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Per local Rule, This case is assigned to
Judge Fannin, Jill C, for all purposes.

Attorneys for Plaintiff, MANUEL FUMERO

SUPERIOR COURT OF CALIFORNIA

SUMMONS ISSUED

COUNTY OF CONTRA COSTA

MANUEL FUMERO, individually

Case No.: C23-01227

Plaintiff,

**INDIVIDUAL AND REPRESENTATIVE
ACTION COMPLAINT FOR**

vs.

**SF MARKETS, LLC; a California limited liability
company; and DOES 1-100, inclusive,**

Defendants.

- 1. FAILURE TO PAY MINIMUM WAGE
FOR ALL HOURS WORKED**
- 2. FAILURE TO PAY OVERTIME**
- 3. FAILURE TO PROVIDE MEAL
BREAKS**
- 4. FAILURE TO PROVIDE REST
BREAKS**
- 5. FAILURE TO FURNISH ACCURATE
ITEMIZED WAGE STATEMENTS**
- 6. AGE DISCRIMINATION**
- 7. RETALIATION [Cal. Govt. Code §
12940(h)]**
- 8. FAILURE TO PREVENT
DISCRIMINATION/HARASSMENT**
- 9. RETALIATION [Cal. Labor Code §
1102.5]**
- 10. FAILURE TO TIMELY PROVIDE
PERSONNEL RECORDS**
- 11. FAILURE TO TIMELY PROVIDE
PAYROLL RECORDS**
- 12. VIOLATION OF THE PRIVATE
ATTORNEYS GENERAL ACT OF 2004
[Cal. Labor Code §§ 2698, et seq.]**

Plaintiff Manuel Fumero brings this individual action against SF Markets, LLC, and Does 1
through 100, for violations of the California Labor Code.

PARTIES

1. Manuel Fumero (“Fumero” or “Plaintiff”) is and at all times relevant herein was employed in Oakland, Alameda County and Brentwood, Contra Costa County, California, and was an “employee” as defined by the California Labor Code (“Labor Code”) and the applicable California Industrial Wage Commission (“IWC”) Order(s).

2. SF Markets, LLC (“Defendant” or “Sprouts”) is a corporation organized and existing under the laws of the state of Delaware, with its identified principal place of business located at 5455 E. High Street, Suite 111, Phoenix, Arizona 85054. At all relevant times, Sprouts conducted business in California through the operation of retail grocery stores, including the specific Brentwood store location where Plaintiff was employed and performed work. Sprouts also operated each of the stores in which Fumero applied for management positions.

3. At all times relevant herein, Sprouts has been an “employer” as defined by the California Labor Code (“Labor Code”) and the applicable California Industrial Wage Commission (“IWC”) Order(s).

4. Sprouts and Does 1-100 are collectively referred to as Defendants.

5. Plaintiff is not aware of the true names and capacities of the Defendants sued herein as Does 1 through 100, whether individual, corporate, associate, or otherwise and therefore sue such Defendants by these fictitious names. Plaintiff will amend this Complaint to allege their true names and capacities when ascertained. Plaintiff is informed and believe, and on that basis allege, that each of the fictitiously named Defendants is responsible in some manner for the occurrences herein alleged and that Plaintiff’s injuries and damages herein alleged were legally caused by such Defendants. Unless otherwise indicated, each Defendant was acting within the course and scope of said agency and/or employment, with the knowledge and/or consent of said co-Defendant.

6. Plaintiff is informed and believe and thereupon allege that at all times mentioned herein, each of the Defendants, including each Doe Defendant, was acting as the agent, servant, employee, partner and/or joint venture of and was acting in concert with each of the remaining Defendants, including each Doe Defendant, in doing the things herein alleged, while at all times acting within the course and scope of such agency, service, employment partnership, joint venture and/or

1 concert of action. Each Defendant, in doing the acts alleged herein, was acting both individually and
2 within the course and scope of such agency and/or employment, with the knowledge and/or consent of
3 the remaining Defendants.

4 **JURISDICTION AND VENUE**

5 7. California Code of Civil Procedure § 395(a), allows for an action to be brought in any
6 county designated by Plaintiff when action arises within California or when the Defendant is a resident
7 of another state.

8 8. California Code of Civil Procedure § 393(a) authorizes an action for the imposition of a
9 penalty imposed by statute to be brought in the county where the cause of action arises.

10 9. This Court is the proper Court, and this action is properly filed in the Superior Court of
11 California for the County of Contra Costa because Sprouts conducts business in this County, and
12 Plaintiff performed work for Sprouts in this County. Plaintiff hereby demands a jury trial.

13 **GENERAL ALLEGATIONS**

14 10. Fumero was hired by Sprouts on or about December 6, 2021. At the time Fumero was
15 hired, he was fifty-eight (58) years old. At all times during his employment, Fumero held the position
16 of Assistant Manager and was improperly classified as a salaried exempt employee.

17 11. At all relevant times, Fumero's responsibilities required him to devote more than 50%
18 of his time to non-exempt tasks. *Heyen v. Safeway, Inc.* (2013) 216 Cal.App.4th 795.

19 12. Specifically, Fumero spent the majority of his working time stocking shelves, receiving
20 and unloading deliveries, covering the cash register/checkstand, and/or otherwise assisting with
21 customer service (answering customer class, responding to customer inquiries, etc.).

22 13. While Fumero did have some managerial-type duties, he did not have full discretion to
23 hire and fire employees (he would always have to get the approval of his store manager).

