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

PLAINTIFF'S RESPONSE TO CHAVEZ/MYERS OBJECTION [DOC. 274]

Dated: July 13, 2017

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Plaintiff Karen L. Bacchi hereby responds to the objections to the proposed settlement submitted on behalf of Christina Chavez ("Chavez") and Michael D. Myers, M.D. ("Myers") [Doc. 274]. Objector Chavez is the named plaintiff and class representative in a California state court action brought on behalf of a certified class of 300 term life policyholders from California (the "Chavez Class") against Massachusetts Mutual Life Insurance Company ("MassMutual"), styled *Chavez v. Massachusetts Mutual Life Insurance Company et al.*, Case No. BC435321 and currently pending in Los Angeles Superior Court (the "Chavez Action"). Objector Myers is apparently a member of a putative non-certified class proposed in the Chavez Action and a member of the Settlement Class in the above-captioned action (the "Bacchi Action"). Chavez and Myers are herein referred to collectively as the "Chavez Objectors." [1]

I. INTRODUCTION

The Chavez Objections are premised on the erroneous contention that the release of claims contained in the proposed Settlement Agreement (the "Bacchi Release"), if approved by the Court, will encompass and preclude the claims asserted in the Chavez Action. To the contrary, the Bacchi Release extends only to claims "***which arise out of or in any way relate to the subject matter of the Action*** and have been, or could have been, asserted in the Action or in any court or forum … ***concerning … MassMutual's compliance with M.G.L. c. 175, §§ 140 or 141*** with regard to any putative statutory, contractual, or common law limitation on MassMutual's retention of surplus or payment of dividends." [Doc. 235, at 7 (emphasis added).] Furthermore, the Bacchi Release expressly carves out from the Bacchi Release the certified claims in the Chavez Action:

> For avoidance of doubt, "Released Claims" do not include the certified class claims currently pending in the action captioned as Christina Chavez v. Massachusetts Mutual Life Insurance Co., Case No. BC435321, currently pending in the Superior Court for the County of Los Angeles, California.

[Doc. 235, at 7-8.]

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[1] This submission also responds to similar concerns expressed by Objectors Coral [Doc. 244], Himmelfarb [Doc. 257], and Woods [Doc. 284].

As the Court knows, and as the Chavez Objectors acknowledge, Plaintiff in the Bacchi Action alleges that over the past many years MassMutual improperly withheld surplus in excess of the limit established by the Massachusetts Safety Fund Law (the "Safety Fund Claims") and therefore paid lower dividends than might otherwise have been paid. *See* Stipulation of Settlement [Doc. 235, at 2 ("The Complaint in the [Bacchi] Action … alleges that MassMutual incorrectly calculated its compliance with a limitation on participating surplus set forth in M.G.L. c. 175, § 141 in a number of respects and was obligated to pay participating surplus in excess of that limitation as additional dividends.").][2] Accordingly, the Bacchi Release is expressly and appropriately limited to claims which arise out of or relate to the subject matter of the Bacchi Action concerning MassMutual's compliance with the Massachusetts safety fund statutes.

The Chavez Objectors expressly aver that the claims alleged in the Chavez Action are distinct from the claims litigated in the Bacchi Action. [Doc. 274 ("Chavez Obj."), at 9.][3] *See also e.g.,* Morris Decl., ¶ 15 ("The safety fund issue [asserted in the Bacchi Action] is irrelevant to the claims and defenses in *Chavez* …").[4] They also admit that the Bacchi Release expressly carves out the class claims certified in the Chavez Action. *See* Chavez Obj., at 9 ("The *Bacchi* release carves out the certified claims of the Chavez certified class ….").

Nonetheless, the Chavez Objectors inexplicably make the incorrect assertion that the Bacchi Release somehow extends to the claims alleged in the Chavez Action. *See e.g.*, Chavez Obj., at 8 (claiming that the "unpaid dividend claims are included in the sweeping *Bacchi* settlement release in order to relieve MassMutual from" the Unpaid Dividend Claims); *id.* at 7 ("the *Bacchi* release will extinguish those annual dividend claims"); *id.* at 9 ("The certified *Chavez* class members' annual dividend rights, claims never even considered/litigated in *Bacchi*, would

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[2] *See also* Stipulation of Settlement [Doc. 235, at 2 (same).]

