IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

MICHELLE ANDERSON, an individual, On Behalf of Herself and All Others Similarly Situated, Plaintiff, v. TRAVELEX INSURANCE SERVICES INC. and TRANSAMERICA CASUALTY INSURANCE COMPANY, Defendants.	Case No. 8:18-cv-00362-JMG-SMB **PLAINTIFF'S MOTION FOR APPROVAL OF ATTORNEYS' FEES, EXPENSES AND SERVICE AWARD**

Pursuant to FED. R. CIV. P. 23(h), Plaintiff Michelle Anderson ("Plaintiff") respectfully moves this Court for entry of an Order:

(1) awarding Plaintiff's Counsel[1] attorneys' fees of $1,079,166.67;

(2) awarding Plaintiff's Counsel up to $75,000.00 in reimbursement of their Litigation Expenses incurred and disbursed in prosecuting this litigation;[2]

(3) awarding a service award of $6,500.00 to Plaintiff for her service in representing the Settlement Class; and

(4) approving payment of up to $199,500 to the Settlement Administrator for its actual fees and costs incurred, in providing notice and settlement administration services.

[1] Capitalized terms not otherwise defined have the meaning set forth in the Parties' Class Action Settlement Agreement dated June 11, 2021 (the "Settlement Agreement" or "Settlement") filed previously with the Court. *See* Dkt. 108-2.

[2] Plaintiff will provide the Court with an update as to Plaintiff's Counsel's actual Litigation Expenses at or prior to the Final Approval Hearing, which will in any event be below the maximum $75,000 amount set forth in the Notice to the Settlement Class.

In support of this Motion, Plaintiff relies upon the accompanying Memorandum of Law and the Declaration of Peter R. Kahana, which attaches, among other things, the Declarations of Ingrid Evans, Randall Andreozzio, Brian Devery, and Michelle Anderson, as well as all other documents filed in support of the Settlement, and all other proceedings in this Action. Pursuant to the terms of the Settlement Agreement, Defendants do not oppose the relief requested. Dkt. 108-2 at ¶ C.8.

A proposed form of Order will be emailed to the Court in accord with Local Rule 7.2. Concurrent with the filing of this Motion, Plaintiff is also filing a separate Motion for Final Approval of Class Action Settlement, in advance of the Final Approval Hearing scheduled for September 22, 2021.

Dated: September 1, 2021

Respectfully submitted,

/s/ John G. Albanese

John G. Albanese
BERGER MONTAGUE PC
1229 Tyler Street, Suite 205
Minneapolis, MN 55413
Tel.: (612) 594-5997
Fax: (612) 584-4470
jalbanese@bm.net

BERGER MONTAGUE PC
Shanon J. Carson
Peter R. Kahana
Lane L. Vines
Y. Michael Twersky
1818 Market Street, Suite 3600
Philadelphia, PA 19103
Tel.: (215) 875-3000
scarson@bm.net
pkahana@bm.net
lvines@bm.net
mitwersky@bm.net

EVANS LAW FIRM, INC
Ingrid M. Evans
3053 Fillmore Street, #236
San Francisco, CA 94123
Tel.: (415) 441-8669
ingrid@evanslaw.com

BURKE SMITH LAW
Burke Smith, NE Bar No. 19883
10730 Pacific St #100
Omaha, NE 68114
Tel.: (402) 718-8865
Fax: (402) 218-4391
burke@burkesmithlaw.com

Counsel for Plaintiff and the Proposed Settlement Class

CERTIFICATE OF SERVICE

I certify that on September 1, 2021, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on the following counsel of record via transmission of Notices of Electronic Filing generated by CM/ECF:

Burke Smith
BURKE SMITH LAW
10730 Pacific Street, Suite 100
Omaha, NE 68114
burke@burkesmithlaw.com

Shanon J. Carson
Peter R. Kahana
Lane L. Vines
Y. Michael Twersky
BERGER MONTAGUE PC
1818 Market Street
Philadelphia, PA 19103
scarson@bm.net
pkahana@bm.net
lvines@bm.net
mitwersky@bm.net

Ingrid M. Evans
EVANS LAW FIRM, INC.
3053 Fillmore Street, Suite 236
San Francisco, CA 94123
ingrid@evanslaw.com

Markham R. Leventhal
CARLTON FIELDS, P.A.
Suite 400 West
1025 Thomas Jefferson Street, NW
Washington, DC 20007
mleventhal@carltonfields.com

Julianna Thomas McCabe
Michael N. Wolgin
CARLTON FIELDS, P.A.
2 MiamiCentral, Suite 1200
700 N.W. 1st Avenue
Miami, FL 33136
jtmccabe@carltonfields.com
mwolgin@carltonfields.com

/s/ John G. Albanese
John G. Albanese

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

MICHELLE ANDERSON, an individual, On Behalf of Herself and All Others Similarly Situated,

Plaintiff,

v.

TRAVELEX INSURANCE SERVICES INC. and TRANSAMERICA CASUALTY INSURANCE COMPANY,

Defendants.

Case No. 8:18-cv-00362-JMG-SMB

PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR APPROVAL OF ATTORNEYS' FEES, EXPENSES AND SERVICE AWARD

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

Other Authorities

In connection with the class action Settlement[1] of this Action, which was preliminarily approved by the Court on June 16, 2021 (Dkt. No. 109), Plaintiff Michelle Anderson ("Plaintiff") respectfully moves, under FED. R. CIV. P. 23(h), for approval of attorneys' fees of $1,079,166.67, which is one-third of the $3,237,500 non-reversionary Settlement Amount; reimbursement of no more than $75,000 in out-of-pocket Litigation Expenses; payment of a $6,500 Service Award to the sole named Plaintiff and Class Representative in recognition of her substantial service to the Settlement Class; and Settlement Administration Costs not to exceed $199,500. There have been ***no objections*** and only one written request for exclusion from the Settlement Class. As demonstrated below, the requests are fair and reasonable and should be approved.[2]

INTRODUCTION

After nearly four years of hard-fought litigation and extensive discovery, Plaintiff, through her counsel, secured a $3,237,500 non-reversionary cash Settlement from Defendants Travelex Insurance Services Inc. ("Travelex") and Transamerica Casualty Insurance Company ("Transamerica") ("Defendants") (collectively, "the Parties") for the Settlement Class. This is an excellent result, in the circumstances of this case, which was reached only after significant discovery and motion practice, and is the product of extensive arm's-length negotiations by experienced and informed counsel, with the aid of an experienced mediator, Rodney Max. Indeed, there were many obstacles to achieving any recovery in this novel and factually complex litigation.

---

[1] Unless otherwise stated, all capitalized terms used herein are as defined in the Stipulation and Agreement of Settlement filed with the Court on June 11, 2021 (Dkt. No. 108-2) (the "Settlement Agreement" or "SA"). References to the accompanying Declaration of Peter R. Kahana filed concurrently herewith are cited as "Kahana Decl. __". Unless otherwise stated, all references to "Dkt. No. __" are cites to the Court docket in this Action, No. 8:18-cv-00362-JMG-SMB (D. Neb.).

[2] Defendants do not oppose Plaintiff's Counsel's request for attorneys' fees, reasonable Litigation Expenses, and Plaintiff's Service Award. SA ¶ C.8. Defendants' agreement not to oppose the relief requested was obtained only after the material terms for the relief to the Settlement Class were agreed upon by the Parties. *Id.*

Among other things, Plaintiff overcame two motions to dismiss; overcame Defendants' motion to certify for appeal the denial of one of those motions; conducted substantial discovery, including the review of approximately 20,000 pages of documents produced by Defendants and the deposition examination of Travelex Senior VP Risk and Compliance Sally Dunlap; oversaw the liability and damages analysis by an actuarial expert; participated in two formal mediation sessions, as well as informal discussions, using a well-respected neutral; and, thereafter negotiated the terms of the Parties' Settlement Agreement over the course of three months after they initially reached an agreement in principle to settle the litigation.

As demonstrated below, the requested attorneys' fees, Litigation Expense reimbursement, and Service Award are fair and reasonable, given the relief secured for the Settlement Class and the work that counsel did to achieve it. Plaintiff's Counsel prosecuted this unprecedented litigation on a purely contingent basis and have received no payment for their services, nor reimbursement of their expenses, since the investigation for this case began five years ago. Absent a Settlement, the risk was real that Plaintiff's Counsel would never have been paid or reimbursed. A lodestar cross-check confirms that the requested fee is not only reasonable but represents a very modest multiplier of Plaintiff's Counsel's current lodestar.

RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

Defendants sold Travel Plans underwritten by Transamerica and marketed by Travelex. These plans contained both pre-departure insurance benefits (such as payment for losses due to trip cancellation), and post-departure insurance benefits (such as payment for losses due to trip interruption and baggage delay). Dkt. No. 1, Compl. ¶¶ 18, 33. Plaintiff alleged that by the Travel Plans' own terms, coverage for pre-departure losses takes effect when the plan is purchased; whereas coverage for post-departure losses only becomes effective when the insured trip actually begins. *Id.* ¶ 30. Defendants ceased selling the plans at issue in this case in 2017. SA at 1.

Plaintiff purchased her Travel Plan from Defendants through the online travel agency, Just Air Ticket. Compl. ¶¶ 32-33. Plaintiff did not take her covered trip and filed a claim for travel cancellation benefits, which was denied by Defendants for being outside the scope of such coverage. Moreover, upon her subsequent demand, Defendants refused to provide her a partial premium refund related to the post-departure benefits. *Id.* ¶¶ 37-39. Plaintiff initially brought this case in the Western District of New York because the address to send claims under Defendants' travel insurance plan was the "Travelex Claims Department" located in Niagara Falls, NY. Dkt. No. 33 at 7.[3] Defendants filed a motion to dismiss challenging personal jurisdiction in New York and requesting, in the alternative, that the case be transferred to Arizona, where Plaintiff resides. *Id.* at 7-8. Plaintiff voluntarily dismissed the action in New York and refiled in this Court based on Defendant Travelex's extensive ties to Nebraska. *Id.* at 8.

In the operative Complaint, Plaintiff alleges that Defendants' policy of failing to provide partial premium refunds was an unfair practice under the Nebraska Consumer Protection Act and constituted unjust enrichment as they were obligated to return unearned premiums in accord with long established insurance principles. Compl. ¶¶ 55-69. Defendants moved to dismiss the complaint under FED. R. CIV. P. 12(b)(6), arguing that Plaintiff's unjust enrichment claim failed because the Parties' relationship was governed by a contract. Dkt. No. 27. Defendants also moved to dismiss Plaintiff's claim under the Nebraska Consumer Protection Act, arguing that she lacked statutory standing as a non-Nebraska resident to bring such a claim and had not adequately alleged an unfair practice covered by the statute. *Id*. The Court denied Defendants' motion, finding that Plaintiff had plausibly alleged claims for unjust enrichment and violation of the Nebraska

[3] Plaintiff originally filed this litigation on December 5, 2017. S*ee* W.D.N.Y. Case No. 1:17-cv-001274, Dkt. No. 1 (Class Action Complaint).

Consumer Protection Act. *See Anderson v. Travelex Ins. Servs., Inc.,* No. 8:18-cv-362, 2019 WL 1932763 (D. Neb. May 1, 2019). In denying the motion, the Court noted that determining when the risk for post-departure coverage attached could "only be sorted out after the defendants have answered the complaint and the parties have had a reasonable opportunity for discovery." *Id.* at 3.

Following the Court's denial of Defendants' motion to dismiss on May 1, 2019, the Parties commenced discovery, and Plaintiff propounded comprehensive requests for the production of relevant documents, as well as interrogatories. Kahana Decl. at ¶ 14. Plaintiff also retained an actuarial consultant, Charles DeWeese, FSA, MAAA,[4] to review Defendants' documents, assist in proffering expert opinions as warranted to support Plaintiff's theories of liability and help develop a class-wide damages model. *Id.*

After responding in part and objecting in part to Plaintiff's written discovery requests, Plaintiff and Defendants engaged in extensive meet and confer discussions to attempt to resolve related discovery disputes, to avoid unnecessary motion practice. *Id.* at ¶ 15. Plaintiff received and reviewed approximately 20,000 pages of documents that were produced by Defendants in the course of litigation, and mediation. *Id.* at ¶ 16. Among other things, the documents produced included Defendants' various Travel Plans and records of rate filings, along with other relevant materials. *Id.*

[4] As is summarized in a confidential report prepared for mediation and shared with Defendants, Mr. DeWeese is a fellow in the Society of Actuaries and a Member of the American Academy of Actuaries. He is the President of DeWeese Consulting, Inc., an actuarial consulting firm he founded in 1990. Prior to that, he was employed as an actuary by Connecticut General Life Insurance Company (now part of CIGNA) and by Tillinghast, a Towers Perrin Company (now part of Willis Towers Watson). His consulting practice focuses on the review of rate filing for a state regulatory agency, pricing and valuation of liabilities for a dental and vision insurance entity, and litigation support services, including expert testimony on a range of actuarial subjects. Kahana Decl. at ¶ 14 n.6.

During litigation discovery, Defendants objected to providing information regarding any of their travel protection plans other than plans sold through Just Air Ticket. Defendants moved to dismiss for lack of subject matter jurisdiction under FED. R. CIV. P. 12(b)(1) for claims of putative class members who bought plans other than through Just Air Ticket, arguing that Plaintiff lacked "Article III standing to pursue class claims with respect to products she did not purchase." *Id.* at ¶ 17. In connection with this second motion to dismiss in the Nebraska litigation, Defendants submitted a declaration from Travelex Senior Vice President of Risk and Compliance Sally Dunlap. Plaintiff deposed Ms. Dunlap in connection with responding to Defendants' motion. *Id.* The Court denied Defendants' motion finding that "there is an absence of evidence suggesting that the plaintiff's claim and alleged injury is so different from the possible claims and injuries of putative class members, such that the exception to the general standing requirement for class actions should not apply." *Id.* (quoting *Anderson v. Travelex Ins. Servs., Inc.*, No. 8:18-cv-362, 2020 WL 1323489, at *4 (D. Neb. Mar. 20, 2020)). Defendants then moved to certify for interlocutory appeal the denial of their motion, which the Court also denied following full briefing by the Parties. *Id.* (citing *Anderson v. Travelex Ins. Servs., Inc.*, No. 8:18-cv-362, 2020 WL 2909980 (D. Neb. June 3, 2020)).

Thereafter, the Parties agreed to mediate this case. Prior to mediation, the Parties negotiated with Defendants to produce further discovery in the form of additional documents and information relating to the Travel Plans, including, (*e.g.*), rate filings and documents setting forth the premiums collected. *Id.* at ¶ 18. Plaintiff also requested her previously retained consultant to review Defendants' rate filings, and other produced documents to assist Plaintiff's settlement class counsel in evaluating the claims and defenses in this litigation, in connection with meditation. *Id.*

Mr. DeWeese's work of necessity included: a) an analysis of the standard insurance principles and prevailing insurance practice that refunds should be provided to customers for the unused portion of insurance coverage, such as where consumers bought travel insurance with a variety of post-departure benefits and trip was cancelled; and b) a determination of the portion of premium that relates to post-departure benefits based on Defendants' own rate manual, which builds up the premium based on the cost of each specific benefit, whether pre-departure or post-departure. *Id.* at ¶ 19. Among other things, Mr. DeWeese estimated approximately between 26.35% and 29.27% of the total aggregate premium charged for Defendants' Travel Plans could be attributed to post-departure benefits. *Id.* at ¶ 20.

While Plaintiff's theory of post-departure liability is predicated on well-established insurance principles that premium can be recovered by an insured (and needs to be refunded by an insurer) for any risk of loss never assumed, there was no existing legal precedent for her attempt to apply these principles in the specific setting of trip cancellation insurance and the travel insurance industry's sale of packages of bundled trip-related benefits. *Id.* at ¶ 21.

Subsequent to Plaintiff's commencement of this litigation, litigation has been filed in other courts (in the context of trip cancellations due to COVID-19) which also addresses the legal question of whether insurers who are paid travel insurance premiums must refund the portion allocable to post-departure benefits in the circumstance where insured travel is cancelled. Defense motions to dismiss and for judgment on the pleadings have been denied in two of those cases. *See, e.g., Haas v. Travelex and Berkshire Hathaway Specialty Ins. Co.,* 2021 WL 3682309 at *5 (C.D. Cal. Aug. 19, 2021) (discussing this Court's decision at 2019 WL 1932763, and stating that "[t]he district court in *Anderson* reached the same conclusion on a very similar set of facts"); and *Gordon v. Arch Ins. Co.,* 2021 WL 2186392, at *1 (E.D. Pa. May 28, 2021). Nonetheless, the viability

through class certification, summary judgment, trial, and appeal of Plaintiff's claims (absent Settlement) remains far from certain.

