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Attorneys for Plaintiff

**SUPERIOR COURT OF CALIFORNIA  
COUNTY OF ALAMEDA**

KELLY ANDERSEN,

Plaintiff,

vs.

THE SCHWAN FOOD COMPANY  
and DOES 1 through 50 inclusive,

Defendants.

\_\_\_\_\_ /

ENDORSED  
FILED  
ALAMEDA COUNTY

APR 18 2013  
OF THE SUPERIOR COURT  
~~R. McNAMEE~~

NO. *15-13676229*

CLASS ACTION

**COMPLAINT**

1. Violation of Labor Code § 1194;
2. Violation of B & P § 17200, et seq;
3. Failure to Provide Mandated Meal Periods and Rest Breaks
4. Failure to Indemnify Employees for Expenditures and/or Losses Expenses
5. Failure to Make Payments Within the Required Time
6. Private Attorney General Act Penalties
7. Failure to Furnish Accurate Wage and Hour Statements

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**INTRODUCTION**

**1.**

COMES NOW, Plaintiff, KELLY ANDERSEN (Plaintiff herein after) an individual over the age of eighteen (18), and brings this challenge to defendant's lucrative, repressive and unlawful business practices on behalf of himself and a class of all others similarly situated and for a Cause of Action against defendants, THE SCHWAN FOOD COMPANY, SCHWANS HOME SERVICE, INC. and DOES 1-50, inclusive, (hereinafter Defendants) and each of them, alleges as follows:

**THE PARTIES, JURISDICTION AND VENUE**

**2.**

This class action is brought pursuant to §382 of the California Code of Civil Procedure. The monetary damages and restitution sought by Plaintiff exceeds the minimal jurisdiction limits of the Superior Court and will be established according to proof at trial. The monetary damages sought on behalf of each and every member of the class and as aggregate class damages exceed those jurisdictional limits as well. However, the claims of individual class members, including Plaintiff, are under the \$75,000 jurisdictional threshold for federal court. For example, a class member who was or has been employed for a relatively brief period could never reasonably be expected to receive a recovery of \$75,000 or more. The total damages for the entire case does not exceed \$5,000,000.00. In addition, there is no federal question at issue, as all the issues related to payment wages alleged herein are based solely on California law and statutes, including the Labor Code, Civil Code, Code of Civil Procedure, and Business and Professions Code.

**3.**

Plaintiff, KELLY ANDERSEN ("Plaintiff") was employed in California by Defendants

1  
2 and provided the title of Route Salesman. Mr. Andersen worked for Defendants within four years  
3 prior to the filing of this Complaint and within one year of the filing of the complaint for  
4 purposes of the Private Attorney General Act.

5  
6 **4.**

7 Plaintiff brings this action against Defendants, for engaging in a uniform policy and  
8 systematic scheme of wage abuse against their Route Sales Representatives in California. This  
9 scheme involved, inter alia, categorically misclassifying the Route Sales Representative position  
10 as "exempt" for purposes of the payment of overtime compensation and minimum wage when, in  
11 fact, the position should have been classified as "non-exempt" according to California law.  
12 Further, Defendants did not have a meal/rest break policy for the Route Sales Representative  
13 position (because Defendants classified the position as exempt) and thus denied the Route Sales  
14 Representative mandated meal and rest breaks under California law. As a result of Defendants'  
15 systematic and clandestine scheme, the Route Sales Representatives throughout California were  
16 not paid all wages owed and were deprived of mandated meal periods and rest breaks.  
17 Accordingly, Defendants have violated California common and statutory laws as described more  
18 particularly below.  
19

20 **5.**

21 Defendants own/owned and operate/operated an industry, business and establishment  
22 within the State of California, including Alameda County, for the purpose of selling food and  
23 merchandise under the name of THE SCHWAN FOOD COMPANY. As such, and based upon  
24 all the facts and circumstances incident to defendants' business in California, defendants are  
25 subject to California Labor Code Sections 1194, et seq., 500, et seq., California Business and  
26 Professions Code Section 17200, et seq., (Unfair Practices Act) and the applicable wage order(s)  
27 issued by the Industrial Welfare Commission. At least some of the acts complained of herein  
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occurred in Alameda County as defendants do business in Alameda County area. Plaintiff is informed and believes and thereon alleges that at all times herein mentioned defendants are and were corporations licensed to do business and actually doing business in the State of California.

**6.**

At all times herein mentioned Plaintiff and the class identified herein worked for defendants as Route Sales Representatives. These positions are not positions, which involve work falling within any exception to the above-referenced Labor Code sections, the Unfair Practices Act and/or California Industrial Welfare Commission orders applicable to defendant's business.

