

United States District Court  
Northern District of California

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**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA**

**JOHNNY DOE,**  
Plaintiff,  
  
vs.  
  
**EPIC GAMES, INC.,**  
Defendant.

CASE NO. 19-cv-03629-YGR

**ORDER (1) DENYING MOTION TO COMPEL  
ARBITRATION OR TRANSFER;  
(2) GRANTING IN PART MOTION AND  
DENYING IN PART MOTION TO DISMISS;  
(3) GRANTING MOTION TO COMPEL  
COMPLIANCE WITH F.R.C.P. 10(A)**

Re: Dkt. Nos. 18, 20, 21, 44, 47, 49, 52

Plaintiff Johnny Doe, by and through his guardian Jane Doe, brings this putative class action against defendant Epic Games, Inc. arising out of plaintiff’s in-application purchases made while playing defendant’s video game, *Fortnite*.

Now pending before the Court are three concurrently-filed motions: (1) defendant’s motion to compel arbitration, or in the alternative, to transfer; (2) defendant’s motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6); and (3) defendant’s motion to compel plaintiff to comply with Federal Rule of Civil Procedure 10(a). Having carefully considered oral argument, the pleadings in this action, and the papers submitted, and for the reasons set forth below, the Court rules as follows: (1) defendant’s motion to compel arbitration or transfer is **DENIED**, (2) defendant’s motion to dismiss is **GRANTED IN PART** and **DENIED IN PART**; and (3) defendant’s motion to compel compliance with Rule 10(a) is **GRANTED**.

**I. BACKGROUND**

The following background is drawn from the complaint and declarations offered in support of the parties’ briefs.

1           **A.       *Fortnite***

2           Defendant is the creator of *Fortnite*, “an open-world survival video game in which players  
3 collect weapons, tools, and resources . . . in order to survive and advance in the game.” The game  
4 can be downloaded at no cost but allows players to make “in-App purchases” using virtual  
5 currency called “V-Bucks,” which can be earned through game play or purchased for money. One  
6 hundred V-Bucks general cost around \$1.00, but a player can obtain V-Bucks at a discount for  
7 purchasing a higher quantity. On certain platforms, defendant may refund a total of three items  
8 during the lifetime of the user if those purchases were made within the previous 30 days. Other  
9 purchases are non-refundable. Players allegedly do not have access to their historical purchases,  
10 within the game or otherwise.

11           **B.       The End User Licensing Agreements**

12           Plaintiff, a minor, created a *Fortnite* account on March 4, 2018. Upon downloading the  
13 software for the video game, plaintiff accepted the terms of defendant’s End User License  
14 Agreement (“EULA”) by first clicking a box that read, “I have read and agree with the End User  
15 License Agreement,” and then clicking a button that read, “Accept.” The EULA purported to set  
16 forth players’ rights and obligations relating to the gaming experience. The EULA contained a  
17 forum selection clause, which provided, in relevant part:

18           **11. Governing Law and Jurisdiction.** Any action or proceeding brought to  
19 enforce the terms of this Agreement or to adjudicate any dispute must be brought  
20 in the Superior Court of Wake County, State of North Carolina or the United States  
21 District Court for the Eastern District of North Carolina. You agree to the exclusive  
22 jurisdiction and venue of these courts[.]

23           The EULA further provided that defendant might “issue an amended Agreement, Terms of  
24 Service, or Privacy Policy at any time in its discretion,” and if any such amendment “[wa]s not  
25 acceptable to [the player], [the player] may terminate th[e] Agreement and must stop using the  
26 Software.” Continued use of the software would “demonstrate [the player’s] acceptance of the  
27 amended Agreement and Terms of Service[.]” Plaintiff allegedly does not recall seeing, reading,  
28 or agreeing to the EULA, nor did plaintiff’s parents seek, read, or agree to the EULA.

1 On June 7, 2019, plaintiff logged on to *Fortnite* and accepted an amended EULA,<sup>1</sup> which  
2 contained the following arbitration provision:

3 **THIS AGREEMENT CONTAINS A BINDING, INDIVIDUAL**  
4 **ARBITRATION AND CLASS-ACTION WAIVER PROVISION. IF YOU**  
5 **ACCEPT THIS AGREEMENT, YOU AND EPIC AGREE TO RESOLVE**  
6 **DISPUTES IN BINDING, INDIVIDUAL ARBITRATION AND GIVE UP**  
7 **THE RIGHT TO GO TO COURT INDIVIDUALLY OR AS PART OF A**  
8 **CLASS ACTION, AND EPIC AGREES TO PAY YOUR ARBITRATION**  
9 **COSTS FOR ALL DISPUTES OF UP TO \$10,000 THAT ARE MADE IN**  
10 **GOOD FAITH (SEE SECTION 12). YOU HAVE A TIME-LIMITED RIGHT**  
11 **TO OPT OUT OF THIS WAIVER.**

12 It also provided:

13 TO ENTER INTO THIS LICENSE AGREEMENT, YOU MUST BE AN ADULT  
14 OF THE LEGAL AGE OF MAJORITY IN YOUR COUNTRY OF RESIDENCE.  
15 . . . YOU AFFIRM THAT YOU HAVE REACHED THE LEGAL AGE OF  
16 MAJORITY, UNDERSTAND AND ACCEPT THIS AGREEMENT  
17 (INCLUDING ITS DISPUTE RESOLUTION TERMS). IF YOU ARE UNDER  
18 THE LEGAL AGE OF MAJORITY, YOUR PARENT OR LEGAL GUARDIAN  
19 MUST CONSENT TO THIS AGREEMENT.

20 In addition, the amended EULA contained a “governing law and jurisdiction” clause like the one  
21 contained in the original EULA. The amended EULA, also like the original EULA, stated that  
22 continued use of the software would demonstrate acceptance of the amended agreement. Further,  
23 as with the original EULA, plaintiff’s parents allegedly did not see, read, or agree to the amended  
24 EULA.

### 25 C. The Instant Suit

26 On May 17, 2019, plaintiff’s counsel sent a letter to defendant in which counsel claimed  
27 that defendant had “specifically target[ed] minors for in-App Purchases” without “includ[ing] any  
28 provisions to get parental consent before making purchases.” The letter further asserted that  
plaintiff “can legally disaffirm contracts with [defendant] for in-App [p]urchases,” including  
purchases that were made by using the minor’s own money. The letter purported to put defendant  
on “notice of [its] violations of the state laws of California,” and “demand[ed] that [defendant]  
correct, repair, replace or otherwise rectify” its policies regarding non-refundable in-App

<sup>1</sup> The amended EULA was promulgated by defendant on March 15, 2019.

1 purchases. The letter warned that if defendant did not respond, plaintiff would file a class action  
 2 complaint. The letter further stated that plaintiff wished to remain anonymous, describing him as  
 3 “a minor residing in California” and “a player of *Fortnite*.”

4 On June 21, 2019, plaintiff filed the instant suit. In the complaint, plaintiff alleges that he  
 5 made several non-refundable in-App purchases using V-Bucks, including, for example, purchases  
 6 of “Battle Pass” or “Battle Pass Tiers.” Plaintiff further alleges that he used his own money,  
 7 through gift cards received on social occasions, to make these purchases. Plaintiff alleges that he  
 8 made these purchases without understanding the dollar amounts involved, and although the later  
 9 wanted to cancel the purchases, he was not allowed to do so under defendant’s non-refundable  
 10 policy. Plaintiff brings this putative class action on behalf of all minors in the United States (the  
 11 nationwide class) and California (the statewide sub-class) who made an in-App purchase that was  
 12 non-refundable or made an in-App purchase with their own gift card.

13 Plaintiff brings claims for declaratory judgment; violation of the California Consumer  
 14 Legal Remedies Act, Cal. Civ. Code § 1750, *et seq.* (“CLRA”); breach of duty of good faith and  
 15 fair dealing; negligent misrepresentation; violation of California Business & Professions Code  
 16 § 17200 *et seq.* (“UCL”); and restitution or unjust enrichment.

## 17 **II. MOTION TO COMPEL ARBITRATION**

18 The Court first considers defendant’s motion to compel arbitration. The Federal  
 19 Arbitration Act (“FAA”) reflects a “liberal federal policy favoring arbitration.” *AT&T Mobility*  
 20 *LLC v. Concepcion*, 563 U.S. 333, 339 (2011) (citation omitted). “By its terms, the [FAA] leaves  
 21 no room for the exercise of discretion by a district court, but instead mandates that district courts  
 22 shall direct the parties to proceed to arbitration on issues as to which an arbitration agreement has  
 23 been signed.” *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213 (1985) (emphasis in original); *see*  
 24 *also* 9 U.S.C. § 4. “The court’s role under the Act is therefore limited to determining: (1) whether  
 25 a valid agreement to arbitrate exists and, if it does, (2) whether the agreement encompasses the  
 26 dispute at issue. If the response is affirmative on both counts, then the Act requires the court to  
 27 enforce the arbitration agreement in accordance with its terms.” *Daugherty v. Experian Info.*  
 28 *Sols., Inc.*, 847 F. Supp. 2d 1189, 1193 (N.D. Cal. 2012) (quoting *Chiron Corp. v. Ortho*

1 *Diagnostic Sys., Inc.*, 207 F.3d 1126, 1130 (9th Cir. 2000)).

2 Defendant moves to compel arbitration pursuant to the arbitration provision contained in  
3 the amended EULA. In opposition, plaintiff argues, among other things, that he has disaffirmed  
4 the EULAs and therefore cannot be compelled to arbitrate. Thus, as a threshold issue, the Court  
5 must determine whether plaintiff disaffirmed the agreement in which he purportedly agreed to  
6 arbitration.

7 **A. Disaffirmance**

8 California law<sup>2</sup> provides that a minor has the capacity to contract, with the exception of  
9 certain contracts specifically prohibited by statute,<sup>3</sup> and subject to the power of disaffirmance. *See*  
10 Cal. Family Code § 6700 (“Except as provided in Section 6701, a minor may make a contract in  
11 the same manner as an adult, subject to the power of disaffirmance[.]”). Under California Family  
12 Code section 6710, “[e]xcept as otherwise provided by statute, a contract of a minor may be  
13 disaffirmed by the minor before majority or within a reasonable time afterwards[.]” Cal. Fam.  
14 Code § 6710.

