IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS (BOSTON)

KAREN L. BACCHI, Individually and on Behalf of all Persons Similarly Situated, Plaintiff, v. MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY, Defendant.	Civil Action No. 12-cv-11280-DJC

JOINT DECLARATION OF CLASS COUNSEL IN SUPPORT OF PLAINTIFF'S MOTION FOR FINAL APPROVAL OF PROPOSED CLASS SETTLEMENT AND MOTION FOR APPROVAL OF ATTORNEYS' FEES, REIMBURSED LEGAL EXPENSES AND SERVICE AWARD

Dated: July 13, 2017

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Attorneys for Plaintiff and the Settlement Class

We, Jason B. Adkins, Andrew S. Friedman and Mark A. Chavez, each declare as follows:

1. Jason B. Adkins is a duly licensed attorney admitted to the Massachusetts bar and a member of the law firm of Adkins, Kelston & Zavez, P.C. ("AKZ").

2. Andrew S. Friedman is a duly licensed attorney admitted to the Arizona bar and a member of the law firm Bonnett, Fairbourn, Friedman & Balint, P.C. ("BFFB"). Mr. Friedman was admitted *pro hac vice* in this matter.

3. Mark A. Chavez is a duly licensed attorney admitted to the California bar and a member of the law firm Chavez & Gertler LLP ("C&G"). Mr. Chavez was admitted *pro hac vice* in this matter.

4. We serve as co-lead Class Counsel in this class action (collectively, "Class Counsel"). We submit this declaration in support of Plaintiff's Motion for Final Approval of Proposed Class Settlement [Doc. 294] and Plaintiff's Motion for Approval of Attorneys' Fees, Reimbursement of Litigation Expenses, and Class Representative Incentive Award [Doc. 264]. We are familiar with the matters described below and, if called upon, could competently testify that the following facts are true and correct.

5. The Parties reached the settlement after some four years of hard-fought litigation, and equally hard-fought, arm's-length negotiations conducted under the auspices of an experienced mediator, Prof. Eric Green.

6. The proposed settlement is beneficial to the Settlement Class, especially considering two major risks to any recovery at all by participating MassMutual policyholders under the Massachusetts Safety Fund law. First, at the time of the mediation the Court had taken under advisement MassMutual's motion for summary judgment, which included a challenge to Plaintiff's ability to enforce the Safety Fund law either as a contract term or under an implied

private right of action theory. Second, in August 2016 the Massachusetts Safety Fund statute was amended, enlarging the permissible level of retained surplus from 12% to 20%. Of critical concern, the amended Safety Fund statute permitted MassMutual to "accumulate and hold, ***or hold if already accumulated***, as a safety fund, an amount not in excess of 20 per cent of its reserve…" (emphasis added). Because MassMutual's retained surplus never exceeded 20%, MassMutual gained an additional, potentially dispositive defense.

7. Although as described below, as experienced class counsel we took steps to mitigate these risks, they undeniably presented a significant potential for zero recovery for Plaintiff and other similarly situated participating policyholders. Notwithstanding these risks, Plaintiff secured a settlement which (a) generates an immediate common fund of $37.5 million and (b) binds MassMutual to administrative reporting requirements not required by the Safety Fund law, with (c) MassMutual to bear all costs of administration and class notice. The proposed settlement is thus highly favorable in comparison to the alternative of continued litigation, especially in the face of the heightened risk created by the last-minute amendment of the Safety Fund law in MassMutual's favor.

8. One such step to mitigate the risk of an adverse ruling against the putative class was to withdraw the class allegations while MassMutual's motion for summary judgment and Plaintiff's cross-motion for summary judgment were pending. This action did not forfeit the benefit of a favorable outcome on the pending summary judgment motions. Consistent with First Circuit authority, Plaintiff argued in opposition to MassMutual's motion that the Court should grant summary judgment in favor of Plaintiff on her breach of contract claim and her claim for declaratory relief. [Doc. 209, at 26-31.] Because state non-discrimination statutes uniformly require MassMutual to treat similarly-situated policyholders in a comparable fashion (see, e.g.,

