IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

KAREN L. BACCHI, individually and on behalf of those similarly situated, Plaintiff, v. MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY, Defendant.	Civil Action No. 12-11280-DJC

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR PRELIMINARY APPROVAL OF PROPOSED CLASS SETTLEMENT, FOR PRELIMINARY CERTIFICATION OF SETTLEMENT CLASS, FOR APPROVAL OF CLASS NOTICE, AND FOR APPOINTMENT OF THE CLASS REPRESENTATIVE AND CLASS COUNSEL

Dated: March 13, 2017.

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INTRODUCTION

After more than four years of hard-fought litigation, Plaintiff Karen L. Bacchi ("Plaintiff") and Defendant Massachusetts Mutual Life Insurance Company ("MassMutual") have reached an agreement to settle the above-captioned action (the "Action") on a class-wide basis (the "Proposed Settlement") under the terms and conditions set forth in the Stipulation and Agreement of Compromise, Settlement and Release of Action [ECF 235 ("Stipulation")].[1] The Proposed Settlement is the product of a successful mediation conducted by well-respected Resolutions, LLC mediator, Harvard Professor Eric Green. Subject to Court approval, the Proposed Settlement provides for a lump sum, common fund payment of $37.5 million, distributed as Paid-Up Additions to the Settlement Class members' policies or as cash.

Plaintiff's legal counsel, a team of experienced attorneys with extensive experience in class action litigation involving life insurance products, unanimously believe that the Proposed Settlement of the Action is fair, reasonable and adequate given the merits of the alleged class claims and the risks associated with further litigation. [Declaration of Jason Adkins in Support of Motion for Preliminary Approval ("Adkins Decl.") ¶ 20.)

For these reasons, further addressed below, the Court should preliminarily approve the Proposed Settlement, conditionally certify the Settlement Class, and appoint Plaintiff the Class Representative and Plaintiff's counsel Settlement Class Counsel. The Court should also approve the proposed Settlement Class Notice and Notice Plan, and adopt a schedule leading to a final Fairness Hearing.

[1] All capitalized terms used herein have the same meaning as in the Stipulation unless otherwise stated.

LEGAL STANDARD

A district court may approve a class action settlement that is fair, reasonable and adequate. Fed. R. Civ. P. 23(e)(2). *Accord, Voss v. Rolland*, 592 F.3d 242, 251 (1st Cir. 2010); *City P'ship Co. v. Atl. Acquisition Ltd. P'ship*, 100 F.3d 1041, 1043 (1st Cir. 1996). The Court enjoys "great discretion to 'balance [a settlement's] benefits and costs' and apply this general standard." *Voss*, 592 F.3d at 251 (citing *Nat'l Ass'n of Chain Drug Stores v. New England Carpenters Ass'n*, 582 F.3d 30, 45 (1st Cir. 2009)).

At the "preliminary approval" stage, the Court "must make a preliminary determination on the fairness, reasonableness, and adequacy of the settlement terms…." MANUAL FOR COMPLEX LITIGATION (FOURTH) §21.632 (2004); *accord*, *In re M3 Power Razor Sys. Mktg. & Sales Practice Litig.*, 270 F.R.D. 45, 62 (D. Mass. 2010). If the parties negotiated at arm's length and conducted sufficient discovery, a presumption arises that the settlement is fair and reasonable. *In re Pharm. Indus. Average Wholesale Price Litig.*, 588 F.3d 24, 32-33 (1st Cir. 2009).

To certify a settlement class at the preliminary approval stage, the Court must confirm that the requirements of Rule 23 are met. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997); *Smilow v. Sw. Bell Mobile Sys., Inc.*, 323 F.3d 32, 38 (1st Cir. 2003) (citing *Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 161 (1982)). In doing so, "the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met." *Waste Mgt. Holdings, Inc. v. Mowbray*, 208 F.3d 288, 298 (1st Cir. 2000) (quoting *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178 (1974)). The Court must also formally appoint class representatives and class counsel. Fed. R. Civ. P. 23(a), (c)(1)(B), (g). Finally, upon preliminary review the Court must also evaluate and approve the proposed notice to Class

members. Fed. R. Civ. P. 23(e)(1) ("The court must direct notice in a reasonable manner to all class members who would be bound by the proposal.").