In addition, Plaintiff had to address, and succeed upon, Defendants' second motion to dismiss pursuant to FED. R. CIV. P. 12 (b)(l), challenging Plaintiff's standing with respect to travel insurance plans that were not the specific kind of plan that was purchased by the Plaintiff (which in effect was intended by Defendants to limit the prospective class of potential similarly situated individuals to only those who had purchased a Just Air Ticket plan). Kahana Decl. at ¶ 22. Defendants also: contest that the insurance provided through their Travel Plans is legally divisible (arguing that it is not); argue that all risk, including for post-departure benefits, attached at the time of purchase of the Travel Plans; argue that Plaintiff's unjust enrichment claims are barred because a contract exists between the Parties (purportedly covering the subject matter of this action); and otherwise deny that their refund practices violated any laws or were unjust. *Id.* at ¶ 23.

In summary, through all the motion practice, discovery and expert analysis above, the Parties gained significant knowledge of the strengths and weaknesses of the claims and defenses both as to class certification and as to the merits of the claims. *Id.* at ¶ 24.

On November 11, 2020, the Parties attended via Zoom an all-day mediation session with Rodney Max. Kahana Decl. at ¶ 25. Prior to the mediation, the Parties exchanged detailed mediation statements and Plaintiff provided Defendants with a copy of a report prepared by Mr. DeWeese for the purposes of mediation. The Parties did not resolve the matter at the first mediation but continued to exchange settlement correspondence, and reconvened for a second mediation with Rodney Max on March 4, 2021. *Id.* Only after a second full day of mediation did the Parties reach an agreement in principle to resolve this matter. *Id.* Over the course of the next three months, the Parties negotiated the details of the Settlement Agreement. *Id.*

THE SETTLEMENT AGREEMENT

A. The Settlement Class

The Settlement Class in the Settlement Agreement is defined as:

> all persons in the United States who have been identified by the defendants as insured under a Travel Plan purchased from January 1, 2014 to December 31, 2017, and for whom a claim for trip cancellation benefits was initiated under the Travel Plan.

Dkt. No. 109 at ¶ 3. [5] Here, the total number of potential Settlement Class members identified by the Settlement Administrator is 96,382. Kahana Decl. at ¶ 27. The Settlement only releases the claims of Settlement Class Members (and related Persons). *Id.* (citing SA ¶ F.1).

B. Relief to the Settlement Class

The Settlement provides for Defendants to pay the Settlement Amount of ***$3,237,500*** from which payments to Settlement Class Members will be made. SA ¶ C.1. After deductions for Court-approved attorney fees, litigation expenses, settlement administration costs, and a service award, the Net Settlement Fund will be divided among Settlement Class Members *pro rata* based on the amount of premium paid to insure that Settlement Class Member under their applicable Travel Plan, SA ¶ C.3, unless a Settlement Class Member would receive a payment of less than $5.00, in which event the payment will be increased until the payment reaches $5.00. *Id.* Based on analysis of available data about Settlement Class Members, Plaintiff estimates that each Settlement Class Member who does not receive the minimum will receive 7.5-10% of their premium paid, which

[5] "Excluded from the Settlement Class are: (a) all persons who previously received a refund of premium from the defendants for any Travel Plan at issue in the Litigation; (b) all persons who previously entered into a written agreement with the defendants releasing all claims related to a Travel Plan at issue in the Litigation; (c) all insureds for whom no premium was charged under a Travel Plan; and (d) all persons who from January 1, 2014 to December 31, 2017 were officers, directors, or employees of either defendant." *Id.*

represents about 25%-35% of the estimated premium paid for post-departure benefits. Kahana Decl. at ¶ 28.[6]

SETTLEMENT NOTICE AND ADMINISTRATION

After receiving competitive bids from several class action administration firms, Angeion was retained by the Parties, and was then appointed by the Court, to serve as the Settlement Administrator in this Action. Devery Decl. at ¶ 5 (citing Dkt. No. 109, Preliminary Approval Order at ¶ 6).[7] Among other things, Angeion was tasked to provide notice to Settlement Class members; respond to Settlement Class member inquiries; and perform other duties as specified in the Settlement and by the directives of the Court, including but not limited to the Court's Order entered on June 16, 2021 (Dkt. No. 109), granting preliminary approval of the Settlement. The Court directed Angeion to issue the approved Notice of the Settlement, including using direct mail and email, by July 19, 2021 (Dkt. No. 112).

A. Implementation of the Notice Program

***CAFA Notice*:** On June 21, 2021, pursuant to the Class Action Fairness Act, 28 U.S.C. § 1715 ("CAFA"), Angeion, on behalf of the Defendants, caused notice of the Settlement and related materials (collectively, "CAFA Notice") to be sent to the Attorney General of the United States, the Attorneys General of all U.S. states and territories, and/or insurance commissioners or other state level departments responsible for insurance regulations of the states and the District of

[6] For instance, if Settlement Payments are 7.5% of the total premium paid by Settlement Class Members, and assuming 29.27% is the portion of the total premium attributable to post-departure benefits (as was the high-end of the range estimated by Plaintiff's expert), the Settlement Payment would represent 25.6% (7.5/29.27) of the recoverable damages. Of course, the final settlement payment amounts will depend on if this motion is granted, how many Settlement Class Members cash their check, and relatedly if a second distribution of the Residual Settlement Fund takes place.
[7] The Declaration of Brian Devery of Angeion Group, LLC Regarding Implementation of Notice Angeion, dated August 31, 2021 ("Devery Decl") is attached to the Kahana Decl. (*see* ¶ 37 n.11).

Columbia. Devery Decl. at ¶ 6 (attaching copy of the CAFA Notice as Exhibit A thereto). To date, no recipient of the CAFA Notice has lodged any objection to the Settlement.

***The Class List*:** On or about June 24, 2021, Angeion received from the Defendants Excel spreadsheets containing contact information for Settlement Class members to whom the Court-approved Notice of the Settlement should be sent. Devery Decl. at ¶ 7. Angeion reviewed the spreadsheet data to identify and remove duplicate records, which resulted in a Class List that totals 96,382 Settlement Class members. *Id.* Of the record for those Settlement Class members: 4,116 records did not contain a valid mailing address or email address; 663 contained a valid email address only; 67,737 contained only a mailing address; and 23,866 contained both a mailing address and a valid email address. *Id.*

***Direct Email Notice*:** On or about July 15, 2021, Angeion caused all records on the Class List with an email address to be subjected to an email verification process whereby common errors and typos are corrected and the email is verified with the hosting email system. Devery Decl. at ¶ 8. After the verification process was completed, 24,529 emails were determined to be valid.[8] *Id.* On July 16, 2021, Angeion caused the Court-approved Email Notices to be sent via email to the 24,529 records on the Class List that contained a valid email address.[9] *Id.* at ¶ 9 (attaching copy of the Email Notices as Exhibit B thereto).

***Direct Mail Notice*:** On or about July 16, 2021, Angeion caused all Settlement Class member address data to be updated utilizing the NCOA database, which provides updated

[8] The email verification process returns a result with valid, unknown and invalid email addresses. For purposes of sending notice, email addresses marked as valid or unknown are considered to be valid. Devery Decl. at ¶ 8.

[9] Of those, 663 had a valid email address but no postal address, as reflected on the Class List. Angeion sent those Settlement Class members a modified Email Notice alerting them that no mailing address was on file and specifically requesting that they provide their mailing address.

addresses for all individuals who have moved during the previous four years and filed a change of address with the United States Postal Service ("USPS"). Devery Decl. at ¶ 10. On July 17, 2021, Angeion caused the Class Mailed Notice to be sent via first-class mail to 91,603 class members with a mailing address. *Id.* at ¶ 11 (attaching copy of the Notice mailed to Settlement Class members as Exhibit C thereto).

During the period from the initial notice through August 30, 2021, Angeion received notification from the USPS of 1,446 Notices with updated addresses. The USPS forwarded these Notices to the updated addresses and Angeion updated its database records accordingly. *Id.* at ¶ 12. During the period from the initial notice through August 30, 2021, a total of 7,883 Notices were returned to Angeion by the USPS without forwarding addresses. Angeion conducted skip traces utilizing Lexis Nexis, a nationally recognized address search firm.[10] *Id.* at ¶ 13.

New addresses were identified for 5,228 of the undeliverable notices that were skip traced. The Class List and database were updated with the new address information and a Notice was re-mailed to these 5,228 Class Members. *Id.* at ¶ 14. As of August 30, 2021, none of these Notices were returned to Angeion by the USPS as undeliverable. *Id.* at ¶ 15. [11]

***Settlement Website*:** On July 16, 2021, Angeion established the following website devoted to the Settlement: www.TravelPlanSettlement.com ("Settlement Website"). Devery Decl. at

[10] Lexis Nexis combines numerous public records and publicly available sources, which contain nationwide person locator, authentication and verification information for approximately 400 million unique individuals based in the United States and territories. Those sources include national credit reporting companies header databases, current and historic address files, white page phone publisher data, an electronic Directory Assistance type database, Social Security death records from the Social Security Administration, numerous public record sources (including motor vehicle registrations, driver's license databases, voter registration databases, public license data and property ownership records), and data collected by marketing, registrations and warranty card aggregators.

