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**SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ORANGE – CIVIL COMPLEX CENTER**

SULENI ITZEP, ROBERTA MOSER,
individually, and on behalf of other
members of the general public similarly
situated and on behalf of aggrieved
employees pursuant to the Private
Attorneys General Act (“PAGA”);

Plaintiffs,

v.

AXONICS MODULATION
TECHNOLOGIES, INC., a Delaware
corporation; and DOES 1 through 100,
inclusive,

Defendants.

Case No.: 30-2020-01140962-CU-OE-CXC

ASSIGNED FOR ALL PURPOSES TO JUDGE
GLENDA SANDERS, DEPT. CX-101

CLASS ACTION

**NAMED PLAINTIFFS’ NOTICE OF
MOTION AND MOTION FOR
PRELIMINARY APPROVAL OF CLASS
ACTION SETTLEMENT, CONDITIONAL
CERTIFICATION, APPROVAL OF CLASS
NOTICE, SETTING OF FINAL APPROVAL
HEARING DATE; MEMORANDUM OF
POINTS AND AUTHORITIES IN SUPPORT
THEREOF**

[Declaration of Proposed Class Counsel
(Douglas Han); and [Proposed] Order filed
concurrently herewith]

Hearing Date: January 28, 2022
Hearing Time: 1:30 p.m.
Hearing Place.: Department CX-101

Complaint Filed: May 26, 2020
FAC Filed: October 18, 2021
Trial Date: None Set

1 **PLEASE TAKE NOTICE** that on January 28, 2022 at 1:30 p.m., or as soon as the
2 matter may be heard before the Honorable Glenda Sanders in Department CX-101 of the Orange
3 County Superior Court, located at 751 West Santa Ana Boulevard, Santa Ana, California 92701,
4 Named Plaintiffs Suleni Itzep and Roberta Moser (“Named Plaintiffs,” “Named Plaintiff Itzep,”
5 and “Named Plaintiff Moser”) will and hereby move for an order:

- 6 • Granting Preliminary Approval of the proposed class action settlement described
7 herein and as set forth in the Parties’ Joint Stipulation of Class Action and PAGA
8 Settlement and Release (“Settlement,” “Agreement,” or “Settlement Agreement”),
9 attached as “**EXHIBIT 2**” to the Declaration of Douglas Han, including, and not
10 limited to, the means of allocation and distribution of funds, and the allocations
11 for penalties under the California Labor Code Private Attorneys General Act of
12 2004 (“PAGA”), Attorneys’ Fees, Attorneys’ Costs, Named Plaintiffs’
13 Enhancement and General Release Payment, and the Administration Fees and
14 Costs;
- 15 • Conditionally certifying the proposed Class for settlement purposes only;
- 16 • Appointing Named Plaintiffs as the Class Representatives;
- 17 • Appointing Justice Law Corporation as Class Counsel;
- 18 • Approving the proposed Notice of Proposed Class Action Settlement (“Class
19 Notice”) attached as “Exhibit A” to the Settlement Agreement;
- 20 • Approving the proposed form, content, and procedure of the request for
21 exclusion from the Settlement by a Class Member (“Opt-Out Form”), attaches as
22 “Exhibit B” to the Settlement Agreement;
- 23 • The Class Notice and Opt-Out Form are collectively known as the Notice Packet;
- 24 • Directing the mailing of the proposed Notice Packet with a postage-paid return
25 envelope to the proposed Class;
- 26 • Approving the proposed deadlines for the notice and Settlement Administration
27 process;

28 ///

- Approving Phoenix Settlement Administrator (“Phoenix”) as the Settlement Administrator; and
- Scheduling a hearing to consider whether to grant Final Approval of the Settlement, at which time the Court will also consider whether to grant Final Approval of the requests for the Attorneys’ Fees, Attorneys’ Costs, Named Plaintiffs’ Enhancement and General Release Payment, and approval of the allocation for PAGA penalties and the Administration Fees and Costs.

This motion is based upon the following memorandum of points and authorities; the Declaration of proposed Class Counsel (Douglas Han); and the [Proposed] Order lodged together with this motion, as well as the pleadings and other records on file with the Court in this matter, and such documentary evidence and oral argument as may be presented at the hearing on this motion.

Dated: November 3, 2021

JUSTICE LAW CORPORATION

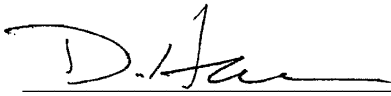
By: 
Douglas Han
Attorneys for Named Plaintiffs

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1 **I. INTRODUCTION**

2 This motion seeks preliminary approval of a \$225,000 proposed wage and hour class
3 action settlement by Named Plaintiffs on behalf of themselves and all non-exempt employees
4 and non-exempt contractor/staffing agency employees employed or retained by Defendant
5 Axonic, Inc. (“Defendant”) in the State of California in a non-exempt position during the Class
6 Period (“Class” and “Class Members”). The Class Period is the period of time beginning on June
7 14, 2017 through September 14, 2021 (“Class Period”). During the Class Period, Named
8 Plaintiffs estimate that there are approximately one hundred forty-four (144) Class Members.

9 It is requested this Court grant Preliminary Approval, as, when analyzing the strengths
10 and vulnerabilities of the class claims along-side Defendant’s potential liability exposure, this
11 proposed settlement of \$225,000 – **with an average Individual Settlement Payment estimated**
12 **at \$651.04^{1 2}** – is well within the “ballpark” of reasonableness.

13 As the following sections show, Class Counsel is convinced that the proposed Settlement
14 is in the best interests of the Class based on the negotiations and a detailed knowledge of the
15 issues present in this action. The length and risks of trial and perils of litigation that effect the
16 value of the claims were all carefully weighed. In addition, the defenses asserted by Defendant,
17 particularly, the uncertainty of class certification, the difficulties of complex litigation, the
18 lengthy process of establishing specific damages and various possible delays and appeals, were
19 also carefully considered by Class Counsel in arriving at the proposed Settlement.

