191. Defendants explicitly acknowledge that users "may…be subject to cybersecurity review obligations if the Cybersecurity Review Office decides to initiate a review against us[.]" *Id*. ¶ 190. This statement is nowhere to be found in Temu's privacy policy.

In response to the State's opposition to Defendant PDD Holdings Inc., f/k/a Pinduoduo Inc.'s separately filed motion to dismiss, PDD voluntarily withdrew its challenge to personal jurisdiction. PDD asserted that the Court could not exercise jurisdiction over it because the State could not attribute Defendant Whaleco Inc.'s conduct to PDD. PDD Mot. to Dismiss at pp. 11–16, filed 9/30/24. In response to PDD's motion, the State produced evidence showing both the interconnections between Whaleco and PDD—i.e., between Temu and Pinduoduo—and both companies' extensive ties to China. Pl. Resp. to PDD Mot. to Dismiss at pp. 7–21, filed 10/30/24. In response to the extensive evidence presented by the State connecting Whaleco to PDD, and both companies to China, PDD withdrew its motion to dismiss. Def. Ex. 1 at 117:1–11 (stating on the record that PDD's motion is "completely withdrawn" and that "we're not gonna talk about it").

Defendants' present motion to dismiss makes no distinction between PDD and Whaleco. Temu's brief never defines either the term "Defendants" or "Temu," both of which are used throughout the brief to refer collectively to Defendants PDD Holdings Inc., f/k/a Pinduoduo Inc., and Whaleco Inc., d/b/a Temu. Thus, at present, the Temu Defendants have "completely withdrawn" their opposition to PDD's inclusion in this suit and have chosen to treat Whaleco and PDD as indistinguishable in their briefing. Thus, Temu's connection to data appropriation by the Chinese Government is not an afterthought attached to the State's prior PIPA claim but remains one of the central bases for liability in this proceeding. To that end, the State has supplemented its allegations demonstrating how Whaleco's connection to PDD exposes Arkansas consumers' sensitive personal information misappropriated by Temu to collection by the Chinese Government. *See, e.g.*, Am. Compl. at ¶¶ 155–91.

In sum, the State alleges violations of the ADTPA and that Temu was unjustly enriched in ordinary and concise language. Discovery is necessary to unearth and exchange the full evidentiary

support to ultimately prove the State's claims by a preponderance of the evidence at trial. But Temu cannot challenge the accuracy of the State's allegations in a Rule 12(b)(6) motion to dismiss. Respectfully, this Court should deny Temu's motion to dismiss the State's Amended Complaint in its entirety.

III. LEGAL STANDARD

Rule 8 requires only that a complaint "contain (1) a statement in ordinary and concise language of facts showing that…the pleader is entitled to relief." Ark. R. Civ. P. 8(a). To this same end, Rule 8 reiterates that "each averment of a pleading shall be direct and stated in ordinary and concise language. No technical forms of pleadings or motions are required," Ark. R. Civ. P. 8(e), and that "[a]ll pleadings shall be liberally construed so as to do substantial justice." Ark. R. Civ. P. 8(f). While Arkansas is a fact-pleading state, courts "treat[] the facts alleged in the complaint as true and view[] them in a light most favorable to the party who filed the complaint." *Perry v. Baptist Health*, 358 Ark. 238, 241–42, 189 S.W.3d 54 (2004). "In testing the sufficiency of the complaint on a motion to dismiss, all reasonable inferences must be resolved in favor of the complaint, and the pleadings are to be liberally construed." *Id*. at 242. "[I]t is improper for the trial court to look beyond the complaint to decide a motion to dismiss." *Battle v. Harris*, 298 Ark. 241, 243, 766 S.W.2d 431, 432 (1989).

IV. ARGUMENT

A. Temu's attempt to argue the facts is procedurally improper.

Once again, Temu ignores the controlling legal standard for a motion to dismiss and instead improperly argues the facts. There is no dispute that under the fact-pleading standard, "mere conclusions [are] not sufficient under the Arkansas Rules of Civil Procedure." *Thomas v. Pierce*, 87 Ark. App. 26, 28, 184 S.W.3d 489 (2004). "Nevertheless, pleadings are to be liberally construed and are sufficient if they advise a party of its obligations and allege a breach of them." *Id*. "It is

improper for the trial court to look beyond the complaint to decide a motion to dismiss." *Deitsch v. Tillery*, 309 Ark. 401, 405, 833 S.W.2d 760 (1992). Temu, not the State, violates this black-letter standard with its motion to dismiss.

Temu asks the Court to look beyond the pleadings and find disputed facts in favor of Temu, the moving party. Throughout its motion to dismiss, Temu attempts to read the Grizzly Report into the State's Amended Complaint and to give more importance to isolated lines, which the State did not cite to or quote, pulled from the State's cited scholarly sources rather than the portions of those texts relied on by the State in its pleading. *See, e.g.*, Def. Br. at pp. 8–9, 11–12, 27, 28 (impermissibly attempting to read the Grizzly Report back into the State's complaint, which no longer forms a basis of any of the State's factual allegations), 13–14, 16, 24 (attempting to contradict the State's factual allegations with other portions of articles not cited by the State in its complaint—at best this creates a dispute of material fact, which must be read in the State's favor and not Temu's at this juncture).

Temu attempts to make this case proceed backwards, repeatedly asking this Court to make findings of fact based on the construction of contested language in its privacy policies (addressed below), or to favor one source of information outside the four corners of the complaint over another quoted in the pleading, *and* to do so in the light most favorable to the moving party. Under the Arkansas Rules of Civil Procedure, the only issue is whether the State's Amended Complaint, when liberally construed, "advise[s] [Temu] of its obligations and allege[s] a breach of them." *Thomas*, 87 Ark. App. at 28. As demonstrated in the following three sections, because the State's Amended Complaint alleges that Temu breached its obligations under the ADTPA and the equitable doctrine of unjust enrichment, Temu's motion to dismiss must be denied.

B. Temu does not raise valid legal defenses to the ADTPA.[3]

The Amended Complaint sufficiently alleges that Temu violated the ADTPA. The ADTPA broadly authorizes the Attorney General to seek, among other available remedies, "restitution and…an injunction prohibiting any person from engaging in any deceptive or unlawful practice prohibited by this chapter." Ark. Code Ann. § 4-88-104.

The ADTPA applies broadly to any deceptive and unconscionable trade practice. In no less than three separate provisions of § 4-88-107, the legislature codified that there is no complete statutory recitation of what constitutes either a "deceptive" or "unconscionable" trade practice within the meaning of the ADPTA. First, under the ADTPA, "[d]eceptive and unconscionable trade practices made unlawful and prohibited by this chapter include, *but are not limited to*," a set of 12 enumerated, but expressly non-exclusive, examples. Ark Code Ann. § 4-88-107(a) (emphasis added). Second, one subset of those 12 enumerated examples further reaffirms that the list is non-exclusive and broadly encompasses any deceitful or unconscionable trade practice, making it a violation to "[e]ngag[e] in *any other* unconscionable, false, or deceptive act or practice in business, commerce, or trade." Ark Code Ann. § 4-88-107(a)(10) (emphasis added). In fact, this "catch-all" provision was enacted because "the General Assembly could not be expected to envision every conceivable violation under the DTPA." *State ex rel. Bryant v. R & A Inv. Co., Inc.*, 336 Ark. 289, 295, 985 S.W.2d 299, 302 (1999). Finally, Ark. Code Ann. § 4-88-107 concludes where it began, reiterating that "[t]he deceptive and unconscionable trade practices listed in this section are *in addition to and do not limit the types of* unfair trade practices actionable at common law or under other statutes of this state." Ark. Code Ann. § 4-88-107(b) (emphasis added).

[3] This section addresses Temu's arguments in Section III(C) of its brief.

