

SECOND JUDICIAL DISTRICT COURT
BERNALILLO COUNTY
STATE OF NEW MEXICO

FILED
2ND JUDICIAL DISTRICT COURT
Bernalillo County
8/24/2020 7:08 PM
CLERK OF THE COURT
Blair Sandoval

Case No. D-202-CV-2020-04841

DERRICK CAGE,

Plaintiff,

v.

THE WENDY'S COMPANY,
WEN NEW MEXICO, LLC,
WENDY'S OF COLORADO SPRINGS, INC.,
WENDY'S PROPERTIES LLC, and
JANE DOE,

Defendants.

**COMPLAINT FOR DAMAGES FOR
NEW MEXICO HUMAN RIGHTS ACT VIOLATIONS, NEGLIGENCE,
AND INTENTIONAL INFLECTION OF EMOTIONAL DISTRESS**

Plaintiff Derrick Cage, by and through undersigned counsel, Rothstein Donatelli LLP (Paul M. Linnenburger and Caroline "KC" Manierre), hereby brings this Complaint for monetary damages for violations of the New Mexico Human Rights Act, NMSA 1978, §§ 28-1-1 to -15 ("NMHRA"), negligence, and intentional infliction of emotional distress. In support thereof, Plaintiff states as follows.

INTRODUCTION

This suit is one man's stand against the concerning resurgence of open racism in America and the failure of corporate America to bring action rather than just hollow words in the struggle for equality and recognition of basic humanity of all peoples.

African Americans have long suffered unique and particularly virulent racism in America stemming from our original sin - slavery. As America slogged towards a more perfect union in the

mid-1800's, a trek that left the country barreling towards civil war, even ardent abolitionists maintained deeply racist views of African Americans. Leading up to the Civil War Era, minstrel shows traveled the countryside showcasing actors in blackface and former slaves, billed as "Darkeys" to white audiences. As Reconstruction turned to the Jim Crow Era, "Darkie" became widely used as synonymous with other racist slurs pointed at the African American population.

No adult misunderstands the vile connotation of "Darkie" when directed at an African American man. For instance, when Colgate purchased Hawley & Hazel in the mid-1980's, it found itself in the midst of a public relations firestorm because Hawley & Hazel had been marketing a "Darkie" toothpaste in Asia, complete with a blackface figure on the packaging. In 2012, Rush Limbaugh used the term to deride President Barack Obama. It is a vile racist trope that has no place in public accommodations.

Yet this is precisely the written word directed at Derrick Cage by Wendy's on January 3, 2020, when he wanted nothing more than to enjoy his lunch with business associates. Rather than friendly family service, Derrick Cage was served the blatant racism of "Darkie", and with it, the weight of generations of bigotry.

A manager at a Wendy's restaurant in Albuquerque took Plaintiff's order, typing the identifying name onto his receipt as "Darkie." When called out for the disgusting act, she smirked and giggled. Such disturbing racism could only occur within a company structure that insufficiently addresses racial sensitivity or otherwise implicitly permits, condones or supports racial discrimination. It appears this is such a company structure, as racism within the Wendy's organization occurs repeatedly, including Wendy's itself tweeting a racist meme to the world in 2017, attacking Hispanic, Latino and Chicano persons on the open world wide web. The attack on

Plaintiff's humanity was more personal, but just as distressing, causing deep anxiety and pain – anxiety and pain only amplified by Wendy's actions since.

PARTIES

1. Plaintiff Derrick Cage is a resident of Bernalillo County, New Mexico.
2. Defendant The Wendy's Company ("Wendy's Co.") is an Ohio corporation that, through wholly owned subsidiaries such as Wendy's U.S. and Wendy's International, LLC, which is registered in New Mexico and authorized to conduct business in New Mexico as a foreign limited liability company headquartered in Ohio, owns, operates and/or controls Wendy's restaurants and franchises throughout the United States and worldwide, including the Wendy's restaurant at 4800 Menaul Boulevard NE, Albuquerque, New Mexico. The Wendy's Company advertises in New Mexico, operates in New Mexico, derives income from New Mexico, and purposefully avails itself of New Mexico.
3. Defendant WEN New Mexico, LLC ("WEN") is a New Mexico limited liability company registered and authorized to conduct business in this state. Defendant WEN oversees and operates the Wendy's restaurant at 4800 Menaul Boulevard NE, Albuquerque, New Mexico.
4. Defendant Wendy's of Colorado Springs, Inc. ("Wendy's of Colorado Springs") is a Colorado corporation registered and authorized to conduct business in New Mexico with a principle place of business in New Mexico of 1820 East Main Street, Farmington, New Mexico 87401. Upon information and belief, Defendant Wendy's of Colorado Springs operates Defendant WEN by and through its agents and maintains the same mailing address and key managers as Defendant WEN.