[3] Page cites to the Chavez Obj. and all other matters of record referenced in this brief are to the ECF pages.

[4] Declaration of Timothy J. Morris in Support of Objectors Christina Chavez, in her Individual and Representative Capacities, and Michael D. Myers, M.D.'s Objections to Proposed Class Settlement and Notice of Intention to Appear at Fairness Hearing in Support of Objections to Proposed Class Settlement [Doc. 274-1 (the "Morris Decl.")], ¶ 15.

also be released …"). To create this incorrect impression that the Bacchi Release will extinguish the claims alleged in the Chavez Action – which is the lynchpin of their objections – the Chavez Objectors selectively misquote the actual language of the Bacchi Release by ***excising*** its all-important express limitation to claims "***which arise out of or in any way relate to the subject matter of the [Bacchi] Action***" concerning "***MassMutual's compliance with M.G.L. c. 175, §§ 140 or 141….***" *See* Chavez Obj., at 7 (quoting Bacchi Release but deliberately omitting through ellipsis the language expressly limiting the release to claims arising under the Massachusetts Safety Fund Law). The Chavez claims are expressly not within the scope of the Bacchi Release, and approval of the proposed Settlement will not release, preclude or otherwise prejudice those claims. In short, Chavez and her Class are completely free to try their claims in the Chavez Action.

The Chavez Objectors also attack the Proposed Plan of Allocation of the common fund created through the Settlement Agreement, emphasizing that those participating policyholders who never received a dividend do not stand to recover any share of the Net Settlement Amount. As shown below, however, the Plan of Allocation reasonably and rationally distributes the Net Settlement Amount to those policyholders who suffered underpaid dividends due to MassMutual's alleged noncompliance with the Massachusetts Safety Fund Law.

Finally, Objectors' derivative attacks on class certification fail because the forgoing arguments on which they are premised fail.

II. OBJECTORS LACK STANDING TO OBJECT ON BEHALF OF THE CHAVEZ CLASS

As members of the Bacchi Class who chose not to opt-out of the Bacchi Action, Chavez and Myers ***individually*** have standing to object. However, Chavez and Myers lack standing to object on behalf of the entire Chavez Class, given the limits on a class representative's authority to act in a representative capacity outside of the action in which he or she is certified to act on behalf of the class. *See e.g.*, *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1024 (9th Cir. 1998) (due process rights of the individual class members preclude class-wide objections or class-wide exclusion attempts); *In re: Volkswagen "Clean Diesel" Mktg., Sales Practices, and Products Liab.*

Litig., 2672 CRB (JSC), 2016 WL 4376623, at *4 (N.D. Cal. Aug. 17, 2016) (same; rejecting purported objection made on behalf of all Virginia class members); *Zamora v. Ryder Integrated Logistics, Inc.*, 13CV2679-CAB BGS, 2014 WL 9872803, at *2 n.2 (S.D. Cal. Dec. 23, 2014) (same; possibility that class settlement may preclude members from separate class action does not give putative class representative standing to intervene on their behalf); *In re Lease Oil Antitrust Litig. (No. II)*, 186 F.R.D. 403, 439 (S.D. Tex. 1999) (same; class representative cannot effectuate class-wide opt-out). Chavez and Myers therefore have standing only to object on their own, individual behalf.

III. OBJECTION TO THE SCOPE OF THE RELEASE

Chavez and Myers first object that the proposed Bacchi Release is "overbroad" because it supposedly extends to claims that are not premised on M.G.L. c. 175, §§ 140 or 141. Chavez Obj., at 8 and 22. To do so, Objectors misleadingly delete the crucial language when quoting the Bacchi Release in their brief.