20 **I. BACKGROUND**

21 Based in Irvine, California, Defendant is a United States-based medical technology
22 company that focuses on the design, development, and commercialization of innovative and
23 minimally invasive sacral neuromodulation solutions. This case involves all non-exempt
24 employees and non-exempt contractor/staffing agency employees employed or retained by

25

¹ \$93,750 (Net Distribution Fund) / 144 (Class Members) = \$651.04.

26 ² Class Counsel cannot provide the expected high and low Individual Settlement Payments or Named Plaintiffs’
27 expected Individual Settlement Payments. This is because pursuant to the Settlement Agreement, Defendant will
28 provide the Settlement Administrator with the Class Member Data needed to calculate these amounts within thirty
(30) days after filing the Preliminary Approval Order. Thus, the Settlement Administrator will not have the
necessary information to calculate the expected high and low Individual Settlement Payments or Named Plaintiffs’
expected Individual Settlement Payments until after the filing of the Preliminary Approval Order.

1 Defendant in the State of California in a non-exempt position during the period of time
2 beginning on June 14, 2017 through September 14, 2021. Named Plaintiffs allege that at all
3 times during the Class Period, Defendant's non-exempt employees work and/or worked on an
4 hourly basis. (Declaration of Douglas Han ("Han Dec.") ¶ 8.)

5 On March 13, 2020, Named Plaintiff Itzep, a former employer of Defendant, provided
6 written notice to the California Labor and Workforce Development Agency ("LWDA") and
7 Defendant of the specific provisions of the Labor Code she contends were violated, and the
8 theories supporting her contentions. (Han Dec. ¶ 9.)

9 After the 65-day period expired with the LWDA not taking any action to investigate or
10 prosecute, Named Plaintiff Itzep filed a representative PAGA action against Defendant on May
11 26, 2020 in the Superior Court of California, County of Orange. Named Plaintiff Itzep's
12 representative PAGA action was predicated on Defendant's alleged failure to: (a) pay minimum
13 and overtime wages; (b) provide meal periods and rest breaks; (c) timely pay wages during
14 employment; (d) timely pay wages upon termination; (e) provide complete and accurate wage
15 statements; and (f) reimburse business expenses. (Han Dec. ¶ 10.)

16 The Parties agreed to attend a mediation of Named Plaintiff Itzep's claims on June 14,
17 2021 with experienced wage-and-hour mediator Anthony F. Pantoni, Esq. Under the auspices of
18 the mediator after lengthy negotiations, the Parties were eventually able to reach a settlement via
19 a mediator's proposal. (Han Dec. ¶ 11.)

20 Pursuant to the Parties' decision to settle this Action, Named Plaintiff Itzep filed a First
21 Amended Complaint ("FAC") on October 18, 2021 in the Superior Court of California, County
22 of Orange. The FAC added Named Plaintiff Moser as an additional plaintiff and class
23 representative and added the following causes of action: (a) unpaid overtime (Labor Code
24 sections 510 and 1198); (b) unpaid meal period premiums (Labor Code sections 226.7 and
25 512(a)); (c) unpaid rest period premiums (Labor Code section 226.7); (d) unpaid minimum
26 wages (Labor Code sections 1194 and 1197); (e) final wages not timely paid (Labor Code
27 sections 201 and 202); (f) noncompliant wage statements (Labor Code section 226(a)); (g)

unreimbursed business expenses (Labor Code sections 2800 and 2802); and (h) violation of Business & Professions Code sections 17200, *et seq.* (Han Dec. ¶12.)

Using the Courthouse News Service that keeps track of class actions and representative PAGA actions filed, Class Counsel found no pending class action, representative PAGA action, or other collective action in any other court that asserts claims like those in this Action. Class Counsel also performed a PAGA search and found no other similar representative PAGA action. (Han Dec. ¶ 13.)

Defendant denies the allegations of this Action in their entirety. Defendant also asserts that, if this matter were to be litigated further, it would have strong defenses to class certification and on the merits. Thus, while Defendant specifically denies any liability or wrongdoing in this Action, Defendant has agreed to settle this matter to avoid the cost and business disruption associated with defending the Action. (Han Dec. ¶ 14.)

II. INVESTIGATION/ LITIGATION HISTORY

a. Discovery, Investigation, and the Parties' Staunchly Conflicting Positions

After Named Plaintiff Itzep filed her representative PAGA action, both Parties engaged in discovery. Named Plaintiffs propounded one (1) set of form interrogatories, one (1) set of special interrogatories, one (1) set of requests for admissions; and one (1) set of requests for production of documents. Defendant responded to Named Plaintiffs' discovery. Afterwards, the Parties met and conferred regarding this discovery, and Named Plaintiffs sent Defendant a mediation data request letter on March 26, 2021 that included an exhaustive list of data and documents. (Han Dec. ¶ 15.)

As the result of the investigation and formal and informal discovery conducted by Named Plaintiffs, Defendant produced hundreds of documents. These documents related to Defendant's policies, practices, and procedures regarding reimbursement of business expenses, paying non-exempt employees for all hours worked, meal and rest break policies, and payroll and operational policies. As part of Defendant's production, Named Plaintiffs also reviewed time records, pay records, and information relating to the size and scope of the Class, as well as data permitting Named Plaintiffs to understand the number of pay periods and workweeks in the Class Period.

1 Furthermore, Named Plaintiffs interviewed several putative class members who worked for
2 Defendant throughout the Class Period. These putative class members apprised Named Plaintiffs
3 of their experiences working for Defendant and provided Named Plaintiffs with relevant
4 documents, including the contact information for other putative class members. (Han Dec. ¶ 16.)

5 The Parties agree that the above-described investigation and evaluation, as well as the
6 information exchanged during the settlement negotiations, are more than sufficient to assess the
7 merits of the respective Parties' positions and to compromise the issues on a fair and equitable
8 basis. (Han Dec. ¶ 17.)

