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DAVID PONCE

8 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**  
9 **FOR THE COUNTY OF RIVERSIDE**

10  
11 DAVID PONCE, an individual,

12 Plaintiff,

13 vs.

14 UNITED NATURAL FOODS, INC., a Delaware  
15 Corporation, GARY SCEBBI, an individual,  
16 DOES 1 through 25, inclusive,

17 Defendants.

Case No. **RIC 1901589**

**COMPLAINT FOR DAMAGES**

1. **DISCRIMINATION ON THE BASIS OF RACE AND/OR NATIONAL ORIGIN IN VIOLATION OF FEHA;**
2. **HARASSMENT ON THE BASIS OF RACE AND/OR NATIONAL ORIGIN IN VIOLATION OF FEHA;**
3. **RETALIATION FOR OPPOSING PRACTICES FORBIDDEN BY FEHA;**
4. **AIDING, ABETTING, INCITING, COMPELLING, OR COERCING ACTS FORBIDDEN BY FEHA;**
5. **WHISTLEBLOWER RETALIATION IN VIOLATION OF LABOR CODE §§ 1102.5 and 6310;**
6. **FAILURE TO PREVENT, INVESTIGATE, AND REMEDY DISCRIMINATION, HARASSMENT, OR RETALIATION;**
7. **WRONGFUL TERMINATION IN VIOLATION OF PUBLIC POLICY;**
8. **INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS;**
9. **NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS.**

**DEMAND FOR JURY TRIAL.**

1 Plaintiff DAVID PONCE (hereinafter “PLAINTIFF”) brings this action as an individual  
2 against UNITED NATURAL FOODS, INC. (hereinafter “UNFI”), GARY SCEBBI (hereinafter  
3 “SCEBBI”), and Does 1 through 25, inclusive, (UNFI, SCEBBI, and Does 1 through 25  
4 collectively are hereinafter referred to as “DEFENDANTS”). PLAINTIFF complains and alleges  
5 as follows on the basis of personal knowledge and/or information and belief:

6 **JURISDICTION AND VENUE**

7 1. The Superior Court of the State of California has jurisdiction over this action  
8 pursuant to California Constitution Article VI, section 10, which grants the Superior Court  
9 “original jurisdiction in all cases except those given by statute to other trial courts.”

10 2. The Superior Court of the State of California has jurisdiction in this matter because  
11 PLAINTIFF is a resident of the State of California. Moreover, upon information and belief, at  
12 least one of DEFENDANT is a citizen of California, the alleged discriminatory acts and wrongful  
13 termination occurred in California, and significant relief is being sought against DEFENDANTS  
14 whose violations of California employment laws form a significant basis for PLAINTIFF’S claims.  
15 Further, no federal question is at issue because the claims are based solely on California law and at  
16 least one DEFENDANT is a resident of, and/or regularly conducts business in the State of  
17 California, as well as its principal place of business is located within California.

18 3. Venue is proper in this judicial district and the County of Riverside, California  
19 because PLAINTIFF performed work for UNFI in the County of Riverside, UNFI maintains offices  
20 and facilities and transacts business in the County of Riverside, and DEFENDANTS’ illegal acts,  
21 which are the subject of this action, occurred in the County of Riverside. Thus, a substantial portion  
22 of the transactions and occurrences related to this action occurred in this county. Cal. Civ. Proc.  
23 Code § 395.

24 4. Prior to filing this action, PLAINTIFF timely exhausted his administrative remedies,  
25 by timely filing an administrative complaint with the Department of Fair Employment and Housing  
26 (“DFEH”) and receiving a DFEH right to sue letter on July 3, 2018.

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**PARTIES**

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2           5.       PLAINTIFF is an individual who is, and at all times herein mentioned was, a  
3 resident of California.

4           6.       UNFI is, and at all times mentioned in this Complaint was, a Delaware corporation  
5 authorized to conduct and conducting business in Riverside County, California. UNFI'S place of  
6 business, where the following causes of action took place, was and is in the County of Riverside, at  
7 22150 Goldencrest Drive, Moreno Valley, California. At all relevant times herein, UNFI  
8 employed PLAINTIFF, within the meaning of California Government Code section 12926(d).  
9 Accordingly, this lawsuit is properly venued in the Riverside County Superior Court pursuant to  
10 Government Code section 12965(b) and California Code of Civil Procedure section 395.

11           7.       PLAINTIFF worked at UNFI'S 22150 Goldencrest Drive, Moreno Valley,  
12 California location from December 2013 until, as alleged herein, PLAINTIFF'S employment was  
13 terminated in or about July 2017 for unlawful reasons in violation of the California Fair  
14 Employment and Housing Act (the "FEHA," California Government Code section 12900, *et seq.*)  
15 and California public policy.

16           8.       PLAINTIFF is informed and believes that at all times relevant herein SCEBBI was  
17 employed by UNFI as a Transportation Manager. At all times known to PLAINTIFF, SCEBBI  
18 was a resident of California.