5. Defendant Wendy's Properties, LLC, ("Wendy's Properties") is a wholly owned subsidiary of Defendant Wendy's Co and is a Delaware limited liability corporation that owns and maintains real property and premises on the behalf of the Wendy's Co. According to Bernalillo County tax records, Defendant Wendy's Properties is the owner of the premises at 4800 Menaul Boulevard NE, Albuquerque, New Mexico.

6. Upon information and belief, Defendant Jane Doe is a resident of Bernalillo County, New Mexico. Although Plaintiff does not currently know the identity of Defendant Jane Doe, Jane Doe is believed to use the name "Irene" and was employed at the Wendy's restaurant at 4800 Menaul Boulevard NE, Albuquerque, New Mexico, in January 2020.

JURISDICTION AND VENUE

7. The preceding paragraphs are incorporated as if fully stated herein.

8. This Court has jurisdiction over the subject matter and parties to this action pursuant to the Court's general jurisdiction.

9. Venue is proper in this district pursuant to NMSA 1978, § 38-3-1(A), and NMSA 1978, § 28-1-12.

10. Defendant Wendy's Co., by and through wholly owned subsidiaries such as Wendy's U.S. and Wendy's International, LLC, oversees the operations of Wendy's restaurants throughout New Mexico and Bernalillo County and receives income and franchise fees therefrom.

11. Defendant WEN owns, oversees and operates Wendy's franchises in New Mexico and Bernalillo County.

12. Defendant Wendy's of Colorado Springs oversees and operates more than 150 Wendy's restaurants nationwide, including in New Mexico and throughout Colorado.

13. Wendy's restaurants, the operation of which are overseen by Defendants Wendy's Co., its wholly-owned subsidiaries, Wendy's of Colorado Springs, and WEN, are establishments that provide services and goods to the public purportedly with a commitment to fresh food, at a fair price, in a comfortable atmosphere. Said restaurants are not bona fide private clubs and are not, by their nature, distinctly private establishments. Said Defendants are thus "public accommodations" as defined by the NMHRA. NMSA 1978, § 28-1-2(H).

14. On or about June 22, 2020, Plaintiff filed charges of discrimination against Defendants Wendy's Co., Wendy's of Colorado Springs, and WEN, with the New Mexico Department of Workforce Solutions, Human Rights Bureau ("NMHRB").

15. On or about August 6, 2020, the NMHRB issued Orders of Non-Determination as to each of the three charges of discrimination submitted by Plaintiff, giving Plaintiff the right to file claims under the NMHRA with the District Court within 90 days from the date of service of the Order.

FACTUAL ALLEGATIONS

16. The preceding paragraphs are incorporated as if fully stated herein.

17. Defendants Wendy's Co., Wendy's of Colorado Springs, and WEN have sizeable advertising budgets used to become cultural influencers with an ability to shape public perception.

18. Defendant's Wendy's Co., Wendy's of Colorado Springs, and WEN engage in marketing campaigns specifically targeting the African American community, including campaigns seeking to take advantage of Black activist celebrity. In 2019, Wendy's engaged Chance the Rapper in a public campaign designed to capitalize on his status and good name as a spokesman for equality and promotion of Black culture and community.

**Derrick Cage is Humiliated by Being Called a Racist Slur
in Black-and-White at Wendy's in Albuquerque**

19. Plaintiff is African American.

20. As a Black man in America, the marketing campaigns launched by Defendants specifically targeting the African American community were specifically directed towards individuals like Plaintiff. Through these campaigns, Defendants misrepresented to Plaintiff that the Wendy's restaurant he would visit in 2020 was a welcoming, friendly and family environment.

21. On January 3, 2020, Plaintiff and two colleagues, including an employee of his, went to Wendy's located at 4800 Menaul Boulevard NE, they thought, to enjoy a quick lunch. Unfortunately, Plaintiff's "Biggie Bag" was served with an unwelcome side of slur.

22. The three approached the counter to separately order lunch. The register station was worked by Defendant Jane Doe, who wore a nametag with the name "Irene." Upon information and belief, Defendant Jane Doe was within the ranks of management at said location.

23. Plaintiff's female colleague and subordinate, who is clearly not African American, was the first to order at approximately 1:29 p.m. She provided her name as "Jessica."

