EXHIBIT 1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 20-cv-01057-RM-SKC
Consolidated for Pretrial:
20-cv-01158-RM-SKC; 20-cv-01175-RM-SKC
20-cv-01186-RM-SKC; 20-cv-01254-RM-SKC
20-cv-01347-RM-SKC; 20-cv-01520-RM-SKC
20-cv-01583-RM-SKC; 20-cv-01691-RM-SKC
20-cv-01699-RM-SKC; 20-cv-02021-RM-SKC
20-cv-02907-RM-SKC

TIMOTHY GOODRICH, NOLTE MEHNERT, GEORGE T. FARMER JOSEPH PANGANIBAN, ERIK ERNSTROM, W. WALTER LAYMAN, BRADLEY BRIAR, and KERI REID, each individually and on behalf of all others similarly situated,

Plaintiffs,

v.

ALTERRA MOUNTAIN COMPANY, ALTERRA MOUNTAIN COMPANY U.S. INC., and IKON PASS INC.,

Defendants.

UNOPPOSED MOTION FOR PRELIMINARY APPROVAL

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Plaintiffs and proposed Class Representatives Timothy Goodrich, Nolte Mehnert, George T. Farmer, Erik Ernstrom, W. Walter Layman, Bradley Briar, and Keri Reid ("Plaintiffs")[1] submit this memorandum in support of their motion for (i) preliminary approval of the proposed settlement (the "Settlement") of the above-captioned class action (the "Action") on the terms and conditions set forth in the Settlement Agreement dated August 11, 2022 (the "Settlement Agreement") submitted herewith;[2] (ii) certification of the Settlement Class for settlement purposes; (iii) appointment of Class Counsel and Class Representatives; (iv) appointment of the Settlement Administrator; (v) approval of the form and manner of providing notice of the proposed Settlement to the Settlement Class; and (vi) scheduling of a hearing to consider final approval of the Settlement (the "Fairness Hearing").

I. INTRODUCTION

The Parties have reached a hard-fought class-wide resolution of this consolidated class action (the "Action") that will provide substantial relief to Settlement Class Members, valued at roughly $17.5 million in direct benefits, and over $20 million when taking into account attorneys' fees, costs, and expenses and Settlement administration and notice costs. Indeed, the primary form of relief available to Settlement Class Members—credits toward the purchase of a 2023/24 or 2024/25 Ikon pass—will be distributed *automatically* and without the need to take any action to submit a claim. In short, subject to Court approval, the Settlement will deliver

[1] Plaintiff Panganiban is not a member of the Settlement Class, and accordingly is not seeking to be appointed as a Class Representative and is not part of this Motion.

[2] The Settlement Agreement is attached as Exhibit 1 to the Declaration of Yeremey Krivoshey in support of this Motion filed herewith ("Krivoshey Decl."). All capitalized terms not otherwise defined herein have the meaning set forth in the Settlement Agreement.

substantial benefits to the class in the simplest way possible.

The Settlement is the product of nearly eight months of searching for compromise, starting with a day-long mediation on January 24, 2022, and culminating in the fully-executed Settlement Agreement on August 11, 2022. The Parties engaged Jill R. Sperber with Judicate West to mediate the dispute and guide the negotiations that followed.

The Settlement meets all the criteria for preliminary approval pursuant to Rule 23(e)(1), Tenth Circuit precedent, and this Court's prior decisions, *i.e.*, the proposed Settlement is within the range of reasonableness and warrants notifying the Settlement Class and setting a final approval hearing. *See, e.g., Murray v. Tips, Inc*., 2020 WL 1852382, at *5 (D. Colo. Apr. 13, 2020) (Moore, J) (outlining factors that must be met for preliminary approval). Accordingly, Plaintiffs request that the Court enter the proposed order, approve the form and manner of notice, preliminary certify the Settlement Class, appoint Class Counsel and the Class Representatives, and schedule the Fairness Hearing.

II. LITIGATION AND DISCOVERY BACKGROUND

On March 15, 2020, Defendants suspended operations of their ski resorts in North America due to the COVID-19 pandemic. Twelve putative class actions were filed on behalf of purchasers of Defendants' Ikon Passes, alleging damages stemming from the early closure of Defendants' ski resorts and the associated inability to use those Ikon Passes over the course of a full ski "season." In a series of Orders between May and October 2020, the Court consolidated the twelve actions. *See* ECF Nos. 23, 34, 38, 41, 45, 62, 64, 72.

