IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In re VTech Data Breach Litigation	Master Case No. 15-cv-10889
This document relates to all actions.	Consolidated Case Nos. 15-cv-10889, 15-cv-10891, 15-cv-11280, 15-cv-11620, 15-cv-11885 Before the Honorable Manish S. Shah

PLAINTIFFS' RESPONSE IN OPPOSITION TO
VTECH ELECTRONICS NORTH AMERICA, LLC'S MOTION TO DISMISS
PLAINTIFFS' SECOND AMENDED COMPLAINT

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INTRODUCTION

This is a simple case: purchased toys that were supposed to provide a safe, online environment for their children, when in reality they did not. Defendant VTech North America, LLC's ("Defendant" or "VTech") is right that this case is now squarely focused on Plaintiffs' benefit of the bargain damages, which Plaintiffs suffered when they purchased VTech's online-enabled products (the "Products") and received something significantly less valuable than they paid for. But VTech's suggestion that this injury occurred "as a result of a data breach" (Mot. at 1) is wrong. The data breach did not "cause" Plaintiffs' damages. Rather, Plaintiffs were damaged the moment they bought VTech's product because VTech never delivered on its promises that its Products would provide a "Kid-Safe" online environment and later denied consumers the supportive services necessary to enable that online functionality (e.g., Kid Connect and Learning Lodge, the "Online Services") for which they paid a price premium.

The data breach is relevant to this case solely because it took that massive data breach—which compromised the personally identifiable information ("PII") of 4.8 million adults and 6.3 million children—to *expose* the fact the VTech products were fundamentally unsafe and insecure from the moment they were purchased. The breach also resulted in VTech's discontinuation of several of the Online Services, which rendered the Products inoperable in material respects. More to the point, because of the revelation, millions of parents were forced to choose between risking the integrity and safety their children's online activity (i.e., through continued use of the Products), or accepting a loss and, at best, forgoing use of the Products' main selling point—online functionality.

VTech refuses to accept responsibility for any of this. Its head-in-the-sand tactics are prevalent through the Motion, where VTech spends most of its time ignoring the newly-pleaded allegations, all of which were brought in direct response to the Court's prior dismissal Order.

(Dkt. 87 (the "Order") at 16.) For example, while the underlying legal theories relating to Plaintiffs' overpayment damages have not changed significantly, the Second Amended Complaint (the "SAC") now provides what the Court found lacking in the prior pleading: explicit allegations demonstrating the many representations VTech made to its customers' *directly* through the on-and-in-the-box packaging for the Products, which emphasized and promised "Kid-Safe" online functionality. (*See, e.g.*, Order at 16, 23, 26.) The new allegations show conclusively that when Plaintiffs purchased the Online Products, they paid for a safe and secure environment through which their children could use their VTech toys.

But while these representations are now front-and-center in the SAC, VTech either pretends they don't exist, incorrectly writes them off as meaningless, or asks the Court to interpret them in its favor. Such tactics provide no basis for dismissal.

For example, VTech challenges both the breach of contract and warranty claims on the basis that Plaintiffs' initial purchase could not have included the Online Products' online functionality. This argument cannot withstand the allegations specifically highlighting VTech's point-of-purchase representations (the precise allegations the Court instructed Plaintiffs to include). VTech also argues that its online terms and warranty disclaimers insulate it from liability. Under VTech's interpretation of those online terms, however, the parties' underlying contract would be illusory. And both the online terms and the warranty disclaimer fit the textbook definition of unconscionability, which render them unenforceable under Illinois law.

Similarly, VTech's argument against Plaintiffs' consumer fraud count ignores these specific, point-of-sale allegations, which more than satisfy the pleading requirements of Rule 9(b). VTech cannot escape this claim simply by ignoring the allegations in the SAC.

Finally, VTech's confusing challenge to Plaintiffs' unjust enrichment claim improperly asks for dismissal on arguments aimed at a future motion for class certification and attempts to capitalize on Plaintiffs' inadvertent failure to use the express words "in the alternative" to describe the relationship of this claim to Plaintiffs' claim for breach of contract. As described below, neither approach bears fruit. The first is not yet ripe, and VTech admits the second cannot defeat the claim.

The Motion should be denied in its entirety.

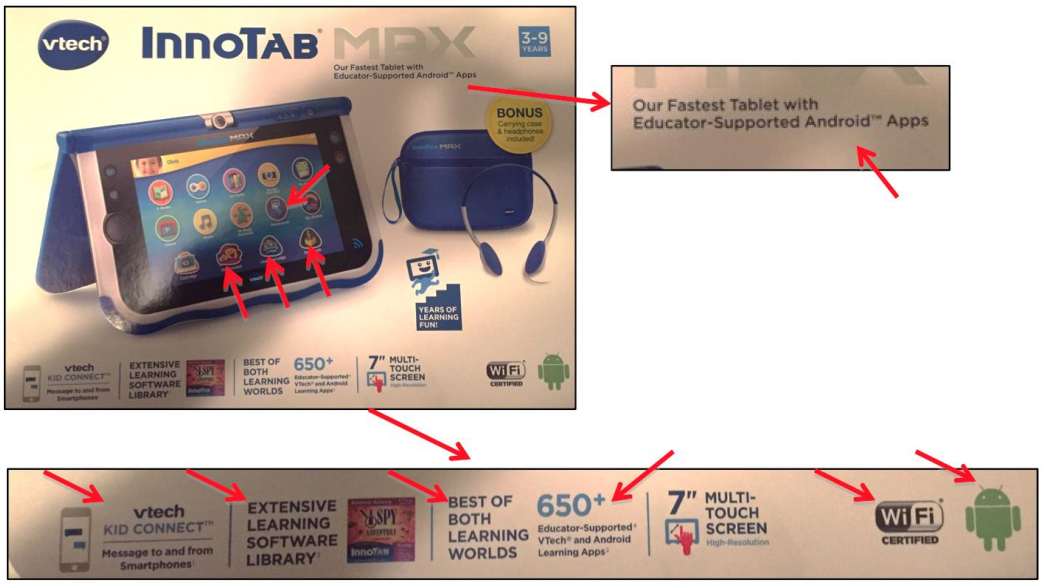
RELEVANT FACTS

VTech is the nation's leading manufacturer and distributor of digital learning toys for preschool and grade school age children. (SAC ¶ 2.) Its learning toys include tablets, smart watches, and multi-functional handheld touch learning systems. (*Id.*) VTech offers both "online" and "offline" versions of its learning toys. (*Id.* ¶ 26.) VTech explains that its "online" Products provide the "best of both learning worlds" because they offer the basic functionality of VTech's "offline" products (e.g., offline learning tools) and include internet functionality, which is delivered through VTech's Online Services. (*Id.* ¶¶ 3, 26.) Critically, access to the Online Services is *required* to utilize the Products' core online functionality. (*Id.* ¶ 3.) For example, without access to the Online Services, purchasers cannot download new applications for their online Products or the "free apps" VTech advertises on its product packaging. (*See, e.g.*, *id.* ¶¶ 25, 31, 35, 36, 78, 85, 93, 100, 106, 113, 122, 130.) Nor could purchasers' children use the other online features—such as Kid Connect, the "650+" connected applications, internet browsing, and other features—that are prominently featured as *the* reason to buy the Products over VTech's offline (and less expensive) toys. (*Id.* ¶ 34.)

