APPELLATE DIVISION
DOCKET NO: A-002323-23T4

DANA CLARK STEVENSON and MARK HENDRICKS and KENNETH FUQUA and DARIUS SNEAD, individually and on behalf of a class of others similarly situated	:	SUPERIOR COURT OF NEW JERSEY LAW DIVISION SALEM COUNTY
	:	SLM 92-17
Plaintiffs,	:	Sat Below: Benjamin Morgan, J.S.C.
v.	:	
THE COUNTY OF SALEM,	:	
Defendant.	:	

APPELLANTS' BRIEF

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I. INTRODUCTION

The Class Representatives objected to this class action settlement, and appeal from the Trial Court's final approval because it is contrary to New Jersey's liberal application of Rule 4:32 which gives vulnerable citizens the right to access the courts, when on an individual basis that would not be possible. The Honorable Jean Chetney, J.S.C. in a well-reasoned Opinion certified four subclasses concerning Salem County's strip search practices. She found under R.4:32(b)(3) Superiority analysis that absent class members required class certification because as individuals they would be unable to access the courts. The Honorable Benjamin Morgan's ("Trial Court") approval of this class action settlement decertifies/dismisses Classes 2 and 4 so they are effectively denied access to the courts and so denied due process.

The Class Representative-Objectors make three due process arguments. First, Class Counsel has agreed to not represent their clients who may seek to opt out, and enforced this provision against their clients, which on its face violates R.P.C. 5.6(b). This is particularly damning for Class Counsel because per *Cardillo* (cited below) it appears that Class Counsel was "bought off". The Trial Court permitted the facial violation of R.P.C. 5.6(b) by overlooking its fiduciary responsibility to independently review the terms of a settlement agreement.

The Class Representative-Objectors' second argument is that the decertification of Classes 2 and 4 violates their due process rights for the reasons

expressed by the Honorable Jean Chetney, J.S.C. in her Opinion finding that without class action status the individual absent class members will not be able to access the courts. Decertification's high bar requires a finding of new circumstances arising after certification that the class cannot proceed for failing one of the prongs of R. 4:32(a)(1)-(4) or (b)(3). The Trial Court never made such a finding. Instead there is a contradictory finding that Classes 2 and 4 could have plausibly recovered at trial. The Trial Court's fiduciary duty should have obligated it to ensure that something so substantial as denying access to the courts would adhere to the standard – finding an independent basis for the decertification. Instead, the Trial Court deferred to Class Counsel overlooking its fiduciary duty to act in the best interest of the Class.

Also, it is argued that Class Counsels' failure to provide notice to the Class that their claims are dismissed violates due process. The Order itself determines on its face that notice was not being provided regarding the decertification/dismissal of Classes 2 and 4. So, thousands of absent class members like Class Representative Kenneth Fuqua who are uniquely in Classes 2 and 4 have been abandoned by their attorneys – Class Counsel - because they have no idea that their statute of limitations began to run upon the entry of that order. Similarly, thousands of absent class members like Class Representative Darius Snead who are in Class 1 but also have Class 2 and 4 claims are never advised that by accepting the terms of the Settlement they are giving up their Class 2 and 4 claims. This must violate due process.

Finally, Objectors argue that due process is violated because the Class has been denied Adequate Representation. R. 4:32(a)(4). Here, Class Counsel continues violating R.P.C. 5.6(b) and did so below by effectively beating their clients the Class Representatives. Class Counsel sought to extinguish their clients' Objection by claiming that their attorney, former Class Counsel, was ethically prohibited from representing them including a false allegation that the Objectors had not authorized the Objection. So, the Class Counsel fought against their clients by procuring an order requiring their clients to submit adversarial interviews and depositions. It turns out that there was nothing substantive to Class Counsels' very serious allegations against someone who was only practicing law. Yet, Class Counsel was permitted to violate R.P.C. 5.6(b) because the Trial Court overlooked its fiduciary duty to independently evaluate the Settlement and held that Class Representatives' testimony, which became mandatory, did not provide the factual predicate that the restrictive covenant was their basis for the Objection. Yet, the Class Representatives objected based upon their attorneys' lack of Adequacy, presumably driven by being "bought off". Regardless, the Trial Court had a fiduciary duty to ensure that the terms of the settlement were not a product of collusion or unethical conduct. It is submitted that Class Counsel was not Adequate for other reasons like they abandoned their clients uniquely in Class 2; failed to communicate the dismissal to their clients in Class 1; created an intra-class conflict etc. which should require disqualification.

II. FACTS

A. Salem County's "at-risk" policy violates New Jersey law.

Salem County's Suicide Identification and Prevention Policy ("Suicide Policy") is approved by Warden who is not a qualified mental health professional.[1] (Pa384-Pa403) (Deposition of Joel Friedman, PhD, November 5, 2018 at 44:21-45:11; 106:17-107:9; 135:22-136:7) (Pa1329; Pa1331; 1332). Salem County's mental health contractor, the Center for Family Guidance ("CFG") opposes Salem County's Suicide Policy because it violates mental health standards and overclassifies detainees as "at-risk". (Id. at 182:1-183:10; 194:7-14) (Pa1333; Pa1334).

1. Salem County's "at-risk" classification system is arbitrary.

Salem County's unauthorized policy utilizes a 32 question-questionnaire administered by a correction officer. (Cuzzupe Dep. Tr. 34:17-35:13) (Pa315). (Pa89-Pa91; Pa155-Pa160; Pa566-Pa567; Pa575) The Warden has decided to assign point values to each question where a score of 75 results in automatic "at-risk" classification. (Id.) In opposition to this practice, CFG threatened to discontinue their mental health contract. (Friedman Dep. Tr. 182:12-183:10) (Pa1333).

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[1] New Jersey law requires that a county correctional facility have a suicide identification and prevention policy approved by a mental health professional. N.J.S.A. 10A:31-13.24

Salem County's use of the questionnaire as determinative of "at-risk" status does not even follow its own written policy which provides that the questionnaire is only to be used by the Medical Department as part of an "at-risk" clinical assessment – not determinative of at-risk status:

> "The initial classification screening, which consists of a series of incisive questions asked during the booking process, shall determine an individual's initial potential for a designation of 'At-Risk Status'. Officers must complete the classification and medical screening question with the inmate's responses. The computerized inmate management system automatically calculates a number, based on the question responses. That number determines the level of potential risk for the inmate.
>
> Medical Staff will interview all new inmates prior to the inmate being assigned to a permanent housing unit. The Medical Staff will review the initial classification screening and medical question responses with the inmate during the interview session. In the event that the inmate demonstrates strange or inappropriate behavior during the interview or responds positively to relevant mental health questions, the Medical staff has the authority to place an inmate on "At-Risk" status. When an inmate is placed on At-Risk Status by a member of the medical staff, the medical department must immediately notify both the on-duty Shift Commander and the Classification Department. If an inmate is actively expressing suicidal ideation, demonstrating suicidal behavior or the medical staff suspects the inmate poses a legitimate threat to harm themselves, the inmate shall be referred to a mental health professional for evaluation... When an inmate is placed on an At-Risk Status, he/she may only be removed from the "At-risk Status" by a psychologist/psychiatrist.

(Pa384-Pa403) (emphasis added) Nowhere does the written policy state that 75 points results in automatic at-risk classification. (Id.)

CFG is opposed to Salem County's suicide classification scoring system because it violates mental health standards and is arbitrary. (Friedman Dep. Tr. 194:7-14) (Pa1334) Plaintiffs' proposed expert concurs that Salem County's use of

the questionnaire violates mental health standards and is arbitrary. (Expert Witness Report of Steven J. Helfand, PsyD, CCHP) (Pa1016-Pa1024)

2. "At-risk" classification results in redundant-violative strip searches which formed the basis of the Order certifying four subclasses[2].

As a consequence of being classified as "at-risk" detainees are

- Put on a 15 minute watch in the booking unit (Suicide Policy ¶V(6)) (Pa387)
- escorted from Booking to the "at-risk" unit;
- strip searched again upon admission to the "at-risk" unit. (Id. at VIII(J)(Pa393)
- forced to wear an anti- suicide vest without undergarments (Id at III; VIII (N) (Pa384; Pa393)
- locked down in a cell with electronic surveillance (Id at VIII (a) IX (a)(Pa392; Pa394) where;
- the electronic surveillance CCTV system live streams to 20 locations throughout the jail with permissive cross-gender viewing (Cuzzupe Dep. Tr. 98:24-101:8; 108:18-110:1) (Pa331;Pa333-Pa334) (Reilly Dep. Tr. 91:6-23; 125:7-127:24; 134:10-135:18; 235:6-21; 259:9-260:22); (Pa261;Pa269-Pa270;Pa272;Pa297; Pa303) (Deposition of Dana Clark Stevenson February 26, 2019 at 72:25-73:20) (Pa489) (Dana Clark Stevenson Answers to Interrogatories #2) (Pa112) (Oral Deposition of Kenneth Fuqua February 26, 2019 at 51:1-53:7) (Pa534-Pa535) Kenneth Fuqua Answers Interrogatories August 15, 2017, #2) (Pa162) (Deposition of Darius Snead July 15, 2019 at 53:24-54:10) (Pa560)
- strip searched twice per day, and any time leaving their cell. (Cuzzupe Dep. at 30:6-32:18) (Pa314) including;
- documentation of thousands of detainees strip searched in a cell with a camera (Pa793-Pa885; Pa1165-1263)

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[2] The Order certifying the four subclasses is set forth below at p. 9 below.

- Salem County admits that twice per day strip searches are unnecessary; (Id)

III. PROCEDURAL HISTORY

A. Plaintiffs' class action complaint alleges violations of the New Jersey strip search statute and the New Jersey Constitution Art. 1 ¶7.

On May 11, 2017, Dana Clark Stevenson, Kenneth Fuqua, Darius Snead, and Mark Hendricks ("Class Representatives") filed their class action complaint alleging *inter alia* that Salem County's strip search practices violate the Strip Search Statute 2A:161A:1 et. *seq.* and the New Jersey Constitution Art. 1 ¶7. (Pa1- Pa44) On June 12, 2019, Plaintiffs filed an amended complaint to include a claim under the New Jersey Law Against Discrimination for cross-gender viewing of the strip searches. (Pa45-Pa70).

B. Four subclasses are certified to adjudicate Salem County's strip search practices.

On October 17, 2019, the Class Representatives filed their motion to certify seven sub-classes. (Pa71-Pa225) On November 26, 2019, Salem County filed its' opposition. (Pa232-Pa575) On December 6, 2019, Plaintiffs filed their reply. On December 19, 2019, the Honorable Jean Chetney, J.S.C. heard argument and made oral rulings certifying four sub-classes. ("T2")[3] On that same date, an order

[3] "T1"October 4, 2018 Transcript of Order to Show Cause;
"T2" December 18, 2019, Transcript of Hearing on Class Certification
"T3" October 7, 2021 Transcript of Case Management Hearing

was entered denying Salem County's motion to strike the class allegations. (Pa576).

The Honorable Jean Chetney, J.S.C. found, pursuant to R. 4:32 (b)(3) – Superiority, that a class action was the only way the absent class members could access the courts because the absent class members would not be able to procure representation on an individual basis. (T2 at pp.46:18-20; 56:1-57:8; 76:15 and 162:7). Also at the December 19, 2019 hearing William Riback, Esquire requested to have Mark Kancher, Esquire appointed as additional co-class counsel because of his concerns with Carl Poplar's Adequacy to represent the Class. (T2 at 248:14-249:24) Mr. Poplar and Salem County opposed that request. (Id. at 250:7-251:23) On March 12, 2020, after additional briefing, the Trial

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"T4" December 17, 2021, Transcript of Argument for Preliminary Approval
"T5" April 20, 2022 Transcript on Notice to the Class
"T6" April 29, 2022 Transcript on Notice to the Class
"T7" May 27, 2022 Transcript of Hearing on Motion for Reconsideration of Preliminary Approval and to Disqualify Class Counsel
"T8" June 10, 2022 Transcript of Hearing on Deposing the Class Representative-Objectors
"T9" August 5, 2022 Transcript of Case Management Conference
"T10" September 9, 2022 Transcript of Decision Enforcing the Restrictive Covenant; Denying Class Counsels' Motion to Disqualify the Class Representative-Objectors' Counsel and; giving leave of Class Counsel to conduct adversarial interviews and depositions of the Class Representative-Objectors
"T11" January 5, 2024 Transcript of Fairness Hearing/Final Approval of Class Action Settlement

Court entered its order certifying four classes to adjudicate Salem County's alleged unlawful strip search practices:

1) Non-indictable detainees classified as at-risk who were strip searched based on their identification as at-risk inmates absent reasonable suspicion in violation of N.J.S.A. 2A:161A-1(c);

2) Detainees admitted to the at-risk unit and strip searched 2-3 times per day despite being in a 24/7 lockdown unit;

3) Detainees who were strip searched in the view of others in a group strip search;

4) Detainees who were strip-searched in their cells in the at-risk unit while being videotaped and observed by a person not authorized to view the search. (PA 161-Pa163).

(Pa577-579) There is no doubt that certified Class 1 is comprised of only non-indictable detainees. Equally, there was no doubt that certified Class 2 includes both indictable and non-indictable detainees. (Pa1394-Pa1401) (T269:17-70:3) (Fuqua Dep. 7:1-13) (Pa1265) (Snead Dep. 8:24-9:8) (Pa1285). Judge Chetney certified Class 2 as including indictable detainees and appointed Darius Snead who was detained on non-indictable offenses to represent Class 2 along with Kenneth Fuqua who was detained on indictable charges. (Id. at 76:10-11)[4]

That Order appointed William Riback, Esquire and Carl Poplar as co-Class Counsel. (Pa579) On April 29, 2020, William Riback, Esquire moved to amend

[4] Class 2 definition becomes a matter of concern later in the proceedings when Salem County represents that Class 1, 2 and 4 are co-extensive despite Class 2 being more extensive including indictable detainees. (below at p. 26)

the March 12, 2020 Order to add Mark Kancher, Esquire and Stephen Barry, Esquire as additional co-class counsel. (Pa591-Pa603) On May 4, 2020, Salem County opposed this motion. On May 22, 2020, the Honorable Jean Chetney, J.S.C. appointed Stephen Barry, Esq. as co-Class Counsel and denied the motion relating to Mark Kancher, Esq. (Pa604-Pa605)

C. The Parties agree to a settlement "in principle".

On October 7, 2020, the Parties filed a letter advising that they scheduled mediation for November 24, 2020. (Pa606) On October 14, 2020, Salem County filed a motion to decertify Classes 1 and 4. (Pa607-611) On November 10, 2020, Salem County's motion for decertification of Classes 1 and 4 was rescheduled to January 8, 2021. (Pa612) On November 24, 2020, the Parties mediated but the Class Representative-Objectors' Counsel, at the time co-Class Counsel William Riback, did not attend due to health issues. (Op. at 3)(Pa1313) On November 25, 2020, Class Counsel notified the Trial Court that the Parties had settled "in principle". (613).

On diverse dates in January 2021, more than two months after the mediation, outside of the presence of the Mediator[5], all Class Counsel signed the Term

[5] The Trial Court credited the Mediator for his involvement with this Settlement. (Pa1313) Yet all of the above referenced settlement documents were prepared and signed after the mediation, outside the Mediators' presence. Nowhere is there any evidence that the Mediator approved of the terms of this Settlement. It is hard to believe that the Mediator would articulate a restrictive covenant etc.

Sheet. (Pa652-Pa653) On diverse dates in July 2021, outside of the presence of the Mediator, all Class Counsel signed the Settlement Agreement ("SA"). (Pa616-Pa640) On diverse dates in July 2021, outside of the presence of the Mediator, all Class Counsel signed the Stipulation of Decertification/Dismissal of Classes 2 and 4. (Pa718-Pa724)

D. Class Counsel files its Motion for preliminary approval and proposed stipulation to decertify Classes 2 and 4 without notice to the Class.

Eleven months after the mediation, on October 4, 2021, Class Counsel filed their motion for preliminary approval of the class action settlement. (Pa641-Pa642). The Settlement Agreement ("SA") provides that Class Counsel is not permitted to represent optouts. (SA ¶V(D))(Pa631) This restrictive covenant is apparently in exchange for the payment of Class Counsels' fees in the amount of $375,000.00. (Id at ¶D(1)) (Pa627) The Settlement Agreement redefines Class 1 as those non-indictable detainees who were overclassified as a result of the suicide identification procedures and strip searched. (¶I(B)(1))(Pa619) Those in Class 1 were entitled to request payment in an amount of $75.00. (¶C(1))(Pa627) Those in Class 3 were entitled to request payment in an amount of $300.00. (¶C(2))(Pa627) There is only one mailing to the Class. (¶IV(B)(1))(Pa629) This Notice program was designed to obtain a 5% participation rate. (Pa1085) The

Notice documents, like the Settlement Agreement, are silent on the decertification/dismissal of Classes 2 and 4. (Pa654-Pa674)

Separate and apart from the Settlement Agreement is Class Counsels' stipulation to dismiss/decertify their clients in Classes 2 and 4 as though it is not part of the settlement. (Pa718-Pa724). The dismissal of Class Counsels' clients' claims is kept secret by the lack of notice. (Pa654-Pa674) Class Counsels' Stipulation to Dismiss/Decertify Classes 2 and 4 represents that the reason for the dismissal/decertification is because of unspecified facts learned through discovery. (Pa720). Class Counsels' Stipulation to Dismiss/Decertify Classes 2 and 4 represents that the reason for not providing notice of the dismissal of their clients' claims is because Class Counsel had never previously noticed them. (¶1(c)(d). (Pa721).[6] The Settlement Agreement contains no affirmative/injunctive/"ancillary" relief. (Pa616-Pa640)

E. The Class Representatives' Objection and the responses to the Objection.

1. The Objection

From September 23,2021 through November 26, 2021, the Class Representatives objected to the settlement arguing that the integrated settlement

[6] R. 4:32-2(e) requires notice to anyone who is bound by a dismissal. Notice was also required under R. 4:32-2(b)(2) when the Class was certified.

violates the Rules of Professional Conduct, violates due process and the monetary payout to the Class is unreasonable. (Pa735-Pa1024)

2. Class Counsels' response to the Objection

Class Counsel did not respond to the Objection on the merits. Instead, Class Counsel made sought to deny the Class Representatives' right to object/have counsel of their choice/be heard: 1) Objectors' Counsel was contractually precluded from objecting as a result of his agreement with Stephen Barry, Esquire which ensured that he was the one and only Class Counsel who was entitled to make binding decisions for the Class (Certification of Stephen Barry, Esquire ¶8) (Pa1026); and 2) the Class Representatives could not be represented by one of the Class Counsel based upon a purported conflict of interest in class counsel representing the Class Representative-Objectors after he signed the settlement documents. (Pa1032; Pa1033) and (T3 at 9:16-24; 16:-7-22). The Honorable David Morgan, J.S.C. later rejected this argument finding that the Class Representatives were entitled to the attorney of their choosing. (below at 23)

3. Salem County's Response to the Objection

On October 14, 2021, Salem County opposed the Objection by arguing that the decertification of Classes 2 was appropriate because the Defendant was

essentially entitled to summary judgment. (Pa1035-Pa1042)[7] Similarly, Salem County argued it was appropriate to dismiss/decertify Class 4 because there was no evidence that detainees were strip searched in their cells where someone could have viewed that strip search. (Pa1040-Pa1041). Salem County in speaking for Class Counsel claimed that Class Counsel negotiated away their clients' claims at mediation for nothing because Class Counsel concurred that Salem County was entitled to summary judgment. (Pa1039) Neither Salem County nor Class Counsel addressed the Objection's arguments that the Class was entitled to notice of the dismissal of their claims nor that the dismissal of those uniquely in Classes 2 and 4 amounted to an unlawful preference to those in Classes 1 and 3 who receive some value.

