UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

	Master Case No. 15-cv-10889
IN RE VTECH DATA BREACH LITIGATION	Consolidated Case Nos. 15-cv-10889, 15-cv-10891, 15-cv-11280, 15-cv-11620, 15-cv-11885
This document relates to all actions	The Honorable Manish S. Shah

DEFENDANT VTECH ELECTRONICS NORTH AMERICA, LLC'S MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS SECOND CONSOLIDATED AMENDED COMPLAINT

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTRODUCTION

In their Second Consolidated Amended Complaint ("Complaint"), Plaintiffs have withdrawn their previous claims of typical "data breach" injuries (such as fear of future identity theft or diminished value of their personal information) to focus exclusively on arguments that the devices they purchased from VTech are somehow less valuable than they originally thought as a result of a data breach that took place in November 2015. The Complaint now presents a garden-variety diminished value case, with which the courts have long experience.

Plaintiffs' narrowed claims for (1) breach of express contract; (2) breach of an implied warranty of merchantability; (3) violations of the Illinois Consumer Fraud and Deceptive Practices Act ("ICFA"); and (4) unjust enrichment, fare no better than they did when this Court first considered them. They still rest on the fundamentally flawed premise that VTech's alleged promises regarding its "Online Services" (Learning Lodge and Kid Connect) were somehow relevant to the hardware devices that Plaintiffs purchased ***before*** they registered for the Online Services. As this Court correctly concluded earlier, the Plaintiffs' "registration for online services is a separate and distinct event, unrelated to the purchase of the toys, and the online services agreements are likewise separate and distinct from the contract made at the point of purchase." *See* July 5, 2017, Memorandum Opinion and Order ("Opinion"), Dkt. 87, at 19. Nothing in the current Complaint gives the Court any reason to depart from this conclusion. The Complaint, like its predecessor, should therefore be dismissed under Federal Rule of Civil Procedure 12(b)(6), only this time with prejudice.[1]

[1] VTech reserves all rights to move to strike or otherwise challenge the class certification claims set forth in Plaintiffs' Complaint if this matter moves beyond initial dispositive briefing.

FACTUAL ALLEGATIONS[2]

I. The Parties and Products

VTech is the leading manufacturer of electronic learning toys such as tablets, smartwatches and "multi-functional handheld touch learning systems" for preschool and grade school children. Compl. ¶ 2. VTech provides functional support for certain of its hardware devices through the use of its "Online Services"—Learning Lodge and Kid Connect. *Id*. ¶ 3. However, customers may register for and access these Online Services only ***after*** they purchase their hardware devices. The use of these Online Services is governed by contract terms and conditions, as explained below, that govern the relationship between VTech and those who register on the two online sites. Parents can access Learning Lodge to register their devices online, track their children's learning progress, update certain product features and applications, and purchase educational games. *Id.* ¶¶ 3, 35-36. Notably, while the Complaint discusses these functions of Learning Lodge in broad terms, nowhere does it explain what features of the devices are (or were) made unavailable when VTech temporarily shut down Learning Lodge after the data breach, or the impact (if any) on any particular VTech device in the absence of Learning Lodge access. Without such allegations, Plaintiffs' claims of damage while the Online Services were unavailable are pure speculation.

Kid Connect is a separate online platform that facilitates communications between parents (using their cellular phones) and children (using select VTech tablets) via text message and, for those upgrading to "Premium Kid Connect," through image and voice message functions. *Id*. ¶ 40. While the Complaint specifies that it is not possible to use the Online Services without first having purchased a VTech device, the Complaint does not allege the

[2] Although VTech disputes Plaintiffs' material allegations, for purposes of this motion, VTech accepts any well-pleaded facts as true, as is required on a Rule 12(b) motion to dismiss.

inverse—*i.e.*, that it is not possible to use a VTech device without the Online Services. *Id.* ¶ 38. That is because the products' central functionality—allowing children to play educational games—remained unaffected by the temporary shut-down of Kid Connect (or Learning Lodge for that matter).

To access VTech's Online Services, customers register with their names, home addresses, email addresses, and passwords for the website. *Id.* ¶ 42. After parents activate a primary account, they have the option of creating profiles for their children that may include the child's name, date of birth, and gender (parents may include photographs or other images in the setup of the Kid Connect account). *Id.* ¶ 43. The Complaint does not allege what, if any, information about a child or user is required to activate an account and what information is merely optional. Furthermore, the Complaint does not allege which particular VTech device functions, if any, are inoperable without accessing the Online Services.

A. *Providing a Kid Safe Experience*

Central to Plaintiffs' claims is their conclusory assertion that VTech misled customers by promising a "kid safe experience," which allegedly meant keeping kids' ***information*** safe. But the ***factual*** allegations in the Complaint make it clear that VTech's statements about providing a "kid safe experience" refer only to the functions on the devices that permit parents to control what children do and see online, ***not*** to any data security measures for information collected from or about children as part of the Online Services. For example, according to the Complaint, VTech lauds its ability to provide children with a "safe environment to explore the Internet ***by limiting the sites he or she is allowed to visit***." *Id.* ¶ 11. To do so, "VTech has selected several websites, videos and games with kid-safe content." *Id.* In a technological world that offers largely unfettered access to potentially inappropriate online content, VTech has created a "kid-safe" space that prevents children from using their VTech devices to access offensive content

that may not be age appropriate. *Id*. ¶¶ 12-13. The Complaint contains no allegations that any child accessed inappropriate content through their VTech devices or circumvented the kid-safe space to visit sites that were not parent-approved.

Similarly, VTech promoted certain devices as offering a "kid-safe Wi-Fi connection to the Internet" so that "children can search VTech and parent-approved websites as well as communicate in real time" using Kid Connect. *Id*. ¶ 13. Plaintiffs' own factual allegations underscore that these offerings deal with limits on online navigation by saying that, according to experts, "two of the biggest drawbacks of children playing with adult tablets are: (a) the potential for unsupervised web access; and (b) content that isn't really meant for young children." *Id*. ¶ 20. The "kid safe Wi-Fi connection" addresses those concerns. It also provides convenience for parents who are not near a computer but who desire to access or upload "new educational games for their kids" using the device's Wi-Fi capabilities. *Id*. ¶ 14. Notably, the Complaint does not allege that the Wi-Fi access feature was unavailable, inaccessible, or somehow permitted children to access inappropriate internet content. Indeed, there have been no allegations that VTech's platform provided anything other than "kid-friendly apps," "web access for child-safe websites," or a "kid-safe browser"—precisely what VTech advertised. *Id*. ¶¶ 16, 20.

B. ***Advertising***

The Complaint alleges that VTech made "prominent representations on the Kid Connect Products' packaging" to broadcast the kid-safe internet experience offered by certain VTech devices.[3] *Id*. ¶ 24. But this packaging says nothing about data security. Rather it clearly details that the applicable devices are Wi-Fi accessible (which they are), can be connected to Android

[3] The Complaint limits its discussion of representations made through advertising predominately to VTech's devices that could access the Kid Connect service—namely, the InnoTab Max, and InnoTab 3s. *Id*. ¶¶ 23, 24. Thus, the allegations involving VTech's Kid Connect advertising do not apply to the several "Learning Lodge devices" identified in the Complaint. *Id*. ¶ 22.

devices (which they can), and provide access to an extensive learning software library (which they do). *Id*. ¶ 25. The packaging also identifies the ability of these devices to "explore VTech selected sites, or manage your child's access to websites with parental controls" (which they do). *Id*. ¶ 27 (figure 2).

