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OF ORIGINAL FILED
Los Angeles Superior Court

NOV 21 2003

John A. Clarke, Executive Officer/Clerk
By _____, Deputy
SUE GABB

8 SUPERIOR COURT OF CALIFORNIA

9 LOS ANGELES COUNTY

10 BROOK CHALMERS, individually and on
11 behalf of other members of the general public
12 similarly situated,

13 Plaintiff,

14 vs.

15 ELECTRONICS BOUTIQUE OF AMERICA,
16 INC., and DOES 1 through 50, inclusive,

17 Defendant

NO. BC306571

COMPLAINT

[CLASS ACTION]

1. Violations of Labor Code
2. Violation of B&P § 17200

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21 FIRST CAUSE OF ACTION

22 COMES NOW, Plaintiff, an individual over the age of eighteen (18), and brings this
23 challenge to Defendant's lucrative, repressive and unlawful business practices on behalf of
24 himself and a class of all others similarly situated and for a Cause of Action against
25 Defendants, ELECTRONICS BOUTIQUE OF AMERICA, INC., and DOES 1-50, inclusive,
26 (hereinafter Defendants) and each of them, alleges as follows:
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1 **THE PARTIES, JURISDICTION AND VENUE**

2 1.

3 This class action is brought pursuant to Section 382 of the California Code of Civil
4 Procedure. The monetary damages sought by Plaintiff exceeds the minimal jurisdiction limits
5 of the Superior Court and will be established according to proof at trial. The amount in
6 controversy for the class representative, including his claims for compensatory damages and
7 pro rata share of attorney fees, is less than \$75,000.
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9 2.

10 Venue is proper in Los Angeles County as at least some of the acts complained of
11 herein occurred in Los Angeles County as Defendant owns and operates retail stores in Los
12 Angeles County where Plaintiff Brook Chalmers was employed as a salaried retail store
13 employee in the position of manager. At all times herein mentioned, Plaintiff and the class
14 identified herein worked as an employee for Defendant in a salaried position in Defendant's
15 retail store locations. Defendant's salaried retail position is not a position which falls into an
16 exception to the California Labor Code Section 1194 and/or California Industrial Welfare
17 Commission Wage Order 7 governing the mercantile industry, applicable to Defendants'
18 business. The acts complained of in this First Cause of Action occurred, at least in part, within
19 three years of the filing of the original complaint in this action up to and including the time that
20 this action is certified as a class action. The representative Plaintiff who worked in a salaried
21 retail position at one of Defendant's retail locations within the State of California is BROOK
22 CHALMERS.
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3.

Defendant, ELECTRONICS BOUTIQUE OF AMERICA, INC., is a corporation doing business in California under the names of "ELECTRONICS BOUTIQUE," "EB GAMES" and "EBX."

4.

Plaintiff is informed and believes and thereon alleges that all times herein mentioned Defendant and Does 1 through 50, are and were corporations, business entities, individuals and partnerships, licensed to do business and actually doing business in the State of California, Los Angeles County. Defendant owns and operates an industry, business and establishment in approximately 92 separate geographic locations within the State of California, including within Los Angeles County, for the purpose of selling electronic games, electronic game software and accessories. As such, and based upon all the facts and circumstances incident to Defendants' business in California, Defendants are subject to California Labor Code Section 1194, et seq., California Business and Professions Code Section 17200, et seq., (Unfair Practices Act) and IWC Wage Order 7.

5.

Plaintiff does not know the true names or capacities, whether individual, partner or corporate, of the Defendants sued herein as DOES 1 through 50, inclusive, and for that reason, said Defendants are sued under such fictitious names, and Plaintiff prays leave to amend this complaint when the true names and capacities are known. Plaintiff is informed and believes and thereon alleges that each of said fictitious Defendants was responsible in some way for the matters alleged herein and proximately caused Plaintiff and members of the general public and

1 the class to be subject to the illegal employment practices, wrongs and injuries complained of
2 herein.