4. ***The Trial Court's rulings granting preliminary approval.***

On March 25, 2022, the Trial Court made two rulings concerning this appeal. First, the Trial Court found that the Class Representatives were entitled to object and were entitled to be represented by counsel of their choosing including one of the three Class Counsel in objecting. (Pa1051). Second, the Trial Court granted Class Counsels' motion for preliminary approval. (Pa1052-Pa1073).

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[7] Salem County's argument of an entitlement to dismissal is contrary to later decisions in the federal court finding that the repetitive strip searches in this case plausibly violate the United States Constitution Fourth Amendment. (Pa1156 – Pa 1164)

But the Opinion overlooked the Class Representatives' Objection in its entirety. (Id.).

5. Objectors move for reconsideration of Preliminary Approval and for disqualification of Class Counsel.

On April 13, 2022, the Class Representative-Objectors filed a motion for reconsideration. (Pa1074-Pa1076) On April 22, 2022, the Class Representative-Objectors filed a motion to disqualify Class Counsel. (Pa1078-Pa1080). On May 9, 2022, Class Counsel opposed the motion for reconsideration by claiming that the Class Representative-Objectors' Counsel was perpetrating a fraud on the court by improperly claiming he represented the Class Representative-Objectors:

> Mr. Riback now cannot credibly contend he represents any party or person in interest. He has no standing to bring these Motions. Mr. Riback's conduct must be explored in order to protect the public and the Class Representatives.... The only objection is by Mr. Riback personally. The possibility that Mr. Fuqua, Mr. Henderson and/or Mr. Snead saw or reviewed the 1700 pages prior to its submission is remote or non-existent. The possibility of Ms. Stevens having reviewed or understood Mr. Riback's proposed Federal lawsuit complaint is remote or non-existent.

(Pa1082-Pa1083). On May 10, 2022, Salem County opposed the motion for reconsideration and to disqualify Class Counsel. Salem County seems to have argued that the change in circumstances warranting decertification was Class Counsels' agreement to decertify their own clients' claims with no other reason:

> Although Attorney Riback claims there is no change in circumstances since the Honorable Jean Chetney's Order certifying Classes 1-4, the circumstances have changed because the parties engaged in a multitude of discovery and, after discovery, entered into a Settlement Agreement in which Classes 2 and 4 would be decertified as part of resolution of this case... Moreover, while Attorney Riback claims no basis exists to decertify Classes 2 and 4, the Court had ample basis to support the dismissal in the form of the Settlement Agreement between the parties.

(Salem County's Opposition to Reconsideration at 7) (Pa1382)

6. The Trial Court denies the Class Representative-Objectors' motions for reconsideration and disqualification of Class Counsel.

On May 27, 2022, the Trial Court heard argument on the Class Representative-Objectors motion for reconsideration on preliminary approval and to disqualify Class Counsel. Salem County reiterated that decertification was appropriate on the merits because Classes 2 and 4 would be dismissed on summary judgment and so their claims should be disposed of without notice:

> Salem County's position was that these claimants in the decertified classes did not actually have a valid claim that could be adjudicated, that -- the merits of the claim. And so we do not believe notice is required to them and that decertification is appropriate without notice.

(T7 at 47:4-11). On May 27, 2022, after argument, the Trial Court gave its basis to reject the Class Representatives' Objection on the record, that the prior order was not palpably incorrect. (T7 at 50:7-14; 64:21-23) The Trial Court recognized that 1) decertification is a "draconian remedy" and 2) that the proposed order decertifying Classes 2 and 4 had nothing to do with the ability of the Class to

proceed under R. 4:32 (a)(1)-(4) or (b)(3). (Id. 52:17-53:12) ("I know we are talking about a merits decision"). The Trial Court's Order decertifying Classes 2 and 4 received preliminary approval because Class Counsel agreed to this in furtherance of the Settlement not because of any finding that the Class could not proceed under R. 4:32:

> Now the next point he brings up is this decertification is a draconian remedy. Well this issue about decertification, that's not, that's not a new argument. That's something that I knew was going to be part of the settlement. I saw that. I considered it. I didn't find it to be draconian because it was part of the agreement by the parties. I know we're talking about a merits decision, but it's not a merits decision by the Court. It's a decision that was reached by the parties when they were doing their settlement discussions and what they thought the strengths and weaknesses of their particular cases were. And that's how you get settlements. You look at what your case is and you say you know what, maybe I can win on this, maybe I'm going to lose on this and you make a determination. But just because that's what comes down on a decision about the decertification where there may not be any merit to the claim, that -- I don't think that's draconian. So I can't find that that's a basis for reconsideration.

(T7 52:17-53:12). The Trial Court also explained that there was no preference for Class 1 receiving some benefit ($75.00) over Classes 2 and 4 who receive nothing because these are the terms of the Settlement. (Id. at 53:13-54:3). The Trial Court on reconsideration provided that notice was constitutional: "that's the same argument that I've heard before and made a determination on". (Id. at 54:4-12). But by the terms of the Trial Court's March 25, 2022 written Opinion and Order there is no legal reasoning of how it can be constitutional to not

provide notice to litigants that their claims are slated to be dismissed. (Pa1052-Pa1073)

On June 7, 2022, the Trial Court provided a written decision denying the Class Representatives motion to disqualify Class Counsel. (Pa1092-Pa1099). The Trial Court acknowledged Class Counsels' failure to notify their clients of the dismissal of their clients' claims through the Notice could run afoul of Class Counsels' duty to inform their clients concerning the material terms of any settlement. (Pa1095). But the Trial Court reserved judgment because "any claim of non-communication to the class is not yet ripe" (Id). The ruling on disqualification seems contradictory to the Trial Court's March 25, 2022 Order and Opinion finding, with no legal reasoning, that the Notice to the Class and "all persons and entities affected by…the Settlement to be constitutional". (March 25, 2022 Order at 5 ¶12)(Pa1056). It is submitted that Notice should not have been approved with some doubt as to whether the Class was notified of the terms of the settlement.

In that same vein, the Trial Court found that dismissing a clients' case, in this instance thousands of clients, without ever advising him of the dismissal is not client abandonment because it is acceptable to walk away from a client as part of a settlement: "A settlement that ends a litigation does not equate to a 'termination' of representation". (Pa1096). And there was no preference given to

Classes 1 and 3 who receive some value from the Settlement as opposed to those uniquely in Classes 2 and 4 who receive nothing because there was no direct evidence of "horse trading". (Pa1097-Pa1098).

The Parties now had an approved settlement. Ordinarily, the next step for them would be to request the court to enter an order setting a date for notice for final approval of the class action settlement. Instead, Class Counsel sought to silence the Class Representatives by denying them counsel of their choice.

7. *Class Counsel and Salem County seek to silence the Objection.*

At the conclusion of the May 27, 2022 hearing, Class Counsel requested an order allowing them to depose the Class Representative-Objectors to demonstrate their Counsel's bad faith. (T7 May 27, 2022, 61:2-63:16). The Trial Court scheduled a hearing for June 10, 2022 as to how to proceed concerning the Class Counsel arrangement – which included in the context of Class Counsels' request that they have the opportunity to depose their own clients. (Id. at p. 74:22-75:12).

a. Salem County's one-on-one communication with the Trial Court.

On June 2, 2022, Salem County's attorney emailed Objectors' Counsel advising that he had a one-on-one communication with the Trial Court concerning the depositions of the Class Representative-Objectors. (Pa1104) In the ensuing Zoom

meeting amongst the attorneys, Salem County's attorney, along with Class Counsel, represented that the Trial Court was directing Objectors' Counsel to present his clients for deposition. (Transcript of the Zoom Meeting between Counsel p. 7:6-22; 8:10-25; 11:20-23 and 16:6-9) (Pa1109; Pa1111and Pa1113)

At the June10, 2022, hearing Class Counsel implored the Trial Court to issue an order to permit them to depose their own clients in an effort to disqualify their attorney and silence the Objection: "[W]e need to…take the deposition of these people that Mr. Riback has been representing [the Class Representatives] that he speaks for them and only he speaks for them". (T8 at 26:17-20) The Trial Court rejected Class Counsels' informal effort to depose their own clients because the obvious ethical consideration in giving imprimatur to allowing an attorney to conduct an adversarial deposition of his client:

> What my concern is that you go through all these machinations to get whatever you need from the clients, from your clients, and it turns out I may not have any legal authority to do anything with those facts. That's -- you have those facts there, but I don't have a [sic] answer as to whether I can do something or not with all those facts that you've collected. I think in order to, I -- I -- I kind – I disagree with what you were saying about cart before the horse. I want to know that if you collect these facts, and we can talk about that in a second, that there's something I can do with them.

(Id. at 33:11-23) (emphasis added) The Trial Court determined that Class Counsel would need to file a motion to establish justification for an adversarial deposition of the Class Representatives. (Id 39:8-23).

b. Class Counsel moves to Disqualify Objectors' Counsel and Enforce the Terms of the Settlement against the Class Representative Objectors.

On July 12, 2022, Class Counsel moved to enforce the terms of the Settlement against the Class Representatives, and by extension the Class, because their attorney signed the settlement agreement. (Pa1122-Pa1125) As part of that motion Class Counsel sought to disqualify the Class Representative-Objectors' Counsel from representing them, or anyone involved in the case, because of a purported conflict of interest based upon their attorney being Class Counsel. (Pa1122-Pa1125) On July 28, 2022, the Objectors opposed disqualification[8]. On August 18, 2022, Mark Kancher, Esquire, counsel for William Riback, Esquire, filed additional briefing in opposition to his disqualification based upon a conflict of interest. On August 22, 2022, Class Counsel filed their reply brief.

c. Salem County requests an order for the Class Representative-Objectors' depositions and Objectors seek a protective order.

On July 5, 2022, Salem County filed a letter requesting leave of court to depose the Class Representative-Objectors in lieu of the Trial Court's directive

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[8] On August 5, 2022, the Appellate Division docket AM000622-21T4, Motion M005703-21 denied Objectors' motion for an interlocutory appeal to vacate preliminary approval. On August 11, 2022, as a result, the Class Representative-Objectors Counsel corresponded for an Order to be relieved as Class Counsel. (Pa1126) On August 16, 2022, the trial court granted William Riback's application to be relieved as class counsel. (Pa1127)

for Class Counsel to file a motion. (Pa1121) On July 20, 2022, Salem County filed a proposed form of order for these depositions. (Pa1120) On July 21, 2022, Objectors filed a motion for a protective order. (Pa1384, Pa1385) On July 28, 2022, Salem County filed its opposition arguing that it was imperative to hear directly from the Class Representatives insinuating that the Class Representative Objectors' Counsel filed false certifications and was perpetrating a fraud on the court. "If the allegations in counsel for the Objectors' various filings are true, he should be more than willing to have his clients deposed to get on the record why they now think settlement is unfair and their prior agreement thereto should be disregarded". (Pa1387) On August 22, 2022, Objectors filed their Reply Brief.

8. ***The Honorable David Morgan, J.S.C. enforces the restrictive covenant against the Class; denies Class Counsels' motion to disqualify the Objectors' Counsel without prejudice; and orders the Class Representative-Objectors to submit to adversarial interviews with Class Counsel and subsequent depositions in consideration of Class Counsels' allegation that Objectors' Counsel is perpetrating a fraud on the court.***

On September 9, 2022, the Honorable David Morgan, J.S.C. enforced the terms of the settlement against the Class Representative-Objectors and denied disqualification without prejudice. (Pa 1127- Pa1129). The terms of the Settlement were enforced against the Class Representatives because their

attorney signed the settlement papers. The enforcement of the agreement implicitly includes a restriction on Objectors' Counsels' practice of law precluding the representation of opt-outs. (T10 at 83:1-21) Notwithstanding enforcing the Settlement against the Class Representatives, they were permitted to object on the basis of arguments which would suffice as a collateral attack. (Id. at 94:23-95:6; 96:17-97:11). The Opinion and Order rejected Class Counsels' argument that there is an inherent conflict of interest in former class counsel representing an Objector. (Id. at 86:4-103:6) (relying on *In Re Agent Orange Product Liability Litigation*, 800 F. 2d 14 2d Cir. 1986) ("*Agent Orange*")

> It's difficult to see a real conflict if the class representatives, as a whole, are saying we don't want the settlement agreement, didn't understand thc settlement agreement from the beginning, weren't informed of its ramifications, would've objected had known that Mr. Riback is following the dictates by opposing the settlement agreement at this point."

(Id.at 102:14-103:6). But disqualification was only denied without prejudice. (Pa1128-Pa1129). The Honorable David Morgan, J.S.C. permitted Class Counsels' application to depose the Class Representatives to address their arguments that the Objectors' Counsel violated the Rules of Professional Conduct in representing the Class Representative-Objectors. (T10 at 89:5-7; 91:12-18; 98:7-10; 103:7-17) So, the Class Representative-Objectors were ordered to submit to adversarial interviews with Class Counsel and then to be deposed to substantiate Class Counsels' allegations. (T10:105-106:13)

9. The depositions reveal that Class Counsels' serious allegations made against the Class Representatives' Counsel are unfounded.

On July 5, 2023, the court entered its amended Preliminary Approval Order approving Notice to Classes 1 and 3; scheduling the date for any objections to be filed and; setting January 5, 2024 as the date for a final approval hearing. (Pa-1142-Pa1143). On October 4, 2023, the Class Representatives filed their Objection including the Class Representative-Objectors court ordered deposition testimony. (Pa1145-Pa1307). Class Counsels' claim that the Class Representatives were not actually objecting was baseless:

a. Kenneth Fuqua testified that he:

- understood the case and subclass definitions (Fuqua Dep. Tr. 7:8-13) (Pa1265)
- was appointed to represent Classes 2 and 4 (Id. at 7:16) (Id)
- was not advised by Class Counsel that Classes 2 and 4 were dismissed; (Id. at 8:4-10:24) (Pa 1265-Pa1266)
- would not have agreed to the terms of the Settlement if that had been disclosed (Id. at 11:18-12:1; 12:9-14:18). (Pa1266-Pa1267)

***b.* Darius Snead testified that he:**

- Was appointed to represent Classes 1,2, and 4. (Darius Snead. Deposition, February 14, 2023, at 9:19-25) (Pa1285)

- objects to the settlement based upon the amount Class 1 is receiving and he gets nothing for his Class 2 or 4 claims. (Id. at 14:16-15:7) (Pa1287)

- that Class Counsel did not advise him that his Class 2 and 4 claims were being dismissed; (Id. at 15:15-19; 17:14-18) (Pa1287.).

- made his decision to object when he learned that Classes 2 and 4 were dismissed; (Id. at 15:15-19; 17:14-18) (Pa1287.).

- is satisfied with the services of his attorney, William Riback, Esquire. (Id. at 20:12—21:20) (Pa1288)

c. Mark Hendricks testified that he:

- Objects to the dismissal of Classes 2 and 4. (Hendricks Dep. Tr. January 19, 2023 at 9:13-19; 14:1-7; 35:12-16; 39:6-23; 40:20-22 (Pa1271; Pa1272; Pa1278; Pa1279)

- objects to the Settlement (Id. at 20:14-20; 21:2-14; 22:18-19) (Pa1274; Pa1275))

- understands the dehumanization related to Salem County's "at-risk" practices particularly the videotaping of strip searches 10:12-11:4; 12:13-13:6; 24:1-25:4) (Pa1272; Pa1275)

10. The Trial Court grants Final Approval for Classes 1 and 3 and decertifies Classes 2 and 4 absent notice to the Class.