On July 31, 2020, the Court appointed the law firms of Bursor & Fisher and Dovel & Luner as Interim Co-Lead Counsel, who now seek appointment as Class Counsel for settlement

purposes, and ordered that a Consolidated Amended Complaint be filed. ECF No. 64. Plaintiffs filed a Consolidated Class Action Complaint on September 4, 2020. ECF No. 66.

On October 16, 2020, Defendants filed a motion to dismiss. ECF No. 73. On June 25, 2021, the Court granted in part and denied in part Defendants' motion. Defendants filed an Answer on July 19, 2021. ECF No. 102.

The Court held a Rule 16(b) Scheduling Conference on August 12, 2021, where it set the schedule for fact and expert discovery and class certification. ECF No. 105.

The Parties began discovery in earnest in September 2021, exchanging initial disclosures, serving requests for production, interrogatories, and third-party subpoenas on the National Ski Areas Association, Inc., Powdr Corporation, and RRC Associates, LLC. *See* ECF No. 111 (Joint Status Report); Krivoshey Decl. ¶ 5. On September 22, 2021, the Court granted the Parties' motion for a protective order. ECF No. 109.

The Parties conducted extensive discovery, both through formal exchanges and through mediation. Krivoshey Decl. ¶¶ 5. Defendants produced hundreds of thousands of Ikon Pass holder purchase and visitation records, responded to interrogatories, and produced information concerning revenue, sales, and customer renewal rates. *Id*. This information was critical to an analysis of damages, as Plaintiffs' damages theory rested largely on the contention that Defendants prematurely ended the ski "season" without compensation or refunds. *Id*. Through discovery and expert analysis, Plaintiffs believed that the ski "season" was cut short by roughly 20 percent. *Id*. Plaintiffs retained and consulted with three experts to analyze both liability issues (*i.e*., the amount of the season that was cut short) and damages. *Id*. Plaintiffs developed multiple alternative damages theories, using data on ski pass usage and season length. *Id.* This

included theories for both legal damages and, alternatively, equitable restitution. *Id.*

III. SETTLEMENT NEGOTIATIONS

Settlement negotiations were arduous, contentious, and well-informed. *Id.* ¶ 6. In late October 2021, the Parties booked a mediation before Jill R. Sperber, Esq., of Judicate West. Prior the mediation, the parties conducted an extensive review of Defendants' Class Member and revenue records, consulted with experts, and exchanged sober reviews of respective damages methodologies and analyses. *Id.* The Parties participated in a full-day mediation before Ms. Sperber on January 24 2022, and then continued those negotiations with the mediator throughout the months that followed. *Id.* The Parties negotiated the benefits due to Settlement Class Members through the mediator and were able to finalize those terms prior to any discussion of reasonable attorneys' fees, costs, and service awards to the Plaintiffs. *Id.* Only after reaching an agreement as to the Class benefit terms, the Parties began negotiations through the mediator regarding reasonable attorneys' fees, costs, and service awards to the Plaintiffs, which, as discussed below, do not derogate in any way from the benefits that are otherwise available to Settlement Class Members under the Settlement. *Id.* The Parties executed a binding term sheet on June 5, 2022. *Id.* After finalizing and executing the term sheet, the Parties drafted and negotiated the terms of the full Settlement Agreement, including the contents of the notice plan and Claim Form. *Id.* The Settlement Agreement was executed on August 11, 2022. *Id.*

IV. SETTLEMENT TERMS AND VALUATION

The Settlement Class: As part of the Settlement, and for the purpose of settlement only, the Parties have agreed to the certification of the following Rule 23 class:

> **"Settlement Class"** means all persons in the United States and its territories who (a) purchased any form of Ikon pass for the 2019/20 season; or (b) received as a gift, from a donor meeting those requirements, any form of Ikon pass not used by the donor or by anyone else after the donor purchased the Ikon pass and before the donor gave the Ikon pass to the Settlement Class Member; and who used their Ikon pass for mountain access to any Ikon Resort on one or more days on or before March 15, 2020. Each Settlement Class Member must have been either (c) a primary Ikon pass holder; or (d) an Ikon pass holder associated with a primary Ikon pass holder's account (e.g., family or other household member), on or before March 15, 2020.