Specifically, the Chavez Objectors describe the "Released Claims" as "all direct, individual, or class claims … against any of the Released Parties (MassMutual) … with regard to any putative statutory, contractual, or common law limitation on MassMutual's retention of surplus or payment of dividends." Chavez Obj., at 7 (emphasis original; misleading ellipses highlighted). Objectors use the highlighted ellipses to completely omit the key language limiting the Bacchi Release to the Safety Fund Claims; in reality, the Bacchi Stipulation of Settlement provides:

> "Released Claims" means all direct, individual, or class claims, rights or causes of action or liabilities whatsoever, whether known or unknown (including Unknown Claims as defined below), whether accrued or unaccrued, and whether arising under federal, state, local, statutory, common or any other law, rule, or regulation, against any of the Released Parties, ***which arise out of or in any way relate to the subject matter of the Action and have been, or could have been, asserted in the Action*** or in any court or forum by the Releasing Parties (or any of their beneficiaries, heirs, executors, successors or assigns, in their capacities as such, or any person or entity whom the Settlement Class Member represents as the purchaser or beneficiary of a participating MassMutual policy), ***concerning in any respect, MassMutual's compliance with M.G.L. c. 175, §§ 140 or 141*** with regard to any putative statutory, contractual, or common law limitation on MassMutual's retention of surplus or payment of dividends.

[Doc. 235, at 7 (emphasis added).] To the extent Chavez and Myers are objecting on the grounds that the Bacchi Release somehow extinguishes or prejudices the claims actually alleged in the Chavez Action, the objection is based on an indefensible misrepresentation of the language of the Bacchi Release. *See also, e.g.,* Chavez Obj., at 20 ("MassMutual seeks to gain a release from all of its participating policyholders that 'in any way relate to … the payment of dividends' even though the *Bacchi* litigation was confined to a claim of excess surplus above the safety fund limit held by MassMutual.") (misleading ellipses highlighted).

Furthermore, even if the Bacchi Release did read as the Chavez Objectors misleadingly suggest, that release would nevertheless as a matter of law be limited to claims sharing the same factual predicate as those alleged in the Bacchi Action. *TBK Partners, Ltd. v. Western Union Corp*., 675 F.2d 456, 460 (2d Cir.1982); *see*, *Reppert v. Marvin Lumber & Cedar Co.*, 359 F.3d 53, 58-59 (1st Cir. 2004) ("[I]n order to achieve a comprehensive settlement that would prevent relitigation of settled questions at the core of a class action, a court may permit the release of a claim based on the identical factual predicate as that underlying the claims in the settled class action even though the claim was not presented and might not have been presentable in the class action." (quoting *TBK Partners*) and enforcing release of claims "that have been or could have been asserted arising out of any purchase or performance of [product at issue] (either directly or indirectly) to the extent that such claims are based upon any allegations that were or could have been asserted in the Amended Complaint filed in this Action"); *City P'ship Co. v. Atl. Acquisition Ltd. P'ship*, 100 F.3d 1041, 1044 (1st Cir. 1996) (same); *accord, Bezdek v. Vibram USA Inc.*, 79 F. Supp. 3d 324, 349 (D. Mass. 2015), *aff'd*, 809 F.3d 78 (1st Cir. 2015).[5]

The Bacchi Release is carefully circumscribed to be entirely consistent with this precedent.

[5] The Chavez Objectors invoke the "identical factual predicate" rule in noting that the scope of a class action release must be circumscribed. But the proposed release here is appropriately limited as required by that rule. *See, e.g., Bezdek*, 79 F. Supp. 3d at 349. And they elsewhere assert that the factual predicates of the Bacchi Action are not asserted in the Chavez action. Accordingly, even if this release did not expressly carve out the claims of the Chavez class, it would follow from their own analysis that the release would not bar those claims.

Indeed, the Chavez Objectors devote a great deal of their brief emphasizing that the claims alleged in the Bacchi Action, premised as they are on the Massachusetts Safety Fund, are distinct from the claims alleged in the Chavez Action. *See, e.g.*, Chavez Obj., at 9-10 ("The lone issue raised in the *Bacchi* complaint is that MassMutual retained excess surplus amounts in violation of Mass. Gen. Law, c. 175, § 141. (Dkt. 1.)"); *see also*, Morris. Decl., ¶ 15 ("The safety fund issue [asserted in the Bacchi Action] is irrelevant to the claims and defenses in *Chavez* and has no bearing on whether annual dividends were owed to MassMutual participating term life insurance policyholders…"); Morris Decl., Ex 1 (copy of First Amended Class Action Complaint in the Chavez Action making no allegations or references with respect to the Massachusetts Safety Fund Law).[6]

