No. 16-2712

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

MATTIE HALLEY; SHEM ONDITI; LETICIA MALAVE;
TEMPORARY ADMINISTRATOR OF THE ESTATE OF
SERGIO DE LA CRUZ,
On Behalf of Themselves and All Others Similarly Situated

v.

HONEYWELL INTERNATIONAL, INC.;
PPG INDUSTRIES, INC.

MAUREEN CHANDRA,
Objector-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
Case No. 10-cv-03345
Hon. Esther Salas

BRIEF AND JOINT APPENDIX VOLUME I OF V (A1-A68) ON BEHALF OF APPELLANT, MAUREEN CHANDRA

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JURISDICTIONAL STATEMENT

The District Court had original jurisdiction pursuant to 28 U.S.C. 1332(d)(2) because: any class member is a citizen of a State different than any defendant; there are at least 100 class members; and the amount in controversy exceeds $5 million.

On April 26, 2016, the District Court filed an Opinion (A13) and Preliminary Order (A11) approving the class action settlement, awarding attorney fees and costs, and overruling Ms. Chandra's objections. The District Court filed an Order and Final Judgment (A3) on May 10, 2016.

Ms. Chandra filed a Notice of Appeal (A1) on May 26, 2016. This Court has jurisdiction pursuant to 28 U.S.C. 1291.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the District Court abused its discretion by approving the Settlement as fair, reasonable, and adequate compensation when:

   (a) The District Court had no information concerning the extent of ground contamination to class members' homes nor the remediation required, yet the Settlement released claims for contamination and remediation;

Raised: Objection by Maureen Chandra to Settlement (A181) and to Motion for Final Approval (A500)

Opposed: Honeywell Reply In Support of Settlement (A510)

Class Counsel Reply to Objection (A513)

Ruled: District Court Opinion (A13)

(b) The District Court relied on Honeywell's conclusory and false statements during oral argument at the Final Approval Hearing, that class members can obtain remediation from the N.J.D.E.P.;

Raised: Honeywell at oral argument during the Final Approval Hearing (A527)

Opposed: Class Counsel at oral argument during the Final Approval Hearing (A527 at Tr. 26:5-12).

District Court denied Maureen Chandra an opportunity to respond after the hearing (A527 at Tr. 127:8-22)

Ruled: District Court Opinion (A13)

(c) A class member's home may need to be demolished to remediate the property;

Raised: Maureen Chandra raised the issue generally in her Objection (A187) that the court was without any

information concerning remediation, including remediation may not be possible; and specifically that a home may need to be demolished to remediate, during oral argument at the Final Approval Hearing (A591)

Opposed: None

Ruled: District Court Opinion (A13)

(d) The Settlement releases unknown and unforeseen toxic waste contamination claims that class members may have in the future which are impossible to evaluate;

Raised: Objection by Maureen Chandra to Settlement (A188) and to Motion for Final Approval (A507)

Opposed: Class Counsel Reply to Objection (A513)

Ruled: District Court Opinion (A13)

(e) The District Court did not consider the reaction of the class during a July 22, 2015 meeting with, and sponsored by, Class Counsel;

Raised: Objections by Maureen Chandra to Settlement (A188-89) and to Motion for Final Approval (A508)

Opposed: Class Counsel Reply to Objection (A513)

Ruled: District Court Opinion (A13)

(f) Class Counsel did not provide any estimate of damages as required by *Girsh* factors eight and nine;

Raised: Objections by Maureen Chandra to Settlement (A186) and to Motion for Final Approval (A506-07)

Opposed: Class Counsel Reply to Objection (A513)

Ruled: District Court Opinion (A13)

2. Whether the District Court abused its discretion by approving improperly calculated attorney fees and expenses when:

(a) The District Court refused to follow New Jersey Court Rule 1:21-7 and awarded attorney fees on the gross recovery, before expenses, instead of the net recovery after deducting expenses;

Raised: Objection by Maureen Chandra (A195-97)

Opposed: Class Counsel Opposition to Objection (A211)
Class Counsel Suppl. Memo (A664)

Ruled: District Court Opinion (A13)

(b) The District Court refused to allow the class an opportunity to review the basis for Class Counsels' expense request before the deadline to object had expired;

Raised: Objection by Maureen Chandra (A203)

Opposed: Class Counsel Opposition to Objection (A211)

Class Counsel Suppl. Memo (A664)

Honeywell Suppl. Memo (A682)

Ruled: District Court Opinion (A13)

(c) The District Court allowed Class Counsel to recover all expenses pursuing litigation against PPG (until the Settlement with Honeywell was reached), even though litigation against PPG was – realistically, entirely for the benefit of Class B and would have not resulted in any additional recovery at trial for Classes A and C.

Raised: Objection by Maureen Chandra (A200-01)

Opposed: Class Counsel Opposition to Objection (A211)

Ruled: District Court Opinion (A13)

STATEMENT OF RELATED CASES AND PROCEEDINGS

This case has not been before this Court previously. *Interfaith Cmty. Org. v. Honeywell Int'l, Inc.*, 263 F. Supp. 2d 796, 826 (D.N.J. 2003), *aff'd*, 399 F.3d 248 (3d. Cir. 2005) is related to this case because it involves the contamination and remediation of Honeywell's chromium ore processing site in Jersey City, from which the claims in this case arise.

STATEMENT OF THE CASE

This class action arises from alleged toxic waste contamination to class members' homes that originated from defendants' chromium ore processing sites in Jersey City. Class Counsel pursued litigation against two distinct defendants on behalf of three different property classes – against Honeywell on behalf of Classes A and C, and – against PPG on behalf of Class B. (A78).

Defendants operated in different geographical areas of Jersey City. Honeywell and its Disposal Area "A" operated on the west side of Jersey City where Classes A and C homes are located. (A119). PPG and its Disposal Area "B" operated on the east side of Jersey City where Class B homes are located. (A119).

The Sixth Amended Complaint (A78) alleges causes of action for private nuisance, strict liability, trespass, and negligence against Honeywell on behalf of Classes A and C. The same counts are alleged against PPG on behalf of Class B. In addition, a civil conspiracy count is alleged against PPG and Honeywell on behalf of all classes.

Class Counsel settled with Honeywell on behalf of Classes A and C for $10,017,000. (A280 at § II(34)). There are 3,495 properties in Classes A and C. (A243). After fees and expenses, it was estimated that each class home would receive approximately $1,850. (A243 n. 5).

After the Settlement, the civil conspiracy count was abandoned against all defendants. (A287 at § IV(10)(a-b)). PPG paid nothing to Classes A and C. (A272). Litigation continues against PPG only on behalf of Class B.

The court preliminarily approved the settlement on April 30, 2015. (A69). Direct notice of the settlement was distributed to the class on June 1, 2015. (A246).

On July 22, 2015 Class Counsel hosted a public meeting (which lasted over two hours) to answer class member questions. Many homeowners expressed fear, sorrow, and even outrage. A distressed class member analogized the situation to Love Canal in Niagara Falls. (A508).

In response to the reaction of the class, Class Counsel, Steven German announced over the public address system, "I'm hearing that some people have very serious concerns about their property." And, "Based on the tenor of the crowd, it looks like a lot of people are unhappy with the settlement." (A508).