Settlement § I(GG).[3]

Pass Credits: The Settlement allows Settlement Class Members to receive one of two forms of potential relief: a Pass Credit or a Lift Product Voucher. Settlement § IV. Pass Credits are provided to Settlement Class Members automatically without the requirement that they fill out a Claim Form, so long as they do not submit a Claim Form electing to receive a Lift Product Voucher in lieu of a Pass Credit. Settlement § IV(B). The value of the Pass Credit is tiered based on the numbers of times that Settlement Class Members used their 2019/20 Ikon Passes, according to the following formula:

Days of Usage During 2019/20 Season	Pass Credit Value
1 day	$150
2 days	$125

[3] Excluded from the Settlement Class are (e) purchasers of any form of Ikon pass for the 2019/20 season or (f) recipients of a gift, from a donor meeting those requirements, of any form of Ikon pass not used by the donor or by anyone else after the donor purchased the Ikon pass and before the donor gave the Ikon pass to the Settlement Class Member, who did not use their Ikon pass for mountain access to any Ikon Resort on or before March 15, 2020. Also excluded from the Settlement Class are (g) all persons who previously received a 2019/20 Ikon pass as a complimentary gift from Alterra. *Id.*

3 days	$100
4 days	$50
5 or 6 days	$20
7 or more days	$10

Settlement § IV(A).[4] The reasoning for this tiering is simple and fair. The Ikon Passes at issue are *season* passes, costing between $599-1,049 for adult passes depending on the type of pass during the 2019/20 season. Krivoshey Decl. ¶ 7. Customers that chose to pay per day, instead of buying the season passes, had to pay peak rates of between $99-189 or more *per day* during the 2019/20 season, depending on the resort. *Id*. Thus, Settlement Class Members that used their season passes multiple times got more value out of them. For instance, a Settlement Class Member that used a $599 season pass 5 times at a resort where the single-day pass cost $189 would have received $945 ($189 x 5 days = $945) in value from the season pass. Someone else with an identical $599 season pass that only went one time, however, would have received only $189 in value out of that same season pass, thereby suffering more harm (under Plaintiffs' theory) than someone that went multiple times before the season ended. Accordingly, tiering the benefits available under the Settlement according to the number of days Settlement Class Members used was the fairest way to treat Settlement Class Members. *Id*.

The Parties agree that the combined value of the Pass Credits is approximately $17.5 million. Settlement § IV(F). The value results from multiplying the number of Settlement Class

[4] Notably, Ikon customers that did not use their Ikon passes at all during the 2019/20 season are not part of the Settlement Class and are accordingly not releasing any claims nor receiving any benefits through the Settlement. Such customers have, however, already received a free season pass from Defendants directly.

Members in each "bucket" – *i.e.* the number of days they used their Ikon passes – by the Pass Credits each Settlement Class Member will receive in that bucket, as summarized below:

Days Pass Used	No. of Settlement Class Members	Pass Credit Value	Combined Value
1	[redacted]	$150.00	[redacted]
2	[redacted]	$125.00	[redacted]
3	[redacted]	$100.00	[redacted]
4	[redacted]	$50.00	[redacted]
5 or 6	[redacted]	$20.00	[redacted]
7+	[redacted]	$10.00	[redacted]
			Total Value = $17,557,565.00

Krivoshey Decl. ¶ 8.

The $17.5 million valuation is simplified by the fact that unless a Settlement Class Member submits a valid Claim Form for a Lift Product Voucher in lieu of a Pass Credit, the appropriate Pass Credit amount will automatically be applied to each Settlement Class Member's Ikon pass holder profile without any requirement to fill out a claim form or take any other affirmative action. Settlement § IV(B). The Pass Credits can be used for purchase of any Ikon pass product during the 2023/24 or 2024/25 Ski Seasons that the Pass Credit recipient is eligible for, and be used with any other applicable discounts. *Id*. § IV(C). Further, the Pass Credits can be transferred to other Ikon pass holders associated with the same primary pass holder account. *Id*. § IV(D). And, because the Pass Credits are "stackable", a parent that purchased season passes for his or her children will be able to aggregate the entire family's Pass Credits and apply the Pass Credits toward the purchase of a heavily discounted, and perhaps completely free, season pass during the 2023/24 or 2024/25 seasons. *Id*. §§ IV(D), (E).

Based on hard data, the Parties know that Settlement Class Members will utilize the vast majority of the Pass Credits. Defendants' data shows that its Ikon Pass pass customers renew their season passes at a rate between [redacted] percent. Krivoshey Decl. ¶ 9. This has been consistently true both predating the COVID-19 pandemic and as recently as this past ski season. *Id.* In other words, Settlement Class Members are highly loyal to Defendants' ski resorts and renew their season passes at an incredibly high rate. Providing such customers with automatic Pass Credits, that would be loaded automatically to their online pass holder profiles, and that would apply to ski passes that they *would have purchased anyways* means that at least [redacted] percent, if not more (given the extra Pass Credit), of the $17.5 million in Pass Credits will be redeemed by Settlement Class Members. And, given that Settlement Class Members have two seasons to use the Pass Credits, the redemption rate may well be above [redacted].