24. Plaintiff was the second to order at approximately 1:31 p.m. Plaintiff ordered a "Biggie Bag" for a total cost of \$5.39. When asked his name for the receipt, Plaintiff provided his given first name, "Derrick."

25. Plaintiff's male colleague followed as the third to order. Said colleague's name begins with the letter "W."

26. When Plaintiff's female colleague retrieved her meal, the receipt included a notation near the top of the receipt: "JESSICA."

27. When Plaintiff retrieved his meal, he did not immediately examine the receipt and thus did not immediately notice the racist slur denoted where his name should have been: “DARKIE.”



28. When Plaintiff’s male colleague retrieved his meal, his receipt included a single letter notation near the top where his name should have been: “F”.

29. After sitting together to eat their meals, Plaintiff and his colleagues noticed for the first time the horrifying remark on Plaintiff’s receipt: “DARKIE.”

30. Confused and deeply hurt by seeing the centuries-old racist trope in black and white rather than his given name, Plaintiff approached Defendant Jane Doe to seek answers.

31. Jane Doe represented herself as management to Plaintiff and responded to his questioning of the racist language on his receipt with a smirk, giggled and gave a bogus explanation concerning keys on the register becoming “stuck” on occasion.

32. Plaintiff, still reeling from the shock of the brazen racism, memorialized in black and white, removed himself from the situation.

33. Unfortunately, Plaintiff could not remove the anxiety, pain and deep distrust sown by the act. The aftermath has negatively impacted his psyche, his income, and his trust.

34. Plaintiff was eventually contacted by two individuals concerning the January 3, 2020, incident, each of whom represented themselves as being associated with Defendants.

Disregard for the Need to Address Racism

35. Upon information and belief, following the blatantly racist language directed at Plaintiff at the Wendy’s restaurant located at 4800 Menaul Boulevard NE, Defendants acted with disregard for the problem within their organization.

36. Upon information and belief, Defendants disregarded the seriousness of the racist event at the Wendy’s restaurant located at 4800 Menaul Boulevard NE on January 3, 2020. Rather than conduct racial sensitivity training, Defendants instead instructed employees to spell names correctly in the register system and not to speak with representatives of the media without explanation or otherwise addressing the need to maintain sensitivity towards diversity, inclusion and/or to simply not act racist.

37. On January 7, 2020, a woman who Plaintiff recalls represented herself to be a Ms. Lucero contacted Plaintiff in regards to the afore-described racist message he received on his receipt on January 3, 2020. Plaintiff understood Ms. Lucero to be a District Manager associated

with the Wendy's organization and/or the Wendy's at 4800 Menaul Boulevard NE and/or Defendants. Plaintiff was led to believe Ms. Lucero was a representative of Defendant Wendy's Co.

38. During the conversation with Ms. Lucero, Plaintiff was informed that Defendant Jane Doe, known as "Irene", was a long-time employee of Wendy's restaurants. Ms. Lucero made a reference about Defendant Jane Doe, known as "Irene", being within the Wendy's organization for a period of approximately twenty years.

39. Ms. Lucero indicated to Plaintiff that Wendy's would provide food coupons for future visits to Wendy's restaurants. The less-than-token gesture added to the insult, humiliation and injury suffered by Plaintiff from the "DARKIE" notation on his receipt.

40. Plaintiff declined coupons.

41. Next, on the morning of January 8, 2020, Plaintiff was contacted by a woman identifying herself as Jodie Longwell. Ms. Longwell represents herself publicly as being "responsible for interviewing" individuals with potential claims against Defendant Wendy's of Colorado Springs. Upon information and belief, Defendant Wendy's of Colorado Springs, by and through its owners and agents, manages Defendant WEN.

42. Over the course of several days, Ms. Longwell spoke with Plaintiff on multiple occasions. Eventually, during those communications, Ms. Longwell offered Plaintiff limited monetary compensation (approximately \$1,000 to \$3,000) in exchange for removal of a social media post that contained a picture of the January 3, 2020, "DARKIE" receipt.

43. Plaintiff declined.

44. Neither Ms. Lucero nor Ms. Longwell described any attempts by Defendants to address the overt racism of its employees and agents, such as racial sensitivity training or the like.

45. Neither Ms. Lucero nor Ms. Longwell provided any indication that Defendants would be taking any action to address the overt racism of its employees and agents in the future.

46. Plaintiff's interactions with Defendants' representatives laid bare that Defendants were actively working to silence his voice as a Black man and added to his pain and humiliation.

