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 8 *Classes*

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

11 LUZ SANCHEZ and M.S., a minor,
 12 individually and on behalf of all others
 13 similarly situated,

14 Plaintiffs,

15 vs.

16 NINTENDO OF AMERICA INC.,

17 Defendant.
 18

CASE NO.

CLASS ACTION COMPLAINT

1. Violation of Cal. Bus. & Prof. Code § 17200, *et seq.*
2. Violation of California Civil Code § 1750, *et seq.*
3. Violation of California Business and Professions Code § 17500, *et seq.*
4. Violation of the Song-Beverly Consumer Warranty Act for Breach of Implied Warranty of Merchantability
5. Unjust Enrichment/Quasi-Contract
6. Violation of the Magnuson-Moss Act, 15 U.S.C. § 2301, *et seq.* for Breach of Implied Warranty of Merchantability
7. Declaratory and Injunctive Relief

DEMAND FOR JURY TRIAL

1 Plaintiffs Luz Sanchez and M.S. (“Plaintiffs”) bring this action individually and
2 on behalf of all those similarly situated for damages, declaratory relief, and injunctive
3 relief against Defendant Nintendo of America Inc. (“Defendant” or “Nintendo”).
4 Plaintiff M.S., a minor, conducts this action by and through his mother and guardian
5 Luz Sanchez. Plaintiffs allege the following based on the investigation of counsel and
6 based on information and belief.

7 **INTRODUCTION**

8 1. This is a consumer protection class action arising out of the sale of
9 Nintendo’s Joy-Con controllers (“Joy-Cons”). With the sale of each Nintendo Switch
10 console, Defendant includes two detachable Joy-Cons that gamers use to control an
11 object or character in the game.

12 2. Unbeknownst to consumers, these controllers experience Joy-Con drift,
13 a defect that occurs when the joystick stops working properly (“Joy-Con Drift”). This
14 will cause on-screen characters or the cursor to “drift” even when players are not
15 moving the joystick. Once the defect manifests, it progressively gets worse until the
16 Joy-Cons become inoperable, and consumers are forced to buy a new pair of
17 controllers. Defendant has known and had exclusive knowledge of the problem for
18 years, and still, has done nothing to adequately fix it or alert consumers of its
19 existence.

20 3. Consumers who purchased the Nintendo Switch Lite, a handheld device
21 similar to the Nintendo Switch, also report experiencing Joy-Con Drift. The Nintendo
22 Switch Lite and Joy-Cons (the “Products”) share similar design features and/or
23 hardware components likely causing the same defect in both devices.

24 4. Defendant is well aware that the Products have an unfixable defect.
25 Indeed, Nintendo president Shuntaro Furukawa apologized for the defect on June 30,
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1 2020,¹ after years of complaints from consumers. Yet, Defendant has never disclosed,
2 through its advertising or packaging, that the Products suffer from Joy-Con Drift, nor
3 has Defendant stopped selling the Products.

4 5. This is after Nintendo heavily promoted the functionality and
5 performance of the Products. Nintendo released several statements with
6 representations like, “[T]hose amazing controllers, the Joy-Con, which combine all
7 the gameplay innovations Nintendo’s invented, and then adds to them.”² “The Joy-
8 Con controllers fit a lot of features into one small package,” “[t]he new HD rumble
9 feature allows for high definition vibration[,] [i]t can reproduce sensations and
10 experiences in entirely new ways.”³ These affirmative misrepresentations lead
11 consumers to believe that the Products would at least work properly and not have Joy-
12 Con Drift, a defect that undermines its central function—the control of on-screen
13 characters.

14 6. As a result of Defendant’s unlawful conduct, Plaintiffs and members of
15 the proposed Classes (the “Classes” are defined below) have purchased Products they
16 otherwise would not have purchased or would have paid less for. Therefore, Plaintiffs
17 and other members of the Class have been injured.

18 7. Plaintiffs bring this action on behalf of themselves and all others
19 similarly situated to obtain monetary damages for those who have purchased
20 Defendant’s defective Products, and redress for Defendant’s violation of various state
21 and federal laws.

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24 ¹ Vic Hood, *Nintendo finally apologizes for Joy-Con drift amid lawsuit*, techradar, June 30, 2020
25 <https://www.techradar.com/news/nintendo-finally-apologizes-for-joy-con-drift-amid-lawsuit>.

26 ² Valiantenger, *Nintendo Switch Presentation 2017*, YouTube (Jan. 14, 2017),
27 <https://www.youtube.com/watch?v=JsiRY521Nis> (“Switch Presentation”) (at 59:38).

28 ³ Nintendo, *Nintendo Switch Hardware Overview*, YouTube (Feb. 7, 2017),
<https://www.youtube.com/watch?v=gUEhQ65FOJ8> (“Switch Overview”) (at 2:19, 3:11).

1 **JURISDICTION AND VENUE**

2 8. The Court has original jurisdiction under 28 U.S.C. § 1332(d)(2) because
3 the matter in controversy, exclusive of interest and costs, exceeds the sum or value of
4 \$5,000,000, this is a class action in which there are more than 100 Class members,
5 and at least some Class members are citizens of states different from Defendant.

6 9. This Court has personal jurisdiction over Defendant because Defendant
7 intentionally avails itself of the markets in California through the promotion,
8 marketing, and sale of the Products in California to render the exercise of jurisdiction
9 by this Court permissible under traditional notions of fair play and substantial justice.

10 10. Venue is proper in this Court pursuant to 28 U.S.C. §§ 1391(b)(1) and
11 (b)(2). Defendant resides and conducts business in this District and in the State of
12 California. Indeed, Defendant has a regular and established place of business at 2000
13 Bridge Pkwy #200, Redwood City, California 94065 (“Redwood City Offices”). At
14 this location, it has its largest sales and marketing office,⁴ as well as a dedicated
15 merchandizing field team who work with retail stores.⁵ Furthermore, upon
16 information and belief, Plaintiffs’ claims against Defendant for the sale and marketing
17 of defective Products emanate from Defendant’s Redwood City Offices in this
18 District.

