

No. 13-17132 [Dist Ct. No.: 3:12-CV-03288-WHO]

IN THE
UNITED STATES COURT OF APPEAL
FOR THE NINTH CIRCUIT

JOHN TEIXEIRA; et al.,
Plaintiffs - Appellants,

vs.

COUNTY OF ALAMEDA; et al.,
Defendants - Appellees.

APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

**APPELLANTS' OPPOSITION TO
MOTION TO DISMISS APPEAL**

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OPPOSITION TO MOTION TO DISMISS

Plaintiff/Appellants, by and through undersigned counsel, hereby oppose the Appellees' Motion to Dismiss. (DktEntry: 22-1)

Plaintiff/Appellants do not dispute that prior lead appellate counsel¹ failed to notify the County which portions of the trial court transcripts he intended to order and that he failed to serve the "Statement of Issues."

However, they do dispute whether FRAP 10(b) (or Circuit Rule 10-3) was violated based on this record. Furthermore, Appellants also dispute: (1) whether Appellees were prejudiced by this omission, and (2) whether dismissal of the appeal is an appropriate remedy.

STATEMENT OF FACTS

This case is on appeal from an order/judgment in the trial court granting a Motion to Dismiss under FRCP 12. An order granting an FRCP Rule 12 motion to dismiss for failure to state a claim is reviewed de novo. Furthermore, review ordinarily is limited to the face of the complaint, including materials incorporated by reference and matters of judicial notice. All well-pleaded allegations of material fact are accepted as true and construed in the light most favorable to the

¹ Mr. Hokanson was relieved as counsel of record in a substitution of counsel that was filed on March 31, 2014. (DktEntry: 23)

nonmoving party (plaintiffs below). *Carlin v. DairyAmerica, Inc.*, 688 F.3d 1117, 1127 (9th Cir. 2012); *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1030 (9th Cir. 2008); *Leadsinger, Inc. v. BMG Music Publishing*, 512 F.3d 522, 526 (9th Cir. 2008).

This is NOT an appeal after a jury trial, a court trial, or even a hotly contested Motion for Summary Judgment. The “hearing” on the FRCP 12 Motion was held on September 4, 2014 during the trial court’s regular law & motion calendar. (Doc #55, USDC Docket.) The order granting the motion to dismiss was filed on September 9, 2013. (Doc #56, USDC Docket.) It is questionable whether a reporter’s transcript of the law & motion proceedings from the trial court is even relevant or necessary to properly prosecute this appeal.

The original scheduling order gave Appellants until November 20, 2013 to order the transcript in this matter. (DktEntry 1-4, page 3 of 3) The transcript was not ordered by Mr. Hokanson until February 7, 2014. (Doc #63, USDC Docket. Attached as Exhibit A.) The Transcript Order was filed the same day on February 7, 2014. (Doc #64, USDC Docket. Attached as part of Exhibit A.) These documents clearly indicate that **the entire transcript** of the September 4, 2013 hearing was ordered by Mr. Hokanson.

The email exchange submitted as part of the Appellees' Motion to Dismiss is embarrassing for its lack of cooperation in the collegial spirit normally associated with appellate practice.² Appellants have remedied the unfortunate choices made by their original (lead) appellate counsel by replacing him with backup counsel. Furthermore (as set forth in the declaration of counsel), Appellants' substitute counsel immediately contacted Appellees' counsel of record and offered to agree to any reasonable extension of time to address any possible prejudice to the County for the tardy resolution of the "Statement of Issues" matter in exchange for Appellees withdrawal of their motion. Unfortunately, County Counsel was unable to obtain the consent of her client to withdraw the motion, hence this opposition.³

STATEMENT OF THE LAW

Circuit Rule 10-3 (which supercedes FRAP 10(b)) requires service on Appellees of Appellants' notice regarding which portions of the reporter's transcript will be designated for the record. It is not disputed that Mr. Hokanson did not follow this rule.

² Mr. Hokanson could have just informed County Counsel that he intended to order the entire transcript.