FACTUAL AND PROCEDURAL BACKGROUND

A. Summary of Plaintiff's Challenges to MassMutual's Safety Fund Calculation

A mutual insurance company is formed to hold and invest premiums paid by its participating ("par") policyholder members, whose insureds are the owners of the company, and to pay death claims received from its policyholders. When the common fund grows large enough to establish policy reserves sufficient to more than cover the company's operating expenses and anticipated liabilities, the par policyholders are entitled to a return of the surplus, typically through the payment of dividends. The par policyholder's right to return of excess surplus – known as divisible surplus -- is the "essence of mutual insurance" and the fundamental feature that distinguishes mutual insurance from other forms of insurance. *Penn Mutual Life Ins. Co. v. Lederer*, 252 U.S. 523, 525 (1920) (emphasis added). As the U.S. Supreme Court recognized, the payment of dividends by a mutual insurance company "are, in a sense, a repayment of that part of the premium previously paid which experience has proved was in excess of the amount which had been assumed would be required to meet the policy obligations (ordinarily termed losses) or the legal reserve and the expense of conducting the business." *Id.* at 524.

Plaintiff filed this action in July 2012 and contends that the Massachusetts "Safety Fund" law, M.G.L. c. 175, § 140 ("Section 140") & § 141 ("Section 141") sets a statutory percentage limit on the maximum amount of surplus a Massachusetts-domiciled mutual life insurance company may withhold from its par policyholders: "Once the … threshold has been reached in its Safety Fund, whatever 'surplus funds or profits' that remain must be returned to its policyholders in additional dividends unless the Commissioner specifically authorizes it to keep a greater amount

in the Safety Fund 'for cause shown.'" *Goldstein v. Savings Bank Life Ins. Co. of Mass.*, No. 98-2330-BLS2, 21 Mass. L. Rptr. 204, 2006 WL 1720153, at *3 (Mass. Super. Ct., Apr. 7, 2006) (Gants, J.) (emphasis added); *accord, Goldstein v. Savings Bank Life Ins. Co. of Mass.,* 435 Mass. 760, 765-66, 761 N.E.2d 938, 942 (2002) (any surplus over the statutory Safety Fund limit established by Section 141 must be distributed to participating policyholders by annual dividend).

Plaintiff further contends that the Safety Fund Law is made contractually enforceable by Section 140 (entitled "Annual dividends on policies of life … insurance"), which specifically requires that the par policyholder's annual right to apportionment and distribution of her share of divisible surplus as defined by the Safety Fund Law be incorporated into every par policy contract of a Massachusetts-domiciled mutual life insurance company such as MassMutual. Consistent with Section 140, Plaintiff's policy expressly provides that at the end of each policy year she "be credited with such share of the divisible surplus, if any, as may be apportioned to it by the Company as a dividend."

In her Complaint and proposed First Amended Complaint, Plaintiff alleges that MassMutual has exceeded the Safety Fund limit by improperly calculating its Safety Fund, including by double-counting amounts already deducted from its surplus and therefore withheld from par policyholders: once under the required Asset Valuation Reserve ("AVR") and a second time through its computation of the "the margin of the market value of its securities over their book value" ("MVM") under Section 141. ECF 1, ¶¶ 10, 19.a & 49. Plaintiff also alleges MassMutual improperly (a) excluded from surplus its net admitted Deferred Tax Asset and (b) deducted pre-paid pension expenses from surplus between 2001 and 2005. ECF 1, ¶¶ 19.b. & 19.c.

B. Summary of MassMutual's Defenses to Plaintiff's Challenge

MassMutual in response argues that it has calculated its Safety Fund limit in accordance with the statutorily provided two-part formula, and has complied with Section 141 at all times. Specifically, MassMutual contends that its Board of Directors, in the exercise of its business judgment, decides each year what part of MassMutual's earnings will be paid out as dividends to participating policyholders, and what part the Company will retain to ensure its ability to pay claims, to cover expenses, and to grow its business. MassMutual emphasizes that each year it has reported its Safety Fund calculation to its chief regulator, the Massachusetts Division of Insurance, which never objected to them.

