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11
 12 Attorneys for Defendant
 Nintendo of America Inc.

13 **UNITED STATES DISTRICT COURT**
 14 **NORTHERN DISTRICT OF CALIFORNIA**
 15

17 N.A., by and through his Guardian BRUCE
 18 ALLS, individually and on behalf of similarly
 situated individuals,

19 Plaintiff,

20 v.

21 NINTENDO OF AMERICA INC.,

22 Defendant.
 23
 24

Case No. _____

**NINTENDO OF AMERICA INC.’S
 NOTICE OF REMOVAL TO FEDERAL
 COURT**

[Removed from the Superior Court of the State
 of California for the County of Contra Costa,
 Case No. C23-00609]

Complaint Filed: March 17, 2023

25 **TO THE CLERK OF THE ABOVE-ENTITLED COURT:**

26 **PLEASE TAKE NOTICE** that Defendant Nintendo of America Inc. (“Nintendo”) hereby
 27 removes this civil action from the Superior Court of the State of California, County of Contra Costa,
 28

1 to the United States District Court for the Northern District of California under 28 U.S.C.
2 §§ 1332(d) and 1453. Pursuant to 28 U.S.C. § 1446(a), Nintendo provides the following “short and
3 plain statement of the grounds for removal.”

4 BACKGROUND

5
6 1. On March 17, 2023, Plaintiff N.A., a minor, filed a civil action titled *N.A., by and*
7 *through his Guardian Bruce Alls, individually and on behalf of similarly situated individuals v.*
8 *Nintendo of America Inc., a Washington corporation*, Case No. C23-00609, in the Superior Court
9 of the State of California, County of Contra Costa. A true and correct copy of the Complaint is
10 attached as Exhibit A (“Compl.”).

11 2. N.A. alleges deceptive and misleading practices in connection with the marketing
12 and sale to minors of “Spotlight Pipes” in Nintendo’s Mario Kart Tour video game. Compl. ¶¶ 1–

13 3. N.A. claims that minors were allowed “to pay real-world currency to gamble on winning in-
14 game items” via the Spotlight Pipes and Nintendo “refus[ed] to provide refunds” for those
15 purchases. *Id.* ¶ 5.

16
17 3. N.A. asserts claims for (1) declaratory judgment on minors’ rights to disaffirm
18 their purchases and contracts with Nintendo, *id.* ¶¶ 62–70; (2) monetary and injunctive relief
19 based on alleged violations of the Washington Consumer Protection Act (“CPA”), Wash. Rev.
20 Code §§ 19.86.010, *et. seq.*, *id.* ¶¶ 71–87; (3) monetary and injunctive relief based on alleged
21 violations of California’s Unfair Competition Law (“UCL”), Cal. Bus. & Prof. Code §§ 17200,
22 *et. seq.*, *id.* ¶¶ 88–104; and (4) restitution or unjust enrichment in the alternative, *id.* ¶¶ 105–09.

23
24 4. N.A. purports to bring the claims on behalf of himself and a proposed nationwide
25 class and/or a proposed “California Minor Subclass.” *Id.* ¶ 55. He defines the proposed
26 nationwide class as “[a]ll minors located within the United States who, during the applicable
27 limitations period, made a purchase to fire the Spotlight Pipe in the Mario Kart Tour game using
28

1 real-world currency.” *Id.* He defines the proposed “California Minor Subclass” as “[a]ll minors
2 located within the state of California who, during the applicable limitations period, made a
3 purchase to fire the Spotlight Pipe in the Mario Kart Tour game using real-world currency.” *Id.*

4
5 5. On behalf of himself and the proposed classes, N.A. seeks declaratory and
6 injunctive relief, damages, and attorney’s fees and costs. *Id.* at Prayer for Relief. He also seeks
7 restitution and the disgorgement of alleged profits from the Mario Kart Tour game. *Id.* ¶ 103.

8 6. On April 18, 2023, N.A. purported to serve on Nintendo the summons and
9 Complaint. *See* Ex. B (Summons). The Superior Court of California has also issued a Notice of
10 Assignment to Department 12 for Case Management. *See* Ex. C (other state-court papers); *see*
11 *also* 28 U.S.C. § 1446(a).

12
13 **REMOVAL IS PROPER UNDER THE CLASS ACTION FAIRNESS ACT**

14 7. “[A]ny civil action brought in state court of which the district courts of the United
15 States have original jurisdiction[] may be removed by the defendant.” 28 U.S.C. § 1441(a). This
16 action is removable under 28 U.S.C. § 1441(a) because this Court would have had original
17 jurisdiction under the Class Action Fairness Act of 2005 (“CAFA”) had N.A. initially filed this
18 action in federal court. *See* 28 U.S.C. § 1332(d); *see also* 28 U.S.C. § 1453(b) (setting procedure
19 for removing class actions).

20
21 8. CAFA gives federal courts original jurisdiction over putative class actions in
22 which (1) the aggregate number of members in the proposed class consists of at least 100
23 members; (2) the parties are minimally diverse, meaning “any member of a class of plaintiffs is
24 a citizen of a State different from any defendant”; and (3) the aggregated amount in controversy
25 “exceeds the sum or value of \$5,000,000, exclusive of interests and costs.” 28 U.S.C.
26 § 1332(d)(2), (d)(5)(B).

27
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1 9. Based on the allegations as pleaded in the Complaint, which must be taken as true
2 for purposes of removal, this action satisfies CAFA's requirements and is removable to this Court.

3 ***The proposed class consists of at least 100 members.***

4 10. This action is a putative class action within the meaning of CAFA. CAFA defines
5 "class action" as "any civil action filed under rule 23 of the Federal Rules of Civil Procedure or
6 similar State statute or rule of judicial procedure authorizing an action to be brought by 1 or more
7 representative persons as a class action." 28 U.S.C. § 1332(d)(1)(B).

8 11. Here, N.A. asserts claims on behalf of two putative classes containing "hundreds,
9 if not thousands" of members, Compl. ¶ 60: (1) "[a]ll minors located within the United States
10 who, during the applicable limitations period, made a purchase to fire the Spotlight Pipe in the
11 Mario Kart Tour game using real-world currency" and (2) "[a]ll minors located within the state
12 of California who, during the applicable limitations period, made a purchase to fire the Spotlight
13 Pipe in the Mario Kart Tour game using real-world currency," *id.* ¶ 55.

14 12. In addition, N.A. seeks certification of the proposed class under California Code
15 of Civil Procedure § 382, *see* Ex. A ¶ 55, which authorizes "representative actions" when "the
16 question is one of a common or general interest, of many persons, or when the parties are
17 numerous, and it is impracticable to bring them all before the court." Because the requirements
18 of § 382 are similar to those of Federal Rule of Civil Procedure 23, § 382 is a "similar State
19 statute" under CAFA. *See Baumann v. Chase Inv. Serv's. Corp.*, 747 F.3d 1117, 1121 (9th Cir.
20 2014).

21 13. Accordingly, this is a putative class action in which the aggregate number of
22 proposed class members is 100 or more.
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Minimal diversity exists.

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2 14. Minimal diversity under CAFA exists if “any member of a class of plaintiffs is a
3 citizen of a State different from any defendant.” 28 U.S.C. § 1332(d)(2)(A). A corporation is a
4 citizen of the states “by which it has been incorporated and . . . where it has its principal place of
5 business.” *Id.* § 1332(c)(1).
6

7 15. N.A. alleges that he is a citizen of California. Compl. ¶ 10. In addition, the putative
8 California subclass is limited to minors who are “located” in California. *Id.* ¶ 55.

9 16. Nintendo is the sole defendant and is both incorporated in and has its principal
10 place of business in Washington State. *See* 28 U.S.C. § 1332(c)(1).
11

12 17. Thus, the minimal diversity requirement is met because at least one putative class
13 member—N.A.—is diverse from Nintendo.