On January 5, 2024, the Trial Court conducted its Fairness Hearing. The Class Representatives testified upon direct and cross-examination that they objected to the Settlement. (T11 19:6-72:12). The Class Representatives provided testimony to substantiate their belief that Class Counsel had been

"bought-off" or in legal terms was violating R.P.C. 5.6(b). (T11 22:7-21; 37:16-38:16; 52:8-16) On that same day, at the hearing, Salem County submitted the Settlement Administrator's Certification ten days late so it could not be analyzed to determine what benefit of the settlement flows to the Class. (T11 at 6:9-11:20) (Pa1308-Pa1310) (Settlement Agreement ¶IVB(6))(Pa630) (Pa-1142-Pa1143) Salem County inaccurately represented and apparently mislead the Trial Court into believing that Class 2 and 4 are co-extensive with Class 1. T11 122:17-125:1) (See FN 4 and corresponding text at p. 9 above). Class Counsel stood by silent allowing Salem County to get court imprimatur of their clients not even being certified as a class which would if true resolve the abandonment issue below. The Claims Administrator's Certification asserts that the Class will be paid $127,125.00. Yet, that is a highly inflated and fictitious number because the Administrator acknowledges that 212 of the claims have not been resolved as valid claimants. (T11 13:12-23) (Pa1308-Pa1309) Additionally, apparently according to the fogged understanding of what transpired, the Notice was mailed to individuals in Class 2 who like Kenneth Fuqua were excluded from the terms of the Settlement because they were indictable detainees so obviously not qualifying for Class 1 benefits under the

purported Settlement.[9] (T11 at 122:19-123:15) So, Salem County admits that in addition to 212 fictitious claims being counted, all or part of Class 1 may not meet the Class definition of being non-indictable detainees. So, rather than the Settlement amount as claimed by the Administrator to be the paltry $125,000.00 it is likely much closer to ZERO. On January 9, 2024, and February 2, 2024, Objectors filed letters addressing the gross deficiency. (Pa1359-Pa1369) On February 8, 2024, in lieu of the court ordered Settlement Administrator's Certification, Salem County submitted a self-serving letter claiming what the benefits to the class are which continue to have 212 potential fraudulent claims and Class 1 payments to persons outside the Class Definitions making it likely that payment to actual class members may Zero or perhaps $25,000.00. (Pa1310) (Pa1310a)[10] On that same date, February 8, 2024, the Trial Court entered an Order enforcing the settlement. (Pa1311-Pa1320) On February 22, 2024, the Trial Court entered a final and appealable order dismissing/decertifying classes 2 and 4 without notice to the classes. (Pa1799-Pa1804). On February 4, 2024 the Class Representatives timely appealed.

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[9] Salem County's representation to the Trial Court that those in Class 2 were by definition also in Class 1 is utterly and completely false. Class 1 is defined by the charge being non-indictable and Class 2 encompasses all detainees including indictable. (FN 4 at p. 9) Class Counsel stayed silent concerning how they were representing individuals they agreed were dismissed out of the case.

[10] There are two page "1310" in the appendix.

(Pa1370-Pa1375) On August 5, 2024, the Class Representative-Objectors filed an Amended Notice of Appeal. (Pa1376-Pa1381)

IV. STANDARD OF REVIEW

> [On appeal from approval of a class action settlement] the usual rubric for appellate review is abuse of discretion. *City P'ship Co.*, 100 F.3d at 1043–44. This over-simplifies embedded legal issues are reviewed *de novo, see, e.g., Durrett,* 896 F.2d at 603; *Cent. States Se. & Sw. Areas Health & Welfare Fund v. Merck–Medco Managed Care, L.L.C.*, 504 F.3d 229, 247 (2d Cir.2007), and factual findings for clear error, Fed.R.Civ.P. 52(a)(6).

Nat'l Ass'n of Chain Drug Stores v. New England Carptenters Health Benefits Fund, 582 F.3d 30, 45 (1st Cir. 2009). A trial court in reviewing a class action settlement may not simply rely on the representations of the parties, but must conduct an independent evaluation to ensure fairness and adequacy of the settlement Sutter v. Horizon Blue Cross Blue Shield of New Jersey, 406 N.J.Super. 86 (2009). "A district court abuses its discretion if it applies an incorrect legal standard, follows improper procedures in making the determination, or makes findings of fact that are clearly erroneous." *Chi. Trib. Co. v. Bridgestone/Firestone, Inc.*, 263 F.3d 1304, 1309 (11th Cir. 2001). *In re Blue Cross Blue Shield Antitrust Litig. MDL 2406*, 85 F.4th 1070, 1087 (11th Cir. 2023), cert. denied sub nom. *Behenna v. Blue Cross Blue Shield Ass'n*, 144 S. Ct. 2686 (2024), and cert. denied sub nom. Home Depot U.S.A., Inc. v. Blue Cross Blue Shield Ass'n, 144 S. Ct. 2687 (2024).

V. ARGUMENT

A. The Trial Court abused its discretion by overlooking its fiduciary duty to supervise the settlement on behalf of the absent class members. (The Trial Court did not recognize it had a fiduciary duty to the Class but the issue was raised) (Pa1391-Pa1392)

Courts have a fiduciary duty to supervise class action settlements because there is an inherent conflict between class counsel who want to maximize their attorneys' fees/reduce their workload at the expense of an absent uniformed client. *Laguna v. Coverall N. Am., Inc.,* 753 F.3d 918, 927 (9th Cir. 2014). (the fiduciary scrutiny is especially important when the interests of the class and its counsel are not aligned. *See Reynolds v. Beneficial Nat'l Bank,*288 F.3d 277, 279–80 (7th Cir.2002) *Sharp Farms v. Speaks*, 917 F.3d 276, 293-94 (4th Cir. 2019) ("[W]e have repeatedly stated that district courts should act as the fiduciary of the class, subject to the high duty of care that the law requires of fiduciaries." (citation and internal quotation marks omitted)); ... *see also* 1 *Newberg on Class Actions* § 3:72, at 394 (explaining that "judges provide the primary oversight of class counsel, and they have long utilized the adequate representation requirement of Rule 23(a)(4) to do so"); 4 William B. Rubenstein, *Newberg on Class Actions* § 13:40, at 427–30 (5th ed. 2014) (explaining the court's fiduciary duty during settlement).

This settlement demonstrates lack of alignment between the interests of Class Counsel who receive $375,000.00 based upon a fee shifting recovery under the New

Jersey Civil Rights Act, and a purported benefit which is a fractional amount of the attorneys' fees $127,125.00 the purported class members would receive. In other words, this is diametrically opposite of a case where Class Counsel is getting a cross-checked percentage of a seven figure award. CITE To the contrary, a 300% Class Counsel fee suggests self-dealing. S*ee Reynolds v. Beneficial Nat'l Bank,*288 F.3d 277, 279–80 (7th Cir.2002) (class counsel "may, in derogation of their professional and fiduciary obligations, place their pecuniary self-interest ahead of that of the class ...").

1. ***The Trial Court abused its discretion by overlooking the Settlement Agreement's restrictive covenant.*** (The Trial Court overlooked the restrictive covenant for two reasons: 1) the Class Representative-Objectors did not provide explicit testimony concerning the restrictive covenant and 2) a restrictive covenant in this case does not violate public policy because any opt out could do no better than the Settlement.) (Order of Final Approval of Class Action Settlement, at 10 FN 2) (Pa1320).

The Rules of Professional Conduct 5.6 provides:

> "[a] lawyer shall not participate in offering or making . . . an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a client controversy."

R.P.C. 5.6(b). It is undisputed that there was an offer and acceptance of a restrictive covenant. (Settlement Agreement (¶V(D)) (Pa631). The prohibition on restrictive covenants protects the public from lawyers who placed self-interest ahead of their client's interest:

> [T]he use of such agreements…[reflects] the desire of the defendant to "buy off" plaintiff's counsel… [And] restrictive agreements places the plaintiff's lawyer in a situation where there is conflict between the interests of present clients and those of potential future clients.

Cardillo v. Bloomfield 206 Corp., 411 N.J. Super. 574, 579 (App. Div. 2010). (emphasis added). *Cardillo* relied on ABA Comm. Ethics and Prof'l Responsibility Formal Op. 93-371 (1993) ("Fromal Opinion") (Pa1302-Pa1306) The Formal Opinion cited in *Cardillo* is directly on-point: "The question presented for Committee consideration is whether, in the context of mass tort or other ***class action litigation,*** the lawyer can ethically agree, as a condition of settlement, to refrain from representing either present clients or potential future clients." (Pa1302-Pa1307) The answer is decidedly "no". (Id.)

Yet, the Trial Court overlooked the restrictive covenant as applied in this case. But there is nothing in this case which should permit the Parties to the Settlement disregard the Rules of Professional Conduct. And the restrictive covenant makes the settlement open to collateral attack. "A contract that violates the *Rules of Professional Conduct* is void and unenforceable as a violation of public policy. *Jacob v. Norris, McLaughlin Marcus, supra*, 128 *N.J.* at 17, 607 *A.*2d 142." *Id.* at 580 (App. Div. 2010).

a. The Trial Court abused its discretion when it overlooked its fiduciary duty to independently review the terms of the Settlement. (The Trial Court overlooked the restrictive covenant because the Class Representative-Objectors did not provide explicit testimony concerning the restrictive covenant. (Order of Final Approval of Class Action Settlement, at 10 FN 2) (Pa1320).

Courts have an independent duty to scrupulously review the terms of a settlement agreement to ensure that it is not unethical. *Payton-Fernandez v. Burlington Stores, Inc.,* 671 F. Supp. 3d 512, 523 (D.N.J. 2023) (the court "must act 'as a fiduciary, guarding the claims and rights of the absent class members'. *Ehrheart v. Verizon Wireless*, 609 F.3d 590, 593 (3d Cir. 2010)"). *Moses v. New York Times Co.,* 79 F.4th 235, 244 (2d Cir. 2023) ("court is required to review the terms of the settlement"). *McBean v. City of New York*, 233 F.R.D. 377, 382–83 (S.D.N.Y. 2006) (courts must examine the terms of the settlement themselves). *D'Amato,* 236 F.3d at 85. *In re TikTok, Inc., Consumer Priv. Litig.*, 617 F. Supp. 3d 904, 933 (N.D. Ill. 2022) (same).

b. The Trial Court erred in requiring the Objectors to testify concerning the restrictive covenant. (The Trial Court held that "Mr. Riback is the Objectors' Counsel, not an objector, therefore, his 'objections not also raised by the objectors can be ignored".) (Order of Final Approval of Class Action Settlement, at 10 FN 2) (Pa1320).

The interpretation of a contract, specifically an attorney's ethical responsibilities to the public are beyond the purview of an objectors ability to understand. *In re Nat. Football League Players' Concussion Inj. Litig.*, 307 F.R.D. 351, 375 (E.D. Pa. 2015), "A class representative need only possess a minimal degree of knowledge"

about the litigation to be adequate. *New Directions Treatment Servs. v. City of Reading,* 490 F.3d 293, 313 (3d Cir.2007); *see also Greenfield v. Villager Indus., Inc.,* 483 F.2d 824, 832 n. 9 (3d Cir.1973) ("Experience teaches that it is counsel for the class representative and not the named parties, who direct and manage these actions."). *In re Res. Am. Sec. Litig.*, 202 F.R.D. 177, 187 (E.D. Pa. 2001) (unrealistic to require a class action representative to have in-depth grasp of the legal theories). So, courts generally do not rely on testimony at a fairness hearing to interpret the contract. A fairness hearing is not a trial. "Historically, courts have commonly relied on affidavits, declarations, arguments made by counsel, and other materials in the record without also requiring live testimony." *Union Asset Mgmt. Holding A.G. v. Dell, Inc.,* 669 F.3d 632, 642 (5th Cir. 2012)

Moreover, an attorney is obligated to bring to the courts' attention conduct before the tribunal which impugns the public interest.

> [An attorney] owes to his client the duty of fidelity, but he also owes the duty of good faith and honorable dealing to the judicial tribunals before whom he practices his profession. He is an officer of the court—a minister in the temple of justice. His high vocation is to correctly inform the court upon the law and the facts of the case, and to aid it in doing justice and arriving at correct conclusions.

In re Seelig, 180 N.J. 234, 248, 850 A.2d 477, 486 (2004) (internal citations omitted). It is submitted that disregarding the restrictive covenant turns Class Counsels' duty of candor to the Tribunal on its head. *In re Agent Orange Prod. Liab. Litig.,* 800 F.2d 14, 18 (2d Cir. 1986) (class counsel has a duty to disclose any potential conflicts

to the court so that the court may take appropriate steps to protect the interests of absentee class members.) *Rodriguez v. W. Publ'g Corp.,* 563 F.3d 948, 968 (9th Cir. 2009) (class counsel's fiduciary duty includes reporting potential conflict issues)

c. **The Trial Court erred in finding that the restrictive covenant was permissible because there were no consequences to the restrictive covenant.** (Pa 1320 FN 10: "Classes 2 and 4 were inevitably going to be dismissed and Classes 1 and 3 obtained the best result possible")

The Trial Court's determination that no class members could plausibly wish to opt out is refuted by the intended design of the Settlement as Class Counsel represented to the Trial Court. The respective settlement amounts were only designed to compensate for the violation of their right not to be strip searched. Those respective amounts were not designed to compensate for emotional distress. If the absent class members wanted compensation for emotional distress such as triggering PTSD, the absent class member is entitled to opt out:

> There is special damages and general damages. In the class action it's only the strip search. It's not any emotional fallout, you know, in terms of the settlement. If people wanted to opt out, they can sue for the strip search and any emotional overlay or any collateral damages. [special damages] But the actual settlement is just for being strip searched.

(Transcript, January 5, 2024 at 99:8-15) *Augustin v. Jablonsky*, 819 F. Supp. 2d 153 (E.D.N.Y. 2011) (upon bench trial of a strip search class action the court awarded $500.00 as general damages for the violation of being strip searched in violation of the Constitution and decertified the Class to allow class members to pursue claims

for emotional distress damages – "special damages"). And there are opt outs pursuing litigation. Price v. Salem County, 3:22-cv-06042 (MAS-JTQ).

B. The Trial Court abused its discretion by improperly decertifying/dismissing Classes 2 and 4 and then permitted the improper decertification to occur without notice to the Class.

(Decertification was appropriate based upon the representations of Class Counsel that Classes 2/4 could not obtain a financial recovery and; notice was provided Pa1319 and Pa1320).

Throughout the Fairness Hearing Salem County's attorney represented that it had filed a motion to decertify Classes 2 and 4. And the Trial Court accepted Salem County's representation that it had filed a motion to dismiss Classes 2 and 4. But Salem County filed a motion to decertify/dismiss Classes 1 and 4 – not Classes 2 and 4. (Pa1344-Pa1357).

1. *The Trial Court abused its discretion in decertifying Classes 2 and 4 because this draconian remedy lacks a substantive basis.*

(The Trial Court relied on Class Counsels' representation that those claims are worthless: "As it pertains to class members in Classes 2 and 4, those class members will not receive any monetary award and thus did not receive any monetary benefit. However, the court does not find this result to be unfair or unreasonable because all class counsel agreed that the evidence produced in discovery did not set forth facts that would entitle those class members to a recovery regardless. (Op. at 9)(Pa1319)

The Trial Court's reliance on Class Counsel in terminating their clients' rights because they proffered a view on the ability to recover from a jury as minimal is arbitrary because the standard is that the court must determine new circumstances

demonstrate such a change that proceeding under R. 4:32 (a)-(d) and (b)(3) would no longer be feasible. That finding was never made.

> The underlying merits of the case...should not cloud the Court's decertification analysis—the only question is whether the requirements of Rule 23 (*e.g.*, commonality and predominance) continue to be met. *See Comcast*, 569 U.S. at 33–34, 133 S.Ct. 1426...[T]he issue is whether the proof is amenable to class treatment. Moreover, "[n]either the possibility that a plaintiff will be unable to prove [her] allegations, nor the possibility that the later course of the suit might unforeseeably prove the original decision to certify the class wrong, is a basis for [decertifying] a class...." *Blackie v. Barrack*, 524 F.2d 891, 901 (9th Cir. 1975).

Siqueiros v. Gen. Motors LLC, 676 F. Supp. 3d 776, 789 (N.D. Cal. 2023). The Trial Court's finding that Classes 2 and 4 could "theoretically" or plausibly recover demonstrates that such a finding was not made. (Op. at 8)(Pa1318)

The Trial Court also alluded to Salem County's pending motion to decertify Classes 1 and 4, but here the Stipulation decertified Class 2. (Op. at p. 9) (Pa1319). Class Counsel never explained why Salem County's motion would be successful. A review of that motion as the basis for the Stipulation of Dismissal suggests its probability of success as minimal.

Class 1 was defined as

> Non-indictable detainees classified as at-risk who were strip searched based on their identification as at-risk inmates absent reasonable suspicion in violation of N.J.S.A. 2A:161A-1(c);

(PA577-Pa588) This definition encompasses two interrelated claims. The simple claim encompassed in Class One is that non-indictable detainees may not be strip

searched absent reasonable suspicion that the detainee is secreting contraband in his rectum or other private area. N.J.S.A. 2A:161A-1(c) and 8. The statute in addition to prohibiting strip searches absent reasonable suspicion also requires in the latter provision that the search be authorized by the Regulation. And the Regulation does not authorize strip searches based upon admission to an "at-risk" unit. N.J. Admin. Code § 10A:31-8.4. Every strip search which has been filed except perhaps one was either certified or settled under Fed. R. Civ. Pro. 23(b)(3). Salem County's motion for decertification was addressing Salem County's apparently unlawful "at-risk" classification system. Salem County's motion for decertification which the Trial Court was relying on had nothing to do with the commonality/preponderance of being strip searched.

Class 2, which was the subject of the Stipulation of Dismissal is a variant of Class 1 where it claimed that Salem County was unlawfully subjecting detainees classified as "at-risk" to redundant strip searches. The Trial Court impliedly recognized that the federal court in Price v. Salem County 3:22-cv-06042 ruled on this claim finding it plausible and denying Salem County's motion to dismiss. (Pa1160-Pa1166). (Op. at 8) ("Theoretically, each of those subclasses could possibly" recover). (Pa1318) As noted above, every strip search class which has been brought except perhaps one has either been certified or settled because the

predominant question is the constitutionality of the policy at issue which in one single swoop resolves liability.

Salem County's unadjudicated motion to decertify Class 4 is equally defensible. Class 4 was defined as

> Detainees who were strip-searched in their cells in the at-risk unit while being videotaped and observed by a person not authorized to view the search.