Beyond this claimed "regulatory blessing," MassMutual argues that Section 141 was not incorporated into Plaintiff's par policy contract, and that she lacks a private right of action to otherwise enforce Section 141, citing *Roberts v. Enterprise Rent-A-Car Co. of Boston, Inc.*, 16 Mass. L. Rptr. 453, 453 (Super. Ct. July 28, 2003), *aff'd sub nom. Hershenow v. Enterprise Rent-A-Car Co. of Bos., Inc.*, 445 Mass. 790 (2006) and 445 Mass. 811 (2006) (where statute did not provide for private right of action, liability for statutory violation could not be couched as breach of contract). MassMutual also argued that Plaintiff's theory was one of "implied repeal," against which there is a "strong presumption" under Massachusetts law. *Registrar of Motor Vehicles v. Board of Appeal on Motor Vehicle Liab. Policies & Bonds*, 382 Mass. 580, 586 (1981) (courts are "loath to find that a prior statute has been superseded in whole or in part in the absence of express words to that effect or of clear implication"); *Thurdin v. SEI Boston, LLC*, 452 Mass. 436, 467-69 (2008) (noting that "[i]t is not to be lightly supposed that radical changes in the law were intended where not plainly expressed").

MassMutual also asserts that Plaintiff's interpretation of the Safety Fund Law is contrary to the unambiguous text of Section 141, which must be enforced as enacted. *Co-Op. Bank v. Suffolk Constr. Co.*, 464 Mass. 543, 547-48 (2013) ("If the language of the statute is unambiguous, our function is to enforce the statute according to its terms." (citations omitted)).

Finally, MassMutual argues that Plaintiff's complaint is time-barred, based on deposition testimony it claimed showed that its Safety Fund calculations were public records and that Plaintiff was aware of the facts giving rise to her claims by virtue of these public records filed more than 10 years before she filed suit. *Dapkus v. Dapkus*, 73 Mass. App. Ct. 1110 (2008) ("claims are not 'inherently unknowable' where . . . the information is discoverable by examination of public records"); *see also, Riley v. Metro. Life. Ins. Co.*, 744 F.3d 241 (1st Cir. 2014) (limitations period was triggered where defendant made "a single decision that results in lasting negative effects").

MassMutual accordingly filed a motion for summary judgment in May 2016 [ECF 203] – proffering several independent bases on which the Court could dismiss Plaintiff's Complaint in its entirety. Oral argument was held on July 27, 2016, and the Court took the matter under advisement.

After the Court heard oral argument on MassMutual's motion for summary judgment, the Massachusetts Legislature on August 10, 2016, amended Section 141 to increase the Safety Fund percentage limit from 12% to 20%. Plaintiff does not contend that MassMutual's claimed Safety Fund amount exceeds the limit established by the recent amendment to Section 141.

C. Settlement Achieved

Represented by exceptionally experienced legal counsel, the Parties agreed to participate in mediation before Professor Green while the Court's ruling on summary judgment was pending. Through that intensely adversarial process, the Parties reached an agreement to settle the Action

on a class-wide basis though a non-reversionary common fund payment by MassMutual of $37.5 million, to be distributed to current and former participating MassMutual policyholders through a plan of allocation to be approved by the Court. The settlement fund will be distributed to current participating policyholders, where feasible, through Paid-Up Additions increasing the face amount of the in force policies. Former participating policyholders will receive cash distributions of their share of the Settlement common fund.

MassMutual has agreed to bear all costs associated with notice and administration of the Proposed Settlement (in addition to the $37.5 million common fund amount). MassMutual furthermore commits to continue for at least ten years to provide voluntary annual Safety Fund calculations to the Massachusetts Division of Insurance. To implement the Proposed Settlement, the parties have agreed to seek certification of a Settlement Class consisting of all participating policyholders of MassMutual between January 1, 2001 through December 31, 2016. In return for the benefits afforded under the Proposed Settlement, members of the Settlement Class agree to entry of a final Judgment dismissing with prejudice the Action and releasing any and all claims, whether class or individual, arising out of, or in any respect having their origin in or relating to, any claims or facts giving rise to the claims that were or could have been asserted in the Action.