19 **PARTIES**

20 11. Plaintiff Luz Sanchez (“Ms. Sanchez”) is a citizen and resident of the
21 State of California, and at all relevant times in this action resided in Firebaugh,
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23 _____
24 ⁴ See *PlayVision Labs, Inc. v. Nintendo of America Inc.*, Case No. 3:14-cv-312-GCM, ECF No. 20
25 (W.D.N.C. Nov. 18, 2014) (Nintendo’s Memorandum ISO Motion to Transfer Venue granted in
26 *PlayVision Labs, Inc. v. Nintendo of America Inc.*, Case No. 3:14-cv-312-GCM, 2014 WL
27 6472848 (W.D.N.C. Nov. 18, 2014)) (Nintendo states that its largest sales and marketing office is
28 in Redwood City, California).

⁵ *About Us*, Nintendo of America Careers, <https://careers.nintendo.com/about-us/> (last visited October 2, 2020).

1 California. Plaintiff Luz Sanchez is not a signatory to Nintendo’s Terms of Use.

2 12. Plaintiff M.S. (“M.S.”) is a citizen and resident of the State of California,
3 and at all relevant times in this action resided in Firebaugh, California. The Nintendo
4 Switch that Ms. Sanchez purchased was played by M.S. He was eight years old when
5 he set up the console, and during that process, he agreed to certain terms of use set
6 forth by Nintendo. Upon information and belief, Nintendo’s Terms of Use included
7 an arbitration agreement and class action waiver. M.S. hereby disaffirms Nintendo’s
8 Terms of Use, including the arbitration agreement and class action waiver.

9 13. On or about December 2018, Ms. Sanchez purchased a Nintendo Switch
10 console for personal, family, and household use. The Nintendo Switch came with a
11 set of left and right Joy-Con controllers.

12 14. Before purchasing the Nintendo Switch, Ms. Sanchez had no reason to
13 know that the Joy-Con controllers were or would become defective. However, within
14 a month of the purchase, Plaintiff M.S. began experiencing Joy-Con Drift with both
15 controllers. Specifically, the joysticks on both the left and right Joy-Cons registered
16 movement even when they were not being manually controlled.

17 15. By September 2019, less than a year after the Joy-Cons were purchased,
18 the Joy-Con Drift became so pronounced that the controllers become inoperable for
19 general gameplay use.

20 16. On or about November 28, 2019, Ms. Sanchez purchased another set of
21 Joy-Cons.

22 17. By about June 2020, these replacement controllers also began exhibiting
23 Joy-Con Drift, severely limiting general gameplay.

24 18. At the time Ms. Sanchez purchased the Nintendo Switch, she did not
25 know about the defect, and Nintendo did not disclose the defect to her. Had she
26 known about the defect, she would not have purchased the Nintendo Switch or
27 additional controllers, or she would have paid substantially less for them.

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1 19. Defendant Nintendo of America, Inc. is registered with the Secretary of
2 State to do business in California. It also manufactures, promotes, and sells the
3 Products in California, and upon information and belief, has its largest sales and
4 marketing office in Redwood City, California.

5 **FACTUAL ALLEGATIONS**

6 **A. Defendant's Joy-Con Controllers**

7 20. Nintendo is a consumer electronics and video game company. It
8 develops, produces, and markets videogame software and hardware, including the
9 video game console Nintendo Switch and Nintendo Switch Lite.

10 21. The Nintendo Switch is a hybrid console that can be used as a home
11 console connected to a television or as a portable device. It has two wireless Joy-Con
12 controllers (*shown below*), with standard buttons and directional joysticks for user
13 input, motion sensing, and tactile feedback:



1 22. The Joy-Con controllers can attach to both sides of the console to support
2 handheld gameplay:



13 23. They can also connect to a grip accessory to provide a traditional home
14 console experience:



1 24. Joy-Con controllers can also be used individually in the hand to support
2 single-player and multiplayer modes:



14 25. The Nintendo Switch Lite (*shown below*) is like the Nintendo Switch,
15 but does not have detachable Joy-Con controllers (though both share the same joystick
16 defect and design), and is only a handheld portable device:



1 26. The Nintendo Switch is sold for about \$299.99, which includes the set
2 of detachable Joy-Con controllers.

3 27. A replacement set of Joy-Con controllers is sold for about \$79.99, and
4 \$49.99 for an individual left or right Joy-Con controller.

5 28. The Nintendo Switch Lite is sold for about \$199.99. As discussed above,
6 it does not have detachable Joy-Con controllers, but does share the same joystick
7 design.

8 29. Defendant made it a point to promote and advertise the functionality and
9 performance of the Products. For example, Nintendo has made the following
10 representations:

- 11 • “[E]ach joy-con can be used as a *fully functioning* individual
12 controller.”⁶ (emphasis added)
- 13 • “[T]hose amazing controllers, the Joy-Con, which combine all the
14 gameplay innovations Nintendo’s invented, and then adds to them.”⁷
- 15 • “The Joy-Con controllers fit a lot of features into one small package.”⁸
- 16 • “[T]he new HD rumble feature allows for high definition vibration. It
17 can reproduce sensations and experiences in entirely new ways.”⁹

18 30. Indeed, through various media platforms like YouTube, Nintendo shows
19 consumers using the Products to control on-screen characters in sports games, race
20 car driving, and fighting sequences. These are fundamental characteristics of the
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24 ⁶ Switch Presentation, YouTube (Jan. 14, 20017), <https://www.youtube.com/watch?v=JsiRY521Nis>
(at 13:31).

25 ⁷ *Id.* at 59:38.

26 ⁸ Switch Overview, YouTube (Feb. 7, 2017), <https://www.youtube.com/watch?v=gUEhQ65FOJ8>
27 (at 3:11).

28 ⁹ *Id.* at 2:19.

1 Products that requires precision and cannot be accomplished with Joy-Con Drift.¹⁰

2 31. Plaintiffs recall seeing such representations online. Specifically, Ms.
3 Sanchez relied on representations that the Joy-Cons could be used as fully functioning
4 individual controllers, and M.S. relied on representations that the controllers were
5 amazing based on their functionality and features.

6 32. Based on these representations of the functionality and performance of
7 the Products, consumers reasonably believed that they were purchasing Products that
8 would at least function properly and not have Joy-Con Drift.

9 **B. Defective Joy-Con Controllers and Nintendo Switch Lites**

10 33. During the relevant time period, Defendant manufactured, marketed, and
11 sold the defective Products. These Products share a common defect known as “Joy-
12 Con Drift” that occurs when the joystick stops working properly.

13 34. This will cause on-screen characters or cursor to drift even when players
14 are not moving the joystick.