19           9.       The true names and capacities of DOES 1 through 25, inclusive ("DOES"), are  
20 unknown to PLAINTIFF at this time, and PLAINTIFF therefore sues such DOE Defendants under  
21 fictitious names. PLAINTIFF is informed and believes, and thereon alleges, that each Defendant  
22 designated as a DOE is in some manner highly responsible for the occurrences alleged herein, and  
23 that PLAINTIFF'S injuries and damages, as alleged herein, were proximately caused by the  
24 conduct of such DOE Defendants. PLAINTIFF will seek leave of the court to amend this  
25 complaint to allege the true names and capacities of such DOE Defendants when ascertained.

26           10.      PLAINTIFF is informed and believes, and thereon alleges, that each and every one  
27 of the acts and omissions alleged herein were performed by, and/or attributable to, all  
28 DEFENDANTS, each acting as agents and/or employees, and/or under the direction and control of,

1 each of the other DEFENDANTS, and that said acts and failures to act were within the course and  
2 scope of said agency, employment and/or direction and control.

3 11. PLAINTIFF is informed and believes, and based thereon alleges, that each  
4 DEFENDANT acted in all respects pertinent to this action as the agent of the other  
5 DEFENDANTS, carried out a joint scheme, business plan or policy in all respects pertinent hereto,  
6 and the acts of each DEFENDANT are legally attributable to the other DEFENDANTS.

7 12. As a direct and proximate result of the unlawful actions of DEFENDANTS,  
8 PLAINTIFF has suffered, and continues to suffer, from loss of earnings in amounts as yet  
9 unascertained, but subject to proof at trial, and within the jurisdiction of this Court.

10 13. All DEFENDANTS compelled, coerced, aided, and/or abetted the discrimination,  
11 retaliation, and harassment alleged in this Complaint, which conduct is prohibited under California  
12 Government Code section 12940(i). All DEFENDANTS were responsible for the events and  
13 damages alleged herein, including on the following bases: (a) DEFENDANTS committed the acts  
14 alleged; (b) at all relevant times, one or more of the DEFENDANTS was the agent or employee,  
15 and/or acted under the control or supervision of, one or more of the remaining DEFENDANTS  
16 and, in committing the acts alleged, acted within the course and scope of such agency and  
17 employment and/or is or are otherwise liable for PLAINTIFF'S damages; (c) at all relevant times,  
18 there existed a unity of ownership and interest between or among those DEFENDANTS such that  
19 any individuality and separateness between or among these DEFENDANTS has ceased, and  
20 DEFENDANTS are the alter egos of one another. DEFENDANTS exercised domination and  
21 control over one another to such an extent that any individuality or separateness of DEFENDANTS  
22 does not, and at all times herein mentioned did not, exist. Adherence to the fiction of the separate  
23 existence of DEFENDANTS would permit abuse of the corporate privilege and would sanction  
24 fraud and promote injustice. All actions of all DEFENDANTS were taken by employees,  
25 supervisors, executives, officers, and directors during employment with all DEFENDANTS, were  
26 taken on behalf of all DEFENDANTS, and were engaged in, authorized, ratified, and approved of  
27 by all other DEFENDANTS. Finally, at all relevant times mentioned herein, all DEFENDANTS  
28 acted as agents of all other DEFENDANTS in committing the acts alleged herein.

1 **FACTS COMMON TO ALL CAUSES OF ACTION**

2 ***PLAINTIFF’S employment:***

3 14. UNFI is a leading national distributor of natural and organic foods, specialty foods,  
4 and related products spanning both the US and Canada that boasts a “focus on Corporate Social  
5 Responsibility” and a “culture of doing what’s right.” UNFI professes that it is “a place where  
6 people can be their authentic selves and share their own diverse backgrounds, experiences,  
7 perspectives and ideas,” and maintains a corporate culture “without regard to race, color, religion,  
8 sex, sexual orientation, gender identity, national origin, age, [or] disability status...”

9 15. In December 2013, DEFENDANTS hired PLAINTIFF as a truck driver for UNFI’S  
10 Moreno Valley facility to transport products to surrounding store locations. Until PLAINTIFF’S  
11 unlawful termination in July 2017, PLAINTIFF received positive evaluations and feedback from  
12 his job performance. Because PLAINTIFF was bilingual, and because of his experience and  
13 knowledge, PLAINTIFF was frequently consulted by other drivers, including Spanish speaking  
14 drivers, seeking advice regarding proper compensation and compliance with driving regulations,  
15 including, but not limited to, Department of Transportation (“DOT”) drive time requirements.  
16 PLAINTIFF also advocated for UNFI employees to be properly reimbursed for uniform expenses  
17 pursuant to the California Labor Code.

18 ***PLAINTIFF’S Job Performance:***

19 16. PLAINTIFF was an exemplary and dedicated driver of UNFI who consistently  
20 earned “exceeds expectations” ratings in his performance reviews. As an experienced driver,  
21 PLAINTIFF safely operated vehicles and therefore was an asset to UNFI. In fact, PLAINTIFF’S  
22 December 2014 performance review noted that “David is able to turn vision into action. He shows  
23 genuine concern for our company values and vision and he is a safe and professional driver.”  
24 PLAINTIFF’S subsequent performance reviews also reflected that PLAINTIFF was “very decisive  
25 and develops fresh solutions... [h]e utilizes his years of experience and training to resolve issues  
26 and complete his work assignments in a safe and timely manner.”