THE SETTLEMENT SHOULD BE PRELIMINARILY APPROVED

The law favors settlement, particularly in class actions where substantial resources can be conserved by avoiding the time, cost, and rigors of formal litigation. H. Newberg & A. Conte, 4 N*ewberg on Class Actions* (4th ed. 2002), §11.41. The First Circuit and district courts within it have recognized this policy in favor of encouraging class action settlements. *Durrett v. Providence Hous. Auth.*, 896 F.2d 600, 604 (1st Cir. 1990) (reversing denial of approval of class action settlement as an abuse of discretion); *Lazar v. Pierce*, 757 F.2d 435, 440 (1st Cir. 1985) (noting

the "overriding public interest in favor of the voluntary settlement of disputes, particularly where class actions are involved."); *In re Lupron*, 228 F.R.D. at 88 (noting that "the law favors class action settlements"). When asked to preliminarily review a class action settlement, the Court is to examine the proposed settlement for "obvious deficiencies" before determining whether it is in the range of fair, reasonable, and adequate. *See, e.g.*, MANUAL FOR COMPLEX LITIGATION (FOURTH) § 21.632 (2004).

For the reasons discussed below, the Settlement presented to the Court has no obvious deficiencies and is in fact presumptively fair.

A. There Is No Risk of Fraud or Collusion because the Settlement Agreement Was Negotiated at Arm's-Length by Reputable Lawyers and Facilitated by a Highly Respected Mediator.

The Parties reached the Proposed Settlement after more than four years of hard-fought litigation. Adkins Decl., ¶ 4. The Proposed Settlement was undeniably achieved through arms'-length negotiations and a mediation between skilled and experienced counsel. *Id.* The mediation and negotiations were unquestionably adversarial. *Id.* Achievement of the Proposed Settlement through a formal mediation process overseen by Prof. Green provides additional evidence that the Proposed Settlement is the product of arms'-length negotiation untainted by collusion or other improper influences. *Id.*

B. The Stage of Discovery

"The stage of the proceedings at which settlement is reached is important because it indicates how fully the district court and counsel are able to evaluate the merits of plaintiffs' claims." *Duhaime*, 177 F.R.D. at 67, quoting *Armstrong v. Board of School Directors of Milwaukee*, 616 F.2d 305, 325 (7th Cir.1980). Fact discovery in this case began in 2013 and concluded on October 15, 2015. Adkins Decl. ¶ 5. Over the course of discovery, MassMutual

produced (and Plaintiff's counsel reviewed) over 145,000 pages of documents. *Id.*. This discovery covered all substantive issues raised by the Complaint and proposed First Amended Complaint and other matters raised by Plaintiff throughout the Action. *Id.*

Plaintiffs' Counsel also deposed ten (10) MassMutual fact witnesses, and conducted other informal investigation prior to the completion of fact discovery in the Action. *Id.* ¶ 6.

In addition, before entering into settlement negotiations, the Parties exchanged initial and rebuttal expert disclosure reports. All told, Plaintiff served disclosures for five (5) experts and MassMutual served disclosures for six (6) experts. Adkins Decl., ¶ 7. The Parties conducted depositions of their primary respective experts. *Id.*

The breadth of Plaintiff's formal and informal discovery is surely sufficient to permit a reliable assessment of each parties' strengths and weaknesses. Indeed, all fact and expert discovery was completed well before the Parties began to explore settlement. Adkins Decl., ¶ 8*; see, e.g., Duhaime*, 177 F.R.D. at 67 (noting that "far less discovery has been deemed ample to support a settlement").

Furthermore, before commencing settlement negotiations the Parties completed briefing and presented oral argument on MassMutual's motion for summary judgment. Adkins Decl., ¶ 8. Subject to the Court's ruling on MassMutual's summary judgment motion, the trial in this Action was set to commence on February 6, 2017. [ECF 178].

In summary, this Action had progressed through the conclusion of discovery and pretrial motion practice and was poised for trial when the Proposed Settlement was reached. The advanced stage of the litigation supports preliminary approval of the Proposed Settlement.

C. Continued Litigation Would Be Fraught with Risk

MassMutual aggressively defended this case from the outset, and could be counted on to continue to do so. Absent settlement, this litigation would at a minimum be protracted through appeal and involve a substantial amount of resources on both sides. Although Plaintiff believes that she would have succeeded had the case gone to trial, she undeniably faced significant risks of an adverse outcome, not the least of which was MassMutual's pending motion for summary judgment which, if successful, would have foreclosed Plaintiff's claims absent reversal on appeal.

