

1 drier, that this objection therefore connotates or
2 indicates it is a boilerplate objection that has no
3 legal thought, that was just simply filed
4 willy-nilly, so to speak, without any regard to any
5 review of the case, the settlement, et cetera.

6 And I guess while we're on the subject,
7 I do believe that there are objectors out there that
8 probably do that, and you can review those. They're
9 out there in cyber space and in other cases, but
10 this is not one of those cases, and those are not
11 objections that we filed.

12 Q. Sure. And just so we have good
13 communication on the terms I'm using, while people,
14 and perhaps I at points in time, have made arguments
15 about what people do in cutting and pasting, when I
16 ask a question about cutting and pasting, I
17 literally mean when you're on your -- when you
18 highlight a portion, you cut it from one document
19 and you then go paste it into another document, so
20 why don't I get to the issue this way.

21 Your group, you, Mr. Fortman and Mr.
22 Miller, filed an objection in the Electrolux case,
23 correct?

24 A. Yes, that's correct.

25 Q. And would it be fair to say that the

1 Electrolux case dealt with the risk of fires in
2 driers and this case deals with the risk of fires in
3 dishwashers? Would it be fair to say that there was
4 similar claims brought in both cases?

5 A. To be fair, Steven, I don't recall all
6 the facts of Roberts v Electrolux. What I recall
7 from it more than anything is that there was a nunc
8 pro tunc order entered that removed a great deal of
9 offensive language directed as us as objectors's
10 counsel that continues to be repeated in this case
11 before Judge Olguin, which is patently false.

12 I don't remember the specific facts, I
13 knew -- I can tell you it involved driers and it
14 involved I guess an overheating event, but beyond
15 that, I can't really tell you more about it without
16 actually reviewing their settlement again and those
17 documents.

18 Q. Do you know or recall why your group
19 and your clients withdrew the objection filed in the
20 Roberts versus Electrolux case?

21 A. I don't believe that objection was
22 withdrawn. I believe that we ended up appealing
23 that court's decision in that particular case.

24 Q. Did you at some point dismiss your
25 appeal?

1 A. Yes, we did.

2 Q. Were you paid any money to dismiss your
3 appeal?

4 A. I'm sorry, was I paid any money?

5 Q. Yeah, was there any money or other
6 compensation paid to you and your group in

7 connection with the dismissal of the appeal in the
8 Roberts verse Electrolux case?

9 A. What I will tell you that it is not
10 uncommon under certain circumstances that the
11 objectors' attorneys are awarded attorneys' fees by
12 class counsel at that stage of the proceedings. I
13 can't really get into the specifics of that because
14 I believe it does exceed the scope of your subpoena.

15 But to be fair with you, you brought it
16 up, or actually perhaps I brought it up also, or
17 both of us did, but I would tell you it would not be
18 uncommon for that to occur under certain conditions.

19 Q. I'm going to ask my question again --

20 A. Sure.

21 Q. -- because I have a court order
22 deposition subpoena for you to testify which was not
23 limited to what documents were produced.

24 Were you and your group paid money in
25 connection with the dismissal of the appeal that you

1 filed in the Electrolux case?

2 MR. FORTMAN: Well, let me interpose an
3 objection here because even though he was served
4 with a subpoena, it does not permit him absent a
5 court order to get into specifics of any settlement
6 on appeal. Those are all protected by circuit court
7 mediation protections and confidentiality. There's
8 been no court order to disclose that information.

9 So subject to that, I mean you can -- I
10 mean, you can answer whether there was a settlement.

11 THE WITNESS: And --

12 Q. (By Mr. Schwartz) Let me just say
13 this --

14 A. Sure.

15 Q. -- before you go forward, Mr. Kress, in
16 response to the objection of your counsel. The
17 issue of payments and appeals was briefed in the
18 Motion to Compel Proceedings, we got an order
19 compelling the testimony. We got a second order on
20 your reconsideration motion, or Mr. Fortman's
21 reconsideration motion that it wasn't just for the
22 documents in this document portion of the subpoena,
23 but also protective about these issues, so I
24 disagree that you have not been ordered to testify
25 about these issues and payments not just for trial

1 court dismissal but appellate dismissals, we have an
2 understanding that the information that would be
3 designated confidential under the confidentiality
4 agreement, and I think it's fair to say that both
5 the orders from the Eastern District of Missouri and
6 from the Central District of California rejected the
7 notion that there was a privilege or confidentiality
8 protection that would prevent disclosure of the
9 amounts of the payments, even though they may be
10 subject to confidentiality for our proceeding.