15 Disaffirmance “may be made by any act or declaration” indicating an intent to disaffirm.  
16 *Celli v. Sports Car Club of Am., Inc.*, 29 Cal.App.3d 511, 517 (1972). In other words, “express  
17 notice to the other party is unnecessary,” *id.*, and “[n]o specific language is required to  
18 communicate an intent to disaffirm[.]” *Berg v. Traylor*, 148 Cal.App. 4th 809, 820 (2007).  
19 Whatever the method, “[d]isaffirmance by a minor rescinds the entire contract, rendering it a  
20 nullity.” *I.B. ex rel. Fife v. Facebook, Inc.*, 905 F.Supp.2d 989, 1000 (N.D. Cal. 2012)

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23 <sup>2</sup> Plaintiff asserts that California law applies to the Court’s disaffirmance analysis, and  
24 defendant does not appear to disagree. In any event, both California and North Carolina law  
25 recognize a minor’s right to disaffirm, and the disaffirmance analysis would not necessarily vary  
based on which law was applied. *R.A. v. Epic Games, Inc.*, Case No. 2:19-cv-014488 (C.D. Cal.  
July 30, 2019), Dkt. No. 39 at 6.

26 <sup>3</sup> Under California law, a minor may not: (1) give a delegation of power; (2) make a  
27 contract relating to real property or any interest therein; or (3) make a contract relating to any  
28 personal property not in his or her immediate possession or control. Cal. Family Code § 6701.  
Such contracts are void and require no act of disaffirmance. *See id.* The parties do not contend  
that the contracts at issue here fall into any one of these categories.

1 (citing *Scollan v. Gov't Emps. Ins. Co.*, 222 Cal.App.2d 181, 183-84 (1963)). The disaffirmance  
2 statute reflects a policy of “shield[ing] minors from their lack of judgment and experience and  
3 confer[ing] upon them the right to avoid their contracts in order that they may be protected against  
4 their own improvidence and the designs and machinations of other people.” *Sparks v. Sparks*, 101  
5 Cal.App.2d 129, 137 (1950); *see also Fife*, 905 F.Supp.2d 1000 (same); *Berg v. Traylor*, 148 Cal.  
6 App. 4th 809, 818 (2007) (“Although in many instances such disaffirmance may be a hardship  
7 upon those who deal with an infant, the right to avoid his contracts is conferred by law upon a  
8 minor ‘for his protection against his own improvidence and the designs of others.’” (quoting  
9 *Niemann v. Deverich*, 98 Cal.App.2d 787, 793 (1950))). The statute also “discourag[es] adults  
10 from contracting with minors.” *I.B. ex rel. Bohannon v. Facebook, Inc.*, No. 12-cv-01894–BLF,  
11 2015 WL 1056178, at \*4 (N.D. Cal. Mar. 10, 2015) (collecting cases). However, the “infancy  
12 defense may not be used inequitably to retain the benefits of a contract while renegeing on the  
13 obligations attached to that benefit.” *I.B. by & through Fife v. Facebook, Inc.*, No. C 12-1894  
14 CW, 2013 WL 6734239, at \*3 (N.D. Cal. Dec. 20, 2013) (citation omitted). Accordingly, if a  
15 minor seeks to disaffirm a contract, “equitable principles dictate that [the minor] ‘must disaffirm  
16 the entire contract, not just the irksome portions.’” *Id.* at \*4 (quoting *Holland v. Universal*  
17 *Underwriters Ins. Co.*, 270 Cal.App.2d 417, 421 (1969)).

18 Here, plaintiff claims that by sending the May 17 letter and later filing suit, he has  
19 disaffirmed both EULAs. Defendant disagrees arguing that (i) plaintiff has not clearly  
20 communicated what he is or is not disaffirming, and (ii) plaintiff’s briefs suggest that he may  
21 continue playing *Fortnite*, which means he cannot disaffirm the contract.

22 With respect to defendant’s first argument, both the May 17 letter and the complaint  
23 convey plaintiff’s intent to repudiate the binding force and effect of plaintiff’s in-App purchases.  
24 Neither, however, conveys disaffirmance of the EULAs more generally. Indeed, the letter asserts  
25 that plaintiff “can legally disaffirm contracts with [defendant] for in-App Purchases” and  
26 purchases plaintiff made “us[ing] [his] own money from gift cards.” Consistent with this  
27 assertion, plaintiff’s complaint purports to bring this declaratory judgment action “for a minor’s  
28

1 right to disaffirm in-App purchases in Epic’s video game Fortnite.”<sup>4</sup> Given that the minor’s power  
2 to disaffirm a contract is broad and can be invoked through “any act or declaration” that conveys  
3 his intent to repudiate a contract, *Celli*, 29 Cal.App.3d at 517, the Court finds this statement  
4 sufficient to “disclos[e] [plaintiff’s] unequivocal intent to repudiate [the] binding force and effect”  
5 of both EULAs.<sup>5</sup>

6 *Berg v. Traylor*, 148 Cal.App. 4th 809 (2007) is in accord. There, one of the appellants, a  
7 minor, purportedly entered into a contract giving the respondent authority to act as the minor’s  
8 exclusive personal manager in exchange for a commission and other consideration. *Id.* at 812-  
9 813. After the minor obtained a recurring role on a network television show, the minor’s parent  
10 sent the respondent a letter stating they no longer needed her services and could no longer afford  
11 to pay her commission. *Id.* at 813. The respondent filed suit. *Id.* Approximately three years  
12 later, following issuance of an arbitration award and the filing of a petition to confirm said award,  
13 appellants secured substitute counsel, which filed a “Notice of Disaffirmance of Arbitration  
14 Award by Minor.” *Id.* at 815. The notice assumed that the letter sent to the respondent had  
15 disaffirmed the original contract but added that plaintiff disaffirmed “all other documents filed  
16 under his name or affecting him as a minor in this litigation.” *Id.* at 820. The court found that this  
17 language was adequate to convey the minor’s disaffirmance of the original contract, the arbitration  
18 award, and the subsequent judgment. *Id.* at 822. Likewise, plaintiff’s counsel’s representations to  
19 this Court constitutes disaffirmance of the EULAs.<sup>6</sup>

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21 <sup>4</sup> During the hearing on this motion, however, plaintiff’s counsel explicitly stated that  
22 plaintiff was “not arguing for any selective disaffirmance. We agree, it’s all or nothing. *The*  
23 *whole EULA has been disaffirmed[.]*” (Emphasis supplied.) Thus, to the extent the May 17 letter,  
24 the complaint, or plaintiff’s briefing on the pending motions were unclear regarding what was  
25 being disaffirmed, plaintiff’s counsel statement on the record clarified.

26 <sup>5</sup> In its reply, defendant avers that neither the May 17 letter nor the complaint disclosed  
27 plaintiff’s real name, address, or *Fortnite* user name, “without which Epic Games could not  
28 possibly honor a disaffirmation.” Even assuming a minor must disclose such information in order  
to disaffirm a contract—a proposition for which defendant provides no legal authority—plaintiff  
has now identified himself to defendant.

<sup>6</sup> Defendant contends that if a minor has already enjoyed the benefit of a contract, he  
“cannot disaffirm it after-the-fact in order to avoid its dispute resolution provisions.” In *Berg*,

1 As to defendant’s second argument that plaintiff cannot disaffirm the contract because he  
 2 continues to play *Fortnite*, this contention is directly contradicted by a notice filed by plaintiff’s  
 3 counsel shortly after the hearing on the motion, which stated that plaintiff “has not played the  
 4 Fortnite game . . . after filing of the lawsuit” and “has no intention of playing Fortnite in the  
 5 future.” Thus, this is not a case in which a minor seeks to “adopt that part of an entire transaction  
 6 which is beneficial, and reject its burdens.” *E.K.D. ex rel. Dawes v. Facebook, Inc.*, 885 F. Supp.  
 7 2d 894, 899 (S.D. Ill. 2012) (quoting *Peers v. McLaughlin*, 88 Cal. 294, 26 P. 119, 120 (1891))  
 8 (rejecting minor plaintiffs’ attempt to disaffirm a forum selection clause in Facebook’s terms of  
 9 service while continuing to use facebook.com); 5 Samuel Williston & Richard A. Lord, A Treatise  
 10 on the Law of Contracts § 9:14 (4th ed. 1993 & Supp. 2011) (“If an infant enters into any contract  
 11 subject to conditions or stipulations, the minor cannot take the benefit of the contract without the  
 12 burden of the conditions or stipulations.”). Instead, plaintiff has disaffirmed the EULAs in their  
 13 entirety, including by not playing *Fortnite*.<sup>7</sup> See *T. K. v. Adobe Sys. Inc.*, No. 17-CV-04595-LHK,  
 14 2018 WL 1812200, at \*6 (N.D. Cal. Apr. 17, 2018) (“T.K. has disaffirmed the entire renewal  
 15 agreement. There is . . . no evidence that T.K. continues to use ACCP. . . . In these

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16  
 17 however, the California court of appeal expressly held that a minor may “disaffirm all obligations  
 18 under a contract, *even for services previously rendered*, without restoring consideration or the  
 19 value of services rendered to the other party.” 148 Cal.App.4th at 810 (emphasis supplied); see  
 20 also *I.B. ex rel. Fife v. Facebook, Inc.*, 905 F. Supp. 2d 989, 1001 (N.D. Cal. 2012) (citing *Berg*  
 21 for proposition that minors may disaffirm contracts even after receiving benefits). Absent  
 22 controlling authority holding to the contrary, and in light of the broad language of Section 6710,  
 23 the Court finds plaintiff’s disaffirmance is valid notwithstanding that he has already played  
 24 *Fortnite* and made in-App purchases. See *Lopez v. Kmart Corp.*, No. 15-CV-01089-JSC, 2015  
 WL 2062606, at \*7 (N.D. Cal. May 4, 2015) (“California’s rules on disaffirmance are set forth in a  
 statute; in other words, the legislature considered the relevant policy implications and arrived at  
 chosen language. It is not for the Court to impose additional limitations or remove those that the  
 legislature included based on its own policy rationale.”).

25 <sup>7</sup> In *R.A. v. Epic Games, Inc.*, Case No. 2:19-cv-014488 (C.D. Cal. July 30, 2019), Dkt.  
 26 No. 39 at 9, which dealt with similar motions in a separate case brought against the same  
 27 defendant, the court reached a similar conclusion. Specifically, the court found that plaintiff  
 28 disaffirmed the EULA by submitting a declaration to the court conveying his disaffirmance. The  
 court further found that there was “no evidence . . . that Plaintiff continued playing the Fortnite  
 video game after he submitted his declaration that would contradict his intent to disaffirm the  
 entirety of the EULAs.” The same is true here.

1 circumstances, the Court sees no basis to enforce the arbitration or no-class-action terms of a  
2 contract that is now a ‘nullity.’”).