Similarly, the Complaint details the information provided on the packaging of these devices regarding various apps that were included with or available for the device, which would be "safe for the devices they are on…age-appropriate and embodied with learning principles." *Id*. ¶¶ 27-28 (figures 2, 3). There are no allegations that the advertised apps were not included on or available for the devices that were purchased, or that the apps were otherwise not "safe for the devices" or "age appropriate."

The "footnotes" on VTech's packaging specifically state that "VTech Kid Connect is a subscription service." *Id*. ¶ 29 (figure 5). While VTech offers the service free for one year after the purchase and registration of certain devices and the separate setting up of a Kid Connect account, the packaging does not represent that the service is free beyond that period of time or that the service will continue in perpetuity if the subscription is not later renewed. *Id*. Likewise, the packaging does not advise the purchaser that the device will be rendered unusable in the event that the purchaser opts not to renew a Kid Connect subscription (because it will not).

The Complaint's discussion of VTech's advertising regarding the Learning Lodge concludes that VTech "marketed access to the Learning Lodge as an integral feature directly on the product's packaging." *Id*. ¶ 32. The specific language of the advertising, however, stated simply, "add your personal videos and music and discover a wealth of music tracks to download from the VTech Learning Lodge." *Id*. ¶ 32 (Figure 6). The advertising did not say that the customer must connect to Learning Lodge to purchase or play games, or for the product to

function. It merely describes an alternate method of purchase, i.e., downloading a game, for which internet connectivity is required, as opposed to purchasing the game at a brick and mortar location. *Id*. ¶ 34.

II. The Terms

VTech has Learning Lodge Terms and Conditions and Kid Connect Terms and Conditions (together, the "Terms") associated with the use of its Online Services. *Id*. ¶ 48. VTech's Terms, along with its Privacy Policy (which is expressly incorporated into the Terms), discuss VTech's data safety protocols and procedures for information collected through the Online Services.[4] *Id*. As they did in their original complaint, Plaintiffs omit from their amended Complaint several significant provisions of the Terms, discussed below.[5]

A. *Learning Lodge Terms*

Learning Lodge is a VTech-designed application store that enables adult customers (age 18 years or older) of certain VTech devices to download certain VTech software. Ex. A, ¶ 1.1. A customer's use of the Learning Lodge constitutes his or her acceptance of the Learning Lodge Terms, and customers who do not agree with the Learning Lodge Terms are expressly instructed not to install or to use the Learning Lodge. *Id*. ¶ 1.2. In the Learning Lodge Terms, VTech

[4] The Terms, as they existed at the time of the data breach in November 2015, were attached to the Complaint, and are attached hereto as Exhibits for the Court's convenience. The Learning Lodge Terms and Conditions (the "Learning Lodge Terms") are attached as **Exhibit A**, the Kid Connect Terms and Conditions (the "Kid Connect Terms") are attached as **Exhibit B**, and the Privacy Policy is attached as **Exhibit C**.

[5] "[O]n a Rule 12(b)(6) motion to dismiss, the court generally must confine its inquiry to the factual allegations set forth within the four corners of the complaint," subject to the one exception where documents that "are referred to in the plaintiff's complaint are central to her claim," and are "concededly authentic." *Venture Assocs. Corp. v. Zenith Data Sys. Corp*., 987 F.2d 429, 431 (7th Cir. 1993); *Tierney v. Vahle*, 304 F.3d 734, 738 (7th Cir. 2002). Here, Plaintiffs' reliance on VTech's Terms is central to their claims, even though Plaintiffs omitted ***significant*** provisions of those documents in their Complaint. As this Court noted in granting VTech's motion to dismiss Plaintiffs' first complaint, the Court may consider all relevant portions of the Terms in evaluating Plaintiffs' claims and applicable defenses. Dkt. 87, at 4 n. 3.

explicitly reserves the right to "ALTER OR REMOVE THE LEARNING LODGE™ OR SUSPEND OR TERMINATE [THE CUSTOMERS'] USE IN ANY WAY, AT ANY TIME, FOR ANY REASON, WITHOUT PRIOR NOTIFICATION, AND WILL NOT BE LIABLE IN ANY WAY FOR POSSIBLE CONSEQUENCES OF SUCH CHANGES." *Id.* ¶ 2.7 (emphasis in original). Further, the Learning Lodge Terms contain several express provisions limiting liability:

> VTech will not be responsible or liable, directly or indirectly, in any way for any loss or damage of any kind incurred as a result of, or in connection with, your failure to use of or inability to use the VTech Software and/or the Website.
>
> ***
>
> VTech shall have no liability for any damage, loss, expense or detriment caused, whether directly or indirectly, by a defect under the Learning Lodge™ or arising in respect of your use of or inability to use the Learning Lodge™.
>
> ***
>
> You agree to hold VTech, and its subsidiaries, affiliates, officers, agents, co-branders or other partners, and employees harmless from and against any or all claims, proceedings, damages, losses, injuries, costs and expenses or liabilities arising from . . . your use of the Learning Lodge™ and/or the Website . . . .
>
> ***
>
> You expressly understand and agree that to the extent permitted by law, VTech shall not be liable to you for any direct, indirect, incidental, special, consequential or exemplary damages, including but not limited to damages for loss of profits, revenue, data, or goodwill, resulting from your use of or inability to use the Learning Lodge™ and/or the Website.

Id. ¶¶ 2.4, 3.2, 5, 6. The Complaint does not allege that any of the Learning Lodge Terms were concealed or unavailable to them before they accessed or used the Learning Lodge, or that they were unable to return their VTech device in the event that they disagreed with the Terms. Nor does it allege that any of VTech's exculpatory clauses are inconsistent with any express warranty from VTech.

The Learning Lodge Terms contain a choice-of-law provision identifying Illinois law as governing, as well as an exclusive forum clause identifying Cook County, Illinois, as the proper venue for disputes related to the Terms. *Id*. ¶ 10; Compl. ¶ 137.

B. *Kid Connect Terms*

The Kid Connect Terms "govern User's ***use of the services***, including, without limitation, Content, Submitted Content, software/applications, [and] components or features of VTech Kid Connect." Ex. B, Preface (emphasis added). A User must confirm acceptance of the Kid Connect Terms by "clicking the box stating 'Confirmed,'" and minors are permitted to use Kid Connect only if their parents have accepted the Kid Connect Terms. *Id*. ¶¶ 2.1, 2.2.

The Kid Connect Terms do not say anything about the VTech devices that are compatible with Kid Connect other than notifying users that they are to use "the appropriate products and internet connections, including the mobile phone devices, communication devices, operating systems and data connection services . . . designated as necessary for using the Service under the Users' own responsibility and at the Users' own expense." *Id*. ¶ 7.1. As with the Learning Lodge Terms, in the Kid Connect Terms, VTech "reserves the right to modify at the Company's own discretion, the whole or part of the [Kid Connect] Service at anytime without any prior notice to the Users," and expressly notes that "Users shall use this Service at his/her own risk, and shall bear all responsibility for actions carried out and their results upon this Service." *Id*. ¶¶ 7.3, 11.1.