³ However, Appellants were able to obtain an agreement from the Appellees to stipulate to filing a corrected (and properly abbreviated) Excerpt of Record. That stipulation will be filed forthwith.

However, an exception to the rule exists when appellant intends to order the entire transcript. (Circuit Rule 10-3.1(a)) And, though it was not timely ordered, the record shows that Mr. Hokanson did – in fact – order the entire transcript for what was perhaps only a 15 or 20 minute hearing in the trial court, which consisted almost entirely of counsels’ arguments. Former counsel’s error was a failure of courtesy to County Counsel by not letting her know that he intended to request the entire transcript. This is not the kind of error that should prejudice a client by having an appeal dismissed, and the Circuit Rule Advisory Notes strongly imply exactly that assessment.

Dismissal is not mandated where the record is otherwise sufficient, even when appellant fails to provide the required statement. Furthermore, the Advisory Committee Notes permit a party who is prejudiced by missing portions of a transcript to file a motion to augment the record. (Circuit Rule 10-3, Adv. Comm. Note.)

ARGUMENT

The “Statement of Issues” is not required when the entire transcript is ordered. It was. That should end the matter. The motion should be denied.

Furthermore, the hearing that was transcribed was a very short proceeding before a trial court on an FRCP 12 Motion. The facts

necessary to adjudicate this appeal are contained in the Complaint, not in any law & motion oral proceedings held in the trial court.

An extension of time for Appellees to review the late transcripts, rather than a dismissal of the appeal is the more proportionate remedy that will prevent a miscarriage of justice to clients who should not be penalize for the boorish behavior of their former attorney.

Finally, the Appellees have failed to allege, let alone prove, that they were prejudiced by the failure to serve a “Statement of Issues.” (or simply give notice that the entire transcript was going to be ordered).

CONCLUSION

The Appellees’ Motion to Dismiss for the failure to serve a “Statement of Issues” in connection with designating the reporter’s transcript should be denied. Instead, Appellees should be granted a generous extension of time to file their Responsive Brief as a remedy to any potential breach of the spirit, rather than the letter, of Circuit Rule 10-3.

Respectfully Submitted on April 7, 2014.

/s/ Donald Kilmer
Attorney for Appellants

DECLARATION OF COUNSEL

I, Donald Kilmer, declare as follows:

1. I am authorized to practice before this Court.
2. On March 31, 2014 I was instructed by the Plaintiff/Appellants to file a substitution of counsel in this matter. That filing is set forth at Docket Entry 23.
3. On that same day I contacted Alameda County Counsel and offered any reasonable extension of time to mitigate any prejudice to her clients in connection with the present controversy over the “Statement of Issues” relating to the reporter’s transcripts.
4. I also inquired whether she would consent to a stipulation to file a corrected Excerpt of Record. (There is extraneous material included and important omissions in the currently filed ER.)
5. On April 4, 2014, County Counsel informed me that she had authorization to consent to a corrected Excerpt of Record, but that her clients would respectfully decline to withdraw their motion to dismiss.
6. I hereby stipulate to any reasonable extension of time for Appellees to file a Responsive Brief in this matter to mitigate the lack of courtesy.
7. Exhibit A consists of true and correct copies of the Transcript

Order forms (Doc #63 and #64) from the District Court.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on April 7, 2014.

/s/ Donald Kilmer
Donald Kilmer, Attorney for Plaintiff/Appellants

CERTIFICATE OF SERVICE

On April 7, 2014, I served the foregoing APPELLANTS' OPPOSITION TO MOTION TO DISMISS by electronically filing it with the Court's ECF/CM system, which generated a Notice of Filing and effects service upon counsel for all parties in the case.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on April 7, 2014,

/s/ Donald Kilmer
Attorney of Record for Appellants

Exhibit A

Clear Form

CAND TDOF (Rev. 07/2013)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
TRANSCRIPT DESIGNATION FORM

For appeals to the Ninth Circuit United States Court of Appeals; do not use for appeals to the Federal Circuit.