47. Overt racism has occurred in the past in Wendy's restaurants. For instance, in Arvada, Colorado in 2015, a young girl discovered a playing card with her children's meal with racist slurs written on it. (It is unknown whether or not the Arvada, Colorado location is directly operated by either of the franchisee Defendants). Following said incident, Defendant Wendy's Co. released public statements through its spokesperson Bob Bertini claiming to take "this situation very seriously." Future events show Defendant Wendy's Co. did not, in fact, take situations of racism "very", or even minimally, seriously.

48. Upon information and belief, following the 2015 incident and Mr. Bertini's statement that Defendant Wendy's Co. took the situation "very seriously," Defendant Wendy's Co. posted a racist meme on its official Twitter account.

49. Upon information and belief, in January 2017, the official Twitter account for Defendant Wendy's Co., @Wendys, issued a tweet with racist undertones, after another Twitter user with the screenname @MrRespek directed a question to @Wendys: "Got any memes?", to which @Wendy's replied with a tweet of the "Pepe the Frog" meme. The "Pepe the Frog" meme was, and is, recognizable and widely known to be intended as derogatory towards Hispanics, Latinos and Chicanos.

50. As the January 2017 “Pepe the Frog” Twitter incident followed approximately two years after the incident in Arvada, Colorado, the “DARKIE” receipt given to Plaintiff followed approximately two years after the January 2017 “Pepe the Frog” Twitter incident.

51. To date, Plaintiff is unaware of any standardized racial sensitivity training within the Wendy’s organization, including Defendants, following either the 2015 Arvada incident, the 2017 “Pepe the Frog” tweet, or the 2020 “DARKIE” incident directed at Plaintiff.

52. Upon information and belief, Defendant Wendy’s Co. entire “Leadership Team” is comprised of solely Caucasian persons.

53. Upon information and belief, the ownership and executive teams of Defendants Wendy’s of Colorado Springs and WEN are comprised of solely Caucasian persons.

54. Unlike competitors who have implemented modern business practices, upon information and belief, none of Defendants maintain a leadership position to address issues of diversity and inclusion. Throughout the industry and business community, such positions are used to develop programming to ensure instances of racism, blatant and otherwise, do not occur.

55. On June 3, 2020, the official Twitter account for Defendant Wendy’s Co. tweeted:



56. When it came to the blatant racism directed at Plaintiff by Defendants' representative, Defendants did not believe his "voice[] need[s] to be heard. Period." This false public representation made by Wendy's Co. increased the pain and humiliation felt by Plaintiff.

57. On the same day, the official Twitter account for Defendant Wendy's Co. tweeted:



58. When it came to the blatant racism against Plaintiff by Defendants' representative, they were not committed to doing the work and did not hear him. The public representation made by Wendy's Co. increased the pain and humiliation felt by Plaintiff.

59. On the same day, the official Twitter account of Wendy's Co. tweeted:



60. Plaintiff's voice was not amplified by Defendants Wendy's Co., Wendy's of Colorado Springs, or WEN. (In fact, "in the coming days" Wendy's Co. violated its promise and did not utilize its Twitter account to amplify Black voices, although it did utilize it to respond to

customer complaints about poor food production). The public representations to a commitment to amplify Black voices when Defendants instead sought to quiet Plaintiff's voice on matters of public concern related to acts of blatant racism by Defendants' representative that caused pain increased the pain and humiliation felt by Plaintiff.

61. On June 25, 2020, the official Twitter account of Defendant Wendy's Co. tweeted:



62. When it came to the blatant racism within its own organizations, including the blatant racism directed at Plaintiff by Defendants' representative, Defendants had not and have not taken the time to ensure a focus on supporting positive change. Defendant Wendy's Co.'s public representation increased the pain and humiliation felt by Plaintiff.

**Defendant Wendy's Co.'s Control Over Franchisees
Wendy's of Colorado Springs and WEN**

63. Defendant Wendy's Co. is a global corporation operating fast food restaurants and overseeing franchises worldwide, including by and through various wholly owned subsidiaries such as Wendy's U.S., Wendy's International, LLC, and Wendy's Properties. Defendant Wendy's Co. knowingly operates in New Mexico, advertises in New Mexico, utilizes its trademarks in New Mexico, and otherwise purposefully avails itself of New Mexico.

64. Defendant Wendy's Co. has developed and owns a distinctive format and system relating to the establishment and operation of Wendy's Old Fashioned Hamburgers restaurants.

65. Said format and system includes uniform standards and procedures for operations, including uniformity in services, training, and procedures for management.