Accordingly, the legislature has set forth, throughout § 4-88-107, that the ADTPA is to be given broad effect to protect consumers in this State from any trade practices deemed to be either unconscionable or deceptive by a finder of fact. Nevertheless, Temu raises three purported legal defenses to the application of the ADTPA under the facts alleged in this proceeding: (1) whether the State alleges Temu committed "unconscionable" trade practices; (2) whether the State alleges that Temu took advantage of Arkansas consumers' "ignorance" of its trade practices; and (3) whether Temu constitutes either a "good" or "service" within the meaning of the ADTPA. These issues essentially duplicate the parties' first round of Rule 12(b)(6) briefing as they do not consider the amendments to the State's complaint.

1. Temu committed unconscionable trade practices.

Temu committed unconscionable trade practices within the meaning of the ADTPA because it secretly obtains consumers' private information and discloses it to the Chinese Government. "The ADTPA prohibits any 'unconscionable, false, or deceptive act or practice in business, commerce, or trade.'" *Apprentice Info. Sys., Inc. v. DataScout, LLC*, 2018 Ark. 149, at 5, 544 S.W.3d 536, 539.

The broad, liberal construction of the ADTPA conveys "[t]he General Assembly's intent to protect consumers by passing the DTPA…by making its provisions effective for consumers who are not likely to have financial means to obtain legal assistance to bring individual actions, who are unlikely to be aware of their legal rights." *State ex rel. Bryant v. R & A Inv. Co., Inc.*, 336 Ark. 289, 296, 985 S.W.2d 299, 303 (1999). The United States Court of Appeals for the Eighth Circuit[4] cited the Supreme Court's ruling in *R & A Inv. Co.* when noting that "the Arkansas Supreme Court

[4] In accordance with the Court's statements during the April 29, 2025, hearing, the State will provide courtesy copies of any non-Arkansas opinion but will endeavor as much as possible to limit its legal citations to the controlling Arkansas reporters.

has recognized the legislature's remedial purpose in enacting the ADTPA and also that a liberal construction of the [A]DTPA is appropriate. Liberal construction in this context means that the ADTPA should protect consumers from trade practices beyond common law fraud." *Curtis Lumber Co., Inc. v. Louisiana Pacific Corp.*, 618 F.3d 762, 780 (8th Cir. 2010). Accordingly, the State seeks to protect Arkansas consumers from Temu's unconscionable and deceptive business practices.

Taken as true, the State's allegations establish that Temu's secret surveillance of Arkansas consumers' most private information is unconscionable. "The determination of unconscionability is a mixed question of fact and law." *Gulfco of La., Inc., v. Brantley*, 2013 Ark. 367, at 9, 430 S.W.3d 7, 13. Critically, because whether a business practice is unconscionable contains a question of fact, it should not be resolved on a motion to dismiss.

"Arkansas's consumer-protection law…is an expression of this State's public policy." *Id*. "An act is unconscionable if it affronts the sense of justice, decency, and reasonableness." *Id*. Arkansas fundamentally recognizes a right to privacy as a matter of public policy. *Jegley v. Picado*, 349 Ark. 600, 631–32, 80 S.W.3d 332 (2002). The State alleges that Temu uses an online-shopping platform to gain unfettered access to Arkansas consumers' personal electronic devices and their most personal private information. This includes Temu's undisclosed access to consumers' cameras, microphones, precise real-time location, social media accounts, e-mails, text messages, and personal habits. *See, e.g.*, Am. Compl. at ¶¶ 116–43. Temu's violation of Arkansans' right to privacy contravenes the public policy of this State and thus constitutes an unconscionable trade practice within the meaning of the ADTPA. Temu's claim that there must be fraud is wrong. Def. Br. at p. 32. The Arkansas Court of Appeals has specifically noted that "a claim of common-law

fraud and a claim under the statutory provisions of the ADTPA are distinctly different." *Pleasant v. McDaniel*, 2018 Ark. App. 254, at 7, 550 S.W.3d 8, 12.

Moreover, Temu's unconscionable acquisition of Arkansans' private information is not limited to consumers who sign up for Temu's service. Temu also misappropriates the private information of any other Arkansan whose data just happens to be stored on a device on which the Temu app is installed. *Id*. at ¶ 152. Additionally, Temu unconscionably deceives Arkansas consumers regarding the quality, character, and provenance of the goods it sells on its platform. *Id*. at ¶¶ 201–29. Finally, all of Temu's already unconscionable practices are further compounded by the fact that the endpoint of Temu's violations of Arkansans' right to privacy is to provide their impermissibly obtained private information to the Chinese Communist Party. *Id*. at ¶¶ 155–91.

Temu repeatedly cites to federal court cases for the proposition that the catch-all provision cannot cover conduct that falls under other specific ADTPA violations. Def. Br. at p. 32. But this interpretation is completely at odds to the Arkansas Supreme Court's interpretation of the catch-all provision. *State ex rel. Bryant v. R & A Inv. Co., Inc.*, 336 Ark. 289, 295, 985 S.W.2d 299, 302 (1999) (the catch-all provision of the ADTPA was passed because "the General Assembly could not be expected to envision every conceivable violation under the DTPA."). The catch-all provision was passed to broaden the ADTPA, and this Court must follow the Arkansas Supreme Court, not federal district courts.

Therefore, Temu violated Arkansans' fundamental right to privacy by harvesting their most personal and private information, this is an unconscionable practice under Ark. Code Ann. § 4-88-107.

2. Temu took advantage of Arkansas consumers' ignorance.

Temu violates § 4-88-107(a)(8)(B) of the ADTPA by taking advantage of consumers unable to protect their own interests due to ignorance. Am. Compl. at ¶¶ 234(c), 250(c). Temu claims that the State has not sufficiently alleged ignorance. In its renewed motion-to-dismiss briefing, Temu continues to rely on an inapplicable canon of statutory construction, which cannot supplant the plain ordinary meaning of the statutory text.

Temu incorrectly asserts that to claim "ignorance" as a basis for an ADTPA violation, the State must allege "a mental impairment on the same level as a physical infirmity." Def. Br. at 34. Temu's unsupportable and unworkable construction of the ADTPA is premised on the canon of statutory construction of *noscitur a sociis*, "which allows for a word to be defined by the words accompanying it." *Edwards v. Campbell*, 2010 Ark. 398, at 5, 370 S.W.3d 250, 253. Temu's attempt to misconstrue the meaning of the word "ignorance" under § 4-88-107(a)(8)(B) is fatally flawed because Temu does not follow the correct procedures of statutory interpretation.

"The basic rule of statutory construction is to give effect to the intent of the General Assembly." *Baptist Health v. Murphy*, 2010 Ark. 358, 28, 373 S.W.3d 269. Courts "first construe[] a statute just as it reads, giving the words their ordinary and usually accepted meaning in common language." *Id*. "When the language of a statute is plain and unambiguous, conveying a clear and definite meaning, the court does not resort to the rules of statutory construction." *Id*. Thus, the Court only turns to the canon of *noscitur a sociis* if the term at issue lacks a plain and ordinary meaning.

"Ignorance," both as a term and within the context of § 4-88-107(a)(8)(B) possesses a clear and definite meaning. The Merriam-Webster Dictionary provides only a single definition for the term "ignorance": "the state or fact of being ignorant: lack of knowledge, education, or

awareness." *Ignorance*, MERRIAM-WEBSTER.COM, http://merriam-webster.com/dictionary/ignorance (last visited Aug. 20, 2025). Thus, for Temu to assert that "ignorance" must be an "inherent" "physical quality" of the victim, Def. Br. at pp. 33–34, contravenes the plain and ordinary meaning of the term "ignorance" in violation of the principles of statutory construction.

Temu's proffered caselaw does nothing to supersede the ordinary and usually accepted meaning of the term "ignorance." *In re Bateman* involved a trial on a proof of claim in a bankruptcy proceeding. 435 B.R. 600, 603 (Bankr. E.D. Ark. 2010). There, the federal district court held that debtor failed to meet their evidentiary burden at trial of establishing that they were not "capable of understanding the language of the agreement in question." *Id*. at 610. Therefore, *In re Bateman* is entirely consistent with the plain ordinary meaning of the term "ignorance." Similarly, in *Dauda v. One Reverse Mortg., LLC*, the federal district court denied the defendant's motion to dismiss because the evidentiary record created a dispute of material fact that the plaintiff "does not adequately understand what she is doing." No. 5:14-CV-05276, 2015 WL 11120407 at *1 (W.D. Ark. Aug. 28, 2015). These cases do not stand for the proposition that a physical infirmity is necessary for a finding of ignorance.

