No. 16-2712

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

MATTIE HALLEY, *et al*.,
Plaintiffs-Appellees,

v.

HONEYWELL INTERNATIONAL INC., *et al*.,
Defendant-Appellee,

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 OF APPELLEE HONEYWELL INTERNATIONAL INC.

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Third Circuit Local Appellate Rule 26.1, Defendant-Appellee respectfully submits the following disclosure statement.

Honeywell International Inc. ("Honeywell") is a publicly-held corporation. It has no parent company and no publicly-held corporation owns 10% or more of stock in Honeywell. There are no publicly-held corporations not named as a party to this proceeding that have a financial interest in the outcome of the proceeding.

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INTRODUCTION

Out of an approximately 3,500 member class, a single objector has brought this appeal challenging the District Court's final approval of an environmental class action settlement. That settlement provides substantial monetary relief to thousands of residential property owners who have indicated both their satisfaction with, and desire to participate in, the settlement.

The settlement followed several years of contentious litigation and was the product of several months of negotiations, including two sessions before a neutral mediator. On April 27, 2016, the District Court issued its Opinion which certified a class for settlement purposes and granted final approval. As reflected in the District Court's detailed 56-page Opinion and the Transcript from the Fairness Hearing, the District Court thoroughly analyzed the proposed Settlement according to the requirements of Rule 23 and evaluated the fairness, reasonableness and adequacy of the proposed Settlement by considering each of the nine factors set forth in *Girsh v. Jepson*, 521 F.2d 153 (3d Cir. 1975). The District Court also carefully considered the three objections to the Settlement, including those submitted by Objector, and properly exercised its discretion in overruling them.

The Settlement has garnered considerable support from the members of the Class, with over two thousand claims submitted, only 28 opt-outs received, and three objections filed—only one of which led to this appeal. As demonstrated

below and by the record before this Court, the District Court was thorough in its review of the proposed Settlement. Objector has failed to demonstrate that the District Court clearly abused its discretion in finding that the proposed Settlement was fair, reasonable, and adequate pursuant to Rule 23 or that any of the District Court's findings under the *Girsh* factors were clearly erroneous. Accordingly, Honeywell respectfully submits that this Court affirm the District Court's final approval and reject Objector's attempts to prevent thousands of Class Members from obtaining the substantial monetary relief that the Settlement provides.

COUNTER-STATEMENT OF ISSUES

Whether the District Court appropriately exercised its discretion in approving the class settlement as fair, reasonable, and adequate.

Whether the District Court clearly erred in its findings under the second, third, eighth, and ninth factors set forth in *Girsh v. Jepson*, 521 F.2d 153, 157 (3d Cir. 1975).

COUNTER-STATEMENT OF RELATED CASES AND PROCEEDINGS

This case has not been before this Court previously. Objector claims that *Interfaith Community Organization v. Honeywell International, Inc.*, 399 F.3d 248 (3d Cir. 2005) is related. Although *ICO* concerned some of the same historical disposal practices at issue in this case, *ICO* was a case brought under the Resource Conservation and Recovery Act (RCRA); it did not involve any of the common

law claims asserted here; it pursued only injunctive relief; and it was brought by a faith organization and a group of individuals, not as a class action.

COUNTER-STATEMENT OF THE CASE

A. Factual Background

From 1895 to 1954, Mutual Chemical Company ("Mutual") operated a chromium chemical production plant on Route 440 in Jersey City, New Jersey. A82 (6th Am. Compl. ¶ 17). Plaintiffs allege that Honeywell is the successor to Mutual Chemical. *Id.* Another manufacturer, PPG and its predecessors, operated a chromium plant on Garfield Avenue in a different part of Jersey City from approximately 1924 to 1963. A83 ¶ 19.[1]

The chromium chemical production process employed by the plants generated a waste material known as chromium ore processing residue or "COPR." A78 ¶ 1. COPR is a soil-like material that contains hexavalent chromium as well as numerous other minerals. A79 ¶ 2. COPR from the Mutual plant was disposed of on several properties in the vicinity of the plant that have come to be known as Study Areas 5, 6, and 7 and Site 119. D.E. 367-1 at 1. The COPR that was generated by each of the entities during the production process also was used as fill material during the construction of

[1] PPG is also a defendant in the litigation, but is not a party to the Settlement Agreement, and with limited exception, the Settlement Agreement does not resolve claims against PPG.

various residential, commercial, and industrial sites in Jersey City and other parts of Hudson County. A83 ¶ 26. Sites at which COPR or chromium was suspected are referred to as "chromium sites" or "COPR sites" and bear numbers assigned by the New Jersey Department of Environmental Protection ("NJDEP") during its investigation of the COPR issue in Jersey City beginning in the early 1990s. A620 (Tr. 94:9-11).

In compliance with a consent order with the State of New Jersey,[2] a federal court order, and various federal consent orders resolving litigation, Honeywell has been actively remediating COPR at numerous sites (many of which are otherwise known as "Study Areas") in Jersey City for over a decade. D.E. 367-1 at 1-2.

For example, as a result of the citizen suit filed in *ICO*,[3] Honeywell excavated all of the COPR (over one million tons) from Mutual's primary disposal site (referred to as Study Area 7). A621 (Tr. 95:14-18). The excavation of Study Area 7, which Honeywell completed in 2009, was subject to substantial oversight by the Federal District Court of New Jersey, the NJDEP, and former Senator Robert Torricelli, whom the court appointed as Special Master to oversee the remediation. A620 (Tr. 94:15-20).

[2] D.E. 12-6 at 2.

[3] *Interfaith Cmty. Org. v. Honeywell Int'l Inc.*, Case No. 95-2097 (D.N.J. Complaint filed May 3, 1995).

