

CANADA

PROVINCE OF QUÉBEC  
DISTRICT OF MONTREAL

NO: 500-06-001219-233

(Class Action)  
SUPERIOR COURT

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ALEXANDER MARTIN-BALE, domiciled at

[REDACTED]

Applicant

v.

DELL CANADA INC., legal person having its  
head office at 501-155 Gordon Baker Road,  
Toronto, Ontario, M2H 3N5

Defendant

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**APPLICATION TO AUTHORIZE THE BRINGING OF A CLASS ACTION  
AND TO APPOINT THE STATUS OF REPRESENTATIVE PLAINTIFF  
(ARTICLES 571 AND FOLLOWING C.C.P.)**

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**TO ONE OF THE HONOURABLE JUDGES OF THE SUPERIOR COURT, SITTING IN  
AND FOR THE DISTRICT OF MONTREAL, YOUR APPLICANT STATES:**

**I. INTRODUCTION**

1. The Applicant wishes to institute a class action on behalf of the following class, of which he is a member, namely:

All consumers in Canada who purchased a Nintendo Switch for \$79.99 from Dell's website on or around January 25, 2023, and whose purchase was unilaterally cancelled by Dell thereafter.

or any other class to be determined by the Court.

(hereinafter referred to as the "**Class**")

2. The Applicant is a consumer within the meaning of the *Consumer Protection Act* ("**C.P.A.**");
3. The Defendant Dell Canada Inc. (hereinafter "**Dell**") is a corporation that owns and operates the Canadian version of the Dell website (<https://www.dell.com/en-ca>);

4. An extract of the enterprise's information statement from the Quebec enterprise register for Dell is disclosed as **Exhibit P-1**;
5. Dell does business in Canada, including in the province of Quebec, and runs its website where consumers can purchase products online. Dell is a merchant within the meaning of the C.P.A. and its activities are governed by this legislation, among others;
6. Dell is very familiar with Quebec's C.P.A., having been involved in the landmark Supreme Court case of *Dell Computer Corp. v. Union des consommateurs*, 2007 SCC 34, based on virtually identical breaches of the C.P.A. as alleged herein. This case was a catalyst for the legislator to amend the C.P.A. to add its section 11.1;
7. Therefore, the legal loophole which shielded Dell from a class action in 2007 no longer exists and the Applicant can now bring forward this class action in Quebec;

## **II. CONDITIONS REQUIRED TO AUTHORIZE THIS CLASS ACTION AND TO APPOINT THE STATUS OF REPRESENTATIVE PLAINTIFF (S. 575 C.C.P.):**

### **A) THE FACTS ALLEGED APPEAR TO JUSTIFY THE CONCLUSIONS SOUGHT:**

8. On January 25, 2023, the Applicant visited Dell's website because he was shopping for a Nintendo Switch that he wished to purchase for his personal use;
9. On January 25, 2023, the Applicant saw that the "*Nintendo Switch with Pastel Green and blue Joy-Con - New Horizons Edition - Game console - blue, pastel green*" (the "**Nintendo Switch**") was advertised on Dell's website<sup>1</sup> for **\$79.99** plus taxes and he decided to purchase this item at this advertised price, as it appears from a copy of his purchase confirmation email (2009470753889) from Dell disclosed as **Exhibit P-2**;
10. The Applicant confirms that the Nintendo Switch that he purchased and that was advertised on Dell's Website contained all of the essential elements of the intended contract, including the product description and price;
11. The Applicant further confirms that at the time of his purchases, Dell's Website indicated that the Nintendo Switch was available in stock and that Dell restricted purchases to ten (10) units per customer, as it appears from **Exhibit P-3**;
12. Applicant understood that Dell was offering a very good promotion as this Nintendo Switch retails on Nintendo's website \$399.99 plus taxes, which is the reason why Dell placed a restriction on the number of purchases a customer can make. In the Applicant's case, he decided to purchase a single unit for his personal use;