The amount in controversy exceeds \$5,000,000.

14
15 18. CAFA permits courts to aggregate the claims of the individual putative class
16 members “to determine whether the matter in controversy exceeds the sum or value of
17 \$5,000,000, exclusive of interest and costs.” 28 U.S.C. § 1332(d)(6).
18

19 19. A defendant must only set forth “a plausible allegation that the amount in
20 controversy exceeds the jurisdictional threshold.” *Dart Cherokee Basin Operating Co., LLC v.*
21 *Owens*, 574 U.S. 81, 89 (2014). That standard is satisfied when it is “facially apparent” from the
22 complaint that the asserted claims put into controversy more than \$5,000,000. *Id.* “The amount
23 in controversy is simply an estimate of the total amount in dispute, not a prospective assessment
24 of defendant’s liability.” *Lewis v. Verizon Commc’ns, Inc.*, 627 F.3d 395, 400 (9th Cir. 2010).
25

26 20. “Among other items, the amount in controversy includes damages (compensatory,
27 punitive, or otherwise), the costs of complying with an injunction, and attorneys’ fees awarded
28

1 under fee-shifting statutes or contract.” *Fritsch v. Swift Transp. Co. of Ariz., LLC*, 899 F.3d 785,
2 788 (9th Cir. 2018).

3 21. N.A. seeks for himself and the two putative classes declaratory relief; “economic,
4 monetary, actual, consequential, compensatory, and punitive damages”; attorney’s fees;
5 injunctive relief; and “other relief as the Court deems just and equitable.” Compl. at Prayer for
6 Relief. N.A. also seeks the disgorgement of profits, *id.* ¶ 103, and “restitution to Plaintiff and the
7 other Class and Subclass members in the amount which Defendant was unjustly enriched by each
8 of their in-game purchases,” *id.* ¶ 108.

9
10 22. N.A. alleges that Nintendo’s revenue from the Mario Kart Tour “Pipe lootbox
11 mechanism” is nearly \$300 million dollars. *Id.* ¶ 29. He further alleges that “minor
12 children . . . comprise a large segment of Defendant’s player population” for the Mario Kart Tour
13 game, *id.* ¶ 5, and that “there are hundreds, if not thousands, of Class and Subclass members,” *id.*
14 ¶ 60.

15
16 23. Because N.A. alleges that “a large segment” of the Mario Kart Tour “player
17 population” are minors, much of the alleged \$300 million revenue from the Mario Kart Tour’s
18 “Pipe lootbox mechanism” may be plausibly attributed to purchases made by N.A. and the
19 putative class members.

20 24. Moreover, N.A. seeks disgorgement of that revenue on a classwide basis, *id.*
21 ¶ 103, and restitution “in the amount which Defendant was unjustly enriched” by the minors’ in-
22 game purchases, *id.* ¶ 109. N.A. has therefore placed more than \$5,000,000 at issue—“a large
23 segment” of the \$300 million in alleged revenue from the Mario Kart Tour’s “Pipe lootbox
24 mechanism” that N.A. seeks to have returned to the putative classes. *See In re Land Rover LR3*
25 *Tire Wear Prod. Liab. Litig.*, No. SACV 09- 257, 2010 WL 11558112, at *8 (C.D. Cal. June 16,
26
27
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1 2010) (explaining that a plaintiff’s request for disgorgement of revenue can satisfy the amount in
2 controversy requirement where that revenue exceeds \$5,000,000).

3 25. In addition, N.A. seeks punitive damages, attorney’s fees, and injunctive relief, all
4 of which further contribute to an amount in controversy in excess of \$5 million. *See Guglielmino*
5 *v. McKee Foods Corp.*, 506 F.3d 696, 700 (9th Cir. 2007) (attorneys’ fees included in determining
6 amount in controversy); *Fritsch*, 899 F.3d at 788 (punitive damages included in determining
7 amount in controversy); *Hunt v. Wash. State Apple Advert. Comm’n*, 432 U.S. 333, 347 (1977)
8 (cost of complying with declaratory or injunctive relief included in determining amount in
9 controversy); *see also* Wash. Rev. Code § 19.86.090 (providing for recovery of treble damages
10 and attorney’s fees for violations of the CPA).

12 26. This action therefore meets CAFA’s amount in controversy requirement.

13 27. Nintendo does not concede, however, that N.A. or any putative class member is
14 entitled to any damages or other relief or concede that Nintendo is liable for any conduct alleged
15 in this action.

17 ***None of CAFA’s exceptions bar removal of this action.***

18 28. This action does not fall within the exclusions to removal jurisdiction described in
19 28 U.S.C. §§ 1332(d)(4), (d)(9) or 28 U.S.C. § 1453(d).

20 29. Section 1332(d)(4) provides that a district court shall not exercise CAFA
21 jurisdiction over a class action in which, among other things: “greater than two-thirds of the
22 members of all proposed plaintiff classes in the aggregate are citizens of the State in which the
23 action was originally filed” and “at least 1 defendant is a defendant . . . who is a citizen of the
24 State in which the action was originally filed.” 28 U.S.C. § 1332(d)(4)(A); *see also* 28 U.S.C.
25 § 1332(d)(4)(B) (similarly excluding cases where “two thirds or more of” the class members and
26 “the primary defendants, are citizens of the State in which the action was originally filed”). This
27
28

1 exception does not apply here because the only defendant, Nintendo, is a citizen of Washington
2 State and is not a citizen of California—the state where the action was filed. *See Corsino v.*
3 *Perkins*, No. CV0909031 MMMCW, 2010 WL 317418, at *5 (C.D. Cal. Jan. 19, 2010) (“Suits
4 involving a primary defendant who is not a citizen of the forum state cannot qualify for the [local
5 controversy] exception.”) (citation omitted).
6

7 30. Sections 1332(d)(9) and 1453(d) exempt certain securities and corporate
8 governance cases from CAFA’s broad jurisdictional grant. *See* 28 U.S.C. §§ 1332(d)(9), 1453(d)
9 (explaining that § 1332(d)(2) does not apply to cases arising under several sections of the
10 Securities Act of 1933, several sections of the Securities Exchange Act of 1934, and certain state
11 corporate governance laws). Those provisions do not bar jurisdiction here because N.A.’s claims
12 do not arise under the Securities Act of 1933 or the Securities Exchange Act of 1934, nor do they
13 involve state-centric corporate governance issues.
14

15 **PROCEDURAL STATEMENT**

16 ***All defendants consent to removal.***

17 31. Only Nintendo has been named as a defendant and served as of the filing of this
18 Notice of Removal. Therefore, the only defendant in this action consents to removal.
19

20 ***Removal is timely.***

21 32. N.A. purports to have served Nintendo on April 18, 2023. This Notice of Removal
22 is therefore timely under 28 U.S.C. § 1446(b) because Nintendo filed the Notice within 30 days
23 after it was purportedly served. *See Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S.
24 344, 47–48 (1999) (holding that the 30-day removal period is triggered with formal service).
25

26 ***Venue is proper in this Court.***

27 33. Venue properly lies in the United States District Court for the Northern District of
28 California because this “district and division embrac[e]” Contra Costa County, in which the

1 Complaint was initially filed. 28 U.S.C. §§ 84(a), 1441(a).

2 *Assignment to the Oakland Division is proper.*

3 34. Assignment to the Oakland Division of this Court is proper because that division
4 embraces Contra Costa County, in which the Complaint was initially filed. L.R. 3-2(c), (d), 3-5(b).

5 *Nintendo is providing notice to the state court and Plaintiff.*

6 35. Pursuant to 28 U.S.C. § 1446(d), Nintendo is filing a copy of this Notice of
7 Removal with the Superior Court of the State of California, County of Contra Costa, where the
8 action was originally filed. Nintendo is also providing to N.A. written notice of this removal by
9 serving his counsel with the Notice of Removal.

