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FILED
SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN BERNARDINO
SAN BERNARDINO DISTRICT
JUN 05 2023
BY NICOLE O'DWYER, DEPUTY

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN BERNARDINO

DAVID ALEGRIA, Individually, and on behalf of other members of the general public similarly situated Plaintiff v. NEXEN TIRE AMERICA, INC., a California Corporation, and DOES 1-10, inclusive Defendants	CASE NO. CIV SB 2304566 (Proposed CLASS ACTION) **FIRST AMENDED COMPLAINT FOR:** **1. VIOLATION OF LABOR CODE §§ 226.7 and 512 (Class Claim)** **2. VIOLATION OF LABOR CODE §§ 510, 1194 and 1197 (Class Claim);** **3. VIOLATION OF LABOR CODE § 226 (Class Claim)** **4. VIOLATION OF LABOR CODE §§ 2802 (Class Claim)** **5. VIOLATION OF LABOR CODE §§ 201-203 (Class Claim)** **6. VIOLATION OF BUSINESS AND PROFESSIONS CODE § 17200 et seq. (Class Claim)** **7. PENALTIES PURSUANT TO THE PRIVATE ATTORNEYS GENERAL ACT OF 2004 (Representative Claim)** ***Demand for Jury Trial.***

COMES NOW Plaintiff DAVID ALEGRIA ("ALEGRIA"), individually, and on behalf of all other members of the general public similarly situated, and alleges for his First Amended Complaint as follows:

PARTIES, JURISDICTION, AND VENUE

1. This Court has jurisdiction over this matter in that all parties are residents of, or do business within, the State of California and the amount in controversy exceeds the statutory minimum limit of this Court. The monetary damages and restitution sought by Plaintiff exceeds the minimal jurisdiction limits of the Superior Court and will be established according to proof at trial. Furthermore, there is no federal question at issue as Wage and Hour protections and remedies related thereto are based solely on California Law and Statutes, including the Labor Code, Civil Code, and IWC Wage Order(s).

2. Plaintiff is informed and believes and thereon alleges that at all relevant times mentioned herein, Defendant NEXEN TIRE AMERICA, INC., was and is a California Corporation doing business throughout the state, including the County of San Bernardino, State of California.

3. Venue before this Court is proper in that Defendant NEXEN TIRE AMERICA, INC., (hereinafter "Defendants") were and are performing business in the state of California, and county of San Bernardino. Additionally, certain acts constituting the below violations were committed in the county of San Bernardino. Defendants, and each of them, were each Plaintiff's employers, as evidenced by (among other facts), certain admissions by the Defendants, as well as certain rules, restrictions, benefits and compensation services provided by Defendants, to the Plaintiff and each alleged Class Member.

4. At all relevant times herein, Plaintiff ALEGRIA was and is an individual working in the county of San Bernardino, state of California.

5. Plaintiff is presently unaware of the true names, capacities and liability of Defendants named herein as DOES 1 through 10, inclusive. Accordingly, Plaintiff will seek leave of court to amend this complaint to allege their true names and capacities after the same have been ascertained.

6. Plaintiff is informed and believes and thereon alleges that each of the fictitiously named

Defendants are responsible in some manner for the wrongs and damages as herein alleged, and in so acting was functioning as the agent, servant, partner, and employee of the co-defendants, and in doing the actions mentioned below, was acting within the course and scope of his or her authority as such agent, servant, partner, and employee with the permission and consent of the co-defendants. Plaintiff's injuries as herein alleged were proximately caused by said Defendants. Wherever it is alleged herein that any act or omission was done or committed by any specially named Defendant or Defendants, Plaintiff intends thereby to allege and does allege that the same act or omission was also done and committed by each and every Defendant named as a DOE, both separately and in concert or conspiracy with the named Defendant or Defendants.

7. Plaintiff is informed and believes and thereon alleges that Defendants, and each of them, including DOES 1 through 10, are and at all times herein mentioned were either individuals, sole proprietorships, partnerships, registered professionals, corporations, alter egos or other legal entities which were licensed to do and/or were doing business in the county of San Bernardino, state of California at all times relevant to the subject matter of this action.

FACTUAL BACKGROUND

8. Plaintiff was employed by Defendants as a non-exempt employee, from approximately June 29, 2015 through March 15, 2022. Throughout his employment with Defendants, Plaintiff performed his job in a capable and competent manner, and was commended for doing so.

9. Throughout the term of his employment, Plaintiff and all other aggrieved employees were and currently are denied the benefits and protections of the Labor Code due to Defendants' institutionalized pay practices, standard as to all of Defendants' California-based, nonexempt, non-union employees.

CLASS ACTION ALLEGATIONS

10. As more specifically set forth below, Plaintiff brings this action on behalf of an ascertainable class and a well-defined community of interest among the class members. Code Civ. Proc. § 382; *Richmond v. Dart Industries, Inc.* (1981) 29 Cal.3d 426, 470. Throughout the operative limitations period, that is February 22, 2019 until the completion of this action, Plaintiff and

all other class members were denied the protections and benefits of the Labor Code and Industrial Welfare Commission ("IWC") Wage Order(s) due to Defendants' standard practices. Throughout their employment, Plaintiff and all other class members were and are denied full and accurate compensation, including overtime compensation, in violation of, *inter alia*, Labor Code sections 510 and 1194. Plaintiff and the other class members were and are denied legally-compliant Meal and Rest Periods and Meal and Rest Period payments, in violation of, *inter alia*, IWC Wage Order 7 (or any other applicable Wage Order) and Labor Code sections 226.7 and 512. Defendants failed to furnish accurate itemized wage statements in violation of, *inter alia*, Labor Code section 226. Defendants failed to reimburse Plaintiff and other class members for necessary business expenditures in violation of, *inter alia*, Labor Code section 2802.

11. Plaintiff brings this action on the grounds that he and other similarly situated current and former employees of Defendants were and are improperly denied the mandated wages and reimbursements resulting from the above-referenced violations. *Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319. The class is believed to contain approximately One Hundred (100) members.