Under the plain meaning of the term "ignorance," the general purpose of the ADTPA, and Temu's own cited precedent, the State is required to assert that Temu took advantage of Arkansas consumers' "lack of knowledge or awareness" to state a claim under § 4-88-107(a)(8)(B) of the ADTPA. Therefore, Temu's argument that § 4-88-107(a)(8)(B) requires a "physical infirmity," respectfully, must be denied.

3. Temu's arguments regarding whether it is a "Good" or "Service" within the ADTPA are fatally flawed in numerous respects.

Temu asserts that the State's commercial claims under §§ 4-88-107(a)(1), 4-88-107(a)(3), 4-88-108(a)(1), and 4-88-108(a)(2) should be dismissed because Temu is neither a "good" nor a "service" within the meaning of the ADTPA, but Temu's argument is fatally flawed in numerous respects. First, Temu ignores the unambiguous language of the statute.

Section 4-88-107(a)(1), by its plain and ordinary terms, applies to making a false representation regarding the "characteristics" of "goods or services," including a certification that the "goods or services" are "of a particular standard, quality, grade." Similarly, § 4-88-107(a)(3) applies to "advertising" goods or services "with the intent not to sell them as advertised." Accordingly, on their face, sub-sections 107(a)(1) and 107(a)(3) apply to the making of a false representation regarding the character of goods or services and whether the defendant intends to ever provide what it advertises. Thus, for these two statutory sections identified by Temu in its renewed briefing, it is immaterial whether Temu itself is a "good" or "service," as the liability stems from the representation or advisement made by the defendant irrespective of what the defendant is selling.

The same is true for §§ 4-88-108(a)(1) and 4-88-108(a)(2). Both of these statutory sections impose liability for activities "when utilized in connection with the sale or advertisement of any goods, services, or charitable solicitation." Ark. Code Ann. § 4-88-108(a). Thus, on its face, this section of the ADTPA requires only a "connection with" a sale, or an "advertisement" of goods, services, or charitable solicitations. As with §§ 4-88-107(a)(1) and (3), on its face § 4-88-108(a) does not require that Defendants' product itself constitutes a "good" or "service," and thus Temu's arguments are not relevant as to whether the Amended Complaint sets forth violations of these

statutory sections. Therefore, it is immaterial whether Temu itself is a "good" or "service" to these provisions, as the advertised purpose of the Temu application is to facilitate the sale of goods.[5]

Second, because the State also alleges that Temu misrepresents its own data-collection practices, these unconscionable trade practices are also actionable under the subdivisions signaled out by Temu in its briefing because Temu is a "service" within the meaning of the statute. As an initial matter, Temu's own terms of service define the Temu app as a "service." Temu's terms of service provide that: "These Terms of Use ("Terms") contain the rules and restrictions that govern your use of our applications, products, services and websites ("Services.")" Ex. D to Whaleco Mot. to Dismiss at 1, filed 9/30/24.

Moving from Temu's own statements to the statutory text, the ADTPA defines a "service" as: "work, labor, or other things purchased that do not have physical characteristics." Ark. Code Ann. § 4-88-102(8); *see also Arkansas v. Cap. Credit Sols., Inc.*, No. 4:16-cv-00912, 2017 WL 4269469 at *3 (E.D. Ark. Sept. 26, 2017). As recently pointed out by this Court, "the ADTPA does not define 'purchase.'" *Arkansas v. TikTok, Inc.*, No. 12CV-23-65 at p. 8 (Cleburne Cnty. Cir. Ct. May 15, 2024). Temu again cites *Erxleben v. Horton Printing Co.*, 283 Ark. 272, 275, 675 S.W.2d 638, 640 (1984) for the proposition that "[t]he 'thing' must be 'purchased' to qualify as a service under the ADTPA," Def. Br. at p. 34, but as with the first round of motion to dismiss briefing, Temu continues to misinterpret *Erxleben*.

[5] Conspicuously, Temu does not explain to the court whether it is a good or a service. Temu appears to argue that even though it is one of the world's busiest online marketplaces, it exists in a legal no-man's land wherein none of Arkansas's consumer-protection laws can have any effect. Def. Br. at p. 34–35. Such ultra-fine parsing of Arkansas's statutes represents the latest in a string of attempts by the tech industry at large to exempt itself from scrutiny under State consumer-protection laws.

First, *Erxleben* did not involve the ADTPA, and Temu's paraphrase is inaccurate. More importantly, the Supreme Court in *Erxleben* did provide a definition of "purchase," drawn from Black's Law Dictionary, that Temu again deliberately omits from its briefing. There, the Supreme Court defined "purchase" as "a transmission of property from one person to another by voluntary act and agreement on valuable consideration." *Erxleben*, 283 Ark. at 275, 675 S.W.2d at 640. This definition comports exactly with that used by this Court in *TikTok* and applies to Temu in this action.

Like the Supreme Court in *Erxleben*, this Court previously determined whether use of a free-to-download online platform constituted a "service" on the basis that: "Although Defendants do not charge a monetary fee for the use of the TikTok app, users provide valuable consideration to TikTok—their data." *TikTok*, No. 12CV-23-65 at p.8. The exact same is true here. Further, whereas TikTok is primarily a social-media sharing platform, Temu's business model (when it is not harvesting user data) is defined by selling and facilitating the sale of material goods in exchange for money.

Temu's terms of service provide that "[i]n connection with your use of the *Services*, you acknowledge and agree that we may collect, access, use, preserve and disclose your personal information (including your Account and user information) as described in our Privacy Policy and Cookie and Similar Technologies Policy." Ex. D to Whaleco Mot. at § 4.1, filed 9/30/24 (emphasis added). Temu attempts to distinguish this Court's ruling in *TikTok* by asserting that the *TikTok* decision turned on the existence of bilateral contracts between TikTok and Arkansas consumers and then attempts to assert that no such contracts exist here. Def. Br. at p. 35. But Temu's terms of service expressly provide that they constitute a binding contract between Temu and the individual Arkansas consumer. *See*, e.g., Ex. D to Whaleco Mot. at 1, filed 9/30/24 ("These Terms of Use

('Terms') contain the rules and restrictions that govern your use of our application…*These Terms form a binding agreement between you and us*."), § 2.2 ("You may not use the *Services* if: (a) you cannot enter into *a binding contract* with us."), etc. (emphasis provided throughout). Accordingly, this Court's well-reasoned opinion in *TikTok* is directly on point.

Thus, while not required to state a claim under the ADTPA, because Temu itself is a "service" within the meaning of the Act, all of Temu's misrepresentations regarding its own data practices, discussed in detail in the following sections, constitute additional violations of the identified sections of the ADTPA beyond being made in connection with the sale or advertisement of goods. Temu's motion to dismiss on the basis of whether it is a "good" or "service" respectfully must, therefore, be denied.

C. The Amended Complaint states sufficient facts to support privacy-based violations of the ADTPA.

As with the entirety of its renewed motion to dismiss, Temu confuses a simple legal issue by highlighting procedurally irrelevant *factual* disputes. "The ADTPA prohibits *any* unconscionable, false, or deceptive act or practice in business, commerce, or trade." *Apprentice Info. Sys.*, 2018 Ark. 149, at 5 (emphasis added, quotation omitted). To state a claim under §§ 4-88-113(a) through (e) of the ADTPA, the Attorney General, on behalf of the State of Arkansas, needs only show that a defendant committed an act or practice that is unlawful under the ADTPA. In contrast to a private action brought under the ADTPA, the Attorney General is not required to show any "actual financial loss" as a result of any "reliance on the use of a practice declared unlawful by this chapter[.]" *Compare* § 4-88-113(a) through (e) *with* § 4-88-113(f); *but see Pleasant v. McDaniel*, 2018 Ark. App. 254, *7, 550 S.W.3d 8, 12 (2018). The State's Amended Complaint amply satisfies the requirement to show that show that Temu commits a multitude of acts and practices that are unconscionable, false, or deceptive to consumers.

