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

REPLY BRIEF
ON BEHALF OF APPELLANT, MAUREEN CHANDRA

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I. Introduction

"Federal courts are increasingly weary of professional objectors." *O'Keefe v. Mercedes-Benz USA, LLC*, 214 F.R.D. 266, 295 n. 26 (E.D. Pa. 2003). Ms. Chandra is not a professional objector. She has never objected to a class action other than this. Likewise, her counsel has never represented an objector other than Ms. Chandra. As explained to the District Court:

> By the way, I never objected or represented an objector in the past. I know that this is a really sticky issue for most people from class counsel because I have litigated class actions myself. In fact, I originated a class action that settled earlier this year, it was Osram Sylvania, $30 million settlement before Judge Arleo. I settled another class action before Judge Shipp against Pep Boys. I am not unfamiliar with this process. I never, never represented an objector. I live in this area, I live on Stevens Avenue. This is personal to me.

(A604 at Tr. 78:12-23).

"Commentators have also noted how, where there is an absence of objectors, courts lack the independently-derived information about the merits to oppose proposed settlements." *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Products Liab. Litig.*, 55 F.3d 768, 803 (3d Cir. 1995). Counsel for Ms. Chandra emphasized this principle to the District Court:

> [T]he adversarial process doesn't exist now. You have Honeywell and class counsel. They have come together and agreed to this. You have no adversarial process. I am the only person who will enlighten you. Nobody else [will]. Everybody else wants smooth sail[ing]. If I don't have an opportunity to review [the in-camera submissions] you have to hope that your clerk brings it to your attention. I am experienced in

> this and I am able to bring up things you wouldn't have seen otherwise.

(A609 at Tr. 83:14-23).

A good illustration of this is the $100,000 discrepancy between what Class Counsel certified the class administrative expenses would be (based on his discussions and "negotiations" with the claims administrator) and the bills the claims administrator later filed with the court. The $100,000 discrepancy was overlooked by the District Court and never addressed in its opinion. The issue is detailed in Ms. Chandra's Appellate Brief. (Chandra Br. 37-38). The extra $100,000 comes out of Class Members' pockets – not Class Counsels'.

II. No Information Exists About Ground Contamination at Class Members' Homes

Ms. Chandra's objection to the settlement is primarily concerned with what is buried in-the-ground at Class Members' homes. Her objection has absolutely nothing to do with contaminated dust or Honeywell's cleanup activities at its own property.

Honeywell concedes in its statement of facts that the chromium ore processing residue or COPR waste material from its facility "was used as fill material during the construction of various residential, commercial, and industrial sites in Jersey City and other parts of Hudson County." (Honeywell Br. 3-4). In

other words, the chromium waste from Honeywell's facility is buried in the ground throughout Jersey City and Hudson County. Since that facility operated over a century ago, from 1895 until 1954, (Honeywell Br. 2), nobody knows where all that fill material is buried. Since the chromium waste was used throughout Jersey City as free construction fill, it is likely buried in at least some of the 3,497 Class Members' homes. And considering the close proximity of the homes to the facility, highly likely.

Neither Honeywell nor Class Counsel have any information – one way or the other – concerning ground contamination at Class Members' homes. None! Class Counsel, Steven German, told class members that he does not know if their homes are contaminated. (A188). He also admitted that none of Plaintiffs' experts tested Class Members' homes as part of Plaintiffs' damages analysis. (A504). Counsel for Honeywell conceded at the Final Approval Hearing, that Honeywell had no information either, concerning ground contamination at Class Members' homes. (A628 at Tr. 102:14-22).[1]

[1] At the Fairness Hearing, Honeywell's counsel, Mr. Daneker, characterized the quantity of chromium waste used as construction fill from Honeywell's facility as limited to "a wheelbarrow" or "a pickup truck." Mr. Daneker has since come clean in Honeywell's Appellee Brief and acknowledges that chromium waste from Honeywell's facility was used as fill throughout Jersey City and Hudson County – far exceeding a single wheelbarrow or pickup truck. (Honeywell Br. 3-4).

Without any information whatsoever concerning ground contamination at Class Members' homes, the parties entered into a settlement agreement releasing claims that include ground contamination.