12. The approximately One Hundred (100) member class is ascertainable via their experience as Defendants' current or former California-based employees, designated as "nonexempt" by Defendants.

13. Plaintiff seeks to represent the following class (collectively the "class" or "class members"):

> All current and former nonexempt employees of Defendants who were employed in California between February 22, 2019 and 90 days before the first designated trial date in this matter.

Plaintiff reserves the right to expand, limit, modify, or amend this class definition, including the addition of one or more subclasses, in connection with his motion for class certification, or at any other time, based upon, *inter alia*, changing circumstances and/or new facts obtained during discovery.

14. Class members share a community of interest and an injury-in-fact as Defendants have violated California compensation laws, depriving class members of money earned.

15. There are questions of fact and law common to the class that predominate over any questions

affecting only individual members. The questions of law and fact common to the class arising from Defendants' actions include, without limitation, the following:

a. Whether Defendants failed to pay its employees the proper straight-time, overtime, and double time wages due and owing to them;

b. Whether Defendants failed to provide its employees with statutorily-compliant Meal and/or Rest Periods, in violation of, *inter alia*, California Labor Code section 512 and 226.7, in that Defendants written policies are not compliant with California law, Defendants do not allow its employees timely and duty-free breaks, and Defendants improperly "alter" employees recorded Meal Periods to avoid Meal Penalty payments;

c. Whether Defendants failed to properly provide Meal and Rest Period premiums in accordance with law;

d. Whether Defendants failed to properly calculate and pay its employees overtime compensation or Meal and Rest Period premiums in accordance with law by failing to properly calculate, into the Regular Rate of Pay, the value of employee benefits;

e. Whether Defendants failed to properly reimburse its employees for necessary business expenditures for, *inter alia*, cell phone costs and mileage, in violation of Labor Code section 2802;

f. Whether Defendants failed to provide all compensation upon termination of employment in violation of Labor Code sections 201-203, due, in part, to the fact that Defendants failed to provide proper compensation for all hours worked, as discussed above; and

g. Whether Defendants conduct constituted a violation of Business & Professions Code section 17200 *et seq*.

16. The class on whose behalf this action is brought is so numerous that joinder of all parties individually would be impracticable. Plaintiff brings the class action on behalf of approximately One Hundred (100), California-based current and former employees of Defendants who share a common or general interest, and it would be impracticable for those employees to bring the action individually. Any variations in job activities between the

individual class members are legally insignificant to the issues presented by this action since the central facts remain, to wit, Plaintiff and all other class members were improperly denied the benefits and protections of the Labor Code and IWC Wage Order(s), by and through Defendants' standard and institutionalized practices.

17. There are questions of law and fact common to the class. Plaintiff, and all class members, were injured by Defendants' violations of the enumerated Labor Code sections and IWC Wage Order(s). As these violations resulted from Defendants' standard and institutionalized practices, questions of law and fact are common to the class.

18. Plaintiff's claims in this action are typical of the class whom Plaintiff generally represents. The claims result from Defendants' standard and institutionalized practices, experienced by Plaintiff and all other class members.

19. Plaintiff can fairly and adequately protect the interests of all the members of the class he represents in this action. Any difference in job titles is immaterial, as Defendants used (and uses) standard systems to compensate class members. Plaintiff's experience and knowledge of Defendants' "wage and hour" practices, in addition to Plaintiff's familiarity with Defendants pay policies pertaining to the class members he represents, entitles him to adequately and fairly represent the class.

20. Common questions predominate over questions affecting individual class members. Plaintiff and all other class members were improperly denied the benefits and protections of the Labor Code and IWC Wage Order(s) by and through Defendants' standard and institutionalized practices. Common questions of law or fact therefore "present a significant aspect of the case" and are capable of resolution "in a single adjudication." *Hanlon v. Chrysler Corp.* (9th Cir. 1998) 150 F.3d 1011, 1022.

21. At all times mentioned herein, Defendants are and were "employers" as that term is used within the relevant sections of the California Labor Code.

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FIRST CAUSE OF ACTION
Meal and Rest Period Violations Pursuant to Labor Code §§ 226.7 and 512
Class Action
(Individually, and on behalf of the Class against Defendants and DOES 1 through 10)

22. Plaintiff hereby incorporates by reference paragraphs 1 through 21 as though fully set forth herein.

23. Labor Code section 1198 states:

> The maximum hours of work and the standard conditions of labor fixed by the commission shall be the maximum hours of work and the standard conditions of labor for employees. The employment of any employee for longer hours than those fixed by the order or under conditions of labor prohibited by the order is unlawful.

Defendants violated this section by establishing working conditions below the standard of the applicable Wage Order.

24. Under applicable California law, "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 [...] An employer may not employ an employee for a work period of more than 10 hours per day without providing the employee with a second meal period of not less than 30 minutes" Lab. Code § 512(a); see also 8 Cal. Code Regulations. § 11070 (11)(A). Unless the employee is relieved of all duty for a full thirty (30) minute meal period, the meal period shall be considered an "on duty" meal period and counted as time worked. 8 Cal. Code Regulations. § 11070 (11); See *Safeway v. Superior Court* (2015) 238 Cal.App.4th 1138, 1160.

25. California law requires employers to provide employees with a 10-minute rest break for every four hours worked, or "major fraction thereof." 8 Cal. Code Regs. § 11070 (12).

26. An employer who fails to provide meal or rest periods as required by an applicable Wage Order must pay the employee one additional hour of pay at the employee's regular rate of pay for each workday that the meal or rest period was not provided. Lab. Code § 226.7(b); 8 Cal. Code Regs. § 11070 (11), (12).

27. Within the operative time period, Defendants failed to possess compliant Meal and Rest Period policies.

28. For example, Defendants' Rest Period policy and practice does not provide the right for

employees to "leave the premises," and actually require the employees to "remain on premises for the duration of this Rest Period" where"coverage" issues require as such.