The State organized its factual allegations supporting its ADTPA claims into two large groups: deceptive and unconscionable practices regarding Temu's collection of Arkansas consumers' private personal information and deceptive and unconscionable practices regarding the nature of the goods available on its platform. This section of the State's response addresses the sufficiency of the State's factual allegations centered on Temu's privacy-based trade practices. The commercial-based practices allegations are addressed in the following section.

In regards to the sufficiency of the State's factual allegations centered on Temu's deceptive and unconscionable collection of Arkansas consumers' private personal information, Temu addresses six separate categories of supporting facts—(1) dynamic recompilation; (2) manifest-file omissions; (3) root access; (4) code obfuscation; (5) incorporation of Pinduoduo's code; and (6) collection of consumers' personal data—as if they were each separate causes of action with their own pleading requirements. But these factual allegations are only made in support of the State's ADTPA and unjust enrichment claims and are not independent actions of their own.

The State has asserted sufficient facts to establish Temu's unconscionable and deceptive data-collection practices by asserting, throughout the Amended Complaint, that "Temu is using the inducement of low-cost goods to lure users into unknowingly providing near-limitless access to their [personally identifiable information]." Am. Compl. at ¶ 66. "Temu's efforts to hide its behavior are done in furtherance of accessing and controlling virtually all aspects of a user's device and surreptitiously acquiring its sensitive PII." *Id*. at ¶ 116. Furthermore, "Temu's deceptive and unconscionable data-collection practices expose consumers' data to…misappropriation of the Chinese government…Temu does not disclose the risk of the Chinese government accessing consumers' data." *Id*. at ¶ 191. Arkansas consumers' "privacy and security" are harmed by these "code-level behaviors in the Temu app." *Id*. at ¶ 3.

The six pleading categories identified and analyzed in Temu's brief are merely further factual support for these allegations. Thus, the only question is not whether these six categories of allegations meet Temu's entirely invented technical standards or anticipated factual defenses at trial, but whether they provide further alleged factual support for the State's claim that Temu violates the ADTPA by secretly collecting Arkansas consumers' private personal information.

Dynamic recompilation

The State alleges that Temu deceptively and unconscionably includes "an unpacking and patching tool" known as "Manwe," that "enables Temu to patch the app on the device, rather than through releasing updates via the Apple App Store or Google Play Store." Am. Compl. at ¶¶ 80–81. This function shows Temu's unconscionable and deceptive harvesting of Arkansas consumers' personal information on behalf of the Chinese government, because it "enables the app to change its functionality on the user's phone, without anyone being able to know, much less prevent the change." *Id*. at ¶ 82.

Temu incorrectly asserts that these allegations warrant dismissal of the State's ADTPA claim because the State does not detail how the app changes after its installed and because the Grizzly Report, no longer part of the State's complaint, makes similar accusations. Neither argument warrants dismissal of the State's ADTPA claim. First, and most importantly, Temu does not even bother to contest that Temu contains the Manwe tool, that the Manwe tool allows the Temu app to reconfigure itself after being downloaded onto an Arkansas consumer's device, or that such a tool would violate the terms of the Apple or Google app stores, as the State alleges. Am. Compl. at ¶ 85.

Second, throughout its brief, Temu claims that the State's allegations are hypothetical. For instance, here Temu fixates on the State's use of the word "enables" in paragraphs 80–81 of the

Amended Complaint. The use of words such as "enables" does nothing to undermine the sufficiency of the State's ADTPA allegations, especially on a Rule 12(b)(6) motion. There is nothing equivocal about the basis of the State's ADTPA data-privacy claims. The State clearly, and unequivocally, alleges that Temu harms

> "Arkansans' privacy and security due to code-level behaviors in the Temu app. These behaviors collect users' sensitive personally-identifiable information ("PII") without their knowledge or consent. These privacy and security harms are compounded both because the Temu app is purposely designed to evade detection …. and because Defendants…have a portion of their operations located on mainland China, where cybersecurity laws allow the government unfettered access to data owned by Chinese businesses whenever it wishes."

Id. at ¶ 3. The uncontested inclusion in Temu of the Manwe tool and its uncontested violation of the terms of the Google and Apple app stores evinces how Temu violates the ADTPA, in this instance, by building in a virtual secret back door that allows it to manipulate the app on Arkansas consumers' devices without either their knowledge or consent. Thus, these allegations further support the State's ADTPA claim.[6]

To the degree the State does not definitively allege how the app changes after installation on an Arkansas consumer's device, that is a matter for discovery, not a Rule 12(b)(6) motion. *See, e.g.* Am. Compl. at ¶¶ 21, 78 (stating that discovery is required to fully detail the functionality of Temu's secret code). Despite the State's extensive forensic analysis of the Temu app, including deciphering significant features that were intentionally hidden from exactly that type of analysis,

[6] Further, as stated, *supra*, it is nonsensical for Temu to argue that because the State's own independent investigation *corroborates* an allegation in the Grizzly report, that this somehow undermines the Complaint. The opposite is true: the fact that two separate analyses show this behavior in the Temu app shows the folly of Temu's original motion to dismiss. While Temu sought to discredit the Grizzly report due to its provenance, what has since been shown is that by and large that report was accurate, and all Temu was doing was trying in its first round of briefing was make an emotional appeal about the authors' motivations. It turns out that, setting those motivations aside, the analysis was accurate.

Am. Compl. at ¶¶ 93–110, large portions of Temu's code remains under lock and key, and the *only* way that the State can get access to the still-hidden sections of Temu's code is through the discovery process. This puts the State in between a rock and a hard place. The bottom line is that the State has done sufficient investigation based on publicly-available sources to allege sufficient facts to get to discovery. That is all that the Arkansas Rules of Civil Procedure require.

Here, the Court is required to take the allegations as true and view them in the light most favorable to the State as the non-moving party. *Perry*, 358 Ark. at 241–42. The State alleges that Temu violates the ADTPA by secretly collecting Arkansas consumers' private information without their knowledge or consent. The State alleges that one example of how Temu does this is by building in unauthorized tools that allow it to manipulate the app on a consumer's device without pushing through an update through the device's app manager (that is, the Apple or Google app stores). Thus, these allegations, taken as true as they must be at this stage, support the State's ADTPA claim. The same is true regarding the remainder of the factual allegations identified by Temu in its renewed motion to dismiss.

Manifest-File omissions

Similar to its allegations regarding Temu's inclusion of the Manwe tool, the State alleges that Temu omitted permissions it was required to disclose from its manifest file. Am. Compl. at ¶ 87. "Omitting a permission from the app's manifest file infers that the app is not interested in the functionality associated with that permission." *Id*. at ¶ 89. Developers are required to disclose these permissions. *Id*. at ¶ 88.

Despite this clear requirement, Temu omitted the permissions for its ability to "ACCESS_COARSE_LOCATION" and "ACCESS_FINE_LOCATION" from its manifest file to

track Arkansas consumers without either their knowledge or consent. *Id*. at ¶¶ 90–91. Temu only later reinserted these permissions after these facts were unveiled by the press. *Id*. at ¶ 92.

Temu incorrectly asserts that these allegations should somehow support dismissal because they do not evince consumer-oriented conduct, when that is precisely what this entire suit is about. The State repeatedly alleges harm to consumers. Here, Temu's own cited authority readily demonstrates that the alleged harm from Temu's data collection practices is to Arkansas *consumers*. Temu's reliance on *Skalla v. Canepari*, 2013 Ark. 415, 30 S.W.3d 72 is misplaced. *Skalla* is a land-partition matter, and the facts are nothing like those here. *Id*. at 5, 430 S.W.3d at 77. Similarly, *Digital Recognition Net., Inc. v. Hutchinson* is a constitutional challenge by a company that provided license-plate-reader software to an Arkansas statute that made such technology illegal, and the court decided the matter on the basis that the company lacked standing to challenge the statute. 803 F.3d 952, 954–55 (8th Cir. 2015).