Lift Product Vouchers: Those Settlement Class Members that do not wish to purchase a season pass in the future have the option of submitting a Claim Form to receive a Lift Product Voucher in lieu of a Pass Credit. Settlement § IV(G). A Lift Product Voucher entitles Settlement Class Members to a discount of between 20-50% of the purchase of a single-day lift ticket, depending on the number of days that they used their 2019/20 Ikon Pass. *Id*. As with the Pass Credits, Settlement Class Members that used their 2019/20 Ikon Passes the least will receive a higher-valued Voucher, while those that used the passes the most will receive a lower-valued Voucher. *Id*. The Lift Product Vouchers can be used toward the purchase and use of a single-day ticket on or before July 31, 2025 *Id*. § IV(I), (J). And notably, for anyone that does not want to ski again at an Alterra resort, the voucher can be transferred or sold. *Id*. § IV(I), (J).

Attorneys' Fees, Costs, and Expenses: Defendants have agreed to pay Class Counsel reasonable attorney fees, costs, and expenses, as approved by the Court, of up to $2,872,000, without reducing the amount of money available to pay valid claims. Settlement § VIII(A). The anticipated fee is estimated to be about 14 percent of the overall value of the Settlement, far below federal benchmarks in consumer class action settlements.[5] The Parties have no "clear sailing" provision, and Defendants remain free to oppose the amount sought by Class Counsel for fees, costs, and expenses. *See id*. § VIII(B); Krivoshey Decl. ¶ 11. Should the Court award less than $2,872,000, the delta between $2,872,000 and the amount awarded by the Court will be divided and distributed in equal amounts to eligible Settlement Class Members in the form of Pass Credits. *See* Settlement § VIII(C). Settlement Class Members will have the opportunity to review Class Counsel's fee application and object prior to final approval. Defendants shall pay any Court approved fees and expenses, as well as any Service Awards to the Plaintiffs, within 31 days of the Court's entry of judgment. *Id*. § VIII(E).

Service Awards: For their services, work, and dedication on behalf of Settlement Class Members, Class Counsel may seek up to $3,500 as the reasonable amount of Service Awards to be paid to each of the named Plaintiffs, subject to Court approval. Settlement § VIII(D).

Notice and Administration: Defendants have agreed to pay all reasonable Administration and Notice Expenses. Settlement § V(B). The Parties have agreed, and request that the Court appoint, Angeion Group as Settlement Administrator. *Id*. § V(F). *See also*

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[5] The value of attorney's fees, expenses, and costs, as well as notice and administration costs are included in the overall valuation of the Settlement. *See* Herr, Ann. Manual for Complex Litigation § 21.71, p. 525 (4th ed. 2008) ("the sum of the two amounts [class settlement and fees] ordinarily should be treated as a settlement fund for the benefit of the class").

Declaration of Steven Weisbrot ("Angeion Decl."). The Settlement Administrator will provide direct notice to all Settlement Class Members for whom valid email addresses are known to Alterra, which Alterra's preliminary survey suggests to be virtually all Settlement Class Members, *i.e.*, of approximately [redacted] 2019/20 Ikon pass holders, Alterra has an associated email address for approximately [redacted] of them. Angeion Decl. ¶ 13.[6] For all Settlement Class members for whom Defendants only have a physical mailing address, or whose email notice bounces back, the Settlement Administrator will provide direct notice by mail after utilizing reverse look-up service to search for other valid email addresses and after performing a national change of address search. *See id*. § V(H). In sum, the Parties anticipate that virtually all Settlement Class Members will receive direct notice. The Settlement Administrator will also create a Settlement Website, through which Settlement Class Members can submit Claim Forms electronically, and which will include detailed information concerning the Settlement, including a multi-point FAQ resource. *Id*. § V(J).