10 *Nintendo has attached all pleadings in the state court.*

11 36. In accordance with 28 U.S.C. § 1446(a), copies of all processes, pleadings,
12 minutes, and orders served on Nintendo in this action are attached as Exhibit C. A true and correct
13 copy of the Contra Costa Superior Court docket for this action is attached as Exhibit D.

14 **NON-WAIVER OF DEFENSES**

15 37. Nintendo expressly reserves all of its defenses. By removing the action to this
16 Court, Nintendo does not waive any rights or defenses available under federal or state law. *See,*
17 *e.g., Maplebrook Townhomes LLC v. Greenbank*, No. 10–CV–03688–LHK, 2010 WL 4704472,
18 at *4 (N.D. Cal. Nov. 12, 2010) (“[R]emoval to federal court counts as a special appearance and
19 does not waive the right to object to personal jurisdiction.”). Nothing in this Notice of Removal
20 should be taken as an admission that N.A.’s allegations are sufficient to state a claim or have any
21 substantive merit. In addition, Nintendo does not concede that N.A. states any claim upon which
22 relief can be granted or that N.A. or the putative classes are entitled to any relief of any kind or
23 nature. *See Lewis*, 627 F.3d at 400 (“The amount in controversy is simply an estimate of the total
24 amount in dispute, not a prospective assessment of defendant's liability”); *LaCross v. Knight*

1 *Transp. Inc.*, 775 F.3d 1200, 1203 (9th Cir. 2015) (holding that plaintiffs should not “conflat[e]
2 the amount in controversy with the amount of damages actually recoverable”). If any questions
3 arise as to the propriety of the removal of this action, Nintendo respectfully requests the
4 opportunity to submit additional papers and to present oral argument.
5

6 WHEREFORE, Nintendo hereby removes the above-titled case to this Court.
7
8

9 Dated: May 17, 2023

PERKINS COIE LLP

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12 By: *s/ Susan D. Fahringer*

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26 Attorneys for Defendant
Nintendo of America Inc.
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Exhibit A

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6 Per local Rule, This case is assigned to
7 Judge Treat, Charles S, for all purposes.
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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF CONTRA COSTA

10 N.A., by and through his Guardian BRUCE)
11 ALLS, individually and on behalf of similarly)
12 situated individuals,)

13 Plaintiff,)

14 v.)

15 NINTENDO OF AMERICA INC., a)
16 Washington corporation,)
17 Defendant.)

Case No. C23-00609

) Assigned to:
) Department:
) Complaint Filed:

) **COMPLAINT – CLASS ACTION JURY**
) **TRIAL DEMANDED**

-) **1. Declaratory Judgment on Minors’**
) **Rights to Disaffirm**
) **2. Violation of Washington Consumer**
) **Protection Act, Wash Rev. Code §§**
) **19.86.010, et seq.**
) **3. Violation of California Business and**
) **Professions Code § 17200, et seq.**
) **4. Unjust Enrichment**
)
) DEMAND FOR JURY TRIAL

CLASS ACTION COMPLAINT

24 Plaintiff N.A. a minor, by and through his Guardian Bruce Alls (collectively “Plaintiff”),
25 through their undersigned counsel, brings this Class Action Complaint against Nintendo of
26 America Inc. (“Nintendo” or “Defendant”), on behalf of himself and all others similarly situated,
27 and alleges the following upon personal knowledge as to his own actions, and upon information
28 and belief as to counsel’s investigations and all other matters.

NATURE OF THE CASE

1
2 1. This is an action brought by Plaintiff on his own behalf and on behalf of others
3 similarly situated individuals for the unlawful, deceptive, and misleading trade practices engaged
4 in by Defendant, a provider of some of the most popular video games in the nation.

5 2. One of Defendant’s most popular games is Mario Kart Tour, a series of racing
6 games with Nintendo’s most recognizable characters including Mario, Luigi, Donkey Kong and
7 Captain Toad, which can be downloaded for free on mobile or tablet devices via the Apple or
8 Android app store. Users playing Mario Kart Tour on their devices connect through the internet to
9 Defendant’s servers that allow them to play with other users across the country, and the world.

10 3. A critical and lucrative aspect of Defendant’s Mario Kart game were virtual
11 “Lootboxes” that Defendant calls “Spotlight Pipes”. Defendant marketed and sold these Pipes for
12 real-world currency to players, including minors such as Plaintiff. The Pipes were advertised in
13 game as possibly containing valuable unlockable prizes that allowed players to upgrade and/or
14 advance their playing advantage in the game. Nothing players did in game increased or altered
15 their chances of what would be unlocked when a Pipe was opened even though what was won
16 could advance a player. Players such as Plaintiff were not told in advance what is inside any
17 particular Pipe or the odds of winning something which may be contained in the Pipe, and thereby
18 were functionally gambling on the chance of winning some valuable prize.

19 4. In addition, Defendant’s in-game content, including its Pipes, is non-refundable,
20 regardless of whether the purchases, gambling or otherwise, are made by a minor.

21 5. Defendant’s unfair, deceptive, or unlawful acts or practices of allowing players,
22 including minors, to pay real-world currency to gamble on winning in-game items, implemented
23 in conjunction with undisclosed “dark patterns” that steered players towards making such
24 purchases and making it particularly difficult to advance in the game otherwise, as well as refusing
25 to provide refunds to minors who made in-game purchases, have through such omissions deceived,
26 misled, and harmed consumers, especially minor children who comprise a large segment of
27 Defendant’s player population. Plaintiff and other consumers as well as the public interest have
28

1 been impacted or injured as a result of Defendant’s practices, including, but not limited to, having
2 suffered out-of-pocket loss.

3 6. Plaintiff brings this class action lawsuit on behalf of himself, and all others similarly
4 situated. Plaintiff, on behalf of himself and the Class, seeks damages, restitution, declaratory and
5 injunctive relief.

6 **JURISDICTION AND VENUE**

7 7. This Court has subject-matter jurisdiction over this action pursuant to Cal. Code
8 Civ. Proc. § 410.10 and Article VI, § 10 of the California Constitution.

9 8. Plaintiff has standing to bring this action pursuant to the Washington Consumer
10 Protection Act, Wash Rev. Code §§ 19.86.010, *et seq.*; the California Unfair Competition Law,
11 California Business and Professions Code § 17200, *et seq.* (“UCL”); and the common law.

12 9. This Court has personal jurisdiction over Defendant and venue is proper in this
13 Court because a substantial part of the events giving rise to the claims asserted herein occurred in
14 this County.

15 **PARTIES**

16 10. Minor Plaintiff N.A. and his Guardian, Bruce Alls, are natural persons and are
17 citizens and residents of California.

18 11. Defendant Nintendo of America Inc. is a Washington corporation with its
19 headquarters and principal place of business located in Redmond, Washington, and has regularly
20 engaged in business throughout the state of California, including in Contra Costa County. Upon
21 information and belief, Defendant directs the marketing and development of its products and
22 services to Contra Costa County, and the unfair, deceptive, or unlawful acts and practices stemming
23 therefrom, from its headquarters located in Washington.

24 12. At all times relevant to this action, Defendant, in the ordinary course of business as
25 the provider of products and services to individuals who play its Mario Kart Tour video game
26 engaged in acts or practices affecting commerce within the meaning of California consumer
27
28

1 protection laws, and Defendant’s deceptive and unfair trade practices alleged herein have affected
2 tens of thousands of consumers within California.

