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IN THE UNITED STATES DISTRICT COURT

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FOR THE DISTRICT OF ARIZONA

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12 Fidelity National Financial,)
Inc.,)

13 Plaintiff,)

No. CIV 03-1222-PHX-RCB (DKD)

14 vs.)

O R D E R

15 Colin H. Friedman, et al.,)

16 Defendants.)

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18 The dispute presently before the court involves the scope of
19 the record on appeal to the Ninth Circuit Court of Appeals. The
20 defendant/appellants, Colin H. Friedman and Hedy Friedman, assert
21 that a transcript of the February 12, 2008, oral argument before
22 Magistrate Judge David K. Duncan is not necessary to the appeal.
23 Taking the opposite view, plaintiff/appellees, Fidelity National
24 Financial, Inc. and Fidelity Express Network,, Inc. ("Fidelity"),
25 assert that a transcript of that argument is necessary to the
26 appeal. For the reasons set forth below, the court does not deem
27 that transcript necessary to the appeal.

28 . . .

1 Background

2 After conducting its own independent *de novo* review, this
3 court found no merit to any of the Friedmans' objections to
4 Magistrate Judge David K. Duncan's Report & Recommendation ("R&R")
5 (doc. 187) that this court deny their "Motion to Quash, Vacate
6 and/or Strike Fidelity's Certification of Judgment for Registration
7 in Another District (dated January 1, 2007) and Renewal of Judgment
8 in District of Arizona" (doc. 171). Fidelity Nat. Financial, Inc.
9 v. Friedman, 2008 WL 3049988, at *12 (D.Ariz. Aug. 1, 2008). On
10 August 28, 2008, in the Ninth Circuit Court of Appeals, the
11 Friedmans filed their notice of appeal from that August 1, 2008,
12 order. Doc. 231. Citing to Fed. R. App. P. 10(b)(1)(B)¹ and
13 Ninth Cir. R. 10-3.1(a),² the Friedmans timely filed a "Statement
14 of Intent to not Order Transcript for Record on Appeal[.]" Doc.
15 236.

16 Fidelity responded, as Ninth Circuit Rule 10-3.1(b) allows, by
17 filing and serving a "List of Additional Portions of the Transcript
18 Necessary to the Appeal" ("List") (doc. 237). In particular,
19 Fidelity is seeking to have "[t]he official transcript of the oral
20 argument on the Motion to Quash, held before . . . [Magistrate]
21 Judge Duncan on February 12, 2008[.]" made a part of the record on
22 appeal. Such a transcript is "necessary to the record" on appeal,
23 Fidelity asserts, because it "evidences the[ir] arguments in favor
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25 ¹ "[F]iling a certificate that no transcript will be ordered[.]" is one
26 of the appellant's alternate duties under this Rule. See Fed. R. App. P.
10(b)(1)(B).

27 ² Echoing Fed. Rule of Appellate Procedure 10(b)(1)(B), this Ninth
28 Circuit Rule alternatively requires an appellant to "serve on appellee a statement
indicating that appellant does not intend to order any transcripts." Ninth Cir.
R. 10-3.1(a).

1 of the Motion to Quash, and Fidelity's arguments in opposition."
2 Id. at 2:3-5; and 2:14-15. Fidelity further contends, mistakenly
3 as it turns out, that a transcript is a necessary part of a record
4 on appeal.

5 Objecting, the Friedmans accurately point out that the
6 transcript of the oral argument before Magistrate Judge Duncan was
7 not part of the record which this court considered in reviewing the
8 R&R. If Fidelity deemed that transcript significant to this
9 court's review, it could have ordered the transcript at that time,
10 but it did not. Moreover, as the Friedmans note, because none of
11 the parties ordered it, no transcript exists which could be made a
12 part of the record on appeal. Then, attributing some malevolence
13 to Fidelity, the Friedmans indicate that "[t]he only possible
14 reason for listing the Transcript as part of the record on appeal
15 is to increase the[ir] . . . costs[,] an onerous burden" which the
16 court should not "countenance[.]" Certification that Transcript
17 is Unnecessary to the Appeal (doc. 238) at 2:14-16. There is no
18 basis on this record for the court to accept such an attribution.

19 Discussion

20 The Friedmans have the stronger argument, except when it comes
21 to the cost issue.³ Fed. R. App. P. 10(a) enumerates the items
22 which constitute the record on appeal. Among those items are "the
23 original papers and exhibits filed in the district court[.]" and
24

25 ³ The court gives little credence to Friedmans' argument as to the cost
26 of the transcript. Where, as here, a party has filed a certification that
27 additional portions of the record are "unnecessary to the appeal and explains
28 why[.]" this court has the authority under Ninth Cir. R. 10-3.1(f) to "determine
which party shall pay for which portions of the transcript." Thus, even if the
court agreed with Fidelity, it would not necessarily fall to the Friedmans to pay
the cost of the requested transcript.

1 "the transcript of the proceedings, *if any*[" Fed. R. App. P.
2 10(a) (emphasis added). Incorporating Rule 10(a) by reference,
3 Ninth Cir. R. 10-2 3.1(f) provides that "the complete record on
4 appeal consists of[" *inter alia*, "the official transcript of oral
5 proceedings before the district court ('transcript'), *if there is*
6 *one*[" Ninth Cir. R. 10-2(a) (emphasis added).

7 Fidelity overlooks the highlighted language of those Rules.
8 As just explained, there is no transcript here. What is more,
9 despite Fidelity's contrary assertion, the transcript is not
10 necessary to "evidence[" the parties' respective arguments before
11 the Magistrate Judge. See List (doc. 237) at 2:14 Those arguments
12 were fully set forth in the Friedmans' objections to the R&R (doc.
13 188); Fidelity's "Motion . . . to Affirm" the Magistrate Judge's
14 R&R (doc. 189); and the Friedmans' reply thereto (doc. 190) - all
15 of which this court carefully considered and addressed in Fidelity
16 Nat. Financial, 2008 WL 3049988. Thus, the court cannot find that
17 a transcript of the February 12, 2008, (which does not exist in any
18 event), is necessary to the Friedmans' appeal.

19 To conclude, the court does not deem necessary to the
20 Friedman's appeal a transcript from the February 12, 2008, oral
21 argument before Magistrate Judge David K. Duncan. Hence, the court
22 will not require the Friedmans to designate that February 12, 2008,
23 transcript as part of the record on appeal in this case.


24 IT IS ORDERED denying Fidelity's request to have an official
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1 transcript of the oral argument before Judge Duncan designated as a
2 part of the record on appeal.

3 DATED this 6th day of November, 2008.

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Robert C. Broomfield
Senior United States District Judge

Copies to counsel of record