V. THE SETTLEMENT SHOULD BE PRELIMINARILY APPROVED

The settlement of complex class action litigation is favored by public policy and strongly encouraged by the courts. *Am. Home Assurance Co. v. Cessna Aircraft Co.,* 551 F. 2d 804, 808 (10th Cir. 1977) ("The inveterate policy of the law is to encourage, promote, and sustain the compromise and settlement of disputed claims."); *Big O Tires, Inc. v. Bigfoot 4x4, Inc.,* 167 F. Supp. 2d 1216, 1229 (D. Colo. 2001) ("As a matter of public policy, the law favors and

[6] Note that not all of the approximately [redacted] pass holders are Settlement Class Members, as [redacted] pass holders who skied zero days in 2019/20 already received a rollover pass credit and are excluded from the Settlement.

encourages settlements."). The "presumption" in favor of settlements is especially strong in class actions. *O'Dowd v. Anthem, Inc.*, 2019 WL 4279123 (D. Colo. Sept. 9, 2019).

Under Rule 23(e), approving a class action settlement is a two-step process: preliminary approval and then a fairness hearing. In the first stage, relevant here, the Court preliminarily approves the settlement agreement, provisionally certifies a settlement class, and authorizes that notice be given to the class so that interested members may object or opt out. Fed. R. Civ. P. 23(e). In the second stage, after notice is provided, the Court holds a fairness hearing to address any timely objections to either class treatment or the fairness and adequacy of the settlement.

For the Court to issue notice, the Parties must show that the "court will likely be able to": (A) "certify the class for purposes of judgment on the proposal" and (B) "approve the proposal under Rule 23(e)(2)." Fed. R. Civ. P. 23(e)(1). At preliminary approval, the Court determines only whether there is "any reason not to notify the class members of the proposed settlement and to proceed with a fairness hearing." *Lucas v. Kmart Corp.*, 234 F.R.D. 688, 693 (D. Colo. 2006).

A. The Court Is Likely To Certify The Settlement Class

The Court is likely to certify the Settlement Class because it meets the requirements of Rule 23(a) and Rule 23(b)(3). This is particularly true given the lower standard for Rule 23 certification in the settlement context. *See Murray*, 2020 WL 1852382, at *3 ("Rule 23(b)(3)(D) need not be considered" in context of certification for settlement purposes).

1. The Settlement Class Satisfies All Requirements Of Rule 23(a)

Numerosity: "Numerosity is shown where the class is so numerous that joinder of all members is impracticable." *Murray*, 2020 WL 1852382, at *3 (citing Rule 23(a)(1)). Here, there are an estimated [redacted] Settlement Class Members, easily satisfying the numerosity

requirement. *See id*. (holding that 545 class members is sufficient); Krivoshey Decl. ¶ 10.

Commonality: "A finding of commonality requires only a single question of law or fact common to the entire class." *DG ex rel. Stricklin v. Devaughn*, 594 F.3d 1188, 1194–95 (10th Cir. 2010). Here, this is a breach of contract case where the breach was alleged to be identical for all Settlement Class Members – *i.e*., early termination of the ski season. Another critical common legal issue is the contested definition of "season." *See* Order on Motion to Dismiss, ECF No. 94, at 4, 6. Other common issues include: whether government stay-at-home orders frustrated the purposes of the contract, whether such orders were the cause of harm, whether restitution is appropriate, and whether Defendants' Cancellation Policy language foreclosed Settlement Class Members' claims. *See id*. at 8-10. There is no question that Defendants' policies and contractual language concerning the season passes and 2019/20 closures were common to all Settlement Class Members. In such circumstances, commonality is satisfied. *See Suaverdez v. Circle K Stores, Inc*., 2021 WL 4947238, at *4 (D. Colo. June 28, 2021) ("Commonality exists if class members challenge the application of a commonly-applied policy, even if the class members' circumstances differ factually") (internal quotations omitted).

Typicality: Plaintiff must show that his claims "are typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). "Differing fact situations of class members do not defeat typicality... so long as the claims of the class representative and class members are based on the same legal or remedial theory." *Colo. Cross Disability Coal. v. Abercrombie & Fitch Co.*, 765 F.3d 1205, 1216 (10th Cir. 2014) (quotations and alteration omitted). Here, Plaintiffs are each members of the Settlement Class, subject to the same terms and conditions of Defendants' Ikon Passes, and subject to the same 2019/20 closures. *See gen*. Consol. Compl., ECF 66, at ¶¶ 5-10,

12. For settlement purposes, Plaintiffs' claims are sufficiently typical to satisfy Rule 23(a)(3).

Adequacy: Rule 23(a)(4) requires that the representative party fairly and adequately protect the interests of the class. Fed. R. Civ. P. 23(a)(4). The Tenth Circuit has identified two questions relevant to this inquiry: "(1) do the named plaintiffs and their counsel have any conflicts of interest with other class members and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" *Rutter & Wilbanks Corp. v. Shell Oil Co*., 314 F.3d 1180, 1187–88 (10th Cir. 2002). "Absent evidence to the contrary, a presumption of adequate representation is invoked. Any doubt regarding adequacy of representation should be resolved in favor of upholding the class, subject to later possible reconsideration." *Schwartz v. Celestial Seasonings*, 178 F.R.D. 545, 552 (D. Colo. 1998).