3 Because plaintiff validly disaffirmed the EULAs, plaintiff cannot be compelled to arbitrate  
4 this dispute pursuant to the arbitration provision contained in the amended EULA.<sup>8</sup> Defendant’s  
5 motion to compel arbitration is therefore **DENIED**.<sup>9</sup>

### 6 **III. MOTION TO TRANSFER**

7 Having found that plaintiff cannot be compelled to arbitrate this dispute, the Court  
8 considers defendant’s motion to transfer this action to the Eastern District of North Carolina  
9 pursuant to 28 U.S.C. sections 1391(b) or 1404(a).

#### 10 **A. 28 U.S.C. § 1391(b)**

11 Under 28 U.S.C. section 1391(b), venue is proper in (1) a district in which any defendant  
12 resides, if all of the defendants reside in the same state; (2) a district in which a substantial part of  
13 the events or omissions giving rise to the claim occurred, or a substantial part of property that is  
14 the subject of the action is situated; or (3) a judicial district in which any defendant may be found,  
15 if there is no district in which the action may otherwise be brought. Relevant here, with respect to  
16 the first prong, a corporate defendant “resides” “in any judicial district in which such defendant is  
17 “subject to the court’s personal jurisdiction with respect to the civil action in question[.]”

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18  
19 <sup>8</sup> The Court notes that the first page of the amended EULA states, in all-caps text, that an  
20 individual must be an adult of the legal age of majority or have the consent of a parent or legal  
21 guardian in order to enter into the agreement. Neither occurred here, that is, plaintiff was a minor  
22 at the time he purportedly accepted the EULAs, and his parent or legal guardian did not authorize  
23 him to do so. The original EULA, in contrast, did not contain a parallel provision. However, in  
24 light of the Court’s finding that both EULAs have been disaffirmed, the Court need not reach a  
25 decision on the enforceability of the agreements in light of an apparent lack of adult consent.

26 <sup>9</sup> Defendant’s motion for leave to submit a recent decision also is **GRANTED**. (Dkt. No.  
27 47) In the decision submitted by defendant, an order granting a motion to compel arbitration in  
28 *Williams v. Eaze Solutions, Inc.*, No. 3:18-cv-02598-JK (N.D. Cal.), Dkt. No. 17, the court held  
that where a contract was unenforceable because of an unlawful object, the arbitration clause was  
severable and separately enforceable from the rest of the contract. Here, in contrast, the parties do  
not argue that the EULAs had an unlawful object. Rather, as discussed herein, the EULAs are  
unenforceable because of plaintiff’s disaffirmance, which defendant itself argues cannot be  
selective as to certain parts of the agreement but not others. Thus, *Williams* is distinguishable and  
has no bearing on this Court’s decision to deny the motion to compel arbitration.

1 28 U.S.C. § 1391(c)(2). “[I]n a [s]tate which has more than one judicial district,” such as  
 2 California, “and in which a defendant that is a corporation is subject to personal jurisdiction . . . ,  
 3 such corporation shall be deemed to reside in any district in that [s]tate within which its contacts  
 4 would be sufficient to subject it to personal jurisdiction if that district were a separate [s]tate.”  
 5 28 U.S.C. § 1391(d).

6 Where, as here, a defendant raises a venue challenge, the plaintiff bears the burden of  
 7 showing that venue is proper. *Piedmont Label Co. v. Sun Garden Packing Co.*, 598 F.2d 491, 496  
 8 (9th Cir. 1979). The court need not accept the pleadings as true and may consider facts outside of  
 9 the pleadings. *See Kukje Hwajae Ins. Co., Ltd. v. M/V Hyundai Liberty*, 408 F.3d 1250, 1254 (9th  
 10 Cir. 2005). Plaintiff claims venue is proper for two reasons: (i) defendant waived its right to argue  
 11 lack of personal jurisdiction by failing to move to dismiss on this basis, and venue therefore is  
 12 proper under sections 1391(b)(1) and (c)(2); and (2) a substantial portion of the events at issue  
 13 occurred in this jurisdiction, and venue therefore is proper under section 1391(b)(2).<sup>10</sup> The Court  
 14 addresses each.

15 First, with respect to personal jurisdiction and venue under section 1391(b)(1), plaintiff  
 16 argues defendant’s failure to move on a timely basis to dismiss for lack of personal jurisdiction  
 17 within 21 days of service constitutes waiver and is sufficient to establish the “residency”  
 18 requirement under section 1391(b)(1). *See Agasino v. American Airlines*, No. 19-cv-03243-LB,  
 19 2019 WL 3387803, at \*3 (N.D. Cal. July 26, 2019) (by failing to move to dismiss for lack of  
 20 personal jurisdiction, defendant “therefore has waived any personal-jurisdiction arguments and is  
 21 subject to personal jurisdiction here with respect to this case”); *Ward v. Certain Underwriters at*  
 22 *Lloyd’s of London*, No. 18-cv-07551-JCS, 2019 WL 2076991, at \*4 (N.D. Cal. May 10,  
 23 2019) (“As far as this Court is aware, every court to consider the issue has held that personal  
 24 jurisdiction even based on waiver is sufficient to establish ‘residency’ for the purpose of  
 25 § 1391(c)(2).”) (citing cases); *AT&T Corp. v. Teliix, Inc.*, No. 16-cv-01914-WHO, 2016 WL  
 26 4241910, at \*2 (N.D. Cal. Aug. 11, 2016) (“A party waives a defense based on lack of personal  
 27

28 <sup>10</sup> Defendant contends that venue does not lie under any of the three prongs of section 1391(b). However, defendant did not address plaintiff’s arguments on reply.

1 jurisdiction by omitting it from its first Rule 12(b) motion. . . . [B]ecause [defendant] did not  
 2 contest personal jurisdiction, it is therefore ‘subject to personal jurisdiction’ in this district for the  
 3 purposes of establishing venue.”) (citing cases and treatise); *Markel Am. Ins. Co. v. Pac. Asian*  
 4 *Enters., Inc.*, No. C-07-5749 SC, 2008 WL 2951277, at \*2 (N.D. Cal. July 28, 2008)  
 5 (“[Defendants], each having brought a Rule 12 motion without challenging personal jurisdiction,  
 6 have waived that defense. As each of the Defendants is subject to personal jurisdiction in this  
 7 district, each is considered to reside here for the purposes of venue.”) (citations omitted).  
 8 Defendant does not distinguish these cases nor offer any contrary authority. Accordingly, this  
 9 Court finds plaintiff has carried his burden of establishing that venue is proper in this district  
 10 under section 1391(b)(1) based on defendant’s waiver.

11 Even if venue was not proper under section 1391(b)(1), the Court finds plaintiff also has  
 12 established proper venue under section 1391(b)(2), namely, because a substantial portion of events  
 13 at issue occurred in this district. Notably, section 1391(b)(2) “does not require that a majority of  
 14 the events have occurred in the district where the suit is filed, nor does it require that the events in  
 15 that district predominate,” and “venue may be proper in multiple districts if a ‘substantial part’ of  
 16 the underlying events took place in each of those districts.” *Ward v. Certain Underwriters at*  
 17 *Lloyd’s of London*, No. 18-CV-07551-JCS, 2019 WL 2076991, at \*5 (N.D. Cal. May 10, 2019)  
 18 (quoting *Tech. Credit Corp. v. N.J. Christian Acad., Inc.*, 307 F. Supp. 3d 993, 1002 (N.D. Cal.  
 19 2018)). Here, plaintiff contends, and defendant does not dispute, that plaintiff downloaded and  
 20 played *Fortnite*, and completed all in-App purchases, in this district. This is sufficient to establish  
 21 venue under section 1391(b)(2) given the dispute at issue.

22 **B. 28 U.S.C § 1404(a)**

23 The Court proceeds to consider whether transfer is appropriate under 28 U.S.C. section  
 24 1404(a). That statute provides:

25 For the convenience of the parties and witnesses, in the interest of justice, a  
 26 district court may transfer any civil action to any other district or division where it  
 27 might have been brought or to any district or division to which all parties have  
 consented.

28 Section 1404(a) “does not condition transfer on the initial forum’s being ‘wrong’ . . . [a]nd it

1 permits transfer to any district where venue is also proper . . . or to any other district to which the  
2 parties have agreed by contract or stipulation.” *Atlantic Marine Const. Co., Inc. v. United States*  
3 *District Court*, 571 U.S. 49, 59 (2013) (“*Atlantic Marine*”).<sup>11</sup> Importantly, the moving party  
4 carries the burden of showing that the transferee district is the more appropriate forum. *Jones v.*  
5 *GNC Franchising, Inc.*, 211 F.3d 495, 499 (9th Cir. 2000).

6 Courts considering transfer must first determine whether the action could have been  
7 brought in the target district in the first instance. *See Hoffman v. Blaski*, 363 U.S. 335, 343-44  
8 (1960). An action could have been brought in any court that has subject matter jurisdiction over  
9 the claims and personal jurisdiction over the defendant, and where venue would have been proper.  
10 *See id.* Here, defendant contends, and plaintiff does not appear to dispute, that this action could  
11 have been brought in the Eastern District of North Carolina.

12 If the action could have been brought in the target district, courts then undertake an  
13 “individualized, case-by-case consideration of convenience and fairness.” *Stewart Org., Inc. v.*  
14 *Ricoh Corp.*, 487 U.S. 22, 29 (1988) (quoting *Van Dusen v. Barrack*, 376 U.S. 612, 622 (1964))  
15 (internal quotations omitted). Relevant factors the Court may consider include: (1) plaintiff’s  
16 choice of forum, (2) convenience of the parties, (3) convenience of the witnesses, (4) ease of  
17 access to the evidence, (5) familiarity of each forum with the applicable law, (6) feasibility of  
18 consolidation with other claims, (7) any local interest in the controversy, and (8) the relative court  
19 congestion and time of trial in each forum. *Vu v. Ortho-McNeil Pharm., Inc.*, 602 F. Supp. 2d  
20 1151, 1156 (N.D. Cal. 2009).<sup>12</sup> The Court considers the relevant factors below.<sup>13</sup>

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<sup>11</sup> Where a valid forum selection clause governs, “a district court should ordinarily transfer the case to the forum specified in that clause” except “under extraordinary circumstances unrelated to the convenience of the parties[.]” *Atlantic Marine*, 571 U.S. at 581. The EULAs contain forum selection clauses, however, because they have been disaffirmed, they do not modify the Court’s analysis of the motion to transfer pursuant to section 1404(a).

<sup>12</sup> This list is non-exclusive and courts may consider other factors. *See Williams v. Bowman*, 157 F.Supp.2d 1103, 1106 (N.D. Cal. 2001) (noting that this list of factors “does not exhaust the possibilities” and highlighting differing combinations of factors used by courts in conducting this analysis).

