

Jonathan Fortman  
August 17, 2016

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IN THE UNITED STATES DISTRICT COURT  
FOR THE CENTRAL DISTRICT OF CALIFORNIA

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STEVE CHAMBERS, et al.,	)	
	)	
Plaintiffs	)	
	)	
vs.	)	No. 811CV01733FMO(ANX)
	)	
WHIRLPOOL CORPORATION, et	)	
al.,	)	
	)	
Defendants.	)	
_____	)	

TELEPHONIC DEPOSITION OF

JONATHAN FORTMAN

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August 17, 2016

(Beginning at 10:07 a.m.)

1           A.    We would bring her in on different  
2 cases.  I mean, there's no -- I mean, I can't tell  
3 you why or why not.  I mean, it's just, you know --  
4 it's Steve Miller, John Kress and I, and then if we  
5 think we need additional assistance, we'll bring  
6 somebody else in.

7           Q.    Does the decision as to whether  
8 Ms. O'Connors -- or whether Ms. Connors as part of  
9 the group in an objection that's filed, is that --  
10 has that in the past hinged on whether or not  
11 Ms. Connors was bringing in one of her relatives in  
12 as a client to serve as the objector?

13          A.    No, it had nothing to do with that.  
14 It's whether she was performing any service in the  
15 case.

16          Q.    Now, in this case, the client is  
17 Mr. Kress's wife, Kelly Kress, correct?

18          A.    Correct.

19          Q.    And in other cases, you have been  
20 counsel where Mr. Miller's wife has been the  
21 objector; is that correct?

22          A.    That's correct.

23          Q.    And there have been cases where, I  
24 believe it's sisters of Ms. O'Connor has been the  
25 client; is that correct?

1 A. That's correct.

2 Q. Has Ms. -- has Ms. Connors been one of  
3 the lawyers in all the cases in which you have been  
4 involved when one of Ms. Connors' relatives was the  
5 objector?

6 MR. KRESS: I would just state that you  
7 have to look at the docket. I mean, and there's a  
8 number of cases, and obviously what those cases  
9 reflect and demonstrate are those are the attorneys  
10 of record in those respective cases, Steve.

11 THE WITNESS: But I think if you -- if  
12 you at the chart, I mean, it would tell you. If she  
13 was --

14 MR. SCHWARTZ: Why don't we mark your  
15 affidavit so we get that because I know you're going  
16 to be looking at it, so we'll mark it as Exhibit 1,  
17 the docket which is in folder L which is the  
18 affidavit of Jonathan Fortman. So if the court  
19 reporter could pull out from folder L, let's mark  
20 that as Exhibit 1.

21 (Exhibit 1 was marked for  
22 identification.)

23 THE WITNESS: So as far as I know, in  
24 cases where her sisters were the objector, that she  
25 was an attorney on that. I mean, I don't have the

1 objector names on the chart but, yeah, I think  
2 that's true.

3 BY MR. SCHWARTZ:

4 Q. You have raised conflicts of interest  
5 issues related to the class representatives in this  
6 case; is that correct?

7 A. Yeah. I think, yeah, that's accurate.

8 Q. And in various other cases in which  
9 you've served as counsel for an objector, you've  
10 raised conflict of interest issues related to either  
11 the lawyers or the class representatives in those  
12 cases as well, correct?

13 A. That's correct.

14 Q. Do you believe that there's any  
15 conflict of interest present when objector counsel,  
16 such as you and the members of your group,  
17 Mr. Miller, Mr. Kress, Ms. Connors, use as their  
18 client objectors, their wives or their sisters or  
19 other relatives?

20 A. I don't -- it's not a conflict as it  
21 would be when you're looking at a class  
22 representative who is representing all the unnamed  
23 members of the class, where, you know, they need to  
24 be the oversight on behalf of the class and dealing  
25 with class counsel. And I think, you know, the

1 other -- the other issue that we have is, in these  
2 cases, when we do file objections, class counsel  
3 goes on the attack and, you know, if I can use  
4 somebody that is, you know, ready for that attack,  
5 knowing that they're going to be called all sorts of  
6 names, then I will do that. So I don't see it as a  
7 conflict, no.

8 Q. Do you believe that the objectors that  
9 you represent in connection with class actions have  
10 any responsibility to the other members of the  
11 class?

12 A. I don't believe that Rule 23 imposes  
13 upon them a duty on behalf of all the other absent  
14 class members. Now, you know, if you look at the  
15 rule, but I think as a practical matter, they are  
16 proceeding, trying to raise issues that would be  
17 relevant to all the other class members or, if  
18 they're a member of a subclass, members of that  
19 subclass. But I don't think there's a duty imposed  
20 upon the objector that they have to proceed in that  
21 manner.

22 Q. Do you believe that it's appropriate  
23 for an objector in a class action that you're  
24 involved as counsel to seek solely personal  
25 financial gain for themselves or for their lawyers

1 any of the lawyers have a -- either a fee agreement  
2 or retention agreement with Kelly Kress in this  
3 case?

4 A. No.

5 Q. Have you had fee or retainer  
6 agreements, or has co-counsel had fee or retainer  
7 agreements with your class action client objectors  
8 in the other cases that are listed in this affidavit  
9 or the others that you've been involved in?

