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SUPERIOR COURT FOR THE STATE OF CALIFORNIA
COUNTY OF ALAMEDA

ALEX MEYER, individually and on
behalf of all others similarly situated,

Plaintiff,

vs.

BETHESDA SOFTWARES, LLC D/B/A
BETHESDA GAME STUDIOS, a
Delaware corporation;

Defendant.

FILED BY FAX

ALAMEDA COUNTY

February 05, 2019

CLERK OF
THE SUPERIOR COURT
By Shabra Iyamu, Deputy

CASE NUMBER:

RG19002237

CASE NO. RG19002237

**FIRST AMENDED CLASS ACTION
COMPLAINT FOR**

- (1) NEGLIGENT MISREPRESENTATION;**
- (2) FAL VIOLATIONS (CAL. BUS. & PROF. CODE §§ 17500 ET SEQ.); AND**
- (3) UCL VIOLATIONS (CAL. BUS. PROF. CODE §§ 17200 ET SEQ.)**

DEMAND FOR JURY TRIAL

1 Plaintiff Alex Meyer (“Plaintiff”), on behalf of himself and all others similarly situated,
2 complains and alleges as follows:

3 **OVERVIEW OF CLAIMS**

4 1. This is as a class action under California Code of Civil Procedure § 382, seeking
5 damages, including restitution and reasonable attorneys’ fees and costs, caused by negligent
6 misrepresentations of Bethesda Softworks LLC, d/b/a Bethesda Game Studios, a subsidiary of
7 ZeniMax Media Inc. (hereinafter “Bethesda” or “Defendant”) in connection with the marketing
8 of the Power Armor Edition of Fallout 76 (hereinafter “Power Armor Edition”) to Plaintiff and a
9 proposed nationwide class of individuals who purchased the Power Armor Edition in reasonable
10 reliance on Bethesda’s representations and whose reliance on Bethesda’s misrepresentations was
11 a substantial factor in causing them harm (hereinafter “Class Members”).

12 2. Plaintiff also seeks restitution and reasonable attorneys’ fees and costs under Cal.
13 Bus. Prof. Code §§ 17500 *et seq.*, (“False Advertising Law” or “FAL”), California Business and
14 Professions Code (hereinafter “Cal. Bus. & Prof. Code”) §§ 17200 *et seq.*, (“Unfair Competition
15 Law” or “UCL”), and California Civil Code (hereinafter “Cal. Civ. Code”) § 1021.5 *et seq.*, on
16 behalf of himself and a proposed Sub-Class comprised of all other similarly situated individuals
17 in California who purchased the Power Armor Edition of Fallout 76 (hereinafter “California Sub-
18 Class Members”).

19 3. The “Class Period” is defined as the period of time between June 10, 2018 and
20 November 29, 2018.

21 4. During the Class Period, Bethesda manufactured, packaged, marketed, advertised,
22 sold, and distributed the Power Armor Edition online through various retail channels throughout
23 the United States, including but not limited to Amazon, Wal-Mart, and Target.

24 5. During the Class Period, Defendant made false, deceptive and misleading claims
25 regarding the materials used for the West Tek Duffel Bag that was marketed as one of the items
26 included for sale in the Power Armor Edition. Defendant created and/or authorized the false,
27 misleading, and deceptive marketing materials for the Power Armor Edition that falsely claimed
28

1 that the West Tek Duffel Bag was made of canvas, when it in fact was made out of nylon, a
2 cheaper material of lower quality (“Canvas Duffel Bag Representation”).

3 **JURISDICTION**

4 6. This Court has jurisdictions over Plaintiff and Class Members’ claim for damages
5 arising from Defendant’s negligent misrepresentations under Code of Civil Procedure § 410.10.

6 7. This Court has jurisdiction over Plaintiff and California Sub-Class Members’
7 claims for restitution arising from Defendant’ unlawful business practices under Cal. Bus. Prof.
8 Code §§ 17203, 17204, and 17535.

9 8. This Court has specific jurisdiction over Defendant for Class Members’ claims
10 because Power Armor Edition was initially announced in California, Defendant’s nationwide
11 marketing efforts for Power Armor Edition explicitly referenced its participation in an event in
12 California, and because Defendant made Power Armor Edition available for purchase in
13 connection with its presentation at an event in California, as well as other reasons as set forth
14 herein.