The Kid Connect Terms also contain an express warranty disclaimer, which states:

> THE SERVICE IS PROVIDED "AS IS" AND "AS AVAILABLE" WITHOUT ANY WARRANTY WHATSOEVER. TO THE EXTENT ALLOWED UNDER APPLICABLE LAWS AND REGULATIONS, COMPANY DISCLAIMS ANY AND ALL EXPRESS, STATUTORY AND IMPLIED WARRANTIES WHATSOEVER, INCLUDING WITHOUT LIMITATION, THE WARRANTIES OF MERCHANTABILITY . . . . USER AGREES HE/SHE ASSUMES TOTAL RESPONSIBILITY FOR YOUR USE OF THIS SERVICE.

Id. ¶ 12.1 (emphasis in original). It also contains an unambiguous limitation of liability provision, stating:

> THE COMPANY SHALL NOT BE RESPONSIBLE FOR ANY DAMAGES INFLICTED UPON USERS IN RELATION TO THE USE OF THE SERVICE TO THE EXTENT ALLOWED UNDER THE APPLICABLE LAWS, REGULATIONS, AND JURISDICTION.
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> ***
>
> TO THE EXTENT ALLOWED UNDER APPLICABLE LAWS AND REGULATIONS, IN ADDITION TO, CLAUSE 12.2 ABOVE, IN NO EVENT SHALL THE COMPANY, ITS AFFILIATES, SHAREHOLDERS . . . OR AGENTS, BE LIABLE TO THE USERS FOR ANY DIRECT, INDIRECT, SPECIAL, EXEMPLARY, PUNITIVE, OR CONSEQUENTIAL DAMAGES WHATSOEVER RESULTING FROM . . . (III) ANY UNAUTHORIZED ACCESS TO OR USE OF COMPANY SERVERS AND/OR ANY AND ALL MATERIALS, DATA, INCLUDING, WITHOUT LIMITATION, PERSONAL INFORMATION AND/OR FINANCIAL INFORMATION STORED THEREIN, (IV) ANY INTERRUPTION OR CESSATION OF TRANSMISSION TO OR FROM OUR SERVERS AND LOSS OF SUBMITTED CONTENT, (V) ANY BUGS, VIRUSES, TROJAN HORSES, OR THE LIKE, WHICH MAY BE TRANSMITTED TO OR THROUGH THE SERVICE BY ANY THIRD PARTY, (VI) ANY LOSS OR DAMAGE OF ANY KIND INCURRED AS A RESULT OF THE USE OF ANY CONTENT OR SUBMITTED CONTENT, POSTED, EMAILED, TRANSMITTED, OR OTHERWISE MADE AVAILABLE VIA THE SERVICES, AND/OR (VII) ANY DISCLOSURE OF INFORMATION PURSUANT TO THE TERMS AND CONDITIONS OR PRIVACY POLICY.

Id. ¶¶ 12.2, 12.3 (emphasis in original).

The Kid Connect Terms are governed by the laws of Hong Kong SAR, and "conflicts between Users and the Company related to the Service will be governed primarily under the exclusive jurisdiction of the court of Hong Kong SAR." *Id.* ¶ 14.2.[6]

[6] For purposes of this Motion to Dismiss only, VTech consents to the application of Illinois law, including Illinois conflicts of law rules, as alleged by the Plaintiffs in their Complaint. Compl. ¶ 138. VTech does so while reserving its right to enforce the Hong Kong choice-of-law provision and/or forum selection clause set out in the Kid Connect Terms in the event that any of Plaintiffs' claims regarding Kid Connect survive this Motion to Dismiss.

C. *Privacy Policy*

VTech incorporates its Privacy Policy by reference into the Learning Lodge Terms and the Kid Connect Terms. *See* Ex. A, ¶ 1.2; Ex. B, ¶ 2.3; Compl. ¶ 48. Under the Privacy Policy, VTech's web services (including the Online Services at issue here) are intended to be purchased and used by adults:

> Although VTech sells and promotes children's ***products***, the Web ***Services*** are intended for adult use, and VTech's information collection practices are targeted towards adults . . . . [A]ll of our products are intended to be purchased by adults and the services offered by the Web Services are intended for adults. If you are under 18 years old and you want to buy something on the Web Services, you must have an adult buy it for you.

Ex. C, Preface, ¶ 7.1 (emphasis added). Further, the use of VTech's web services constitutes the customer's acceptance of the Privacy Policy. *Id*. ¶ 1. VTech collects certain information from customers if the customer chooses to participate in various web service features, including: creating and managing a web services account; purchasing products or downloading software applications; uploading play or activity data from a web-connected product; or registering products. *Id*. ¶ 2.3. While customers' decisions to withhold certain information about themselves and their children may limit or prevent access to certain functions of VTech's Online Services, nothing in the Privacy Policy indicates that withholding such information will affect the use of VTech's devices. *See id*. ¶ 2.1.

The Privacy Policy also expressly disclaims liability for the actions of third parties that compromise a user's information:

> VTech will not be liable in any way for its failure or delay to comply with this Policy if that performance becomes commercially impracticable as a result of . . . any cause beyond VTech's reasonable control. . . . VTech uses reasonable precautions to keep your personal information secure. However, VTech is not responsible for the actions of others.

Id. ¶ 14. Like the Learning Lodge Terms, the Privacy Policy contains an Illinois choice-of-law provision, and a Cook County exclusive forum provision. *Id*. ¶ 12.

III. The Data Breach

On November 14, 2015, a hacker, whose avowed mission was to expose security issues in commercial websites, illegally circumvented VTech's data security systems and gained access to VTech databases containing certain non-financial customer information, including: some customers' names, email addresses, "secret questions and answer[s] for password retrieval," mailing addresses, download history and encrypted passwords, and names, genders, and birthdates for some of the customers' children. Compl. ¶¶ 4, 53-54. The hacker also gained access to some images and messages that parents and children exchanged over Kid Connect. *Id*.

The hacker transmitted samples of the data to Lorenzo Francheschi-Bicchierai, a journalist working for a data security media outlet, Motherboard/Vice Media ("Motherboard"), to prove a point and to tout his own exploits. *Id.* ¶ 54 n. 30 (*citing* Motherboard's Nov. 30, 2015 article, which specifically stated that the hacker "said he doesn't intend to publish or sell the data")[7]; *see also id.* ¶59. Motherboard did not disseminate the data, but consulted with a single individual named Troy Hunt, a data security consultant who tracks and analyzes malicious web activity. Hunt confirmed that "this is not data that I've seen distributed around the usual channels, to the best of my knowledge it remains with the individual who obtained it, Lorenzo and myself." *See* Troy Hunt, *When children are breached – inside the massive VTech hack,* TROYHUNT.COM (Nov. 28, 2015), http://www.troyhunt.com/2015/11/when-children-are-breached-inside.html, *relied upon* in Compl. ¶ 58 n. 31, 60 n. 34. Plaintiffs do not allege that the

[7] VTech does not concede that Plaintiffs' cited articles set forth the facts, but to the extent statements made in the articles are assumed to be true for the purposes of this motion, they still show that Plaintiffs have failed to state a proper claim or to establish injury.

dissemination of VTech's customer information went beyond Messrs. Francheschi-Bicchierai or Hunt, or that they did anything with the information that might cause Plaintiffs harm. Nor do Plaintiffs allege that the hacker sold or provided access to the breached material to cybercriminals or any other unauthorized third-party. To the contrary, nearly two years after the breach, the dissemination of VTech's customer information has been limited and contained to those discrete parties.