**7.**

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

**8.**

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

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**9.**

At all times herein mentioned, defendants, and each of them, were members of, and engaged in, a joint venture, partnership and common enterprise, and acting within the course and scope of, and in pursuance of, said joint venture, partnership and common enterprise.

**10.**

At all times herein mentioned, the acts and omissions of various defendants, and each of them, concurred and contributed to the various acts and omissions of each and all of the other defendants in proximately causing the injuries and damages as herein alleged.

**11.**

At all times herein mentioned, defendants, and each of them, ratified each and every act or omission complained of herein. At all times herein mentioned, the defendants, and each of them, aided and abetted the acts and omissions of each and all of the other defendants in proximately causing the damages as herein alleged. Further, at all times mentioned herein, the wage and hour related compensation policies of stores in California are and were dictated by, controlled by, and ratified by the defendants herein and each of them.

**CLASS ACTION ALLEGATIONS**

**12.**

This complaint is brought by Plaintiff pursuant to California Code of Civil Procedure section 382 on behalf of a class. All claims alleged herein arise under California law for which Plaintiff seeks relief authorized under California law. The class is comprised of, and defined as:

All California based Route Sales Representatives who worked at any time during the four years preceding the filing of this Complaint up until the present for Defendants in the State of California.

The members of the class are so numerous that joinder of all members would be impractical, if not impossible. The members of the class are readily ascertainable by a review of defendant's

1  
2 records. Further, the subject matter of this action both as to factual matters and as to matters of  
3 law, are such that there are questions of law and fact common to the class which predominate  
4 over questions affecting only individual members including, among other things, the following:

5 a. Statistically, one hundred percent of the class members were paid on a salary basis  
6 with no overtime compensation paid for work accomplished in excess of forty hours per week, or  
7 eight hours per day. Plaintiff is informed and believes and based thereon alleges that all class  
8 members failed to meet the exemption requirements of California law. Thus, Plaintiff and the  
9 class members were not exempt from the overtime requirements of California law for that  
10 reason;  
11

12 b. Defendants uniformly administered a corporate policy concerning the duties and  
13 responsibilities of the class members which brought them outside of any of the applicable  
14 exemption for overtime under California law.

15 c. The duties and responsibilities of the Route Sales Representatives at the  
16 defendant's locations were virtually identical from region to region, district to district, employee  
17 to employee. Further, any variations in job activities between the different individuals in these  
18 positions are legally insignificant to the issues presented by this action since the central facts  
19 remain, to wit: whether the factors for overtime exemption were met. Further, these employees  
20 did not regularly exercise discretion and independent judgment; these employees' work routinely  
21 included work in excess of 40 hours per week and/or 8 hours per day and they were not, and have  
22 never been, paid overtime compensation for their work. Furthermore, Defendants failed to  
23 provide Plaintiff and class members the required "off duty" rest and meal periods during the  
24 relevant time period as required under the IWC Wage Orders. Defendants did not have a  
25 meal/rest period policy for Route Sales Representatives.  
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2 d. Members of the class identified herein were discharged by defendants or  
3 voluntarily quit, and did not have a written contract for employment. The defendants, in  
4 violation of California Labor Code Sections 201, and 202, et seq., respectively, had a consistent  
5 and uniform policy, practice and procedure of willfully failing to pay the earned and unpaid  
6 wages of all such former employees timely upon separation. The defendants have willfully failed  
7 to pay the earned and unpaid wages of such individuals, including, but not limited to, regular  
8 time, overtime, and other wages earned and remaining uncompensated according to amendment,  
9 or proof.  
10

11 **13.**

12 Plaintiff and all members of the class identified herein were regularly scheduled as a  
13 matter of uniform company policy to work and in fact worked as Route Sales Representatives in  
14 excess of eight hours per workday and/or in excess of forty hours per workweek without  
15 receiving straight time or overtime compensation for such overtime hours worked in violation of  
16 California Labor Code Section 1194 and the applicable California Industrial Welfare  
17 Commission wage order(s). Plaintiff and the other members of the class were improperly and  
18 illegally mis-classified by defendants as "exempt" employees when, in fact, they were "non-  
19 exempt" employees according to California law. For example, Plaintiff and class members did  
20 not spend more than 50% of their work time engaged in bona fide sales tasks; rather, Plaintiff  
21 and class members spent the majority of their time delivering products to customers and working  
22 a route that was provided to them by supervisors/dispatchers. Plaintiff and other class members  
23 did not supervise any other employees or perform tasks related to the management of the  
24 business. Plaintiff and the other members of the class have the right to be compensated by  
25 defendants at the appropriate compensatory wage rate for said work heretofore performed,  
26 consisting of the straight time rate plus the appropriate overtime premium as mandated by  
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1  
2 California law. Furthermore, Defendants failed to provide the Plaintiff and class members the  
3 required rest and meal periods during the relevant time period as required under the IWC Wage  
4 Orders and thus are entitled to any and all applicable penalties.