10 A. No.

11 Q. Do you or your co-counsel have retainer  
12 agreements with any of the various objectors that  
13 you have represented in connection with objections  
14 as a class action?

15 A. No.

16 Q. And as part of the resolutions of any  
17 of the objections, have any of your clients received  
18 any money as part of the resolution of the  
19 objection?

20 A. Non-attorneys have not received any  
21 money.

22 Q. Okay. Now, let's make sure we're  
23 talking about the same thing. No attorney -- no  
24 non-attorney, to your knowledge, has ever received a  
25 payment -- let me start over.

1           There's no -- no non-attorney that you  
2           have represented has received any financial payment  
3           as a result of the resolution of objections that  
4           you've been involved in; is that correct?

5           A.    Correct.  Well, as set out in the  
6           exhibit, yes, that's correct.

7           Q.    Okay.  Let's talk about people who are  
8           attorneys but served as clients or the objector in  
9           cases.

10          A.    Yes.

11          Q.    Have any of those been paid in  
12          connection with the resolution of objections?

13          A.    In the eMachines case that is set out  
14          in that -- in that exhibit where Ms. Connors and  
15          Mr. Kress were the objectors, they were paid fees  
16          because they provided services in the case.

17          Q.    Okay.  So we're looking at the, what is  
18          the exhibit, Exhibit A to your affidavit?

19          A.    Correct.

20          Q.    And we're looking at the eMachines  
21          case.

22          A.    Correct.

23                MR. KRESS:  I'm sorry, Steve, and just  
24                for clarity, that's also Exhibit 1, correct?

25                THE WITNESS:  Well, it's Exhibit --

1 MR. SCHWARTZ: The affidavit is  
2 Exhibit 1, and the chart is Exhibit A to Exhibit 1.

3 MR. KRESS: Thank you.

4 BY MR. SCHWARTZ:

5 Q. And the eMachines case is -- I just  
6 want to find out exactly where that is.

7 A. It's about 60 percent of the way down.

8 Q. I see it.

9 A. Stroud versus eMachines.

10 Q. So in the eMachines case, who were  
11 the -- who were the objector clients?

12 A. Maureen Connors and John Kress.

13 Q. And they were paid -- okay, so your  
14 group as a whole was paid \$300,000 for that case,  
15 correct?

16 A. That's correct.

17 Q. And the reason why John Kress and  
18 Maureen Connors were paid the amounts listed, which  
19 is about \$67,000 each, even though they were not  
20 serving as objector counsel in that case, was  
21 because they were providing legal work in their  
22 capacity of objectors? Is that your testimony?

23 A. Yes.

24 Q. And I don't want to get into the  
25 substance of that work. But how is that work



1 different when Mr. Kress and Ms. Connors were  
2 serving in the role as objector from what they would  
3 do in the other cases where they served as counsel?  
4 Is there any difference of the nature of the work  
5 that they did or is it pretty much the same?

6 A. It's -- well, I mean, it was a lot more  
7 extensive work that they performed, but, what it  
8 comes down to is, you know, under the Missouri Rules  
9 of Ethics, I cannot share fees with non-attorneys.  
10 So, you know, when we look at the source of the  
11 funds that are paid as part of the settlement, there  
12 are attorney's fees and, you know, I am very  
13 conscientious of, you know, I would love to be able  
14 to provide some compensation to the non-attorney  
15 objector, but I think that raises a whole host of  
16 issues for us for sharing fees and ultimately could  
17 cause problems for class counsel if, you know,  
18 there's -- there's fees ultimately paid to settle an  
19 objection that ends up with a non-attorney who, you  
20 know, could get paid more than the class reps do.  
21 And so it's just been our practice as a practical  
22 matter to let them know that, you know, unless  
23 there's further benefit to the class, we cannot pay  
24 them.

25 Q. But it's your view that if an attorney

1 serves as the actual objector in connection with an  
2 objection, that that objector attorney can be paid  
3 legal fees or a portion of legal fees that are  
4 covered as part of the objection, right?

5 A. For work that's performed, yes.

6 Q. Okay. So that gets me back to my --  
7 where we started with this which is, how does the  
8 work that Mr. Kress and Ms. Connors performed in the  
9 eMachines case when they were in the capacity of the  
10 objector different from the work they have done in  
11 the other objections where they were serving as  
12 objector's counsel? I'm trying to figure out if  
13 there's any meaningful difference that you can  
14 explain to me in terms of the legal work that they  
15 did.

16 A. No, it's the same. It's the, you know,  
17 legal research, helping draft the objection and all  
18 of that, so it is no different. It's just that  
19 they're the absent class member that is the  
20 objector.

21 Q. Looking through this chart, it appears  
22 that you and Mr. Kress and Mr. Miller tend to get  
23 pretty much the same share of fee recovery as part  
24 of objections and there may be a few little small  
25 differences, but is that generally correct?

1           A.    Yeah, I mean, that's our -- our  
2   understanding between us, without getting too  
3   specific as to what each party does, is that we  
4   equally divide the work.

