No. 18-15054

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re: NATIONAL COLLEGIATE ATHLETIC ASSOCIATION ATHLETIC GRANT-IN-AID CAP ANTITRUST LITIGATION,

SHAWNE ALSTON, et al.,
Plaintiffs-Appellees
v.

DARRIN DUNCAN,
Objector-Appellant,
v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, et al,
Defendants-Appellees.

On Appeal from the United States District Court for North California
4:14-md-02541-CW

APPELLANT'S OPPOSITION TO MOTION TO DISMISS OBJECTOR APPELLANT'S APPEAL OF FINAL APPROVAL ORDER AND FINAL JUDGMENT DUE TO FAILURE TO PROSECUTE, OR, IN THE ALTERNATIVE, MOTION FOR SUMMARY AFFIRMANCE AND OPPOSTION TO MOTION FOR SANCTIONS

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Objector/Appellant, Darrin Duncan ("Objector"), through undersigned counsel, hereby files this opposition to motion to dismiss appeal/ motion for summary affirmance and opposition to motion for sanctions and states:

I. Duncan has prosecuted has appeal

In Plaintiffs-Appellees' Motion to Dismiss, Appellees' primary complaint is that Objector is no longer prosecuting his appeal because his appellate brief focuses on the fee award. While Objector does not deny that his appeal is focused on the excessive fees awarded by the district court, Objector rejects any notion that his has abandoned his appeal of the final approval order. The very first paragraph in the Summary of Argument section can only be interpreted as regarding the overall fairness of the settlement:

> "Fed.R.Civ.P. 23(e) requires the district court to determine whether a proposed settlement is fundamentally fair, adequate, and reasonable. *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998). The district court has a fiduciary duty to look after the interests of those absent class members." *Allen v. Bedolla*, 787 F.3d 1218, 1223 (9th Cir. 2015); *Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277, 280 (7th Cir. 2002. (at the settlement phase, the district judge is "a fiduciary of the class," subject "to the high duty of care that the law requires of fiduciaries").

Initial Brief, p. 9.

This paragraph is undeniably not about the fee order. It is about the fairness of the settlement, which directly correlates to the final approval order. Based upon this section alone, there can be no finding that Objector abandoned his appeal of the final approval order.

Further, appellate courts have long since found that the award of attorney's fees directly relates to the overall fairness of the settlement. "Attorneys' fees provisions included in proposed class action settlement agreements are, like every other aspect of such agreements, subject to the determination whether the settlement is fundamentally fair, adequate, and reasonable." *Staton v. Boeing Co.*, 327 F.3d 938, 963 (9th Cir. 2003); *see also Evans v. Jeff D.,* 475 U.S. 717, 732, 734, 106 S.Ct. 1531, 89 L.Ed.2d 747 (1986) (recognizing that "the possibility of a tradeoff between merits relief and attorney's fees is often implicit in class action settlement negotiations, because "[m]ost defendants are unlikely to settle unless the cost of the predicted judgment, discounted by its probability, plus the transaction costs of further litigation, are greater than the cost of the settlement package."); *True v. Am. Honda Motor Co.*, 749 F. Supp. 2d 1052, 1078 (C.D. Cal. 2010) ("even if the plaintiff's attorney does not consciously or explicitly bargain for a higher fee at the expense of the beneficiaries, it is very likely that this situation has indirect or subliminal effects on the negotiations.").

Thus, an argument that the district court abused its discretion in awarding attorney's fees is necessarily an argument that the district court abused its discretion in approving the settlement. The attorney fees do not exist independently of the settlement. The fairness of the fees and the overall fairness of the settlement are intertwined. Appellees' argument that Objector abandoned its appeal of the fairness

of the settlement because the appeal focused on the unfairness of the fee award is absurd. This Court should not dismiss Objector's appeal of the final settlement.

II. The Final Approval Order should not be summarily approved

Class counsel's motion for summary dismissal does not meet this Court's rigorous standard for summary disposition. A motion to affirm a final judgment should be filed only where "it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument. Although it is difficult to formulate a precise standard, not every case in which appellant files an unimpressive opening brief is appropriate for summary affirmance. Motions to affirm should be confined to appeals obviously controlled by precedent and cases in which the insubstantiality is manifest from the face of appellant's brief." *U.S. v. Hooton*, 693 F.2d 857, 858 (9th Cir. 1982) (internal citations omitted).

One principle that the Courts typically consider in deciding whether to grant summary disposition is whether the movant must clearly be entitled to relief on the merits. An appeal need not be frivolous to satisfy this standard, but there must be no "substantial" question for the court to decide. *Joshua v. United States*, 17 F.3d 378, 380 (Fed. Cir. 1994). The merits of the case must be "so clear" that "plenary briefing, oral argument, and the traditional collegiality of the decisional process would not affect [the] decision." *Sills v. Bureau of Prisons*, 761 F.2d 792 (D.C. Cir. 1985).

Here, Objector raised substantial questions regarding the overall fairness of the settlement and the fairness of the attorney fees awarded in the opening brief. It was well supported by both the facts and the law. These serious issues cannot be decided without full briefing and without careful review of the district court's orders.

Furthermore, Appellees do not claim that the opening brief was unsubstantial, which is the standard for summary dismissal. This Court should deny Plaintiffs' Motion for Summary Affirmance.

III. Sanctions are unwarranted

Appellees' main argument as to why sanctions are warranted is that Duncan has failed to prosecute his appeal. As explained above, this idea cannot be further from the truth. Duncan has prosecuted his appeal. Thus, there is no basis for sanctions.

Duncan believes that while Appellees claim that their concern is for class members to receive their funds, their real motive is to try to intimidate Objector to drop his appeal. Appellees have spent a great deal of their motion for sanctions inappropriately attacking Objector's attorney. Representing class members who do not feel like the settlement is fair is a noble thing to do. Most class members are apathetic to the actual terms of the settlement and there is often little incentive to object.

While Appellees may feel that objectors are a thorn in their side who provide no value to the settlement process, this Court and other courts have felt differently. "Objectors provide a critically valuable service of providing knowledge from a different point of view [from that of the settling parties.]" *Lane v. Facebook, Inc.*, 696 F.3d 811, 830 (9th Cir. 2012) (Kleinfield, J., dissenting); *see also Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277, 288 (7th Cir. 2002) (Posner, J.) ("It is desirable to have as broad a range of participants in the fairness hearing as possible because of the risk of collusion over attorneys' fees and the terms of settlement generally.").

The use of a motion for sanctions to chill the pursuit of legitimate, good-faith appeals is a practice that this Court should emphatically discourage. This Court should deny the Motion for Sanctions.

CONCLUSION

For the foregoing reasons, this Court should deny Plaintiffs' motion to dismiss appeal/ motion for summary affirmance and deny the motion for sanctions.

Dated: June 17, 2018

Respectfully submitted,

/s Caroline V. Tucker
Caroline V. Tucker

PROOF OF SERVICE

I hereby certify that on June 17, 2018, I electronically filed the foregoing with the Clerk of the United States Court of Appeals for the Ninth Circuit using the CM/ECF system, which will provide notification of such filing to all counsel of record.

/s Caroline V. Tucker
Caroline V. Tucker