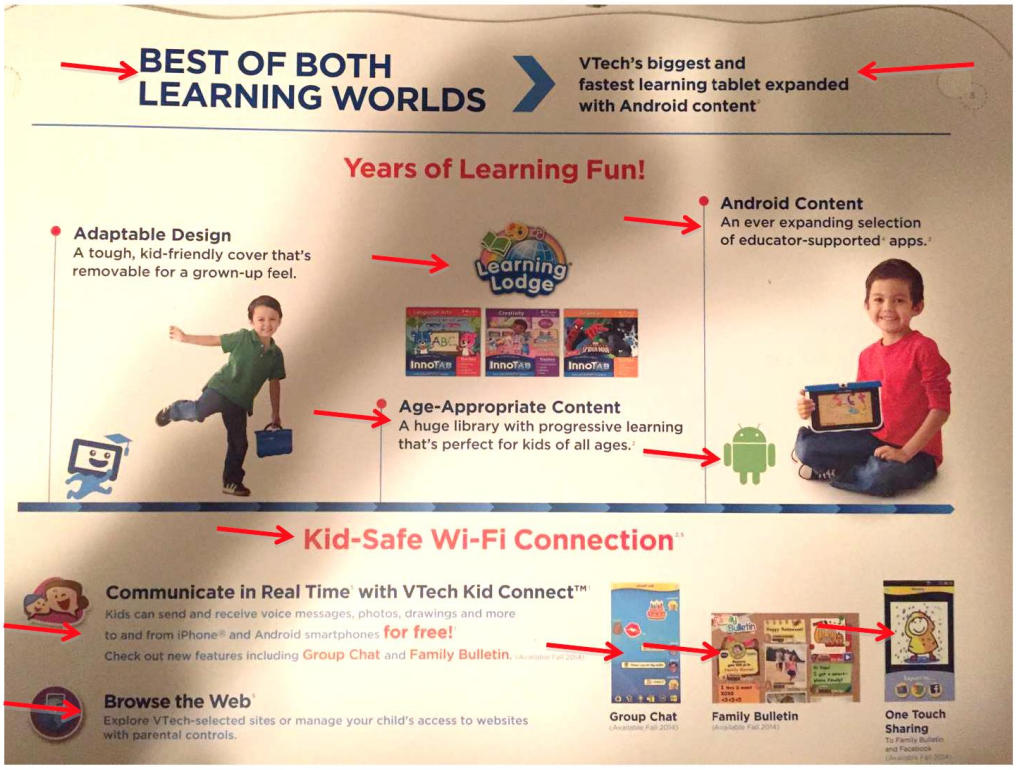
VTech's Online Services are available *only* to customers who pay for access to them *as part of* their initial VTech purchase; there is no option to purchase an offline product and then

later "upgrade" to include online capabilities. (*Id.* ¶ 38.) Recognizing that its online-enabled customers expect this functionality as a part of their upfront purchase, VTech prices the online Products at a premium. (*Id.* ¶ 30.) For example, in 2013, VTech sold two versions of its InnoTab3 product: the "3s" (the online version) included a physical toy *and* access to the Online Services through a Wi-Fi connection, while the "3" (the offline version) included *only* a physical toy with no Wi-Fi capabilities or access to the Online Services. (*Id.*) While both products included access to the same offline capabilities, VTech charged its customers 30% more for the online version, recognizing that parents looking for a "Kid-Safe," online tablet will pay for that benefit. (*Id.* ¶¶ 24, 30.)

Given that VTech's Online Services are an integral part of its online products—and understanding that parents in the market for connected toys for their children primarily consider (i) whether the product is able to connect to the internet and (ii) whether the manufacturer provides a safe online experience (including a safe internet connection) for their child—it is no surprise that VTech made prominent representations at the point of purchase that users would have access to "safe" Online Services. (*Id.* ¶¶ 16-17.) Specifically, VTech represented on the online toys' packaging that parents and children would have access to "Kid-Safe" Online Services in an effort to convince customers to pay more for online products instead of opting for its less expensive offline products. (*Id.* ¶¶ 10, 30.) In fact, and as Figures 1 and 2 of the SAC shows, VTech devotes a significant portion of its online product packaging to the Online Services and ensuring customers that the Products provide an assortment of online features, all of which are delivered through a "Kid-Safe Wi-Fi Connection:"



(**Figure 1**, showing representations of Online Services marked with red arrows.)



(**Figure 2**, showing representations of Online Services marked with red arrows.)

The "Kid-Safe" nature of the Products is emphasized heavily and repeatedly. As noted above, VTech represents that the Wi-Fi connection itself—i.e., the gateway through which all

Product-to-Internet connections and communications must pass—is "Kid-Safe." These representations continue on the inside flap of the Products' packaging, where VTech detailed "expert" opinions designed to convince parents that VTech can be trusted with their child's online activity, including any information transmitted online. (*Id*. ¶ 28.) And while it did attempt to disclaim or limit several of its on-box representations through footnotes, VTech *never* tried to suggest that the Online Services (that they so prominently market) were separate and apart from the VTech product being purchased, would not be built with industry-standard protections, or could be terminated (and rendered useless) at VTech's sole discretion. (*Id*. ¶ 29.)

In addition to its on-the-box advertising, VTech undertook a years-long marketing campaign, which repeated and emphasized that its products were "Kid-Safe." (*Id*. ¶¶ 14, 24.)[1] For example, in 2012, VTech published a press release specifically touting the supposed secure internet connection one of its Products, stating:

> The unique-to-its category InnoTab 2s offers **secure W-Fi capabilities** so parents are never more than a couple of clicks away from new educational games for their kids
>
> "For more than 30 years, VTech has been providing parents and their kids'[sic] with fun, educational toys that are on the forefront of technology," said Tom McClure, Director of Marketing for VTech Electronics North America. "We are excited to continue this tradition by expanding our offerings in the learning toy aisle with MobiGo 2, InnoTab 2 and InnoTab 2s with **secure Wi-Fi** downloads – all built for little hands and big imaginations."

(*Id*. ¶ 14 (emphasis added).) VTech also attempted to gain credibility as a secure education technology provider via enlistment of bloggers through its "VTech blogging program." (*Id*.

[1] As Plaintiffs explain in the SAC, children's online privacy is a paramount concern for parents. (SAC ¶ 7.) Indeed, 81% of all parents surveyed by the Pew Internet Research Center stated that they were concerned about "how much information advertisers can learn about their child's online behavior," and 72% of all parents had "concern[s] regarding their children's interactions with people they do not know." (*Id.*) Another survey found "82% of American parents...said they believe it is their primary responsibility as parents or legal guardians to protect their child's personal information on the Internet." (*Id*. ¶ 8.) And parents have *heightened* concerns in the educational technology market specifically. (*Id*. ¶ 9.)

¶ 16.) These bloggers similarly tout the "kid-safe" security of VTech's products. (*Id.*) For example, one of VTech's bloggers (an ostensible expert from MIT) emphasized that VTech's products offer both "closed, high quality, kid-friendly apps" and "safe Wi-Fi." (*Id.* ¶ 20.)

VTech's point-of-purchase representations are reaffirmed in the after-the-fact terms that purchasers and users must agree to in order to use the online functionality of the Products. To utilize the Online Services (and, thus, their purchased Products), parents must register the toys and create a profile on VTech's website by providing, *inter alia*, their names, addresses, email addresses, and passwords. (*Id.* ¶ 42.) VTech says that it requires this information to "identify the customer, market [its] content and track [customer] downloads." (*Id.*) Once a parent has activated his or her account, a child then creates his or her profile by providing VTech with their name, password, date of birth, gender, and photographs. (*Id.* ¶ 43.) VTech links information about parents with information about children in its databases. (*Id.* ¶ 44.) Once users create their online profiles, VTech requires them to affirmatively agree to its Learning Lodge and Kid Connect terms of service in order to actually use the Products' online functionality.

Recognizing that no reasonable parent would have purchased a VTech online product had they known their child's PII would be vulnerable to hackers and thieves (*Id.* ¶ 71), these online terms explain that VTech would "protect [Plaintiffs'] privacy and personal information," "use[] reasonable precautions to keep [their] personal information secure" (*Id.* ¶ 48), and "handl[e] [their] information carefully," (*Id.*; Dkt. 62-3 at 8.)

To these ends, VTech specifically promised to: (1) use secure encryption and (2) store customers' PII in a database inaccessible over the internet:

> The security of your personal information is important to VTech, and VTech is committed to handling your information carefully. In most cases, if you submit your PII to VTech directly through the Web Services it will be transmitted encrypted to protect your privacy using HTTPS encryption technology. **Any**

> **Registration Data submitted in conjunction with encrypted PII will also be transmitted encrypted. Further, VTech stores your PII and Registration Data in a database that is not accessible over the Internet.**
>
> * * *
>
> [Unless otherwise stated in the Privacy Policy, [a]ny information we collect from you about your children is treated and handled in the same manner as the information we collect about you.