<sup>13</sup> Neither party addresses the sixth and eighth factors, that is, feasibility of consolidation

1                                    *I. Plaintiff's Choice of Forum*

2                    “While a plaintiff’s choice of forum always weighs against transfer under section 1404(a),  
3 a court considering transfer must determine how much weight to give this choice under the  
4 circumstances.” *Glob. Hawk Ins. Co. v. Vega*, No. 15-CV-02093-YGR, 2015 WL 7720801, at \*4  
5 (N.D. Cal. Nov. 30, 2015). “Although great weight is generally accorded plaintiff’s choice of  
6 forum, when an individual . . . represents a class, the named plaintiff’s choice of forum is given  
7 less weight.” *Lou v. Belzberg*, 834 F.2d 730, 739 (9th Cir. 1987) (citation omitted). The rationale  
8 for a diminished degree of deference is that “where there are hundreds of potential plaintiffs . . . all  
9 of whom could with equal show of right go into their many home courts, the claim of any one  
10 plaintiff that a forum is appropriate merely because it is his home forum is considerably  
11 weakened.” *Koster v. (Am.) Lumbermens Mut. Cas., Co.*, 330 U.S. 518, 524 (1947). Where a case  
12 involves a putative statewide class, courts in this district have applied varying degrees of  
13 deference. *See, e.g., Hendricks v. StarKist Co.*, No. 13-CV-729 YGR, 2014 WL 1245880, at  
14 \*2–3 (N.D. Cal. Mar. 25, 2014) (discussing “diminished degree of deference,” and ultimately  
15 applying “at least some deference” where plaintiff sought to represent nationwide class and  
16 California class); *Bennett v. Bed Bath & Beyond, Inc.*, C 11–02220 CRB, 2011 WL 3022126, at \*2  
17 (N.D. Cal. July 22, 2011) (citation omitted) (“[A]s a putative class representative for a state-wide  
18 class, Plaintiff’s forum choice is not entitled to the same degree of deference as an individual  
19 plaintiff pursuing her own claim on her own behalf.”); *Cardoza v. T-Mobile USA Inc.*, 2009 WL  
20 723843, at \*4 (N.D. Cal. Mar. 18, 2009) (“The Court does not give less weight to Plaintiff’s  
21 choice of forum based on Plaintiff’s decision to bring this suit on behalf of a [statewide] class.  
22 Courts tend to do so in cases where the plaintiff seeks to represent a nationwide class.”).

23                    Further, in determining the appropriate amount of deference to accord plaintiff’s choice of  
24 forum, courts consider the extent of the parties’ contacts with the chosen forum, including contacts  
25 relating to the plaintiff’s cause of action. *Belzberg*, 834 F.2d at 739 (citing *Pac. Car & Foundry*  
26 *Co. v. Pence*, 403 F.2d 949, 954 (9th Cir. 1968)). A plaintiff’s choice of forum receives only

27 \_\_\_\_\_  
28 with other claims and relative court congestion.

1 minimal deference if the operative facts did not occur within the forum and the forum has no  
2 interest in the parties or subject matter. *Id.* In contrast, where “there is no evidence that plaintiffs  
3 engaged in forum shopping and both plaintiffs and defendant have significant contacts with the  
4 Northern District of California, plaintiffs’ choice of forum carries significant weight.” *Roling v.*  
5 *E\*Trade Sec., LLC*, 756 F.Supp.2d 1179, 1186 (N.D. Cal. 2010).

6 Here, plaintiff purports to bring this action on behalf of a nationwide class and a California  
7 sub-class. That this case involves a putative nationwide class diminishes the deference afforded to  
8 plaintiff’s choice of forum. Even if the classes are certified, however, the named plaintiff, who  
9 resides in this district, “would still bear a fiduciary responsibility to lead the class,” and thus his  
10 choice of forum still is entitled to some deference. *Van Slyke v. Capital One Bank*, 503 F.Supp.2d  
11 1353, 1363 (N.D. Cal. 2007). As to the extent of the parties’ contacts with this forum, plaintiff  
12 avers that his contacts are significant because he resides, downloaded and played *Fortnite*, and  
13 accepted and disaffirmed the EULAs in this district. Defendant does not dispute these facts but  
14 counters that it has no relevant contacts with this district, and indeed, the relevant functions related  
15 to in-App sales and refunds are determined by employees located in North Carolina. That said, it  
16 also cannot be disputed that large numbers of *Fortnite* players reside in this district.

17 On balance, although defendant’s relevant contacts with this district appear minimal, it is  
18 undisputed that plaintiff has substantial contacts with this forum. Thus, plaintiff’s choice of forum  
19 is entitled to at least some deference. This factor weighs minimally against transfer.

## 20 2. *Convenience of the Parties and Witnesses*

21 Section 1404(a) provides for transfer to a more convenient forum, “not to a forum likely to  
22 prove equally convenient or inconvenient.” *Adobe Sys. Inc. v. Childers*, No. 5:10-cv-03571-  
23 JF/HRL, 2011 WL 566812, at \*9 (N.D. Cal. Feb. 14, 2011) (quoting *Van Dusen*, 376 U.S. at 646).  
24 Thus, transfer “should not be granted if the effect is simply to shift the inconvenience to the  
25 plaintiff.” *Id.* (citing *Decker Coal Co. v. Commonwealth Edison Co.*, 805 F.2d 834, 843 (9th Cir.  
26 1986)). Further, “[t]he convenience of the witnesses, particularly non-party witnesses, is often the  
27 most important factor” in ruling on a motion to transfer venue under section 1404(a). *Grossman v.*  
28 *Johnson & Johnson*, No. 14-CV-03557-VC, 2015 WL 1743116, at \*1 (N.D. Cal. Apr. 13, 2015)

1 (citation omitted). To evaluate witness convenience, “courts must consider not only the number of  
2 witnesses, but also the nature and quality of their testimony.” *United States ex rel. Tutanés-Luster*  
3 *v. Broker Sols., Inc.*, No. 17-CV-04384-JST, 2019 WL 1024962, at \*5 (N.D. Cal. Mar. 4, 2019)  
4 (citation omitted). Moreover, courts generally give less consideration to the convenience of party  
5 witnesses or witnesses employed by a party because these witnesses can be compelled by the  
6 parties to testify regardless of where the litigation will occur. *Allstar Mktg. Grp., LLC v. Your*  
7 *Store Online, LLC*, 666 F.Supp.2d 1109, 1132 (C.D. Cal. 2009). “[In] establishing inconvenience  
8 to witnesses, the moving party must name the witnesses, state their location, and explain their  
9 testimony and its relevance.” *Imran v. Vital Pharm., Inc.*, No. 18-CV-05758-JST, 2019 WL  
10 1509180, at \*4 (N.D. Cal. Apr. 5, 2019) (citation omitted).

11 As previously mentioned, defendant avers that the employees familiar with issues in this  
12 case, including the marketing of and refunds for in-App purchases, work at or near defendant’s  
13 headquarters in Cary, North Carolina. Plaintiff counters that based on publicly-available job  
14 postings, some party witnesses, including defendant’s software engineers and Chief Technology  
15 Officer, work at defendant’s office in Larkspur, California. Plaintiff further emphasizes that  
16 defendant has not identified any witnesses who cannot be produced in this district or for whom  
17 this district would not be a more convenient forum.

18 Defendant’s arguments fail to persuade. Although it is likely some witnesses would be  
19 inconvenienced by traveling from North Carolina headquarters to this district for trial, defendant  
20 does not identify any one of them—much less a non-party witness—with specificity. The absence  
21 of reference to non-party witnesses is notable because defendant’s employees may be compelled  
22 to appear in this Court. Insofar as some employees may leave the company by the time this case is  
23 tried, the Court cannot predict where these former employees will reside, and thus, cannot assume  
24 either district will be a more convenient forum. With respect to depositions, those can be  
25 conducted in North Carolina if appropriate.

26 Defendant has not carried its burden of demonstrating that North Carolina is a more  
27 convenient location for the parties or most witnesses. Plaintiff, for his part, has not identified any  
28 witnesses that would be inconvenienced by transfer either. Therefore, this factor is neutral.

1                   3.       *Ease of Access to Evidence*

2                   “[I]n the age of electronically stored information, the ease of access to evidence is neutral  
3 because much of the evidence in this case will be electronic documents, which are relatively easy  
4 to obtain in any district.” *See Simpson Strong-Tie Co., Inc. v. Oz-Post Int’l, LLC*, 2018 WL  
5 3956430, at \*8 (N.D. Cal. Aug. 17, 2018) (internal citation and quotation marks omitted). As  
6 such, this factor is neutral.

7                   4.       *Familiarity with Applicable Law*

8                   Plaintiff contends that this Court is more familiar with California law, which governs at  
9 least two of his six claims in this action. Defendant counters that there is a dispute regarding  
10 whether California law or North Carolina law will apply to the substantive claims, and thus, it is  
11 premature for the Court to consider which if either court is more familiar with the applicable law.  
12 Defendant’s argument persuades. Given that a dispute remains regarding what state’s law applies,  
13 this factor is neutral.

14                   5.       *Local Interest in the Controversy*

15                   Defendant argues that this factor is, at worst, neutral, because North Carolina has as much  
16 interest in regulating the conduct of one of its corporations as California does in protecting its  
17 residents. In *R.A. v. Epic Games, Inc.*, Case No. 2:19-cv-014488 (C.D. Cal. July 30, 2019), Dkt.  
18 No. 39 at 15 n.4, the court found California and North Carolina both had interests in the outcome  
19 of the litigation based on this rationale, especially given the reach of defendant. This Court  
20 agrees. Thus, this factor is neutral.

21                   6.       *Balancing of Factors*

22                   In sum, all section 1404(a) factors are neutral except for plaintiff’s choice of forum, which  
23 weighs minimally against transfer. As such, defendant has not established that the Eastern District  
24 of North Carolina is the more appropriate forum, and its request for transfer is **DENIED**.<sup>14</sup>

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26                   <sup>14</sup> Defendant notes that this is the third putative class action brought against Epic Games  
27 in recent months, all which were filed in districts outside of North Carolina. The other two were  
28 transferred to the Eastern District of North Carolina. *R.A. v. Epic Games, Inc.*, Case No. 2:19-cv-  
014488 (C.D. Cal. July 30, 2019), Dkt. No. 39; *Krohm v. Epic Games*, Case No. 5:19-cv-00173  
(N.D. Ill. Apr. 30, 2019), Dkt. No. 13. Neither is binding on this Court, however, and in any

1 **IV. MOTION TO DISMISS**

2 Under Federal Rule of Civil Procedure 12(b)(6), a district court must dismiss a complaint  
3 if it fails to state a claim upon which relief can be granted. To survive a motion to dismiss, the  
4 plaintiff must allege “enough facts to state a claim to relief that is plausible on its face.” *Bell Atl.*  
5 *Corp. v. Twombly*, 550 U.S. 544, 570 (2007). This “facial plausibility” standard requires the  
6 plaintiff to allege facts that add up to “more than a sheer possibility that a defendant has acted  
7 unlawfully.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). In deciding whether the plaintiff has  
8 stated a claim, a court must assume that plaintiff’s allegations are true and draw all reasonable  
9 inferences in the plaintiff’s favor. *Usher v. City of L.A.*, 828 F.2d 556, 561 (9th Cir. 1987).  
10 However, the court is not required to accept as true “allegations that are merely conclusory,  
11 unwarranted deductions of fact, or unreasonable inferences.” *In re Gilead Scis. Sec. Litig.*, 536  
12 F.3d 1049, 1055 (9th Cir. 2008) (citation omitted).