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<sup>1</sup> [https://www.dell.com/en-ca/shop/nintendo-switch-with-pastel-green-and-blue-joy-con-new-horizons-edition-game-console-blue-pastel-green/apd/ac434094/gaming-gaming-accessories-techspecs\\_section](https://www.dell.com/en-ca/shop/nintendo-switch-with-pastel-green-and-blue-joy-con-new-horizons-edition-game-console-blue-pastel-green/apd/ac434094/gaming-gaming-accessories-techspecs_section)

13. The Applicant used his credit card to make the purchase, as it appears from **Exhibit P-4**;
14. On January 25, 2023, Dell sent first email confirmation to the Applicant titled “Your Dell Order Has Been **Received** | Dell Purchase ID: 2009470753889 (Exhibit P-2);
15. A few minutes later on January 25, 2023, Dell sent a second email confirmation to the Applicant titled “Your Dell Order Has Been **Confirmed** | Dell Purchase ID: 2009470753889”, leaving no doubt that a binding contract had been formed, as it appears from **Exhibit P-5**;
16. Moreover, by clicking on the “View Order Details” (blue button in Exhibit P-5), the Applicant was directed to a webpage on Dell’s site showing the status of his order and which provided the “Estimated ship date: Feb 28, 2023” and the “Estimated arrival: March 3, 2023”, as it appears from **Exhibit P-6**;
17. On January 25, 2023, Dell debited the Applicant’s credit card (Exhibit P-4);
18. However, on January 26, 2023, Dell unilaterally cancelled the Applicant’s order, as it appears from the screenshot disclosed as **Exhibit P-7**;
19. Having learnt that his order was cancelled (Exhibit P-7), the Applicant contacted Dell via its online chat tool on January 26, 2023. The Dell online customer service agent confirmed to the Applicant that the cancellation was due to a pricing error, as it appears from a copy of the chat transcript disclosed as **Exhibit P-8**;
20. Under consumer protection legislation, a binding agreement was formed at \$79.99 plus taxes, which Dell cannot unilaterally cancel on the basis of pricing error, even if Dell’s Terms of Sale provides for otherwise (**Exhibit P-9**, clause 3) – notably because section 54.1 C.P.A. is of public order and stipulates the following:

<p><b>54.1</b> Un contrat conclu à distance est un contrat conclu alors que le commerçant et le consommateur ne sont pas en présence l’un de l’autre et qui est précédé d’une offre du commerçant de conclure un tel contrat.</p> <p>Le commerçant est réputé faire une offre de conclure le contrat dès lors que sa proposition comporte tous les éléments essentiels du contrat envisagé, qu’il y ait ou non indication de sa volonté d’être lié en cas d’acceptation <b>et même en présence d’une indication contraire.</b></p>	<p><b>54.1</b> A distance contract is a contract entered into without the merchant and the consumer being in one another’s presence and preceded by an offer by the merchant to enter into such a contract.</p> <p>A merchant is deemed to have made an offer to enter into a distance contract if the merchant’s proposal comprises all the essential elements of the intended contract, regardless of whether there is an indication of the merchant’s willingness to be bound in the event the proposal is accepted <b>and even if there is an indication to the contrary.</b></p>
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21. Dell’s cancellation of the class members’ orders is also in violation of sections 16, 54.1 and 224c) CPA, rendering sections 253 and 272 applicable;
22. The Applicant is therefore entitled to claim on his behalf and on behalf of all class members damages equivalent the “Lost Value”, calculated as the difference between the price it would cost to purchase the Nintendo Switch today and the price advertised by Dell at the time of his purchase on January 25, 2023:

Item	Price paid by Applicant to Dell on January 25, 2023	Price advertised online on January 26, 2023	Lost Value
Nintendo Switch with Pastel Green and blue Joy-Con - New Horizons Edition - Game console - blue, pastel green	\$79.99	\$536.97 Amazon.ca (Exhibit P-10)	\$456.98
	\$79.99	\$399.99 Nintendo website (Exhibit P-11)	\$320.00

