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 FINAL APPROVAL OF CLASS ACTION SETTLEMENT**

Pursuant to Federal Rule of Civil Procedure 23(e), Plaintiff Michelle Anderson hereby moves the Court to enter the proposed Final Approval Order and Judgment, which, *inter alia*: (1) finally approves the class action Settlement reached in the matter; (2) certifies the Settlement Class; (3) appoints Plaintiff Michelle Anderson as the Class Representative; (4) appoints Shanon J. Carson, Peter R. Kahana, Lane L. Vines, Y. Michael Twersky, and John G. Albanese of Berger Montague PC as Lead Counsel for the Settlement Class; (5) approves the Notice Plan and Notice issued to members of the Settlement Class, and binds all Settlement Class Members to the Final Approval Order and Judgment; (6) approves the distribution plan for the Net Settlement Fund as set forth in the Settlement Agreement; and (7) bars Settlement Class Members from asserting any claims for which a Release is given in the Settlement.

In support of her Motion, Plaintiff relies on the concurrently filed Memorandum of Law in support thereof, the exhibits attached thereto, and the Final Approval Hearing. Defendants Travelex Insurances Services, Inc., and Transamerica Casualty Insurance Company do not oppose the relief sought in this Motion.

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

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

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

Counsel for Plaintiff and the Proposed Settlement Class

CERTIFICATE OF SERVICE

I HEREBY 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

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

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

Ingrid M. Evans
EVANS LAW FIRM, INC.
3053 Fillmore Street, Suite 236
San Francisco, CA 94123
ingrid@evanslaw.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 FINAL APPROVAL OF CLASS ACTION SETTLEMENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

Other Authorities

Pursuant to FED. R. CIV. P. 23(e)(2) and this Court's Memorandum and Order Certifying Settlement Class, Preliminarily Approving Class-Action Settlement, and Approving Form and Manner of Notice (Dkt. 109) ("Preliminary Approval Order"), Plaintiff respectfully moves the Court for an order granting final approval of the proposed class action Settlement.[1] The Settlement, if finally approved by the Court, will fully resolve all claims against all Defendants in this Action. Thus far, there are been no objections to the Settlement and only one person has opted out. While the Defendants disagree with Plaintiff's position on the merits of the claims asserted in this case as summarized herein, they have agreed to resolve the litigation through the Settlement and do not oppose the relief sought in this motion.

INTRODUCTION

After nearly four years of fiercely contested litigation, and extensive arms-length negotiations, Plaintiff Michelle Anderson and Defendants Travelex Insurance Services Inc. ("Travelex") and Transamerica Casualty Insurance Company ("Transamerica") ("Defendants") (collectively, "the Parties") have reached an agreement to resolve this Action. The Settlement was reached only after the Parties, through experienced counsel, engaged in substantial motion practice, exchanged significant discovery, and participated in two full days of mediation with a nationally prominent mediator, Rodney Max.[2] The Settlement exhibits all the signs of procedural and substantive fairness, reasonableness, and adequacy, and therefore should be finally approved.

Defendants sold single-trip travel insurance plans ("Travel Plans") that included both pre-departure and post-departure benefits. Plaintiff alleges that these two categories of coverage are

[1] The Class Action Settlement Agreement ("Settlement Agreement" or "SA"), was filed with the Court as an exhibit to Plaintiff's Unopposed Motion for Preliminary Approval of Class Action Settlement, Dkt. 108-2. Unless otherwise defined, all capitalized terms referred to herein are as defined in the Settlement Agreement.

[2] *See* https://www.floridamediators.org/rodney-max.

distinct, and that by the Travel Plans' own terms the post-departure coverage only became effective upon commencement of travel. Defendants had a policy of not providing partial premium refunds for post-departure benefits whenever a covered trip was cancelled. Plaintiff alleges that Defendants violated the Nebraska Consumer Protection Act and were unjustly enriched by retaining the portion of the premium attributable to post-departure benefits when the covered trip was cancelled before departure, because the risk associated with providing these benefits to insureds never attached. While Plaintiff's theories of liability were predicated on well-established insurance principles that premiums should be returned to an insured for any risk of loss never assumed, these principles had not previously been tested in the specific setting of the travel insurance industry's sale of bundled travel insurance plans with packages of pre-departure and post-departure benefits. *See* Kahana Decl. ¶ 21.[3]

Defendants strenuously dispute Plaintiff's claims and have advanced many defenses. Among other defenses, Defendants contest that the travel insurance plans are divisible into pre and post-departure benefits; 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. *See, e.g.,* Kahana Decl. ¶ 23.

The Court's Preliminary Approval Order certified the Settlement Class, preliminarily approved the Settlement, appointed Plaintiff as the representative of the Settlement Class,

[3] In support of her Motion, Plaintiff is filing concurrently herewith the Declaration of Peter R. Kahana (the "Kahana Decl." or "Kahana Declaration") in Support of Plaintiff's Motion for Final Approval of Class Action Settlement and Motion for Approval of Attorneys' Fees, Expenses, and Service Award.

appointed attorneys from Berger Montague PC as settlement class counsel, and directed that the Notice Plan be initiated. *See* Preliminary Approval Order ¶¶ 2-7; Dkt. 112 (granting an extension until July 19 to complete Notice Plan). The Notice Plan was timely implemented and Direct Notice was sent to all members of the Settlement Class with a valid mailing or email address, informing them of the Settlement, of the nature of the Action, the definition of the certified class, the claims, the Settlement (and its binding nature), that Class Counsel would be seeking Attorney's Fees, Litigation Expenses, and a Service Award, and of their right to object to it or opt out of the Settlement Class. *See* Kahana Decl. at ¶¶ 37-51. Devery Decl. ¶¶ 6-19.[4] The Objection and Opt-Out Deadline is September 14, 2021. *See* Prelim. Approval Order ¶¶ 8-15. As of August 30, 2021, of the 96,382 Settlement Class members, ***not a single*** member of the Settlement Class has objected to the Settlement and only one has validly opted out of the Settlement. *See* Devery Decl. ¶ 18.[5] "The absence of any opposition to the settlement strongly supports final approval." *In re Zurn Pex Plumbing Prod. Liab. Litig.*, No. 08-MDL-1958 ADM/AJB, 2013 WL 716088, at *7 (D. Minn. Feb. 27, 2013).

The Settlement offers the Class significant benefits, and especially when considered in light of the costs, risks, and delay presented at every turn of continued litigation. The Settlement calls for Defendants to pay a ***non-reversionary***, Gross Settlement Fund of $3,237,500 ("Settlement

[4] Plaintiff also is filing concurrently herewith the Declaration of Brian Devery of Angeion Group, LLC Regarding Implementation of Notice ("Devery Declaration" or "Devery Decl."), confirming that Notice was timely accomplished. *See* Preliminary Approval Order ¶ 21 (requiring "an affidavit from a representative of the settlement administrator confirming that notice has been accomplished."). The Devery Declaration is attached as Exhibit 4 to the Kahana Declaration.

[5] Angeion also received voicemails from three persons inquiring about exclusion from the Settlement Class. Angeion (and settlement class counsel) have responded to these inquiries and advised those persons regarding the opt-out procedure. *See* Preliminary Approval Order at ¶ 8 (describing opt-out procedures, including that, among other things, a submission must be in writing and signed).