Plaintiff faced very substantial risks at any trial of this Action. At trial, MassMutual would have presented testimony from an array of highly qualified experts, including actuaries, accountants and insurance finance experts. Adkins Decl., ¶ 9. MassMutual also would offer testimony of experienced company executives, including actuarial and accounting personnel, risk management officers and management personnel responsible for calculating the Company's Safety Fund, interacting with Division of Insurance officials and determining annual dividends. *Id.* MassMutual argued, with some force, that it had a long history of declaring dividends consistent with those distributed by its industry peers and that payment of additional dividends in the amounts claimed by Plaintiff posed a risk of competitive harm to the Company. *Id.*

Adding to these significant risks, in August of 2016 the Massachusetts Legislature amended Section 141 to increase the Safety Fund percentage limit from 12% to 20%, while retaining language allowing MassMutual to argue that the new limit created a safe harbor immunizing the Company from liability for the prior statutory violations alleged by Plaintiff. Adkins Decl., ¶ 9. If the case were not settled, MassMutual would have argued at trial (if not beforehand) that the statutory amendments to Section 141 vitiated Plaintiff's claims in their entirety. *Id.*

Failure to overcome any of these hurdles would mean ***zero*** recovery for all. Plaintiff thus faced very real hurdles to securing relief for herself and the other MassMutual policyholders, which supports preliminary approval of the Proposed Settlement.

D. The Proposed Settlement Provides Real Relief

The Settlement is inarguably valuable because it will, if approved, provide members of the Settlement Class with an immediate, tangible financial benefit while avoiding all risk of receiving nothing. MassMutual has agreed to a common fund settlement of $37.5 million for the benefit of the Settlement Class. Stipulation, § II. Members of the Settlement Class with in force policies will automatically receive Paid-Up Additions increasing the face amount of their life insurance policies, with no need to file any claim form. *Id.*, § X(A)(2). Members of the Settlement Class who are former participating policyholders will receive cash payments, also without the need for any claim form. *Id.* All members of the Settlement Class will receive their respective *pro rata* shares of the Net Cash Settlement Amount determined with reference to the total annual dividends they received during the Settlement Class Period. *Id.*, § X(A)(1).

In addition, MassMutual has agreed to pay all costs associated with the provision of class notice and settlement administration. Stipulation, § X(B)(2). MassMutual will pay these costs in addition to the $37.5 million common fund amount.

Finally, under the Proposed Settlement MassMutual has agreed to continue for at least ten years to provide voluntary annual Safety Fund calculations to the Massachusetts Division of Insurance. Stipulation, § X(B)(1).

The Settlement Agreement undoubtedly achieves a favorable outcome for the Settlement Class, especially considering the substantial costs, risks, and delay of continued litigation. Adkins Decl. ¶ 11.

THE PROPOSED SETTLEMENT CLASS MEETS ALL REQUIREMENTS FOR PRELIMINARY CERTIFICATION

This Court must next consider whether a class can be preliminarily certified for settlement purposes under Rules 23(a) and (b). The fact that class certification is requested only for the purpose of settlement is no barrier to certification.[2] *Amchem*, 521 U.S. at 619, 117 S.Ct. 2231.

A. The Requirements of Rule 23(a) Are Satisfied for Settlement Purposes

Rule 23(a) imposes four prerequisites to class certification:

> (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a).

Numerosity

Rule 23(a)(1) requires that "the class [be] so numerous the joinder of all members is impracticable." Fed. R. Civ. P. 23(a); *Swack v. Credit Suisse First Bos.*, 230 F.R.D. 250, 258 (D. Mass. 2005). The standard of impracticability does not mean "impossibility" but only difficulty or inconvenience of joining all members of the class. *Novella v. Westchester Cnty.*, 661 F.3d 128, 143 (2d Cir. 2011). The Settlement Class encompasses approximately 2.9 million MassMutual policyholders, in jurisdictions across the country. Adkins Decl. ¶ 12. This large number easily demonstrates that joinder is a logistical impossibility. *See, e.g., Gorsey v. I.M. Simon & Co.*, 121

[2] MassMutual has stated that it reserves the right to object to class certification in a litigation context in the event the proposed settlement is terminated for any reason. (*See* Stipulation §§ III, V, XI.)