5 **14.**

6 As a pattern and practice, also in violation of the aforementioned labor laws and wage  
7 orders, defendants did not maintain any records pertaining to when Route Sales Representatives  
8 began and ended each work period, meal period, the total daily hours worked, and the total hours  
9 worked per pay period and applicable rates of pay.  
10

11 **15.**

12 There are predominant common questions of law and fact and a community of interest  
13 amongst Plaintiff and the claims of the absent class members concerning whether defendant's  
14 regular business custom and practice of requiring substantial "overtime" work and not paying for  
15 said work according to the overtime mandates of California law is, and at all times herein  
16 mentioned was, in violation of California Labor Code Sections 1194 and 500, et seq., the Unfair  
17 Practices Act and the applicable California Industrial Welfare Commission wage orders.  
18 Defendant's employment policies and practices wrongfully and illegally failed to compensate  
19 Route Sales Representatives for substantial overtime compensation earned as required by  
20 California law. For instance, questions of fact and/or law common to the members of the  
21 aforesaid class -- which predominate over any questions which may affect only individual  
22 members -- are:  
23

24 i. Whether defendant's California based Route Sales Representatives were  
25 classified as "exempt" in violation of California law;  
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2           ii.       Whether defendants uniformly failed to pay overtime wages to its Route  
3 Sales Representatives by virtue of defendant's unlawful class wide designation of such  
4 employees as "exempt" in violation of California law;

5           iii.       Whether Plaintiff and the class could waive the wage and hour laws  
6 designed for their benefit under California law and whether such waivers were voluntary,  
7 knowing and valid;

8           iv.       Whether defendant's conduct constituted an illegal, or unfair, business  
9 practice in violation of California law;

10           v.       Whether Plaintiff and the class are entitled to compensatory damages  
11 pursuant to the California Labor Code;

12           vi.       Whether Plaintiff and the class are entitled to injunctive relief, including  
13 restitution and/or disgorgement of profits pursuant to California law.

14           vii.       What is the correct computation formula for the payment of overtime in  
15 California?

16           viii.      What work is customarily and regularly accomplished by class members in  
17 defendant's – and what category (exempt or non-exempt) does that work properly fall into?

18           ix.       What are the realistic requirements of the Route Sales Representative  
19 positions?

20           x.       What are Defendant's expectations for Route Sales Representatives vis-à-  
21 vis the class members' job performance?

22           xi.       Who has the burden of proof on the exemption issue?

23           xii.      Can defendant rely on the "sole charge" or "primary duty" exemption  
24 standards applicable under federal law, or must defendants comply with California's more strict  
25 quantitative exemption standards?  
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xiii. Whether Defendants failed to provide Plaintiff and class members rest and meal breaks in violation of California Labor Code and applicable IWC wage orders;

xiv. Whether Defendants' lack of a meal and rest break policy for Route Sales Representatives is subject to common proof.

**16.**

The claims of Plaintiff are typical of the claims of all members of the class. Plaintiff, as a 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.

**17.**

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 it would be able to exploit and overwhelm the limited resources of each individual Plaintiff with its 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 former employer for

1  
2 real and justifiable fear of retaliation and permanent damage to their careers at subsequent  
3 employment.

4 **18.**

5 The prosecution of separate actions by the individual class members, even if possible,  
6 would create a substantial risk of (1) inconsistent or varying adjudications with respect to  
7 individual class members against the defendants and which would establish potentially  
8 incompatible standards of conduct for the defendants, and/or (2) adjudications with respect to  
9 individual class members which would, as a practical matter, be dispositive of the interests of the  
10 other class members not parties to the adjudications or which would substantially impair or  
11 impede the ability of the class members to protect their interests. Further, the claims of the  
12 individual members of the class are not sufficiently large to warrant vigorous individual  
13 prosecution considering all of the concomitant costs and expenses.  
14