[11] Of the 2,655 records where no updated address was located, email notice was sent to 482 of those Settlement Class members (*i.e.*, those of the 2,655 with an available and valid email address).

¶ 16. The Settlement Website contains an online portal whereby Settlement Class members may log in, using the Claim Number and Confirmation Code provided to them on their respective Notices, to update their address information as well as select an alternative method of payment other than check should they chose to do so. *Id.*

The Settlement Website also contains general information about the Settlement Agreement, documents filed with the Court, and important dates and deadlines pertinent to the Settlement. *Id.* The Settlement Website also has a "Contact Us" page whereby Settlement Class members can contact Angeion via email to update their address or submit additional questions regarding the Settlement. *Id.* Additionally, a copy of the Settlement Class Notice and other important documents are available on the Settlement Website. *Id.*

On July 16, 2021, Angeion also established a dedicated toll-free hotline for this Settlement to further apprise Settlement Class members of their rights and options under the Settlement: 1-833-370-1212. *Id.* at ¶ 17. The toll-free hotline utilizes an interactive voice response ("IVR") system to provide responses to frequently asked questions and essential information regarding the Settlement. *Id.* This hotline is accessible 24 hours a day, seven days a week. *Id.*

Plaintiff's Counsel did all work that was necessary to assist Angeion in the full discharge of its assigned duties under the terms of the Settlement Agreement and as otherwise directed by the Court's Order preliminarily approving the Settlement Agreement.

B. There Have Been No Objections and Only One Exclusion Request to Date

The deadline for requests for exclusion and objections to the Settlement is September 14, 2021. Devery Decl. at ¶ 19. As of August 30, 2021, Angeion has received ***no objections*** to the Settlement and only one written request for exclusion from the Settlement Class. *Id.* at ¶ 18.

(attaching copy of the exclusion request as Exhibit D thereto).[12] This strongly weighs if favor of the Court granting Plaintiff's request for attorney's fees. *See Vogt v. State Farm Life Ins. Co.*, 2021 WL 247958, at *2 (W.D. Mo. Jan. 25, 2021) ("[T]he fact that no class member objected to the request for fees weighs in favor of granting the motion.").

Angeion will continue to accept address updates and form of payment selections from Settlement Class Members, as well as reply to any inquiries they may have. *Id.* at ¶ 20. Angeion will also continue to keep the Parties apprised of any additional exclusion requests or objections received, and any documentation that is received or postmarked after the deadline date. *Id.* Following an Order from the Court that provides final approval of the Settlement, and following the Effective Date of the Settlement, Angeion will cause the distribution of the Settlement funds in accord with the terms of the Settlement Agreement and the directives and Orders of the Court. *Id.* at ¶ 21. Angeion will also send, 90 days in advance of the 180-day checking cashing deadline, a check-cashing reminder by email, or postcard if email is unavailable, to Settlement Class Members who were sent a check, but did not yet cash it at that juncture. *Id.* Based on the Notice Plan and other administrative services contemplated by the Parties' Settlement Agreement, Angeion prepared a detailed estimate of Angeion's costs for the services to be provided, which were calculated as not exceeding $199,500.[13] Dkt. No. 108-3 at ¶ 24. Angeion's estimate of costs to complete remains unchanged. *Id.* at ¶ 22.

[12] Angeion has also received and responded to five voicemails requesting information about the exclusion process, however to date, no additional written exclusion requests have been received.
[13] This amount does not include costs for a second distribution to Settlement Class Members, if sufficient funds remain as a result of uncashed checks following the distribution of the Settlement Payments and a second distribution were to be deemed appropriate.

C. Attorneys' Fees, Litigation Expenses and Plaintiff's Service Award

The Settlement allows Plaintiff to petition for attorneys' fees not to exceed one-third of the Settlement Amount, Litigation Expenses not to exceed $75,000, and a Service Award for Plaintiff Michelle Anderson not to exceed $6,500. SA ¶¶ C.7, C.8. As previously noted, (n.2, *supra*), Defendants' agreement not to oppose Plaintiff's Counsel's request for attorneys' fees and reasonable expenses identified herein, and Plaintiff's Service Award, were obtained only after the material terms for the relief to the Settlement Class were agreed upon. SA ¶ C.8. The Notice Plan disclosed to members of the Settlement Class the amounts of the requested attorneys' fees, litigation expenses, and service award to Plaintiff, and that those amounts, as well as the notice and administration costs, will come from the Settlement Amount (after approval by the Court). *See* SA, Exhibit A, B, C, and https://www.travelplansettlement.com/.

The Court's Preliminary Approval Order (Dkt. No. 109) directed Plaintiff to file the motion for fees and costs by September 8, 2021. However, Plaintiff has filed this motion early to coordinate with the filing of the motion for final approval of the Settlement. Once filed with the Court, the Settlement Administrator will promptly post these motions on the Settlement Website. SA ¶ C.9. Settlement Class members will thus be able to fully examine these motions before deciding whether to opt-out, or object. Additionally, Plaintiff's Counsel also seeks the Court's approval for the costs of the Settlement Administrator to be paid from the Settlement Amount. SA ¶ C.10. *See Campbell v. Transgenomic, Inc.*, 2020 WL 2946989, at *4 (D. Neb. June 3, 2020) (Gerrard, J.) ("The Court is aware that administrative costs are to be paid from the settlement fund. The Court has considered those costs, and they are justifiable.").

ARGUMENT

As demonstrated below, the requested attorneys' fees should be granted in full; a lodestar cross-check confirms counsel's fees are reasonable; counsel's Litigation Expenses are reasonable

and should be reimbursed, and the Settlement Administrator's costs for notice and settlement administration should be approved; and Plaintiff should receive the requested service award.

I. THE REQUESTED ATTORNEYS' FEES SHOULD BE GRANTED IN FULL

The Supreme Court recognizes that "a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). "In a certified class action, the court may award reasonable attorneys' fees and nontaxable costs that are authorized by law or by the parties' agreement." FED. R. CIV. P. 23(h). [14]

"Courts utilize two main approaches to analyzing a request for attorney fees." *Campbell v. Transgenomic, Inc.*, 2020 WL 2946989, at *3-4 (citing *Johnston v. Comerica Mortg. Corp.*, 83 F.3d 241, 244 (8th Cir. 1996)). "Under the 'lodestar' methodology, the hours expended by an attorney are multiplied by a reasonable hourly rate of compensation so as to produce a fee amount which can be adjusted, up or down, to reflect the individualized characteristics of a given action." *Id.* "Another method, the 'percentage of the benefit' approach, permits an award of fees that is equal to some fraction of the common fund that the attorneys were successful in gathering during the course of the litigation. *Id.* The percentage-of-the-benefit method is recommended in common-fund cases." *Id.* "But the Court has the discretion to use either method." *Id.* (citations omitted).

[14] *See also Allen v. City of Omaha*, 136 Neb. 620, 286 N.W. 916, 918 (1939) ("Where the services of a litigant's attorney result in rescuing or preserving a large amount of property or funds, not only for the benefit of the particular litigant, but for the benefit of all others in the same class, and by means of these services the property or funds are conserved for the benefit of all, the cost thereof, including attorney's fees, should be borne by those benefited by it.").

A. Relevant Factors Confirm That Plaintiff's Fee Request Is Warranted

"Under either the lodestar or percentage-of-the-benefit method, the Court may determine the reasonableness of the fee award by considering relevant factors from the twelve factors listed in *Johnson v. Georgia Highway Express*, 488 F.2d 714, 719-20 (5th Cir. 1974)." *Id.* (citations omitted). Those factors include: "1. The time and labor required, 2. The novelty and difficulty of the questions, 3. The skill requisite to perform the legal service properly, 4. The preclusion of other employment by the attorney due to acceptance of the case, 5. The customary fee, 6. Whether the fee is fixed or contingent, 7. Time limitations imposed by the client or the circumstances, 8. The amount involved and the results obtained, 9. The experience, reputation, and ability of the attorneys, 10. The 'undesirability' of the case, 11. The nature and length of the professional relationship with the client, and 12. Awards in similar cases." *Id.* (citing *Johnson*, 488 F.2d at 717-19.) In combining these considerations, the Eight Circuit has endorsed the use of five comprehensive factors in considering the award of attorneys' fees: "'(1) the time and work required; (2) the preclusion of other employment by the attorney due to acceptance of this case; (3) the contingent nature of the fee; (4) the results obtained; and (5) the experience, reputation, and ability of the attorneys.'" *Huyer v. Buckley*, 849 F.3d 395, 399 (8th Cir. 2017) (citation omitted) (citing *Johnson v. Ga. Highway Express*, 488 F.2d 714, 719-20 (5th Cir. 1974)).