28. Defendants' Meal and Rest Period policy also assumes that employees have "waived" the right to a legally-compliant Meal or Rest Period, or a Meal or Rest Period penalty payment, unless the employees complete a very specific process of formal notification to the Defendants.

29. Moreover, Defendants policies and practices preclude "duty-free" Meal and Rest Periods. These institutional and established practices of Defendants are illegal, in that Plaintiff and all other employees were denied proper and/or timely Meal and Rest Periods.

30. These violations are due, in part, to the fact that Defendants do not possess a legal Rest Period policy or practice, as its Rest Period policy lacks required language, resulting in employees failing to receive all Rest Periods legally due. Defendants do not provide Rest Periods, as defined by California law. Further, Defendants have never provided a fully-compliant Rest Period penalty payment to any employee.

31. Defendants also do not possess a legal Meal Period policy, and make no attempt to ensure that its employees are either timely or wholly provided Meal Periods. The employees would often either miss a Meal Period entirely, be provided a short or late Meal Period, or be provided only one Meal Period, even when they were working in excess of 10 hours a day. Additionally, Defendants failed to accurately record its employees actual start and stop times of Meal Periods, in violation of the IWC Wage Orders. 8 Cal. Code Regs. § 11070 (6)(A)(3). Defendants also improperly "alter" employee meal period times.

32. Moreover, Defendants' policies and practices preclude "duty-free" Meal and Rest Periods, in that the employees are required to remain "On Call" at all times, including during the Meal and Rest Periods, in order to (among other reasons) respond to job-site supervisors. These institutional and established practices of Defendants are illegal, in that Plaintiff and all other class members were denied proper and/or timely Meal and Rest Periods.

33. Defendants willfully failed and refused to pay Plaintiff and all other class members one additional hour of pay at their regular rate of pay for all workdays that a Meal or Rest Period was not provided, as required by Labor Code section 226.7 and IWC Wage Order 7 (11), (12).

34. Any payments made by Defendants for missed or late Meal Periods were not paid at an employee's regular rate in violation of Labor Code section 226.7 and the operative IWC Wage Orders. Instead, these payments were made at an employee's base rate and did not include the value of, *inter alia*, additional compensation and/or employee benefits such as employee discounts and non-discretionary bonuses.

35. As a direct result of Defendants' willful failure and refusal to comply with the California Labor Code, Plaintiff and other employees have suffered injury, loss, and harm in a sum according to proof. On behalf of the class, Plaintiff hereby seeks compensatory damages, back pay (or penalty), prejudgement interest, and other remedies set forth below.

36. Plaintiff has incurred and continues to incur legal expenses and attorneys' fees. Plaintiff is presently unaware of the precise amount of these expenses and fees and prays leave of court to amend this Complaint when the amounts are more fully known.

SECOND CAUSE OF ACTION
Minimum Wage and Overtime Violations Pursuant to Labor Code §§ 510, 1194 and 1197
Class Action
(Individually, and on behalf of the Class against Defendants and DOES 1 through 10)

37. Plaintiff incorporates by reference paragraphs 1 through 36 as though fully set forth herein.

38. Throughout the applicable time period, Plaintiff and the other Class Members were denied the benefits and protections of the California Labor Code and IWC Wage Order(s) and were damaged thereby.

39. Defendants failed to pay its employees all compensation due, including overtime compensation, in violation of, among other statutes, Labor Code sections 510 and 1197. This failure was caused by several separate uniform practices of Defendants. This failure was caused by and through Defendants failure to maintain accurate Time Records (as required by California law), to the detriment of the employee. Specifically, although Defendants would receive "to-the-minute" start and end times (from its employees required actions), Defendants would thereafter alter - and deduct time from - the Time Records, prior to payment of compensation to the employees. Additionally, the right to receive the proper minimum wage and overtime compensation was impacted by Defendants knowingly failing to consider other

work performed by the employees. Finally, Defendants' failed to keep accurate time records which reflected when its employees were actually working or under Defendants' control. These actions, and instructions, caused the employees to lose compensation, including the proper minimum wage and overtime compensation.

40. Additionally, Defendants failed to properly calculate Plaintiff's regular rate of pay for purposes of overtime compensation such that the value of employee's benefits were not included in the calculation of Plaintiff's regular rate of pay. Plaintiff is informed and believes and thereon alleges that at all relevant times herein, Defendants failed to take into account the value of all employee benefits when calculating their regular rates of pay, for purposes of overtime compensation, in violation of Labor Code section 510. Additionally, by altering its employees' time records, as referenced above, Defendants alter the actual hourly rate of pay for its employees. Defendants do not factor in this actual hourly rate, when calculating the overtime rate of pay, in violation of Labor Code section 510.

41. Defendants failed to pay Plaintiff and all other class members all compensation due, including Overtime Compensation, due in violation of, among other statutes, Labor Code section 510. These violations occurred due to Defendants' illegal policies, referenced above, including the failure to accurately record employee time worked, whereby employees experienced monetary under-compensation. These violations also occurred as Defendants had several policies and practices which required employees to work in excess of 8 hours, without receiving all overtime (and/or double-time) compensation. The systematic failure to provide proper overtime compensation is a violation of California law.

42. As a direct result of Defendants' willful failure and refusal to comply with the California Labor Code, Plaintiff and other employees have suffered injury, loss, and harm all to their damages in a sum according to proof. On behalf of the class, Plaintiff hereby seeks compensatory damages, back pay (or penalty), prejudgement interest, and other remedies set forth below.

43. Plaintiff has incurred and continues to incur legal expenses and attorneys' fees. Plaintiff is presently unaware of the precise amount of these expenses and fees and prays leave of court to amend this Complaint when the amounts are more fully known.

<u>THIRD CAUSE OF ACTION</u>

Wage Statement Violations Pursuant to Labor Code § 226
Class Action
(Individually, and on behalf of the Class against Defendants and DOES 1 through 10)

44. Plaintiff hereby incorporates by reference paragraphs 1 through 43 as though fully set forth herein.

45. Throughout the applicable time period, Plaintiff and the other class members were denied the benefits and protections of the California Labor Code and IWC Wage Order(s) and were damaged thereby.