No attorney could advise a client to accept such a settlement without first knowing the extent of contamination to the client's property and the cost to remediate. The malpractice liability is obvious. 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. When it did so, the District Court breached its fiduciary duty to the class.

To obscure from this Court their lack of information about ground contamination at Class Members' homes, the parties make a lot of noise in their Appellee Briefs about the million pages of discovery produced, the many depositions taken, and the years of litigation. But it doesn't matter how many millions or even billions of pages of discovery are produced if those pages don't contain the information necessary to make an informed decision concerning settlement. *In re National Football League Players Concussion Injury Litigation*, 821 F.3d 410, 439 (3d Cir. 2016) ("What 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.").

And without information concerning ground contamination at Class Members' homes, the parties and the District Court were without necessary information to determine if the settlement was fair, reasonable, and adequate as to the release of ground contamination claims at Class Members' homes.

To mute the parties' noise, this Court should carefully look at the information produced to the District Court in support of final approval of the settlement. An examination of the exhibits submitted by Class Counsel and Honeywell with their Memorandum in Support of Joint Motion (A232), reveal the information is limited to chromium contaminated dust and the health effects of chromium exposure:

Joint Appendix	Description	ECF No.
A346	Ex. C to Joint Memo, Report: Characterization of Hexavalent Chromium Concentrations in Household Dust in Background Areas	415-5
A362	Ex. E to Joint Memo, Journal Article: Hexavalent Chromium In House Dust, A Comparison Between An Area with Historic Contamination from Chromate Production and Background Locations	415-6
A368	Ex. F to Joint Memo, Report: Chromium Exposure and Health Effects in Hudson County: Phase II	415-7
A399	Ex. G to Joint Memo, Report: Analysis of Lung Cancer Incidence Near Chromium-Contaminated Sites In New Jersey	415-8
A455	Ex. H to Joint Memo, Report: Chromium Exposure and Health Effects in Hudson County: Phase I	415-9

A482	Ex. I to Joint Memo, Report: Derivation of Ingestion Based Soil Remediation Criterion for Cr +6 Based on the NTP Chronic Bioassay Data for Sodium Dichromate Dihydrate	415-10
A486	Ex. J to Joint Memo, Research Project Summary: Derivation of an Ingestion-Based Soil Remediation Criterion for Cr+6 Based on the NTP Chronic Bioassay Data for Sodium Dichromate Dihydrate	415-11
A493	Ex. K to Joint Memo, Excerpt from Gochfeld Deposition, Dated May 29, 2014	415-12

None of those exhibits contain information about in-the-ground chromium contamination at Class Members' homes. Those exhibits provided no assistance to the District Court in evaluating the release of ground contamination claims. Rather, the exhibits touch upon issues central to the medical monitoring class that Class Counsel abandoned with the Amended Complaint. (ECF 124).

Likewise, an examination of the Joint Memorandum itself contains no information about in-ground contamination at Class Members' homes. (A232). For example, Honeywell refers generally (without specifics) and in a conclusory fashion to air, soil, and groundwater samples taken at only its property during cleanup – and not at Class Members' homes – and concludes that chromium has not migrated from its property to Class Members' properties during its remediation activities. (A252). Honeywell also refers to studies concerning "household dust" and "urine sampling" of children and concludes again, that chromium at its remediation sites has not impact surrounding neighborhoods. (A253). Honeywell

also refers to a study concerning lung cancer for the same conclusion. (A254). None of this material concerns chromium in-the-ground at Class Members' homes.

Class Counsel for its part, cites a report that says people living near chromium sites have a 17% increase incidence of lung cancer. (A256). Class Counsel also cites the exhibits attached to the memo to support that chromium dust was found in Jersey City homes, the chromium dust originated from Honeywell's property, and ingested chromium is carcinogenic. (A257). None of this material concerns chromium in-the-ground at Class Members' homes.

Class counsel also says that home values have been suppressed as a result of being located near Honeywell's chromium contaminated waste sites, and a non-disclosed expert report would support that conclusion. (A258). Honeywell blames the 2007 recession for suppressed property values. (A254). Again, none of this material concerns chromium in-the-ground at Class Members' homes.

