

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)

**DECLARATION OF BENJAMIN E. SHIFTAN IN SUPPORT OF
PLAINTIFFS-APPELLEES' MOTION FOR SANCTIONS AGAINST
OBJECTOR-APPELLANT DARRIN DUNCAN AND HIS LAWYER
CAROLINE TUCKER**

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Attorneys for Plaintiffs-Appellees

I, Benjamin E. Shiftan, declare as follows:

1. I am an attorney in the law firm of Pearson, Simon & Warshaw, LLP (“PSW”), co-counsel for Plaintiffs-Appellees (“Plaintiffs”).¹ I am admitted to practice before this Court, and I am a member in good standing of the bar of the State of California.

2. I am one of the attorneys principally responsible for the handling of this matter. I am personally familiar with the facts set forth in this declaration, and, if called as a witness, I could and would competently testify to the matters stated herein.

3. On May 22, 2018—the day after Objector-Appellant Darrin Duncan (“Duncan”) filed his appellate brief—I sent a letter to Duncan’s attorney, Caroline Tucker (“Tucker”), asking that she dismiss the appeal of the final approval order. A copy of that letter is attached as **Exhibit 1**.

¹ “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.

4. Tucker and I have exchanged a few emails since my letter, but she has refused to dismiss the appeal. A copy of that email correspondence is attached hereto as **Exhibit 2**.

5. Ever since Duncan filed his opening appellate brief (which abandoned the argument that final approval of the settlement was improperly granted), Plaintiffs have incurred fees while trying to dispose of the appeal of the final approval order and dealing with Duncan's refusal to dismiss the appeal. These include fees incurred (1) writing correspondence to Tucker, asking her to voluntarily dismiss the appeal, (2) preparing the concurrently-filed motion to dismiss for failure to prosecute, or, in the alternative, motion for summary affirmance, and (3) preparing the motion for sanctions.

6. In total, Plaintiffs are seeking to recover \$12,880 in fees incurred from May 22, 2018 (the day after Duncan filed his appellate brief in which he abandoned his appeal of the final approval order) through June 6, 2018.² **Exhibits 3 and 4** to this declaration break down these incurred fees by activity and timekeeper.

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///

² This requested figure is just a portion of the fees incurred by Plaintiffs' counsel.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on June 7, 2018 at San Francisco, California

By: /s/ Benjamin E. Shiftan
 BENJAMIN E. SHIFTAN

EXHIBIT 1

LAW OFFICES
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FAX (818) 788-8104

WRITER'S DIRECT CONTACT
(415) 400-7713
BSHIFTAN@PSWLAW.COM

May 22, 2018

VIA EMAIL

Ms. Caroline Tucker
Tucker Pollard
2102 Business Center Drive, Suite 130
Irvine, CA 92612
ctucker@tuckerpollard.com

Re: *In re: Darrin Duncan, et al v. NCAA, et al*
United States Court of Appeals, Ninth Circuit, 18-15054
Our File No.: 5449-00001

Dear Ms. Tucker:

We write to follow up on our February 1, 2018 correspondence.¹ As we explained in the prior letter, Darrin Duncan's ("Duncan") short objection to the settlement is frivolous, and is unfortunately holding up the distribution of funds to deserving class members. We asked that Duncan withdraw his appeal of the final approval order, but unfortunately never heard back from you.

We have now had the opportunity to review Duncan's opening appellate brief. We are pleased to see that Duncan has abandoned any contention that the Court erred in granting final approval to the settlement, choosing instead to focus exclusively on the Court's purported errors in awarding attorneys' fees.² Given that Duncan no longer takes issue with the settlement itself, please dismiss the appeal of the final approval order immediately.

¹ For your convenience, a copy of the prior letter is attached as Exhibit A.

² We, of course, also believe these arguments to be meritless, and we will vigorously defend the fee award in the Ninth Circuit.

LAW OFFICES

PEARSON, SIMON & WARSHAW, LLP

Ms. Caroline Tucker

May 22, 2018

Page 2

Class members are anxiously awaiting their settlement checks, so please file the voluntary dismissal papers in the Ninth Circuit by 5:00 pm on Friday May 25. If you do not do so, then we will be forced to pursue all available remedies (including sanctions) against Duncan and you for improperly preventing the distribution of funds to the class.

Sincerely,

PEARSON, SIMON & WARSHAW, LLP

/s/ Benjamin E. Shiftan

BENJAMIN E. SHIFTAN

EXHIBIT A

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February 1, 2018

VIA EMAIL

Ms. Caroline Tucker
Tucker Pollard
2102 Business Center Drive, Suite 130
Irvine, CA 92612
ctucker@tuckerpollard.com

Re: *In re: Darrin Duncan, et al v. NCAA, et al*
United States Court of Appeals, Ninth Circuit, 18-15054

Dear Ms. Tucker:

I am co-counsel for Consolidated Plaintiffs¹ in the above-captioned antitrust litigation against the NCAA and eleven different athletic conferences. We have received notification that your client Darrin Duncan has appealed the Court's order granting final approval to the settlement (Dkt. 746) and the Court's order granting attorneys' fees, expenses, and incentive awards to class representatives (Dkt. 745).