46. Defendants failed to provide Plaintiff and all other members of the Class action with accurate itemized wage statements in violation of, among other statutes, Labor Code section 226. These violations include, but are not limited to, Defendants failure to provide an <u>accurate</u> showing of the gross wages earned, in violation of Labor Code section 226(a)(1), due to under-payments caused by the "Regular" time and Overtime allegations listed above, Defendants failure to accurately identify all applicable regular and overtime (including double-time) rates of pay in violation of section 226(a)(9), and providing inaccurate representations of both "gross" and "net wages." Defendants also failed to provide the "inclusive dates of the pay period," in violation of 226(a)(6). Defendants also failed to provide an accurate showing of the "total hours worked," in violation of Labor Code section 226(a)(2).

47. Defendants violated Labor Code section 226(a)(9) by failing to furnish an <u>accurate</u> showing of all applicable hourly rates, in effect during the pay period and the corresponding number of hours worked at each hourly rate by the employee. Plaintiff and the other employees were not compensated for all hours worked (due in part to Defendants requiring employees to list only *scheduled* work-times, not actual work-times to include "on-call" hours).

48. As a direct result of Defendant's willful failure and refusal to comply with the California Labor Code, Plaintiff and other employees have suffered injury, loss, and harm all to their damages in a sum according to proof. On behalf of the class, Plaintiff hereby seeks compensatory damages, back pay (or penalty), prejudgement interest, and other remedies set forth below.

49. Plaintiff has incurred and continues to incur legal expenses and attorneys' fees. Plaintiff is

presently unaware of the precise amount of these expenses and fees and prays for leave of court to amend this Complaint when the amounts are more fully known.

FOURTH CAUSE OF ACTION
Failure to Reimburse Pursuant to Labor Code § 2802
Class Action
(Individually, and on behalf of the Class against Defendants and DOES 1 through 10)

50. Plaintiff hereby incorporates by reference paragraphs 1 through 49 as though fully set forth herein.

51. Defendants failed to reimburse Plaintiff and all other Class Members for all necessary business expenditures incurred in direct consequence of the discharge of their duties in violation of, among other statutes, Labor Code section 2802. These expenditures are the result of, *inter alia*, Defendants' standard policies which require its employees to incur mileage costs without full reimbursement. Plaintiff and all other Class Members were also forced to incur cell phone costs, without reimbursement.

52. As a direct result of Defendants' willful failure and refusal to comply with the California Labor Code, Plaintiff and other non-exempt employees have suffered injury, loss, and harm all to their damages in a sum according to proof. On behalf of the class, Plaintiff hereby seeks compensatory damages, back pay (or penalty), prejudgement interest, and other remedies set forth below.

53. Plaintiff has incurred and continues to incur legal expenses and attorneys' fees. Plaintiff is presently unaware of the precise amount of these expenses and fees and prays for leave of court to amend this Complaint when the amounts are more fully known.

FIFTH CAUSE OF ACTION
Failure to Pay Wages Upon Separation Pursuant to Labor Code § 203
Class Action
(Individually, and on behalf of the Class against Defendants and DOES 1 through 10)

54. Plaintiff hereby incorporates by reference paragraphs 1 through 53 as though fully set forth herein.

55. Throughout the applicable time period, Plaintiff and the other Class Members were denied the benefits and protections of the California Labor Code and IWC Wage Order(s) and were damaged thereby. These violations resulted from, among other unlawful actions, Defendants

willful failure to provide accurate and complete compensation to class members under Labor Code sections 226.7, 510, 512, 1197, and 2802.

56. As set forth above, Defendants failed (and continue to fail) to provide all wages due and owing to Plaintiff and all other class members throughout the course of their employment. As a direct result of this failure, Plaintiff and all other class members who were discharged or quit were denied all wages due and owing when they received their final paychecks. These final paychecks failed to take into account all outstanding wages due as a result of Defendants' standard and institutionalized payroll practices.

57. Labor Code section 203 provides for waiting time penalties for failing to pay wages earned and unpaid at the time of discharge, in violation of Labor Code section 201. Accordingly, Plaintiff and all other putative class members seek these penalties as relief for Defendants' violations.

58. As a direct result of Defendants' willful failure and refusal to comply with the California Labor Code, Plaintiff and other employees have suffered injury, loss, and harm all to their damages in a sum according to proof. On behalf of the class, Plaintiff hereby seeks compensatory damages, back pay (or penalty), prejudgement interest, and other remedies set forth below.

59. Plaintiff has incurred and continues to incur legal expenses and attorneys' fees. Plaintiff is presently unaware of the precise amount of these expenses and fees and prays for leave of court to amend this Complaint when the amounts are more fully known.

SIXTH CAUSE OF ACTION
Violation of Business and Professions Code § 17200
Class Action
(Individually, and on behalf of the Class against Defendants and DOES 1 through 10)

60. Plaintiff hereby incorporates by reference paragraphs 1 through 59 as though fully set forth herein.

61. Plaintiff is a direct victim of Defendants' illegal and/or unfair business acts and practices referenced in this complaint, has lost money as a result of such practices, and brings this action both in his individual capacity and on behalf of Defendants' current and former California-based, nonexempt employees who share a common or general interest in the damages as a result of the illegal and/or unfair practices.

62. The approximately 100 member class is ascertainable via their experience as Defendants' current or former California-based, nonexempt employees. Class members share a community of interest and an injury-in-fact as Defendants have violated California compensation laws, thereby depriving class members of money earned. Based on the facts set forth above, it would be impracticable to proceed in individual actions.

63. Plaintiff suffered an injury-in-fact pursuant to Business & Professions Code section 17204, and lost money as a result of Defendants' illegal and/or unfair practices.