Neither Plaintiffs nor Class Counsel have any interests antagonistic to those of the Settlement Class. Krivoshey Decl. ¶ 11. "Plaintiff[s] ha[ve] vigorously prosecuted this action on behalf of [themselves] and the putative class; and Plaintiff[s'] counsel has considerable experience as lead counsel in class action … litigation." *Murray*, 2020 WL 1852382, at *4; Krivoshey Decl. ¶ 11. All Rule 23(a) factors are satisfied.

2. The Settlement Class Satisfies All Requirements Of Rule 23(b)(3)

Under Rule 23(b)(3), a class action may be maintained if the court finds "questions of law or fact common to class members predominate over any questions affecting only individual members," and "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." "Four matters relevant to a court's findings are: '(A) the class members' interests in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against

class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action.'" *Murray*, 2020 WL 1852382, at *4 (quoting Fed. R. Civ. P. 23(b)(3)(A)-(D)). However, because Plaintiffs seek certification for purposes of settlement only, Rule 23(b)(3)(D) (manageability) is not relevant. *Murray*, 2020 WL 1852382, at *4.

Here, each of the three relevant 23(b)(3) factors are satisfied. Alleged damages concern roughly 20 percent of the value of Ikon Passes (the amount of the ski season Plaintiffs claim was lost), a small amount in the context of complex litigation. Accordingly, "due to the relatively small claims, individual settlement class members would have no particular interest in individually controlling the prosecution of separate actions. Plus, the members have an opportunity to opt-out if they wish to control their own litigation." *Id*. As to the second factor, the Parties are not aware of any other litigation concerning the controversy already begun by or against class members outside of this litigation. As to the third factor, it is highly desirable to concentrate the litigation in this forum. This Court has already consolidated the twelve related actions, Defendants are headquartered in this District, and a substantial number of Settlement Class Members, as well as Defendants' resorts, are located here. Common questions concerning Defendants' termination of 2019/20 ski season predominate. On this record, certification for settlement purposes under Rule 23(b)(3) is appropriate. *See Murray*, 2020 WL 1852382, at *5.

B. The Court Is Likely To Approve Interim Co-Lead Class Counsel As Settlement Class Counsel And Appoint Plaintiffs As Settlement Class Representatives

A court that certifies a class must also appoint class counsel. *Id*. (citing Rule 23(g)(1)). Here, the Court has already considered each of the Rule 23(g)(1) factors when it appointed

Bursor & Fisher and Dovel & Luner as Interim Co-Lead Class Counsel. Order, ECF No. 64. Class Counsel under the Settlement Agreement are the same two law firms. Settlement § I(G). Class Counsel's qualifications and experience, as well as the work that they have done in this action to date, are summarized in the Krivoshey Decl. ¶¶ 4-13, Exs. 2, 3. Plaintiffs ask that the Court preliminarily appoint Bursor & Fisher and Dovel & Luner as Class Counsel, as the requirements of Rule 23(g)(1) are readily satisfied. Further, Plaintiffs ask that the Court preliminarily appoint them as Class Representatives pursuant to Rule 23(e)(2)(A), as they have shown that they are qualified. *See Murray*, 2020 WL 1852382, at *5; Krivoshey Decl. ¶ 11.

C. The Proposed Settlement Warrants Preliminary Approval

"Under Rule 23(e)(2), the court may approve a proposal which binds class members only if it finds the proposal 'fair, reasonable, and adequate' after considering four factors." *Murray*, 2020 WL 1852382, at *5. "Those four factors are whether '(A) the class representatives and class counsel have adequately represented the class; (B) the proposal was negotiated at arm's length; (C) the relief provided for the class is adequate, taking into account: (i) the costs, risks, and delay of trial and appeal; (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims; (iii) the terms of any proposed award of attorney's fees, including timing of payment; and (iv) any agreement required to be identified under Rule 23(e)(3); and (D) the proposal treats class members equitably relative to each other.'" *Id*. (quoting Rule 23(e)(2)). "In addition, the Tenth Circuit has outlined factors for the courts to consider, "including: "(1) whether the proposed settlement was fairly and honestly negotiated; (2) whether serious questions of law and fact exist, placing the ultimate outcome of the litigation in doubt; (3) whether the value of an immediate recovery outweighs the

mere possibility of future relief after protracted and expensive litigation; and (4) the judgment of the parties that the settlement is fair and reasonable." *Id*. Almost all Tenth Circuit factors overlap with the factors set out in Rule 23(e)(2), as they predate the 2018 amendments to Rule 23. *Id*., 2020 WL 1852382, at *5 n. 2. Here, the Settlement satisfies every Rule 23(e)(2) factor and all Tenth Circuit factors.