24 14. Prior to working for Sprouts, Fumero had substantial experience in retail management.
25 He had been a store manager at CVS for more than ten (10) years and had also worked in management
26 for Lucky Stores and Big Lots. In total, he had more than 40 years of retail experience, more than 25
27 years of which was in retail management.

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1 15. Fumero was initially hired to work as an assistant manager in a Sprouts store in
2 Oakland, California. Approximately 4-5 months after he was hired, Fumero was transferred to the
3 Brentwood, California store location (still in the assistant manager role).

4 16. In approximately March 2022 (prior to Fumero being transferred to Brentwood), a store
5 manager position for a Sprouts location in Albany, California became available. Fumero applied for
6 that position and expected that his substantial retail management experience, and performance since
7 being employed by Sprouts, would make him an extremely qualified candidate.

8 17. Inexplicably, however, Fumero was not selected for the manager position in the
9 Albany, California store location. The only explanation given was the wholly subjective alleged
10 observation that Fumero “didn’t smile enough” during the interview.

11 18. Fumero is informed and believes that the individual who was selected for the Albany
12 store manager position was substantially younger than him (15-20+ years), had substantially less retail
13 and/or retail management experience than Fumero, and had no prior experience with Sprouts.

14 19. Fumero expressed his frustration to corporate management that he had been passed
15 over for the Albany manager position and advised he believed his age was playing an adverse role in
16 the decision not to promote him to manager.

17 20. In July 2022, Fumero received a positive performance review from the store manager at
18 the Brentwood location.

19 21. In September 2022, the Brentwood store manager left. Fumero was tasked with being
20 the “interim” or “acting” store manager in his stead, although he continued to have to devote more
21 than 50% of his time to non-exempt tasks.

22 22. In approximately November/December 2022, Fumero submitted a formal application
23 for the Brentwood store manager job that he had been filling in for. During that same timeframe,
24 Fumero also applied for an open store manager position in Dublin, California.

25 23. Despite his performance, qualifications, and experience, Fumero was not selected for
26 either position.

27 24. Instead, an assistant store manager from another location was selected as the Dublin
28 store manager and an outside candidate was chosen as the Brentwood store manager.

1 25. Fumero's colleagues and subordinates at the Brentwood location did not understand
2 why Fumero had been passed over and were upset by the unfair decision. Without Fumero's
3 knowledge, the staff penned a letter outlining all of his qualifications and explaining their belief that
4 he should have been selected.

5 26. Fumero is informed and believes the individuals selected for both the Dublin and
6 Brentwood manager positions over him are both in their 30's or 40's—more than 15 years younger
7 than Fumero. Fumero is also informed and believes each individual selected had less retail and retail
8 management experience than him. The individual selected over him for the Brentwood position had
9 no previous relationship with Sprouts.

10 27. Fumero again raised concerns that his being passed over was improper, unfair, and
11 adversely affected by his age (59 in December 2022).

12 28. Fumero was given a performance review in early 2023, but it did not contain any
13 substantive evaluation whatsoever. Fumero is informed and believes his supervisors did not provide
14 him any substantive feedback 1) because they were upset about his ongoing complaints and the letter
15 his colleagues penned on his behalf and 2) because they knew putting a non-substantive review would
16 further hamper/adversely affect his ability to secure promotion.

17 29. Frustrated by the repeated passing over for younger, less qualified candidates, Fumero
18 tendered his resignation to Sprouts. His last day will be May 26, 2023.

19 30. Throughout Fumero's employment with Sprouts, he should have been classified as a
20 non-exempt employee (regardless of whether he was compensated by salary or hourly pay) and was
21 entitled to be paid for all hours worked, for overtime according to California law, and to meal and rest
22 breaks. Fumero was also entitled to paid sick leave under California law, including paid COVID-19
23 supplemental paid sick leave to care for his wife when she was ill.

24 31. Throughout his employment, Fumero regularly worked in excess of 40 hours per
25 workweek; Plaintiff was often required to work in excess of 8 hours per day. Despite working in
26 excess of 8 hours per day, he was always salaried and misclassified as exempt and thus was never
27 provided overtime premium payments for overtime hours worked. Instead, he was only compensated
28 his base hourly wage for all hours worked.

1 32. Fumero regularly worked in excess of fifty (50) hours or more each workweek during
2 his employment with Sprouts.

3 33. Fumero has also regularly been required to forego meal and rest breaks due to
4 understaffing and the responsibilities he had to personally shoulder.

5 34. The volume of meal periods Fumero was not provided an opportunity to take because
6 he was misclassified as exempt is substantial.

7 35. In addition, Sprouts failed to include non-discretionary bonuses and other items of
8 remuneration (including “Bonus-Store”) when calculating the regular rate of pay for the purposes of
9 overtime, meal/rest break premiums, and redeemed sick leave.

10 36. As a result of all of the wage and hour violations, and particularly not keeping track of
11 Plaintiff’s hours because he was misclassified as exempt, the wage statements Sprouts issued to
12 Fumero were inaccurate. They failed to accurately identify all hours worked (always identifying “40”),
13 and the gross and net wages earned, all wage rates and the number of hours worked at each rate.

14 37. Sprouts was, at all times relevant herein, aware of the requirements of California Labor
15 Code section 226.

16 38. Fumero suffered injury as a result of Defendant’s knowing and intentional failures to
17 comply with California Labor Code section 226(a), in that he was unable to promptly and easily
18 determine total hours worked, net and gross wages earned, and all wage rates and the number of hours
19 worked at each from review of the wage statements.