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4 **6.**

5 At all times herein mentioned, each of said Defendants participated in the doing of the
6 acts hereinafter alleged to have been done by the named Defendant; and furthermore, the
7 Defendants, and each of them, were the agents, servants and employees of each of the other
8 Defendants, as well as the agents of all Defendants, and at all times herein mentioned, were
9 acting within the course and scope of said agency and employment.
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11 **7.**

12 At all times herein mentioned, Defendants, and each of them, were members of, and
13 engaged in, a joint venture, partnership and common enterprise, and acting within the course
14 and scope of, and in pursuance of, said joint venture, partnership and common enterprise.
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16 **8.**

17 At all times herein mentioned, the acts and omissions of various Defendants, and each
18 of them, concurred and contributed to the various acts and omissions of each and all of the
19 other Defendants in proximately causing the injuries and damages as herein alleged.
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21 **9.**

22 At all times herein mentioned, Defendants, and each of them, ratified each and every act
23 or omission complained of herein. At all times herein mentioned, the Defendants, and each of
24 them, aided and abetted the acts and omissions of each and all of the other Defendants in
25 proximately causing the damages as herein alleged. Further, at all times mentioned herein, the
26 wage and hour related compensation policies of Defendant's retail locations in California are
27 and were dictated by, controlled by, and ratified by the Defendants herein and each of them.
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1 **FACTUAL AND CLASS ALLEGATIONS**

2 **10.**

3 Pursuant to California Labor Code §§ 218, 218.5, 218.6 and 1194, Plaintiff may bring a
4 civil action for overtime wages directly against the employer without first filing a claim with
5 the California Division of Labor Standards Enforcement and may recover such wages, together
6 with interest thereon, penalties, attorney fees and costs.
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8 **11.**

9 Plaintiff and all members of the class identified herein were regularly scheduled as a
10 matter of uniform company policy to work and in fact worked as salaried retail employees in
11 excess of eight hours per workday and/or in excess of forty hours per workweek without
12 receiving straight time or overtime compensation for such overtime hours worked in violation
13 of California Labor Code § 1194 and IWC Wage Order 7. Plaintiff and the other members of
14 the class were improperly and illegally mis-classified by Defendant as "exempt" employees
15 when, in fact, they were "non-exempt" employees according to California law. Plaintiff and the
16 class have the right to be compensated by Defendant at the appropriate compensatory wage rate
17 for said work heretofore performed, consisting of the straight time rate plus the appropriate
18 overtime premium as mandated by California law including interest, attorney fees and costs,
19 and civil penalties thereon pursuant to Labor Code §§ 558 and 1197.1.
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22 **12.**

23 This complaint is brought by Plaintiff pursuant to California Code of Civil Procedure §
24 382 on behalf of a class. All claims alleged herein arise under California law for which
25 Plaintiff seeks relief authorized under California law. The class is comprised of, and defined
26 as:
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1 All current and former California based salaried retail store employees
2 who worked overtime for Defendants within the four years preceding the
3 filing of the original complaint in this action up to the time the class is
certified, yet were not paid overtime.

4 The members of the class are so numerous that joinder of all members would be
5 impractical, if not impossible. The members of the class are readily ascertainable by a review
6 of Defendant's records. Further, the subject matter of this action both as to factual matters and
7 as to matters of law, are such that there are questions of law and fact common to the class
8 which predominate over questions affecting only individual members including, among other
9 things, the following:
10

11 a. Statistically, one hundred percent of the class members were paid on a salary
12 basis with no overtime compensation paid for work accomplished in excess of forty hours per
13 week, or eight hours per day. Plaintiff is informed and believes and based thereon alleges that
14 Defendants and each of them have failed to meet the requirements for establishing the
15 exemption because all class members (1) regularly spent more than 50% of their time
16 performing non-exempt work, (2) did not customarily and regularly exercise discretion and
17 independent judgment, (3) did not have the authority to hire or fire or make meaningful
18 recommendations regarding same, and, (4) did not customarily and regularly supervise at least
19 two employees or the equivalent. In primarily engaging in non-exempt work, Plaintiff and the
20 class, at all times relevant, met the realistic expectations of Defendants and each of them. Thus,
21 Plaintiff and the class members were not exempt from the overtime requirements of California
22 law for these reasons.
23

24 b. Defendants have a uniform and consistent policy and practice concerning duties
25 and responsibilities of the class members which required that the class members both work
26 overtime without pay and regularly spend more than 50% of their time performing non-exempt
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1 tasks. Further, Defendants dispensed misinformation amongst the class members to the effect
2 that salaried retail employees are not entitled to overtime compensation under Defendant's
3 labor policies and practices and under California law.

