

06-CV-01743-CMP

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AT SEATTLE
CLERK U.S. DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
DEPUTY

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

TJ DIAZ, On Behalf of Himself and all
Others Similarly Situated,

Plaintiff,

v.

NINTENDO OF AMERICA, INC.,

Defendant.

No. CV 06 - 1743 JLR

CLASS ACTION COMPLAINT

JURY TRIAL DEMANDED

INTRODUCTION

1. This is a class action brought by Plaintiff on behalf of a class (the "Class") of all consumers who purchased a Nintendo Wii game console ("Nintendo Wii") manufactured and marketed by Defendant Nintendo of America, Inc. ("Nintendo" or the "Company").

2. As explained more fully below, Plaintiff brings this action for equitable and injunctive relief as a result of Nintendo's violation of the Washington Consumer Protection Act and its breach of warranty through its conduct in the production, marketing, advertising, and sale of the Nintendo Wii.

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CLASS ACTION COMPLAINT - 1

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ORIGINAL

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PARTIES

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2 3. Plaintiff Diaz is a resident and citizen of Austin, Texas. Plaintiff
3 purchased a Nintendo Wii.

4 4. Defendant Nintendo is a Washington corporation with its executive offices
5 and principal place of business and corporate headquarters at 4820 150th Avenue NE,
6 Redmond, Washington 98052.

7 5.

JURISDICTION AND VENUE

8
9 6. This Court has subject matter jurisdiction over this action pursuant to
10 28 U.S.C. § 1332(d)(2) in that Plaintiff is a citizen of a State different from the Defendant
11 and the matter in controversy exceeds the sum or value of \$75,000.

12 7. This Court has personal jurisdiction over Defendant because Defendant is
13 located within this District.

14 8. Venue is proper in this District because Defendant resides, has principal
15 executive offices, and/or systematically and continuously does business in this District.

SUBSTANTIVE ALLEGATIONS

16
17 9. Nintendo is a designer and provider of gaming hardware and software.

18 10. On or about November 19, 2006, Nintendo released in North America the
19 much anticipated Nintendo Wii game console.

20 11. Nintendo describes the Wii as a "ground breaking console." Mr. Saturo
21 Iwata, President of Nintendo Co. Ltd., described the Wii as "our revolutionary new
22 console."

23 12. When a consumer purchases a Nintendo Wii, the consumer receives: the
24 Wii console; Wii sensor bar; Wii remote; nunchuck; Wii sports disc; Wii console stand;
25 and a power adapter and connecting wiring.
26

1 13. According to a November 8, 2006, CNet News.com article, "Space Age
2 Remote Control Coming in 2007," one of the main features of the Nintendo Wii is the
3 hand held controllers --- the Wii remote and the nunchuck.

4 14. Shigeru Miyamoto, General Manager, Entertainment Analysis and
5 Development Division of Nintendo Co. Ltd, described the unique design of the Wii
6 remote by stating, "With the Wii remote, however, we didn't just add, but subtracted as
7 well, and even multiplied and divided. I believe that we've gone about developing the
8 controller in a fundamentally different manner."

9 15. According to Nintendo's website when the user plays a tennis game, the
10 remote serves as a racket and the user is to swing with their arm. When a user plays a
11 driving game, the user is to operate the remote as if it's a steering wheel, and in a first-
12 person shooting game, the remote is to act as the weapon the user is to point at its on-
13 screen enemy.

14 16. The Wii remote is a "multi-functional device" that has pointing and motion
15 sensing abilities and includes a speaker, rumble feature, and an expansion port for other
16 devices including the nunchuck. The Wii remote also contains a wrist strap. The wrist
17 strap is designed for the user to wear when operating the remote.

18 17. At all relevant times, Nintendo represented to the public, including the
19 Class, that the purpose of the strap was to prevent the Wii remote from leaving the user's
20 hand if the user accidentally lets go of the remote.

21 18. Nintendo expressly instructed Wii users to use the wrist strap "to prevent
22 losing your grip," and stated that the wrist strap "will help prevent the Wii Remote from
23 flying across the room and causing damage to the remote or surrounding objects, or
24 injury to other people."

25 19. The wrist strap on the Wii remote is ineffective for its intended use.
26

1 20. Contrary to Nintendo's representations, the wrist strap on the remote is
2 prone to break while the user of the remote is using the remote in its intended manner.