Amount") from which Settlement Class Members who are reached will receive *automatic payment* without the need to submit a claim form. *See* Kahana Decl. ¶¶ 28-29. The common fund will also be used for Settlement Administration Costs, payment of Attorneys' Fees, Litigation Expenses, and a Service Award for Plaintiff, which are the subject of Class Counsel's pending Plaintiff's Motion for Approval of Attorneys' Fees, Expenses and Service Award ("Fee Motion") filed concurrently. *See, e.g.*, Kahana Decl. ¶¶ 28, 52.

If the Settlement is approved, and the Fee Motion is granted, Settlement Class Members will receive a payment representing approximately 25%-35% of the disputed premium amount. *Id.* ¶ 28. This is an excellent result in the face of the lengthy and risky litigation in the absence of settlement. The class action Settlement warrants final approval as the terms are "fair, reasonable, and adequate" and meets all requirements of Rule 23 of the Federal Rules of Civil Procedure. Plaintiff respectfully requests that the Court enter the Parties' proposed Final Approval Order and Judgment, which will be emailed to Court in accord with Local Rule 7.2.

RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

I. The Claims in this Action and the Scope of the Class Have Been Vigorously Contested in Numerous Motions Filed by Defendants Prior to Settlement

Defendants sold Travel Plans underwritten by Transamerica and marketed by Travelex. These plans contained both pre-departure and post-departure insurance benefits. Dkt. 1, Compl. ¶¶ 18, 33; Kahan Decl. ¶ 8. By the Travel Plans' express 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. Kahana Decl. ¶ 8. Defendants ceased selling the plans at issue in this case in 2017. *Id.* Plaintiff purchased her Travel Plan from Defendants through the online travel agency, Just Air Ticket. *Id.* ¶ 9. 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.*[6]

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. *See* Kahana Decl. ¶ 13. Defendants moved to dismiss the complaint arguing that Plaintiff's unjust enrichment claim failed because the Parties' relationship was governed by a contract. *Id.* 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. *See Anderson v. Travelex Ins. Servs., Inc.,* No. 8:18-cv-362, 2019 WL 1932763 (D. Neb. May 1, 2019). While Plaintiff prevailed on Defendants' Rule 12(b)(6) motion, absent settlement, the outcome of the Action was still far from clear, as 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. Also, Defendants each filed an Answer, which not only contested many of Plaintiff's allegations, but also contained over twenty enumerated "affirmative,

[6] Plaintiff and settlement class counsel initially began developing the claims in this litigation in the fall of 2016. Kahana Decl. ¶ 62. Plaintiff originally filed this litigation in the Western District of New York on December 5, 2017, because the address to send claims under Defendants' travel insurance plan was the "Travelex Claims Department" located in Niagara Falls, NY. *See* Kahana Decl. ¶ 11. Defendants filed a motion to dismiss challenging personal jurisdiction in New York and requesting, in the alternative, that the case be transferred to Arizona. *Id.* After conducting additional factual and legal research, Plaintiff and her counsel voluntarily dismissed the action in New York and refiled in this Court on July 30, 2018, based on Defendant Travelex's ties to Nebraska. *Id.* ¶ 12.

and other defenses." Dkts. 42, 43. Although Plaintiff is confident in her claims, absent the Settlement before the Court now for Final Approval, there is little question this Action would have continued to be strenuously contested at every twist and turn.

Apart from contesting the merits of Plaintiff's claim, in an attempt to limit the discovery in this Action, Defendants also moved to dismiss for lack of subject matter jurisdiction under FED. R. CIV. P. 12(b)(1) the claims of putative class members who bought plans other than through Just Air Ticket. Dkts. 61, 66 at 3. In connection with that motion, Defendants submitted a declaration from Travelex Senior VP Risk and Compliance Sally Dunlap, and Plaintiff deposed Ms. Dunlap in connection with responding to Defendants' motion. Dkts. 67, 76-1. The Court denied this second motion to dismiss 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." *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. *Anderson v. Travelex Ins. Servs., Inc.*, No. 8:18-cv-362, 2020 WL 2909980 (D. Neb. June 3, 2020). Again, while the Court denied Defendants' motion, nonetheless, many hurdles lay ahead in discovery before class certification. *Anderson v. Travelex Ins. Servs., Inc.*, 2020 WL 1323489, at *5 ("The Court's ruling does not address, in any way, whether the plaintiff is an appropriate representative to litigate a class of claims regarding all of the defendants' travel insurance policies. That issue will be addressed when considering class certification.") Thereafter, the Parties agreed to mediate this case before an experienced independent mediator (as discussed below). *See* Kahana Decl. ¶ 18.

II. The Parties Have Conducted Significant Discovery

During the course of discovery, and in connection with mediation, significant discovery has taken place, providing Plaintiff (and Defendants) with adequate information to fully and fairly assess the Settlement. This discovery has included the exchange of initial disclosures, comprehensive requests for the production of relevant documents, as well as interrogatories served on both Transamerica and Travelex. Defendants have produced discovery in the form of approximately twenty thousand pages of documents relating to the travel plans, including, (*e.g.*), rate filings and documents setting forth the premiums collected. *See* Kahana Decl. ¶¶14-20.

Moreover, in connection with mediation, Plaintiff retained an experienced actuarial consultant, Charles DeWeese, FSA, MAAA, 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. Mr. DeWeese's labor in connection with mediation 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.* ¶¶ 18-20. Most importantly for analysis of the Settlement, Mr. DeWeese estimated that approximately between 26.35% and 29.27% of the total aggregate premium charged for Defendants' Travel Plans could be attributed to post-departure benefits (which is the claimed damages here). *Id.* ¶ 20.

In summary, through all the formal, and informal, fact discovery, expert analysis, and motion practice conducted, 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.* ¶ 24. While Plaintiff maintains (and Defendants dispute) that her theory of liability is predicated on well-established insurance principles that premium can be recovered by an insured for any risk of loss never assumed, there is still serious risk that Defendants' defenses to their alleged liability could ultimately prevail. Prior to this Action this theory had not been tested in the travel insurance context and there is no binding, conclusive authority either way that would definitively resolve Plaintiff's claims. *Id.* ¶ 21.[7]

III. The Settlement Agreement Has Been Preliminarily Approved and the Notice Program Has Been Successfully Implemented

On November 11, 2020, the Parties attended via Zoom an all-day mediation session with Rodney Max. Kahana Decl. ¶ 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. *Id.* The Parties did not resolve the matter at the first mediation, but discussions were fruitful, and conversation continued. *Id.* The Parties continued to exchange settlement correspondence and resumed mediation with Rodney Max on March 4, 2021. *Id.* Only after a second full day of hotly contested 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, and on June 11, Plaintiff filed an Unopposed Motion for Preliminary Approval of Class Action Settlement. Dkt. 108.

[7] Subsequent to Plaintiff's commencement of this litigation, litigation has been filed in other courts (in the context of trip cancelations due to COVID-19) that 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 (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.

On June 16, 2021, the Court: a) certified the Settlement Class; b) granted preliminary approval of the Settlement; c) appointed Michelle Anderson as the Class Representative; d) appointed Berger Montague PC as settlement class counsel; e) appointed Angeion Group to serve as settlement administrator; and, approved the Notice of class action settlement, directing that it be issued to Settlement Class members. Dkt. 109.[8]

The Settlement Class certified by the Court 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. 109 at ¶ 3.[9] Since the time of the Preliminary Approval Order, Angeion has determined that the Settlement Class consists of 96,382 Settlement Class members (Devery Decl. ¶ 7). The Settlement, of course, only releases the claims of Settlement Class Members and related persons identified in the Release. *See* SA ¶ F.1.