F.R.D. 135, 138 (D. Mass. 1988) (proposed class consisting of 800 to 900 members made joinder impracticable).

Commonality

To satisfy commonality a plaintiff must show that the class claims "depend upon a common contention" and that determining the truth or falsity of that contention "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*, 131 S. Ct. 2541, 2554 (2011). The Settlement Class here has just such a significant common issue: whether MassMutual breached a contractual duty in its calculation of the permissible Safety Fund. Resolution of whether MassMutual's action constitutes a breach of duty to its participating policyholders would resolve an issue central to the validity of the alleged class claim "in one stroke." Adkins Decl. ¶ 14.

Typicality

Rule 23(a)(3) requires that "the claims or defenses of the representative parties are typical of the claims or defenses of the class…." The requirement is satisfied if the "class representative[s] … 'possess the same interest and suffer the same injury' as the class members." *East Tx. Motor Freight Sys., Inc. v. Rodriguez*, 431 U.S. 395, 403 (1977) (quoting *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 216 (1974)). Here, it is clear that Plaintiff's alleged injury is premised on the same act (that is, MassMutual's alleged miscalculation of the Safety Fund limit) and on the same legal theory (breach of contract) as that every other member of the Settlement Class.

Adequate Representation

Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class." This element is generally characterized as an inquiry into whether the

attorneys together with the named plaintiffs will act diligently on behalf of the class. *Amchem*, 521 U.S. at 625; *Duhaime v. John Hancock Mut. Life Ins. Co.*, 177 F.R.D. 54, 63-64 (D. Mass. 1997). The First Circuit employs a two-part test in analyzing adequacy: (1) the class representatives' interests must not conflict with the interests of the class; and (2) class counsel is experienced, qualified and able to vigorously conduct the proposed litigation. *Andrews v. Bechtel Power Corp.*, 780 F.2d 124, 130 (1st Cir. 1985); *In re Bos. Scientific Corp. Sec. Litig.*, 604 F. Supp. 2d at 282.

Both requirements are met here. First, there is no conflict or antagonism between the Plaintiff and members of the Settlement Class. Adkins Decl. ¶ 15. Second, Plaintiff's counsel are experienced class action lawyers whose diligence and commitment to this litigation has fully demonstrated their ability to adequately protect the interests of the Settlement Class. Adkins Decl. ¶ 15 & Exs. A, B, & C.

B. The Requirements of Rule 23(b)(3) Are Satisfied for Settlement Purposes

Rule 23(b)(3) allows for class certification if "the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." *See generally, In re Evergreen Ultra Short Opportunities Fund Sec. Litig.*, 275 F.R.D. 382, 392-93 (D. Mass. 2011). In short, Plaintiff must demonstrate predominance and superiority. *M3 Power Razor*, 270 F.R.D. at 55-57.

Predominance

"The Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem*, 521 U.S. at 623, 117 S.Ct. 2231; *Smilow*, 323 F.3d at 39 ("Rule 23(b)(3) requires merely that common issues predominate, not that

all issues be common to the class."). Predominance requires only that "a sufficient constellation of common issues binds class members together." *Waste Mgmt. Holdings*, 208 F.3d at 296. Moreover, "[w]here ... common questions predominate regarding liability, then courts generally find the predominance requirement to be satisfied even if individual damages issues remain." *Otte ex rel. Estate of Reynolds v. Life Ins. Co. of N. Am.*, 275 F.R.D. 50, 58 (D. Mass. 2011) (applying *Smilow*).

Applying the foregoing principles, courts routinely find that predominance is met in cases involving breaches of written form contracts. *Smilow*, 323 F.3d at 39 (predominance found "where the common factual basis is found in the terms of the contract…."). Here, every member of the Settlement Class was by definition issued a participating policy by a Massachusetts domiciled mutual life insurance company, from which their right to divisible surplus is derived as a matter of Massachusetts law. With respect to liability, the overriding common question is whether MassMutual failed to perform its contractual obligations in its common calculation of the Safety Fund limit.

Superiority

Rule 23(b)(3) requires that a class action be "superior to other available methods for fairly and efficiently adjudicating the controversy." Courts must consider:

> (A) the class members' interests in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against class members; (C) the desirability or un-desirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action.

