

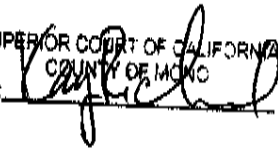
1 Robert W. Ottinger (SBN 156825)
robert@ottingerlaw.com
2 **THE OTTINGER FIRM, P.C.**
535 Mission Street, 14th Floor
3 San Francisco, CA 94105
MAIN: 415-262-0096
4 FAX: 212-571-0505

5 Jennifer Liu (SBN 279370)
jliu@liulawpc.com
6 **THE LIU LAW FIRM, P.C.**
800 Menlo Avenue, Suite 102
7 Menlo Park, CA 94025
MAIN: 650-461-9000
8 FAX: 650-460-6967

9 *Attorneys for Plaintiffs*

FILED

FEB 02 2022

SUPERIOR COURT OF CALIFORNIA
COUNTY OF MONO
BY: 

10 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
11 **COUNTY OF MONO**
12

13 SAM STEUART, BRANDT EARHART,
and WILLIAM BERRIER, individually, and
14 on behalf of all other members of the
general public similarly situated,

15 Plaintiffs,

16 vs.

17 SQUAW VALLEY RESORT, LLC,
18 MAMMOTH MOUNTAIN SKI AREA, LLC,
and SNOW SUMMIT, LLC; and DOES 1
19 THROUGH 100, inclusive,
20 Defendants.
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Case No. 21UCM49

**PLAINTIFFS' NOTICE OF MOTION
AND MOTION FOR ORDER
APPROVING REPRESENTATIVE
PAGA ACTION SETTLEMENT WITH
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT
THEREOF**

Complaint Filed: October 13, 2021

Date: March 3, 2022

Time: 9:30 a.m.

Location: Mammoth Lakes Courthouse

[Declarations of Robert Ottinger and Jennifer
Liu; [Proposed] Order Filed Concurrently
Herewith]

1 Robert W. Ottinger (SBN 156825)
robert@ottingerlaw.com
2 **THE OTTINGER FIRM, P.C.**
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MAIN: 415-262-0096
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jliu@liulawpc.com
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1 **TO THE COURT AND TO ALL PARTIES AND THEIR COUNSEL OF RECORD:**

2 **PLEASE TAKE NOTICE** that on March 2, 2022 at 9:30 a.m. in the Mammoth Lakes
3 Courthouse of the Mono County Superior Court of the State of California, located at 100 Thompsons
4 Way, Mammoth Lakes, California, 93546, Plaintiffs Sam Steuart, Brandt Earhart, and William
5 Berrier (collectively, "Plaintiffs"), by and through their attorneys of record, will and hereby do make
6 the instant Motion for an Order approving the parties' settlement of this PAGA-only action
7 ("Motion").

8 This Motion is based on this Notice attached Memorandum of Points and Authorities, along
9 with all exhibits and declarations attached thereto, any and all papers previously filed herein, and
10 any and all oral argument and/or evidence as may be offered at the time of the hearing in this matter.

11
12 Dated: February 2, 2022

Respectfully submitted,

13
14 By: 
15 Robert W. Ottinger
16 **THE OTTINGER FIRM, P.C.**
17 *Attorneys for Plaintiffs*
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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

By and through this Motion, Plaintiffs Sam Steuart, Brandt Earhart, and William Berrier (“Plaintiffs”) seek this Court’s approval pursuant to Labor Code § 2699(I) of the settlement of Private Attorneys General Act (“PAGA” Labor Code § 2698, *et seq.*) with Defendant Squaw Valley Resort, LLC, Defendant Mammoth Mountain Ski Area, LLC, Defendant Snow Summit, LLC, (“Alterra” or “Defendants”) (collectively, “the Parties”). This is a settlement of PAGA claims for civil penalties only, not a class settlement, and the Settlement does not release any individual non-PAGA claims of the members of the PAGA Settlement Group (as defined below) other than the named Plaintiffs. Labor Code § 2699(g)(1); *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348, 381.

The proposed Settlement Agreement¹ (“Settlement Agreement”) provides that Defendants will pay eight hundred fifty thousand dollars (\$850,000.00) (the “Total Settlement Amount”) to resolve all claims brought on behalf of the State of California for the PAGA Settlement Group Members’ claims of Labor Code violations based on the allegations of the Complaint² filed in connection with this Settlement Agreement (the “Complaint”). The Total Settlement Amount will cover: (a) payment to the Labor & Workforce Development Agency (“LWDA”); (b) all Settlement Shares to PAGA Settlement Group Members; (c) Plaintiffs’ Counsel’s fees, costs, and expenses; (d) the incentive payments to Plaintiffs; and (e) settlement administration fees and expenses. (Settlement Agreement, III.A.) The non-reversionary Settlement Agreement encompasses all claims Plaintiffs asserted in their letter to the LWDA and subsequent Complaint on behalf of themselves and the State of California, for claims of Labor Code violations for current and former California employees of Defendant in the PAGA Settlement Group.