23. If the Applicant wants to purchase the model Nintendo Switch today, it appears that the only way to do so (in Canada) would be online from Amazon’s website for \$536.97 (**Exhibit P-10**). Applicant notes that the Nintendo Switch is listed on the Nintendo Canada website for \$399.99, but that it is out of stock and not available for sale (**Exhibit P-11**);
24. As such, the Lost Value claimed by the Applicant is **\$456.98**;
25. Quebec case law has already applied the Lost Value formula (“*valeur perdue*”) in similar circumstances, as it appears from the judgment in *Charest-Corriveau c. Sears Canada inc.*, 2015 QCCQ 6417, disclosed as **Exhibit P-12**;
26. Dell refused to sell the items that the Applicant purchased at the price advertised by Dell on its website and failed to honour its contracts with the Applicant and all Class members;
27. Given the duration for which the Nintendo Switch was available for sale on Dell’s website (24 hours), the fact that Dell sent reception and confirmation emails to class members – and that Dell has already been to the Supreme Court of Canada for this issue (related to a Quebec class action), Dell’s “pricing error” in this case can only be qualified as inexcusable, especially by a multinational such as Dell who should have systems in place to ensure that the prices it advertises on its website to the public are correct;

28. Quebec case law states that merchants must have “*safeguards to protect the integrity of its on-line system from the type of human error that was allegedly made here*” (*Lavoie c. Wal-Mart Canada Corp.*, 2022 QCCS 1060, par. 63);
29. Even if Dell later insists that there was no pricing error and that reason for cancellation was the item was out of stock, it follows that Dell would have then violated section 231 C.P.A. by having an insufficient quantity of the goods it advertised;
30. The Applicant declares that at the time he purchased the Nintendo Switch, Dell’s website displayed the item as available and contained an option showing that there was sufficient quantity available for purchase – even capping the quantity per purchase to 10 units per customer. Dell also indicated a description of the Nintendo Switch, a picture of the item, the price and that it was available for purchase at the advertised price (**Exhibit P-3**);
31. By refusing to honour its advertised price Dell violated several sections of the C.P.A., including sections 16, 54.1, 224 c) and 231. The Applicant is therefore entitled to claim damages in the form of the “Lost Value” described at paragraph 22 above;
32. In the circumstances, the Applicant is also entitled to claim punitive damages pursuant to section 272 C.P.A. which he hereby claims in the aggregate amount of \$500 per class member, which is appropriate in the circumstances given that Dell is clearly a repeat offender;
33. Indeed, Dell’s conduct warrants such a condemnation because it refused to honour the advertised price despite the Applicant’s request and because it is well aware of the law in Quebec;
34. The Applicant believes that some consumers were able to purchase the Nintendo Switch by going to other stores, such as BestBuy (i.e. competitors of Dell) and asking them to match the price advertised on Dell’s websites on January 25, 2023. The Applicant could have done the same, but had no reason to believe that Dell would not honour its contract with him;
35. The Applicant’s damages are a direct and proximate result of Dell’s misconduct and, in these circumstances, the Applicant’s claims for both compensatory and punitive damages are justified;

**B) THE CLAIMS OF THE MEMBERS OF THE CLASS RAISE IDENTICAL, SIMILAR OR RELATED ISSUES OF LAW OR FACT:**

36. The questions of fact and law raised and the recourse sought by this Application are identical with respect to each member of the Class, namely:
  - a) By cancelling consumers’ orders, did Dell violate the C.P.A. or the *Competition*

*Act?*

- b) If so, are Class members entitled to compensation and in what amount?
- c) Are the Class members entitled to punitive damages and, if so, in what amount?

