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 — The Hon. Esther Salas

PLAINTIFFS-APPELLEES' RESPONSE BRIEF

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STATEMENT OF FACTS

From approximately 1895 to 1954, the Mutual Chemical Company ("Mutual") operated a chromium chemical plant located on Route 440 in Jersey City, New Jersey. That plant produced chromium chemicals for industrial use. In the process, it also generated a residual waste material known as chromium ore processing residue ("COPR"). COPR was disposed of on several properties in the plant's vicinity, properties known as Study Areas 5, 6, and 7 and Site 119 (the "Mutual Sites"). Defendant Honeywell International, Inc. ("Honeywell") is Mutual's successor in interest. Plaintiffs allege that Honeywell's and Mutual's decades-long generation, disposal, and failure to properly remediate COPR and associated hexavalent chromium contamination from the Mutual plant, at the Mutual Sites, and within the Settlement Class boundaries have caused the Plaintiffs to suffered damage to their properties, loss of use and enjoyment of their properties, and diminution in the value of their properties. Honeywell denies everything.

In addition to Mutual's chromium plant on Route 440, a second chromium manufacturing plant operated in Jersey City for much of the 20th century. That other facility was located on Garfield Avenue and was operated by Defendant PPG Industries, Inc. ("PPG") and its corporate predecessors. Plaintiffs have brought claims against PPG related to manufacturing, disposal, and residential properties where Plaintiffs claim PPG generated, improperly disposed of, and failed to properly

remediate COPR and/or associated hexavalent chromium contamination. *Id.* A239 n.3 (Joint Memo in Support of Final Approval of Class Action Settlement).

Plaintiffs' Sixth Amended Complaint alleges causes of action on behalf of three classes of property owners, identified as Classes A, B, and C. A78 *et. seq*. Classes A and C generally cover properties within the vicinity of the Mutual Sites for which Honeywell has or had remediation responsibility. With limited exception, the Settlement Agreement resolves claims by owners of residential properties within Classes A and C. Litigation regarding Class B claims against PPG is ongoing.

This litigation was commenced in 2010. The District Court's Opinion Approving the Final Settlement Agreement summarized the intensive litigation that followed:

> Honeywell filed a motion to dismiss relating to statute of limitations and a motion for reconsideration of the Court's decision denying the motion to dismiss. … fact discovery has been ongoing for approximately three years—but the case is still in the pre-class certification, fact-discovery stage. Aside from going through expert discovery, the issue of class certification would need to be resolved (including any appeal of that issue). The Court expects further motion practice involving, but not limited to, discovery disputes, potential case-dispositive issues, class certification, and pre- and post-trial submissions.

A31. In Class Counsel's Memorandum in Support of their Request for Costs and Fees, they summarized the intensive litigation that preceded the settlement:

> More than 100 individuals and organizations with relevant knowledge were identified. *Id.* ¶30.[1] The parties served Interrogatories, Requests for Production and Requests for Admission. Together defendants produced over 5,000,000 pages of documents in 37 separate rolling productions. *Id.* ... At the time of settlement, an untold number of additional documents remained outstanding from defendants. *Id.* Defendants also logged more than 41,000 assertions of privilege. *Id.* ¶31 .... Plaintiffs and defendants collectively issued 69 subpoenas for document productions or depositions on non-parties which together produced hundreds of thousands of additional documents, more assertions of privilege and days of deposition. *Id.* ¶32.
>
> Plaintiffs faced three Motions to Quash and Protective Orders. *Id.* ¶36. Discovery disputes concerning the permissible scope of class phase discovery, the completeness of defendants' responses, confidentiality, cost-shifting and privilege resulted in numerous meet-and-confers, letter-writing, motions, briefing and court appearances, including an appeal and oral argument to the District Judge. *Id.*
>
> The parties appeared for 33 days of deposition and 23 court conferences. *Id.* ¶¶33-34. The Court issued numerous Scheduling Orders, which, due to the complexity of the case, were periodically amended and deadlines extended. *Id.* ¶34.

A138-39.

Honeywell and Class Counsel engaged in two days of intensive, arms-length settlement negotiations, which concluded with the settlement agreement now before the Court.

[1] "¶" references are to the paragraphs of the Declaration of Steven J. German In Support of Class Counsel's Motion Seeking Costs and Fees. A154-174.

In July 2014, Plaintiffs and Honeywell informed the Court they had reached a settlement On November 7, 2014, Counsel for Plaintiffs ("Class Counsel") and Honeywell moved for preliminary approval of the settlement. On April 30, 2015 the Court granted the motion, A69-77, which resulted in certification of two settlement classes for settlement purposes, preliminarily approval of the settlement, appointment of settlement class counsel, approval of a Claims Administrator, and approval of forms and procedures for class notice. *Id.* The Order set September 24, 2015 for the Fairness Hearing. A73. The Court approved the Notice and Publication notice and the method of directing notice to the Class. A74.

Pursuant to the District Court's Preliminary Approval Order, Notice was mailed individually to Class members on three occasions, was published in the Jersey Journal once a week for four consecutive weeks, and posted (in English and Spanish) on the website that had been established for purposes of the settlement. A46-48. At Class Counsel's request, the District Court extended the deadline for filing objections or requests to opt-out of the settlement to August 31, 2015. A208.

There were 3,497 properties in Classes A and C. Valid claims were submitted for 2,085 of the 3,497 properties. A18.

Twenty-eight people opted out of the settlement while four property-owners filed objections, including a joint one by two individuals, and one by Objector-Appellant Maureen Chandra ("Chandra"). A17. Chandra supported her objection

with three briefs. A181, A192, and A500.Honeywell and Class Counsel responded separately to Chandra's objections. A229, A510, A513.

The District Court convened the Fairness Hearing, on September 24, 2015Ms. Chandra was the only objector who appeared at the hearing. Following hearing, and pursuant to the District Court's order,A525, Class Counsel filed, *in camera*, detailed documentation of their hours and case expenses. A662

The District Court issued its Order and Opinion, approving the Settlement and granting Class Counsel's request for fees and cost, on April 26, 2016. A11-68. Chandra timely filed her Notice of Appeal on May 26, 2016. A1.

SUMMARY OF ARGUMENT

The crux of Chandra's arguments are: (1) the District Court abused its discretion when it approved the Honeywell Settlement Agreement because the Agreement requires Class Members to release all future claims—including "unknown claims," such as possible claims for ground contamination about which there is "no information"—against Honeywell for remediation of their properties, and there is no evidence that such remediation may not be required in the future; and (2) the District Court, in fulfilling its fiduciary duty to fairly allocate case costs, abused its discretion by approving the claim for expenses without giving Chandra a chance to see the detailed documentation of those expense that Class Counsel submitted *in camera*, and thereby deprived the court of the benefit of her counsel's

unique skills, *i.e.*, insofar as he was "the only person who will enlighten you" and " bring up things you [Judge Salas] wouldn't have seen otherwise," A609 (Tr. 83:18-23)(Fairness Hearing).

Chandra is wrong on both arguments.

There is ample evidence in the record, which Chandra does not address, that related to the potential need for remediation of Class A and Class C properties in the future. More importantly, the only thing the settlement releases is the right of Class Members to sue Honeywell, directly. The release leaves intact rights under the New Jersey Spill Act and under a 2011 Consent Judgment between NJDEP and Honeywell for Class Members to seek relief from NJDEP to address any contamination found on their property that is attributable to Honeywell.

Chandra's repeated claim that the District Court cannot be relied upon to fulfill its fiduciary duty to properly review and analyze the detailed expense records *in camera*, without the benefit of Chandra's counsel assistance, is rebutted by the careful attention Judge Salas paid to Chandra's concerns about expenses both during the Fairness Hearing and in her decision. Chandra does not provide any persuasive answer to the arguments advanced below by Class Counsel that justify why *in camera* review was warranted here given, among other reasons, that claims are still pending against PPG.

ARGUMENT

I. THE SETTLEMENT AGREEMENT IS FAIR, REASONABLE, AND ADEQUATE

A. STANDARD OF REVIEW

This Court reviews a district court's decision to certify a class and approve a settlement for abuse of discretion. *Dewey v. Volkswagen Aktiengesellschaft*, 681 F.3d 170, 182 (3d Cir.2012). This Court reviews any factual findings made in conjunction with class certification and settlement approval for clear error. *In re Pharmacy Benefit Managers Antitrust Litig.*, 700 F.3d 109, 117 (3d Cir.2012).

"Because of the district court's proximity to the parties and to the nuances of the litigation," this Court 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; quotation marks omitted).

Even if this Court's own fairness analysis might differ from the District Court's if conducted in the first instance, the Court accords "deference to the District Court's exercise of discretion" and sets aside "its decision only if there was an abuse of that discretion." *In re Cendant Corp. PRIDES Litig.*, 264 F.3d 201, 243 (3d Cir.2001).

Public policy and judicial economy strongly favor settlement of civil litigation. *See, e.g., McDermott, Inc. v. AmClyde*, 511 U.S. 202, 215 (1994)("public

policy wisely encourages settlements"); *Pennwalt Corp. v. Plough, Inc.*, 676 F.2d 77, 80 (3d Cir.1982)("There is a strong judicial policy in favor of parties voluntarily settling lawsuits."). Indeed, the policy favoring settlement "is especially strong in 'class actions and other complex cases where substantial judicial resources can be conserved by avoiding formal litigation.'" *Ehrheart v. Verizon Wireless*, 609 F.3d 590, 595 (3d Cir. 2010)(quoting *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.* ("*GM Trucks"*), 55 F.3d 768, 784 (3d Cir.1995)). This Court has long maintained a "policy of encouraging settlement of complex litigation that otherwise could linger for years." *In re School Asbestos Litig.*, 921 F.2d 1330, 1333 (3d Cir.1990).