5           Q.    So in terms of equally dividing the  
6   work, and I don't want to get into specifics, but do  
7   you generally equally divide the work in each  
8   objection, or is it sometimes one takes the lead in  
9   one objection and another takes the lead in  
10   another --

11           MR. KRESS:  I'm going to instruct  
12   Mr. Fortman not to answer that.  I think that goes  
13   into attorney-client privilege, and it's also work  
14   product.  I don't think it's proper that class  
15   counsel knows who's the lead on what particular case  
16   because that would go to a litigation strategy  
17   necessarily under certain circumstances and  
18   conditions.

19           Next question, Steve.

20           MR. SCHWARTZ:  Okay.  Right.  Just for  
21   the record, I haven't asked -- and just so the  
22   record is clear, I'm not trying to find out who took  
23   the lead in a particular case.  I am only trying to  
24   find out whether, as part of this agreement to  
25   equally share in the work and the fees, whether

1 paid but there's no corresponding benefit to the  
2 class? Are you aware of those situations?

3 A. Yes.

4 Q. Is that something that you or the  
5 members of your group, Mr. Kress and Mr. Miller,  
6 have ever done?

7 A. Have we settled cases on appeal? Yes.

8 Q. Have you settled a case on appeal where  
9 there was no corresponding benefit to the class, but  
10 there was a payment made to your group for  
11 attorney's fees?

12 A. Yeah, there's been cases settled on  
13 appeal, yes.

14 Q. Where there is no corresponding benefit  
15 to the class?

16 MR. KRESS: I'm just going to object to  
17 the extent that if there's --

18 THE WITNESS: Well --

19 MR. KRESS: Go ahead, Jon. It's fine.

20 THE WITNESS: Well, where -- yeah, I  
21 mean, there's been cases where, you know, we have --  
22 we have wanted changes made, class counsel has  
23 refused and there's been a settlement -- a monetary  
24 settlement, yes.

25 BY MR. SCHWARTZ:

1 Q. Could you just say that again? I  
2 didn't quite hear it.

3 A. There have been cases where we have  
4 wanted settlements changed, where want benefit to  
5 the class. Class counsel has refused and instead  
6 negotiated a payment of fees as part of a  
7 settlement.

8 Q. So you have been paid fees in cases  
9 where there's no change to the settlement agreement  
10 or no corresponding benefit to the class; is that  
11 correct?

12 A. Well, let me go back. I think we have  
13 brought benefit to the class, as I state in the  
14 declaration, by bringing the objection and raising  
15 those issues. So, you know, I think there is  
16 benefit to the class, but has there been an actual  
17 change to the settlement? No.

18 Q. Has there ever been a case where there  
19 was no benefit to the class achieved or no change in  
20 the settlement agreement achieved, but you also got  
21 paid to dismiss either an objection or an appeal?

22 A. Can you restate that question, please?  
23 I mean, because you're saying dismiss the appeal or  
24 dismiss the objection. I mean --

25 Q. Okay. Let's break it down. Let's talk

1 about appeal.

2 Is there any case that you've been  
3 involved in where there is no benefit achieved on  
4 behalf of the class in the trial court --

5 A. Uh-huh.

6 Q. -- you filed an appeal, and you  
7 dismissed that appeal in exchange for money where  
8 there was no corresponding additional benefit for  
9 the class?

10 A. Yes.

11 Q. Which cases are those?

12 A. Well, I mean, as part of what you  
13 requested, you requested information concerning  
14 where objections were withdrawn. In appeals the  
15 objection is not withdrawn.

16 Q. We're talking about appeals that are  
17 dismissed. Can you identify the cases where you  
18 filed appeals, the appeals were dismissed, and you  
19 were paid money with no corresponding benefit to the  
20 class?

21 A. I mean, I can go off the top of my  
22 head. I'm not prepared with any kind of list or  
23 anything.

24 Q. Sure. Why don't you do your best.

25 A. In LCD, in DRAM, D-R-A-M, there was a

1 United Healthcare case, In Re. Lawn Mower, Propane  
2 one and two, and Bank of America in the Checking  
3 Account Overdraft Litigation. And there may be one  
4 or two more, but I don't have that list in front of  
5 me.

6 MR. KRESS: If I believe correctly,  
7 wasn't Lawn Mower -- and just for the record, Steve,  
8 since you asked, just to clarify, I think that Lawn  
9 Mower, the attorney fee reduction at the trial level  
10 was, I think, around 7 million before that was  
11 appealed.

12 BY MR. SCHWARTZ:

13 Q. Okay. Let's put Lawn Mower to the  
14 side. The other cases you mentioned, LCD, DRAM and  
15 United Health, Propane one and two and Bank of  
16 America overdraft. In those cases, you did not get  
17 an additional benefit for the class from the trial  
18 court, you filed an appeal, you did not get an  
19 additional benefit for the class, but you agreed to  
20 dismiss your appeal in exchange for a cash payment;  
21 is that correct?

22 A. Well, and I think in Bank of America,  
23 and I think I put this in the papers and, you know,  
24 in the motion to quash in response to your chart,  
25 there was a change made to that settlement well

1 after the Court had overruled the objections, and he  
2 then went back when they went for a side pray  
3 payment and, you know, reversed them self. So there  
4 was in that one a change which then led to changes  
5 in every case after that, so -- so in that respect,  
6 I do believe that the objectors brought benefit in  
7 that class.