3 21. As a result of the faulty wrist strap, the remote flies out from user's hand
4 while they are operating the remote, causing damage to the remote, surrounding objects,
5 and/or injury to other people.

6 22. The defective nature of the wrist strap was never disclosed by Nintendo to
7 purchasers.

8 23. As a result of Nintendo's false and misleading statements and concealment,
9 Plaintiff and the Class bought thousands of Wiis and are unable to use these devices as
10 advertised. The Wii remote's failures continue to occur.

11 CLASS ACTION ALLEGATIONS

12 24. Pursuant to Federal Rules of Civil Procedure 23(a) and (b), Plaintiff brings
13 this action on behalf of himself and a Class of similarly situated persons defined as:

14 All persons or entities who purchased a Nintendo Wii.

15 Excluded from the Class is Defendant, any entity in which Defendant has a controlling
16 interest, the officers, directors, and employees of Defendant, and the legal
17 representatives, heirs, successors, and assign of Defendant.

18 25. This action is brought as a class action and may properly be so maintained
19 pursuant to the provisions of the Federal Rule of Civil Procedure 23.

20 Numerosity

21 26. Members of the Class are so numerous that their individual joinder is
22 impracticable. The precise number of members of the Class and their addresses are
23 unknown to the Plaintiff. Plaintiff estimates that the class consists of hundreds of
24 thousands of members. The precise number of persons in the class and their identities
25 and addresses may be ascertained from Defendants' records. Members of the Class may
26

1 be notified of the pendency of this action by mail, supplemented (if deemed necessary or
2 appropriate by the Court) by published notice.

3 **Commonality**

4 27. Common questions of fact and law exist to all members of the Class. These
5 common legal and factual questions include:

6 a. Whether Nintendo made false and/or misleading statements of fact
7 to the Class and the public concerning the defects inherent in the Wii.

8 b. Whether Nintendo concealed from Plaintiff, the Class and the public
9 that the Wii does not conform to their product specification.

10 c. Whether Nintendo's false and/or misleading statements of fact and
11 its concealment of material facts regarding the performance and reliability of the Wii
12 were likely to deceive the public.

13 d. Whether, by the misconduct set forth in this Complaint, Nintendo
14 has engaged in unfair or deceptive practices with respect to the advertising, marketing,
15 and sale of the Wii.

16 e. Whether, as a result of Nintendo's misconduct, Plaintiff and the
17 Class are entitled to equitable relief, and, if so, the nature of such relief.

18 **Typicality**

19 28. Plaintiff's claims are typical of the claims of the members of the Class
20 because Plaintiff purchased a Nintendo Wii.

21 **Adequacy**

22 29. Plaintiff is an adequate representative of the Class because his interests do
23 not conflict with the interests of the members of the Class he seeks to represent. Plaintiff
24 has retained counsel competent and experienced in complex class action litigation and
25 Plaintiff intends to prosecute this action vigorously. The interests of the members of the
26 Class will be fairly and adequately protected by Plaintiff and his counsel.

1 30. This suit may also be maintained as a class action because Plaintiff and the
2 Class seek declaratory and injunctive relief pursuant to Federal Rule of Civil Procedure
3 23(b)(2) as Defendants acted on grounds generally applicable to Plaintiff and the Class,
4 thereby making declaratory and/or injunctive relief proper.

5 31. This suit may also be maintained as a class action under Federal Rule of
6 Civil Procedure 23(b)(3) because a class action is superior to other available means for
7 the fair and efficient adjudication of this dispute. The damages suffered by each
8 individual Class member may be relatively small, especially given the burden and
9 expense of individual prosecution of the complex and extensive litigation necessitated by
10 Defendants' conduct. Furthermore, it would be virtually impossible for the Class
11 members, on an individual basis, to obtain effective redress for the wrongs done to them.
12 Moreover, even if Class members themselves could afford such individual litigation, the
13 court system could not. Individual litigation presents a potential for inconsistent or
14 contradictory judgments. Individualized litigation increases the delay and expense to all
15 parties and the court system. By contrast, the class action device presents far fewer
16 management difficulties, and provides the benefits of a single adjudication, economy of
17 scale and comprehensive supervision by a single court.