Plaintiffs’ Counsel have pursued this action for nearly two years, displayed zealous advocacy

¹ A true and correct copy of the Parties’ fully-executed Settlement Agreement (“Settlement Agreement”) is attached as Exhibit 5 to the Declaration of Robert Ottinger (“Ottinger Decl.”) filed herewith. All capitalized terms have the meaning set forth in the Settlement Agreement unless indicated otherwise.

² A Complaint alleging each of the PAGA claims being released in the Parties’ Settlement Agreement has been filed herewith. A true and correct copy of said Complaint is attached as Exhibit 3 to the Ottinger Declaration.

1 on behalf of Plaintiffs and the PAGA Settlement Group Members, and have committed the time and
2 resources to pursue this action in litigation, through trial, and through any necessary appeals in the
3 event a settlement is not reached. In order to compensate them for those efforts, the Settlement
4 Agreement permits Plaintiffs' Counsel to request attorneys' fees in the amount not to exceed two
5 hundred ninety-seven thousand, five hundred dollars (\$297,500.00), or thirty-five percent (35%) of
6 the Total Settlement Amount. (Settlement Agreement, ¶ III.B.) Plaintiffs' Counsel has provided
7 herewith a detailed explanation of the basis for their rates, how they allocated work, and a task-based
8 summary based on contemporaneous time-records in order to assist the Court in performing the
9 required analysis. (Ottinger Decl., Exh. 4.) Based on the foregoing, Plaintiffs' Counsel respectively
10 requests that the Court grant their request for attorneys' fees in the amount of \$283,333.33, equal to
11 one-third (33-1/3%) of the Total Settlement Amount.

12 The Settlement Agreement also permits Plaintiff's Counsel to seek reimbursement of their
13 actual and reasonable litigation costs in addition to their fees in an amount not to exceed ten
14 thousand dollars (\$10,000.00). (Settlement Agreement, ¶ III.B.)³ It also provides for an incentive
15 payment to in an amount of up to five thousand dollars (\$5,000.00) per Plaintiff (*Id.* ¶ III.C.), and
16 reimbursement of the Settlement Administrator's reasonable fees and expenses as approved by the
17 Court. (*Id.* ¶ III.H.) The remaining Net Settlement Amount is to be distributed 75% to the LWDA
18 for resolution of the PAGA claims, and the remaining 25% of the Net Settlement Amount to be
19 distributed to the PAGA Settlement Group Members as required by *ZB, N.A. v. Superior Court*
20 (2019) 8 Cal.5th 175. (*Id.* ¶ III.E, F.)

21 Plaintiffs now respectfully request that the Court approve the Settlement as fair, adequate, and
22 reasonable, and approve the requested awards for attorneys' fees, representative incentive awards
23 and settlement administration costs, and enter judgment accordingly so that this matter can be
24 resolved, judgment can be entered, and the settlement funds distributed to the LWDA and PAGA
25 Settlement Group as expeditiously as possible.

26 **II. PROCEDURAL HISTORY AND SETTLEMENT NEGOTIATIONS**

27 **A. Factual Background and Claims in Operative Complaint**

28 ³ Plaintiffs' litigation costs to date total \$5,355.44. (Ottinger Decl., ¶ 31.)

1 The three named Plaintiffs in this PAGA-only action were employed by Defendants at ski
2 resort locations throughout California. In the Complaint, Plaintiffs allege that they performed
3 preliminary and postliminary activities without proper compensation for all of their time on these
4 activities, including but not limited to: 1) donning and doffing required uniforms, gear and
5 equipment; 2) traveling at the beginning of the shift from the base of the mountain to assigned work
6 locations on the mountain and back again; and 3) maintaining their equipment. (Complaint, ¶¶
7 14,24.) Plaintiffs further allege that, as a policy, Defendants did not compensate Plaintiffs for
8 necessary business-related expenses. (*Id.* ¶¶ 17, 22, 26, 29.) Specifically, as a snowboard
9 instructor, Plaintiff Earhart incurred expenses for, among other things, his snowboard, boots and
10 bindings goggles, helmets, and base layers; as a ski instructor, Plaintiff Steuart incurred expenses for,
11 among other things, his skis, boots and bindings, poles, goggles, helmets, and base layers; as a ski
12 instructor, Plaintiff Berrier incurred expenses for, among other things, his skis, boots and bindings,
13 poles, goggles, helmets, and base layers. (*Id.* ¶¶ 22, 26, and 29.) Finally, Plaintiffs alleged that
14 Defendants failed to provide them with legally compliant meal breaks, rest breaks, and wage
15 statements. (*Id.* ¶¶ 15-16, 19-20.)