"The strong judicial policy in favor of class action settlement contemplates a circumscribed role" for the courts in reviewing a class action settlement that follows substantial adverse litigation and intense arm's-length negotiations. *Ehrheart*, 609 F.3d at 595. The courts do not and cannot demand that "the settlement is the fairest possible resolution—a task particularly ill-advised given that the likelihood of success at trial (on which all settlements are based) can only be estimated imperfectly." *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 173-74 (3d Cir.2013). Instead, courts play a more modest role in ensuring that "the compromises reflected in the settlement …are fair, reasonable, and adequate when considered from the perspective of the class as a whole." *Id.* at 174. This Court's role is particularly

"limited": It "will reverse a settlement approval only when the district court has committed a 'clear abuse of discretion.'" *Lazy Oil Co. v. Witco Corp.*, 166 F.3d 581, 587 (3d Cir.1999).

Finally, a district court's approval of a settlement agreement deserves "'a double layer of swaddling.'" *In re Tutu Water Wells CERCLA Litig*., 326 F.3d 201, 207 (3d Cir. 2003)(citation omitted). The first derives from the "law's policy of encouraging settlement; the second layer is the deference [appellate courts] owe the district court's discretion." *Id.* Hence, challengers to a settlement agreement face "a heavy burden" in "attempt[ing] to persuade [this Court] that the district court abused its discretion …." *Id.*

B. THE SETTLEMENT IS ENTITLED TO A PRESUMPTION OF FAIRNESS.

Consistent with the policy favoring settlement of class actions, this Court applies "an initial presumption of fairness when reviewing a proposed settlement where: '(1) the settlement negotiations occurred at arm's length; (2) there was sufficient discovery; (3) the proponents of the settlement are experienced in similar litigation; and (4) only a small fraction of the class objected.'" *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 535 (3d Cir.2004)(citation omitted).

As the District Court recognized, this hard-fought and substantial settlement agreement is entitled to a presumption of fairness because all four *Warfarin* elements "are satisfied here." A29. Significantly, Chandra did not dispute "any of this." *Id.*

Class Counsel established—and Chandra does not controvert—that: (1) the negotiations were conducted at "arm's-length," A241; (2) discovery was more than "sufficient," A138-39, and was informed by substantial pre-suit investigation, A159;[2] (3) the six members of the Class Counsel team had collectively accumulate considerable experience in class action, mass tort, and environmental litigation, A166-170; and (4) only a very "small fraction of the class objected," *Warfarin*, 391 F.3d at 535, *i.e.*, only four property-owners out the owners of 3,497 properties. A17, A19. Indeed, only 0.56% of the class either opted-out or objected. A519.

In sum, the District Court correctly applied a presumption of fairness to the settlement.

C. THE *GIRSH* FACTORS SUPPORT THE DISTRICT COURT'S DECISION APPROVING THE SETTLEMENT.

"This court has adopted a nine-factor test to help district courts structure their final decisions to approve settlements as fair, reasonable, and adequate as required by Rule 23(e)." *GM Trucks*, 55 F.3d at 785. First articulated by this Court in *Girsh v. Jepson*, 521 F.2d 153 (3d Cir. 1975), those factors are:

> (1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks

[2] This pre-suit investigation enabled Class Counsel to obtain valuable additional information to assess the strengths and weaknesses of Plaintiffs' case and to make an informed settlement decision. A159. Counsel for both parties developed ample familiarity with the potentially dispositive legal issues in the course of extensive briefing and oral argument on, *inter alia*, multiple motions to dismiss. A159.

> of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through the trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

521 F.2d at 157 (quotation marks and ellipses omitted). Each factor requires the district court to make findings of fact, and those findings "will be upheld unless they are clearly erroneous." *GM Trucks*, 55 F.3d at 786. In reviewing the District Court's application of the *Girsh* factors, this Court "first consider[s] the strength of each side's arguments on each factor, and then, based on the totality of the factors, determine whether the District Court abused its discretion in finding overall that the *Girsh* factors weighed in favor of the Settlement." *Cendant*, 264 F.3d at 232-33 (emphasis added).

The District Court's approval of the settlement agreement is manifestly correct. As discussed below, that court found seven of the *Girsh* factors favor approving the settlement, while an eighth factor is neutral and a ninth is irrelevant. Chandra challenges the District Court's findings on only four of the nine *Girsh* factors.

As shown below, Chandra's challenges do not withstand scrutiny as they cannot be reconciled with the relevant law, the District Court's extensive factual findings, and the basic realities of the settlement process.

1. The first *Girsh* factor weighed in favor of approving the settlement because continued litigation of this class action would be complex, costly, and time consuming.

"The first [*Girsh*] factor captures the probable costs, in both time and money, of" the alternative to settlement, *i.e.*, "continued litigation." *Warfarin*, 391 F.3d at 535-36 (quotation marks omitted). "By measuring the costs of continuing on the adversarial path, a court can gauge the benefit of settling the claim amicably." *GM Trucks*, 55 F.3d at 812; *In re Pet Food Prods. Liab. Litig.*, 629 F.3d 333, 351 (3d Cir. 2010).

The District Court found that continued litigation in the absence of a settlement would be unquestionably complicated, expensive, and time-consuming as it "would require the parties—and the Court—to expend significant resources" just through trial, on top of "the likelihood of an appeal, the related costs, and the attendant delay of final resolution." A31. "After all, this case involves complex legal issues and technical disciplines such as environmental science, air modeling, and property valuation. Including both Classes A and C, this involves well over 3,000 residential properties." A32.

Thus the District Court found the first *Girsh* factor "weighs in favor of approving the settlement." A32.

Chandra does not challenge this finding.

2. The second *Girsh* factor weighed in favor of approving the settlement because the class overwhelmingly reacted favorably to the settlement.

"The second *Girsh* factor attempts to gauge whether members of the class support the settlement," *Warfarin*, 391 F.3d at 536 (quotation marks omitted), and requires courts to heed "the reaction of the class …." *Girsh*, 521 F.2d at 15. "Courts have generally assumed that 'silence constitutes tacit consent to the agreement.'" *GM Trucks*, 55 F.3d at 812 (quoting *Bell Atlantic Corp. v. Bolger*, 2 F.3d 1304, 1313 n.15 (3d Cir.1993)).

As the District Court's Opinion noted, class reaction may be appropriately "'measur[ed]'" by "'look[ing] to the number and vociferousness of the objectors,'" A32 (quoting *GM Trucks*, 55 F.3d at 812), and by gauging the "'disparity,'" if any, "'between the number of potential class members who received notice of the Settlement and the number of objectors ….'" *Id.* (quoting *Cendant*, 264 F.3d at 235).

Here, the District Court relied on both of the "measures" this Court highlighted in *GM Trucks* in "find[ing] that the second *Girsh* factor weighs in favor of approving the settlement." A33. Thus, the District Court noted

> from early June 2015 to early September 2015, the Claims Administrator sent approximately 5,500 claim packets—which included a notice of proposed class action settlement providing, among other things, the settlement terms and a claim-and-release form. 2,232 valid claims were submitted for 2,089 of the 3,497 properties

in Class Areas A and C, which "reflects a response rate of nearly 60%." A32 (internal citations omitted).

The District Court received "only twenty-eight opt-out requests and three objections," the latter from only four different property-holders, including Chandra. A32. The court overruled the objection of two property-holders (and discounted the objection of a third), *i.e.*, the three objectors besides Chandra, because those objections "rest[ed] on a misplaced premise," *i.e.*, that the Settlement resolves personal injury claims). A33.

A "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." *Cendant*, 264 F.3d at 235. That presumption applies with particular force here, where it is undisputed that a "mere 0.56%" of the class objected to, or opted out of, the settlement. A519. The "vast disparity" between settlement class members and Objectors and Opt-outs confirms the wisdom of the District Court's conclusion that this factor weighs in favor of settlement.

Chandra does not contend the District Court used the wrong measures or measured improperly or inaccurately. Instead, she contends the District Court committed clear error "by only considering filed objections and opt-outs," in general, and specifically by "refus[ing] to consider" two other—utterly novel but

supposedly probative and persuasive—"'indications that the class reaction to the suit was quite negative.'" Chandra.Br.25 (quoting *GM Trucks*, 55 F.3d at 813).

Thus, Chandra faults the District Court for refusing to credit two bits of supposedly credible and compelling indications that she says demonstrate the reaction to the settlement was overwhelmingly negative. These "indications" consisted of: (1) her counsel's unsworn, uncorroborated hearsay recollections about what he said he heard "many" people—unnamed and unnumbered—say about the proposed settlement at a community meeting open to both class members and non-class members of the public, Chandra.Br.25; and (2) "[t]he only common sense reason 40% of the class neither filed claims … nor opted out": that 40% "either didn't understand the proceedings or didn't agree with the Settlement." Chandra.Br.8.

Chandra's argument is wholly lacking in merit. She cites no precedent for a court crediting such indicia of class reaction and provides no authority or reason why this Court should be the first one to do so. At the Fairness Hearing the District Court made clear that Chandra's references to what was heard or said at a meeting are not in the record and not evidence in this case. A597 ("we 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 received three objections.").

First, Chandra asserts that "[o]n July 22, 2015 Class Counsel hosted a public meeting … to answer class member questions" about the proposed settlement. Chandra.Br.25. Chandra states that her counsel "attended" that meeting, too, Chandra.Br.19, and that he heard "[m]any homeowners express [] fear, sorrow, and even outrage." Chandra.Br.25 (citing A508). Chandra's counsel did not say what qualifies as "many" or how he knew that all or even any of these individuals were homeowners and Class members. Counsel also said he had heard "[a] distressed class member analogize[] the situation to Love Canal in Niagara Falls." *Id.* (citing A508).

"A508," which Chandra relied on, does not contain or describe evidence; rather, it is nothing but a page of argument from Chandra's "Objection to Motion for Final Approval," A500, which Chandra's counsel drafted and filed on her behalf and which reports his impressions about what happened at the "public meeting."