11 So I've asked the question, I would
12 like to know if there was a payment and what the
13 amount is, you're either going to answer that
14 question or you're not, and then if you don't
15 answer, we will have to ask to have a further
16 proceedings from the court to figure out whether we
17 get that answer or not. So are you going to answer
18 that question or not?

19 MR. FORTMAN: Well, we definitely
20 disagree with your characterization of what the
21 court has ordered. The court has ordered the
22 production of the documents pursuant to your
23 subpoena and it did not exceed that scope. So I'm
24 going to instruct him, he can -- he can tell you
25 whether it was settled or not, but beyond that,

1 they're subject to confidentiality agreements in the
2 various circuit court mediation programs, and, you
3 know, without some additional subpoena or some
4 additional Motion to Compel, I don't think he's
5 required to, and I think he would be violating the
6 terms of those confidentiality agreements if he
7 disclosed specifics of those settlements.

8 Q. (By Mr. Schwartz) Mr. Kress, are you
9 going to answer the question or not?

10 A. The answer to your question is yes,
11 that case did settle. That's the extent of my
12 answer for that.

13 Q. And are you refusing to tell me whether
14 you and your group was paid money to settle that
15 case and dismiss the appeal?

16 MR. FORTMAN: I mean, I think -- I
17 mean, I think we can say that there was financial
18 compensation paid.

19 THE WITNESS: There was -- I -- I'm --
20 there was payment of attorneys' fees, and beyond
21 that, I'm not permitted to disclose further without
22 another order from the court and with some subpoena
23 compelling that information and narrowing the scope
24 of what it is that you seek.

25 Q. (By Mr. Schwartz) Can you identify any

1 change made to the Electrolux settlement or any
2 change to the fees that were awarded by the court in
3 the Electrolux case that were the result of the
4 objections that you filed?

5 A. As I sit here, off the top of my head,
6 I don't recall any changes being made to that
7 settlement in particular or any changes to the
8 amount of the attorneys' fees. It has always been
9 our position and continues to be that the filing of
10 the objection itself, again reinjects the
11 adversarial process, or to put it a different way,
12 it points out issues to all the parties and the
13 court that may have been kind of lost or cast aside
14 as the parties were either figuring out how they
15 wanted to settle the case and the payment of
16 attorneys' fees or, quite frankly, under certain
17 conditions hadn't been considered at all that we
18 believe are legitimate issues and that, therefore,
19 point out to the parties and to the court.

20 Q. So in the Electrolux case, would it be
21 your position that even though there is no change
22 for the better for the settlement or reduction in
23 the fees or concrete any benefit that was achieved
24 by your objection in terms of what the settlement
25 was and the fees were, that the benefit that

1 justifies the payment of the fees was assisting in
2 the adversarial process and bringing the issues in
3 front of the court so there could be a better
4 assessment, is that basically what you're saying?

5 A. You're asking several things, but I
6 think I can address them one-by-one. First of all,
7 as justification for payment of an award of
8 attorneys' fees, you really would have to ask class
9 counsel that question. I can't get into their heads
10 as to their motivation and, as you know as an
11 attorney, perhaps what someone's motivation is is
12 not necessarily what they outwardly display to a
13 third party or necessarily what they're willing to
14 share with you.

15 And so what would motivate class
16 counsel to make that or justify that, you would
17 really have to -- you would have to go back to class
18 counsel and either depose them or perhaps just
19 simply ask them what motivated them to do that.

20 What I can tell you is that -- you just
21 disappeared from me, Steven, on the video.

22 MR. FORTMAN: There he is.

23 THE WITNESS: Okay. Now you're back.

24 Can you see me okay?

25 Q. (By Mr. Schwartz) Yes, I can.

1 A. Okay. Because you disappeared from me
2 and I couldn't see, and didn't want you -- anyhow,
3 the actual -- the filing of that objection again
4 provides that benefit to the class members and
5 it's -- I think it's also important to keep in mind
6 is that, you know, under Rule 23, we don't have that
7 duty to the class that you as class counsel have.

8 Nonetheless, it is our efforts and our
9 attempt to inform, if you will, the court that these
10 are issues that should be addressed, this is why we
11 believe they need to be addressed, and that this is
12 why this is important and can assist and help the
13 class.