Regardless of how much noise Honeywell and Plaintiffs make in their Appellee Briefs, a vigilant review of the record reveals the District Court had no information about chromium in-the-ground at Class Members' homes – None! Without this information the District Court could not properly evaluate the release of ground contamination claims. *In re NFL Concussion Litig*., 821 F.3d at 439.

To rectify this lack of information, Ms. Chandra urged the District Court in her written objection, to allow class members an opportunity to test their homes so Class Members could make an informed decision regarding settlement:

> Since neither Honeywell nor Class Counsel have the necessary information to evaluate whether Class Members' soil and ground water is contaminated, Class Members should be given the opportunity to have their properties tested before the court decides if the settlement is fair, reasonable and adequate. Since Class Counsel has presumably retained experts and seeks recovery of those expenses from the settlement fund, those experts can assist Class Counsel with a methodology for testing Class Member properties. Class Members can then be given the option to test their properties for contamination at their own expense. Only then can the court and the Class make informed decisions regarding the settlement.

(A505).

Both Honeywell and Class Counsel opposed allowing Class Members an opportunity to test their homes – even at Class Members' expense. It's obvious why Honeywell objected. After spending over half a billion dollars remediating its own property (A187), the last thing Honeywell wanted were objective test results showing hundreds or thousands of homes contaminated with its chromium waste – necessitating remediation on a scale dwarfing its own property.

But Class Counsel's opposition to allowing Class Members the opportunity to test their homes – thereby giving them information that would have allowed them to make informed decisions regarding settlement – is troubling. This is

especially so because Class Counsel has a fiduciary duty to the class and has not provided the Class with that necessary information.

Honeywell also says in its brief that "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.'" (Honeywell Br. 26, citing Tr. 103:12-15). If that were true, then the District Court should not have released ground contamination claims on a class wide basis if those claims could not satisfy *Rules* 23(a) and b(3). But as this Court knows, individual testing does not preclude class treatment of settlement claims. *See In re NFL Concussion Litig*., 821 F.3d at 424 (approving settlement that allowed players to obtain individual neurological testing).

III. Class Counsel Had a Duty to Disclose the Negative Reaction of the Class to the Settlement During the July 22, 2015 Meeting with Class Counsel

On July 22, 2015 Class Counsel held a community meeting for class members to answer litigation questions. Class members were informed of the meeting with postcards. (A559, Tr. 33:14-19). When entering the meeting hall, class members signed in with the claims administrator and Class Counsel estimates that 175 class members attended. (A559-60, Tr. 33:25-34:5).

Ms. Chandra's counsel attended the meeting and observed many homeowners express fear, sorrow, and outrage during the Q & A with Class

Counsel. A distressed class member analogized the situation to Love Canal in Niagara Falls. (A508).

Ms. Chandra's counsel was not alone in his observations. Class Counsel, Steven German, announced over the PA 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 this negative reaction of the class to the District Court. Class Counsel kept silent and represented to the District Court that there were only three objections. (A249).

Honeywell says this Court should not consider the negative reaction of the class during the July 22, 2015 meeting with Class Counsel because "it is untenable as a policy matter to have district courts approving well-subscribed class settlement based on hearsay and a sole objector's say-so." (Honeywell Br. 18). Honeywell's argument has merit if the court were relying on a lone objector's say-so. But that's not happening here.

The real issue is whether Class Counsel can knowingly withhold or conceal from the court, the negative, class reaction to the settlement, when informed during a meeting with class members? Permitting so is untenable. Counsel has an obligation of candor toward the court. *R.P.C.* 3.3(a)(5) ("A lawyer shall not knowingly fail to disclose to the tribunal a material fact knowing that the omission

is reasonably certain to mislead the tribunal"). A knowing omission is fraud. *See, e.g., N.J.S.A.* 56:8-2.[2] Therefore, Class Counsel had a duty to disclose the negative class reaction to the court.

Class Counsel's statement to Class Members over the PA system, "it looks like a lot of people are unhappy with the settlement," was a present sense impression, exempt from the rule against hearsay. *Fed. R. Evid*. 803(1). When presented to the court by Ms. Chandra, the statement is not hearsay because it is an opposing party's statement "offered against an opposing party and was made by the party's agent on the matter within the scope of that relationship and while it existed." *Fed. R. Evid*. 801(d)(2)(D).