1. <u>The Time and Work Required in the Litigation</u>

The investigation of this case began five years ago, in 2016, and the initial complaint was filed 2017, and was then re-filed in this District in 2018. Kahana Decl. at ¶¶ 11-12, 62. Throughout the past five-year period, Plaintiff's Counsel has dedicated and expended very significant resources in the factual and legal investigation of this novel insurance case, initiating this case in two venues, litigating successfully to defeat two motions to dismiss and a related motion to certify for appeal the Court's denial of one of those motions to dismiss, followed by extensive document and other

discovery. *Id.* at ¶¶ 62-70. Plaintiff's efforts also entailed retaining an actuarial expert to conduct research regarding Defendants' regulatory filings and other issues necessary to prepare a liability and damages report that, among other things, calculated relevant damages, as well as participation in a protracted mediation proceeding using a well-respected neutral, Rodney Max. *Id.* at ¶¶ 14-25.

As set forth in detail in the Kahana Decl., Plaintiff's Counsel collectively expended a total of more than 1,596 hours, with a lodestar value of $933,352. *Id.* at ¶ 59. While Plaintiff and her counsel strongly believe in the merits of the claims asserted, it cannot be understated that to prevail, Plaintiff would still need to win class certification, likely defend the certification order in a Rule 23(f) appeal to the Eighth Circuit, survive summary judgment, protect its expert(s) from evidentiary challenges before trial, and prevail at trial. This would be no small feat and would likely require at least several years to fully complete. *See Moreno v. Beacon Roofing Supply, Inc.*, 2020 WL 3960481, at *5 (S.D. Cal. July 13, 2020) (continued litigation "poses various risks such as failing to certify a class, having summary judgment granted against Plaintiff, or losing at trial"); *Hudson v. Libre Tech. Inc.*, 2020 WL 2467060, at *6 (S.D. Cal. May 13, 2020) (same). Moreover, any victories would surely be appealed, further extending this marathon litigation. *See Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 966 (9th Cir. 2009) ("[i]nevitable appeals would likely prolong the litigation … for years"). *See also In re Charter Commc'ns, Inc., Sec. Litig.*, No. 4:02-cv-1186 CAS, 2005 WL 4045741, at *18 (E.D. Mo. June 30, 2005) ("Had the case not been settled, considerably more time would have been necessary to complete formal discovery (particularly of third parties) and to prepare this case for trial with no assurance that the outcome would have been any more successful."); *Khoday v. Symantec Corp.*, No. 11-cv-180 (JRT/TNL), 2016 WL 1637039, at *9 (D. Minn. Apr. 5, 2016) ("Absent settlement, this case (pending since 2011) would continue to generate vigorously disputed issues of law and fact.").

Moreover, the complexity of this case further justifies the requested fees. *In re Heritage Bond Litig.*, 2005 WL 1594403, at *21 (C.D. Cal. June 10, 2005) ("This factor strongly weighs in favor [of] permitting class plaintiffs to recover [33⅓%] of the settlement fund."); *Jones v. Monsanto Co.*, 2021 WL 2426126, at *11 (W.D. Mo. May 13, 2021) ("the complexity of the legal issues justifies a higher award"). The theory of this case was unprecedented, and required significant expertise to develop and support the claims asserted.

Moreover, Defendants raised very significant defenses, and potentially case-dispositive arguments, in their motions to dismiss based the inapplicability of unjust enrichment principles to Plaintiff's claims, the insufficiency of Plaintiff's claim under the Nebraska Consumer Protection Act for consumers who were non-Nebraska residents, and Plaintiff's Article III standing to pursue class claims. Kahana Decl. at ¶¶ 13, 17, 23, 69-70. Plaintiff overcame (at the motion to dismiss stage) those and other arguments in sustaining her asserted claims. Nonetheless, there was no guarantee of a successful ultimate outcome, and absent the Settlement, Defendants would have undoubtedly continued to contest Plaintiff's allegations at every turn.

Thus, in addition to the very significant expenditure of attorney time and resources, the factual and legal risks involved in undertaking and prosecuting this litigation were substantial and support the requested fee award. *See In re CenturyLink Sales Pracs. & Sec. Litig.*, No. 17-cv-2832, 2020 WL 7133805, at *12 (D. Minn. Dec. 4, 2020) ("If the case had survived to the class certification stage, there would have been strong arguments against class certification with regard to manageability concerns that do not exist with the current Settlement. If the case continued in litigation, Plaintiffs' Counsel would have had to expend considerable additional resources on discovery, expert analysis, a highly contested motion for class certification, motions for summary judgment, and trial."). *See also In re Xcel Energy, Inc., Sec., Derivative & "ERISA" Litig.*, 364 F.

Supp. 2d 980, 994 (D. Minn. 2005) (stating that "[t]he risk of no recovery in complex cases of this sort is not merely hypothetical" and that "[p]recedent is replete with situations in which attorneys representing a class have devoted substantial resources in terms of time and advanced costs yet have lost the case despite their advocacy") (citation omitted).

2. The Preclusion of Other Employment

As noted above, Plaintiff's Counsel has spent to date more than 1,596 hours, constituting a collective lodestar of $933,352 in the prosecution of this Action. Kahana Decl. at ¶ 59. That commitment to this litigation has resulted in plethora of foregone opportunities to pursue other litigation matters. *Id.* at ¶¶ 10-23, 69-70. Those facts are only then augmented by the numerous highly disputed complex, novel, nuanced legal and factual issues at issue in this case. Among other things, this included working with Plaintiff's expert to craft methodologies to: a) prepare an analysis of the standard insurance principles and prevailing insurance practice that refunds should be provided to customers for the unused portion of insurance coverage, such as where consumers bought travel insurance with a variety of post-departure benefits and trip was cancelled; and b) make a determination of the portion of premium that relates to post-departure benefits based on Defendants' own rate manual, which builds up the premium based on the cost of each specific benefit, whether pre-departure or post-departure. *Id.* at ¶ 19. Indeed, in order to ultimately prevail in this case, Plaintiff would have needed to successfully defend the requisite, and complicated, proofs for the alleged divisibility of the Travel Plans, as well as the impact of the so-called "Ten Day Free Look Period" and other provisions in the Travel Plans. *Id.* at ¶¶ 19, 23.

Such issues lie at the core of the Parties' disputes over liability as well as certification of a potential trial class. Plaintiff's Counsel's skill, tenacity, and efficiency in navigating the many legal and factual challenges led to the Settlement. But for seeking redress for the Settlement Class in

this litigation, Plaintiff's Counsel's efforts and resources would have been applied to the pursuit of other litigation matters. This factor favors the requested fee.

3. The Contingent Nature of the Fee

"'Courts have recognized that the risk of receiving little or no recovery is a major factor in awarding attorney fees.'" *Yarrington v. Solvay Pharms., Inc.*, 697 F. Supp. 2d 1057, 1062 (D. Minn. 2010). As such, "class counsel's fees should reflect the important public policy goal of 'providing lawyers with sufficient incentive to bring common fund cases that serve the public interest.'" *Larson v. Allina Health Sys.*, No. 17-cv-03835SRNTNL, 2020 WL 2611633, at *2 (D. Minn. May 22, 2020) (quoting *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 51 (2d Cir. 2000)). While court-awarded fees must be reasonable, if they are set too low, there will be insufficient incentive for attorneys to bring large class action cases. *See In re Veeco Instruments Inc. Sec. Litig.*, No. 05 MDL-1695 (CM), 2007 WL 4115808, at *3, 8 (S.D.N.Y. Nov. 7, 2007) (citing *Goldberger*, 209 F.3d at 53). Accordingly, in the Eighth Circuit, "courts have routinely awarded attorney fees ranging from 25% to 36% of a common fund under the percentage-of-the-fund method." *See Yarrington v. Solvay Pharm., Inc.*, 697 F. Supp. 2d at 1061 (approving attorneys' fees of 33% of the common fund).

Here, Plaintiff's Counsel assumed a significant risk in undertaking this case on a pure contingency basis; invested substantial time, effort and money over the past five years with no guarantee of recovery; and were wholly prepared to continue prosecuting the litigation until conclusion. Moreover, the claims asserted are a truly novel theory using core principals of insurance law. Suffice to say, Plaintiff's Counsel "faced a substantial risk of non-recovery." *In re UnitedHealth Grp. Inc. PSLRA Litig.*, 643 F. Supp. 2d 1094, 1104 (D. Minn. 2009).