8 Q. So let's talk about LCD, DRAM, United  
9 Health, and Propane one and two. Were there any  
10 corresponding benefits to the class as a result of  
11 the objection to --

12 MR. KRESS: Ken, I'm going to object  
13 that this has been asked and answered. You continue  
14 to persist in asking the same question. Mr. Fortman  
15 has already testified repeatedly that the benefit  
16 that is brought but is not required to be brought by  
17 the objector is simply the filing of the objection  
18 and advising the Court of what the issues are that  
19 the other parties are not addressing.

20 Subject to that, Jon, you can answer.

21 MR. SCHWARTZ: Mr. Kress, you're not  
22 getting the speaking objection. You're going to  
23 have your chance to testify, and I don't believe he  
24 actually said that testimony, although he may have  
25 said it in his affidavit.



1 THE WITNESS: No.

2 BY MR. SCHWARTZ:

3 Q. But I just want to make sure we have a  
4 clean record so neither one of us is confused.  
5 We're talking about LCD, DRAM, United Health and  
6 Propane one and two.

7 Were there any corresponding benefits  
8 to the class achieved in those cases in exchange for  
9 the payment made to dismiss the appeals?

10 A. Well, and I did say before that I  
11 believe that every case we've filed benefits the  
12 class in injecting that adversarial process again,  
13 so, yeah.

14 Q. Okay. Besides the -- your filing of  
15 the objection and promoting the adversarial process  
16 that you testified --

17 (Reporter clarification.)

18 Q. Beyond simply filing the objection and  
19 whatever benefit there is to the adversarial process  
20 of filing the objection, is there any concrete  
21 substantive additional benefit that you can point to  
22 that would achieve the classes in LCD, DRAM, United  
23 Health and Propane one and two, in exchange for the  
24 dismissal of the appeal and the corresponding  
25 payment of money that you received?

1 A. No. The answer is no.

2 Q. Okay. Let's go to page 6 of your  
3 affidavit.

4 A. Okay.

5 Q. Before you do that, so we're talking  
6 about the benefits of the adversarial process. Why  
7 don't you give me a little more detail or  
8 explanation as to what you mean by the filing of  
9 objections, if there's a change to the settlement  
10 agreement or the fees, how that benefits the  
11 adversarial process and what benefit that brings to  
12 the class?

13 A. Because we're raising issues at a time  
14 when you have an inherent conflict with your class  
15 that, you know, you're seeking your fees and you're  
16 seeking approval of a settlement and, you know,  
17 several courts have found that, and to that extent,  
18 you know, I think that injecting these issues where  
19 we're looking at, is a settlement fair, reasonable  
20 and adequate to, you know, our absent class member,  
21 you know. And injecting that and causing class  
22 counsel to respond to that and sometimes a defendant  
23 to respond to it, you know, to assist the Court and  
24 I think, you know, that is what the process is  
25 designed to do. I think that's why Rule 23 has that

1 provision.

2 So, you know, I think that that is  
3 really the benefit that is brought by objectors to  
4 allow the Court to look at it and to consider those  
5 issues.

6 Q. As part of objections that you and your  
7 group have filed in the past, have you made  
8 arguments related to the propriety of what are  
9 called clear sailing agreements?

10 A. Absolutely.

11 Q. Why don't you explain what clear  
12 sailing agreements are and why you've objected to  
13 those?

14 A. Where the defendant has agreed not to,  
15 you know, object to a certain fee up to a certain  
16 amount that class counsel is seeking, so, you know,  
17 that -- to look out for collusion, where the  
18 defendant obviously wants to -- to buy some finality  
19 to a case and is looking at their risk, and I think  
20 the danger is class counsel coming in and exploiting  
21 that and saying, you know, we want to ask for X  
22 amount in fees and then we can provide this benefit  
23 to the class that, you know, that is something that  
24 the Court needs to be aware of.

25 Q. And in terms of how it affects the

1 objections.

2 Q. Do you believe -- why do you believe  
3 that there should be transparency in fees that are  
4 paid to class counsel and class representatives --  
5 and vendors, correct, that's separate from the rule,  
6 but that's something you feel strongly about,  
7 correct?

8 A. Correct.

9 Q. And you believe that the same rules  
10 should apply for payments to objectors or objectors"  
11 counsel, that there should be transparency?

12 A. Well, I agree that there should be  
13 transparency in the system including with what the  
14 objectors do. I mean, the whole purpose -- you  
15 know, I think it goes beyond the pale doing this  
16 deposition of objectors' counsel, but, you know, as  
17 far as what the rule says, the Court has the right  
18 to inquire and, you know, we've never stood in the  
19 way of that.

20 Q. Could you explain to me why, if that's  
21 what you believe, you oppose our request to provide  
22 a list like the list that you provided in your  
23 affidavit of cases and the amounts that were paid in  
24 those cases? Why did you oppose providing that  
25 information if you believe in the transparency that

1 you just testified about?

2 A. Because I think it's ridiculous that  
3 you've subpoenaed another practicing attorney. I  
4 think that's ridiculous. I mean, if you had come to  
5 me, you know, without trying to serve me with a  
6 subpoena, we could have worked this out, but I felt  
7 the need, I had to file the motion to quash because  
8 I think it's improper but that's -- that's why I did  
9 that. I mean, you know, I could have chosen to be  
10 held in contempt and taken it up to the Eighth  
11 Circuit, but I didn't want to do that either so...