15 **19.**

16 Such a pattern, practice and uniform administration of corporate policy regarding illegal  
17 employee compensation, as described herein, is unlawful and creates an entitlement to recovery  
18 by the Plaintiff and the class identified herein, in a civil action, for the unpaid balance of the full  
19 amount of the straight time compensation and overtime premiums owing, including interest  
20 thereon, willful penalties, reasonable attorneys fees, and costs of suit according to the mandate of  
21 California Labor Code Section 1194, et seq.  
22

23 **20.**

24 Proof of a common business practice or factual pattern, of which the named Plaintiff's  
25 experiences are representative, will establish the right of each of the members of the Plaintiff  
26 class to recovery on the causes of action alleged herein.  
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**21.**

The Plaintiff class is entitled in common to a specific fund with respect to the overtime compensation monies illegally and unfairly retained by defendants. The Plaintiff class is entitled in common to restitution and disgorgement of those funds being improperly withheld by defendants. This action is brought for the benefit of the entire class and will result in the creation of a common fund.

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

**FIRST CAUSE OF ACTION**  
**Violation of Labor Code Section 1194**

COMES NOW, Plaintiff, individually and on behalf of both the class and bring this separate and distinct cause of action against defendants and allege as follows:

**22.**

Plaintiff herein repeats and re-alleges as though fully set forth at length each and every paragraph of this Complaint. Plaintiff and all members of the class identified herein were regularly scheduled as a matter of uniform company policy to work and in fact worked as Route Sales Representatives in excess of eight hours per workday and/or in excess of forty hours per workweek without receiving straight time or overtime compensation for such overtime hours worked in violation of California Labor Code Section 1194 and the applicable California Industrial Welfare Commission wage order(s). Plaintiff and the other members of the class were improperly and illegally mis-classified by defendants as "exempt" employees when, in fact, they were "non-exempt" employees according to California law. Plaintiff and the other members of the class have the right to be compensated by defendants at the appropriate compensatory wage

1  
2 rate for said work heretofore performed, consisting of the straight time rate plus the appropriate  
3 overtime premium as mandated by California law.

4 **SECOND CAUSE OF ACTION**

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

7 **23.**

8  
9 Plaintiff herein repeats and re-alleges as though fully set forth at length each and every  
10 paragraph of this Complaint, excepting those paragraphs which are inconsistent with this cause  
11 of action for relief regarding defendant's violations of Business and Professions Code 17200 et  
12 seq. (Unfair Practices Act).

13 **24.**

14 Defendants, and each of them, have engaged in unfair business practices in California by  
15 practicing, employing and utilizing the employment practices to perform work without overtime  
16 compensation and meal and rest periods. Defendant's utilization of such unfair business  
17 practices constitutes unfair competition and provides an unfair advantage over defendant's  
18 competitors. Plaintiffs – and members of the class -- seek full restitution and disgorgement of  
19 monies, as necessary and according to proof, to restore any and all monies withheld, acquired  
20 and/or converted by the defendants by means of the unfair practices complained of herein.  
21 Plaintiff seeks, on his own behalf and on behalf of the class, the appointment of a receiver, as  
22 necessary. The acts complained of herein occurred, at least in part, within the last four (4) years  
23 preceding the filing of the original complaint in this action.  
24  
25

26 **25.**

27 Plaintiff is informed and believes and on that basis alleges that at all times herein  
28 mentioned defendants have engaged in unlawful, deceptive and unfair business practices, as

1  
2 proscribed by California Business and Professions Code section 17200 thereby depriving  
3 Plaintiff and other members of the class minimum working condition standards and conditions  
4 due to them under the California labor laws and Industrial Welfare Commission wage orders as  
5 specifically described herein.

6 **26.**

7  
8 Plaintiff, and all persons similarly situated, are further entitled to and do seek a both a  
9 declaration that the above-described business practices are unfair, unlawful and/or fraudulent and  
10 injunctive relief restraining defendants from engaging in any of such business practices in the  
11 future. Such misconduct by defendants, unless and until enjoined and restrained by order of this  
12 Court, will cause great and irreparable injury to all members of the class in that the defendants  
13 will continue to violate these California laws, represented by labor statutes and IWC Wage  
14 Orders, unless specifically ordered to comply with same. This expectation of future violations  
15 will require current and future employees to repeatedly and continuously seek legal redress in  
16 order to gain compensation to which they are entitled under California law. Plaintiff has no other  
17 adequate remedy at law to insure future compliance with the California labor laws and wage  
18 orders alleged to have been violated herein.  
19

20 **THIRD CAUSE OF ACTION**

21 COMES NOW, Plaintiff, individually and on behalf of a class and as a third, separate and  
22 distinct cause of action against defendants, and each of them, alleges as follows.