While Defendants ultimately agreed to settle, they also had significant defenses to liability and class certification as discussed above, and absent this Settlement, recovery would remain

highly uncertain. The contingent nature of this litigation further supports the requested fee. *Huyer v. Buckley*, 849 F.3d at 399 (crediting factor where "all of the attorneys worked on a contingent basis").

4. The Result Obtained for the Settlement Class

"In evaluating the reasonableness of an attorney fee request, courts have consistently recognized that the 'degree of success obtained' is 'the most critical factor.'" *Carlin v. DairyAmerica, Inc.*, 380 F. Supp. 3d at 1019-20 (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983)). *See also* FED. R. CIV. P. 23(h) 2003 advisory committee note ("For a percentage approach to fee measurement, results achieved is the basic starting point"). The non-reversionary $3,237,500 million Gross Settlement Fund achieved is an excellent recovery for the Settlement Class as it represents a substantial all cash recovery and is even further notable in its certainty in light of the inherent high risks of continued litigation.

Here, there are clear benchmarks to show the high value of the recovery. Under the Settlement, the Net Settlement Fund will be divided among Settlement Class Members *pro rata* based on the amount of premium paid to insure that Settlement Class Member under their applicable Travel Plan, SA ¶ C.3, unless a Settlement Class Member would receive a payment of less than $5.00, in which event the payment will be increased until the payment reaches $5.00. *Id.* Based on analysis of available data about Settlement Class Members, Plaintiff estimates that each Settlement Class Member who does not receive the minimum will receive 7.5-10% of their premium paid, which represents about ***25%-35% of the estimated premium paid*** for post-departure benefits. Such an assured recovery, especially given the novel nature of the claims asserted, is both a significant and highly commendable result.[15] This factor supports the requested fee.

[15] "[S]tanding alone, nine percent or higher constitutes a fair settlement even absent the risks associated with prosecuting these claims." *In re Checking Acct. Overdraft Litig.*, 830 F. Supp. 2d

5. Plaintiff's Counsel's Experience, Reputation and Ability

The experience, reputation and ability of Plaintiff's Counsel further militate in favor of the request. "The prosecution and management of a complex national class action requires unique legal skills and abilities." *Cheng Jiangchen v. Rentech, Inc.*, No. 17-cv-1490-GW(FFMX), 2019 WL 5173771, at *10 (C.D. Cal. Oct. 10, 2019); *Swinton v. SquareTrade, Inc.*, 454 F. Supp. 3d 848, 886 (S.D. Iowa 2020) ("Class actions are not easy cases. It takes lawyers of great skill to navigate the procedural and substantive hurdles inherent in them and, should such a matter settle, arrive at a settlement that is fair to the class as a whole."). Especially, where, as here, counsel has "represented 'intimate knowledge of the case,' and applied their unique skills to obtain favorable results, this factor should weigh in favor of an increase in the benchmark rate." *Carlin v. DairyAmerica, Inc.*, 380 F. Supp. 3d at 1021 (citation omitted).

Here, Plaintiff's Counsel are skilled litigators with vast experience in prosecuting class actions and other complex cases. *See* Kahana Decl. ¶¶ 3 & n.1, 4, 6, 12 n.5 (attaching firm biographies of Plaintiff's Counsel). "Berger Montague currently consists of approximately 60 attorneys who represent plaintiffs in class action and other complex litigation around the country. The firm's Consumer Protection Department has extensive experience representing aggrieved persons and entities in class action litigations. Berger Montague has played lead roles in major

1330, 1346 (S.D. Fla. 2011). *See also, e.g., Newbridge Networks Sec. Litig.,* 1998 WL 765724, *2 (D.D.C. Oct. 23, 1998) ("an agreement that secures roughly six to twelve percent of a *potential* recovery ... seems to be within the targeted range of reasonableness"); *In re Rite Aid Corp. Sec. Litig.,* 146 F. Supp. 2d 706, 715 (E.D. Pa. 2001) (noting that since 1995, class action settlements have typically "recovered between 5.5% and 6.2% of the class members' estimated losses"); *In re Linerboard Antitrust Litig.,* 296 F. Supp. 2d 568, 581 (E.D. Pa. 2003); *Keil v. Lopez*, 862 F.3d 685, 696 (8th Cir. 2017) ("[A] settlement is a product of compromise and the fact that a settlement provides only a portion of the potential recovery does not make such settlement unfair, unreasonable or inadequate... 27 percent of the maximum recovery at trial, is a compromise well within the fair and reasonable range.") (citation omitted).

class action cases for over 50 years, resulting in collective recoveries totaling many billions of dollars for our firm's clients and the classes they have represented." *Id.* at ¶ 4.

"The quality of opposing counsel is also important in evaluating the quality of Class Counsel's work." *Thorpe v. Walter Inv. Mgmt. Corp.*, No. 1:14-cv-20880-UU, 2016 WL 10518902, at *9 (S.D. Fla. Oct. 17, 2016). In the instant case, there is "no dispute that the plaintiffs in this litigation were opposed by highly skilled and respected counsel with well-deserved local and nationwide reputations for vigorous advocacy in the defense of their clients." *In re Heritage Bond Litig.*, 2005 WL 1594403, at *20. Defendants are represented by top litigators from the law firm of Carlton Fields, P.A., a national law practice that has more than 330 attorneys and government and financial services consultants serving clients from offices in California, Connecticut, Florida, Georgia, New Jersey, New York, and Washington, D.C. *See* https://www.carltonfields.com/. Carlton Fields has been ranked among The National Law Journal's annual survey of the 250 largest U.S. law firms and The American Lawyer's AmLaw 200 based on gross revenue. Defendants' counsel in this case includes Carlton Fields' National Class Actions Practice Group Chair Julianna Thomas McCabe, along with Shareholders Markham Leventhal and Michael Wolgin, both of whom are highly experienced litigators in the defense of class action and insurance lawsuits.

This case was vigorously litigated by both sides, as reflected in the extensive docket entries. There is a comprehensive record of the discovery and motions practice in this hard-fought litigation spanning the past four years. The quality of representation is reflected in the exemplary Settlement, and strongly favors the fee request. *Accord Carlin v. DairyAmerica, Inc.*, 380 F. Supp. 3d at 1021 ("Suffice to say, the Court takes a favorable view of the breadth and depth of experience

of Plaintiffs' Counsel, recognizes the extraordinary efforts they made on behalf of the class, and (as stated above) finds the settlement amount extraordinary.").

B. Plaintiff's Counsel's Fee Request Accords with Awards in Other Cases

Plaintiff's Counsel's fee request of one third of the non-reversionary common fund created is "in line with other awards in the Eighth Circuit." *Accord Huyer v. Buckley*, 849 F.3d at 399.

As decisions in this Circuit often reflect, "courts have frequently awarded attorneys' fees ranging up to 36% in class actions." *Huyer v. Buckley*, 849 F.3d at 399 ("Although 38% is on the high end of the typical range, we cannot say that it is unreasonable when compared to other awards within this circuit."). *Accord In re U.S. Bancorp Litig.*, 291 F.3d 1035, 1038 (8th Cir. 2002) (affirming attorneys' fee award of 36% in class action settlement); *Yarrington v. Solvay Pharm., Inc.*, 697 F. Supp. 2d at 1061 (approving attorneys' fees of 33% of the common fund; "courts have routinely awarded attorney fees ranging from 25% to 36% of a common fund under the percentage-of-the-fund method"); *Carlson v. C.H. Robinson Worldwide, Inc.*, No. 02-cv-3780 JNE/JJG, 2006 WL 2671105, at *8 (D. Minn. Sept. 18, 2006) (approving as reasonable attorney fee award that amounts to 35.5% of the settlement fund).

Here, Plaintiff requests attorneys' fees equal to one third of the $3,237,500 non-reversionary Settlement Amount. As this Court recently held, awarding such fees as a "percentage of the benefit" is "well in line with other attorney's fee awards in this circuit." *Campbell v. Transgenomic, Inc.*, 2020 WL 2946989, at *4 (awarding fee of one third of settlement) (citing *Rawa v. Monsanto Co.*, 934 F.3d 862, 870 (8th Cir. 2019); *In re Target Corp. Customer Data Sec. Breach Litig.*, 892 F.3d 968, 977 (8th Cir. 2018); *Keil v. Lopez*, 862 F.3d 685, 701 (8th Cir. 2017); *Caliguri v. Symantec Corp.*, 855 F.3d 860, 865-66 (8th Cir. 2017); *Huyer v. Buckley*, 849 F.3d at 399; *In re Life Time Fitness, Inc., Tel. Consumer Prot. Act (TCPA) Litig.*, 847 F.3d 619, 623 (8th Cir. 2017)).