66. Defendant Wendy's Co. permits franchisees to operate under said format and system under the oversight of Defendant Wendy's Co. In order to operate Wendy's restaurants, Defendant Wendy's Co. requires franchisees, such as Defendants Wendy's of Colorado Springs and WEN, operate the business in conformity with Wendy's Co.'s standards and procedures. Defendant Wendy's Co. developed and printed an Operating Manual which franchisees, such as Defendants Wendy's of Colorado Springs and WEN, are required to follow. Franchisees must operate any Wendy's restaurant in strict conformity with the standards and methods of Defendant Wendy's Co. This includes control over the Wendy's restaurant at 4800 Menaul Boulevard NE.

67. In order to operate a Wendy's restaurant, franchisees such as Defendants Wendy's of Colorado Springs and WEN are required to comply with Defendant Wendy's Co.'s training requirements, in particular for individuals within the management structure. Franchisees' management employees involved in the operation of any Wendy's restaurant are required to attend refresher courses, seminars and other training programs as Defendant Wendy's Co. may require. This includes control over the Wendy's restaurant at 4800 Menaul Boulevard NE.

68. In order to continue operating a Wendy's restaurant, franchisees such as Defendants Wendy's of Colorado Springs and WEN are required to present evidence to satisfy Defendant Wendy's Co. that the rigorous standards are being met. This includes control over the Wendy's restaurant at 4800 Menaul Boulevard NE.

69. Defendant Wendy's Co. requires franchisees, such as Defendants Wendy's of Colorado Springs and WEN, to permit inspections of any Wendy's restaurants operated by said franchisee. Said inspections evaluate both products sold and services rendered. This includes control over the Wendy's restaurant at 4800 Menaul Boulevard NE.

70. Defendant Wendy's Co. provides continuing assistance to franchisees, such as Defendants Wendy's of Colorado Springs and WEN, as to the operation of any Wendy's restaurant. This includes control over the Wendy's restaurant at 4800 Menaul Boulevard NE.

71. Defendant Wendy's Co. requires franchisees, such as Defendants Wendy's of Colorado Springs and WEN, to satisfy Defendant Wendy's Co.'s managerial and business standards. This includes control over the Wendy's restaurant at 4800 Menaul Boulevard NE.

72. Defendant Wendy's Co. requires any franchisee, such as Defendants Wendy's of Colorado Springs and WEN, to implement and adhere to any and all changes, additions or refinements to the afore-mentioned format and system, which includes managerial matters and quality of service issues. This includes control over the Wendy's restaurant at 4800 Menaul Boulevard NE.

73. Franchisees, such as Defendants Wendy's of Colorado Springs and WEN, cannot freely transfer ownership without the express approval of Defendant Wendy's Co. This includes control over the Wendy's restaurant at 4800 Menaul Boulevard NE.

74. Defendant Wendy's Co. may terminate the franchise of a franchisee, such as Defendants Wendy's of Colorado Springs and WEN, that fails to implement or adhere to the format and system required by Defendant Wendy's Co., including managerial matters and quality of service issues. This includes control over the Wendy's restaurant at 4800 Menaul Boulevard NE.

75. Defendant Wendy's Co. maintains "a system-wide advertising program" and maintains "the right to review and approve or disapprove of all advertising and promotional materials" of Defendant Wendy's of Colorado Springs and Defendant WEN. Defendant Wendy's Co. mandates any franchisee to conduct any promotional and advertising activities it deems required in connection with the opening of a Wendy's restaurant. In other words, Defendant Wendy's Co. controls the marketing activities of Defendant Wendy's of Colorado Springs and Defendant WEN. This includes control over the Wendy's restaurant at 4800 Menaul Boulevard NE.

76. Defendant Wendy's Co. purposefully permits the use of its registered trademarks by Defendant Wendy's of Colorado Springs and Defendant WEN, who represent themselves as representatives of Defendant Wendy's Co. as a result thereof with the knowledge and understanding of Defendant Wendy's Co.

77. Defendant Wendy's Co. mandates that Defendant Wendy's of Colorado Springs and Defendant WEN maintain specific hours of operation and that any deviation therefrom must be approved in writing by Defendant Wendy's Co. This includes control over the Wendy's restaurant at 4800 Menaul Boulevard NE.

78. Defendant Wendy's Co. maintains the right to enter the premises of all Wendy's restaurants to make modifications it deems necessary. This includes control over the Wendy's restaurant at 4800 Menaul Boulevard NE.