14 I'll be the first one to tell you, and
15 you already know this, it's an uphill battle and
16 it's not an easy one to win if the way you are going
17 to analyze it is stating okay, show me in the
18 court's order, for example, where it says that your
19 group or your objector brought benefit to the class.
20 It's a difficult thing to accomplish, but it has
21 been done under certain circumstances.

22 Q. Was there any disclosure of that
23 payment made to the trial court judge in Electrolux?

24 A. I think, as I already testified, that
25 was up on appeal, and I'm not familiar with any rule

1 that would have required its disclosure to the trial
2 court, and I'm not familiar with any rule that would
3 require that in general.

4 My understanding is that through these
5 various mediation offices, when cases are appealed,
6 it is not uncommon, one of the first documents that
7 is required to be filled out is the -- I believe
8 it's called a mediation questionnaire, where the
9 parties indicate whether or not that they would even
10 have an interest in discussing with the other side
11 resolution of their particular issues while on
12 appeal.

13 As you well know, sometimes that
14 happens, sometimes it doesn't. Sometimes there's a
15 mediation and it's successful, sometimes it's not,
16 under a variety of circumstances. But I'm not
17 familiar with anything that would require a party or
18 us or our counsel to inform or notify the trial
19 court that there has been a settlement up on appeal.

20 Q. Okay. Mr. Kress, I think we've both
21 fallen into a trap which is that the attorneys, we
22 didn't go over the rules, because we assume we know
23 them, but there's an old quote that says attorneys
24 make the worst witnesses, and I don't mean that as a
25 pejorative term for you, but one of the rules we

1 usually go over with witnesses, both when we prepare
2 them and when we are taking their deposition, is
3 listen to the question and answer the question,
4 don't answer a different question.

5 I specifically asked you whether or not
6 there had been disclosure to the trial judge, and
7 you asked all the reasons why you think there was a
8 need to have disclosure. So I want to see if we can
9 speed things along a little bit by your answering my
10 specific question, so I'll go back to the question
11 where I started from, which was just yes or no, was
12 there any disclosure of that payment to the
13 Electrolux case that dismissed the appeal to the
14 trial court judge?

15 A. I can tell you that it was not -- the
16 trial court was not informed that there was a
17 payment of attorneys' fees, but I do believe, and
18 you would have to look through the docket, but I
19 believe that you will find a motion or memorandum
20 that was filed by class counsel that informed the
21 trial court that that nunc pro tunc order was
22 necessary in part due to a settlement that had been
23 reached with our objectors.

24 I can't remember the document number
25 or -- well, I just recall that there was some basis

1 that -- well, my understanding is that was filed for
2 that reason, so that the court would understand that
3 we're doing this and you're doing this for this
4 reason also. They needed to advise the court and
5 give them additional supporting information. So I
6 hope you find that helpful.

7 Q. Mr. Kress, my recollection from
8 reviewing that docket was there's no such document
9 filed making that explanation as you described. Let
10 me then -- let me get back into that in a different
11 way.

12 Was -- was part of the consideration
13 for dismissing the appeal having class counsel or
14 the parties go back to the trial judge and request a
15 nunc pro tunc change to the final approval order?

16 A. Yes.

17 Q. And were you or your co-counsel part of
18 any teleconference with the judge regarding changing
19 the final approval order?

20 A. No, no.

21 Q. And in the Electrolux case, remind me,
22 who was your client, the objector of the Electrolux
23 case?

24 A. I'm sorry, I don't recall the names of
25 the clients in that case.

1 Q. Okay.

2 A. That was several years ago.

3 Q. Were those by lawyers or are they
4 non-lawyers?

5 A. I believe they were non-lawyers.

6 Q. Okay. And I believe Mr. Fortman
7 testified yesterday, but confirm this for me, that
8 for your group, and I'm using that as shorthand for
9 you and Mr. Miller and Mr. Fortman --

10 A. Certainly.

11 Q. -- that you had never been involved in
12 an objection in a class action where a non-lawyer
13 client objector received money in connection with
14 their participation as an objector above and beyond
15 what they got as a regular class member, is that
16 right?

17 A. That's correct.

18 Q. And is Electrolux another one of those
19 cases where you and Mr. Miller and Mr. Fortman
20 shared whatever fees were paid by class counsel
21 based upon an equal basis relative to your work that
22 you did?

23 A. Yes.

24 Q. Do you know whether other objectors
25 were paid money to dismiss their appeals in the

1 Electrolux case?

2 A. I have no knowledge of what other
3 objectors did in that case or whether or not those
4 appeals were resolved or in what manner, or if they
5 appealed for that matter.

