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11 Attorneys for Plaintiff Abner Quincho

12 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
13 **COUNTY OF SAN BERNARDINO**

14 ABNER QUINCHO, on behalf of the State of
15 California, as private attorney general,

16 **PLAINTIFF,**

17 **v.**

18 CAFE RIO, INC., a Corporation; and DOES 1
19 through 50, inclusive,

20 **DEFENDANTS.**

Case No.: CIVDS2011822

[Assigned for all purposes to the Hon. Janet
Frangie, Dept. S29]

**DECLARATION OF DAVID S. WINSTON
IN SUPPORT OF APPROVAL OF PAGA
SETTLEMENT**

Date: December 14, 2021
Time: 9:00 am

Complaint Filed: May 29, 2020
Trial Date: None Set

1 **DECLARATION OF DAVID S. WINSTON**

2 I, **DAVID S. WINSTON**, declare as follows:

3 1. I am an attorney licensed to practice before all of the courts of the State of California. I
4 am an attorney of record for Abner Quincho the above-entitled action. I have personal knowledge of
5 the facts set forth herein, and if called upon as a witness, I could and would testify competently thereto.

6 2. I graduated from the University of California, Los Angeles School of Law in 2014 and
7 graduated *summa cum laude* with a B.A. in Political Science from Vanderbilt University. I am
8 admitted to practice before the following Courts: the United States District Court for the Central
9 District of California, the United States District Court for the Eastern District of California, the United
10 States District Court for the Southern District of California, the United States District Court for the
11 Northern District of California, the Ninth Circuit Court of Appeal, and all California State Courts. I
12 have been practicing law since 2014.

13 **THE EXPERIENCE AND VIEWS OF PAGA COUNSEL**

14 3. Prior to starting the Winston Law Group, P.C. in 2017, I regularly litigated class and
15 representative PAGA actions as an Associate at Kingsley & Kingsley and represented employers in
16 class, representative, and individual actions at Lewis Brisbois Bisgaard & Smith and Burke, Williams,
17 & Sorensen, LLP.

18 4. Although PAGA Counsel's adequacy is not an issue that a court may consider in a
19 PAGA action,¹ I also have significant experience with PAGA litigation having briefed PAGA issues
20 before the California Court of Appeal several times including in *Anaya v. J's Maint. Serv., Inc.*, No.
21 B261662, 2016 WL 519867 (Cal. Ct. App. Feb. 9, 2016) and the appellant's brief in *Lopez v. Friant &*
22 *Assocs., LLC*, 15 Cal.App.5th 773, 788 (2017) while at Kingsley & Kingsley, APC.

23
24
25 ¹ See *Williams v. Superior Court*, 3 Cal.5th 531, 546-547 (2017) ("Marshalls notes, correctly, that PAGA actions and
26 certified class actions have a host of identifiable procedural differences. PAGA does not make other potentially aggrieved
27 employees parties or clients of plaintiff's counsel, does not impose on a plaintiff or counsel any express fiduciary
28 obligations, and does not subject a plaintiff or counsel to scrutiny with respect to the ability to represent a large class;
Baumann v. Chase Inv. Servs. Corp., 747 F.3d 1117, 1123 (9th Cir. 2014) ("a PAGA suit is fundamentally different than a
class action" because "the court does not inquire into the named plaintiff's and class counsel's ability to fairly and
adequately represent unnamed employees.")).

1 5. Since founding Winston Law Group, P.C. I have also been appointed Class or PAGA
2 Counsel in numerous class action and PAGA cases including:

3 a. *Porras et al. vs. Chipotle Services, LLC, Stanislaus County Superior Court (Case No.*
4 *CV-19-000937)*. This PAGA settlement was approved by the Hon. Sonny S. Sadhu on June 16, 2020 in
5 the gross amount of \$4,900,000.

6 b. *Miller et al. vs. Mattress Firm, Inc., Santa Clara County Superior Court (Case No.*
7 *17CV313148)*. This PAGA settlement was approved by the Hon. Thomas E. Kunle on December 17,
8 2018 in the gross amount of \$3,750,000.

9 c. *Smart & Final Wage and Hour Cases, Sacramento County Superior Court (JCCP*
10 *Number 5089)*. This PAGA settlement was approved by the Hon. Richard K. Sueyoshi on July 9, 2021
11 in the gross amount of \$3,470,000.00.

12 d. *Zirpolo vs. UAG Stevens Creek, Inc. (Penske), Santa Clara County Superior Court*
13 *(Case No. 17CV313457)*. The matter was finally approved for settlement by the Honorable Brian C.
14 Walsh on July 10, 2018 in the gross amount of \$3,275,000.

15 e. *Espindola et al. vs. Panda Express, LLC et al., San Bernardino County Superior Court*
16 *(Case No. CIVDS1931455)*. This PAGA settlement was approved by the Hon. David Cohn on April 13,
17 2021 in the gross amount of \$3,125,000.00.

18 f. *Westbrook vs. Winco Holdings Inc. et al., Riverside County Superior Court (Case No.*
19 *RIC1710168)*. The matter was finally approved for settlement by the Hon. Raquel A. Marquez on
20 January 15, 2019 in the gross amount of \$3,000,000.

21 g. *Amster et al. vs. Starbucks Corporation, San Bernardino County Superior Court (Case*
22 *No. CIVDS1922016)*. This PAGA settlement was approved by the Hon. Donald Alvarez on July 14,
23 2020 in the gross amount of \$3,000,000.