Counsel for Maureen Chandra was at the public meeting. He asked Mr. German if any of his experts tested class members' properties for contamination. Mr. German said that none of their experts did any physical testing to determine if class members' properties were contaminated. (A504). When homeowners asked Mr. German if their properties were contaminated, he said he did not know. (A188).

Pursuant to the Settlement, class members were to be paid approximately $1850 per home (A243 n. 5) to release Honeywell from, among other things, having to remediate their homes due to hexavalent chromium and other undisclosed "chemical contamination." (A278-79 at § II(27)). Because approximately 40% of the class did not file claims or opt out, they will receive nothing and yet still be bound by the Settlement. The money originally allocated to those class members will be redistributed to the class members who did file claims, resulting in an award of approximately $3000. (A244). But make no mistake – the Settlement allocation is only $1850 per home when all class members file claims. The only common sense reason 40% of the class neither filed claims for $1850, nor opted out, is that they either didn't understand the proceedings or didn't agree with the Settlement.

The Settlement releases ground contamination and remediation claims. Yet, neither Honeywell nor Class Counsel provided the District Court with any information concerning the extent of ground contamination to class members' homes – nor the cost to remediate. (A417)

The Settlement also releases "UNKNOWN" and "UNFORESEEN" future claims that are impossible to evaluate. (A279 at § II(27)). Chromium slag from Honeywell's facilities was used as "fill material for use in construction and development projects at residential, commercial and recreational areas throughout

Jersey City." (A83 ¶ 26). Because Honeywell's toxic waste site began operation in 1895 – more than a century ago (A273 at § I(1)), nobody knows what unknown and unforeseen claims are lurking underground that may be discovered in the future.

The Settlement also releases claims for lost property value, i.e. – property near a toxic waste site is worth less. (A279 at § II(27)). Presumably, Class Counsel had at least a damage analysis concerning lost property values when they mediated the case – as opposed to no information concerning ground contamination of class members' homes. But Class Counsel refused to provide the court with a damage analysis – or any expert reports for anything – in support of the Motion for Final Approval of the Settlement. (A232).

Class Counsel filed a motion for attorney fees and expenses on June 1, 2015. (A120). Class Counsel sought attorney fees of 25% of the gross settlement (before deducting expenses). Class Counsel also sought reimbursement of expenses litigating against Honeywell – as well as reimbursement of all expenses litigating against PPG until the time Honeywell settled with Classes A and C.

Maureen Chandra objected to Class Counsels' motion for attorney fees and expenses. (A192). She objected that Class Counsels' fee should be based on 25% of the settlement, *after* deducting expenses, pursuant to New Jersey Court Rule 1:21-7; that Class Counsel didn't provide the class with the basis for their expenses

– just a total amount, in violation of Rule 23(h); and that Class Counsel should not be reimbursed for expenses litigating against PPG from the Honeywell settlement because litigation against PPG was for the benefit of Class B and not for the benefit of Classes A and C.

In response to the objection, Class Counsel alternatively raised the fee request to 28.7% so the requested dollar amount would stay the same, claimed the expenses litigating against PPG and Honeywell were indistinguishable, and still refused to disclose the basis for their expenses to enable class review. (A211).

Maureen Chandra also filed two objections to the Settlement. At the time class notice was distributed, the parties had overlooked the need for a final approval motion and no briefing schedule existed – just an objection deadline. Ms. Chandra filed an Objection on July 31, 2015. (A181). She objected that the parties had not provided the court with necessary information to determine if the settlement is fair, reasonable, and adequate, including: the extent of ground contamination at class members' homes and the cost to remediate. (A187). She also objected to the release of unknown and unforeseen future claims, informed the court of the reaction of the class at the July 22, 2015 meeting with Class Counsel, and objected to $100,000 of the settlement being diverted from the class to an undisclosed, *cy pres* community project.

Thereafter, the parties submitted a briefing schedule for the motion for final approval, and extended the deadline for oppositions. The court filed the scheduling Order on September 2, 2015. (ECF 414).

In their Joint Motion for Final Approval of the Settlement, the parties abandoned the *cy pres* community project and agreed to distribute that money directly to class members. (A232). Noticeably absent from the motion was any information concerning ground contamination at class members' homes, or a damage analysis for lost property value.

Maureen Chandra objected to the Motion for Final Approval because: (1) still, no information concerning ground contamination of class members' homes had been provided; (2) unknown and unforeseen future claims were still released, (3) no damage analysis was provided for any claims; and (4) Class Counsel did not disclose the reaction of the class at the July 22, 2015 meeting. (A500).

Because the court was not provided with any information concerning ground contamination of class members' homes, Ms. Chandra requested that: class members be given the opportunity to test their properties (A505), or the release of claims for soil and groundwater contamination be stricken from the Settlement Agreement pursuant to the court's equitable powers and Section IX (I)(l) of the Settlement Agreement, which gives the parties' consent for the court to "incorporate any other provisions as the Court deems necessary and just." (A509).

The District Court held a final approval hearing on September 24, 2016. The court ordered Class Counsel to submit expense and time records for *in camera* review, and the parties to file supplemental memorandum concerning Maureen Chandra's objections. (A525). The District Court refused to allow Ms. Chandra a supplemental filing or to comment on anything submitted by the parties after the hearing. (A653 at Tr. 127:8-22).

On April 26, 2016, the District Court filed an Opinion (A13) and Order (A11) in which it overruled all of Ms. Chandra's objections, awarded attorneys' fees and expenses as requested, and granted final approval of the Settlement without modification. On May 10, 2016, The District Court entered a Final Order and Judgment. (A3).

SUMMARY OF THE ARGUMENTS

The District Court abused its discretion and committed clear error because it did not have necessary information to determine whether the Settlement was fair, reasonable, and adequate. The Settlement released (among other things) claims for contamination and remediation to class members' homes – including toxic hexavalent chromium and other undisclosed chemical contamination. But neither the parties nor the District Court had any information concerning the extent of ground contamination to class members' homes. Nor did the parties provide the

court with any information concerning remediation. Without that information, it is impossible for the court to determine if the settlement is fair, reasonable, and adequate.

Simply put – no attorney could advise a client to take the settlement without first knowing the extent of contamination to the client's property and the cost to remediate. And if no attorney could advise a single client without knowing the extent of contamination and the cost to remediate, then certainly the District Court was in no better position to tell an entire class the settlement was fair, reasonable, and adequate.

And to make matters worse, the Settlement also releases unknown, unforeseen, and future claims which are impossible to evaluate. Honeywell's facility was in operation since 1895. Its chromium waste used as fill material in residential, commercial, and recreational areas throughout Jersey City. Nobody knows what unknown and unforeseen claims are lurking underground that may be discovered in the future.

The Settlement also released claims for lost property value – i.e., homes near a toxic waste site are worth less. Presumably, the District Court could have evaluated those claims, but Class Counsel never produced a damage analysis – or any expert reports – in support of the settlement.