Courts give "no weight to the arguments of counsel … that [a]re not supported by admissible evidence." *Pivirotto v. Innovative Sys., Inc.*, 191 F.3d 344, 358 n.7 (3d Cir.1999). By like token, "statements by counsel are not competent evidence." *Quint v. A.E. Staley Mfg. Co.*, 172 F.3d 1, 20 (1st Cir.1999). Here, the subjective, self-serving, hearsay impressions of Chandra's counsel about the supposed "fear, sorrow, and even outrage" of "many" unidentified people at a "public meeting," Chandra.Br.25, do not qualify as either "competent" or "admissible" evidence. They

are not verified by a tape or transcript of what was said, and by whom, at that "public meeting." They are not supported by a declaration or sworn affidavit by Chandra's counsel, Chandra herself, or any of the other "approximately 175 attendees" at the meeting. A262 (Joint Memo). Nor were these purported criticisms expressed in any of the myriad ways courts have deemed acceptable, *e.g.*, signed "telegrams," "letters," or "e-mails."[3]

Second, Chandra contends the District Court erred by refusing to recognize that "[t]he only common sense reason 40% of the class neither filed claims …, [nor filed objections,] nor opted out, is that they either didn't understand the proceedings or didn't agree with the Settlement." Chandra.Br.8 (emphasis added). Suffice it to say that "[t]he law does not take judicial notice of matters of 'common sense,' and common sense is no substitute for evidence," *Adams v. Freedom Forge Corp.*, 204 F.3d 475, 487 (3d Cir.2000), and that "common sense" is not the kind of reliable "indication []" of "class reaction" *GM Trucks* contemplated.

Tellingly, Chandra has not cited, and Class Counsel cannot find a decision from any jurisdiction which credited "class reaction" of the kind supposedly

[3] *See Ragsdale v. Turnock*, 941 F.2d 501, 503 (7th Cir.1991) ("telegram"); *Spicer v. Chicago Bd. Options Exch., Inc.*, 844 F. Supp. 1226, 1248 (N.D. Ill. 1993) ("letter"); *Casey v. Coventry Healthcare, Inc.*, 2011 WL 8007035, at *3 (W.D. Mo. Dec. 6, 2011) ("e-mail").

A lawyer's recollections do not qualify as hearsay exceptions under Fed.R.Evid. 803 or Fed.R.Evid. 807.

expressed here. In sum, counsel's impressions do not come close to the kind of admissible "indication" of a class' reaction that this Court has suggested a District Court could reasonably consider: "a poll conducted by class counsel's marketing expert," a poll submitted in the record. *GM Trucks*, 55 F.3d at 813.

The District Court had ample, acceptable, and adequate indicia about the reaction of the class to the settlement. Virtually no one objected or opted out. The court did not err by refusing to credit the unverified, uncorroborated, and self-serving statements of Chandra's counsel or by disregarding her counsel's self-serving elucidation of purported "common sense." And it did not abuse its discretion in "find[ing] that the second *Girsh* factor weighs in favor of approving the settlement." A33 (Opinion 21).

3. The third *Girsh* factor weighed in favor of approving the settlement because class action had an "adequate appreciation of the merits of the case before negotiating" the settlement.

"The third *Girsh* factor 'captures the degree of case development that class counsel had accomplished prior to settlement,' and allows the court to 'determine whether counsel had an adequate appreciation of the merits of the case before negotiating.'" *Sullivan*, 667 F.3d at 321 (quoting *Warfarin*, 391 F.3d at 537). Likewise, a district court must itself have enough information to "appreciate sufficiently" the strengths and weakness of each side's case before approving a settlement. *In re Nat'l Football League Players Concussion Injury Litig*. ("*NFL*

Players"), 821 F.3d 410, 439 (3d Cir. Apr. 18, 2016), as amended (May 2, 2016)(emphasis added).

The District Court found the "third *Girsh* factor weighs in favor of approving the settlement," A34, inasmuch as the parties had actively litigated the case for "almost three years" and "ha[d] conducted sufficient discovery to inform settlement negotiations." *Id.*[4] The District Court also found that the parties had a sufficient appreciation of the merits of the case because "the proposed settlement results" from "two rounds of multi-day negotiations before … an experienced and skilled third-party mediator," Professor Eric D. Green of Boston University Law School, "whose background the [District] Court … [had] independently reviewed," *Id.*, and whose acumen in facilitating settlements of class actions and mass torts has been commended by two Circuit Courts and Harvard Law School.[5]

[4] The District Court specifically found that Class Counsel's discovery requests had caused Honeywell to "produce [] over one million pages concerning, among other things, the history of contamination, status of remediation efforts, regulatory communications, and sampling and monitoring data," while additional "discovery [had] included depositions of third parties such as authors of certain studies referenced in the Plaintiffs' complaint, regulators, and Honeywell's remediation contractor." A34.

[5] *See Newby v. Enron Corp.*, 394 F.3d 296, 302 (5th Cir.2004); *In re Atlantic Pipe Corp.*, 304 F.3d 135, 146 (1st Cir.2002). Harvard (where he is a Lecturer on Law) extols him as "one of the founding pioneers of Alternative Dispute Resolution in the United States and around the world." *See* Harvard Law School—Faculty, http://hls.harvard.edu/faculty/directory/11582/Green (avail. 092616).

Chandra contends that both the District Court's finding that the settlement was just, fair, adequate, and reasonable, in general—and its finding that the settlement satisfied the third *Girsh* factor, in particular—were clearly erroneous because the parties ostensibly lacked, and thus failed to provide the District Court with "'enough information about the case to appreciate sufficiently the value of the claims.'" Chandra.Br.at 27 (quoting *NFL Players*, 821 F.3d at 439).

Notably, Chandra does not challenge the amount of the settlement, but only the scope of the release. A508-09 ("if Class Members' properties are not contaminated, then $3000 may be fair reasonable and adequate"); *see* A590 ("the only way to really determine [if the settlement is fair and reasonable] is by looking at the release"). So the crux of Chandra's objection is that the release prevents Class Members from having their properties remediated if they turn out to be contaminated by Honeywell. As discussed below, the premise is false.

Chandra argues there are three "lack-of-enough-information"-based reasons why the District Court abused its discretion in finding the settlement satisfied the third *Girsh* factor:

> a. the District Court should not have approved the settlement because it released all Class Members' "unknown" claims, which are "impossible to evaluate under *Girsh.*" Chandra.Br.24 (emphasis added);
>
> b. the District Court should not have approved the settlement because it released all Class Members' ground contamination claims, because the parties and the court lacked

> adequate information—and, indeed, "any information"—about such claims. Chandra.Br.17;
>
> c. the District Court should not have approved the settlement because it relied on the existence of a weak New Jersey state environmental protection agency. Chandra.Br.20.

As detailed below, none of these argument withstands scrutiny.

a. The District Court did not abuse its discretion in permitting the release of "unknown" claims

Chandra's broadest "lack-of-information"-based argument urges this Court to reverse the District Court's decision to approve the settlement, and the settlement's release of "unknown claims, on the basis of the third *Girsh* factor because the District Court relied on non-existent information, indeed on information that no one knew or could know, information that was categorically "impossible to evaluate under *Girsh*, 521 F.2d at 157, and Fed. R. Civ. P. 23(e)." Chandra.Br.at 24 (emphasis added).

Chandra asserts "the District Court abused its discretion" by countenancing the settlement's release of unknown claims. She is wrong.

The release approved by the District Court provides that each class member will be barred from:

> bringing against Honeywell International Inc. any and all manner of actions, ... and claims of any kind or nature whatsoever arising out of the ownership of 1-4 family residential property ... under any theory of common law or under any federal, state, or local law, statute, regulation, ordinance, or executive order that I ever had or may have in the future, whether directly or indirectly, that arose from the beginning of time through execution of this Agreement, WHETHER FORESEEN OR UNFORESEEN, OR

> WHETHER KNOWN OR UNKNOWN TO ALL OR ANY OF THE PARTIES, that arise out of the release, migration or impacts or effects of COPR, hexavalent chromium, or other chemical contamination ... at any time through the date of this Claims Form ….

A8; A316.

The release of unknown claims necessarily means a claim is being released that a party does not know it has. Although Chandra believes such releases are both unusual and inherently unacceptable, federal courts have been approving class settlements that released "all claims, demands, liabilities, or causes of action [whether] known or unknown," for nearly forty years. *McNary v. Am. Sav. & Loan Ass'n*, 76 F.R.D. 644, 653 (N.D. Tex. 1977). And federal appellate courts have been approving "hold-harmless" clauses in contractual settlements that "cover all claims [whether] known or unknown to the parties" for nearly ninety years. *See Fidelity & Deposit Co. of Maryland v. Wheeler*, 34 F.2d 892, 894 (8th Cir.1929).

In this light, it is significant that Chandra cannot cite a decision by any court rejecting, faulting, or limiting class action settlements that release "unknown" claims, even though all such claims are "impossible to evaluate." Chandra.Br.at 24.

In reality, this Court (like many around the country) has found nothing unusual, objectionable, problematic, or unenforceable about an agreement in a products liability class action that completely and unconditionally released

> "all claims, demands, actions, suits, and/or causes of action that have been brought or could have been brought, are currently

> pending or were pending, or are ever brought in the future, by any Settlement Class Member against any Defendant or Released Entity, ... whether known or unknown, asserted or unasserted, under or pursuant to any statute, regulation, common law or equity, that relate in any way, directly or indirectly, to facts, acts, … in the Pet Food Recall Litigation."

Pet Food, 629 F.3d at 338–39 (emphasis added; ellipses in the original).