Honeywell also has been actively remediating sites that comprise what are referred to as Study Areas 5 and 6, which are areas adjacent to or across the street from Study Area 7. A621-22 (Tr. 95:19-96:25.) This remediation resulted from Honeywell's efforts with NJDEP to implement remedies at those sites, as well as subsequent litigation that was filed by the Jersey City Incinerator Authority ("JCIA"), the Jersey City Municipal Utilities Authority ("JCMUA"), the Hackensack Riverkeeper, and a few individuals. A620-21 (Tr. 94:21-95:5).[4] Honeywell worked closely with the City of Jersey City and other property owners to craft an innovative resolution of the litigation that coordinated remediation with ambitious redevelopment that will transform the west side of Jersey City. A255. This resolution was embodied in a series of federal consent decrees entered from 2008 to 2010 and supported by the City, New Jersey City University, and Riverkeeper. Under the consent decrees, the federal District Court, a court-appointed Special Master, and NJDEP have overseen the cleanup. Remediation of Study Area 5 is complete and construction of New Jersey City University's West Side Campus has begun. A255. Remediation of Study Area 6 is expected to be complete by early 2017. A622 (Tr. 96:14-16.)

[4] *Jersey City Muni. Utils. Auth. v. Honeywell Int'l, Inc.*, Civ. No. 05-5955 (D.N.J.); *Jersey City Incineration Auth. v. Honeywell Int'l, Inc.*, Civ. No. 05-5993 (D.N.J.); *Hackensack Riverkeeper Inc. v. Honeywell Int'l Inc.*, Civ. No. 06-0022 (D.N.J.).

And, in 2011, Honeywell entered into a consent judgment with NJDEP pursuant to which Honeywell agreed to remediate several additional COPR sites, including the remediation of groundwater at Site 119 (referred to as Droyer's Point).[5]

B. History of this Litigation

As related to Honeywell, Plaintiffs' Fourth Amended Complaint (the operative complaint in October 2014 when Plaintiffs and Honeywell reached a settlement), focused on allegations arising out of 17 chromium sites for which Honeywell has assumed remediation or investigation responsibility—specifically those sites that comprise Study Areas 5, 6, and 7, and Site 119. D.E. 259. Asserting claims for negligence, strict liability, trespass, nuisance, and civil conspiracy on behalf of themselves and as representatives of two classes of property owners within the vicinity of these sites, Plaintiffs alleged that their properties have been adversely impacted by the disposal and alleged historical failure to properly remediate hexavalent chromium contamination and COPR at these chromium sites. *Id.* Plaintiffs alleged the presence of chromium contamination in soil, dust, air, and groundwater; Plaintiffs have never alleged chromium was present in the drinking water. *Id.* Plaintiffs sought damages for loss of use and enjoyment of property and diminution in

[5] *New Jersey Dep't of Envt'l Prot. v. Honeywell Int'l Inc.*, Case No. C-77-05 (N.J. Super. Ct., Hudson Cnty. Sept. 7, 2011).

value and also sought injunctive relief in the form of remediation—both of the chromium sites themselves and the Plaintiffs' and putative class members' individual properties. *See id.* at ¶ 57.

Since the inception of the case in May 2010, Plaintiffs' claims have been challenged, more fully developed, and refined. For example, Plaintiffs' original complaint filed in May 2010 asserted claims for both medical monitoring and property damages and covered approximately 137 chromium sites scattered throughout Jersey City, New Jersey. D.E. 1-1. No distinction was made between those sites for which Honeywell had assumed remediation responsibility, those for which PPG had assumed remediation responsibility, or those where a third party assumed remediation responsibility. *Id.*

As the litigation progressed, Plaintiffs amended their complaint several times, with each amendment resulting in a further narrowing of Plaintiffs' claims. For example, a Third Amended Complaint filed in June 2012 removed medical monitoring, pursued only a property damage class, and reduced the number of chromium sites from approximately 137 to 77, but still did not differentiate the sites and related class members between Honeywell and PPG. D.E. 124.

Only in January 2014, with the Fourth Amended Complaint, did Plaintiffs propose a putative class structure that differentiated between sites for which Honeywell assumed remediation responsibility and those for which PPG assumed

remediation responsibility. It did so by delineating the putative class areas as Classes A, B, and C. Classes A and C governed areas near Honeywell COPR sites and Class B covered areas near PPG COPR sites. D.E. 259.

From the initial Complaint to the Fourth Amended Complaint, Plaintiffs have continuously pursued allegations about both historical disposal practices of the former Mutual plant at Study Areas 5, 6, and 7 as well as remediation practices since the plant's closure in 1954. Specifically, Plaintiffs have consistently alleged that the case concerned Defendants' "emission, release, discharge, handling, storing, transportation, processing, and disposal" of the manufacturing by-product COPR and/or Defendants' failure to remove or "properly remediate said COPR and related chromium contamination." D.E. 1-1 ¶ 1; D.E. 124 ¶ 1; D.E. 259 ¶ 1.

Prior to reaching settlement, the settling parties engaged in extensive discovery into class certification and related merits issues over the course of nearly three years. This discovery included, among other things, the production of over one million pages of relevant documents by Honeywell, significant third-party document and deposition discovery, including the depositions of the key authors of the studies referenced in the Complaint, depositions of each of the named Plaintiffs and Class Representatives, depositions of regulators at the NJDEP, the Rule 30(b)(6) deposition of Honeywell's corporate designee on issues central to the case, and consultation with experts. A250. There also has been significant

motions practice, including an initial motion to dismiss filed by Honeywell, and several discovery motions and informal discovery letter applications. *Id.*

C. The Settlement Agreement

In July 2014, after years of protracted and contentious litigation, Honeywell and Plaintiffs reached a settlement in which Honeywell agreed to establish a non-reversionary Settlement Fund in the amount of Ten Million Seventeen Thousand Dollars ($10,017,000) for the benefit of residential property owners in Class Areas A and C (i.e., those within the vicinity of the former Mutual plant).[6]

The Settlement was the result of extended negotiations before an independent third-party mediator. It was memorialized in a settlement agreement executed in October 2014, and submitted to the district court for preliminary approval in November 2014. D.E. 367. The district court granted preliminary approval of the settlement on April 30, 2015. A69. Pursuant to the district court's preliminary approval order, the court-approved claims administrator began mailing the court-approved notices and claim forms to eligible class members informing them of the terms of the settlement and their ability to file claims to participate in the settlement, to opt out of the settlement, or to file an objection. *Id.* Class

[6] With limited exception, the Settlement Agreement does not resolve claims against PPG, nor does it relate to class members in "Class B" residing near the former Garfield Avenue plant.

members were given four months from the date of notice (i.e., until August 31, 2015) in which to file claims, opt-outs, or objections. A208.