24 h. *Antonov et al. vs. GL HHR, LLC (Ken Garff Automotive) et al., San Bernardino County*
25 *Superior Court (Case No. CIVDS1724725)*. The matter was finally approved for settlement by the Hon.
26 David Cohn on December 11, 2018 in the gross amount of \$2,850,000.

1 i. *Scoggins et al. vs. Crossmark, Inc. et al., Ventura County Superior Court (Case No. 56-*
2 *2017-00492936-CU-OE-VTA)*. The matter was finally approved for settlement by the Hon. Matthew P
3 Guasco on January 23, 2020 in the gross amount of \$2,100,000.

4 j. *Smith et al. vs. Burlington Merchandising Corporation et al., San Bernardino County*
5 *Superior Court (Case No. CIVIDS1929684)*. This PAGA settlement was approved by the Hon. David
6 Cohn on October 23, 2020 in the gross amount of \$2,000,000.

7 k. *Castaing et al. vs. Hendrick Automotive Group et al., Alameda County Superior Court*
8 *(Case No. RG17879115)*. The matter was finally approved for settlement by the Hon. Brad Seligman on
9 June 24, 2019 in the gross amount of \$1,850,000.

10 l. *Westphal vs. New York Life Insurance Company, Placer County Superior Court (Case*
11 *No. S-CV-0040532)*. The matter was finally approved for settlement by the Hon. Michael Jones on
12 September 11, 2018 in the gross amount of \$1,701,366.

13 m. *Williams vs. Kaiser Foundation Health Plan, Inc., Alameda County Superior Court*
14 *(Case No. RG 18917898)*. The matter was finally approved for settlement by the Hon. Stephen Klaus
15 on August 19, 2020 in the gross amount of \$1,250,000.

16 n. *Berbano and Centeno vs. Ingram Micro, Inc., San Bernardino County Superior Court*
17 *(Case No. CIVDS1826805)*. The matter was finally approved for settlement by the Hon. David Cohn on
18 September 17, 2019 in the gross amount of \$1,180,000.

19 o. *Chiefer and Goldenberg vs. WHGM, Inc. (Keyes Motors), Los Angeles County Superior*
20 *Court (Case No. LC106505)*. The matter was finally approved for settlement by the Hon. Rupert A.
21 Byrdsong on September 21, 2018 in the gross amount of \$1,150,000.

22 p. *Hollis vs. Union Pacific Railroad Co., Central District of California No. 5:17-Cv-*
23 *02449-JGB (SHKx)*. The matter was finally approved for settlement by the Hon. Jesus G. Bernal on
24 September 19, 2018 in the gross amount of \$1,083,965.

25 q. *Myers vs. Mor Furniture for Less, Inc., San Diego County Superior Court (Case No. 37-*
26 *2018-00055055-CU-OE-NC)*. The PAGA Settlement was approved by the Hon. Ronald Frazier on
27 November 27, 2018 in the amount of \$1,062,000.

1 r. *Grotte vs. Normal Life of California, Inc. et al., San Luis Obispo County Superior Court*
2 *(Case No. 18CV-0672)*. The matter was finally approved for settlement by the Hon. Tana L. Coates in
3 the gross amount of \$1,050,000 on June 24, 2020.

4 s. *Wilson et al. vs. DGDG 1, LLC et al. (Del Grande Automotive Group), Santa Clara*
5 *County Superior Court (Case No. 2018-1-CV-331434)*. The matter was finally approved by the Hon.
6 Thomas E. Kuhnle on January 17, 2020 in the gross amount of \$1,024,963.71.

7 t. *Perea vs. Drybar Holdings LLC, Los Angeles County Superior Court (Case*
8 *No.BC703413)*. The matter was finally approved for settlement by the Hon. Yolanda Orosco on
9 September 9, 2019 in the amount of \$1,000,000.

10 u. *Ali vs. Auto Nation, Inc. et al., San Diego County Superior Court (Case No. 37-2018-*
11 *00037616-CU-OE-CTL)*. The PAGA settlement was approved by the Hon. Ronald Frazier on
12 November 14, 2019 in the gross amount of \$851,000.

13 v. *Ashe vs. Farmers Insurance Exchange et al., Los Angeles County Superior Court (Case*
14 *No. 18STCV00453)*. This Fair Credit Reporting Act class action was finally approved by the Hon.
15 Steven J. Kleifield on August 6, 2020 in the gross amount of \$800,000.

16 w. *Anderson vs. ABC Phones of North Carolina, Inc., Contra Costa County Superior Court*
17 *(Case No. MSC20-00957)*. This PAGA action was approved by the Hon. Edward G. Weil on July 8,
18 2021 in the gross amount of 2021.

19 x. *Martinez vs. Vieira Agricultural Enterprises, LLC, Merced County Superior Court*
20 *(Case No. 19CV-04603)*. The matter was finally approved for settlement by the Hon. Brian McCabe on
21 February 26, 2021 in the gross amount of \$775,000.

22 y. *Pia vs. 5G's Automotive, Inc., Tulare County Superior Court (Case No. VCU274628)*.
23 The matter was finally approved for settlement by the Hon. Brett Hillman on September 6, 2019 in the
24 gross amount of \$750,000.

25 z. *Herrera vs. Inland Staffing et al., San Bernardino County Superior Court (Case No.*
26 *CIVDS2924284)*. The matter was finally approved for settlement by the Hon. David S. Cohn on March
27 10, 2021 in the gross amount of \$750,000.