64. Plaintiff brings this action on behalf of an ascertainable class who share a community of interest pursuant to Business & Professions Code section 17203 and Code of Civil Procedure section 382 and who share a common or general interest in the damages as a result of the illegal and/or unfair practices, in that those individuals on whose behalf the action is brought have also lost money as a result of Defendants' practices, as set forth above, and that it would be impracticable to proceed as an individual plaintiff action.

65. As set forth above, during the course of Plaintiff's employment, Defendants failed and refused to properly pay Plaintiff and all other class members. Defendants also failed to comply with fundamentally protective California laws including, but not limited to, Labor Code sections 201-203, 226, 226.7, 510, 512, 1194, and 2802, as well as IWC Wage Order 7, or any other applicable Wage Order.

66. Business & Professions Code section 17200 *et seq.* prohibits any unlawful, unfair, or fraudulent business act or practice.

67. Plaintiff's allegations herein are based upon Defendants' institutional business acts and practices.

68. Defendants' acts and practices, as described herein above, are unlawful and unfair, in that they violate the Labor Code and IWC Wage Order(s).

69. As a direct result of Defendants' unlawful and unfair business acts and practices, Plaintiff and all other class members have been denied wages earned, and have therefore been damaged in an amount to be proven. Accordingly, Plaintiff prays for restitution and injunctive damages in an amount to be proven.

70. Plaintiff is informed and believes, and on that basis alleges, that Defendants' unlawful and unfair business practices, alleged above, are continuing in nature and are widespread.

71. On behalf of the ascertainable class, Plaintiff respectfully requests an injunction against Defendants to enjoin them from continuing to engage in the illegal conduct alleged herein.

72. On behalf of the ascertainable class, Plaintiff respectfully requests restitution damages.

73. Plaintiff has incurred and continue to incur legal expenses and attorneys' fees. Plaintiff is presently unaware of the precise amount of these expenses and fees, and prays for leave of court to amend this complaint when the amounts are more fully known.

SEVENTH CAUSE OF ACTION

Violation of Labor Code § 2698 et seq. - Representative Action
(By Plaintiff in a *Representative* Capacity)

74. Plaintiff hereby incorporates by reference paragraphs 1 through 73 as though fully set forth herein.

75. At all times mentioned herein, Defendants were subject to the Labor Code and Industrial Welfare Commission Wage Orders of the State of California, including, but not limited to, California Labor Code section 2698 *et seq.*

76. Throughout the operative limitations period, Plaintiff and all other aggrieved employees were denied the protections and benefits of the Labor Code and IWC Wage Order(s) due to Defendants' standard practices. Said violations were set forth in the causes of action above and are re-stated below. This "PAGA" cause of action alleges that there are One Hundred (100) aggrieved employees are comprised of Defendants' current or former California-based employees at all Defendants' locations.

77. Plaintiff has exhausted his administrative remedies and pre-filing requirements pursuant to California Labor Code section 2699.3, and has also fulfilled all notice requirements under the statute. To wit, on February 8, 2023, counsel for Plaintiff prepared and sent to the California Labor & Workforce Development Agency ("LWDA") via electronic service. A copy of this letter was mailed to Defendants, NEXEN TIRE AMERICA, INC., also via USPS Certified Mail. This letter contained the specific provisions of the California Labor Code and Business and Professions Code violated by Defendants, as well as the facts and theories in support of

Plaintiff's claims. (Please see **Exhibit 1**, a true and correct copy of this letter.) The statutory time period for the LWDA to investigate and/or respond, and for the employers to respond, has concluded, allowing Plaintiff to proceed with this lawsuit.

78. At all times mentioned herein, Defendants were and are "employers" as that term is used within the relevant sections of the California Labor Code.

79. Throughout the Class Period, Defendants committed the above-referenced and incorporated Labor Code and Wage Order violations against Plaintiff and the other employees. To wit, throughout their employment, Plaintiff and all other California non-exempt employees during the limitations period were and are denied full and accurate compensation, including overtime compensation and minimum wages, in violation of, *inter alia*, Labor Code sections 510 and 1194. Plaintiff and the other class members were and are denied Meal and Rest Periods and Meal and Rest Period payments, in violation of, *inter alia*, IWC Wage Order 7 (or any other applicable Wage Order) and Labor Code sections 226.7 and 512. Defendants failed to furnish accurate itemized wage statements in violation of, *inter alia*, Labor Code section 226. Defendants failed to reimburse Plaintiff and other class members for necessary business expenditures in violation of, *inter alia*, Labor Code section 2802. Defendants failed to provide all compensation due at termination of employment in violation of, *inter alia*, Labor Code sections 201 through 203.

80. As California Labor Code Section 2699 provides for civil penalties recoverable by Plaintiff on behalf of himself and other aggrieved employees by and through Labor Code section 2699.3, and as Plaintiff has complied with the pre-filing requirements, Plaintiff may recover the penalties pursuant to Labor Code section 2699, as more specifically set forth in the below Prayer For Relief.

81. As a direct result of Defendants' failure to comply with the provisions of the Labor Code and orders of the commission, Plaintiff and other employees of Defendants have been damaged in an amount to be proved at trial.

82. Plaintiff seeks an award of statutory civil penalties for each underpaid employee of Defendants pursuant to Labor Code sections 2699(a) for each of these employees.

83. Plaintiff also seeks an award of reasonable attorneys' fees and costs pursuant to Labor Code section 2699(g)(1).

PRAYER FOR RELIEF

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

1. For an order certifying the proposed class(es);
2. For compensatory damages according to proof, as set forth under Labor Code sections 510, 1194, and 2802, among other statutes;
3. For penalties and restitution of wages according to proof, as set forth under Labor Code sections 221, 226, 226.7 and 1197.1, among other statutes;
4. For penalties pursuant to Title 8, California Code of Regulations, Wage Order 7 (or any applicable Wage Order);
5. For lost back pay in an amount to be proven;
6. On behalf of the ascertainable Class, for a permanent injunction against Defendants restraining, preventing, and enjoining Defendants from engaging in the illegal practices alleged, and to ensure compliance with, among other employee protections, Labor Code sections 226, 226.7, 510, 512, 1197, and 2802;
7. On behalf of the ascertainable Class, for restitution damages on behalf of the section 17200 claimants who share a common or general interest;
8. Where available, for liquidated damages pursuant to Labor Code section 1194.2;
9. For an award of interest, including prejudgment interest, pursuant to Labor Code section 218.6;
10. For an award of attorneys' fees and costs of suit herein pursuant to Labor Code sections 218.5, 226, 1194, 2802 and Code of Civil Procedure section 1021.5; and
11. For such other relief as the Court deems just and proper.