Indicating their satisfaction with, and desire to participate in, the settlement, 2,232 property owners submitted valid claims for 2,089 of the 3,497 eligible class properties, representing a participation rate of nearly 60%. A698. Twenty-three class members opted out. A312. Although the class consists of 3,497 identified properties, only three class members (or less than 0.1%) objected to the settlement (A175; A 181; A205) and only Ms. Chandra has appealed the final judgment approving the settlement.

As a result of the Settlement, and after accounting for Class Counsel's attorneys' fees, incentive awards for the settlement class representatives, and claims administration expenses, owners of 2,089 residential properties are entitled to a payment of approximately $3,000 per property. A244.

On September 3, 2015, Honeywell and Plaintiffs submitted their joint motion for final approval of the Settlement Agreement, accompanied by a sworn affidavit by the claims administrator and eight exhibits reflecting various studies about chromium issues in Jersey City and Hudson County, New Jersey. A232.

In addition to filing an initial objection to the settlement, Ms. Chandra also filed a brief opposing Plaintiffs' and Honeywell's joint motion for final approval of the settlement (A500), to which Plaintiffs and Honeywell responded (A510;

A513). The district court held a Fairness Hearing on September 30, 2015, which lasted over three hours. A527. Ms. Chandra (through counsel) was the only objector to appear at the hearing and was given ample opportunity to present her objections to the settlement agreement. *Id.* Following the final approval hearing and pursuant to the district court's request, Plaintiffs and Honeywell submitted additional supplemental briefing in support of final approval, in part to address additional arguments raised by Ms. Chandra for the first time at the Fairness Hearing. A664; A682.

On April 26, 2016, Judge Esther Salas of the United States District Court for the District of New Jersey issued a 56-page Opinion granting final approval of the Settlement Agreement, entered a final order approving the settlement the same day, and entered final judgment on May 10, 2016. A13. In her Opinion, Judge Salas found that class certification was appropriate for purposes of settlement, that an evaluation of the *Girsh* factors weighed in the favor of finding the Settlement "fair, reasonable, and adequate" pursuant to Rule 23(e)(2), that the class notice met the requirements of Due Process and Rule 23, and that the plan of allocation of settlement class funds was appropriate. *Id.*

Objector's appeal timely followed. As is applicable to Honeywell, Objector challenges only the District Court's finding that the Settlement Agreement was

"fair, reasonable, and adequate" under the second, third, eighth, and ninth *Girsh* factors.[7]

SUMMARY OF ARGUMENT

I. The District Court did not commit clear error in evaluating the second, third, eighth, and ninth *Girsh* factors.

First, the District Court did not commit clear error in evaluating the second *Girsh* factor, which considers the reaction of the class, when it failed to consider unverified out-of-court statements of individuals at a community meeting, and instead considered the reaction of the class as reflected in the record before it with attention to the number of claims submitted, opt-out requests received, and objections filed.

Second, the District Court did not commit clear error in evaluating the third, eighth, and ninth *Girsh* factors, which consider, respectively, "the stage of proceedings and the amount of discovery completed;" "the range of reasonableness of the settlement fund in the light of the best possible recovery;" and "the range of

[7] Objector does not challenge the District Courts findings under the first, fourth, fifth, sixth and seventh *Girsh* factors, nor does Objector challenge the certification of the classes for settlement purposes, the plan of allocation of settlement class funds, or the adequacy of class notice. In addition, although Objector challenges Class Counsel's request for reasonable costs and attorneys' fees, that argument is directed at Settlement Class Counsel and therefore Honeywell does not address it here.

reasonableness of the settlement fund in the light of all the attendant risks of litigation." *Girsh*, 521 F.2d at 157 (internal quotation marks and citation omitted). The Settlement was reached following years of litigation and after substantial discovery was completed, allowing both sides to adequately appreciate the merits of their claims and defenses and the attendant risks of further litigation. Moreover, the District Court had sufficient information about the presence (or absence) of contamination and alleged diminution in property values to determine whether the Settlement was fair, reasonable, and adequate.

II. The District Court did not abuse its discretion in approving the Settlement Agreement's release of claims.

First, the release of unknown and unforeseen claims is appropriate given that the release was based on the same factual predicate as the underlying litigation.

Second, the release properly disposed of claims for remediation costs, given that, contrary to Objector's argument, a class member bound by the release would not be without a remediation remedy should chromium contamination be identified in the future given the NJDEP's express statutory authority for directing or implementing the remediation of contaminated property.

STANDARD OF REVIEW

The decision to certify a class and approve a classwide settlement is reviewed for an abuse of discretion. *In re Nat'l Football League Players*

Concussion Injury Litig., 821 F.3d 410, 425-26 (3d Cir. 2016), *as amended* May 2, 2016, *petition for cert. filed*, No. 16-283 (Sept. 2, 2016). An abuse of discretion exists only "if 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.'" *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 312 (3d Cir. 2008) (citation omitted), *as amended* Jan. 16, 2009.

In determining the fairness of a proposed settlement, district courts are instructed to consider the nine factors articulated in *Girsh v. Jepson*, 521 F.2d 153, 157 (3d Cir. 1975), and, because the district court's findings under *Girsh* are factual, they are to be upheld unless they are clearly erroneous. *In re Pet Food Prods. Liab. Litig.*, 629 F.3d 333, 350 (3d Cir. 2010). "'Because of the district court's proximity to the parties and to the nuances of the litigation,'" this Circuit accords "'great weight to the [district] court's factual findings' in conducting the fairness inquiry." *Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 320 (3d Cir. 2011) (en banc) (citation omitted).