Likewise, the Chavez Objectors acknowledge that "the *Bacchi* complaint contains no allegations of MassMutual's failure to pay past-due dividends owed to its term life insurance policyholders as alleged in the *Chavez* complaint." Chavez Obj., at 9-10. Chavez and Myers also concede that "MassMutual's liability for those unpaid annual dividends are ***distinct factual issues never alleged, investigated, nor even considered in the Bacchi litigation***…" *Id.* at 8 (emphasis added); *see also*, *id.* at 13 ("the factual predicates in the *Chavez* and *Bacchi* lawsuits are materially different"); *id.* at 22 ("Unpaid annual dividend claims were never at issue in *Bacchi*.").[7] Indeed, Objectors elsewhere emphasize:

> The rights of the uncompensated class members to unpaid dividends rests on a separate factual predicate and rely on "proof of further facts." Those "further facts" include for each participating policy series: the profit margins, internal rates of return, mortality experience, lapse and expense analyses each year from 2002-2016, the amount of each of those policy series' annual contribution to MassMutual's divisible surplus each year from 2002-2016, and the dividend contract language for

[6] The Chavez Objectors begrudgingly acknowledge that the Bacchi Release also expressly excludes "the certified class claims currently pending" in the Chavez Action, but complain that "[t]here is no such carve-out at all for the *Chavez* putative classes." Chavez Obj., at 9. But at the same time the Chavez Objectors assert that it is clear that the putative class claims asserted in the Chavez Action are no different than the admittedly distinct claims alleged on behalf of the certified class in the Chavez Action.

[7] As noted above, to the extent this argument is credited at all, the distinct factual predicate of such claims would place them outside the scope of the Bacchi Release, both by definition under the language of the Bacchi Release and as a matter of law.

> each such policy form. None of those facts were part of the *Bacchi* lawsuit and constitute a separate factual predicate that cannot be part of the overbroad *Bacchi* release.

Chavez Obj., at 22-23 (footnote omitted).[8]

Chavez and Myers' objection that participating policyholders other than those Chavez chose to include in the Chavez Class "must release their factually-distinct damage claims under the overbroad *Bacchi* release," Chavez Obj., at 13, is unfounded under both the law and the language of the Bacchi Release. To the contrary, the Bacchi Release (a) is expressly limited to claims that are not asserted in the Chavez Action, namely those arising from or relating to the same subject matter of the Bacchi Action concerning MassMutual's compliance with M.G.L. c. 175, §§ 140 or 141; (b) expressly carves out the Chavez class claims; (c) is reasonable and proper in light of the claims actually pleaded in the Bacchi Action; (d) as a matter of law can only extend to claims arising from the same factual predicate as those alleged in the Bacchi Action; and (e) will not bind anyone who elects to opt out.

IV. OBJECTION TO THE PLAN OF ALLOCATION

The Chavez Objectors tellingly make no specific objection to the ***amount*** of $37.5 million common fund achieved by the Settlement, nor do they contend that a greater amount could or should have been achieved in light of the undisputed risks that continued litigation of this case would have produced no recovery whatsoever (including given the amendment of the Massachusetts Safety Law raising the Safety Fund limit to 20%, a level which MassMutual undisputedly has never exceeded and a risk which the Chavez Objectors studiously ignore). Nor would any such objection to the overall amount of the common fund have merit. *See Duhaime v. John Hancock Mut. Life Ins. Co.*, 177 F.R.D. 54, 72 (D. Mass. 1997) ("The fact that some might have preferred more lucrative relief does not control that question. A settlement is, after all, not

[8] As if that were not enough, the factual distinctions between the Bacchi Class claims and the Chavez Class claims are further illustrated by the damages claimed by the Chavez Class, which are tied not to an alleged underpayment of dividends, but instead to restitution based on a "contribution to surplus" theory. *See* Chavez Obj., at 14 (Chavez Class claims not based "upon any 'excess safety fund surplus' [theory] as alleged in this *Bacchi* lawsuit").

full relief but an acceptable compromise."); *In re Lupron Mktg. & Sales Practices Litig.*, 228 F.R.D. 75, 97-98 (D. Mass. 2005).