(*Id.*)

In reality, however, VTech's data security was not "Kid-Safe," consistent with its terms of service, nor did it meet basic industry standards. (*Id.* ¶ 31.) Indeed, despite its express promises and on-box representations of a "Kid-Safe Wi-Fi Connection" and further promises of data security set out in its online terms, VTech did *not* use secure encryption and customers' PII *was* accessible over the internet (i.e., in direct contravention of its promises to do exactly that). (*Id.* ¶ 5.) This failure to implement basic security allowed an individual to infiltrate VTech's computer systems in a proof-of-concept hack in November 2015, wherein he accessed and downloaded the sensitive, non-public personally identifiable information ("PII") of more than ten million VTech customers. (*Id.* ¶ 51.)

Among the PII compromised in the breach were the names, photographs, birthdates, and physical addresses of minors. (*Id.* ¶ 4.) Regardless of whether anyone suffered identity theft from this specific episode, the hack exposed VTech's failure to take reasonable steps to secure customers' PII, and the falsity of its express promises to make "Kid-Safe" devices with "Kid-Safe Wi-Fi Connection." (*Id.* ¶ 5.) According to the hacker, this was the entire point of the exercise: to let the public know that VTech did *not* offer even basic security in connection with its online products, and force VTech to accept accountability for its decisions. (SAC ¶¶ 54-61.)

STANDARD OF REVIEW

A complaint survives a Rule 12(b)(6) motion to dismiss when it contains "enough facts to state a claim [for] relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Detailed factual allegations are not required, and "[a] claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A court must accept all well-pleaded facts as true, construing them in the light most favorable to the nonmoving party, and drawing all reasonable inferences in that party's favor. *Bell v. City of Chicago*, 835 F.3d 736, 738 (7th Cir. 2016).

ARGUMENT

I. PLAINTIFFS STATE CLAIMS FOR BREACH OF CONTRACT.

VTech raises a narrow attack on Plaintiffs' breach of contract claim, which is primarily based on the now outdated arguments made in its prior motion to dismiss. Specifically, VTech does not contest breach or damages.[2] It only argues that the relevant point-of-purchase contractual terms either (i) did not cover its Products' "Kid-Safe" online functionality, which required the Online Services to operate or (ii) if they did, Plaintiffs' claims are rendered null by exculpatory and limitation of liability clauses. Both challenges, however, rely entirely on the

[2] In terms of breach and damages, Plaintiffs allege both expressly. As noted above, the November 2015 data breach conclusively shows that VTech did not provide secure or "Kid-Safe" connections for its Products, most prominently by failing to encrypt customers' PII and store it in a place inaccessible over the internet. (SAC ¶¶ 155, 168.) And Plaintiffs also allege benefit of the bargain damages, given that they were promised and paid for secure, internet-connected tablets for children, but received something less valuable (i.e., *in*secure tablets and, at best, sporadic access to the Online Services—and, thus, the tablets' online functionality, for which Plaintiffs' paid). To the latter point, VTech sold the Online Services on a subscription model and included a year's subscription as part of the initial product purchase. Thus, when VTech took the Online Services offline, it deprived Plaintiffs and other VTech customers of access to something that they paid for.

allegations of the First Amended Complaint and ignore the operative pleadings. These new allegations readily defeat VTech's bid for dismissal.

A. Plaintiffs plead facts sufficient to show the purchase of an indivisible bundle of goods and services.

First, VTech says that the online services were not part of the contract that formed the initial purchase of the VTech device. (Mot. at 14.) This position ignores the plain allegations of the SAC, which explains that all of VTech's online products emphasized, and were priced pursuant to, their online functionality—which *required* the use of the Online Services (i.e., Kid Connect and the Learning Lodge).

The SAC shows clearly that VTech featured and advertised its "Kid-Safe" Online Services as a core feature of its Online Products—i.e., one-half of the "BEST OF BOTH LEARNING WORLDS." In other words, it demonstrates that VTech and its customers understood that those services and features were a material part of the initial purchase agreement. *See Urban Sites of Chicago, LLC v. Crown Castle USA*, 979 N.E.2d 480, 489 (Ill. App. 1st Dist. 2012) ("The principal objective in construing a contract is to determine and give effect to the intention of the parties at the time they entered into the agreement."). That conclusion is supported by VTech's pricing structure. VTech marked up its Products (i.e., over and above their "offline" counterparts) by a significant degree. (SAC ¶ 30.) The *only* reason for that difference in price is that the Products offered VTech's customers something the "offline" products did not: they promoted Online Services and features.

VTech's argument in this section of its briefing mirrors the Court's prior dismissal order, which was based on an entirely different pleading. (Mot. at 18-19.) There, the Court found that the "[FAC] does not allege facts sufficient to show that the initial purchase transaction included both the toy and VTech's furnishing of online services," but, rather, was limited to payment "for

only the physical toys" themselves. (Order at 18-19.) In reaching this decision, the Court recognized that "plaintiffs base[d] their breach of contract theory on pictures of the packaging of two of the products," and the representations evident thereon, but held that because those were factual contentions not raised in the pleadings, the product packaging argument could not be considered. (*Id*. at 16.) Thus, for the FAC, the Court only considered Plaintiffs' reliance on VTech's marketing campaign to make the connection, which the Court found insufficient to show that Plaintiffs' in-store purchases also included the Online Services (which were the subject of the Kid Connect and Learning Lodge terms that Plaintiffs viewed and agreed to following their in-store purchases). (*Id.* at 17-18; *see also id.* at 18 ("There are a variety of ways to form a contract, and purchase contracts sometimes incorporate terms that a consumer reads after payment." (citing *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147, 1149 (7th Cir. 1997)).)

Here, the SAC cures the shortcomings identified by the Court and specifically details that VTech's express promises to provide "Kid-Safe" Online Services were a basis for their bargain—i.e., part of the "indivisible bundle of goods and services"—at the point of purchase. The chief allegations supporting Plaintiffs' theory concern VTech's substantial on-and-in-the-box representations about (i) the Products' online functionality and (ii) the essential role the Online Services played in enabling that functionality. Those allegations detail precisely how VTech describes access to the Online Services as an integral, and essential, feature of its Online Products on its product packaging. (SAC ¶ 16-17.) Among many other representations, VTech explains that its Online Products:

- Offer the "BEST OF BOTH LEARNING WORLDS," meaning that they provide users with access to both online and offline learning features, because the VTech online tablets have been "expanded with Android content;"
- Provide a "Kid-Safe Wi-Fi Connection," which lets children

> "Communicate in Real Time with VTech Kid Connect," and use several other online features. The Kid Connect service itself is referenced on front, back, and inside flap of the packaging; and
>
> - Allow users to download kid-oriented applications (including "2 FREE VTech downloads" that are included with the initial purchase), which can only be done through VTech's Learning Lodge service.
>
> - Are priced to include a one-year subscription to the Kid Connect service, which can only be accessed through the Online Services

(SAC Figs. 1, 2, and 3.) Inside the VTech Product packaging, purchasers are presented with in-box terms that reinforce the on-box promises. For instance, Plaintiffs point to the Kid Connect products' user manual, which states that to obtain the "free" apps advertised on VTech's external product packaging, purchasers must register online and complete steps two through five, each of which requires access to Online Services. (*Id.* ¶ 31.) Likewise, all of these point-of-purchase representations are further reinforced by VTech's extensive marketing campaign, where VTech states that its products "let kids learn, create and connect using a kid-safe Wi-Fi connection to the Internet" and offer "secure Wi-Fi capabilities" and "secure Wi-Fi downloads..." (*Id.* ¶ 13-14.) Plaintiffs allege VTech's bloggers tout similar "kid-safe browser[s]," like VTech's MIT expert, who wrote a blog post characterizing VTech devices as offering "safe Wi-Fi." (*Id.*)