Finally, counsel for Ms. Chandra stressed that the District Court did not have to rely on his observations at the July 22 meeting; but rather, could question Mr. German directly, who was in the court room. (A597-58 at Tr.71:22-72:2). Neither Honeywell nor Plaintiffs addressed that fact in their Appellee Briefs.

IV. The NJDEP and the Spill Act

Both Honeywell and Plaintiffs say Class Members can turn to the NJDEP under the Spill Act to have their homes remediated, even if they can't seek remediation directly from Honeywell because of the settlement release.

[2] Even though the Consumer Fraud Act is not applicable to this situation, it is useful to define fraud.

(Honeywell Br. 34) (Plaintiffs' Br. 29-31). But the Spill Act doesn't require the NJDEP to do anything. Rather, "[w]henever any hazardous substance is discharged, the department may, in its discretion, act to clean up and remove" the discharge. *N.J.S.A.* 58:10-23.11(f)(a)(1). Therefore, the Spill Act gives the NJDEP the discretion not to remediate Class Members' homes. Neither party has shown that the NJDEP will act in this case.

Honeywell also claims that "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." (Honeywell Br. 34). Honeywell then cites several cases where it consented to cleanup activities, including: "Honeywell's 2011 entry into a Consent Judgment with NJDEP," (Honeywell Br. 35); "remedial measures implemented at Study Areas 5, 6, and 7 is governed by various court-ordered Consent Decrees," (Honeywell Br. 35 n. 10); and "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)," (Honeywell Br. 35 n. 11). Plaintiffs also cite several "consent" agreements to show that Honeywell has learned its lesson since Judge Cavanaugh's decision. (Plaintiffs' Br. 29-31).

The crucial distinction between the cases cited by Honeywell and Plaintiffs, and this case is that Honeywell consented to remediation activities in the cases the

parties cite. In this case, Honeywell does not consent to remediate Class Members' homes – which is evident by the Settlement Release. (A287-89).

Of course, Honeywell can remedy this with a modification to the Settlement Agreement, wherein Honeywell agrees to remediate Class Members' homes if found to be contaminated with chromium. But as the Settlement stands now, Honeywell has not consented to remediate Class Members' homes.

Plaintiffs also say – but not Honeywell – a "Consent Judgment" in "*NJDEP v. Honeywell Int'l Inc., et al.*, entered Sept. 7, 2011, Super. Court of New Jersey, Ch. Div.-Hudson Cty., No. C-77-05, at p.15 (avail. 10/04/16 at http://www.nj.gov/dep/srp/legal/honeywell_chrome_cj_20110620.pdf)" "provides for remediation" if "Class Members discover chromium on their property." (Plaintiffs' Br. 30-31). But a review of that Consent Judgment reveals that Honeywell has agreed to remediate only the properties contained in that document on Appendix A, which do not include Class Members' homes.

V. The Parties Produced No Information Concerning Lost Property Value

Honeywell says the District Court did have information concerning lost property value because 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." (Honeywell Br. 27). Honeywell produced nothing but that conclusory statement which the District Court was required to ignore. *In re Pet Food Products*, 629 F.3d 333, 350 (3d Cir. 2010). ("the court cannot substitute the parties' assurances or conclusory statements for its independent analysis of the settlement terms."). It is undisputed that Class Counsel produced no expert report concerning lost property value.

Honeywell also claims 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." (Honeywell Br. 28). This cuts both ways – how do you have meaningful mediation without a damages analysis? If the experts had not developed their "damages model" at the time of mediation, then mediation was premature. And if the experts had not developed their damages model, then how can Honeywell assure the court that it would have produced an expert report showing the Class suffered no damages? Honeywell's attempt to blow hot and cold is why courts should not accept a party's bare, conclusory arguments. *In re Pet Food Products*, 629 F.3d at 350.

Also, the law is well established that when class certification issues mesh with merits issues, courts are required to inquire into merits issues at the time of class certification. *See Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1433 (2013) ("requiring a determination that Rule 23 is satisfied, even when that requires

inquiry into the merits of the claim."); *see also, In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 316 (3d Cir. 2008) ("An overlap between a class certification requirement and the merits of a claim is no reason to decline to resolve relevant disputes when necessary to determine whether a class certification requirement is met.").