9 Based upon the information and documents produced by Defendant, as well as interviews
10 Named Plaintiffs had with putative class members, Named Plaintiffs contend – and Defendant
11 denies – that Defendant failed to maintain a practice of providing employees with legally
12 mandated meal and rest breaks. Specifically, Named Plaintiffs alleged that improper, uniform
13 policies and practices precluded employees from receiving compliant breaks. (Han Dec. ¶ 18.)

14 Additionally, Named Plaintiffs assert – and Defendant denies – that Defendant forced
15 employees to work off-the-clock for which they were not compensated. This purportedly
16 included having to come to work earlier than usual due to line of employees trying to clock in
17 and being instructed to continue working after clocking out. (Han Dec. ¶ 19.)

18 Named Plaintiffs also allege – and Defendant denies – that Defendant failed to reimburse
19 employees for necessary business expenses. This included employees using their personal cell
20 phones and vehicles for various business-related purposes. (Han Dec. ¶ 20.)

21 Finally, Named Plaintiffs contend – and Defendant denies – that Defendant is liable wage
22 statement penalties and waiting time penalties due to the underlying violations stated above.
23 (Han Dec. ¶¶ 21-22.)

24 Defendant denies Named Plaintiffs' contentions in their entirety. Specifically, Defendant
25 has countered that it did not force employees to forgo receiving compliant meal and rest breaks,
26 did not pressure employees to work-off-the-clock, always reimbursed employees for incurring
27 business expenses, and that any failure to comply with California labor laws (which it denies)
28 was an honest mistake made in good faith. (Han Dec. ¶ 23.)

1 Per the above, the Parties took staunchly conflicting positions with respect to Defendant's
2 policies and procedures and their effect on non-exempt employees.

3 **b. The Parties Attended Mediation Which Resulted in the Joint Stipulation**

4 The Parties agreed to go to mediation with experienced wage and hour mediator,
5 Anthony F. Pantoni, Esq. The mediation took place on June 14, 2021, and the Parties were
6 ultimately able to reach an agreement on settlement via a mediator's proposal, the terms of which
7 were memorialized in a Settlement Agreement that the Parties seek preliminary approval of in
8 the instant motion. (Han Dec. ¶ 24; Exhibit 2.)³

9 **c. Terms of the Proposed Settlement**

10 **i. Deductions from the Settlement**

11 The Parties have agreed (subject to and contingent upon the Court's approval) that this
12 action be settled and compromised for the total sum of \$225,000 ("Gross Settlement Amount")
13 which includes, subject to Court approval: (a) Attorneys' Fees of up to 78,750 (35% of the Gross
14 Settlement Amount) to compensate Class Counsel; (b) Attorneys' Costs as reimbursement for
15 actual litigation costs to Class Counsel in a sum not to exceed \$15,000⁴; (c) Named Plaintiffs'
16 Enhancement and General Release Payment in a sum not to exceed \$5,000 to each Named
17 Plaintiff; (d) Administration Fees and Costs to Phoenix, the Settlement Administrator, in an
18 amount not to exceed \$5,000; and (e) the sum of \$22,500, seventy-five percent (75%) of which
19 (\$16,875) will be paid to the LWDA and twenty-five percent (25%) of which (\$5,625) will be
20 paid to PAGA Employees. Other than employer-side payroll taxes, in no event shall Defendant
21 be required to pay any amounts above the Gross Settlement Amount with respect to the Released
22 Claims or Released PAGA Claims or because of the Agreement for any reason. (Han Dec. ¶ 25.)

23 ///

24 _____
25 ³ Attached as **EXHIBIT 3** to the Declaration of Douglas Han is a true and correct copy of the email confirmation
26 and LWDA submission evidencing the submission of the Named Plaintiffs' Notice of Motion and Motion for
27 Preliminary Approval of Class Action Settlement and the Settlement Agreement to the LWDA.

28 ⁴ The amount of the actual litigation costs will be provided to the Court in conjunction with Named Plaintiffs'
motion for final approval. At that time, Named Plaintiffs will ask the Court to approve the amount of these actual
litigation costs. If Named Plaintiffs' actual litigation costs exceed \$15,000 Named Plaintiffs will only seek
reimbursement in the amount of \$15,000. If the Court awards less than the full amount requested for Attorneys'
Costs, the un-awarded amount will be made available for distribution as part of the Net Distribution Fund and
distributed to all Class Members other than those who opt-out ("Participating Class Members"). (Han Dec. ¶ 26.)

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Only the following individuals will receive Individual Settlement Payments under the Settlement Agreement: (1) Named Plaintiffs; and (2) Participating Class Members. Individual Settlement Payments will be calculated as follows:

As for the PAGA Payment in the sum of \$5,625 to be distributed to PAGA Employees, the \$5,625 will be divided by the total number of PAGA Pay Periods credited to all PAGA Employees (“PAGA Pay Period Value”) that will then be multiplied by each PAGA Employees’ individual Total PAGA Pay Periods worked according to Defendant’s records. (Han Dec. ¶ 29.)

iii. The Allocation of (34%) to Wages and the remainder to Penalties (33%), and to Interest and Any Other None-Wage Related Amount (33%) are Justified Under the Claims of this Action

All Individual Settlement Payments shall be paid in a net amount after applicable employee state and federal tax withholdings, including payroll taxes, if any, have been deducted. Specifically, (a) thirty-four percent (34%) of the Individual Settlement Payment will be allocated to wages and W-2s shall be issued; and (b) thirty-three percent (33%) of the Individual Settlement Payments will be considered penalties and the remaining thirty-three percent (33%) will be allocated to interest and any other non-wage related amount, if any. These latter allocations will be reported as such to each Participating Class Member on an IRS Form 1099.

1 The PAGA Payments to PAGA Employees will be designated as payments for alleged penalties
2 and other non-wage amounts. (Han Dec. ¶ 31.)