15 35. Upon information and belief, once the defect occurs, it cannot be fixed.

16 36. As a result, consumers are forced to pay additional costs to have the
17 Products replaced.

18 37. Joy-Con Drift greatly impacts consumers and the Products’ value
19 because the defect severely limits gameplay once it manifests.

20 38. Defendant has yet to offer consumers experiencing Joy-Con Drift a
21 permanent solution.

22 **C. Consumer Complaints**

23 39. Below are a few examples of the numerous consumer complaints made
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27 ¹⁰ Nintendo, *First Look at Nintendo Switch*, YouTube (Oct. 20, 2016),
28 <https://www.youtube.com/watch?v=f5uik5fgIaI&t=4s>.

1 online and directly to Defendant regarding Joy-Con Drift.¹¹

- 2 • Posted by Axzas, January 15, 2019:¹²

3 So I've had this problem for a long time and it's to the point where I can
4 no longer deal with it. Both of my joycons drift. My right joycon seems
5 basically destroyed and is far worse than my left joycon. Is there any way
6 to fix this? I've tried cleaning my joycons with compressed air and it fixed
7 it for about 2 days and then they both went back to how they were. I would
8 really love to fix my joycon and I'm wondering if there is a way to send
9 it to get fixed? I really don't want to spend \$80 for another set of
10 controllers. Everything else seems to work fine except that they drift like
11 crazy. Please tell me there's a way to go get it fixed. Thank you for
12 reading.

- 13 • Posted by Farore's Chosen, January 23, 2020:¹³

14 Yeah the joycons suck. I've never had issues with controllers like this
15 before. Even my 10+ yo GBA, who's shoulder button occasionally gets
16 stuck, and who's a and b buttons are a bit sunk in still works real good.
17 Had ours since Feb and its already drifting. We've got two other controllers
18 for our Switch.

- 19 • Posted by akaris1, April 3, 2020:¹⁴

20 Yes Drift is still an issue in 2020

- 21 • Posted by Gram, July 17, 2020:¹⁵

22 My left joycon started drifting a bit not long after I got my switch. From
23 what I've heard, it starts small like that but it can eventually get really

24 ¹¹ Online complaints reproduced here have been copied verbatim, so any grammatical or
25 typographical mistakes are attributable to the original author.

26 ¹² Axzas, Nintendo Support Forums (Jan. 15, 2019) <https://en-americas-support.nintendo.com/app/social/questions/detail/qid/77430/~joycon-drifting>.

27 ¹³ Farore's Choice, Zelda Dungeon (Jan. 23, 2020), <https://zeldadungeon.net/forum/threads/joycon-drift-issues.66246/page-2> (post #17).

28 ¹⁴ akaris1, reddit (Apr. 3, 2020), https://www.reddit.com/r/Switch/comments/fublee/is_the_joycon_drift_still_an_issue_in_2020/fmc575x/?utm_source=reddit&utm_medium=web2x&context=3.

¹⁵ Gram, Nintenpedia (July 17, 2020), <https://nintenpedia.com/forum/threads/is-the-switch-joy-con-drift-really-that-bad.39203/> (post #2).

1 bad, making games very hard to play.

2 **D. Nintendo Was Aware and Had Exclusive Knowledge of the Defect**

3 40. Nintendo was aware of the Joy-Con Drift defect for years because it
4 received numerous complaints online (as shown above) and directly from consumers.

5 41. Indeed, by on or about July 14, 2019, a thread on the Nintendo Switch
6 subreddit about Joy-Con drift was upvoted over 25,000 thousand times.¹⁶

7 42. Based on the exclusive knowledge Defendant received from consumer
8 complaints, on or about July 23, 2019, it created an internal memo instructing its
9 customer service department to fix Joy-Con Drift for free.¹⁷

10 43. Yet, Defendant concealed and suppressed this information by refusing to
11 admit or disclose that the Products were defective.

12 44. Nintendo manufactures, develops, markets, sells, and offers support
13 services for Joy-Cons and Nintendo Switch Lite. Thus, upon information and belief,
14 it is responsible for testing the controllers, and Defendant was aware of the Joy-Con
15 Drift defect.

16 45. Indeed, on or about June 30, 2020, Nintendo president Shuntaro
17 Furukawa apologized for the trouble caused to customers experiencing Joy-Con Drift
18 and stated that Nintendo was continuing to aim to improve their products.¹⁸

19 46. Yet, Defendant continues to market and sell the Products with full
20 knowledge of the defect and without disclosing the Joy-Con Drift defect to consumers
21 in its marketing, promotion, or packaging.

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24 ¹⁶ Gita Jackson, *Joy-Con Drift Is Becoming A Real Problem On The Switch*, Kotaku (July 16, 2019),
<https://kotaku.com/joy-con-drift-is-becoming-a-real-problem-on-the-switch-1836417809>.

25 ¹⁷ Patrick Klepek, *Internal Nintendo Memo Instructs Customer Service to Fix 'Joy-Con Drift' for*
26 *Free*, Vice (July 23, 2019), https://www.vice.com/en_us/article/8xzzva/internal-nintendo-memo-instructs-customer-service-to-fix-joy-con-drift-for-free.

27 ¹⁸ Nicole Carpenter, *Nintendo president apologizes for Joy-Con drift*, Polygon (June 30, 2020),
28 <https://www.polygon.com/2020/6/30/21308085/joy-con-drift-apology-nintendo-president>.

1 47. Upon information and belief, Defendant has had a financial motive to
2 conceal the defect, as it did not want to stop selling the Products, and/or would need
3 to expend a significant amount of money to cure the defect.

4 48. Despite Defendant’s affirmative misrepresentations as to the
5 functionality of the Products, Defendant could have easily disclosed the defect to
6 potential consumers in any number of ways, including on the product’s packaging or
7 the set-up screen.

8 49. Further, as a result of Defendant’s misrepresentations, Plaintiffs and
9 members of the Classes did not expect the Products to have Joy-Con Drift, a defect
10 where the controller registers an input even where there is none. Similar to a computer
11 mouse, the ability to control the cursor is a central function of the Product.

12 50. Because of Defendant’s actions, consumers have suffered an injury-in-
13 fact and are entitled to damages, and other appropriate relief.