20 39. On February 22, 2023, Fumero sent a written request for copies of his personnel and
21 payroll records to Sprouts via certified mail. No responsive records were provided within the
22 timeframes mandated by Labor Code sections 226(c) or 1198.5(b)(1). In fact, no responsive records
23 were provided until April 5, 2023 (following Fumero’s submission of a second identical request).

24 40. On April 5, 2023, Fumero filed a complaint with the Department of Fair Employment
25 & Housing (“DFEH”) against Sprouts based on the unlawful conduct of age discrimination and
26 retaliation described above. That same day, the DFEH issued Fumero a right-to-sue notice, which
27 Fumero served on Sprouts via certified mail on April 5, 2023.

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1 41. The list of misconduct by Defendants set forth above is a partial list only, and by
2 way of example.

3 **PRIVATE ATTORNEYS GENERAL ACT ALLEGATIONS**

4 42. The Labor Code Private Attorneys General Act of 2004 (“PAGA”), as set forth at
5 Labor Code § 2698 *et seq.*, is and at all times relevant herein was applicable to Fumero’s
6 employment with Sprouts.

7 43. Pursuant to Labor Code § 2699(a), any provision of the Labor Code which provides
8 for a civil penalty to be assessed and collected by the Labor and Workforce Development Agency
9 (“LWDA”) for violations of the Labor Code may, as an alternative, be recovered through a civil
10 action brought by an aggrieved employee on behalf of himself or herself and other current or
11 former employees pursuant to the procedures outlined in Labor Code § 2699.3.

12 44. Fumero was employed by Sprouts and the alleged violations were committed
13 against him in relation to his employment with Sprouts. Fumero is therefore an aggrieved
14 employee as defined by Labor Code § 2699(c). Other employees, current and former, are also
15 aggrieved employees in that one or more of the alleged violations were also committed against
16 them in relation to their employment with Sprouts.

17 45. Pursuant to Labor Code § 2699(g), an aggrieved employee may recover the civil
18 penalty on behalf of himself or herself and other current or former employees against whom one or
19 more of the alleged violations was committed. Furthermore, any employee who prevails in any
20 such action shall be entitled to an award of reasonable attorney's fees and costs.

21 46. Pursuant to Labor Code § 2699.3, an aggrieved employee may pursue a civil action
22 arising under the PAGA after the following requirements have been met:

- 23 a. The aggrieved employee shall give written notice by online filing to the LWDA
24 and by certified mail to the employer (hereinafter “Employee’s Notice”) of the
25 specific provisions of California Labor Code alleged to have been violated,
26 including the facts and theories to support the alleged violations;
27 b. The LWDA shall provide notice (hereinafter “LWDA’s Notice”) to the
28 employer and the aggrieved employee by certified mail that it does not intend to

1 investigate the alleged violation within 60 days of the postmark date of the
2 Employee's Notice. Upon receipt of the LWDA's Notice, or if the LWDA does
3 not provide notice with 65 calendar days of the postmark date of the Employee's
4 Notice, the aggrieved employee may commence a civil action pursuant to
5 California Labor Code § 2699 to recover civil penalties in addition to any other
6 penalties to which the employee may be entitled.

- 7 c. For all alleged violations not enumerated in Labor Code § 2699.5, the employer
8 is given thirty-three (33) days to cure and notify the aggrieved employee by
9 certified mail that the violation has been cured. If the violation is not cured, the
10 aggrieved employee may commence a civil action pursuant to California Labor
11 Code § 2699 to recover civil penalties in addition to any other penalties to which
12 the employee may be entitled.

13 47. On February 2, 2023, Plaintiff provided written notice by certified mail to
14 Defendant, and by online filing to the LWDA, of the specific provisions of the Labor Code alleged
15 to have been violated, including the facts and theories to support the alleged violations. A true and
16 correct copy

17 48. As of the date of this complaint, which is more than sixty-five (65) days after the
18 February 2, 2023, the LWDA has not responded to Plaintiff's notifications or otherwise indicated an
19 intention to investigate his claims. Defendant has also not provided any notification or other indication
20 that it has cured any of the violations alleged in the notification letter. Plaintiff has therefore satisfied
21 the administrative prerequisites under Labor Code § 2699.3 to bring a civil action to recover civil
22 penalties against Defendant for violations of California Labor Code.

23 **FIRST CAUSE OF ACTION**
24 **(Failure to Pay Minimum Wage)**
25 **Against Defendants**

26 49. Plaintiff hereby realleges and incorporates by reference each and every allegation
27 herein, except as said paragraphs are inconsistent with the allegation of this cause of action.

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1 50. Labor Code § 1182.12 provides that employees must be paid at least minimum wage,
2 on the established day for the pay period involved, for all hours worked in a payroll period, whether
3 the remuneration is measured by time, piece, commission or otherwise.

4 51. At all relevant times, California Labor Code sections 1194, 1197, and 1197.1 provide
5 that the minimum wage to be paid to employees, and the payment of a lesser wage than the minimum
6 so fixed is unlawful.

7 52. During the relevant time period, Defendant failed to pay a minimum wage to Plaintiff
8 as required by California Labor Code.

9 53. Defendant was at all times material herein Plaintiff's employer. Throughout his
10 employment, Fumero was improperly classified as an exempt employee compensated solely on the
11 basis of a salary. Pursuant to California Labor Code section 515(d)(2), the payment of a fixed salary
12 (such as Fumero was paid) to a non-exempt employee "shall be deemed to provide compensation **only**
13 for the employee's regular, nonovertime hours."