Rule 23(e)(2)(A)(adequacy): The Class Representatives and Class Counsel have adequately represented the Settlement Class. This factor has effectively been addressed by the Court's Order appointing Interim Co-Lead Class Counsel and in the discussion of adequacy under Rule 23(a)(4) above. *See id*. at *6.

Rule 23(e)(2)(B)(negotiation) / Tenth Circuit Factor 1: The Settlement was negotiated at arm's length over the course of many months, with sufficient discovery, and with the assistance of a mediator. *See id*. In determining whether the settlement was fairly negotiated, courts consider the experience of counsel, the vigor with which the case was prosecuted, and [any] coercion or collusion that may have marred the negotiations themselves." *Suaverdez*, 2021 WL 4947238, at *7 (quotations omitted). "Utilization of an experienced mediator during the settlement negotiations supports a finding that the settlement is reasonable, was reached without collusion and should therefore be approved." *Id*. Here, the parties utilized an experienced mediator who assisted with months of mediation efforts. The litigation was contentious, and the discovery thorough. "Because the settlement resulted from arm's length negotiations between experienced counsel after significant discovery had occurred, the Court may presume the settlement to be fair, adequate, and reasonable." *Lucas*, 234 F.R.D. at 693.

Rule 23(e)(2)(C)(i)(costs and risk) / Tenth Circuit Factors 2 & 3: Had this litigation gone forward, there would be substantial costs and risks associated with class certification, summary judgment, trial, and appeal that all weigh heavily in support of Settlement. Krivoshey Decl. ¶ 12. For instance, in *McCauliffe v. Vail Corp*., 2021 WL 4820542, at *1-17 (D. Colo. Oct. 15, 2021), plaintiffs asserted very similar claims to those here, alleging that Alterra's main competitor – Vail Resorts – harmed its season pass holders by cutting the 2019/20 ski season short due to the COVID-19 pandemic. Judge Jackson held for the defendant on every count, dismissing the action with prejudice, and adopted a conflicting definition of the term "season" as compared to the Court's holding in this case. *See id*., at *4-5. Judge Jackson's decision is now on appeal, and, even if reversed, it may be many years before the plaintiffs in that case are able to certify a class and proceed to trial, which would again be subject to yet more appeals. Plus, the pending Tenth Circuit decision could potentially affect the Court's favorable ruling in this case. Here, Plaintiffs were able to obtain significant benefits for Settlement Class Members that will be available during the upcoming 2023/24 and 2024/25 seasons, without the threat of no recovery at all. Defendants continue to ardently deny all liability, and Judge Jackson's ruling has only added weight to their substantially identical arguments. Should this case proceed, it would face serious hurdles at class certification, summary judgment, and on appeal.

Rule 23(e)(2)(C)(ii)(effective distribution of relief): As discussed above, the Pass Credits will be distributed automatically without the requirement of submitting a Claim Form, and will be uploaded automatically to Settlement Class Members' online pass holder profiles. This is a favorable outcome for this particular Settlement Class because, as discussed above, the Pass Credits are highly likely to be redeemed. Further, for those Settlement Class Members that

do not want to purchase a season pass, they will receive Lift Product Voucher by submitting a Claim Form. The method of distribution is designed to be highly effective, as the default distribution mechanism will be done automatically.