1 *aa. Kennedy vs. 99 Cents Only Stores, LLC, Los Angeles County Superior Court (Case No.*
2 *19STCV09311).* The PAGA settlement was approved by the Hon. Anthony Mohr on November 19,
3 2019 in the gross amount of \$700,000.

4 *bb. Sumlin vs. BNSF Railway Company, San Bernardino County Superior Court (Case No.*
5 *CIVDS1724126).* The matter was finally approved for settlement by the Hon. David Cohn on
6 September 5, 2018 in the gross amount of \$675,000.

7 *cc. Brown vs. Saks and Company, LLC, Central District of California (CV 17-04210 SJO*
8 *(JEM)).* This matter was finally approved for settlement by the Hon. S. James Otero on March 22, 2018
9 in the gross amount of \$638,800.

10 *dd. Myers vs. LBC Limited Partnership, San Bernardino County Superior Court (Case No.*
11 *CIVDS 1715068).* The matter was finally approved for settlement by the Hon. Janet Frangie on July 25,
12 2018 in the gross amount of \$600,000.

13 *ee. Garcia vs. Optima Tax, Orange County Superior Court (Case No. 30-2019-01082473-*
14 *CU-OE-CXC).* This PAGA settlement was approved on July 31, 2020 by the Hon. William Claster in
15 the gross amount of \$550,000.

16 6. I am experienced and qualified to evaluate the PAGA claims and viability of the
17 defenses. I have extensive experience in prosecuting and defending employment litigation, and have
18 focused my practice primarily on cases regarding wage and hour class actions and representative
19 PAGA actions.

20 7. Based upon my experience and after factoring in the risks associated with the claims, I
21 believe that this Settlement is fair and reasonable and should be approved.

22 8. In my opinion, the attorneys' fees sought by my firm and my Co-Counsel are fair and
23 reasonable and should be approved.

24 9. I am familiar with the contingent fee market throughout California, particularly as it
25 pertains to complex employment, wage and hour, class action, and PAGA litigation. During this
26 litigation, my Co-Counsel and I litigated this case without receiving any payment for our services or
27 reimbursement of the costs incurred for the benefit of the state of California and the aggrieved
28 employees.

1 10. On behalf of my firm, I have negotiated numerous contingency fee agreements with
2 plaintiffs, both as individuals and as representatives in class action and PAGA suits. Many of those
3 agreements provided that counsel will receive a fee that is between 33.33% and 40% of any recovery
4 that is obtained, and, in addition, that counsel be reimbursed for the costs they incurred out of the
5 recovery amount.

6 11. Winston Law Group, P.C. has never been paid any money for attorneys' fees in this
7 case.

8 12. There are always risks attendant to billing cases on a contingency basis. It is not a
9 foregone conclusion that every case taken on a contingency fee basis will result in a recovery or that
10 the attorneys' fees recovered will actually compensate my firm for the amount of time expended in an
11 action. Moreover, even when successful, a class action contingency law firm may only receive a small
12 percentage of the amount of attorneys' fees incurred during the prosecution of a case. Where
13 plaintiffs' counsel does succeed, therefore, it is appropriate to compensate the firm for the risks the
14 firm regularly undertakes. There is also always the possibility that the Plaintiff will not prevail and
15 Class Counsel will not receive any compensation for its services and/or that the Defendant will declare
16 bankruptcy or lack the assets necessary to satisfy any judgment obtained against it. This has happened
17 in a case handled by Winston Law Group, P.C. For instance, in *Chamberlain vs. United Airlines, Inc.*,
18 Case No.: 3-18-cv-05246-RS, my firm spent more than 62.90 hours on the case and did not receive
19 any compensation for the \$28,934.00 in attorney time expended on the case.

20 13. When awarding attorneys' fees, courts have discretion to choose among two different
21 methods for calculating a reasonable attorney's fees award: 1) the common fund approach; or 2) the
22 lodestar approach *See Laffitte v. Robert Half Int'l Inc.*, 1 Cal.5th 480, 504 (2016) ("The choice of a fee
23 calculation method is generally one within the discretion of the trial court, the goal under either the
24 percentage or lodestar approach being the award of a reasonable fee to compensate counsel for their
25 efforts.") In *Laffitte*, the California Supreme Court held that "[t]he recognized advantages of the
26 percentage method – including relative ease of calculation, alignment of incentives between counsel
27 and the class, a better approximation of market conditions in a contingency case, and the
28 encouragement it provides counsel **to seek an early settlement and avoid unnecessarily prolonging**

1 **litigation** – convince us the percentage method is a valuable tool that should not be denied by our trial
2 courts.” *Id.* (emphasis added). Similarly, the Ninth Circuit has found that counsel should not “receive
3 a lesser fee for settling a case quickly.” *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043 (9th Cir. 2002).
4 Such an award is especially appropriate, whereas here, PAGA Counsel efficiently prosecuted the
5 action and reached a settlement without unnecessarily exhausting Defendant’s resources that could be
6 allocated towards settlement during the COVID-19 pandemic.