13 Defendant moves to dismiss plaintiff’s claims. Below, the Court analyzes each claim in  
14 turn.<sup>15</sup>

15 **A. Declaratory Judgment**

16 Defendant moves to dismiss claiming that plaintiff lacks standing to pursue a declaratory  
17 judgment given the dispute over the legal effect of disaffirmance and the failure to plead whether  
18 defendant refused plaintiff’s request for a refund.

19 Pursuant to the Declaratory Judgment Act, “[i]n a case of actual controversy,” the Court  
20 “may declare the rights and other legal relations of any interested party seeking such declaration,

21 \_\_\_\_\_  
22 event, both are distinguishable. In *R.A.*, the court found that in light of the parties’ contacts with  
23 North Carolina, the number of witnesses located there, and the fact that the Central District of  
24 California bench is vastly understaffed weighed in favor of transfer. Here, the parties here have  
25 not provided any information regarding relative court congestion here. In *Krohm*, the court  
transferred the action because of the EULA’s forum selection clause, which, as discussed, does not  
apply here in light of plaintiff’s disaffirmance.

26 <sup>15</sup> Defendant devotes a portion of its motion to dismiss to its argument that plaintiff has  
27 not disaffirmed its in-App purchases. This argument is not tied to any specific cause of action  
28 defendant seeks to have dismissed. In any event, as previously discussed, the May 17 letter and  
the filing of this suit conveyed plaintiff’s intent to disaffirm in-App purchases allegedly made  
using plaintiff’s own money.

1 whether or not further relief is or could be sought.” 28 U.S.C. § 2201(a). “This statute does not  
2 create new substantive rights, but merely expands the remedies available in federal courts.” *Shell*  
3 *Gulf of Mexico, Inc. v. Center for Biological Diversity, Inc.*, 771 F.3d 632, 635 (9th Cir. 2014).  
4 “To determine whether a declaratory judgment action presents a justiciable case or controversy,  
5 courts consider ‘whether the facts alleged, under all the circumstances, show that there is a  
6 substantial controversy, between parties having adverse legal interests, of sufficient immediacy  
7 and reality to warrant the issuance of a declaratory judgment.’” *Id.* (quoting *Md. Cas. Co. v. Pac.*  
8 *Coal & Oil Co.*, 312 U.S. 270, 273 (1941)). A critical question is whether the declaratory relief  
9 “will serve a useful purpose in clarifying and settling the legal relations in issue[.]” *McGraw-*  
10 *Edison Co. v. Preformed Line Prods. Co.*, 362 F.2d 339, 342 (9th Cir. 1966).

11 Here, plaintiff seeks “a determination by the Court that: (a) this action may proceed and be  
12 maintained as a class action; (b) the sales contracts between [d]efendant and the children of the  
13 class members, relating to the purchase of Game Currency, are voidable at the option of the  
14 respective class members on behalf of their minor children; (c) if the class members elect to void  
15 the contracts, they will be entitled to restitution and interest thereon; (d) an award of reasonable  
16 attorneys’ fees and costs of suit to Plaintiff and the Class is appropriate; and (e) such other and  
17 further relief as is necessary and just may be appropriate as well.”

18 Defendant’s standing arguments fail to persuade. To claim that there is no dispute on  
19 disaffirmance strains credulity. Nowhere in its numerous filings related to the pending motions  
20 does defendant suggest that it *agrees* with plaintiff’s position on disaffirmance or refunds, such  
21 that there can be no dispute. To the contrary, in its motion, defendant argues that plaintiff did not  
22 and cannot disaffirm contracts with defendant. Further, the May 17 letter sent by plaintiff’s  
23 counsel to defendant stated plaintiff’s position that he “can legally disaffirm contracts with  
24 [defendant] for in-App [p]urchases” and that defendant’s “non-refundable policy violates the laws  
25 of the state of California with respect to contracting with minors.” The letter “demand[ed] that  
26 [defendant] correct, repair, replace[,] or otherwise rectify the Fortnite video game non-refundable  
27 policy” and stated that plaintiff would file a complaint if defendant did not respond. There is no  
28

1 evidence, allegation, or suggestion that defendant responded. Defendant therefore has indicated  
2 its unwillingness to honor plaintiff's disaffirmance and refund the in-App purchases.

3 Next, with respect to the notion that plaintiff lacks standing because he has not alleged that  
4 he purchased items labeled "not eligible for refund" or that he saw any non-refundable disclosures,  
5 the complaint alleges that "[s]ome items remain non-refundable and outside Epic's refund policy  
6 including for example, Battle Pass or BattlePass tiers," both which plaintiff allegedly purchased.  
7 The complaint also includes screenshots indicating that when a player purchases "Battle Pass," at  
8 the bottom-right of the screen, there is a disclaimer that the item "is not eligible for refund."  
9 Whether or not he saw this or any other disclosure before making in-App purchases, plaintiff  
10 alleges that he later "wanted to disaffirm" and "cancel" his in-App purchases but "was not allowed  
11 to do so," in part because of defendant's non-refundable policy. At this juncture, the Court must  
12 construe the complaint in the light most favorable to plaintiff, resolving any ambiguity in his  
13 favor. *See Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969). The Court thus finds that the  
14 allegations in the complaint are sufficient to establish plaintiff's standing for purposes of his  
15 declaratory judgment claim.

16 Finally, *T. K.*, on which defendant relies, does not compel a different result. There, the  
17 court *allowed* plaintiff to proceed with a declaratory relief claim, finding that the complaint  
18 "show[ed] an apparent dispute between the parties about the legal effect of disaffirmance, insofar  
19 as Adobe initially refused to refund all of T.K.'s payments made under the renewal agreement and  
20 did so only after T.K. filed this action." 2018 WL 1812200, at \*13. Here, defendant is not  
21 entitled to dismissal simply because it has not affirmatively rejected a refund request. Nor can  
22 defendant claim to be ignorant regarding plaintiff's position on disaffirmance. Rather, like in *T.K.*,  
23 there exists an actual controversy between the parties over the rights of minors to disaffirm in-App  
24 purchases and, if the contracts can be disaffirmed, whether minors are entitled to refunds. *See In*  
25 *re Apple In-App Purchase Litig.*, 855 F. Supp. 2d 1030, 1035-36 (N.D. Cal. 2012) (denying  
26 motion to dismiss declaratory relief claim for determination that minors' sales contracts of in-app  
27 game currency are voidable).

28 Defendant's motion to dismiss the claim for declaratory relief is therefore **DENIED**.

1           **B. California Consumer Legal Remedies Act (CLRA)**

2           Defendant moves for dismissal of the CLRA claim on the grounds that virtual currency is  
3 not a good or service and because plaintiff was not misled. The CLRA prohibits “unfair methods  
4 of competition and unfair or deceptive acts or practices undertaken by any person in a transaction  
5 intended to result or which results in the sale or lease of goods or services to any consumer.” Cal.  
6 Civ. Code § 1770(a). Plaintiff alleges that defendant has violated the CLRA’s proscription against  
7 (i) the concealment of the characteristics, use, benefit or quality of goods; (ii) representing that  
8 goods have uses or characteristics that they do not have; (iii) representing that goods are of  
9 particular standard or quality when they are not; and (iv) representing that a transaction confers or  
10 involves rights, remedies, or obligations which it does not have or involve, or which are prohibited  
11 by law. The Court considers each argument in turn.

12                           1. “Goods or Services”

13           The CLRA applies to transactions involving the sale or lease of “goods or services.”  
14 Relevant here, “goods,” as defined in California Civil Code section 1761(a), means “tangible  
15 chattels bought or leased for use primarily for personal, family, or household purposes, including  
16 certificates or coupons exchangeable for these goods.”

17           Defendant argues that V-Bucks, the virtual currency plaintiff allegedly purchased while  
18 playing *Fortnite*, is not a “good or service” under the CLRA. Defendant primarily relies on two  
19 cases for support. In the first, *Berry v. American Express Publishing, Inc.*, 147 Cal. App.4th 224,  
20 227, 229 (2007), the California Court of Appeal held that “the extension of credit” was not  
21 “tangible chattel.” Specifically, the court found that although a plastic credit card was tangible, it  
22 had “no intrinsic value and exist[ed] only as an indicia of the credit extended to the card holder.”  
23 *Id.* at 229. Thus, “separate and apart from the sale or lease of any specific goods or services, [the  
24 extension of credit] does not fall within the scope of the [CLRA].” *Id.*

25           In the second case, *I.B. ex rel. Fife v. Facebook, Inc.*, 905 F. Supp. 2d 989, 996 (N.D. Cal.  
26 2012), which relied on *Berry*, minors brought a CLRA claim against Facebook arising out of their  
27 alleged purchases of “Facebook Credits,” a “payment system” that allowed “users to make  
28 purchases within the Facebook website.” On a motion to dismiss, the court found that Facebook

1 Credits, like the extension of credit in *Berry*, were not “tangible chattel,” and thus were not  
2 covered by the CLRA. *Id.* at 1007-08.

3 Plaintiff avers that the “digital content” players can acquire through in-App purchases,  
4 including “virtual supplies, ammunition, and skins,” is more akin to a “real-world” good than the  
5 credit at issue in *Berry* and *I.B.* The Court disagrees. The complaint alleges that *Fortnite* players  
6 can use real money to purchase V-Bucks, which can then be used to purchase content with which  
7 to play the game. Thus, the transactions at issue in this case involve purchases of virtual currency,  
8 not virtual supplies, ammunition, and skins. As such, and contrary to plaintiff’s contention, this  
9 case bears close similarities to *I.B.*, in which Facebook Credits, which could be used as “payment”  
10 on Facebook’s website, were not considered “goods” under the CLRA. Additionally, like in  
11 *Berry*, V-Bucks “exist only as an indicia of the credit extended” to a *Fortnite* player. Moreover,  
12 although “supplies” and “ammunition” may sound tangible, they are, as plaintiff himself agrees,  
13 “digital.”<sup>16</sup>

14 Plaintiff’s CLRA claim therefore fails because the virtual currency at issue is not a good or  
15 service. Nevertheless, in order to fully address the claim on the merits, the Court proceeds to  
16 consider the other proposed basis for dismissal, namely, whether plaintiff has adequately pleaded  
17 that he was misled.