14 54. Throughout his employment, and during all times Fumero was misclassified as exempt,
15 he regularly worked hours beyond eight (8) in a workday and/or forty (40) in a workweek. He was not
16 compensated, at all, for hours that constituted overtime hours under California law.

17 55. Pursuant to California Labor Code section 1194(a), notwithstanding any agreement to
18 work for a lesser wage, any employee receiving less than the legal minimum wage or the legal
19 overtime compensation applicable to the employee is entitled to recover in a civil action the unpaid
20 balance of the full amount of this minimum wage or overtime compensation, including interest
21 thereon, reasonable attorney's fees, and costs of suit.

22 56. Pursuant to California Labor Code § 1194.2, Fumero is entitled to recover liquidated
23 damages in an amount equal to the wages unlawfully unpaid and interest thereon.

24 57. As a direct and proximate result of Defendant's misconduct, Plaintiff has lost wages
25 and benefits and thus seeks recovery as hereinafter provided.

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SECOND CAUSE OF ACTION
(Failure to Pay Overtime)
Against Defendants

58. Plaintiff hereby realleges and incorporates by reference each and every allegation set forth above as though fully set forth herein, except as said paragraphs are inconsistent with the allegations of this cause of action.

59. Pursuant to California Labor Code section 510, any work in excess of eight hours in one workday and any work in excess of 40 hours in any one workweek and the first eight hours worked on the seventh day of work in any one workweek shall be compensated at the rate of no less than one and one-half times the regular rate of pay for an employee. Any work in excess of 12 hours in one day shall be compensated at the rate of no less than twice the regular rate of pay for an employee. In addition, any work in excess of eight hours on any seventh day of a workweek shall be compensated at the rate of no less than twice the regular rate of pay of an employee.

60. Pursuant to California Labor Code section 1198, the maximum hours of work and standard conditions of labor fixed by the commission shall be the maximum hours of work and the standard conditions of labor for employees and the employment of any employee for longer hours than those fixed by the commission or under conditions of labor prohibited by the order is unlawful.

61. The “regular rate of pay” includes all remuneration for employment paid to the employee and includes, but is not limited to, hourly earnings, salary, piece work earnings, commissions, non-discretionary bonuses, and the value of meals and lodging. See 29 U.S.C. § 207(e); DLSE Enforcement Policies and Interpretations Manual Section 49.

62. Fumero has regularly worked overtime hours throughout his employment.

63. During the relevant time period, Defendant intentionally and willfully failed to pay the proper overtime wages due to Plaintiff.

64. Wherefore, Plaintiff has been injured as set forth above and request relief as hereafter provided.

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THIRD CAUSE OF ACTION
(Failure To Provide Meal Periods and Associated Premiums)
Against Defendants

65. Plaintiff hereby realleges and incorporates by reference each and every allegation set forth above as though fully set forth herein, except as said paragraphs are inconsistent with the allegations of this cause of action.

66. Labor Code § 226.7 requires employers to provide employees meal periods as mandated by Order of the Industrial Welfare Commission. It states:

a. No employer shall require any employee to work during any meal or rest period mandated by an applicable order of the Industrial Welfare Commission.

b. If an employer fails to provide an employee a meal period or rest period in accordance with an applicable order of the Industrial Welfare Commission, the employer shall pay the employee 1 additional hour of pay at the employee's regular rate of compensation for each work day that the meal or rest period is not provided.

67. The applicable Wage Order(s) provides that every "employer shall authorize and permit all employees to take rest periods, which insofar as practicable shall be in the middle of each work period. The authorized rest period time shall be based on the total hours worked daily at the rate of ten (10) minutes net rest time per four (4) hours or major fraction thereof..." The applicable Wage Order further provides that "[i]f an employer fails to provide an employee rest period in accordance with the applicable provisions of this order, the employer shall pay the employee one (1) hour of pay at the employee's regular rate of compensation for each workday that the rest period is not provided."

68. Throughout his employment, Fumero was frequently denied the opportunity to take uninterrupted meal periods.

69. During the time Fumero was salaried, he was not afforded any meal period premiums for denied meal periods and never received meal period premiums at his "regular rate of compensation."

70. Wherefore, Plaintiff has been injured as set forth above and request relief as hereafter provided.

FOURTH CAUSE OF ACTION
(Failure To Provide Rest Periods and Associated Premiums)
Against Defendants

71. Plaintiff hereby realleges and incorporates by reference each and every allegation set forth above as though fully set forth herein, except as said paragraphs are inconsistent with the allegations of this cause of action.

72. Labor Code § 226.7 requires employers to provide employees rest periods as mandated by Order of the Industrial Welfare Commission. It states:

a. No employer shall require any employee to work during any meal or rest period mandated by an applicable order of the Industrial Welfare Commission.

b. If an employer fails to provide an employee a meal period or rest period in accordance with an applicable order of the Industrial Welfare Commission, the employer shall pay the employee 1 additional hour of pay at the employee's regular rate of compensation for each work day that the meal or rest period is not provided.

73. The applicable Wage Order(s) provides that every "employer shall authorize and permit all employees to take rest periods, which insofar as practicable shall be in the middle of each work period. The authorized rest period time shall be based on the total hours worked daily at the rate of ten (10) minutes net rest time per four (4) hours or major fraction thereof..." The applicable Wage Order further provides that "[i]f an employer fails to provide an employee rest period in accordance with the applicable provisions of this order, the employer shall pay the employee one (1) hour of pay at the employee's regular rate of compensation for each workday that the rest period is not provided."