7 14. I am familiar with the amounts awarded by other courts where there is a common fund
8 recovery, including in similar matters. For instance, the Court of Appeal in *Amaro v. Anaheim Arena*
9 *Mgmt., LLC*, 69 Cal. App. 5th 521, 545 (2021) recently recognized “‘fee awards in class actions
10 average around one-third of the recovery’” regardless of “‘whether the percentage method or the
11 lodestar method is used.’” *Id.* (quoting *Chavez v. Netflix, Inc.*, 162 Cal.App.4th 43, 66, fn. 11 (2008)).
12 This is consistent with findings made by other courts including the federal district court in San
13 Bernardino as evidenced by the two below citations from cases from Federal District Court Judge
14 Jesus Bernal. *McCrary v. Elations Co., LLC*, No. EDCV 13-0242 JGB (SPx), 2016 U.S. Dist. LEXIS
15 24050, at *2 (C.D. Cal. Feb. 25, 2016) (“California Courts have consistently recognized “that most fee
16 awards based on either a lodestar or percentage calculation are 33%.”); *McClellan v. Chase Home Fin.*
17 *LLC*, No. SACV 12-1331-JGB (JEMx) 2015 U.S. Dist. LEXIS 118005, at *20 (C.D.Cal. Aug. 31,
18 2015) explaining that while the attorneys’ fee award that approximated 32% of all sums paid under the
19 Settlement Agreement was reasonable after citing numerous other cases finding that an award of 33%
20 of the common fund was common in class actions.).

21 15. Consistent with *Laffitte v. Robert Half Int’l Inc.*, 1 Cal.5th 480, 506 (2016), I believe
22 that the Court should make a common fund award of 1/3 of the settlement as attorneys’ fees given the
23 significant, meaningful relief obtained by Plaintiff and PAGA Counsel through the prosecution of this
24 action. In my opinion, PAGA Counsel should not be penalized for their diligent and efficient litigation
25 of this action resulting in a significant award recovery for the State of California and aggrieved
26 employees while conserving judicial resources and avoiding unnecessarily prolonging litigation in the
27 midst of a pandemic. This is a particularly important consideration in this action because Café Rio is a
28

1 restaurant within the hospitality industry and it is well known that the hospitality industry as a whole
2 was impacted greatly by COVID-19.

3 16. My contributions to this action are not merely quantifiable on an hourly or lodestar as I
4 used my expertise to identify claims and issues and brought in Co-Counsel to work with us on this
5 matter leading to this significant recovery for the State of California and the aggrieved employees.
6 This includes, but is not limited to identifying the issue related to the failure to include the inclusive
7 dates of the pay periods on the itemized wage statements issued to the aggrieved employees.

8 17. I understand that recently, the California Court of Appeal recognized in a published
9 appellate decision that attorneys' fees can be awarded under California law in a wage and hour class
10 action to an attorney who did not perform any work on behalf of the class and that even a quantum
11 meruit award "is not measured strictly by hours times hourly rate." *Hance vs. Super Store Industries*,
12 44 Cal. App. 5th 676, 694 (2020). In my opinion this suggests that even under the lodestar approach a
13 court must also ascribe and/or consider the non-quantitative value provided by counsel when awarding
14 fees. Notably, in *Hance* one of the attorneys received a portion of the fees despite only having referred
15 the case. The Court noted that the trial court found that a 15% referral or \$645,000 was appropriate for
16 an attorney (William Margolin) who did nothing at all except refer the case. The *Hance* court also
17 found that another attorney (Steven Waisbren) who did not disclose his lack of malpractice insurance
18 in violation of the ethical rules was entitled to a *quantum meruit* award that reflected his non-monetary
19 contributions in referring the case to yet another attorney (Steve Miller) and for his work on the
20 matter. In reaching its decision, the Court of Appeal rejected Miller's argument that a quantum meruit
21 recovery is measured strictly by the hours times hourly rate. *Hance*, 44 Cal. App. 5th at 693
22 ("Miller...seems to conclude that, if a quantum meruit recovery is appropriate, Waisbren's recovery of
23 fees must be limited to the hours reflected in his time records, multiplied by a reasonable hourly rate.
24 We do not believe the trial court is bound by such a strict rule."). The Court of Appeal further noted
25 that "[i]f the class benefitted from Waisbren's referral of the case to Miller, that referral would appear
26 to constitute part of Waisbren's contribution to services rendered in support of, the class action, the
27 value of which should be considered in determining the amount of attorneys' fees to award to
28

1 Waisbren.” This was despite the fact that another attorney had already received \$645,000 in attorneys’
2 fees or 15% for referring the case to Waisbren who then referred it to Miller.

3 18. In my opinion, in light of *Hance vs. Super Store Industries*, 44 Cal. App. 5th 676, 694
4 (2020), the choice that California Court’s face when awarding attorneys’ fees is whether to make a pure
5 common fund award under the percentage method or a lodestar plus approach that takes into account
6 the non-quantitative contributions of counsel to an action. Simply put, it cannot be that an attorney who
7 violates the ethical rules is entitled to a greater award on a quantum meruit basis than an attorney who
8 follows the rules. Nor would such a result comport with *Hance*, which recognized that Waisbren’s
9 lower quantum meruit award that was not limited to hours worked on the case despite the fact that it
10 was intended to be a punishment for failing to comply with the ethical rules. *Hance*, 44 Cal. App. 5th at
11 690 (“Although the law firm may be entitled to some compensation for its work, its ethical breach will
12 ordinarily require it to relinquish some or all of the profits for which it negotiated.”).

13 19. While I believe that the Court should make an award of attorneys’ fees under the
14 common fund doctrine as a lodestar award would penalize Counsel for efficiently litigating a case, I
15 nevertheless wish to provide information concerning my hourly rate and time expended on the case to
16 permit the Court to run a lodestar cross-check if it desires.