23 **27.**

24  
25 Plaintiff re-alleges and incorporates by reference each and every allegation set forth in the  
26 preceding paragraphs. Cal. Lab. Code §226.7(a) provides, "No employer shall require any  
27 employee to work during any meal or rest period mandated by an applicable order of the  
28 Industrial Welfare Commission."

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**28.**

Industrial Welfare Commission Order No. 7-2001(11)(c) provides in relevant part, "Unless the employees is relieved of all duty during a 30 minute meal period, the meal period shall be considered an 'on duty' meal period and counted as time worked."

**29.**

Industrial Welfare Commission Order No. 7-2001 (12)(A) authorizes employees to take rest periods based on the total hours worked daily at the rate of ten minutes rest per four hours or major fraction thereof.

**30.**

Cal. Lab. Code Section 512, which provides in relevant part:

**Meal periods**

An employer may not employ an employee for a work period of more than five hours per day without providing the employee with a meal period of not less than 30 minutes, except that if the total work period per day of the employee is no more than six hours, the meal period may be waived by mutual consent of both the employer and employee. An employer may not employ an employee for a work period of more than 10 hours per day without providing the employee with a second meal period of not less than 30 minutes, except that if the total hours worked is no more than 12 hours, the second meal period may be waived by mutual consent of the employer and the employee only if the first meal period was not waived.

**31.**

As alleged herein, defendants routinely interrupted and/or failed to permit, authorize and/or provide Plaintiff's and Class members' meal and rest breaks. Defendant did not maintain a policy for meal and rest breaks for Plaintiff and Class Members because Defendant classified Route Sales Representatives as exempt. By these actions, defendants violated Cal. Lab. Code §226.7(a) and is liable to Plaintiff and the Class.

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**32.**

As a result of the unlawful acts of defendants, Plaintiff and Class members have been deprived of meal and rest breaks, and are entitled to recovery under Cal. Lab. Code §226.7(b) in the amount of one additional hour of pay at the employee's regular rate of compensation for each work day that a meal or rest period was not provided.

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

**FOURTH CAUSE OF ACTION  
(Failure to Indemnify Employees for  
Expenditures: California Labor Code Sections 2802)**

**33.**

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

**34.**

California Labor Code Section 2802 provides in relevant part, "An employer shall indemnify his or her employee for all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties, or of his or her obedience to the directions of the employer, even though unlawful, unless the employee, at the time of obeying the directions, believed them to be unlawful."

**35.**

As alleged herein, Defendants failed to indemnify Plaintiff and the class members for all business expenses and/or losses as required under Labor Code Section 2802 incurred while working under the direction of Defendants. For example, Defendant required Plaintiff and class members to purchase and utilize personal cell phones for work throughout the day without compensation or reimbursement.



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**36.**

As a result of the unlawful acts of Defendants, Plaintiff and the Class members have been deprived of compensation in amounts to be determined at trial, and are entitled to recovery of such amounts, including interest thereon, attorneys' fees, costs, and any other damages as set forth under California Law.

**FIFTH CAUSE OF ACTION  
(Failure to Make Payment Within the Required Time: California  
Labor Code Sections 201, 202, 203, 226)**

**37.**

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

**38.**

California Labor Code Section 201 provides in relevant part, "[i]f an employer discharges an employee, the wages earned and unpaid at the time of discharge are due and payable immediately."

**39.**

California Labor Code Section 202 provides in relevant part, "[i]f an employee not having a written contract for a definite period quits his or her employment, his or her wages shall become due and payable not later than 72 hours thereafter, unless the employee has given 72 hours previous notice of his or her intention to quit, in which case the employee is entitled to his or her wages at the time of quitting."

**40.**

As alleged herein, Defendants willfully failed to pay earned wages to Plaintiff and the Class who are former employees of Defendants at the time they became due and payable. Thus,

1  
2 Defendants violated Cal. Labor Code Sections 201 and 202. Accordingly, Plaintiff seeks  
3 recovery of waiting time penalties as provided under Labor Code Section 203.

4  
5 **SIXTH CAUSE OF ACTION**  
6 **Private Attorney General Act, Labor Code Section 2698 et seq.**

7  
8 **41.**

9 Plaintiff herein realleges and incorporates each and every allegation set forth in the  
10 preceding paragraphs.

11  
12 **42.**

13 As a further and direct proximate result of the failure to pay overtime  
14 compensation, Plaintiff was deprived of his overtime compensation is entitled to penalties  
15 under California Labor Code §§204, 210, 226, 510 and 558 et seq. pursuant to California  
16 Labor Code Section 2698-99 (Private Attorney General's Act aka PAGA).