4
5 c. Defendants have a uniform and consistent policy and practice concerning duties
6 and responsibilities of the class members such that members do not regularly and customarily
7 exercise discretion and independent judgment.

8
9 d. The duties and responsibilities of the salaried retail positions at Defendant's
10 retail locations were substantially similar from store to store, and, employee to employee.
11 Further, any variations in job activities between the different individuals in these positions are
12 legally insignificant to the issues presented by this action since the central facts remain, to wit,
13 these employees performed non-exempt work in excess of 50% of the time in their workday,
14 these employees did not regularly exercise discretion and independent judgment, these
15 employees' work routinely included work in excess of 40 hours per week and/or 8 hours per
16 day and they were not, and have never been, paid overtime compensation for their work.

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18 **13.**

19 There are predominant common questions of law and fact and a community of interest
20 amongst Plaintiff and the claims of the absent class members concerning whether Defendant's
21 regular business custom and practice of requiring substantial "overtime" work and not paying
22 for said work according to the overtime mandates of California law is, and at all times herein
23 mentioned was, in violation of California Labor Code §§ 1194, et seq., the Unfair Practices Act
24 and IWC Wage Order 5. Defendants' employment policies and practices wrongfully and
25 illegally failed to compensate salaried retail employees for substantial overtime compensation
26 earned as required by California law.
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14.

Plaintiff's claims are typical of the claims of all members of the class. Plaintiff, as the representative party, will fairly and adequately protect the interests of the class by vigorously pursuing this suit through attorneys who are skilled and experienced in handling civil litigation of this type.

15.

The California Labor Code and Wage Order provisions upon which Plaintiff asserts these claims are broadly remedial in nature. These laws and labor standards serve an important public interest in establishing minimum working conditions and standards in California. These laws and labor standards protect the average working employee from exploitation by employers who may seek to take advantage of superior economic and bargaining power in setting onerous terms and conditions of employment. The nature of this action and the format of laws available to Plaintiff and members of the class identified herein make the class action format a particularly efficient and appropriate procedure to redress the wrongs alleged herein. If each employee were required to file an individual lawsuit, the corporate Defendants would necessarily gain an unconscionable advantage since they would be able to exploit and overwhelm the limited resources of each individual class member with their vastly superior financial and legal resources. Requiring each class member to pursue an individual remedy would also discourage the assertion of lawful claims by employees who would be disinclined to file an action against their current or former employer for real and justifiable fear of retaliation and permanent damage to their careers at subsequent employment.

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16.

The prosecution of separate actions by the individual class members, even if possible, would create a substantial risk of (1) inconsistent or varying adjudications with respect to individual class members against the Defendants and which would establish potentially incompatible standards of conduct for Defendants, and/or (2) adjudications with respect to individual class members which would, as a practical matter, be dispositive of the interests of the other class members not parties to the adjudications or which would substantially impair or impede the ability of the class members to protect their interests. Further, the claims of the individual members of the class are not sufficiently large to warrant vigorous individual prosecution considering all of the concomitant costs and expenses.

17.

Such a pattern, practice and uniform administration of corporate policy regarding illegal employee compensation, as described herein, is unlawful and creates an entitlement to recovery by Plaintiff and the class identified herein, in a civil action, for the unpaid balance of the full amount of the straight time compensation and overtime premiums owing, including interest thereon, penalties, reasonable attorneys fees, and costs of suit according to the mandate of California Labor Code § 1194, et seq.

18.

Proof of a common business practice or factual pattern, of which the named Plaintiff's experience is representative, will establish the right of each member of the plaintiff class to recovery on the causes of action alleged herein.

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19.

The plaintiff class is entitled in common to a specific fund with respect to the overtime compensation monies illegally and unfairly retained by Defendants. This action is brought for the benefit of the entire class and will result in the creation of a common fund.

