

10 M.S., a minor, by and through his guardian  
11 LUZ SANCHEZ, and A.D., a minor, by and  
through her guardian, DOLLY VIERRA,  
12 individually and on behalf of all others  
similarly situated,

13 Plaintiffs, No. C 20-06929 WHA

14 v.

15 NINTENDO OF AMERICA INC.,

16 Defendant.

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**17 ORDER RE MOTION FOR LEAVE  
18 TO FILE SECOND AMENDED  
19 COMPLAINT**

**20 INTRODUCTION**

21 In this putative class action about an allegedly defective video game system, plaintiffs  
move for leave to file a second amended complaint. For the following reasons, the motion is

**DENIED.**

**22 STATEMENT**

23 The facts herein are described in our previous order (Dkt. No. 67). In brief, plaintiffs  
24 allege the Nintendo Switch video game console, working as a unit with two hand-held controllers  
25 ("Joy Cons"), harbored a defect, which caused an on-screen avatar to move without direction  
26 from the player. The defect grew worse over time to the point where plaintiffs assert the consoles  
27 became unusable. At set-up, Nintendo required consent to an End User License Agreement  
28 (EULA), which contained arbitration and forum-selection clauses.

1 Plaintiffs, then two parents and two minor children, filed the first amended complaint in  
2 November 2020. They asserted the complaint on behalf of a putative national class and alleged  
3 injuries pursuant to the California Unfair Competition Law (Cal. Bus. & Prof. Code § 17200,  
4 *et seq.*), California False Advertising Law (Cal. Bus. & Prof. Code § 17500, *et seq.*), California  
5 Consumers Legal Remedies Act (California Civil Code § 1750 *et seq.*), the Song-Beverly  
6 Consumer Warranty Act for Breach of Implied Warranty of Merchantability (Song-Beverly Act),  
7 and unjust enrichment. The complaint also sought declaratory judgment that minor plaintiffs may  
8 disaffirm the EULA on behalf of all minors in the putative class (Dkt. No. 25).

9 In December 2020, defendant moved to dismiss under Rule 12(b)(1) due to, *inter alia*,  
10 lack of standing, or, in the alternative, to compel arbitration due to a forum selection clause in the  
11 EULA. During the hearing, the Court sent the case to arbitration on the issue of the delegation  
12 clause's compulsory effect. An arbitration panel determined claims by the parents, Dolly Vierra  
13 and Luz Sanchez, had to proceed in arbitration and that minors, A.D. and M.S., were never parties  
14 to the EULA (Dkt. Nos. 27, 43, 73-4).

15 Following the arbitration panel's decision, parents abandoned their claims and minors  
16 returned to this forum for litigation (Dkt. No. 57). A September 2022 order stayed the action as to  
17 parents Sanchez and Viera and denied defendant's motion to dismiss minors' declaratory  
18 judgment claims as moot. The order further granted defendant's motion to dismiss minors'  
19 remaining claims for lack of standing because the complaint did not adequately allege that minors  
20 had received gift and, thereby, failed to state an injury-in-fact. Dismissal was without prejudice,  
21 allowing minors a chance to cure the complaint's defects (Dkt. No. 67).

22 Now, minors seek leave to file a second amended complaint alleging the same claims for  
23 relief as in the first amended complaint. This order follows full briefing and oral argument.

## 24 ANALYSIS

25 Rule 15(a)(2) states that a court should freely give leave to amend a pleading when justice  
26 so requires. Leave to amend, however, should not be granted automatically. A court may deny  
27 leave if permitting an amendment would be futile or the amended complaint would otherwise be  
28 subject to dismissal. *Jackson v. Bank of Hawaii*, 902 F.2d. 1385, 1387 (9th Cir. 1990); *Moore*

1       v. *Kayport Package Express, Inc.*, 885 F.2d 531, 538 (9th Cir.1989).

2           Standing requires concrete, particularized, and actual or imminent injury in fact, fairly  
3           traceable to the defendant's conduct, which will be redressed by a favorable decision.  
4           *TransUnion LLC v. Ramirez*, 141 S.Ct. 2190, 2203 (2021). The September 2020 order held  
5           minors failed to allege they had become owners of the consoles and, thereby, failed to allege  
6           injury in fact (Dkt. No. 67 at 3–4). Minors now argue their second amended complaint corrects  
7           those deficiencies because this time, they sufficiently allege ownership of the consoles and injury  
8           in fact, or alternatively, they have standing based on the assignment of rights by parents (Br. 10–  
9           13). Both standing theories fail.

10           **1.       COLLATERAL ESTOPPEL.**

11           Minors are estopped from asserting they have standing on the basis that they received the  
12           consoles as a gift from their parents and, thereby, became *de facto* owners of the consoles who  
13           disaffirmed the EULA. Plaintiffs already presented these arguments to the arbitration panel  
14           which considered and rejected them, so they cannot relitigate these issues.

15           A party may be barred from relitigating issues actually adjudicated in a previous  
16           arbitration proceeding between the same parties. “To foreclose relitigation of an issue under  
17           collateral estoppel: (1) the issue at stake must be identical to the one alleged in the prior litigation;  
18           (2) the issue must have been actually litigated in the prior litigation; and (3) the determination of  
19           the issue in the prior litigation must have been a critical and necessary part of the judgment in the  
20           earlier action.” *Clark v. Bear Stearns & Co.*, 966 F.2d 1318, 1320–21 (9th Cir. 1992). “If a court  
21           does not make specific findings, the party must introduce a record sufficient to reveal the  
22           controlling facts and pinpoint the exact issues litigated in the prior action. Necessary inferences  
23           from the judgment, pleadings and evidence [are] given preclusive effect.” *See Davis & Cox v.*  
24           *Summa Corp.*, 751 F.2d 1507, 1518–19 (9th Cir. 1985) (cleaned up).