Yet, without any of this necessary information, the District Court approved the Settlement as fair, reasonable, and adequate. Instead of conducting a rigorous analysis of the settlement, the District Court relied heavily on the presumption of fairness afforded class action settlements under *In re Warfarin Sodium Antitrust Litig*., 391 F.3d 516, 531 (3d Cir. 2004). Since the presumption of fairness never shifts the burden from the party seeking approval of the settlement, "determining whether a proposed class action settlement is entitled to a presumption of fairness while also requiring a rigorous analysis under *Girsh* and *Prudential* is, at worst, contradictory or illusory and, at best, redundant." *Altnor v. Preferred Freezer Servs., Inc.*, 2016 WL 3878161 n. 4 (E.D. Pa. July 18, 2016).

The District Court also abused its discretion and committed clear error by approving improperly calculated attorneys' fees and expenses. First, the District Court did not follow *New Jersey Court Rule* 1:21-7 and awarded attorney fees on the gross recovery before expenses, instead of the net recover, after expenses. Second, the District Court refused the class an opportunity to review the particulars of Class Counsels' expense request before the time to object had expired, in violation of Rule 23(h). Finally, the District Court erred by allowing Class Counsel to recover expenses pursuing litigation against PPG, from the Honeywell settlement. Since litigation against PPG was pursued for the benefit of Class B,

expenses pursuing litigation against PPG should not have been reimbursed from the Class A and C settlement fund with Honeywell.

STANDARD OF REVIEW

A district court's decision to certify a class and approve a settlement is reviewed under an abuse of discretion standard. *In re Pet Food Products Liab. Litig.*, 629 F.3d 333, 341 (3d Cir. 2010). "An abuse of discretion may be found where the district court's decision rests upon a clearly erroneous finding of fact, an errant conclusion of law or an improper application of law to fact." *Id*.

A "District Court's attorneys' fees award [is reviewed] for abuse of discretion which can occur if the judge fails to apply the proper legal standard or to follow proper procedures in making the determination, or bases an award upon findings of fact that are clearly erroneous." *In re Rite Aid Corp. Sec. Litig*., 396 F.3d 294, 299 (3d Cir. 2005) (quotations and references omitted). An award of attorney fees can be reviewed *sua sponte* on appeal. *In re Pet Food Products*, 629 F.3d at 358.

ARGUMENTS

I. THE DISTRICT COURT ABUSED ITS DISCRETION BECAUSE IT DID NOT HAVE NECESSARY INFORMATION TO DETERMINE WHETHER THE SETTLEMENT WAS FAIR, REASONABLE, AND ADEQUATE

"[A] class action cannot be settled without the approval of the court and a determination that the proposed settlement is fair, reasonable and adequate." *In re Pet Food Products*, 629 F.3d at 349 (citations omitted). *Fed. R. Civ. P.* 23(e) "protects unnamed class members from unjust or unfair settlements affecting their rights when the representatives become fainthearted before the action is adjudicated or are able to secure satisfaction of their individual claims by a compromise." *Id*. at 350 (citations omitted).

When determining if a proposed settlement is fair, reasonable, and adequate, the district court must consider the nine factors articulated in *Girsh v. Jepson*:

> (1) the complexity, expense and likely duration of the litigation;
> (2) the reaction of the class to the settlement;
> (3) the stage of the proceedings and the amount of discovery completed;
> (4) the risks of establishing liability;
> (5) the risks of establishing damages;
> (6) the risks of maintaining the class action through the trial;
> (7) the ability of the defendants to withstand a greater judgment;
> (8) the range of reasonableness of the settlement fund in light of the best possible recovery; and
> (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

521 F.2d 153, 157 (3d Cir. 1975).

"The settling parties bear the burden of proving that the *Girsh* factors weigh in favor of approval of the settlement." *In re Pet Food Products,* 629 F.3d at 350. "Because district courts must make findings as to each of the *Girsh* factors . . . the court cannot substitute the parties' assurances or conclusory statements for its independent analysis of the settlement terms." *Id*.

Furthermore, a district court is required "to apply an even more rigorous, heightened standard in cases where settlement negotiations precede class certification, and approval for settlement and certification are sought simultaneously." *Id*. (citations and quotations omitted). In this case, because approval for the settlement and certification were sought simultaneously, the court was required to apply a more "rigorous, heightened standard."

a. The District Court Abused Its Discretion and Committed Clear Error Because It Lacked Any Information About Ground Contamination or Remediation to Class Members' Homes.

Neither Honeywell nor Class Counsel provided the District Court with any information concerning ground contamination or remediation to class members' homes. Yet, the settlement release includes claims for contamination and remediation due to hexavalent chromium and other undisclosed "chemical contamination." (A278-79 at § II(27)). Honeywell confirmed the settlement releases ground contamination and remediation claims. (A629-30 at Tr. 103:16-104:23). Without knowing the extent of ground contamination to class members'

homes nor the cost to remediate, the court lacked information necessary to determine if the settlement is fair, reasonable, and adequate as to ground contamination and remediation claims. *See In re Pet Food Products*, 629 F.3d at 353 ("the District Court lacked the information necessary to evaluate the value and allocation of the [claims] and so we will vacate and remand on this one issue.").

Even more troubling is that Class Counsel engaged in mediation and executed a settlement on behalf of class members – releasing contamination and remediation claims, without having any information whatsoever about ground contamination to class members' homes. (A504). It defies reason how anyone could engage in meaningful mediation concerning claims they have no information about.

The only reasonable explanation is that this case was never about ground contamination; but rather, lost property values and medical monitoring related to contaminated dust.[1] And after Class Counsel abandoned the medical monitoring class, all that remained was the claim for lost property value. Class Counsel said as much during a public meeting with class members.

[1] Class Counsel may argue in their opposition that this case was always about ground contamination of class members' homes. If they do, then Class Counsel prove themselves inadequate under *Fed. R. Civ. P. 23*(g)(1)(B) and (g)(4) by mediating and executing a settlement agreement releasing ground contamination claims on behalf of class members without any information concerning those claims.

On July 22, 2015, at a public meeting for class members hosted by Class Counsel (and attended by counsel for Objector, Ms. Chandra), Class Counsel, Steven German announced over the public address system to class members, "The lawsuit that we are here about, is only about the loss of property values. However, the lawsuit is not about the cleanup. There is a completely separate lawsuit in federal court about the cleanup." (A504 at § II).

Later in the meeting, Mr. German responded to class members' questions over the public address system. When homeowners asked Mr. German if their properties were contaminated, he said he did not know. (A188). Counsel for Ms. Chandra asked Mr. German if any of his experts tested class members' homes as part of his damage analysis to determine the extent of contamination. Mr. German said none of the experts retained by Class Counsel did any physical testing at class members' properties. (A504 at §II).

Furthermore, if this litigation was really about compensation for ground contamination and remediation, the "Class Ownership Period" as defined in the Settlement (A277 at § II(7)) would include current property owners instead of limiting the property ownership period from "May 17, 2010 up to and including October 1, 2014." Keep in mind that class notice was not distributed until June 1, 2015 (A246), and the District Court's Final Order and Judgment is dated May 10, 2016. (A3).