15 9. The amount in controversy for Plaintiff, individual Class Members, and individual
16 California Sub-Class Members, in the aggregate, is less than \$5,000,000.

17 **VENUE**

18 10. Venue is proper in the County of Alameda pursuant to California Code of Civil
19 Procedure §§ 395(a) and 395.5. Defendant is a Delaware corporation that has not designated and
20 does not maintain a principal place of business in California. Venue is therefore proper in
21 Alameda County.

22 **THE PARTIES**

23 11. Plaintiff Alex Meyer (“Plaintiff Meyer”) is a California resident who resides in
24 Cameron Park, California. During the Class Period, Plaintiff Meyer purchased the Power Armor
25 Edition.

26 12. Defendant Bethesda Softworks LLC d/b/a Bethesda Game Studios is a subsidiary
27 of ZeniMax Media Inc., a Delaware Corporation with its principal place of business at 1370
28 Piccard Drive, Rockville, Maryland 20850. Throughout the Class Period, Bethesda has

1 transacted business in California, including launching the initial advertising campaign for the
2 Power Armor Edition in California.

3 **FACTUAL BACKGROUND**

4 13. Bethesda is a prominent videogame development studio responsible for, among
5 other titles, the “Fallout” series.

6 14. On June 10, 2018, Bethesda held a press conference in Los Angeles to announce
7 the upcoming release of several versions of the videogame Fallout 76. Included in this
8 announcement was the release of the Tri-Centennial version of the Fallout 76 game with a retail
9 price of \$79.99.

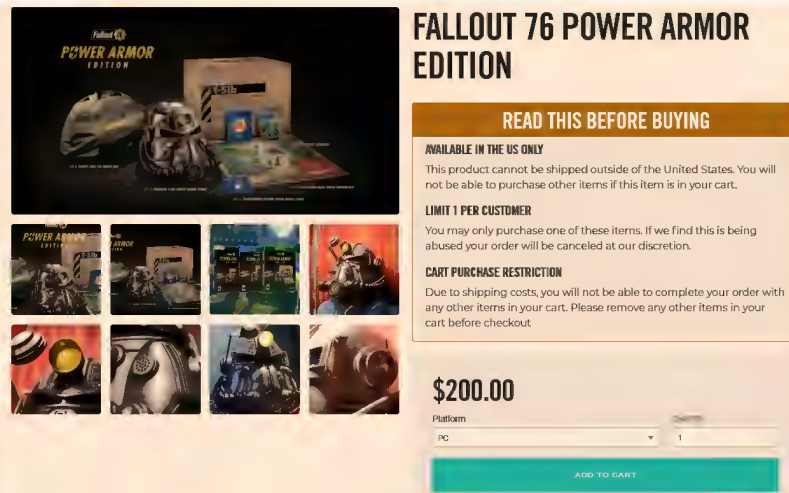
10 15. At the same time, Defendant marketed and advertised the Power Armor Edition
11 with the Tri-Centennial version of the Fallout 76 game and other physical products including a
12 West Tek Canvas Duffel Bag, Full-Scale Wearable T-51 Power Armor Helmet, and Glow-in the
13 Dark World Terrain Map. Upon information and belief, the retail price of the Power Armor
14 Edition was approximately \$200.

15 16. The marketing materials were unambiguous about the material from which the
16 West Tek Duffel Bag would be made, as can be seen below:



FIG 1. CANVAS WEST TEK DUFFEL BAG

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About the product

- Full-Scale Wearable T-51 Power Armor Helmet with West Tek Canvas Carrying Bag: This wearable helmet faithfully replicates the in-game model and comes complete with voice modulator speaker, functioning LED head lamp, and custom V.A.T.S. sound feature.
- Glow-in-the-Dark World Terrain Map: This physical, fully-colored 21"x 21" glow in the dark vintage map showcases the six distinct regions of West Virginia complete with irradiated landmarks, towns, and wildlife.
- The title rated as mature 17 plus blood and gore, drug reference, strong language, Intense violence

17. Upon information and belief, all distribution channels utilized product images and descriptions supplied by Defendant.