17 20. Although I do not believe that a lodestar analysis is appropriate for the reasons
18 explained herein, my current hourly rate is \$650.00 per hour. My hourly rate reflects the current
19 market conditions as well as the amounts charged by the other firms. For instance, under the Laffey
20 Matrix, which measures years based upon the date of law school graduation (*i.e.* it changes in May
21 each year) and which does not distinguish between complex and non-complex litigation or associates
22 versus partners, my hourly rate should be \$672.00 per hour.

23 21. My lodestar hourly rate of \$650.00 per hour was used by Judge David Cohn of the San
24 Bernardino County Superior Court in performing a lodestar cross-check in *Flores vs. AVDC, Inc.*, San
25 Bernardino County Superior Court Case No. CVISB2025388 on October 21, 2021. The Court also
26 awarded a positive multiplier in that action and stated orally that the fees sought were reasonable both
27 under the common fund and lodestar approaches.

22. In another matter that my firm prosecuted in 2020, my counterpart on the other side advised that his “customary and usual rate for 2020 was \$945.” Below is a true and correct copy of an email from Keith Jacoby, who was the opposing counsel in *Amster et al. vs. Starbucks Corporation, San Bernardino County Superior Court (Case No. CIVDS1922016)* wherein he stated that his customary and usual rate for 2020 was \$945.

David Winston

From: Jacoby, Keith A. <KJacoby@littler.com>
Sent: Thursday, February 6, 2020 2:10 PM
To: Kyle Nordrehaug; Lavi, Rachael S.; david@employmentlitigators.com; Craig Ackermann
Cc: Iriye, Judy; Norm Blumenthal; Nicholas De Blouw; Lior Barkodar; Jaclyn Blackwell; AJ B; Rico Ehmann
Subject: RE: Starbucks-Bentley - draft Motion for PAGA Approval

If you want to use our rates instead or in addition to other firms, my customary and usual 2020 rate is \$945.
Have you reserved a hearing date?

Keith Jacoby
Shareholder
310.772.7284 direct, 310.701.6164 mobile, 310.553.5583 fax
kjacoby@littler.com



Labor & Employment Law Solutions | Local Everywhere
2049 Century Park East, 5th Floor, Los Angeles, CA 90067-3107

23. My hourly rate reflects both my experience with Class and PAGA litigation including participating in the litigation of numerous PAGA matters at the appellate levels, only some of which are referenced in this declaration. It also reflects the fact that I am a partner at Winston Law Group, P.C. and not an associate and oversaw this litigation. I have been lead or co-lead counsel in numerous multi-million dollar PAGA cases.

24. If the Court elects to undertake a lodestar crosscheck, I also believe that the Court should consider the published appellate decisions in *Horsford v. Board of Trustees of California State University*, 132 Cal. App. 4th 359, 397-400 (2005) and *Caldera v. Department of Corrections & Rehabilitation*, 48 Cal.App.5th 601, 610 (2020). In *Caldera*, the California Court of Appeal explained that the attorneys’ fees awards made by the trial court “was an abuse of discretion because the court failed to consider the out-of-town market rates of the attorneys involved in this case.” In *Caldera*, the

1 California Court of Appeal's addressed the San Bernardino County Superior Court's error in
2 arbitrarily ignoring out-of-town rates where evidence existed that local attorneys could not be found
3 and/or do not handle this type of litigation. The evidence before the Court indicates that both Plaintiff
4 and Defendant are represented by attorneys outside of San Bernardino—from Los Angeles, Orange
5 County, and San Diego—such that the proper market rate are those within the entirety of the Central
6 District of California or the State as a whole as opposed to just San Bernardino rates. Therefore, in my
7 opinion if a lodestar cross check is performed, the rates should reflect the prevailing rates within the
8 Central District of California or the State as a whole and not just the local rates in San Bernardino. I
9 also believe that the Court should also consider Judge Bernal, who is the federal district court judge in
10 Riverside, explanation "that most fee awards based on either a lodestar or percentage calculation are
11 33%." *McCrary*, No. EDCV 13-0242 JGB (SPx), 2016 U.S. Dist. LEXIS 24050, at *2; *McClellan*,
12 No. SACV 12-1331-JGB (JEMx) 2015 U.S. Dist. LEXIS 118005, at *20 (explaining that while the
13 attorneys' fee award that approximated 32% of all sums paid under the Settlement Agreement was
14 reasonable after citing numerous other cases finding that an award of 33% of the common fund was
15 common in class actions.).

16 25. Under the lodestar approach, a base amount is calculated by "multiplying the
17 reasonable hours expended by a reasonable hourly rate." *In re Washington Pub. Power Supply Sys.*
18 *Secs. Litig.* (9th Cir.1994) 19 F.3d 1291, fn. 2; *Wershba*, 91 Cal.App.4th at p. 254; *Serrano III*, 20
19 Cal.3d at p. 48. The reasonable hourly rate is that prevailing in the community for similar work.
20 *Margolin v. Regional Planning Com.* (1982) 134 Cal.App.3d 999, 1004–1005. Typically, the lodestar
21 is merely the starting point of the calculation of a reasonable fee, and courts often multiply the
22 lodestar by a factor to account for the risk of non-payment, delay in payment, the quality of work, and
23 the novelty and difficulty of the issues involved. *See, e.g., Ketchum v. Moses*, 24 Cal.4th at p. 1132;
24 *see also Serrano III*, 20 Cal.3d at 49; *Radar v. Thrasher* (1962) 57 Cal.2d 244, 253; *Beasley v. Wells*
25 *Fargo Bank* (1991) 235 Cal.App.3d 1407, 1419; *Coalition for L.A. County Planning v. Bd. of*
26 *Supervisors* (1977) 76 Cal.App.3d 241, 251. Multipliers can range from two to four, or even higher.
27 *Wershba v. Apple Computer, Inc.*, 91 Cal.App.4th 224, 255 (2001).