4 COMMON FACTUAL ALLEGATIONS

5 **I. Lootboxes**

6 13. Broadly speaking, a Lootbox is a video game microtransaction in which the
7 consumer purchases a reward containing one or more virtual items of differing value or rarity that
8 is assigned at random.¹ Lootboxes are defined in the dictionary as “a box containing a prize of
9 unknown value, especially one offered for sale to players as part of an online game.”²

10 14. Although Lootboxes are advertised and portrayed by video game providers as a
11 vehicle that allows it users to quickly advance further in a game through purchases using real-
12 world currency, the use of Lootboxes and associated omissions in videogames is overwhelmingly
13 misleading and exploitive of consumers like Plaintiff.

14 15. Over the past decade Lootboxes have been the epicenter of a host of issues that have
15 caused lawsuits and law reform around world because of their addictive and predatory nature as
16 Lootboxes are often used in free-to-play video games as the main source of revenue for video game
17 providers but players very rarely actually end up getting anything valuable when they purchase a
18 Lootbox.^{3,4,5,6} One of the most problematic issues with Lootboxes universally is that despite their
19 use in games that are aimed at and/or played by minor children, Lootbox purchases are often non-
20 refundable—as is the case with Defendant’s Mario Kart Tour in-game purchases.⁷

21 ¹www.ftc.gov/system/files/documents/reports/staffperspectivepaperlootboxworkshop/loot_box_workshop_staff_perspective.pdf.

22 ²www.collinsdictionary.com/us/dictionary/english/lootbox#:~:text=noun,part%20of%20an%20online%20game.

23 ³ www.gamechangerslaw.com/blog/italian-antitrust-authoritys-recent-activision-blizzard-lootbox-decision.

24 ⁴<https://screenrant.com/lootbox-gambling-microtransactions-illegal-japan-china-belgium-netherlands/>.

25 ⁵www.revisor.mn.gov/bills/text.php?number=HF4460&version=0&session=ls90&session_year=2018&session_number=0.

26 ⁶<https://www.gamedeveloper.com/business/washington-state-senator-introduces-bill-to-tackle-the-big-loot-box-debate>; www.nprillinois.org/statehouse/2021-05-04/illinois-house-approves-adding-warnings-to-video-games-that-include-loot-boxes;

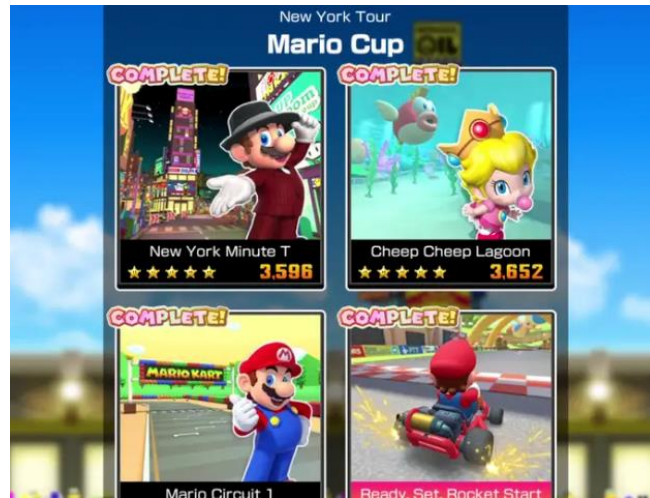
27 ⁷<https://accounts.nintendo.com/term/eula/US?lang=en-US>

1 **II. Mario Kart Tour's Spotlight Pipes**

2 16. Mario Kart Tour is a free to play and download video game for mobile devices in
3 which players race against computer-controlled opponents in a series of races or against other
4 players online.

5 17. In order to keep track of a user's progress, an online Nintendo account is required.

6 18. The races are divided into a series of "cups," each of which have three courses and
7 a bonus challenge.



16 19. Before each race, a player chooses a driver, kart, and glider, and the speed to race
17 at, with 50cc being the slowest, and 200cc being the fastest.

18 20. Crucially, using specific characters or equipment can give the player added bonuses
19 in certain races, but they have to be unlocked first; the better the driver, the harder it is to unlock.



1 21. Unlike other racing games where the objective is simply to reach the finish line first,
 2 Mario Kart Tour utilizes a point-based system, allowing players to unlock experience points to
 3 improve their driver and kart, along with increasing the player's driver's level to earn more rewards
 4 from races. The player receives some player points for their level if they place in the top three. The
 5 player will level up and receive a prize when the gauge is fully filled.



13 22. Grand Stars are also given to the player after each race, allowing them to unlock
 14 new cups.

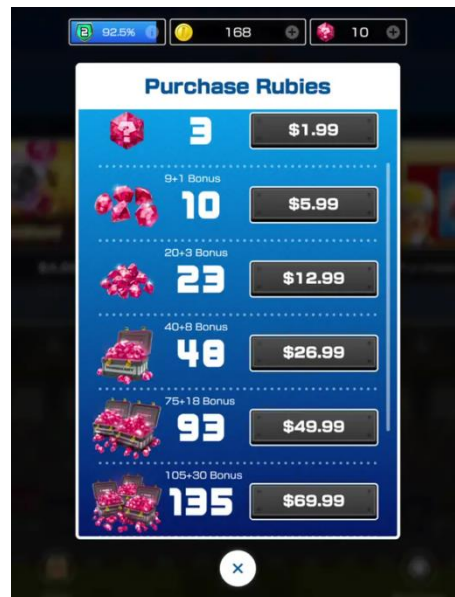


25 23. Unlocking all rewards, such as Mario Kart Tour characters, gliders, and karts, is a
 26 time-consuming effort. For example, you can only collect a maximum of 30 coins per race and
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1 some of the “Daily Selects” - which offer a random collection of items each day that can be
 2 unlocked using coins collected during a race - can be expensive.



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 10 24. Mario Kart Tour was purposefully designed in this manner so as to introduce a way
 11 for users to spend real cash to unlock things faster by either buying rotating gift sets that include
 12 unlockable prices and other collectibles, or by buying in-game currency called “Rubies” in packs
 13 costing up to \$70 for a chance to unlock random items.



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 24 25. For example, if a user spends five Rubies, they will unlock a random item. Or they
 25 can spend Rubies on a special race called “coin rush” that lets them collect hundreds of coins at
 26 once.

1 26. The most popular way to attain any random and unlockable prize is by firing a so-
 2 called “Spotlight Pipe” where for five Rubies a player can draw a random item, and receive a new
 3 kart character/driver or kart part. Or they have the option to draw 10 (ten) different random items
 4 by firing the Pipe 10 (ten) times, for 45 Rubies. That means that a player is paying anywhere from
 5 \$2.60-\$3.32 for a single draw, or \$23.40-\$29.84 for the ability to draw 10 (ten) items at a time.



18 27. Critically, as with traditional lootboxes, when a player purchases Rubies to draw a
 19 Spotlight Pipe, they are not told or shown anything about the gifts or unlockable prizes they will
 20 actually receive. In addition to omitting what can be won there is a complete omission on the odds
 21 of winning any prize. Furthermore, even though like with most other games utilizing “lootboxes”
 22 a player may attain some prizes at a faster rate by having the player pay directly for them by firing
 23 a “Pipe,” the chances of a player drawing rare valuable items through the Pipe is still designed to
 24 be very small. Thus, in order to keep up and gain valuable items to remain competitive in gameplay,
 25 players must make large amounts of in-game purchases of Rubies using real-world currency so
 26 that they can fire “Pipes”.

1 28. As with other lootbox games, Defendant’s lootbox mechanism capitalized on and
2 encouraged addictive behaviors, akin to gambling. The “Pipe” Lootboxes offered in Mario Kart
3 meet the definition of gambling as set forth in a multitude of gambling statutes and regulations and
4 rely on the same predatory practices designed to induce consumers to spend money on games of
5 chance. Minors are especially susceptible to these addiction-enhancing elements of game design.
6 The experience of acquiring surprise rewards and the associated excitement of uncovering
7 unexpected in-game items holds a strong appeal for minors and reinforces their desire to keep
8 playing and keep getting rewards.