Given the above-described allegations, Plaintiffs' purchases of online-compatible Products necessarily included the Kid Connect and Learning Lodge terms of service—and the explicitly-referenced and incorporated the Privacy Policy—wherein VTech made its overt representations of data security. *See Integrated Genomics, Inc. v. Gerngross*, 636 F.3d 853, 861 (7th Cir.2011) ("[T]he pertinent language must be viewed in context, and the contract must be construed . . . as a whole . . . ." (citing *Utility Audit, Inc. v. Horace Mann Serv. Corp.*, 383 F.3d 683, 687 (7th Cir. 2004))). It is true, as VTech notes, that the respective Kid Connect and Learning Lodge terms purport to only govern those services, (*see* Mot. at 15-16), but because

they were sold as *necessary to utilize* the online functions of the Products, (*see* SAC Figs 1, 2, and 3), VTech cannot divorce the services or terms from the Plaintiffs' purchases.[3] And because those terms necessarily became a part of Plaintiffs' purchases (and, apart from a handful of unenforceable terms through which VTech attempted to reserve itself the option of providing nothing at all, despite Plaintiffs' payments), VTech was obliged to follow through on its promises to "protect [parents' and children's] privacy and personal information," "use[] reasonable precautions to keep [their] personal information secure," "handl[e] [their] information carefully," transmit purchase and child PII only when encrypted, and "store[] . . . PII and Registration Data in a database that is not accessible over the Internet[.]" (SAC ¶ 48.)

VTech also raises a handful of other arguments to suggest the promised Online Services had nothing to do with Plaintiffs' purchases. None are availing. First, VTech re-emphasizes its view that the Kid Connect and Learning Lodge terms did not relate to the initial purchase and that a customer was not required to access these Online Services to enjoy their purchase. (Mot. at 15.) But this argument ignores that, as discussed above, VTech explicitly held the online functionality of its Online Products out as essentially "half" of the purchase and charged customers for the use of that functionality. (*See* SAC Fig. 2, ¶ 30.) Purchasers were not prevented from *using* the "offline" half of their product by VTech's conduct; but they did not pay solely for (or expect) an offline product, and should not have to settle for one. (SAC ¶ 41.) Indeed, VTech sold offline versions of its Online products, and charged much less for them.

Second, VTech says that its use of the "Kids-Safe" descriptor could not have referred to data security, but only related to the content children could access on the Products. (Mot. at 16-

[3] VTech's argument relies wholly on the Court's prior finding that Plaintiffs had not sufficiently alleged a connection between the products and online services. (Mot. 16.) But as noted, VTech ignores that the Court specifically stated that it did not consider the significant on-and-in-the-box representations that Plaintiffs now allege.

17.) Not so. To start, VTech asks for significant inferences in its favor, but that is not the standard for this Motion. *Bell*, 835 F.3d at 738. Despite VTech's efforts to downplay it, the "Kid-Safe" descriptor is used more broadly than VTech suggests. For instance, the packaging describes the Online Products' "Wi-Fi Connection"—which, of course, is the gateway for the *entirety* of the online features—as "Kid-Safe." (SAC Fig. 2.) Given the intended target audience (and the fact that VTech requires the provision of PII from parents and children-users), it was reasonable for parents to believe that VTech would use basic cyber security protections—like the encrypted transmission and offline storage explicitly promised by the incorporated Privacy Policy—to make the Products' threshold internet connection "Kid-Safe," as promised. (SAC ¶¶ 46, 49, 71.)[4]

The Products' on-and-in-the-box representations show that Plaintiffs and VTech both understood—at the point of purchase—that these are online toys, requiring the secure and "Kid-Safe" Online Services for such connectivity. They were part of the Parties' contract.

B. VTech's online terms did not give it complete discretion about whether to provide the Online Services.

Perhaps recognizing the futility of its leading argument, VTech also suggests that even if it did promise to provide its customers with *functional* online capabilities, certain of its one-sided terms actually show that VTech promised nothing at all (because it could terminate the Online Services at any time). But the enforcement of such an agreement—that does not provide consumers with any meaningful choice—would allow VTech to continue making promises to

[4] VTech elsewhere notes that the Court previously held that "it is too much of a stretch to infer . . . that VTech's inadequate data security constitutes a material omission at the point of purchase." (Mot. at 27 (citing Order at 26).) That is true, but VTech again ignores that the Court specifically held that, with respect to the FAC, it could not consider the on-packaging representations, despite Plaintiffs' reliance on them in opposing VTech's first Rule 12 motion. All those representations are now pleaded expressly and establish the link between VTech's promises and obligations to provide data security, on the one hand, and the point of purchase, on the other.

customers at the time of purchase, get them to pay for that promise, and then retract those promises as soon as the customer started using the product. That is unconscionable.

To start, VTech's reading of the contract—i.e., that it had unilateral, unfettered discretion to decide whether to provide the Online Services at all—would render the central purpose of the contract illusory because the Online Services were *required* for the Products' operation. *W.E. Erickson Constr., Inc. v. Chi. Title Ins. Co.*, 641 N.E.2d 861, 864 (Ill. App. Ct. 1994) ("An illusory promise is also defined as one in which the performance is optional."). Courts reject such extreme readings. *See, e.g.*, *Tymshare, Inc. v. Covell*, 727 F2d 1145, 1154 (D.C. Cir. 1984) (Scalia, J.) ("[S]ole discretion . . . is not necessarily the equivalent of 'for any reason whatsoever, no matter how arbitrary or unreasonable.'"); *First Bank & Trust Co. of Ill. v. Vill. of Orland Hills*, 787 N.E.2d 300, 305 (Ill. App. Ct. 2003) (explaining that courts do not interpret agreements to nullify provisions or render them meaningless). A more sensible reading is that VTech cannot be held liable for occasional outages (e.g., for software updates) or for discontinuing the Online Services many years after purchase—at least beyond the one-year included subscription.

Second, the at-issue provisions are also invalid because they are unconscionable. A contractual provision is substantively unconscionable when it is so inordinately one-sided in one party's favor, *see, e.g.*, *Crown Mortg. Co. v. Young*, 989 N.E.2d 621, 624 (Ill. App. Ct. 2006), and is procedurally unconscionable where it is so difficult to locate, read, or understand that a party "cannot fairly be said to have been aware he was agreeing to it." *Razor v. Hyundai Motor Am.*, 854 N.E.2d 607, 622 (Ill. 2006)). In Illinois, moreover, a contract may be invalidated for *either* procedural or substantive reasons, as well as for a combination of both. *Kinkel v. Cingular Wireless LLC*, 857 N.E.2d 250, 263 (2006).

Here, and as set out above, Plaintiffs allege that they expected and paid for their products' online functionality at the time of their purchases, which *required* use of VTech's Online Services.[5] Thus, VTech's decision to include terms that could only be accessed *after* the Plaintiffs' purchase and which rendered a material aspect of Plaintiffs' purchase illusory was unconscionable. The Court has already agreed that "Plaintiffs are right to suggest that a term that was unavailable to a consumer until after she purchased a product might be unconscionable, especially if she was not given an opportunity to review and reject that term by returning the product without incurring financial loss." (Order at 20 (citing *Razor*, 222 Ill.2d at 100-01).) And here, Plaintiffs could not have reviewed VTech's exculpatory and limitation of liability clauses until *after* their purchases, when VTech forced the Kid Connect and Learning Lodge terms on them. (SAC ¶¶ 41, 48.) If Plaintiffs did not agree to the clauses, Plaintiffs' only recourse was to stop using the Online Services—which would also require them to forgo using the Products' bargained-for online functionality—rather than return their half-functional purchases. That is the definition of procedural unconscionability. *See, e.g.*, *Razor*, 854 N.E.2d at 622.