18. Plaintiff purchased the Power Armor Edition and were willing to pay a premium price for the Power Armor Edition because of the Canvas Duffel Bag Representation.

19. However, the Canvas Duffel Bag Representation was false, misleading and deceptive, because the West Tek Canvas Duffel Bag was made of nylon, and not canvas.

20. Defendant was solely responsible for the approval of the design and materials for the bag included with Power Edition and the decision to supply a nylon bag rather than the advertised canvas bag was made during the Class Period.

21. Defendant therefore had no reasonable grounds for believing the Canvas Duffel Bag Representation was true during the Class Period.

22. Defendant intended for consumers to rely on its marketing materials, including the Canvas Duffel Bag Representation, when deciding whether or not to purchase Power Armor Edition.

1 23. Plaintiff reasonably relied on Defendant's Canvas Duffel Bag Representation and
2 paid a premium for the Power Armor Edition because, at least in part, Defendant promised to
3 deliver a Canvas Duffel Bag.

4 24. Plaintiff would not have paid the premium price that he did pay had he known
5 that Defendant's Canvas Duffel Bag Representation was false.

6 25. Plaintiff was therefore harmed by his reasonable reliance on the Canvas Duffel
7 Bag Representation.

8 **CLASS ACTION ALLEGATIONS**

9 26. Plaintiff brings this action on behalf of himself and similarly situated Class
10 Members as a class action under California Code of Civil Procedure § 382.

11 27. Plaintiff seeks to represent the following Class and Sub-Class:

12 All persons residing in the United States who purchased a Power Armor Edition in
13 reasonable reliance on the Canvas Duffel Bag Representation and were harmed thereby
14 between June 10, 2018 and November 29, 2018 (the "Class"); and

15 All persons in California who purchased a Power Armor Edition between June 10, 2018
16 and November 29, 2018 (the "California Sub-Class").

17 28. This action has been brought and maintained as a class action under California
18 Code of Civil Procedure § 382 because there is a well-defined community of interest in the
19 litigation, the proposed class is ascertainable, and the Plaintiff is a proper representative of the
20 Class.

21 a. Numerosity: The potential members of the Classes as defined are so numerous
22 and so diversely located that joinder of all members of the Classes is impracticable.

23 b. Commonality: There are questions of law and fact common to the Plaintiff and
24 the Class that predominate over any questions affecting only individual members of the Class.

25 These common questions of law and fact include, without limitation, the following:

26 i. Whether Defendant negligently misrepresented that the Canvas Duffel bag
27 was made out of canvas;

28 ii. Whether Defendant's conduct was an unfair, unlawful, or fraudulent
business act or practice within the meaning of the UCL;

1 iii. Whether Defendant’s marketing and advertising of the Power Armor
2 Edition was untrue or misleading within the meaning of the FAL;

3 iv. Whether Defendant made false and misleading representations in the
4 marketing and advertising of the Power Armor Edition;

5 v. Whether Plaintiff and California Sub-Class Members are entitled to
6 restitution under the UCL;

7 vi. Whether Plaintiff and California Sub-Class Members are entitled to
8 restitution under Cal. Bus. Prof. Code § 17535; and

9 vii. The proper formula(s) for calculating damages and/or restitution owed to
10 California Sub-Class Members.

11 c. Typicality: Plaintiff’s claims are typical of the claims of the Class and Sub-class,
12 and Plaintiff will fairly and adequately represent and protect the interests of the Class and Sub-
13 class.

14 d. Adequacy of Representation: Plaintiff is a member of the Class and Sub-class and
15 will fairly and adequately represent and protect the interests of the Members of the Class and
16 Sub-class. Plaintiff’s interests do not conflict with those of Members of the Class and Sub-class.
17 Counsel who represent Plaintiff are competent and experienced in litigating large class actions,
18 and will devote sufficient time and resources to the case and otherwise adequately represent the
19 Class.