We write today specifically regarding the appeal of the final approval order.² Mr. Duncan's objection to the final approval of the settlement is frivolous in nature, and we strongly encourage you to withdraw the appeal. Mr. Duncan's objection—which predominantly opposed class counsel's fee request—included only two paragraphs

¹ Mr. Duncan's appeal improperly named Martin Jenkins, Nigel Hayes, and Alec James as appellees. Those individuals—the *Jenkins* Plaintiffs—were not involved in the damages case upon which your appeal is based. Please voluntarily dismiss them as appellees immediately.

² We, of course, also believe the appeal of the fee, cost, and incentive awards is meritless, and we will vigorously defend those in the Ninth Circuit.

Ms. Caroline Tucker
February 1, 2018
Page 2

criticizing purported problems with the plan of distribution of the funds. *See* Dkt. 699 at p. 7. Consolidated Plaintiffs responded to that objection in detail, explaining that there is simply no basis for Mr. Duncan's request that the Court should mandate redistribution of funds until each class member would receive less than \$3.00. Dkt. 711 at pp. 11-12. The Court overruled the objection in its final approval order. Dkt. 746 at pp. 10-11. You chose not to appear at the hearing.

Mr. Duncan's nonsensical objection to the plan of distribution is preventing the class members from each receiving thousands of hard-earned dollars. Your client's appeal of the final approval order is frivolous under Federal Rule of Appellate Procedure ("FRAP") 38.

Please withdraw the appeal of the final approval order so that the class members can receive their money. Please confirm your willingness to do so by Thursday February 8 at 5:00 p.m. P.T. If we do not hear from you by then, we will pursue sanctions pursuant to FRAP 38.

Sincerely,

PEARSON, SIMON & WARSHAW, LLP

/s/ Benjamin E. Shiftan

BENJAMIN E. SHIFTAN

EXHIBIT 2

Shiftan, Benjamin E.

From: Shiftan, Benjamin E.
Sent: Wednesday, May 30, 2018 1:33 PM
To: 'Caroline Tucker'
Cc: Jeff Friedman <jefff@hbsslaw.com> (jefff@hbsslaw.com)
Subject: RE: NCAA - GIA -- Darrin Duncan Appeal

Ms. Tucker,

As you know, the Court entered two separate orders: (1) an order regarding final approval of the settlement (Dkt. 746), and (2) an order granting the requested fees, expenses, and incentive awards (Dkt. 745). In response to your request for authority, the Court-approved settlement agreement explicitly states that any appeals regarding the fee award are **handled separately** from the settlement. Dkt. 560-1 at ¶ 26 (“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. Any order or proceeding relating to the Fee and Expense Application, or any appeal from any Fee and Expense Award or any other order relating thereto or reversal or modification thereof, shall not operate to terminate or cancel this Agreement, or affect or delay the finality of the Judgment and the Settlement of the Actions as set forth herein. No order of the Court or modification or reversal on appeal of any order of the Court concerning any Fee and Expense Award shall constitute grounds for cancellation or termination of this Agreement.”).

Duncan’s dismissal of the appeal of the final approval order therefore would not cause him to be unable to pursue his appeal of the fee award. *See, e.g., Knisley v. Network Assocs., Inc.*, 312 F.3d 1123, 1125 (9th Cir. 2002) (noting that appellant objector “resolved his challenge to the settlement” but continued “his appeal from the fee award”); *id.* at 1126 (“The class member may have standing to appeal the fee even if he doesn’t also appeal the settlement. The reason is that common funds typically distribute to claimants whatever amount is left over after all expenses are paid . . .”).

Lastly, your suggestion that Duncan’s appeal argued “that the settlement was not reasonable, which goes to the overall fairness of the settlement” is simply inaccurate. As we have told you previously, Duncan’s appellate brief prosecutes only the appeal of the fee award, not the settlement itself.

Every day that goes by without Duncan dismissing his appeal of the final approval order is another day that the class goes without their money. There is simply no reason for this, especially now that Duncan has abandoned his contention that there was anything wrong with the settlement to begin with. Please confirm today that you will dismiss the appeal of the final approval order, so that we can begin distributing the funds to class members.

You can call me on my direct line below if you would like, but we need your final position on this by the end of the day. Thank you.

Ben

Benjamin E. Shiftan
Pearson Simon Warshaw, LLP
44 Montgomery St., Suite 2450
San Francisco, CA 94104
bshiftan@pswlaw.com
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dissemination, distribution, copying or forwarding of this communication is strictly prohibited. If you have received this email in error, please immediately notify the sender and delete all copies.

From: Caroline Tucker [mailto:CTucker@tuckerpollard.com]
Sent: Tuesday, May 29, 2018 9:27 PM
To: Shiftan, Benjamin E.
Cc: Jeff Friedman <jeff@hbsslaw.com> (jeff@hbsslaw.com)
Subject: RE: NCAA - GIA -- Darrin Duncan Appeal

Mr. Shiftman,

Now your request is clear, but what is lacking is the legal authority requested. Please provide the legal authority that indicates that dismissing the appeal of the final order in a lawsuit would not dismiss the entire appeal. Additionally, I believe that I have argued that the settlement was not reasonable, which goes to the overall fairness of the settlement.