A. A Summary of the Settlement Terms Demonstrates Their Significant Benefit to the Settlement Class

The Settlement provides for Defendants to pay a gross Settlement Amount of ***$3,237,500*** from which payments to Settlement Class Members will be made. SA ¶ C.1. After deductions for (Court-approved) Attorneys' 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

[8] On July 15, 2021, the Court granted an enlargement of time of one business day until Monday, July 19, 2021, of the deadline to complete the dissemination of notice to the Settlement Class. Dkt. 112.

[9] Excluded from the Class: (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.

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.* If the Settlement is approved, and the concurrently filed Fee Motion is granted, the Net Settlement Fund (to be automatically distributed to Settlement Class Members) will be no less than $1,877,333. The difference between the Gross Settlement Fund, and Net Settlement Fund accounts for a reduction (if approved by the Court) for the (a) the service award to the Class Representative ($6,500), (b) attorneys' fees and Litigation Expenses ($1,154,166.67), and (c) the Settlement Administration Costs paid from the Gross Settlement Fund ($199,500). *See* Fee Motion. Based on analysis of available data about Settlement Class Members (if Plaintiff's Fee Motion is granted), each Settlement Class Member who does not receive the minimum will receive approximately 7.5-10% of their premium paid, which represents about 25%-35% of the estimated premium paid for post-departure benefits (the damages). Kahana Decl. ¶ 28.[10]

If a portion of the Net Settlement Fund remains following the distribution by the Settlement Administrator to Settlement Class Members of their payments and the Check Cashing Deadline, then such remaining funds will be distributed to a *cy pres* recipient to be proposed by the Parties subject to the Court's approval. SA ¶ C.6. However, if the amount remaining is of such an amount that in the discretion of Lead Counsel and the Settlement Administrator it is feasible that such monies should be redistributed, then Lead Counsel may petition the Court for an Order to distribute the remaining Net Settlement Fund to those Settlement Class Members (rather than making a *cy*

[10] For instance, if Settlement Payments are 7.5% of the total premium paid by Settlement Class Members for their travel insurance plans, 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 amount in dispute. Of course, the final settlement payment amounts will depend on how many Settlement Class members cash their check, and if a second distribution of the Residual Settlement Fund takes place. *See* SA ¶ C.6.

pres distribution). *Id.* This is consistent with the requirement that "a cy pres distribution to a third party of unclaimed settlement funds is permissible only when it is not feasible to make further distributions to class members." *Caligiuri v. Symantec Corp.*, 855 F.3d 860, 867 (8th Cir. 2017) (citation omitted).

In consideration for the benefits to Plaintiff and Settlement Class Members, Settlement Class Members will release all claims which were asserted or could have been asserted in the case concerning Defendants' alleged liability to pay partial refunds of premium paid by policyholders for post-departure benefits when their insured travel is cancelled (as described in the Settlement). SA ¶ F.1. Significantly, the Release will exclude pending or as yet unfiled policyholder claims for trip cancellation benefits under the Travel Plans. *Id.*

B. The Notice Plan Was Successfully Implemented

Pursuant to the Court's Preliminary Approval Order, Defendants advanced the estimated cost of providing the Notice, and Angeion successfully implemented the Notice Plan set out in the Settlement, including (as explained below) the dissemination by Direct Notice by mail and/or email to over 93% of the Settlement Class of the 96,382 Settlement Class members identified from Defendants' records. *See* Devery Decl. ¶¶ 7-15. The Eighth Circuit has found that similar robust Direct Notice programs are sufficient Notice. *See, e.g., Keil v. Lopez*, 862 F.3d 685, 692 (8th Cir. 2017) (sustaining approval of a class settlement where the notice program as a whole had reached "more than 87 percent of the class members"). As ordered by the Court, settlement class counsel has furnished the Devery Declaration "confirming that notice has been accomplished." *See* Dkt. 109 ¶ 21; Devery Decl. ¶¶ 5-19.

On or about June 24, 2021, Defendants provided Angeion with Settlement Class members' mail/email contact information via Excel Spreadsheets. Devery Decl. ¶ 7. Angeion reviewed the spreadsheet data to identify and remove duplicate records, which resulted in a Class List of 96,382

Settlement Class members. *Id.* From this list Angeion was able to identify mail and/or valid email addresses for approximately almost 96% of the members of the Settlement Class (or all but 4,116). *Id.* More specifically, Angeion was able to identify 23,866 members of the Settlement Class with both a mailing address and a valid email address, 67,737 members of the Settlement Class with a mailing address only, and 663 Settlement Class members with a valid email address only (all based on the records provided to Angeion by Defendants). *Id.*

On July 16, 2021, Angeion caused the Court-approved Email Notice to be sent via email to the 24,529 records on the Class List that contained a valid email address. [11] A copy of the Email Notices is attached to the Devery Declaration as Exhibit B.

Prior to sending the Mail Notice to the 91,603 class members with a mailing address, Angeion updated 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"). *Id.* ¶ 10. On July 17, 2021, Angeion caused the Class Mailed Notice to be sent via first-class mail to the 91,603 Settlement Class members with a mailing address. *Id.* A copy of the Notice mailed to Settlement Class members is attached to the Devery Declaration as Exhibit C.[12] During the period from the initial Notice through August 30, 2021, a total of 7,883 Notices were returned to Angeion by the

[11] The 24,529 valid email addresses were determined to be valid based on an email verification process whereby common errors and typos are corrected and the email is verified with the hosting email system. 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. *Id.* ¶ 8. For the 663 Settlement Class members that had a valid email address (but no postal address) Angeion sent those Settlement Class members a modified Email Notice, which was materially identical to the other Email Notice, except that it alerted these Settlement Class members that Angeion had no mailing address on file and specifically requested that they provide their mailing address. *Id.* at ¶ 9, and Exhibit B thereto.

[12] 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.* ¶ 12.

USPS without forwarding addresses. *Id.* ¶ 13. Using skip trace techniques, Angeion was able to identify new addresses for 5,288 of the undeliverable notices. *Id.* ¶ 14. The Class List and database were updated with the new address information, and a Notice was re-mailed to these 5,288 Settlement Class members. *Id.* [13]

In short, Direct Notice by mail, email, or both was sent to over **93%** of 96,382 Settlement Class members.[14] This is more than adequate and represents excellent notice. *See, e.g., Swinton v. SquareTrade, Inc.*, 454 F. Supp. 3d 848, 871 (S.D. Iowa 2020) ("[C]ourts routinely find notice is sufficient even when it does not reach every class member.").

The Settlement Administrator has also created and maintained a Settlement Website, https://www.travelplansettlement.com/. The Settlement Website contains an online portal, through which 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. Devery Decl. ¶ 16. 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 of this Action. *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 Long Form Notice and other important

[13] Moreover, of the 2,655 records where no updated mailing address was located, email notice was sent to 482 of those Settlement Class members. *Id.* ¶ 14.

[14] This figure is based on the 4,116 Settlement Class members for whom no address, or valid email address was initially identified, plus the 2,655 records where no updated postal address was located (after Skip Trace techniques were implemented) minus the 482 of the 2,655 Settlement Class members that were sent Direct Notice by email. To get the 93% figure, settlement class counsel divided these 6,289 Settlement Class members by the 96,382 total Settlement Class members and multiplied by 100 equating to 6.525% of the Settlement Class that were not sent email or mail notice to a valid address.

documents are available on the Settlement Website. The Settlement Administrator also established a toll-free dedicated hotline relating to the Settlement. *Id.* ¶ 17.