74. In addition, Labor Code section 226.2 mandates that employees who are compensated other than on an hourly basis must separately compensate for rest periods. E.g. *Vaquero v. Stoneledge Furniture, LLC* (2017) 9 Cal.App.5th 98, 111. The salary Sprouts provided to Fumero only compensated him for work performed and did not compensate for non-productive time Fumero was on the clock.

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75. In addition, Fumero was denied the opportunity for rest breaks as explained in more detail above throughout his employment. Fumero was never afforded a rest period premium for any rest period he was denied by Sprouts.

76. Wherefore, Plaintiff has been injured as set forth above and request relief as hereafter provided.

FIFTH CAUSE OF ACTION
(Failure to Furnish Accurate Itemized Wage Statements)
Against Defendants

77. Plaintiff hereby realleges and incorporates by reference each and every allegation set forth above as though fully set forth herein, except as said paragraphs are inconsistent with the allegations of this cause of action.

78. Pursuant to California Labor Code section 226(a) “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 the 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 [. . .], (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, (5) net wages earned, (6) the inclusive dates of the period for which the employee is paid, (7) the name of the employee and only the last four digits of his or her social security number or an employee identification number, (8) the name and address of the legal entity that is the employer [. . .], (9) all applicable hourly rates in effect during the pay period and corresponding number of hours worked at each hourly rate by the employee and, if the employer is a temporary services employer [. . .], the rate of pay and the total hours worked for each temporary services assignment.”

79. An employee suffering injury as a result of the knowing and intentional failure by an employer to comply with Labor Code section 226(a) is entitled to recover the greater of all actual damages or fifty dollars (\$50) for the initial pay period in which a violation occurs and one hundred dollars (\$100) per employee for each violation in a subsequent pay period, not to exceed the aggregate penalty of four thousand dollars (\$4,000), and is entitled to an award of costs and reasonable attorney's fees. Labor Code § 226(e)(1).

1 80. An employee is deemed to suffer injury if the employer fails to provide a wage
2 statement or if the employer fails to provide accurate and complete information as required by any one
3 or more of the items (1) to (9), inclusive, of subdivision (a) and the employee cannot promptly and
4 easily determine from the wage statement alone, i) the amount of gross/net wages paid to the employee
5 during the pay period or any of the other information required to be provided pursuant to Labor Code
6 section 226(a) items (2) to (4), inclusive, (6) and (9), ii) deductions made by the employer, iii) the
7 name and address of the employer and iv) the name of the employee and the last four digits of his or
8 her social security number or employee identification number. Labor Code § 226(e)(2)(A) and (B)(i)-
9 (iv). “Promptly and easily determine” means a reasonable person would be able to readily ascertain
10 the information without reference to other documents or information. Labor Code § 226(e)(2)(C).

11 81. As set forth above, Defendant intentionally and willfully failed to furnish accurate
12 itemized wage statements which complied with Labor Code section 226.

13 82. Wherefore, Plaintiff has been injured as set forth above and request relief as hereafter
14 provided.

15 **SIXTH CAUSE OF ACTION**
16 **VIOLATION OF GOV. CODE § 12940(a)**
17 **(Age Discrimination)**
 Against Defendants

18 83. Plaintiff hereby realleges and incorporates by reference all allegations set forth
19 herein, except as said paragraphs are inconsistent with the allegations of this cause of action.

20 84. FEHA prohibits an employer from discriminating against an individual based on age
21 over 40. Gov. Code § 12940(a).

22 85. Nevertheless, as set forth above, Defendants discriminated against Fumero because
23 of his age, repeatedly refusing to select him for the position of Store Manager that he is qualified
24 for, in favor of younger, less qualified candidates.

25 86. As a result of Defendants’ conduct, Fumero has suffered damages including denied
26 wages and benefits, as well as attendant emotional distress.

27 87. Wherefore, Fumero seeks damages as set forth below.

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SEVENTH CAUSE OF ACTION
VIOLATION OF GOVERNMENT CODE SECTION 12940(h)
(Retaliation)
Against All Defendants

88. Plaintiff hereby realleges and incorporates by reference each and every allegation as though fully set forth herein, except as said paragraphs are inconsistent with the allegations of this cause of action.

89. The FEHA expressly prohibits an employer from retaliating against an employee for complaining about unlawful and discriminatory conduct that violates the FEHA.

90. Defendants at all times relevant herein were an employer pursuant to Government Code section 12926(d), were Fumero's employer, and were therefore prohibited from such retaliatory conduct.

91. Fumero repeatedly protested conduct violative of the FEHA when he voiced his frustrations that he believed his age was adversely impacting decision-makers when he applied for store manager positions.

92. Following these complaints, as explained above, a number of adverse employment actions have been taken against him.

93. As a direct and proximate result of Defendants' conduct, Fumero has been harmed and requests relief as hereafter provided.

EIGHTH CAUSE OF ACTION
VIOLATION OF GOV. CODE § 12940(k)
(Failure to Prevent Discrimination/Retaliation)
Against Defendants

94. Plaintiff hereby realleges and incorporates by reference each and every allegation as though fully set forth herein, except as said paragraphs are inconsistent with the allegations of this cause of action.

95. FEHA requires an employer to "take all reasonable steps necessary to prevent discrimination and harassment from occurring." Gov. Code § 12940(k).

96. Nevertheless, as set forth above, Defendants failed to prevent and remedy the discrimination and retaliation against Fumero, ultimately forcing him to resign.