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1 ***PLAINTIFF'S Protected Status:***

2 17. PLAINTIFF, a Hispanic male, was wrongfully terminated for discriminatory and  
3 retaliatory reasons. Consequently, PLAINTIFF is a protected employee, as defined under  
4 California law. *See* Cal. Gov't § 12940 *et seq.*

5 ***DEFENDANTS' Adverse Employment Actions and Behavior:***

6 18. During PLAINTIFF'S employment with UNFI, PLAINTIFF was subjected to  
7 ongoing harassment and discrimination. This included, but was not limited to, harassment and  
8 discrimination by PLAINTIFF'S direct supervisor and Transportation Manager, SCEBBI, who was  
9 known to "have a problem with Hispanics" and directed racial slurs at PLAINTIFF during  
10 PLAINTIFF'S tenure with UNFI. For instance, in or around April 2017, UNFI provided a taco  
11 truck for employees during driver appreciate week. SCEBBI turned the employee appreciation  
12 lunch into an opportunity to harass PLAINTIFF, snarling "I brought you your taco truck, go eat  
13 your tacos, Ese" in response to PLAINTIFF'S complaints regarding unlawful working conditions  
14 for drivers pressured to work longer than Department of Labor ("DOL") regulations permitted.  
15 SCEBBI'S use of the word "Ese" to PLAINTIFF, just three months before PLAINTIFF'S  
16 unwarranted termination, was a racial slur to refer to PLAINTIFF as a gang member of Mexican  
17 origin.

18 19. Moreover, SCEBBI criticized and disparaged PLAINTIFF for speaking Spanish.  
19 PLAINTIFF, who is bilingual, frequently spoke Spanish with his Spanish speaking colleagues who  
20 sought out PLAINTIFF'S advice regarding their working conditions, such as proper compensation  
21 and compliance with driving regulations. On at least one occasion, SCEBBI told PLAINTIFF not  
22 to speak with his coworkers in Spanish, in violation of California law. *See* Cal. Gov't Code  
23 §12951(a).

24 20. In July 2017, PLAINTIFF was the victim of a highway violence incident while  
25 engaged in his employment for UNFI (hereinafter referred to as the "INCIDENT"). During the  
26 INCIDENT, PLAINTIFF was assaulted and battered by the other driver involved and used his  
27 hands-free cellphone to record evidence and seek assistance. Immediately after the INCIDENT,  
28 PLAINTIFF called 911 emergency and was connected with a California Highway Patrol ("CHP")

1 officer to report the INCIDENT. Within minutes of calling 911, PLAINTIFF next called UNFI to  
2 notify dispatch of the INCIDENT. A short time later, PLAINTIFF returned to his route and  
3 completed his assigned deliveries.

4 21. Two days later, PLAINTIFF met with the night supervisor, Rick Frieri, to explain the  
5 details of the INCIDENT. The following day, SCEBBI requested a meeting with PLAINTIFF to  
6 discuss the INCIDENT. PLAINTIFF inquired whether he needed Union Representation during this  
7 meeting, but SCEBBI told him there would be no disciplinary action and that the meeting was only  
8 to gather information about the INCIDENT. SCEBBI reiterated this point several times during the  
9 meeting. Despite SCEBBI'S assurances, during the meeting, SCEBBI informed PLAINTIFF that  
10 he was being suspended pending further investigation into the INCIDENT.

11 22. On or about July 17, 2017, PLAINTIFF again met with SCEBBI and Craig Pritchett,  
12 of UNFI'S Human Resources Department, to discuss the INCIDENT. PLAINTIFF asked SCEBBI  
13 and Mr. Pritchett whether he was going to be fired, to which the response was "no."

14 23. Later that week, SCEBBI and Rodrigo Villalobos, UNFI'S Human Resources  
15 Manager, requested another meeting with PLAINTIFF to discuss the INCIDENT. Again,  
16 PLAINTIFF asked whether he needed Union Representation, to which Mr. Villalobos responded that  
17 PLAINTIFF did not. When PLAINTIFF met with SCEBBI and Mr. Villalobos, as requested, he was  
18 informed that he was being terminated for misconduct for allegedly violating company policy.

19 24. UNFI'S stated reason for PLAINTIFF'S termination was that PLAINTIFF violated  
20 UNFI policy, as well as state and/or federal law, for, among other things, PLAINTIFF'S use of a cell  
21 phone while operating a commercial vehicle. However, UNFI was unable to provide any policy  
22 prohibiting use of a cell phone to record video in an emergency situation. Additionally, the CHP  
23 officer who responded to the INCIDENT specifically determined that PLAINTIFF'S use of his cell  
24 phone to record evidence of the assault and battery he suffered during the INCIDENT was not a  
25 violation of *any* law. Moreover, the CHP Investigation Report specifically stated that "[t]he fact that  
26 the crimes committed in this case occurred while the involved parties were operating motor vehicles  
27 does not make them any less of an emergency. Therefore, [PLAINTIFF'S] use of his cellular  
28 telephone to capture video and photographic evidence of a crime under these circumstances

1 *constituted permissible use during an emergency* as provided in Section 23123(c) [Vehicle Code].”  
2 (emphasis added).