So has the Supreme Court. For example, in *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367 (1996), the Court held that a state court judgment that had approved a class action settlement agreement was entitled to Full Faith and Credit, notwithstanding the fact that state settlement judgment had released claims within the exclusive jurisdiction of the federal courts. 516 U.S. at 385-86. Significantly, the settlement mirrored the one Chandra finds so offensive here, *i.e.*, it provided:

> All claims, rights and causes of action … whether known or unknown that are, could have been or might in the future be asserted by any of the plaintiffs or any member of the Settlement Class ... are hereby compromised, settled, released and discharged with prejudice ….

516 U.S. at 371-72 (emphasis added).

Notably, federal courts often have upheld the release of "unknown" claims in class action settlements right on point, *i.e.*, ones for environmental pollution, where the risk of future harm from historic hazards of unknown dimension is ever-present.

See Olden v. Gardner, 294 F.App'x. 210, 213, 2008 WL 4297245, at *2 (6th Cir.2008).[6]

The Second Circuit has explained why "[b]road class action settlements are [so] common": because "defendants … would otherwise face nearly limitless liability from related lawsuits in jurisdictions throughout the country. Practically speaking, '[c]lass action settlements simply will not occur if the parties cannot set definitive limits on defendants' liability.'" *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 106 (2d Cir.2005)(citations omitted). *See In re Prudential Ins. Co. of Am. Sales Practice Litig.* (*Prudential II*), 261 F.3d 355, 366–67 (Cir.2001).

This explains why Chandra cannot cite a single decision or other authority or provide any reason why this Court should be the first one in the nation to hold that the release of "unknown" claims are voidable, unenforceable, or otherwise grounds for disapproving a settlement.

b. The District Court did not abuse its discretion in permitting the release of "ground contamination" claims

Chandra contends "the District Court abused its discretion and committed clear error"—and disregarded the third *Girsh* factor—because that court (like the

[6] *See also Roeder v. Atlantic Richfield Co.*, No. 3:11-CV-00105-RCJ, 2013 WL 5878432, at *13 (D.Nev. Oct. 21, 2013); *Smith v. Ohio Dep't of Rehab. & Correction*, No. 2:08-CV-15, 2012 WL 1440254, at *18 (S.D. Ohio Apr. 26, 2012).

parties) supposedly "lacked ***any*** information about ground contamination or remediation to class members' homes," Chandr.Br.17 (emphasis added).

Chandra's argument to this Court merely rehashes the arguments she made to the District Court, arguments that the District Court carefully considered and then gave several different reasons for completely rejecting.

First, as the District Court noted, Chandra's repeated assertion that the parties and the court "were … **without any information**" about ground contamination, Chandra.Br.at 18 (emphasis added) ignores the ample contrary evidence.

The District Court and the parties had vast information. Indeed, the District Court expressly found, as a matter of fact, that:

> this is not a situation where *no* information exists; [instead], this appears to be a situation where Settlement Class Counsel and Honeywell disagree as to the significance and impact of the information that does currently exist. (Compare Parties' Joint Motion at 16-18 with Parties' Joint Motion at 20-21 (providing opposing positions based on research and studies)).

A41 (emphasis in the original).

The court's finding was based on the voluminous information the parties had gathered and exchanged regarding if, where, when, how, and to what extent any water, ground, and air—on, under, inside, outside, adjacent to, and nearby the Class Members' homes and properties—had been contaminated with chromium waste, information that the parties summarized in their detailed Memorandum in Support

of their Joint Motion for Final Settlement. On the one hand, the class claimed, with citations to the voluminous documents produced in discovery in this case, that the contamination was widespread. A256-57 Honeywell, by contrast—and also with numerous citations to documents—claimed it was not. A252-55; A346-454.

Chandra does not specify what was wrong with the District Court's factual finding, or why the information the parties gathered during the course of this litigation was not sufficient enough to allow them and the Court to adequately assess the merits of the settlement of all claims, and not just the merits of her own hypothetical claim for the cost of rebuilding her home if it ever needed to be demolished because of chromium contamination. Instead, Chandra simply ignores the extensive evidence (referenced above and detailed in the parties' Joint Memo and the court's opinion) regarding the extent of contamination from Honeywell, evidence that was understandably in conflict with Honeywell's evidence.

To be sure, Class Counsel and Honeywell disagreed in their Joint Memo about what information was most significant and each party drew diverse inferences from such information. This disagreement was a central consideration in the settlement of the claims as each party recognized the cost, delay, and risk of proceeding to resolve that dispute.

The District Court agreed, explaining that a decision to mandate "testing of the Class Members' properties before the Settlement Agreement is approved," as

Chandra requested, "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 (quotation marks and citation omitted).

Chandra also suggests, Chandra.Br.17-20, that the District Court erred because it is conceivable that the parties might have found more information (and conceivably information that could inculpate Honeywell) about residential ground contamination and the possible necessity for ground remediation—if only the parties had tried harder and not agreed to settle after a mere five years of litigation.

Yet, the question confronting the District Court, and this Court, too, is not whether any more information ever can be found. Some more information always can be found. Rather, the question posed by *Girsh*'s third factor is "whether counsel had an adequate appreciation of the merits of the case before negotiating.'" *Sullivan*, 667 F.3d at 321 (quoting *Warfarin*, 391 F.3d at 537). This explains why, as many courts have noted in the class action context, "it is important not to let a quest for perfect evidence become the enemy of good evidence." *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 808 (7th Cir.2012).

This Court recently stressed the same principle in deciding the overall question of whether a settlement is fair, reasonable, and adequate.

> It is the nature of a settlement that some will be dissatisfied with the ultimate result. … [W]e do not doubt that objectors are well-

> intentioned in making thoughtful arguments against certification of the class and approval of this settlement. … But they risk making the perfect the enemy of the good. This settlement … [t]hough not perfect, … is fair.

NFL Players, 821 F.3d at 447–48 (emphasis added). *See Mullins v. Direct Digital, LLC*, 795 F.3d 654, 666 (7th Cir.2015), *cert. denied*, 136 S. Ct. 1161 (2016).

Lastly, as the District Court noted, although Chandra had decided not to opt-out and thereby to preserve her right to prosecute her own claims for remediation of ground contamination of her home—if such ever were to be found—she had no legitimate reason to fear the expense of remediating such contamination, even if that remediation required her home to be demolished and rebuilt. Thus, although she did not opt-out, the court noted that Chandra was "***not*** forgoing the possibility of all relief." A43 (emphasis the original). "Rather," she, and any other Class Member,

> could turn to the N.J. Department of Environmental Protection [("NJDEP")]—and Honeywell would have to remediate pursuant to the New Jersey Spill Act, N.J.S.A. 58:10-23.11. In other words, the Release does ***not*** require giving up an ability to obtain remediation all together; it [merely] releases 'a Class Member's] "ability to seek damages from [Honeywell] ... above and beyond the remediation that the state would require."

A43 (emphases in the original; citations omitted).

In the same vein, the Court "f[ound]," as a matter of fact,

> 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, and under the supervision of both the New Jersey Department of Environmental Protection and a Special

> Master appointed by the United States District Court of the District of New Jersey."

A43-44 (citations omitted). *See* A254-55; A620-25 (Tr. 94:9—99:20)(detailing the history, knowledge, and status of contamination and remediation efforts using demonstratives).

In the final analysis, Chandra's argument to this Court that the information the parties had gathered and had presented to the District was insufficient contains nothing new. She simply rehashes that that information was insufficient, as if saying so would make it so. It does not.

c. The District Court did not abuse its discretion by ostensibly relying on the existence of the N.J. Spill Act and the efficacy of the NJDEP in allowing the release of ground contamination claims

Chandra contends the District Court "committed clear error" because it concluded that the New Jersey Spill Act, N.J.S.A. 58:10-23.11, provided an opportunity for Chandra and the class to seek remediation should chromium ever be found on or under their properties. Chandra.Br.20.

Although Chandra never specifies the kind of "clear error" the District Court purportedly made, she seems to suggest it made an errant conclusion of law regarding the Spill Act's authority and the efficacy of the N.J. Dept. of Environmental Protection ("NJDEP"), the state agency charged with enforcing the Spill Act. Significantly, however, she nowhere denies the Spill Act provides for

cleanup of properties by order of NJDEP when they have been contaminated.[7] In reality, she ignores the fact that NJDEP has already acted to compel Honeywell to clean up sites where its contamination may be found to exist in the future.

Thus, in 2011 Honeywell reached a comprehensive settlement with NJDEP, one in which Honeywell agreed to conduct remediation activities at any site where:

> (1) CCPW [Chromate Chemical Production Waste] has been placed on or migrated from the Site [identified as being one for which Honeywell is accepting responsibility in the agreement] in such a manner as to extend beyond a property boundary;
>
> (2) groundwater contaminated with chromium associated with CCPW placed on the Site is migrating from the Site; or
>
> (3) surface water or other erosion caused the CCPW to migrate onto a neighboring site.

[7] *See* N.J.S.A. §58:10-23.11f—a.(1)("Whenever any hazardous substance is discharged, the department may, in its discretion, act to clean up and remove or arrange for the cleanup and removal of the discharge or may direct the discharger to clean up and remove, or arrange for the cleanup and removal of, the discharge."); N.J.S.A. §58:10-23.11g—c.(1)("any person who has discharged a hazardous substance, or is in any way responsible for any hazardous substance, shall be strictly liable, jointly and severally, without regard to fault, for all cleanup and removal costs no matter by whom incurred. Such person shall also be strictly liable, jointly and severally, without regard to fault, for all cleanup and removal costs incurred by the department ….). *See also* N.J.S.A. §58:10-23.11a, §58:10-23.11b, and §58:10-23.11q. The force of the Act and NJDEP's implementation of its cleanup provisions is evidenced in several court decisions. *See, e.g., Morristown Associates v. Grant Oil Co.*, 106 A.3d 1176, 1187-90 (N.J. 2015); *NJDEP v. Exxon Mobil Corp.*, 923 A.2d 345, 353 (N.J.App. 2007)).