18 32. In addition, this suit may be maintained as a class action under Federal Rule
19 of Civil Procedure 23(b)(1) and (2), because:

20 a. The prosecution of separate actions by individual Class members
21 would create a risk of inconsistent or varying adjudication with respect to individual
22 Class members that would establish incompatible standards of conduct for Defendants; or

23 b. The prosecution of separate actions by individual Class members
24 would create a risk of adjudications with respect to them that would, as a practical matter,
25 be dispositive of the interests of other Class members not parties to the adjudications or
26 substantially impair or impede their ability to protect their interests; or

1 c. Defendants have acted or refused to act on grounds generally
2 applicable to the Class, thereby making appropriate final injunctive or corresponding
3 declaratory relief with respect to the Class as a whole.

4 **FIRST CAUSE OF ACTION**

5 **(Violation of Washington Consumer Protection Act, RCW 19.86, et. seq.)**

6 33. Plaintiff hereby incorporates by reference each of the preceding paragraphs
7 as though fully set forth herein.

8 34. This claim is brought by Plaintiff against Defendant on behalf of himself
9 and on behalf of all of the members of the Class.

10 35. The Washington Consumer Protection Act prohibits "unfair methods of
11 competition and unfair or deceptive practices in the conduct of any trade or commerce."

12 36. By committing the acts alleged in this Complaint, Defendant has engaged
13 in unfair and/or deceptive acts or practices, in violation of the Washington Consumer
14 Protection Act, RCW 19.86, et seq.

15 37. Nintendo's misrepresentations and omissions about the defective nature of
16 the wrist strap on the Wii remote sold to the public with the Wii console and the past and
17 continued sale of the Wii were unfair and deceptive acts by Nintendo in the conduct of
18 trade or commerce.

19 38. Nintendo's misrepresentations and omissions about the defective nature of
20 the wrist strap on the Wii remote sold to the public with the Wii console and the past and
21 continued sale of the Wii was conduct that affects public interest.

22 39. As a result of the defective nature of the wrist strap on the Wii remote,
23 Plaintiff's wrist strap broke on his remote causing damage to the Wii product Plaintiff
24 purchased. The controller is an essential component of any video game console, and so
25 Plaintiff is unable to use the Nintendo Wii for its intended purposes as a result of the
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1 broken wrist band. Accordingly, it renders the Wii console, which retails in the United
2 States for \$250, useless.

3 **SECOND CAUSE OF ACTION**

4 **(Breach of Warranty)**

5 40. Plaintiff on behalf of himself and all others similarly situated, reallege, as if
6 fully set forth, each and every allegation previously alleged.

7 41. This claim is brought by Plaintiff against Defendant on behalf of himself
8 and on behalf of all of the members of the Class.

9 42. By committing the acts alleged in this Complaint, Defendant has breached
10 its warranties to the Plaintiff and the Class.

11 43. Nintendo's misrepresentations about the purpose and efficacy of the wrist
12 strap on the Wii remote sold to the public with the Wii console breached Nintendo's
13 warranties to the Plaintiff and the Class.

14 44. As a result of the defective nature of the wrist strap on the Wii remote,
15 Plaintiff's wrist strap broke on his remote causing damage to the Wii product Plaintiff
16 purchased. The controller is an essential component of any video game console, and so
17 Plaintiff is unable to use the Nintendo Wii for its intended purposes as a result of the
18 broken wrist band. Accordingly, it renders the Wii console, which retails in the United
19 States for \$250, useless.

20 **PRAYER FOR RELIEF**

21 WHEREFORE, on his own behalf and on behalf of the Class, Plaintiff demands
22 judgment as follows:

23 A. An Order determining that this action is a proper class action maintainable
24 under Federal Rule of Civil Procedure 23;

25 B. An injunction requiring Defendant to cease its unfair or deceptive business
26 to the extent it has not done so already;

1 C. An injunction requiring Defendant to correct the defect in the Wii Remote
2 on behalf of the Class by refunding or replacing the product with a product that functions
3 as warranted, represented, and intended;

4 D. Plaintiff's attorneys fees and costs of suit; and

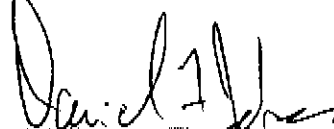
5 E. Such other and further relief as the Court deems just and proper.

6 **JURY TRIAL DEMANDED**

7 Plaintiff hereby demands a trial by jury with respect to all issues so triable.

8
9 DATED this 6th day of December, 2006.

10
11 SHORT CRESSMAN & BURGESS PLLC

12
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