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.* ¶ 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.*

The Settlement also 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. Defendants' agreement not to oppose Class Counsel's request for attorneys' fees and reasonable expenses, 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. Significantly, the Notice Plan disclosed to members of the Settlement Class the requested attorneys' fees and 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* Devery Decl., at Exhibits B-C, and https://www.travelplansettlement.com/important-documents.php. *See Campbell v. Transgenomic, Inc.*, No. 4:17-cv-3021, 2020 WL 2946989, at *2 (D. Neb. June 3, 2020) ("The Court notes, in particular, the opportunity to object to the award of attorney's fees in the amount of [1/3] of the settlement fund.").

The Court's Preliminary Approval Order directed Plaintiff to file the motion for fees and costs no later than September 8, 2021. Dkt. 109. Plaintiff is filing the Fee Motion concurrently

with the Motion for Final Approval to coordinate those filings, and for ease of the Court. Kahana Decl. ¶ 36. Once filed with the Court, the Settlement Administrator will promptly post the motions on the Settlement Website. SA ¶ C.9. Settlement Class members will then be able to sufficiently examine these motions in full, with adequate time remaining, before deciding whether to opt-out, or object.[15]

Significantly, as of August 30, 2021, not a single Settlement Class member has objected to the Settlement and only one has opted out. Devery Decl. ¶ 18.

ARGUMENT

The Eighth Circuit has held that "strong public policy favors [settlement] agreements, and courts should approach them with a presumption in their favor." *Petrovic v. Amoco Oil Co.*, 200 F.3d 1140, 1148 (8th Cir. 1999) (citing *Little Rock Sch. Dist. v. Pulaski Cnty. Spec. Sch. Dist. No. 1*, 921 F.2d 1371, 1388 (8th Cir. 1990)). *See also* William Rubenstein, 4 NEWBERG ON CLASS ACTIONS § 13:44 (5th ed.) ("NEWBERG") ("The law favors settlement, particularly in class actions and other complex cases where substantial resources can be conserved by avoiding lengthy trials and appeals."). "It is the surety of settlement that makes it a favored policy in dispute resolution as compared to unknown dangers and unforeseen hazards of litigation." *In re Charter Commc'ns, Inc., Sec. Litig.*, No. 4:02-cv-1186 CAS, 2005 WL 4045741, at *4 (E.D. Mo. June 30, 2005) (quoting *In re Wireless Tel. Fed. Cost Recovery Fees Litig.*, No. 03-cv-015, 2004 WL 3671053, at *11 (W.D. Mo. Apr. 20, 2004)). This policy is "particularly strong in the class action context." *In*

[15] Additionally, the Fee Motion seeks the Court's approval of the fees and costs of the Settlement Administrator, which are to be paid from the Settlement Amount. SA ¶ C.10. *See also Campbell v. Transgenomic, Inc.*, 2020 WL 2946989, at *4 ("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.").

re Uponor, Inc., F1807 Plumbing Fittings Prods. Liab. Litig., 2012 WL 2512750, at *7 (D. Minn. June 29, 2012); *Cohn v. Nelson*, 375 F. Supp. 2d 844, 852 (E.D. Mo. 2005) ("The law favors settlement, particularly in class actions and other complex cases where substantial judicial resources can be conserved by avoiding formal litigation.") (citations omitted).

Approval of a class action settlement is generally a three-step process. *See* NEWBERG § 13:39; *Lechner v. Mut. of Omaha Ins. Co.*, No. 8:18-cv-22, 2020 WL 5982022, at *3 (D. Neb. Oct. 8, 2020). Step one is a "preliminary determination of the fairness, reasonableness and adequacy of the settlement terms and [directing] the preparation of notice of the proposed settlement and the date of the fairness hearing." *Id.* Step two is "notice is given to the class members." *Id.* Finally, step three is "taking account of all of the information learned during that process, the court decides whether or not to give 'final approval' to the settlement." NEWBERG § 13:39 ("final approval can also encompass a decision certifying the class"). Here, after the Court's order preliminarily approving the settlement, Notice was provided to the Settlement Class. *See* Devery Decl. ¶¶ 5-20.

"Ultimately, the court must examine whether the interests of the class are better served by settlement than by further litigation." *Casey v. Coventry Healthcare of Kansas, Inc.,* No. 08-cv-00201-W-DGK, 2012 WL 860395, at *1 (W.D. Mo. Mar. 13, 2012). As recently articulated by this Court:

> The Court's role in reviewing a negotiated class settlement is to ensure that the agreement is not the product of fraud or collusion and that, taken as a whole, it is fair, adequate, and reasonable to all concerned.… If the proposed settlement would bind the class members, the Court may approve it only after a hearing and upon finding that it is fair, reasonable, and adequate.… But a class action settlement is a private contract negotiated between the parties.... ***And a settlement agreement is presumptively valid.***

Campbell v. Transgenomic, Inc., 2020 WL 2946989, at *2 (citations omitted) (emphasis added). Additionally, as August 31, 2021, ***not a single class member*** has objected to the settlement, and

only one class members has provided a written exclusion request. Devery Decl. ¶ 18. This new information about the response of Settlement Class members to the Settlement further supports approval of the Settlement. Rule 23(e)(2) states that a Court may grant final approval of a class action settlement "only on finding that it is fair, reasonable, and adequate" and provides seven factors for consideration. FED. R. CIV. P. 23(e)(2)(A)-(D). Application of those factors, here, indicates that the Settlement is indeed fair, reasonable, and adequate, and should be approved.

I. The Settlement is Procedurally Fair, as the Class Representatives and Class Counsel Have Adequately Represented the Class, and the Settlement Was Negotiated at Arm's Length with the Assistance of a Mediator

Rule 23(e)(2)(A) and (B) query "if the class representatives and class counsel have adequately represented the class; [and if] the proposal was negotiated at arm's length[.]" These factors focus on "'procedural' concerns, looking to the conduct of the litigation and of the negotiations leading up to the proposed settlement." FED. R. CIV. P. 23(e)(2) adv. comm. notes (2018). The "focus at this point is on the actual performance of counsel" for the class, and courts may consider factors such as "the nature and amount of discovery", the "conduct of the negotiations", and the "involvement of a neutral … mediator". *Id.* A key goal is to determine whether counsel "had an adequate information base." *Id.* "The experience and opinion of counsel on both sides may be considered, as well as whether a settlement resulted from arm's length negotiations, and whether a skilled mediator was involved." *Lechner v. Mut. of Omaha Ins. Co.*, 2020 WL 5982022, at *4 (citation omitted). Courts have held terms of a settlement are appropriate where, like here, the parties have engaged in extensive negotiations at an appropriate stage in the litigation when they can evaluate the strengths and weaknesses of the case and the propriety of settlement. *See*, *e.g.*, *In re Emp. Ben. Plans Sec. Litig.*, No. 3:92-cv-708, 1993 WL 330595, at *5-6 (D. Minn. June 2, 1993). "Rule 23(e) requires the court to intrude on that private consensual agreement merely to ensure that the agreement is not the product of fraud or collusion and that,

taken as a whole, it is fair, adequate, and reasonable to all concerned." *Ramsey v. Sprint Commc'ns Co., L.P.*, No. 4:11-cv-3211, 2012 WL 6018154, at *1 (D. Neb. Dec. 3, 2012).