In terms of substantive unconscionability, the provisions VTech cites operate solely in its favor by stripping consumers of their ability to enforce the promises VTech made at the point of purchase, which the Court already recognized as unenforceable. (Order at 21 ("To the extent that plaintiffs' claim is based on the breach of the data security provisions, the exculpatory provisions do not preclude recovery.").) As noted, Illinois courts refuse to interpret contractual provisions in a way that nullifies or renders them meaningless, as VTech tries to do here. *See, e.g.*, *First Bank & Trust Co. of Illinois*, 787 N.E.2d at 305; *Health Prof'ls, Ltd. v. Johnson*, 791 N.E.2d 1179,

[5] The Court previously rejected Plaintiffs' unconscionability arguments only because it found that the pleadings of the First Amended Complaint were "insufficient to establish that online services are part of the purchase transaction." (Order at 20.) As set out above, that deficiency has been cured.

1193 (Ill. Ct. App. 2003) ("Courts will construe a contract reasonably to avoid absurd results."). To hold these terms are enforceable would simply enable VTech to continue making promises to customers at the time of purchase, (SAC ¶¶ 25-32), get them to *pay for* that promise, (*id.* ¶¶ 41, 47), and then retract those promises once the consumer gets home and opens the product they purchased, while keeping the premium the customers paid for itself, (*id.* ¶¶ 268-274). Such disclaimers are unconscionable, and VTech was not within its rights to indefinitely suspend Plaintiffs' access to the Online Services they rightfully paid for, or provide online functionality without an iota of the promised cybersecurity.

II. PLAINTIFFS STATE CLAIMS FOR BREACH OF THE IMPLIED WARRANTY OF MERCHANTABILITY.

VTech continues to rely upon the allegations of the First Amended Complaint to argue in favor of dismissing Plaintiffs' claims for breach of the implied warranty of merchantability. As before, VTech says that the claims fail because (i) they are based on services, not goods; (ii) Plaintiffs lack privity with VTech; and (iii) VTech disclaimed liability for any implied warranty in the Terms. As with its attack on Plaintiffs' contract claims, VTech does not address the SAC.

To state a claim for breach of the implied warranty of merchantability under the UCC, plaintiffs must allege "(1) a sale of goods, (2) by a merchant of those goods, and (3) the goods were not of merchantable quality [at the time of sale]." *Brandt v. Boston Sci. Corp.*, 792 N.E.2d 296, 299 (Ill. 2003); 810 ILCS 5/2-314(1). Goods are not merchantable when they are not "fit for the ordinary purpose for which such goods are used." 810 ILCS 5/2-314(2)(c).

A. Plaintiffs' transactions were predominantly for goods, but included the Online Services, without which Plaintiffs' physical purchases were materially limited.

VTech's leading argument again follows the Court's prior analysis, where it held that under the prior allegations "two transactions occurred: one for the toy and one for the online

services." (Order at 23.)[6] But Plaintiffs have now made abundantly clear in the SAC that *one* transaction occurred, which included a "mix" of goods and services, (*see* Order at 23), the latter of which were *required* for the Products' core and advertised functionality.

The implied warranty of merchantability applies to "transactions in goods." 810 ILCS 5/2-102. "Goods" are defined as "all things, including specially manufactured goods, which are moveable at the time of identification to the contract for sale." *Brandt*, 792 N.E.2d at 299 (quoting 810 ILCS 5/2-105(1)). When a sales contract involves a combination of both goods and services, a plaintiff must show the "predominant thrust of the transaction was for goods and only incidentally for services." *Ogden Martin Sys. of Indianapolis, Inc. v. Whiting Corp.*, 179 F.3d 523, 530 (7th Cir. 1999); *see also Belleville Toyota, Inc. v. Toyota Motor Sales, U.S.A., Inc.*, 770 N.E.2d 177, 195 (Ill. 2002). The question of whether the UCC applies is a question of fact. *See Maldonado v. Creative Woodworking Concepts, Inc.*, 796 N.E.2d 662, 667 (Ill. 2003).

No one disputes that Plaintiffs purchased physical toys, which are purchases governed by the UCC. The only question is whether the Online Services were included as a part of that purchase (rather than an after-the-fact and distinct transaction) and, if so, whether they are incidental to the purchase of the toys. *The answer is simple: the Online Services were necessarily included* ***because the toys that were able to access the Internet cost more***. The preceding discussion demonstrates that the Online Services were unquestionably an essential *part of* the Plaintiffs' initial purchases—i.e., given VTech's on-and-in-the-box representations

[6] VTech suggests that the "law of the case" doctrine precludes the Court from revisiting its finding that two transactions occurred. (Mot. at 20.) This misstates the doctrine. Under that doctrine, "a decision on an *issue of law* made at one stage of a case becomes binding . . ." *In re PCH Assocs.*, 949 F.2d 585, 592 (2d Cir. 1991) (emphasis added). In its prior opinion, the Court applied the law to a different set of allegations. The SAC provides the key allegations that the Court specifically noted were missing from the FAC, and the Court has made no findings of law on *these* facts. In any event, "law of the case is a discretionary doctrine," *Redfield v. Cont'l Cas. Corp.*, and even if it somehow could be applied here, it should not be. 818 F.2d 596, 605 (7th Cir. 1987).

about the products' online functionality and that VTech's provision of the Online Services were *necessary* for that functionality.[7] Because the Plaintiffs' claims concern those Online Services—including, for example, VTech's failure to deliver secure and "Kid-Safe" online functionality—the warranty claim concerns the Plaintiffs' singular, "mixed" purchase. Moreover, the fact that Plaintiffs' purchases weren't rendered wholly inoperable by VTech's failure to provide the promised Online Services does not defeat the warranty claim, as VTech suggests. (Mot. at 21.) While VTech's products retained *some* functionality without the promised Online Services, they became no different than VTech's less advanced—and less expensive—offline toys. Without the Online Services, they became a different product entirely.

Second, as to the question of which facet of the purchase predominated, VTech's online services are *only* available to customers who purchase physical VTech Products. *Compare* SAC ¶ 38 ("It is not possible to actually use the software or the Online Services without having first purchased a VTech product...Online Services are only available to people who paid for them as part of their VTech purchase"); *with* Order at 18 ("[I]t cannot be inferred from the [initial] complaint that the online services were also available to people who did not pay anything at all."). The hypothetical supplied in *Bruel and Kjaer v. Village of Bensenville* helps articulate the predominating nature Plaintiffs' "mixed" purchase:

> Plaintiff supplies certain tangible widgets to buyers along with sufficient services to make the widgets operable. In the absence of the widgets themselves, the services to make them operable would be meaningless and without value.

969 N.E.2d 445, 451 (Ill. App. Ct. 2012). Here, like the example in *Bruel*, VTech supplied tangible toys to Plaintiffs along with sufficient Online Services *to make the toys operable*. (*See,*

[7] VTech attempts to write off the SAC's new allegations, but the bulk of the new allegations concern VTech's on-the-box representations and set out, in detail, what VTech offered and what Plaintiffs expected at the point of purchase (i.e., toys with online functionality, which were delivered through the Online Services). They therefore respond to the Court's repeated concern that Plaintiffs previously failed to allege that the Online Services are "necessary to the functioning of the toy." (Order at 23-24.)

e.g., SAC ¶¶ 3, 26.) And in the absence of the toys themselves, the Online Services would be without value.

While the transactions were for a "mix" of goods and services, they were predominately for goods, supported (and made more expensive) by necessary Online Services. The UCC applies to the whole transaction.

B. Plaintiffs satisfy the "direct relationship" exception to the privity requirement.

VTech again discounts the SAC's new allegations and suggests that Plaintiffs still have not satisfied the privity requirements of their warranty claim. (Mot. at 22.) No one disputes that Plaintiffs purchased their products from retailers, but VTech claims the "few more references to product packaging and the like" does nothing to remedy the issues identified by the Court. (*Id.* at 23.) VTech is wrong.