ARGUMENT

I. The District Court Did Not Abuse Its Discretion in Concluding that the Second, Third, Eighth, and Ninth *Girsh* Factors Weighed in Favor of Finding the Settlement Fair, Reasonable, and Adequate.

A. The District Court Did Not Commit Clear Error in Evaluating the Second *Girsh* Factor

Objector challenges the District Court's assessment of the second *Girsh* factor, which considers the "'reaction of the class.'" *Girsh*, 521 F.2d at 157 (citation omitted). Objector asks this Court to conclude that it was clear error for the District Court to look beyond the documented and sworn record before it—which detailed the number of affirmative claims filed, opt-out requests received, and objections lodged—and that instead the District Court should have considered Objector's Counsel's hearsay characterization of the reaction of the class based on a community meeting Objector's Counsel attended in July 2015. (*See* Br. 25-26 (describing that certain individuals expressed fear and sorrow).

Objector relies on *In re General Motors Corp. Pick-Up Truck Fuel Tank Products Liability Litigation*, 55 F.3d 768, 813 (3d Cir. 1995) for the proposition that courts can consider "'other indications that the class reaction to the suit was quite negative.'" (Br. 25.) But Objector's reliance on *General Motors* is misplaced. As this Circuit recently noted, in *General Motors*, the court looked to those other indications because of a "concern that the passive victims of a product defect lacked 'adequate interest and information to voice objections.'" *In re Nat'l*

Football League Players Concussion Injury Litig., 821 F.3d at 438(citation omitted). Just as those concerns were not present in *NFL Players*, those same concerns are not present here, where claims were affirmatively filed for over 60% of the settlement class properties and there has been no suggestion that the class notice was in any way lacking information or otherwise unclear.[8]

Objector's position that the District Court should have considered Objector's Counsel's characterization of unverified out-of-court statements by individuals at a community meeting is unsupported by the case law. More importantly, it is untenable as a policy matter to have district courts approving or disapproving well-subscribed class settlements based on hearsay and a sole objector's say-so. This is particularly so given that Objector has not presented any information to demonstrate that the attendants at the community meeting whose views she attempts to characterize were in fact members of the Settlement Classes as opposed to residents of the community at large. Objector has provided no names, no

[8] For this reason, Objector's suggestion that the Court should infer that class members who did not respond to the class Notice "either didn't understand the proceedings or didn't agree with the Settlement" (Br. 8) should not be credited. Not only was this argument not raised below and is therefore waived, *see DIRECTV, Inc. v. Seijas*, 508 F.3d 123, 125 n. 1 (3d Cir. 2007), but it is untenable where Objector nowhere challenged (either in the District Court or on appeal) that the class notice or related proceedings were in any way deficient. Moreover, Objector's contention that the Court should infer dissatisfaction from the number of class members who did *not* respond to the notice is contrary to Third Circuit law, which has recognized that in the class settlement context, it is generally appropriate to assume that "silence constitutes tacit *consent to the agreement*." *Bell Atl. Corp. v. Bolger*, 2 F.3d 1304, 1313 n. 15 (3d Cir. 1993) (emphasis added).

addresses or dates of ownership, and no other way to verify the individuals' membership in the Classes. This stands in sharp contrast to the formal claim, opt-out, and objection process where an individual is required to demonstrate his or her membership in the class. *See, e.g.*, A311 ¶ 16 (affidavit from Claims Administrator describing the process for determining whether class member had submitted proper information to establish membership in Settlement Class); A321 ¶ 16 (notice of proposed settlement explaining that opt-out requests must include name and address of Settlement Class property); A321 ¶ 21 (similarly requiring that objections set forth the name and address of the individual filing the objection).

And, when considering the formal record of claims, opt-outs, and objections, this Court has made clear that "[t]he vast disparity between the number of potential class members who received notice of the Settlement and the number of objectors creates a strong presumption that this factor weighs in favor of the Settlement . . . ." *In re Cendant Corp. Litig.*, 264 F.3d 201, 235 (3d Cir. 2001). Thus, in *Stoetzner v. United States Steel Corp.*, 897 F.2d 115, 118-19 (3d Cir. 1990), the Court noted that "only" 29 objections from a 281 member class "strongly favors settlement." In *In re Prudential Insurance Co. America Sales Practice Litigation Agent Actions*, 148 F.3d 283, 318 (3d Cir. 1998), this Court affirmed the district court's determination that the class response was favorable

where 19,000 policyholders out of 8 million opted out and 300 class members objected. And in *In re Warfarin Sodium Antitrust Litigation*, 391 F.3d 516, 536 (3d Cir. 2004), this Court affirmed the approval of a settlement where "[t]he District Court concluded that the insignificant number of objections filed weighed in favor of approving the settlement."

Consistent with Third Circuit case law, the District Court properly evaluated the record it had before it, explaining during the Fairness Hearing that:

> [W]e are dealing with what the Court has before it, I wasn't there at this meeting. But there is a process in which parties have to object and I have received three objections. . . . [W]e have to be mindful of what the Court has, and what the Court has is indeed, you know, three objectors . . . and 20-odd opt-outs . . . . I want to be mindful you keep that in mind in terms of what I have by way of documentation to rely on.

A597 (Tr. 71:1-4; 73:12-18). The documentation the District Court had to rely on were the sworn affidavits by the Claims Administrator setting forth the notice process and the number of claims filed and opt-outs received. A32, A306, A695. Relying on that affidavit, the District Court found that 2,232 valid claims were submitted for 2,089 of the 3,497 identified class properties, reflecting a response rate of nearly 60%. A32. The District Court compared that high response rate to the only 28 opt-out requests and 3 objections filed. *Id.* It then concluded that, "[g]iven the relative minimal number of objectors and opt-outs . . . the second

Girsh factor weighs in favor of approving the settlement." A32-33. Nothing about this finding was clearly erroneous.

B. The District Court Did Not Commit Clear Error in Evaluating the Third *Girsh* Factor

The third *Girsh* factor "captures the degree of case development that class counsel have accomplished prior to settlement." *General Motors*, 55 F.3d at 813. "Through this lens, courts can determine whether counsel had an adequate appreciation of the merits of the case before negotiating." *Id.* Thus, "[t]o ensure that a proposed settlement is the product of informed negotiations, there should be an inquiry into the type and amount of discovery the parties have undertaken." *Prudential*, 148 F.3d at 319.