Within four days of being notified of the possibility of a data breach (and one day after confirming the breach with Motherboard), VTech informed its customers of the hack. *Id*. ¶¶ 52, 62-63. Indeed, as the Complaint concedes, VTech took immediate and sweeping steps to protect its customers and their data from further risk, beginning with the suspension of its Online Services. *Id*. ¶¶ 6, 66. Some services, like Learning Lodge, resumed less than two months later, in January 2016. *Id*. ¶ 6 n. 1. Kid Connect resumed in December 2016. Plaintiffs' Complaint fails to mention that less than a month after suspending the Online Services, on December 24, 2015, VTech launched interim websites to permit its customers to access firmware updates until the Learning Lodge was once again accessible.

IV. Claimed Damages

In this Complaint, Plaintiffs have narrowed their claims for damages to a single concept—diminishment of the value of their VTech devices.[8] This consists of two allegations:

[8] Speckled throughout their Complaint, Plaintiffs assert cursory, unsubstantiated allegations of injuries that echo back to their original complaint, such as claims that their "sensitive information and privacy [were] compromised," and that they incurred "expenses and time spent replacing non-secure VTech Products with secure alternative products and services." *Id.* ¶¶ 1, 159. The Court considered these claims (previously categorized as "potential risks of future harm" and "risk reduction efforts and intangible risks" in the initial complaint) and provided a thorough analysis detailing why they failed under Article III's standing requirements and Federal Rule of Civil Procedure 12(b)(1). Dkt. 87, at 7-11. To the extent that Plaintiffs argue that they have pled some injury other than diminishment of value in this Complaint, and for purposes of preserving all arguments for potential appeal, VTech adopts and incorporates the Rule 12(b)(1)

(1) that Plaintiffs overpaid for the VTech devices, *Id.* ¶¶ 1, 72; and (2) that Plaintiffs lost the use of VTech's Online Services, which diminished the value of their hardware devices *Id.* ¶¶ 1, 66. Plaintiffs allege breach of contract and other identical theories to seek punitive damages, restitution, and an award of attorneys' fees, expenses, and costs. *Id.* ¶ 275.

ARGUMENT

I. Plaintiffs Fail Again To State a Claim for Breach of Contract

Plaintiffs' First and Second Causes of Action allege breach of contract on behalf of the Learning Lodge Class and the Kid Connect Class, respectively. For breach of contract, Plaintiffs must allege: "(1) the existence of a valid and enforceable contract; (2) substantial performance by the plaintiff; (3) a breach by the defendant; and (4) resultant damages." Dkt. 87, at 13 (quoting *Reger Dev., LLC v. Natl' City Bank*, 592 F.3d 759, 764 (7th Cir. 2010)).

Plaintiffs claim two purported breaches of contract: (a) VTech's alleged failure to implement industry-standard data security measures to protect Plaintiffs' information; and (b) VTech's suspension of access to the Online Services. Compl. ¶¶ 150, 163. As the Court made perfectly clear in its Opinion, to succeed in pleading a breach of contract, the Plaintiffs must plead facts sufficient to demonstrate that the initial purchase transaction included ***both*** the hardware device ***and*** the Online Services. Dkt. 87, at 18-19. Plaintiffs once again fall short in this endeavor. For this reason alone, the Court should dismiss Plaintiffs' breach of contract claims. But, even if the Court concludes that the purchase transaction somehow included both VTech's device and access to the Online Services, Plaintiffs are unable to escape the Terms' exculpatory and limitation of liability clauses. For both—independent—reasons, Plaintiffs do

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standing arguments set out in its previous Motion to Dismiss Plaintiff's Consolidated Complaint (Dkt. 61, at 12-19) and Reply in support thereof (Dkt. 74, at 1-6), as if fully set forth herein.

not state a sustainable claim for breach of contract, and this Court should dismiss their claims with prejudice.

A. *Plaintiffs Failed to Plead Facts Sufficient to Show the Purchase of an Indivisible Bundle of Products and Services*

Plaintiffs have claimed that their hardware devices are worth less than they paid for them because of VTech's purported actions regarding the Online Services (providing inadequate security for information collected through those services and then temporarily suspending the Online Services after the breach). To succeed in that claim, Plaintiffs must allege and prove that VTech breached its contract governing the hardware devices. But, just as this Court found in its Opinion dismissing Plaintiffs' first complaint, Plaintiffs do not state a claim for breach because the Online Services, upon which this entire litigation is based, were not part of the contract forming the initial purchase of the VTech devices.

Plaintiffs admit that a customer is not automatically granted access to VTech's Online Services after purchasing a VTech device. Compl. ¶¶ 34-35 ("Learning Lodge serves as a portal" and as a "gateway"); 31 (citing the Kid Connect user manual instruction for purchasers to "register" to obtain access to the Online Services). As the Court stressed in its Opinion, Plaintiffs had the option of enjoying (or returning) the devices without ever using the Online Services, something that Plaintiffs do not materially dispute in this Complaint. Dkt. 87, at 20. If a customer who purchased a VTech device wanted to access the Online Services, that customer had to take the extra steps of going online, creating an account for the Online Services, and reviewing and accepting each set of Terms before gaining access. Taking the additional step of accepting the Terms, by way of a "click-wrap" agreement, created a separate contract governing the use of the Online Services. Click-wrap agreements are well-established internet-based

contracts that govern the use of an online platform.[9] *See Van Tassell v. United Mktg. Grp., LLC*, 795 F. Supp. 2d 770, 790 (N.D. Ill. 2011).

The plain language of the Terms reiterates that the contracts a consumer entered to gain access to the Online Services are wholly separate and distinct from the purchase of the device. The Terms govern only the use of Learning Lodge and Kid Connect. For instance, the Learning Lodge Terms state that they are an "offer[] to install and use" ***only*** Learning Lodge. Ex. A recitals, ¶ 1.2 (stating that a customer's acceptance of the Learning Lodge Terms permits only use of the Learning Lodge). Similarly, the Kid Connect Terms govern only a "User's use of the ***services***, including . . . [the] features of VTech Kid Connect." Ex. B recitals (emphasis added). And only an individual aged 18 years or older can agree to the Terms governing the use of the Online Services, while the electronic toys are not subject to the same express restrictions. Ex. B ¶ 2.2; Ex. A ¶ 1.1.

In the event a user breaches the Terms or does not accept the Terms, she is prevented only from using the Online Services. Ex. A ¶ 7. The Terms do not require a return of the VTech device for a breach or non-acceptance of the Terms, nor do they provide for a partial refund if a user is unwilling to submit to the Terms. Further clarifying the distinction between the product and the Online Services, the Learning Lodge Terms provide a limited 90-day warranty that is related ***only to access to Learning Lodge***. Ex. A ¶ 3.1. The Terms simply do not govern the purchase, handling, or use of the VTech device in any manner. Nor is a customer ***required*** to access Online Services to enjoy the VTech device. This Court has already held as much: "registration for online services is a separate and distinct event, unrelated to the purchase of the

[9] Notably, customers who purchase more than one VTech device are not required to repeatedly agree to the Terms for the Online Services (assuming that they want to use the Online Services) after the purchase of each new device. If the device and the Online Services were truly an "indivisible package," that would not be the case.

toys, and the online service agreements are likewise separate and distinct from the contract made at the point of purchase." Dkt. 87, at 19. Plaintiffs have failed to assert any factual allegations calling the Court's ruling into question.[10]

Rather than confronting this issue, Plaintiffs cherry-pick a host of out-of-context advertisements relating to Kid Connect accessible devices. Critically, none of Plaintiffs' "new" allegations relating to VTech advertising: (1) constitutes an express promise by VTech; or (2) establishes the existence of an understanding between both parties that a portion of the purchase price for the device was allocated to the provision of the Online Services, as the law requires. The Court should therefore reject these allegations as insufficient to state a claim, just as it did in its first decision. *See* Dkt. 87, at 16 n.7 (stating that the user manual is not an express promise to provide online services); 19 (stating that Plaintiffs must plead facts showing that both parties "understood that a portion of the purchase price was allocated to the provision of the online services").