As a general rule, a claim for breach of implied warranty is only available to a buyer "against his immediate seller." *See, e.g., Rothe v. Maloney Cadillac, Inc.*, 518 N.E.2d 1028, 1029 (Ill. 1988). There are, however, "various exceptions to the privity requirement," including the direct relationship exception, which applies when there are direct dealings between the manufacturer and the remote customer. *Elward v. Electrolux Home Prod., Inc.*, 214 F. Supp. 3d 701, 705 (N.D. Ill. 2016) (citing *Apex Mgmt.*, 225 B.R. at 646). In *In re Rust-Oleum Mktg. Sales Practices & Prods. Liab. Litig.*, for example, the Court held the direct relationship exception applied when a defendant engaged in a direct marketing campaign to consumers. 155 F. Supp. 3d 772, 806-07 (N.D. Ill. 2016). There, as here, the Plaintiffs recounted explicit statements from

brochures and product packaging and plaintiffs' reliance on the representations made in defendant's advertisements. *Id.*[8]

In the Order, the Court faulted the FAC for "mak[ing] only vague references to VTech's marketing of the products, and . . . not explicitly alleg[ing] that plaintiffs relied on that marketing." (Order at 25.) This has been cured. Here, like in *In re Rust-Oleum* and *Elward*, Plaintiffs satisfy the "direct dealing" exception to the requirement of privity, because they allege detailed facts pertaining to VTech's direct marketing campaign to customers, (SAC ¶¶ 10-21), including explicit statements from VTech's on-and-in-the-box product packaging, (*id.* ¶¶ 24-31, 46-50), and Plaintiffs' reliance on the representations VTech made in its advertisements, (*id.* ¶¶ 215, 217, 223, 247, 249, 255). Plaintiffs also sufficiently allege that they had direct dealings with VTech by agreeing to its online Kid Connect and Learning Lodge agreements, and by handing over their PII to VTech to register their products. (*Id.* ¶ 42-45.) For example, Plaintiffs allege that customers must register on VTech's website to fully use the VTech products they purchased:

> To use the Online Services, Customers must register for online accounts and provide PII to VTech. In particular, Customers must provide their names, home addresses, email addresses, and passwords. VTech requires this information so that it can '**identify the customer**, market content and track [customer] downloads.'

(*Id.* ¶¶ 42 (quoting VTech FAQs) (emphasis added).) These and other allegations bring this case

[8] *See also Elward*, 214 F. Supp. 3d at 705 ("Given the fact-intensive nature of the privity inquiry, the Court holds that [allegations of direct dealings with the defendant via its advertisements, warranty forms, and registration cards] state a plausible claim that Electrolux is liable for breach of implied warranty under the direct relationship exception to the privity requirement.").

Multiple courts in this district have found that the privity inquiry is "fact-intensive," *see Matter of L & S Indus., Inc.*, 989 F.2d 929, 932 (7th Cir. 1993), and that a determination as to whether privity exists is often "not appropriate at the motion-to-dismiss stage," *Apex Mgmt. Corp. v. WSR Corp.*, 225 B.R. 640, 646-47 (N.D. Ill. 1998). As such, in the event the Court finds there are not enough facts to determine the issue of privity at this stage, Plaintiffs respectfully request that the Court give them the opportunity to establish privity through discovery.

squarely under the direct relationship exception to the warranty claim's privity requirement.

C. VTech's warranty disclaimer is not valid, nor does it change the Court's analysis.

VTech says that even though its representations promised online functionality—which, in turn, were provided through the Online Services—the Kid Connect terms included a claim-dispositive warranty disclaimer. (Mot. at 23.) This attack fails for at least three reasons.

First, because VTech offered a written warranty (i.e., its terms of use), its attempt to disclaim the implied warranty of merchantability is without any effect. *See* 15 U.S.C. § 2308(a). This is so because a manufacturer such as VTech may not "disclaim or modify" any "implied warranty" if its products include a "written warranty to the consumer." *Id*.

Second, the Kid Connect disclaimer only pertains to the Kid Connect "service" but not the products themselves, which are what Plaintiffs claim were not merchantable. *See Rosenburg v. Cottrell*, No. 05-545-MJR, 2007 WL 1120242, at *1 (S.D. Ill. Apr. 13, 2007) ("[W]arranty exclusions are strictly construed against the author." (citation omitted)). True, Plaintiffs allege that the Products relied on the Kid Connect services—i.e., as part of the Online Services—for aspects of their online functionality, but that does not change the nature of the claim, which concerns the goods purchased, which were not as promised. Besides, *all* of the Kid Connect products also used the Learning Lodge (i.e., the other half of the Online Services), and VTech did not include any disclaimer for those services, or the Products' use of them. This defense does not even apply to that portion of Plaintiff's claim.

Third, and as set out above, the Kid Connect disclaimer cannot be enforced because it is unconscionable. Multiple courts have recognized that unconscionability may render a warranty disclaimer invalid, "even if a court finds that disclaimer to be conspicuous." *Federico v. Freedomroads RV, Inc.*, No. 09-CV-2027, 2010 WL 4740181, at *7 (N.D. Ill. Nov. 10, 2010)

(citing *Semitekol v. Monaco Coach Corp.*, 582 F. Supp. 2d 1030 (N.D. Ill. 2008) (applying Illinois law)). Here, the Kid Connect disclaimer was first presented to Plaintiffs via the Kid Connect terms, *after* their initial purchases, which renders it procedurally unconscionable. *See, e.g.*, *Razor*, 222 Ill. 2d at 100-01 (finding waiver ineffective because it was not "provided to the purchaser at or before the time that the purchase occurs."). It should therefore not be enforced.

For all these reasons, Plaintiffs' breach of warranty claim survives.

III. PLAINTIFFS STATE CLAIMS UNDER THE ILLINOIS CONSUMER FRAUD AND DECEPTIVE PRACTICES ACT.

VTech raises familiar challenges to Plaintiffs' claims brought under the Illinois Consumer Fraud and Deceptive Practices Act ("ICFA").[9] None, however, are effective.

To state a claim under ICFA, a plaintiff must allege (1) an unfair or deceptive act or practice by the defendant, (2) the defendant's intent that the plaintiff rely on the deception, (3) the occurrence of the deception in a course of conduct involving trade or commerce, and (4) actual damage to the plaintiff that is (5) a result of the deception. *See De Bouse v. Bayer*, 922 N.E.2d 309, 313 (Ill. 2009); *see also Robinson v. Toyota Motor Credit Corp.*, 775 N.E.2d 951, 960 (Ill. 2002) ("[The ICFA] is to be liberally construed to effectuate its purpose."). Recovery under ICFA is permitted for either unfair or deceptive conduct. *See Robinson*, 775 N.E.2d at 960.

[9] As a typical precaution, Plaintiffs plead claims under their home state consumer protection laws in the alternative to their ICFA claims. (SAC ¶¶ 205, 235, 237, 267.) VTech argues that Plaintiffs are prohibited from pleading these "mystery statutes" because VTech was not provided fair notice under Federal Rule of Civil Procedure 8(a)(2). (Mot. at 24 n. 13.) But "nothing in Fed. R. Civ. P. 8 suggests that complaints must contain legal citations or arguments, and we have held that they need not." *Whitfield v. Ill. Dep't of Corr.*, 237 F. App'x 93, 94 (7th Cir. 2007) (unpublished). Besides, the underlying facts supporting these alternative claims would not vary, so VTech's concern is misguided.

A. Plaintiffs' "deceptive" ICFA claims satisfy Rule 9(b) by describing the contents of VTech's on-box misrepresentations and omissions and the timeframe of Plaintiffs' purchases.

VTech claims that Plaintiffs fail to meet Federal Rule of Civil Procedure 9(b)'s heightened pleading standard. (Mot. at 30.) This ignores the SAC.

Courts uphold deceptive packaging claims under ICFA where information is omitted from, or misrepresented on, a product's packaging and where a plaintiff alleges he "would not have purchased the [product], or paid the selling price for the [product], had [he] known [of the omission.]" *See, e.g., Jamison v. Summer Infant (USA), Inc.*, 778 F. Supp. 2d 900, 911 (N.D. Ill. 2011); *Gavin v. AT&T Corp.*, 543 F. Supp. 2d 885, 910 (N.D. Ill. 2008) ("[W]hether an omission is material in light of all the circumstances is a question of fact."); *Connick v. Suzuki Motor Co.*, 675 N.E.2d 584, 595 (Ill. 1996) (upholding ICFA claim where "plaintiffs alleged that the safety problems of [a car] were a material fact in that they would not have purchased the vehicles if Suzuki had disclosed the [car's] safety risk."). And while ICFA claims sounding in fraud trigger Rule 9(b)'s pleading requirements, specific descriptions of the contents of on-box representations or omissions, along with the timeframe of plaintiff's purchase, satisfy the Rule. *See, e.g.*, *Stavropoulos v. Hewlett-Packard Co.*, No. 13 C 5084, 2014 WL 7190809, at *2 (N.D. Ill. Dec. 17, 2014) (upholding ICFA omission claim) (citing collected cases).