16 On behalf of themselves and the State of California as private attorneys general, Plaintiffs
17 assert PAGA claims for the following Labor Code violations: (1) failure to pay regular and overtime
18 wages (Cal. Lab. Code §§ 510, 1194, 1197, 1197.1 and Industrial Wage Commission (“IWC”) Order
19 No. 10-2001); (2) failure to provide meal breaks (Cal. Lab. Code §§ 218.5, 226.7, 512, 1198, IWC
20 Order No. 10-2001); (3) failure to provide rest breaks (*Id.*); (4) failure to pay wages upon termination
21 of employment (Cal. Lab. Code §§ 201-203); (5) failure to timely pay wages during employment
22 (Cal. Lab. Code §§ 204, 210); (6) failure to issue compliant wage statements (Cal. Lab. Code §
23 226(a)); (7) failure to keep requisite payroll records (Cal. Lab. Code § 1174(d)); and, (8) failure to
24 reimburse business expenses (Cal. Lab. Code § 2802).

25 **B. Procedural Background**

26 On August 6, 2020, Plaintiff Brandt Earhart sent a notice to the LLWDA, indicating his intent
27 to seek penalties under PAGA for himself and all other employees of Alterra whose rights under
28 various California Labor Code provisions were violated, including but not limited to all current and

1 former Instructors who were employed by Alterra in California. Plaintiff Earhart's LWDA letter
2 alleged violations for failure to reimburse business expenses, failure to pay for all hours worked,
3 failure to timely pay wages, failure to pay wages upon discharge, failure to provide accurate wage
4 statements, and failure to maintain payroll records. (Ottinger Decl., ¶ 8, Exh. 1 (Initial PAGA letter).
5 To this date, Plaintiff Earhart has not received any response from the LWDA. (Ottinger Decl., ¶ 8.)
6 On August 10, 2020, The Liu Law Firm, P.C., and The Ottinger Firm, P.C., (collectively, "Plaintiffs'
7 Counsel") sent a letter to Alterra, inviting the company to explore a possible pre-litigation resolution
8 of the claims brought by Plaintiffs. (Ottinger Decl., ¶ 9.) The Parties agreed to participate in
9 mediation and entered into a tolling agreement effective September 10, 2020. (*Id.*)

10 After significant meet and confer efforts, Alterra agreed to produce employee policies and
11 timekeeping records. Alterra also produced summary statistics for the ski/riding employees within
12 the PAGA period. These data include the number of employees, pay periods, workweeks, and
13 average hourly rate for the three major Alterra resorts in California: Squaw Valley/Alpine Meadows,
14 Mammoth Mountain, and Big Bear Mountain. Alterra also produced personnel files for each
15 Plaintiff. Each of the three plaintiffs had executed an arbitration agreement and meal break waiver
16 as a condition of their employment with Alterra. (Ottinger Decl., ¶ 9.)

17 Using the information provided by Alterra, as well as conducting its own independent review
18 and analysis, Plaintiffs' Counsel investigated and evaluated the merits of all potential claims and
19 defenses in this matter. (Ottinger Decl., ¶10.) As part of their investigation, Plaintiffs' Counsel
20 conducted multiple in-depth interviews with all three named Plaintiffs and numerous additional
21 witnesses who were employed by Defendants at locations across California. (*Id.*) Additionally,
22 Plaintiffs' Counsel performed in-depth background research on Defendants, including obtaining each
23 named Plaintiffs' personnel files and reviewing Alterra's website, job postings, and job duties to
24 obtain further information on the claims and defenses. (Ottinger Decl., ¶11.) Plaintiffs' Counsel
25 also sought and obtained from Defendants' corporate policies, payroll data, and data regarding the
26 number of individual PAGA Settlement Group Members. (Ottinger Decl., ¶12.) Plaintiffs' Counsel
27 also had numerous conferences and meetings with counsel for Defendant over the course of their
28 prosecution of this matter. (Ottinger Decl., ¶13.)

1 **C. Settlement Negotiations**

2 In or around November 2020, the Parties agreed to pursue private mediation in an effort to
3 reach a resolution of all potential claims in this action. (Ottinger Decl., ¶ 14.) As noted above, the
4 Parties agreed that Defendants would produce targeted discovery to allow Plaintiffs’ Counsel to
5 assess the merits of Plaintiffs’ representative claim. (*Id.*) Consistent with that agreement,
6 Defendants produced data on group size, compensation, and total workweek information for PAGA
7 Settlement Group Members from the Covered Period, and a sampling of corporate employee policy
8 and training documents related to breaks, time-keeping, and compensation for relevant employees
9 during the relevant time period. (*Id.*)

10 The Parties participated in a full-day mediation session on April 13, 2021. (Ottinger Decl., ¶
11 15.) The mediation was conducted by Michael Russell, Esq., an experienced wage and hour
12 mediator. (*Id.*) The Parties agreed to settle on a PAGA-only basis and over the course of several
13 months reduced their agreement to a formal Settlement Agreement. The settlement discussions
14 during and after mediation were vigorous and conducted at arm’s length. (*Id.*)

15 Pursuant to the terms of the Parties’ Settlement Agreement, Plaintiffs submitted an amended
16 notice to the LWDA on May 20, 2021, fully articulating the Released PAGA Claims to be released
17 under the Settlement Agreement. (Settlement Agreement, ¶ III.J.1.), (Ottinger Decl., Exh. 2
18 (Amended LWDA Letter).) To this date, Plaintiffs have not received any response from the LWDA.
19 (Ottinger Decl., ¶ 17.) In addition to this amended PAGA letter, Plaintiffs provided a copy of the
20 Complaint and Settlement Agreement to the LWDA concurrently with the filing of this Motion.
21 (Ottinger Decl., ¶ 18.)