6 Q. What -- was the resolution of your
7 Electrolux appeal done by a circuit court mediator
8 or was it done bilaterally with class counsel?

9 A. Well, I don't think I can answer.

10 MR. FORTMAN: Yeah, I think you're
11 getting into kinda what was covered under the
12 mediation confidentiality rules.

13 THE WITNESS: We're getting too close,
14 I don't think I can discuss that, unfortunately.

15 MR. FORTMAN: I think the mechanics of
16 how that case was resolved, I think is covered by
17 that protection.

18 MR. SCHWARTZ: Well, I'm trying to
19 determine whether mediation applies, whether it's
20 actually a mediation --

21 THE COURT REPORTER: I can't understand
22 you, sir.

23 MR. SCHWARTZ: -- or what the nature
24 and extent of that was. Like for example, in our
25 case we know that Professor Oragreid [phonetic]

1 served as mediator and we provided details of that
2 to the court. So I'm just trying to figure out --

3 THE WITNESS: Steven, I'm sorry to
4 interrupt you, the court reporter here is saying
5 she's having trouble hearing you, so.

6 MR. SCHWARTZ: Oh, okay. Do you want
7 me to speak slower or is it the voice quality?

8 THE COURT REPORTER: It's the voice
9 quality.

10 Q. (By Mr. Schwartz) Okay. Let's see if
11 by speaking clearer and slower we can make this
12 better.

13 Was the Electrolux appeal resolved in
14 connection with a court sponsored mediation process?

15 MR. FORTMAN: Again, I think that's
16 getting too close to, you know, because whether it
17 was through the mediation process or confidentiality
18 between the parties under the California rules, I
19 think you're still getting into a point where we are
20 not able to disclose that information absent some
21 order from the court.

22 THE WITNESS: And let me be clear for
23 the record, Steven, you know, I don't have issues
24 with disclosing what's going on with settlements on
25 appeal. I think there should be that transparency,

1 but there are also these offices that handle these
2 mediations, and I'm aware that they say that the
3 terms will be held strictly confidential, and along
4 with those settlement agreements.

5 So if this is an issue for you and you
6 feel this strongly about it, and if you're going to
7 be filing something with the court to do that, let
8 us know and I will talk to my group and see if
9 there's some way that we can either join you in that
10 motion perhaps, because, you know, my issue is that
11 I don't want to disclose something to you and then
12 I've got these other circuit mediators or their
13 offices saying okay, now you've done this. I don't
14 even know how that's handled in terms of if you do
15 that without absent a court order.

16 But again, if that's something you feel
17 strongly about and you need those numbers, you know,
18 when we're done today, call me, talk to me and we'll
19 see if we can't work something out and we'll file a
20 joint motion if you feel that's necessary if my
21 co-counsel are agreeable with that. Because I think
22 the information you're seeking is reasonable is what
23 I'm trying to say, but I can't disclose it.

24 Q. I appreciate that. I appreciate that.
25 What I'm trying to figure out is whether a circuit

1 court mediator was actually involved in the
2 settlement and dismissal of your appeal in
3 Electrolux, but I don't have that information yet.

4 A. And I understand your need for that,
5 and to be fair to you, I would like to tell you more
6 about that, but I believe that I can't because of
7 the rules and because of the objections that my
8 co-counsel has just raised.

9 But I'm again telling you I'm willing
10 to explore that with you at a later time other than
11 today if there's something you feel that is so
12 necessary that you want to obtain that information,
13 you know, contact me and call me and we'll discuss
14 it.

15 Q. Okay. And just to close a loop, you're
16 refusing to provide that specific information to me
17 today at this deposition?

18 A. Yes, sir, I am.

19 Q. Okay. Let's talk about what you
20 testified about in the Fortman case, similar
21 testimony about, even if there's no what I'll call
22 success in approving the settlement or reducing the
23 fee, et cetera, that there's a benefit that
24 objectors provide to transparency and the
25 adversarial process and giving the judge information

1 injury, and I think that there should be damages
2 that are paid to those class members. I think as
3 you refer to it as asymptomatic dishwasher, that
4 they should be paid something in cash, and they
5 should receive something for that as part of their
6 damages because the opinion would be is that if
7 they're capable of providing a coupon -- here is an
8 example.