Fed. R. Civ. P. 23(b)(3). The predominance and superiority requirements are inherently interrelated, and were added "to cover cases 'in which a class action would 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.'" *Amchem*, 521 U.S. at 615 (quoting advisory committee's notes). "Certification allows the plaintiffs to pool claims which would be uneconomical to litigate individually." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809 (1985); *accord*, *Gintis v. Bouchard Transp. Co.*, 596 F.3d 64, 66–67 (1st Cir. 2010) ("Rule 23 has to be read to authorize class action in some set of cases where seriatim litigation would promise such modest recoveries as to be economically impracticable.").

The superiority considerations certainly weigh in favor of certification here. The claims of individual participating policyholder could not be cost-effectively litigated on an individual basis. Adkins Decl. ¶ 18 (Plaintiff incurred expert fees in excess of $1.3 million). *Smilow*, 323 F.3d at 41 ("The core purpose of Rule 23(b)(3) certification is to vindicate the claims of consumers and other groups of people whose individual claims would be too small to warrant litigation."); *Grace v. Perception Tech., Inc.*, 128 F.R.D. 165, 171 (D. Mass. 1989); *Randle v. SpecTran*, 129 F.R.D. 386 (D. Mass. 1988). Not surprisingly, therefore, there is no known individual prosecution of the claims alleged by Plaintiff, demonstrating the lack of interest in individually controlling the prosecution or defense of separate actions. Adkins Decl. ¶ 18. Nor would it make sense for any court other than this Court to resolve claims alleged under Massachusetts law against a Massachusetts domiciled issuing insurer. *Id.*

Finally, any potential difficulties in managing this case as a class action are vitiated by the fact of this Proposed Settlement. *Amchem*, 521 U.S. at 620 (when "confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present Intractable Management Problems . . . For The Proposal Is That There Be No Trial.").

C. Appointment of Class Counsel and Class Representatives

For the reasons discussed above in connection with Fed. R. Civ. P. 23(a)(4), Plaintiff is an adequate representative of the Settlement Class and should be formally appointed in that capacity. Adkins Decl. ¶ 19. Plaintiff has devoted several years of her time and effort to pursuing this litigation on behalf of the putative class, including reviewing pleadings, responding to discovery, and sitting for deposition. *Id*. Plaintiff is fully aware of her responsibilities as a representative for the Settlement Class. *Id.*

Similarly, for the reasons described in the Adkins Declaration, the undersigned Plaintiff's Counsel are appropriately appointed as Settlement Class Counsel for the Settlement Class pursuant to Rule 23(g). Adkins Decl. ¶ 20 & Exs. A, B, & C. Proposed Settlement Class Counsel have devoted substantial resources to this case over four years, and have been successful in obtaining what by all marks is an exceptionally fair, reasonable and adequate settlement.

SETTLEMENT CLASS NOTICE

Federal "due process" jurisprudence requires notice to the prospective members of the settlement class of the terms of the proposed settlement and the options that are open to them in connection with the proceedings. *Philips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985) (citations omitted) (the notice must be "reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections"). The mechanics of such notice process are left to the discretion of the Court, subject only to the broad "reasonableness" standards imposed by due process. *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314-15 (1950). In this Circuit, it has long been the case that a notice of settlement will be adjudged adequate where the notice announces the date of the

settlement hearing, outlines the allegations prompting the litigation, and summarizes the settlement terms. *See Greenspun v. Bogan*, 492 F.2d 375, 381-82 (1st Cir. 1974).

The Parties have agreed to provide notice to the Settlement Class in the form attached to the Stipulation as Exhibit B.[3] The Proposed Settlement Class Notice informs the members of the Settlement Class of the terms of the Proposed Settlement, the relief they will receive, and their rights to opt out of or object to the Proposed Settlement. The Notice is written in straightforward, understandable terminology, and includes: (1) general information about the litigation; (2) a description of the benefits provided by the Proposed Settlement; (3) an explanation of how and when Settlement Class members will obtain the benefits of the Proposed Settlement; (4) an explanation of how Settlement Class members can exercise their right to opt out or object to the Proposed Settlement; (5) an explanation that any claims against MassMutual that could have been litigated in this Action will be released if the Settlement Class member does not opt out of the Proposed Settlement and a description of the scope of the proposed release; (6) the information regarding MassMutual's separate payment, subject to Court approval, of incentive awards for the Settlement Class Representatives and attorneys' fees and expenses to Settlement Class Counsel; (7) the date of the Final Approval Hearing; (8) an explanation of eligibility for appearing at the Final Approval Hearing; and (9) the deadline for filing objections to the Settlement. This information will also be available on the Settlement website. Stipulation § VII.