3 25. UNFI’s stated reason for terminating PLAINTIFF’S employment was pretextual. In  
4 reality, DEFENDANTS terminated PLAINTIFF because he is Hispanic, and in retaliation for his  
5 complaints about the unlawful harassment and discrimination to which he was subjected by SCEBBI,  
6 as described above, as well as his complaints about UNFI’S unlawful working conditions and  
7 violations of the California Labor Code. Indeed, PLAINTIFF’S termination for an alleged violation  
8 of company policy deviated from UNFI’s practices for White employees who used their cell phones  
9 during *non-emergencies*. PLAINTIFF is informed and believes UNFI’s Moreno Valley location had  
10 two other incidents where non-Hispanic employees who violated the company’s cell phone policy  
11 were not terminated. First, a White UNFI employee used her cell phone to make/take a call while  
12 backing up a trailer in the UNFI yard, which could have resulted in a collision with another vehicle  
13 and/or person on foot. That White employee merely received a warning. Second, another White  
14 UNFI employee used his cell phone to take a picture of a car that hit his vehicle on the freeway. That  
15 employee also was not terminated, but instead received a warning and a 3-day suspension. This  
16 leniency toward White employees stands in stark contrast to DEFENDANTS’ treatment of  
17 PLAINTIFF, who was terminated despite his entirely appropriate use of a cell phone during an  
18 emergency situation.

19 26. As a consequence of DEFENDANTS’ conduct, PLAINTIFF has had to employ  
20 attorneys to prosecute the action and has therefore incurred costs and attorneys’ fees necessary to  
21 pursue this action.

22 **FIRST CAUSE OF ACTION**

23 **Discrimination on the Basis of Race and/or National Origin**

24 **(Violation of FEHA, Cal. Govt. Code Sections 12900 *et seq.*)**

25 **(Against UNFI and DOES)**

26 27. PLAINTIFF incorporates by reference and realleges as if fully stated herein each and  
27 every allegation set forth above.

28 28. The FEHA makes it an unlawful employment practice for an employer to

1 discriminate against an employee “in terms, conditions, or privileges of employment” on the basis  
2 of an employee’s race and/or national origin. Cal. Gov’t Code § 12940(a).

3 29. At all times herein mentioned, the FEHA was in full force and effect and was  
4 binding on UNFI. This statute requires UNFI to refrain from discriminating against any employee  
5 on the basis of race and/or national origin, among other things.

6 30. As alleged herein, PLAINTIFF’S race and/or national origin, and/or other  
7 characteristic(s) protected by the FEHA, were motivating factors in UNFI’s decision not to retain,  
8 hire, or otherwise employ PLAINTIFF in any position, and/or to take other adverse employment  
9 actions against PLAINTIFF, including prohibiting PLAINTIFF from speaking with coworkers in  
10 Spanish. *See* Cal. Gov’t Code §§ 12940(a), 12951(a).

11 31. As set forth herein and above, UNFI discriminated against PLAINTIFF because of  
12 his race and/or national origin, in violation of California Government Code sections 12940(a) and  
13 12951(a).

14 32. The doctrines of equitable tolling and continuing violations apply to PLAINTIFF’S  
15 claim of discrimination. *See Richards v. CH2M Hill, Inc.*, 26 Cal.4th 798 (2001) (an employee is  
16 not required to file a lawsuit the moment conditions become intolerable for the employee); *McDonald*  
17 *v. Antelope Valley Community College Dist.*, 45 Cal.4th 88 (2008).

18 33. As a proximate result of OCCIDENTAL’S willful, knowing, and intentional  
19 discrimination against PLAINTIFF, PLAINTIFF has sustained and continues to sustain substantial  
20 losses of earnings and other employment benefits, and has suffered and continues to suffer  
21 humiliation, emotional distress, and physical and mental pain and anguish, all to his damage in a sum  
22 according to proof.

23 34. PLAINTIFF has incurred and continues to incur legal expenses and attorneys’ fees.  
24 Pursuant to California Government Code section 12965(b), PLAINTIFF is entitled to recover  
25 reasonable attorneys’ fees and costs (including expert costs) in an amount according to proof.

26 35. UNFI committed the acts herein despicably, maliciously, fraudulently, and  
27 oppressively, with the wrongful intention of injuring PLAINTIFF, from an improper and evil motive  
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1 amounting to malice, and in conscious disregard of PLAINTIFF’S rights. PLAINTIFF is thus  
2 entitled to punitive damages from UNFI in an amount according to proof.