Best,

Caroline V. Tucker, Esq.

TUCKER | POLLARD
Attorneys at Law

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556 N. Diamond Bar Blvd., Suite 213
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PERSONAL INJURY, FAMILY LAW AND CIVIL LITIGATION



RISING STAR 2013 through 2018

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From: Shiftan, Benjamin E. <bshiftan@pswlaw.com>
Sent: Tuesday, May 29, 2018 3:52 PM
To: Caroline Tucker <CTucker@tuckerpollard.com>
Cc: Jeff Friedman <jeffff@hbsslw.com> (jeffff@hbsslw.com) <jeffff@hbsslw.com>
Subject: RE: NCAA - GIA -- Darrin Duncan Appeal

Ms. Tucker,

We think our request was crystal clear in my letter. Duncan's appellate brief did not contain any argument that final approval of the settlement was erroneously granted. Instead, Duncan focused exclusively on the fee award. Given that Duncan is no longer prosecuting the appeal of the final approval order, we simply ask that Duncan dismiss the appeal of the final approval order (Duncan can continue to pursue his appeal regarding the fee award—which we will, of course, continue to defend in the Ninth Circuit).

Duncan is currently single-handedly holding up the distribution of funds to class members. Please confirm today that Duncan will dismiss the appeal of the final approval order, so that we can begin distributing the funds. If you are unwilling to do so, then we will have no choice but to seek court intervention (including but not limited to under Ninth Circuit Rule 42-1 [Dismissal for Failure to Prosecute]) and request sanctions.

Ben

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From: Caroline Tucker [<mailto:CTucker@tuckerpollard.com>]
Sent: Tuesday, May 29, 2018 2:14 PM
To: Shiftan, Benjamin E.
Subject: RE: NCAA - GIA -- Darrin Duncan Appeal

Hello Ben,

I apologize for not getting back to you sooner about your 5-22-18 letter.

Was your letter just a request to dismiss the appeal in general or are you asking for something different? If asking for something different please provide authority for your request.

Best,

Caroline V. Tucker, Esq.

TUCKER | POLLARD
Attorneys at Law

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PERSONAL INJURY, FAMILY LAW AND CIVIL LITIGATION



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From: Shiftan, Benjamin E. <bshiftan@pswlaw.com>
Sent: Tuesday, May 29, 2018 1:19 PM
To: Caroline Tucker <CTucker@tuckerpollard.com>
Cc: 'Jeff Friedman <jefff@hbssl.com> (<jefff@hbssl.com>)' <jefff@hbssl.com>
Subject: RE: NCAA - GIA -- Darrin Duncan Appeal

Ms. Tucker,

I left a message with your assistant a few hours ago. Please call me later today when you have a moment. You can reach me on my direct line: (415) 400-7713. Thanks.

Ben

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From: Shiftan, Benjamin E.
Sent: Tuesday, May 22, 2018 10:41 AM
To: 'ctucker@tuckerpollard.com'
Cc: 'Jeff Friedman <jeff@hbsslw.com> (<jeff@hbsslw.com>)'
Subject: RE: NCAA - GIA -- Darrin Duncan Appeal

Ms. Tucker,

Please see the attached letter.

Ben

Benjamin E. Shiftan
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44 Montgomery St., Suite 2450
San Francisco, CA 94104
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From: Shiftan, Benjamin E.
Sent: Thursday, February 01, 2018 3:53 PM
To: 'ctucker@tuckerpollard.com'
Cc: Jeff Friedman <jeff@hbsslw.com> (<jeff@hbsslw.com>)
Subject: NCAA - GIA -- Darrin Duncan Appeal

Ms. Tucker,

Please see the attached letter.

Ben

Benjamin E. Shiftan
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EXHIBIT 3

NCAA – GIA --- Duncan Appeal
PEARSON, SIMON & WARSHAW, LLP
Reported Hours and Lodestar by Category
May 22, 2018 through June 6, 2018

CATEGORY	HOURS	LODESTAR
Attorney Meeting / Strategy	1.00	\$1,050.00
Investigation	0.70	\$455.00
Pleadings / Motions	17.50	\$11,375.00
	19.20	\$12,880.00

EXHIBIT 4

NCAA – GIA --- Duncan Appeal
PEARSON, SIMON & WARSHAW, LLP
 Reported Hours and Lodestar
 May 22, 2018 through June 6, 2018

TIME REPORT

NAME	TOTAL HOURS	HISTORICAL HOURLY RATE	LODESTAR
ATTORNEYS			
Bruce L. Simon (P)	1.00	\$1,050	\$1,050.00
Benjamin E. Shiftan (A)	18.20	\$650	\$11,830.00
TOTAL ATTORNEY BILLING	19.20		\$12,880.00
NON-ATTORNEYS			
TOTAL NON-ATTORNEY BILLING	0.0		\$0.00
TOTAL:		19.20	\$12,880.00

(P) Partner
 (A) Associate