14 **CLASS ACTION ALLEGATIONS**

15 51. Plaintiffs, pursuant to Federal Rules of Civil Procedure 23(a) and
16 23(b)(2) and (b)(3), bring this action on behalf of the following Nationwide Class,
17 California Subclass, and California Consumer Subclass (“Classes”):

- 18 a. **The “Nationwide Class”**: All persons in the United States who
19 purchased a Nintendo Switch, Joy-Con controllers, or a Nintendo
20 Switch Lite, within the applicable statute of limitations period.
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22 b. **The “California Subclass”**: All persons in California who
23 purchased a Nintendo Switch, Joy-Con controllers, or a Nintendo
24 Switch Lite, within the applicable statute of limitations period.
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26 c. **The “California Consumer Subclass”**: All persons in the United
27 States who purchased a Nintendo Switch, Joy-Con controllers, or
28 a Nintendo Switch Lite for personal, family, or household
purposes in the state of California, within the applicable statute of

1 limitations period.

2 52. The Nationwide Class, California Subclass, and California Consumer
3 Subclass are collectively referred to herein as the “Classes.”

4 53. Excluded from the Classes are Defendant, its parents, subsidiaries,
5 affiliates, officers, and directors; all persons who make a timely election to be
6 excluded from the Classes; the judge to whom this case is assigned and any immediate
7 family members thereof; and any persons who assert claims for personal injury.

8 54. Plaintiffs reserve the right to modify or amend the definition of the
9 proposed Classes after having had an opportunity to conduct discovery.

10 55. Plaintiffs Luz Sanchez and M.S. are members of the Nationwide Class,
11 California Subclass, and California Consumer Subclass.

12 56. Numerosity: The members of the Classes are so numerous that individual
13 joinder of all Classes members is impracticable. Since the release of the Nintendo
14 Switch on March 3, 2017, Defendant has sold a total of approximately 22.12 million
15 units in the Americas.¹⁹ The Nintendo Switch Lite launched on September 20, 2019
16 and has since sold approximately 2.33 million units in the Americas.²⁰ With a total of
17 24.45 million units sold in the Americas, there are at least thousands of Class members
18 in the United States.

19 57. Commonality and Predominance: This action involves common
20 questions of law and fact, which predominate over any questions affecting individual
21 Class members, including, without limitation:

22 a. Whether Defendant’s conduct violated the laws and/or regulations
23

24 _____
25 ¹⁹ *Dedicated Video Game Sales Units* (Consolidated Hardware/Software Sales Transition tab,
26 Consolidated Sales Transition by Region in Historical Data for details about prior fiscal years link,
27 Consolidated Sales Transition by Region) (March 31, 2020),
https://www.nintendo.co.jp/ir/en/finance/hard_soft/number.html.

28 ²⁰ *Id.*

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- asserted herein;
- b. Whether the Products are defective;
- c. Whether the affirmative representations discussed herein that Defendant made about Joy-Con Controllers and Nintendo Switch Lite were or are false, misleading, or likely to deceive a reasonable consumer;
- d. Whether the representations discussed herein were material to a reasonable consumer;
- e. Whether Defendant’s conduct violates public policy;
- f. Whether Plaintiffs and the other Class members have been injured and the proper measure of their losses as a result of those injuries;
- g. Whether Defendant knowingly failed to disclose the existence and cause of the defect;
- h. Whether Defendant placed the Joy-Con Controllers and Nintendo Switch Lite into the stream of commerce in the United States with knowledge of the defect;
- i. Whether Defendant knew or should have known that Joy-Con Controllers and/or Nintendo Switch Lite were defective;
- j. Whether Plaintiffs and the other Class members are entitled to damages, including punitive damages, as a result of Defendant’s conduct alleged herein, and if so, the amount or proper measure of those damages; and
- k. Whether Plaintiffs and the other Class members are entitled to injunctive, declaratory, or other equitable relief.

58. Typicality: Plaintiffs’ claims are typical of those of the other Class members because, among other things, Plaintiffs and all Class members were injured in a similar manner through the uniform conduct by Defendant described herein.

1 59. Adequacy of Representation: Plaintiffs are adequate representatives of
2 the Classes because Plaintiffs’ interests do not conflict with the interests of the other
3 Class members Plaintiffs seek to represent. In addition, Plaintiffs have retained
4 counsel competent and experienced in complex commercial and class action
5 litigation. Plaintiffs and their counsel intend to prosecute this action vigorously for
6 the benefit of the Classes, and the interests of the Class members will be fairly and
7 adequately protected by Plaintiffs and their counsel.

8 60. Declaratory and Injunctive Relief: Defendant has acted or refused to act
9 on grounds generally applicable to Plaintiffs and the other Class members, thereby
10 making appropriate final injunctive relief and declaratory relief, as described below,
11 with respect to the Classes as a whole.

12 61. Superiority: A class action is superior to any other available means for
13 the fair and efficient adjudication of this controversy, and no unusual difficulties are
14 likely to be encountered in the management of this class action. The damages or other
15 financial detriment suffered by Plaintiffs and the other Class members are relatively
16 small compared to the burden and expense that would be required to individually
17 litigate their claims against Defendant, making it impracticable for Class members to
18 individually seek redress for Defendant’s wrongful conduct. Even if Class members
19 could afford individual litigation, the court system could not. Individualized litigation
20 creates a potential for inconsistent or contradictory judgments and increases the delay
21 and expense to all parties and the court system. By contrast, the class action device
22 presents far fewer management difficulties, and provides the benefits of single
23 adjudication, economies of scale, and comprehensive supervision by a single court.

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1 **CAUSES OF ACTION**

2 **COUNT I**

3 **Violation of California’s Unfair Competition Law (“UCL”)**
4 **Cal. Bus. & Prof. Code § 17200, *et seq.***
5 ***(for the California Subclass)***

6 62. Plaintiffs re-allege and incorporate Paragraphs 1-61 as if fully set forth
7 herein.

8 63. Plaintiffs bring this claim individually and on behalf of the California
9 Subclass.

10 64. Plaintiffs and Defendant are “persons” within the meaning of the UCL.
11 Cal. Bus. & Prof. Code § 17201.

12 65. Under the UCL, a business act or practice is “unlawful” if it violates any
13 established state or federal law.

14 66. In the course of manufacturing, selling, and marketing the defective
15 Products, Defendant engaged in “unlawful” business practices by violating the
16 California Consumers Legal Remedies Act, and other applicable state and federal
17 laws described herein.