3 **SECOND CAUSE OF ACTION**

4 **Harassment On The Basis of Race and/or National Origin**

5 **Violation of FEHA, Cal. Govt. Code Sections 12900 *et seq.***

6 **(Against All DEFENDANTS)**

7 36. PLAINTIFF incorporates by reference and realleges as if fully stated herein each  
8 and every allegation set forth above.

9 37. The FEHA provides that it shall be unlawful for an employer or for any person to  
10 harass an employee because of a person’s race and/or national origin. “Harassment of an  
11 employee...shall be unlawful if the entity, or its agents or supervisors, knows or should have  
12 known of this conduct and fails to take immediate and appropriate corrective action...” Cal.  
13 Gov’t Code § 12940(j).

14 38. At all times herein mentioned, the FEHA was in full force and effect and was  
15 binding on DEFENDANTS. This statute requires DEFENDANTS to refrain from harassing any  
16 employee on the basis of race and/or national origin, among other things.

17 39. As alleged above, during PLAINTIFF’S employment with DEFENDANTS,  
18 DEFENDANTS intentionally engaged in harassment, including creating a hostile work  
19 environment, on the basis of race and/or national origin.

20 40. PLAINTIFF is a qualified employee who performed his job in an exemplary  
21 manner. DEFENDANTS subjected PLAINTIFF to negative comments, and continuous harassing  
22 and threatening behavior, based on his race and/or national origin. DEFENDANTS intentionally  
23 harassed PLAINTIFF in violation of California law.

24 41. As alleged above, DEFENDANTS, including through their managers and  
25 supervisors, acted in a manner that was antagonistic to PLAINTIFF and which exhibited harassing  
26 motivations, intentions, and consciousness, including PLAINTIFF’s supervisor directing ethnic  
27 slurs at him and prohibiting PLAINTIFF from speaking with coworkers in Spanish.

28 42. A reasonable person subjected to the discriminatory and harassing conduct would

1 find, as PLAINTIFF did, that the harassment so altered PLAINTIFF'S working conditions as to  
2 make it more difficult to do his job. *See* Cal. Gov't Code § 12923(a).

3 43. DEFENDANTS' conduct, as alleged herein, violated the FEHA, and DEFENDANTS  
4 committed unlawful employment practice(s), including, without limitation, by materially affecting  
5 the terms and conditions of PLAINTIFF'S employment, in whole or in part on the basis of  
6 PLAINTIFF'S race and/or national origin, and/or other protected characteristic(s), in violation of  
7 California Government Code section 12940(a).

8 44. The doctrines of equitable tolling and continuing violations apply to PLAINTIFF'S  
9 claims of harassment. *See Richards v. CH2M Hill, Inc.*, 26 Cal.4th 798 (2001); *McDonald v.*  
10 *Antelope Valley Community College Dist.*, 45 Cal.4th 88 (2008).

11 45. As a proximate result of DEFENDANTS' willful, knowing, and intentional  
12 harassment of PLAINTIFF, PLAINTIFF has sustained and continues to sustain substantial losses  
13 of earnings and employment benefits.

14 46. As a proximate result of DEFENDANTS' willful, knowing, and intentional  
15 harassment of PLAINTIFF, PLAINTIFF has suffered and continues to suffer humiliation,  
16 emotional distress, and physical and mental pain and anguish, all to his damage in a sum according  
17 to proof.

18 47. PLAINTIFF has incurred and continues to incur legal expenses and attorneys' fees.  
19 Pursuant to California Government Code section 12965(b), PLAINTIFF is entitled to recover  
20 reasonable attorneys' fees and costs (including expert costs) in an amount according to proof.

21 48. DEFENDANTS committed the acts herein despicably, maliciously, fraudulently, and  
22 oppressively, with the wrongful intention of injuring PLAINTIFF, from an improper motive  
23 amounting to malice, and in conscious disregard of the rights of PLAINTIFF. PLAINTIFF is thus  
24 entitled to punitive damages from DEFENDANTS in an amount according to proof.

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1 **THIRD CAUSE OF ACTION**

2 **Retaliation For Opposing Practices Forbidden by FEHA**  
3 **(Violation of FEHA, Cal. Govt. Code sections 12900, et seq.)**  
4 **(Against UNFI and DOES)**

5 49. PLAINTIFF incorporates by reference and realleges as if fully stated herein each  
6 and every allegation set forth above.

7 50. At all times herein mentioned, the FEHA was in full force and effect and was  
8 binding on UNFI. This statute requires UNFI to refrain from retaliating against any employee for  
9 opposing practices forbidden by the FEHA or who asserts rights under the FEHA, including  
10 complaining of discrimination and/or harassment on the basis of race and/or national origin, among  
11 other things.

12 51. UNFI, through their agents and supervisors, took actions and made a number of  
13 comments to and about PLAINTIFF that exhibited discriminatory and retaliatory motivations,  
14 intentions, and consciousness.

15 52. As alleged herein and above, during PLAINTIFF'S employment with UNFI,  
16 DEFENDANTS intentionally engaged in discrimination and harassment about which PLAINTIFF  
17 complained to UNFI, including complaints to UNFI's Human Resources department about being  
18 retaliated against because of his protected statuses.