**C) THE COMPOSITION OF THE CLASS**

- 37. The composition of the Class makes it difficult or impracticable to apply the rules for mandates to take part in judicial proceedings on behalf of others or for consolidation of proceedings;
- 38. The Applicant presumes that Dell has a very important number of customers across Quebec. While he is unaware of the total number of people who are included in the Class, he already knows about several them. He estimates that the total class size is likely in the hundreds or thousands;
- 39. While researching online, the Applicant discovered that there are hundreds of other consumers who had their orders cancelled by Dell in the same manner as his;
- 40. The names and addresses of all the other consumers included in the Class are not known to the Applicant, however, are all in the possession of Dell since the orders must be placed online (with an email address) and delivered to a postal address;
- 41. Class members are numerous and are dispersed across the province;
- 42. These facts demonstrate that it would be impractical, if not impossible, to contact each and every Class member to obtain mandates and to join them in one action;
- 43. In these circumstances, a class action is the only appropriate procedure for all of the members of the Class to effectively pursue their respective rights and have access to justice without overburdening the court system;

**D) THE CLASS MEMBER REQUESTING TO BE APPOINTED AS REPRESENTATIVE PLAINTIFF IS IN A POSITION TO PROPERLY REPRESENT THE CLASS**

- 44. The Applicant requests that he be appointed the status of representative plaintiff for the following main reasons:
  - a) He is a member of the Class and has a personal interest in seeking the conclusions that he proposes herein;
  - b) He is competent, in that he has the potential to be the mandatary of the action if it had proceeded under article 91 of the *Code of Civil Procedure*;
  - c) His interests are not antagonistic to those of other Class members;
- 45. The Applicant participated in the drafting of the present application and has reviewed the exhibits;

46. He is taking this action so that he and all Class members can be compensated and to hold Dell accountable;
47. Applicant adds that he has already been appointed the status of Representative Plaintiff in a separate class action that resulted in a very favourable settlement for Class members, which was approved by the Court;

### III. DAMAGES

48. Dell has breached several obligations imposed on it by consumer protection legislation in Quebec, notably:
  - a) Quebec's C.P.A., including sections 16, 54.1, 215, 219, 224 c) and 231, thus rendering sections 253 and 272 applicable;
  - b) The *Competition Act*, including ss. 52 and 54.
49. In light of the foregoing, the following damages may be claimed against Dell:
  - a) compensatory damages in the aggregate of the Lost Value (= \$456.98 x # of Class members); and
  - b) punitive damages of \$500 per Class member for the breach of obligations imposed on Dell pursuant to s. 272 C.P.A.;

### IV. NATURE OF THE ACTION AND CONCLUSIONS SOUGHT

50. The action that the Applicant wishes to institute on behalf of the members of the Class is an action in damages;
51. The conclusions that the Applicant wishes to introduce by way of an originating application are:
  1. **GRANT** the Plaintiff's action against Defendant;
  2. **CONDEMN** the Defendant to pay to the members of the Class an amount to be determined in compensatory damages, and **ORDER** collective recovery of these sums;
  3. **CONDEMN** the Defendant to pay to the members of the Class \$500 each in punitive damages, and **ORDER** collective recovery of these sums;
  4. **CONDEMN** the Defendant to pay interest and the additional indemnity on the above sums according to law from the date of service of the *Application to Authorize the Bringing of a Class Action and to Appoint the Status of Representative Plaintiff*;
  5. **ORDER** the Defendant to deposit in the office of this Court the totality of the sums which forms part of the collective recovery, with interest and costs;

6. **ORDER** that the claims of individual Class members be the object of collective liquidation if the proof permits and alternately, by individual liquidation;
7. **CONDEMN** the Defendant to bear the costs of the present action including the cost of notices, the cost of management of claims and the costs of experts, if any, including the costs of experts required to establish the amount of the collective recovery orders;

## V. JURISDICTION

52. The Applicant requests that this class action be exercised before the Superior Court in the district of Montreal, notably because he is a consumer and resides in this district.

### FOR THESE REASONS, MAY IT PLEASE THE COURT:

1. **GRANT** the present Application;
2. **AUTHORIZE** the bringing of a class action in the form of an originating application in damages;
3. **APPOINT** the Applicant the status of representative plaintiff of the persons included in the Class herein described as:

All consumers in Canada who purchased a Nintendo Switch for \$79.99 from Dell's website on or around January 25, 2023, and whose purchase was unilaterally cancelled by Dell thereafter.

or any other class to be determined by the Court.