9 Instead of giving them the 15 percent
10 off of the dishwasher, you give them that equivalent
11 in cash, or you offer them the discount and say
12 look, I can give you -- I can give you 15 percent
13 off today, or I can give you that equivalent in cash
14 tomorrow or on another day or on the same day, but
15 you're giving -- you're giving the class members
16 that option, and then you're making sure that that
17 particular certificate or option, as I refer to it,
18 is transferable or marketable instead of just saying
19 well, here, you just get what everybody else gets at
20 a sale over Labor Day weekend, or it just appears to
21 me that Sears has more holidays sales, they must
22 have more holidays than anybody, maybe Mr. Myers can
23 chime in, they may keep a different calendar, but
24 they appear to have sales constantly.

25 So when the only thing you're offering

1 to the class is what they can already get on the
2 street, it doesn't appear to be a benefit.

3 Q. Okay. Let's just be -- just make sure
4 we're on the same page here in our language. Not
5 everyone on the street can stack a discount from
6 this litigation with other sales, correct?

7 A. If they're able to do that. I think
8 any time you can stack a coupon, and I think the way
9 you're using that term means add them both together
10 for a cumulative discount, I think that's always
11 good for the consumer. Always.

12 Q. And that's a portion of our negotiation
13 where you would say yes, they made them stackable
14 and usable with any other discounts compared to not
15 do willing that, correct?

16 A. That could be helpful to the consumer.
17 But I also believe that based on the testimony of
18 Kelly Kress, my wife, yesterday, that when she
19 pulled up that website, there's a disclaimer that
20 says that you can't take this discount with any
21 other coupons, which would create a conflict with
22 that clerk at that respective Sears or Sears outlet,
23 I just -- I think that that creates even bigger
24 issues, which is why I go back to that I think that
25 what -- because you asked me what I thought that the

1 class should be given and what should be done, they
2 should be given cash. I believe that's what they
3 should be given.

4 Q. Well, how much do you think that people
5 like you and your wife should get in cash to get
6 over the threshold where you and your wife would be
7 satisfied and that meets the minimum standards for
8 fairness as a part of the resolution of the claims
9 that --

10 A. Well, I don't have a particular dollar
11 amount. I go back to my previous testimony. I gave
12 you an example where at minimum what you could do
13 is just simply say instead of a 15 percent off or as
14 I understand up to a 20 percent off coupon under
15 these circumstances, instead of taking the coupon,
16 they get the cash based on the value of that drier.
17 I'm sorry, that dishwasher.

18 You know, they dry dishes, what can I
19 tell you? I do it with the dishwasher also, so over
20 the clothing washer.

21 Q. That drier --

22 A. Sorry, you know, the syntax here could
23 be for me internally, so my apologies, that just
24 provides further confusion.

25 Q. That's okay. So it sounds like what

1 complaining about what they're calling, I think is
2 it the moldy washer cases or something, and somebody
3 was claiming, I think the article was titled All
4 Washed Up, and it talks about how class counsel is
5 getting all these fees but the class doesn't get
6 anything but coupons.

7 But that's how I'm familiar with that.
8 But beyond that, I really don't have any knowledge
9 of that, unfortunately.

10 Q. Okay. So you're not familiar with the
11 class certification?

12 A. No, I'm not.

13 Q. Okay. So it sounds like what I'm
14 hearing is that you don't believe in this kind of
15 appliance case where there's an alleged defect but
16 for the people who don't have the defect, it sounds
17 like what I'm hearing is you don't believe that any
18 settlement that does not paid cash but that pays or
19 provides discounts is going to not meet the minimum
20 standards of fair and reasonable and adequate from
21 your perspective, is that fair?

22 A. That is fair, and I'll provide that
23 with a caveat. You know, here would be a different
24 situation. You know, what's being offered isn't
25 much more and maybe under certain circumstances is

1 less than what a consumer could acquire at a Sears
2 outlet or at another merchant on sale. So perhaps
3 if the coupon were for something obviously
4 strikingly amazing, say half off, we're talking
5 about talking a substantial discount, whereby, for
6 example, and then the consumer could say well, you
7 could either take 25 percent of the value cash or
8 you can take half off of a new -- a new dishwasher.

9 But I -- you know, again, we stand
10 behind our objection, we think that the relief
11 offered to the class, for those people that you're
12 referring to as asymptomatic dishwashers is woefully
13 inadequate.

14 Q. Okay. And just to close the loop, I
15 think your wife in her certification attached a sale
16 where someone could get 15 percent off, and then if
17 you added one of the rebate opportunities from our
18 litigation, whether it's a 10 or 15 or 20 or 30, you
19 get up to 30 to 45 percent off, depending on what
20 the level of the rebate was and what your situation
21 was in this case, there is an opportunity by the
22 stacking feature to actually get a very significant
23 discount off of a replacement washer for current
24 washers, right?