22 **III. TERMS OF THE SETTLEMENT**

23 **A. Settlement Fund**

24 The Settlement Agreement creates a non-reversionary common fund of \$850,000 to settle
25 claims against Defendants (“Total Settlement Amount”). (Ottinger Decl., ¶ 27), (Settlement
26 Agreement, ¶ III.A.) The Settlement Amount covers PAGA Settlement Group Members’
27 settlement awards, service awards, attorneys’ fees and costs, the Settlement Administrator’s fees
28 and costs, and all amounts to be paid to the LWDA. (*Id.*)

1 **B. Eligible Employees**

2 The Settlement Agreement covers “PAGA Settlement Group Members,” who are defined as:
3 California non-exempt employees of Defendants during the Covered Period who were on-duty skiers
4 and riders, including, but not limited to, ski instructors, ski team coaches, lift operators, hosts, ski
5 patrol and associated on-mountain safety personnel, and other employees.” (Settlement Agreement,
6 ¶ I.N.) At mediation, Defendants estimated that approximately 4,250 or fewer persons would qualify
7 as PAGA Settlement Group Members. (Ottinger Decl., ¶ 28.) Defendant has subsequently
8 represented that approximately 4,250 persons qualify as PAGA Settlement Group Members. (*Id.*)

9 **C. Allocation Formula**

10 The Settlement Agreement provides that each PAGA Settlement Group Member will be
11 allocated an individual Settlement Share from 25% of the Net Settlement Amount, with the
12 remaining 75% of the Net Settlement Amount going to the LWDA. (Settlement Agreement, ¶ III.D.)
13 The 25% of the Net Settlement Amount available for distribution to PAGA Settlement Group
14 Members will be divided equally among all PAGA Settlement Group Members. (Settlement
15 Agreement, ¶ III.E.) Because the payments are for civil penalties under PAGA, they will be made
16 without withholdings and with the Settlement Administrator issuing IRS Form 1099s to the PAGA
17 Settlement Group Members for each Settlement Share. (*Id.*) PAGA Settlement Group Members will
18 be responsible for any and all taxes due on their individual Settlement Shares. (*Id.*)

19 **D. Distribution Process**

20 Because this is a PAGA-only settlement, there is no claims process and no statutory right for
21 any PAGA Settlement Group Member to opt out or otherwise exclude themselves from the
22 Settlement. (Settlement Agreement, ¶ III.L.) Defendants will provide the Settlement Administrator
23 with a list of all PAGA Settlement Group Members and all necessary information for the
24 Administrator to locate PAGA Settlement Group Members, process payments, and process claims
25 for payments, including, but not limited to, last known addresses, social security numbers, and any
26 other information required to effectuate the Agreement. (*Id.* III.M.1.) Prior to mailing the
27 Individual Settlement Payments to PAGA Members, the Settlement Administrator will update the
28 addresses for PAGA Settlement Group Members using the National Change of Address and other

1 available resources deemed suitable by the Settlement Administrator. (*Id.* ¶ III.M.2.) In the event
2 settlement checks are returned to the Settlement Administrator as undeliverable, or are not cashed
3 within ninety (90) days after the Settlement Administrator mails them, the Parties agree to make
4 good faith efforts to work together to obtain current contact information for any such PAGA
5 Settlement Group Members. (*Id.* ¶ III.I.) Any unclaimed Settlement Shares not distributed to PAGA
6 Settlement Group Members will be distributed to the California State Controller’s Office Unclaimed
7 Property Fund, or alternatively to a single recipient designated by the Court in its discretion in
8 connection with the Court’s consideration and approval of the Settlement. (*Id.* ¶ III.M.3).

9 **E. Release**

10 In addition to settling the PAGA claim alleged in the operative Complaint, the Settlement
11 Agreement contains a general release of claims by the three named Plaintiffs, including a waiver of
12 any rights under Civil Code § 1542. (Settlement Agreement, ¶ III.Q.)

13 The California Labor Workforce Development Agency (“LWDA”) is being served with a
14 copy of this Motion and the Settlement Agreement through its online processes as required by Labor
15 Code § 2699(l), and therefore has notice of this PAGA settlement and motion. (Ottinger Decl., ¶
16 18.)

17 **F. The Parties Have Settled Plaintiffs’ PAGA Claims.**

18 The only claim before this Court is the PAGA claim in the operative Complaint. The Parties
19 have agreed to settle this claim in its entirety. The Settlement Agreement is intended to fully and
20 finally resolve the PAGA claim asserted by Plaintiffs on behalf of the State of California for the
21 PAGA Settlement Group Members. This is only a settlement of PAGA claims for civil penalties,
22 and is not a class settlement and does not release any individual non-PAGA claims of any members
23 of the PAGA Settlement Group other than named Plaintiffs.