Because Honeywell, Class Counsel, and the District Court lacked any information about ground contamination and remediation of class members' homes, the court abused its discretion when it approved the class action settlement releasing contamination and remediation claims because it was without necessary information to determine if the settlement was fair, reasonable, and adequate.

b. The District Court Abused Its Discretion And Committed Clear Error By Relying On Honeywell's Conclusory And False Statement During Oral Argument That Class Members Can Obtain Remediation From The N.J. Department Of Environmental Protection.

On September 24, 2015, during oral argument at the final approval hearing, counsel for Honeywell raised for the first time, that class members could seek remediation from the NJDEP under the Spill Act, notwithstanding the settlement release.

> [T]hey would still have the right to go to DEP and say, that is contamination that has to be remediated, and under New Jersey, New Jersey's Spill Act which is the New Jersey statute that governs the remediation of contaminated sites, Honeywell, a person in any way responsible for the presence of that material, still has an obligation to the state to remediate it. New Jersey DEP can issue us a directive saying remediate that site. And so the home owner isn't foregoing an ability to obtain remediation of that COPR. They are foregoing an ability to seek damages from us in order -- above and beyond the remediation that the state would require.

(A630 at Tr. 104:2-14).

Contrary to Honeywell's claim during oral argument that the NJDEP could somehow make it remediate class members' homes, Judge Cavanaugh held

otherwise after a bench trial involving the cleanup of Honeywell's chromium ore processing sites in Jersey City in a precursor lawsuit brought by private citizens and a non-profit organization represented by Class Counsel. Judge Cavanaugh held that the "trial record is replete with instances of Honeywell's avoidance tactics," and that the NJDEP was ineffective at making Honeywell remediate its own property, much less class members' properties:

> As an example of Honeywell's behavior, Mr. Faranca who testified on behalf of NJDEP, experienced a pattern whereby Honeywell, when faced with proposals relating to the remediation of the Site, would make a proposal, NJDEP would reject it, it would be discussed, and sometime thereafter, Honeywell would return with the same or a similar rejected proposal. This pattern occurred frequently during the twenty-year period and frustrated DEP's continued efforts to design an appropriate permanent remedy for the Site. It became clear to me, that the NJDEP was understaffed and overworked, and therefore, susceptible to these and other delaying tactics.

Interfaith Cmty. Org. v. Honeywell Int'l, Inc., 263 F. Supp. 2d 796, 826 (D.N.J. 2003), *aff'd,* 399 F.3d 248 (3d. Cir. 2005).

Class Counsel echoed that position during oral argument at the Final Approval Hearing:

> [W]e believe that the enforcement by the DEP has frankly [been] anemic, and that is, I don't like to disparage the DEP in open court. However, I will make it easy on myself and I will cite to Judge Cavanaugh in his 2003 opinion which was sustained by the Third [C]ircuit, essentially reached the same conclusion that the DEP tried and tried for years to enforce clean-ups and they didn't work.

(A552 at Tr. 26:5-12).

Notwithstanding all of the above, and without any findings of fact, the District Court held,

> As Honeywell notes, an individual is not forgoing the possibility of all relief. Rather, as went undisputed[2] by Ms. Chandra at the Fairness Hearing, such an individual could turn to the New Jersey Department of Environmental Protection – and Honeywell would have to remediate pursuant to the New Jersey Spill Act, N.J.S.A. 58:10-23.11.

(A43).

The District Court abused its discretion by substituting Honeywell's false assurances for its own independent analysis of the settlement terms. *In re Pet Food Products*, 629 F.3d at 350 ("the court cannot substitute the parties' assurances or conclusory statements for its independent analysis of the settlement terms."). Judge Cavanaugh's findings of fact after a bench trial directly contradict Honeywell's claims regarding remediation and the NJDEP. Moreover, only after a trial brought by private citizens and a non-profit organization in *Interfaith*

[2] Make no mistake, counsel for Ms. Chandra did not at any time tell the District Court during oral argument that he agreed with Honeywell's statement. Rather, this was a claim Honeywell improperly raised for the first time during oral argument and counsel for Ms. Chandra had no opportunity at that time to research the claim or base an objection. *See Girsh v. Jepson*, 521 F.2d 153, 157 (3d Cir. 1975) (objector's "opportunity to participate effectively in the settlement hearing … was also frustrated by the late filing of the affidavits upon which plaintiffs and defendants relied to demonstrate the fairness of the settlement.") Furthermore, the District Court abused its discretion by refusing to allow counsel for Ms. Chandra to file a written, supplemental response after the hearing, while allowing Class Counsel and Honeywell that opportunity. (A653 at Tr. 127:8-22).

Community did Honeywell begin remediating its own property, and not because of the NJDEP. Therefore, any claim by Honeywell that class members can obtain remediation through the NJDEP is clearly erroneous and the District Court abused its discretion and committed clear error by relying on it.

c. The District Court Abused Its Discretion And Committed Clear Error by Approving the Settlement as Fair, Reasonable, and Adequate Compensation Even If a Class Member's Home Must Be Demolished to Remediate the Property.

Without any information concerning ground contamination of class members' homes or home valuations, the District Court held that the settlement is fair, reasonable, and adequate compensation even if a class member's home must be demolished to remediate the property. Honeywell confirmed during oral argument that the settlement release would preclude class members from recovering the value of their home if the home must be demolished to remediate the property.

> **THE COURT:** So in counsel's argument, they said if the home owner, what if it was found and the home owner would have to demolish their home and deal with remediation on top of that. Your position would be remediation would be available via the DEP if needed. As to the value of the home, any issues with respect to decreased value of the home, that would be waived within –
>
> **MR. DANEKER**: We are asking for that.
>
> **THE COURT**: Thank you, counsel.

(A630 at Tr. 104:15-23).

Putting aside that the District Court had no information whatsoever concerning ground contamination of class members' homes nor home values, it is clearly erroneous for the District Court to approve a settlement as fair, reasonable, and adequate that compensates only $1850-$3000 for a demolished home. Therefore, the District Court abused its discretion by approving such a settlement.

d. The District Court Abused Its Discretion by Approving an Overly Broad Release Which Includes Unknown, Unforeseen, and Future Claims That Are Impossible to Evaluate.

The Settlement also releases "UNKNOWN" and "UNFORESEEN" future claims that are impossible to evaluate. (A279 at § II(27)). Chromium waste from Honeywell's facilities was used as "fill material for use in construction and development projects at residential, commercial and recreational areas throughout Jersey City." (A83 ¶ 26). Because Honeywell's toxic waste site began operation in 1895 – more than a century ago (A273 at § I(1)), nobody knows what unknown and unforeseen claims are lurking underground that may be discovered in the future. Neither the District Court nor the parties provided any methodology to evaluate unknown or unforeseen future claims.

Because the "district court must make findings as to each of the nine *Girsh* factors in order to approve a settlement as fair, reasonable, and adequate, as required by Rule 23(e)," *In re Pet Food Products*, 629 F.3d at 350, and the court is unable to evaluate unknown and unforeseen toxic waste claims, or claims class

members may have in the future, the District Court abused its discretion by approving the settlement – releasing unknown, unforeseen, and future claims which are presently impossible to evaluate under *Girsh,* 521 F.2d at 157, and Fed. R. Civ. P. 23(e).

e. The District Court Abused Its Discretion By Not Considering The Negative Reaction Of The Class During a July 22, 2015 Meeting With Class Counsel.