(PA 161-Pa163). The evidence establishes that thousands of detainees were strip searched in their cells subject to the CCTV system. (Pa1165-Pa1263) Salem County's argument hinges on the Plaintiffs being unable to prove that anyone viewed the strip searches occurring in the "at-risk" cells which have active CCTV cameras broadcasting throughout the facility. (Pa1350-Pa1351) Salem County's argument disregards the well-reasoned Opinion certifying Class 4:

> With respect to commonality, the argument against this subsection of the rule is that it requires individual proof of viewing. I find that it cannot be that a plaintiff would have to prove something that it-- it just cannot prove -- that someone viewed a video, and -- and the failure to produce specific proofs of an individual viewing the video can't preclude the class action certification with respect to this requirement. That is supported by the case law cited by the plaintiff, Friedman versus Martinez, 454 New Jersey Super. 87 (Appellate Division 2018). That is the case where there was a janitor who was recording individuals. The argument was made in that case that there was no video that was proffered that could prove that the plaintiffs were, in fact, videotaped. The Appellate Division determined that it was enough that the victim provided evidence supportive of a finding that the recording device was present when she was in a secluded area where a reasonable expectation of privacy may be assumed, which may be shown inferentially. All right? The -- if this claim gets to the jury, the jury will be able to -- will hear the evidence of – if -- if there is evidence, of how many individuals were

> strip searched on video, who -- who had access to that videotape and, pursuant to Friedman, a -- a jury may make inferences, depending on the evidence that is submitted at the time of trial. So I find the failure to have a specific -- specific evidence of anyone viewing the video, it does not defeat the claim.

(Transcript of Decision on Class Certification, December 18, 2019 at 152:7-153:11).

> 2. ***The Trial Court abused its discretion in decertifying Classes 2 and 4 because the appropriate standard was overlooked.*** (The Trial Court decertified Classes 2 and 4 based upon the representations of Class Counsel and an unadjudicated motion.) (Pa1319 and Pa1320).

It is an abuse of discretion for a trial court to apply an incorrect standard when evaluating a class action settlement. *Sutter v. Horizon Blue Cross Blue Shield of New Jersey* and *In re Blue Cross Blue Shield Antitrust Litig. MDL 2406* both above at 21 The standard required for a court to decertify a class requires the movant to meet a high bar to show new evidence or a change in the law which makes the class action infeasible. *Baker v. Equity Residential Mgmt., L.L.C.*, 390 F. Supp. 3d 246, 259 (D. Mass. 2019) *Mazzei v. Money Store*, 829 F.3d 260, 266 (2d Cir. 2016). *Lightfoot v. D.C.,* 246 F.R.D. 326, 334 (D.D.C. 2007) (In considering the District's Motion to Decertify, the Court must reevaluate whether the class, as currently defined, continues to meet the requirements of Rule 23.) The Trial Court did not identify any new circumstances which would warrant decertification and none was proffered.

The Trial Court's decertification can be described as draconian because it deprives thousands of absent class members access to the courts

> "[D]ecertification is a 'drastic step,' not to be taken lightly." H. Newberg & A. Conte, 2 *Newberg on Class Actions* § 7:37 at 190 (3rd ed. 1992)...."[I]t is an extreme step to dismiss a suit simply by decertifying a class, where a 'potentially proper class' exists and can easily be created." *In re Urethane Antitrust Litig.*, 2013 WL 2097346 at *2 (D.Kan. May 15, 2013) (quoting *Woe v. Cuomo,* 729 F.2d 96, 107 (2nd Cir.1984)). "Prior to decertification, the Court must consider all options available to render the case manageable." *Chisolm v. TranSouth Fin. Corp.,* 194 F.R.D. 538, 554 (E.D.Va.2000).

In re Whirlpool Corp. Front-Loading Washer Prod. Liab. Litig., 302 F.R.D. 448, 459 (N.D. Ohio 2014). *Norman v. Trans Union, LLC,* 669 F. Supp. 3d 351, 367 (E.D. Pa. 2023) (decertification is an "extreme step particularly at a late stage in litigation." *Chiang v. Veneman*, 385 F.3d 256, 268 (3d Cir. 2004), *abrogated on other grounds by In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 318 n.18 (3d Cir. 2008) (same). As the Opinion in granting class certification makes clear, decertification is a draconian remedy because it serves to preclude the absent class members from gaining access to the courts.

> "[T]he class action is a device that allows 'an otherwise vulnerable class' or diverse individuals with small claims access to the courthouse," Lee, 203 N.J. at 518, 4 A.3d 561 (quoting *Iliadis,* 191 N.J. at 120, 922 A.2d 710), and thus, it " 'should be liberally construed.' " *Dugan,* 231 N.J. at 46-47, 171 A.3d 620 (quoting Lee, 203 N.J. at 518, 4 A.3d 561). "[I]n the context of [civil rights], 'class actions should be liberally allowed ... under circumstances that would make individual actions uneconomical to pursue.' " *Daniels v. Hollister Co.,* 440 N.J. Super. 359, 363, 113 A.3d 796 (App. Div. 2015) (quoting *Varacallo v. Massachusetts Mut. Life Ins. Co.,* 332 N.J. Super. 31, 45, 752 A.2d 807 (App. Div. 2000)). "In short, as the Court made clear in *Iliadis,* 'a class action

> "should lie unless it is clearly infeasible." ' " *Ibid.* (quoting *Iliadis*, 191 N.J. at 103, 922 A.2d 710).

Cameron v. S. Jersey Pubs, Inc., 460 N.J. Super. 156, 176, 213 A.3d 967, 979 (App. Div. 2019). (emphasis added). It is submitted that the Trial Court overlooked its fiduciary duty to the absent class to supervise class counsel and make specific findings which would support new evidence which makes the continued certification of Classes 2 and 4 infeasible.

3. ***The Trial Court abused its discretion in not providing the Class with Notice that it was decertifying Classes 2 and 4.*** (The Trial Court found Notice Constitutional because the Notice was sent to members of Classes 2 and 4: "Mr. Riback also argues Classes 2 and 4 are entitled to notice. This argument has no merit because defense counsel confirmed that every member of Class 2 and Class 4 was placed on notice of the final hearing by the Claims Administrator". (Op. at 10)(Pa1320))

"Due process requires that notice be "reasonably calculated, under all the circumstances, to apprise ***interested parties*** of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) ." D. Kress v. Fulton Bank, CIVIL 19-18985 (CDJ)(MJS), at *36 (D.N.J. June 30, 2022) (emphasis added). The New Jersey Rule requires that notice be given upon the class being certified as well as upon a dismissal as occurred. R. 4:32-2(b)(2) and/or (e)(1)(B) That did not happen here.

The purpose of notice in a class action settlement is to ensure that class members are adequately informed about the terms of the settlement, which provides

them with the necessary information to make an informed decision regarding their options to opt out or object to the settlement. The notice is designed to be a clear, concise communication that informs class members of their rights and the implications of the settlement agreement *Macarz v. Transworld Systems*, Inc., 201 F.R.D. 54 (2001). Denying the Class notice concerning the dismissal of their claims violates due process. *In re Katrina Canal Breaches Litig.*, 628 F.3d 185, 197 (5th Cir. 2010) (Notice deficient in failing to provide information reasonably necessary for a decision on whether to object or opt out.) *Vassalle v. Midland Funding LLC*, 708 F.3d 747, 759 (6th Cir. 2013) (same).

Notice must clearly communicate the terms of the settlement. *Strougo v. Ocean Shore Holding Co.*, 457 N.J. Super. 138, 154, 198 A.3d 309, 318 (Ch. Div. 2017) *Varacallo v. Massachusetts Mut. Life Ins. Co.*, 226 F.R.D. 207, 225 (D.N.J. 2005) (notice requires disclosure of the settlement's general terms). The purpose of noticing the terms of the settlement is to allow the absent class members to consider whether to participate in the settlement, opt out or object. *Silvis v. Ambit Energy L.P.*, 326 F.R.D. 419, 430 (E.D. Pa. 2018) relying on Fed. R. Civ. P. 23(c)(2)(B); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974).

Here, Notice makes no mention of Class 2 or 4 claims, let alone the dismissal of these claims. So, the Class never knew they had the claim, and

never knew their attorneys had dismissed it. (Pa656-Pa677). This must fail due process on its face.

Despite the complete lack of disclosure, the Trial Court found that Notice was in fact given based upon the clearly erroneous representations of counsel. The Trial Court's finding that everyone received notice that their claims were being dismissed/decertified is contradicted by the Court's Order which ion itself admits that no notice was being provided to the Classes about the dismissal of Classes 2 and 4. (Stipulation of Decertification at p. 4¶1(c)-(e).)(Pa727-Pa728) According to the Stipulation of Dismissal, the reason no Notice was being sent to the Class was because there was no prior notice when the Class was certified. (Id.) Yet, as submitted above Notice was required upon the Class being certified. R. 4:32-2(b)(1).

The Trial Court aptly held that the reaction of the Class is a highly relevant consideration in approving a class action settlement. (Op. at 6 citing *Fanning v. AcroMed Corp.* (In re Orthopedic Bone Screw Prods. Liab. Litig)., 176 F.R.D. 158, 184 (E.D. Pa. 1997). But it should be abundantly clear that keeping the dismissal secret from the Class deprives them of the due process which is required, the amount necessary to permit an informed decision on opting out or objecting.

Here, the dismissal of the absent members claims are material to the settlement and their decision to participate, opt out or object. Those in Class 1 like Darius Snead who had Class 2 and/or Class 4 claims had no idea that by accepting the settlement they were foregoing more valuable claims of, in addition to being strip searched just once (Class 1), they had claims for being methodically strip searched 2-10 times – (obviously more valuable than what they accepted) and in addition to being strip searched, being strip searched under camera including cross-gender viewing(obviously more valuable than what they accepted). Those uniquely in Classes 2 and 4 will have no recovery which presumably would be objectionable.

C. The Trial Court abused its discretion because Class Counsel was not Adequate and should have been disqualified. ("Mr. Riback claims that the settlement cannot be approved because class counsel is not adequate. These allegations are not based on any factual record and do not show the actual settlement agreement reached was unfair, unreasonable or does not confer a benefit upon the class as addressed above. Therefore, this argument is also without merit" (Op. at 10) (Pa1320).

Class Counsels' activities are beyond lacking Adequacy. They acted in opposition to the Rules of Professional Conduct in violating their clients' rights.

A court cannot bind the class if representation lacks Adequacy. *Hansberry v. Lee*, 311 U.S. 32, 42-43 (1940); *Hanlon*, 150 F.3d at 1020. *In re Premera Blue Cross Customer Data Sec. Breach Litig.*, No. 3:15-md-2633-SI, at *21 (D. Or. July 29, 2019). Absent Adequacy there is no due process. R.4:32-1(a)(4)

> Class counsel need not commit "egregious misconduct"... Rather, courts must deny certification if "[m]isconduct by class counsel . . . creates a serious doubt that counsel will represent the class loyally." 662 F.3d at 918.

Savanna Grp., Inc. v. Trynex, Inc., No. 10-cv-7995, at *26 (N.D. Ill. Jan. 4, 2013). *Piambino v. Bailey,* 757 F.2d 1112 (11th Cir. 1985) gives what Objectors believe is an apt criticism of Counsels' conduct in this case in turning the Classes' serious claims into a strike suit designed only to obtain fees. Id. 1143–44 (class actions if not supervised can become strike suits for fees) "A serious...ethical violation, [like those submitted below] creates a heavy burden on class counsel to demonstrate Adequacy. *Id.* at 919 *Reliable Money Ord., Inc. v. McKnight Sales Co.*, 281 F.R.D. 327, 334 (E.D. Wis. 2012), aff'd, 704 F.3d 489 (7th Cir. 2013). Yet, Class Counsel asks this Court to validate its unethical conduct.

1. ***Class Counsels' continuing violation of RPC 5.6(b) demonstrates inadequacy.*** (The Trial Court disregarded Class Counsels' agreement not to represent opt outs because the Class Representatives did not testify that this was a basis for the Objection. (Op. at 10 FN2)

Class Counsel has a duty of candor to bring potential conflicts to the courts' attention especially when those conflicts are entangled in a settlement. Class Counsel is content with the Trial Court overlooking its accepting fees in exchange for an agreement not to represent their clients. The restrictive covenant was not done in error. It was a tactical decision to legitimize Salem County's unlawful conduct at minimal cost. Class Counsel has blamed the Mediator and taken their co-Counsels'

fee as an additional reward for their unethical conduct. (Pa1126-Pa1127). Their dangerous behavior should not be countenanced.

2. ***Class Counsel is not Adequate because they failed to notify their clients concerning the dismissal of their claims.*** The Trial Court found Notice Constitutional because the Notice was sent to members of Classes 2 and 4: "Mr. Riback also argues Classes 2 and 4 are entitled to notice. This argument has no merit because defense counsel confirmed that every member of Class 2 and Class 4 was placed on notice of the final hearing by the Claims Administrator". (Op. at 10)(Pa1320)) (Upon the initial motion for disqualification the Trial Court found that the failure to give notice to their clients was not ripe because notice was yet to be given.(Pa1095)

The failure to give Classes 2 and 4 notice that their claims were dismissed was not a mistake but a calculated gambit to keep their clients in the dark. It is a clear violation of R.P.C. 1.4. Failure to give the Class reasonable notice is grounds to find Class Counsel not Adequate. *McNamee v. Nationstar Mortg.*, No. 14-1948, at *11-12 (S.D. Ohio Dec. 7, 2020) citing *Sheinberg*, 2007 WL 496872 at *3 (failure to give notice is "irresponsible"). Class Counsels' failure to advise their clients of the dismissal of their claims violated their fiduciary duty to keep their clients informed.

> T]he interests of lawyer and class may diverge, as may the interest of different members of the class, and certain interests may be wrongfully compromised, betrayed, or "sold out" without drawing the attention of the court. For this reason, in addition to requiring that the trial court evaluate whether a class action settlement is "fair, adequate and reasonable and is not the product of collusion between the parties", ... the law accords special protections, primarily procedural in nature, to individual class members whose interests may be compromised in the settlement process. These protections include notice, ensuring that class members know when their rights are being

compromised, and an opportunity to voice objections to the settlement. *Piambino v. Bailey*, at 1145 (emphasis added) Class Counsel know they have a duty to inform their clients of the terms of a settlement but chose to maintain the terms of the Settlement secret from their own clients.

a. **Class Counsel abandons their clients who are uniquely Classes 2 and 4 by not notifying them that their claims are dismissed.** (The Trial Court found it acceptable to dismiss clients' claims and not inform the clients of that dismissal because it was Class Counsels' assessment of the value of those claims. (Pa1096-Pa1097))

Class Counsel contrived reason for not informing their clients who are uniquely in Classes 2 and 4 about the settlement is because they had never previously sent notice. (Pa1324-Pa1325). This runs contrary to R. 4:32-2(b)(2), due process and Class Counsels' ethical obligation to their clients. Those thousands of absent Class Members uniquely in Classes 2 and 4 like Kenneth Fuqua have been abandoned. R.P.C. 1.16.

"Class Counsel may not abandon the fiduciary role they assumed at will or by agreement with the [defendants], if prejudice to the members of the class they claimed to represent would result or if they have improperly used the class action procedure for their personal aggrandizement." *Piambino* at 1143–44. Class Counsel failed their duty of zealous representation. *Ziegelheim v. Apollo*, 128 N.J. 250, 261, 607 A.2d 1298, 1303 (1992) (lawyer must pursue goals of the client). "Indeed, there

is no greater failure to protect a client's interests than to abandon the client." *In re Whitney,* No. DRB 19-296 (May 12, 2020) (slip op. at 24).

b. Class Counsel misleads their clients in Classes 1 and 3 who are unaware that by accepting the settlement they are foregoing their more valuable Class 2 and 4 claims . (The Trial Court found notice was sent Pa1311-1320)

Thousands of absent class members like Darius Snead who are in Class 1 and also have Class 2 and 4 claims have no idea that by accepting the terms of the Settlement that they have dismissed those claims. [L]itigants rely heavily on the professional advice of counsel when they decide whether to accept or reject offers of settlement, and we insist that the lawyers of our state advise clients with respect to settlements with the same skill, knowledge, and diligence with which they pursue all other legal tasks. *Ziegelheim v. Apollo*, 128 N.J. 250, 263, 607 A.2d 1298, 1304 (1992). An attorney's keeping secret from his client the terms of a settlement is a gross violation of an attorney's duty. (RPC) 1.4(c) *Delaney v. Dickey*, 244 N.J. 466, 486, 242 A.3d 257, 269 (2020) (paramount duty is to make necessary disclosures so that the client can make informed decisions). Id. at 1306 (a competent attorney would provide all terms of the settlement in writing to the client.)

3. Class Counsels' Settlement creates an unlawful preference for Classes 1 and 3 to receive value while Classes 2 and 4 receiving nothing. (The Trial Court found that such an arrangement where one client receives a benefit while others receive nothing as appropriate because there was no evidence of horse trading (Pa1097-Pa1098)

Adequacy encompasses a duty to ensure that there are no preferences between subclasses in a settlement. *Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 595, 117 S. Ct. 2231, 2236, 138 L. Ed. 2d 689 (1997) ("no structural assurance of fair and adequate representation for diverse groups" violates due process). Here, the structure was appropriate as evidenced by the Class Representatives' Objection. It is Class Counsel who disregarded their responsibility to their clients so they could be paid. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 854, 119 S. Ct. 2295, 2318, 144 L. Ed. 2d 715 (1999) (class settlement which excludes a class of claimants violates due process) *In re Literary Works in Elec. Databases Copyright Litig.*, 654 F.3d 242, 253 (2d Cir. 2011) (failure to have Adequate Representation for each subclass voids the settlement) *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 827 F.3d 223, 233 (2d Cir. 2016)([o]nly the advocacy of an attorney representing each subclass ensures that the interests of that particular subgroup are in fact adequately represented). It cannot be argued with a straight face that absent class members uniquely in Classes 2 and 4, like Mr. Fuqua, who receive nothing, not even notice, have been represented when they were jettisoned. The Trial Court's finding that Classes 2 and 4 received an ancillary benefit in the form of prospective

injunctive relief is not supported by anything in the record. (Op. at 10) (Pa 1311 The public may aptly perceive that Class Counsel jettisoned Classes 2 and 4 for a fee.