12 Q. And just so I understand, is your  
13 testimony that -- that we could have worked out you  
14 providing the information like you provided in the  
15 list, in this Exhibit 1, if we had had more  
16 discussions in that summary objection to your  
17 objection to this deposition part of it?

18 A. I mean, I still would have objected to  
19 it. I mean, you requesting it, but, you know, I  
20 understand the need for transparency. I mean, we're  
21 saying that, you know, the Courts have found you  
22 have a potential inherent conflict, and so we're --  
23 we're -- they're picking away at you that it should  
24 only be fair that you get to look at kind of, you  
25 know, our -- our motives and things like that. I

1 mean, I have no problem with that. It was the whole  
2 process that, you know, was my issue.

3 Q. Okay. Later down there's a reference  
4 to Mr. Kessinger who is now running a restaurant, I  
5 guess, in Hawaii, but he served as co-counsel and  
6 sometimes as the objector client in some objections  
7 that you've been involved in; is that correct?

8 A. That's correct.

9 Q. What were the facts he moved to Hawaii  
10 and did this restaurant deal, had he been part of  
11 what I'll call the Miller/Kress working group prior  
12 to that, or was he -- was he a full-fledged member  
13 of that group or was he someone that came in and out  
14 of that group?

15 A. There was no -- I mean, you're saying a  
16 full-fledged group. There really wasn't a group. I  
17 mean, you know, we have the core -- John and I have  
18 worked together for almost 14 years now on different  
19 cases and so, you know, there's really -- there's  
20 really no group. I mean, there's no written  
21 agreements. There's no partnership, there's nothing  
22 like that. So, I mean, I can't -- that's  
23 speculation that -- and I can't answer that. It  
24 depends.

25 Q. Okay. And before we take our break,

1           If you file an objection as attorney  
2           and you learn after you filed it that you have made  
3           a factual misrepresentation or a factual mistake in  
4           the objection, do you believe you have an obligation  
5           to correct those mistakes for the Court?

6           A.    I think that's -- obviously, I think if  
7           it's something that isn't addressed, yeah, I think  
8           we need to.  But, I mean, that's a really broad  
9           question, you know.

10           MR. KRESS:  Yeah, objection as to  
11           improper hypothetical and vague.

12           THE WITNESS:  I mean, you know, it  
13           depends on if it's a disputed fact.  I mean, you  
14           know, I don't think that, you know, if class counsel  
15           is coming in and saying, well, that's not correct  
16           and this is why we think so and there's still a  
17           dispute, then, no, but, you know, it's such a broad  
18           question.

19           BY MR. SCHWARTZ:

20           Q.    Sure.  But if it's objectively, you  
21           just flat-out made a mistake, do you believe it's  
22           your responsibility to correct your flat-out  
23           mistakes when you learn from them, from filings with  
24           courts?

25           A.    Again, it's a broad question.  But, I

1 mean, I would hope so, yes.

2 Q. Okay. Let's mark as Exhibit 4 the  
3 objection of Ms. Kress, Kelly Kress, that was filed  
4 in this case, and I believe that's available to the  
5 court reporter to mark.

6 (Exhibit 4 was marked for  
7 identification.)

8 THE WITNESS: I've got it.

9 BY MR. SCHWARTZ:

10 Q. Okay. This is the objection that you  
11 and your co-counsel filed on behalf of Kelly Kress,  
12 correct?

13 A. That's correct.

14 Q. And similar to what we discussed  
15 before, is this an objection that you participated  
16 in the drafting of along with your co-counsel?

17 A. Yes.

18 Q. And you may or may not answer this  
19 question, so we'll wait for an objection if it  
20 comes, but is there any particular person, whether  
21 it's Mr. Miller or Mr. Kress or yourself, that took  
22 primary responsibility for drafting and researching  
23 this objection?

24 MR. KRESS: And again --

25 MR. SCHWARTZ: For --



1 MR. KRESS: I'm sorry, Steve. Finish  
2 your question.

3 MR. SCHWARTZ: Go ahead, Mr. Kress. Is  
4 there an objection?

5 MR. KRESS: Yes, there is an objection  
6 on work product and attorney-client privilege. I  
7 would instruct you not to answer, Jon.

8 THE WITNESS: Yeah, I'm not going to  
9 answer that.

10 BY MR. SCHWARTZ:

11 Q. Okay. Let's get at it a different way.  
12 Is it fair to say that since you were listed on this  
13 objection before it was filed, you reviewed the  
14 objection and you felt you had a basis to make the  
15 statements in this objection along with your  
16 co-counsel?

17 A. Yes.

18 Q. And as one of the lawyers in this  
19 objection, you take responsibility for this  
20 objection as opposed to saying, no, it was Mr. Kress  
21 and Mr. Miller who are responsible, I'm not  
22 responsible for any mistakes; is that fair?

23 A. If my name appears on an objection, I  
24 take full responsibility.

25 Q. Okay. There are no page numbers that

1 are on the objection at the bottom, but we'll use  
2 the page numbers at the top which is the page -- so  
3 if you go to page 2 of 30, do you see that?