As the parties presented to the District Court, both Plaintiffs and Honeywell have undertaken extensive discovery in this litigation, which has enabled each side to properly evaluate the merits and limitations of their respective positions. Prior to reaching settlement, the parties engaged in extensive discovery into class certification and related merits issues over the course of nearly three years. A240; A250. This discovery included: (a) the production of over one million pages of documents by Honeywell regarding the history of contamination, status of remediation efforts, sampling and monitoring data, hundreds of photographs, real estate records, depositions and exhibits from prior chromium-related litigations, regulatory reports and correspondence with regulatory agencies, and other

materials for all of the Mutual Sites at issue in the litigation; (b) significant third-party document and deposition discovery, including the depositions of the key authors of the studies referenced in the Complaint and depositions of regulators at the NJDEP; (c) the deposition of remediation contractors of Honeywell; and (d) the Rule 30(b)(6) deposition of Honeywell's corporate designee on issues related to the history and extent of chromium contamination, remedial investigations and remediation efforts, and correspondence with the public about remediation, among other topics. A250. Each of the Named Plaintiffs, including the Class Representatives for Class A and C, also gave deposition testimony, in addition to responding to thirty interrogatories and over seventy document requests. *Id.* Finally, the settling parties had retained and consulted with experts and litigated several dispositive and discovery-related motions. *Id.* Thus, when the settlement was reached, the Settling Parties had "'conducted extensive discovery, retained and used experts, and litigated pre-trial motions.'" *Cendant Corp.*, 264 F.3d at 235 (citation omitted). This lengthy and well-developed record meant that "'the parties understood the merits of the class action and could fairly, safely and appropriately decide to settle . . . .'" *Id.* (citation omitted).

After surveying the "extensive discovery [that] was exchanged regarding class certification and related merits issues," the District Court concluded that it was "satisfied that Settlement Class Counsel and Honeywell have conducted

sufficient discovery to inform settlement negotiations." A34. Moreover, the District Court appreciated that the Settlement resulted not only from the significant discovery that had been completed, "but also two rounds of multi-day negotiations before Eric D. Green, an experienced and skilled third-party mediator whose background the Court has independently reviewed." *Id.* Against this backdrop, the District Court's finding that "the third *Girsh* factor weighs in favor of approving the settlement" (*id.*) was not clearly erroneous. *See Warfarin*, 391 F.3d at 537 ("Based on the type and amount of discovery undertaken by the parties, the District Court concluded that class counsel adequately appreciated the merits of the case before negotiating, and we agree that this factor strongly favors approval of the settlement.").

C. The District Court Did Not Commit Clear Error in Evaluating the Eighth and Ninth *Girsh* Factors

"The last two *Girsh* factors ask whether the settlement is reasonable in light of the best possible recovery and the risks the parties would face if the case went to trial." *Prudential*, 148 F.3d at 322. In other words, 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." *Warfarin*, 391 F.3d at 538.

Objector argues that the District Court committed clear error because it lacked information about ground contamination or diminution in property values. Objector is wrong on both fronts.

Objector is incorrect that the District Court lacked sufficient information about the presence (or absence) of contamination at class members' homes. Honeywell explained to the District Court that "thousands of air, soil, and groundwater samples have been collected at Study Areas 5, 6, and 7 and Site 119 in connection of the remediation of those sites," which in Honeywell's view "demonstrates that neither COPR nor chromium disposed on the Mutual Sites has migrated into the Class A or Class C areas or otherwise contaminated Plaintiffs' properties." A252. Moreover, during the Fairness Hearing, Counsel for Honeywell expanded upon this data by providing additional background and submitting two exhibits for the District Court's review. A618-29. After detailing the history of Honeywell's remediation activities, Counsel for Honeywell explained:

> Where does that leave us in terms of what we know about the contamination? For the most part, we know where it is, it went across the street from the plant. We can easily identify it. We have thousands of soil points. We have all of our air samples showing that the migration has not occurred into the community through the air. And we have groundwater data, and the groundwater data shows that the groundwater flows away from the communities, and towards the Hackensack River. So there is groundwater contamination. It is being actively remediated through a treatment system being monitored by the federal court, but it is flowing away from the neighborhood and into our treatment system now before it hits the Hackensack River. So the opposite direction of class A and class C.

A625 (Tr. 99:5-20).

Having explained what the data showed about contamination on the chromium sites themselves, Honeywell also presented to the District Court its view about contamination (or the lack thereof) within areas throughout Jersey City, including in the class boundaries. Indeed, as exhibits to the parties' joint motion for final approval of the settlement, the parties submitted to the District Court several studies, which Honeywell contended demonstrated an absence of contamination within the class boundaries, including:

(1) Final Report: Chromium Exposure and Health Effects in Hudson County: Phase I, Nov. 24, 2008 ("2008 Dust Study") (A455);

(2) Final Report: Characterization of Hexavalent Chromium Concentrations in Household Dust in Background Areas (Mar. 24, 2009) ("2009 Dust Study") (A346);

(3) Hexavalent Chromium in House Dust—A Comparison Between an Area with Historic Contamination from Chromate Production and Background Locations (2010) (A362); and

(4) Final Report: Chromium Exposure and Health Effects in Hudson County: Phase II (Jan. 6, 2012) (A368).

Specifically, with respect to the 2008 Dust Study, Honeywell explained that the report "was in fact 'Phase 1' in a two-phase study[,] [where] Phase 1 sampled 100 homes in Jersey City from 2006 to 2008 for hexavalent chromium in dust, and found that only 2% exceeded the residential cleanup criterion for hexavalent chromium, with measurable but low levels found in most other homes." A252.