4. Class Counsel have conflicts with the Class.

Class Counsel opposed members of the Class – the Class Representatives - in having a full and fair hearing by making a specious allegation. Class Counsel made a strategic decision to silence the objection. Class Counsel was highly effective at turning the tables on their clients.

VI CONCLUSION

For all of the above reasons, the Court should vacate the Trial Courts' Orders approving the Settlement; disqualify Class Counsel and remand for further proceedings.

Dated: 10/24/24 s/William Riback 013581994

IN THE SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION

DOCKET NO.: A-002323-23T4

DANA CLARK STEVENSON and MARK HENDRICKS and KENNETH FUQUA and DARIUS SNEAD, individually and on behalf of a class of others similarly situated,

Class Representatives/Objectors/Appellants,

v.

THE COUNTY OF SALEM AND JOHN S. CUZZUPE,

Defendants/Respondents.

Brief of Respondents the County of Salem and John S. Cuzzupe

Appeal from Salem Court Order Granting Final Approval of Class Action Settlement and Order for Dismissal

Name of the Court Below:	SUPERIOR COURT OF NEW JERSEY, LAW DIVISION – CIVIL PART, SALEM COUNTY, DOCKET NO. SLM-L-92-17, CIVIL ACTION
Judge Who Sat Below:	The Honorable Benjamin Morgan, J.S.C.

Date Submitted: December 2, 2024

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I. PRELIMINARY STATEMENT

Objectors/Appellant's request to disturb the Orders appealed in this matter should be rejected for three reasons. First, the trial division conducted a fair and appropriate examination of the issues raised on multiple fronts in this matter when the request to approve the settlement was presented and concluded that all the requirements of the law have been satisfied. Second, the claims decertified and dismissed were done so with the consent of all counsel, including counsel for the parties now objecting or purporting to object, and was entered into based on an examination of the potential merits of the claims. Finally, The Classes were well represented by their counsel in this matter and any claims that they were not is without foundation and should be rejected. To the extent Objectors/Appellants' counsel raises issues related to the merits of the claims here, which is not before this Court and should not be considered, they were dismissed with the consent of all counsel after reaching a resolution on the settled classes and based on the analysis of the claims, and this decision should not be disturbed.

In this class action case, through their respective counsel, Class Representatives, now Objectors/Appellants, Dana Clark Stevenson, Mark Hendricks, Kenneth Fuqua, and Darius Snead (collectively "Objectors") and Defendants, the County of Salem and Warden John S. Cuzzupe ("Defendants") (all collectively hereinafter "Parties") reached terms of settlement which are captured

in a Settlement Agreement that was executed by all counsel in July 2021. As part of that Agreement, and through a separately executed Joint Stipulation, two (2) of the four (4) Classes in this Class Action would be decertified and dismissed. The decertification and dismissal was based on the evaluation of the viability of these claims and the likelihood of success on the Summary Judgment Motion to be filed by Defendants.

On September 1, 2021, the Settlement Agreement was filed with a letter from lead counsel for Objectors, Stephen W. Barry, Esquire. The letter from Attorney Barry requested a hearing, notice, and approval dates pursuant to the Settlement Agreement.

William Riback, Esquire, who claims to be the attorney for the alleged Objectors, who are also Class Representatives, filed an objection to settlement despite the fact he signed Settlement Agreement, and the letter to the Court from Attorney Barry, was sent on behalf of all counsel, for a hearing to approve settlement. ***It is very important to note that Attorney Riback signed the Settlement Agreement in July 2021.*** Furthermore, as recently as August 2021, based on email communications between the parties, Attorney Riback did not oppose the Settlement Agreement and discussed filing the Agreement with the Court for approval. For reasons unknown, Attorney Ribak *sua sponte* changed his

position and opposed settlement. It is unclear why Attorney Riback decided, last minute, to change his position and oppose settlement.

For over three (3) years Attorney Riback has raised a multitude of objections and filed meritless motions, including three (3) failed appeals to the New Jersey Superior Court Appellate Division Docket Nos. AM 622-21, AM 633-21 and AM 57-22. *See also* Docket in Salem County Superior Court Law Division, No. SLM-L-97.

All of Attorney Riback's motions, objections, etc., were without merit because the Salem County Court entered an Order granting final approval of settlement on February 8, 2024, and entered an Order decertifying and dismissing certain classes on February 22, 2024. It is from those Orders, which Objectors' counsel now appeals.

II. PROCEDURAL HISTORY

This is an appeal of a July 2021 settlement of a class action litigation in the Salem County Superior Court, Law Division. Plaintiffs appeal from the February 8, 2024, Order of Final Approval of Class Action Settlement, *see* Pa1311 (containing Order) and Pa1312 (containing opinion), and the February 22, 2024, Order approving the Joint Stipulation for Decertification and Dismissal of Claims with Prejudice, *see* Pa1321. This matter took almost three (3) years to reach those Orders because counsel for Objectors continuously filed opposition to the

settlement.

On May 16, 2017, Objectors Dana Clark Stevenson, Darius Snead, Mark Hendricks and Kenneth Fuqua filed their Class Action Complaint. *See* Pa1. On June 12, 2017, Defendants, the County of Salem and Warden John Cuzzupe filed their Answer to the Complaint. An Amended Complaint was filed on November 6, 2017, and a Second Amended Complaint was filed on June 12, 2019 after Objectors' counsel received permission from the Court. *See* Pa45.

On March 12, 2020, the Trail Court certified the following to proceed in the underlying class action litigation:

> Class 1A: Non-indictable detainees classified as at-risk who were strip-searched based on their identification as at-risk inmates and absent reasonable suspicion in violation of N.J.S.A. 2A:161A-1(c). Class period commences on April 6, 2015.
>
> Class 2: Detainees admitted to the at-risk unit and strip-searched 2-3 times per day despite being in a 24/7 lock-down unit. Class period commences on April 6, 2015.
>
> Class 3: Detainees who were strip-searched in the view of others in a group strip search. Class period commences April 6, 2015.
>
> Class 4: Detainees who were strip-searched in their cells in the at-risk unit while being videotaped and observed by a person not authorized to view the search. Class period commences April 6, 2015.

See Pa577.

Discovery continued and on November 25, 2020, Attorney Stephen Barry

notified the Court of settlement, stating mediation occurred before Judge Joel Rosen on November 24, 2020, and a settlement was reached in principle on all issues. *See* Pa613; *see also* Pa652 (containing signed Mediation Terms and Conditions). ***In July 2021, counsel for the Parties, to include Attorney Riback, signed the Settlement Agreement ("Agreement") and Joint Stipulation for Decertification and Voluntary Dismissal of Claims with Prejudice ("Joint Stipulation"). See*** **Pa616 (containing Settlement Agreement) and Pa718 (containing Joint Stipulation for Decertification and Voluntary Dismissal of Claims with Prejudice)** ***(decertifying and dismissing Classes 2 and 4).*** In September 2021 Attorney Barry filed a letter with the Court stating that a settlement was reached on all issues and all claims in this pending class action county jail strip search case. *See* Pa614-15. Attorney Barry's letter included a copy of the Settlement Agreement and Joint Stipulation as well as copies of the Notices to be sent. *See id*. Attorney Barry's letter also provided "I have reached out to the four class representatives to discuss the settlement terms and they are in agreement with them." *See id*. It is important to note that emails from Attorney Riback around August 21, 2021, indicate he agrees with settlement and decertification and discussed ways to present it to the Court for approval. *See* Pla53-66.

On September 23, 2021, Attorney Riback Filed his objection to settlement

and post-settlement litigation continued until the present day. *See* Pa735 (containing Attorney Certification in Support of the Objection). Despite Attorney Riback's extensive efforts to disrupt settlement, on March 25, 2022, the Trial Court issued an Order preliminarily approving settlement. *See* Pa1052 (containing Order) and Pa1062 (containing Motion Decision). On May 17, 2022, Objector's Motion to reconsider Preliminary Approval was denied. *See* Pa1100. On June 7, 2022, Objector's Motion to disqualify Carl Poplar, Esq., and Stephen Barry, Esq., was denied. *See* Pa1092 (containing Oder) and Pa1093 (containing Motion Decision).

The Salem County Court enter the Order of Final Approval of Class Action Settlement on February 8, 2024, and the Order decertifying and dismissing certain classes pursuant to Stipulation on February 22, 2024, from which Objectors' counsel now appeals. *See* Pa1311 and 1321, respectively.

III. CONCISE STATEMENT OF FACTS

Objectors' statement of facts attempts to argue the merits of the underlying litigation—which are not at issue on this appeal. Specifically, Objectors reference matters that are not at issue on this appeal, i.e., "Salem County's "at-risk" policy violates New Jersey law," "Salem County's "at-risk" classification system is arbitrary," and ""[a]t-risk" classification results in redundant-violative strip searches which formed the basis of the Order certifying four subclasses," Pb4-7.

Despite Objectors' claim regarding strip searches after confinement in a closed custody unit, the searches are permissible under New Jersey law and opposing counsel's interpretation of the New Jersey Code is without basis. The New Jersey Administrative Code provides *additional*, permissive circumstances as to when a strip search of an inmate *may* be conducted. Specifically, "a strip search may be conducted in any of the following circumstances . . . [b]efore placement of an inmate under a psychological observation or suicide watch. . . ." N.J.A.C. § 10A:31-8.5(b)(3). Furthermore, Objectors' counsel cites authority outside New Jersey to support his position regarding strip searches after an inmate is confined in a closed custody unit. However, testimony provided in discovery indicated that inmates confined to the at-risk unit were found to have contraband on their person after the initial strip search prior to confinement. Therefore, the searches performed by Salem County were necessary despite the enhanced level of confinement of the inmates.

Attorney Riback's application of the New Jersey strip search law is flawed. The New Jersey Statute provides: "[a]ny strip search or body cavity search conducted under this act shall be performed by persons of the same sex as the arrested person and at a location where the search cannot be observed by persons not physically conducting the search." N.J.S.A. § 2A:161A-4. Subsequently, the New Jersey Code provides further guidance that "a strip search of a person shall be

conducted . . . [a]t a location where the search cannot be observed by unauthorized person. . . .” N.J.A.C. § 10A:31-8.4 and 8.5. A combined reading of the above Statute and Code supports Salem County’s position that the Class 4 Objectors’ claims are meritless because the record contains no evidence that strip searches were videotaped and observed by a person not authorized to view the search.

Defendants in the underlying litigation were prepared to file for Summary Judgment on all of Objectors’ claims, especially claims relating to Classes 2 and 4. However, in November 2020, the parties met for mediation before The Honorable Joel Rosen (Ret.) and reached terms of settlement. Counsel for the Parties thereafter signed the Settlement Agreement and Joint Stipulation in July 2021. In September 2021, the Trial Court was renotified of the settlement, however, Attorney Riback began the three-year long opposition to settlement which now culminates in this appeal.

IV. LEGAL ARGUMENT

The standard of review that should be applied in this matter is an abuse of discretion standard as “[t]he [trial] court has considerable discretion in determining whether a settlement is fair and reasonable.” *Goldberg v. Healthport Techs., LLC*, No. A-2657-16T3, 2018 N.J. Super. Unpub. LEXIS 2030, at *8-9 (App. Div. Sep. 5, 2018) (citing *Bryan v. Pittsburgh Plate Glass Co. (PPG Indus., Inc.)*, 494 F.2d 799, 801 (3d Cir. 1974)). Specifically,

> *Rule* 4:32 provides the framework for class actions, and is modeled after *Federal Rule of Civil Procedure* 23(a) and (b). *See Saldana v. City of Camden*, 252 N.J. Super. 188, 194 n.1, 599 A.2d 582 (App. Div. 1991). Because there is no binding precedent within our court to determine the standard of review in assessing the approval of a class action settlement, and because *Rule* 4:32 is modeled after its federal counterpart, we look to federal precedent.
>
> The Third Circuit has determined that when reviewing the decision of the . . . [c]ourt to certify [a] class and approve [a] settlement, it does so "under an abuse of discretion standard. *In re Warfarin Sodium Antitrust Litig*., 391 F.3d 516, 527 (3d Cir. 2004) (citations omitted). The abuse of discretion standard is applied because "[t]he [trial] court has considerable discretion in determining whether a settlement is fair and reasonable. . . .

Goldberg v. Healthport Techs., LLC, No. A-2657-16T3, 2018 N.J. Super. Unpub. LEXIS 2030, at *8-9 (App. Div. Sep. 5, 2018) (internal quotation marks and citation omitted).

Therefore, the Salem County Superior Court, Law Division, Orders of February 8, 2024, granting "Final Approval of Class Action Settlement," Pa1311 and Pa1312, and February 22, 2024, granting the Joint Stipulation for Decertification and Dismissal of Claims with Prejudice, Pa1321, should be affirmed.

A. Settlement was Properly Granted and Enforced (*See* Pa1311-20)

1. *Settlement is Reasonable (See Pa1311-20)*

Objectors purport to oppose the Settlement agreed to and signed by their

counsel. *See* Pa616-640 at Pa640 (containing Attorney Riback' signature on the Settlement Agreement). The main argument is the alleged imbalance between amounts to be paid to the classes ($127,125.00) and the amount to be paid to Class Counsel ($375,000.00). Pb29-30. Objectors' counsel uses the difference between these two numbers to suggest "self-dealing" by Class Counsel without any further support. As will be indicated below, Objectors' argument, like all his other arguments, is without merit.

As articulated in the Order Preliminarily Approving Settlement, *see* Pa1052-1073, and affirmed in the Order of Final Approval of Class Action Settlement, *see* Pa 1311-1320, the proposed settlement is fair, reasonable and satisfies the factors in *Girsh v. Jepson*, 521 F.2d 153, 157 (3d Cir. 1975). Members of Class 1 will receive a payment of $75.00 and members of Class 3 will receive a payment of $300.00. At the time of Preliminary Approval of Settlement there were potentially 4,500 and 6,500 individuals for each of those classes, respectively. *See* Pa1063. There was the potential of $337,500.00 in funds that could be awarded to Class 1 and $1,950,000.00 that could be awarded to Class 3 claimants, for a total of $2,287,000.00 in settlement funds to be paid. The above amounts do not take into account the amounts that would be paid to each of the four (4) class representative ($7,500.00), for a total of $30,000.00, to be paid to the Class Representatives. *See*

id. The above amounts were available to be paid to potential claimants, and as will be described in the next paragraph, the notice to potential claimants was adequate.

The notice plan contemplated advertising via several different means to include direct mailing, publication in the South Jersey Times, establishment of a website and toll-free telephone number. *See* Pa1054-55 at ¶9 (Ordering preliminary approval of the Notice Program as set forth in the Settlement Agreement). Any returned notices required the Settlement Administrator to attempt to locate the individual via a national locator database or service. A similar notice plan was approved for a different New Jersey strip search case. *See Sanchez v. Essex County, et al*., D.N.J., Docket No. 2:15-cv-03391. As such, the notice plan was adequate to support the approval of the Settlement and properly permitted to proceed to administration. Once the above notice plan was executed, it resulted in 479 members of Class 1 and 304 members of Class 3, with $35,925.00 to be paid to Class 1 and $91,200.00 to be paid to Class 3, for a total of $127,125.00. *See* Pa1310 [sic] (containing letter from counsel for Defendants of February 8, 2024); *see also* Pa1310 (containing declaration of Jason M. Stinehart of Rust Consulting, Inc., which served as Settlement Administrator for this matter).

Although the amounts to be paid to Classes 1 and 3 are lower than the amount of funds that was available to those classes, it does not make settlement improper. The notice plan was adequate and properly executed, it just yielded a

lower number of claimants than expected. ***There are 783 total members of Classes 1 and 3 that believe the amounts to be paid are adequate because they filed claim forms and did not object***. Therefore, the Trial Court properly approved settlement, both preliminarily and finally. Accordingly, the settlement in this matter is proper and Objectors' Appeal should be dismissed.

2. *Objectors Only Oppose the Restrictive Covenant Because it Impacts Their Counsel (See Pa631)*

As stated throughout this Brief, counsel for Objectors signed the Settlement Agreement knowing full well it contained an alleged "restrictive covenant." The Settlement Agreement in this matter provides "Class Counsel agrees they will not represent any individuals who opt-out from the Settlement in asserting claims against Defendants that are the same subject of this agreement." *See* Pa631 at Section V.D. (containing section titled "Requests for Exclusion by Class Members" of the Settlement Agreement). The purpose of this provision was to prevent counsel for the Class from also representing objectors in a potential appeal. When preparing and signing the Settlement Agreement, all counsel did not want to fight a battle against the same person because it was perceived as a conflict by the signatories to the Settlement Agreement.

Counsel for Objectors opposes the alleged "restrictive covenant" and claims it is a conflict in an effort to not only upend settlement in this case, but to also protect his representation in *Price, et al. v. Salem, et al.* D.N.J. 3:22-cv-06042.

Objectors' counsel likely believes if settlement continues in this case, it will impact his ability to represent the Plaintiffs Anthony Price, Christine Ottinger, Robert Strauss, and Sarah Provost in *Price, et al. v. Salem, et al.* ***Those Plaintiffs are the only alleged opt outs*** **from the underlying class action—*no other opt out or objections were received*.** Litigation in *Price* has been ongoing for over two (2) years, and no one, to include Class Counsel and undersigned counsel in this case, has moved to disqualify Objectors' counsel in *Price, et al. v. Salem, et al.* due to the alleged "restrictive covenant," nor do counsel intend to enforce the restrictive covenant against counsel for Objectors in *Price*. As such Objectors' arguments against the alleged "restrictive covenant" are futile and should be disregarded.[1] Furthermore, even if the alleged "restrictive covenant" is found to be a violation, it does not merit upending this settlement and that provision should be struck, if necessary.