17  
18 **43.**

19 Plaintiff's Counsel has taken the steps necessary to exhaust the administrative  
20 remedies and Plaintiff has exhausted his administrative remedies. On February 7, 2013  
21 Plaintiff sent a letter to the California Labor & Workforce Development agency and  
22 Defendants outlining the specific facts underlying Plaintiff's claims. A copy of the letter is  
23 attached hereto as Exhibit 1.

24  
25 **44.**

26 The Labor Workforce Development Agency did not respond to the letter and the  
27 33-day time period for the LWDA to respond has expired. Therefore, Plaintiff may seek to  
28 recover these penalties.

1  
2 **SEVENTH CAUSE OF ACTION**  
3 **Failure to Furnish Accurate Wage and Hour Statements**

4 **45.**

5 Plaintiff herein realleges and incorporates each and every one of the allegations set  
6 forth in the proceeding paragraphs. During the period covered by this lawsuit Defendants  
7 failed to provide the Plaintiff with timely and accurate wage and hour statements showing  
8 gross wages earned, total hours worked, all deductions made, net wages earned, and all  
9 applicable hours and rates in effect during each pay period and the corresponding number of  
10 hours worked at each hourly rate by plaintiff.

11 **46.**

12 Based on Defendants' conduct as alleged herein, Defendants are liable for civil  
13 penalties pursuant to California Labor Code sections 226.3, 558 and other applicable  
14 provisions of the Wage Order and Labor Code.

15 **47.**

16 Plaintiff has exhausted his administrative remedies under California Labor Code  
17 Section 2698-99 and seeks penalties pursuant to the PAGA for this statutory violation as well.

18 **PRAYER FOR JUDGMENT**

19 WHEREFORE, Plaintiff on his own behalf and on behalf of the members of the class  
20 prays for judgment as follows:  
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- 22
- 23 1. Determining that this action may proceed and be maintained as a class action;
  - 24 2. For the First Cause of Action:
    - 25 a. A declaratory judgment that Defendants have violated Labor Code Sections 1194,  
26 1194.2 and 1197;  
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- b. An award to Plaintiff and the Classes of damages for the balance of unpaid compensation, including interest thereon, and penalties subject to proof;
  - c. An award to Plaintiff and the Classes of reasonable attorneys' fees and costs pursuant to Labor Code Section 1194;
  - d. Pursuant to Labor Code Section 218.6, an award of all accrued interest from the date that the wages were due and payable at the interest rate specified in subdivision (b) or Section 3289 of the Civil Code; and
3. For the Second Cause of Action:
- a. Ordering Defendants, their agents, servants and employees, and all persons acting, directly or indirectly, in concert with them, to restore and disgorge all funds to each member of the Class acquired by means of any act or practice declared by this Court to be unlawful, unfair or fraudulent and therefore constitute unfair competition under Section 17200 *et. seq.* of the Business and Professions Code;
  - b. For injunctive relief pursuant to Business and Professions Code Section 17203, consisting of *inter alia*: (1) a declaration that Defendants have engaged in unlawful and unfair and fraudulent business acts and practices in violation of California Business and Professions Code Section 17200 *et. seq.*; (2) a preliminary and/or permanent injunction enjoining Defendants and their respective successors, agents, servants, officers, directors, employees and all persons acting in concert with them from pursuing the policies, acts and practices complained of herein and prohibiting Defendants from continuing such acts of unfair and illegal business acts and practices; and
  - c. Restitution, including, but not limited to, the relief permitted by the California IWC Order Nos. 7-1997 through 7-2001 *et. seq.*

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4. For the Third Cause of Action:

- a. A declaratory judgment that Defendants have violated Labor Code Sections 226.7, 512, and the IWC Order Nos. 9-1997 *et seq.* through 9-2001 *et seq.*;
- b. Pursuant to Labor Code Section 226.7, an award to Plaintiff and the Class of an additional hour of pay at the rate of the employee's regular rate of compensate for each work day that a meal and/or rest break was not provided;
- c. Pursuant to Labor Code Section 218.6, an award of all accrued interest from the date that the wages were due and payable at the interest rate specified in subdivision (b) or Section 3289 of the Civil Code; and
- d. An award to Plaintiffs and the Class members of reasonable attorneys' fees and costs pursuant to Labor Code Section 218.5; and