Also, looking at the docket sheet shows the deadline for affirmative expert disclosures had already been extended, and the new deadline (December 1, 2014) was only three weeks from the date (November 7, 2014) the parties filed their motion for preliminary approval of the settlement. *See* ECF 364 ("TEXT ORDER - The deadline for service of affirmative expert reports is hereby extended through and including 12/1/14. SO ORDERED by Magistrate Judge Joseph A. Dickson on 9/11/14."). If the experts had not completed their damages analysis yet, then what were they waiting for? And if Plaintiffs' expert had not completed his damages analysis yet, then why did Class Counsel spend over $700,000 on expert fees? (A637 at Tr. 111:22-25).

VI. Unknown and Unforeseen Claims Cannot Be Evaluated In This Case

A court may approve a class action settlement "only after a hearing and on finding that it is fair, reasonable, and adequate." *Fed. R. Civ. P.* 23(e)(2). To determine if a proposed settlement is fair, reasonable, and adequate, this Court requires district courts to consider the nine *Girsh* factors. *Girsh v. Jepson*, 521 F.2d

153, 157 (3d Cir. 1975). Neither Honeywell nor Plaintiffs articulate any methodology in their Appellee Briefs for evaluating an unknown claim, much less, an unforeseen claim. If a claim cannot be evaluated, then a court cannot determine if a settlement of that claim is fair, reasonable, and adequate.

This case is so much different than a traditional class action settlement. As Ms. Chandra's counsel explained to the District Court:

> [W]hat makes this case different than [] other class actions, is that most class actions involve a purchase by the class member of the defendant's products, service, or a security. So the entire scope of what the damages could be is usually the purchase price, so an unforeseen claim or an unknown claim under those circumstances, when you are limited to that universe of what you paid out of pocket, that is one thing. We are not talking about this. We are talking about contamination, toxic waste contamination, onto people's homes, and as I learned the first time during that July meeting, if you need to remediate, it may require you to tear down your home, thereby making your home valueless and the remediation cost on top of that. That could exceed a person's lifetime income. This is so different from a classic class action where the universe of what the out-of-pocket expense is is limited to what is [paid] out of pocket. What is the damage to the class? Out of pocket expense. Here, what is the damage to the class. It could exceed a person's lifetime income if they find that they have chromium slag on their property and have to remediate it.

(A601-02 at Tr. 75:10-76:9).

Compounding the problem – the District Court and Class Counsel, both of whom have a fiduciary duty to the Class, refused and opposed allowing Class Members an opportunity to test their homes for chromium contamination before final approval of the settlement. At least if Class Members had an opportunity to

test their homes and chose not to, there would be an argument for releasing unknown claims because of lack of due diligence. But here, Class Members were blindfolded by the District Court and Class Counsel and told to roll the dice.

VII. New Jersey Court Rule 1:21-7 Applies in This Case

In their Appellee Brief, the only reason Plaintiffs say *New Jersey Court Rule* 1:21-7 does not apply in this case is because they can find no federal court that has applied it. (Plaintiffs' Br. 39-41). But Plaintiffs cannot cite a single federal court that evaluated it and said the Rule does not apply to class actions in federal court.

Importantly, Plaintiffs do not say the Rule is vague or ambiguous – because it is not. The Rule is clear, unambiguous, and applies to class action settlements. *R*. 1:21-7(i). Because the Rule is clear and unambiguous, courts are obligated to follow it. *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 363 (2011) ("Of course it is the Rule itself, not the Advisory Committee's description of it, that governs."); *see also*, *Richardson v. Bd. of Trustees, Police and Firemen's Ret. System*, 927 A.2d 543, 547 (N.J. 2007) ("If the plain language leads to a clear and unambiguous result, then our interpretive process is over.").