## 18 2. Whether Plaintiff Adequately Pleaded that He Was Misled

19 The CLRA prohibits “unfair methods of competition” and “unfair or deceptive acts or  
20 practices.” Cal Civ. Code § 1770(a). To state a claim under the CLRA, a plaintiff generally must  
21 allege a misrepresentation, reliance, and damages. *See Marolda v. Symantec Corp.*, 672  
22 F.Supp.2d 992, 1002-03 (N.D. Cal. 2009). A plaintiff can state a claim under the CLRA by  
23 alleging either an affirmative misrepresentation or a failure to disclose. *See Rasmussen v. Apple,*  
24 *Inc.*, 27 F.Supp.3d 1027, 1032 (N.D. Cal. 2014). Claims under the CLRA are governed by the  
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26 <sup>16</sup> The cases on which plaintiff relies, *Doe 1 v. AOL LLC*, 719 F.Supp.2d 1102, 1112 (N.D.  
27 Cal. 2010), *Morgan v. AT & T Wireless Services, Inc.*, 177 Cal.App.4th 1235, 1260, 99  
28 Cal.Rptr.3d 768 (2009), and *America Online, Inc. v. Sup. Ct.*, 90 Cal.App.4th 1, 108 Cal.Rptr.2d  
699 (2001), are inapposite, as all three involved internet and telephone *service* providers. Plaintiff  
does not argue that, as currently alleged, his CLRA claim is based on purchase of a “service.”

1 “reasonable consumer” test. *Williams v. Gerber Prods. Co.*, 552 F.3d 934, 938 (9th Cir. 2008)  
 2 (citing *Freeman v. Time, Inc.*, 68 F.3d 285, 289 (9th Cir. 1995)).

3 Here, defendant argues that plaintiff’s CLRA claim fails because plaintiff was not misled.  
 4 Specifically, defendant contends that plaintiff does not claim that he saw statements about in-App  
 5 purchases being “not eligible for refund,” and even if he had, he has not alleged that these  
 6 statements caused him damages. Plaintiff counters that the complaint sufficiently pleads that he  
 7 was “misled and misinformed” by defendant and suffered harm from relying on these  
 8 misrepresentations. The portions of the complaint to which plaintiff cites, however, do not  
 9 support these contentions. For example, while plaintiff alleges that a disclaimer stating that  
 10 purchases are “not eligible for refund” appears “in very small inconspicuous text,” plaintiff does  
 11 not allege whether he saw this disclosure, and if he did, how he was misled by it. Further, it is not  
 12 clear whether plaintiff’s theory regarding defendant’s non-refundable policy is based on  
 13 affirmative misrepresentations or a failure to disclose: in one part of the complaint, plaintiff  
 14 describes the “non-refundable” disclosure as “inconspicuous,” and in another part, he alleges there  
 15 was a “publicized non-refund policy.”<sup>17</sup>

16 *T.K.* is instructive. There, a minor brought a CLRA claim related to Adobe’s sales of  
 17 subscriptions to the “Adobe Creative Cloud Platform” to minors. 2018 WL 1812200, at \*1.  
 18 Adobe brought a motion to dismiss, arguing in part that plaintiff failed to allege that she relied on  
 19 defendant’s alleged misrepresentations, which purportedly led plaintiff to believe that she “had no  
 20 right to either disaffirm the[] contracts or receive refunds.” *Id.* at \*7. The court agreed, finding  
 21 that the complaint did not allege that plaintiff actually read the relevant terms of service or relied  
 22

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23  
 24 <sup>17</sup> The Court notes that the complaint sets forth several theories for how defendant’s  
 25 conduct was misleading and unlawful. For example, plaintiff alleges that he was induced to make  
 26 in-App purchases, did not understand how much actual money was involved, did not understand  
 27 defendant’s refund policy, and was not allowed to disaffirm or receive a refund. Plaintiff also  
 28 alleges that defendant did not institute proper parental controls. While plaintiff may pursue any  
 plausible theory at this juncture, the Court notes that any amended complaint would benefit from  
 clarification regarding these separate theories, including which theory underlies each cause of  
 action.

1 on them. *Id.*<sup>18</sup> Similarly here, plaintiff fails to allege that he relied on any particular  
2 misrepresentations or omissions when making in-App purchases.

3 In addition, the subsections of the CLRA cited in the complaint, namely sections  
4 1770(a)(5) (representations regarding “characteristics, . . . uses, benefits, or quantities”),  
5 1770(a)(7) (representations that goods “are of a particular standard, quality, or grade”), and  
6 1770(a)(14) (representations regarding “rights, remedies, or obligations”), are unsupported.  
7 Nowhere in the complaint does plaintiff allege facts showing that defendant misrepresented the  
8 characteristics, uses, benefits, or quantities of V-Bucks, or failed to disclose that they were of  
9 lower standard or quality than represented. Further, and as previously explained, plaintiff fails to  
10 explain how he was misled regarding his rights, remedies, or obligations when making the in-App  
11 purchases.

12 The Court finds plaintiff’s CLRA claim fails on this ground as well. However, because  
13 amendment of the pleadings could potentially cure the defects identified herein, the CLRA claim  
14 is **DISMISSED WITH LEAVE TO AMEND**.

15 **C. Implied Duty of Good Faith and Fair Dealing**

16 Defendant moves for dismissal of this claim on the basis that it is not grounded in any  
17 express contract provision. Moreover, defendant argues there was no breach of these purported  
18 implied covenants because players must enter payment methods to make in-App purchases and  
19 plaintiff allegedly made such purchases using his own money.

20 Every contract in the state of California contains an implied covenant of good faith and fair  
21 dealing that neither party will injure the right of the other party to receive the benefits of the  
22 agreement. *In re Apple In-App Purchase Litig.*, 855 F.Supp.2d at 1041 (citing *Wolf v. Walt Disney*  
23 *Pictures & Tel.*, 162 Cal. App. 4th 1107, 1120 (2008)). “The covenant is implied in every contract  
24 in order to protect the express covenants or promises of the contract.” *Imber-Gluck v. Google*,

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25  
26  
27 <sup>18</sup> The *T.K.* court also found that the plaintiff could not draw a plausible connection  
28 between defendant’s terms of service and the alleged injury because plaintiff was able to exercise  
her right to disaffirm the contract and received a refund. The portion of the court’s holding carries  
no weight here, where plaintiff does not allege that he received any refund from defendant.

1 *Inc.*, No. 5:14–CV–01070–RMW, 2014 WL 3600506, at \*8 (N.D. Cal. July 21, 2014). As such,  
2 the implied covenant “cannot impose substantive duties or limits on the contracting parties beyond  
3 those incorporated in the specific terms of their agreement.” *Appling v. State Farm Mut. Auto. Ins.*  
4 *Co.*, 340 F.3d 769, 779 (9th Cir. 2003) (quoting *Guz v. Bechtel Nat. Inc.*, 24 Cal.4th 317, 352  
5 (2000)). However, “breach of a specific provision of the contract is not a necessary prerequisite”  
6 for breach of implied covenant of good faith and fair dealing. *Carma Developers (Cal.), Inc. v.*  
7 *Marathon Development California, Inc.*, 2 Cal.4th 342, 373 (1992).

8 “A plaintiff asserting a claim for breach of the implied covenant of good faith and fair  
9 dealing must allege the following elements: (1) the existence of a contract; (2) the plaintiff did all,  
10 or substantially all of the significant things the contract required; (3) the conditions required for  
11 the defendant’s performance had occurred; (4) the defendant unfairly interfered with the plaintiff’s  
12 right to receive the benefits of the contract; and (5) the plaintiff was harmed by the defendant’s  
13 conduct.” *Oculus Innovative Sciences, Inc. v. Nofil Corp.*, 2007 WL 2600746, at \*4 (N.D. Cal.  
14 Sept. 10, 2007) (citation omitted). Here, plaintiff alleges that defendant breached its duty of good  
15 faith and fair dealing by not taking steps to ensure that minors obtained consent from their parents  
16 or guardians before playing *Fortnite* and by inducing minors to make non-refundable in-App  
17 purchases.

18 Defendant relies on *T.K.* to support its argument. There, the court dismissed plaintiff’s  
19 good faith and fair dealing claim on the ground that plaintiff had not alleged that defendant  
20 frustrated her right to receive the benefits of the contract. 2018 WL 1812200, at \*9. Specifically,  
21 the court found that plaintiff’s entire case was premised on her claims that Adobe’s terms of  
22 service misled her about her rights under California law and that Adobe refused to honor her  
23 disaffirmance. *Id.* By the plaintiff’s own admission, however, the contract did not promise her  
24 the right to disaffirm, and thus, it was not actionable as a breach of the implied covenant of good  
25 faith and fair dealing, which covers “the express covenants or promises of the contract.” *Id.*  
26 (quoting *Imber-Gluck*, 2014 WL 3600506 at \*8).

27 The Court agrees that this case is similar to *T.K.* Namely, plaintiff alleges that defendant  
28 breached the implied covenant of good faith and fair dealing by misleading plaintiff with respect

1 to disaffirmance and refunds. However, the EULA and the screenshot included in the complaint  
2 indicate that defendant never promised plaintiff such options would be available, and indeed,  
3 stated that certain products were non-refundable. Further, although the amended EULA requires  
4 minors to obtain the consent of a parent or guardian before accepting the agreement, the Court is  
5 not persuaded that defendant breached an implied covenant by failing to ensure minors abide by  
6 this provision. Indeed, the provision imposes a duty on the player, not defendant. Thus, plaintiff  
7 has not alleged any failure to receive the benefits of a contract between him and defendant. *See In*  
8 *re Apple In-App Purchase Litig.*, 855 F. Supp. 2d at 1042 (“The Terms & Conditions signed by  
9 Plaintiffs expressly provide that Plaintiffs are responsible for activity occurring on or through their  
10 accounts and Apple may charge them for any such activity. Thus, the implied covenant cannot  
11 negate Apple's ability to charge Plaintiffs.”)

12 Accordingly, defendant’s motion to dismiss plaintiff’s good faith and fair dealing claim is  
13 **GRANTED**. Because amendment would not be futile, however, the Court grants plaintiff **LEAVE**  
14 **TO AMEND**.