24 **III. THE PARTIES REQUEST APPROVAL OF THIS PAGA SETTLEMENT**

25 Under PAGA, an aggrieved employee may bring a civil action personally and on behalf of
26 other current or former employees and the State of California to recover civil penalties for Labor
27 Code violations. *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348, 380.
28 Seventy-five percent of any PAGA penalties go to the LWDA, leaving the remaining twenty-five

1 percent to be distributed to aggrieved employees. *Id.*; *see also* *ZB, N.A. v. Superior Court* (2019) 8
2 Cal.5th 175, 275. PAGA is intended to augment the limited enforcement capability of the LWDA by
3 empowering employees to enforce the Labor Code as representatives of the State. *Id.* at 383. A
4 judgment in a PAGA action binds all those who would be bound by a judgment in any action
5 brought by the State. *Id.* at 381.

6 A PAGA action need not meet the requirements of a class action lawsuit. *Arias v. Superior*
7 *Court* (2009) 46 Cal.4th 969, 975. A court does not, for example, have a fiduciary duty to protect
8 putative class members in a PAGA action. Nonetheless, Labor Code § 2699 (l) provides that “[t]he
9 superior court shall review and approve any penalties sought as part of a proposed settlement
10 agreement pursuant to PAGA.” The relief provided in a PAGA settlement must be “genuine and
11 meaningful, consistent with the underlying purpose of the statute to benefit the public.” *Villalobos v.*
12 *Calandri Sonrise Farm LP* (C.D. Cal, July 22, 2015, No. CV122615PSGJEMX) 2015 WL
13 12732709, at *13. The settlement must be reasonable in light of the potential verdict value. *See*
14 *O’Connor v. Uber Technologies, Inc.*, (N.D. Cal. 2016) 201 F.Supp.3d 1110, 1135. Courts will
15 generally approve a PAGA settlement on a showing that the settlement terms are “fundamentally
16 fair, adequate and reasonable” in light of PAGA’s policies and purposes. *See Jordan v. NCI Grp.,*
17 *Inc.* (C.D. Cal. Jan. 5, 2018), No. EDCV161701JVSSPX) 2018 WL 1409590, at *3; *Flores v.*
18 *Starwood Hotels & Resorts Worldwide, Inc.* (C.D. Cal. 2017) 253 F.Supp.3d 1074, 1075. A
19 settlement may be substantially discounted from the total potential liability amount, however, given
20 that courts often exercise their discretion to award PAGA penalties below the statutory maximum,
21 even when a PAGA claim succeeds at trial. *See Vicerol v. Mistras Group, Inc.* (N.D. Cal., Oct. 11,
22 2016, No. 15-cv-02198-EMC) 2016 WL 5907869 at *8-9.

23 **A. The Settlement to Be Paid Is Fair, Adequate, and Reasonable**

24 The Parties believe that the \$850,000 settlement amount is fair, adequate, and reasonable and
25 therefore should be approved. This amount compares favorably to the estimated amount of PAGA
26 penalties which Plaintiffs calculated to be the maximum amount recoverable for purposes of
27 mediation. Plaintiffs calculated that the maximum potential PAGA penalties, assuming the Court
28 would “stack” penalties for similar and derivative violations, were approximately \$6.4 million,

1 assuming duplicative violations of the Labor Code provisions cited in the operative Complaint and
2 associated PAGA letter, and assuming maximum frequencies (every pay period where applicable).
3 (Ottinger Decl., ¶ 23.)

4 However, in order to recover any PAGA penalties, Plaintiffs would be required to prove at
5 trial each of the underlying Labor Code violations associated with their PAGA claim. *See Cardenas*
6 *v. McLane Foodservice, Inc.*, 2011 U.S. Dist. LEXIS 13126, *10 (C.D. Cal. 2011) (“Given the
7 statutory language [of PAGA], a plaintiff cannot recover on behalf of individuals whom the plaintiff
8 has not proven suffered a violation of the Labor Code by the defendant.”). Here, Plaintiffs would
9 need to prove that each PAGA Settlement Group Member suffered each of the Labor Code violations
10 articulated in the operative Complaint. (Ottinger Dec., ¶ 23.) This case presented particular hurdles,
11 including the fact that Defendant had numerous policies and practices in place that were designed to
12 prevent the alleged Labor Code violations (e.g., providing employees with 15 minutes to don and 15
13 minutes to doff, obtaining meal break waivers from employees, etc.), as well as the fact that the
14 number and extent of violations differed across job titles, locations, and individuals. (Ottinger Decl.,
15 ¶ 24.) While Plaintiffs’ Counsel believe that they could have proven violations based on, *inter alia*,
16 the data produced by Defendants and the witness interviews and other case evaluation/examination
17 performed by Plaintiffs’ Counsel, Plaintiffs’ Counsel recognizes that these claims faced significant
18 risk of failure. (Ottinger Decl., ¶ 25.) In addition, Plaintiffs’ Counsel acknowledges that even if they
19 prevailed, the Court may have exercised its discretion to lower the amount of PAGA penalties
20 awarded, in light of Defendants’ efforts to comply with the Labor Code and the fact that many
21 PAGA Settlement Group Members worked only seasonally and/or part-time. (Ottinger Decl., ¶ 26.)