Plaintiffs' discussions regarding VTech's advertising are also flawed in that they rely entirely on a total mischaracterization of the advertisements' use of the term "kid-safe." In an effort to capitalize on a convenient buzzword, Plaintiffs added to their Complaint a number of allegations about the use of the terms "kid-safe" and "kid-friendly" internet on certain VTech device packaging. Compl. ¶¶ 10-21. Plaintiffs then make conclusory assertions that the use of these terms somehow amounted to an express promise that when a consumer purchased any VTech device, that consumer would receive a certain level of data security protection for

[10] Plaintiffs allege in a wholly conclusory manner, "[w]hen customers purchase a VTech Product, they do not merely purchase a physical object (e.g. a tablet). Rather, VTech Customers purchase an indivisible bundle or ecosystem of goods and services… ." Compl. ¶ 46. Plaintiffs' allegations are not supported by any actual factual allegations in the Complaint, and neither the Court nor the Defendants are bound by wholly conclusory statements in a motion to dismiss. *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009) ("[T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions.").

information collected through the use of the Online Services. *See* Compl. ¶¶ 12, 21, 30. But Plaintiffs' argument suffers from two fundamental problems: (1) the Complaint's ***factual*** allegations regarding the "kid safe" references make it clear that the references have nothing to do with data security at all; and (2) the references simply describe the types of "kid-safe" content customers would be able to access with their devices. Thus, nothing in these advertisements somehow renders the Online Services part of the purchase contract for the devices.

First, as the Complaint's factual allegations make clear, the references to "kid-safe" and "kid friendly" simply mean that VTech's internet-accessible toys provide a "safe environment to explore the Internet by limiting the sites [their son] is allowed to visit." Compl. ¶¶ 11, 16 (VTech's bloggers tout "web access for child-safe websites" and a "kid-safe browser"); 20 ("two of the biggest drawbacks of children playing with adult tablets are: a.) the potential for unsupervised web access and b.) content that isn't really meant for young children"); 27 (Fig. 2) (Kid Connect-accessible products allow parents to "manage your child's access to websites with parental controls."). References to "kid-safe" and "kid-friendly" internet thus mean that the devices allow parents to control their children's access to content on the internet; they do not mean that VTech would provide data security for information that customers might provide to VTech during use of the Online Service. Plaintiffs cannot and do not allege that VTech failed to restrict access to adult or other inappropriate websites. Since references to "kid-friendly" and "kid-safe" have nothing to do with a promise of data security, these purported representations are simply irrelevant.[11]

[11] Furthermore, the advertisements identified by the Plaintiffs relate only to certain devices that could be used to access Kid Connect. Compl. ¶¶ 11, 13, 16-19, 25-31. As such, these factual allegations do not apply to the Learning Lodge Class or the other devices identified in the Complaint that could not be used to access Kid Connect.

Second, the references in the advertisements to "kid-safe" content do not even remotely suggest that the purchase of the device somehow includes unfettered access to Learning Lodge or Kid Connect. Therefore, this Complaint fails for the same reason as the first complaint: "[b]ecause plaintiffs did not enter into an online services contract at the time of purchase, the complaint does not plausibly allege that VTech breached a contractual obligation to provide those services." Dkt. 87, at 19.

B. *VTech's Limitation of Liability Clauses Eliminate Plaintiffs' Claims for Interruption of Online Services*

Plaintiffs' breach of contract claim fails for a second, independent reason: the Plaintiffs affirmatively agreed to a provision in the Terms giving VTech the right to suspend or terminate each of the Online Services, and stating that VTech would not be liable for any consequences of such suspension or termination. The Learning Lodge Terms give VTech the right to "ALTER OR REMOVE THE LEARNING LODGE™ OR SUSPEND OR TERMINATE [THE CUSTOMERS'] USE IN ANY WAY, AT ANY TIME, FOR ANY REASON, WITHOUT PRIOR NOTIFICATION, AND WILL NOT BE LIABLE IN ANY WAY FOR POSSIBLE CONSEQUENCES OF SUCH CHANGES." Ex. A, ¶ 2.7. Similarly, in the Kid Connect Terms VTech "reserves the right to modify at the Company's own discretion, the whole or part of the [Kid Connect] Service at anytime without any prior notice to the Users," and expressly notes that "Users shall use this Service at his/her own risk, and shall bear all responsibility for actions carried out and their results upon this Service." Ex. B, ¶¶ 7.3, 11.1.

VTech's temporary suspensions of the Online Services fall squarely within the confines of these unambiguous provisions. *See Becka v. Dieterich*, No. 14 C 8279, 2015 WL 1887844, at *3 (N.D. Ill. Apr. 24, 2015) ("Clear and unambiguous terms are given their plain and ordinary meaning."). This Court has already held that the provision is enforceable, "and VTech was within its rights to suspend the online services." Dkt. 87, at 19-21.

The Terms also contain several plain and unambiguous limitations on liability that the Plaintiffs agreed to when enrolling in Learning Lodge and Kid Connect, respectively. These provisions prevent liability for, among other things: loss or damage relating to consumers' use or inability to use the Online Services, unauthorized access to VTech's servers, and loss or damage incurred as a result of the use of any submitted content or otherwise made available via the Online Services. Ex. A ¶¶ 2.4, 3.2, 5, 6; Ex. B ¶¶ 11.1, 12.2, 12.3.

Federal courts, including the Seventh Circuit, routinely enforce exculpatory clauses and limitations on liability in web-based agreements, just like the Terms here. *Duffy v. Ticketreserve, Inc.*, 722 F. Supp. 2d 977, 990 (N.D. Ill. 2010); *see also Trieber & Straub, Inc. v. U.P.S., Inc.*, 474 F.3d 379, 382 (7th Cir. 2007) (determining liability limitation clause in online click-wrap agreement was valid and enforceable). As the Court definitively held in dismissing Plaintiffs' first complaint, "the exculpatory provisions are enforceable, and VTech adequately disclaims liability." Dkt. 87, at 21-22. Nothing in Plaintiffs' amended Complaint changes this fact. VTech was fully within its rights to suspend the Online Services.

II. Plaintiffs Fail To State a Claim for Breach of the Implied Warranty of Merchantability

Plaintiffs' Third and Fourth Causes of Action for breach of the implied warranty of merchantability fail to address the critical and dispositive issues that plagued their first complaint. As in the first complaint, these causes of action fail to state a claim because: (1) the allegations concerning data security and suspension of the Online Services relate solely to those services, not to the devices, and the services are governed by separate contracts; (2) Plaintiffs are not in privity with VTech because they admittedly bought their devices from third-party retailers; and (3) VTech properly and appropriately disclaimed liability in the Terms.