3 The allocation of wages, penalties, and interest described above was reached based on the
4 realistic exposure Named Plaintiffs could expect to receive for meal penalties, rest penalties, and
5 unpaid wages due to off-the-clock work if this case went to trial (discussed in detail below).
6 While unpaid wages due to off-the-clock work qualifies as wages, failure to pay premium wages
7 for noncompliant meal and rest breaks could be characterized as wages or penalties. As a result,
8 the Parties added the realistic exposure for meal penalties and rest penalties (\$25,914.09 +
9 \$17,857.30 = \$43,771.39) and divided the sum in half to represent one-half (1/2) for wages and
10 one-half (1/2) for penalties (\$21,885.70). The Parties then added the \$43,700.22 representing
11 wages to the high end of the realistic exposure for unpaid wages due to off-the-clock work
12 (\$21,885.70 + \$43,700.22 = \$65,585.92). This realistic exposure of \$65,585.92 that Named
13 Plaintiffs can expect to receive for the wage portion of meal penalties, rest penalties, and unpaid
14 wages due to off-the-clock work equates to almost thirty-four percent (33.82%) of the high end
15 of the realistic exposure of the maximum total exposure (\$193,915.33). Because this represents
16 almost thirty-four percent (34%) of wages, the Parties determined that allocating thirty-four
17 percent (34%) as wages, thirty-three percent (33%) as penalties, and thirty-three percent (33%)
18 as interest and any non-wage related amount pursuant to the Settlement Agreement was
19 appropriate. (Han Dec. ¶ 32.)

20 **iv. Notice to the Class**

21 Within thirty (30) days after filing of the Preliminary Approval Order, Defendant
22 shall provide to the Settlement Administrator the Class Member Data. (Han Dec. ¶ 33.)

23 Within seven (7) days after receipt of the Class Member Data, the Settlement
24 Administrator shall send the Notice Packet to each Class Member's and PAGA Member's Last
25 Known Address or Updated Address (if applicable) via First-Class U.S. mail. No claim form is
26 necessary to participate in the Settlement. The Class Notice and Opt-Out Form are attached as
27 Exhibits A and B respectively to the Settlement Agreement, which is attached as Exhibit 2 to the
28 Declaration of Douglas Han. (Han Dec. ¶ 34.)

1 **v. Distribution of Funds**

2 Defendant will deposit the Funding Payment into an account established by Phoenix by
3 the Funding Deadline. The distribution of Individual Settlement Payments to Participating Class
4 Members shall occur no later than the Settlement Proceeds Distribution Deadline. The
5 distribution of Attorneys' Fees, Attorneys' Costs, and the Named Plaintiffs' Enhancement and
6 General Release Payment shall occur after the Effective Date and Funding Deadline and no later
7 than the Settlement Proceeds Distribution Deadline. (Han Dec. ¶ 35.)

8 Participating Class Members who are sent Individual Settlement Payments shall have one
9 hundred fifty (150) days after mailing by the Settlement Administrator to cash their settlement
10 checks. Settlement checks that are not cashed within one hundred and fifty (150) days of mailing
11 shall, subject to Court approval, will be distributed by the Settlement Administrator to the State
12 Controller Unclaimed Property Fund, or as otherwise directed by California Code of Civil
13 Procedure section 384 and as ordered by the Court. (Han Dec. ¶ 36.)

14 **vi. Release of Claims**

15 As of the Effective Date, Named Plaintiffs and all Participating Class Members shall be
16 deemed to have fully, finally, and forever released, settled, compromised, relinquished, and
17 discharged any and all Settled Claims against any and all Released Parties ("Settled Claims").
18 *See Exhibit 2, ¶¶ 33 & 51.* (Han Dec. ¶ 37.)

19 Moreover, as of the Effective Date, Named Plaintiffs, the LWDA, the State of California,
20 and any other representative, proxy, or agent thereof, including but not limited to any and all
21 PAGA Employees release and are barred from prosecuting "Settled Claims" that arose from the
22 start of the PAGA Period against any and all of the Released Parties ("Settled PAGA Claims").
23 *See Exhibit 2, ¶¶ 34 & 52.* (Han Dec. ¶ 38.)

24 In addition to the releases made by the Participating Class Members and PAGA
25 Employees set forth in the Agreement, Named Plaintiffs release, as individuals and in addition to
26 the Settled Claims and Settled PAGA Claims described in the Agreement, all claims, whether
27 known or unknown, under federal law or state law against the Released Parties. *See Exhibit 2, ¶*
28 *53.* (Han Dec. ¶ 39.)

1 Finally, the Released Parties include Defendant and its past, present or future parents,
2 subsidiaries, affiliates, officers, directors, employees, partners, shareholders, attorneys, agents,
3 and any other successors, assigns, or legal representatives (“Released Parties”). *See* Exhibit 2, ¶
4 30. (Han Dec. ¶ 40.)

5 The releases are limited to the scope of the allegations in the Complaints. In other words,
6 the releases are “ ‘ “based on the identical factual predicate as that underlying the claims in the
7 settled class action.” ’ ” (*Amaro v. Anaheim Arena Management, LLC* (2021) 69 Cal.App.5th
8 521, 537.)

9 **III. ARGUMENT**

10 **a. Class Action Settlements Are Subject to Court Review**

11 Rule 3.769 requires court approval for class action settlements.⁵ “Before final approval,
12 the court must conduct an inquiry into the fairness of the proposed settlement.” (California Rules
13 of Court, Rule 3.769(g). Rule 3.769 further requires a noticed motion for preliminary approval of
14 class settlements:

- 15 (a) A settlement or compromise of an entire class action, or a cause of action
16 in a class action, or as to a party, requires the approval of the court after
17 hearing.
18 . . .
19 (b) Any party to a settlement agreement may serve and file a written notice of
20 motion for preliminary approval of the settlement. The settlement
21 agreement and proposed notice to class members must be filed with the
22 motion, and the proposed order must be lodged with the motion.

23 Courts act within their discretion in approving settlements that are fair, not collusive, and
24 take into account “all the normal perils of litigation as well as the additional uncertainties
25 inherent in complex class actions.” *In re Beef Industry Antitrust Litigation* (5th Cir. 1979) 607 F.
26 2d 167, 179, cert. den. sub nom. *Iowa Beef Processors, Inc. v. Meat Price Investigators Ass’n*
(1981) 452 U.S. 905.