This factor supports Plaintiff's fee request.

C. Lodestar Cross-Check Confirms Counsel's Fees Are Reasonable

The reasonableness and fairness of the fee award requested by Plaintiff is confirmed by a lodestar cross-check.[16]

As the Eight Circuit has explained, courts may verify the reasonableness of a percentage fee award "by crosschecking it against the lodestar method." *Huyer v. Buckley*, 849 F.3d at 399-400 (citing *Petrovic v. Amoco Oil Co.*, 200 F.3d 1140, 1157 (8th Cir. 1999) ("[U]se of the 'lodestar' approach is sometimes warranted to double-check the result of the 'percentage of the [benefit]' method.")). Accordingly, courts in this Circuit have approved of multipliers of up to 5.6. *Rawa v. Monsanto Co.*, 934 F.3d at 870 (while a lodestar multiplier of 5.3 would be high, "it does not exceed the bounds of reasonableness") (citing, *e.g.*, *In re Charter Commc'ns, Inc., Sec. Litig.*, 2005 WL 4045741, at *18 (finding reasonable a 5.61 cross-check multiplier)). *Accord Nelson v. Wal-Mart Stores, Inc.*, No. 05-cv-000134, 2009 WL 2486888, at *2 (E.D. Ark. Aug. 12, 2009) (approving multiplier of 2.5 and citing cases within the Eighth Circuit approving multipliers of up to 5.6). By contrast, courts in this Circuit have found that a multiplier of less than two "is *below* the range of multipliers commonly accepted." *Caligiuri,* 855 F.3d at 866 (emphasis added) (citing *Khoday v. Symantec Corp.*, 2016 WL 1637039, at *11).

[16] "The standards to be considered in calculating attorneys' fees under a 'lodestar' approach include (1) the number of hours spent in various legal activities by the individual attorneys, (2) the reasonable hourly rate for the individual attorneys, (3) the contingent nature of success, and (4) the quality of the attorneys' work." *Campbell v. Transgenomic, Inc.*, 2020 WL 2946989, at *4 (citing *Jorstad v. IDS Realty Trust*, 643 F.2d 1305, 1312-13 (8th Cir. 1981)). "But the starting point is multiplying hours and typical hourly rates; only after such a calculation do other, less objective factors come into the equation." *Id.* (citation omitted). Nevertheless, as discussed above, the contingent nature of this case, the novel and innovative theory of the case, and the quality of Plaintiff's Counsel's work, including the result achieved, also strongly support the requested fee.

Moreover, "'[t]he lodestar cross-check need entail neither mathematical precision nor bean counting but instead is determined by considering the unique circumstances of each case." *Yarrington v. Solvay Pharms., Inc.*, 697 F. Supp. 2d at 1065 (quoting *In re Xcel Energy, Inc. Sec., Derivative & ERISA Litig.*, 364 F. Supp. 2d 980, 999 (D. Minn. 2005)). Instead, the Court "may rely on summaries submitted by the attorneys and need not review actual billing records." *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 307 (3d Cir. 2005). "'The resulting multiplier need not fall within any pre-defined range, so long as the court's analysis justifies the award, such as when the multiplier is in line with multipliers used in other cases." *Yarrington v. Solvay Pharms., Inc.*, 697 F. Supp. 2d at 1065 (citation omitted).

Here, Plaintiff's fee request results in a very modest multiplier of 1.16. Kahana Decl. at ¶ 60.[17] Further, this modest multiplier will only decrease through the distribution of the Net Settlement Fund as additional work is performed by Plaintiff's Counsel in connection with the administration of the Settlement. *Id.* The lodestar cross-check supports the requested fee award.

II. PLAINTIFF'S COUNSEL'S LITIGATION EXPENSES ARE REASONABLE AND SHOULD BE REIMBURSED, AND THE SETTLEMENT ADMINISTRATOR'S COSTS ARE REASONABLE AND SHOULD BE PAID

In accord with federal Rule 23(h), Plaintiff seeks reimbursement for her counsel's reasonable Litigation Expenses of up to $75,000, which is the ceiling that was fixed by the Parties' Settlement Agreement and specified in the Notice provided to the Settlement Class. Kahana Decl.

[17] *See also, e.g., Klug v. Watts Regul. Co.*, No. 8:15-cv-61, 2017 WL 1373857, at *2 (D. Neb. Apr. 13, 2017) (approving rates of professional from Berger Montague and other counsel; finding that "[t]he hourly rates for the partners, associates and professional staff who worked on the litigation are in line with the rates of attorneys with similar expertise and experience would charge in non-contingent matters; *Sharp v. Watts Regul. Co.*, No. 8:16-cv-200, 2017 WL 1373860, at *2 (D. Neb. Apr. 13, 2017) (same); *South Peninsula Hospital v. Xerox State Healthcare, LLC*, No. 3:15-cv-00177-JMK, slip op. at Dkt. No. 251 (D. Alaska Mar. 16, 2021) (accord).

at ¶ 52. No objection from the Settlement Class has been received as to this or any other aspect of the Settlement. *Id.* ¶ 53.

"'Reasonable costs and expenses incurred by an attorney who creates or preserves a common fund are reimbursed proportionately by those class members who benefit by the settlement.'" *Yarrington v. Solvay Pharms., Inc.*, 697 F. Supp. 2d at 1067 (quoting *In re Media Vision Tech. Sec. Litig.*, 913 F. Supp. 1362, 1366 (N.D. Cal. 1996)). The award "should be limited to typical out-of-pocket expenses that are charged to a fee paying client and should be reasonable and necessary." *In re Immune Response Sec. Litig.*, 497 F. Supp. 2d 1166, 1177 (S.D. Cal. 2007). These reimbursable litigation costs and expenses include, but are not limited to, such things as: "'expert witness costs, mediation costs, computerized research, court reports, travel expenses, and copy, telephone, and facsimile expenses." *In re CenturyLink Sales Pracs. & Sec. Litig.*, No. 17-cv-2832, 2020 WL 7133805, at *13 (D. Minn. Dec. 4, 2020) (quoting *Krueger v. Ameriprise Fin., Inc.*, No. 11-cv-2781 SRN/JSM, 2015 WL 4246879, at *3 (D. Minn. July 13, 2015) (internal quotations omitted)). *Accord* FED. R. CIV. P. 23(h).[18] "[B]ecause counsel had no guarantee that these expenses would ever be reimbursed, Plaintiffs' Counsel had the incentive to keep the amounts reasonable." *In re CenturyLink Sales Pracs. & Sec. Litig.*, 2020 WL 7133805, at *13.

Here, Plaintiff's Counsel expended a total of $48,685.08 in out-of-pocket costs in this litigation through August 18, 2021. Kahana Decl. at ¶ 75. Those expenses consist primarily of costs for experts and consultants; mediation fees; computerized research and database hosting and processing. *Id.* The expenses incurred were reasonable and necessary to the prosecution of this

[18] "Reimbursable expenses include many litigation expenses beyond those narrowly defined 'costs' recoverable from an opposing party under [Federal] Rule 54(d), and includes: expert fees; travel; long-distance and conference telephone; postage; delivery services; and computerized legal research." *Tussey v. ABB, Inc.*, No. 06-cv-04305-NKL, 2019 WL 3859763, at *5 (W.D. Mo. Aug. 16, 2019) (citing Alba Conte, 1 ATTORNEY FEE AWARDS § 2:19 (3d ed.)).

case. *Id.* at ¶¶ 73, 74. The reimbursement request of Litigation Expenses of up to $75,000 was included in the Notice to the Settlement Class, and no objections were received. *Id.* at ¶ 75. Plaintiff will provide the Court with an update as to Plaintiff's Counsel's actual Litigation Expenses at or prior to the Final Approval Hearing, which will in any event be below the $75,000 ceiling, as set forth in the Notice to the Settlement Class.

As detailed in the Kahana Decl., from the beginning of the case, Plaintiff's Counsel funded this litigation aware that they might not obtain any recovery or reimbursement of their advanced costs and, at the very least, would not recover anything until the litigation was successful in producing a recovery. Further, Class Counsel also understood that, even if the case was ultimately successful, an award of expenses would not compensate counsel for the lost use of the funds advanced. *Id.* at ¶ 71. The expenses incurred are also reasonable in the circumstances and should be approved.[19] *Accord Ray v. Lundstrom*, No. 4:10-cv-3177, 2012 WL 5458425, at *5 (D. Neb. Nov. 8, 2012) ("The court finds the claimed expenses are reasonable in amount. The court finds the costs, mediation fees, forensic accounting fees, consultants fees, and other costs and expenses were also necessary to prosecute the claims on behalf of the class.").