The second *Girsh* factor, "the reaction of the class to the settlement," *Girsh,* 521 F.2d at 157, "attempts to gauge whether members of the class support the settlement." *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions,* 148 F.3d 283, 318 (3d Cir. 1998). "[A] combination of observations about the practical realities of class actions has led a number of courts to be considerably more cautious about inferring support from a small number of objectors to a sophisticated settlement." *In re GM Corp. Pick-Up Truck Fuel Tank Products Liab. Litig.*, 55 F.3d 768, 812 (3d Cir. 1995) (citations omitted). "[T]he inference of approval drawn from silence may be unwarranted." *Id*. District courts can use "other indications that the class reaction to the suit was quite negative." *Id*. at 813.

On July 22, 2015 Class Counsel hosted a public meeting (which lasted over two hours) to answer class member questions. Many homeowners expressed fear, sorrow, and even outrage. A distressed class member analogized the situation to Love Canal in Niagara Falls. (A508).

In response to the reaction of the class, Class Counsel, Steven German announced over the public address system, "I'm hearing that some people have very serious concerns about their property." And, "Based on the tenor of the crowd, it looks like a lot of people are unhappy with the settlement." (A508). Yet, Class Counsel did not disclose to the District Court the negative reaction of the class to the settlement that he personally observed during the July 22nd meeting.

Maureen Chandra urged the court to consider the reaction of the class during the July 22, 2015 meeting in response to *Girsh* factor no. 2, in both her written objections (A188; A508) and during oral argument. (A596-98 at Tr.70:18-72:15). In-fact, counsel for Ms. Chandra stressed that the court did not have to rely on his observations of class members at the July 22 meeting, but rather, could question Mr. German directly, who was present in the court room presenting oral argument for Class Counsel. (A597-58 at Tr.71:22-72:2).

The District Court refused to consider anything other than filed objections and opt-outs to gauge the reaction of the class. The District Court abused its discretion by only considering filed objections and opt-outs and not considering "other indications that the class reaction to the suit was quite negative." *G.M. Trucks*, 55 F.3d at 813.

f. The District Court Abused Its Discretion And Committed Clear Error In Evaluating the Third *Girsh* Factor.

When evaluating the third *Girsh* factor, "[w]hat matters is not the amount or type of discovery class counsel pursued, but whether they had developed enough information about the case to appreciate sufficiently the value of the claims." *In re Nat'l Football League Players Concussion Injury Litig*., 821 F.3d 410, 439 (3d Cir. Apr. 18, 2016), as amended (May 2, 2016). "The parties must have an 'adequate appreciation of the merits of the case before negotiating.'" *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 319 (3d Cir. 1998) (citing *G.M. Trucks*, 55 F.3d at 813).

Neither Honeywell nor Class Counsel had, or provided the court with, any information concerning the extent of ground contamination to class members' homes or the cost of remediation. Yet, the settlement release includes claims for contamination and remediation due to hexavalent chromium and other undisclosed "chemical contamination." (A279 at § II(27)). Since the parties had no information concerning ground contamination at class members' homes, they had not developed enough information to appreciate sufficiently the value of those claims. Since no information was provided to the District Court concerning ground contamination of class members' homes, the District Court abused its discretion and committed clear error in finding that "the third *Girsh* factor weighs in favor of approving the settlement." (A34).

g. The District Court Abused Its Discretion In Evaluating the Eighth and Ninth *Girsh* Factors.

"The last two *Girsh* factors evaluate whether the settlement represents a good value for a weak case or a poor value for a strong case." *In re Warfarin Sodium Antitrust Litig*., 391 F.3d 516, 358 (3d Cir. 2004). "The reasonableness of a proposed settlement is assessed by comparing the present value of the damages plaintiffs would likely recover if successful at trial, appropriately discounted for the risk of not prevailing[,] with the amount of the proposed settlement." *Sullivan v. DB Investments, Inc*., 667 F.3d 273, 323-24 (3d Cir. 2011) (citing reference and quotations omitted). The District Court was not provided any estimate of damages to evaluate the last two *Girsh* factors.

"Released Claims" in the settlement agreement include contamination and remediation claims, and "diminution of value to property," or in other words, lost property value. (A279 at § II(27)). Since the parties have not provided the court with any information concerning ground contamination of class members' homes, much less the cost to remediate, the District Court could not evaluate those claims at all, especially pursuant to *Girsh* factors eight and nine.

Putting aside that neither party provided the court with any information concerning ground contamination of class members' homes – presumably, Class Counsel did go to mediation with a lost property value, damage analysis. This is especially so since Class Counsel told the class during the July 22, 2015 meeting,

"The lawsuit that we are here about, is only about the loss of property values." (A504 at § II).

However, Class Counsel refused to provide the District Court with any estimate of damages concerning lost property value. In response to Ms. Chandra's objection, Class Counsel argued – not that an estimate of damages did not exist – but rather, it wasn't "final" and flat out refused to produce an estimate. (A522 at n. 6). And if Class Counsel truly had no estimate of damages concerning lost property value at the time of mediation – it further supports the position that Class Counsel had not "developed enough information about the case to appreciate sufficiently the value of the claims." *In re NFL Concussion Litig*., 821 F.3d at 439.

Class Counsel also said that producing a damage analysis in support of the settlement would injure Class B in their ongoing suit against PPG:

> Even assuming, arguendo, that plaintiffs' merits-phase damages expert had finalized his damages model at this stage of the litigation (which he has not), it would be prejudicial to force plaintiffs to disclose that figure while the case against PPG is proceeding.

(A522 at n. 6). In other words, Class Counsel said that producing a damage analysis in their representation of Classes A and C would harm Class B.

Because Class Counsel's conflict claim was raised for the first time in a reply brief, counsel for Ms. Chandra had no opportunity to file a response and addressed the issue during oral argument. (A615-17 at Tr. 89:20-91:1). The

District Court allowed Class Counsel a supplemental filing to respond to the conflict.

In its supplemental filing, Class Counsel did an about face and now claims the conflict "is speculative and hypothetical." (A677). In other words, Class Counsel blew hot and cold – claimed a conflict so they wouldn't have to produce a damage analysis, and then claimed the conflict was speculative and hypothetical after realizing they couldn't represent both sides in a conflict. *See RPC* 1.7(a) ("a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if: (1) the representation of one client will be directly adverse to another client; or (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client").

Instead of requiring an estimate of damages and evaluating whether the settlement represents a good value for a weak case or a poor value for a strong case, the District Court ignored the proper procedures for evaluating *Girsh* factors eight and nine, and side stepped the conflict issue. (A41). Because the court "must make findings as to each of the nine *Girsh* factors in order to approve a settlement as fair, reasonable, and adequate," *In re Pet Food Products*, 629 F.3d at 350, and the District Court failed to follow the proper procedures for evaluating *Girsh* factors eight and nine, the District Court abused its discretion.

Furthermore, "[t]he settling parties bear the burden of proving that the *Girsh* factors weigh in favor of approval of the settlement," *id.*, and "[w]hen the parties have not supplied the information needed for the court to determine whether the settlement is fair, reasonable, and adequate, the court may affirmatively seek out such information." *Id.* at 351. Since the District Court did not have an estimate of damages it needed to determine whether the settlement is fair, reasonable, and adequate, the District Court also abused its discretion by not requiring Class Counsel to produce an estimate of damages for the lost property value claim.