79. Employees of Defendant Wendy's of Colorado Springs and Defendant WEN wear uniforms containing the emblems and markings of Defendant Wendy's Co., and are required to do

so by Defendant Wendy's Co. This includes control over the Wendy's restaurant at 4800 Menaul Boulevard NE.

80. Defendant Wendy's Co. controls "the quality, service and cleanliness" of each restaurant operated by a franchisee, such as Defendants Wendy's of Colorado Springs and WEN. This includes control over the Wendy's restaurant at 4800 Menaul Boulevard NE.

81. Defendant Wendy's Co. controls "the products and services sold, offered for sale, or provided" at every Wendy's restaurant, including those within by Defendants Wendy's of Colorado Springs and WEN. This includes control over the Wendy's restaurant at 4800 Menaul Boulevard NE.

82. Defendant Wendy's Co. requires payments from Defendants Wendy's of Colorado Springs and WEN based on a percentage of earnings from said Defendants' restaurants, including, but not limited to the Wendy's restaurant at 4800 Menaul Boulevard NE, Albuquerque, New Mexico.

83. Defendant Wendy's Co. controls the operation of every Wendy's restaurant. This includes control over the Wendy's restaurant at 4800 Menaul Boulevard NE.

Defendant Wendy's of Colorado Springs' Management

84. Upon information and belief, Defendant Wendy's of Colorado Springs was founded and is operated by Richard Holland.

85. According to the New Mexico Secretary of State, Mr. Holland is listed as the Director and President of Defendant Wendy's of Colorado Springs, and also as a Manager of Defendant WEN.

86. According to the New Mexico Secretary of State, the two companies share another manager, Thomas J. Reinhard.

87. According to the New Mexico Secretary of State, the two companies share a mailing address of 1515 North Academy Boulevard, Suite 400, Colorado Springs, Colorado 80909.

88. On or about July 25, 2003, the Colorado Springs Business Journal published an interview of Mr. Holland. In said interview, Mr. Holland described a close relationship between Defendant Wendy's Co. and himself as owner of Defendant Wendy's of Colorado Springs, including specific requests from Defendant Wendy's Co. for Mr. Holland to build Wendy's restaurants. In that interview Mr. Holland referred to Wendy's as a whole, encompassing all Wendy's restaurants, indicating a significant level of control by Defendant Wendy's Co.

89. In the July 25, 2013, Colorado Springs Business Journal interview, Mr. Holland also discussed his personal involvement with relations and recognition of long-term Wendy's employees within his web of Wendy's restaurants.

90. Upon information and belief, Defendants Wendy's Co. and Wendy's of Colorado Springs, by and through their agents, maintain management and/or oversight responsibilities over Defendant WEN.

COUNT I
Violations of the New Mexico Human Rights Act
(Against All Defendants)

91. The preceding paragraphs are incorporated as if fully stated herein.

92. Defendants provide services and goods to public and are "public accommodations" as defined in NMSA 1978, § 28-1-2(H).

93. The Wendy's restaurant located at 4800 Menaul Boulevard NE is open to all members of the public and Defendants Wendy's Co. and WEN hold it out as a public accommodation.

94. The NMHRA provides that it is unlawful for "any person in any public accommodation" to discriminate against an individual based on race, religion, color, national origin, or ancestry, among other characteristics. NMSA 1978, § 28-1-7(F).

95. Defendants distinguished in service provided Plaintiff because of his race, color and ancestry. Printing his identification as "Darkie", an old racist slur, was a derogatory reference to Plaintiff's race (African American), his color (black), and his ancestry (of African descent). This was not a case of keys becoming stuck or misspelling. It was intentional and open discrimination from a person of authority within the Wendy's system.

96. Plaintiff has suffered damages, including, but not limited to, emotional pain and suffering and loss of enjoyment of life, as a result of Defendants' unlawful conduct.

97. The conduct of Defendants was willful, intentional, wanton, or taken in utter disregard for the safety and well-being of others, including Plaintiff, and subjects the Defendants to punitive damages.

COUNT II
Intentional Infliction of Emotional Distress
(Defendant Jane Doe)

98. The preceding paragraphs are incorporated as if fully stated herein.

99. Defendant Jane Doe (aka "Irene") was acting during and in the course of her employment as a representative of Wendy's and Defendants at all times material hereto.

100. The conduct of Defendant Jane Doe was intentional and malicious or in reckless disregard for the welfare of Plaintiff, and, under the circumstances, was extreme and outrageous.