1 97. As a result of Defendant's conduct, Plaintiff has suffered damages and request relief
2 as hereinafter provided.

3 **NINTH CAUSE OF ACTION**
4 **VIOLATION OF LABOR CODE SECTION 1102.5(b)**
5 **(Retaliation)**
6 **Against All Defendants**

7 98. Plaintiff hereby realleges and incorporates by reference each and every paragraph as
8 though fully set forth herein, except as said paragraphs are inconsistent with the allegations of this
9 cause of action.

10 99. Labor Code section 1102.5, subdivision (b) expressly prohibits and employer, or
11 anyone acting on behalf of an employer, from retaliating against an employee for
12 disclosing/reporting information about alleged violation/non-compliance with a state or federal
13 statute, rule, or regulation to any person with authority over the employee.

14 100. As described above, Fumero repeatedly complained about numerous violations of
15 California law to his supervisors. These complaints included, but are not limited to, complaining
16 that he was being subjected to discrimination/harassment based on his age.

17 101. Thereafter, Defendants retaliated against Plaintiff for making good faith complaints
18 about statutory violations.

19 102. As a result of Defendants' conduct, Plaintiff has suffered damages.

20 103. Wherefore, Plaintiff has been damaged as set forth below and requests relief as
21 hereafter provided.

22 **TENTH CAUSE OF ACTION**
23 **FAILURE TO TIMELY FURNISH PERSONNEL RECORDS**
24 **(Cal. Lab. Code § 1198.5)**
25 **Against all Defendants**

26 104. Plaintiff hereby realleges and incorporates by reference each and every allegation as
27 though fully set forth herein, except as said paragraphs are inconsistent with the allegations of this
28 cause of action.

1 105. California Labor Code section 1198.5, subdivision (b) mandates than an employer
2 who receives a written or oral request from an employee or former employee to inspect records
3 pursuant to that section “shall” comply with the request within 30 days. Lab. Code § 1198.5(b).

4 106. Whenever an employer fails to comply with section 1198.5, the employee is entitled
5 to recover a penalty of \$750 from the employer. Lab. Code § 1198.5(k). In the event an employee
6 must bring an action to ensure compliance with the code, he/she is entitled to recover attorney’s
7 fees. Lab. Code § 1198.5(l).

8 107. Fumero made a written request to Defendants for records under section 1198.5 on
9 February 2, 2023. No records were furnished within 30 days of Fumero’s request.

10 108. Wherefore, Plaintiff has been damaged as set forth above and requests relief as
11 hereafter provided.

12 **ELEVENTH CAUSE OF ACTION**
13 **FAILURE TO TIMELY FURNISH PAYROLL RECORDS**
14 **(Cal. Lab. Code § 226)**
 Against all Defendants

15 109. Plaintiff hereby realleges and incorporates by reference each and every allegation as
16 though fully set forth herein, except as said paragraphs are inconsistent with the allegations of this
17 cause of action.

18 110. California Labor Code section 226 mandates than an employer who is required to
19 maintain payroll records, such as Himalayan, afford a current or former employee the right to
20 inspect and receive copies of such records upon reasonable request. A request may be either
21 written or oral and the employer “shall” comply with the request within 21 days. Lab. Code §
22 226(b).

23 111. Whenever an employer fails to comply with section 226, the employee is entitled to
24 recover a penalty of \$750 from the employer. Lab. Code § 226(f). In the event an employee must
25 bring an action to ensure compliance with the code, he/she is entitled to recover attorney’s fees.
26 Lab. Code § 226(h).

27 112. Plaintiff made a written request, through his counsel, to Defendants for records
28 under section 226 on February 2, 2023.

1 113. No responsive records were furnished within 21 days of Fumero's request.

2 114. Wherefore, Plaintiff has been damaged as set forth above and requests relief as
3 hereafter provided.

4 **TWELFTH CAUSE OF ACTION**
5 **VIOLATION OF LABOR CODE SECTION 2698 ET SEQ.**
6 **(Private Attorneys General Act)**
7 **Against Defendant**

8 115. Plaintiff hereby realleges and incorporates by reference each and every allegation set
9 forth above as though fully set forth herein, except as said paragraphs are inconsistent with the
10 allegations of this cause of action.

11 116. Pursuant to Labor Code section 2699(a), any provision of the Labor Code which
12 provides for a civil penalty to be assessed and collected by the LWDA for violations of the Labor
13 Code may, as an alternative, be recovered through a civil action brought by an aggrieved employee on
14 behalf of himself or herself and other current or former employees pursuant to the procedures outlined
15 in Labor Code section 2699.3.

16 117. Plaintiff was employed by Defendant and the alleged violations were committed against
17 him during his time of employment. Plaintiff is therefore an aggrieved employee as defined by Labor
18 Code section 2699(c). Other current and former employees are also aggrieved employees in that one or
19 more of the alleged violations were also committed against them during their time of employment with
20 Defendant.

21 118. Pursuant to Labor Code section 2699(f), the civil penalty recoverable in a PAGA action
22 is that which is provided for by the Labor Code or, where no civil penalty is specifically provided, one
23 hundred dollars (\$100) for each aggrieved employee per pay period for the initial violation and two
24 hundred dollars (\$200) for each aggrieved employee per pay period for each subsequent violation.

25 119. Pursuant to California Labor Code section 2699(g), an aggrieved employee may recover
26 the civil penalty on behalf of himself or herself and other current or former employees against whom
27 one or more of the alleged violations was committed. Furthermore, any employee who prevails in any
28 such action shall be entitled to an award of reasonable attorney's fees and costs.