Instead, the Chavez Objectors suggest that certain members of the Bacchi Class are being treated unfairly under the proposed Plan of Allocation, because those Bacchi Class members who have no history of dividend payments ("Zero Dividend Policyholders") do not stand to receive a monetary share of the common fund generated in settlement of the Safety Fund Claims. Chavez Obj., at 10 (asserting that such participating policyholders are "shut out of any settlement benefits"). The Zero Dividend Policyholders do receive no share of the common fund under the Plan of Allocation -- but that is not unfair, because they have no cognizable damages from ***underpaid*** dividends under those claims.

A plan for allocating settlement proceeds, like a proposed class settlement itself, should be approved if it is fair, reasonable and adequate. *See In re Tyco Intern, Ltd. Multidistrict Litig.*, 535 F.Supp.2d 249, 262 ("Like the settlement itself, the plan of allocation must be fair, reasonable, and adequate."); *Hochstadt v. Boston Scientific Corp.*, 708 F.Supp.2d 95, 109 (D. Mass. 2010) (same). A plan of allocation is fair and reasonable as long as it has a "reasonable, rational basis." *Hill v. State St. Corp.*, 2015 WL 127728 at *11 (D. Mass. Jan. 8, 2015) (quoting *In re IMAX Sec. Litig.*, 283 F.R.D. 178, 192 (S.D.N.Y.2012)).

A reasonable plan of allocation "need not necessarily treat all class members equally." *Hill,* 2015 WL 127728, at *11 (quoting *Schwartz v. TXU Corp.*, No. 3:02–CV–2243–K, 2005 WL 3148350, at *23 (N.D. Tex. Nov.8, 2005)), but may allocate funds based on the extent of class members' injuries and "consider the relative strength and values of different categories of claims." *Id.* (quoting *IMAX*, 283 F.R.D. at 192, and citing *In re Cabletron Sys., Inc. Sec. Litig.*, 239 F.R.D. 30, 35 (D.N.H. 2006) (approving a plan of allocation that took into consideration "the strengths and weaknesses of the claims of the various types of class members"); *In re MicroStrategy, Inc. Sec. Litig.*, 148 F.Supp.2d 654, 669 (E.D. Va. 2001) (approving plan that "sensibly makes interclass distinctions based upon, inter alia, the relative strengths and weaknesses of class members' individual claims")). In determining whether a plan of allocation is fair and reasonable,

courts give great weight to the opinion of experienced counsel. *Id.* (citing *e.g., In re Giant Interactive Grp., Inc. Sec. Litig.*, 279 F.R.D. 151, 163 (S.D.N.Y. 2011)).

There is no requirement, then, that all class members must receive compensation under the plan of allocation implementing a proposed class settlement. Rather, it is reasonable to allocate settlement funds based on the relative damages or merits of the claims potentially held by different groups within the class, and it is entirely permissible to allocate nothing to class members who have no damages, purely speculative damages or dubious claims under the legal theories alleged in the underlying case. *See, e.g.*, *Hochstadt v. Boston Sci. Corp.*, 708 F. Supp. 2d 95, 110 (D. Mass. 2010) (preliminary approval of settlement releasing claims by segment of class receiving no compensation); *Vinh Nguyen v. Radient Pharmaceuticals Corp.*, 2014 WL 1802293 at *5-7 (C.D. Cal. May 6, 2014) (same); *In re: Cathode Ray Tube (CRT) Antitrust Litig.* 2016 WL 3648478, at *12 (N.D. Cal. July 7, 2016) ("…[i]t is fine to release a claim without compensation if the value of the claim is zero"); *In re Omnivision Technologies, Inc.* 559 F. Supp.2d 1036, 1045 (N.D. Cal. 2008) (approving plan allocating nothing to two groups of class members who "suffered no injury" thereby preserving common fund for "the only Class Members to suffer any injury"); *Parker v. Time Warner Entm't Co. L.P.*, 239 F.R.D. 318, 339 (E.D.N.Y. 2007) ("Consideration of nothing [under a plan of allocation] for releasing a worthless claim is therefore fair, reasonable and adequate").[9]

For example, in *Vinh Nguyen*, the Court approved a class settlement plan of allocation in a securities fraud case allocating no settlement funds to a segment of the class comprised of "in-and-out traders" because the objectors produced only speculative evidence that they had sustained cognizable damages. In doing so, the Court recognized that a plan of allocation may reasonably make "interclass distinctions based upon, *inter alia*, the relative strengths and weaknesses of class'