Here, by contrast, the Attorney General of Arkansas initiated this action to protect Arkansas consumers from Temu's deceptive and unconscionable acquisition of their sensitive personal information using its consumer goods sales platform.

Moreover, there are numerous additional allegations in the Amended Complaint describing how Temu seeks to acquire users' precise locations through its hidden functionalities. The removal of the permissions from the app manifest should be read in the larger context of the Amended Complaint, which explains that Temu *also* uses data elements that it collects (but does not disclose) in order to determine users' geolocation without having to rely on accessing a phone's GPS permissions. And, more critically, the Amended Complaint explains that Temu also hides its location data collection practices from consumers more explicitly through its misrepresentations and omissions in its privacy policy. *See* Am. Compl. pages 39–43.

While not relevant to the applicable Rule 12(b)(6) standard, it must be noted that Temu does not even contest that it omitted the identified permissions it was required to disclose in its manifest file. Because the State alleges that Temu designed its platform to secretly track the locations of Arkansas consumers without their knowledge or consent, these allegations properly support the State's ADTPA claim.

Root-Access and debugger detection

The State also alleges that the Temu app deploys defenses to determine if a cybersecurity researcher is attempting to analyze the app. These defenses include the use of "root access" detection and inclusion of the query "Debug.isDeubberConnected()." Am. Compl. at ¶¶ 94, 100.

The State alleges that these inclusions evince Temu's violation of the ADTPA because they are "*intended* to obstruct or obscure analysis of the app." *Id*. at ¶ 100 (emphasis added). As stated throughout this section of the State's response, these allegations are evidence that Temu violates the ADTPA through its secret collection of user data, and as part of that secret collection, Temu attempts to hide the true functionality of its app—including the ultimate obtainment of that data by the Chinese government—from consumers in Arkansas through the implementation of concealment tactics such as root-access and debugger detection.

Temu incorrectly argues that these allegations *could* evince a benevolent rather than nefarious intent—i.e. to protect the app rather than hide its true functionality—but that argument is precluded by the applicable standard on a Rule 12(b)(6) motion. In effect, Temu improperly asks the Court to view these facts in the light most favorable to itself, rather than to the State as the non-moving party. While Temu is certainly free to argue its view of the facts to a jury, a Rule 12(b)(6) motion is not the appropriate venue for this approach. Because the State alleges that these allegations further evince Temu's attempts to deceive Arkansas consumers regarding the true

functionality of its platform, they support the State's ADTPA claim. In other words, the State is alleging that this functionality is for a malevolent purpose, not a benevolent one.

Code obfuscation

Similarly, in support of its claim that Temu deceptively and unconscionably acquires Arkansas consumers' sensitive personal information and discloses that information to the Chinese government, the State alleges that Temu employs a level of encryption far beyond that employed by an ordinary online-shopping platform.

The State claims that Temu "uses at least three layers of encryption beyond ordinary TLS to obfuscate data that the app transmits from a user's device to Temu's servers." Am. Compl. at ¶ 108. "This makes it easier for Temu to send surreptitiously acquired PII from a user's device without being caught." *Id*. at ¶ 109. Most importantly, the State alleges that this layered encryption is done in furtherance of acquiring user's data without their knowledge: "The State's investigation discovered that some deeper layers of encrypted data transmitted to Temu's servers by the app contains [*sic*] information about the device that is never disclosed to the user, including specific information about the user, the device, and the way the user interacts with the device outside of the Temu app." *Id*. at ¶ 110.

Temu incorrectly asserts that these allegations should support dismissal of the State's ADTPA claim because customers expect that online companies will encrypt and protect their data, but once again this is a procedurally improper attempt to read the alleged facts in in favor of the moving party. There is no dispute that encryption is a "pillar" of "the modern [i]nternet," as set forth in the State's Amended Complaint. *Id*. at ¶ 106. However, the State alleges that the level of encryption applied by Temu far exceeds what would be reasonably expected under the circumstances. *Id*. at 106–07 (describing how it is the normal practice that "apps that deal with the

most sensitive types of user data usually do not apply additional layers of encryption beyond TLS"). More importantly, the State alleges that this encryption is done to obscure the collection of data which is undisclosed to the user. Am. Compl. at ¶ 110. This ends the inquiry. There may be an unintended benefit of the level of secrecy Temu employs in its theft of user data (to wit, that consumer data is heavily encrypted), but that cannot excuse the theft itself.

Temu continues to blur the lines between evidence of Temu's actions that create liability with the liability itself. Here, the State does not assert that Temu violates the ADTPA by encrypting its data. Instead, the State claims that Temu violates the ADTPA by surreptitiously acquiring Arkansas consumers' sensitive personal information without their knowledge or consent and discloses that information to the Chinese government. Temu's employment of multiple layers of encryption far beyond what is to be reasonably expected "to obfuscate data that the app transmits from a user's device to Temu's servers" is additional evidence of Temu's violations of the ADTPA through its deceptive collection of Arkansas consumers' sensitive personal information without their knowledge or consent.

Incorporation of Pinduoduo's Code

The State claims that Temu's code overlaps in significant, meaningful ways with its malicious predecessor, the Pinduoduo app. "Multiple packages in the Temu app begin with the same naming convention "com.xunmeng.pinduoduo," and are proprietary, non-public packages, meaning that they were developed by PDD and were copied wholesale from the Pinduoduo app." Am. Compl. at ¶ 112.

Temu's only argument for the dismissal is that the State allegedly does not detail why this technical overlap between Pinduoduo and Temu is "not benign." Def. Br. at p. 14. It is unclear how this argument would even serve as a basis to dismiss the State's ADTPA claim. Nevertheless, the

State's Amended Complaint does explain why it is harmful to Arkansas consumers for Temu to incorporate large swaths of the Chinese-based Pinduoduo app into Temu.

First, the State details the malicious overlaps between Pinduoduo and Temu. Am. Compl. at ¶¶ 114–15 (detailing overlaps between Pinduoduo and Temu for "device identifier collection," "methods for access to user files," "custom encryption," "a native library that allows each app to update their respective code without…the knowledge or consent of users," and the "Manwe SDK" discussed above). Second, throughout the Amended Complaint the State claims that Temu harms Arkansas consumers by serving as little more than a malicious repacking of the previously banned Pinduoduo app. *See, e.g.*, Am. Compl. at ¶ 45 (detailing that "[o]n March 21, 2023, Google suspended the Pinduoduo app from the Google Play Store after malware was found on the app"), ¶ 46 (detailing that experts found the Pinduoduo "was programmed to bypass users' cell phone security to monitor and record users' activates across their phones, including activities unrelated to the app"). Accordingly, allegations detailing the shared codebase between Pinduoduo and Temu support the State's ADTP claim and do not provide a basis for dismissal.

Data collection

In one passing sentence and an accompanying list of bullet points, Temu attempts to wave away the entirety of the State's claimed privacy-based violations of the ADTPA. Def. Br. at pp. 14–15. ("The State also contends that the Temu app surreptitiously accesses and collects information.") To respond to this list of bullet points would require restating the entirety of the State's Amended Complaint, but the State will refute Temu's arguments in the same abbreviated fashion in which they are presented.

Regarding Temu's unauthorized and nondisclosed collection of Arkansas consumer's granular location data, Temu incorrectly asserts, and in contradictory fashion, both that this data-

collection is disclosed and that the State does not allege that Temu collects this data from consumers. But the State alleges that Temu collected this data without listing the permission (as discussed above). Am. Compl. at ¶ 117 ("Temu had removed the permission, ACCESS_FINE_LOCATION, from the Temu app's Android manifest…and later reintroduced it after this intentional omission was discovered.") This nondisclosed collection of Arkansas consumers' "GPS locations within an accuracy of at least 10 feet" sets forth a deceptive and unconscionable trade practice under the ADTPA. Furthermore, even after Temu began listing this permission, the State alleges that Temu "was simultaneously acquiring data points from users that allowed Temu to determine users' locations even without these permissions." Am. Compl. at ¶ 118. Therefore, Temu's deceptive acquisition of Arkansas consumers' precise locations and disclosure of that information to the Chinese government is a violation of the ADTPA.