M.G.L. c. 176D, Section 3(7)), and because M.G.L. c. 175, § 140 requires MassMutual to apportion dividends in proportion to the amount that each participating policy has contributed to surplus, a favorable non-class determination that the Safety Fund law requires MassMutual to pay out excess surplus would inure to the benefit of all participating policyholders entitled to receive dividends, even without class certification. On the other hand, in the absence of class certification, any adverse ruling on MassMutual's pending summary judgment motion would not be binding on absent class members, who would be free to initiate new actions against MassMutual. Furthermore, even if MassMutual prevailed on its summary judgment motion and Plaintiff did not ultimately succeed in an appeal to the First Circuit, Plaintiff's counsel were poised to initiate a new class action raising Safety Fund Claims not encompassed by MassMutual's summary judgment motion. Thus, the strategic decision to forgo class certification during the pendency of MassMutual's summary judgment motion effectively protected the putative class members and advanced Plaintiff's negotiating leverage for the Settlement Class in the mediation.

9. The extensive discovery and expert analysis completed before the mediation with Prof. Green (*see* Declaration of Jason B. Adkins in Support of Plaintiff's Motion for Approval of Attorneys' Fees, Reimbursement of Litigation Expenses, and Class Representative Incentive Award [Doc. 265-1 ("Adkins Fee Decl.")] at ¶¶ 17-22) was ample to permit a reliable assessment of the strengths and weaknesses of each Parties' claims and defenses.

10. This was an exceedingly complex case involving highly technical issues including complicated questions of statutory accounting. Nor was it an easy case. MassMutual is a well-financed adversary, represented by experienced defense counsel. MassMutual has the financial and legal wherewithal to, and did, aggressively defend the claims from the outset. Moreover, given its resources MassMutual could be counted on to continue to do so through trial and the inevitable

appeals. Absent settlement, to the extent the Court denied MassMutual's pending motion for summary judgment (and likewise its likely subsequent motion for summary judgment based upon the amendment of the Safety Fund statute), this litigation would be protracted, expensive and time consuming. Although Plaintiff remains convinced that her claims are meritorious, she unquestionably faced very significant risks that she would not prevail and the policyholders would receive nothing. *See, e.g.*, Declaration of Jason B. Adkins in Support of Plaintiff's Motion for Preliminary Approval [Doc. 238], ¶ 9.

11. Class Counsel have demonstrated their commitment to the case, having invested over $7.1 million in time and over $1.5 million of their own money in expenses litigating this case. *See* Adkins Fee Decl. at ¶¶ 30, 32. Continued litigation through trial and appeal would require an even larger investment of time and money.

12. Of the more than 2.71 million Class Members, only 301 have excluded themselves from the Settlement Class (0.01%). In addition, only 32 Class Members filed or submitted unfiled objections to the Settlement Agreement (0.001%), and of those 11 objected essentially ***in defense of*** MassMutual and/or its challenged actions. A Table of Objections/Responses is attached as Appendix A to the Memorandum in Support of Plaintiff's Motion for Final Approval of Proposed Class Settlement and is filed concomitantly herewith.

13. One objector was concerned about the inclusion of the *de minimis* dividends in the denominator in the Plan of Allocation. This concern is misplaced: any amounts not paid to Settlement Class Members as a result of application of the *de minimis* threshold will not be retained by MassMutual, but will be distributed *pro rata* among Class members who are receiving payments, which accomplishes the same result.

14. One objector complained the Class is composed of two groups, in-force policyholders and not-in-force policyholders, and that Plaintiff Bacchi could only represent the in-force policyholders due to an interclass conflict. There is no conflict. The in-force and not-in-force policyholders comprise a single class – participating policyholders. All Class Members will be treated equally in determining their allocable share of the common fund based on total dividends received by each policyholder during the Class Period, irrespective of whether their policies are currently in-force or not. Only the method of distribution varies for in-force and not-in-force policyholders; because the later cannot receive paid up additions, they receive checks which are subject to the $1 *de minimis* check distribution threshold.

15. Despite the Settlement, MassMutual continues to hold the statutorily mandated reserves for claims as well as surplus assets in excess of $15.4 billion at year end 2016, which is not materially altered by the $37.5 million common fund.