22 Defendants maintain that they did not engage in the alleged Labor Code violations, that
23 Plaintiffs are not aggrieved employees, and that the PAGA Settlement Group Members are not
24 aggrieved employees. (Settlement Agreement, ¶ II.) Defendants assert that they maintain lawful
25 policies and practices regarding all matters referenced in the operative Complaint, including, *inter*
26 *alia*, pay for all time worked, overtime pay, meal and rest breaks, reimbursement of business
27 expenses, itemized wage statements, maintenance of business records, and final payment of wages.
28 (Ottinger Decl., ¶ 24.) Further, Defendants contend that the claims asserted would be unmanageable

1 due to the required individualized analyses regrading all of Plaintiffs' claims. As state and federal
2 courts have held, PAGA claims that require highly individualized analysis are subject to dismissal as
3 unmanageable. *See Fenley v. Rite Aid Corp.* (Cal. Super. Ct. Santa Clara County Sept. 17, 2015)
4 Case No. 1-12-cv-229127, 2015 WL 8240387, at *2 (dismissing PAGA claim where Plaintiff failed
5 to show how numerous individualized issues could be managed at trial); *Amiri v. Cox*
6 *Communications California, LLC* (C.D. Cal. Sept. 27, 2017) 2017 WL 4400463 (granting motion to
7 strike PAGA claims on the basis of unmanageability); *Salazar v. McDonald's Corp.* (N.D. Cal. Jan.
8 5, 2017) 2017 WL 88999 (same); *Brown v. American Airlines, Inc.* (C.D. Cal. Oct. 5, 2015) 2015
9 WL 6735217 at *4; *Bowers v. First Student, Inc.* (C.D. Cal. Apr. 23, 2015) 2015 WL 1862914 at *4;
10 *Bright v. 99 Cents Only Stores* (Cal. Super. Ct. Los Angeles County, Dec. 7, 2011) 2011 WL
11 12913379 at *2.

12 Given Defendants' potential defenses to the alleged Labor Code violations at issue, and the
13 risks and costs of continued litigation, Plaintiffs believe that the Settlement Amount is fair, adequate,
14 and reasonable. (Ottinger Decl. ¶ 7.) The terms of the settlement were negotiated by experienced
15 counsel at arm's length before an experienced private mediator. (Ottinger Decl. ¶ 15.) The LWDA
16 has been provided with the Complaint, Settlement Agreement, notice of this motion, and the initial
17 and amended PAGA letters referencing all of the Labor Code violations alleged in the Complaint.
18 (Ottinger Decl. ¶¶ 18,19.) The decision of the LWDA not to intervene or otherwise oppose this
19 motion should be given considerable weight. This is also not a situation where the Court needs to be
20 concerned about the rights of absent employees (as in a class action settlement), as this PAGA-only
21 settlement does not release any individual non-PAGA claims of any of the allegedly aggrieved
22 employees other than those of Plaintiffs, and the LWDA has received its statutorily-required notice
23 of the Settlement and is fully able to object to the Settlement if it so chooses.

24 Here, the Net Settlement Amount being paid to the LWDA and the PAGA Settlement Group
25 Members exceeds amounts that have been approved by courts in other such cases. For example, in
26 *Franco v. Ruiz Food Products, Inc.* (E.D. Cal. 2012) 2012 WL 5941801, the court approved a total
27 PAGA penalty amount of \$10,000, with the \$2,500 employee portion divided between as many as
28 2,055 current and former employees. Similarly, in *Schiller v. David's Bridal, Inc.* (E.D. Cal. 2012)

2012 WL 2117001, the court approved a PAGA penalty amount of \$10,000, with the \$2,500 employee portion divided between as many as 3,326 individuals. *See also Sanderson v. Scott Shaw Enterprises, Inc.* (Sacramento County Super. Ct., Aug. 20, 2020) Case No. 34-2019-00253039 (approving PAGA settlement providing an LWDA payment of \$23,068.50 and a \$7689.50 net fund divided among PAGA members); *Tamayo, et al. v. Maintex Inc.* (Los Angeles Super. Ct., Dec. 5, 2018) Case No. BC665105 (approving PAGA settlement providing an LWDA payment of \$13,796.25 and a \$4598.99 net fund divided among PAGA members).