Similarly, the State alleges that Temu generates a map of the Wi-Fi access points used by an Arkansas consumer to track their location and that Temu collects this data "without users' consent, whether these users ever consented to providing geolocation data." Am. Compl. at ¶ 121. Temu argues that this basis of the State's ADTPA claim should be dismissed because this activity is carried out by an unrelated third party (Niantic), Def. Br. at p. 15, but that argument is premised on a willful misreading of the State's Amended Complaint.

Paragraph 122 of the Amended Complaint is merely an example of how another company, Niantic, via its popular Pokémon Go app, created a similar, disclosed map of its user's movements using this process of Wi-Fi access point mapping. Am. Compl. at ¶ 122. The State does not allege that Niantic did this on behalf of Temu. Instead, Niantic is merely provided as an example of how this technology operates when properly disclosed, whereas Temu carried out similar mapping *without* Arkansas consumer's knowledge or consent. Therefore, Temu's unauthorized and

nondisclosed collection of Arkansas Consumers' Wi-Fi access point data sets forth a claim for violation of the ADTPA.

Regarding Temu's use of the permissions "CAMERA" and "RECORD_AUDIO," the State alleges that Temu uses these permissions to gain much more access to an Arkansas consumer's camera and microphone than is disclosed in Temu's privacy policies in violation of the ADTPA. Am. Compl. at ¶ 123. In other words, Temu deceives consumers about its camera and audio access.

Next, Temu incorrectly asserts that the State does not allege that Temu abuses the disallowed method "ActivityManger.getRunningTasks" to collect Arkansas consumer's data in violation of the ADTPA. The Amended Complaint does not support this claim. The Amended Complaint details that "this method was deprecated by Android over a decade ago…because developers could exploit this method and acquire a user's personal information, such as a user's app usage patterns across their entire device." Am. Compl. at ¶ 124.

Despite being prohibited, the State claims that Temu still incorporates this method into its code. *Id*. ("The Temu app code contains the method ActivityManager.getRunningTask"), *Id*. at ¶ 125 ("Because Temu was not founded until 2022 [after the method was disallowed], Temu could not have a benign reason to include this method in its code" and thus includes it "in furtherance of a purposeful and opportunistic exploit of users who have devices running older operating systems.") Along with this disallowed method, the State identifies Temu's use of the related method, "android.telephony.TelephonyManger.listen()" as "evidence of malware" because, according to academic research, these methods are used as examples when training models to detect malware. Am. Compl. at ¶ 130. Therefore, Temu's alleged inclusion of these disallowed methods of covert data collection sets forth a violation of the ADTPA.

Furthermore, the State claims that "Temu contains code that allows it to identify all the applications installed on a user's device via the method getPackageManager().getInstalledPackages." Am. Compl. at ¶ 131. Here, yet again, Temu inappropriately attempts to argue the facts by asserting that this method has other benign usages, including detection of "social media and payment apps, typical for an e-commerce app to enable users to share products or pay for purchases." Def. Br. at p. 15. Whether or not this method can theoretically be used for benign ends is irrelevant to the question of whether the State alleges that it is also used to collect Arkansas consumers' personal information without either their knowledge or consent. Moreover, the Amended Complaint also explains that, regardless of whether one might view this code as benign, the code is indisputably forbidden to be used in the manner employed by Temu under Apple's and Google's respective operating system rules. Am. Compl. ¶ 132.

According to the Amended Complaint, Temu's inclusion of this method in its code "violates the 'sandbox' established by both Apple and Google for their respective operating systems…a principal that keeps one app from gathering data about other apps on a user's device." Am. Compl. at ¶ 132. The State also avers that "Temu utilizes 'query' commands, which seek information about various aspects of a user's device…that includes, but is not limited to: (1) the name of every installed app on a user's device; (2) likely install and update timestamps; (3) the version of the installed app; and (4) unknown flags and IDs for each entry." *Id*. at ¶¶ 133-34. The State also alleges that "Temu does not disclose to its users that it accesses the centralized registry of these online accounts." *Id*. at ¶ 138. Accordingly, the State's allegations regarding Temu's undisclosed and nonauthorized access to all apps and accounts on an Arkansas consumer's device sets forth a violation of the ADTPA.

Last in Temu's bullet-pointed arguments against the substance of the State's data practice related claims, the State alleges that Temu also collects other forms of sensitive personal information without Arkansas consumers' knowledge or consent, including their "uniquely-identifying data points that are associated with each mobile phone's unique SIM card," which allows Temu to "track that individual without their knowledge or consent;" Am. Compl. at ¶ 140, their "MAC address," which is also "used to track an individual's location as they move from Wi-Fi network to Wi-Fi network;" *Id*. at ¶ 141, their "international mobile equipment identity," which is "used to identify a specific individual's location over time, along with that individual's usage of his or her device;" *Id*. at 142, and their "android advertising ID" which is also "used to track an individual's activity over time and across the various apps or websites with which he or she engages." *Id*. at ¶ 143.

Here again, Temu attempts to argue the facts, asserting that this data could also be used to combat fraud. Def. Br. 16. Temu's opinion regarding other potential uses of these sensitive personal data points is irrelevant to the analysis on a 12(b)(6) motion. Because the State avers that Temu violates Arkansas consumers' rights to privacy by collecting this personal information without their knowledge or consent, these allegations also set forth violations of the ADTPA.

The bottom line here is that regardless of Temu's alleged innocent uses of these code functions, what matters is that the State is specifically alleging that Temu uses the functions for nefarious reasons. This is sufficient under the Rule 12(b)(6) standard. This Court cannot weigh the evidence at this stage of the litigation.

Finally, Temu claims that it discloses these challenged practices in its privacy policies. This argument presents a quintessential fact issue inappropriate for resolution on a Rule 12(b)(6) motion. In the parties' last round of briefing, the State went through each of Temu's purported

disclosures and demonstrated that they do not disclose to Arkansas consumers the true nature of the amount of sensitive personal information that Temu surreptitiously collects. The State incorporates this analysis here. Pl. Br. filed 10/30/24, Section IV(B)(5). In response to the parties' last round of briefing on this issue, Temu now produces no less than three competing privacy policies and asks the Court to (i) construe the meaning of these competing documents, (ii) determine if or when each competing document is applicable, and (iii) determine that the language of each document, where applicable, clearly and unambiguously informs Arkansas consumers of the full nature of personal information it collects at issue in this litigation. Respectfully, such fact-intensive requests are nowhere close to being in accordance with the legal standard for a Rule 12(b)(6) motion.

Considering the parties' numerous competing interpretations of the language of the numerous competing privacy policies and their addenda, at minimum, the Court can and should determine that the language at issue is ambiguous and deny Temu's motion to dismiss. Simply put, Temu's argument that it fully discloses its data-collection practices turns on a fact question of contractual interpretation. "The initial determination of the existence of an ambiguity in a contract rests with the trial court, and if an ambiguity exists, the meaning becomes a question of fact for the fact finder." *Keller v. Safeco Ins. Co. of America*, 317 Ark. 308, 312, 877 S.W.2d 90 (1994). Here, all the language across the numerous privacy policies that Temu attempts to use to exculpate itself from liability is clearly ambiguous as it relates to Temu's actual practices. Therefore, the motion must be denied as a matter of factual determination.

In anticipation of Temu's arguments, the State has already included charts for the Court in its Amended Complaint, broken down by policy, identifying both the type of data-collection practice which the State asserts violates the ADTPA, and explaining why the relevant language

from Temu's policy does not fully disclose the practice to an Arkansas consumer. Am. Compl. at ¶¶ 147–49, *contrast with* Def. Br. at p. 17. To conserve judicial resources, the State incorporates the charts in paragraphs 147 and 149 of the Amended Complaint to show that, at a minimum, *numerous* ambiguities exist in these competing privacy policies which render this a fact issue for a jury.