4. **IDENTIFY** the principle questions of fact and law to be treated collectively as the following:
  - a) By cancelling consumers' orders, did Dell violate Quebec's *Consumer Protection Act* or the *Competition Act*?
  - b) If so, are Class members entitled to compensation and in what amount?
  - c) Are the Class members entitled to punitive damages and, if so, in what amount?
5. **IDENTIFY** the conclusions sought by the class action to be instituted as being the following:
  1. **GRANT** the Plaintiff's action against Defendant;
  2. **CONDEMN** the Defendant to pay to the members of the Class an amount to be determined in compensatory damages, and **ORDER** collective



recovery of these sums;

3. **CONDEMN** the Defendant to pay to the members of the Class \$500 each in punitive damages, and **ORDER** collective recovery of these sums;
4. **CONDEMN** the Defendant to pay interest and the additional indemnity on the above sums according to law from the date of service of the *Application to Authorize the Bringing of a Class Action and to Appoint the Status of Representative Plaintiff*;
5. **ORDER** the Defendant to deposit in the office of this Court the totality of the sums which forms part of the collective recovery, with interest and costs;
6. **ORDER** that the claims of individual Class members be the object of collective liquidation if the proof permits and alternately, by individual liquidation;
7. **CONDEMN** the Defendant to bear the costs of the present action including the cost of notices, the cost of management of claims and the costs of experts, if any, including the costs of experts required to establish the amount of the collective recovery orders;
6. **DECLARE** that all members of the Class that have not requested their exclusion, be bound by any judgement to be rendered on the class action to be instituted in the manner provided for by the law;
7. **FIX** the delay of exclusion at thirty (30) days from the date of the publication of the notices to Class members, date upon which the members of the Class that have not exercised their means of exclusion will be bound by any judgement to be rendered herein;
8. **ORDER** the publication of a notice to the members of the Class in accordance with article 579 C.C.P. within sixty (60) days from the judgement to be rendered herein by e-mail to each Class member, to their last known e-mail address, with the subject line "Notice of a Class Action";
9. **THE WHOLE** with costs including publication fees.

Montreal, January 27, 2023

*(s) LPC Avocat Inc.*

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**LPC AVOCAT INC.**

Me Joey Zukran, attorney for Applicant  
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Montréal, Québec, H2Y 1N3

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**SUMMONS**  
(ARTICLES 145 AND FOLLOWING C.C.P)

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**Filing of a judicial application**

Take notice that the Applicant has filed this *Application for Authorization to Institute a Class Action and to Appoint the Status of Representative Plaintiff* in the office of the Superior Court in the judicial district of **Montreal**.

**Defendant's answer**

You must answer the application in writing, personally or through a lawyer, at the courthouse of Montreal situated at 1 Rue Notre-Dame E, Montréal, Quebec, H2Y 1B6, within 15 days of service of the Application or, if you have no domicile, residence or establishment in Québec, within 30 days. The answer must be notified to the Applicant's lawyer or, if the Applicant is not represented, to the Applicant.

**Failure to answer**

If you fail to answer within the time limit of 15 or 30 days, as applicable, a default judgement may be rendered against you without further notice and you may, according to the circumstances, be required to pay the legal costs.

**Content of answer**

In your answer, you must state your intention to:

- negotiate a settlement;
- propose mediation to resolve the dispute;
- defend the application and, in the cases required by the Code, cooperate with the Applicant in preparing the case protocol that is to govern the conduct of the proceeding. The protocol must be filed with the court office in the district specified above within 45 days after service of the summons or, in family matters or if you have no domicile, residence or establishment in Québec, within 3 months after service;
- propose a settlement conference.

The answer to the summons must include your contact information and, if you are represented by a lawyer, the lawyer's name and contact information.

**Change of judicial district**

You may ask the court to refer the originating Application to the district of your domicile or residence, or of your elected domicile or the district designated by an agreement with the applicant.

If the application pertains to an employment contract, consumer contract or insurance

contract, or to the exercise of a hypothecary right on an immovable serving as your main residence, and if you are the employee, consumer, insured person, beneficiary of the insurance contract or hypothecary debtor, you may ask for a referral to the district of your domicile or residence or the district where the immovable is situated or the loss occurred. The request must be filed with the special clerk of the district of territorial jurisdiction after it has been notified to the other parties and to the office of the court already seized of the originating application.