B. The Attorneys' Fees and Costs to Be Paid Are Fair, Adequate and Reasonable

The Settlement requires that attorneys' fees, costs, and incentive payments be paid from the common fund. (Settlement Agreement, ¶ III.A.) This is appropriate, even in the non-class action context. "California has long recognized, as an exception to the general American rule that parties bear the costs of their own attorneys, the propriety of awarding an attorney fee to a party who has recovered or preserved a monetary fund for the benefit of himself or herself and others. In awarding a fee from the fund or from the other benefitted parties, the trial court acts within its equitable power to prevent the other parties' unjust enrichment." *Lafitte v. Robert Half Intern. Inc.* (2016) 1 Cal.5th 480, 561 (approving percentage of recovery method in wage and hour class action); *Fox v. Hale & Norcross Silver Mtn. Co.* (1895) 108 Cal. 475, 476 (approving fee payment from common fund in early derivative case). In PAGA-only settlements, attorneys' fees and costs are typically paid out of the common fund. *See Sicairos v. Staffmark Holdings, Inc., et al.* (Orange County Super. Ct., Dec. 1, 2020) Case No. 30*2019-01050988 (attorney's fees paid from the common fund); *Sanderson v. Scott Shaw Enterprises, Inc.* (Sacramento County Super. Ct., Aug. 20, 2020) Case No. 34-2019-00253039 (attorney's fees paid from the common fund); *Tamayo, et al. v. Maintex Inc.* (Los Angeles Super. Ct., Dec. 5, 2018) Case No. BC665105 (attorney's fees paid from the common fund).

A prevailing PAGA plaintiff is entitled to no more than his or her "reasonable [attorney] fees." *Harrington v. Payroll Entertainment Services, Inc.* (2008) 160 Cal.App.4th 589, 594 (emphasis in original); Labor Code § 2699(g)(1). Here, Plaintiffs' counsel seek one-third of the total settlement, or \$283,333.33, an amount analogous to that awarded in the class action context. *Lafitte,*

1 *supra* at 488. Plaintiffs’ counsel’s lodestar as of the filing of this motion is \$173,969.00 which
2 would result in a multiplier of approximately 1.66, an amount well within the bounds of
3 reasonableness in the analogous class action context. (Ottinger Decl., ¶¶ 36,37.) Indeed, in class
4 actions, “[m]ultipliers can range from 2 to 4 *or even higher*.” *Wershba v. Apple Computer, Inc.*
5 (2001) 91 Cal.App.4th 224, 255 (emphasis added). The one-third fee award sought here is also an
6 appropriate percentage when compared to privately-negotiated contingency fee arrangements,
7 particularly in employment matters. (Ottinger Decl., ¶ 38.) Consistent with these benchmarks,
8 Plaintiffs’ Counsel’s retainer agreements with Plaintiff also authorize Class Counsel to seek up to
9 33-1/3% of the Gross Settlement Amount. (*Id.*)

10 Plaintiffs also seek reimbursement of their reasonable and actual costs incurred, in the amount
11 of \$5,355.44 (Ottinger Decl., ¶ 31.) Plaintiffs’ Counsel’s expenses include court and process server
12 fees, postage and courier fees, transportation, meals, photocopies, electronic research, and Plaintiff’s
13 share of the mediator’s fee. (*Id.*) Courts regularly approve these types of expenses for
14 reimbursement. *See, e.g., In re Media Vision Tech. Sec. Litig.*, 913 F.Supp. at 1366-72 (postage,
15 photocopying, consulting and expert fees); *Plumbers & Steamfitters, Local 290 v. Duncan* (2007)
16 157 Cal.App.4th 1083, 1099 (holding legal research costs compensable).

17 Moreover, the cost items expended were reasonable and necessary for the successful
18 prosecution of this case; Plaintiffs’ Counsel could not have litigated the case as successfully as they
19 did without having incurred each cost item. (Ottinger Decl., ¶ 37.) By the time of the settlement
20 approval hearing, Plaintiffs’ Counsel will have advanced significant costs in this case, without any
21 reimbursement. (*Id.*) Particularly for firms that perform the majority of their work on contingency,
22 this places significant financial pressure on them, because such firms typically do not receive
23 compensation for hours expended until months or years after the work is performed (and after the
24 salaries are paid). (*Id.*) These costs were advanced by Plaintiff’s Counsel on a purely contingent
25 basis; had there been no recovery, the costs would have been lost. Plaintiff’s Counsel also seeks
26 reimbursement without any addition for interest or the “time value of money.” (*Id.*)

27 The Settlement Agreement also provides for reimbursement of reasonable Settlement
28 Administration fees and costs. (Settlement Agreement, ¶ III.H.) Plaintiff’s Counsel proposes JND

1 Legal Administration (“JND”) as the Settlement Administrator, pending Defendant’s approval.
2 (Ottinger Decl., ¶ 33.) JND is a well-established class action settlement administrator and has
3 substantial experience administrating wage and hour class action settlements. (*Id.*) JND has agreed
4 to administer the settlement for an amount not to exceed \$22,000.00 and estimates that the total
5 fees and expense will be approximately \$18,749.00. (*Id.*) The Settlement Administrator’s fees
6 will be paid from the Maximum Settlement Amount. (Settlement Agreement., ¶ III.H.)