Honeywell further explained that a follow-on background study, the 2009 Dust Study, looked at hexavalent chromium in household dust in homes in other communities in New Jersey where there is no history of chromium production, including homes in New Brunswick, over 30 miles from Jersey City. *Id.* That study found (1) that the hexavalent chromium levels in Jersey City were as low as urban background in areas with no history of chromium contamination; (2) that wood stains, paint and other household materials are a likely source of the hexavalent chromium found; and (3) that the results were "'the opposite of what would be expected if COPR were a significant source of [hexavalent chromium] in Jersey City.'" A252-53 (citation omitted). The results of both phases of the study were published in a peer-reviewed article in 2010 which observed, among other things, that "'airborne particulate transport from the outside environment is not the major source of the Cr+6 found on indoor surfaces'" and "'there are no data to suggest a contribution from residual chromate production waste to the Cr+6 we observed in the house dust in Jersey City.'" A253 (citation omitted).

In addition, Honeywell explained that yet additional follow-on studies have been conducted since this lawsuit was filed, including a January 2012 study conducted by New Jersey's Environmental and Occupational Health and Safety Institute, which conducted urine sampling to examine actual chromium exposure in children living in the areas that had been the subject of the earlier dust studies. *Id.*

That study, which included another round of dust sampling, confirmed that levels of chromium dust in Jersey City homes were at or below background and also found that the urinary chromium concentrations of the Jersey City children tested were similar to those of children living in communities with no history of chromium waste. *Id.*

In sum, Honeywell explained that "the studies demonstrate that the presence of COPR and/or chromium at the Mutual Sites have no substantial impact on surrounding neighborhoods" and indeed, "demonstrate that chromium exposure levels in Jersey City are at or below levels that are found in communities with no historic chromium waste sites." *Id.* Thus, "[i]n Honeywell's view those dust studies and urine studies demonstrate the absence of any exposure in these neighborhoods." A627 (Tr. 101:7-9).[9]

To be sure, Plaintiffs submitted to the District Court their countervailing views of these studies and what Plaintiffs believe them to show. Indeed, the parties' joint submission in support of final approval described at great lengths the parties' differing positions with respect to the state of the science and the evidence (or lack thereof) of class-wide contamination. As such, the District Court found that, as related to the studies, "this is not a situation in which *no* information

[9] For this reason, Objector's suggestion that a class member's home may need to be demolished in order to remediate (Br. 23) is not only entirely speculative, but is also unsupported by any evidence before the District Court.

exists," but where the parties "disagree as to the significance and impact of that information . . . ." A41 (Op. at 29) (emphasis in the original).

In the face of this evidence, Objector still argues that the parties did not provide sufficient information about contamination. But contrary to Objector's assertion, Honeywell explained what it did know through its years of environmental investigation and remediation: that other than in the clearly delineated Study Areas and Site 119 that are the subject of remediation, "there is zero evidence of widespread class wide contamination." A629 (Tr. 103:11-12). In fact, the only way to conclusively determine the presence of COPR in the class areas "is to test every home, which is quintessentially an individual lawsuit, not a class action lawsuit." *Id.* (Tr. 103:12-15). The District Court appreciated as much when it explained that requiring testing of every property before the Settlement Agreement can be approved "'would essentially require the Court to try the case in the context of a settlement hearing, thus defeating the very purpose of settlement, which is to avoid the delay and expense of continued litigation.'" A41 (Op. at 29) (quoting Hon. Reply in Supp. of Final Approval, A511.)

Accordingly, as demonstrated through the substantial information presented to the District Court by way of briefing, exhibits, and argument during the Fairness Hearing, the District Court had sufficient information about the presence (and

absence) of ground contamination to conclude that the Settlement was fair, reasonable, and adequate.

Objector is also incorrect that the District Court lacked sufficient information about property values. Honeywell explained to the District Court that if the case proceeded, it "'would proffer expert testimony that there has been *no discernable diminution in property value attributable to the Mutual Sites* and that additional evidence demonstrates that Plaintiffs and Class Members *have not been damaged at all*.'" A40-41 (Op. at 28-29) (quoting Final Approval Brief, A260) (emphasis added). Elsewhere it its Opinion, the District Court also noted its understanding that "Honeywell avers that there are past and ongoing substantial remediation and redevelopment efforts—which undercuts Plaintiffs' diminution-of-value argument." A37 (Op. at 25, citing Final Approval Brief, A254-55).

The District Court also recognized that on the question of ultimate damages, "there would be a significant battle of experts." *Id*. The District Court was right. Assessing how nearly 3,500 properties with different ownership histories, with different amenities, and in different neighborhoods may or may not have been impacted by an alleged "stigma" associated with the presence of nearby Study Areas being remediated or the publication of certain chromium related studies is a complex endeavor that would necessarily require expert evaluation. *See*, *e.g.*, *Torres v. Schripps, Inc.*, 342 N.J. Super. 419, 430 (App. Div. 2001) (noting that

"expert testimony is generally needed to determine the market value of real property"); *see also Player v. Motiva Enters., LLC*, 240 F. App'x 513, 521-22 (3d Cir. 2007) (summary judgment was proper once property valuation expert was excluded because otherwise there was no proof of loss of property value). This fact makes this case distinguishable from *In re Pet Food*, where the information sought was not the subject of expert testimony, but rather, was readily quantifiable based on objective data (information regarding pet food sales) likely in the company's possession. 629 F.3d at 355.

When concluding that "precedent does not compel rejecting a settlement and forcing Plaintiffs' expert to provide a damages model at this juncture, thereby risking excessive speculation, additional costs and/or delay," the District Court appreciated that the case had been bifurcated into a class phase and a merits phase, and was still in the pre-class certification phase, which meant that the merits damages expert had not completed a damages model. A42 n.8 (Op. at 30 n.8). Thus, the District Court concluded that "[d]etermining the best possible recovery in this case appears to risk either being exceedingly speculative—or exceedingly burdensome by compelling litigation to continue, including further fact discovery and full-blown expert discovery, all of which this Settlement seeks to avoid." A41 (Op. at 29).