26. The Ninth Circuit has held that district courts “*must* apply a risk multiplier to the lodestar ‘when (1) attorneys take a case with the expectation they will receive a risk enhancement if they prevail, (2) their hourly rate does not reflect that risk, and (3) there is evidence that the case was risky. Failure to apply a risk multiplier in cases that meet these criteria is an abuse of discretion.’” *Stetson v. Grissom*, 821 F.3d 1157, 1166 (9th Cir. 2016) (*quoting Stanger v. China Elec. Motor, Inc.*, 812 F.3d 734, 741 (9th Cir. 2016).

27. Here, significant risk existed with respect to this action that was prosecuted in the midst of the COVID-19 pandemic, and it was uncertain what the financial impact of the pandemic would be upon a restaurant chain. As such, aside from the typical risk that existed with other wage and hour actions, there were also additional risks brought upon by the lack of certainty and disruption to the hospitality industry during the pandemic.

28. Although an award of attorneys’ fees as a percentage of the common fund is both common and universally accepted in wage and hour representative action litigation and I do not believe that a lodestar award would be appropriate and/or is consistent with the discussion of quantum meruit awards in *Hance*, I also performed a lodestar analysis for my firm in support of the attorneys’ fees request. In case the Court wishes to review it, attached as **Exhibit 1** is a true and correct copy of my firm’s redacted time records for this matter. My firm’s lodestar analysis is also summarized below for the Court’s convenience:

<u>ATTORNEY</u>	<u>HOURS</u>	<u>HOURLY</u> <u>RATE</u>	<u>TOTALS</u>
David S. Winston	21.50	\$650.00	\$13,975.00

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1 I declare under penalty of perjury under the laws of the State of California and the United States
2 of America that the foregoing is true and correct.

3
4 Executed this 11th day of November 2021, in Los Angeles, California.

5 
6 DAVID S. WINSTON

Exhibit 1

Un-Invoiced Time List

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Date	Client Name	Project	Description	Hours
8/2/2019	Cafe Rio		Identify issues including issues related to the absence of a pay period date on the wage statement	1.10
8/27/2019	Cafe Rio		Send email to Nick re: Records and status	0.10
12/19/2019	Cafe Rio		Review/Analyze email from Nick re: Issues identified in Document Production	0.10
12/19/2019	Cafe Rio		Respond to email from Nick re: Issues identified in Document Production	0.10
12/19/2019	Cafe Rio		Review/Analyze additional email from Nick re: Issues identified in Document Production	0.10
12/19/2019	Cafe Rio		Send email to BB re: Phone Call with Client	0.10
12/19/2019	Cafe Rio		Send email to Nick re: Phone Call with Client	0.10
12/19/2019	Cafe Rio		Review/analyze another email from Nick re: Phone Call	0.10
12/19/2019	Cafe Rio		Discuss communications with client with BB	0.10
12/20/2019	Cafe Rio		Phone Call with Nick De Blouw about discovery and additional issues	0.40
12/23/2019	Cafe Rio		Phone Call with Client re: Status of the case and update	0.60
12/23/2019	Cafe Rio		Send detailed email to Nick re: additional issues	0.20
1/2/2020	Cafe Rio		Review/Analyze PAGA Notice prepared by Co-Counsel	0.30
5/1/2020	Cafe Rio		Review/Analyze email from Nick to Opposing Counsel re: Phone Call about the case	0.10
5/1/2020	Cafe Rio		Review/Analyze email from Opposing Counsel to Nick re: Phone Call about the case	0.10
7/6/2020	Cafe Rio		Review/Analyze email from Rico re: Court Complaint and call from Clerk	0.10
7/6/2020	Cafe Rio		Respond to email from Rico re: Court Complaint and call from Clerk	0.10
7/10/2020	Cafe Rio		Review/Analyze email re: Potential Judicial Assignments	0.10

7/10/2020	Cafe Rio	Send detailed email re: Potential Judicial Assignments and whether or not to exercise 170.6	0.30
7/13/2020	Cafe Rio	Review/Analyze email from Rico to Co-Counsel re: Possible 170.6 peremptory challenge	0.10
7/13/2020	Cafe Rio	Review/Analyze email from AJ to Rico re: Possible 170.6 peremptory challenge	0.10
8/3/2020	Cafe Rio	Review/Analyze email from Daryl Landy re: Extension on time to file responsive pleading	0.10
8/3/2020	Cafe Rio	Review/Analyze email from Rico re: Extension on time to file responsive pleading	0.10
8/3/2020	Cafe Rio	Review/Analyze email from David Rashe re: Notice and Acknowledgment	0.10
8/3/2020	Cafe Rio	Review/Analyze email from Rico re: Notice and Acknowledgment	0.10
8/3/2020	Cafe Rio	Review/Analyze new complex department guidelines based upon reference to filing of answer, recently stays were imposed only permitting an appearance	0.30
8/13/2020	Cafe Rio	Review/Analyze email from Rico re: Extension	0.10
8/13/2020	Cafe Rio	Review/Analyze email from Daryl Landy re: Extension and potential early mediation	0.10
8/13/2020	Cafe Rio	Send email to Co-Counsel re: Strategy for mediation	0.10
8/13/2020	Cafe Rio	Review/Analyze email from Daryl Landy re: Early Mediation and responsive pleading deadline	0.10
8/13/2020	Cafe Rio	Send email to Co-Counsel re: Early Mediation and issues related thereto	0.10
8/17/2020	Cafe Rio	Review/Analyze email from AJ re: Mediation with Mark Rudy on March 2nd	0.10
8/17/2020	Cafe Rio	Review/Analyze email from Daryl Landy re: Mediation	0.10
8/17/2020	Cafe Rio	Review/Analyze follow-up email from AJ re: Mediation with Mark Rudy	0.10
8/18/2020	Cafe Rio	Review/Analyze email from Daryl Landy re: Mediation	0.10
8/18/2020	Cafe Rio	Review/Analyze email from AJ re: Mediation	0.10
8/19/2020	Cafe Rio	Review/Analyze email from Daryl Landy re: Mediation	0.10
8/26/2020	Cafe Rio	Review/Analyze email from Jackland Hom re: Revisions to the Stipulation	0.10
8/26/2020	Cafe Rio	Review/Analyze email from Daryl Landy to Jackland Hom re: Stipulation	0.10
8/26/2020	Cafe Rio	Review/Analyze respond to email from Daryl Landy by Jackland Hom re: Stipulation	0.10

