U.S. Court of Appeals Docket No. 18-15054

IN THE 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 the Northern District of California
Case No. 4:14-md-02541-CW (Honorable Claudia Wilken)

PLAINTIFFS-APPELLEES' REPLY IN SUPPORT OF 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

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INTRODUCTION

Objector-Appellant Darrin Duncan's ("Duncan") opposition brief (Dkt. 18;[1] "Opp.") fails to explain away the undisputable fact that Duncan did not include a single criticism of the final approval order in his opening appellate brief. Despite the fact that he no longer is even pursuing an appeal of that order, he and his lawyer, Caroline Tucker ("Tucker"), are single-handedly holding up the distribution of funds to deserving class members. Enough is enough. Plaintiffs-Appellees ("Plaintiffs")[2] urge the Court to promptly dismiss Duncan's appeal of the final approval order or, in the alternative, summarily affirm the final approval order, so that these funds can be distributed.

ARGUMENT

A. Duncan's Appeal of the Final Approval Order Should Be Dismissed Because He Failed to Prosecute that Appeal in His Opening Brief

Duncan does not deny that his opening appellate brief (Dkt. 8) did not contain a single criticism of the final approval order. Instead, Duncan boldly suggests that he "prosecuted" the appeal of that order by including in the appellate

[1] All docket citations are to the Ninth Circuit docket in Case No. 18-15054.

[2] "Plaintiffs" refers to the Plaintiffs who pursued damages claims in *In re: National Collegiate Athletic Association Athletic Grant-in-Aid Cap Antitrust Litigation*, N.D. Cal. Case No. 14-md-2541-CW. Duncan's appeal improperly named as appellees various individuals who were not involved in the damages case upon which the appeal is based.

brief a paragraph that summarizes the law governing class action settlement approval. *See* Opp. at 1 (citing Dkt. 8 at 9).

This is an absurd argument. For one, Duncan never linked that paragraph of summarized case law to any purported errors in the district court's final approval order ***in this case***. *See* Dkt. 8 at 9. In fact, in the first sentence of the very next paragraph of his opening brief, Duncan criticized the ***fee order***, stating, "The district court abused its discretion when it awarded attorney's fees." *Id.*

Furthermore, one paragraph of general case law does not constitute a legitimate prosecution of an appeal. If Duncan wanted to pursue his appeal of the final approval order, then his opening brief needed to "clearly and distinctly" raise any such arguments challenging that order. *Avila v. Los Angeles Police Dep't*, 758 F.3d 1096, 1101 (9th Cir. 2014) ("Arguments 'not raised clearly and distinctly in the opening brief' are waived.") (citation omitted).

Duncan's opening brief does not come close to meeting this standard. Duncan himself "does not deny that his appeal is focused on the [purportedly] excessive fees awarded by the district court." Opp. at 1. This is illustrated in the "Statement of Issues on Appeal" section of his opening brief (Dkt. 8 at 2), where Duncan only listed two fee-related issues.

Recognizing that he did not include any actual argument about the final approval order in his opening appellate brief, Duncan then switches gears. He

suggests that his argument that the district court erred in awarding attorneys' fees "is necessarily an argument that the district court abused its discretion in approving the settlement" because—in his mind—"[t]he fairness of the fees and the overall fairness of the settlement are intertwined." Opp. at 2.

Duncan's argument ignores the record in this case.[3] The settlement agreement is crystal clear: "The procedure for, and the allowance or disallowance by the Court of, the Fee and Expense Application are ***not part of the Settlement*** set forth in this Agreement, and are to be considered by the Court ***separately*** from the Court's consideration of the fairness, reasonableness and adequacy of the Settlement set forth in this Agreement." Duncan's Excerpts of Record ("ER") 58 at ¶ 26 (emphasis added). And the district court evaluated the two issues separately, entering two different orders: (1) a fee order (ER 113-132), and (2) an order granting final approval (ER 133-147).

Because Duncan's opening brief did not prosecute the appeal of the final approval order, that appeal should be dismissed. *See United States v. Perez-Silvan,*

[3] He also fails to cite any authorities that support his argument, instead citing cases that simply do not apply to the facts at hand. In *Staton v. Boeing Co.*, 327 F.3d 938 (9th Cir. 2003)—unlike in this case—"[t]he parties negotiated the amount of attorneys' fees as part of the settlement between the class and the [defendant]." *Id.* at 945. *Evans v. Jeff D.*, 475 U.S. 717 (1986) involved a settlement under which the plaintiffs' attorney waived the right to seek fees. *Id.* at 722. Finally, *True v. Am. Honda Motor Co.*, 749 F.Supp.2d 1052 (C.D. Cal. 2010) involved a settlement agreement (unlike the one in this case) that contained a "clear sailing" provision regarding fees. *Id.* at 1077.

861 F.3d 935, 938 (9th Cir. 2017) (dismissing appeal of district court ruling for failure to prosecute when appellant did not offer argument on subject in his opening appellate brief).

B. In the Alternative, the Final Approval Order Should Be Summarily Affirmed

Duncan claims that the final approval order cannot be summarily affirmed because he "raised substantial questions regarding the overall fairness of the settlement and the fairness of the attorney fees awarded in the opening brief." Opp. at 4. However, Duncan tellingly fails to cite to a single page in the opening brief where he purportedly raised "substantial questions" regarding the settlement itself. *See* Opp. at 4. The reason for this is clear—Duncan's opening brief did not offer a single such criticism. *See generally* Dkt. 8.

Duncan has waived all arguments regarding the final approval order. *Avila*, 758 F.3d at 1101. Accordingly, given that he himself has abandoned any challenge to the final approval order, the Court can summarily affirm that order. *See Camboni v. Brnovich*, No. 16-16645, 2017 WL 4182114, at *1 (9th Cir. June 14, 2017) (granting motion for summary affirmance and noting that "issues not supported by argument in . . . opening brief are waived") (citing *Acosta–Huerta v. Estelle*, 7 F.3d 139, 144 (9th Cir. 1993)).[4]

[4] Duncan oddly suggests that Plaintiffs "do not claim that the opening brief was unsubstantial." Opp. at 4. This is simply not true. Plaintiffs' (footnote continued)

CONCLUSION

Duncan and Tucker are single-handedly preventing the distribution of millions of dollars to deserving class members. This gamesmanship needs to stop. The Court should grant the motion to dismiss for failure to prosecute, and dismiss Duncan's appeal of the district court's final approval order. In the alternative, the Court should summarily affirm the final approval order.

Dated: June 22, 2018

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motion to dismiss/motion for summary affirmance explained how Duncan did not include a single criticism of the final approval order in his opening brief, thereby waiving any such arguments. *See* Dkt. 14-1 at 4, 6.

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