VIII. The District Court Committed Clear Error Because Class Notice of the Change in Fee and Expenses Requests Was Not Posted On the Settlement Website

In her Appellate Brief, Ms. Chandra says the District Court committed clear error by finding that "Class Counsel provided website notice of the change in fee and expenses requests at http://honeywelljerseycitysettlement.com/." (Chandra Br. 34). The increase in attorney fees was contained in Class Counsel's "Opposition to Objection" brief (A211). Ms. Chandra argued that Class Counsel's "Opposition to Objection" brief was not posted on the settlement web site, contrary to what the District Court held (A55), so the class was never given notice of the change in attorney fees.

Not only did the District Court not say when it viewed that document on the settlement website, it also listed the wrong address for court documents. Court documents were available on the settlement web site at the following web page address: (http://honeywelljerseycitysettlement.com/courtdocs) and not the address the District Court listed.

Counsel for Ms. Chandra viewed the court documents section of the settlement website numerous times before the Fairness Hearing, after the Fairness Hearing, and when the District Court issued its written opinion. At no time did counsel observe the "Opposition to Objection" brief on the settlement website. Since the purpose of that document was to give the Class notice of the increase in

attorneys' fees, it should have been posted to the settlement web site between the time it was filed on ECF (August 25, 2015) and the date of the Fairness Hearing (September 24, 2015).

Plaintiffs argue in their appellee brief that even though that document is not currently available on the settlement web site, and Ms. Chandra hasn't seen it on the settlement web site, doesn't mean it wasn't posted and then removed. (Plaintiffs' Br. 43-44). Documents don't just appear and disappear from websites. The documents have to be uploaded to the web server and web pages created with links to those documents. If the document is removed, the web page is modified again to remove the link. Because the settlement website is maintained by the claims administrator (who was hired by Class Counsel), Plaintiffs can obtain from the claims administrator, the dates the document was posted and removed – if it was ever posted on the website. If the document was never posted on the settlement website, Plaintiffs could not obtain this information – which they don't. Instead, Plaintiffs cite five cases that say the obvious – web pages can change. Simply put, there is nothing in the record to show that the document was ever posted on the settlement website.

IX. Rule 23(h) is Violated When Information Necessary to Support an Objection is Withheld

Fed. R. Civ. P. 23(h)(1) requires Class Counsel to give class members notice of motions for fees and expenses. *Fed. R. Civ. P.* 23(h)(2) gives class members the right to object to a motion for fees and expenses. Prior to the Fairness Hearing, Class Counsel provided the Class with little more than the total amount of expenses. Class Counsel did not provide the Class with enough information to determine if the expenses were adequately documented and appropriately incurred in the prosecution of the case. (Chandra Br. 35-39). As such, Rule 23(h) was violated.

In its Appellee Brief, Plaintiffs say that "the information Class Counsel provided to the class through its motion for expenses contained more than enough information to satisfy both Rule 23(h) and … NFL Players." (Plaintiffs' Br. 46). Aside from that conclusory statement, Plaintiffs never explain how the Class could possibly determine if the expenses were adequately documented and appropriately incurred with nothing more than the total amount expended and little else. Without enough information to base an objection, the right to object is illusory. Plaintiffs never address that issue raised in Ms. Chandra's Appellate Brief.

Plaintiffs then spend several pages highlighting items from the initial class notice of the litigation that has nothing to do with providing the Class with enough information to determine if the expenses were adequately documented and

appropriately incurred in the prosecution of the case. (Plaintiffs' Br. 46-48). Plaintiffs then say, "This amount of information easily exceeded the quantum this Court deemed satisfactory in *NFL Players*." (Plaintiffs' Br. 49). But in *In re NFL Concussion Litig*., there was no expense information produced because counsel chose not to file a petition for fees and expenses until after the settlement was approved. 821 F.3d at 444. So, this Court never determined the "quantum" of information required in an application for fees and expenses in *In re NFL Concussion Litig*.

Plaintiffs also say the reason objectors "need not be furnished with particularized expense records is that the District Courts are assigned the 'fiduciary' role of protecting the interests of unnamed class members." (Plaintiffs' Br. 53). If Congress did not want class members to have access to information needed to base an objection, then Congress would not have given class members the right to object. *See Fed. R. Civ. P.* 23(h)(2). It makes no sense to give class members the right to object and then deny them the information necessary to support an objection. But then again, Plaintiffs also argue that this Court should not use common sense. (Plaintiffs' Br. 17).