In the Amended Complaint, the State also sets forth why the Addendum for U.S. Residents to Temu's privacy policies does not properly disclose material facts to Arkansas consumers. Am. Compl. ¶¶ 148–49, Def. Ex. 5 at p. 256. As properly alleged, the addendum merely states that US Residents "may have additional privacy rights" and that United States residents "can learn more about which rights may be available to them and how to exercise those rights" by reviewing the addendum. *Id*. Nothing in this notice directs an Arkansas consumer to additional disclosures of Temu's data collection practices. In sum, because Temu does not unambiguously disclose the practices at issue in this litigation, Temu's motion to dismiss the State's data-privacy related claims under the ADTPA, respectfully must be denied.

D. The Amended Complaint states commercial practices based violations of the ADTPA.

While addressed to an entirely distinct set of trade practices, Temu's arguments regarding the State's commercial practices violations of the ADTPA suffers from the same infirmities as its arguments related to its data privacy violations. As already fully briefed above, the ADTPA broadly "prohibits any unconscionable, false, or deceptive act or practice in business, commerce, or trade." *Apprentice Info. Sys.,* 2018 Ark. 149, at 5. Accordingly, while the State identifies several of the enumerated non-exclusive examples of what can constitute a "deceptive and unconscionable trade practice," all that is required to state a claim under § 4-88-107 is a "deceptive and unconscionable trade practice," which includes any "unconscionable, false, or deceptive act or practice in business, commerce, or trade." Ark. Code Ann. § 4-88-107(a)(10).

In essence, the State claims that Temu also violates the ADTPA through its "representations regarding the products sold on the Temu platform [which] are false and serve only to further conceal its scheme to maximize the number of users who sign up to the platform and unwittingly subject their private data to theft by [Temu]." Am. Compl. at ¶ 204. While all that is required to state a claim under the ADTPA is any "unconscionable, false, or deceptive act or practice in business, commerce, or trade," Ark. Code Ann. § 4-88-107(a)(10), the State also alleges that Temu's commercial practices violate the ADTPA's specifically enumerated protections against "[k]nowingly making a false representation as to the characteristics, ingredients, uses, benefits, alterations, source, sponsorship, approval, or certification of goods or services or as to whether goods are original or new or of a particular standard, quality, grade, style, or model," Ark. Code Ann. § 4-88-107(a)(1); "[a]dvertising the goods or services with the intent not to sell them as advertised," *Id*. (a)(3); "[t]he act, use, or employment by a person of any deception, fraud, or false pretense" "[w]hen utilized in connection with the sale or advertisement of any goods, services, or charitable solicitation," Ark. Code Ann. § 4-88-108(a)(1); and "[t]he concealment, suppression, or omission of any material fact with intent that others rely upon the concealment, suppression, or omission" "[w]hen utilized in connection with the sale or advertisement of any goods, services, or charitable solicitation," *Id*. (a)(2). The State will now show how each of its averments regarding Temu's commercial practices evince a violation of the ADTPA.

Quality of goods

The State avers that Temu violates the ADTPA by misrepresenting the quality of the goods it sells to Arkansas consumers. According to the Amended Complaint, Arkansas consumers "frequently receive low-cost merchandise when the photo on the app indicates that they would receive high-quality goods. Photos and product descriptions are sometimes simply copied directly

from other sellers on sites like Amazon and do not have any relationship to the actual goods being sold." Am. Compl. at ¶ 206.

Temu incorrectly asserts that these allegations cannot support an ADTPA claim because they are mere puffery, but these allegations plainly fall outside the purview of puffery. "An expression of opinion that is false and known to be false at the time it is made is actionable. This exception must be weighed against a mere expression of opinion or puffery, which is not actionable for deceit." *JKC Cellars, LLC v. Fort Chaffee Redev. Auth.*, 2023 Ark. App. 346, at 10, 670 S.W.3d 819. Here, the State does not seek to impose liability based on differing opinions regarding the quality of goods, but rather for Temu selling goods received that do not match either photos or descriptions of the goods as listed on Temu's platform. These are demonstrable facts, not matters of mere opinion. The photos and product descriptions are often taken from other websites and thus in no way match the goods actually received. Am. Compl. at ¶ 206.

Temu also incorrectly asserts that the State's allegations are not sufficiently detailed, but that is not what is required to overcome a Rule 12(b)(6) motion to dismiss. As set forth repeatedly above, all that is required under Ark. R. Civ. P. 8(a) is "a statement in ordinary and concise language of facts showing…that pleader is entitled to relief." Here the State alleges that Temu violates, among other provisions, Ark. Code Ann. §§ 4-88-107(a)(1),(3) and 4-88-108(a)(1),(2) by selling products that do not match their listings on Temu's platform. Whether the State can sufficiently present enough evidence to support this factual allegation at trial is a matter for summary judgment, not a Rule 12(b)(6) motion. Thus, while not required, the State also substantiates this factual allegation by providing the Court with outside evidence of the practice via a news article from Business Insider. Am. Compl. at ¶ 206, n.86. Therefore, the State's

allegations that Temu sells goods that do not match their descriptions and photos on its platform set forth a violation of the ADTPA.

False reference pricing and delivery of non-ordered Goods

The State similarly alleges that Temu violates the ADTPA by engaging in the deceptive practice known as false reference pricing, which entails representing "to a prospective customer that a product is on sale at a deep discount when the perceived discount is an illusion manufactured by the retailer." Am. Compl. at ¶ 208.

Temu's only asserted basis for dismissal of this aspect of the State's ADTPA claim is that the averments are without factual support, which is of course directly contradicted by the State's amended pleading. The State provides two examples. First, an Arkansas flag pin that Temu represents "is usually sold for $7.99 but is available for a 'limited time' for $0.98…[but] [t]he 'strikethrough price' of $7.99 for the flag pin is a false price—the pin is never offered for anywhere near that price." Am. Compl. at ¶ 209. The second is a copy of the video game Zelda: Breath of the Wild, which Temu displayed as being discounted from $144.90 to $40, despite the fact the game was never offered for sale for $144.90. *Id*. at ¶ 211. These are just two illustrative examples. Again, whether discovery can unearth sufficient evidence to create a dispute of material fact on the extensiveness of Temu's use of false reference pricing is a question for summary judgment. For now, because the State avers that Temu engages in false reference pricing by displaying items with false discounts to deceive consumers in Arkansas, these allegations support the State's ADTPA claim.

Similarly, the State claims that Temu unconscionably deceives Arkansas consumers by delivering, and then charging for, items that customers never ordered. Am. Compl. at ¶ 212. The State alleges that "numerous customers have complained to the Better Business Bureau," *id*., that

"[t]hese fraudulent deliveries and charges occur frequently after consumers make comparatively small purchases from Temu and then much larger charges and deliveries are made." *Id*. at ¶ 213. As an example, the State alleged that an Arkansas consumer was charged $598 for an order that she did not make. *Id*. at ¶ 214. These averments are sufficient to set forth in concise and ordinary language the factual basis for the State's ADTPA claim based on false reference pricing which will be further substantiated through the course of discovery.

Sign-Up scams and gamification

The State also alleges that Temu deceives Arkansas consumers by continuing to send "emails and notifications…even after users delete the app from their devices and even when users seek to block such notifications," Am. Compl. at ¶ 217. The State further alleges that Temu uses deceptive gamification that includes an instance where an "Arkansas customer was promised a $90 win credit rebate if they spent $142.93. When the customer tried to place an order that met the requirement specifically to redeem that credit, Temu failed to give them the $90 credit." *Id*. at ¶ 223. The State will further support these allegations through the course of discovery. For now, the State has alleged sufficient facts to get past a Rule 12(b)(6) motion to dismiss.

Fake reviews

Temu also deceives Arkansas consumers by using false product reviews. The State alleges that "Temu…compensates users to write reviews," and that Temu categorizes product reviews "in a deceptive manner with reviews characterized as 'five star' positive reviews when they contain extremely negative comments about the platform…and that when a user tries to give an item a one-star rating, the rating is automatically 'upgraded' to a 5." Am. Compl. at ¶ 219. These allegations set forth violations of, among other statutory provisions, Ark. Code Ann. § 4-88-108(a)(1), (2), which prohibits the use of "any deception, fraud, or false pretense" or the

"concealment, suppression, or omission of any material fact" in the sale or advertisement of goods or services. In publishing false product reviews and modifying reviews from actual consumers, Temu is suppressing material facts regarding the quality of goods it sells in violation of the ADTPA.