### **Transfer of application to Small Claims Division**

If you qualify to act as a plaintiff under the rules governing the recovery of small claims, you may also contact the clerk of the court to request that the application be processed according to those rules. If you make this request, the plaintiff's legal costs will not exceed those prescribed for the recovery of small claims.

### **Calling to a case management conference**

Within 20 days after the case protocol mentioned above is filed, the court may call you to a case management conference to ensure the orderly progress of the proceeding. Failing this, the protocol is presumed to be accepted.

### **Exhibits supporting the application**

In support of the Application for Authorization to Institute a Class Action and to Appoint the Status of Representative Plaintiff, the Applicant intends to use the following exhibits:

- Exhibit P-1:** Copy of the enterprise's information statement from the Quebec enterprise register for Dell Canada Inc.;
- Exhibit P-2:** Copy of first purchase confirmation email from Dell titled "Your Dell Order Has Been Received" from January 25, 2023;
- Exhibit P-3:** Screenshots taken of Dell's website on January 25, 2023 indicating a limit of 10 units per order;
- Exhibit P-4:** Copy of Applicant's credit card statement (redacted) showing the charge from Dell;
- Exhibit P-5:** Copy of second purchase confirmation email from Dell titled "Your Dell Order Has Been Confirmed" from January 25, 2023;
- Exhibit P-6:** Screen capture of the Dell's website showing the order progress of Applicant's order;
- Exhibit P-7:** Screen capture of Dell's website showing the Applicant's order was cancelled;

- Exhibit P-8:** Copy of the chat transcript between the Applicant and Dell;
- Exhibit P-9:** Copy of Dell's Terms of Sale;
- Exhibit P-10:** Screen capture of the Amazon.ca website showing the Nintendo Switch available for \$536.97 (in stock);
- Exhibit P-11:** Screen capture of the Nintendo Canada website showing the Nintendo Switch listed MRSP of \$399 (out of stock);
- Exhibit P-12:** Copy of the judgment of *Charest-Corriveau c. Sears Canada inc.*, 2015 QCCQ 6417.

These exhibits are available on request.

### **Notice of presentation of an application**

If the application is an application in the course of a proceeding or an application under Book III, V, excepting an application in family matters mentioned in article 409, or VI of the Code, the establishment of a case protocol is not required; however, the application must be accompanied by a notice stating the date and time it is to be presented.

Montreal, January 27, 2023

*(s) LPC Avocat Inc.*

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**LPC AVOCAT INC.**

Mtre Joey Zukran

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**NOTICE OF PRESENTATION**  
(articles 146 and 574 al. 2 C.C.P.)

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**TO: DELL CANADA INC.**  
501-155 Gordon Baker Road  
Toronto, Ontario, M2H 3N5

**Defendant**

**TAKE NOTICE** that Applicant's *Application to Authorize the Bringing of a Class Action and to Appoint the Status of Representative Plaintiff* will be presented before the Superior Court at **1 Rue Notre-Dame E, Montréal, Quebec, H2Y 1B6**, on the date set by the coordinator of the Class Action chamber.

**GOVERN YOURSELVES ACCORDINGLY.**

Montreal, January 27, 2023

*(s) LPC Avocat Inc.*

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**LPC AVOCAT INC.**

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500-06-001219-233

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(Class Action)  
SUPERIOR COURT  
DISTRICT OF MONTREAL

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**ALEXANDER MARTIN-BALE**

Applicant

v.

**DELL CANADA INC.**

Defendant

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**APPLICATION TO AUTHORIZE THE BRINGING OF  
A CLASS ACTION AND TO APPOINT THE STATUS  
OF REPRESENTATIVE PLAINTIFF  
(ARTICLES 571 AND FOLLOWING C.C.P.)**

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**ORIGINAL**

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**BL 6059**

**N/D: JZ-247**

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