

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' 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**

---

Steve W. Berman  
Craig R. Spiegel  
HAGENS BERMAN SOBOL SHAPIRO  
LLP  
1918 Eighth Ave., Suite 3300  
Seattle, WA 98101

Bruce L. Simon  
Benjamin E. Shiftan  
PEARSON, SIMON & WARSHAW, LLP  
44 Montgomery Street, Suite 2450  
San Francisco, California 94104  
Telephone: (415) 433-9000

Telephone: (206) 623-7292  
Facsimile: (206) 623-0594  
steve@hbsslaw.com  
craigs@hbsslaw.com

Facsimile: (415) 433-9008  
bsimon@pswlaw.com  
bshiftan@pswlaw.com

*Attorneys for Plaintiffs-Appellees*  
Additional counsel listed on signature page

**TABLE OF CONTENTS**

**Page**

INTRODUCTION ..... 1

STATEMENT OF FACTS ..... 2

    A. The District Court Proceedings ..... 2

    B. The Appellate Proceedings..... 3

    C. Duncan’s Lawyer—Tucker—Has Rebuffed Plaintiffs’ Request  
    that She Voluntarily Dismiss the Appeal of the Final Approval  
    Order..... 4

    D. The Abandoned Appeal of the Final Approval Order is  
    Preventing the Distribution of Millions of Dollars to Deserving  
    Class Members ..... 4

ARGUMENT ..... 5

    A. Duncan’s Appeal of the Final Approval Order Should be  
    Dismissed Due to His Failure to Prosecute ..... 5

    B. In the Alternative, the Final Approval Order Should be  
    Summarily Affirmed ..... 6

CONCLUSION ..... 7

**TABLE OF AUTHORITIES**

**Page(s)**

**Cases**

*Avila v. Los Angeles Police Dep’t*,  
758 F.3d 1096 (9th Cir. 2014) .....5, 6

*Camboni v. Brnovich*,  
No. 16-16645, 2017 WL 4182114 (9th Cir. June 14, 2017) .....6

*United States v. Hooton*,  
693 F.2d 857 (9th Cir. 1982) .....6

*United States v. Perez-Silvan*,  
861 F.3d 935 (9th Cir. 2017) .....6

**Ninth Circuit Rules**

Ninth Circuit Rule 3-6(b).....1, 6

Ninth Circuit Rule 42-1.....1, 5

## INTRODUCTION

Pursuant to Ninth Circuit Rule 42-1, Plaintiffs-Appellees (“Plaintiffs”)<sup>1</sup> request that Objector-Appellant Darrin Duncan’s (“Duncan”) appeal of the district court’s order granting final approval to a class action settlement and final judgment (“the final approval order”) be dismissed due to his failure to prosecute. In the alternative, Plaintiffs request, pursuant to Ninth Circuit Rule 3-6(b), that the Court summarily affirm the final approval order.

After years of hard-fought antitrust litigation against the National Collegiate Athletic Association (“NCAA”) and eleven different athletic conferences, Plaintiffs—a group of former college football and basketball players—secured a class action settlement of \$208,664,445. Out of more than 50,000 class members, only *a single class member*—Duncan—objected to the settlement. Duncan’s baseless objection was rightfully rejected by the district court.

Duncan and his lawyer, Caroline Tucker (“Tucker”), filed a notice of appeal regarding the final approval order.<sup>2</sup> However, Duncan and his lawyer have

---

<sup>1</sup> “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 Martin Jenkins, Nigel Hayes, and Alec James as appellees. Those individuals—the “Jenkins Plaintiffs” in *Jenkins, et al. v. National Collegiate Athletic Association, et al.*, N.D. Cal. Case No. 14-cv-02758—were not involved in the damages case upon which the appeal is based, and should be dismissed.

<sup>2</sup> As explained in the concurrently-filed motion for sanctions, Duncan and Tucker are serial objectors to class action settlements and attorneys’ fee awards.

completely failed to prosecute their appeal of the final approval order, choosing instead to file an appellate brief that focused entirely on a separate district court order awarding attorneys' fees to Plaintiffs' counsel.

In light of Duncan's decision not to pursue the appeal of the final approval order, Plaintiffs' counsel reached out to Tucker and asked that the appeal of the final approval order be voluntarily dismissed. Unfortunately, Tucker has refused.

Duncan and Tucker's gamesmanship—refusing to dismiss an appeal that *they themselves are no longer even prosecuting*—is holding up the distribution of funds to well-deserving former college athletes. The Court should 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.

### **STATEMENT OF FACTS**

#### **A. The District Court Proceedings**

This appeal arises from multidistrict litigation consolidated in the Northern District of California, *In re: National Collegiate Athletic Association Athletic Grant-in-Aid Cap Antitrust Litigation*. In 2014, current and former college football and basketball players sued the NCAA and various athletic conferences, alleging that these Defendants conspired to cap the amount of athletic scholarship to which they were entitled. *See generally* N.D. Cal. Case No. 14-md-2541-CW (“*NCAA-GIA*”) at Dkt. 60 (Consolidated Amended Complaint).

Plaintiffs aggressively litigated the damages case for nearly three years, ultimately reaching a \$208 million dollar settlement.<sup>3</sup> The district court granted preliminary approval to the settlement in March 2017. *NCAA-GIA* at Dkt. 615 (Amended Order Granting Preliminary Approval of Settlement).

Out of more than 50,000 class members (*see* Duncan’s Excerpts of Record (“ER”) 137), only *one* class member lodged an objection—Darrin Duncan. ER 104-112. Duncan devoted virtually his entire objection to criticizing Plaintiffs’ request for attorneys’ fees. ER 104-110. In fact, Duncan included just two short, conclusory paragraphs ostensibly criticizing the plan of distribution for the settlement funds. ER 110.