Here, the Settlement bears all the hallmarks of procedural fairness, and no signs of fraud or collusion. Plaintiff's settlement class counsel has been exploring the claims at the heart of this litigation since the fall of 2016. Kahana Decl. ¶ 62. And the Parties have been actively litigating the Action for the past three and a half years. *Id.* ¶¶ 11-24. The Settlement was reached only after two separate rounds of motions to dismiss briefing in which Plaintiff prevailed following extensive arguments on both the viability of the merits of Plaintiff's claims and Article III jurisdictional challenges (relating to the scope of the proposed class). *Id.* ¶¶ 13, 15-17. Moreover, substantial discovery has taken place both during the course of litigation, and tailored for mediation, including the production and review of nearly twenty thousand pages of documents, the deposition of Travelex's Senior VP, and Plaintiff's procurement of an expert damage analysis in connection with mediation. *Id.* ¶¶ 14-22. In total, Plaintiff's settlement class counsel (and co-counsel) have spent close to 1,600 hours on this litigation, and have invested significant time, and expense in developing, and prosecuting this litigation. *Id.* ¶¶ 54-75.

In addition, the Parties' negotiations leading to the Settlement were prolonged and at arm's-length culminating in two full days of mediation conducted by a well-respected and experienced neutral, Rodney Max. *Id.* ¶ 25. *See* NEWBERG § 13:50 ("there appears to be no better evidence of [a truly adversarial bargaining process] than the presence of a neutral third party mediator").

In short, the Parties were well informed regarding the material facts and in a position to properly assess the merits of Plaintiff's claims and Defendants' defenses, before agreeing to the Settlement, and found the Settlement to be appropriate. *See In re UnitedHealth Grp. Inc. S'holder Derivative Litig.*, 631 F. Supp. 2d 1151, 1158 (D. Minn. 2009) ("Where sufficient discovery has

been provided and the parties have bargained at arms-length, there is a presumption in favor of the settlement."); *Khoday v. Symantec Corp.*, No. 11-cv-180 (JRT/TNL), 2016 WL 1637039, at *8 (D. Minn. Apr. 5, 2016 (same); *Desert Orchid Partners, LLC v. Transaction Sys. Architects, Inc.*, Nos. 8:02-cv-553, 8:02-cv-561, 2007 WL 703515, at *2 (D. Neb. Mar. 2, 2007) (finding the assistance of "qualified mediators" supports approval of a settlement).

Moreover, Plaintiff and the proposed Settlement Class are represented by very competent and experienced counsel with vast and significant experience in insurance and class action matters. Kahana Decl. ¶¶1-7. *See Christina A. v. Bloomberg*, No. 00-cv-4036, 2000 WL 33980011, at *4 (D.S.D. Dec. 13, 2000) ("The Court attributes significant weight to Plaintiffs' attorney's assertion that the Settlement Agreement is fair, reasonable and provides significant benefits to the Plaintiff class."); *Khoday v. Symantec Corp.*, 2016 WL 1637039, at *7 ("In this case, counsel for plaintiffs and defendants are well-seasoned in complex litigation, with significant resources and class action experience, and both sides have already approved of the settlement.… This factor weighs in favor of approval.").[16]

Indeed, Plaintiff's counsel have decades of combined experienced in class actions and insurance matters. Kahana Decl. ¶¶ 1-7. Lawyers from Berger Montague PC have been approved as Class Counsel in this District and this Circuit numerous times. *See, e.g., Lechner v. Mut. of Omaha Ins. Co.*, No. 8:18-cv-22, 2021 WL 424421 (D. Neb. Feb. 8, 2021); *Klug v. Watts Regul.*

[16] It is also significant that "Defendants' agreement not to oppose Class Counsel's attorneys' fees and reasonable expenses … 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. *See Swinton v. SquareTrade, Inc.*, 454 F. Supp. 3d 848, 876 (Noting favorably that counsel "did not discuss with Defendant's counsel an award of attorney's fees until after the two sides had agreed on the other substantive terms of the Settlement.")

.

Co., No. 8:15-cv-61, 2017 WL 1373857 (D. Neb. Apr. 13, 2017); *Sharp v. Watts Regul. Co.*, No. 8:16-cv-200, 2017 WL 1373860 (D. Neb. Apr. 13, 2017); *Cortez v. Nebraska Beef, Inc.*, No. 8:08-cv-90, 2012 WL 12931431 (D. Neb. Feb. 9, 2012).

In addition, Plaintiff Michelle Anderson has been an exemplary Settlement Class Representative, reviewing pleadings, meeting and conferring with Class Counsel throughout the course of this litigation, providing documents and information, coordinating with Class Counsel during the mediation, and reviewing and approving the Settlement Agreement. Kahana Decl. ¶¶ 76-78. *See also Swinton v. SquareTrade, Inc.*, 454 F. Supp. 3d at 875 (noting favorably that the named Plaintiff "actively participated in the conduct of this litigation").

In short, the setting in which this Settlement was reached, with significant discovery, experienced counsel, and a third party neutral, weighs strongly in favor of final approval. *See In re Zurn Pex Plumbing Prod. Liab. Litig.*, 2013 WL 716088, at *6 (holding that "[s]ettlement agreements are presumptively valid … particularly where a settlement has been negotiated at arm's length, discovery is sufficient, [and] the settlement proponents are experienced in similar matters") (citations and internal quotations omitted); *Risch v. Natoli Eng'g Co., LLC*, No. 4:11-cv-1621 AGF, 2012 WL 4357953, at *3 (E.D. Mo. Sept. 24, 2012) (approving settlement when the parties engaged in "extensive fact discovery, exchanging and reviewing significant numbers of documents … [including] all documents necessary to evaluate the class claims and damages"); *King v. Raineri Const., LLC*, No. 4:14-cv-1828 CEJ, 2015 WL 631253, at *3 (E.D. Mo. Feb. 12, 2015) (approving settlement when the "parties engaged in settlement negotiations and exchanged a 'large amount of information and documents' for a month before submitting the proposed settlement"). The Settlement undoubtedly is procedurally fair.

II. Substantive Adequacy, and Fairness are Met, as the Settlement Provides Adequate Relief and Treats Settlement Class Members Equitably Relative to Each Other

Rule 23(e)(2)(C) and (D) consider the substantive fairness of the Settlement, and focus on whether "the relief provided for the class is adequate" and "the proposal treats class members equitably relative to each other." FED. R. CIV. P. 23(e)(2). In the Eighth Circuit, "[t]he most important consideration in deciding whether a settlement is fair, reasonable, and adequate is 'the strength of the case for plaintiffs on the merits, balanced against the amount offered in settlement.'" *In re Wireless Tel. Fed. Cost Recovery Fees Litig.*, 396 F.3d 922, 933 (8th Cir. 2005) (citation omitted); *Campbell v. Transgenomic, Inc.*, 2020 WL 2946989, at *2 (same).