25           In arbitration, minors presented arguments in their briefs that their parents gifted them  
26           a console, that as a result of the gift, they became owners of the console, and that they are not  
27           bound by the EULA because they properly disaffirmed it (*See Opp. Ex. A* at 1, 4–9, 15–17).  
28           Minors’ motion to amend centers on the same issues regarding gifting, ownership, and

1 disaffirmation (*See* Proposed Second Am. Compl. ¶¶ 26–27, 36–37).

2 The arbitration panel considered minors’ arbitration brief and other briefs along with their  
3 respective exhibits and it concluded:

4 4. Claimants Luz Sanchez and Dolly Vierra (the “Parents”) *were bound* when they  
5 purchased the Switch and assigned to their minor children the tasks of “setting up” the  
6 Switch, which constituted use of the Switch by the Parents.

7 5. *There is no agreement between Nintendo and the Minors.* Because the Minors were  
8 never parties to the EULA or bound by its arbitration provision, we need not decide what  
9 law would govern the Minors’ avoidance of contractual obligations under the EULA.  
Nor do we need to determine whether the Minors misrepresented their ages, or whether  
any contractual obligations of the Minors were avoided or disaffirmed within a  
reasonable time.

10 (See Dkt. No. 73-4 at 1–2) (emphasis added). The necessary inferences of this decision have  
11 preclusive effect. The panel necessarily found that parents were the only owners of the console.  
12 Plaintiffs’ gifting and disaffirmation arguments were “carefully read and considered” and the  
13 arbitration panel ultimately concluded minors are not parties to the EULA, but the parents are.  
14 Because there was never any agreement between Nintendo and minors, the panel did not have to  
15 rule on the other issues presented (*See id.*).

16 The gifting and disaffirmation issues presented by minors to the arbitration panel are  
17 identical to the issues presented in their motion to amend the complaint. They were actually  
18 litigated in the prior proceeding and the determination of the issues was a necessary part of the  
19 arbitration decision. Central to the issue was the question of who is bound by the arbitration  
20 agreement (and, thereby implicitly, who is an owner of the console). The arbitration panel  
21 answered this question. Therefore, minors are collaterally estopped from arguing it again here.  
22 *See Davis* 751 F.2d at 1518–19. Because minors were not parties to the EULA, their declaratory  
23 judgment claim would be subject to dismissal.

24 **2. TRANSFER OF THE RIGHT TO SUE.**

25 In California, a cause of action arising out of violation of property right, or out of contract,  
26 is transferable. Cal. Civ. Code § 954. “The burden of proving an assignment falls upon the party  
27 asserting rights thereunder” and “the evidence of assignment [must] be clear and positive to

1 protect an obligor from any further claim by the primary obligee.” *Cockerell v. Title Ins.*  
2 & Tr. Co.

3 , 267 P.2d 16, 21 (Cal. 1954). To have standing under Sections 17200 and 17500, the  
4 plaintiff must be the one who has suffered an injury in fact as a result of unfair competition or  
5 false advertising. *See* Cal. Bus. & Prof. Code §§ 17204, 17535. Additionally, the assignment of  
6 rights arising under Sections 17200 and 17500 does not confer standing on an uninjured assignee.  
7 *See Amalgamated Transit Union, Loc. 1756, AFL-CIO v. Superior Ct.*, 209 P.3d 937, 942–43  
8 (Cal. 2009). Similarly, rights under the Song-Beverly Act are not transferred upon a private sale  
9 of a product and the assignment of claims arising out of the statute does not confer standing upon  
the assignee. *See Dagher v. Ford Motor Co.*, 238 Cal. App. 4th 905, 926–27 (2015).

10 Here, minors failed to allege they have standing to bring Sections 17200 and 17500, and  
11 Song-Beverly Act claims. Minors did not buy the consoles, so they are not the ones who suffered  
12 injury *due to* unfair competition or false advertising — their parents suffered that injury, if any  
13 injury there be. Because the assignment of claims arising under Sections 17200 and 17500 does  
14 not confer standing on an uninjured assignee, minors cannot allege standing. *See Amalgamated*  
15 *Transit Union*, 209 P.3d at 942–43. Similarly, minors do not have standing to pursue claims  
16 under the Song-Beverly Act because gifting and assignment of rights do not confer standing to  
17 sue. *See Dagher*, 238 Cal. App. 4th at 926–27.

18 Minors next say they have standing to pursue claims under the CLRA and unjust  
19 enrichment based on the ownership and assignment arguments (Br. 10–13). *First*, as already  
20 explained, minors failed to allege ownership of the consoles, so they lack standing under this  
21 theory. *Second*, they also failed to allege valid assignment of rights. The complaint contains a  
22 statement, purportedly attributable to parents, that they now “assign” rights to pursue their claims  
23 as purchasers to minors (*See* Proposed Second Am. Compl. ¶¶ 35, 43). These statements of non-  
24 parties placed in the complaint are not “clear and positive evidence” of assignment. *See*  
25 *Cockerell*, 267 P.2d at 21. Because minors failed to allege ownership of the console and  
26 assignment of right to sue, they lack standing to pursue the CLRA and unjust enrichment claims.

## CONCLUSION

Minors failed to affirmatively demonstrate that the amended complaint corrects deficiencies identified in the September 2022 order, namely, that minors have sufficiently alleged the “constitutional minimum of standing.” This order, therefore, finds the amendment futile and subject to dismissal. Accordingly, minors’ motion for leave to file second amended complaint is **DENIED**. Judgment will be entered accordingly.

## IT IS SO ORDERED.

Dated: November 22, 2022.

Wm. Alsop  
WILLIAM ALSUP

United States District Court  
Northern District of California