101. As a direct and proximate result of said conduct, Plaintiff suffered emotional distress and outrage, which resulted in the injuries and damages discussed herein.

102. The conduct of Defendant Jane Doe was willful, intentional, wanton, or taken in utter disregard for the safety and well-being of others, including Plaintiff, and subjects Defendant Jane Doe to punitive damages.

**COUNT III
PRIMA FACIE TORT
(Defendant Jane Doe)**

103. The preceding paragraphs are incorporated as if fully stated herein.

104. Defendant Jane Doe (aka “Irene”) was acting during and in the course of her employment as a representative of Wendy’s and Defendants at all times material hereto.

105. The conduct of Defendant Jane Doe was intentional.

106. Defendant Jane Doe knew with certainty that her conduct would cause harm to Plaintiff.

107. Defendant Jane Doe’s conduct did cause Plaintiff harm.

108. Defendant Jane Doe’s conduct was not justifiable.

**COUNT IV
Vicarious Liability
(Defendants Wendy’s Co., Wendy’s of Colorado Springs, and WEN)**

109. The preceding paragraphs are incorporated as if fully stated herein.

110. Defendant Jane Doe (aka “Irene”) was acting during and in the course of her employment as a representative of Wendy’s and Defendants at all times material hereto.

111. Defendants Wendy's Co., Wendy's of Colorado Springs, and WEN placed "Irene" in a position of direct contact with the public as a representative of Wendy's and cloaked her in the trappings of agency for Wendy's.

112. Defendants Wendy's Co., Wendy's of Colorado Springs, and WEN trained, instructed and required "Irene" and other employees to obtain the name of each walk-in customer to be put on said customer's receipt.

113. Defendants Wendy's Co., Wendy's of Colorado Springs, and WEN trained, instructed, and required "Irene" and other employees to print the name of each walk-in customer directly onto their receipt.

114. "Irene" was able to cause harm through printing a vile racist trope on Plaintiff's receipt by virtue of the position in which she was placed by Defendants.

115. Defendants Wendy's Co., Wendy's of Colorado Springs, and WEN are liable for the actions of "Irene" as their agent.

116. Defendants Wendy's Co., Wendy's of Colorado Springs, and WEN are otherwise vicariously liable for the actions of "Irene."

117. By reason of her agency relationship with Defendants Wendy's Co., Wendy's Colorado Springs, and Wen, "Irene" was able to engage in her discriminatory actions against Plaintiff.

118. Defendants Wendy's Co., Wendy's of Colorado Springs, and WEN are liable for the actions of "Irene" pursuant to New Mexico's adoption of the theory of aided-in-agency.

119. As a direct and proximate result of Defendants' conduct, Plaintiff suffered emotional distress and outrage, which resulted in the injuries and damages discussed herein.

120. The conduct of “Irene” and Defendants was willful, intentional, wanton, or taken in utter disregard for the safety and well-being of others, including Plaintiff, and subjects the Defendants to punitive damages.

COUNT V
Negligence
(Defendants Wendy’s Co., Wendy’s of Colorado Springs, and WEN)

121. The preceding paragraphs are incorporated as if fully stated herein.

122. As a public accommodation, Defendants Wendy’s Co., Wendy’s of Colorado Springs and WEN had a duty to provide Plaintiff service free from discrimination at the hands of their employees, agents and representatives.

123. Defendants Wendy’s Co., Wendy’s of Colorado Springs and WEN breached their duty by failing to provide non-discriminatory service.

124. Defendants Wendy’s Co., Wendy’s of Colorado Springs and WEN had a duty to adequately supervise, prohibit, control, and regulate the behavior of their managers, supervisors, agents, and employees as alleged in this Complaint.

125. Defendants Wendy’s Co., Wendy’s of Colorado Springs and WEN breached their duty and failed to properly screen, hire, train, monitor, supervise, and discipline employees within their organizations, including the provision of proper training, supervision, and discipline on the subject of discriminatory practices by employees, including, but not limited to, such failures within the “format and system” developed and overseen by Defendant Wendy’s Co. and implemented by Defendant’s Wendy’s of Colorado Springs and WEN. This negligent training and supervision on the part of Defendants Wendy’s Co., Wendy’s of Colorado Springs and WEN was a direct and proximate cause of the injuries and resultant damages to Plaintiff.

126. Defendants Wendy's Co., Wendy's of Colorado Springs and WEN knew or reasonably should have known that the conducts, acts, omissions, or failures to act of its supervisors, agents, and employees such as Defendant Jane Doe as alleged in this Complaint would and did result in emotional distress and damages to Plaintiff.