II. THE DISTRICT COURT ABUSED ITS DISCRETION BY APPROVING IMPROPERLY CALCULATED ATTORNEY FEES AND EXPENSES

a. The District Court Abused Its Discretion By Not Following New Jersey Court *Rule* 1:21-7 and Awarding Attorney Fees On The Gross Recovery Before Deducting Expenses, Instead of the Net Recovery, After Deducting Expenses.

New Jersey Court Rule 1:21-7 limits contingency fees in cases involving tortious conduct. *R.* 1:21-7(c). Attorney fees are calculated on the balance of the recovery *after* deducting litigation expenses. *R.* 1:21-7(d) (attorney fees "shall be computed on the net sum recovered after deducting disbursements in connection with the institution and prosecution of the claim").

Rule 1:21-7 applies to all attorneys admitted in New Jersey, regardless of "whether the case is to be litigated in the state or federal courts in New Jersey…."

Am. Trial Lawyers Ass'n, New Jersey Branch v. New Jersey Supreme Court, 316 A.2d 19, 21 (App. Div. 1974), aff'd, 66 N.J. 258 (1974). *Rule* 1:21-7 also applies to attorneys admitted *pro hac vice* in the District of New Jersey. *Local Rule* 85.1(c)(4) ("A lawyer admitted *pro hac vice* is deemed to have agreed to take no fee in any tort case in excess of New Jersey Court Rule 1:21-7 governing contingent fees."); *see also*, *Mitzel v. Westinghouse Elec. Corp*., 72 F.3d 414, 418 (3d Cir. 1995) ("we hold that the district court did not err in applying New Jersey Court Rule 1:21-7 or its local federal court counterpart to the Mitzels' contingent fee agreement."). *Rule* 1:21-7 also applies to class action settlements. *R.* 1:21-7(i)("Calculation of Fee in Settlement of Class or Multiple Party Actions.").

Rule 1:21-7 applies in this case because it applies to: (1) New Jersey admitted attorneys and *pro hac vice* attorneys practicing in the District of New Jersey, including Class Counsel and assisting counsel; (2) class actions; and (3) tort claims, including the claims in the Sixth Amended Complaint, *i.e*., private nuisance, strict liability, trespass, and negligence. (A78).

The District Court abused its discretion by disregarding *Rule* 1:21-7 and awarding attorney fees on the gross recovery before deducting expenses, instead of the net recovery after deducting expenses. The only reason the District Court gave for disregarding *Rule* 1:21-7 was that it could find no case in which a district court applied *Rule* 1:21-7 to a class action. (A54). But equally compelling is that the

District Court could find no case that even evaluated *Rule* 1:21-7 in the context of a class action. In other words – this is an issue of first impression. Even so, since *Rule* 1:21-7 is neither vague nor ambiguous, the District Court was obligated to follow the rule. The District Court abused its discretion by not following *Rule* 1:21-7 in this case.

Alternatively, the District Court also analyzed the attorney fee by multiplying the requested 25% by the entire settlement amount of $10,017,000 and arrived at a fee of $2,504,240. The District Court then calculated the net settlement amount by deducting litigation expenses of $1,140,023.77 and administrative expenses of $219,278.87 from the total settlement amount of $10,017,000 to arrive at the net settlement amount of $8,657,697.40. The court then divided $2,504,240 (the dollar amount counsel would have received if the attorney fee was based on 25% of the gross settlement amount) by the net settlement amount of $8,657,697.40 and concluded that amount "represents approximately 28%."[3] (A54 at n.11). The District Court then concluded that "the requested fee would be under 30% of the net recovery – which the Court finds reasonable in this action." (A54).

The problem with the District Court's reasoning is that Class Counsel had only requested an attorney fee of 25% in its moving papers and the class was only given notice of a 25% fee request. (A127). Only after Ms. Chandra objected, citing

[3] Actually, $2,504,240 divided by $8,657,697.40 is 28.92% or approximately 29%.

Rule 1:21-7, did Class Counsel alternatively, raise the request to 28.7% in a reply brief. (A218). The Class was not given notice of either the increase or Ms. Chandra's objection because neither was ever published on the settlement website. (http://honeywelljerseycitysettlement.com/courtdocs). And the District Court abused its discretion by *sue sponte* increasing the counsel fee to 28.92% without giving the class notice and an opportunity to object.

The District Court also committed clear error by finding that "Class Counsel provided website notice of the change in fee and expenses requests at http://honeywelljerseycitysettlement.com/." (A55). To the contrary, no notice of the change in counsel fee was ever posted on the settlement website. (http://honeywelljerseycitysettlement.com/courtdocs). Rather, the only document posted on the settlement website related to counsel fees (after Class Counsel posted its initial request for fees and expenses) is a letter dated October 9, 2015 which says counsel is submitting support for expenses for *in camera* review, and reducing the expense request from $1,191,174.67 to $1,140,023.77. (A663).

The District Court also abused its discretion by misinterpreting *Fed. R. Civ. P.* 23(h). The District Court held that "to date, the Court of Appeals for the Third Circuit has not interpreted Rule 23(h) to include a requirement that applications for attorneys' fee in class action settlements must precede the objection deadline," so "Rule 23(h) doesn't require that Class Members be given all the details of [a] fee

motion.…" (A56). But the District Court's reasoning is at odds with *Rule* 23(h)(2) which gives class members the right to object to a fee application. In other words, the right to object to a fee application would be illusory if the fee application is filed after the deadline to object.

Contrary to the District Court's interpretation of *Rule* 23(h), this Court has interpreted a *Rule* 23(h) violation when class members are not given the opportunity to object to the particulars of a fee request:

> the district courts denied class members the opportunity to object to the particulars of counsel's fee request because counsel were not required to file a fee petition until after the deadline for class members to object expired. By the time they were served with notice of the fee petition, it was too late for them to object. We have little trouble agreeing that Rule 23(h) is violated in those circumstances.

In re NFL Concussion Litig., 821 F.3d at 446 (citing *Redman v. RadioShack Corp*., 768 F.3d 622, 638 (7th Cir. 2014), other citation omitted).

b. The District Court Abused Its Discretion By Not Allowing the Class An Opportunity To Review The Basis For Class Counsels' Expense Request Before the Deadline to Object Had Expired.

Fed. R. Civ. P. 23(h)(2) gives class members the right to object to an award of attorney fees and costs. *Rule* 23(h) is violated when class members are denied "the opportunity to object to the particulars of counsel's fee request until after the deadline for class members to object expired." *In re NFL Concussion Litig*., 821 F.3d at 446. In other words, the right to object is illusory when information necessary to support an objection is withheld.