[9] *See also, In re Mego Financial Corp. Securities Litigation*, 213 F.3d 454, 461 (9th Cir. 2000); *In re New Motor Vehicles Canadian Export Antitrust Litig.*, MDL No. 1532, 2011 WL 1398485, at *4-5 (D. Me. Apr. 13, 2011); *In re Urethane Antitrust Litig.*, No. 04-1616-JWL, 2016 WL 4060156, at *2 (D. Kan. July 29, 2016); *Lively v. Dynegy, Inc.*, No. 05-CV-0063-NJR, 2008 WL 4657792, at *4 (S.D. Ill. Sept. 30, 2008).

members individual claims" and that "the skilled judgment of [class] counsel" is entitled to substantial weight. 2014 WL 1802293 at *5 & *7. The Court observed:

> The Objector argues that the plan [of allocation] is unfair because it provides no recovery for traders whose shares fall into the "in and out" category.... The Objector argues that any settlement that releases any claim without compensation is per se unreasonable, but the Objector's authority does not bear this out…. "It is reasonable to allocate the settlement funds to class members based on the extent of their injuries or the strength of their claims on the merits." The record shows that it is very unlikely that the in-and-out traders could have proved recoverable damages.

Id. at *7 (internal citations omitted).

The *Vinh Nguyen* court specifically distinguished *Mirfasihi v. Fleet Mortg. Corp.*, 356 F.3d 781, 785–86 (7th Cir. 2004), relied on by the Chavez Objectors. *See* Chavez Obj., at 21 n.12. *Mirfasihi* and the other cases the Chavez Objectors cite in footnote 12 are indeed distinguishable, for none involves a rational distinction drawn among class members based on the differences in cognizable damages. *See, Acosta v. Trans Union, LLC*, 243 F.R.D. 377, 387 (C.D. Cal. 2007) (disapproving proposed settlement where distinction between those who stood to recover monetary relief and those who did not that was "arbitrary and bears no relationship to the procedural or substantive limitations on the class members' claims"); *Mirfasihi*, 356 F.3d at 785–86 (reversing settlement where record failed to show basis for allocating no monetary relief to one sub-class); *Petruzzi's, Inc. v. Darling-Delaware Co., Inc.*, 880 F. Supp. 292, 300–01 (M.D. Pa. 1995) (plan of allocation disapproved where one half the class received no compensation although they suffered the same degree of injury as those receiving compensation). Indeed, the *Petruzzi's* court acknowledged that "disparate treatment of class members may be justified by a demonstration that the favored class members have … greater damages." 880 F. Supp. at 300-01. Likewise, the Seventh Circuit in *Mirfasihi* acknowledged: "Even the denial of ***all relief*** to the information class might be justified if careful scrutiny indicated that the class had no realistic prospect of sufficient success to enable an actual distribution to the class members." 356 F.3d at 785-86 (emphasis added). Finally, *Crawford v. Equifax Payment Servs.*, 201 F.3d 877, 882 (7th Cir.2000) did not involve a plan of allocation at all, because no common fund was created for any portion of the settlement class; the only monetary relief went to the class representative and class counsel.

Here, the Plan of Allocation distributes the Net Settlement Fund among the Settlement Class Members, all of whom are participating policyholders, in proportion to the amount of dividends actually received during the class period. This allocation formula makes perfect sense, because MassMutual is required by law to adhere to the contribution principle requiring it "apportion its [divisible surplus based] upon the contribution to surplus …as dividends." M.G.L. c. 175, § 140. The Bacchi Action alleges no claims challenging MassMutual's apportionment of dividends based on the contribution principle; rather, Bacchi alleges only that MassMutual should have paid ***additional*** divisible surplus to those policyholders who received dividends by virtue of the Massachusetts Safety Fund Law.

Because Bacchi's Safety Fund Claim is that dividends ***paid out*** to participating policyholders were ***understated***, the Zero Dividend Policyholders (who never received any dividend at all) cannot muster any cognizable underpayment damages. Hence the Zero Dividend Policyholders do not share in the common fund under the proposed Plan of Allocation; the net settlement fund is instead allocated to those policyholders who can claim to have been underpaid. *See, e.g., In re WorldCom, Inc. ERISA Litig.*, 02 CIV. 4816 (DLC), 2004 WL 2338151, at *8 (S.D.N.Y. Oct. 18, 2004) ("The plan of allocation is based on the proportional share of the loss of each participant. The more a class member lost, the more that person will receive."), *order clarified sub nom. In re Worldcom, Inc. ERISA Litig.*, 02 CIV. 4816 (DLC), 2004 WL 2922083 (S.D.N.Y. Dec. 17, 2004); *In re Cabletron Sys.*, 239 F.R.D. at 35 (approving plan of allocation accounting for class members' relative damages depending on timing of stock sale).