4 A. Yes.

5 Q. Okay. The introduction of the  
6 objection that you filed, do you see at the last  
7 paragraph you're talking about Mr. Chambers and the  
8 payment that is proposed for him for his website, do  
9 you see where you wrote at the beginning of the last  
10 paragraph, "Not surprisingly, it's only Mr. Chambers  
11 and class counsel getting paid on this case"?

12 A. Uh-huh.

13 Q. Do you see that?

14 A. I see that.

15 Q. Is that statement true that only  
16 Mr. Chambers and class counsel are getting paid cash  
17 money in this case?

18 A. Look, Steve, I don't want to get into  
19 the merits of this objection. I don't think this is  
20 proper to do that. You're asking me as the attorney  
21 as to kind of, you know, you're going to get into  
22 what documents I reviewed to support the statements  
23 in the objection. I don't think that's proper. It  
24 goes to my work product. I am not going to answer  
25 anything about the work that I performed or anything

1 in this objection.

2 Q. Okay. I'm not asking you what the  
3 basis was for that statement. I haven't asked you  
4 what work you did or what you looked at. I simply  
5 asked whether that statement that it is only  
6 Mr. Chambers and class counsel getting paid on this  
7 case, whether that statement in the objection you  
8 filed was true or not.

9 A. I will say that there are other --  
10 there are people that, you know, that had fire  
11 events that are getting payments in that case. Or  
12 had overheating events, I guess. So there's a small  
13 minority of classes -- of class members that are  
14 getting some actual payment.

15 Q. Did you disclose that fact when you  
16 wrote or approved the statement that it's only  
17 Mr. Chambers and class counsel getting paid on this  
18 case?

19 A. I don't want to get into this argument  
20 with you. I don't think this is proper, and I am  
21 not going to answer anything related to what I put  
22 in an objection as the attorney.

23 Q. Let's go to page 3.

24 A. Okay.

25 Q. Do you see in the first paragraph on

1 page 3 the objection that you are a part of states,  
2 "However, that claim may be true because the class  
3 members get nothing but cash incentives for  
4 purchasing new dishwashers." Do you see that?

5 A. Yes.

6 Q. Is it true that class members get  
7 nothing but cash incentives for purchasing new  
8 dishwashers?

9 A. Well, I think that's part of it.

10 MR. KRESS: And, well, and do you also  
11 see on page 2 -- Steve, if we're going to do this,  
12 let's do it right, please. This is John Kress on --

13 (Simultaneous speech.)

14 MR. SCHWARTZ: Please let me speak --

15 THE WITNESS: Just follow up. Follow  
16 up.

17 Okay. All right. So what's the  
18 question?

19 BY MR. SCHWARTZ:

20 Q. The question was whether it is true  
21 that class members get nothing but cash incentives  
22 for purchasing new dishwashers.

23 A. Again, I don't -- you know, I'll tell  
24 you what I told you before, that there are -- a  
25 minority of the class is getting payments for

1 overheating events. But, but, you know, that's --  
2 that's what I am saying.

3 Q. And just so we have the same  
4 understanding as to who gets paid, everyone who had  
5 an overheating event for one of the class washers  
6 has the opportunity to get reimbursement for the  
7 full cost of repair, and I believe it's \$300 for a  
8 replacement if there is some documentary proof  
9 either in Whirlpool and Sears databases or provided  
10 by the class member. Is that your understanding?

11 MR. MYERS: Object to the form.

12 THE WITNESS: Yeah. And I'm going to  
13 say the settlement agreement speaks for itself.

14 BY MR. SCHWARTZ:

15 Q. Let's go to page 4 of your objection.

16 A. And just for the record it is not my  
17 objection. It is an objection I filed on behalf of  
18 an absent class member.

19 Q. And that is a fair point. I was using  
20 shorthand, but I'll try to keep the language  
21 accurate.

22 On the first full paragraph at the  
23 bottom, the objection that you again stated,  
24 "Meanwhile, the class members get nothing more than  
25 a discount toward a future dishwasher purchase." Do

1 you see that?

2 A. Yes.

3 Q. Is that statement true?

4 MR. KRESS: And, again, I'm going to  
5 object. I'm going to object that the document  
6 speaks for itself. I'm also going to object that  
7 it's -- I'm going to object as to the form of the  
8 question, and you're not looking at the document in  
9 its totality. You're asking about one sentence, and  
10 I think for that basis that the question is unfair  
11 and it's objectionable on that basis. But, Jon, if  
12 you can answer, go right ahead.

13 THE WITNESS: Well, again, you know,  
14 we've identified in the settlement agreement that  
15 there are, you know, at least a small benefit going  
16 to those who have had overheating events.

17 BY MR. SCHWARTZ:

18 Q. Everyone who is subject to the defect  
19 and actually suffered, right?

20 A. Well, it's all in the -- it's all in  
21 the settlement agreement.

22 Q. Right, which says that defendants are  
23 going to pay damages for anyone who had an  
24 overheating event for their dishwasher which was the  
25 defect that was challenged in the lawsuit, right?