In its motion for fees and expenses, Class Counsel reported the total amount expended – but little else, and refused to provide a breakdown of how that total was arrived at. (A148-50; A171-72 at ¶ 42-44) Class Counsel did not disclose expenses in a way that was reviewable by the class or the court to determine reasonableness. *See generally*, *Dewey v. Volkswagen of Am.*, 728 F. Supp. 2d 546 (D.N.J. 2010) (rev'd and remanded on other grounds, 681 F.3d 170 (3d Cir. 2012)). "In determining whether the expenses claimed by counsel in common fund cases are reasonable, the courts consider whether these expenses were adequately documented and appropriately incurred in the prosecution of the case." *Id*. at 611.

At the fairness hearing, after the deadline for objections had passed, Class Counsel disclosed that they spent $700,000 on experts, $83,000 for depositions, $120,000 for document management, and $30,000 on legal research. (A637-38 at Tr. 111:22-112:16). While it is plausible that counsel could have spent $700,000 on experts in a case such as *Interfaith Cmty. Org. v. Honeywell Int'l, Inc.*, 263 F. Supp. 2d 796 (D.N.J. 2003), *aff'd*, 399 F.3d 248 (3d. Cir. 2005) – in this case, where counsel admitted that none of their experts did any physical testing of class members' homes, have no information concerning ground contamination at class members' homes, and no expert reports were produced in support of the motion for final approval of the settlement, Class Counsel has not adequately documented that $700,000 on experts was appropriately incurred in the prosecution of this case.

Furthermore, $30,000 for legal research also appears excessive without an explanation, such that counsel is seeking reimbursement for their monthly, regularly occurring, Westlaw or Lexis, ordinary, office overhead expenses.

After the fairness hearing, the District Court ordered Class Counsel to produce expense records for *in camera* review. Before Class Counsel submitted those records for *in camera* review, they reduced the expense request by more than $50,000 from $1,191,174.67 to $1,140,023.77. (A663). Had the District Court not requested expense records for *in camera* review, it is doubtful that reduction would have occurred.

More important, an *in camera* review of expenses did not cure the *Rule* 23(h) violation because the class was not afforded an opportunity to review the particulars of Class Counsels' expense request. Without an opportunity to review necessary information to support an objection, the right of class members to object pursuant to Rule 23(h)(2) was violated.

Even though Class Counsel did not disclose the particulars of their expenses outside of an *in camera* review, the claims administrator filed an affidavit and invoice via ECF for its expenses and fees, *albeit*, after the final approval hearing and after the deadline for objections had passed. In its filing, Garden City Group requested a grand total of $219,278.87 (A701) – far exceeding the "$100,000 to $120,000" Class Counsel anticipated in his declaration in support of fees and

expenses. (A155 at ¶ 7)[4]. Class Counsel's anticipation was "based on discussions and negotiations with the Claims Administrator," yet the District Court never examined or even referenced the $100,000 discrepancy in its opinion (A13), much less the substance of the "discussions and negotiations" that were the basis for that expectation – further supporting the necessity of class review.

Moreover, a cursory review of the claims administrator's invoices reveals inadequate documentation and explanation for large fees – e.g., $56,460.50[5] for "Project Management" and $18,352.00[6] for "Quality Assurance." (A703-06). Requests for reimbursement of expenses that are not adequately documented should be denied. *See Dewey*, 728 F. Supp. at 615 ("the reimbursement requests of $3,549.89 for what is labeled as 'attorney travel/disbursement/expenses,' $122.56 for what is labeled as 'searches,' $7,902.12 for what is labeled as 'internet investigation,' and $250 for what is labeled as 'witness expenses' will be denied for lack of specific information to show that the expenses are reasonable or how they furthered the plaintiffs' pursuit of their claims."). Class Counsel has no incentive to monitor or dispute these expenses because Class Counsel seeks their attorney fees as a percentage of the gross settlement – before deducting expenses.

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[4] "Plaintiffs anticipate that the cost of Notice and Administration will range from $100,000 to $120,000, based on discussions and negotiations with the Claims Administrator, Garden City Group."
[5] $40,429.50 + $16,031.00 = $56,460.50
[6] $13,810.00 + $4,542.00 = $18,352.00

The District Court abused its discretion and committed clear error by approving expenses that were not adequately documented. The District Court also abused its discretion by not allowing the class any opportunity to review the basis for Class Counsels' expense request before the deadline to object had expired.

c. The District Court Abused Its Discretion and Committed Clear Error by Allowing Class Counsel to Recover Expenses Pursuing Litigation Against PPG

Class Counsel pursued litigation against two distinct defendants on behalf of three different property classes – against Honeywell on behalf of Classes A and C, and against PPG on behalf of Class B. (A78). In truth, this case is really two distinct cases against different defendants who operated in different geographical areas of Jersey City. Honeywell and its Disposal Area "A" operated on the west side of Jersey City where homes of Classes A and C are located. (A119). PPG and its Disposal Area "B" operated on the east side of Jersey City where Class B homes are located. (A119).

There are no allegations in the Sixth Amended Complaint that Honeywell's operations in Disposal Area "A" caused harm to Class B homes (A98 at ¶ 97), or that PPG's operations in Disposal Area "B" caused harm to Class A or C homes. (A98 at ¶ 96). Absent the conspiracy charge under Count V, these cases would have been pursued individually.

Besides, if PPG and Honeywell conspired in the operation of Honeywell's Disposal Area "A," no doubt Class Counsel would have uncovered that fact after years of litigation and a bench trial before Judge Cavanaugh in *Interfaith Cmty. Org. v. Honeywell Int'l, Inc*., 263 F. Supp. 2d 796, 826 (D.N.J. 2003), *aff'd*, 399 F.3d 248 (3d. Cir. 2005). Yet, PPG was not a named defendant.

Moreover, Class Counsel told Judge Dickson during a status conference on October 18, 2013, that the conspiracy claim applied only for misleading the public and government agencies, and not for operations at defendants' disposal areas:

> So, there is a claim that the defendants worked together to mislead the public and regulatory agencies about the extent of the contamination, its risks and the risk to the surrounding community.
>
> . . .
>
> So, there is a conspiracy claim, but we are not seeking to hold PPG liable for what Honeywell did in its disposal area, or Honeywell liable for what PPG did in its disposal area.

(A230 at 43:3-12). Since the conspiracy claim did not apply to defendants' operations at their disposal areas, it provided no benefit to any class for contamination, remediation, or lost property value damages.

Class Counsel admitted in the Settlement Agreement that they did not expect the conspiracy claim to yield any relief above what is already available from the non-conspiracy claims:

> Named Plaintiffs and Class Counsel further expressly acknowledge that a claim for civil conspiracy by any Class B putative class member is not anticipated to recover any damages or relief in addition to that

> otherwise available under plaintiffs' or putative class members' non-conspiracy claims.

(A288 at §IV(10)(b)).

The conspiracy count appeared to be nothing more than a procedural device used by Class Counsel to mitigate litigation risk. This strategy is further exposed by examining the date Class Counsel began distinguishing expenses – after a settlement was reach with Honeywell, and not when Class Counsel first learned the conspiracy claim lacked merit. (A718 at ¶¶ 31-32). And if settlement negotiations with Honeywell had been unproductive, no doubt Class Counsel would have continued to advance expenses "on an indistinguishable basis."