20.

Plaintiff and members of the class identified herein were discharged by Defendants or voluntarily quit, and did not have a written contract for employment. Defendants, in violation of California Labor Code §§ 201 and 202, et seq., respectively, had a consistent and uniform policy, practice and procedure of willfully failing to pay the earned and unpaid wages of all such former employees. Defendants have willfully failed to pay the earned and unpaid wages of such individuals, including, but not limited to, straight time, overtime, vacation time, and other wages earned and remaining uncompensated according to amendment, or proof. Plaintiff and other members of the class did not secret or absent themselves from Defendants nor refuse to accept the earned and unpaid wages from Defendants. Accordingly, Defendants are liable for waiting time penalties for the unpaid wages pursuant to California Labor Code § 203.

21.

As a pattern and practice, in violation of the aforementioned labor laws and wage orders, Defendants knowingly and intentionally did not maintain any records or furnish any records to the class pertaining to when Plaintiff and the members of the class began and ended each work period, meal period, the total daily hours worked, and the total hours worked per pay period and applicable rates of pay in violation of California Labor Code §§ 226 and 1174 thereby causing injury to the class. Accordingly, Defendants and each of them are liable for civil penalties to Plaintiff and the class pursuant to Labor Code §§ 226, 558 and 1174.5.

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22.

In violation of sections 11 and 12 of IWC Wage Order 7, Defendants failed to provide meal and rest period breaks in the requisite number, length and manner as provided in the Wage Order. At no time has Plaintiff and the class entered into any written agreement with Defendants expressly or impliedly waiving their right to their meal breaks. Plaintiff and the class have been injured by Defendants' failure to comply with sections 11 and 12 of IWC Wage Order 7 and are thus entitled to the wages set forth in Wage Order 7 and penalties per Labor Code § 558.

23.

Pursuant to Labor Code § 2699, the Labor Code Private Attorneys General Act of 2004 (SB 796 operative January 1, 2004), Plaintiff brings this action on behalf of himself and other current and former employees and seek recovery of applicable civil penalties as follows:

a. where civil penalties are specifically provided in the Labor Code for each of the violations alleged herein, Plaintiff seeks recovery of such penalties;

b. where civil penalties are not established in the Labor Code for each of the violations alleged herein, Plaintiff seeks recovery of the penalties established in § 2699(e) of the Labor Code Private Attorneys General Act of 2004.

WHEREFORE, Plaintiff on his own behalf and on behalf of the members of the class, pray for judgment as hereinafter set forth.

SECOND CAUSE OF ACTION

COMES NOW, Plaintiff, individually and on behalf of both the class and the general public and as a second, separate and distinct cause of action against Defendants, and each of them, alleges as follows:

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24.

Plaintiff herein repeats and re-alleges as though fully set forth at length each and every paragraph of this Complaint, excepting those paragraphs which are inconsistent with this cause of action for relief regarding Defendants' violations of California Business and Professions Code § 17200 et seq. (Unfair Practices Act).

25.

At all times herein mentioned Defendants, and each of them, acting as the employer, individually or through officers, directors, agents or employees of another have (1) required or caused Plaintiff and the class to work for longer hours than those fixed or under conditions prohibited by Industrial Welfare Commission wage orders applicable to Defendants' business, (2) paid or caused to be paid to Plaintiff and the class less than the minimum fixed by IWC Wage Order 7, and (3) violated, refused, or neglected to comply with any provision of Part 4, Chapter 1 of the Labor Code beginning at § 1171 or any order or ruling of the Industrial Welfare Commission. As a result of the foregoing and the acts complained of herein, Defendants, and each of them, are guilty of violating California Labor Code §§ 204, 216, 1198 and 1199. In addition to the other violations of the law set forth in the First Cause of Action, Defendants' violations of California Labor Code §§ 204, 216, 1198 and 1199 serve as a further basis for Defendants' liability under California Business & Professions Code § 17200, et seq.

26.