18 67. As a result of Defendant’s unlawful business acts and practices,
19 including misrepresentations, omissions, and fraudulently concealing material
20 information and suppressing the truth, Defendant has and continues to unlawfully
21 obtain money from Plaintiffs and members of the Classes.

22 68. Under the UCL, a business act or practice is “unfair” if the defendants’
23 conduct is substantially injurious to consumers, offends public policy, and is immoral,
24 unethical, oppressive, and unscrupulous, as the benefits for committing such acts or
25 practices are outweighed by the gravity of the harm to the alleged victims.

26 69. Defendant’s conduct was and continues to be of no benefit to purchasers
27 of the Products, as it is unfair, unlawful, misleading, and is injurious to consumers
28 who seek to purchase Products that are not defective. Plaintiffs and members of the
California Subclass were deceived by Defendant’s fraudulent omissions and

1 misrepresentations. Specifically, Defendant manufactured, promoted, and sold the
2 Products which were substantially certain to fail within the useful life of the Products.
3 It fraudulently concealed the defect at the time of sale and after the defect manifested,
4 which is of no benefit to consumers. Plaintiffs and members of the California Subclass
5 could not have avoided these claimed injuries because Defendant knowingly and
6 fraudulently concealed material information. Upon information and belief, Defendant
7 also had a financial motive to conceal the defect, as it did not want to stop selling the
8 Products, and/or would need to expend a significant amount of money to cure the
9 defect.

10 70. Furthermore, Defendant is aware and had exclusive knowledge of the
11 defect (as described *supra*) and has a duty to disclose the defect to consumers.

12 71. Receiving money as a result of manufacturing, promoting, selling, and
13 misrepresenting the defective Products is contrary to public policy and is immoral,
14 unethical, oppressive, unscrupulous and substantially injures consumers. And, as
15 demonstrated by the many California laws prohibiting such practices, there is no
16 justification or motive that outweighs the harm caused by Defendant's defective
17 Products. Therefore, Defendant's conduct was and continues to be unfair.

18 72. Plaintiffs and the members of the California Subclass paid large sums of
19 money to Defendant to receive Products they believed were not defective based on
20 Defendant's representations and/or promises—which they did not receive. As a result
21 of Defendant's unfair business acts and practices, Defendant has and continues to
22 unfairly obtain money from Plaintiffs and members of the California Subclass.

23 73. Under the UCL, a business act or practice is “fraudulent” if it actually
24 deceives or is likely to deceive members of the consuming public.

25 74. Defendant's conduct here was and continues to be fraudulent because it
26 has the effect of deceiving consumers into believing that the Products would be fit for
27 ordinary use, when they are not. Furthermore, Defendant failed to disclose a known
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1 defect in the Products, as discussed herein, which was a material fact that Plaintiffs
2 and members of the California Subclass relied upon and influenced their decision to
3 purchase the Products. As such misrepresentations misled and were likely to deceive
4 Plaintiffs and members of the California Subclass, Defendant’s conduct was
5 “fraudulent.”

6 75. As a result of Defendant’s fraudulent business acts and practices,
7 Defendant has and continues to fraudulently obtain money from Plaintiffs, and
8 members of the California Subclass.

9 76. Defendant knew or should have known, and had exclusive knowledge
10 that its material misrepresentations and omissions would be likely to deceive and
11 harm the consuming public and result in consumers making payments to Defendant
12 under the false impression about the Products.

13 77. Plaintiffs and the California Subclass lost money and suffered injury-in-
14 fact by purchasing Defendant’s Products, and Defendant was unjustly enriched by
15 receiving payments from Plaintiffs and the California Subclass in return for providing
16 Plaintiffs and the California Subclass Products that were not fit for ordinary use and
17 defect free.

18 78. Unless restrained and enjoined, Defendant will continue to engage in the
19 unlawful, unfair and fraudulent conduct described herein.

20 79. Accordingly, Plaintiffs, individually and on behalf of all the California
21 Subclass, seek restitution from Defendant of all money from Plaintiffs and the other
22 members of the California Subclass obtained as a result of Defendant’s unfair
23 competition, an injunction prohibiting Defendant from continuing and further
24 engaging in its unlawful, unfair and fraudulent conduct, corrective disclosures, and
25 all other relief the Court deems appropriate.

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COUNT II

Violation of California’s Consumers Legal Remedies Act (“CLRA”)

Cal. Civ. Code § 1750, *et seq.*

(for the Nationwide Class; in the alternative, California Consumer Subclass)

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5 80. Plaintiffs re-allege and incorporate Paragraphs 1-61 as if fully set forth
6 herein.

7 81. Plaintiffs bring this claim individually and on behalf of the Nationwide
8 Class, or in the alternative, California Consumer Subclass.

9 82. The CLRA was designed and enacted to protect consumers from unfair
10 and deceptive business practices. To this end, the CLRA sets forth a list of unfair and
11 deceptive acts and practices in California Civil Code § 1770.

12 83. Plaintiffs and members of the Nationwide Class and California
13 Consumer Subclass are “consumers,” Defendant is a “person,” and the Products are
14 “goods” within the meaning of the CLRA. Cal. Civ. Code § 1761(a), (c) and (d).

15 84. The purchase of Products by Plaintiffs and members of the Nationwide
16 Class and California Consumer Subclass constitute “transactions” within the meaning
17 of the CLRA. Cal. Civ. Code § 1761(e).

18 85. California Civil Code § 1770(a)(5) prohibits “[r]epresenting that goods
19 or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or
20 quantities that they do not have[.]” Defendant represents and continues to represent
21 that the Products have characteristics – that they will be fit for ordinary use – when
22 they do not have such characteristics. In fact, the Products suffer from a defect known
23 as Joy-Con Drift, which severely limits its central functionality and general gameplay.
24 Therefore, Defendant has violated section 1770(a)(5) of the CLRA

25 86. California Civil Code § 1770(a)(7) prohibits “[r]epresenting that goods
26 or services are of a particular standard, quality, or grade, or that goods are of a
27 particular style or model, if they are of another.” Defendant represents and continues
28 to represent that the Products are of a particular standard (fit for ordinary use) when

1 they are of another standard instead (contain a defect that severely limits its
2 functionality). Therefore, Defendant has violated section 1770(a)(7) of the CLRA.