20 e. Superiority of Class Action: A class action is superior to other available means
21 for the fair and efficient adjudication of this controversy. Individual joinder of all Members of
22 the Class is not practicable, and questions of law and fact common to the Class predominate over
23 any questions affecting only individual members of the Class and Sub-class. Plaintiff and Class
24 Members have suffered injury in fact and have lost money as a result of Defendant’s false
25 representations. Certification of this case as a class action will allow those similarly situated
26 persons to litigate their claims in the manner that is most efficient and economical for the parties
27 and the judicial system. Certifying this case as a class action is superior because it allows for
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1 efficient and full restitution to Members of the Class, and will thereby effectuate California's
2 strong public policy of protecting the public from violations of its laws. If this action is not
3 certified as a Class Action, it will be impossible as a practical matter for many or most Members
4 of the Class to bring individual actions to recover monies due from Defendant, due to the
5 relatively small amounts of such individual recoveries relative to the costs and burdens of
6 litigation.

7 **FIRST CAUSE OF ACTION**

8 ***Negligent Misrepresentation***
9 **(On behalf of the Class)**

10 29. Plaintiff re-alleges and incorporates by reference each and every allegation set
11 forth in the preceding paragraphs

12 30. Defendant misrepresented the nature and quality of the contents of the Power
13 Armor Edition. Defendant had a duty to disclose this information.

14 31. At the time Defendant made the false Canvas Duffel Bag representation and
15 representations, Defendant knew or should have known that these representations were false or
16 made them without knowledge of their truth or veracity.

17 32. Defendant negligently misrepresented and omitted material facts about the Power
18 Armor Edition, in that canvas duffel bag delivered was not made of canvas, rather was made of
19 nylon. Plaintiff and Class Members relied upon the negligent statements or omissions and were
20 deceived and induced into purchasing the Power Armor Edition.

21 33. The negligent misrepresentations and/or omissions made by Defendant, upon
22 which Plaintiff and the Class members reasonably and justifiably relied, were intended to induce
23 and actually induced Plaintiff and the Proposed Class members to purchase the Power Armor
24 Edition.
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1 34. Plaintiff and Class members would not have purchased the Power Armor Edition
2 and/or would not have paid a price premium therefore, if the true facts had been known to them
3 regarding the falsity of the Canvas Duffel Bag representation.

4 35. The negligent actions of Defendant caused damage to Plaintiff and the Class
5 members, who are entitled to damages and other legal and equitable relief as a result.
6

7 **SECOND CAUSE OF ACTION**

8 **FAL Violations**

9 ***Cal. Bus. & Prof. Code §§ 17500 et seq.***

10 **(On Behalf of the California Sub-Class)**

11 36. Plaintiff re-alleges and incorporates by reference each and every allegation set
12 forth in the preceding paragraphs.

13 37. The FAL makes it is unlawful to “make or disseminate or cause to be made or
14 disseminated before the public [a statement] which is untrue or misleading, and which is known,
15 or which by the exercise of reasonable care should be known, to be untrue or misleading” with
16 the intent to “induce the public to enter into any obligation relating thereto.” Such statements
17 include statements made through “any advertising device,” including “over the Internet.” Cal.
18 Bus. & Prof. Code § 17500.

19 38. Defendant committed acts of false advertising as defined by §17500, by making
20 the Canvas Duffel Bag representation regarding the Power Armor Edition because those claims
21 were false and misleading.

22 39. Defendant knew or should have known through the exercise of reasonable care
23 that the Canvas Duffel Bag representation was false, untrue and misleading as to the Plaintiff and
24 California Sub-Class Members.

25 40. Defendant’ actions in violation of § 17500 were false and misleading such that the
26 Plaintiff and the California Sub-Class Members were likely to be deceived.

27 41. Plaintiff and the Proposed Sub-Class lost money or property as a result of
28 Defendant’ false advertising violations, because they would not have purchased or paid a
premium for the Power Armor Edition if they had not been deceived by the false Canvas Duffel
Bag representation.

1 42. Plaintiff and the California Sub-Class Members paid a premium for the Power
2 Armor Edition due to their reliance on the Canvas Duffel Bag representation and on the
3 Defendant' good faith and reputation.

4 43. Plaintiff and similarly situated California Sub-Class Members are entitled to
5 restitution pursuant to Cal. Bus. & Prof. Code § 17535 for all monies paid by them attributable to
6 the difference in value between the advertised canvas duffel bag and the supplied nylon bag.