127. The conduct of Defendants Wendy's Co., Wendy's of Colorado and WEN was willful, intentional, wanton, or taken in utter disregard for the safety and well-being of others, including Plaintiff, and subjects the Defendants to punitive damages.

128. As a direct and proximate result of Defendant Wendy's Co., Wendy's of Colorado and WEN's negligence, Plaintiff suffered emotional distress and other damages.

COUNT VI
(Premises Liability – Defendants Wendy's Co., Wendy's Properties and WEN)

129. The preceding paragraphs are incorporated as if fully stated herein.

130. At all times material hereto, Defendant Wendy's Co. had access to and control over the premises, operations, policies, training, and branding at the Wendy's restaurant located at 4800 Menaul Blvd. NE, Albuquerque, New Mexico.

131. Upon information and belief, Defendant Wendy's Properties is a wholly owned subsidiary of Defendant Wendy's Co, subject to the control thereof.

132. Upon information and belief, at all times material hereto, Defendant Wendy's Properties owned, controlled and had access to the real property at 4800 Menaul Blvd. NE, Albuquerque, New Mexico and the Wendy's restaurant located thereon.

133. As a result of Defendant's Wendy's Co. and Wendy's Properties' ownership, control and access to the Wendy's restaurant located at 4800 Menaul Blvd. NE, Albuquerque, New

Mexico, said Defendants had a duty to exercise ordinary care to maintain the premises in a safe condition and free from unreasonable hazards.

134. Upon information and belief, at all times material hereto, the Wendy's restaurant located at 4800 Menaul Blvd. NE, Albuquerque, New Mexico, was subject to a lease agreement between Defendant WEN and Defendant Wendy's Properties and/or Defendant Wendy's Co.

135. Upon information and belief, at all times material hereto, the Wendy's restaurant located at 4800 Menaul Blvd. NE, Albuquerque, New Mexico, was subject to a franchise agreement such as described in this Complaint between Defendant Wendy's Co. and Defendant WEN which provided Defendant Wendy's Co., by and through wholly-owned subsidiaries, access to and control over the premises, operations, policies, training and branding at the Wendy's restaurant located at 4800 Menaul Blvd. NE, Albuquerque, New Mexico.

136. At all times material hereto, Defendant WEN had access to and control over the premises, operations, policies, training, and branding at the Wendy's restaurant located at 4800 Menaul Blvd. NE, Albuquerque, New Mexico, and thus had a duty to exercise ordinary care to maintain the same in a safe condition and free from unreasonable hazards.

137. Defendants Wendy's Co., Wendy's Properties and WEN knew or should have known that blatant racism by Wendy's employees and agents posed an unreasonable and dangerous hazard to minority patrons and invitees, including Plaintiff.

138. Defendants Wendy's Co., Wendy's Properties and WEN knew or should have known that failing to adequately supervise, prohibit, control, and regulate the behavior of their managers, supervisors, agents, and employees as set forth in this Complaint posed an unreasonable hazard to African American patron invitees.

139. Defendants Wendy's Co., Wendy's Properties and WEN breached their respective duties to exercise ordinary care as set forth in this Complaint, and said breach directly and proximately caused Plaintiff to suffer injury, emotional distress and other damages.

140. The conduct of Defendants Wendy's Co., Wendy's Properties and WEN was willful, intentional, wanton, or taken in utter disregard for the safety and well-being of others, including Plaintiff, and subjects the Defendants to punitive damages.

REQUEST FOR RELIEF

ACCORDINGLY, Plaintiff seeks relief from the Court as follows:

1. Award Plaintiff damages as a direct and proximate result of the wrongful and unlawful acts and omissions of Defendants; Plaintiff was injured and has suffered and continues to suffer damages, including, but not limited to: severe emotional distress, anguish, suffering, humiliation, psychological injuries, indignities, and loss of enjoyment of life;
2. Award Plaintiff full compensatory and statutory damages against all Defendants as a result of the above-described damages and injuries in amounts to be determined at the trial of this cause;
3. Award Plaintiff his costs and expenses, including reasonable attorneys' fees to the extent permitted by law; and
4. Award Plaintiff punitive damages as provided by law against all Defendants in an amount sufficient to compensate him for all injuries and harm he has suffered, as well as the costs of bringing this action, pre- and post-judgment interest as provided

by law, and such other and further relief as proves just or appropriate under the circumstances.

JURY DEMAND

Plaintiff requests a trial by a six-person jury on all issues and counts so triable.

Respectfully Submitted,

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