Neither Duncan nor his lawyer appeared at the final approval hearing before Judge Claudia Wilken on November 17, 2017. A few weeks later, the district court entered *two separate* orders: (1) an order granting the requested fees, expenses, and incentive awards (ER 113-132), and (2) the final approval order (ER 133-147).

## **B. The Appellate Proceedings**

Duncan filed his notice of appeal on January 3, 2018. ER 1-2. The notice of appeal purported to challenge both the fee order and the final approval order. *Id.* Duncan’s opening appellate brief was due on May 21, 2018. *See* 9th Cir. Case No. 18-15054 (“*Duncan Appeal*”) at Dkt. 7.

---

<sup>3</sup> The injunctive portion of the *NCAA-GIA* litigation is ongoing in the Northern District of California.

Duncan filed an opening appellate brief on May 21, 2018. *Duncan Appeal* at Dkt. 8. However, the opening appellate brief does not contain a single criticism of the final approval order, instead focusing exclusively on the separate fee award.<sup>4</sup> *Id.* Even a cursory read of the brief shows this to be the case. For example, Duncan’s “Statement of Issues on Appeal” lists only two issues, both of which pertain exclusively to the fee award, not the final approval order. *See Duncan Appeal* at Dkt. 8 at p. 2 (listing two issues: (1) “Whether the district court abused its discretion when it failed to reduce the *excessive fee request*” and (2) “Whether the district court erred when it failed to properly do a lodestar crosscheck of *attorney’s fees*”) (emphasis added).

**C. Duncan’s Lawyer—Tucker—Has Rebuffed Plaintiffs’ Request that She Voluntarily Dismiss the Appeal of the Final Approval Order**

Recognizing that Duncan’s opening appellate brief dropped his challenge to the final approval order, Plaintiffs’ counsel immediately reached out to Tucker to ask her to voluntarily dismiss the appeal of the final approval order. Declaration of Benjamin E. Shiftan in Support of Motion to Dismiss/Motion for Summary Affirmance at ¶ 3. Tucker, to date, has refused to do so. *See id.* at ¶ 4.

**D. The Abandoned Appeal of the Final Approval Order is Preventing the Distribution of Millions of Dollars to Deserving Class Members**

---

<sup>4</sup> Plaintiffs are defending their fee award on the normal Ninth Circuit briefing schedule.



Under the settlement agreement, the funds cannot be disbursed until the resolution of Duncan’s appeal regarding the final approval order. *See* ER 59-60 at ¶ 29 (stating that the “Effective Date”—upon which disbursements can begin to be made—will not arise until the “resolution of all appeals” regarding the final approval order). Accordingly, even though Duncan *no longer is even arguing that final approval was improperly granted*, he and his lawyer are single-handedly preventing the distribution of funds to class members.

### **ARGUMENT**

#### **A. Duncan’s Appeal of the Final Approval Order Should be Dismissed Due to His Failure to Prosecute**

Ninth Circuit Rule 42-1 states as follows:

When an appellant fails to file a timely record, pay the docket fee, file a timely brief, or otherwise comply with rules requiring processing the appeal for hearing, an order may be entered by the clerk dismissing the appeal. In all instances of failure to prosecute an appeal to hearing as required, the Court may take such other action as it deems appropriate, including imposition of disciplinary and monetary sanctions on those responsible for prosecution of the appeal.

An argument is waived if it is not presented in the opening appellate brief. *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 has plainly failed to prosecute his appeal of the final approval order. The opening appellate brief does not contain a single criticism of the final approval order. *Duncan Appeal* at Dkt. 8. Instead, Duncan’s brief focuses entirely on the

separate fee award. *Id.* at p. 2 (“Statement of Issues on Appeal” listing two fee-related issues). Duncan’s appeal of the final approval order should be dismissed due to this failure to prosecute. *See United States v. Perez-Silvan*, 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**

Pursuant to Ninth Circuit Rule 3-6(b), the Ninth Circuit can grant a motion for summary affirmance when “it is manifest that the questions on which the decision in the appeal depends are so insubstantial as not to justify further proceedings.” Motions for summary affirmance can be granted in appeals where “the insubstantiality is manifest from the face of appellant's brief.” *United States v. Hooton*, 693 F.2d 857, 858 (9th Cir. 1982) (footnote omitted).

Duncan waived any challenges to the final approval order by failing to include them in his brief. *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)).

**CONCLUSION**

Duncan and his lawyer are single-handedly preventing the distribution of millions of dollars to deserving class members. These former college football and basketball players left their blood, sweat, and tears on the gridiron and hardwood and should receive this money immediately. The Court should grant this 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 7, 2018

By:     /s/ Steve W. Berman    

Steve W. Berman  
Craig R. Spiegel  
HAGENS BERMAN SOBOL  
SHAPIRO LLP  
1918 Eighth Avenue, Suite 3300  
Seattle, WA 98101  
Telephone: (206) 623-7292  
Facsimile: (206) 623-0594  
steve@hbsslaw.com  
craigs@hbsslaw.com

Jeff D. Friedman  
HAGENS BERMAN SOBOL  
SHAPIRO LLP  
715 Hearst Avenue, Suite 202  
Berkeley, CA 94710  
Telephone: (510) 725-3000  
Facsimile: (510) 725-3001  
jefff@hbsslaw.com

By:     /s/ Bruce L. Simon    

Bruce L. Simon  
Benjamin E. Shiftan  
PEARSON, SIMON &  
WARSHAW, LLP  
44 Montgomery Street, Suite  
2450  
San Francisco, CA 94104  
Telephone: (415) 433-9000  
Facsimile: (415) 433-9008  
bsimon@pswlaw.com  
bshiftan@pswlaw.com