9 29. Defendant’s Pipe lootbox mechanism has allowed it to obtain profits of almost \$300
10 million dollars while they were in effect.⁸

11 30. Acknowledging the deceptive nature of their game design and the dark patterns
12 incorporated within it, Nintendo shut down its Pipe lootbox mechanism in or around September
13 2022.⁹

14 31. Players are now allowed to purchase specific individual items in the Spotlight Shop,
15 where Rubies can be exchanged directly for the specific drivers, karts, and gliders that were
16 attainable by mere luck and chance through the Pipes. Accordingly, the previously omitted odds
17 are now essentially disclosed since the person now knows exactly what is being purchased and for
18 how much.

19 32. In sum, during the relevant time period players purchased large quantities of
20 Rubies using real-world currency to fire “Pipes” hoping to receive valuable prizes and/or
21 rewards that would help them advance in the game. However, each Pipe pull was mostly
22 worthless, often filled with valueless prizes and/or rewards that players already had or did not
23 want. Had players known the omitted odds of receiving specific prizes and/or rewards they
24 desired in any particular Spotlight Pipe that they purchased, they would not have made the
25 purchase to fire the Pipe. Given Defendant’s superior knowledge that each “Pipe” pull had
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27 ⁸[https://www.vg247.com/nintendo-is-removing-loot-boxes-from-mario-kart-tour-which-has-made-the-company-](https://www.vg247.com/nintendo-is-removing-loot-boxes-from-mario-kart-tour-which-has-made-the-company-close-to-300-million)
28 [close-to-300-million](https://www.vg247.com/nintendo-is-removing-loot-boxes-from-mario-kart-tour-which-has-made-the-company-close-to-300-million)

⁹ <https://twitter.com/mariokarttourEN/status/1565585887303532544>

1 little to no chance of providing any valuable benefit, Defendant was required to disclose the
2 odds associated and its omission of any indication about the real odds was material.

3 **III. Dark Patterns & Defendant’s Mario Kart Tour Game**

4 33. Dark patterns are online user interfaces, that are, amongst other reasons, intended
5 to achieve a financial goal for those who implement them by manipulating users into taking certain
6 actions or making certain decisions against their own interests.¹⁰ Dark patterns are undisclosed and
7 work by exploiting cognitive biases, and “often employ strategies that render the ease of selecting
8 different options asymmetric, cover up the mechanisms by which consumers are influenced,
9 deceive users through acts or omissions, hide relevant information, or restrict choices likely to be
10 popular among consumers.”¹¹ The term “dark patterns” was coined to convey the unscrupulous
11 nature of such design elements, “and also the fact that [they] can be shadowy and hard to pin
12 down.”¹²

13 34. The FTC has given some examples of “dark patterns” deemed deceptive. This
14 includes “Grinding”, or “making the free version of a game so cumbersome and labor-intensive
15 that the player is induced to unlock new features with in-app purchases,” which the FTC deems as
16 “coercive action.”¹³

17 35. As described above, grinding is built into the Mario Kart Tour game. Players that
18 choose not to make Ruby purchases using real-world currency must use the “grinding” mechanism
19 and complete repetitious tasks (i.e. racing to gain small amount of in-game points) if they want to
20 attain any in-game benefits. While each mission (or cup, tournament, or tour) grants the player
21 some in-game benefits such as experience points, levels, equipment, or some other perk without
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23 ¹⁰ Jamie Luguri, Lior Jacob Strahilevitz, Shining a Light on Dark Patterns, 13 J. Legal Analysis, Issue 1, 2021, Pages
43–109, <https://doi.org/10.1093/jla/laaa006>.

24 ¹¹ Jamie Luguri, Lior Jacob Strahilevitz, Shining a Light on Dark Patterns, 13 J. Legal Analysis,
25 Vol. 13, Issue 1, 2021, 43–109, <https://doi.org/10.1093/jla/laaa006> (citing Mathur, Arunesh,
26 Jonathan Mayer, and Mihir Kshirsagar. What Makes a Dark Pattern.. Dark? Design Attributes,
Normative Considerations, and Measurement Methods, ACM Conference on Human Factors in
Computing Systems. 2021 (available at <https://arxiv.org/pdf/2101.04843.pdf>)).

27 ¹² Harry Brignull, Bringing Dark Patterns to Light, MEDIUM (June 6, 2021),
<https://harrybr.medium.com/bringing-dark-patterns-to-light-d86f24224ebf>

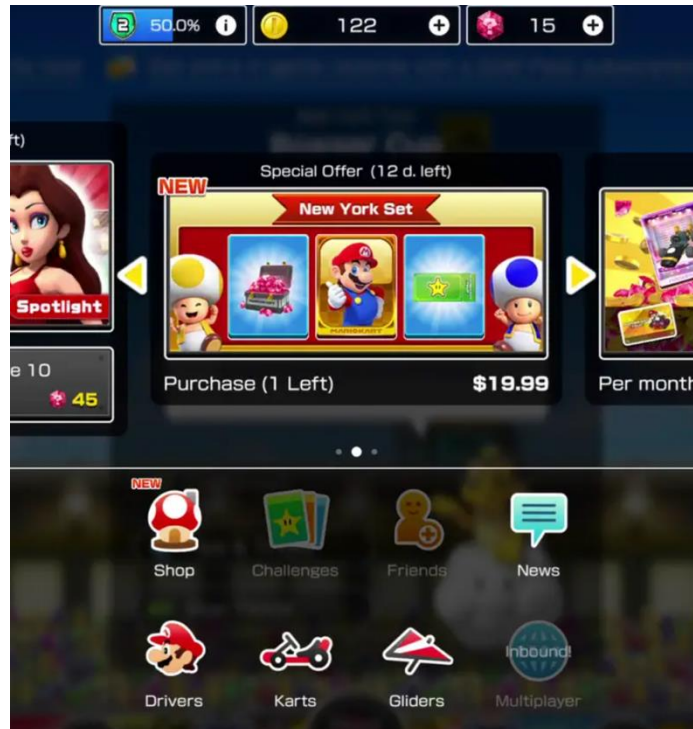
28 ¹³https://www.ftc.gov/system/files/ftc_gov/pdf/P214800%20Dark%20Patterns%20Report%209.14.2022%20-%20FINAL.pdf

1 having to purchase Rubies and fire a “Pipe,” they are not valuable enough to matter unless the
 2 player performs an extremely large amount of them. Therefore, players in Mario Kart Tour game
 3 are actively looking to “ramp up” their play.

4 36. Therefore, Grinding is often linked with another dark pattern mechanism such as
 5 “Pay to Skip”, where a user pays money to skip specific grind-related activities by making in-game
 6 purchases that give immediate significant in-game benefit or advantage. This often comes in the
 7 form of premium currency (i.e. Rubies in Mario Kart Tour).

8 37. Relatedly, to take advantage of specific grind-related activities and the dark pattern
 9 of “Pay to Skip”, Mario Kart Tour also creates artificial scarcity.

10 38. This method is used by Mario Kart to get you to invest more time and money in the
 11 game. Limited-time deals are a common manifestation of this, where the main purpose of the
 12 limited time offers is to pressure users into making an impulsive choice and prevent them from
 13 weighing the relative values of several options.



26 39. Finally, the most severe monetary dark pattern are lootboxes where the quantity and
 27 quality of valuable objects might vary, and they are less likely to occur than common items. Players
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1 are encouraged to keep trying until they win the desired prize by the randomization of the awards
2 by firing the Spotlight Pipe with undisclosed prizes and a complete omission of the odds of winning
3 any one prize.