25 A. I think what she also testified to, she

1 did -- I believe she testified that stacking is a
2 good thing for consumers, but that in this situation
3 according to the disclaimer that she had read
4 online, that would not be permitted.

5 Q. Okay.

6 A. So your, you know, your settlement
7 forces the consumer to further haggle or wrangle
8 with getting this discount. And by the way, when I
9 said a 50 percent, what we're still missing here at
10 the heart of this is cash, and giving the consumer
11 the option, because I think it's important to
12 understand that there are probably enough consumers
13 out there who don't want those products any more
14 because they're concerned that again, as I refer to
15 them, is they could be potential fire bombs in their
16 kitchen even if Whirlpool disclaims them and says
17 we've changed these models, they're more safe now,
18 et cetera, et cetera. So I think cash is still the
19 primary component that is lacking from your
20 settlement.

21 And with that, Steven, and I don't want
22 to cut you off, we've been here for about hour, I'd
23 like to stretch my legs for about ten minutes and a
24 cup of water, but if you want to finish up with me,
25 I don't want to cut you off.

1 Q. No, actually this is a good time for a
2 break, and as we discussed yesterday, just let me
3 know when you need breaks so you can stretch because
4 I understand there are some back issues.

5 A. Yes. Carrying canoes, Steven, never a
6 good thing to do at my age.

7 Q. Well, at least you're doing stuff and
8 not sitting around. So why don't we come back round
9 9:30. Okay?

10 A. Sounds great.

11 (Short recess.)

12 Q. (By Mr. Schwartz) Let's talk about the
13 relief for people who had to repair their
14 dishwashers due to an overheating event. Okay?

15 A. Okay.

16 Q. You understand those people will get
17 the full amount of the repair costs subject to the
18 documentation requirements, right?

19 A. I seem to recall reading that, yeah. I
20 believe you're correct on that.

21 Q. Well, is there an issue that you -- an
22 objection that you're prosecuting has with respect
23 to that provision of the settlement?

24 A. I think really why that is important to
25 us is that just simply demonstrates that very few

1 week is devoted to class action objections, and if
2 you would ask me that question, I would say it
3 doesn't occur on a weekly basis. It's sporadic, so
4 I think it's -- your percentage would be 20 percent
5 or perhaps even less would be the amount of --

6 Q. Okay. What kind of consumer protection
7 cases are you involved in?

8 A. Well, the ones that I just mentioned I
9 would consider consumer protection, those three
10 cases in particular. Another case that was recently
11 filed, I believe it's styled Hunsinger v Gordmans.

12 Q. What was that case about?

13 A. I believe that's a TCPA case.

14 Q. I went through with your wife, Kelly
15 Kress, and a little bit with Mr. Fortman some of the
16 statements made in the objections related to -- and
17 I'll give you an example, one is the claim may be
18 true because the class members get nothing but
19 cash -- well, let me go back. Why don't we put the
20 objection in front of you. It was marked as Exhibit
21 4 yesterday.

22 A. We're looking here. Yeah, I got the
23 objection.

24 Q. Okay. So why don't we go to page three
25 for example.

1 A. Sure.

2 Q. And in that first full paragraph, about
3 two thirds of the way down, do you see the sentence
4 where it says: However, that claim may be true
5 because the class members get nothing but cash
6 incentives for purchasing new dishwashers? Do you
7 see that?

8 A. Yes.

9 Q. And do you remember I went through with
10 your wife and Mr. Fortman various other statements
11 that were said in an absolute way that class members
12 don't get any -- any cash. Do you remember the
13 testimony about that -- that topic?

14 A. Yeah, I do recall that.

15 Q. Okay. And generally, if I asked you
16 the same questions I asked Mr. Fortman and your
17 wife, is it fair to say I'm generally going to get
18 the same answers?

19 A. I think you're going to get the same
20 answers and the same objections. I think what I
21 would simply tell you is that the document speaks
22 for itself and it's to be interpreted as the whole.
23 You're to look at the entire document in terms of
24 what it is stating because, like anything else, when
25 words are communicated, you know, we don't just want

1 the sentence, you want the whole context within
2 which that sentence was uttered or raised just like
3 a conversation like you and I are having right now,
4 but yes, I would stand behind those objections
5 raised yesterday and the same objections would
6 apply, I think to work product particularly and to
7 attorney/client privilege to my mental thoughts and
8 impressions about what was going into mine or John's
9 or Steve's head as to, you know, what that sentence
10 ultimately conveys aside from what it speaks to on
11 the written -- on the document itself.