19 53. The decision not to retain, hire, or otherwise employ PLAINTIFF in any position,  
20 and/or to take other adverse job actions against PLAINTIFF was in retaliation for PLAINTIFF  
21 engaging in protected activity, including his complaints described above.

22 54. The doctrines of equitable tolling and continuing violations apply to PLAINTIFF'S  
23 claims of retaliation. *See Richards v. CH2M Hill, Inc.*, 26 Cal.4th 798 (2001) (an employee is not  
24 required to file a lawsuit the moment conditions become intolerable for the employee); *McDonald*  
25 *v. Antelope Valley Community College Dist.*, 45 Cal.4th 88 (2008).

26 55. As a proximate result of UNFI'S willful, knowing, and intentional retaliation  
27 against PLAINTIFF, PLAINTIFF has sustained and continues to sustain substantial losses of  
28 earnings and other employment benefits, and has suffered and continues to suffer humiliation,

1 emotional distress, and physical and mental pain and anguish, all to his damage in a sum according  
2 to proof.

3 56. PLAINTIFF has incurred and continues to incur legal expenses and attorneys' fees.  
4 Pursuant to California Government Code section 12965(b), PLAINTIFF is entitled to recover  
5 reasonable attorneys' fees and costs (including expert costs) in an amount according to proof.

6 57. UNFI committed the acts herein despicably, maliciously, fraudulently, and  
7 oppressively, with the wrongful intention of injuring PLAINTIFF, from an improper and evil  
8 motive amounting to malice, and in conscious disregard of the rights of PLAINTIFF. PLAINTIFF  
9 is thus entitled to punitive damages from UNFI in an amount according to proof.

10 **FOURTH CAUSE OF ACTION**

11 **Aiding, Abetting, Inciting, Compelling, or Coercing Acts Forbidden By FEHA**

12 **(Violation of FEHA, Cal. Govt. Code sections 12900, *et seq.*)**

13 **(Against All DEFENDANTS)**

14 58. PLAINTIFF incorporates by reference and realleges as if fully stated herein each  
15 and every allegation set forth above.

16 59. It is unlawful for "any person to aid, abet, incite, compel, or coerce the doing of any  
17 of the acts forbidden under [FEHA], or to attempt to do so." Cal. Gov't Code § 12940(i).

18 60. At all relevant times, DEFENDANTS and their agents knew or should have known  
19 that PLAINTIFF had rights pursuant to FEHA to be free from discrimination, harassment and  
20 retaliation.

21 61. Notwithstanding this knowledge, as alleged herein and above, DEFENDANTS and  
22 their agents assisted, supported, facilitated, participated, encouraged, and/or urged, forcefully, with  
23 overwhelming pressure, and/or with threats, the unlawful discrimination and retaliation against  
24 PLAINTIFF, as described above. As a result, DEFENDANTS aided, abetted, incited, compelled,  
25 and/or coerced the doing of acts forbidden under the FEHA, or attempted to do so, in violation of  
26 Government Code section 12940(i).

27 62. As a proximate result of DEFENDANTS' violation of California Government Code  
28 section 12940(i), PLAINTIFF has sustained and continues to sustain substantial losses of earnings

1 and other employment benefits, and has suffered and continues to suffer humiliation, emotional  
2 distress, and physical and mental pain and anguish, all to his damage in a sum according to proof.

3 63. PLAINTIFF has incurred and continues to incur legal expenses and attorneys' fees.  
4 Pursuant to California Government Code section 12965(b), PLAINTIFF is entitled to recover  
5 reasonable attorneys' fees and costs (including expert costs) in an amount according to proof.

6 64. DEFENDANTS committed the acts herein despicably, maliciously, fraudulently,  
7 and oppressively, with the wrongful intention of injuring PLAINTIFF, from an improper and evil  
8 motive amounting to malice, and in conscious disregard of the rights of PLAINTIFF. PLAINTIFF  
9 is thus entitled to punitive damages from DEFENDANTS in an amount according to proof.

10 **FIFTH CAUSE OF ACTION**

11 **Whistleblower Retaliation**

12 **Violation of Labor Code sections 1102.5, *et seq.*,1104, and 6310**

13 **(Against UNFI and DOES)**

14 65. PLAINTIFF incorporates by reference and realleges as if fully stated herein each  
15 and every allegation set forth above.

16 66. At all relevant times, California Labor Code section 1102.5 was in effect and was  
17 binding on DEFENDANTS. California law prohibits DEFENDANTS from retaliating against any  
18 employee, including PLAINTIFF, for raising complaints of illegality. "An employer, or any  
19 person acting on behalf of the employer, shall not retaliate against an employee for disclosing  
20 information... if the employee has reasonable cause to believe that the information discloses a  
21 violation of state or federal statute, or a violation of or noncompliance with a local, state, or federal  
22 rule or regulation...." Cal. Lab. Code § 1102.5(b).