1 A. Correct.

2 Q. Towards the bottom of page 3 and the  
3 beginning of -- I'm sorry, the bottom of page 4 and  
4 the beginning of page 5, there's more discussion  
5 about the proposed purchase of Mr. Chambers' website  
6 by defendant. And at the bottom of page 4, the  
7 objection states, "It does appear that Mr. Chambers  
8 has spent a great deal of effort and energy to  
9 galvanize support and awareness of the defective  
10 product." Do you see that?

11 A. That's what it says.

12 Q. And that, in fact, is a true statement,  
13 right?

14 A. Well, again, I don't want to get into  
15 arguing --

16 MR. KRESS: Same objection.

17 THE WITNESS: Well, I don't want to get  
18 into arguing the merits of what is going through my  
19 thought process because I think that's improper. It  
20 is what it says in the objection.

21 BY MR. SCHWARTZ:

22 Q. You then wrote, however -- "However,  
23 perhaps this role should have been relegated to that  
24 of a consultant instead of a named plaintiff." Is  
25 that --

1 rules also say that those fees have to be divided  
2 based upon some, you know, at least performing some  
3 legal work in the case and that is not her role.

4 Q. Okay. So for this objection, Kelly  
5 Kress did not perform any legal work, and for this  
6 objection Kelly Kress will not be paid anything for  
7 the division of any legal fees that you or your  
8 co-counsel may get; is that correct?

9 A. At this point, yes.

10 MR. KRESS: I'll just -- you know,  
11 Steve, since you're on the subject, you know, the  
12 declaration that she's submitted, she does not  
13 represent objectors. If I need to restate that, I  
14 can.

15 MR. SCHWARTZ: No, that's okay. That's  
16 fine. I just wanted to --

17 MR. KRESS: I just didn't know if that  
18 needed to be clarified.

19 MR. SCHWARTZ: I just want to get an  
20 understanding and you guys are being helpful here.

21 BY MR. SCHWARTZ:

22 Q. And in the other cases, where there has  
23 been -- where the objector also was an attorney and  
24 has been paid fees, were those cases where those  
25 objector attorneys were paid based on the amount of



1 work they did in that case as opposed to simply just  
2 being the named objector?

3 A. Yes.

4 Q. And without getting the specific  
5 situation, has there been an instance where maybe  
6 the attorney objector did only, like, one percent of  
7 the work and got 20 or 30 or 40 percent of the fees,  
8 or were the fees divided roughly along the lines of  
9 the actual legal work that was -- that was borne?

10 A. The fees have always been divided  
11 roughly based upon the amount of work that was  
12 performed.

13 Q. Okay. And I guess it sounds like  
14 that's true for both the actual attorneys in their  
15 capacities as attorneys when they're serving in that  
16 capacity for objections, and also for the specific  
17 objectors who also happened to be attorneys; is that  
18 fair?

19 A. That's fair.

20 Q. Okay. Down at the bottom of page 5 of  
21 the objection, it states, "The parties could not be  
22 bothered to inform this Court of what the exact  
23 websites were that are the subject matter of the  
24 transactions." Do you see that?

25 A. I see that.

1 subpoena required me to sit for a depo and produce  
2 nonprivileged documents. It does not require me to  
3 testify concerning my thoughts and mental  
4 impressions or my work product, and I think that's  
5 exactly what you're trying to do and I'm not going  
6 to answer it.

7 MR. KRESS: Let's just have an ongoing  
8 objection of that sort, Steve. Let's save yourself  
9 some time here.

10 MR. SCHWARTZ: You can have the ongoing  
11 objection and, Mr. Fortman, you can have what I'll  
12 call a continuing answer. If I ask you a question  
13 where you don't want to answer, you can just say,  
14 "I'm refusing to answer on the same grounds," and  
15 we'll use that shorthand. But I do want to make my  
16 record.

17 BY MR. SCHWARTZ:

18 Q. On page 8 of the objection, on the  
19 third paragraph, do you see in the second sentence  
20 the objection states, "Here, the class members  
21 interests are in receiving the maximum benefit that  
22 can be achieved through either litigation or  
23 settlement." Do you see that?

24 A. Yes.

25 Q. Now, stepping back, generally with

1 litigation, would you agree with me, sir, that it's  
2 difficult to get, for one party to get a full  
3 recovery of everything they seek in a lawsuit that  
4 they file? And that in terms of litigation, that  
5 unless there is a full trial, full exhaustion of  
6 appeals, generally if there's a settlement, there's  
7 going to be some compromise by both parties?

8 A. Absolutely.

9 Q. And would you also agree, it's rather  
10 extraordinary when a litigant is able, in a big  
11 case, to get a full recovery of out-of-pocket  
12 damages that are sought in a case?