12 Q. And I'm not going to go into your
13 wife's testimony about whether she may have written
14 something differently if she were the lawyer in the
15 case, but we'll put that to the side, but as you sit
16 here today, are you willing to admit that if you
17 were rewriting this objection today that you might
18 have for accuracy purposes changed some of the
19 language and sentence structure that was used on the
20 topic that I went through with Mr. Fortman and your
21 wife?

22 A. No. To be fair, Steven, I think what I
23 would probably have changed would be tone. You
24 know, I'm a big believer that, you know, it's not
25 just the words, it's the tone, and, you know, it is

1 pretty strong language, but there were pretty strong
2 objections to why this was a bad settlement, you
3 know. Could some of the language have been changed
4 so it would be less perhaps venomous? Yeah, I mean
5 in hindsight, I could look at this and say sure,
6 this could have been written in a different way, but
7 I believe that although sentences when construed as
8 a whole tell the court and inform the court of
9 exactly what this objection is and why, and I
10 believe it is accurate when taken as a whole.

11 Q. And so putting tone to one side, as you
12 sit here today you stand by the accuracy of the
13 statements made in the objections that you filed,
14 correct?

15 A. Yes.

16 Q. Now you have had an opportunity to
17 read -- well, actually let me verify that. Have you
18 read the -- the brief that class counsel filed in
19 support of settlement to the extent that it
20 addressed objections?

21 A. Yes.

22 Q. And you also read the various briefs
23 related to the Motions to Compel discovery from you
24 and from Mr. Fortman, right?

25 A. Yes, that had the same language that

1 had been stricken from Electrolux that continued to
2 be repeated that had been subject to the nunc pro
3 tunc order. I do recall those specifically, Steven,
4 yes.

5 Q. Right. Do you also recall the briefing
6 that we did in the Motion to Compel and the
7 settlement approval brief that related to the merits
8 of the objections that you filed?

9 A. And I'm just literally asking whether
10 you read those two documents and so you had the
11 opportunity to read what we said about the
12 objections.

13 A. I believe I -- I believe I read
14 everything you said about our objection for the
15 objection of Kelly Kress, yes.

16 Q. Okay. All I want to do is again just
17 verify that in light of everything that we've gone
18 over in the depositions of you and Ms. Kress and Mr.
19 Fortman, and in light of what has been written about
20 the objections in the various motions to compel and
21 in the settlement agreement, as of today, besides
22 maybe some tone issues, do you stand behind these
23 statements made in the objections, correct?

24 A. That is correct, sir.

25 Q. Okay. And I don't want to try to short

1 circuit things in a way that disadvantages you or is
2 prejudicial, is it fair to say that if we went
3 through each and every statement I or my co-counsel
4 wrote in our brief and went through the objection
5 language, that that's not going to change your
6 belief that you stand behind everything and you've
7 had a chance to read both?

8 A. That's correct. That's correct,
9 Steven.

10 Q. All right. I don't have many more
11 questions for you at this point, and so while I may
12 not be fully done until I've had a chance to do what
13 I'll call looking for the mop-up work, it may make
14 sense for us to switch over to Whirlpool if you
15 don't object, to Whirlpool and Sears lawyer's to ask
16 his questions, and I'll come back and do my redirect
17 and mop-up if that's okay.

18 A. Or another suggestion is if you want to
19 take a longer break and then I come back, you know,
20 if you want to take a 20 minute break and have me
21 come back and we can wrap up, that okay too. I'm
22 flexible with your time and I appreciate your
23 consideration in moving these depo times around for
24 Kelly and I. It was very helpful.

25 Q. Sure. I think we'll get out of here

1 A. I do recall reading that, that is
2 correct.

3 Q. All right.

4 A. I don't remember where, but I remember
5 reading that. I might have found it online. I
6 might have found it in your memo. I mean, good
7 heavens, it's 64 pages, there was a lot of stuff in
8 there.

9 Q. You were talking with Mr. Schwartz
10 earlier about, maybe you used the words the
11 burdensome rebate process, and I want to tell you
12 what my understanding would be of how you can stack
13 these rebates, and let me know if you disagree.