B. The Trial Court Properly Decertified and Dismissed Classes 2 and 4 Without Notice (*See* Pa1311-1320 and Pa1321-1327)

As part of the Joint Stipulation, which Attorney Riback signed, the parties agreed decertification of Classes 2 and 4 was appropriate based on information revealed throughout discovery and no further notice was required regarding the

[1] Despite the claims of Objectors' counsel neither the Court in his matter nor in *Price* have ruled on whether the Objectors in *Price* are permitted to recover for claims of emotional distress.

dismissal. *See* Pa1321-1327. It is unclear why Attorney Riback was in favor of dismissing and decertifying Classes 2 and 4 on July 1, 2021, when he signed the Joint Stipulation, and then took the opposite position in September 2021. *See* Pa1327 (containing Attorney Riback's signature on the Joint Stipulation). Similar to the Settlement Agreement that also bears Riback's signature, the Joint Stipulation and subsequent Court Order of February 22, 2024, signing the Joint Stipulation into Order, are proper because counsel for Objectors offers no explanation as to why his signature on the Joint Stipulation is not valid and there are no facts of record that would support continuation of the litigation, to include notice, for those classes.

1. *The Trial Court was Correct to Dismiss and Decertify Classes 2 and 4 (See Pa1319-1320 and Pa1321-1327)*

The Trial Court had adequate basis to Order the decertification and dismissal of Classes 2 and 4. Simply, Classes 2 and 4 were decertified and dismissed based on an assessment of the merits of the claims. The agreement to decertify and dismiss these claims was not made lightly and was given lengthy consideration during the settlement and mediation process and agreed to as fair and reasonable by the Parties through counsel. In addition to representations by counsel, and as will be further described below, the Trial Court had adequate basis to decertify and dismiss Classes 2 and 4.

a. Class 2 Was Properly Dismissed[2] (*See* Pa1319-1320 and Pa1321-1327)

As noted above, Class 2 is defined as "Detainees admitted to the at-risk unit and strip-searched 2-3 times per day despite being in a 24/7 lock-down unit" from April 6, 2015 forward. *See* Pa1312. While the Salem County Corrections Facility did have a practice of strip-searching detainees in the at-risk unit two (2) times per day, this policy is not a violation of the Constitutional rights of the detainees, and Defendants maintain this claim is properly stricken in the Settlement Agreement because it fails on the merits.

The Supreme Court has stated that "[m]any of the liberties and privileges enjoyed by other citizens must be surrendered by the prisoner. An inmate does not retain rights inconsistent with proper incarceration." *Overton v. Bazzetta*, 539 U.S. 126, 131 (2003). It has recognized that "inmates' constitutional rights must in some respects be limited in order to accommodate the demands of prison administration and to serve valid penological objectives." *Fraise v. Terhune,* 283

[2] Appellants improperly state the "Trail Court impliedly recognized that the federal court in Price v. Salem County 3:22-cv-06042 ruled on this claim finding it plausible and denying Salem County's motion to dismiss. (Pa1160-Pa1166). (Op. at 8) ("Theoretically, each of those subclasses could possibly" recover) (Pa1318)" However, Appellants' citation to Pa1160-Pa1166 is to an Opinion in *Nedrick, et al., v. Salem, et al.* D.N.J. Docket No. 1:22-cv-05143, which was dismissed for failure to prosecute. *See* D.N.J. Docket No. 1:22-cv-05143 at ECF 58. Plaintiff's reference to the Trial Court's Decision on Final Hearing to Approve Class Action Settlement, Op. at 8/Pa1318, is also incorrect, because that citation does not reference *Price.*

F.3d 506, 515 (3d Cir. 2002). One limited right is that of bodily privacy, which, in some respects, must yield to strip searches. *Williams v. Price*, 25 F.Supp. 2d 605, 611 (W.D. Pa. 1997) ("although inmates do possess a limited right to bodily privacy, some aspects of the right must yield to searches for contraband, so that prison administrators may maintain security and discipline in their institutions"); *Bell v. Wolfish*, 441 U.S. 520, 557-58 (1979) (an inmate's right to privacy is limited both by the need to maintain prison security and by the inmates own reduced expectation of bodily privacy); *Florence v. Bd. of Chosen Freeholders of Cty. of Burlington*, 566 U.S. 318 (2012)(inmate search policies are constitutional if they strike a reasonable balance between inmate privacy and the needs of the institutions).

As a result, the Supreme Court has routinely held that courts "must accord substantial deference to the professional judgment of prison administrators, who bear a significant responsibility for defining the legitimate goals of a corrections system and for determining the most appropriate means to accomplish them." *Overton,* 539 U.S. at 132. **"Such considerations are peculiarly within the province and professional expertise of corrections officials, and, in the absence of substantial evidence in the record to indicate that the offices have exaggerated their response to these considerations, courts should ordinarily defer to their expert judgment in such matters." *Wolfish*, 441 U.S. at 547-48.**

The claims pursued in this matter deal directly with prison policies aimed at the safety and security of Salem County Correctional Facility's ("SCCF") detainees, correctional staff, and the facility as a whole. Testimony offered in discovery made clear that detainees have been found with contraband in the infirmary or at-risk unit. This means detainees were found with contraband in the at-risk unit after their initial strip-search prior to admission to the at-risk unit. The decision to engage in subsequent strip-searches in the at-risk unit is reasonably designed to prevent the spread of contraband (including heroin, suboxone, marijuana, or other drugs) in the Corrections Facility.

The record developed in this matter included the testimony from corrections officers noting that subsequent searches of detainees revealed contraband on detainees in the at-risk unit, that the Corrections Facility was genuinely concerned with avoiding the serious risk of suicide in the Facility, and the explored methods and conditions under which strip-searches of detainees in the at-risk unit were conducted. Ultimately, counsel for the Parties agreed that the record did not develop a claim that would likely have success on the merits and that the decertification of the class would not violate the rights of detainees that may be members of that identified group.

b. Class 4 Was Properly Dismissed (*See* Pa1319-1320 and Pa1321-1327)

Similar to the claim for Class 2, the claim for Class 4 is equally meritless. The Settlement in this matter agrees to decertify this claim on the same basis. The allegation related to Class 4 is that at-risk detainees were strip-searched in their cell, were videotaped during the search, and that the search was observed by a person not authorized to view the search at that time or at a later date. *See* Pa1313. Defendants need not discuss whether such conduct is violative of the Constitution, or a right of the detainees, because the record contains absolutely no evidence that strip-searches were videotaped and observed by a person not authorized to view the search. In fact, Class Representatives failed to identify a single detainee who was strip-searched in their cell in the at-risk unit while being videotaped and simultaneously or subsequently, the video of that strip-search was viewed by a person not authorized to view it.

Objectors' reference to the March 12, 2020, Opinion of The Honorable Jean Chetney, J.S.C., is without merit. In support of their argument, Objectors claim Judge Chetney's Opinion eliminates the need to have a "person not authorized to view the search" view the surveillance videotape. *See* Pb38-39. However, Judge Chetney's Opinion certifying Class 4, does not defeat that ultimately, Class Counsel was not able to locate any evidence that would support someone viewed the video, to include testimony from the Class Representatives. Furthermore,

testimony from SCCF personnel demonstrates that access to any video contained on the system was intentionally and strictly limited.

Defendants were prepared to defend this claim but dismissal was the appropriate course. Absent some other evidence, which Defendants submit does not exist, there is no evidence to present to the jury regarding someone viewing the video as contemplated by Judge Chetney. *See id.* Therefore, these claims were properly decertified and dismissed. It is noteworthy that, even all these years later, counsel for the Objectors cannot point to a single individual who viewed these videos and did not have permission related to their job responsibilities to do so. Under the circumstances, the claim fails under the weight (or lack of weight) of evidence to support it.

2. *The Trial Court Applied the Appropriate Standard in Dismissing Classes 2 and 4 (See Pa1315-20)*

Pursuant to R. 4:32-2, "[t]he court shall approve any settlement, voluntary dismissal, or compromise of the claims, issues, or defenses of a certified class." *See* R. 4:32-2(e)(1)(A) (addressing Settlement, Voluntary Dismissal, or Compromise). Further, "[t]he court may approve a settlement, voluntary dismissal, or compromise that would bind class members only after a hearing and on finding that the settlement, voluntary dismissal, or compromise is fair, reasonable, and adequate. *Id.* at (C). Finally, "[t]he parties seeking approval of a settlement, voluntary dismissal, or compromise under this rule shall file a statement

identifying any agreement made in connection with the proposed settlement, voluntary dismissal, or compromise." *Id.* at (e)(2).

"As an overarching principle, New Jersey Courts view settlement agreements as normal contracts." *Kennedy v. Samsung Elecs. Am., Inc.*, No. 2:14-4987, 2018 U.S. Dist. LEXIS 84442, at *12-13 (D.N.J. May 21, 2018) (citing *Nolan by Nolan v. Lee Ho*, 577 A.2d 143, 146 (N.J. 1990)). "A settlement is enforceable so long as the parties agree on essential terms and manifest an intention to be bound by those terms." *Id.* (internal quotation marks omitted). "The party seeking to enforce the alleged settlement agreement, has the burden of proving the existence of the agreement under contract law. *United States v. Lightman,* 988 F. Supp. 448, 458 (D.N.J. 1997) (*citing Amatuzzo v. Kozmiuk,* 305 N.J. Super. 469, 473 (App. Div. 1997)). In the case of a class action, where settlement must be approved, "[t]he basic test for court approval of a settlement of a class action is whether it is fair and reasonable to the members of the class." *Strougo v. Ocean Shore Holding Co.*, 198 A.3d 309, 320 (N.J. Super. Ct. Ch. Div. 2017) (citing *Chattin v. Cape May Greene*, 524 A.2d 841, 845 (N.J. Super. Ct. App. Div. 1987).

As stated above at length, the Trial Court was proper to enter an Order to decertify and dismiss Classes 2 and 4. As presented to the Court, since it was notified in September 2021 that the parties had reached a settlement, Classes 2 and

4 would be decertified and dismissed. Defendants continued to make this argument up to and including the hearing on January 5, 2024, for final approval of settlement. At that time, counsel for Defendants affirmed to the Court that Classes 2 and 4 would be dismissed. Thereafter, counsel for Defendants filed the Joint Stipulation previously signed by all counsel. Based on the testimony and representations to the Court on January 5, 2024, the Trial Court entered the Joint Stipulation as an Order decertifying and dismissing Classes 2 and 4. Therefore, the Trial Court properly decertified and dismissed Classes 2 and 4 and Objectors' appeal should be dismissed.

3. *Notice was Not Required to Dismissed Classes 2 and 4 (See Pa1320)*

"After a judge enters a certification order, the judge remains free to modify it in the light of subsequent developments in the litigation. . . ." *Muise v. GPU, Inc.*, 371 N.J. Super. 13, 32 (App. Div. 2004) (internal quotation marks omitted) (citing *General Tel. Co. of the Southwest v. Falcon*, 457 U.S. 147, 160 (1982)). "A certification order is "inherently tentative," particularly before notice is sent to class members. *Id.* (citing *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 n.11 (1978)).

Since the Court has the ability to modify its Order certifying Classes 2 and 4, and response to the Settlement Agreement and the Joint Stipulation, those Classes were properly decertified and dismissed. Although counsel for Appellants claim

there is no change in circumstances since the Honorable Jean Chetney's Order certifying Classes 1-4, the circumstances have changed because the parties engaged in a multitude of discovery and, after discovery, entered into a Settlement Agreement in which Classes 2 and 4 would be decertified and dismissed as part of resolution of this case. *See* Pa1321-27.

Notice is not required to Classes 2 and 4 prior to decertification and dismissal. As indicated above, certification of a class was tentative—especially prior to notification to the potential class members. Appellants' reliance on *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 176 (1974) is misplaced because that case did not involve notice to members of a decertified class. Notice was therefore not required to Classes 2 and 4 because notice has not been sent to the potential class members and the Court remained free to modify it in light of the Settlement Agreement and Joint Stipulation. Additionally, the Court approved Notice to Classes 1 and 3 does not violate Due Process because Classes 1 and 3 are not relinquishing their claims under Classes 2 and 4 by accepting the settlement amounts in this case. The resolution of the claims involving Class 1 and 3 resolve all claims that parties in those classes have with Defendants.

C. Class Counsel Properly Represented Their Clients and Prosecuted This Litigation (*See* Pa1092-99)

Similar to his Motion for Recusal, Attorney Riback's Motion to Disqualify Class Counsel (Carl Poplar, Esq. and Stephen Barry, Esq.) was without merit. As

indicated in Attorney Barry's letter of September 1, 2021, he contacted the four class representatives to discuss the settlement terms and the class representatives were in agreement with the terms. Furthermore, Attorney Riback used his unhappiness with the Court approved settlement to make a personal attack against Attorneys Poplar and Barry for their alleged unethical conduct in bringing this extensive, almost seven (7) year litigation to a close. Moreover, Attorney Riback uses his arguments against Attorneys Poplar and Barry as an attempt to further his arguments and plans to disrupt the Court approved settlement. Despite his many assertions against Attorneys Barry and Poplar, and their alleged unethical conduct, this entire dispute over settlement is faulted to one individual, Attorney Riback. The dispute is faulted to Attorney Riback because he signed the Settlement Agreement and the Joint Stipulation, and then objected to settlement going forward.

Attorneys Poplar and Barry have more than adequately represented the Class Representatives and the Classes. Class counsel brought this matter to a fair and reasonable settlement. Class counsel continue to litigate a settled case that has lasted almost as long as the pre-settlement litigation.

V. CONCLUSION

For the foregoing reasons, Defendants/Respondents, the County of Salem and John S. Cuzzupe, respectfully request This Honorable Court affirm the Orders of the Trial Court and dismiss this appeal.

Respectfully submitted,

MacMAIN LEINHAUSER PC

Dated: December 2, 2024

By: */s/ Brian H. Leinhauser*

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LETTER BRIEF ON BEHALF OF PLAINTIFFS RESPONDENTS

DANA CLARK STEVENSON, MARK HENDRICKS, KENNETH FUQUA AND DARIUS SNEAD, Individually and on behalf of a Class of others similarly situated Plaintiffs v. COUNTY OF SALEM ET AL Defendants	CIVIL ACTION SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NOS. AM-002323-23T4 SAT BELOW: HON. BENJAMIN D. MORGAN,JSC Docket No. SLM-9-17

Your Honors:

This Letter and Appendix is submitted by Stephen W. Barry, Esq. and Carl D. Poplar, Esq. co-class counsel for the Plaintiffs in lieu of a formal brief pursuant to R.2:6-2(b) in response to Appeal filed by William Riback, Esquire.

This appeal has been filed by William Riback Esquire (Riback) who was a co-class counsel who agreed in writing to a class settlement. The class

representatives were notified of the settlement, assented, received all documents and the Court was notified of the settlement. Thereafter Mr. Riback individually filed an objection to the settlement without any motion. (P1a-1) Eleven days later he met with class representative Hendrick to have him sign a Declaration objecting to the settlement and nineteen days later went to a prison armed with a pre-prepared Declaration for Mr. Snead to sign saying he objected to the settlement. Longhand insertions were made by Mr. Riback in the documents. They were giving up an opportunity to receive a recommended incentive award that Mr. Riback had agreed to in the settlement. (Pa743; Pa 748)

At the Fairness Hearing the Court found that "there is little opposition to the settlement". (Pa1316) Riback does not represent a Plaintiff-Appellant. He is asserting in his Appeal that he represents Objectors. The Plaintiffs who are the Class members are Respondents.

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ARGUMENT

PRELIMINARY STATEMENT

The Class Action Complaint alleging improprieties in strip searching of inmates at the Salem County Jail was filed on May 16, 2017. The improprieties were addressed and curtailed. After discovery the case was settled on November 24, 2020 with a mediator, the Hon. Joel Rosen, U.S. Magistrate Retired. The Mediation Term Sheet was signed by all counsel. Mr. Riback signed the document on December 29, 2020. On March 25, 2022 and February 24, 2024 the Orders for Preliminary and Final Approval were filed.

The relevant issues on this appeal are the reasons why there was this prolonged period that is taking to bring this case to a resolution and conclusion. The reasons for the delays will be discussed both in the Procedural History and Argument. The assertions that Riback is making will

be addressed and refuted in the Argument. This appeal is the culmination of the many non-meritorious and unsuccessful efforts of Mr. Riback.

An appropriate and reasonable settlement needed to be judicially enforced. Numerous motions by Riback objecting to the settlement had to be addressed. He made numerous unsuccessful motions to overturn the settlement, to recuse the Trial Judge, disqualify class co-counsel and filed three interlocutory appeals. The class administration was completed and distributions were about to be made but have been delayed for years. It will be more than four years from the time of the settlement to when this appeal will be decided.

APPENDIX REFERENCES

Riback designated his appendix Pa. Riback does not represent the Plaintiffs. He asserts that he is representing Objectors. Current co-class counsel Barry and Poplar will designate their appendix references as P1a to avoid confusion.