In considering the Settlement's fairness, a court must consider the challenges that Plaintiff would face in prevailing on the claims asserted. *See, e.g.*, *Ramsey*, 2012 WL 6018154, at *3. In doing so, the court "does not try the case," but instead identifies the disputed factual and legal issues that make it less likely for the plaintiff class to receive a full recovery. *Id.* (citing *Grunin v. Int'l House of Pancakes*, 513 F.2d 114, 123 (8th Cir. 1975)); *see also Cullan and Cullan LLC v. M-Qube, Inc.*, No. 8:13-cv-172, 2016 WL 5394684, *7 (D. Neb. Sept. 27, 2016) (approving settlement because it provided "a real and substantial remedy without the risk and delay inherent in prosecuting this matter through trial and appeal").

Here, the payments to Settlement Class Members will be approximately 25-35% of the estimated premium paid for the post-departure benefit component of their Travel Plan and hence, the recoverable damages if they were successful at trial. Kahana Decl. ¶ 28. This is a substantial recovery, especially where Settlement Class Members who are reached will be receiving these payments automatically without the need for any claims form or claim process and can elect to receive payment through electronic means. *See 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.") (citations omitted); NEWBERG § 12:17 ("the best practice in most cases is to create a system for distributing the class's funds without the necessity of any claiming process").

Further, the Settlement is not a claims-made settlement nor will any portion of the common fund revert to Defendants based on opt-out rates or otherwise. SA § C.1. ("Upon the Settlement reaching the Effective Date, there shall be no reversion to Defendants of the Settlement Amount under any circumstance."). These factors further support settlement approval, as noted in NEWBERG § 13:53:

> [C]ourts are especially wary of complex claiming programs coupled with either of two other settlement facets: reversionary funds [or] claims-made settlements…. Conversely, a settlement without a claims-made procedure (where a sum certain is disgorged from the defendant) is more likely to be found fair, reasonable, and adequate.

Moreover, all Settlement Class Members are being treated equitably relative to each other. Under the payment allocation plan, Settlement Class Members who are not receiving the $5.00 minimum are receiving a *pro rata* portion of the Net Settlement Fund based on the amount of premium paid by the Settlement Class Member, *i.e.*, Settlement Class Members who paid a bigger premium will receive a larger payment.[17] *See In re Centurylink Sales Pracs. & Sec. Litig.*, No. 18-cv-296 (MJD/KMM), 2021 WL 3080960, at *7 (D. Minn. July 21, 2021) (finding a *pro rata* distribution based on the size of their verified damages claims "a reasonable way to allocate the

[17] The Settlement Payments will be calculated by adding up the total premium paid by all Settlement Class Members eligible for payment, calculating the pro rata share of the total premium of each Settlement Class Member, and multiplying the pro rata share by the Net Settlement Fund. Those Settlement Class Members whose payment would be less than $5.00 will then have their payments adjusted to $5.00 and the payments to the Settlement Class Members receiving higher than the $5.00 minimum payment will be adjusted accordingly pro rata. SA ¶ C.3.

funds and to ensure that the maximum amount of the funds is used for class members' benefit"). In order to ensure that no Settlement Class Member receives a *de minimis* amount, the Settlement also provides that Settlement Class Members who would otherwise receive less than $5.00 get a slightly increased payment to ensure that no one receives less than $5.00. SA ¶ C.3.

This recovery is reasonable especially when compared to the alternative of further litigation. To obtain recovery through a fully litigated judgment, Plaintiff would have to win class certification, summary judgment, trial, post-trial motions, and potentially appeal. Any loss at any one of those (risky) steps would result in no recovery and any litigated judgment would take potentially years before it became final. *See, e.g.*, NEWBERG § 13:52 (describing the inherent risks and drawbacks of protracted litigation). Moreover, the court system is still incurring delays and logistical hurdles as a result of the COVID-19 pandemic, and thus any litigated resolution will probably incur even more delays than in other times when there is not an ongoing public health emergency.

In addition to the general risks and delays associated with complex litigation, each of the Defendants have raised numerous significant defenses that they intended to litigate potentially through appeal, including raising over 20 affirmative and other defenses in their respective Answers to Plaintiff's Complaint. *See* Dkts. 42 and 43. For example, as described above, Defendants contest if Plaintiff's unjust enrichment claim is barred because it is expressly addressed by the Travel Plan, and whether the Travel Plans were divisible insurance policies wherein premiums for pre-departure benefits and post-departure benefits could be segregated. Relatedly, Defendants contest when the premium connected with post-departure benefits is earned. Defendants also contest whether their practice to not provide partial premium refunds constituted unjust enrichment or violated the Nebraska Consumer Protection Act.

While Plaintiff believes that Defendants' defenses could have been overcome, the defenses were substantial with no definite answers provided by case law, as this is in many ways novel litigation. The risks at every turn of further litigation when weighed against the recovery warrants settlement approval here. *Yarrington v. Solvay Pharms., Inc.*, No. 09-cv-2261 (RHK/RLE), 2010 WL 11453553, at *9 (D. Minn. Mar. 16, 2010) (finding class counsel had "exhaustively assessed the probability of ultimate success on the merits against the risks of establishing liability and damages and maintaining a class action through trial and appeal" where parties had extensive motion practice, prepared expert reports, exchanged discovery and took depositions, and engaged in mediation); *see also Keil*, 862 F.3d at 695 (holding that this factor "weighs in favor of approving the settlement because the outcome of the litigation would be far from certain if the case had not settled … whereas the settlement provides substantial benefits to the class") (citations and internal quotations omitted).[18]

III. The Eighth Circuit's *Van Horn* Factors Further Support Approval of the Settlement

Courts in the Eighth Circuit have also looked to the factors set forth in *Van Horn v. Trickey*, 840 F.2d 604, 607 (8th Cir. 1988) (the "*Van Horn*" factors) when analyzing class action settlements. Those factors are: "(1) 'the merits of the plaintiff's case, weighed against the terms of the settlement'; (2) 'the defendant's financial condition'; (3) 'the complexity and expense of further litigation'; and (4) 'the amount of opposition to the settlement.'" *Swinton v. SquareTrade, Inc.*, 454

[18] Finally, as relates to attorney fees, as shown in the concurrently filed Fee Motion, the attorney fee request is appropriate based on the quality of the results achieved, the tremendous amount of time and costs invested in this case, the contingent nature of the work, as well as the unique and highly complicated substance of the claims. This is not a cookie-cutter case, and Defendants presented many defenses. *See* Kahana Decl. ¶¶ 21-23, 54-70; *Huyer v. Buckley*, 849 F.3d 395, 399 (8th Cir. 2017) (stating courts in the Eighth Circuit have "frequently awarded attorneys' fees ranging up to 36% in class actions" (citation omitted)). Further, there are no agreements that are not identified in the Settlement Agreement that would be required to be disclosed pursuant to Rule 23(e)(3).

F. Supp. 3d 848, 860.

The first and third *Van Horn* factors necessarily overlap with the substantive Rule 23(e) factor analyzed above – namely whether the settlement relief is "adequate, taking into account: the costs, risks, and delay of trial and appeal." *See Id.*, at 861 ("[T]he Court's analysis of this [Rule 23(e)(2)(C)(i)] factor will necessarily include analysis of two related *Van Horn* Factors: 'the merits of the plaintiff's case, weighed against the terms of the settlement' and 'the complexity and expense of further litigation.'"). The first and third *Van Horn* factors are met here because, as discussed above, the significant relief achieved in the Settlement is reasonable when weighed against the potential substantial risks and delay of further litigation.