9/24/2020	Cafe Rio	Review Correspondence from the Mediator	0.10
2/2/2021	Cafe Rio	Review/Analyze email from Daryl Landy re: Discovery Requests	0.10
2/5/2021	Cafe Rio	Review/Analyze email from Daryl Landry re: Discovery Requests for Mediation	0.10
2/5/2021	Cafe Rio	Review/Analyze email from AJ to Daryl Landry re: Informal Discovery Requests	0.10
2/5/2021	Cafe Rio	Send email to AJ re: Wage Statement issue applying to non-managers	0.10
2/8/2021	Cafe Rio	Review/Analyze email to Daryl Landy re: Informal Discovery and Mediation	0.10
2/8/2021	Cafe Rio	Send email to AJ re: Wage Statements and production of wage statements that are different than what the company produced	0.10
2/16/2021	Cafe Rio	Review/Analyze email from AJ re: Mediation Brief and Informal Discovery	0.10
2/17/2021	Cafe Rio	Review/Analyze email from Daryl Landy re: Informal Discovery	0.10
2/17/2021	Cafe Rio	Review/Analyze email from AJ to Daryl Landy re: Informal Discovery	0.10
2/17/2021	Cafe Rio	Review/Analyze Confidentiality Agreement	0.30
2/17/2021	Cafe Rio	Send email to Daryl Landy re: Confidentiality Agreement	0.10
2/19/2021	Cafe Rio	Review/Analyze email from AJ re: Wage Statements	0.10
2/19/2021	Cafe Rio	Send detailed email to AJ re: Wage Statement Issues, case cite, and additional issues	0.40
2/19/2021	Cafe Rio	Review/Analyze email from AJ re: McKenzie vs. Fedex	0.10
2/22/2021	Cafe Rio	Review/Analyze data from Cafe Rio re: Number of Pay Periods, Aggrieved Employees, and categories and other informal discovery data for mediation	0.10
2/22/2021	Cafe Rio	Review/Analyze email from Daryl Landy re: Mediation Brief	0.10
2/22/2021	Cafe Rio	Review/Analyze email from Mediator's Office re: Mediation	0.10
2/23/2021	Cafe Rio	Review/Analyze email from Nick DeBlouw re: Mediation/Communications with Client	0.10
2/23/2021	Cafe Rio	Respond to email from Nick re: Mediation Preparations	0.10
2/23/2021	Cafe Rio	Review/Analyze email from Piya re: Mediation Brief and questions about 2802 claims and text messages/communications	0.10
2/23/2021	Cafe Rio	Send detailed email re: Preparations for preparations for mediation and Reins issue	0.20

2/23/2021	Cafe Rio		Send email to Marisol re: Follow Up with Client	0.10
2/23/2021	Cafe Rio		Review/Analyze email from AJ re: Reins Issue	0.10
2/23/2021	Cafe Rio		Respond to email from AJ re: Reins issue	0.10
2/26/2021	Cafe Rio		Review/Analyze email from AJ re: GOLA and damage analysis for use at mediation	0.10
2/26/2021	Cafe Rio		Review/Analyze GOLA Documents to respond to inquiry from AJ including comparative data and send email re same	0.40
3/3/2021	Cafe Rio		Review/Analyze email from AJ re: Informal Discovery re: Financial Information	0.10
3/3/2021	Cafe Rio		Review/Analyze email from Daryl Landy re: Informal Discovery on Financial Issues/Ability to Pay	0.10
3/4/2021	Cafe Rio		Review/Analyze follow-up email from AJ re: Financial Discovery	0.10
3/29/2021	Cafe Rio		Review/Analyze email from AJ re: Settlement Offers	0.10
3/29/2021	Cafe Rio		Review/Analyze email chain with numerous emails between Mark Rudy (mediator) and Daryl Landy re: Defendant's position on settlement	0.20
3/29/2021	Cafe Rio		Send email to AJ about last, best, and final proposal from Defendant	0.10
4/2/2021	Cafe Rio		Review/Analyze email from AJ re: MOU and Settlement	0.10
4/2/2021	Cafe Rio		Respond to email from AJ re: MOU and Settlement	0.10
4/2/2021	Cafe Rio		Review/Analyze email from Daryl Landy re: MOU and Settlement	0.10
4/2/2021	Cafe Rio		Send email to AJ about MOU and process	0.10
6/7/2021	Cafe Rio		Review/Analyze email from Kyle re: Settlement Agreement	0.10
6/7/2021	Cafe Rio		Review/Analyze and Revise Settlement Agreement	0.50
6/7/2021	Cafe Rio		Send email to Kyle re: Settlement Agreement and Declaration	0.10
7/7/2021	Cafe Rio		Draft detailed case specific declaration in support of approval	3.10
7/8/2021	Cafe Rio		Review/Analyze email from Kyle to Darryl re: Status of the Review of the Settlement Agreement and comments	0.10
7/8/2021	Cafe Rio		Review/Analyze response from Daryl Landy re: Status of the review of the settlement agreement and comments	0.10
9/2/2021	Cafe Rio	David Winston	Review/Analyze email from Kyle from earlier in the week re: the Settlement Agreement	0.10