PROCEDURAL HISTORY

On May 16, 2017, the original Complaint was filed. (Pa1)

An Amended Complaint was filed on November 6, 2017 and a Second Amended Complaint was filed on June 16, 2019. (Pa45)

On October 17, 2019 William Riback on his own filed a Motion to certify seven sub-classes. (Pa71)

On March 12, 2020, the Hon. Jean Chetney, J.S.C. certified four classes. (Pa577)

On March 12, 2020, Riback and Poplar, who had been representing the Plaintiffs putative class were named as co-counsel together with Stephen Barry who had then entered an appearance. (Pa577)

On November 24, 2020, mediation was held before the Hon. Joel Rosen, U.S. Federal Magistrate Retired and resulted in a settlement. (Pa652)

On December 29, 2020, Riback signed the Mediation Terms and Conditions Agreement. On December 18, 2020, it was signed by Barry, on January 8, 2021, it was signed by Brian Leinhauser and on January 4, 2021 it was signed by Poplar. (Pa652)

On April 27, 2021, the Plaintiffs Class Representatives Hendricks, Snead, Fuqua and Stevenson (now deceased) received letters and telephone communications from Barry describing the settlement and they assented. (P1a2)

On June 28, 2021, letters were sent to Fuqua, Hendricks and Snead sending documents. (P1a2)

On July 1, 2021, William Riback signed a Joint Stipulation for decertification and voluntary dismissal of claims with prejudice. It was signed by Barry on June 24, 2021, Poplar on July 6, 2021 and Leinhauser on July 21, 2021. The Stipulation decertified the claims of multiple strip searches of the Class which was Class 2 and decertified the video class which was Class 4. The Stipulation was filed with the Court. (Pa718)

On September 1, 2021, the Court was advised by letter of all of the terms of the settlement including the decertification of Classes 2 and 4. The Court was sent a copy of the Settlement Agreement and advised that counsel had spoken to the Class representative and that they were in agreement with the settlement. Riback was copied on the letter. (P1a14)

On September 23, 2021, Riback individually and not with Barry or Poplar filed an "Objection to Settlement". He stated that this filing was on behalf of the absent class members who have an interest in having preliminary approval denied. Riback did not then state or assert that he was representing the Class representatives as objectors. Riback had not yet contacted or spoken to them. (P1a1)

On October 4, 2021, Barry filed a Motion for Preliminary Approval of the Class Settlement which motion was filed jointly by both Poplar, Barry and

Defendants' counsel. (P1a16)

On March 25, 2022, the Hon. David Morgan, J.S.C. entered an Order preliminarily approving the settlement and that the matter could proceed to administration and to a Final Approval hearing. (Pa1050)

On April 13, 2022, Riback filed a Motion seeking reconsideration of the Order that denied his objection of Preliminary Approval. (Pa1074)

On April 14, 2022, Riback filed a Motion for an Order to recuse Judge David Morgan because of his Order of preliminary approval of the Class settlement which approved the decertification of Classes 2 and 4. Riback asserted numerous frivolous reasons why the Judge should be recused. This included that (1) an informed person would have doubts as to the Judge's impartiality; (2) the Judge did not recognize the fiduciary duty to the Class; (3) did not act as a Fiduciary; (4) there were doubts his granting Preliminary Approval ignored his arguments and were materially misleading; that his ruling was based on unsupported evidence; (6) because he approved the amounts of the settlement he was not impartial; and (7) that he relied on nonsensical arguments of co-class counsel. (P1a18)

On April 22, 2022, Riback filed a Motion to Disqualify Carl D. Poplar and Stephen Barry as Class counsel and asserted that they had acted

unethically and had a conflict with the objectors and that they were unethical in their participation in the decertification of the Class which Riback had stipulated to. (Pa1078)

On May 27, 2022 an Order and Opinion denying Riback's motion to disqualify Class counsel was entered. (Pa1100)

On June 21, 2022, Riback filed an Order to Show Cause why the Order granting preliminary approval should not be vacated.

Between June 2022 and October 2022 Riback filed three Notices of motions for Leave to File Interlocutory Appeals addressing the Trial Court's denials of his motions attacking the Preliminary Approval of the Class Settlement, the denial of his Motion to Recuse the Judge and Disqualify Barry and Poplar. He filed various Motions within these appeals. All of his appeals and motions were dismissed on November 3, 2022. (AM00057-22; AM00622-21; AM000633-21; M000542-22; M000625-22; M000700-22 and M0001168-22) (P1a28)

On July 12, 2022, Barry and Poplar filed a Motion seeking disqualification of Riback if he persisted in contending that he was representing Objectors to the Class Settlement which he agreed to and for a declaration that he was to be bound by the terms of the Settlement Agreement

that he signed. (Pa1122)

On July 21, 2022, Riback filed a Motion to prevent Plaintiffs' counsel from communicating and deposing the Class Representatives who Riback asserted to be his clients and who were purportedly objecting to the Class settlement. This motion was denied on September 9, 2022, and the depositions were permitted to take place. (P1a32)

On September 9, 2022, the Court issued an Order declaring that Riback is bound by the terms of the settlement which were the subject matter of the Court's preliminary approval on March 15, 2022 and the denial of the motion to disqualify Riback without prejudice. (Pa1128)

On September 9, 2022, the Court entered an Order confirming a prior Order of the Court accepting Riback's withdraw as serving as Plaintiffs' co-class counsel in the matter at that time. (Pa1127)

On September 9, 2022 the Court Ordered that the settlement be enforced against Riback. (Pa1128)

On June 8, 2023, Riback was ordered to pay counsel fees to Barry and Poplar for time spent in preparing for ordered depositions which Riback did not appear. (P1a39)

On January 5, 2024, the Court conducted the Fairness hearing.

(Transcript of January 5, 2024; Riback did not provide T cites)

On February 8, 2024, the Court entered an Order granting Final Approval of the Settlement and that the Settlement Agreement was fair and reasonable. The Court issued a written opinion on February 8, 2024. (Pa1311) (P1a42)

On April 4, 2024, Riback filed this Notice of Appeal. (A-002323-23 T-4).

On October 24, 2024 Riback, after more than seven (7) months, ultimately filed his Appellate Brief.

STATEMENT OF FACTS

This is a Class Action that was settled at a Mediation with the Hon. Joel Rosen, U.S. Magistrate Retired on November 29, 2020. A Term Sheet was prepared and signed by Riback and all counsel in December, 2020 and January, 2021.

On July 1, 2021, Riback signed a Joint Stipulation and Decertification of two of the four certified Classes and voluntary dismissal of the claims with prejudice that addressed the various dismissals of the Classes. The terms of the Stipulation were included in the Mediation Term Sheet and were memorialized in the Agreement, all of which Riback agreed to.

The Class Representatives Fuqua, Snead, Stevenson and Hendricks were advised as to the settlement and its terms. They were advised which Classes were to be dismissed.

Riback actively participated in the drafting of the Notice and Claim documents. (Pa1025; P1a53) Riback did not voice any objection or disagreement with the dismissal of any of the Classes. Riback exchanged emails and received copies of the multiple drafts. His only comments regarded the times for various events to occur during the administration and regarding the cost of administration.

The final draft was transmitted to him on June 29, 2021. Riback acknowledged receiving it and stated that he would wait the original to be signed and forwarded.

On August 18, 2021, Barry advised Riback by email that he had spoken to the attorney for the Defendants regarding the language for the Motion for Final Approval. Riback suggested that the Memo in support of the Motion for Final Approval should include language that a dismissal should be entered which was conditioned upon settlement and should not be dismissed until the Final Approval. On August 24, 2021 Riback inquired of Defendants' counsel Polaha regarding the draft of the Motion for Preliminary Approval be

circulated for review. Riback did not object to the dismissal of Classes. On August 31, 2021, Riback sent emails to Barry asking for the Order of Preliminary Approval and making comments about the administrative notices. Riback had no concerns regarding the substance of the settlement. Riback stated that the terms, including decertification, should be incorporated in the Order for Preliminary Approval. (P1a52; P1a53)

The September 1, 2021, letter to the Court confirmed the settlement and transmitted the documents which referenced the decertification of Classes 2 and 4. Riback was copied on the letter. (P1a14)

From the date of the settlement on November 24, 2020 until August 31, 2021 Riback participated in the settlement which involved the decertification of Classes 2 and 4. Nine months after the settlement Riback was satisfied with the settlement and decertification. On September 23, 2021 Riback filed a brief without a Motion objecting to the settlement. This is when co-class counsel and defense counsel were first made aware of his objection. Barry filed the Motion for Final Approval which resulted in an Order and Opinion granting the Motion on February 8, 2024.

Riback filed a brief on September 23, 2021 without a motion objecting to the settlement. This was after Mr. Barry communicated with the Class

Representatives and prior to Riback contacting them to get them to sign the certifications he drafted. (Pa743, Pa746, Pa763)

Since that time Riback has initiated a course of unsuccessful motions challenging the preliminary approval, the qualifications of the judge and co-counsel, his questionable solicitation of Class Representatives to object, and vacate the settlement, and numerous interlocutory appeals.

The hearing for the Final Approval took place on January 5, 2024. Three Class Representatives who Riback stated he represented as objectors testified. Judge Benjamin Morgan, J.S.C. issued a written decision on February 8, 2024. (Pa1312) He reviewed the testimony of Class Representatives Mr. Fuqua, Mr. Snead and Mr. Hendricks. The Court stated there was no clear objection to the settlement. (Pa1316) Mr. Fuqua testified that he was unaware that Mr. Riback agreed to the settlement. He wanted the improper process to be corrected and could not confirm that there still was any improper practice going on.

Mr. Snead was not aware of the Motion to Dismiss Classes 2 and 4 but had no evidence to contradict that they should not be dismissed. Mr. Hendricks testified that he also was unaware of the Motion to Dismiss Classes 2 and 4 but said that it was the attorney's job to review the legal arguments.

Judge Morgan found specifically that "in this case there is little opposition to the settlement". (Pa1316) (Transcript of January 5, 2024)

Judge Morgan found that Riback's argument that Classes 2 and 4 are entitled to notice was without merit because every member of Classes 1 through 4 were placed on Notice of the Final Hearing by the Claims Administrator. (Pa1320)

ARGUMENT

I. THE SETTLEMENT WAS FAIR, REASONABLE AND ENFORCEABLE AND WAS AGREED TO BY ALL COUNSEL AND NOT OPPOSED BY THE CLASS REPRESENTATIVES

There is a public policy that favors the settlement of disputes. See *State v. Williams,* 184 N.J. 432, 441 (2005). Mediation is a means of encouraging parties to resolve disputes. A case settled through mediation which is committed to in writing is enforceable. See *Willingboro Mall LTD v. 240/242 Franklin Ave.*, 225 N.J. 241 (2013).

The settlement was made final and enforceable after the Term Sheet and the Stipulation of the decertification of Classes 2 and 4 were signed by all counsel. It was not in principal. It was completed and final. It was further corroborated by multiple email exchanges with Riback about the terms of the Agreement which was the basis for the Preliminary and Final approval.

Riback signing the Stipulation of Decertification of Classes 2 and 4 confirmed his agreement and understanding that Classes 2 and 4 were decertified. The Court had to enforce the settlement because of Riback's change of mind.

II. RIBACK'S CHALLENGES TO THE SETTLEMENT AND MOTIONS TO RECUSE THE JUDGE AND DISQUALIFY CO-CLASS COUNSEL ARE WITHOUT MERIT

There is no clarity in Riback's assertions on this appeal. He is saying that Barry and Poplar have been "bought off" by agreeing not to represent their clients. It is conjectured that he is referencing Class members who allegedly opted out of a Class Settlement. He asserts that is a violation of R.P.C. 5.6(b). This assertion is incomprehensible. The extensive labor and expense to address Riback's actions are the antithesis of being bought off.

Riback's argument that R.P.C. 5.6(b) and *Cardillo v. Bloomfield*, 411 N.J. Super. 574 (App.Div. 2010) is incorrect and inappropriate. There has been no agreement that Riback was prevented from representing anyone. Riback had a potential conflict by soliciting class representatives to object to a settlement that he agreed to. Riback withdrew as co-class counsel.

Riback, nor anyone else, has been precluded from the representation of anyone by agreement or elsewise. Riback has asserted that he represents the Class representative and no one has prevented him from doing so. Because of

Riback the Class representatives have potentially waived their rights to an incentive award which is recommended to be in the amount of $7,500.00. (Pa652) The Class representatives are free to bring an individual claim if they have general damage. At this late date there is no knowledge of any defined general damages beyond the event of being strip searched.

Riback next complains that Classes 2 and 4 should not have been decertified which denied clients access to the Courts. No one has been denied access to the Courts. He is criticizing the Superior Court judges below who did not agree with him.

Riback wanted the Trial Judges to be recused because they overlooked their fiduciary duty to independently evaluate the settlement. In Riback's Memorandum in support of his Motion to recuse the Court he lists ten separate reasons why he alleges the Judge was impartial. Lawyers are prohibited from asserting an issue unless there is a basis in law or fact for doing so. RPC 3.1. The Courts extended extraordinary patience and leeway to Mr. Riback and they should be commended and not criticized. The assertions are illogical, inappropriate and not capable of being comprehended.

Riback in order to support his contention that the Class representatives objected to the settlement includes references to the post settlement deposition

of the Class Representative Fuqua and not their testimony before Judge Morgan at the Fairness Hearing. Snead only objects because he gets nothing for Classes 2 and 4 notwithstanding he receives money from the other Classes. Hendricks objects to the settlement because he understands strip searching is dehumanizing. (Riback's brief p.24 & 25) He disagrees with the practice of strip searching. Strip searching is necessary and required in jails and prisons. See *Florence v. Burlington County*, 566 U.S. 318 (2012).

Riback is creating a new use of the term "restrictive covenant". His objection to the settlement that dismisses Classes 2 and 4 is not supported by the cases he cites. In *Baker v. Equity Residential Mgmt., L.L.C., 390 F. Supp.3d 246, 259 (D.Mass 2019)*(Riback's brief p.59) the Court approved decertification when not justified by the proofs. Riback cited *Lightfoot v. D.C., 246 F.R.D. 326, 334 (D.D.C. 2007)*(Doc.2007) which rejected decertification. Riback fails to point out that the court thereafter permitted decertification after further discovery which demonstrated inadequate proofs. *Lightfoot v. D.C.*, 273 FRD 314 (DDC 2011).

Decertification is required when the proofs are inadequate and then there is a settlement. That is what transpired in this case.

Settlements of lawsuits involve compromises even when positions have

been strongly advocated. Mediation resolves complex disputes of uncertain trial outcome. N.J.R. Civ. Proc. 1:40-1 et seq., N.J.S.A. 2A:23C-1 et seq.

CONCLUSION

After the Mediation Riback signed the "term sheet". He signed the stipulation for decertification and dismissal of classes 2 and 4. He participated in the writing of the agreement and notice to the Class.

Attorney Riback does not anywhere dispute that he agreed that in the event of any disagreement he would defer to attorney Barry (Pa 1025-1031). .

Eight months after Riback's participation in a settlement he changed his mind about the desirability of its terms. He then approached the class representatives in an attempt to persuade them to object. This fell apart at the final approval hearing.

Riback has caused a delay in payment to Class members and deprived Messrs. Snead, Fuqua and Hendricks (sadly Class Representative Stevenson lost her battle with addiction while these post settlement disputes were pending) of their participation in the Class Representative incentive award of $7,500.00.

All of Riback's actions since the agreed upon settlement and in this

appeal are frivolous and without merit. This appeal should be dismissed expeditiously.

Respectfully submitted,

CARL D. POPLAR, P.A.
/s/ Carl D. Poplar
By: Carl D. Poplar

and

Barry Corrado & Grassi, P.C.
/s/ Stephen W. Barry
By: Stephen W. Barry

APPELLATE DIVISION
DOCKET NO: A-002323-23T4

DANA CLARK STEVENSON and MARK HENDRICKS and KENNETH FUQUA and DARIUS SNEAD, individually and on behalf of a class of others similarly situated	:	SUPERIOR COURT OF NEW JERSEY LAW DIVISION SALEM COUNTY
	:	SLM 92-17
Plaintiffs,	:	Sat Below: Benjamin Morgan, J.S.C.
v.	:	
THE COUNTY OF SALEM,	:	
Defendant.	:	

APPELLANTS' REPLY BRIEF

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TABLE OF CONTENTS

I. INTRODUCTION

This appeal presents fundamental questions about the integrity of class action settlements and the courts' responsibility to protect absent class members. At its core, this case challenges a settlement agreement that violates both the Rules of Professional Conduct and basic principles of due process.

The settlement agreement contains an impermissible restrictive covenant that violates RPC 5.6(b). Despite clear precedent from *Jacob v. Norris, McLaughlin & Marcus* and *Cardillo v. Bloomfield 206 Corp.* requiring courts to void such agreements as against public policy, the trial court overlooked this ethical violation and approved the settlement.

Moreover, the Trial Court arbitrarily decertified Classes 2 and 4 without providing constitutionally required notice to absent class members. This decision effectively terminated the claims of thousands of class members - including those detained on indictable charges - without any notice or opportunity to protect their rights. The court's action denied these class members access to the courts and let their claims expire without their knowledge.

This brief demonstrates why reversal is required in three parts. First, it explains why the settlement agreement's restrictive covenant violates RPC 5.6(b) and requires rescission of the entire agreement under controlling New Jersey precedent. Second, it shows that the Trial Court's decertification of Classes 2 and 4 was arbitrary and

unconstitutional, particularly given the complete absence of notice to affected class members. Finally, it will establish that Class Counsel's multiple ethical breaches and conflicts with the Class which should render them inadequate representatives, requiring their disqualification.

II. ARGUMENT

A. *Jacob v. Norris, McLaughlin & Marcus and Cardillo v. Bloomfield 206 Corp* should require the Court to enforce RPC 5.6(b) because restrictive covenants erode confidence in the Judiciary.

The Parties ask the Court to abdicate the courts' responsibility to enforce R.P.C. 5.6 (b) as is required by *Jacob v. Norris, McLaughlin & Marcus*, 128 N.J. 10, 17, 607 A.2d 142, 146 (1992) (contracts that violate the RPCs violate public policy, and courts must deem them unenforceable). Class Counsel argues that RPC 5.6(b) is a guideline which they need not follow allowing them to barter in clients. (Compare *Jacob* at 14 prohibiting the bartering of clients with Class Counsels' Brief at 15 seeking to view their transaction with Salem County prospectively as opposed to at the time the deal was struck) Salem County expands on Class Counsels' argument that because Objectors Counsel has repudiated the Settlement Agreement on behalf of six opt outs there can be no harm and so no foul. (Salem County Opp. Br. at 12-13)

But contrary to the Parties disregard of the law, *Jacob* requires that RPC 5.6(b) be enforced to uphold public policy. Otherwise, Class Counsel benefits from the

transactional use of their clients to negotiate their fee and then are rewarded by their agreement to split their former Co-Class Counsel's fee. (Pa1320)[1] The Parties also ignore *Cardillo v. Bloomfield 206 Corp.*, which follows *Jacob,* requiring that the Settlement Agreement be voided as against public policy. (Appellants' Opening Brief at 29-34) ("Op. Br")

The Parties want the Court to ignore what the case law requires, rescission of the entire agreement, by ignoring the transaction that they themselves negotiated. (Class Counsel Opp. Br. at 15 ignoring the dynamics of their transaction and focusing on Objectors' Counsel's cure) A restrictive covenant in the class action setting is a binary agreement exclusively between defendant and class counsel which is to the detriment of the class. Salem County "bought-off" Class Counsel.