With respect to the second *Van Horn* factor, there is no indication that Defendants are not financially solvent. As a result, analysis of this Factor is neutral. *See Huyer v. Wells Fargo & Co.*, 314 F.R.D. 621, 627 (S.D. Iowa 2016) ("Wells Fargo is financially able to pay the settlement amount, or continue with the litigation in the event the settlement is not approved. As such, this [*Van Horn*] factor is neutral.").

The fourth *Van Horn* factor – the amount of opposition to the settlement –favors approval of the Settlement. As of the date of the filing of this motion, Plaintiff is not aware of a single objection to the Settlement, and Angeion has received only one valid request for exclusion from the Settlement Class. *See* Devery Decl. ¶ 18. In short, "[t]he relative lack of exclusion requests and opposition by a well-noticed Settlement Class strongly supports the fairness, reasonableness, and adequacy of the Settlement." *Stuart v. State Farm Fire & Cas. Co.*, No. 4:14-cv-4001, 2020 WL 2892819, at *5 (W.D. Ark. June 2, 2020). *Accord Hester v. Walmart, Inc.*, No. 5:18-cv-05225, 2020 WL 7130632, at *1 (W.D. Ark. Dec. 2, 2020) ("In particular, the Court finds that the settlement is a reasonable proportion of the total possible recovery at trial and notes that there were no objections

to the settlement."); *Wiles v. Sw. Bill Tel. Co.*, No. 09-cv-4236-C-NKL, 2011 WL 2416291, at *4 (W.D. Mo. June 9, 2011) ("Having no objectors demonstrates strong support for the value and benefits delivered by the settlement."); *Campbell v. Transgenomic, Inc.*, 2020 WL 2946989, at *3 (also noting the lack of objections).

IV. The Settlement Class Should Be Finally Certified

Final settlement approval also requires a showing that the class certification prerequisites are met under FED. R. CIV. P. 23(a) and (b). *See Huyer v. Wells Fargo & Co.,* 314 F.R.D. 621, 624 (S.D. Iowa 2016); NEWBERG § 13:39. The Court previously found, in its Preliminary Approval Order, that those class certification requirements were met for purposes of this Settlement. *See* Preliminary Approval Order at 1-3. Nothing material has changed since that time, and the requirements continue to be met for purposes of final settlement approval, as discussed below.

A. The Settlement Class Is Numerous

Rule 23(a)(1) requires that the class be "so numerous that joinder of all members is impracticable." FED. R. CIV. P. 23(a)(1). Numerosity "requires only the impracticality, not the impossibility, of joinder." *Cortez v. Nebraska Beef, Inc.*, 266 F.R.D. 275, 289 (D. Neb. 2010) (citing *United States Fid. & Guar. Co. v. Lord*, 585 F.2d 860, 870 (8th Cir. 1978)). "[A]s few as 40 class members should raise a presumption that joinder is impractical." *Caroline C. by and through Carter v. Johnson*, 174 F.R.D. 452, 462 (D. Neb. 1996) (citations omitted). Here, the total number of Settlement Class members is 96,382. Devery Decl. ¶ 7. Numerosity is therefore easily satisfied.

B. There Are Common Questions of Law and Fact and Typicality Is Met

Rule 23(a)(2) requires Plaintiff to establish that there are "questions of law or fact common to the class." FED. R. CIV. P. 23(a)(2). However, "[t]he rule does not require that every question of law or fact be common to every member of the class." *Cortez*, 266 F.R.D. at 289 (citing *Paxton v.*

Union Nat'l Bank, 688 F.2d 552, 561 (8th Cir. 1982)). To establish commonality, there must be a "common contention ... of such a nature that it is capable of classwide resolution–which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). A single common question is enough. *Ebert v. Gen. Mills, Inc.*, 823 F.3d 472, 478 (8th Cir. 2016). "Rule 23 is satisfied when the legal question 'linking the class members is substantially related to the resolution of the litigation.'" *DeBoer v. Mellon Mortg. Co.*, 64 F.3d 1171, 1174 (8th Cir. 1995) (internal quotation marks and citation omitted). Further, commonality may be shown "where the question of law linking the class members is substantially related to the resolution of the litigation even though the individuals are not identically situated." *Paxton*, 688 F.2d at 561 (citation and internal quotes omitted).

Here there are multiple common questions of law and fact central to this litigation that Plaintiff contends can be determined in one stroke using common evidence. These include key questions central to this litigation, such as: a) the divisibility of Defendants' Travel Plans; b) when the risk for post-departure benefits included in Defendants' Travel Plan attaches, and the related premium is earned; c) whether the Parties' relationship in connection with refunds for post-departure benefits was governed by a contract (potentially precluding unjust enrichment claims); d) whether Defendants were unjustly enriched by not providing premium refunds when covered trips were not taken; and e) whether Defendants' refusal to provide partial premium refunds in the circumstances of this litigation constitutes an unfair practice under Nebraska law. As this Court has held in regard to its earlier finding about commonality: "the legal and factual issues surrounding the defendants' course of conduct arise out of the same alleged wrongdoing: the retention of premiums for risks that never attached." Preliminary Approval Order at 1-2.

Typicality "is generally considered to be satisfied if the claims or defenses of the representatives and the members of the class stem from a single event or are based on the same legal or remedial theory." *Paxton*, 688 F.2d at 561-62 (citation and internal quotes omitted). "The Eighth Circuit, 'long ago defined typicality as requiring a demonstration that there are other members of the class who have the same or similar grievances as the plaintiff.'" *Cortez,* 266 F.R.D. at 290 (quoting *Chaffin v. Rheem Mfg. Co.*, 904 F.2d 1269, 1275 (8th Cir. 1990)). "[F]actual differences will not render a claim atypical if the claim arises from the same event or practice or course of conduct that gives rise to the claims of the class members, and if it is based on the same legal theory." *Id.* (citing *Beck v. Maximus, Inc.*, 457 F.3d 291, 296 (3d Cir. 2006)). Here, as this Court has already found, typicality is met for the same reasons as commonality (namely, that Plaintiffs' claims arise from the same course of conduct that also impacted Settlement Class members, Preliminary Approval Order at 2). Also, Plaintiff alleges she suffered the same injury as every other Settlement Class member and is advancing the same remedial theory of recovery.

C. Plaintiff and Settlement Class Counsel Are Adequate

The final prerequisite under Rule 23(a) for class certification is adequacy of representation. Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class." *See* FED. R. CIV. P. 23(a)(4). "The focus of Rule 23(a)(4) is whether: (1) the class representatives have common interests with the members of the class, and (2) whether the class representatives will vigorously prosecute the interests of the class through qualified counsel." *Paxton*, 688 F.2d at 562-63 (citation omitted).

Here, Plaintiff has been an active participant during the litigation and her involvement over the course of the litigation has contributed to the Settlement, which if finally approved will provide a real and substantial recovery for all members of the Settlement Class. *See* Kahana Decl. ¶¶ 76-78. Plaintiff's interests are squarely aligned with every other member of the Settlement Class

seeking refund for the portion of the premium paid for post-departure benefits, and she has no known conflict with any Settlement Class members. *See* Preliminary Approval Order at 2. Further, settlement class counsel, Berger Montague PC, is highly qualified and experienced in class actions and has devoted significant resources in prosecuting the claims of the Settlement Class in this litigation. *See* Kahana Decl. ¶¶ 1-7, 54-75.

Plaintiff respectfully requests that Ms. Anderson be finally appointed to serve as the Settlement Class Representative and that Shanon J. Carson, Peter R. Kahana, Lane L. Vines, Y. Michael Twersky, and John G. Albanese of Berger Montague PC be finally appointed as Lead Class Counsel, pursuant to FED. R. CIV. P. 23(g).