To state a claim for breach of 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." *Brandt v. Boston Scientific Corp.*, 792 N.E.2d 296, 299 (Ill. 2003); *see also* 810 ILCS 5/2-314(1). "Goods" are defined as "all things, including specially manufactured goods, which are movable at the time of identification to the contract for sale." *Brandt*, 792 N.E.2d at 299 (quoting 810 ILCS 5/2-105(1)). If the sales contract involves a mix of goods and services, a plaintiff bringing this claim must show that 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).

A. *The Allegations of Non-Merchantability Pertain to Services, not Goods*

Plaintiffs allege that the electronic toys were not merchantable due to inadequate data security for information gathered through their use of the Online Services and due to VTech's suspension of the Online Services after the data breach. Plaintiffs, however, improperly conflate the contract created at the purchase of the VTech ***device*** with the subsequent and optional contracts for access to the ***Online Services***. But as this Court has made clear, ***two*** separate transactions occurred: one for the device and one for the Online Services. Dkt. 87, at 19. That is the law of this case. *United States v. Feldman*, 825 F.2d 124, 130 (7th Cir. 1987) ("Under the doctrine of law of the case, 'when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages of the same case.'" (quoting *Redfield v. Continental Cas. Co.*, 818 F.2d 596, 605 (7th Cir. 1987))); *Marseilles Hydro Power LLC v. Marseilles Land & Water Co.*, 481 F.3d 1002, 1004 (7th Cir. 2007) ("The doctrine of the law of the case creates a presumption against a court's reexamining its *own* rulings in the course of a litigation."). Plaintiffs' allegations of non-merchantability concern the allegedly inadequate security measures applied to information collected through the Online Services. This claim thus

relates ***only*** to the Online Services, not the actual goods (*i.e.*, the VTech devices). Accordingly, the Uniform Commercial Code is wholly inapplicable.

Plaintiffs may argue again that the Online Services are somehow necessary to operate the VTech devices. But in this regard, the Complaint restates the ***exact same allegations*** this Court has already rejected. For instance, Plaintiffs again allege that VTech sequestered "software and hardware" updates behind the "Learning Lodge registration 'wall.'" Compl. ¶ 33. And they again allege that certain applications purchased in the form of physical cartridges "routinely" required a software update before they could be played. Compl. ¶ 35. This Court already evaluated these, and similar, allegations, and concluded that such allegations are insufficient to establish that the Online Services were an ***essential*** feature of the products' functionality—a prerequisite for a claim sounding in breach of implied warranty of merchantability. *See* Dkt. 87, at 24.

Instead, at best, Plaintiffs merely show that they subjectively valued the Online Services. Compl. ¶ 50; Dkt. 87, at 24. Subjective valuation falls short of supporting the conclusory allegation that the Online Services were "central to the toys' functionality, or that the use of the toys was substantially limited by the temporary loss of those features." Dkt. 87, at 24. As the Court identified in its Opinion, while Plaintiffs vaguely claimed that their devices were negatively affected by temporary lack of access to the Online Services, they have yet to identify, even remotely, how that is so. It remains "unclear how many applications were restricted…and how many remained available with or without access to the Online Services," and Plaintiffs still fail to allege that the "removal" of any particular features "stopped plaintiffs from playing games or otherwise using their products" in any material way. Dkt. 87, p. 24. Simply adding length to

their Complaint does nothing to bolster, much less save, their failed implied warranty claims. Those claims fail here for the same reasons they failed the first time Plaintiffs made them.

B. *Plaintiffs Still Lack Privity*

Plaintiffs also did not fix the privity problem identified by this Court in its Opinion. Dkt. 87, pp. 24-25. "In order for a plaintiff to file a claim for economic damages under the UCC for the breach of implied warranty, he or she must be in vertical privity of contract with the seller." *Mekertichian v. Mercedes-Benz U.SA., L.L.C.*, 807 N.E.2d 1165, 1168 (Ill. App. Ct. 2004). The cause of action is available to a buyer only "against his immediate seller." *Rothe v. Maloney Cadillac, Inc.*, 518 N.E.2d 1028, 1029 (Ill. 1988).

Plaintiffs trot out more entirely unsupported conclusory allegations to suggest that they, somehow, have privity with VTech. Compl. ¶¶ 175-176. For instance, Plaintiffs assert that members of both classes "have had sufficient ***direct*** dealings with VTech . . . to establish any required privity of contract," but fail to identify any such "direct dealings." Compl. ¶ 175 (emphasis added). Rather, a fair reading of the Complaint indicates the opposite—namely, that Plaintiffs purchased VTech toys ***directly*** from third-party retailers. *See e.g.*, Compl. ¶ 176 ("VTech did not intend its authorized dealers, franchisees, representatives, or agents to be the ultimate consumers . . . ."). Taking Plaintiffs at their word, the VTech toys they allegedly purchased from retailers did not create privity of contract with VTech. *See Jensen v. Bayer AG*, 862 N.E. 2d 1091, 1099 (Ill. App. Ct. 2007) ("In order for a plaintiff to file a claim for economic damages under the Uniform Commercial Code . . . for breach of an implied warranty, he or she must be in vertical privity of contract with the seller. This means that 'the UCC article II implied warranties give a buyer of goods a potential cause of action only against his immediate seller.'" (quoting *Mekertichian*, 807 N.E.2d at 832)).

Plaintiffs try to work around this fatal flaw in two ways. First, Plaintiffs conclude that privity is not required because Plaintiffs are "intended beneficiaries of contracts between VTech and its dealers, franchisees, representatives, and agents." Compl. ¶ 177. But Plaintiffs' legal conclusion lacks any factual or legal support in the contracts themselves. *See Cronimet Holdings, Inc. v. Keywell Metals, LLC*, 73 F. Supp. 3d 907, 917 (N.D. Ill. 2014) (stating that Illinois courts require an express provision conferring third-party beneficiary status to be effective).

Second, Plaintiffs may argue (as they did previously) that they fall into the "direct relationship" exception to the privity requirement based on VTech's marketing campaign. That is not the case. Even though Plaintiffs' Complaint contains a few more references to product packaging and the like than their original complaint, those references still fail to establish a direct relationship. As discussed above (*supra* Sec. I (A)), the advertisements containing references to "kid-safe" features do not equate to promises to provide unfettered access to Learning Lodge or Kid Connect, and they do not relate to data security at all. Further, Plaintiffs failed to plead a Magnuson-Moss Act claim despite knowing that their failure to do so is fatal to their claim. Dkt. 73, at 22 n. 12. So their claim for breach of implied warranty of merchantability is governed solely by Illinois law, which is crystal clear: these Plaintiffs have no warranty claim against the manufacturer, with whom they have no privity and no direct relationship regarding the devices. *See Jensen*, 862 N.E.2d at 1094.