23 67. At all relevant times, California Labor Code section 6310 was in effect and was  
24 binding on DEFENDANTS. California Labor Code section 6310(b) prohibits employers from  
25 discharging, or in any manner discriminating against an individual in the terms and conditions of  
26 his employment "because the employee has made a bona fide oral or written complaint to... his or  
27 his employer, ... of unsafe working conditions, or work practices, in his or his employment or  
28 place of employment...."



1 or should have known of this conduct and fails to take immediate and appropriate corrective  
2 action.”). Pursuant to the FEHA, UNFI was required to take all reasonable steps to prevent  
3 unlawful harassment, discrimination and retaliation against PLAINTIFF.

4 75. As alleged herein and above, during the course of PLAINTIFF’S employment,  
5 UNFI failed to prevent SCEBBI and others from engaging in intentional actions that resulted in  
6 PLAINTIFF being treated less favorably because of PLAINTIFF’S protected status (*i.e.*, race,  
7 national origin, and/or protected activity). During the course of PLAINTIFF’S employment, UNFI  
8 failed to prevent SCEBBI and others from engaging in unjustified employment practices against  
9 PLAINTIFF. Although UNFI knew, or reasonably should have known, of such unlawful  
10 discrimination, harassment, and/or retaliation in the workplace, UNFI did not take immediate or  
11 corrective action to prevent such discrimination, harassment, and/or retaliation against  
12 PLAINTIFF.

13 76. As alleged herein and above, UNFI violated California law by failing to take all  
14 reasonable steps necessary to prevent the discrimination, harassment, and retaliation from  
15 occurring. *See* Cal. Gov’t. Code § 12940(k).

16 77. As a proximate result of UNFI’s willful, knowing, and intentional failure to prevent,  
17 investigate, or remedy discrimination and retaliation against PLAINTIFF, PLAINTIFF has sustained  
18 and continues to sustain substantial losses of earnings and other employment benefits, and has  
19 suffered and continues to suffer humiliation, emotional distress, and physical and mental pain and  
20 anguish, all to his damage in a sum according to proof.

21 78. PLAINTIFF has incurred and continues to incur legal expenses and attorneys’ fees.  
22 Pursuant to California Government Code Section 12965(b), PLAINTIFF is entitled to recover  
23 reasonable attorneys’ fees and costs (including expert costs) in an amount according to proof.

24 79. UNFI committed the acts herein despicably, maliciously, fraudulently, and  
25 oppressively, with the wrongful intention of injuring PLAINTIFF, from an improper and evil motive  
26 amounting to malice, and in conscious disregard of the rights of PLAINTIFF. PLAINTIFF is thus  
27 entitled to punitive damages from UNFI in an amount according to proof.

28 ///

1 **SEVENTH CAUSE OF ACTION**

2 **Wrongful Termination in Violation of Public Policy**

3 **(Against UNFI and DOES)**

4 80. PLAINTIFF incorporates by reference and realleges as if fully stated herein each  
5 and every allegation set forth above.

6 81. Under California law, it is unlawful for an employer to terminate an employee in  
7 violation of a fundamental public policy of the United States of America and the State of  
8 California.

9 82. The laws and public policy of the State of California as declared by, *inter alia*, the  
10 California Constitution, Art.1, Section 8 and California Government Code section 12940(a),  
11 prohibit an employer from altering the terms of an employee's employment on the basis of race  
12 and/or national origin.

13 83. DEFENDANTS' decision to terminate PLAINTIFF was substantially motivated by  
14 PLAINTIFF'S protected status in blatant violation of the public policy protections set forth in the  
15 FEHA and California Labor Code. PLAINTIFF is informed and believes that DEFENDANTS'  
16 managing agents made the decision to terminate PLAINTIFF and that DEFENDANTS ratified  
17 their decision.

18 84. As a direct and proximate result of the violation of PLAINTIFF'S rights under  
19 California law, PLAINTIFF has sustained and continues to sustain substantial losses of earnings  
20 and employment benefits.

21 85. As a proximate result of the violation of PLAINTIFF'S right under California law,  
22 PLAINTIFF has suffered and continues to suffer humiliation, emotional distress, and physical and  
23 mental pain and anguish, all to his damage in a sum according to proof.

24 86. DEFENDANTS committed the acts herein despicably, maliciously, fraudulently,  
25 and oppressively, with the wrongful intention of injuring PLAINTIFF, from an improper and evil  
26 motive amounting to malice, and in conscious disregard of the rights of PLAINTIFF. PLAINTIFF  
27 is thus entitled to punitive damages from DEFENDANTS in an amount according to proof.

28

1 **EIGHTH CAUSE OF ACTION**

2 **Intentional Infliction of Emotional Distress**

3 **(Against ALL DEFENDANTS)**

4 87. PLAINTIFF incorporates by reference and realleges as if fully stated herein each  
5 and every allegation set forth above.

6 88. A person intentionally inflicts emotional distress when he/she engages in extreme  
7 and outrageous conduct with either: (1) an intent to cause emotional distress; or (2) reckless  
8 disregard of the probability of causing emotional distress, and actually does cause severe emotional  
9 suffering. *See Hughes v. Pair*, 46 Cal.4th 1035, 1050 (2009).