4 40. As already described above, Mario Kart Tour allowed users to purchase Rubies to
5 fire the Spotlight Pipe one time, or 10 (ten) times. This “Gambler’s Fallacy”, or the tendency for
6 players to think that past events can affect the future probability of an event occurring, when in
7 reality the undisclosed odds are always the same, was an integral part of Mario Kart Tour’s
8 monetary dark pattern to help players skip over certain grind-related dark patterns built into the
9 Mario Kart Tour game.

10 41. A similar psychological trait of Defendant’s lootbox dark pattern of firing the
11 Spotlight Pipe was for a user to notice patterns or relationships of previous rewards from the Pipe
12 when they were unrelated. For example, a user may mistakenly notice that they get better rewards
13 when they fire the Pipe 10 (ten) times rather than one time, but in reality, the undisclosed odds
14 were always the same.

15 42. These intentionally-designed, omission-based dark patterns of “grinding” and “pay
16 to skip” (Spotlight Pipes, Limited Offers, etc.) in the Mario Kart Tour game, have been deemed by
17 the FTC to create coercive action, and consist of unlawful, unfair, or deceptive acts or practices,
18 especially when aimed at minor children.

19 **FACTS SPECIFIC TO PLAINTIFF N.A.**

20 43. Plaintiff played Mario Kart Tour from approximately 2021 to 2022 during which
21 time Plaintiff purchased Rubies and fired the Spotlight Pipe numerous times. Plaintiff’s purchases
22 in Mario Kart Tour have totaled over \$170.00 in real-world currency during that time.

23 44. Plaintiff, a minor, was able to make the purchases through his father’s credit card
24 that was linked to his Nintendo account. Many of the purchases made by Plaintiff were without his
25 Guardian’s permission to do so. Nintendo’s charges did not disclose that the money was being used
26 to purchase Defendant’s “Pipe” lootboxes.

1 45. Throughout his time playing Defendant’s Mario Kart Tour game, Plaintiff N.A.
2 was never informed of and was thus unaware of the odds of receiving any reward (including any
3 specific character, kart, glider etc.) when he purchased Rubies with real-world currency to fire the
4 Spotlight Pipe.

5 46. Plaintiff was also unaware that he had a right to disaffirm any purchases he made
6 from Defendant.

7 47. Plaintiff almost never received any valuable reward from the Spotlight Pipes he
8 had purchased during his time playing Mario Kart Tour and would not have made the amount of
9 in-game purchases that he did had he known the true odds of his being able to obtain any reward
10 from the Spotlight Pipe, or that he would not be allotted a refund.

11 48. Plaintiff no longer plays Mario Kart Tour, and wishes that he had never made the
12 purchases that he did and that he obtain a full refund for them.

13 49. While Defendant’s terms and conditions require minors to obtain their parent’s
14 consent to create an account and play Mario Kart Tour, Defendant omitted significant facts and
15 failed to implement sufficient mechanisms for parental consent controls to prevent minors from
16 making unlimited purchases and limiting in-game purchases to players who are over 18.

17 50. Based on all of these omissions, minor Plaintiff made numerous in-game purchases
18 that were labeled non-refundable using his Guardian’s funds and which his Guardian did not
19 receive any notifications of until the charges were already made. Even then none of the charges
20 described the purchases that were made and that Plaintiff had been essentially repeatedly gambling
21 on winning a valuable in-game item by purchasing Defendant’s Pipes.

22 51. Had Defendant provided proper parental control and age verification features,
23 minor Plaintiff would not have been able to make any of the purchases that he did.

24 52. Furthermore, before hiring counsel in this action, Plaintiff N.A. and his Guardian
25 were not aware of a minor’s right to disaffirm and get refunds on any and all in-game purchases
26 without any restrictions. Had Defendant permitted Plaintiff to disaffirm his purchases, he would
27 have done so.

1 53. Moreover, each time Defendant updates its Terms and Conditions, Defendant does
2 not require the minor-user to obtain their parent’s consent to any renewed or updated terms.

3 54. Minor Plaintiff N.A. does not recollect seeing, reading, or agreeing to Defendant’s
4 Terms of Use prior to playing Mario Kart Tour and his Guardian also did not see, read, or agree to
5 the terms. Minor Plaintiff N.A. does not consent to arbitrate any of the claims in this action and
6 disaffirms the entirety of any end-user-license agreement, contract or agreement between him and
7 Defendant.

8 **CLASS ALLEGATIONS**

9 55. Plaintiff brings this action on his own behalf and on behalf of a Class and one
10 Subclass, pursuant to Cal. Code Civ. Proc. § 382, Cal. Civ. Code § 1781, and Cal. Bus. & Prof.
11 Code § 17203, defined as follows:

12 The Class:

13 All minors located within the United States who, during the applicable limitations
14 period, made a purchase to fire the Spotlight Pipe in the Mario Kart Tour game
15 using real-world currency.

16 The California Minor Subclass:

17 All minors located within the state of California who, during the applicable
18 limitations period, made a purchase to fire the Spotlight Pipe in the Mario Kart Tour
19 game using real-world currency.

20 56. **Adequacy.** Plaintiff will fairly and adequately represent and protect the interests of
21 the other members of the Class and Subclass (collectively, the “Class”). Plaintiff has retained
22 counsel with substantial experience in prosecuting complex litigation and class actions. Plaintiff
23 and his counsel are committed to vigorously prosecuting this action on behalf of the other Class
24 and Subclass members, and have the financial resources to do so. Neither Plaintiff nor his counsel
25 have any interest adverse to those of the other members of the Class or Subclass.

26 57. **Predominance & Superiority.** Absent a class action, most Class and Subclass
27 members would find the cost of litigating their claims to be prohibitive and would have no effective
28 remedy. The class treatment of common questions of law and fact is superior to multiple individual

1 actions or piecemeal litigation in that it conserves the resources of the courts and the litigants, and
2 promotes consistency and efficiency of adjudication.

3 58. **Final Declaratory or Injunctive Relief.** Defendant has acted and failed to act on
4 grounds generally applicable to the Plaintiff and the Class and Subclass members, requiring the
5 Court's imposition of uniform relief to ensure compatible standards of conduct toward the Class
6 and Subclass members, and making injunctive or corresponding declaratory relief appropriate for
7 the Class and Subclass as a whole.

8 59. **Typicality.** The factual and legal basis of Defendant's liability to Plaintiff and to
9 the other Class and Subclass members are the same, resulting in injury to the Plaintiff and to all of
10 the other members of the Class and Subclass. Plaintiff and the other members of the Class and
11 Subclass have suffered harm and damages as a result of Defendant's unlawful and wrongful
12 conduct.

13 60. **Numerosity.** Upon information and belief, there are hundreds, if not thousands, of
14 Class and Subclass members such that joinder of all members is impracticable.

15 61. **Commonality.** There are many questions of law and fact common to the claims of
16 Plaintiff and the other members of the Class and Subclass, and those questions predominate over
17 any questions that may affect individual members of the Class and Subclass. Common questions
18 for the Class and Subclass include, but are not limited to, the following:

- 19 (a) Whether Defendant's unfair, deceptive, or unlawful acts or practices omitting
20 material facts while promoting "Pipes" that contained unknown rewards and in-
21 game benefits was unfair or deceptive to a reasonable consumer;
- 22 (b) Whether Defendant's unfair or deceptive act or practice of using undisclosed "Dark
23 Patterns" to steer players towards making purchases of "lootboxes" designed as
24 "Pipes" was unfair or deceptive to a reasonable consumer;
- 25 (c) Whether Defendant's failure to provide a method for minors or their guardians to
26 disaffirm any purchases violated their consumer rights;
- 27 (d) Whether Plaintiff and the other Class and Subclass members were damaged by
28 Defendant's conduct; and
- (e) Whether Plaintiff and the other Class and Subclass members are entitled to
restitution or other relief.