Plaintiffs say further that "even assuming, *arguendo*, that Chandra had the right to peruse confidential documents submitted in camera (or the right to oppose such submissions) she failed to preserve her right to appeal on those grounds by

failing to assert them in a full and timely fashion below." (Plaintiffs' Br. 55). But Ms. Chandra did raise the issue both in both her written objection and during the Fairness Hearing.

Ms. Chandra's written objection to Class Counsels' motion for fees and expenses is found at (A192-A204). In her objection to Class Counsels' motion for fees and expenses, Ms. Chandra objects to Class Counsel withholding from the Class, the particulars for their expenses:

> Class Counsel's submission of expenses is equally vague. Class Counsel has reported total expenses, and even reported the total spent by each law firm. But what Class Counsel has failed to do is itemize expenses in a way that is reviewable by the court and the class to determine reasonableness.
>
> Any late submission by Class Counsel correcting deficiencies in their motion for fees and expenses, without granting the class an opportunity to review and object to those submissions, violates Fed. R. Civ. P. 23(h).

(A203, citing references omitted).

Ms. Chandra made further objections concerning this issue through counsel during oral argument at the final approval hearing:

> **THE COURT:** I have already indicated that I am requiring counsel to supplement the record and provide me a detailed list of their fees and expenses, and I have asked them to explain how they arrived at their blended average, I asked them to list for me the expenses. I have given them 15 days to do that. I understand that you believe you are more equipped to review those expenses and determine whether they are adequate or fair or reasonable under the circumstances, but I would submit to you, sir, that this Court has

> also agreed to and will scrutinize those records, and does have experience, this is not my first class action that I have presided over.
>
> **MR. PACIORKOWSKI:** I don't want to suggest that this is the, that this is your first class action. I know it isn't. But your Honor, the class, according to the rule, the class has the opportunity to actually review the application for attorneys' fees and expenses, and the class will not have that opportunity because it is not –
>
> **THE COURT:** I am going to ask counsel for both sides, in particular plaintiff counsel, to address that point, and whether you are entitled to see a detailed breakdown of all expenses that are being requested.

(A613 at Tr. 87:18-88:17).

Even if Ms. Chandra did not timely object, which she clearly did, this Court has held that "the standards for waiver may be relaxed somewhat in the class action context because we have an independent obligation to protect the rights of absent class members." *In re NFL Concussion Litig*., 821 F.3d at 445.

X. The District Court Abused Its Discretion and Committed Clear Error by Allowing Class Counsel to Recover Expenses Pursuing Litigation Against PPG From the Honeywell Settlement

Plaintiffs do not address any of the points raised by Ms. Chandra on this issue. Rather they say, "Chandra finds nothing to fault in the District Court's opinion, except its conclusion." (Plaintiffs' Br. 55).

Plaintiffs do not dispute that Classes A and C did not receive any benefit from litigation against PPG. The fact that the settlement releases Class A and C

claims against PPG with no compensation is incontrovertible proof that Classes A and C received no benefit from litigation against PPG. The only class to receive a benefit from PPG litigation is Class B. Yet, the District Court allowed Class Counsel to recover from Classes A and C, all of their expenses litigating against PPG until the time a settlement was reach with Honeywell. The District Court made findings of fact that Classes A and C received a benefit from PPG litigation, which was clearly erroneous.

XI. Conclusion

Maureen Chandra respectfully requests the decision of the United States District Court be reversed in its entirety and the relief requested in her Appellate Brief.

Respectfully submitted,

November 7, 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.

November 7, 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.

November 7, 2016 s/ Thomas Paciorkowski
Thomas Paciorkowski, Esq.

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This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(ii) because this brief contains 5554 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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November 7, 2016 s/ Thomas Paciorkowski
Thomas Paciorkowski, Esq.

CERTIFICATE OF SERVICE

I, Thomas Paciorkowski, certify that on November 7, 2016, I electronically filed the Reply Brief 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 Reply Brief were also mailed to the Clerk on this day at the follow address:

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November 7, 2016

s/ Thomas Paciorkowski
Thomas Paciorkowski, Esq.