3 87. California Civil Code § 1770(a)(9) prohibits “[a]dvertising goods or
4 services with intent not to sell them as advertised.” By marketing the Products as
5 being free from defect and fit for their ordinary use, such that a reasonable consumer
6 would believe that the Products would not have Joy-Con Drift, and then not selling
7 the Products as such, Defendant has violated section 1770(a)(9) of the CLRA.

8 88. California Civil Code § 1770(a)(16) prohibits “[r]epresenting that the
9 subject of a transaction has been supplied in accordance with a previous
10 representation when it has not.” By marketing and selling the Products as being
11 defect-free and fit for their ordinary use, such that a reasonable consumer would
12 believe that the Products would not have Joy-Con Drift, and then selling the Products
13 with the defect, Defendant has violated section 1770(a)(16) of the CLRA.

14 89. Defendant also violated the CLRA based on fraudulent omission because
15 it had a duty to disclose that the Products suffer from Joy-Con Drift. Defendant had
16 exclusive knowledge of the defect based on years of complaints and numerous
17 attempts to repair and/or replace the Products. The defect was material because had
18 Plaintiffs and members of the Nationwide Class and California Consumer Subclass
19 known the omitted information, they would not have purchased the Products or would
20 have paid substantially less for them.

21 90. At all relevant times, Defendant has known or reasonably should have
22 known that the Products were defective and not fit for ordinary use, and that Plaintiffs
23 and members of the Nationwide Class and California Consumer Subclass would
24 reasonably and justifiably rely on Defendant and its expertise in design and
25 manufacturing to provide Products that were defect-free and fit for ordinary use.

26 91. Plaintiffs and members of the Nationwide Class and California
27 Consumer Subclass reasonably and justifiably relied on Defendant and its expertise
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1 in design and manufacturing to provide Products that are defect-free and fit for their
2 ordinary use.

3 92. Plaintiffs and members of the Nationwide Class and California
4 Consumer Subclass have suffered and continue to suffer injuries caused by Defendant
5 because they would not have purchased the Products or would have paid significantly
6 less for the Products had they known that Defendant's conduct was unlawful and
7 fraudulent.

8 93. Pursuant to California Civil Code § 1782(d), Plaintiffs, individually and
9 on behalf of the other members of the Nationwide Class and California Consumer
10 Subclass, seek a court order enjoining the above-described wrongful acts and
11 practices of Defendant and for other appropriate injunctive relief.

12 94. Plaintiff Luz Sanchez's affidavit stating facts showing that venue in this
13 Court is proper pursuant to California Civil Code § 1782 Code § 1780(d) is attached
14 hereto.

15 95. Plaintiffs provided notice to Defendant of its CLRA violation pursuant
16 to California Civil Code § 1782 Code § 1782 on September 29, 2020. If within 30
17 days of receipt, Defendant does not agree to rectify the problems identified, Plaintiffs
18 will amend this Complaint to seek damages pursuant to Cal. Civ. Code § 1780 on
19 behalf of themselves and the California Consumer Subclass.

20 **COUNT III**

21 **Violation of California's False Advertising Law ("FAL")**

22 **Cal. Bus. & Prof. Code § 17500, et seq.**

23 ***(for the Nationwide Class; in the alternative, California Subclass)***

24 96. Plaintiffs re-allege and incorporate Paragraphs 1-61 as if fully set forth
25 herein.

26 97. Plaintiffs bring this claim individually and on behalf of the Nationwide
27 Class, or in the alternative, California Subclass.

28 98. The FAL, in relevant part, states that "[i]t is unlawful for any . . .

1 corporation . . . with intent . . . to dispose of . . . personal property . . . to induce the
2 public to enter into any obligation relating thereto, to make or disseminate or cause to
3 be made or disseminated . . . from this state before the public in any state, in any
4 newspaper or other publication, or any advertising device, or by public outcry or
5 proclamation, or in any other manner or means whatever, including over the Internet,
6 any statement . . . which is untrue or misleading, and which is known, or which by the
7 exercise of reasonable care should be known, to be untrue or misleading[.]” Cal. Bus.
8 & Prof. Code § 17500.

9 99. Defendant’s material misrepresentations and omissions alleged herein
10 violate California Business & Professions Code § 17500.

11 100. Defendant has represented and continues to represent to the public,
12 including Plaintiffs and members of the Nationwide Class and California Subclass,
13 that the Products are defect-free and function properly. Furthermore, by selling the
14 Products as “Joy-Con controllers,” Defendant has represented that the Products would
15 be controllers fit for their ordinary use and not defective with Joy-Con Drift.
16 Defendant’s representations are misleading because the Products are defective and
17 not fit for ordinary use. Ordinary use of Joy-Con controllers does not involve having
18 to use a controller with Joy-Con Drift. Furthermore, Defendant is aware and had
19 exclusive knowledge of the defect (as described *supra*) and had a duty to disclose
20 based on years of complaints and numerous attempts to repair and/or replace the
21 Products.

22 101. Further, upon information and belief, Defendant had a financial motive
23 to conceal the defect, as it did not want to stop selling the Products.

24 102. Because Defendant has disseminated misleading information regarding
25 the Products, and Defendant knows, knew, or should have known through the exercise
26 of reasonable care that the representations were and continue to be false and
27 misleading, Defendant violated the FAL.

1 103. As a result of Defendant’s false advertising, Defendant has and continues
2 to fraudulently obtain money from Plaintiffs and members of the Nationwide Class
3 and California Subclass.

4 104. As a direct and proximate result of Defendant’s false, misleading, and
5 deceptive advertising, Plaintiffs and members of the Nationwide Class and California
6 Subclass have suffered injury-in-fact and have lost money.

7 105. Pursuant to California Business & Professions Code §§ 17203 and
8 17500, Plaintiffs request that this Court cause Defendant to restore this fraudulently
9 obtained money to Plaintiffs and members of the Nationwide Class and California
10 Subclass, to disgorge the profits Defendant made on these transactions, and to enjoin
11 Defendant from violating the FAL or violating it in the same fashion in the future as
12 discussed herein. Otherwise, Plaintiffs and members of the Nationwide Class and
13 California Subclass may be irreparably harmed and/or denied an effective and
14 complete remedy if such an order is not granted.

15 **COUNT IV**
16 **Violation of the Song-Beverly Consumer Warranty Act**
17 **Breach of Implied Warranty of Merchantability**
(for the California Subclass)

18 106. Plaintiffs re-allege and incorporate Paragraphs 1-61 as if fully set forth
19 herein.