Given the "exceedingly speculative" or "exceedingly burdensome" endeavor of determining the best possible recovery and because the Settlement "'yields substantial and immediate benefits'" without the attendant risks of further litigation, the District Court did not commit clear error in finding that "the last two *Girsh* factors weigh in favor of approval over the objection of Ms. Chandra." A41-42; A44 (Op. at 29-30; 32) (citation omitted).

II. The District Court Did Not Abuse Its Discretion in Approving the Settlement Release

Objector's final argument is that it was an abuse of discretion for the District Court to approve the settlement release. This is so, according to Objector, for two reasons (1) because it released unknown and unforeseen claims; and (2) because it released claims related to remediation.

A. The Release of Unknown or Unforeseen Claims is Routinely Approved and Was Not an Abuse of Discretion

Objector argues that it was an abuse of discretion for the District Court to approve a release of unknown and unforeseen claims, but cites absolutely no law suggesting that a release of such claims is prohibited. That Objector failed to do so is unsurprising because even Objector conceded during the final approval hearing that "[y]es, you could have unknown claims eliminated in a settlement . . . ." (A601 Tr. 75:9-10).

And Objector was right. It is settled in this Circuit that a class representative can enter into a settlement barring future claims "even though the precluded claim was not presented, and could not have been presented, in the class action itself." *In re Prudential Ins. Co. of Am. Sales Practice Litig.*, 261 F.3d 355, 366 (3d Cir. 2001). "The key inquiry is whether the factual predicate for future claims is identical to the factual predicate underlying the settlement agreement." *Freeman v. MML Bay State Life Ins. Co.*, 445 F. App'x 577, 579 (3d Cir. 2011). The very purpose of a release for "unknown" claims is to preclude a future litigant from claiming ignorance of certain claims that it may have had but did not pursue. *See Ingram Corp. v. J. Ray McDermott & Co.*, 698 F.2d 1295, 1312 (5th Cir. 1983) (noting that litigant cannot escape the validity of the releases by merely asserting ignorance of its claim; "[i]ndeed, it may be unaware of many claims existing in its favor").

Here, in relevant part, the "Released Claims" include claims that:

> arise out of the release, migration or impacts or effects of COPR, hexavalent chromium, or other chemical contamination (a) originating from the Mutual Facility at any time through the date of this Agreement or (b) present on or released or migrating at or from Study Area 5, Study Area 6 South, Study Area 6 North, Study Area 7, or Site 119 at any time through the date of this Agreement, including but not limited to property damage, remediation costs, diminution of value to property, including stigma damages, loss of use and enjoyment of property, fear, anxiety, or emotional distress as a result of the alleged contamination.

A278-79 (D.E. No. 415-3 at 7-8).

The claims being released thus track the allegations in the Complaint. The Complaint's allegations concerned releases or migrations of COPR, hexavalent chromium, and other hazardous substances from the Mutual facility (*see, e.g.*, D.E. 259 ¶¶ 17, 23, 26, 30) and/or from the chromium sites within Class Areas A and C (D.E. 259 ¶¶ 67, 69) for which Plaintiffs and Class Members sought:

> redress and damages for economic losses, such as loss of property value and the interference with the use and enjoyment of their property; [and the] the prompt excavation and removal of all COPR and related contaminants from Plaintiffs' and the Class Members' properties and from those COPR sites located within the defined class areas.

D.E. 259 ¶ 57. Accordingly, the release is based on the same "factual predicate" underlying the litigation and was therefore properly approved.

B. The Release of Claims for Remediation Was Appropriate and Not an Abuse of Discretion

Objector's final argument is that the settlement release improperly covers claims concerning remediation. Br. 20. As discussed above, the release of claims, including those for "remediation costs" is based on the same factual predicate as the litigation, where Plaintiffs sought the "prompt excavation and removal of all COPR and related contaminants from Plaintiffs' and the Class Members' properties" (*see* D.E. 259 ¶ 57) and is therefore appropriate.

Unable to challenge the release's language based on the underlying factual predicate doctrine, Objector resorts to arguing that Honeywell's statement to the District Court that class members could seek remediation from the NJDEP under the Spill Act was conclusory and false. (Br. 20.) It was neither. Honeywell explained to the District Court that if chromium contamination were located on a class member's property, that class member:

> 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 [Honeywell] 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 [Honeywell] in order -- above and beyond the remediation that the state would require.

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

This statement was an accurate representation of NJDEP's remediation authority. Specifically, the New Jersey Spill Compensation and Control Act, NJSA 58:10-23 *et seq.* (the "Spill Act") authorizes the NJDEP to "act to clean up and remove or arrange for the cleanup" of any hazardous discharges or to "direct the discharger to cleanup and remove, or arrange for the cleanup and removal, of the discharge." *Id*. at 23.11f(a)(1); *see also Morristown Assocs. v. Grant Oil Co.*, 220 N.J. 360, 364-65 (2015) (explaining that the Spill Act "'prohibits the discharge

of hazardous substances,'" "'provides for the cleanup of that discharge,'" and imposes joint and several liability on the responsible parties) (quoting NJSA 58:10-23.11f(a)(1)) .

A key feature of the Spill Act was the establishment of the New Jersey Spill Compensation Fund ("Spill Fund"). NJSA 58:10-23.11i. "The purpose of the Spill Fund is to finance the prevention and cleanup of oil spills and hazardous-waste discharges and to compensate resort businesses and other people damaged by such discharges." *Buonviaggio v. Hillsborough Twp. Comm.*, 122 N.J. 5, 7 (1991) (citation omitted). To effectuate this purpose, the Spill Fund provides a mechanism by which innocent property owners who incur cleanup and removal costs or who otherwise suffer damages due to diminution in value are eligible for compensation. *See generally* NJAC 7:1j-2 *et seq.*; *see also Marsh v. New Jersey Dep't of Envtl. Prot.*, 152 N.J. 137, 139 (1997) (noting that the Spill Fund "provides for qualified claimants reimbursement of the cleanup costs for environmental contamination").