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DEMAND FOR JURY TRIAL

Plaintiff hereby requests that this matter be heard and decided by trial by jury.

Dated: June 1, 2023

SULLIVAN & YAECKEL LAW GROUP, APC

Eric K. Yaeckel
Ryan T. Kuhn
Karoline D. Kitlowski
Attorneys for Plaintiff DAVID ALEGRIA, individually, and on behalf of other members of the general public similarly situated

Exhibit 1

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February 8, 2023

Labor and Workforce Development Agency
Attn. PAGA Administrator

Submitted Via Online Filing

Re: **David Alegria v. Nexen Tire America, Inc.**
Our File No.: 7336

Dear Administrator:

Please allow this correspondence to serve as "written notice," as required by California Labor Code section 2699.3(a)(1), of the specific provisions of the California Labor Code believed to have been violated by Nexen Tire America, Inc., (hereinafter "Nexen"), in the above referenced matter. This "written notice" is filed on behalf of Mr. Alegria, and all current and former non-exempt employees employed by Nexen. Thank you for your assistance and instruction on this issue.

The specific provisions alleged to have been violated by Nexen are as follows:

> CALIFORNIA LABOR CODE SECTIONS 201-203, 226, 226(a), 226.7, 510, 512, 1194, 1197.1, 1198.5 and 2802, as well as IWC Wage Order 7, and any other applicable wage orders, codified as Title 8, California Code of Regulations, section 11070 *et seq.*

Facts and theories supporting the allegations: Mr. Alegria has been employed as a non-exempt employee for Nexen from approximately July 17, 2015, through March 18, 2022.

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Throughout the term of Mr. Alegria's employment, Nexen required Mr. Alegria and all other non-exempt employees to experience actions illegal under the California Labor Code, including the following:

Minimum Wage and Overtime Violations

- Nexen failed to provide all compensation, including minimum wage and overtime compensation, as well as compensation for work performed inside of Meal and Rest Periods, to its employees in violation of, *inter alia*, Labor Code sections 1194, 510, IWC Wage Order 7, and any other applicable wage orders. This illegal action is due, in part, to Nexen's policies of **(1)** failing to properly retain accurate Time Records, in violation of California law, and **(2)** failing to provide compensation (including both minimum and overtime compensation) for all time worked by the employees, or in control of the employer. For instance, Nexen would instruct Mr. Alegria to report scheduled (as opposed to *actual*) work hours, resulting in a loss of compensation. Additionally, Nexen would often require Mr. Alegria to work extended hours (beyond scheduled hours), without compensation. Further, Nexen would regularly contact Mr. Alegria outside of normal work hours (*i.e.*, "after hours" or during lunch) without compensation.

- Additionally, among other issues, Nexen has notice of Mr. Alegria, and others, working outside of their scheduled and/or reported hours, as well as *within* Meal and Rest Periods, but fails to provide any compensation for this work-time. Further, on occasion Mr. Alegria was required to attend Employee meetings after his shift ended from 4:00 to 5:00 p.m. Mr. Alegria was not compensated for this time as Nexen would automatically clock him out for this time. Mr. Alegria was frequently scheduled to be "On Call" outside of when his work shifts ended, but was never compensated for this time. Mr. Alegria was not compensated for this time. Further, Nexen failed to properly calculate and pay overtime at the actual overtime rate of pay, as Nexen ignores certain compensation (including bonuses) when calculating the Regular Rate of Pay. (Please See **Exhibit A and B.**)

Failure to Provide Compliant Meal Periods

- Nexen failed to provide compliant Meal Periods or requisite Meal Period penalty payments, in violation of, *inter alia*, Labor Code sections 226.7, 512, and IWC Wage Order 7, or any other applicable wage orders. For example, Nexen does not possess a legal Meal Period policy and makes no attempt to ensure that its employees are either timely or wholly provided Meal Periods. The employees would often either miss a Meal Period entirely, or be provided a short or untimely Meal Period. Whether or not an employee was provided a Meal Period was often contingent upon the how busy or understaffed the employees were on a given day. Mr. Alegria was frequently interrupted during his Meal Periods by supervisors to discuss work related matters.

- Nexen would pressure its employees to either skip, or cut short, a Meal Period as employees were expected to respond to clients and supervisors at all times. Nexen has never provided a compliant Meal Period penalty payment to any employee as to the above referenced issues. Finally, on the rare occasions when employees *were* paid Meal Period penalties (*i.e.* California Meal Period Premiums), such payments do not "cure" the stated Labor Code violation under section 226.7. The California Supreme Court held that "An employer's failure to provide an additional hour of pay does not form part of a section 226.7 violation, and an employer's provision of an additional hour of pay does not excuse a section 226.7 violation. The failure to provide required meal and rest breaks is what triggers a violation of section 226.7." (*Kirby v. Immoos Fire Protection, Inc.* (2012) 53 Cal.4th 1244, 1256, italics added.). Even more recently, a 2020 California Supreme Court ruling stated that, "The remedy for a Labor Code violation, through settlement or other means, is distinct from the fact of the violation itself. For example, employers can pay an additional hour of wages as a remedy for failing to provide meal and rest breaks. (§ 226.7, subd. (c).) But we have held that payment of this statutory remedy 'does not excuse a section 226.7 violation.'" *Kim v. Reins International California, Inc.*, (2020) 9 Cal.5th 73. To be clear, payment of a Meal Period penalty to employees does not rectify the violation, it is in fact an admission of a Labor Code violation. Finally, Nexen failed to pay Meal Period Premiums at the proper rate, as Nexen fails to either **(1)** pay a full hours worth of pay, or **(2)** properly calculate the regular rate of pay for purposes of determining the premium rate owed. *Ferra v. Loews Hollywood Hotel, LLC*, (2021) 11 Cal.5th 858.