20 107. Plaintiffs bring this claim individually and on behalf of the California
21 Subclass.

22 108. Plaintiffs and those similarly situated were “buyers” of “consumer
23 goods” as defined under California Civil Code § 1791(a-b). The Products are
24 “consumer goods” within the meaning of Cal. Civ. Code § 1791(a).

25 109. Defendant is a “manufacturer” within the meaning of California Civil
26 Code § 1791(j).

27 110. Defendant impliedly warranted to Plaintiffs and members of the
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1 California Subclass that the devices were “merchantable” within the meaning of
2 California Civil Code §§ 1791.1(a) & 1792.

3 111. California Civil Code § 1791.1(a) states: “Implied warranty of
4 merchantability” or “implied warranty that goods are merchantable” means that the
5 consumer goods meet each of the following: (1) pass without objection in the trade
6 under the contract description; (2) are fit for the ordinary purposes for which such
7 goods are used; (3) are adequately contained, packaged, and labeled; and (4) conform
8 to the promises or affirmations of fact made on the container or label.

9 112. The Products would not pass without objection in the gaming console
10 trade because the defect causes all or substantially all of the controllers to experience
11 Joy-Con Drift and to not operate as intended.

12 113. Because the defect materially reduces the reliability and dependability
13 of the devices, they are not fit for ordinary purposes for which such goods are used.

14 114. Further, the Products are not adequately labeled because the labeling
15 fails to disclose and does not advise consumers of the defect, which is a material
16 fact regarding the Products’ central functionality. Because Defendant omitted this
17 material fact regarding the Products’ central functionality, Defendant was obligated
18 to disclose this information to Plaintiffs and other consumers. Yet, Defendant failed
19 to disclose the defect, which misled consumers.

20 115. The defect deprived Plaintiffs and members of the California Subclass
21 of the benefit of their bargain and has caused the devices to be worth less than what
22 Plaintiffs and members of the California Subclass paid for them.

23 116. As a direct and proximate result of Defendant’s breach of implied
24 warranty, Plaintiffs and members of the California Subclass received goods whose
25 condition substantially impairs their value. Plaintiffs and members of the California
26 Subclass have been damaged by the diminished value of the Products, their
27 malfunctioning, and actual and potential increased maintenance and repair or
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1 replacement costs.

2 117. Under California Civil Code §§ 1791.1(d) and 1794, Plaintiffs and
3 members of the California Subclass are entitled to damages and other legal and
4 equitable relief including, at their election, the purchase price of the Products, or the
5 overpayment or diminution in value of their devices, and are also entitled to their
6 attorney fees and costs.

7 **COUNT V**
8 **Unjust Enrichment/Quasi-Contract**
9 ***(for the Nationwide Class; in the alternative, California Subclass)***

10 118. Plaintiffs re-allege and incorporate Paragraphs 1-61 as if fully set forth
11 herein.

12 119. Plaintiffs bring this claim individually and on behalf of Nationwide
13 Class, or in the alternative, for the California Subclass.

14 120. As alleged herein, Plaintiffs and members of the Nationwide Class and
15 California Subclass have reasonably relied on Defendant to provide what it
16 promised—Products that are not defective. Yet, they have not received all of the
17 benefits promised by Defendant.

18 121. Plaintiffs and members of the Nationwide Class and California Subclass
19 conferred upon Defendant non-gratuitous payments for the Products and would not
20 have made these payments had they known that the Products suffered from Joy-Con
21 Drift. Defendant accepted or retained the non-gratuitous benefits conferred by
22 Plaintiffs and members of the Nationwide Class and California Subclass, with full
23 knowledge and awareness that, as a result of Defendant’s deception, breach of implied
24 warranty, failure to disclose, and sale of defective controllers, Plaintiffs and members
25 of the Nationwide Class and California Subclass were not receiving a product of the
26 quality, nature, fitness, or value that had been represented by Defendant and that
27 reasonable consumers would have expected.

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1 122. Defendant has been unjustly enriched in retaining the revenues derived
2 from purchases of the Products by Plaintiffs and members of the Nationwide Class
3 and California Subclass. Defendant’s retention of that benefit under these
4 circumstances is unjust and inequitable because Defendant misrepresented and sold
5 defective Products that were not fit for their ordinary use. Defendant’s
6 misrepresentations caused injuries to Plaintiffs and members of the Nationwide Class
7 and California Subclass because they paid for defective Products.

8 123. Retaining the non-gratuitous benefits conferred upon Defendant by
9 Plaintiffs and members of the Nationwide Class and California Subclass under these
10 circumstances made Defendant’s retention of the non-gratuitous benefits unjust and
11 inequitable. Thus, Defendant must pay restitution to Plaintiffs and members of the
12 Nationwide Class and California Subclass for unjust enrichment, as ordered by the
13 Court.

14 **COUNT VI**

15 **Violation of Magnuson-Moss Act, 15 U.S.C. § 2301, *et seq.***
16 **Implied Warranty of Merchantability Under California Law**
(for the Nationwide Class; in the alternative, California Subclass)

17 124. Plaintiffs re-allege and incorporate Paragraphs 1-61 as if fully set forth
18 herein.

19 125. Plaintiffs bring this claim individually and on behalf of Nationwide
20 Class, or in the alternative, for the California Subclass.

21 126. The Products are “consumer products” within the meaning of 15 U.S.C.
22 § 2301(1).

23 127. Plaintiffs and members of the Nationwide and California Subclass are
24 “consumers” as defined in 15 U.S.C. § 2301(3).

25 128. Defendant is a “supplier” and “warrantor” as defined in 15 U.S.C. §
26 2301(4) and (5).

27 129. In connection with the sale of the Products, Defendant issued an “implied
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1 warranty” as defined in 15 U.S.C. § 2301(7), which warranted that the Products are
2 defect-free and fit for their intended and ordinary use.

3 130. Defendant breached the implied warranty by manufacturing, selling, and
4 promoting Products that are not defect-free and fit for their intended and ordinary use.
5 Rather, the Products suffer from Joy-Con Drift, a defect that affects their central
6 functionality. Accordingly, Defendant has violated the statutory rights due to
7 Plaintiffs and members of the Nationwide and California Subclass pursuant to the
8 Magnuson-Moss Warranty Act, 15 U.S.C. § 2301, *et seq.*, thereby damaging Plaintiffs
9 and members of the Nationwide and California Subclass.