Thus, not only can NJDEP direct dischargers to clean up property, but property owners can also submit claims for cleanup costs or other property damages against the Spill Fund directly. But the bottom line is that regardless of the avenue pursued, a property owner is not without recourse with respect to any future costs it may incur to remediate contamination on its property. Here, what

the Settlement Agreement's release provides is that if the property owner does incur such remediation costs, the property owner cannot pursue such claims against Honeywell directly.

The District Court clearly understood this distinction. Specifically, the District Court understood that even if an individual were bound by the settlement release here, that "individual is *not* forgoing the possibility of all relief." A43 (emphasis in original). Rather, "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." *Id.* (citing A629-30, Tr. 103:16-104:14). The District Court properly recognized that "the Release does *not* require giving up the ability to obtain remediation all together; it releases 'an ability to seek damages from [Honeywell] . . . above and beyond the remediation that the state would require.'" *Id.* (emphasis in original) (quoting A630, Tr. 104:10-14).

Finally, Objector's reference to statements made by Judge Cavanaugh in a 2003 district court opinion (Br. 21) ignores Honeywell's remediation activities over the past decade. Specifically, as Honeywell presented to the District Court at the time of final approval, "Honeywell has been conducting remediation at each of the COPR disposal sites that Plaintiffs have alleged were associated with Mutual's operations" and has been doing so "'pursuant to several different federal and state

orders, and under the supervision of both the New Jersey Department of Environmental Protection and a Special Master appointed by the United States District Court for the District of New Jersey.'" A43-44 (quoting Final Approval Brief, A254-255). Objector either overlooked or simply chose to ignore this extensive history of remediation.[10] Indeed, Objector's suggestion that NJDEP is "ineffective" at remediating property (Br. 21) is belied by NJDEP's considerable oversight of COPR issues in Jersey City, as evidenced by, among other things, Honeywell's 2011 entry into a Consent Judgment with NJDEP, which directed the remediation or continued remediation of several COPR sites pursuant to the Spill Act, including certain of the sites at issue here.[11]

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[10] Honeywell's obligation to remediate or monitor the remedial measures implemented at Study Areas 5, 6, and 7 is governed by various court-ordered Consent Decrees and is unaffected by the Settlement Agreement. Specifically, pursuant to the Stipulated Order Clarifying the Settlement Agreement, Claim and Release Forms, and Final Judgment entered on July 30, 2015 (D.E. 404, at 2), "[t]he Settlement Agreement, Claim and Release Forms, and Final Judgment in this action shall have no effect on the rights or obligations of any person or party with respect to the Study Area 5 to 7 Litigations."

[11] *See* Consent Judgment, *N.J. Dep't of Envt'l Prot. v. Honeywell Int'l Inc.*, Case No. C-77-05 (N.J. Super. Ct. Hudson Cnty. Sept. 7, 2011), attached hereto as Attachment A. Honeywell respectfully requests that the Court take judicial notice of the Consent Judgment pursuant to Federal Rule of Evidence 201, which permits a court to take judicial notice of facts that "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b)(2); *see also In re Semcrude, L.P.*, 728 F.3d 314, 326 n.11 (3d Cir. 2013) (noting that judicial notice may be taken at any stage of the proceedings, including on appeal). As a court order, the accuracy of the Consent Judgment cannot be reasonably questioned, nor can there be any unfairness to Objector in judicially noticing this document, since the District Court specifically referenced such orders in its Opinion granting final approval, noting that: "Honeywell has been conducting remediation at each of the COPR disposal sites that Plaintiffs have alleged were associated with Mutual's operations *pursuant to several different federal and state orders*." A43-44 (emphasis added and internal quotation omitted).

In short, there was nothing false or conclusory about Honeywell's statement to the District Court about New Jersey's remediation authority, and no abuse of discretion in the District Court's approval of the Settlement's release of remediation-related claims.

* * *

Objector does not challenge the District Court's findings under the first, fourth, fifth, sixth and seventh *Girsh* factors, the plan of allocation of settlement class funds, the certification of the classes for settlement purposes, or the adequacy of class notice, and therefore concedes that the District Court did not abuse its discretion or commit clear error in its analysis of same. However, should this Court nonetheless decide to review any of the foregoing issues not challenged on appeal, Honeywell respectfully directs the Court's attention to the parties' briefing in support of preliminary and final approval (D.E. 367-1 and A232-499, respectively), the Transcript from the Fairness Hearing (A527-661), and the District Court's Orders and Opinions granting preliminary and final approval (A69 and A13-68, respectively) for the record on these issues. Honeywell submits that "based on the totality of the [*Girsh*] factors," *Cendant Corp.*, 264 F.3d at 233, the District Court appropriately exercised its discretion in approving the class settlement as fair, reasonable, and adequate.

CONCLUSION

Honeywell respectfully submits that the judgment of the district court should be affirmed.

Dated: October 4, 2016

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify, pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and Third Circuit Rule 31.1(c), that the attached Brief of Appellee:

(1) contains 8,534 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii);

(2) complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman font;

(3) has been scanned for viruses using Microsoft System Center Endpoint Protection (Antimalware Client Version 4.6.305.0 & Engine Version 1.1.12101.0) and is free from viruses; and

(4) that the text of the electronic brief is identical to the text in the paper copies.

Dated: October 4, 2016

/s/ Michael D. Daneker
Michael D. Daneker

Attorney for Appellee

CERTIFICATE OF BAR MEMBERSHIP

I certify, pursuant to Third Circuit Rule 28.3(d), that I am a member of the Bar of this Court.

Dated: October 4, 2016

/s/ Michael D. Daneker
Michael D. Daneker

CERTIFICATE OF SERVICE

I hereby certify that on October 4, 2016, I electronically filed the *Brief of Appellee Honeywell International Inc.* with the Clerk of the Court for the United States Court of Appeals for the Third Circuit via the Court's appellate CM/ECF system. Participants in the case who were registered CM/ECF users were served by the appellate CM/ECF system at that time.

Further, I hereby certify that on October 4, 2016, I served 10 paper copies on the Clerk of the Court for the United States Court of Appeals for the Third Circuit via Federal Express Priority Overnight.

Dated: October 4, 2016

/s/ Michael D. Daneker
Michael D. Daneker