

United States District Court
For the Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

)	Case No.: 09-CV-02708-LHK
JEFFREY SCHULKEN, et al.,)	
)	ORDER RE: TRANSCRIPTS
Plaintiffs,)	
v.)	
)	
WASHINGTON MUTUAL BANK, HENDERSON,)	
NV, et al.,)	
)	
Defendants.)	
)	

On January 28, 2012, Appellant Donald R. Earl (“Mr. Earl”) filed a Notice of Appeal of four Orders of this Court, alleging inadequate representation by lead plaintiffs, a “disproportionate” settlement distribution, and an inadequate opt-out notice. ECF No. 238.¹

In order to submit a complete supplemental excerpt of the record on appeal, Plaintiffs-Appellees Jeffrey and Jenifer Schulken (“Plaintiffs-Appellees”) continue to seek copies of the following transcripts: (1) October 13, 2011 Transcript of Hearing on Revised Motion to Certify Class; (2) July 19, 2012 Transcript of Hearing on Motion for Preliminary Approval of Class Action

¹ Mr. Earl appeals the Courts’ Orders: (1) granting in part and denying in part class certification, ECF No. 184; (2) granting preliminary approval of the settlement, ECF No. 210; (3) granting final approval of the settlement over Mr. Earl’s objections, ECF No. 223, and (4) denying Mr. Earl’s post-judgment Motion to Vacate, ECF No. 238. For further summary of the background of this litigation, see Order Re: Miscellaneous Motions Related to Appeal, ECF No. 259 at 2-3.

1 Settlement Agreement; and (3) November 8, 2012 Transcript of Hearing on Motion for Final
2 Approval of Class Action Settlement. See ECF No. 241 at 6-7, ECF No. 262 at 5-6.

3 On April 2, 2013, this Court ordered Mr. Earl to arrange payment for the requested
4 transcripts, or to certify an explanation of his refusal to do so within 5 days of this Order, pursuant
5 to Circuit Rule 10-3.1(f). ECF No. 59. On April 10, 2013, Mr. Earl filed a document captioned
6 “Objector, Donald R. Earl’s Circuit Rule 10-3.1(f) Certificate,” (“Certification”), alleging that the
7 requested transcripts are “unnecessary,” for the appeal, and “do not aid review of the issues to be
8 considered.” ECF No. 261.² Mr. Earl further argues that the requested transcripts are
9 overinclusive. See *id.* at 6.

10 On April 24, 2013, Plaintiffs-Appellees filed a Response and Cross-Motion to Compel Earl
11 to Order and Pay for Transcripts, (“Response”), ECF No. 262. Plaintiffs-Appellees argue that Mr.
12 Earl “does not (and cannot) explain how or why Plaintiffs’ requested transcripts (of the hearings on
13 Plaintiffs’ motions for class certification and for preliminary and final approval of the settlement)
14 are not necessary for the resolution of his appeal of each of the Court’s Orders stemming from
15 those hearings.” Response at 1. Specifically, Plaintiffs-Appellees argue that each requested
16 transcript is directly relevant to the issues raised in Mr. Earl’s appeal, as enumerated below:

17 (1) Mr. Earl has appealed the class certification Order, claiming that the Court certified an
18 overly broad class. See Response at 5; ECF No. 238-2, Mr. Earl’s Statement of the Issues on
19 Appeal (“Statement of the Issues”), at 1. Plaintiffs-Appellees argue that the transcript of the
20 October 13, 2012 hearing will show that the Court fully considered the rights of class members,
21 including class members such as Mr. Earl, before certifying the class. See Response at 5.

22 (2) Mr. Earl’s appeal alleges that this Court approved a class action Settlement that violates
23 the due process rights of the entire class and subclass. See Response at 6; Statement of the Issues
24 at 2. Plaintiffs-Appellees argue that the transcript of the July 19, 2012 hearing on Plaintiffs-
25 Appellees’ motion for preliminary approval of the settlement will reflect that the Court “carefully
26 considered the rights of the class and relief offered under the settlement, as well as the process
27 through which the settlement was reached.” See Response at 6.

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² Neither party addresses the timeliness of this certification.

1 (3) Mr. Earl's appeal challenges the terms of the settlement as disproportionate. See
2 Response at 6; Statement of the Issues at 2. Plaintiffs-Appellees argue that the transcript of the
3 November 8, 2012 final fairness hearing will show that the Court fully considered Earl's objections
4 at the fairness hearing and found them to be meritless. See Response at 6.

5 Plaintiffs-Appellees further argue that the requested transcripts are not overinclusive,
6 because "Plaintiffs seek transcripts of hearings where the only topic of discussion was Plaintiffs'
7 motion and therefore the entire transcript may be relevant to the issues presented." Response at 7.

8 In light of Plaintiffs-Appellees arguments that the three requested transcripts are necessary
9 to the appeal and Mr. Earl's certification to the contrary, Circuit Rule 10-3.1(f) provides that the
10 Court shall determine which party shall pay for which portions of the transcript. The Rule
11 provides:

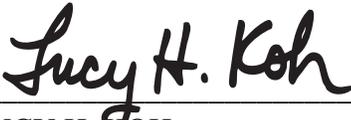
12 If appellee notifies appellant that additional portions of the transcript are required
13 pursuant to Circuit Rule 10-3.1(b), appellant shall make arrangements with the court
14 reporter to pay for these additional portions unless appellant certifies that they are
15 unnecessary to the appeal and explains why not. If such a certificate is filed in the
16 district court, with copies to the court reporter and this Court, the district court shall
17 determine which party shall pay for which portions of the transcript.

18 Neither party cites any precedent that would guide the Court in determining which party
19 shall pay for which portions of the transcript. Because the Court finds that the requested transcripts
20 are necessary to a complete record in reviewing the issues Mr. Earl has identified in his appeal, the
21 Court hereby orders that Mr. Earl shall immediately make arrangements to pay for the requested
22 transcripts.

23 The parties shall seek any necessary extensions from the Appellate Court as provided under
24 Circuit Rule 10-3.1 with respect to the Transcript Order deadline.

25 **IT IS SO ORDERED.**

26 Dated: May 14, 2013

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LUCY H. KOH
United States District Judge