16. Electronic submission of objections would be particularly problematic here, where it would require developing some form of interface with the Court's ECF system.

17. Participating policies are expressly identified as such in the policy contracts.

18. Approximately 81% of the annual dividends declared by MassMutual are distributed as paid up additions in accordance with standing written directives of MassMutual policyholders and only 6% of dividends are paid in cash (another 9% are used to pay premiums, and 4% to pay policy loans or left on deposit). Because paid up additions increase the participating policies' cash values, any Class Member who prefers to receive cash is free to withdraw the requisite funds from the eligible policy's account values through a policy loan. The paid up additions also become available when a policy matures or is surrendered or lapsed.

19. One objector expressed concerns that the receipt of paid up additions would be of no value to a policyholder with an outstanding policy loan. This concern is misplaced. Paid up additions increase the death benefits of a policy independent of any policy loans. For example, consider a policy with a $100,000 face value and subject to a $5,000 policy loan. If that the policy receives a $100 paid up addition in the settlement it will now have a $100,100 value subject to the same $5,000 loan. So, if the insured subsequently dies, the beneficiary would receive $95,100 (i.e., the policy value of $100,100 less the $5,000 outstanding loan) instead of the $95,000 they would have received prior to the paid up addition.

20. The litigation expenses were all incurred in the normal course over the multi-year duration of this litigation and accurately reflect each firm's expenses. Class Counsel will submit any further explanation or back-up documentation requested by the Court.

21. The vast majority of the $31,446.93 in Westlaw charges were incurred by BFFB in connection with the claims asserted in this action:

AKZ	$4,693.93
BFFB	$25,290.31
C&G	$1,462.69
TOTAL	$31,446.93

Before submission of this expense, BFFB did a double-check of the Westlaw charges against firm time entries, and removed anything that did not match up with an entry for legal research or working on a motion. BFFB pays Westlaw at a highly discounted flat rate for access to its databases, including but not limited to the Westlaw case law and statute databases. Westlaw provides reports allocating that flat rate to respective client matters based on usage, thereby

extending to BFFB's clients the benefit of the discounted subscription pricing over per-search pricing. BFFB does not mark-up the discounted Westlaw costs in any way.

22. AKZ's expense charges for Westlaw are $4,693.93. This expense is not based on any mark-up, but on usage, at cost, through AKZ's discounted plan for Westlaw. The average annual expense for this litigation is under $1,200 annually, despite the fact that AKZ averaged hundreds of Westlaw transactions per year on this case. (Since May 2015 alone, AKZ has undertaken approximately 482 Westlaw search transactions that would cost, per standard Westlaw transaction costs, in excess of $16,000.)

23. C&G's Westlaw expense is $1,462.69 for the entire matter. C&G likewise does not mark-up its Westlaw charges.

24. The hotly contested and highly technical merits of Plaintiff's claims and MassMutual's defenses is reflected in the 20 expert reports served by the Parties and the Parties' other voluminous pleadings. These expert reports included:

Plaintiff's Initial Reports	3
MM Initial Reports	6
Plaintiff's Rebuttal Reports	5
MM Rebuttal Reports	2
MM Sur-Rebuttal	4
TOTAL Reports	20

25. Some Objectors have asked the Court to more thoroughly scrutinize Class Counsel's underlying time and expense records. Class Counsel stands willing to submit to the Court whatever additional billing detail it requires above and beyond the information already submitted as part of the lodestar "cross-check."

We declare under pains and penalty of perjury under the laws of the Commonwealth of Massachusetts that the foregoing is true and correct to the best of each of our knowledge and that this declaration was executed this 13th day of July, 2017 at Boston, Massachusetts.

/s/ *Jason B. Adkins*
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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 July 13, 2017.

A copy of the foregoing was mailed this 13th day of July, 2017 to the Settlement Administrator at:

Analytics LLC, Settlement Administrator
Bacchi v. Massachusetts Mutual Life Insurance Co.
P.O. Box 2004
Chanhassen, MN 55317-2004

Dated: July 13, 2017

/s/Jason B. Adkins
Jason B. Adkins