NJDEP v. Honeywell Int'l Inc., et al., "Consent Judgment" 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). Thus, if Chandra or any Class Members discover chromium on their property that is linked to Honeywell sites, this Consent Judgment provides for remediation.[8]

Furthermore, for all the reasons set forth above, this Court should reject all of Chandra's argument that the District Court abused its discretion in finding the third *Girsh* factor favored approving the settlement.

4. The fourth and fifth *Girsh* factors weighed in favor of approving the settlement because of the manifest uncertainty of success, for either party, if the case went to trial

"The fourth and fifth *Girsh* factors survey the possible risks of litigation in order to balance the likelihood of success and the potential damage award if the case were taken to trial against the benefits of an immediate settlement." *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions,* (*Prudential I*), 148 F.3d 283, 319 (3d Cir.1998). "By evaluating the risks of establishing liability, the district court can examine what the potential rewards (or downside) of litigation might have been had

[8] Chandra's only asserted basis for the claimed inability of Class Members to obtain remediation of their properties in the future is the *dicta* in an opinion by Judge Dennis Cavanaugh in *Interfaith Cmty. Org. [("ICO")] v. Honeywell Int'l, Inc*., 263 F.Supp.2d 796, 826 (D.N.J. 2003), *aff'd*, 399 F.3d 248 (3d. Cir.2005)), where he chastised NJDEP for not vigorously enforcing the Spill Act. As evidenced by the cited 2011 Consent Judgment, NJDEP took Judge Cavanaugh's concerns seriously.

class counsel elected to litigate the claims rather than settle them." *GM Trucks*, 55 F.3d at 814.

Class Counsel and Honeywell differ significantly on plaintiffs' chances of proving liability and winning damages. Each party point to studies that prove they're right; each disparages the ones that don't. Each is confident of victory; but neither is certain of it. Both agree, however, on one thing: pursuing litigation, through trial and very likely appeals, would fulfill two of Hobbes' criteria for hell of earth: it would be "nasty [and] brutish," but, alas, anything but "short." *See* A35-37.

The District Court predicted "[e]ven if this case were to traverse class certification and summary judgment challenges, Plaintiffs faces a real risk that a jury could find no liability." A37. And if they succeeded in establishing liability, they would need to gird for "a significant battle of experts on damages." *Id.*

In light of the manifest "uncertainty of success," the District Court "f[oun]d that the fourth and fifth *Girsh* factors weigh in favor of approving the settlement." A38.

Chandra found no reason to disagree.

5. The sixth Girsh factor was neutral the advantages of certification were in equipoise with the risks of decertification

"Under Rule 23, a district court may decertify … a class at any time during the litigation …." *Prudential I*, 148 F.3d at 321. Although "the prospects for

obtaining certification have a great impact on the range of recovery" a class may enjoy from pursuing the case to conclusion, *GM Trucks*, 55 F.3d at 817, a class must recognize that certification is conditional and revocable and thus must live in constant fear of decertification and oblivion. Accordingly, a district "court can always claim this factor weighs in favor of settlement." *Prudential I*, 148 F.3d at 321.

In this case, Class Counsel candidly recognized "'that Honeywell intends to challenge class certification in a litigated context'" and "'that there is no guarantee that this Court will certify all, or any, of Plaintiffs' claims.'" A38 (citation omitted).

For these reasons. The District "f[ound] that the sixth *Girsh* factor is neutral." A38.

Chandra does not challenge this finding.

6. The seventh *Girsh f*actor was irrelevant because of the remote likelihood of Plaintiffs obtaining a judgment, in the near term, greater than Honeywell could withstand

This factor "is concerned with whether the defendant [] could withstand a judgment for an amount significantly greater than the Settlement." *Cendant*, 264 F.3d at 240. The parties agreed that although Honeywell could readily withstand a judgment greater than the $10,000,000 the settlement provides—if the Plaintiffs proved their case on liability and damages—the chances of greater success,

especially in the near-term, is sufficiently remote as to render this factor "'of diminished importance,"" in their calculations. A39 (citation omitted).

The District Court agreed, which rendered the seventh *Girsh* factor "not relevant" to the court's overall evaluation of the settlement's fairness, adequacy, and reasonableness. A39

Chandra saw no reason to demur.

7. The eighth and ninth *Girsh* factors weighed in favor of approving the settlement because the settlement represented best possible recovery in light of what the parties faced if they went to trial

The eighth and ninth "*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 I,* 148 F.3d at 322. These twin factors call upon a court to exercise its best judgment in "evaluat[ing] 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. As the emphasized terms indicate, determining what is "reasonable" is an inherently imprecise and substantially subjective enterprise.

In this case, Honeywell and Class Counsel asserted the settlement was reasonable under all the circumstances. Chandra objected, asserting the settlement economic value was "impossible" to assess because "Class Counsel has no information concerning soil or ground water contamination, A504, and "refused to

provide … an estimate … concerning loss of property value." A506 (citation omitted).

The District Court overruled Chandra's objections, finding

> - "this is not a situation where ***no*** information exists; this appears to be a situation where [the parties] disagree as to the significance and impact of the information that does currently exist," A41 (emphasis in the original*; See* discussion above);
> - "'continuing to litigate this case … will be a lengthy, complicated, and expensive process,'" A43; and
> - "testing of the Class Members' properties before the Settlement Agreement is 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'" *Id.*[9]

The court also reasoned "there is no fatal flaw by not having an estimate of the best possible recovery. … The key is that this Settlement, … 'yields substantial and immediate benefits, and it is reasonable in light of the best possible recovery and the attendant risks of litigation—little or no recovery at all.'" A43-44 (emphasis added; citation omitted). Thus, the District Court "f[oun]d," overall, "that the last two *Girsh* factors weigh in favor of approval …." A44.

Now, before this Court, Chandra reprises her "no information" arguments, without even mentioning the District Court's rejoinder. A28-29. Chandra also asserts

[9] "'The temptation to convert a settlement hearing into a full trial on the merits ….'" *Bell Atl.*, 2 F.3d at 1315 (quoting *Mars Steel Corp. v. Continental Illinois Nat'l Bank & Trust Co.*, 834 F.2d 677, 684 (7th Cir.1987) (Posner, J.)).

"the District Court abused its discretion" by "fail[ing] to follow the proper procedures for evaluating *Girsh* factors eight and nine," without pinpointing what the "property procedures" exactly are or identifying which authority declaims they are the "proper" ones. A29.

Chandra's last contention deserves more discussion, not because she provided any authority for it but because this Court has stated that "all else being equal," the more precision and "the more information available the better." *NFL Players*, 821 F.3d at 447. This Court also has stated that—"if available"—the parties should "provide the District Court with estimations of recoverable damages." *Pet Food*, 629 F.3d at 335. Significantly, however, this Court never has held that damage "estimations" are required in every case, *i.e.*, even in a case where the information may be unavailable or even if the cost of acquiring the information needed to make such estimations makes a settlement economically infeasible, *i.e.*, that the cost of obtaining the estimations outweighs the value of having them. In such cases, as the Supreme Court noted in another context, "the game is unlikely to be worth the candle." *Am. Trucking Associations, Inc. v. Michigan Pub. Serv. Comm'n*, 545 U.S. 429, 436 (2005).

Thus, this Court has stressed has stressed that parties and courts should avoid "the risk of making the perfect the enemy of the good." *NFL Players*, 821 F.3d at 447. Other Circuits agree. As the Seventh Circuit recently explained in affirming a

district court's approval of a settlement agreement—and affirming the lower court's rejection of objectors' demands for "quantified" damages estimations—

> for the court to have quantified the case in this manner would have required testimony by a damages expert. Any such testimony would have been hotly contested [which] … would have resulted in a lengthy and expensive battle of the experts, with the costs of such a battle borne by the class—exactly the type of litigation the parties were hoping to avoid by settling.

Wong v. Accretive Health, Inc., 773 F.3d 859, 863, (7th Cir.2014).[10]

The same principle that has guided the Seventh, Eighth, Ninth, and Tenth Circuits should guide this Court in concluding that the District Court did not abuse its discretion in finding the eighth and ninth *Girsh* factors favored approving the settlement.

II. THE DISTRICT COURT EXERCISED ITS DISCRETION APPROPRIATELY IN AWARDING FEES AND COSTS

The District Court approved Class Counsel's request for an award $2,504,250 in attorney fees, reimbursement of $1,140,023.77 for their costs in prosecuting the action against Honeywell, and reimbursement of $219,278.87 in claims administration expenses. A49. Chandra contends the court abused its discretion in

[10] *See Marshall v. NFL*, 787 F.3d 502, 518 (8th Cir.2015), *cert. denied*, 136 S. Ct. 1166 (2016) (affirming approval of a settlement "[i]n a case … where the damages are not easily calculable, are highly speculative, and are heavily dependent on expert opinions, [because] it would be difficult if not impossible to derive the … for potential value of the claims in such an accurate way as to allow for a meaningful conclusion.")(citing *Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 964 (9th Cir.2009); *Gottlieb v. Wiles*, 11 F.3d 1004, 1013 (10th Cir.1993)).

approving those requests and she asserts several overlapping substantive and procedural grounds why this Court should reverse. As discussed below, each of Chandra's contentions lacks merit.

A. THE STANDARD OF REVIEW

"We give great deal of deference to a district court's decision to set fees" in class action settlements and, if so, in what amounts. *Gunter v. Ridgewood Energy Corp*., 223 F.3d 190, 195 (3d Cir. 2000) (citing *GM Trucks*, 55 F.3d at 782. "The amount of a fee award ... is within the district court's discretion so long as it employs correct standards and procedures and makes findings of fact not clearly erroneous." *In re Rite Aid Corp. Sec. Litig*., 396 F.3d 294, 299 (3d Cir.2005) (citation and internal quotations omitted). *See In re Insurance Brokerage Antitrust Litig.*, 579 F.3d 241, 256 (3d Cir.2009); *Cendant*, 243 F.3d at 727.