7 **C. The Representative Enhancement Payment is Justified by the Time and**
8 **Effort Expended and the Risks in Prosecuting this Litigation.**

9 Plaintiffs respectfully request a representative enhancement award in the amount of \$5,000
10 each for their effort and work in prosecuting the Action and for executing a general release of all
11 claims against Alterra. This combined amount constitutes less than two percent (2%) of the Total
12 Settlement Amount. (Ottinger Decl., ¶ 32.) While this incentive amount is greater than what
13 Plaintiffs would receive as members of the PAGA Settlement Group, it is merited by virtue of the
14 hours of work put into this matter by Plaintiffs, the general release of all claims executed by
15 Plaintiffs, and the risk Plaintiffs assumed by serving as representative named plaintiffs in this
16 PAGA-only action, including the fact that they can now be easily identified as litigants by future
17 prospective employers. (*Id.*) Plaintiffs have been responsive, communicative, and active in pursuit
18 of this PAGA litigation. Each spent significant time assisting with Plaintiffs’ Counsel’s preparation
19 of this case, communicated with Plaintiffs’ Counsel during mediation, reviewed documents, assisted
20 with informal discovery, and provided significant evidentiary support that helped Plaintiffs’ Counsel
21 obtain this Settlement on behalf of PAGA Settlement Group Members. Plaintiffs’ efforts have also
22 facilitated a significant payment to the State of California. In addition, the incentive award sought
23 here is modest in comparison with class representative awards routinely granted in the analogous
24 class action context. *See, e.g., Garret v. Bank of America*, Alameda County Super. Ct. Case No.
25 RG13699027 (Oct. 28, 2016) (awarding three PAGA plaintiffs \$25,000 each as service awards);
26 *Brewer v. Connell Chevrolet*, Orange County Super. Ct. Case No. 30-2016-00852123 (awarding
27 PAGA representative an individual payment of \$15,000); *Jones v. J.C. Penny Corp.*, Los Angeles
28 Super. Ct. Case No. 30-2016-00852123 (service award of \$10,000 for PAGA plaintiff); *Garcia v.*

1 *Macy's West Stores*, San Bernardino Super. Ct. Case No. CIVDS1516007 (\$10,000 service award
2 for PAGA Plaintiff).

3 **V. CONCLUSION**

4 For all the foregoing reasons, Plaintiffs respectfully request that the Court approve the Parties'
5 Settlement Agreement and grant the instant motion.

6
7 Dated: February 2, 2022

Respectfully submitted,

8
9 By: 

10 Robert W. Ottinger
11 **THE OTTINGER FIRM, P.C.**
12 *Attorneys for Plaintiffs*
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Robert W. Ottinger (SBN 156825)
THE OTTINGER FIRM, P.C.
535 Mission Street
San Francisco, CA 94105
Telephone: (415) 262-0096
Facsimile: (212) 571-0505
robert@ottingerlaw.com

Jennifer Liu (Cal. Bar No. 279370)
THE LIU LAW FIRM, P.C.
800 Menlo Ave, Suite 102
Menlo Park, CA 94025
Tel: (650) 461-9000
Fax: (650) 460-6967
Email: jliu@liulawpc.com

Attorneys for Plaintiff and the Proposed Representative Class

SUPERIOR COURT OF CALIFORNIA
COUNTY OF MONO

BRANDT EARHART, SAM STEUART, and
WILLIAM BERRIER, on behalf of himself and
all those similarly situated,

Plaintiff,

vs.

SQUAW VALLEY RESORT, LLC,
MAMMOTH MOUNTAIN SKI AREA, LLC,
and SNOW SUMMIT, LLC, and DOES 1
THROUGH 100, inclusive,

Defendants.

Case No.: 21UCM49

PROOF OF SERVICE

PROOF OF SERVICE

JURISDICTION: STATE OF CALIFORNIA, COUNTY OF MONO
CASE NAME: EARHART, et al. v. SQUAW VALLEY RESORT, LLC, et al.
CASE NO.: 21UCM49

I certify that I am employed in the County of San Francisco, State of California. I am over the age of 18 and not a party to the within action; my business address is 535 Mission Street, 14th Floor, San Francisco, CA 94105.

On February 2, 2022, I served the following documents:

- **PLAINTIFFS NOTICE OF MOTION AND MOTION FOR ORDER APPROVING SETTLEMENT; MEMORANDUM OF POINTS AND AUTHORITIES**

in this action by transmitting a true copy thereof addressed as follows:

Alexander Chemers

OGLETREE, DEAKINS, NASH, SMOAK & STEWART, P.C.

400 South Hope Street, Suite 1200

Los Angeles, CA 90071

Telephone: 213-330-0802

zander.chemers@ogletreedeakins.com

☐ **BY U.S. MAIL – FIRST CLASS:** I am readily familiar with the firm's practices of collection and processing correspondence for mailing. Under that practice it would be deposited within the U.S. Postal Service on that same day with postage thereon fully prepaid at San Francisco, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postage cancellation date or postage meter date is more than one day after date of deposit for mailing this affidavit.

☒ **BY EMAIL:** By transmitting the foregoing documents to the e-mail addresses listed above.

☒ **STATE**

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

Executed on February 2, 2022 at Jupiter, Florida

/s/ Jolen Medwid
Jolen Medwid