14 So let's say a class member finds 15
15 percent off sale on a Whirlpool dishwasher or a
16 Sears dishwasher and wants to stack that with the
17 rebate that they are entitled to under the
18 settlement. The class member goes to a Sears store
19 and buys a dishwasher and receives the 15 percent
20 off because they printed out the coupon that they
21 found online, and the Sears store sells them the
22 dishwasher and sells them at a price that takes into
23 account that 15 percent discount, right?

24 A. Okay.

25 Q. And then --

1 A. Okay.

2 Q. And then the claimant who has made a
3 claim and a settlement and has received a rebate
4 form specifically from the settlement takes their
5 receipts from that transaction with Sears and
6 provides those receipts along with the rebate forms
7 to the settlement administrator, and then receives,
8 assuming the claim is approved, an additional
9 discount in the form of cash, that effectively
10 stacks those two rebates. Is that your
11 understanding as well?

12 A. No, because, you know, one of the
13 contentions that we've been discussing is that this
14 whole stacking of the coupons does not appear to be
15 realistic. On the one hand, I believe it's class
16 counsel's contention that they can be stacked, and
17 perhaps your's as well, Mr. Myers, but when you go
18 to the website it says that it cannot be combined
19 with any other offer, and so you're putting those
20 class members at loggerheads with people who were
21 paid a wage and they are given their marching orders
22 and instructions in terms of how they ring things
23 out at the register, and I foresee many problems
24 with that. I think in a perfect world that would be
25 beautiful, and then perhaps in that perfect world

1 that all those clerks would be understanding of
2 that, but I don't see that as the reality of the
3 situation, so I would disagree with that.

4 Q. So your understanding is that the
5 rebates that come through the settlement are
6 required to be redeemed with Sears, like at a Sears
7 location or Sears online?

8 A. I don't believe that's my
9 understanding. My understanding is these particular
10 coupons, they can seek a cash rebate, you go out,
11 you buy the -- the washer in question, and then once
12 you've done that, you have your paperwork that
13 you've received, that you then notify Sears and say
14 look, I'd like my rebate for this, and I believe
15 it's like a period of within 12 weeks or up to 12
16 weeks you'll receive that rebate, that cash rebate
17 back.

18 Q. So you believe that the rebate that
19 results from the settlement has to be redeemed
20 through Sears rather than the settlement
21 administrator?

22 A. I didn't say that either.

23 Q. Okay. So would you agree with me,
24 though, that the rebate that comes through the
25 settlement is redeemed through the settlement

1 administrator, you know, specifically appointed by
2 the court to administer this process?

3 A. If -- that's correct. I don't recall
4 if it has to be redeemed through the settlement
5 administrator or if it's redeemed directly through
6 Sears.

7 Q. Okay.

8 A. I recall reading at one point -- I
9 apologize, Mr. Myers, I just don't remember, I don't
10 remember that particular --

11 Q. This website you're talking about that
12 says that the coupon can't be stacked, you're not
13 talking about the settlement administrator website,
14 right?

15 A. That is correct, sir.

16 Q. Okay. And if the settlement
17 administrator has been instructed by the parties in
18 this case by the settlement agreement and by the
19 court to honor the stacking of rebates, and the
20 rebates must be redeemed through the settlement
21 administrator, would you agree that there's probably
22 not going to be an issue with the stacking of the
23 rebates?

24 A. I would -- I could answer and say there
25 probably wouldn't be an issue of the stacking with

1 the rebates so long as the class member had
2 sufficient time to take that coupon, take that
3 rebate, purchase that drier -- I'm sorry, I did it
4 again -- washer, to purchase the washer, because you
5 know, Steven, it dries dishes too, but anyhow, by
6 doing that, I think that the paperwork involved,
7 that would also make that cumbersome, so I think,
8 Mr. Myers, under your scenario, yeah, that would be
9 an additional benefit, if the stacking were
10 permitted, and if that were to occur in that manner,
11 yes.

12 Do I think it's a better benefit than
13 cash? No. As I told Mr. -- as I told Steven
14 earlier, they should be giving people the option,
15 here's cash or here is your coupon.

16 Q. I understand. You and Mr. Schwartz
17 earlier were discussing the types of damages that
18 you thought appropriate for class members who had
19 never experienced the malfunctioning that's alleged
20 in this case, and you were discussing premium price
21 damages, and I believe you said that yes, that would
22 be appropriate in this case, correct?

23 A. I think I testified that I'm aware of
24 premium pricing, but I don't have a lot of
25 information about it other than in generalities, so