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28 ⁵The California Supreme Court also has authorized California’s trial courts to use Federal Rule 23 and cases
applying it for guidance in considering class issues. *See Vasquez v. Superior Court* (1971) 4 Cal.3d 800, 821; *Green*
v. Obledo (1981) 29 Cal.3d 126, 145-146. Where appropriate, therefore, the Parties cite Federal Rule 23 and federal
case law in addition to California law.

1 **b. Conditional Certification of the Class is Appropriate.**

2 For settlement purposes only, the requisites for establishing conditional class certification
3 are met. Code of Civil Procedure Section 382 “authorizes class actions ‘when the question is one
4 of a common or general interest, of many persons, or when the parties are numerous, and it is
5 impracticable to bring them all before the court.” *Sav-On Drug Stores, Inc. v. Superior Court*
6 (2004) 34 Cal. 4th 319, 326. California courts certify class actions where the plaintiff identifies
7 “both [1] an ascertainable class and [2] a well-defined community of interest among class
8 members.” *Id.*

9 The proposed Class is ascertainable and numerous as to make it impracticable to join all
10 Class Members, and there are common questions of law and fact that predominate over any
11 questions affecting any individual Class Member. Named Plaintiffs’ claims are typical of the
12 claims of the Class Members, and Class Counsel will fairly and adequately protect the interests
13 of the Class. Further, prosecution of separate actions by individual Class Members would create
14 the risk of inconsistent or varying adjudications, and a class action is superior to other available
15 means for the fair and efficient adjudication of the case. (Han Dec. ¶ 68.)

16 As discussed below, this case is amenable to class certification.

17 **i. The Proposed Class Is Ascertainable and Sufficiently Numerous**

18 “Ascertainability is required in order to give notice to putative class members as to whom
19 the judgment in the action will be res judicata.” *Hicks v. Kaufman & Broad Home Corp.* (2001)
20 89 Cal. App. 4th 908, 914. “A class is ascertainable if it identifies a group of unnamed plaintiffs
21 by describing a set of common characteristics sufficient to allow a member of that group to
22 identify himself or herself as having a right to recover based on the description.” *Bartold v.*
23 *Glendale Federal Bank* (2000) 81 Cal.App.4th 816, 828. The proposed class must also be
24 sufficiently numerous. *Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 435.

25 This action involves approximately one hundred forty-four (144) Class Members. This
26 Class is sufficiently numerous. *See Ghazaryan v. Diva Limousine, Ltd.* (2008) 169 Cal. App. 4th
27 1524, 1531 n.5 (finding that a proposed class of “as many as 190 current and former employees”
28 is sufficiently numerous). Furthermore, all Class Members can and will be identified by

1 Defendant to the Settlement Administrator through a review of Defendant’s employment records
2 concerning non-exempt or hourly employees who worked for Defendant in the State of
3 California during the Class Period. (Han Dec. ¶ 69.)

4 **ii. The Class Members Share a Well-Defined Community of Interest**

5 The community of interest requirement “embodies three factors: (1) predominant
6 common questions of law or fact; (2) class representatives with claims or defenses typical of the
7 class; and (3) class representatives who can adequately represent the class.” *Sav-On, supra*, 34
8 Cal.4th at p. 326. “[T]he community of interest requirement for certification *does not mandate*
9 *that class members have uniform or identical claims.*” *Capitol People First v. Department of*
10 *Developmental Services* (2007) 155 Cal.App.4th 676, 692 (emphasis in original). Rather, courts
11 focus on the Defendant’s internal policies and “pattern and practice . . . in order to assess
12 whether that common behavior toward similarly situated plaintiffs renders class certification
13 appropriate.” *Id.* (citing *Sav-On, supra*, 34 Cal.4th at 333).

14 The “common issues” requirement “involves analysis of whether the proponent’s ‘theory
15 of recovery’ is likely to prove compatible with class treatment.” *Capitol People, supra*, 155
16 Cal.App.4th at p. 690 (emphasis added) (citing *Sav-On, supra*, 34 Cal.4th at p. 327).
17 Furthermore, the commonality inquiry centers on the “reasonableness” of the Defendants’ labor
18 policies as applied to the potential class. *Ghazaryan, supra*, 169 Cal.App.4th at p. 1534.

19 Named Plaintiffs assert that common issues of fact and law predominate as to each of the
20 claims alleged by Named Plaintiffs. Specifically, Named Plaintiffs contend all hourly-paid non-
21 exempt employees who worked for Defendant during the Class Period were subject to the same
22 or similar employment practices, policies, and procedures. Specifically, all Named Plaintiffs’
23 claims surround Defendant’s alleged common practice and scheme of failing to maintain
24 compliant meal and rest break policies and practices, failing to reimburse business expenses, and
25 failing to fully and properly compensate employees, *inter alia*, for noncompliant rest and meal
26 breaks, off-the-clock work, overtime work, associated wage statement, and waiting time
27 penalties. (Han Dec. ¶ 70.)

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1 **iii. The Proposed Class Representative Has Claims or Defenses Typical of**
2 **the Class and Can Adequately Represent The Class.**

3 The typicality requirement is satisfied where class representatives have claims that are
4 typical of those of the rest of the class. *B.W.I. Custom Kitchen v. Owens-Illinois, Inc.* (1987) 191
5 Cal.App.3d 1341, 1347 (finding typicality satisfied where named Plaintiff purchased the same
6 goods as the putative class in a consumer class action).