The proposed Class Notice thus provides Settlement Class Members with ample information to make an informed and intelligent decision whether to opt out or object to the Proposed Settlement. As such, the proposed Notice satisfies the content requirements of Rule 23.

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[3] A copy of the proposed form of Notice is also attached as Exhibit A to the proposed order submitted herewith.

S*ee In re Compact Disc Minimum Advertised Price Antitrust Litig.*, 216 F.R.D. 197, 203 (D. Me. 2003) ("The notice must describe fairly, accurately and neutrally the claims and parties in the litigation, the terms of the proposed settlement, and the options available to individuals entitled to participate, including the right to exclude themselves from the class"); *In re MassMutual Ins. Co. of Am. Sales Practices Litig.*, 962 F. Supp. 450, 495-96 (D.N.J. 1997).

The means of providing Class Notice also meets or exceeds relevant due process standards. Because this is a case brought by MassMutual policyholders, MassMutual has a mailing address in its records for members of the Settlement Class. Although some Settlement Class members may have moved, the addresses will be updated, before mailing, using the Class member's social security number, and the agreement provides for an address verification procedure. Stipulation, § VII(A). In these circumstances, first class mail is the most reasonable and cost-effective method of providing Class Notice. *Reppert v. Marvin Lumber and Cedar Co., Inc.*, 359 F.3d 53, 56-57 (1st Cir. 2004).

Nevertheless, MassMutual will also, at its own expense, design and maintain a website wherein all settlement documents filed with the Court, along with other information about the matter, will be available for review by members of the Settlement Class. Stipulation § VIII(C).

As an additional benefit to the Settlement Class, MassMutual will pay all costs of Class Notice and administration of the Settlement. *Cf. In re Wachovia Corp. "Pick-A-Payment" Mortg. Mktg. and Sales Practices Litig.*, No. 5:09–md–02015–JF, 2011 WL 1877630, at *2 (N.D. Cal. May 17, 2011) (finding settlement to be fundamentally fair, adequate and reasonable because, among other things, defendant was obligated to pay class notice and claims administration costs).

PROPOSED SCHEDULE

Consistent with the terms of the Proposed Settlement, Plaintiff proposes the following schedule to govern the settlement approval process. Consistent with the Preliminary Approval Order lodged herewith, this schedule is keyed off the date preliminary approval is granted by the Court. Plaintiff will submit a Word version of the proposed Preliminary Approval Order to the Court in advance of the preliminary approval hearing on March 29, 2017. Alternatively, if the Court prefers, Plaintiff will resubmit a final Preliminary Approval Order containing calendar dates once the Court preliminarily approves the proposed Settlement.

Preliminary Approval Order	
Class Notice mailed	35 days after approval
Filing of Plaintiffs' Application for Approval of Attorneys' Fees, Expenses and Service Awards	14 days prior to opt-out and objection deadline
Exclusion Deadline	60 days after Notice is mailed
Opt-Out and Objection Deadline	60 days after Notice is mailed
Declaration to the Court, with copy to Class Counsel, attesting to measures undertaken to provide Class Notice to Settlement Class Members.	In connection with final approval motion
Motion for Final Approval filed	14 days prior to final approval hearing
Final Approval Hearing	

RELIEF REQUESTED

For the foregoing reasons, Plaintiff respectfully requests that the Court preliminarily approve the Settlement Agreement, preliminarily certify the proposed Settlement Class, appoint Plaintiff the Settlement Class Representative, appoint Plaintiff's Counsel as Settlement Class

Counsel, approve the Class Notice and Notice Plan, and schedule a Final Approval Hearing -- all as substantially set forth in the proposed order submitted herewith.

Dated: March 13, 2017.

Respectfully submitted,

/s/ Jason B. Adkins
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Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that this document filed through the CM/ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing and paper copies will be sent to those indicated as non-registered participants on March 13, 2017.

Dated: March 13, 2017. /s/ Jason B. Adkins