C. *The Terms Prevent a Claim for Breach of Implied Warranty as to Kid Connect*

Finally, VTech disclaimed the implied warranty of merchantability in the Kid Connect Terms. *See supra* Factual Allegations II (B). Implied warranties of merchantability may be excluded per Section 2-316 of the Illinois Commercial Code as long as the contractual terms: "mention merchantability and in case of a writing must be conspicuous . . . . [A]ll implied

warranties are excluded by expressions like 'as is,' 'with all faults' or other language . . . [that] makes plain that there is no implied warranty." 810 ILCS 5/2-316(2), (3)(a). Thus, even if the Court decides the UCC is applicable to this case, the Kid Connect Terms clearly and validly disclaim the implied warranty of merchantability as to the Kid Connect service and any information collected as part of that service. *See MAN Roland Inc. v. Quantum Color Corp.*, 57 F. Supp. 2d 568, 573 (N.D. Ill. 1999).[12]

III. Plaintiffs' Illinois Consumer Fraud and Deceptive Business Practices Act Allegations Again Fail To State a Claim

Plaintiffs attempt to re-plead their failed Illinois Consumer Fraud and Deceptive Business Practices Act ("ICFA") claims in the Fifth and Sixth Counts of the Complaint.[13] Recovery under the ICFA is permitted for either unfair or deceptive conduct. *Robinson v. Toyota Motor Credit Corp.*, 775 N.E.2d 951, 960 (Ill. 2002). But, critically, because "[w]hat is deceptive is also unfair," to plead unfair conduct under the ICFA, the allegations must be distinct from any alleged deceptive conduct. *Goldberg v. 401 Wabash Venture LLC*, 755 F.3d 456, 464 (7th Cir. 2014); *Halperin v. Int'l Web Servs., LLC*, 123 F. Supp. 3d 999, 1007 (N.D. Ill. 2015). Here, Plaintiffs, just as in their first complaint, plead ***only*** deceptive conduct. Dkt. 87, at 27 n. 10

[12] It is immaterial that this disclaimer is found in the Kid Connect portion of the VTech Terms because all but one of the Plaintiffs allege they utilized the Kid Connect Services and, thus, are bound by this portion of the Terms. For the one Plaintiff who does not allege access to the Kid Connect Services (Courtney Van Wormer), his claims for implied warranty of merchantability should be dismissed for all other reasons set forth above.

[13] In addition to the ICFA, Plaintiffs purport to bring claims under various state consumer protection laws "[t]o the extent the Court rules that the choice of law provision discussed herein does not extend to allegations concerning state consumer protection laws[.]" Compl. ¶ 205. Any purported claims under consumer protection statutes other than the ICFA must necessarily fail for lack of notice under Federal Rule of Civil Procedure 8(a)(2). *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 545 (2007) (stating that a complaint must adequately "'give the defendant fair notice of what the claim is and the grounds on which it rests'" (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957))). A single unsupported assertion that "[t]he elements of ICFA do not differ substantially from elements of the Plaintiffs' individual state consumer protection laws" does not provide VTech fair notice of Plaintiffs' claims. Compl. ¶ 205. Plaintiffs are prohibited from generally pleading, without any detail, these mystery statutes.

("Plaintiffs also argue that the complaint alleges unfair practices in addition to deceptive acts. That is incorrect. Their claim is based on the alleged misrepresentations and fraudulent and deceptive acts, not unfair practices.").

Although Plaintiffs use the buzzword "unfair," they do not allege any "unfairness" distinct from the purported deception. All of their allegations assert "misrepresentations, omissions, fraudulent conduct, and unfair behavior."[14] *See, e.g.*, Compl. ¶¶ 211 ("VTech violated the ICFA by misrepresenting and/or omitting material facts about the Kid Connect Products, its Online Services, and devices that connect to Learning Lodge and/or Kid Connect."); s*ee also* Compl. ¶¶ 217-221, 223-224, 226-228. Simply adding the word "unfair" to conclusory descriptions of "deceptive" and "fraudulent" conduct is not enough to give rise to an unfairness claim under the ICFA. Thus, the ICFA counts in this Complaint, like the ICFA counts this Court previously dismissed, are strictly for alleged fraudulent activity and, therefore, must satisfy Federal Rule of Civil Procedure 9(b). *See Pirelli Armstrong Tire Corp. Retiree Med. Benefits Trust v. Walgreen Co.*, 631 F.3d 436, 447 (7th Cir. 2009). They do not.

To state a claim under the Illinois Consumer Fraud and Deceptive Business Practices Act, Plaintiffs must allege "(1) a 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 the course of conduct involving trade or commence, and (4) actual damage to the plaintiff (5) proximately caused by the deception." *Avery v. State Farm Mut. Auto. Ins. Co.*, 835 N.E.2d 801, 850 (Ill.

[14] Plaintiffs also apparently allege violations of the Children's Online Privacy Protection Act ("COPPA"). Compl. ¶ 229. Plaintiffs do not even attempt to explain how COPPA can be a proxy for liability under the ICFA. This omission is particularly glaring considering COPPA does not provide a private right of action. Congress specifically chose to limit enforcement of COPPA to the Federal Trade Commission and state attorneys general. Indeed, COPPA specifically assigns *states* the responsibility for "bring[ing] a civil action on behalf of the residents of the State." 15 U.S.C. § 6504(a)(1). Plaintiffs are not permitted to create an end-run around Congress's preclusion of a private right of action for COPPA liability by bootstrapping it through a consumer state fraud statute. No court has held otherwise.

2005). Plaintiffs' ICFA allegations are a country mile from satisfying Rule 9(b)'s requirement of describing the "who, what, when, where, and how" of the supposed fraud. *United States ex rel. Lusby v. Rolls-Royce Corp.*, 570 F.3d 849, 853 (7th Cir. 2009). Plaintiffs' only claimed "misrepresentation" is a promise of reasonable data security, and their only "omissions" are the "material fact that its Online Services did not use industry-standard protections . . . ." Compl. ¶ 221. But Plaintiffs fail to plead reliance on (*i.e.*, that they actually saw) the Terms for the Online Services when purchasing the devices. In fact, there is not a single allegation that any Plaintiff read or reviewed the Terms prior to purchasing a VTech electronic toy. *See Camasta v. Jos. A. Bank Clothiers, Inc.*, 761 F.3d 732, 737-38 (7th Cir. 2014) (stating that a representation must have been made to a plaintiff before the purchase of the merchandise to be actionable under ICFA). The data privacy representations in the Terms, thus, cannot serve as misrepresentations giving rise to a fraud claim.

This leaves only the advertisements listed in the Complaint as claimed misrepresentations of reasonable data security. As already discussed in detail, even under the most liberal reading possible, VTech's advertisements do not relate to data security ***at all***, let alone create express promises. Instead, references to "kid safe" and "kid friendly" relate to parents' ability to restrict their children's access to inappropriate content on the unsupervised World Wide Web. Even if the phrases "kid safe" and "kid friendly" meant what Plaintiffs wish them to mean, they are certainly not specific enough to invoke reliance from a consumer when purchasing a VTech electronic toy. Nor do Plaintiffs plead any such thing. As the Ninth Circuit has explained, '[t]he common theme that seems to run through cases considering puffery in a variety of contexts is that consumer reliance will be induced by specific rather than general assertions." *Cook, Perkiss and Liehe, Inc. v. No. Cal. Collection Serv., Inc.*, 911 F.2d 242, 246 (9th Cir. 1990); *Tylka v.*

Gerber Prods. Co., No. 96 C 1647, 1999 WL 495126, at *5-6 (N.D. Ill. July 1, 1999). The terms "kid safe" and "kid friendly" are not nearly connected enough to data security to be anything more than a very vague and general assertion. The statements in VTech's advertising are not actionable misrepresentations under the well-established case law. *Saltzman v. Pell Corp.*, No. 06 C 4481, 2007 WL 844883, at * 4 (N.D. Ill. Mar. 20, 2007). Further, regarding Plaintiffs' allegations of "omissions," as this Court has already held, "it is too much of a stretch to infer . . . that VTech's inadequate data security constitutes a material omission at the point of purchase." Dkt. 87, at 26. Therefore, again, Plaintiffs fall woefully short of Rule 9(b)'s heightened pleading standard.