B. THE DISTRICT COURT'S DECISION TO AWARD $2,504,250 IN ATTORNEY FEES WAS CONSISTENT WITH FED.R.CIV.P. 23(H) AND EVEN COMPORTS WITH THE SUPPOSEDLY CONTROLLING STATE RULE, N.J. COURT RULE 1:21-7

The District Court recognized its obligation to "'robust[ly] assess[]'" the fee award for "'reasonableness,'" A50 (quoting *Rite Aid*, 396 F.3d at 301-02), even when, as here, only one Class Member objected and even though "'[t]he absence of substantial objections by Settlement Class members to the fees requested … strongly supports approval.'" A53 (citations omitted). *See GM Trucks*, 55 F.3d at 812

(widespread ""silence constitutes tacit consent to the agreement' to the proposed fees." (citation omitted).

The District Court assessed the reasonableness of the fee request by using both of the "'two methods'" this Court has approved for such assessments under Fed.R.Civ.P. 23(h): "'the percentage-of-recovery ("POR") approach [and] the lodestar scheme.'" A50 (quoting *Sullivan*, 667 F.3d at 330).

First, in using the POR method, the court analyzed in depth each of "'the ten factors'" set out in "*Gunter* ... and *Prudential [I]*, 148 F.3d 283." *Id.* (citation omitted). A50. *See* A52-63 (analyzing whether the fee request comported with each of the ten *Gunter/Prudential* factors). Second, the court used the "lodestar" method to "cross-check" the reasonableness of the fee request. A63-65. The court found the request was reasonable under both methods. A52, A65.

Chandra does not contend the District Court applied the wrong federal "standards and procedures," applied them incorrectly, or betrayed the *Gunter/Prudential* factors). Instead, Chandra faults the District Court for refusing to be the first court, state or federal, to use a venerable state court rule, N.J. Court Rule 1:21-7, in a class action. One sub-section of that Rule specifies "[t]he permissible fee provided for in paragraph (c) shall be computed on the net sum recovered <u>after deducting disbursements</u> …." Rule 1:21-7(d)(emphasis added).

Focusing exclusively on the three underlined words in sub-section (d), Chandra insisted the District Court was obligated to rigidly follow that sub-section to the letter. She now argues that the court's refusal to do so constitutes a manifest abuse of discretion. Chandra.Br.33.

In explaining why it demurred from following Rule 1:21-7(d), the District Court noted that although 1:21-7(d) was promulgated in 1971, Chandra could not "cite a single federal decision applying [it] … in a class-action, a fact which "[t]he Court's independent research confirm[ed]." A54. The absence of such precedents was "telling" because "courts in this District" and Circuit "are no strangers to class action litigation" and because Third Circuit courts "consistently award fees based on the gross recovery," not the net. *Id.* (citations omitted).

No New Jersey state court has applied Rule 1:21-7 in a class action, either, even though class actions have been litigated in those courts since 1941. *See Solimine v. Hollander*, 19 A.2d 344, 345 (N.J.Ch. 1941).

The District Court found no reason why it should be the first federal court to use N.J. Court Rule 1:21-7 in a class action. Chandra was unable to offer any reason why that court should have broken the mold, other than to suggest that lawyers and courts in this Circuit may not have been familiar with a Rule that was promulgated in 1971, was the focus of a 1973 decision by the Supreme Court, *ATLA v. N.J. Supreme Court*, 409 U.S. 467, 467–69 (1973)(*per curiam*), the focus of a 1976

decision by this Court, *Elder v. Metro. Freight Carriers, Inc*., 543 F.2d 513, 516 n.2, 517-19 (3d Cir.1976), and the focus of a 1982 decision by the District Court, *Donaghy v. Napoleon*, 543 F. Supp. 112, 115 (D.N.J. 1982).

Now, on appeal, Chandra is unable to explain why this Court should be the first one in any jurisdiction, federal or state, to use the Rule in a class action and why this Court should ignore what the District Court stated and what Chandra does not deny: that courts in this Circuit "consistently award fees based on the gross recovery." A54.

Furthermore, the District Court explained that "even if Settlement Class Counsel's fee is calculated on the balance of the recovery after deducting litigation expenses and administrative costs," that is, "even if" Rule 1:21-7(d) were applicable, "the requested fee would be under 30% of the net recovery—which the Court finds reasonable in this action." A54. In so ruling, that court relied on this Court's admonition that in applying Fed.R.Civ.P. 23(h) federal courts "'need not'" follow the *Gunter/Prudential* factors in a rigid, "'formulaic way,'" A51 (quoting *Gunter*, 223 F.3d at 195 n.1), but instead have an "'independent obligation to ensure the reasonableness of any fee request.'" A54 (quoting *AT&T Corp.*, 455 F.3d at 168)(citation and quotation marks omitted).

Equally important, the District Court explained that its finding that a $2.5 million fee was reasonable—even if the costs were deducted before fees were

calculated—comported with the N.J. Rule's safety clause, 1:21-7(f). That sub-section provides:

> "If at the conclusion of a matter an attorney considers the fee permitted by paragraph [1:21-7(c)] to be inadequate, an application on written notice to the client may be made to the Assignment Judge or the designee of the Assignment Judge for the hearing and *determining of a reasonable fee in light of all the circumstances*. This rule shall not preclude the exercise of a client's existing right to a court review of the reasonableness of an attorney's fee."

A54 (quoting Rule 1:21-7(f); emphasis and brackets added by the District Court).

Rule 1:21–7(f) therefore allows "a court to increase a contingency fee above the maximum limits" set in other sub-sections of the Rule. *Mitzel v. Westinghouse Elec. Corp.*, 72 F.3d 414, 418 (3d Cir.1995). "The language of the rule makes the polestar 'a reasonable fee in light of all the circumstances.'" *Id.* State courts have long used sub-section (f)'s "relaxation provision" to increase fees and thereby avoid the harsh consequences of rigidly following other parts of the Rule. *Murphy v. Mooresville Mills*, 333 A.2d 273, 274-75 (N.J.App. 1975); *Ehrlich v. Kids of N.J., Inc*., 769 A.2d 1081, 1083-84 (N.J.App. 2001).

Here, Chandra has no response to the District Court's reasoning and is noticeably silent about the District Court's reliance on Rule 1:21-7(f). This Court should spurn her appeal on this issue.

C. THE DISTRICT COURT'S DECISION TO AWARD $2,504,250 IN ATTORNEY FEES WAS CONSISTENT WITH PROCEDURAL DUE PROCESS

Chandra maintains that she should have received timely notice that the fees Class Counsel sought would change (from 25% of the gross recovery to 28.7% of the net recovery) if the District Court were to adopt Chandra's preferred net recovery approach, even though the actual dollar amount requested, $2,504,250, in attorney fees would not change at all. The District Court agreed, as a matter of law, but then expressly found, as a matter of fact, that Class Counsel actually had provided timely and appropriate "website notice of the change in the fee" percentage. A55. Simply put, the "website explicitly note[d]" that change. *Id.*

Chandra says the District Court's finding about what the "website explicitly note[d]," A55, is completely and factually false. She insists "no notice of the change in counsel fee was ever posted on the Settlement website." Chandra.Br.34. This is a remarkable accusation, especially because the only authority she cites for it is the website address itself, *i.e.*, "http://honeywelljerseycitysettlement.com/courtdocs." Chandra.Br.34. In other words, she never explains how she knows, as a fact, that it was "[n]ever posted," Chandra.Br.34, other than to insinuate that it was not visible on that website the last time she or her counsel or some unnamed persons looked at the website, on whatever unspecified date that might have been. This kind of

"evidence" is completely insufficient to prove that the District Court's finding was "clear error," as Chandra alleges. Chandra.Br.34.[11]

Chandra also contends the District Court had its own obligation to give the Class timely notice of its interpretation of the N.J. Rule that Chandra had commended to it. Chandra.Br.34. But Chandra ignores that fact that the N.J. Rule she cited included Rule 1:21-7(f), which explicitly allowed the court to conclude that increasing the counsel fee from 25% to 28.92—without increasing the fee in terms of dollars—was appropriate, as the fee amount (whether expressed as a flat amount or a percentage) was "reasonable in light of the circumstances." A54-55. Chandra cites no authority, from any jurisdiction, for the notion that a court must publish

[11] Chandra's assertion of what, supposedly, "was [n]ever published on the Settlement website" is not substantiated by anything in the record. Naked, unauthenticated, uncorroborated, self-serving, and non-record assertions about what may (or may not) have appeared on a computer screen at a particular time are the definition of "incompetent evidence." *S.E.C. v. Locke Capital Mgmt., Inc*., 794 F.Supp.2d 355, 366 (D.R.I. 2011). Differently stated, Chandra has not laid a foundation for her assertion or explained why it should be regarded as reliable. She merely says the District Court "clear[ly] err[ed]." This is insufficient to meet her burden regarding the reliability and authentication of computer-related records. *See Victaulic Co. v. Tieman*, 499 F.3d 227, 236-37 (3d Cir.2007); *United States v. Vayner*, 769 F.3d 125, 133-34 (2d Cir.2014).

Furthermore, the fact that a relevant web-page may not be visible today does not mean it was not posted last year. "Website content is updated and changed all the time, … meaning that pages are frequently changed or deleted." *Gayou v. Celebrity Cruises, Inc.*, No. 11-23359-CIV, 2012 WL 2049431, at *7 (S.D. Fla. June 5, 2012) (citations omitted). *See Business Info. Systems v. Prof'l Governmental Research & Sols., Inc.*, No. CIV.A. 1:02CV00017, 2003 WL 23960534, at *6 (W.D. Va. Dec. 16, 2003).

notice of a pending ruling, and give an objector the opportunity to object before the ruling becomes final especially when, as here, the court's decision relied on the exact Rule that Chandra invited the court to use.