10 131. Prior to filing this action, Plaintiffs, by and through their counsel,
11 provided Defendant with written notice of their claims pursuant to 15 U.S.C.
12 § 2310(e) and also notified Defendant that they were acting on behalf of all persons
13 who purchased the Products during the relevant class period.

14 **COUNT VII**

15 **Declaratory and Injunctive Relief**

16 ***(for the Nationwide Class; in the alternative, California Subclass)***

17 132. Plaintiffs re-allege and incorporate Paragraphs 1-61 as if fully set forth
18 herein.

19 133. Plaintiffs bring this claim individually and on behalf of Nationwide
20 Class, or in the alternative, for the California Subclass.

21 134. A substantial controversy exists between Plaintiffs and members of the
22 Nationwide Class and California Subclass on the one hand, and Defendant, on the
23 other. Pursuant to 28 U.S.C. § 2201, or in the alternative, under California law, this
24 Court may declare the rights and legal relations of any interested party seeking such
25 declaration.

26 135. The substantial controversy in this case is over Defendant’s Terms of
27 Use, which among other things, requires Plaintiff M.S., a minor, and other minors of
28 the Nationwide Class and California Subclass to submit to binding arbitration.

1 Defendant's Terms of Use also purports to deny Plaintiff M.S., a minor, and other
2 minors of the Nationwide Class and California Subclass the right to bring or
3 participate in a class action.

4 136. Plaintiff Luz Sanchez is not a signatory to Defendant's Terms of Use.
5 She seeks, along with Plaintiff M.S., a judgment declaring that Defendant's Terms of
6 Use are invalid as to all minors under the age of 18 and all individuals who agreed to
7 Defendant's Terms of Use when they were under the age of 18 ("Minors").
8 Specifically, Plaintiffs seek declaratory relief invalidating any agreements
9 purportedly waiving Defendant's liability, or preventing Plaintiff M.S. and other
10 Minors from proceeding with their claims in Court on a class-wide basis.

11 137. Plaintiffs also seek a permanent injunction precluding Defendant from
12 disseminating their illegal purported class action waiver and arbitration provisions on
13 Plaintiff M.S and other Minors of the Nationwide Class and California Subclass.

14 138. Plaintiff M.S., as a minor, and by and through his parent and guardian
15 Luz Sanchez, hereby disaffirms Defendant's Terms of Use, including any waiver of
16 rights, limitations on liability, arbitration agreement, and class action waiver.

17 139. Any agreement set forth in Defendant's Terms of Use is also illusory
18 because it does not require Defendant to do and/or provide anything in exchange for
19 this waiver of rights and liabilities.

20 140. The provisions of Defendant's Terms of Use are complicated,
21 ambiguous, unfairly one-sided towards Defendant, the drafter, and are otherwise
22 difficult for the average consumer, especially Minors, to understand. Any ambiguity
23 or lack of clarity in the Terms of Use must be held against Defendant.

24 141. Plaintiffs paid consideration for the goods and services provided by
25 Defendant. The Terms of Use were not material to that basic transaction and did not
26 provide any benefit to Plaintiffs.

27 142. Defendant waived its ability to enforce the Terms of Use by knowingly
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1 and affirmatively knowingly manufacturing, marketing, and selling the defective
2 Products, and failing to adequately repair and/or replace them, in violation of the
3 Terms of Use.

4 143. Among other things, Defendant should be collaterally estopped from
5 arguing that its Terms of Use binds any Minor recipient to a class action waiver or to
6 an arbitration agreement.

7 144. Plaintiffs also request a judgment declaring the liability limitations and
8 dispute resolution provisions of Defendant's Terms of Use to be illusory, illegal,
9 unconscionable, against public policy or otherwise unenforceable under applicable
10 law by Defendant against Plaintiff M.S. and Minors of the Nationwide Class and
11 California Subclass.

12 **PRAYER FOR RELIEF**

13 WHEREFORE, Plaintiffs, individually and on behalf of the other members of
14 the proposed Nationwide Class, California Subclass, and California Consumer
15 Subclass, respectfully request that the Court enter judgment in their favor and against
16 Defendant as follows:

17 A. Certifying the Nationwide Class, California Subclass, and California
18 Consumer Subclass as requested herein, designating Plaintiffs as class representatives
19 and appointing the undersigned counsel as class counsel;

20 B. Declaring that Defendant is financially responsible for notifying the
21 Class members of the pendency of this suit;

22 C. Ordering restitution and disgorgement of all profits and unjust
23 enrichment Defendant obtained from Plaintiffs and the class members as a result of
24 Defendant's unlawful, unfair and fraudulent business practices;

25 D. Ordering payment of damages as permitted by law, including actual,
26 compensatory, statutory, and punitive damages, to the full extent permitted by law;

27 E. Ordering declaratory relief and injunctive relief as permitted by law or
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1 equity, including enjoining Defendant from continuing the unlawful practices as set
2 forth herein, and ordering Defendant to engage in a corrective advertising campaign;

3 F. Ordering Defendant to pay attorneys' fees and litigation costs to
4 Plaintiffs and the other members of the Classes;

5 G. Ordering Defendant to pay both pre- and post-judgment interest on any
6 amounts awarded; and

7 H. Ordering such other and further relief as may be just and proper.

8 **JURY TRIAL DEMANDED**

9 Plaintiffs hereby demand a trial by jury of all claims in this Complaint so
10 triable.

11
12 DATED: October 5, 2020

FARUQI & FARUQI, LLP

13
14 By: /s/ Benjamin Heikali
15 Benjamin Heikali

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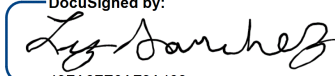
CLRA Venue Declaration Pursuant to California Civil Code Section 1780(d)

I, Luz Sanchez, declare as follows:

1. I am a Plaintiff in this action and a citizen of the State of California. I am also conducting this action on behalf of Plaintiff M.S., a minor, as his mother and guardian. I have personal knowledge of the facts stated herein and, if called as a witness, I would testify competently thereto.

2. This Class Action Complaint is filed in the proper place of trial because Defendant resides and is doing business in this District.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct, executed on 10/2/2020 | 12:49 AM EDT at Firebaugh, California.

DocuSigned by:

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Luz Sanchez