Additionally, the ICFA requires a showing of how a plaintiff suffered "actual damage" as a result of a defendant's violation of the ICFA. 815 ILCS 505/10a; *Kim v. Carter's Inc.*, 598 F.3d 362, 365 (7th Cir. 2010). Yet Plaintiffs do nothing to substantiate their claim that they suffered an actual pecuniary loss, which is required to prove actual damage under the ICFA. *Kim*, 598 F.3d at 365 (stating that the ICFA "requires that the plaintiff suffer actual pecuniary loss"). The only alleged damage is that Plaintiffs paid a "premium" for their VTech products "in exchange for VTech's promise to safeguard their PII using industry-standard data security practices." Compl. ¶ 47. Similarly, Plaintiffs conclude that the "market price for the product that VTech promised is substantially higher than the market price for the product it actually provided." Compl. ¶ 50. But, the ICFA requires more. The Seventh Circuit's decision in *Camasta v. Jos. A. Bank Clothiers, Inc.*, requires Plaintiffs at least to conduct a minimal "precomplaint investigation" to gather sufficient factual information to support their fraud claims. 761 F.3d at 740. This means Plaintiffs cannot rest on "naked assertions" to support a fraud claim. *Id.* Plaintiffs must plead the price of other electronic toys in the market place to

demonstrate that they actually paid a "premium" for their data-secure VTech electronic toys. *Id.* (dismissing plaintiff's ICFA claim for failure to substantiate with a comparison in the actual marketplace his conclusion that he overpaid for goods based on a purported misrepresentation). Plaintiffs do not provide any evidence that they paid more than the actual value of the goods they received.

Finally, Illinois law requires more than a mirror of Plaintiffs' breach of contract claim to make out an ICFA claim. As this Court previously held, to the extent Plaintiffs' ICFA claims are based on representations made in the Privacy Policy, they are duplicative of the breach of contract claims and must be dismissed. *See Avery*, 835 N.E.2d at 844 ("A breach of contractual promise, without more, is not actionable under the Consumer Fraud Act.").

IV. Plaintiffs Fail To State a Nationwide Claim for Unjust Enrichment

Plaintiffs fail to identify any law governing their unjust enrichment claim and improperly assert it on behalf of a nationwide class.[15] Generic pleading is inappropriate given that states analyze unjust enrichment claims differently. *See Avenarious v. Eaton Corp.*, 898 F. Supp. 2d 729, 740 (D. Del. 2012). Plaintiffs' claim for unjust enrichment, therefore, fails to state a cause of action. *See In re Wellbutrin XL Antitrust Litig.*, 260 F.R.D. 143, 167 (E.D. Pa. 2009) ("Plaintiffs fail to link their [unjust enrichment] claim to the law of any particular state. As a result of this deficiency, the plaintiffs fail to state a cause of action . . . ."); *Avenarious*, 898 F. Supp. 2d at 740 (granting defendants' motion to dismiss plaintiffs' unjust enrichment claims "for failure to sufficiently identify those jurisdictions under which it brings its claims"); *In re Flonase Antitrust Litig.*, 610 F. Supp. 2d 409, 419 (E.D. Pa. 2009) (dismissing unjust enrichment claims

[15] The contractual provision in the Learning Lodge Terms nominating Illinois law does not apply to a non-contractual claim like unjust enrichment.

because plaintiffs failed to identify which states' laws applied). But, even assuming Illinois law applies, Plaintiffs' unjust enrichment count still fails.

"Unjust enrichment is a 'quasi-contract' theory that permits courts to imply the existence of a contract where none exists in order to prevent unjust results." *Prudential Ins. Co. of Am. v. Clark Consulting, Inc.*, 548 F. Supp. 2d 619, 622 (N.D. Ill. 2008) (citation omitted). Where the relationship between a plaintiff and defendant is governed by contract (as alleged here), the plaintiff may not bring a claim for unjust enrichment unless the claim falls outside the scope of the contract. *Id.* A party may, however, allege claims for breach of contract and unjust enrichment, *if* the claims are pled in the alternative. *See Thorogood v. Sears, Roebuck and Co.*, No. 06 C 1999, 2006 WL 3302640, at *5 (N.D. Ill. Nov. 9, 2006). Plaintiffs do not allege their unjust enrichment claim in the alternative. Instead, the claim "incorporate[s] by reference the allegations contained in each of the preceding paragraphs as if fully set forth herein." Compl. ¶ 268. This, of course, includes Plaintiffs' allegations that both the Kid Connect and Learning Lodge Classes "entered into valid and enforceable contracts with VTech" when they purchased VTech toys or, at bare minimum, when they agreed to the Terms of the Online Services. Compl. ¶¶ 149, 162. Plaintiffs can't have it both ways, and the unjust enrichment claim therefore fails. *Thorogood*, 2006 WL 3302640, at *5 ("Where unjust enrichment claims incorporate by reference allegations of the existence of a contract between the parties, courts will dismiss the unjust enrichment claim."); *see also Guinn v. Hoskins Chevrolet*, 836 N.E.2d 681, 704 (Ill. App. Ct. 2005) ("[W]hile a plaintiff may plead breach of contract in one count and unjust enrichment . . . in [an]other[], it may not include allegations of an express contract which governs the relationship of the parties, in the count[] for unjust enrichment . . . ." (internal quotations and citations omitted)).

To the extent the unjust enrichment claim is found to fall outside of the breach of contract counts, the claim still should be dismissed. A claim for unjust enrichment based on fraud cannot stand on its own after the underlying claims for fraud have been dismissed. *See Ibarolla v. Nutrex Research, Inc.*, No. 12 C 4848, 2012 WL 5381236, at *8 (N.D. Ill. Oct. 31, 2012) ("Where the plaintiff's claim for unjust enrichment is predicated on the same allegations of fraudulent conduct that support an independent claim of fraud, resolution of the fraud claim against the plaintiff is dispositive of the unjust enrichment claim as well." (internal quotations and citations omitted)). Plaintiffs' allegations regarding VTech's "years long marketing campaign" rests on the same alleged misrepresentations pled in their failed ICFA counts. Compl. ¶ 269. Therefore, dismissal of Plaintiffs' ICFA claim also compels the dismissal of Plaintiffs' unjust enrichment cause of action. *See Cleary v. Philip Morris Inc.*, 656 F.3d 511, 519-20 (7th Cir. 2011).

CONCLUSION

Plaintiffs' Complaint rehashes the same claims that this Court previously—and correctly—dismissed. Nothing in the Complaint dictates a different result. For the reasons stated above, Defendant VTech respectfully requests that this Court dismiss Plaintiffs' Second Consolidated Amended Complaint with prejudice, and grant all other relief that the Court deems appropriate.

Dated: October 5, 2017

Respectfully submitted,

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