7 As mentioned above, Named Plaintiffs' claims are typical of those held by the proposed
8 Class. Specifically, Named Plaintiffs were hourly-paid non-exempt employees of Defendant.
9 Named Plaintiffs allege that they and the Class Members were employed by the same company
10 and injured by Defendant's common policies and practices related to meal and rest breaks,
11 uncompensated off-the-clock work, unpaid overtime, untimely paid final wages, inaccurate wage
12 statements, and unreimbursed business expenses. Given that Defendant's policies and practices
13 applied to all non-exempt employees, Class Members possess a similar interest and have suffered
14 similar alleged injuries as Named Plaintiffs. Thus, Named Plaintiffs' claims as alleged arise from
15 the same employment practices and are based on the same legal theories as those applicable to
16 Class Members. Accordingly, because Named Plaintiffs' claims and those of the Class all arise
17 from the same conduct, typicality is satisfied. (Han Dec. ¶ 71.)

18 The adequacy requirement examines conflicts of interest between named parties and the
19 class(es) they seek to represent. *Capital People First v. Department of Developmental Services*
20 (2007) 155 Cal.App.4th 676, 697.

21 Here, there are no apparent conflicts of interest between Named Plaintiffs and the Class
22 they seek to represent. Indeed, Named Plaintiffs' interests are aligned with those of the Class
23 Members, as they all seek monetary relief under the same facts and legal theories. Additionally,
24 Class Counsel do not have any conflict of interest with the Class. *See McGhee v. Bank of*
25 *America* (1976) 60 Cal.App.3d 442, 450-51 (adequacy satisfied where there was no indication
26 that Class Counsel were not qualified, and the named plaintiff had no interests antagonistic to
27 those of the proposed class).

28 ///

1 Based on these facts, Named Plaintiffs conclude that the proposed Class is readily
2 certifiable in this case. Accordingly, the Court should provisionally certify the Class for
3 settlement purposes only.

4 **c. The Settlement Is Fair, Reasonable, and Adequate**

5 In deciding whether to approve a proposed class action settlement under Code of Civil
6 Procedure section 382, the Court must find that a proposed settlement is “fair, adequate and
7 reasonable.” *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1801. A proposed class
8 action settlement is presumed fair under the following circumstances: (1) the parties reached
9 settlement after arms-length negotiations; (2) investigation and discovery were sufficient to
10 allow counsel and the court to act intelligently; (3) counsel is experienced in similar litigation;
11 and (4) the percentage of objectors is small. *Dunk v. Ford Motor Co.*, *supra*, at 1802. As the
12 following shows, all these elements are present here and the Court’s grant of preliminary
13 approval is therefore requested.

14 **d. The Settlement Was Reached as a Result of Arm’s-Length Negotiations**

15 The Settlement was reached because of arm’s-length negotiations. Though cordial and
16 professional, the settlement negotiations have always been adversarial and non-collusive in
17 nature. At the mediation, Counsel for the Parties conducted extensive arm’s length settlement
18 negotiations until an agreement was ultimately reached by all Parties via a mediator’s proposal.
19 The terms of the settlement are memorialized in the Agreement. (Han Dec. ¶ 41, Exhibit 2.)

20 Named Plaintiffs believe in the merits of their case. But Named Plaintiffs also recognize
21 the inherent risks of litigation and understands the benefit of the Class receiving settlement funds
22 immediately as opposed to risking continued litigation, the merits of the case before and after
23 trial, damages awarded, and an appeal that can take years to litigate. (Han Dec. ¶ 42.)

24 **e. The Settlement Is the Result of Thorough Investigation and Discovery**

25 The Parties thoroughly investigated and evaluated the factual strengths and weaknesses
26 before reaching the proposed settlement, and engaged in enough investigation, research, and
27 discovery to support the settlement. The proposed settlement was only possible following
28 significant formal and informal discovery and evaluation of Defendant’s relevant policies and

1 procedures, as well as the data they produced for the putative class members. This, in turn,
2 permitted Class Counsel to engage in a comprehensive analysis of liability and potential
3 damages. (Han Dec. ¶ 43.) This litigation has reached the stage where “the Parties certainly have
4 a clear view of the strengths and weaknesses of their cases” sufficient to support the Settlement.
5 *Boyd v. Bechtel Corp.* (N.D. Cal. 1979) 485 F. Supp. 610, 617.

6 **f. Counsel for Both Parties Are Experienced in Similar Litigation**

7 Both Class Counsel and Defendant’s counsel are particularly experienced in wage-and-
8 hour employment law and class actions. Class Counsel has significant experience in litigating
9 unpaid wages, unprovided meal break, and unprovided rest break class actions. (Han Dec. ¶¶ 4-
10 7, Exhibit 1.)

11 Class Counsel have prosecuted numerous cases on behalf of employees for Labor Code
12 violations and, thus, are experienced and qualified to evaluate the class claims and to evaluate
13 settlement versus trial on a fully informed basis, and to evaluate the viability of the defenses.
14 This experience instructed Class Counsel on the risks and uncertainties of further litigation and
15 guided their determination to endorse the proposed settlement.⁶ (Han Dec. ¶ 4-7, Exhibit 1.)

16 **g. The Proposed Settlement is a Reasonable Compromise of Claims**

17 An understanding of the amount in controversy is an important factor into whether the
18 settlement “of the class members’ claims is reasonable in light of the strengths and weaknesses
19 of the claims and the risks of the particular litigation.” *Kullar v. Foot Locker Retail, Inc.* (2008)
20 168 Cal.App.4th 116, 129; see also *Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles* (2010)
21 186 Cal.App.4th 399, 409. The most important factor in this regard is “the strength of the case
22 for plaintiffs on the merits, balanced against the amount offered in settlement.” *Id.*

23 In weighing the strength of the plaintiff’s case, *Kullar* instructs that the court is not to
24 “decide the merits of the case or to substitute its evaluation of the most appropriate settlement for
25 that of the attorneys.” *Kullar, supra*, 168 Cal.App.4th at 133. Finally, *Kullar* does not require an
26 explicit statement of the maximum amount the plaintiff class could recover if it prevailed on all

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28 ⁶ The final factor mentioned in *Dunk* – the number of objectors – is not determinable until the Notice of Class
Action Settlement has been provided to the Class and they have had an opportunity to respond. This information will
be provided to the Court in conjunction with the Motion for Final Approval of Class Action Settlement.

its claims, provided there is a record which allows “an understanding of the amount that is in controversy and the realistic range of outcomes of the litigation.” *Munoz*, 186 Cal.App.4th at 409. Put differently, “as the court does when it approves a settlement as in good faith under *Code of Civil Procedure* § 877.6, the court must at least satisfy itself that the class settlement is within the ‘ballpark’ of reasonableness.” *Kullar, supra*, 168 Cal.App.4th at 133, citing *Tech-Bilt v. Woodward-Clyde & Associates* (1985) 38 Cal.3d 488, 499-500.