10 89. DEFENDANTS owed PLAINTIFF a duty of care not to cause PLAINTIFF  
11 emotional distress.

12 90. As alleged herein and above, DEFENDANTS knowingly discriminated, harassed,  
13 and retaliated against PLAINTIFF based on his race and/or national origin, and because he  
14 engaged in other protected activity.

15 91. DEFENDANTS caused PLAINTIFF severe and extreme emotional distress that  
16 exceeded the normal risks of the employment relationship, by conspiring against PLAINTIFF and  
17 terminating his employment for discriminatory, harassing, and retaliatory reasons.

18 92. DEFENDANTS were aware that treating PLAINTIFF in the manner alleged above,  
19 including depriving PLAINTIFF of his livelihood, would devastate PLAINTIFF and cause him  
20 extreme hardship.

21 93. DEFENDANTS breached their duty to PLAINTIFF by way of their own conduct, as  
22 alleged herein and above.

23 94. PLAINTIFF is informed and believes and thereon alleges that such acts of  
24 DEFENDANTS were intentional, extreme, and outrageous. PLAINTIFF is further informed and  
25 believes, and thereon alleges, that such actions were done with the intent to cause serious  
26 emotional distress or with reckless disregard of the probability of causing PLAINTIFF serious  
27 emotional distress.

28 95. As a proximate result of DEFENDANTS' extreme and outrageous conduct,

1 PLAINTIFF has suffered and continues to suffer humiliation, emotional distress, and mental and  
2 physical pain and anguish, all to his damage in a sum according to proof.

3 96. DEFENDANTS committed the acts herein despicably, maliciously, fraudulently, and  
4 oppressively, with the wrongful intention of injuring PLAINTIFF, from an improper and evil motive  
5 amounting to malice, and in conscious disregard of the rights of PLAINTIFF. PLAINTIFF is thus  
6 entitled to punitive damages from DEFENDANTS in an amount according to proof.

7 **NINTH CAUSE OF ACTION**

8 **Negligent Infliction of Emotional Distress**

9 **(Against ALL DEFENDANTS)**

10 97. PLAINTIFF incorporates by reference and realleges as if fully stated herein each  
11 and every allegation set forth above.

12 98. DEFENDANTS owed PLAINTIFF a duty of care not to cause PLAINTIFF  
13 emotional distress.

14 99. As alleged herein and above, DEFENDANTS breached their duty to PLAINTIFF by  
15 way of their own conduct, as alleged herein and above. Specifically, DEFENDANTS engaged in  
16 discriminatory, harassing, and retaliatory actions against PLAINTIFF on the basis of his race  
17 and/or national origin, and for having engaged in protected activity under the FEHA and Labor  
18 Code. DEFENDANTS' conduct was done in a careless or negligent manner, without consideration  
19 for the effect of such conduct upon PLAINTIFF'S emotional wellbeing.

20 100. DEFENDANTS knew, or should have known, that treating PLAINTIFF in the  
21 manner alleged above, including depriving PLAINTIFF of his livelihood, would devastate  
22 PLAINTIFF and cause PLAINTIFF extreme hardship.

23 101. As a proximate result of DEFENDANTS' negligent conduct, PLAINTIFF has  
24 suffered and continues to suffer humiliation, emotional distress, and mental and physical pain and  
25 anguish, all to her damage in a sum according to proof.

26 102. DEFENDANTS committed the acts herein despicably, maliciously, fraudulently, and  
27 oppressively, with the wrongful intention of injuring PLAINTIFF, from an improper and evil motive  
28

1 amounting to malice, and in conscious disregard of the rights of PLAINTIFF. PLAINTIFF is thus  
2 entitled to punitive damages from DEFENDANTS in an amount according to proof.

3 **PRAYER FOR RELIEF**

4 Wherefore PLAINTIFF DAVID PONCE respectfully prays for judgment and relief against  
5 DEFENDANTS UNITED NATURAL FOODS, INC., GARY SCEBBI, and DOES 1 through 25,  
6 inclusive, and each of them, as follows:

- 7 1. For compensatory damages, including emotional distress damages, in an amount to  
8 be ascertained at trial;
- 9 2. For liquidated damages as permitted by law;
- 10 3. For punitive damages in an amount sufficient to punish or make an example of  
11 DEFENDANTS;
- 12 4. For all available injunctive, equitable and other relief, including remedies authorized  
13 by California Government Code section 12965(c);
- 14 5. For "affirmative relief" as defined in California Government Code section 12926(a);
- 15 6. For reasonable attorneys' fees and costs, including expert costs; and
- 16 7. For such further relief that the Court may deem just and proper.

17  
18 DATED: February 22, 2019

19 GUNN COBLE LLP

20  
21 By:   
22 Beth A. Gunn  
23 Catherine J. Coble  
24 David Z. Feingold

25 Attorneys for Plaintiff  
26 DAVID PONCE

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