15 **D. Negligent Misrepresentation**

16 Next, defendant avers that plaintiff has not established any of the five elements of a  
17 negligent misrepresentation claim. “The elements of negligent misrepresentation are (1) the  
18 misrepresentation of a past or existing material fact, (2) without reasonable ground for believing it  
19 to be true, (3) with intent to induce another’s reliance on the fact misrepresented, (4) justifiable  
20 reliance on the misrepresentation, and (5) resulting damage.” *Apollo Capital Fund, LLC v. Roth*  
21 *Capital Partners, LLC*, 158 Cal.App.4th 226, 243 (2007) (citing *Shamsian v. Atlantic Richfield*  
22 *Co.*, 107 Cal.App.4th 967, 983 (2003)); *see also* Cal. Civ. Code § 1710(2) (defining “[d]eceiveit” as  
23 including “[t]he assertion, as a fact, of that which is not true, by one who has no reasonable ground  
24 for believing it to be true”). Plaintiff alleges that defendant misrepresented material facts by not  
25 giving notice to plaintiff of its “non-refundable policy” at the time of in-App purchases and by  
26 “omitting to give summaries or reports of purchases that have already occurred[.]” Plaintiff  
27 further alleges that defendant had a duty to provide players, including minors, with honest and  
28

1 accurate information and should have known that a reasonable minor would be misled by its  
2 policies.

3 Here, defendant argues that although the complaint alleges it did not give notice to plaintiff  
4 of its non-refundable policy at the time of his purchases, plaintiff also alleges that defendant “may  
5 allow a refund of a total of three items through the lifetime of the user” and identifies which items  
6 are not eligible for refund under this policy. Defendant also contends that under the EULA,  
7 purchases of V-Bucks and content are final and not refundable except “as otherwise required by  
8 applicable law.”

9 As explained with respect to plaintiff’s CLRA claim, plaintiff has failed to allege  
10 sufficiently that defendant made a misrepresentation or that plaintiff justifiably relied on any  
11 misrepresentation. Thus, as with the CLRA claim, plaintiff’s negligent misrepresentation claim is  
12 **DISMISSED WITH LEAVE TO AMEND** insofar as plaintiff may be able to replead to meet the  
13 elements of the claim.

#### 14 **E. UCL**

15 Defendant argues plaintiff’s UCL claim fails because (i) plaintiff does not sufficiently  
16 allege claims under any of the UCL’s prongs, and (ii) plaintiff cannot seek equitable relief under  
17 the UCL because he already has an adequate remedy at law. The UCL prohibits “any unlawful,  
18 unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading  
19 advertising.” Cal. Bus. & Prof. Code § 17200. The UCL creates a cause of action for business  
20 practices that are (1) unlawful, (2) unfair, or (3) fraudulent. Each “prong” of the UCL provides a  
21 separate and distinct theory of liability. *Lozano v. AT & T Wireless Servs., Inc.*, 504 F.3d 718, 731  
22 (9th Cir. 2007). Plaintiff asserts claims under all three prongs. The Court addresses each.

##### 23 *1. Unlawful*

24 The unlawful prong of the UCL prohibits “anything that can properly be called a business  
25 practice and that at the same time is forbidden by law.” *Cel-Tech Commc’ns., Inc. v. L.A. Cellular*  
26 *Telephone Co.*, 20 Cal.4th 163, 180 (1999) (quotation marks and citations omitted). “By  
27 proscribing ‘any unlawful’ business practice, the UCL permits injured consumers to ‘borrow’  
28 violations of other laws and treat them as unlawful competition that is independently actionable.”

1 *In re Adobe Sys., Inc. Privacy Litig.*, 66 F. Supp. 3d 1197, 1225 (N.D. Cal. 2014) (quoting *Cel-*  
2 *Tech Commc'ns.*, 20 Cal.4th at 180).

3 Plaintiff alleges that defendant's conduct is unlawful under the UCL because it (i) violates  
4 the CLRA, (ii) breaches the implied covenant of good faith and fair dealing, (iii) constitutes  
5 negligent misrepresentation, and (iv) violates the minor's right to disaffirm a contract. As to the  
6 first three claims, the Court has dismissed these causes of action. Accordingly, they may not form  
7 the basis for plaintiff's UCL claim. The Court also has found, however, that plaintiff's allegations  
8 are sufficient to support his theory that defendant is unwilling to honor plaintiff's disaffirmance of  
9 his in-App purchases.

10 Thus, plaintiff may proceed with his UCL claim for unlawful conduct to the extent it is  
11 predicated on defendant's alleged violation of the minor's right to disaffirm a contract.

12 Defendant's motion to dismiss plaintiff's UCL claim on this ground is therefore **DENIED**.

## 13 2. *Unfair*

14 There are two standards for determining what is "unfair competition" under the UCL. The  
15 first standard, in the context of claims brought by consumers, requires allegations that the  
16 challenged conduct violates a "public policy" that is "tethered" to a specific constitutional,  
17 statutory, or regulatory provision. *Gregory v. Albertson's, Inc.*, 104 Cal. App. 4th 845, 853  
18 (2002). The second standard "involves balancing the harm to the consumer against the utility of  
19 the defendant's practice." *Lozano*, 504 F.3d at 735.

20 Plaintiff asserts that defendant's conduct is unfair under both standards. Specifically,  
21 plaintiff alleges that defendant engaged in unfair practices by actively advertising, marketing, and  
22 promoting applications as "free" with the intent to induce minors to purchase game currency. The  
23 complaint, however, does not contain a single factual allegation to support this conclusory  
24 statement. Indeed, plaintiff alleges that V-Bucks can be earned in-game *or* purchased for money,  
25 and players must enter and save a payment method in order to make in-App purchases. As such,  
26 the Court **GRANTS** defendant's motion to dismiss plaintiff's UCL claim insofar as that claim is  
27 premised on the unfair prong of the UCL. However, because amendment would not be futile, the  
28 Court grants plaintiff **LEAVE TO AMEND**.

1                   3.       *Fraudulent*

2                   The “fraudulent” prong of the UCL “requires a showing [that] members of the public are  
3 likely to be deceived.” *Wang v. Massey Chevrolet*, 97 Cal. App. 4th 856, 871 (2002). “[W]hether  
4 a business practice is deceptive will usually be a question of fact not appropriate for decision on” a  
5 motion to dismiss. *See Williams*, 552 F.3d at 938. To state a claim under the fraudulent prong, a  
6 plaintiff also is “required to prove ‘actual reliance on the allegedly deceptive or misleading  
7 statements,’ and that ‘the misrepresentation was an immediate cause of the injury-producing  
8 conduct.’” *Sateriale v. R.J. Reynolds Tobacco Co.*, 697 F.3d 777, 793 (9th Cir. 2012) (quoting  
9 *Kwikset v. Superior Court*, 51 Cal. 4th 310 (2011) and *In Re Tobacco II Cases*, 46 Cal. 4th 298  
10 (2009)). Here, plaintiff alleges that defendant’s conduct was fraudulent under the UCL because  
11 defendant intentionally and knowingly “omitted giving information” on amounts spent on in-App  
12 purchases, thereby misleading plaintiff about his purchase history. Elsewhere in the complaint,  
13 plaintiff alleges that *Fortnite* players have no way of knowing and cannot track the money already  
14 spent on in-App purchases.

15                   Defendant argues that plaintiff’s claim under the fraudulent prong of the UCL fails because  
16 players can track through their credit or debit cards or through PayPal, and in any event, defendant  
17 is not obligated to provide players with such information. Plaintiff counters that minors do not  
18 have access to their parents’ credit card or bank account statements and that non-disclosure of  
19 material information such as purchasing history is fraudulent.

20                   Plaintiff’s argument that minors do not have access to information about their purchase  
21 history is undermined by the fact that plaintiff’s allegations in this case are based on in-App  
22 purchases he made using his own money. Moreover, it is reasonable to believe that at least some  
23 minors obtain the consent of their parents or guardians before using their credit cards or bank  
24 accounts to make in-App purchases, and for those who do not, the Court is not persuaded that  
25 defendant must make their purchase history easily accessible through *Fortnite*. In addition,  
26 plaintiff’s allegation that defendant “omitted giving information” about purchase history does not  
27 explain whether plaintiff ever sought this information and whether defendant refused to provide it.

28                   Plaintiff’s UCL claim under the fraudulent prong is **DISMISSED WITH LEAVE TO AMEND**.

1                                   4.        *Adequate Remedy at Law*

2                                   Having found that plaintiff’s UCL claim survives to the extent it is brought under the  
3 unlawful prong and predicated on an alleged violation of the minor’s right to disaffirm, the Court  
4 considers whether the claim nevertheless fails because plaintiff has an adequate remedy at law.

5                                   The Court recently considered this issue in *Luong v. Subaru of Am., Inc.*, 2018 WL  
6 2047646 at \*7 (N.D. Cal. May 2, 2018). There, like here, defendant argued that plaintiffs’ UCL  
7 claim was subject to dismissal to the extent they sought equitable relief because plaintiffs already  
8 had an adequate remedy at law. *Id.* This Court held:

9                                   [T]here is a split of authority in the California district courts on the question of  
10 whether plaintiffs should be barred from pleading claims for equitable relief under  
11 the UCL and CLRA if they have alleged a claim that would provide an adequate  
12 remedy at law. *See Aberin v. Am. Honda Motor Co., Inc.*, No. 16-CV-04384-JST,  
13 2018 WL 1473085, at \*9 (N.D. Cal. Mar. 26, 2018) (denying dismissal); *Adkins v.*  
14 *Comcast Corp.*, No. 16-CV-05969-VC, 2017 WL 3491973, at \*3 (N.D. Cal. Aug.  
15 1, 2017) (“A few federal courts seem to have decided that claims for equitable relief  
16 should be dismissed at the pleading stage if the plaintiff manages to state a claim  
17 for relief that carries a remedy at law. . . . But this Court is aware of no basis in  
18 California or federal law for prohibiting the plaintiffs from pursuing their equitable  
19 claims in the alternative to legal remedies at the pleadings stage.”); *Huu Nguyen v.*  
20 *Nissan N. Am., Inc.*, No. 16-CV-05591-LHK, 2017 WL 1330602, at \*4 (N.D. Cal.  
21 Apr. 11, 2017) (granting dismissal because plaintiff had adequate remedy at  
22 law); *Munning v. Gap, Inc.*, 238 F. Supp. 3d 1195, 1204 (N.D. Cal.  
23 2017) (same); *Moss v. Infinity Ins. Co.*, 197 F. Supp. 3d 1191, 1203 (N.D. Cal.  
24 2016) (same). ***The Court finds those decisions allowing claims for equitable  
25 relief to proceed as an alternative remedy, at the pleading stage, to be more  
26 persuasive, based upon the broad remedial purposes of the California consumer  
27 protection statutes.***

28 *Id.* (emphasis supplied). Specifically, the Court reasoned that Business & Professions Code  
section 17205 expressly states that the remedies provided for a UCL violation are “cumulative to  
each other and to the remedies or penalties available under all other laws of this state.” *Id.*; *see*  
*also State v. Altus Fin., S.A.*, 36 Cal. 4th 1284, 1303 (2005) (“[T]he fact that there are alternative  
remedies under a specific statute does not preclude a UCL remedy, unless the statute itself  
provides that the remedy is to be exclusive.”).