Additional proof that the conspiracy claim lacked merit and the litigation against PPG was for the benefit of Class B is the fact that the Settlement Agreement releases all claims with prejudice against PPG on behalf of Classes A and C without PPG paying anything toward the settlement – while litigation by Class B continues against PPG. (A287-88 at ¶ IV (10)(a).) Since litigation was and still is being pursued against PPG for the sole benefit of Class B (and not for the benefit of Classes A and C), expenses pursuing litigation against PPG should not have been reimbursed from the Class A and C settlement fund. The District Court abused its discretion and committed clear error by allowing Class Counsel to recover expenses pursuing litigation against PPG from the settlement with Honeywell.

Expenses pursuing litigation against PPG are considerable. For example, "PPG produced greater than 2,500,000 pages of documents in 14 separate rolling productions. Many of these documents consisted of highly technical environmental reports such as remedial investigation and interim remedial measure reports, sampling data and scientific studies." (A161 at ¶ 30). Depositions were taken of "the Site Administrator for PPG chromium sites and his professionals…." (A162 at ¶ 33). "PPG's privilege logs consisted of 35,433 entries," whereas Honeywell's privilege logs consisted of only 6,054 entries. (A162 at ¶ 31). And, PPG removed the case from state to federal court. (A161 at ¶ 28).

Class Counsel says that the expenses pursuing litigation against Honeywell and PPG are "indistinguishable." (A718 at ¶ 31). Class Counsel provided no support that they couldn't differentiate expenses pursuing litigation against Honeywell from expenses pursuing litigation against PPG – apart from conclusory statements saying so. Class Counsel's conclusory statements are easily dismissed.

For example, at the Fairness Hearing, Class Counsel said they spent $83,000 for depositions, $120,000 for document management, $30,000 on legal research, and $700,000 on experts. (A637-38 at Tr. 111:22-112:16). Since depositions are discrete events, the costs to depose PPG's site administrator and his professionals, along with PPG employees can be determined. Also, document management expenses are based on quantity, usually page counts. Since PPG produced over

"2,500,000 pages of documents," the expense to manage those documents can be determined. Finally, experts provide opinions on discrete subject matter. Since Honeywell and PPG had operations in different geographical locations of Jersey City that did not affect properties outside of those geographical locations, any expert reports concerning lost property value or contamination should be limited to those geographical locations, and thus distinguishable.

Importantly, Class Counsel refused to provide any expert analysis or estimates of damages in support of the settlement. Class Counsel said that producing a damage analysis in support of the settlement would injure Class B in their ongoing suit against PPG:

> Even assuming, arguendo, that plaintiffs' merits-phase damages expert had finalized his damages model at this stage of the litigation (which he has not), it would be prejudicial to force plaintiffs to disclose that figure while the case against PPG is proceeding.

(A522 at n. 6). In other words, expert reports were withheld from Classes A and C for the benefit of Class B. Since Classes A and C were denied the use of those expert reports for the benefit of Class B, it would be unfair, unreasonable, and inequitable to charge Classes A and C for reports that were withheld to benefit another class.

Class Counsel acknowledged the inequity of having Classes A and C pay expenses pursuing litigation against PPG for the benefit of Class B.

> Should the Class B case against PPG resolve to the benefit of the plaintiffs, Class Counsel may perform a second distribution of expenses to the Class A and C plaintiffs from such recovery pursuant to an allocation formula approved by the Court at that time to ensure an equitable distribution of such costs between the Classes.

(A171 at ¶ 44). In other words, Class Counsel wants Classes A and C to bear the risk of Class B pursuing litigation against PPG. If Class B recovers from PPG then Classes A and C will be paid back. If there is no recovery, Classes A and C suffer the loss – not Class Counsel.

Class Counsel pursued the case against PPG on a contingency fee basis, and assumed the risk of nonpayment of fees and expenses absent a successful outcome. (A171 at ¶ 45, "All work was done on a contingency basis."). Class Counsel has not achieved a successful outcome against PPG. Yet, Class Counsel now wants Classes A and C to pay the expense for litigation it pursued against PPG on behalf of Class B. That is not fair or equitable.

No doubt there are some expenses that are indistinguishable, e.g., the filing fee. In circumstances where expenses are truly indistinguishable, they should be apportioned equally – 50% to the Honeywell classes and 50% to the PPG class – but only if all benefited equally from those expenses.

Since litigation against PPG was – realistically – always pursued for the sole benefit of Class B, expenses pursuing litigation against PPG should not be reimbursed from the Class A and C settlement fund. The District Court abused its

discretion and committed clear error by allowing Class Counsel to recover expenses pursuing litigation against PPG from the settlement with Honeywell.

CONCLUSION

For the foregoing reasons, Objector, Maureen Chandra respectfully requests:

(1) The decision of the United States District Court be reversed in its entirety;

(2) The Settlement Release be amended to exclude:

(a) Ground contamination and remediation claims, and

(b) Unknown, unforeseen, and future claims,

pursuant to the court's equitable powers and § IX(1)(l) of the Settlement Agreement, which gives the parties' consent for the court to "incorporate any other provisions as the Court deems necessary and just." (A295);

(3) Attorneys' fees be limited to 25% of the net settlement recovery, i.e., after deducting all expenses, including claims administration expenses;

(4) Expenses pursing litigation against PPG be excluded from recoverable expenses;

(5) Indistinguishable expenses (e.g., the filing fee) be apportioned equally – 50% to the Honeywell classes and 50% to the PPG class;

(6) Expenses not adequately documented or appropriately incurred in the prosecution of the case be excluded from recoverable expenses;

(7) Order Class Counsel to produce the particulars of their expenses to enable class review pursuant to Rule 23(h); and

(8) An estimate of damages be produced by Class Counsel for the lost property value claim, so the District Court can make a proper value determination pursuant to *Girsh* factors eight and nine.

Respectfully submitted,

August 22, 2016

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CERTIFICATE OF BAR MEMBERSHIP

I, Thomas Paciorkowski, counsel for Maureen Chandra, certify that I am a member of the bar of the United States Court of Appeals for the Third Circuit.

August 22, 2016 s/ Thomas Paciorkowski
Thomas Paciorkowski, Esq.

CERTIFICATE OF COMPLIANCE WITH L.A.R. 31.1(c)

I, Thomas Paciorkowski, certify that Windows Defender has been run on this file and no viruses were detected. The text of this electronic brief is identical to the paper copies.

August 22, 2016 s/ Thomas Paciorkowski
Thomas Paciorkowski, Esq.

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 10,336 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this this brief has been prepared in a proportionally spaced typeface using Microsoft Office Processional Plus 2013 in 14 point, Times New Roman font.

August 22, 2016 s/ Thomas Paciorkowski
Thomas Paciorkowski, Esq.

CERTIFICATE OF SERVICE

I, Thomas Paciorkowski, certify that on August 22, 2016, I electronically filed the Brief and Appendix of Appellant, Maureen Chandra with the Clerk of the Court for the U.S. Court of Appeals for the Third Circuit using the appellate CM/ECF system.

One original and six paper copies of the Brief and Appendix Volume I, and four copies of the Appendix, Volumes II thru V were also mailed to the Clerk on this day at the follow address:

Office of the Clerk
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Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

August 22, 2016

s/ Thomas Paciorkowski
Thomas Paciorkowski, Esq.