120. As set forth above, Defendant violated the California Labor Code by, inter alia, failing to properly overtime, failing to pay minimum wage for all hours worked, failing to provide compliant meal and rest breaks, failing to timely pay wages, failing to properly compensate for sick pay, failing to timely pay wages on separation, and failing to furnish accurate itemized wage statements.

121. Wherefore, Plaintiff and the other aggrieved employees have been damaged as set forth above and request relief as hereafter provided.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays judgment against Defendants as follows:

As to the First through Fifth Causes of Action:

1. That this Court award actual, compensatory, special, and general damages as well as restitutionary relief to Plaintiff;
2. That this Court award injunctive relief, including that available under Labor Code section 226(h);
3. That this Court award penalties and liquidated damages including, but not limited to, those available under Labor Code sections 226, 226.7 and 1194.2;
4. That this Court award statutory attorneys' fees and costs, including those available under Labor Code sections 218.5, 226(e)(1), 226(h) and 1194, as well as Code of Civil Procedure section 1021.5;
5. That this Court award prejudgment and post-judgment interest according to any applicable provision of law or as otherwise permitted by law; and
6. That this Court award such other and further relief as the court deems just and proper.

As to the Sixth through Eighth Causes of Action:

1. For compensatory, special, and general damages;
2. For injunctive and declaratory relief, including, but not limited to, a cease-and-desist order requiring Defendants to halt their unlawful practices; an order requiring Defendants to conduct training for all its employees, supervisors, and management on the requirements of FEHA; an order requiring Defendants to develop and promulgate an effective anti-discrimination policy for its employees; and an order

1 requiring Defendants to develop and maintain an effective internal grievance
2 procedure for employee complaints regarding unlawful discrimination;

3 3. For statutory attorneys' fees and costs, including but not limited to those available
4 under Gov. Code § 12965(b);

5 4. For prejudgment and post-judgment interest according to any applicable provision
6 of law or as otherwise permitted by law, including but not limited to that available
7 under Civil Code §§ 3287(a) and 3289(b); and

8 5. For such other and further relief as the court deems just and proper.

9 **As to the Ninth Cause of Action**

10 1. For economic (special) and non-economic (general) damages in an amount yet
11 unknown, but in excess of the minimum jurisdictional limit of this Court;

12 2. For imposition of the requisite statutory penalty as outlined in Labor Code
13 §1102.5(f);

14 3. For statutory attorneys' fees and costs, including those available under Labor Code
15 § 1102.5(j)

16 4. For prejudgment and post-judgment interest according to any applicable provision
17 of law or as otherwise permitted by law, according to proof; and

18 5. For such other and further relief as the Court deems just and proper.

19 **As to the Tenth and Eleventh Causes of Action:**

20 1. For statutory penalties, including but not limited to those available under Labor
21 Code §§ 226 and 1198.5;

22 2. For imposition of the requisite statutory penalty against Defendants in the amount of
23 \$750 per failure to timely provide records to Fumero for a total penalty of
24 \$1,500.00;

25 3. For statutory attorneys' fees and costs;

26 **As to the Twelfth Cause of Action:**

1. For civil penalties, including those available under Labor Code sections 226.3, 256, 558 exclusive of the underpaid wage portion and consistent with the California Supreme Court's holding in *Z.B., N.A. v. Superior Court* (2019) 8 Cal.5th 175; and 2699(f);
2. For statutory attorneys' fees and costs, including those available under Labor Code section 2699(g);
3. For prejudgment and post-judgment interest according to any applicable provision of law or as otherwise permitted by law; and
4. For such other and further relief as the court deems just and proper.

DATED: May 23, 2023

MAYALL HURLEY P.C.

By



JENNY D. BAYSINGER

Attorneys for Plaintiff,

MANUEL FUMERO, individually and as a proxy
for the LWDA

EXHIBIT 1

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GLENDALE, CALIFORNIA 91206
(818) 646-6440

LODI OFFICE
.....
118 W. OAK STREET
LODI, CA 95240

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2453 GRAND CANAL BOULEVARD
STOCKTON, CALIFORNIA 95207

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JENNY D. BAYSINGER
JOHN P. BRISCOE
VLADIMIR J. KOZINA

February 22, 2023

SUBMITTED VIA ONLINE CLAIM NOTICE

<https://dir.tfaforms.net/295>

VIA CERTIFIED MAIL RETURN RECEIPT REQUESTED

Sprouts Farmers Market
5455 E High Street
Phoenix, AZ 85054-5464

Re: Manuel Fumero – SSN: xxx-xx-7439; EEID 60213643

This office has been retained by Manuel Fumero in connection with claims arising out of his current employment as an assistant manager for Sprouts Farmers Market, SF Markets, LLC and/or their affiliates (“Employers” or “Sprouts”). Fumero was initially hired by Employers in December 2021 and has remained employed as an assistant manager since that time. Although Fumero’s responsibilities have always required him to devote a substantial amount of time to non-exempt tasks (stocking shelves, receiving and unloading deliveries, covering the register/customer service), Sprouts has misclassified him as an exempt employee through the duration of his employment. At no time did Fumero qualify for any exemption under California law. See *Heyen v. Safeway, Inc.* (2013) 216 Cal.App.4th 795. Despite full knowledge of the volume of non-exempt tasks Fumero has always been required to perform, Sprouts has always improperly classified Fumero as an exempt employee. In accordance with California Labor Code section 2699.3, this letter shall serve as Fumero’s written notice to the Labor and Workforce Development Agency (“LWDA”) and Sprouts regarding the numerous violations of the California Labor Code committed against Fumero and Sprouts’ other current and/or former California workers, and the facts and circumstances relating thereto.