Accordingly, defendant’s motion to dismiss plaintiff’s UCL claim because plaintiff has an  
adequate remedy at law is **DENIED**.

1           **F. Unjust Enrichment**

2           The Ninth Circuit has held that under California law, while “there is not a standalone cause  
3 of action for unjust enrichment, . . . [w]hen a plaintiff alleges unjust enrichment, a court may  
4 construe the cause of action as a quasi-contract claim seeking restitution.” *Astiana v. Hain*  
5 *Celestial Grp., Inc.*, 783 F.3d 753, 762 (9th Cir. 2015) (internal citations and quotations omitted).  
6 “The fact that one person benefits another is not, by itself, sufficient to require restitution. The  
7 person receiving the benefit is required to make restitution only if the circumstances are such that,  
8 as between the two individuals, it is *unjust* for the person to retain it.” *First Nationwide Savings v.*  
9 *Perry*, 11 Cal.App.4th 1657, 1663 (1992) (emphasis in original); *see also Astiana*, 783 F.3d at  
10 762 (explaining that restitution and unjust enrichment “describe the theory underlying a claim that  
11 a defendant has been unjustly conferred a benefit through mistake, fraud, coercion, or request”  
12 (internal quotation marks omitted)).

13           Plaintiff alleges defendant was unjustly enriched through its policy of not refunding in-  
14 App purchases of digital products and game currency. Plaintiff asserts that he is entitled to  
15 recover all revenue acquired as a result of this policy. Defendant argues that this claim fails for  
16 the same reason as certain of the other claims, namely, because plaintiff has not alleged that he  
17 requested to disaffirm his contract with defendant or that defendant unjustly refused such a  
18 request. This argument fails because, as explained above, plaintiff has sufficiently pleaded that  
19 defendant was unwilling to honor plaintiff’s disaffirmance and refund plaintiff for his in-App  
20 purchases. Plaintiff’s unjust enrichment claim nevertheless fails, however, because plaintiff has  
21 not alleged that he was misled or that defendant breached any express or implied covenant as it  
22 relates to defendant’s non-refundable policy.<sup>19</sup>

23           As such, defendant’s motion to dismiss the unjust enrichment claim is **GRANTED**. As with  
24 the other claims that have been dismissed, however, plaintiff shall be granted **LEAVE TO AMEND**.

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28           <sup>19</sup> Defendant additionally argues that plaintiff’s unjust enrichment claim fails because he  
has an adequate remedy at law. As discussed, however, plaintiff is permitted to pursue alternative  
forms of relief, notwithstanding the availability of a legal remedy.

1 **V. MOTION TO COMPEL COMPLIANCE WITH RULE 10(A)**

2 Finally, the Court addresses defendant’s motion to compel plaintiff to comply with Rule  
3 10(a), which provides that every pleading must “name all the parties.” Fed. R. Civ. P. 10(a).  
4 Defendant asks the Court to require Johnny Doe to litigate under his initials and require Jane Doe  
5 to litigate under her full name.

6 As a threshold matter, plaintiff contends that the motion is procedurally improper because  
7 it essentially is a motion for reconsideration of the Court’s order granting plaintiff leave to proceed  
8 under a pseudonym, filed absent leave of Court. Plaintiff filed this action on June 21, 2019 and  
9 concurrently filed an *ex parte* motion to seek leave from the Court to proceed under a pseudonym.  
10 In its *ex parte* motion, plaintiff noted that defendant would not be prejudiced by the Court  
11 allowing plaintiffs “to press their claims anonymously at this juncture[,] given the limited, initial  
12 stage through which [p]laintiffs seek this relief: as [p]laintiffs plead their case, and [d]efendant  
13 presents its answer and defenses.” On June 25, 2019, defendant executed a waiver of service of  
14 summons that included receipt of the motion. Just over two weeks later, on July 11, 2019, the  
15 Court granted plaintiff’s motion.

16 The Court granted plaintiff’s motion to proceed under a pseudonym when this case was in  
17 its infancy, before defendant’s counsel had appeared let alone responded to the complaint. Now  
18 that defendant’s counsel has appeared and the parties have engaged in motion practice that  
19 provides additional insight into the case, the circumstances have changed materially. This is  
20 sufficient to warrant consideration of the motion to compel compliance with Rule 10(a) on the  
21 merits. *See Jane Doe v. John F. Kennedy University*, No. 4:13-cv-1137-DMR (N.D. Cal.), Dkt.  
22 Nos. 4, 34 (granting an *ex parte* motion to proceed under a pseudonym and later granting motion  
23 for an order requiring plaintiff to refile under her true name).

24 Turning to the merits, in the Ninth Circuit, parties may proceed under pseudonyms only  
25 “in the ‘unusual case’ when nondisclosure of the party’s identity ‘is necessary . . . to protect a  
26 person from harassment, injury, ridicule or personal embarrassment.” *Does I Thru XXIII v.*  
27 *Advanced Textile Corp.*, 214 F.3d 1058, 1067–68 (9th Cir. 2000) (quoting *United States v.*  
28 *Doe*, 655 F.2d 920, 922 n. 1 (9th Cir. 1981)). The Court determines whether the plaintiff may

1 proceed anonymously by balancing five factors: (1) the severity of the threatened harm, (2) the  
2 reasonableness of the anonymous party's fears, (3) the anonymous party's vulnerability to such  
3 retaliation, (4) the prejudice to the opposing party, and (5) the public interest. *Id.* at 1068–69.

4 Here, plaintiff contends that he should be permitted to proceed under pseudonym because  
5 his gaming habits constitute highly sensitive personal information and he fears retaliation from the  
6 community if his identity is revealed. Plaintiff further argues that defendant will not suffer any  
7 hardship from plaintiff proceeding anonymously because defendant knows plaintiff's identity.  
8 Further, plaintiff avers that the public interest in seeing this case resolved on the merits weighs in  
9 favor of granting anonymity, implying that plaintiff may not proceed with the litigation if he must  
10 face public scrutiny.

11 Plaintiff's arguments fail to persuade. Although plaintiff's position in this litigation may  
12 be unpopular to some, his fear of social stigmatization is speculative and there is no indication  
13 plaintiff is likely to suffer more severe retaliation than in the typical consumer action. Further,  
14 plaintiff's "technology preferences" and "video-gaming habits," while perhaps sensitive, do not  
15 justify the use of a pseudonym, which runs contrary to the "normal presumption in litigation [] that  
16 parties must use their real names." *Doe v. Kamehameha Sch./Bernice Pauahi Bishop Estate*, 596  
17 F.3d 1036, 1042 (9th Cir. 2010) (citing *Advanced Textile Corp.*, 214 F.3d at 1043). Indeed,  
18 information about plaintiff's use of *Fortnite* is of an entirely different nature than that which  
19 typically justifies the use of pseudonyms, such as information about sexual abuse, human  
20 trafficking, or mental illness. Moreover, the public interest in resolution of this case on the merits  
21 does not outweigh the public's interest in the openness of the proceeding.

22 As such, defendant's motion to compel compliance with Rule 10(a) is **GRANTED**.

## 23 **VI. CONCLUSION**

24 For the foregoing reasons, the Court hereby **ORDERS**:

- 25 (i) defendant's motion to compel arbitration is **DENIED**;
- 26 (ii) defendant's motion to transfer this case to the Eastern District of North Carolina is  
27 **DENIED**;
- 28 (iii) defendant's motion to dismiss is **DENIED** as to (A) declaratory judgment, and (B)

1 the UCL, insofar as plaintiff's claim is brought under the unlawful prong and  
2 predicated on an alleged violation of the minor's right to disaffirm;

3 (iv) defendant's motion to dismiss is **GRANTED WITH LEAVE TO AMEND** as to (A) the  
4 CLRA, (B) the implied covenant of good faith and fair dealing, (C) negligent  
5 misrepresentation claim, (D) the UCL, except as set forth above, and (E) unjust  
6 enrichment; and

7 (v) defendant's motion to compel compliance with Rule 10(a) is **GRANTED**.<sup>20</sup>

8 An amended complaint must be filed within **twenty-one (21) days** of issuance of this  
9 order.<sup>21</sup> Such complaint must identify plaintiff Johnny Doe and his guardian Jane Doe by name in  
10 accordance with Rule 5.2 as it relates to minors. Any response to thereto is due **fourteen (14)**  
11 **days** after plaintiff's filing.<sup>22</sup>

12 This Order terminates Docket Numbers 18, 20, 21, 44, and 47, 49, and 52.

13 **IT IS SO ORDERED.**

14  
15 Dated: January 23, 2020



16 **YVONNE GONZALEZ ROGERS**  
17 **UNITED STATES DISTRICT COURT JUDGE**

18  
19  
20 <sup>20</sup> In light of the Court's grant of the motion to compel compliance with Rule 10(a),  
21 plaintiff's unopposed administrative motion to file under seal Docket Number 42-1, which  
includes plaintiff's screen name for playing *Fortnite*, is **DENIED**.

22 <sup>21</sup> On December 18, 2019, while the instant motion was pending, plaintiff filed a motion  
23 for leave to file a first amended complaint. (Dkt. No. 49.) In light of this order, plaintiffs' motion  
24 is **DENIED WITHOUT PREJUDICE** to plaintiff to review this order and file an amended complaint in  
conformity thereof.

25 <sup>22</sup> On January 9, 2020, the parties filed a joint discovery letter brief. (Dkt. No. 52.) The  
26 parties are advised that the court shall issue a protective order with respect to source code when  
27 and if such an order is necessary. There is no need to issue it at present. Additionally, the instant  
28 order addresses, at a minimum, some of the other discovery issues, and accordingly, the requests  
set forth in the letter are **DENIED WITHOUT PREJUDICE**. The parties are ordered to meet and  
confer and determine whether any disputes remain. If another motion is brought, the parties  
**SHALL** comply with this Court's standing order and submit letter briefs.