5. For the Fourth Cause of Action:

- a. A declaratory judgment that Defendants have violated Labor Code Section 2802;
- b. An award to Plaintiff and the Class of compensatory damages to be paid by Defendant for failure to indemnify Plaintiff and the Class for all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties, or of his or her obedience to the directions of the employer, even though unlawful, unless the employee, at the time of obeying the directions, believed them to be unlawful.
- c. An award to Plaintiff and the Class of reasonable attorneys' fees and costs pursuant to Labor Code Section 2802;
- d. An award of all accrued interest from the date that the compensation was due and payable at the interest rate specified in subdivision (b) or Section 3289 of the Civil Code; and

6. For the Fifth Cause of Action:

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- a. A declaratory judgment that Defendants have violated Labor Code Sections 201 and 202;
  - b. An award to Plaintiff and the Classes who are former employees of continuing wages as a penalty from the due date thereof at the same rate until paid or until this action was commenced; but for no more that 30 days;
  - c. Pursuant to Labor Code Section 226, an award to Plaintiffs and the Class of actual damages as well as an award of costs and reasonable attorneys' fee; and
7. For the Sixth Cause of Action:
- a. Penalties pursuant to the Private Attorney General Act as well as reasonable attorneys' fees and costs;
8. For the Seventh Cause of Action:
- a. A declaratory judgment that Defendants have violated Labor Code Section 226.
  - b. An award of statutory damages and civil penalties pursuant to Labor Code Section 226.3 as well as attorneys' fees and costs of suit to the extent permitted by law;
9. All other relief as this Court may deem proper.

DATED: April 17, 2013

RIGHETTI GLUGOSKI, P.C.



**Michael Righetti**  
Counsel for Plaintiff

# **EXHIBIT 1**

**RIGHETTI • GLUGOSKI, P.C.**  
ATTORNEYS AT LAW

February 7, 2013

**VIA CERTIFIED MAIL – RETURN RECEIPT REQUESTED**

**California Labor & Workforce  
Development Agency**  
801 K Street, Suite 2101  
Sacramento, CA 95814

**Schwan's Home Service, Inc.**  
**c/o CT Corporation**  
818 W. Seventh Street  
Los Angeles, CA 90017

**The Schwan Food Company**  
**c/o CT Corporation**  
818 W. Seventh Street  
Los Angeles, CA 90017

**Re: Cal. Lab. Code section 2699.3 Notice**

Dear Sir or Madam:

This law firm and the Law Offices Thomas W. Falvey represents Kelly Anderson. Mr. Anderson is a former employee of Schwan's Home Service, Inc., and The Schwan Food Company (collectively referred to herein as "Schwan's"). Pursuant to Cal. Lab. Code section 2699.3, this notifies you that Mr. Anderson intends to seek penalties against Schwan's and related DOE employers, presently unknown and subject to discovery and amendment, for violation of the California Labor Code Sections outlined herein based on the following facts.

Mr. Anderson is a former employee at Schwan's. His employment terminated in July of 2012, thus he has worked for Schwan's within one year of the date of this letter, and he was classified as an exempt employee. Schwan's is a multi-billion dollar food manufacturing and delivery company. Mr. Anderson was a non-union employee and made approximately \$36,000 per year in the form of a base salary plus commissions and other non-commission based incentives (e.g. \$50 bonus per day if he met all time window requirements). As a route salesman for Schwan's, Mr. Anderson drove a company



vehicle delivering Schwan's food products to customers in Riverside and Los Angeles County.

Mr. Anderson's typical day at Schwan's involved arriving at the company "depot" around 7:30 or 8:00 in the morning. He would leave to start deliveries in a company vehicle at approximately 8:30 a.m. Between the time he would arrive at the depot and the time he would leave to start deliveries, he would be doing paperwork and other work-related duties. Mr. Anderson would return to the depot between approximately 8:00 and 9:00 p.m.

Mr. Anderson did not spend more than 50% actively engaged in sales activities. Mr. Anderson's primary responsibility (and the task that he spent the majority of his time performing) was executing deliveries that were assigned to him via a manifest that he received on an electronic hand-held device each morning. The manifest was pre-populated by other employees at the depot, and it was assigned to Mr. Anderson and other route delivery personnel.