Defendants, and each of them, have engaged in unfair business practices in California by practicing, employing and utilizing the employment practices as outlined herein, to wit, by requiring their salaried retail employees to perform the labor services without overtime compensation. Defendants' utilization of such unfair business practices constitutes unfair

1 competition and provides an unfair advantage over Defendants' competitors. Plaintiff, and
2 other similarly situated members of the general public, seek full restitution and disgorgement of
3 monies, as necessary and according to proof, to restore any and all monies withheld, acquired
4 and/or converted by the Defendants by means of the unfair practices complained of herein.
5 Plaintiff seeks, on his own behalf and on behalf of the general public, the appointment of a
6 receiver, as necessary.
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27.

Plaintiff is informed and believes and on that basis alleges that at all times herein mentioned Defendants have engaged in unlawful, deceptive and unfair business practices, as proscribed by California Business and Professions Code § 17200 et seq., including those alleged herein thereby depriving Plaintiff and other members of the general public the minimum working standards and conditions due to them under the California labor law and Industrial Welfare Commission Wage Orders as specifically described herein.

28.

Plaintiff, and all persons similarly situated, are further entitled to and do seek a both a declaration that the above-described business practices are unfair, unlawful and/or fraudulent and injunctive relief restraining Defendants from engaging in any of such business practices in the future. Such misconduct by Defendants, unless and until enjoined and restrained by order of this Court, will cause great and irreparable injury to all members of the class in that the Defendants will continue to violate California law, represented by labor statutes and IWC Wage Orders, unless specifically ordered to comply with same. This expectation of future violations will require current and future employees to repeatedly and continuously seek legal redress in order to gain compensation to which they are entitled under California law. Plaintiff

1 has no other adequate remedy at law to insure future compliance with the California labor laws
2 and Wage Orders alleged to have been violated herein.

3 WHEREFORE, Plaintiff on his own behalf and on behalf of the members of the class
4 and the general public, prays for judgment as follows:

- 5 1. For an order certifying the proposed class;
- 6 2. Upon the First Cause of Action, for consequential damages according to proof
7 as set forth in California Labor Code § 1194, et seq. (and California Industrial Welfare
8 Commission Wage Order 7) related to overtime wages due and owing;
- 9 3. Upon the First Cause of Action, for waiting time penalties according to proof
10 pursuant to California Labor Code § 203;
- 11 4. Upon the First Cause of Action, for damages pursuant to California Labor Code
12 § 226;
- 13 5. Upon the First Cause of Action, for civil penalties pursuant to California Labor
14 Code §§ 226, 558, 1174.5, 1197.1 and 2699;
- 15 6. Upon the First Cause of Action, for wages pursuant to IWC Wage Order 7,
16 Sections 11 and 12;
- 17 7. Upon the Second Cause of Action, that Defendants be ordered to show cause
18 why they should not be enjoined and ordered to comply with IWC Wage Order 7 related to
19 payment of overtime compensation and record keeping for Defendants' salaried retail
20 employees who are primarily engaged in non-exempt work and work more than 40 hours per
21 week or 8 hours per day; and for an order enjoining and restraining Defendants and their
22 agents, servants and employees related thereto;
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1 8. Upon the Second Cause of Action, for a declaratory judgment and a decree
2 adjudging and decreeing that Plaintiff and the members of the class have regularly worked
3 compensable overtime; further, that the work performed by Plaintiff and the members of the
4 class is subject to overtime compensation requirements and/or is in excess of 40 hours per week
5 and/or 8 hours a day, and that Plaintiff and the members of the class are entitled to overtime
6 compensation for said work;
7

8 9. Upon the Second Cause of Action, for restitution to Plaintiff and other similarly
9 effected members of the general public of all funds unlawfully acquired by Defendants by
10 means of any acts or practices declared by this Court to be violative of the mandate established
11 by California Business and Professions Code § 17200 et seq.;

12 10. For pre-judgment interest as allowed by California Labor Code Section 1194
13 and 218.6;
14

15 11. For reasonable attorneys fees, expenses and costs as provided by California
16 Labor Code §§ 218, 1194, and 2699; and,
17

18 12. For such other and further relief the Court may deem just and proper.

19 DATED: November 17, 2003

RIGHETTI ♦ WYNNE



J.E.B. Pickett
Counsel for Plaintiff