Sprouts has, within the last year and beyond, as to Fumero and other current and former employees within California, done the following:

1. Pay Wages for All Hours Worked/Pay Minimum Wage for All Hours Worked – California Labor Code section 1194 and paragraph 4 of the applicable Industrial Welfare Commission Wage Order (16-2001) mandate that employees be paid at least minimum wage for all hours worked. Despite such mandate, and because Fumero has been misclassified as an exempt employee, Sprouts regularly failed to pay him *any* wage for some of the hours worked—multiple hours worked went wholly uncompensated because Fumero was salaried

and his salary covered only forty (40) hours per week. Cal. Labor Code § 515(d)(2). Throughout his employment, Fumero routinely worked 10-12 hour shifts yet was never paid any overtime premiums amounts, or any amounts at all, for hours beyond eight (8) in a workweek. Fumero is informed and believes that Employers similarly failed and refused, and continues to fail and refuse, to pay other employees for all hours worked.

2. Pay Overtime Wages – California Labor Code section 510 requires employers to compensate employees at a rate at least 1 ½ times the regular rate of pay for all hours worked beyond eight (8) in a workday and forty (40) in a workweek, and at least twice the regular rate of pay for all hours worked beyond twelve (12) in a workday and beyond eight (8) on the seventh day of the workweek. At no point was Fumero paid an overtime premium wage, despite the fact he regularly worked more than eight (8) hours in a workday and more than forty (40) hours in a workweek. Fumero is informed and believes that Employers similarly know (and expect) other misclassified employees to work more than eight (8) hours in a workday and/or forty (40) hours in a workweek, is aware more than 50% of their time is being spent on non-exempt/non-managerial work, but does not compensate any of those individuals with overtime premium wages, instead only paying “salary.”

Fumero is also entitled and earns wages beyond salary. These include, but are not limited to store bonuses. Sprouts has never included those amounts in the “regular rate of pay” for purposes of calculating the overtime/doubletime rate. Other employees, are subjected to the same regular rate miscalculations.

3. Provide 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. Similarly, an employer may not employ an employee for more than 10 hours per day without providing the employee with a second meal period. Due to his responsibilities and the volume of non-exempt work he was expected to perform, Fumero was regularly denied the opportunity to take a lunch period. On occasions when he was afforded the opportunity to take a lunch, it was frequently not until after completion of his 5th hour of work. He was never afforded a meal period premium for any meal period denied. Fumero believes other California employees have been similarly treated.

4. Provide Rest Periods – For the same reasons set forth above with respect to meal periods, Fumero and Sprouts’ other employees were often unable to take their rest breaks. Sprouts failed to provide the requisite additional compensation required by Labor Code section 226.7 to Fumero and its other employees when these rest breaks were denied.

5. Furnish Accurate Itemized Wage Statements – Because of the violations set forth above, the wage statements furnished by Sprouts violated Labor Code section 226(a) insofar as they failed to accurately show:

- a. The gross wages earned as required by section 226(a)(1);

Since Employers did not compensate Fumero for all work performed, or compensate him for overtime work performed, the wage statements issued, necessarily failed to accurately identify gross wages earned

- b. Total hours worked by the employee as required by section 226(a)(2);
Because Employers did not track Fumero's actual hours worked during the time he was misclassified as exempt, his hours worked were never accurately reflected on his wage statements.
- c. The net wages earned in violation of section 226(a)(5); and
Because of the myriad failures to properly pay wages, including the failure to provide meal and rest period premiums and/or compensate them at the correct regular rate, the wage statements furnished to Fumero and other employees necessarily failed to accurately identify net wages earned.
- d. All applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate in violation of section 226(a)(9).
Since Sprouts did not pay Fumero for all hours worked, both overtime and regular, the wage statements did not accurately reflect the number of hours worked at each rate—they did not reflect hourly rates at all as Fumero was misclassified as exempt.

6. Timely Pay Wages – Because Employers failed to properly pay overtime, minimum wages, and meal/rest period premiums when they became due, they necessarily violated the provisions of Labor Code section 204.

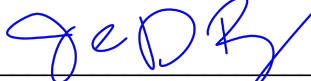
7. Pay All Wages on Separation – Because Employers failed, and continue to fail, to properly pay its employees for all hours worked and fails to pay them overtime premiums for hours worked beyond eight (8) in a workday and/or forty (40) in a workweek, and fails to compensate for meal/rest periods denied there are necessarily wages that remained outstanding at the time and other California employees separate from employment with Sprouts that are not timely paid at the end of their employment.

If the LWDA believes that it needs additional information to determine whether to investigate these claims, please contact me immediately to request the additional information, which I will provide to the extent it is available to me or my client. If the LWDA does not intend to investigate these violations, Fumero intends to file a civil complaint against Sprouts pursuant to the Labor Code Private Attorney General Act of 2004 (Labor Code §§ 2698 – 2699.5), on behalf of herself and, as a proxy for the LWDA, to impose civil penalties arising out of violations of the Labor Code as to Fumero and Sprouts' other current and former California employees. Thank you for your attention in this matter.

Sincerely,

MAYALL HURLEY P.C.

By


JENNY D. BAYSINGER