In short, Plaintiff did not "bargain[] away ... valuable rights" of any member of the Settlement Class [Doc. 274, at 21] and certainly did not bargain away any of the claims asserted in the Chavez Action. Importantly, Chavez Objectors have come forward with no evidence that the claims of the Zero Dividend Policyholders actually released by the Settlement have any value whatsoever. The "$99 million" figure used by the Chavez Objectors relates only to a non-existent nationwide class hypothetically asserting the unpaid dividend claims alleged in the Chavez

Action.[10] Indeed, Chavez has never sought to assert in the Chavez Action any of the Safety Fund claims that the Chavez Objectors claim are being unfairly released in the Bacchi Action. Chavez Obj., at 14 (conceding damages in Chavez Action are "not based upon any 'excess safety fund surplus' as alleged in this *Bacchi* lawsuit"). Chavez and Myers also conspicuously ignore that, if they truly thought such claims had value to pursue, they and other members of the Chavez Class could have simply opted out of the Settlement Class like the 301 other policyholders who did so.

V. OBJECTION TO CERTIFICATION OF THE BACCHI SETTLEMENT CLASS

1. Adequacy and Typicality

Because their attacks on the Bacchi Release and the Plan of Allocation fail, Objectors' derivative attacks on typicality and adequacy are likewise unavailing. *See In re Pet Food Products Liability Litigation*, 629 F.3d 333, 347 (3d Cir. 2010) ("The fact that the settlement fund allocates a larger percentage of the settlement to class members with Injury Claims does not demonstrate a conflict between groups. Instead, the different allocations reflect the relative value of the different claims."); *In re Cathode Ray Tube*, 2016 WL 3648478, at *15 (fact that the settlement fund allocated a larger percentage of the settlement to certain class members did not undermine adequacy); *In re Ins. Brokerage Antitrust Litig.*, 282 F.R.D. 92, 116 (D.N.J. 2012) (overruling objection that plan of allocation based on the relative strengths of the settlement class members' claims undermined adequacy).

Furthermore, the Safety Fund Claims alleged in the Bacchi Action turn on the alleged applicability of the Massachusetts Safety Fund Law, not on the idiosyncratic language of any participating policyholder's policy contract. The difference in contract language emphasized by Chavez and Myers (i.e., that some participating policies would not receive dividends) amounts to only a potential difference in the amount of claimable damages, which is no bar to typicality or adequacy, let alone to certification generally. *See Applegate v. Formed Fiber Techs., LLC*, 2:10-CV-00473-GZS, 2012 WL 3065542, at *6 (D. Me. July 27, 2012) ("a difference in damages arising

[10] As the Chavez Objectors admit, the class actually certified in the Chavez Action includes only 300 policies issued through one agent in Los Angeles. Chavez Obj., at 14 n.9.

from a disparity in injuries among the plaintiff class does not preclude typicality")(quotation omitted); *Pettway v. Harmon L. Offices, P.C.*, 03-CV-10932-RGS, 2005 WL 2365331, at *10 (D. Mass. Sept. 27, 2005) ("Although [the plaintiffs] may not have suffered identical damages, that is of little consequence to the typicality determination when the common issue of liability is shared.") (quoting *In re Lorazepam & Clorazepate Antitrust Litig.*, 202 F.R.D. 12, 28 (D.D.C.2001)); *Lessard v. Metro. Life Ins. Co.*, 103 F.R.D. 608, 611 (D. Me. 1984) (if a "plaintiff and each member of the represented group have an interest in prevailing on similar legal claims, ... differences in the amount of damages claimed may not render his or her claims atypical") (quoting *Zeffiro v. First Pennsylvania Banking & Trust Co.*, 96 F.R.D. 567, 571 (E.D.Pa.1983)).