As the following subsections show, the Parties’ investigation and discovery revealed plenty of reasons to discount claims and agree to this settlement.

i. The Settlement Is Fair and Reasonable

The proposed settlement was only possible following significant informal discovery and evaluation of Defendant’s relevant policies and procedures, as well as the data they produced for the putative class members, which permitted Class Counsel to engage in a comprehensive analysis of liability and potential damages. (Han Dec. ¶ 43.)

This formal and informal discovery resulted in Named Plaintiffs’ central theories of liability, which are predicated the claims that Defendant employed uniform policies of: (a) not providing to authorize and permit employees to take legally mandated meal and rest breaks and paying applicable premium wages; (b) not compensating employees for all hours worked, including minimum wages and overtime wages; (c) not reimbursing employees for necessary business expenses; (d) failing to provide employees with timely wages within seventy-two (72) hours of their resignation or immediately after their termination; (e) not issuing complete and accurate wage statements; (f) violating PAGA; and (g) violating the Business & Professions Code sections 17200, *et seq.* Defendant vehemently denies Named Plaintiffs’ theories of liability. (Han Dec. ¶¶ 44-45.)

Although Named Plaintiffs believe the case is suitable for certification on the alleged basis that there are company-wide policies that Named Plaintiffs contend violate California law and uniformly affect the putative class members; uncertainties with respect to certification are always present. As the California Supreme Court ruled in *Sav-On v. Superior Court* (2004) 34 Cal.4th 319, class certification is always a matter of the trial court’s sound discretion. Decisions

1 following *Sav-On* have reached different conclusions, with respect to certification of wage and
2 hour claims.⁷ (Han Dec. ¶ 46.)

3 Although remaining confident in the strengths of their claims, all these factors led Named
4 Plaintiffs to discount the following calculations of potential damage claims.

5 **ii. The Gross Settlement Amount of \$225,000 is Reasonable**

6 In preparing for mediation, Defendant provided Named Plaintiffs with a sampling of time
7 and pay records and information regarding the estimated number of pay periods and workweeks
8 worked by putative class members and their average hourly rate. Defendant also confirmed there
9 were approximately 7,520 workweeks worked by the putative class members. Named Plaintiffs
10 were also able to determine that the average hourly rate for the putative class members was
11 \$24.21. (Han Dec. ¶ 47).

12 The provisions of the Labor Code potentially triggering PAGA penalties in this case
13 include, but are not limited to, Labor Code sections 201, 202, 203, 204, 226(a), 226.7, 246(l),
14 510, 512(a), 1194, 1197, 1197.1, 1198, 2800, and 2802. Defendant asserted that, regardless of
15 the results of the underlying causes of action, PAGA penalties are not mandatory but permissive
16 and discretionary. Defendant maintained that, in addition to its strong arguments against the
17 underlying claims, it had a strong argument that it would be unjust to award maximum PAGA
18 penalties given the current unsettled state of law. (*Thurman v. Bayshore Transit Mgmt.* (2012)
19 203 Cal.App.4th 1112 (reducing penalties by 30% under this authority).) Named Plaintiffs
20 argued that without stacking and limited to the initial violation, PAGA penalties would be
21 limited to \$13,800 (138 employees x \$100 initial violation) on the low end and \$82,800 on the
22 high end based on six (6) major theories of recovery. (Han Dec. ¶¶ 53-57.)

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26 ⁷ (See, e.g., *Harris v. Superior Court* (2007) 154 Cal. App. 4th 164 (reversing decertification of class claiming
27 misclassification and ordering summary adjudication in favor of employees), *review granted*, 171 P.3d 545 (2007)
28 (not cited as precedent, but rather for illustrative purposes only); *Walsh v. IKON Solutions, Inc.*, 148 Cal. App. 4th
1440 (affirming decertification of class claiming misclassification); *Aguilar v. Cintas Corp. No. 2* (2006) 144 Cal.
App. 4th 121 (reversing denial of certification); *Dunbar v. Albertson's Inc.* (2006) 141 Cal. App. 4th 1422
(affirming denial of certification).

1 Named Plaintiffs also recognized the risk that any PAGA award could be significantly
2 reduced. Many of the causes of action brought were duplicative of the statutory claims, such as
3 violations of Labor Code sections 226(a), 226.7, 510, 512(a), 1194, 1197, 1198, and 2802. Thus,
4 the maximum penalties for each pay period are not justified. It was indeed arguable whether the
5 Court would award the maximum penalties under the law. Thus, allocating \$22,500 to PAGA
6 civil penalties was reasonable based on a rate of \$6.74 per pay period [$\$22,500 \div 3,336$ Pay
7 Periods in PAGA Date Range = \$6.74], given the fact that Defendant is also paying an additional
8 \$202,500 in the class settlement.⁸ Where PAGA penalties are negotiated in good faith and “there
9 is no indication that [the] amount was the result of self-interest at the expense of other Class
10 Members,” such amounts are generally considered reasonable.⁹ (Han Dec. at ¶ 58.)

11 As stated above, Defendant has denied all Named Plaintiffs’ alleged claims, asserted
12 several defenses to Named Plaintiffs’ allegations, and believes that it would prevail if this Action
13 were to go to trial. (Han Dec. ¶ 59).

14 Taking into consideration Defendant’s defenses, its supporting evidence, and its position
15 that the Action is not suitable for class treatment, the settlement amount of \$225,000 – **with an**
16 **average Individual Settlement Payment estimated at \$651.04** – is reasonable and fair.