D. Common Issues Predominate and a Class Action is Superior

"To qualify for certification under Rule 23(b)(3), a class must meet two requirements beyond the Rule 23(a) prerequisites: Common questions must 'predominate over any questions affecting only individual members'; and class resolution must be 'superior to other available methods for the fair and efficient adjudication of the controversy.'" *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 615 (1997). The Supreme Court has stated the "predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Products, Inc.*, 521 U.S. at 623 (citing 7A Wright, Miller & Kane, FED. PRACTICE & PROC. § 1777, at 518-19 (2d ed. 1986)).

Predominance measures "the relation between common and individual questions in a case." *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 453 (2016). "An individual question is one where members of a proposed class will need to present evidence that varies from member to member, while a common question is one where the same evidence will suffice for each member to make a prima facie showing [or] the issue is susceptible to generalized, class-wide proof." *Id.* (internal quotation omitted). "When 'one or more of the central issues in the action are

common to the class and can be said to predominate, the action may be considered proper under Rule 23(b)(3) even though other important matters will have to be tried separately, such as damages or some affirmative defenses peculiar to some individual class members.'" *Id.* Further, "[p]redominance is 'a test readily met' in cases involving alleged consumer or securities fraud." *Campbell v. Transgenomic, Inc.*, 2019 WL 3003920, at *1 (quoting *Amchem Products, Inc.*, 521 U.S. at 625)).

Here, in the context of the Settlement Class, common issues far outweigh any individualized ones. The central questions in this litigation, for example, are when the risk attaches for post-departure benefits, and whether Defendants' Travel Plans are divisible. Plaintiff would not use individual evidence to answer these questions. Likewise, damages issues predominate inasmuch as they do not depend on individualized factors, but rather are determinable by means of a mechanical formula to actuarially compute for each Settlement Class Member the percentage of their total premium attributable exclusively to post-departure coverage. Further, because the Court is certifying a class in the settlement context, there are no trial management issues that the Court needs to consider because the Settlement obviates the need for any trial. *See, e.g., Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 302–03 (3d Cir. 2011). As this Court has found, predominance is met here in the Settlement context because "[t]he class members purchased travel plans containing coverage for the same unrealized risk." Preliminary Approval Order at 2.

For the second prong of the Rule 23(b)(3) inquiry, the class action must be "superior to other available methods for the fair and efficient adjudication of the controversy." *See* FED. R. CIV. P. 23(b)(3). "Implicit in the satisfaction of the predominance test is the notion that the adjudication of common issues will help achieve judicial economy.... Having to engage in separate threshold inquiries for each class member prior to reaching the common issues does not promote

such economy.... [It] will create judicial *dis* economy." *Est. of Mahoney v. R.J. Reynolds Tobacco Co.*, 204 F.R.D. 150, 161 (S.D. Iowa 2001) (internal quotation marks and citation omitted).

Here, the Settlement Agreement ensures judicially economic resolution of this litigation by providing members of the Settlement Class with prompt, predictable, and certain relief. The Settlement also contains well-defined administrative procedures to ensure due process, including the right of any Settlement Class members who are dissatisfied with the Settlement to object to the Settlement or exclude themselves from it. The Settlement would relieve the substantial judicial burdens that would be caused by repeated adjudication of the same issues. *See* Preliminary Approval Order at 2 ("A class action will achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results.") (citation omitted).

Moreover, a class action is particularly superior where, as here, "the alleged damages are small, and absent a class action most plaintiffs would not realistically enjoy a day in court." *Khoday v. Symantec Corp.*, No. 11-cv-180 JRT/TNL, 2014 WL 1281600, at *35 (D. Minn. Mar. 13, 2014); *Stuart v. State Farm Fire & Cas. Co.*, 910 F.3d 371, 377 (8th Cir. 2018) ("The district court properly noted that the class members' claims are generally small and unlikely to be pursued individually."). There is little question that absent this litigation and the Settlement achieved most members of Settlement Class would not realistically enjoy a day in court. Therefore, "class status here is not only the superior means, but probably the only feasible [way] ... to establish liability and perhaps damages." *In re Nassau Cty. Strip Search Cases*, 461 F.3d 219, 229 (2d Cir. 2006) (quoting *Tardiff v. Knox County*, 365 F.3d 1, 7 (1st Cir. 2004)).

As shown above, the predominance and superiority tests are satisfied.

V. The Notice Plan Implemented Satisfies Rule 23 and Due Process

Rule 23(e)(1)(B) mandates that the Court "direct notice in a reasonable manner to all class members who would be bound by the proposal." As such, the Class must receive "the best notice that is practicable under the circumstances, including individual notice to all [class] members who can be identified through reasonable efforts" including by U.S. mail, electronic means, or other appropriate means. *Id.* The Eighth Circuit has found that, pursuant to FED. R. CIV. P. 23(e), notice of a class settlement "need only satisfy the 'broad "reasonableness" standards imposed by due process.'" *Petrovic v. Amoco Oil Co.*, 200 F.3d 1140, 1153 (8th Cir. 1999). Moreover, the United States Supreme Court has concluded that a notice of class action settlement must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950) "The contents must fairly apprise the prospective members of the class of the terms of the proposed settlement and of the options that are open to them in connection with the proceedings." *Campbell*, 2019 WL 3003920, at *2.

Here, the Court previously reviewed the proposed notices of class action settlement, approved the notices, and directed that they be disseminated by Defendants "pursuant to the notice plan set forth in the settlement agreement." *See* Preliminary Approval Order. As set forth in the Devery Declaration, Direct Notice was disseminated to approximately over 93% of the Settlement Class, and notice was also published on the Settlement Website. *See* Devery Declaration. Here, the disseminated Notice was the "the best notice that is practicable" as required under FED. R. CIV. P. 23(c)(2)(B). The proposed Notices themselves were clear, straightforward, and provided in plain English the terms of the Settlement Agreement, the benefits that the Settlement will provide to members of the Settlement Class, and how to object or opt-out of the Settlement. *See Reynolds v. Credit Bureau Servs., Inc.*, No. 8:15-cv-168, 2016 WL 389977, at *5 (D. Neb. Feb. 1, 2016) (notice

is adequate if "'reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections'") (citation omitted). The Notices also informed Settlement Class members what counsel would be requesting for attorneys' fees, Litigation Expenses, and a Service Award, and provided an opportunity to object to this as well.[19]

CONCLUSION

For all of the aforementioned reasons, Plaintiff's Motion for Final Approval of Class Action Settlement should be granted, and the Court should enter the Final Approval Order and Judgment: (i) finally approving the Settlement; (ii) finally certifying the Settlement Class for settlement purposes; (iii) finding that the Notice Plan as implemented fully complied with Rule 23 and due process mandates; and (iv) authorizing the Parties to implement the terms of the Settlement Agreement. A form of order for the Final Approval Order and Judgment, as agreed to by the Parties, will be emailed to the Court in accord with Local Rule 7.2.

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

[19] Additionally, on June 21, 2021, pursuant to the Class Action Fairness Act, 28 U.S.C. § 1715 ("CAFA"), Angeion, on behalf of the Defendants, caused 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 Columbia. *See* Devery Declaration ¶ 6, and Exhibit A thereto. No objections were received in response.

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 12,858 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