FIRST CAUSE OF ACTION

**Declaratory Judgment on Minors' Rights to Disaffirm
(On behalf of Plaintiff and the Class and Subclass)**

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3 62. Plaintiff hereby incorporates the above allegations by reference as though fully set
4 forth herein.

5 63. On information and belief, Defendant's Mario Kart Tour game is marketed to
6 players of all ages, including minors.

7 64. Defendant purports to enter into and otherwise claims to outwardly accept a contract
8 with a minor when an in-game purchase by the minor is confirmed. There is consideration on both
9 sides as Defendant gives the consideration of virtual in-game content exchanged for consideration
10 of actual money from the minor.

11 65. Under California law, and equivalent law in states nationwide, including
12 Washington, minors have the right to disaffirm contracts such as those at issue here. *See, e.g.*, Cal.
13 Family Code § 6700; Wash. Rev. Code § 26.28.030.

14 66. Minors may disaffirm or a guardian may disaffirm a contract on behalf of a minor.
15 Through the filing of this lawsuit, Plaintiff disaffirms all in-game purchases he has made through
16 Mario Kart Tour to-date and requests a refund.

17 67. Plaintiff further seeks injunctive relief on behalf of the Class and Subclass for future
18 and prospective purchases in Mario Kart Tour to allow for refunds on all in-game purchases made
19 by the Class and Subclass without restrictions.

20 68. The purported contracts between Defendant and the members of the Class and
21 Subclass who are minors are voidable—a fact that Defendant denies as evidenced by its denial of
22 the Class and Subclasses' right to be refunded in its Terms of Service.

23 69. Accordingly, there is an actual controversy between the parties, requiring a
24 declaratory judgment.

25 70. This claim for declaratory judgment is brought pursuant to Code of Civil Procedure
26 § 1060 seeking a determination by the Court that: (a) this action may proceed and be maintained
27 as a class action; (b) the sales contracts between Defendant and the Class and Subclass members
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1 are voidable at the option of those Class and Subclass members or their guardians; (c) if Class and
2 Subclass members elect to void the contracts, they will be entitled to restitution and interest
3 thereon; (d) an award of reasonable attorneys' fees and costs of suit to Plaintiff and the Class and
4 Subclass is appropriate; and (e) such other and further relief as is necessary and just may be
5 appropriate as well.

6 **SECOND CAUSE OF ACTION**

7 **Violations of the Washington Consumer Protection Act**
8 **(Wash Rev. Code §§ 19.86.010, *et seq.***
9 **(On behalf of Plaintiff and the Class)**

10 71. Plaintiff incorporates by reference the foregoing allegations as if fully set forth
11 herein.

12 72. The Washington Consumer Protection Act ("WCPA") broadly prohibits "[u]nfair
13 methods of competition and unfair or deceptive acts or practices in the conduct of any trade or
14 commerce." Wash. Rev. Code § 19.86.010.

15 73. Nintendo engaged in the omissions or otherwise committed the acts complained of
16 herein in the course of "trade" or "commerce" within the meaning of Wash. Rev. Code § 19.86.010
17 as Nintendo maintains its headquarters in Washington state, received payments from Plaintiff and
18 the other members of the Class and Subclass in Washington state, and designed, managed, and
19 deployed its Mario Kart Tour video game from Washington state.

20 74. Defendant's conduct is unlawful under the WCPA because it is in violation of a
21 minor's absolute right to disaffirm contracts.

22 75. Furthermore, Nintendo engaged in unfair or deceptive acts or practices through its
23 omissions and conduct described herein in the sale of consumer products and services, such as
24 Defendant's Mario Kart Tour mobile game, and by using undisclosed dark patterns to manipulate
25 and frustrate the minor Plaintiff and members of the minor Class and Subclass in order to induce
26 them into spending real cash for in-game currency and in-game purchases without disclosure and
27 completely omitting the odds of winning any particular prize. As a result most purchases were
28 ultimately worthless.

1 76. Defendant’s conduct described herein is “unfair” under the WCPA because it
2 violates public policy and is immoral, unethical, oppressive, unscrupulous, and/or substantially
3 injurious to consumers, as Defendant fails to disclose and otherwise omits the actual odds of
4 obtaining any valuable reward by firing the Spotlight Pipe purchase while unlawfully denying
5 minors any refunds they seek for receiving worthless rewards and/or prizes.

6 77. Defendant’s conduct is also “unfair”, under the WPCA, because the user interface
7 in the Mario Kart Tour game incorporates undisclosed dark pattern design elements such as
8 “Grinding” and “Pay to Skip”, including related monetary traps through Limited Time Deals and
9 Spotlight Pipes. These tactics are deceptive because they are designed to coerce action and
10 manipulate users, especially minor users, into making certain decisions in the Mario Kart Tour
11 game against their own interests, with real monetary loss to users such as the Plaintiff and other
12 members of the Class and Subclass.

13 78. Defendant’s conduct also constitutes a fraudulent business practice within the
14 meaning of the WCPA in that Defendant intentionally and knowingly omitted information about
15 the actual odds of obtaining any valuable reward by firing a Spotlight Pipe, when Defendant knew
16 the actual odds of obtaining any valuable reward were always the same and Defendant knew that
17 users, especially minors, are more susceptible to these addiction-enhancing elements of game
18 design (i.e. experience of acquiring surprise rewards and the associated excitement of uncovering
19 unexpected in-game items) which constitutes gambling.

20 79. Defendant’s conduct is also a fraudulent business practice within the meaning of
21 the WCPA in that Defendant intentionally and knowingly omitted providing information that
22 refunds are allowed for minors without any restrictions under applicable law for any purchases of
23 firing its Mario Kart Tour Spotlight Pipe.¹⁴ Such omissions misled Plaintiff and the other Class
24 and Subclass members and are likely to mislead the public.

25 80. Defendant was aware that minors are a significant portion of the population that
26 plays Mario Kart Tour and that they are not capable of entering into binding contracts including
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1 for purchases of such things as in-game content like firing the Spotlight Pipe such that Defendant
2 should have provided parental control features and provided for an unrestricted right for minors
3 and their guardians to seek refunds of any purchases made.

4 81. Defendant omitted any age verification or parental control features in its Mario
5 Kart Tour game that would have prevented Plaintiff and the other Class and Subclass members
6 from making the purchases that they did, or would have otherwise allowed them or their guardians
7 to seek a refund for their purchases.

8 82. Nor has Defendant implemented and has intentionally omitted any feature that
9 provides insight as to what rewards and/or prizes a player will obtain when they make any given
10 purchase of firing the Spotlight Pipe.

11 83. Plaintiff and putative Class members acted on Defendant's omissions in that they
12 were unaware that they could disaffirm their contract with Defendant and receive a refund and that
13 they had a very low likelihood of actually obtaining any valuable reward and/or prize from their
14 purchase of Spotlight firing the Spotlight Pipes.

15 84. Defendant knew or should have known that its omissions regarding the in-game
16 purchases were false, unfair, deceptive, or misleading acts or practices, especially after the dark
17 pattern design of the Mario Kart Tour game removing the loot box "Pipes" from its Mario Kart
18 Tour game, but Defendant has nonetheless failed to offer to provide Plaintiff and the other members
19 of the Class and Subclass refunds.

20 85. Defendant's conduct described herein constitutes an unfair business practice
21 because it violates public policy and is immoral, unethical, oppressive, unscrupulous, and/or
22 substantially injurious to consumers.

23 86. As a direct causal link between Defendant's deceptive or unfair trade acts or
24 practices, Plaintiff and the other members of the Class and Subclass, suffered actual damages,
25 including monetary losses.