Rule 23(e)(2)(C)(iii)(attorney fees): The proposed attorney's fees are reasonable and well under federal benchmarks. Class Counsel can request fees, expenses, and costs of up to $2,872,000, which amounts to just 14 percent of the overall value of the Settlement (if fees are included in the calculation). *See, e.g., Farley v. Family Dollar Stores, Inc*., 2014 WL 5488897, at *4 (D. Colo. Oct. 30, 2014) (Moore, J.) (holding that a 33 percent fee and cost recovery "fall[s] within the range of what is reasonable in this District"). Should the Court award less than the full amount requested by Class Counsel, the difference between $2,872,000 and the amount awarded will not revert to Defendants, but will rather be automatically distributed as Pass Credits to qualifying Settlement Class Members. The timing of the fee award is also fair, as Settlement Class Members will have a chance to review the fee application prior to deciding whether to opt-out or object, and payment is not due until the Court enters judgment.[7]

Rule 23(e)(2)(C)(iv)(settlement agreement): The Settlement Agreement is attached as Exhibit 1 to the Krivoshey Decl. *Suaverdez*, 2021 WL 4947238, at *8 n. 7 (factor satisfied where "the Parties have submitted their proposed Settlement Agreement as Exhibit 1").

Rule 23(e)(2)(D) (equitable treatment): The Settlement treats Settlement Class Members as equitably as possible, taking into consideration the varying amounts of harm they

[7] The Settlement's provision of $3,500 Service Awards for the Class Representatives is also reasonable and in line with this Court's precedent. *See Murray*, 2020 WL 1852382, at *6 (approving $5,000 award); Krivoshey Decl. ¶ 11 (discussing work performed by Plaintiffs).

are alleged to have suffered. As in a typical consumer product class action, where settlement class members can receive benefits depending on the number of products they purchased within the class period, here, Settlement Class Members can receive benefits depending on the number of days they utilized their Ikon passes. This is a fair and rational manner of providing benefits.

The Additional Fourth Tenth Circuit Factor: As discussed above, the "Tenth Circuit's additional factors largely overlap with the Rule 23(e)(2) favors." *Suaverdez*, 2021 WL 4947238, at *7 n. 6 (quotations omitted). "[O]nly the fourth factor [the judgment of the parties that the settlement is fair and reasonable] is not subsumed into the new Rule 23." *Id*. (quotations and bracketing omitted). The Settlement also satisfies this factor.

"Counsels' judgment as to the fairness of the agreement is entitled to considerable weight." *Lucas*, 234 F.R.D at 695. Here, experienced counsel versed in class action litigation and settlements strongly believe that the Settlement is fair and reasonable. *See Rhodes v. Olson Associates, P.C.*, 308 F.R.D. 664, 667 (D. Colo. 2015) ("Class Counsel are experienced in consumer class actions, and weight is given to their favorable judgment as to the merits, fairness, and reasonableness of the settlement.").

In sum, under both Rule 23(e)(2) and the Tenth Circuit factors, the proposed Settlement is fair, reasonable, and adequate and should be approved.

VI. The Court Should Approve the Proposed Notice Plan and Appoint the Settlement Administrator

Pursuant to Rule 23(e) and Rule 23(c)(2), the Court must direct reasonable notice to all class members. *See Lucas*, 234 F.R.D. at 696. Courts have broad discretion to approve the specific form and content of notice so long as the notice meets the requirements of constitutional

due process. *See In re Integra Realty Res., Inc.*, 262 F.3d 1089, 1110-11 (10th Cir. 2001). Rule 23 notice requirements are met if the notice is reasonably calculated to apprise interested parties of the pendency of the proposed settlement and afford them an opportunity to present objections. *DeJulius v. New England Health Care Emps. Pension Fund*, 429 F.3d 935, 944 (10th Cir. 2005); *Lucken Family L.P., LLLP v. Ultra Res., Inc.*, 2010 WL 2650037, at *3-4 (D. Colo. June 30, 2010) (describing contents of sufficient notice plan).

The proposed Notice here, consisting of the FAQ, the Summary Notice, and the Settlement Website, satisfies each requirement under Rule 23(c)(2). *See* Settlement Exhibits A (Claim Form), B (FAQ), and C (Summary Notice). As discussed above, all Settlement Class Members will receive direct notice by email (where available), or by mail. As stated above, Alterra's preliminary analysis shows it has email addresses associated with approximately [redacted] of the roughly [redacted] 2019/20 Ikon Pass Holders, of which approximately [redacted] are believed to be Class Members. The Notice is written in plain English, and notifies Settlement Class Members of their rights, deadlines, and opportunities to opt-out or object.

Finally, the Court should appoint Angeion Group as the Settlement Administrator. Angeion has significant experience administering class action settlement and preliminarily estimates that it can administer this Settlement for $63,000. *See* Angeion Decl. ¶ 29. Any fees charged by Angeion will be paid separately by Defendants under the Settlement and will not derogate from any class recovery.

VII. CONCLUSION

For the foregoing reasons, the Motion should be granted.

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Respectfully submitted,

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