D. THE DISTRICT COURT'S DECISION TO AWARD $1,140,023 IN COSTS WAS CONSISTENT WITH PROCEDURAL DUE PROCESS

Chandra contends the District Court abused its discretion and violated Fed.R.Civ.P. 23(h) "by not allowing the class any opportunity to review the basis for Class Counsels' expense request before the deadline to object had expired," and by not "afford[ing]" her any "opportunity to review the particulars of Class Counsels' expense request." Chandra.Br.39, 37 (emphases added).

Chandra is wrong on both counts. As explained below, she misunderstands how much information Class Counsel must provide, when, and to whom. She also fails to appreciate the court's role as a fiduciary on questions of cost and the importance of *in camera* review of expense records.

As an in initial matter, Chandra cannot find anything in the text of Rule 23(h) or any authority that even suggests that Class Counsel must "itemize" expenses to class members "before the deadline to object ha[s] expired." Chandra.Br.39. Instead, Chandra relies on this Court's recent decision in *NFL Players*, which discussed, in *dicta*, "two cases from other circuits that found a violation of Rule 23(h)" regarding fee requests. 821 F.3d at 446 (citations omitted). That reliance is misplaced. In fact,

NFL Players, and the two cases it cites, undercut rather than support Chandra's arguments. As *NFL Players* explained, the decisions from the Seventh and Ninth Circuits had held that the district courts in those cases had

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

821 F.3d at 446 (emphasis added).

As discussed above, and as undisputed by Chandra, the District Court required Class Counsel to file its motion for fees and costs two months before the objection/opt-out deadline. Counsel complied and thereby honored rather than violated the *NFL Players'* timing rule.

Of equal, if not greater importance, 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 the only case Chandra cites, *NFL Players* (which, as noted above, is concerned solely with fees, not costs).[12]

NFL Players' discussion of the notice of settlement that the counsel in that case furnished to class members before the objection/opt-out deadline makes clear

[12] Chandra has not challenged Class Counsel's fee request (except regarding N.J. Court Rule 1-27:1) and she does not contend that she is entitled to see the detailed hourly records that support that request.

that the amount of information that is "sufficient to comply with due process" is not great. In *NFL Players*, that notice provided class members with four pieces of information, and four pieces only. It merely

> advised that [1] the [defendant, the] NFL would pay [class counsel's] attorneys' fees from a separate fund and [2] not object to an award up to $112.5 million and [3] that the District Court would consider fees after final approval and [4] afford retired players an opportunity to object. From this, class members knew from where the fees for class counsel were coming (a separate fund), what the NFL's position on fees would be (no objection up to $112.5 million), and could ballpark the size of class counsel's eventual fee request …. Even if the class members were missing certain information … they still had enough information to make an informed decision about whether to object to or opt-out from the settlement.

NFL Players, 821 F.3d at 446-47 (emphasis added).

In this case, Chandra acknowledges "[d]irect notice of the settlement was distributed to the class on June 1, 2015," Chandra.Br.7, two months before objections were due. Although Chandra omits discussing what that notice said, it contained more information than the notice that passed muster in *NFL Players*. The notice here stated: "The Court will decide how much Class Counsel and any other lawyers will be paid. Class Counsel will ask the Court for an award to cover costs and expenses, as well as for a fee award of $2,504,250," A322. It also said:

> In accordance with the Settlement Agreement, Honeywell must place … ($10,017,000) in a court-administered fund …. The Settlement provides for a monetary payment to the owners of each eligible property. The exact amount of any final payment to the property owners will depend on the Court's award of

> attorneys' fees and expenses, costs of administration, and the number of eligible members participating, and it will be calculated by the Claims Administrator based on the duration of ownership during the period May 17, 2010 through October 1, 2014.

A318. *See* A320.

The Notice additionally explained "You will not be charged for these lawyers. Their fees will be paid out of the Settlement Fund, as explained below." A321. Further, "Class Members "can object to the Settlement or to requests for fees and expenses …." A322.

Finally, the Notice advised class members who wanted to know "HOW DO I GET MORE INFORMATION?"—about the proposed settlement or counsel's request for fees and costs—that they could, *inter alia*, "go to www.honeywelljerseycitysettlement.com." A323. That website, in turn, provided links to the contemporaneously filed 20-page supporting "Declaration of Steven A. German," the plaintiffs' lead counsel, in support of the Motion for Fees and Costs. A154-174.

The German Declaration specifically stated that:

> Class Counsel request an award of reasonable … costs totaling … $1,191,174.67. … The Class firms have advanced $1,425,652.27 in costs including, but not limited to, those for:
>
> - experts and consultants in various scientific disciplines;
> - mediation fees and related expenses;

- document management, imaging, Bates labeling and productions;
- fact and legal research;
- court filing fees;
- deposition transcripts and videos; and
- travel and lodging for hearings, client meetings, expert meetings, site visits, court conferences, co-counsel meetings, document reviews, mediation and meetings with opposing counsel.

A171 at ¶¶42-43.

Although the German Declaration did not detail how much money had been expended on each of the aforementioned categories, that Declaration put more flesh on those bones by explaining that since "litigation commenced on May 17, 2010," A159, ¶23, "the Class firms dedicated 27,639 hours in connection with the investigation, development, prosecution and settlement of the claims in this case," A165, ¶40, including "over 10,000 hours to discovery," alone. A163, ¶38. "Class Counsel consulted and retained numerous experts in highly technical fields such as environmental science, medicine, toxicology, chromium toxicity, geochemistry, air modeling, forensic reconstruction, risk assessment, economics and property valuation," A163, ¶35, covered "33 days of deposition," A162, ¶33, "appeared for 23 court conferences," A162, ¶34, and reviewed "greater than 2,500,000 pages of documents" from Honeywell alone. A161, ¶30.

This amount of information easily exceeded the quantum this Court deemed satisfactory in *NFL Players.* Chandra does not say otherwise.

E. THE DISTRICT COURT'S EXERCISED ITS DISCRETION APPROPRIATELY IN DECIDING THAT THE $1,140,023 IN COSTS THAT CLASSES A AND C WOULD PAY WAS REASONABLE, HAD BEEN ADEQUATELY DOCUMENTED, AND HAD NOT BEEN COMMINGLED WITH EXPENSES BEST CHARGED TO CLASS B

Congress amended Fed.R.Civ.P. 23(h) in 2003 to expressly authorize District Courts to award "reasonable … nontaxable costs that are authorized by law or by the parties' agreement." *Rite Aid*, 396 F.3d at 300 n.7 (citing Fed.R.Civ.P. 23(h), 2003 Advisory Committee Notes).

Based in part on the materials detailed in the German Declaration—and, even more so, on the more than 900 separately itemized expenditures listed by four different law firms on the 56-page "Documentation of Reasonably and Appropriately Incurred Costs," that Class Counsel "Submitted Confidentially for *In Camera* Review Pursuant to [the Court's] Order (DOC. NO. 428)"—the District Court approved that request. The court explicitly "f[ou]nd[] that Settlement Class Counsel is entitled to receive costs in the requested amount because the requested costs ha[d] been adequately documented and reasonably and appropriately incurred in the prosecution of the case," A66-67 (internal quotation marks omitted).

Significantly, the District Court explained that the "requested costs" had been documented sufficient to the court's satisfaction because, "Class Counsel ha[d]

provided this Court with itemized expenditures, including *in camera* submissions showing detailed records of the requested costs." A67 (emphasis added).

Chandra asks this Court to reverse and remand the District Court's decision because she says she was entitled to review the "itemized expenditures" and "detailed records" the court relied on and thus so that she can determine which ones had truly been "reasonably and appropriately incurred" (or inappropriately commingled with expenses more properly chargeable to Class B). According to Chandra, the District Court's

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

Chandra.Br.37 (emphasis added). There are two things amiss with Chandra's arguments.

First, as a substantive matter, although Rule 23(h)(2) explicitly authorizes "[a] class member … [to] object to [a] motion" for fees and costs, nothing in the text of that Rule, the Advisory Committee Notes, or any court's decision states or even suggests that class members, especially solitary objectors like Chandra, are entitled to see "itemized," "detailed," or "particular[ized]" expense records.[13] This is

[13] Chandra's inability to cite any authority in support of her argument is significant because Congress has amended Rule 23 on multiple occasions since it

particularly so where, as here, Class Counsel submitted a sworn declaration explaining that confidential, *in camera* review was essential—and joint expenses between Honeywell and PPG were borne, often "on an indistinguishable basis"—precisely because Plaintiffs had been suing both defendants on joint-and-several-liability grounds, that PPG was still an active litigant, and could gain an unfair advantage, if upon reading public expense reports, it learned about plaintiffs' experts and "case strategy." A718, ¶31. *See* A679 (Class Counsel Supp. Memo for Final Approval)("damages expert report for purposes of settlement" would be "protected work product and as confidential settlement material under F.R.E. 408 and 154.").

Had Congress wished to authorize objectors to review "itemized," "detailed," or "particular[ized]" records, Congress knew how to do so, especially in the context of class-related actions and document requests. For example, in pleading a derivative action under Fed.R.Civ.P. 23.1, a plaintiff must "(3) state with particularity: ((A) any effort by the plaintiff to obtain the desired action from the directors …." Similarly, a party requesting documents pursuant to Fed.R.Civ.P. 34(b)(1)(A), "must

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was first enacted (as Equity Rule 38) in 1937 and because federal courts have awarded attorney fees and costs in class actions since 1941. *May v. Midwest Ref. Co*., 121 F.2d 431, 440 (1st Cir.1941).

describe with reasonable particularity each item or category of items to be inspected."[14]

The absence on anything resembling a "particularity" requirement in Fed.R.Civ.P. 23(h) provides one reason why this Court never has required more information than was furnished in *NFL Players*, *i.e.*, information that (as discussed above) was less detailed than the information supplied to Class Members here.