Mr. Anderson was paid every two weeks. His base pay was approximately \$50 per day if he showed up to work and performed his duties. If he met the time-bonus criteria set by Schwan's (i.e. arrived at approximately 80% of his scheduled stops within the time frames dictated by Schwan's), he would receive a daily time-incentive bonus of approximately \$50.00/day that he met the target. On top of these non-commission payments, Mr. Anderson would receive approximately 1% of sales he made up to the first \$900 in sales as a commission. If he sold between \$900 and \$1000 in Schwan's products, he would receive approximately 1.5% commission for the additional sales. Mr. Kelly's commissions would incrementally increase if he sold over \$1000. Under this pay scheme, practice and/or policy Mr. Anderson and other delivery employees were not paid the minimum wage and/or overtime wage required under California law. These facts constitute violations of California Labor Code Sections 500, et.seq., and 1194. Moreover, he did not meet the commission pay requirements for the outside sales or commissioned sales exemption.

Additionally, Mr. Anderson was expected to use his own cellular telephone during the day to perform his duties without any reimbursement from Schwan's. He was not provided with a company phone, nor given the option to use a company phone. Mr. Anderson was frequently called by his supervisor, customers and the service center in Minnesota, and he had to use his own phone to take these calls. He was never reimbursed for the cost of his cell phone or cell phone service plan. Schwan's failure to indemnify Mr. Anderson and other employees for this and other necessary expenditures or losses incurred by the employees in direct consequence of the discharge of work duties and based upon obedience of the directions provided by the employer constitutes a violation of Labor Code Section 2802.

Mr. Anderson and other route salespeople were on a strict time schedule, so Schwan's provided no time slot for a meal period or rest breaks. If there was any time between customer deliveries, you were expected to solicit new customers. Thus,

Schwan's did not provide, authorize and/or permit Mr. Anderson and other employees to take meal and rest breaks as required by law. This conduct by Schwan's is in violation of the requirements of Labor Code Section 226.7 and the applicable Wage Order.

Further, Schwan's does not comply with the requirements of Labor Code Section 226 which requires that "every employer shall, semimonthly or at the time of each payment of wages, furnish each of his or her employees, either as a detachable part of the check, draft, or voucher paying the employee's wages, or separately when wages are paid by personal check or cash, an accurate itemized statement in writing showing:

- (1) gross wages earned,
- (2) total hours worked by the employee, except for any employee whose compensation is solely based on a salary and who is exempt from payment of overtime under subdivision (a) of Section 515 or any applicable order of the Industrial Welfare Commission,
- (3) the number of piece-rate units earned and any applicable piece rate if the employee is paid on a piece-rate basis,
- (4) all deductions, provided that all deductions made on written orders of the employee may be aggregated and shown as one item,
- (5) net wages earned,
- (6) the inclusive dates of the period for which the employee is paid,
- (7) the name of the employee (and the last four digits of his or her social security number or an employee identification number other than a social security number *may* be shown on the itemized statement),
- (8) the name and address of the legal entity that is the employer, and
- (9) all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate by the employee.

Schwan's fails to provide accurate and complete information, as specified in items 1 through 9 of section 226(a), and the employee cannot "promptly and easily determine" from the wage statement alone the:

- amount of gross or net wages paid to the employee during the pay period or other specified information;
- deductions the employer made from the gross wages to determine the net wages paid to the employee during the pay period; and

- name and address of the employer, or the legal entity which secured the services of the employer;

(A.B. 1744, A.B. 2674, S.B. 1255; amended Labor Code section 226(e).)

We believe that Mr. Anderson and other current and former employees of Schwan's are entitled to penalties as allowed under Cal. Lab. Code section 2699 for violations of the aforementioned Labor Code sections.

The aforementioned facts, policies, procedures and course of conduct has also resulted in the employer's failure to timely pay final wages to former employees (LC § 200-204) and failure to comply with the obligations imposed by LC § 1194 -1197.1, 1198 and 500-558.

Labor Code Section 2699.3 requires that a claimant send a certified letter to the employer in question and the Labor Workforce Development Agency setting forth the claims, and the basis for the claims, thereby giving the Labor Workforce Development Agency an opportunity to investigate the claims and/or take any action it deems appropriate.

The purpose of this letter is to satisfy the requirement created by LC 2699 prior to seeking penalties allowed by law for the aforementioned statutory violations. We look forward to determining whether the Labor Workforce Development Agency intends to take any action in reference to these claims. We kindly ask that you respond to this notice according to the time frame contemplated by the code.

Our client will seek these penalties on his own behalf and on behalf of other similarly situated California based non-exempt individuals employed by Schwan's within one year of the date of this letter, as allowed by law.

Please feel free to contact me if you have any questions or concerns.

Sincerely,

**RIGHETTI • GLUGOSKI, P.C.**



**Michael Righetti**