The Chavez Objectors try to make much of the fact that late in the litigation, Bacchi chose to voluntarily withdraw her class allegations. [Doc. 274, at 17-18 (citing Dkt. 228)]. Plaintiff did make a strategic decision to avoid any preclusive impact on absent class members resulting from an adverse ruling on MassMutual's then-pending motion for summary judgment, which under the pretrial schedule was set to be heard before class certification. This made sense for at least three reasons. *First*, while protecting the putative class members from any *res judicata* argument by MassMutual in the wake of an ***adverse*** summary judgment ruling, Plaintiff's decision to forego class certification did not in any way forfeit the benefit of a ***favorable*** outcome on MassMutual's summary judgment motion. *Second*, 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 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. *Third*, even if MassMutual prevailed on its summary judgment ***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. [Joint Declaration of Class Counsel [Doc. 295] ("Jt. Decl."), ¶ 8.] 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.

2. Predominance and Superiority

Objectors' derivative arguments under Rule 23(b)(3) likewise fail. Chavez Obj., at 18 (citing *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 623 (1997). Objectors' citation to *Amchem* is particularly unhelpful, for there the Supreme Court confirmed that manageability issues pertinent to a litigation class pose no bar to the certification of a settlement class. *Amchem*, 521 U.S. at 620 ("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."). Nor, with respect to the superiority factor, do Objectors establish that numerous individual suits would somehow be preferable to the use of the class mechanism. *Torres-Ronda v. Jt. Underwriting Ass'n*, CIV. 11-1826CCC, 2012 WL 4681063, at *8 (D.P.R. Oct. 2, 2012) ("Class certification is … the most efficient way to resolve the disputes since the alternative would consist of hundreds of individual trials."). As for the coordination between the class claims in the Chavez Action and the Bacchi Action that Objectors suggest, that is precisely what was effectively achieved with the carve out of the Chavez Action in the Bacchi Release.

VI. PASSING ATTACK ON THE SUFFICIENCY OF THE CLASS NOTICE

Without the citation of any authority, the Chavez Objectors criticize the Class Notice for failing to define "participating policy," arguing that otherwise policyholders would not know whether or not they held a participating policy. Chavez Obj., at 23. They fail to mention, though, that "participating" policies are identified themselves as such in the policy contracts. [Jt. Decl., ¶ 17.] And, since some 81% of policyholders take their dividend each year as a "Paid Up Addition," further explanation of that concept was unnecessary as well. [Jt. Decl., ¶ 18.] In any event, the

Class Notice did explain that, to the extent a Paid-Up Addition was not feasible, the settlement payment would be made by check: "If your policy cannot receive paid-up additions for some reason, you may receive a check for the amount of your payment net of any applicable income tax withholding obligations if the amount of that check is not less than $1.00." [Doc. 235-2, at 5.] To the extent any policyholders had any doubts, they could easily call the 800-number printed on every page of the notice for assistance (some 6,200 policyholders who did so were assisted by live agents). Declaration of Richard W. Simmons, etc. [Doc. 292-1, at ¶ 25]

Finally, as explained above, it is entirely appropriate that the Class Notice spoke only of Safety Fund Claims, and not Unpaid Dividend Claims, since only the Safety Fund Claims were at issue in the Bacchi Action and the Unpaid Dividend Claims are not released by the Bacchi Release.

VII. THE OVERALL FAIRNESS OF THE BACCHI SETTLEMENT REMAINS UNDIMINISHED

The creation of a $37.5 million common fund, ***plus*** MassMutual's absorption of all notice and administrative costs, ***plus*** MassMutual's agreement to 10 years of reporting obligations to the Massachusetts Division of Insurance is a fair, reasonable and adequate resolution of the Safety Fund Claims alleged in the Bacchi Action, which does not release or prejudice any claim asserted in the Chavez Action. The objection of Chavez and Myers is based on a misleading and self-serving recitation of the Bacchi Release. Nor is the proposed Plan of Allocation irrational or unreasonable in allocating the common fund of underpaid dividends to those Bacchi Class members who received underpaid dividends, rather than to those who received no dividends at all.

VIII. CONCLUSION

For each and all the foregoing reasons, the individual and representative objections of Chavez and Myers are not well-taken, and should be overruled.

Dated: July 13, 2017

Respectfully submitted,

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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