13 A. I would agree with that, yes.

14 Q. And we'll take another case which you  
15 are involved and I was involved in, my Apple case,  
16 where with a \$53 million settlement even after  
17 attorney's fees were paid, that were awarded and  
18 approved by the Court, class members received checks  
19 for approximately 117 percent of the amount that --

20 MR. KRESS: And I'm going to object to  
21 that question --

22 THE WITNESS: Let him finish.

23 MR. KRESS: -- and --

24 THE WITNESS: Let him finish.

25 MR. SCHWARTZ: Let me finish, please.

1 And you can just say objection, irrelevant, or  
2 something else. Don't -- don't do a speaking  
3 objection.

4 Let me rephrase the question because  
5 I've got to start over now since I've been  
6 interrupted.

7 BY MR. SCHWARTZ:

8 Q. Wouldn't you agree, sir, that in my  
9 Apple iPhone case to which you filed an objection,  
10 where a \$53 million settlement was big enough even  
11 after deduction of attorney's fees that class  
12 members received a check for approximately  
13 117 percent of the amount that they paid for  
14 replacement iPhones that should have been replaced  
15 under warranty, that's the kind of very  
16 extraordinary settlement recovery that we were just  
17 talking about before; would you agree with that,  
18 sir?

19 A. Well, I mean, I can't speak to the  
20 specifics of it because I just don't recall, but,  
21 you know, obviously if you're getting the class  
22 members 100 percent or more of what you're alleging  
23 the loss is, obviously, that's, you know, a very  
24 good settlement.

25 Q. In general, when you make objections in

1 class actions -- I've read some of them, obviously  
2 not all of them. In some of the objections, you and  
3 your co-counsel have challenged both the work and  
4 the integrity of class counsel in some cases; is  
5 that fair?

6 A. Absolutely, yes.

7 Q. And as part of -- now, I'm still  
8 talking generally. When -- when you and your  
9 co-counsel make those kind of attacks on class  
10 counsel, do you undertake any efforts to evaluate  
11 who class counsel is, what their reputations are,  
12 what they have achieved, to evaluate whether or not  
13 such a charge, which is a pretty serious charge, is  
14 a fair charge?

15 A. Again, I think you're getting into work  
16 product as to, you know, what the efforts that I  
17 undertake when I have a client contact me about a  
18 class action settlement, so I really can't get into  
19 that other than to say that, you know, I do what I  
20 believe I'm required to do as far as an adequate  
21 investigation.

22 Q. Let me see if I can get an answer by  
23 asking a more generalized question. Would you agree  
24 with me, sir, that an attorney should take extra  
25 care and undertake extra investigation before making

1 serious charges about other attorneys related to the  
2 quality of their work and their integrity?

3 A. I agree with that, just like class  
4 counsel should do when they make the attacks on us.

5 Q. Obviously, you are aware of my Apple  
6 settlement because you -- and you studied the Apple  
7 settlement because you were part of an objection  
8 that was filed as counsel in that case, right?

9 MR. KRESS: I'm going to object to the  
10 use of the word "study."

11 THE WITNESS: We have -- I was on --

12 MR. SCHWARTZ: I'll rephrase. Let me  
13 rephrase. It was a bad question.

14 Q. You're familiar with my Apple  
15 settlement based on the fact that you or counsel had  
16 objections filed in this case, right?

17 A. I know there was a settlement. I have  
18 no independent recollection of anything related to  
19 it.

20 Q. Are you aware I recently obtained a  
21 summary judgment against Safeway for approximately  
22 \$42 million which was a full recovery of prejudgment  
23 interest and the amount of overcharges in that case,  
24 a complete recovery on summary judgment? Are you  
25 aware of that case that was entered late last year?

1 service?

2 MR. KRESS: I'm going to object again  
3 on work product and Mr. Fortman's mental thoughts  
4 and processes and what he's aware of.

5 THE WITNESS: Yeah, I'll refer you --  
6 you know, the settlement agreement says what it  
7 says. I know there are some things in there.

8 BY MR. SCHWARTZ:

9 Q. Where you've been class counsel, have  
10 you ever sought or been successful in obtaining a  
11 service award or an incentive award for any of your  
12 clients who served as class representative?

13 A. I'm not sure on the one that we had  
14 that went all the way through trial whether there  
15 was -- because it was injunctive relief, so I'm not  
16 so sure that there were incentive awards to the  
17 named class reps. I just don't remember.

18 Q. Is it possible there was an incentive  
19 that was requested and awarded but you just can't  
20 remember?

21 A. I really don't think there were, but,  
22 you know, I'd have to go back, since it was an  
23 injunctive class.

24 Q. Do you think your client in that case  
25 deserved some incentive award or service award based

1 on his or her participation in that case?

2 MR. KRESS: I'm going to object to  
3 relevance and, again, work product and what  
4 Mr. Fortman thinks about what someone may deserve in  
5 a case that's no longer pending or what occurred  
6 within it.

7 THE WITNESS: I mean, yes, absolutely.

8 BY MR. SCHWARTZ:

9 Q. I'm sorry. Absolutely what?

10 A. They deserved compensation. They  
11 deserved an incentive award, but I don't think they  
12 got one.

13 Q. For the objection -- we'll ask  
14 Ms. Kress the same question. I might ask Mr. Kress  
15 the same question, but I'd like to get some clarity.  
16 Do you believe that the proposed \$4,000 incentive  
17 award to the class representatives are improper or  
18 accepted in this case based on the work that they  
19 had done in their role as class representative?

20 A. You know, I'm not going to answer that.  
21 I think, again, that goes to what I've done and the  
22 kind of work I've done. I mean, Mrs. Kress, I  
23 think, you know, it's proper to ask her, but I don't  
24 think it's proper to ask her attorneys.

25 Q. Is there an objection that is being