9/2/2021	Cafe Rio	David Winston	Respond to email from Kyle re: Settlement Agreement	0.10
9/13/2021	Cafe Rio	David Winston	Review/Analyze email from David Rashe re: Revisions to the draft Settlement Agreement	0.10
9/13/2021	Cafe Rio	David Winston	Review/Analyze email from Kyle re: Revisions to the draft Settlement Agreement	0.10
9/13/2021	Cafe Rio	David Winston	Review/Analyze email from Piya re: Revisions to the draft Settlement Agreement	0.10
9/13/2021	Cafe Rio	David Winston	Review/Analyze additional email from Kyle re: Revisions to the draft Settlement Agreement	0.10
9/13/2021	Cafe Rio	David Winston	Review/Analyze additional email from Piya re: Revisions to the draft Settlement Agreement	0.10
9/22/2021	Cafe Rio	David Winston	Review/Analyze email from David Rashe re: Revisions to the Settlement Agreement, draft approval motion, and CMC	0.10
9/22/2021	Cafe Rio	David Winston	Review/Analyze email from Kyle re: Revisions to the Settlement Agreement	0.10
9/27/2021	Cafe Rio	David Winston	Review/Analyze email from Co-Counsel re: FAC	0.10
9/27/2021	Cafe Rio	David Winston	Send email to KV re: FAC	0.10
10/25/2021	Cafe Rio	David Winston	Review/Analyze email from David Rashe re: Settlement Agreement	0.10
10/26/2021	Cafe Rio	David Winston	Revise Declaration ISO Approval	0.60
10/27/2021	Cafe Rio	David Winston	Review/Revise Motion for Approval including suggesting changes	1.10
10/27/2021	Cafe Rio	David Winston	Further revise Declaration to incorporate additional information	1.30
10/27/2021	Cafe Rio	David Winston	Review/Analyze email from David Rashe re: Settlement Agreement and signatures	0.10
10/27/2021	Cafe Rio	David Winston	Review/Analyze email from Kyle to David Rahse re: Settlement Agreement	0.10
10/27/2021	Cafe Rio	David Winston	Review/Analyze email from Kyle re; Draft Motion for Approval of the Settlement and any comments/feedback	0.10
10/27/2021	Cafe Rio	David Winston	Review/Analyze additional email from David Rashe re: Settlement Agreement and timing of filing of approval papers	0.10
10/27/2021	Cafe Rio	David Winston	Review/Analyze email response of Kyle to David Rashe re: Draft Motion and Approval Hearing Date	0.10
10/27/2021	Cafe Rio	David Winston	Send detailed email to Kyle re: Suggested Changes to the Motion and my declaration	0.20
10/27/2021	Cafe Rio	David Winston	Review/Analyze emails between client and Co-Counsel	0.10
10/28/2021	Cafe Rio	David Winston	Review/Analyze email from Kyle accepting my proposed revisions to the Motion for Approval	0.10

10/28/2021	Cafe Rio	David Winston	Review/Analyze email from Kyle to David Rashe re: Approval Motion	0.10
11/9/2021	Cafe Rio	David Winston	Review/Analyze email from Kyle re: Finalizing motion and requesting a hearing date	0.10
11/9/2021	Cafe Rio	David Winston	Review/Analyze email from Kyle to Court clerk about potential dates along with email to Opposing Counsel re: Reservation of hearing from the Court and availability	0.10
11/9/2021	Cafe Rio	David Winston	Respond to email from Kyle re: Potential Hearing Date for the Motion and note my unavailability, emailed about modification to my declaration to remove Courtcall cost for anticipated appearance	0.10
11/9/2021	Cafe Rio	David Winston	Review/Analyze email from Kyle re: Keeping Hearing date and modifying declaration in support of approval	0.10
11/10/2021	Cafe Rio	David Winston	Review/Analyze email from Daryl Landy re: Defendant's suggested revisions to the approval motion	0.10
11/11/2021	Cafe Rio	David Winston	Review/Analyze email from Daryl Landy re: Revisions to the Proposed Order	0.10
11/11/2021	Cafe Rio	David Winston	Review/Analyze Proposed Revisions to the Order itself--no issues with proposed revisions	0.10
11/11/2021	Cafe Rio	David Winston	Review/Analyze Daryl Landy's Proposed Revisions to the Approval Motion and lack of issues with proposed modifications	0.10
11/11/2021	Cafe Rio	David Winston	Prepare Redacted Time Summary for the Court for use as Exhibit and finalize Declaration in support of approval	0.30
TOTALS				21.50