Once again, the SAC's added allegations concerning the Online Products' packaging cure any defects previously identified by the Court. (*See* Order at 26.) As discussed herein, VTech sold the Online Products as a "Kid-Safe" online product. And while VTech tries to cabin those representations to the availability of specific software, the packaging claims are much broader and, especially when drawing inferences in Plaintiffs' favor, reasonably encompass VTech's post-purchase assurances (e.g., as set out in the Privacy Policy) that basic data security—e.g., encryption and safe storage of PII—would be provided. Given those consumer-facing

representations, Plaintiffs spell out multiple, material omissions from and misrepresentations on the Online Products' packaging. (*See, e.g.*, SAC ¶ 251.) These allegations state classic deceptive practice claims under the ICFA. *See, e.g.*, *Jamison*, 778 F. Supp. 2d at 911 (finding allegations that defendants "omitted the fact that the Video Monitors were unencrypted from the packaging . . . and that Plaintiffs would not have purchased the Video Monitors . . . had they known that they were not encrypted . . . [were] sufficient to state a claim for the omission of material facts."). Plaintiffs meet the standard set out in *Jamison* and satisfy Rule 9's pleading standard as a result.

B. Plaintiffs suffered actual damage in the form of benefit-of-the-bargain damages.

VTech also claims that Plaintiffs do nothing to substantiate their allegations that they suffered actual damage under ICFA. (Mot. at 27.) This is entirely inaccurate.

Under the ICFA, the requirement of actual damages is satisfied "if the seller's deception deprives the plaintiff of the benefit of [his] bargain by causing [him] to pay more than the actual value of the product." *Muir v. Playtex Prods., LLC*, 983 F. Supp. 2d 980, 990 (N.D. Ill. 2013) (quoting *Kim v. Carter's Inc.*, 598 F.3d 362, 365 (7th Cir. 2010)). These "benefit-of-the-bargain damages may be awarded to compensate purchasers of products who paid prices that were inflated by the defendant's fraud." *Lipton v. Chattem, Inc.*, No. 11 C 2952, 2012 WL 1192083, at *4 (N.D. Ill. Apr. 10, 2012). In short, "plaintiffs may sue for the diminished value of the product—the difference between the product's value if the misrepresentations had been true and the product's true value." *Id*. Multiple courts have acknowledged that a failure to provide promised data security in connection with a plaintiff's purchase results in economic injury. *See, e.g.*, *In re Anthem Inc. Data Breach Litig*, No. 15-MD-02617-LHK, 2016 WL 589760, at *18 (N.D. Cal. Feb. 14, 2016) (accepting benefit of the bargain damages relating to health insurer's

failure to provide data security on claim brought under California's Unfair Competition Law, and observing that such "benefit of the bargain damages represent economic injury"); *Resnick v. AvMed, Inc.*, 693 F.3d 1317, 1327-28 (11th Cir. 2012) (endorsing benefit-of-the-bargain damages on unjust enrichment claim based on allegations that insurer failed to use money for data security in accordance with privacy notices).

Plaintiffs expressly pled these same benefit-of-the-bargain damages. (*See, e.g.*, SAC ¶ 50 ("VTech's failure to deliver what it promised, [Plaintiffs] did not receive the benefit of their bargain when they purchased [online VTech products]."). Plaintiffs specifically allege that what VTech promised was more valuable than what it actually provided, as evidenced by the fact that "the market price for the product that VTech promised is substantially higher than the market price for the product it actually provided."[10] (*Id.*) Far from being based on "naked assertions," (Mot. at 27), Plaintiffs allege that *VTech itself* prices its online Products higher than those without online functionality; these and other allegations readily support and round out their overpayment claim. (*See, e.g.*, SAC ¶¶ 3, 28, 30, 46, 47, 50, 66, 72, 77, 79, 84, 86, 92, 94, 99, 101.) These allegations also bring this case far outside *Camasta v. Jos. A. Bank Clothiers, Inc.*, where the plaintiff failed to provide any support for his claim of overpayment damages, on allegations that the defendant simply marked up its in-store prices. 761 F.3d 732, 739 (7th Cir. 2014) (conclusory statement that plaintiff "could have shopped around" for better prices

[10] This is true regardless of whether the Online Services are viewed from an absolute perspective (i.e., whether they were provided or not), or from a data security (i.e., whether, assuming the services *were* provided, they were secure). *See, In re Anthem*, 2016 WL 589760, at *18 (accepting benefit of the bargain damages relating to health insurer's failure to provide data security on claim brought under California's Unfair Competition Law); *Resnick.*, 693 F.3d at 1327-28 (endorsing benefit-of-the-bargain damages on unjust enrichment claim based on allegations that insurer failed to use money for data security in accordance with privacy notices). Here, Plaintiffs make the imminently reasonable allegations that they—as parents—would not let their children use online products that were not secure (and not "Kid-Safe"), and never would have bought internet-enabled tablets had they known of VTech's substandard data security practices. Either way, Plaintiffs did not get what they paid for and, thus, suffered benefit of their bargain damages as a result.

insufficient to show overpayment). Plaintiffs do not allege they paid too much in some abstract sense—they paid for something they simply did not receive; i.e., a secure, Kid-Safe, internet-connected learning device.

As such, Plaintiffs sufficiently allege actual damage under ICFA.

C. Plaintiffs' ICFA claims are district from their breach of contract claims.

Next, VTech attempts to argue that Plaintiffs' ICFA claims are duplicative of their breach of contract claims. (Mot. at 33.) They are not. It is well-established that plaintiffs may allege claims for *both* breach of contract and unfair and deceptive practices under the ICFA, so long as they show both an agreement between the parties *and* an unfair or deceptive practice. *See Reid v. Unilever U.S., Inc.*, 964 F. Supp. 2d 893, 913 (N.D. Ill. 2013) ("[T]he United States Supreme Court has recognized that while the basis for a breach of contract action lies in the parties' agreement, in order to succeed under a consumer protection law, a plaintiff must show not necessarily an agreement, but in all cases, an unfair or deceptive practice." (internal citation omitted)); *cf. Avery v. State Farm Mut. Auto. Ins. Co.*, 835 N.E.2d 801, 844 (Ill. 2005) (establishing that "breach of contractual promise, without more, is not actionable under the Consumer Fraud Act").

In *Gehrett v. Chrysler Corp.*, for example, the Court upheld a judgment of liability on an ICFA claim based on misrepresentations the defendant made about a vehicle sold to the plaintiff, when the defendant presented the car as something it was not. 882 N.E.2d 1102, 1115 (Ill. App. Ct. 2008). While the defendant argued the claim was nothing more than a breach of contract (i.e., relating to representations made about the plaintiff's purchased that were "breached"), the Court disagreed and held that the available evidence "established a deceptive act and not merely a breach of contract." *Id.* at 1115-16.

Here, as in *Gehrett*, Plaintiffs allege both an agreement, (SAC ¶¶ 148-83), *and* unfair and deceptive conduct (*id*. ¶¶ 204-67). Among other things, if the Court finds that aspects of VTech's substantial on-and-in-the-box representations and extensive marketing campaign regarding the Products were not part of the parties' contract, they at least form the basis of an ICFA claim, as they were designed to convince consumers to purchase the Product using misleading or unfair business practices.

D. Plaintiffs also plead claims for unfair conduct.

Finally, VTech says that "Plaintiffs plead ***only*** deceptive conduct" and, thus, cannot state a claim under the ICFA's "unfair" prong. (Mot. at 24.) This is incorrect.