In addition, Plaintiff's Counsel has reviewed the work and cost estimate of the Court-appointed Settlement Administrator, and deems the work performed and the cost estimate (capped

[19] "An empirical study of the costs awarded in class action litigation found that the average cost award was equal to 4% of the relief obtained for the class." *Tussey v. ABB, Inc.*, No. 06-cv-04305-NKL, 2019 WL 3859763, at *5 (W.D. Mo. Aug. 16, 2019) (citing Theodore Eisenberg & Geoffrey P. Miller, Attorney Fees in Class Action Settlements: an Empirical Study, 1 J. OF EMPIRICAL LEGAL STUDIES 27, 70 (2004)). "This study suggests that 'requests falling within one standard deviation above or below the mean should be viewed as generally reasonable.'" *Id.* at 74. Here, the total Litigation Expenses amount to 2.3% of the total recovery, which is "well within the range to be considered 'generally reasonable.'" *Id.*

at $199,500) to be reasonable. Kahana Decl. at ¶ 51.[20] Plaintiff's Counsel requests that the Court approve the payment of the Settlement Administrator's fees and expenses. *Accord Rawa v. Monsanto Co.*, No. 4:17-cv-01252 AGF, 2018 WL 2389040, at *9 (E.D. Mo. May 25, 2018), *aff'd*, 934 F.3d 862 (8th Cir. 2019). *See also Fellows v. Am. Campus Communities Servs., Inc.*, No. 4:16-cv-01611-JAR, 2018 WL 3056046, at *6 (E.D. Mo. June 20, 2018) (holding that "attorneys' fees, costs, the costs of notice of administration and related expenses borne by the Defendants are all properly considered in assessing the value of a settlement").

III. PLAINTIFF SHOULD RECEIVE THE REQUESTED SERVICE AWARD

Plaintiff Michelle Anderson should receive the requested $6,500 service award as the sole named Plaintiff and Class Representative, for her expenditures in resources and effort over the past five years in initiating and pursuing this litigation, which has now led to this Settlement to benefit all similarly affected consumers. Kahana Decl. at ¶¶ 76-81 (attaching Anderson declaration).

Courts routinely grant an incentive award to class representatives, "both as an inducement to participate in the suit and as compensation for time spent in litigation activities, including depositions." *Waldbuesser v. Northrop Grumman Corp.*, No. 06-cv-6213-AB (JCX), 2017 WL 9614818, at *7 (C.D. Cal. Oct. 24, 2017) (approving $25,000 award to each of four plaintiffs) (citing *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 463 (9th Cir. 2000)); *accord In re Cont'l Ill. Sec. Litig.*, 962 F.2d 566, 571 (7th Cir. 1992) (awards are appropriate "as may be necessary to induce [class representative] to participate"). "Service awards to representative plaintiffs encourage members of a class to become class representatives and reward individual efforts taken

[20] In accord with the Court's directive (Dkt. No. 109 at 9, ¶ 21), the Devery Decl., which confirms "that notice has been accomplished in accordance with the provisions [of the Court's Preliminary Approval Order]," is attached to the Kahana Decl. (*see* ¶¶ 37-51), filed concurrently herewith.

on behalf of a class." *Klug v. Watts Regul. Co.*, 2017 WL 1373857, at *2 (quoting *Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998) (awarding incentive award of $25,000)).

Here, Plaintiff provided important assistance in the prosecution of the claims asserted, advocating for the redress of the conduct that is alleged to have injured consumers nationwide. Kahana Decl. at ¶¶ 76-81 (attaching Anderson declaration). *Accord Klug v. Watts Regul. Co.*, 2017 WL 1373857, at *3 (recounting similar participation by plaintiff in that case). During this litigation, Plaintiff's Counsel worked closely with the sole named Plaintiff, Michelle Anderson, in each phase of litigation. Among other things, Ms. Anderson: assisted Plaintiff's Counsel as necessary in the preparation of pleadings, motions and other papers; conducted searches for and provided copies of Ms. Anderson's relevant documents; received case status updates; and consulted with Plaintiff's Counsel regarding the strategy and discovery of this litigation, as well as in connection with the mediation sessions that lead to the proposed settlement that is now before the Court for final approval. *Id.*

But for Plaintiff's willingness to step forward and serve as the class fiduciary, it is very possible that this Action would not have been possible, nor would the resulting benefits that have been achieved for the Settlement Class. *Id.* at ¶ 81. Moreover, the significance of Plaintiff Anderson's efforts in this case have led to setting precedent for not only the future handling (and drafting) of consumer travel cancellation insurance generally but also with regard to subsequent events that have occurred due to COVID-19.[21] *Id.* at ¶ 21.

[21] The same insurance principles supporting Plaintiff Anderson's claims have since led to additional similar claims being sustained at the pleading stage. *See* discussion *supra* (at page 6) regarding*, e.g., Haas v. Travelex and Berkshire Hathaway Specialty Ins. Co.,* 2021 WL 3682309 at *5 (C.D. Cal. Aug. 19, 2021); and *Gordon v. Arch Ins. Co.,* No. 21-cv-1911, 2021 WL 2186392, at *3 (E.D. Pa. May 28, 2021).

Plaintiff's intention to move for the requested service award "was disclosed in the Settlement Agreement, as well as the notice", and no objection was received from the Settlement Class. *Accord Lechner v. Mut. of Omaha Ins. Co.*, No. 8:18-cv-22, 2021 WL 424421, at *2 (D. Neb. Feb. 8, 2021). The requested Service Award should be approved in full. *Accord id.*, at *3 (directing service awards in the amount of $10,000 each to the three class representatives, finding that "[a]wards in that amount are in line with other incentive awards" in other class cases).

CONCLUSION

Plaintiff respectfully requests that the Court grant in full the requested attorneys' fees, reimbursement of Litigation Expenses, and Service Award for Plaintiff.

Dated: September 1, 2021

Respectfully submitted,

/s/ John G. Albanese

John G. Albanese
BERGER MONTAGUE PC
1229 Tyler Street, Suite 205
Minneapolis, MN 55413
Tel.: (612) 594-5997
Fax: (612) 584-4470
jalbanese@bm.net

BERGER MONTAGUE PC
Shanon J. Carson
Peter R. Kahana
Lane L. Vines
Y. Michael Twersky
1818 Market Street, Suite 3600
Philadelphia, PA 19103
Tel.: (215) 875-3000
scarson@bm.net
pkahana@bm.net
lvines@bm.net
mitwersky@bm.net

EVANS LAW FIRM, INC
Ingrid M. Evans
3053 Fillmore Street, #236
San Francisco, CA 94123
Tel.: (415) 441-8669
ingrid@evanslaw.com

BURKE SMITH LAW
Burke Smith, NE Bar No. 19883
10730 Pacific St #100
Omaha, NE 68114
Tel.: (402) 718-8865
Fax: (402) 218-4391
burke@burkesmithlaw.com

Counsel for Plaintiff and the Proposed Settlement Class

CERTIFICATE OF WORD COUNT COMPLIANCE

The undersigned certifies in accordance with Local Rule 7.1(d)(3), that the foregoing Memorandum contains 11,798 words, as counted by Microsoft Word 365's Word Count function, including all headings, footnotes, and quotations, as well as the caption.

Date: September 1, 2021

/s/ John G. Albanese
John G. Albanese

CERTIFICATE OF SERVICE

I certify that on September 1, 2021, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on the following counsel of record via transmission of Notices of Electronic Filing generated by CM/ECF:

Burke Smith
BURKE SMITH LAW
10730 Pacific Street, Suite 100
Omaha, NE 68114
burke@burkesmithlaw.com

Shanon J. Carson
Peter R. Kahana
Lane L. Vines
Y. Michael Twersky
BERGER MONTAGUE PC
1818 Market Street
Philadelphia, PA 19103
scarson@bm.net
pkahana@bm.net
lvines@bm.net
mitwersky@bm.net

Ingrid M. Evans
EVANS LAW FIRM, INC.
3053 Fillmore Street, Suite 236
San Francisco, CA 94123
ingrid@evanslaw.com

Markham R. Leventhal
CARLTON FIELDS, P.A.
Suite 400 West
1025 Thomas Jefferson Street, NW
Washington, DC 20007
mleventhal@carltonfields.com

Julianna Thomas McCabe
Michael N. Wolgin
CARLTON FIELDS, P.A.
2 MiamiCentral, Suite 1200
700 N.W. 1st Avenue
Miami, FL 33136
jtmccabe@carltonfields.com
mwolgin@carltonfields.com

/s/ John G. Albanese
John G. Albanese