- Nexen required its employees to constantly monitor their cell phones and be "on-call" at all times, specifically during Meal Periods. On occasion, Nexen would interrupt, or cut short, its employees' Meal Periods and require them to return to work. Nexen was frequently understaffed, this would result in Mr. Alegria being required to respond to clients and supervisors about work related matters during his Meal Periods.

- Nexen illegally retained control over its employees during Meal Periods. For example, Nexen required its employees to "remain on the premises," and to remain "On Call" (*i.e.* monitor their phones) at all times, including during Meal Periods.

<u>Failure to Provide Compliant Rest Periods</u>

- Nexen failed to provide compliant Rest Periods or requisite Rest Period penalty payments, in violation of, *inter alia*, Labor Code sections 226.7, 512, and IWC Wage Order 7, and any other applicable wage orders. For example, Nexen does not possess a legal Rest Period policy, as its Rest Period policy lacks required language under California law. Nexen makes no attempt to ensure that its employees are either timely or wholly provided Rest Periods. The employees would often either miss a Rest

Period entirely, be provided a short or untimely Rest Period, or be provided only one Rest Period, even when they were working in excess of 6.5 hours a day. Nexen would pressure its employees to either skip, or cut short, a Rest Period as employees were expected to respond to clients and supervisors at all times. Mr. Alegria often was required to work during Rest Periods in order to complete his daily duties before he ended his shift for the day. Nexen has never provided a compliant Rest Period penalty payment to any employee as to the above referenced issues. Finally, on the rare occasions in which Nexen would provide a Rest Period penalty, it would pay said penalty at an improper (and *lesser*) rate, due to the failure to properly calculate the Regular Rate of Pay.

- Nexen required its employees to constantly monitor their cell phones and be "on-call" at all times, specifically during Rest Periods. On occasion, Nexen would interrupt, or cut short, its employees' Rest Periods and require them to return to work. When Mr. Alegria was able to take a Rest Period, his Rest Periods were often interrupted by supervisors and clients phone calls.

- Finally, Nexen illegally retained control over its employees during Rest Periods. For example, Nexen required its employees to "remain on the premises," and to remain "On Call" (*i.e.* monitor their phones) at all times, including during Rest Periods.

Wage Statement Violations

- Nexen violated Labor Code section 226(a)**(2)** by failing to furnish an accurate showing of all hours worked at each hourly rate by the employee. Mr. Alegria, and other employees were not compensated for all hours worked (due in part to Nexen's requirement that employees list only *scheduled* work-times, not actual work-times.)

- Nexen violated Labor Code section 226(a)**(5)** by failing to furnish an accurate showing of the net wages earned by its employees. For example, Nexen **(a)** would not provide compensation for all hours and minutes worked, **(b)** would use an improper (and lesser) Overtime Rate of Pay, and **(c)** would fail to pay Meal and/or Rest Period penalties when due. Nexen failed to properly calculate and pay overtime at the actual overtime rate of pay, as Nexen ignores certain compensation (including bonuses) when calculating the Regular Rate of Pay. (Please See **Exhibit A and B.**) Further, on the rare occasions in which Nexen would provide a Meal or Rest Period penalty, it would pay said penalty at an improper (and lesser) rate, due to the failure to properly calculate the Regular Rate of Pay.

- Nexen violated Labor Code section 226(a)**(9)** by failing to furnish an accurate showing of all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate by the employee. Mr.

Alegria, and the other employees were not compensated for all hours worked (due in part to Nexen requiring employees to list only *scheduled* work-times, not actual work-times to include "on-call" hours). Nexen does not explain how its' system describes "time worked" on the "Earnings Statement" itself. Additionally, Nexen does not use "minutes," to describe the amount of time worked, on the "Earnings Statement. As an example, for the pay period ending April 24, 2021, Nexen states that it paid Mr. Alegria for "40.93" total hours of Vacation Pay. (Please see **Exhibit C**). However, Mr. Alegria cannot "readily ascertain" what 40.93 means without "reference to other documents or information." Additionally, Nexen does not use "minutes," to describe the amount of time worked, on the "Earnings Statement." As an example, .93 is not an accurate representation of minutes worked, but an altered representation of those minutes. (i.e., 25 minutes of work could be represented as .25, and 50 minutes of work could be represented as .50, however .93 minutes of work cannot be represented as .93 as there are not 93 minutes within one hour.) This is because Nexen is apparently using a time-calculating system other than "minutes," but without explanation to the employees within the wage statement. As minutes are measured on a scale of 1 through 60, it is not apparent what these figures are meant to represent. Without an explanation for how these figures were arrived at, employees cannot "readily ascertain" their total hours worked. Therefore, Nexen failed to provide an accurate showing of the "total hours worked" by its employees pursuant to section 226(a)(2), due to all the aforesaid reasons.

Failure to Provide Compliant Expense Reimbursement Payments

- Nexen failed to provide compliant expense reimbursement payments in violation of, *inter alia*, Labor Code section 2802, by failing to provide payments for expenses incurred by Mr. Alegria, and other non-exempt employees, including expenses for cell-phone costs, necessary work supplies, and mileage. Mr. Alegria was required to use his personal vehicle to travel to client locations as well as Nexen's Diamond Bar location for sales meetings. Mr. Alegria was never compensated for this mileage.

Willful Failure to Provide All Compensation to Ex-Employees

- Nexen failed to provide all compensation upon termination of employment in violation of Labor Code sections 201-203, due, in part, to the fact that Nexen failed to provide proper compensation for all hours worked, and failed to pay full Meal or Rest Period penalties, as discussed above.

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To confirm, Nexen is a "person" as defined within California Labor Code section 18.