7 44. Defendant should be required to restore to Plaintiff and California Sub-Class
8 Members all monies which Defendant acquired by means of the unlawful practices described
9 herein.

10 **THIRD CAUSE OF ACTION**

11 ***UCL Violations***

12 ***Cal. Bus. & Prof. Code §§ 17200, et seq.***
13 ***(On Behalf of the California Sub-Class)***

14 45. Plaintiff re-alleges and incorporates by by reference each and every allegation set
15 forth in the preceding paragraphs.

16 46. The UCL prohibits unfair competition in the form of any unlawful, unfair, or
17 fraudulent business act or practice. Cal. Bus. & Prof. Code § 17204 allows “any person who has
18 suffered injury in fact and has lost money or property” to prosecute a civil action for violation of
19 the UCL. Such a person may bring such an action on behalf of himself and others similarly
20 situated who are affected by the unlawful, unfair, or fraudulent business practice.

21 47. During the Class Period, Defendant committed unlawful, unfair, and/or fraudulent
22 business practices as defined by the UCL by engaging in deceptive, false, untrue, and/or
23 misleading marketing and advertising of the Power Armor Edition in violation of the UCL.

24 48. Defendant has committed unlawful, unfair, and/or fraudulent business acts and
25 practices as defined by the UCL, by violating FAL.

26 49. As a direct and proximate result of Defendant's unlawful, unfair, and/or
27 fraudulent acts and practices described herein, Defendant has received and continues to hold
28 unlawfully obtained property belonging to Plaintiff and California Sub-Class Members in the
amount of the portion of the sales price for Power Armor Edition attributable to the difference in
value of the advertised canvas duffel bag that is in excess of the value provided by the nylon bag

1 actually included. Defendant has profited from its unlawful, unfair, and/or fraudulent acts and
2 practices in the amount of that monetary value and the interest accrued thereon.

3 50. Plaintiff and similarly situated California Sub-Class Members are entitled to
4 restitution pursuant to Cal. Bus. Prof. Code §§ 17203 and 17208 for all monies paid by
5 California Sub-Class Members attributable to the difference in value between the advertised
6 canvas duffel bag and the supplied nylon bag. Defendant should be required to disgorge all
7 profits and gains it has reaped through its unlawful, unfair, and/or fraudulent acts and practices
8 and restore such profits and gains to Plaintiff and California Sub-Class Members, from whom
9 they were unlawfully taken.

10 **PRAYER FOR RELIEF**

11 Wherefore, Plaintiff, on behalf of himself and the members of the Class and Sub-class,
12 prays for judgment against Defendant as follows:

13 A. That the Court order that this action may proceed and be maintained as a class
14 action under § 382 of the Code of Civil Procedure; and that the Court define the Class and Sub-
15 class as specified above;

16 B. That the Court appoint Plaintiff as the Representative of the Class and Sub-class
17 and his attorneys as Counsel for the Class and Sub-class;

18 C. That the Court award to Plaintiff and Class Members damages pursuant to their
19 claims for negligent misrepresentation in the amount of their actual losses together with pre-
20 judgment interest;

21 D. That the Court find that Defendant's conduct alleged herein constitutes, a
22 violation of the UCL and the FAL;

23 E. That the Court award restitution to Plaintiff and each member of the California
24 Sub-Class, as his or her interest may appear, of all sums unlawfully collected by Defendant from
25 the Plaintiff and other members of the California Sub-Class during the Class Period;

26 F. That Defendant disgorge California Sub-Class Members' money obtained by
27 Defendant as a result of its unfair business practices;

1 G. That Plaintiff and the Members of the Classes be awarded attorneys' fees and
2 costs pursuant to Code of Civil Procedure § 1021.5 and/or other applicable law; and

3 H. An award for such other relief as the nature of this case may require or as this
4 Court deems proper.

5 **VIII. JURY DEMAND**

6 Plaintiff, on behalf of himself and the members of the Class, hereby demand trial by jury
7 of the Negligent Misrepresentation claim against Defendant alleged herein.

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9 Dated: February 5, 2019

Respectfully submitted,

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11
12 JULIAN HAMMOND
HAMMONDLAW, P.C.

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Attorneys for Plaintiff and Putative Class
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