Salem County at the time of the transaction assured itself that the most qualified attorneys, those with deep knowledge of the case, would not represent the absent class members who may opt out effectively negating the Settlement Agreement's opt out clause. The only other beneficiary to the restrictive covenant is Class Counsel who are paid to not represent their clients – what operates like a bribe i.e., ***"bought-off"***. *Cardillo v. Bloomfield 206 Corp.,* 411 N.J. Super. 574, 579, 988 A.2d 136, 139 (App. Div. 2010) ("buy off plaintiff's counsel")

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[1] Calculating Poplar's 383 hours and Barry Corrado firm's hours 473 arrives at 856 hours arrives at a fee of $400.00 per hour.

Contrary to the Parties' arguments, RPC 5.6(b) is directed at the offering or making of such an agreement, not its attempted cure.

> The rationale for [RPC 5.6(b)] is: First, [these] agreements restrict access of the public to lawyers who, by virtue of their background and experience, might be the very best... Second, such agreements may provide clients with rewards that bear less relationship to the merits of their claims than they do to the desire of the defendant to "buy off" plaintiff's counsel. Third, places the plaintiff's lawyer in a situation where there is conflict between the interests of present clients and those of potential future clients.

Cardillo at 579. So for the first time on appeal the Parties argue that their unethical conduct is cured through Objectors' Counsels' (previously Class Counsel) representation of the six opt-outs. (Poplar Br. at 15) (Salem County Br. at 12-13) Price v. Salem County 3:22-cv-006042 (MAS-JTQ) Moore[2] v. Salem County 3:24-cv-10981 (MAS-JTQ)

1. ***The Parties do not dispute that the Trial Court's disregard of their unethical conduct is arbitrary.***

It is undisputed that the Trial Court acquiesced in the violation of RPC 5.6(b) by intentionally overlooking it; disregarded its duty to independently review the terms of the Settlement Agreement and; overlooked Class Counsels' duty to disclose

[2] Plaintiff Moore is presently weighing whether to assert a civil rights claim for denial of access to the New Jerey Courts as a result of Class Counsels' September 9, 2022 Order prohibiting William Riback from practicing in the Superior Court of New Jersey when representing opt outs or proceed under the PLRA applicable only in the federal court under which he gives up the right to damages for pain and suffering if he can demonstrate the unavailability to exhaust administrative remedies.

potential conflicts of interest[3]. The Objectors testified that they objected because they believed the Settlement was unreasonable. So, the Parties fail to controvert:

1) The Trial Court had an independent duty to review the Terms of the Settlement Agreement; (Op. Br. at 29-32);

2) The Objectors were not required to testify about the terms of a contract; (Id.)

3) the Plaintiffs' claims could not possibly exceed $75.00 or $300.00 ("no harm – no foul") (*Id.)

2. The Parties arguments raised for the first time on appeal requesting a blue lining of the restrictive covenant make no sense.

For the first time on appeal, Salem County says the silent part out loud – that the Parties intentionally negotiated ¶VD to restrict the practice of law:

> "The purpose...was to prevent counsel for the Class from also representing objectors in a potential appeal. When preparing and signing the Settlement Agreement, all counsel did not want to [permit representation for objectors].

(Salem County Opp. Br. at 12) (emphasis added) Salem County's admission made for the first time on appeal omits the details of their unethical negotiations.[4] It is incomprehensible how prohibiting representation of opt outs restricts this Appeal.

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[3] *In re Agent Orange Prod. Liab. Litig.,* 800 F.2d 14, 18 (2d Cir. 1986) (class counsel has a duty to disclose any potential conflicts see also *Delaney v. Dickey*, 244 N.J. 466, 471, 242 A.3d 257, 260 (2020).

[4] Neither of the Parties make the absurd allegation that the Mediator was facilitating their unethical negotiations. Apparently the Mediator only mediated the ethical parts of the Settlement Agreement and the balance was between the Parties.

According to Salem County's admission, ¶VD was intended to disincentivize Class Counsel from representing objectors. But an indirect disincentive is equally repugnant as a direct restriction. *Jacob v. Norris, McLaughlin & Marcus,* 128 N.J. 10, 23, 607 A.2d 142, 149 (1992) (disincentive provisions, like direct prohibitions, are unenforceable as against public policy). At the end of the day, it is a clear textual prohibition on the representation of opt-outs which was enforced by Class Counsel against their clients on September 9, 2022. The Parties cannot legitimize their unethical conduct through Objectors' Counsel repudiating the Settlement.

B. The Parties ignore Appellants' arguments that decertifying Classes 2 and 4 was arbitrary and failure to give Notice is unconstitutional.

The Parties do not controvert the findings of the Honorable Jean Chetney, J.S.C that absent class certification:

- thousands of absent Class Members like Kenneth Fuqua detained on indictable charges who are uniquely in Classes 2 and 4 are denied access to the courts and
- thousands of absent Class Members like Darius Snead detained on non-indictable offenses cannot pursue their Class 2 and Class 4 claims.

And the Parties do not controvert that the lack of Notice precludes the Class from objecting or opting out to preserve their statute of limitations. Absent effective Notice it is not possible to measure the "Reaction of the Class".

1. *The Parties do not controvert decertification is arbitrary.*

It remains uncontroverted that

1. The Honorable Jean Chetney, J.S.C. held that the only way class members could access the courts is through the class action device; (Op. Br. at . at 1-2; 7-8, 9)

2. The rule of law must be followed to avoid draconian consequences (Op. Br. at 16-17, 40).

3. The rule of law requires courts to find a change in circumstances that it is infeasible for the class to proceed under R. 4:32(a)-(d) or (b)(3). (Id. at 38-41).

4. The only change in circumstance was Class Counsels' agreement to dismiss their clients' claims – not an inherent inability to proceed under R. 4:32. (Id. at 37).

5. The Trial Court relied on Class Counsels' pretextual reason of unsubstantiated proof problems (Pa1320)

6. The Trial Court's Opinion dismissing the case based upon Class Counsels' bogus arguments that the claims lack merit is contradicted by the Trial Court's own finding acknowledging that Class 2 and 4 are actionable presumably based upon the Robert B. Kugler's Opinion.

The Trial Court overlooked its fiduciary responsibility to ensure that the Settlement Agreement was fair. The Trial Court recognized that it is not plausibly fair to dismiss individuals out of the case absent consideration. (Pa1319). Yet, the Parties failed to substantiate anything which would permit the Trial Court to find consideration.

a. **The Parties fail to demonstrate Classes 2 and 4 received consideration.**

The Parties did not and cannot support the Trial Court's finding that Class 2 and 4 received anything of value. The Trial Court, by the terms of its Opinion, rewrote the Settlement Agreement to find that Classes 2 and 4 obtained injunctive relief:

> Moreover, ...classes [2 and 4] did receive an ancillary benefit..., albeit not set forth expressly in the settlement agreement.... Defendants' counsel has represented..., Salem County has stopped many of its prior

> procedures regarding strip searches. This term was not placed in the settlement agreement because Salem County did not want to wait until a final approval to put those new procedures into effect…Therefore, …Classes 2 and 4 did receive some ancillary benefit from this litigation.

(Pa1319) First, it was inappropriate to re-write the Settlement Agreement. *Friske v. Bonnier Corp.,* 543 F. Supp. 3d 543, 545 (E.D. Mich. 2021) (court cannot modify the bargained-for terms") *Deangelis v. Corzine*, 151 F. Supp. 3d 356, 361–62 (S.D.N.Y. 2015) (district court may not 'dictate the terms of a class settlement; he should approve or disapprove a proposed agreement as it is.')

Second, the purported injunctive relief is illusory. A 'promise is illusory when it is optional. Levine v. Acuative Corp., No. A-0079-22, 2024 WL 139574, at *2 (N.J. Super. Ct. App. Div. Jan. 12, 2024) There is nothing in the final orders which can be construed as compelling Salem County to do anything. And only orders can be enforced – not opinions. *Macfadden v. Macfadden*, 49 N.J. Super. 356, 359, 139 A.2d 774, 776 (App. Div. 1958) 'only what a court adjudicates, not what it says in an opinion).' *Louis W. Epstein Fam. P'ship v. Kmart Corp.,* 13 F.3d 762, 771 (3d Cir. 1994) (order granting an injunction ... shall be specific)

The Opinion does not identify what policy was changed: "Salem County has stopped many of its prior procedures regarding strip searches" without specifying what those changes are. *Bituminous Concrete Co. v. Manzo Contracting Co.,* 70 N.J. Super. 102, 107, 175 A.2d 214, 216 (App. Div. 1961) (order imposing a restraint should be so clear, definite and certain in its terms) *Louis W.*

Epstein Fam. P'ship v. Kmart Corp., 13 F.3d 762, 771 (3d Cir. 1994) (broad, non-specific language contained in an order is insufficient to compel compliance)

It is apparent that the practices which Salem County represented had changed are unrelated to two-a-day strip searches (Class 2) and being strip searched under camera (Class 4). (T11 at 87:6-89:15). The purported policy change was limited to when a detainee would see a medical professional upon admission to the Jail - unrelated to Class 2 or 4. And there is no record evidence to substantiate this purported change. Moreover, it is contradicted by the evidence in the opt-out litigation which demonstrates that detainees would always have seen the Medical Department upon admission to the Jail but the Medical Department had no input on the classification of the detainee who scored 75 on the At Risk Questionnaire resulting in them being strip searched two times a day under CCTV between April 17, 2015 through March 21, 2020 . (Price v. Salem County 22:cv-06042, Plaintiffs' Memorandum in Support of Motion for Sanctions, December 20, 2024, Docket Entry 118, p 24-35 of 50, Page ID 2389-2400) In Neimeister v Salem County the plaintiffs allege these practices continued even after November 21, 2021. (Neimeister v. Salem County, 3:24-cv-00411 (ZNQ-JBD, Amended Complaint, March 12, 2024, Docket Entry 5) At the end of the day, it is apparent that Class Counsel negotiated away their clients' Class 2 and 4 claims in exchange for their fee.

2. The Parties do not controvert Objectors' arguments that decertification of Classes 2 and 4 without notice is arbitrary.

The Parties do not controvert the Objectors' Opening Brief that:

1. Upon Preliminary Approval the Trial Court never found Notice to meet the requirements of R. 4:32-2(b)(2); (e)(1)(B) or the Constitution; (Op. Br. at 17-18)

2. Upon Objectors' motion to disqualify Class Counsel the Trial Court found that disqualification on the basis of their failing to provide notice of the dismissal of Classes 2 and 4 was not ripe because notice was yet to be sent (Op. Br. at 18)

3. Upon Final Approval the Trial Court determined that notice complied with R. 4:32-2 (e)(1)(B) and the Constitution because "defense counsel has confirmed that every member of Class 2 and 4 were given notice; (Op. Br. at 41-44)

4. The finding that every member of Class 2 and 4 were given notice of the termination of their claims conflicts with the written order decertifying Classes 2 and 4 which states that notice was not provided because no notice was previously provided and because unspecified new facts; (Pa1321)

5. Classes 2 and 4 could not have received notice because the Settlement Agreement and Notice are silent on the existence and dismissal of those Classes; (Pa616-Pa640; Pa654-Pa674)

The Trial Courts finding that Notice was effectuated absent mention of Class 2 and 4 claims apparently resulted from a confusing misrepresentation that Class 2 and 4 are co-extensive with Class 1. But The Parties do not attempt to rebut the truth that the classes are not coextensive[5]:

> "There is no doubt that certified Class 1 is comprised of only non-indictable detainees. Equally, there was no doubt that certified Class 2 includes both

[5] Class Counsel at page 14 of their Brief parrots the Trial Court's finding citing Pa1320 despite their full and complete knowledge that Classes 2 and 4 are not co-extensive with Class 1.

> indictable and non-indictable detainees. (Pa1394-1401) (T2 at 69:17-70:3) (Fuqua Dep. Tr. 7:1-13 (Pa 1265) (Snead Dep. Tr. 8:24-9:8) (Pa1285). Judge Chetncy certified Class 2 as including indictable detainees and appointed Darius Snead who was detained on non-indictable offenses to represent Class 2 along with Kenneth Fuqua who was detained on indictable charges."

(Op. Br. at 9).

Apparently what has transpired is that Notice was sent to those in Classes 2 and 4. But that Notice prohibits indictable detainees from making claims under Class 1. (Pa664-Pa674) And Class 3 requires having been subjected to a group strip search. (Pa654-Pa663) So, thousands of class members like Kenneth Fuqua admitted to the Jail on indictable matters and not subjected to a group strip searches are excluded from the Settlement. Apparently indictable detainees are improperly being credited as making Class 1 claims. (Pa1308-Pa1309) It cannot be that the courts will recognize effective notice by penalizing those who are uniquely in Classes 2 and 4 who refused to make fraudulent claims.

C. The Settlement Agreement should be voided because Class Counsel has not been Adequate and Class Counsel should be disqualified.

Courts supervise class counsel under R. 4:32-1(a)(4). To maintain Class Counsel in its present iteration is to assure a repeat.

1. Class Counsel did not and cannot dispute that its negotiation and conduct in violating RPC 5.6(b)is in conflict with the Class.

Class Counsel for the first time claims that they are entitled to negotiate a restrictive covenant. (Class Counsel Br. at 15). They feign a lack of understanding

which prohibits the bartering of clients. (Class Counsel Br. at 15-16) And they are entitled to be rewarded for their unethical conduct by usurping their co-Class Counsel's fee who now repudiates the Settlement. Class Counsel even enforced ¶VD against their clients and remained silent after shutting the courthouse doors on their clients in violation of their fiduciary responsibility to disclose any improprieties/conflicts to the courts. (Op. Br. at 47 "fiduciary role"). According to Salem County, ¶VD was meticulously negotiated. (Salem County Opp. Br. at 12)). Class Counsel never fulfilled their responsibility of disclosing the violation of RPC 5.6(b) and advise the Trial Court on the law as is required by their fiduciary duty. *In re Agent Orange Prod. Liab. Litig.,* 800 F.2d 14, 18 (2d Cir. 1986) (class counsel has a duty to disclose any potential conflicts see also *Delaney v. Dickey*, 244 N.J. 466, 471, 242 A.3d 257, 260 (2020). Instead, Class Counsel, in direct conflict with the Class Representatives, sought to silence them by claiming their lawyer was conflicted as a matter of law which the Trial Court repeatedly rejected. (Op. Br. at 14 citing Pa 1051; p. 23 trial court citing Agent Orange) Then Class Counsel made an unsupported argument that Objectors' Counsel lacked the authority to represent his clients which are proven false – he fabricated the representation. (Op. Br. at 15 citing Pa 1082-Pa1083). (Op. br. at 23 citing T10 at 89:5-7 et seq.). (Op. Br. at 24-25). These tactics are in direct conflict with the Class and permitted Class Counsel to engage in unrepentant unethical conduct. (Op. Br. at 24-25). The Court should

recognize that there is no greater conflict with the Class than trying to silence an objection as opposed to trying to get approval on the merits – something Class Counsel never attempted.

2. Class Counsel abandoned their clients who are uniquely in Classes 2 and 4 by agreeing to decertification without notice.

"Class Counsel may not abandon the fiduciary role they assumed at will or by agreement with the [defendants], if prejudice to the members of the class they claimed to represent would result or if they have improperly used the class action procedure for their personal aggrandizement." *Piambino* at 1143--44. Class Counsel failed their duty of zealous representation. *Ziegelheim v. Apollo,* 128 N.J. 250,261, 607 A.2d 1298, 1303 (1992) (lawyer must pursue goals of the client). "Indeed, there is no greater failure to protect a client's interests than to abandon the client." *In re Whitney,* No. DRB 19-296 (May 12, 2020) (slip op. at 24)

The Trial Court's finding that "'A settlement that ends a litigation does not equate to a termination of representation'" helps understand that Class Counsel has abandoned thousands of their clients like Kenneth Fuqua uniquely in Classes 2 and 4 whose statute of limitations ran because of Class Counsels' decision to dismiss those claims without notice (Op. Br. at 10 citing Pa1096) Of course settlement terminates the representation. Termination of representation requires differing procedures in the context of varying types of representation. In a contingent fee relationship the attorney is the required to fully disclose the distribution of the settlement. In a class action the attorney is required to provide notice to their clients spelling out the terms of the settlement. Dismissing a clients' claim without advising the client of the dismissal is the quintessential abandonment.

3. *Class Counsel misleads their clients who are in Class 1 by failing to disclose to their clients that they agreed to dismiss their clients' Class 2 and 4 claims.*

Those in Class 1 who also have Class 2 and 4 claims have been mislead by their attorneys because they have no idea that they have foregone those valuable claims.

4. *Class Counsel has created a conflict by agreeing to have compensation for those in Classes 1 and 3 in exchange for dismissing those uniquely in Classes 2 and 4.*

Adequacy encompasses a duty to ensure that there are no preferences between subclasses in a settlement. *Amchem Prod., Inc. v. Windsor,* 521 U.S. 591, 595, 117 S. Ct. 2231, 2236, 138 L. Ed. 2d 689 (1997) ("no structural assurance of fair and adequate representation for diverse groups violates due process). Class Counsel disregarded their responsibility to their clients that they be treated fairly in the settlement. *Ortiz v. Fibreboard Corp.,* 527 U.S. 815, 854, 119 S. Ct. 2295, 2318, 144 L. Ed. 2d 715 (1999) (class settlement which excludes a class of claimants violates due process) *In re Litermy Vorks in Elec. Databases Copyright Litig.,* 654 F.3d 242, 253 (2d Cir. 2011) (failure to have Adequate Representation for each subclass voids the settlement) *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.,* 827 F.3d 223, 233 (2d Cir. 2016)([o]nly the advocacy of an attorney representing each subclass ensures that the interests of that particular subgroup are in fact adequately represented).

III. CONCLUSION

For all of the above reasons, the Court should:

- vacate the order approving the settlement
- vacate the order decertifying Classes 2 and 4
- disqualify Class Counsel and
- remand for further proceedings.

Dated: January 23, 2025 *s/ William Riback*, Esquire 013581994