Unlicensed products

Finally, Temu attempts to misconstrue the State's consumer practices ADTPA claim as it relates to Temu's sale of unlicensed products. Temu incorrectly focuses on who has standing to enforce intellectual property rights when the State is not prosecuting this action based on copyright or patent infringement but, instead, to protect Arkansas consumers from Temu's deceptive commercial practices.

The State alleges that Temu "is rife with unlicensed products listed for sale bearing protected trademark images. Countless brands, including some that are Arkansas-based, are impersonated on the store, including major retailers, universities, and entertainment providers." Am. Compl. at ¶ 227. For example, the State avers that Temu "frequently sells counterfeit, knock-off products…. [including] selling knockoff Air Jordans on the site and continued to so even after the issue came to light." *Id*. at ¶ 206. As a result, Arkansas "[c]onsumers are financially harmed by purchasing these low-quality or counterfeit goods" believing them to be genuine. *Id*. at ¶ 207.

These allegations that detail Temu's sale of knockoff goods as if they were the genuine article is a violation of Ark. Code Ann. § 4-88-107(a)(1), which provides that misrepresenting "the characteristics…alterations, source, sponsorship, approval, or certification of goods or services or as to whether goods are original or new or of a particular standard, quality, grade, style, or model" constitutes a deceptive and unconscionable trade practice under the ADTPA. Accordingly, Temu's

motion to dismiss the State's ADTPA claim as it relates to Temu's commercial practices must be denied.

E. The State alleges that Temu was unjustly enriched.

Temu's arguments regarding the State's equitable claim for unjust enrichment essentially repeat those previously addressed to this Court in the first round of briefing. Therefore, to conserve judicial resources, the State acknowledges that what follows largely repeats the arguments already made on this issue, except where Temu incorrectly asserts in its present briefing that the State removed all allegations that Temu inequitably profits off the Arkansas consumer data that it unjustly acquires. Def. Br. at p. 7.

First, Temu is incorrect that the State lacks *parens patriae* standing to bring an unjust enrichment claim on behalf of all Arkansans. The Arkansas Supreme Court has recognized that Article 6, Section 1 of the Arkansas Constitution of 1874 vests the Attorney General with all powers statutorily proscribed as well as the common law. *State ex rel. Williams v. Karston*, 208 Ark. 703, 707, 187 S.W.2d 327, 329 (1945). *Parens patriae* is a common-law power and a critical tool to enforce the State's police power. *See Wright v. DeWitt Sch. Dist. No. 1 of Ark. Cnty.*, 238 Ark. 906, 911, 385 S.W.2d 644, 647 (1965) (acknowledging the state's interests as *parens patriae* to protect the general interest in youth's wellbeing); *St. Louis, I.M. & S. Ry. Co. v. Pitcock*, 82 Ark. 441, 101 S.W. 725, 727 (1907).

Here, the State proceeds on the alternative equitable basis of unjust enrichment to ensure that Temu's inequitable profiting from Arkansans' most private information is not unjustly retained by Temu. The State seeks recovery not only for Arkansas consumers who signed up for Temu's service, but also for those Arkansans whose valuable private information was also obtained by Temu because it happened to be stored on a device on which the Temu platform was installed. *See, e.g.*, Am. Compl. at ¶ 152.

Thus, this action extends beyond the Arkansas consumers who have contracted with Temu and is advanced on behalf of all Arkansans injured by Temu's unjust practices. The State unequivocally possesses an interest in protecting its citizens from harm, separate and apart from rights each individual citizen might assert for themselves. *Alfred L. Snapp & Sons v. Puerto Rico, ex rel. Barez*, 458 U.S. 592, 607 (1982). The State has a quasi-sovereign interest in the health and well-being, both physical and economic, of its residents. *Id.* Accordingly, the State possesses standing to seek equitable recovery from Temu on behalf of the citizens whose data was unjustly taken without their knowledge or consent.

Similarly, Temu is incorrect when it asserts that the State only advances hypothetical claims, and therefore, unjust enrichment does not lie. Instead, the State asserts that Temu has unjustly profited off Arkansans' private information, and that retention by Temu of this unjust benefit would be inequitable. "In order to find unjust enrichment, a party must have received something of value, to which he or she is not entitled and which he or she must restore." *R.K. Enterprises, LLC v. Pro-Comp Management, Inc.*, 372 Ark. 199, 205, 272 S.W.3d 85, 89 (2008). In other words, the State also seeks disgorgement of profits, which focuses on value retained by Temu, not value lost by consumers. Disgorgement of profits is a remedy allowed under the law. *See Phillips v. Denton*, 2018 Ark. App. 90, at 5, 543 SW.3d 508, 511.

Furthermore, in *R.K. Enterp.*, the Arkansas Supreme Court upheld an award of unjust enrichment based on the inequitable taking of trade secrets because the defendant "gained a benefit by using these trade secrets without paying for their development. Because of this, [the defendant] was unjustly enriched by its use of the various lists and databases without having to contribute to the time, effort, and cost of their development." *R.K. Enterprises*., 372 Ark. at 207, 272 S.W.3d at 90. The same is true here, where Temu (i) accessed, used, profited from, and ultimately sold

Arkansans' private information without either their knowledge or consent and (ii) sold products to Arkansans using deceptive and unconscionable means to do so.

The State alleges concrete, not hypothetical, enrichment by Temu based on its unjust acquisition of Arkansans' personal information. While the State has abandoned its claim under PIPA, it in no way has removed its allegations that Temu inequitably profited off Arkansas consumers' valuable private data to which it was not entitled. For example, the State continues to allege that Temu has "benefited from [its] unlawful acts, realizing billions of dollars in revenues and profits through the collection, accumulation, harvesting, use, and monetization of vast amounts of Arkansans' PII." Am. Compl. at ¶ 265. The State also alleges that Temu "substantially profit[s] from the personal data that [it] improperly collect[s] from Arkansas residents and from product sales in the State of Arkansas." *Id*. at ¶ 35. Accordingly, like this Court's well-reasoned determination in *TikTok*, No. 12CV-23-65 at 14, because the State alleges that Temu was unjustly enriched by retaining and profiting from Arkansans' private information to which it was not entitled and from Arkansans' money which it received under illegal circumstances, Temu's motion to dismiss the unjust enrichment claim, respectfully, should be denied.

V. CONCLUSION

Because the State's Amended Complaint alleges sufficient facts to state claims for relief under the ADTPA and for unjust enrichment, this Court should deny Temu's motion to dismiss in its entirety.

Respectfully submitted,

TIM GRIFFIN, ATTORNEY GENERAL

By: /s/ Christine A. Cryer
Christine A. Cryer, ABN 2001082
Deputy Attorney General
Telephone: (501) 682-4058
Facsimile: (501) 682-8118
Christine.Cryer@ArkansasAG.gov

Office of the Arkansas Attorney General
101 West Capitol Avenue
Little Rock, Arkansas 72201

Matthew M. Ford, ABN 2013180
Senior Assistant Attorney General
Telephone: (501) 320-3069
Facsimile: (501) 682-8118
Matthew.Ford@ArkansasAG.gov

Brittany Edwards, ABN 2016235
Senior Assistant Attorney General
Telephone: (501) 682-8114
Facsimile: (501) 682-8118
Brittany.Edwards@ArkansasAG.gov

Brian E. McMath*
Brian L. Moore*
Nachawati Law Group
5489 Blair Road
Dallas, TX 75231
Telephone: (214) 890-0711
bmcmath@ntrial.com
bmoore@ntrial.com

David F. Slade, ABN 2013143
Wade Kilpela Slade
1 Riverfront Place, Suite 745
North Little Rock, AR 72114
501-290-2803
slade@waykayslay.com

*Admitted pro hac vice

CERTIFICATE OF SERVICE

I, Christine A. Cryer, do hereby certify that a true and correct copy of the foregoing was served on all counsel of record via the Court's electronic filing system on or about this 25th day of August, 2025.

/s/ Christine A. Cryer
Christine A. Cryer