Again, thank you for your assistance and instruction throughout this matter. Should you have any questions or comments, please do not hesitate to contact the undersigned.

Very Truly Yours,

Eric K. Yaeckel, Esq.

cc: *Via Certified U.S. Mail*

Yoonseok Han
Agent for Service of Process for
NEXEN TIRE AMERICA, INC.
4305 E. Jurupa St.
Ontario, CA 91761

cc: *Courtesy Copy and Filing Fee via U.S. Mail*

Department of Industrial Relations
Accounting Unit
455 Golden Gate Ave, 10th Floor
San Francisco, CA 94102

Exhibit A

Alegria, David J. WARRSP - Warranty Specialist LAG000133 Terminated

2019 - 08 - 1

Gross Pay		$ 2,912.00
BONUS (field 3)		$ 2,912.00
Taxes		$ 784.42
Federal Income Tax		$ 378.14
Social Security		$ 180.55
Medicare		$ 42.22
State Worked In: California	Code: CA	$ 154.39
SUI/SDI: California (Taxing)	Code: 75	$ 29.12
Deductions		$ 0.00
Take Home		$ 2,127.58
CHECKING 1		$ 2,127.58

Nexen Tire America I
4014 Wheatley Rd.
Richfield, OH 44286

David J. Alegria
[redacted]

2/3/2019

2/16/2019

Pay Date
2/22/2019

LAG

File #
000133

Voucher

00080057

QUALAS

QUALAS

Other Details

Memos

Max Balance	5,824.00

Alegria, David J. WARRSP - Warranty Specialist LAG000133 Terminated

2019 - 08 - 1

Gross Pay			$ 1,369.20
Regular	Rate [illegible]	Hours [illegible]	$ 1,344.00
Overtime	Rate 25.2000	Hours [illegible]	$ 25.20
Taxes			$ 241.01
Federal Income Tax			$ 100.53
Social Security			$ 84.93
Medicare			$ 19.86
State Worked In: California	CA		$ 22.04
SUI/SDI: California (Taxing)	[illegible]		$ 13.69
Deductions			$ 0.00
Take Home			$ 1,128.19
CHECKING 1			$ 1,128.19

Nexen Tire America
4014 Wheatley Rd.
Richfield, OH 44286

David J. Alegria
[redacted]

Period Beginning Date: 2/3/2019
Period Ending Date: 2/16/2019
Pay Date: 2/22/2019

LAG
000133

Voucher
Number: 00090019

QUALAS
QUALAS

Other Details

Memos

Max Eligible Earns	1,369.20

Exhibit B

Pay Summary: **2021 - 43 - 1**

This summary is a record of a payment issued and not an image of the actual pay statement.

Nexen Tire America I 4014 Wheatley Rd. Richfield, OH 44286	**Period Beginning Date** 10/10/2021	**Pay Date** 10/29/2021	**Co.** LAG	**Clock** 00184	**Home Dept** QUALAS
David J. Alegria [redacted]	**Period Ending Date** 10/23/2021	**WGPS Advance Pay Date**	**File #** 000133	**Number** 00430012	**Worked In Dept** QUALAS

Gross Pay			$ 1,371.74
Regular	Rate: 17.9900	Hours: 68.25	$ 1,227.82
VACATION (field 3)	Rate: 17.9900	Hours: 8.00	$ 143.92
Basis of Pay: HOURLY			
Taxes			$ 240.82
Federal Income Tax			$ 99.02
Social Security			$ 85.05
Medicare			$ 19.89
State Worked In: California	Code: CA		$ 20.40
SUI/SDI: California (Taxing)	Code: 75		$ 16.46
Deductions			$ 5.46
74 - GARNISHMENT			$ 5.46

Take Home	$ 1,125.46
CHECKING 1	$ 1,125.46

Other Details

Memos

Max Elig/comp	1,371.74

Pay Summary: **2021 - 43 - 1**

This summary is a record of a payment issued and not an image of the actual pay statement.

Nexen Tire America I 4014 Wheatley Rd. Richfield, OH 44286	**Period Beginning Date** 10/10/2021	**Pay Date** 10/29/2021	**Co.** LAG	**Clock** 00184	**Home Dept** QUALAS
David J. Alegria [redacted]	**Period Ending Date** 10/23/2021	**WGPS Advance Pay Date**	**File #** 000133	**Number** 00430011	**Worked In Dept** QUALAS

Gross Pay — $ 10.00

BONUS (field 3)		$ 10.00

Basis of Pay: HOURLY

Taxes — $ 0.88

Social Security		$ 0.62
Medicare		$ 0.14
SUI/SDI: California (Taxing)	Code: 75	$ 0.12

Deductions — $ 0.00

Take Home — $ 9.12

CHECKING 1	$ 9.12

Other Details

Memos

Max Elig/comp	20.00

Exhibit C

Pay Summary: **2021 - 17 - 1**

This summary is a record of a payment issued and not an image of the actual pay statement.

Nexen Tire America I 4014 Wheatley Rd. Richfield, OH 44286	**Period Beginning Date** 4/11/2021	**Pay Date** 4/30/2021	**Co.** LAG	**Clock**	**Home Dept** QUALAS
David J. Alegria [redacted]	**Period Ending Date** 4/24/2021	**WGPS Advance Pay Date**	**File #** 000133	**Number** 00170012	**Worked In Dept** QUALAS

Gross Pay			$ 1,199.76
SICK (field 3)	Rate: 17.3000	Hours: 28.42	$ 491.67
VACATION (field 3)	Rate: 17.3000	Hours: 40.93	$ 708.09
Basis of Pay: HOURLY			
Taxes			$ 197.40
Federal Income Tax			$ 78.39
Social Security			$ 74.38
Medicare			$ 17.40
State Worked In: California	Code: CA		$ 12.83
SUI/SDI: California (Taxing)	Code: 75		$ 14.40
Deductions			$ 0.00
Take Home			$ 1,002.36
CHECKING 1			$ 1,002.36