Plaintiffs allege that VTech violated the ICFA for product misrepresentations *and* unfairness. Most notably, Plaintiffs allege that VTech's practice of selling online Products designed for children without providing *any* meaningful cybersecurity safeguards constituted an "unfair" act. (SAC ¶ 226.) Indeed, VTech *required* children to submit personal information in order to use the Products; as such, it had a basic ethical duty to safeguard that information—in addition to a *statutory* duty, under laws like the Children's Online Privacy Protection Act, (SAC ¶¶ 229.)[11]

A practice is "unfair" under the ICFA if it is "immoral, unethical, oppressive or unscrupulous," and finding that that "ethical" means "conforming to accepted professional standards of conduct." *Ciszewski v. Denny's Corp.*, No. 09 C 5355, 2010 WL 2220584, at *2 (N.D. Ill. June 2, 2010). Because VTech did not do so, it violated the ICFA's prohibition against "unfair" conduct. VTech's conduct was also unfair inasmuch as it caused (i) substantial injury to

[11] Plaintiffs do not seek to recover under COPPA or make an "end run" around the statute, as VTech suggests. (Mot. at 30.) Rather, the statute reinforces and underscores the unfairness of VTech's conduct, including by showing it had a duty to protect the minor PII in its possession (i.e., as promised and as paid for by its customers).

consumers (here, the classes of purchasers *and* their children), (ii) without any countervailing benefits to consumers or competition, and (iii) in a way that VTech's customers could not have avoided, considering VTech's affirmative statements regarding its data security practices. (*See* SAC ¶¶ 230-232.); *Siegel v. Shell Oil Co.*, 585 N.E. 2d 156, 163-64 (7th Cir. 2010); *see also Ekl v. Knecht*, 585 N.E.2d 156, 163 (Ill. App. Ct. 1991) (overpayment for services constitutes "substantial injury").[12]

For its part, VTech cites two cases to support its attack against Plaintiffs' unfairness claim, but both are distinguishable. (Mot. at 24.) *Halperin* concerned an ICFA deceptive practices claim where the Plaintiff just "sprinkled" the word "unfair" throughout the amended complaint. *Halperin v. Int'l Web Servs., LLC*, 123 F. Supp. 3d 999, 1007 (N.D. Ill. 2015). Here, in contrast, Plaintiffs devote paragraphs to VTech's allegedly unfair conduct and otherwise provide direct support for the unfairness claim as discussed above. And in *Goldberg*, the Court rejected an "eleventh-hour request" for a jury instruction on unfairness distinct from deception where the first time Plaintiff raised a theory of unfairness was on the eve of trial. *Goldberg v. 401 N. Wabash Venture, LLC*, 755 F.3d 456, 464 (7th Cir. 2014) (finding defendants were "not on notice of this theory...[and would] suffer unfair prejudice if Plaintiff [could] now...pursue this new theory."). This case is at the pleading stage, and Plaintiffs have alleged their "unfairness" claim on a timely basis. VTech's argument fails.

[12] The FTC and federal courts have agreed that conduct similar to VTech's is "unfair" under Section 5 of the FTC Act. *F.T.C. v. Wyndham Worldwide Corp.*, 799 F.3d 236, 246 (3d Cir. 2015) (finding that defendant's overstatement of cyber security in its privacy policy was "unfair" under the Federal Trade Commission Act). *See* 815 ILCS 505/2 ("In construing this section consideration shall be given to the interpretations of the Federal Trade Commission and the federal courts relating to Section 5(a) of the Federal Trade Commission Act.").

IV. PLAINTIFFS STATE A CLAIM FOR UNJUST ENRICHMENT.

Finally, VTech argues that the SAC does not state a claim for unjust enrichment because Plaintiffs fail to allege "any law governing their unjust enrichment claim," and the relationship between the parties is governed by contract. (Mot. at 28.) First, any argument that a national unjust enrichment class cannot be certified is premature and not a basis for dismissing a claim at this stage of the litigation. *See, e.g.*, *Rysewyk v. Sears Holdings Corp.*, No. 15 CV 4519, 2015 WL 9259886, *7 (N.D. Ill. Dec. 18, 2015). Second, Plaintiffs brought their unjust enrichment claim in the alternative to warranty and contract-based claims, so dismissal is inappropriate. *See ShopLocal LLC v. Cairo, Inc.*, No. CIV.A. 05 C 6662, 2006 WL 495942, at *2 (N.D. Ill. Feb. 27, 2006) ("Even assuming [plaintiff] is required to plead alternatively, the complaint survives a motion to dismiss. . . . (citations omitted)); *see also Cole-Haddon, Ltd. v. Drew Philips Corp.*, 454 F. Supp. 2d 772, 777 (N.D. Ill. 2006) (holding that failure to plead a quantum meruit claim in the alternative may be cured by amendment).[13] This claim survives the pleadings stage.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court deny VTech's Motion to Dismiss (Dkt. 101) in its entirety.

November 9, 2017

Respectfully submitted,

/s/ _Edward A. Wallace_____

[13] Illinois courts have made clear that unjust enrichment claims may be premised on principles of *either* contract *or* tort law—e.g., fraud. *ShopLocal*, 2006 WL 495942, at *2 ("[A] a plaintiff may sue for both breach of contract and unjust enrichment when: (1) the unjust enrichment claim is based on tort; or (2) the two claims are pled in the alternative." (collecting cases)). Indeed, the Illinois Supreme Court has explicitly rejected the argument VTech makes here and found that because plaintiff's claim was "based on tort, instead of quasi-contract, the existence of a specific contract does not defeat his cause of action." *Peddinghaus v. Peddinghaus*, 692 N.E.2d 1221, 1225 (Ill. 1998). Here, like in *Peddinghaus*, Plaintiffs' claim for unjust enrichment sounds in tort. While VTech attacks Plaintiffs' unjust enrichment claim on the basis of quasi-contract, the Motion only suggests that if the claim sounds in tort its success is tied to Plaintiffs' ICFA claim. But the articulation of fraud underlying Plaintiffs' ICFA claim is sound and VTech provides no independent reason for the unjust enrichment claim's dismissal.

Edward A. Wallace
One of Plaintiffs' Attorneys

Edward A. Wallace
Interim Liaison Counsel
WEXLER WALLACE LLP
55 West Monroe Street
Suite 3300
Chicago, Illinois 60603
T. 312.346.2222
eaw@wexlerwallace.com

Jay Edelson
Interim Co-Lead Counsel
Rafey Balabanian
Benjamin S. Thomassen
EDELSON PC
350 North LaSalle Street, 13th Floor
Chicago, Illinois 60654
T. 312.589.6370
jedelson@edelson.com
rbalabanian@edelson.com
bthomassen@edelson.com

Jason L. Lichtman
Interim Co-Lead Counsel
LIEFF, CABRASER, HEIMANN & BERNSTEIN, LLP
250 Hudson Street, 8th Floor
New York, NY 10013
T. 212.355.9500
jlichtman@lchb.com

Cari Campen Laufenberg
Plaintiffs' Steering Committee
KELLER ROHRBACK L.L.P.
1201 Third Avenue, Suite 3200
Seattle, Washington 98101
T. 206.623.1900
claufenberg@kellerrohrback.com

Christopher S. Hinton
Plaintiffs' Steering Committee
THE HINTON LAW FIRM
275 Madison Avenue, 34th Floor
New York, New York 10016

T. 646.723.3377
chinton@hintonlegal.com

Nancy A. Kulesa
Plaintiffs' Steering Committee
LEVI & KORSINSKY LLP
30 Broad Street, 24th Floor
New York, New York 10004
T. 212.363.7500
nkulesa@zlk.com

Amy E. Keller
DiCELLO LEVITT & CASEY LLC
Ten North Dearborn Street
Eleventh Floor
Chicago, Illinois 60602
T. 312.214.7900
akeller@dlcfirm.com

Counsel for Plaintiffs and the Putative Classes

CERTIFICATE OF SERVICE

I hereby certify that, on November 9, 2017, a copy of the foregoing was filed using this Court's CM/ECF service, which will send notification of such filing to all counsel of record.

/s/ Edward A. Wallace____
Edward A. Wallace