17 **h. Discount Analysis Justifies the Settlement**

18 Excluding the civil penalties, for the reasons stated, the total estimated potential
19 exposure, assuming certification and prevailing at trial, would be approximately \$1,187,899.26
20 on the low end to \$1,278,966.46 on the high end. (Han Dec. ¶ 60.)

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26 ⁸ (See *Carrington, supra*, 30 Cal.App.5th at p. 529 (affirming a rate of \$5 per violation and a total PAGA penalty of
27 \$150,000 while the plaintiff requested a rate of \$25 to \$75 per violation and a total PAGA penalty of
\$70,000,000).)

28 ⁹ (*Hopson v. Hanesbrands Inc.* (N.D. Cal. Apr. 3, 2009) Case No. 08-00844, 2009 U.S. Dist. LEXIS 33900, at *24;
see, e.g., *Nordstrom Com. Cases* (2010) 186 Cal.App.4th 576, 579 (“[T]rial court did not abuse its discretion in
approving a settlement which does not allocate any damages to the PAGA claims.”).)

Category	Potential Exposure	Certification Risk	Merits Risk	Realistic Exposure
Rest Break Penalties	\$215,950.78	70%	60%	\$25,914.09
Meal Break Penalties	\$89,286.48	60%	50%	\$17,857.30
Overtime/Minimum Wage: Off-the-Clock	\$182,059.20 to \$273,126.40	60%	60%	\$29,129.47 to \$43,700.22
Unreimbursed Business Expenses	\$45,110	40%	70%	\$8,119.80
Wage Statement Penalty	\$324,300	70%	50%	\$48,645
Waiting Time Penalty	\$331,192.80	70%	50%	\$49,678.92
MAXIMUM TOTAL EXPOSURE	\$1,187,899.26 to \$1,278,966.46¹⁰			\$179,344.58 to \$193,915.33¹¹

Based on this analysis, the realistic recovery is \$179,344.58 on the low end to \$193,915.33 on the high end. The Gross Settlement Amount of \$225,000 is approximately seventeen percent (17.59%) of the high end of the maximum potential exposure and about one hundred sixteen percent (116.03%) of the high end of the realistic exposure at trial, which an excellent settlement. (Han Dec. ¶ 68).

The only question at preliminary approval is whether the settlement is within the range of possible approval. *In re Tableware Antitrust Litig.*, 484 F. Supp. 2d 1078, 1079 (N.D. Cal. 2007). “The fact that a proposed settlement may only amount to a fraction of the potential recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be disapproved.” *City of Detroit v. Grinnell Corporation* (2d Cir. 1974) 495 F. 2d 448, 455, *see also Linney v. Cellular Alaska Partnership* (9th Cir. 1998) 151 F.3d 1234,1242 (“[I]t is the very uncertainty of outcome in litigation and avoidance of wasteful and expensive litigation that induce consensual settlements. The proposed settlement is not to be judged against a hypothetical or speculative measure of what might have been achieved by the negotiators.”).

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¹⁰ Han Dec. ¶¶ 48-52.

¹¹ Han Dec. ¶¶ 61-66.

1 **i. Notice to Class Members Complies with California Rule of Court 3.769(f)**

2 California Rule of Court, No. 3.769(f), provides:

3 If the court has certified the action as a class action, notice of the final approval
4 hearing must be given to class members in the manner specified by the court. The
5 notice must contain an explanation of the proposed settlement and procedures for
6 class members to follow in filing written objections to it and in arranging to
7 appear at the settlement hearing and state any objections to the proposed
8 settlement.

9 The proposed Notice Packet meets all these requirements. The proposed Notice Packet
10 advises the Class of their rights to participate in the Settlement, how to and when to object to or
11 request exclusion from the Settlement, and the date, time, and location of the final approval
12 hearing. *See* Exhibit 2.

13 **V. CONCLUSION**

14 Named Plaintiffs respectfully submit that the proposed settlement is in the best interests
15 of the Class, as it is fair, adequate, and reasonable, and one that should ultimately be granted
16 final approval. Under the applicable class action criteria and guidelines, the proposed settlement
17 should be preliminarily approved by the Court, the class should be conditionally certified for
18 purposes of settlement only, and the Notice Packet should be approved.

19 Dated: November 3, 2021

20 **JUSTICE LAW CORPORATION**

21 

22 _____
23 Douglas Han
24 Attorneys for Named Plaintiffs
25
26
27
28

**PROOF OF SERVICE
1013A(3) CCP**

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 751 N. Fair Oaks Avenue, Suite 101, Pasadena, CA 91103 and my electronic service address is mking@justicelawcorp.com

On November 3, 2021, I served the foregoing document described as

**NAMED PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR PRELIMINARY
APPROVAL OF CLASS ACTION SETTLEMENT, CONDITIONAL CERTIFICATION,
APPROVAL OF CLASS NOTICE, SETTING OF FINAL APPROVAL HEARING
DATE; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF**

for the following case: **Itzep v. Axonics Modulation Technologies, Inc.**
LWDA/Court Case No.: **LWDA Case No.: CM-778201-20**
Court Case No.: 30-2020-01140962-CU-OE-CXC
Orange County Superior Court

on interested parties in this action by electronically submitting as follows:

State of California
Labor & Workforce Development Agency
800 Capitol Mall, MIC-55
Sacramento, California 95814

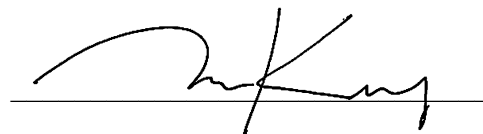
[X] BY ELECTRONIC SUBMISSION

Pursuant to California Senate Bill No. 836, I caused the documents described above to be electronically submitted by and through the procedure stated on the website of the State of California Labor and Workforce Development Agency.

[X] STATE

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on November 3, 2021, at Pasadena, California.



Madeline King