26 87. Plaintiff seeks to enjoin further unfair and fraudulent acts or practices by Nintendo,
27 recover damages, and obtain all other relief allowed under Wash. Rev. Code § 19.86.010.
28

THIRD CAUSE OF ACTION

**Unlawful and Unfair Business Practices in Violation of the California Unfair Competition Law (“UCL”), Cal. Bus. & Prof. Code §§ 17200, *et seq.*
(On behalf of Plaintiff and the Subclass)**

88. Plaintiff hereby incorporates the above allegations by reference as though fully set forth herein.

89. Plaintiff and Defendant are “persons” within the meaning of the UCL Cal. Bus. & Prof. Code § 17201.

90. California’s Unfair Competition Law, Business & Professions Code, § 17200, *et seq.* (“UCL”), prohibits deceptive acts and practices in the sale of consumer products and services, such as Defendant’s Mario Kart Tour video game, and by using dark patterns to manipulate and frustrate Plaintiff and members of the Subclass in order to coerce them into spending real cash for in-game currency and in-game purchases.

91. Defendant’s conduct as alleged herein occurred in the course of trade or commerce.

92. Defendant’s conduct is unlawful under the UCL because it is in violation of a minor’s absolute right to disaffirm contracts.

93. Defendant’s conduct is “unfair”, under the UCL, because the user interface in the Mario Kart Tour game incorporates undisclosed dark pattern design elements such as “Grinding” and “Pay to Skip,” including related monetary traps through Limited Time Deals and Spotlight Pipes. These tactics are deceptive because they are designed to coerce action and manipulate users into making certain decisions in the Mario Kart Tour game against their own interests, with real monetary loss to users such as the Plaintiff and other members of the Subclass.

94. Defendant’s conduct described herein is also “unfair” under the UCL because it violates public policy and is immoral, unethical, oppressive, unscrupulous, and/or substantially injurious to consumers, as Defendant fails to disclose the actual odds of obtaining any valuable reward by firing the Spotlight Pipe purchase while unlawfully denying minors any refunds they seek for receiving worthless rewards and/or prizes.

1 95. Defendant’s conduct is also a fraudulent business practice within the meaning of
2 the UCL in that Defendant intentionally and knowingly omitted providing information on the
3 actual odds of obtaining any valuable reward by firing a Spotlight Pipe, when Defendant knew the
4 actual odds of obtaining any valuable reward were always the same and Defendant knew that users,
5 especially minors, are more susceptible to these addiction-enhancing elements of game design (i.e.
6 experience of acquiring surprise rewards and the associated excitement of uncovering unexpected
7 in-game items) which constitutes gambling.

8 96. In addition, Defendant’s conduct constitutes a fraudulent business practice within
9 the meaning of the UCL in that Defendant intentionally and knowingly omitted providing
10 information that refunds are allowed for minors without any restrictions under applicable law, and
11 by explicitly representing that no refunds whatsoever are permitted for any purchases of firing its
12 Mario Kart Tour Spotlight Pipe.¹⁵ Such omissions misled Plaintiff and the other Subclass members
13 and are likely to mislead the public.

14 97. Defendant was aware that minors are a significant portion of the population that
15 plays Mario Kart Tour and that they are not capable of entering into binding contracts including
16 for purchases of such things as in-game content like firing the Spotlight Pipe such that Defendant
17 should have provided parental control features and provided for an unrestricted right for minors
18 and their guardians to seek refunds of any purchases made.

19 98. Defendant did not implement any age verification or parental control features in its
20 Mario Kart Tour game that would have prevented Plaintiff and the other Subclass members from
21 making the purchases that they did, or would have otherwise allowed them or their guardians to
22 seek a refund for their purchases.

23 99. Plaintiff and putative Subclass members relied on Defendant’s omission in that they
24 were unaware that they could disaffirm their contract with Defendant and receive a refund and that
25 they had a very low likelihood of actually obtaining any valuable reward and/or prize from their
26 purchase of “Spotlight Pipes”.

27 _____
28 ¹⁵<https://accounts.nintendo.com/term/eula/US?lang=en-US>

1 100. Defendant knew or should have known that its omissions regarding the in-game
2 purchases were false, deceptive, and misleading, especially after removing the loot box “Pipes”
3 from its Mario Kart Tour game, but Defendant has nonetheless failed to offer to provide Plaintiff
4 and the other members of the Subclass refunds.

5 101. As a direct and proximate cause of Defendant’s deceptive and unfair trade practices,
6 Plaintiff and the other members of the Subclass, suffered actual damages, including monetary
7 losses.

8 102. Pursuant to Bus. & Prof. Code § 17203, Plaintiff seeks an injunction enjoining
9 Defendant from continuing to engage in the conduct described above as Defendant’s wrongful
10 conduct is ongoing.

11 103. Plaintiff also seeks rescission and an order requiring Defendant to make full
12 restitution and to disgorge its ill-gotten gains wrongfully obtained from members of the Subclass
13 as permitted by Bus. & Prof. Code § 17203.

14 104. Additionally, Plaintiff and the Subclass members seek an order requiring Defendant
15 to pay attorneys’ fees pursuant to Cal. Civ. Code § 1021.5.

16 **FOURTH CAUSE OF ACTION**
17 **Restitution or Unjust Enrichment**
18 **In the Alternative to Count II & III**
19 **(On behalf of Plaintiff and the Class and Subclass)**

20 105. Plaintiff hereby incorporates the above allegations by reference as though fully set
21 forth herein.

22 106. Plaintiff and the other Class and Subclass members conferred an economic benefit
23 on Defendant through their in-game purchases.

24 107. It is inequitable and unjust for Defendant to retain the revenues obtained from in-
25 game purchases made by Plaintiff and the other Class and Subclass members that are refundable
26 or voidable by law, when Defendant does not permit refunds of purchases of its in-game virtual
27 currency and in-game items.
28

1 108. It is also inequitable and unjust for Defendant to retain the revenue obtained from
 2 in-game purchases made by Plaintiff and the other Class and Subclass members due to the
 3 undisclosed dark patterns incorporated in Defendant's Mario Kart Tour game that were designed
 4 to manipulate players and coerce them into making purchases of in-game "Spotlight Pipes" that
 5 did not allow Plaintiff and the other Class and Subclass members to see the value of the rewards
 6 and/or prize that they were purchasing, obtain a refund for their purchases, and for which Plaintiff
 7 and the Class and Subclass members did not receive any valuable items.

8 109. Accordingly, because Defendant will be unjustly enriched if it is allowed to retain
 9 such funds, Defendant must pay restitution to Plaintiff and the other Class and Subclass members
 10 in the amount which Defendant was unjustly enriched by each of their in-game purchases.

PRAYER FOR RELIEF

12 WHEREFORE, Plaintiff respectfully requests, on his own behalf and on behalf of all others
 13 similarly situated, the following relief:

- 14 1. For an order certifying this action as a class action, defining the Class and Subclass
 15 as requested herein, appointing Plaintiff as class representative and his counsel as
 class counsel;
- 16 2. Declaring that the sales contracts between Defendant and Plaintiff and the Class and
 17 Subclass members are voidable;
- 18 3. Awarding Plaintiff all economic, monetary, actual, consequential, compensatory,
 19 and punitive damages available at law;
- 20 4. Awarding Plaintiff's reasonable attorneys' fees, costs, and other litigation expenses;
- 21 5. Awarding pre- and post-judgment interest, as allowable by law;
- 22 6. For injunctive relief as the Court may deem proper; and
- 23 7. Awarding such further and other relief as the Court deems just and equitable.

JURY DEMAND

25 Plaintiff requests trial by jury of all claims that can be so tried.

1 DATED: March 17, 2023

2 Respectfully submitted,

3 N.A., by and through his Guardian BRUCE
4 ALLS, individually and on behalf of similarly
situated individuals

5 By: /s/ Eugene Y. Turin

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