Another reason why Chandra need not be furnished with particularized expense records is that District Courts are assigned the "'fiduciary'" role of protecting the interests of unnamed class members. *NFL Players*, 821 F.3d at 430 (quoting *GM Trucks*, 55 F.3d at 784). *See* Fed.R.Civ.P. 23(h), 2003 Advisory Committee Note. A court's fiduciary responsibilities are particularly important "[a]t the fee determination stage." *Rite Aid*, 396 F.3d at 307.[15] "The court 'must monitor the disbursement of the fund and act as a fiduciary for those who are supposed to benefit from it ….'" *Id.* at 308 (citation omitted).

Consistent with district courts' unique role as fiduciaries, they often are authorized to review documents no one else may be allowed to see. As a general

[14] *See also* Fed.R.Civ.P. 7(b)(1), Fed.R.Civ.P. 9(b), Fed.R.Civ.P. 9(c), and Fed.R.Civ.P., Supp. Rule G(2).

[15] *See Cendant*, 404 F.3d at 187; *AT&T Corp.*, 455 F.3d at 168–69; *Report of the Third Circuit Task Force, Court Awarded Attorneys Fees*, 108 F.R.D. 237, 251 (1985).

matter, the Supreme Court has long "approved the practice of requiring parties who seek to avoid disclosure of documents to make the documents available for *in camera* inspection, and the practice is well established in the federal courts." *United States v. Zolin*, 491 U.S. 554, 569 (1989)(citation omitted).

Furthermore, it is precisely because district courts have such crucial fiduciary responsibilities that this Court has long encouraged lower courts to review, *in camera*, documents submitted in class actions, *see In re Flat Glass Antitrust Litig*., 288 F.3d 83, 91 (3d Cir.2002); *In re Fine Paper Antitrust Litig*., 751 F.2d 562, 587 (3d Cir.1984); *In re Corn Derivatives Antitrust Litig*., 748 F.2d 157, 165 (3d Cir.1984)(Adams, J., concurring), notably including "bills for photocopying, deposition expenses, payments to experts, and so forth." *School Asbestos*, 977 F.2d at 790. On the other hand, the Second Circuit has explained, there is "no authority holding that class counsel must open its books to objectors for inspection …." *Cassese v. Williams*, 503 F.App'x. 55, 58, 2012 WL 5861804, at *2 (2d Cir.2012).

Here, the District Court repeatedly cited its "careful[] review[]" of the detailed expense records submitted *in camera* in explaining why Class Counsel's expense request was adequately documented, reasonable, and did not improperly seek expenses chargeable to PPG. A57, A59, A65, and A67.

Just as Chandra can cite no authority for the proposition that she is entitled to see the "particulars" of expense records, she can cite no authority for the notions that

she is the court's co-fiduciary or was entitled to review documents submitted *in camera* so that she could double-check the court. Indeed, the best her counsel could say was that he, personally, might prove indispensable. Thus, during the Fairness Hearing, he told the District Court: "I am the only person who will enlighten you. … I am experienced in this and I am able to bring up things you wouldn't have seen otherwise," A609 (Tr. 83:18-23).

Finally, 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.

Class Counsel moved for fees and costs on June 1, 2015. Class Counsel's contemporaneous Memorandum in Support twice offered to "provide the detail of each firm's time and expenses for *in camera* inspection." A142 n.2. *See* A148 n.5.

Chandra's objection, which she filed two months later, said nothing about Class Counsel's plan to submit documents *in camera,* even though she could have opposed it or sought discovery on fees and expense issues. *Diet Drugs,* 582 F.3d at 533-34.

Class Counsel filed its Opposition to Chandra's Objection on August 25, 2015 and twice reiterated its *in camera* proposal.

The District Court convened the Fairness Hearing a month later. At that time, the court acknowledged Class Counsel's "repeated offers … to provide details of time and expenses for … review *in camera*," but did not order Class Counsel to tender them. A579 (Tr. 53:2-6). Later, during the same hearing, Chandra's counsel weighed in on those pending "offers" for the first time. Her counsel suggested it would be "important" for all Class Members to be able to see the documents submitted *in camera*, A609 (Tr. 83:12-13), and useful to the court for her counsel to personally "enlighten" the court, A609 (Tr. 83:18-23), but he but cited no authority for the notion that Chandra had a right to review the documents, inside or outside of chambers.

Simply put, it is too late in the day for Chandra to assert an argument it ignored when it had the chance to brief it below. *Diet Drugs*, 706 F.3d at 226.

F. THE DISTRICT COURT'S EXERCISED ITS DISCRETION APPROPRIATELY IN DECIDING CLASS COUNSEL COULD RECOVER EXPENSES FROM CLASSES A AND C THAT WERE INSEPARABLY RELATED TO THE CLAIMS BENEFITTING CLASS B

Chandra urges this Court to reverse the District Court's decision that there was no merit to her argument "that Settlement Class Counsel wants Classes A and C to pay for litigation pursued against PPG for Class B," A58, specifically reimbursement for expenses that should be charged to Class B. Chandra.Br.39-45.

She timely raised that issue in her Objection. A200-01. Class Counsel then rebutted her arguments—point-by-point—in its Opposition to her Objection. A22-25. Most important, the District Court carefully considered her arguments—point-by-point— and then completely rejected them. A58-59.

Chandra finds nothing to fault in the District Court's opinion, except its conclusion. Disagreeing with a court's conclusion, however, does not establish colorable grounds to charge the court with abuse of discretion. Astonishingly, aside from the section's caption and concluding sentence, Chandra never mentions the District Court at all, let alone the court's findings or reasoning. Not a word. Instead, Chandra's brief to this Court contains nothing besides "unsupport[ed] legal and factual conclusions and merely reargue[s]"—largely word-for-word—what she asserted below. This is impermissible. *Huck v. Dawson*, 106 F.3d 45, 52 (3d Cir.1997).

Indeed, other than adding citations to the Joint Appendix and reprising some colloquy from the Fairness Hearing, Chandra simply—and unforgivably—"cut and pasted" the relevant portion of the objection she filed below. *Smeigh v. Johns Manville, Inc.*, 643 F.3d 554, 556 (7th Cir.2011). She just "repeated h[er] arguments made to the district court without any showing that the district court erred" or in what respect. *Ford v. Pryor*, 552 F.3d 1174, 1180 (10th Cir.2008). In fact, her argument on appeal does not cite a single legal authority. Trying to get a second bite

at the apple by recycling, reiterating, and "'rehash[ing] positions'" a district court rejected, without offering any reason whatsoever why that rejection was wrong, is rarely, if ever, countenanced. *In re Bagdade*, 334 F.3d 568, 582 (7th Cir.2003)(per curiam; citation omitted).

The reason why appellants are not permitted to "rehash" and recycle trial court briefs and then seek reversal of a decision they do not discuss is simple: "An appeal is not just the procedural next step in every lawsuit. Neither is it an opportunity for another "bite of the apple," nor a forum for a losing party to "cry foul" without legal or factual foundation." *Beam v. Bauer*, 383 F.3d 106, 108 (3d Cir.2004)(emphasis added).[16]

In this light, exactly because Chandra never addressed what the District Court said—and never tried to meet her burden of showing that "'no reasonable person would adopt the district court's view,'" *Cendant*, 233 F.3d at 192 (citation omitted)—Class Counsel would be wasting this Court's time by: (a) regurgitating what Class Counsel briefed below; (b) repackaging the District Court's detailed critique of Chandra's arguments; and then (c) beseeching this Court to read them. Class Counsel sees no reason to "unnecessarily compound" the "significant

[16] Thus, appellants "'have an affirmative obligation to research the law and to determine if a claim on appeal [has merit].'" *Beam*, 383 F.3d at 107 (brackets in the original; citation omitted).

burden[s]" imposed on this Court by appeals like Chandra's. *Hilmon Co. Inc. v. Hyatt Int'l*, 899 F.2d 250, 253 (3d Cir.1990).

In the final analysis, Chandra's failure to provide any authority for her argument that the District Court abused its discretion constitutes a waiver of that argument.

CONCLUSION

For the reasons discussed above, Plaintiffs-Appellees respectfully urge this Court to affirm the decision below.

Respectfully submitted,

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CERTIFICATE OF BAR MEMBERSHIP

I, NED MILTENBERG, counsel for Plaintiffs-Appellees, hereby certify that I am a member of the bar of the United States Court of Appeals for the Third Circuit.

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CERTIFICATE OF COMPLIANCE
PURSUANT TO THIRD CIRCUIT RULE 31.1(C)

Pursuant to Third Circuit Rule 31.1(c), I, NED MILTENBERG, counsel for Plaintiffs-Appellees, hereby certify that the electronic copy of PLAINTIFFS-APPELLEES' RESPONSE BRIEF was scanned for viruses by BitDefender, "TotalDefender 2016" version and no viruses were detected.

The text of this electronic brief is identical to the printed, paper copies.

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CERTIFICATE OF COMPLIANCE WITH FED.R.APP.P. 32(a)

Pursuant to Third Circuit Rule 32(a), I, NED MILTENBERG, counsel for Plaintiffs-Appellees, hereby certify this PLAINTIFFS-APPELLEES' RESPONSE BRIEF complies with the type-volume limitation of Fed.R.App.P. 32(a)(7)(B) because this brief contains 13,878 words, excluding the parts of the brief exempted by Fed.R.App.P. 32(a)(7)(B)(iii).

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

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CERTIFICATE OF SERVICE

I, NED MILTENBERG, hereby certify that on this 4th day of October, 2016, I electronically filed the foregoing PLAINTIFFS-APPELLEES' RESPONSE BRIEF with the Clerk of the Court for the U.S. Court of Appeals for the Third Circuit using the appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

One original and six (6) paper copies of this Response-Brief also were mailed, to the Clerk of this Court on this day at the following address:

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