9th Cir. Court of Appeals Case No: 13-17132	District Court Case No(s) 12-cv-03288-WHO
Short Case Title Teireira v. County of Alameda	Notice of Appeal Date & District Court Docket No.
Attorney or Pro Se Party Name: Charles W. Hokanson	Address: 4644 Graywood Ave, Ste 200 Long Beach, CA 90807
Telephone: (562) 316-1476	Email: CWHokanson@TowerLawCenter.com

INSTRUCTIONS FOR COMPLETING THIS FORM:

For information about designating transcripts for an appeal before the Ninth Circuit Court of Appeals, refer to the Federal Rules of Appellate Procedure, the Ninth Circuit's Local Rules and the instructions below. If you have further questions, contact the Court Reporter Supervisor in the court division in which your case was filed (cand.uscourts.gov/courtreportercontact).

1. **Designate transcripts.** Open and read the Minutes document for each proceeding via the links on the ECF docket. To designate a particular proceeding's transcript as part of the record on appeal, enter in the table below: the hearing date, court reporter's name, hearing type and, if you are designating transcripts in multiple case numbers, the case number for this proceeding. One line per proceeding/transcript. If you need more space, complete and attach a second copy of this form. If you are not designating transcripts, proceed to item #4.
2. **Identify transcripts already ordered. REVIEW** the ECF docket sheet to determine which, if any, of the transcripts you have designated, are already e-filed. In the right column of the table, **CHECK** "yes" and enter the docket number of each designated, e-filed transcript **OR** "no" for each designated transcript that needs to be ordered. If all transcripts are e-filed, proceed to item #4.
3. **Order transcripts.** For any remaining designated transcripts that have not been e-filed, **COMPLETE, separately for each court reporter**, a CAND 435 Transcript Order (CJA counsel should instead complete CJA 24 forms and submit them to the CJA Unit). **E-FILE** each CAND 435 Transcript Order in the U.S. District Court case.

IMPORTANT: Transcripts are not considered "ordered" until you have (1) **EITHER** e-filed a CAND 435 Transcript Order for each court reporter **OR** submitted a CJA 24 form to the CJA Unit for each court reporter **AND** (2) made payment arrangements. Unless payment is by the U.S. government, payment arrangements may be deemed made on the date the court reporter receives your deposit check. Therefore, you should contact the court reporter immediately upon e-filing your CAND 435 Transcript Order to make payment arrangements. **Please allow at least one week for making payment arrangements or processing your CJA 24 form to meet your Court of Appeals deadline for ordering transcripts.**

HEARING DATE:	COURT REPORTER :	HEARING TYPE:	CASE No.	TRANSCRIPT E-FILED? ECF Dkt #?
09/04/2013		Motions	03288	<input type="checkbox"/> Yes; Dkt # <input checked="" type="checkbox"/> No; I have ordered or will order it.
				<input type="checkbox"/> Yes; Dkt # <input type="checkbox"/> No; I have ordered or will order it.
				<input type="checkbox"/> Yes; Dkt # <input type="checkbox"/> No; I have ordered or will order it.
				<input type="checkbox"/> Yes; Dkt # <input type="checkbox"/> No; I have ordered or will order it.
				<input type="checkbox"/> Yes; Dkt # <input type="checkbox"/> No; I have ordered or will order it.
				<input type="checkbox"/> Yes; Dkt # <input type="checkbox"/> No; I have ordered or will order it.

If you are submitting multiple pages, please complete the blanks at right: Page ___ of ___.

4. **Certify and sign.** Check **ONE** of the following and **SIGN** at the bottom.
 - I do not intend to designate any portion of the transcript and will notify all counsel of this intention.
 - All designated transcripts are already e-filed in the U.S. District Court case(s) at the docket numbers indicated above.
 - As retained counsel (or litigant proceeding in pro per), I am ordering herewith by e-filing a CAND 435 Transcript Order Form the designated transcripts indicated above and I guarantee payment to the court reporter of the cost thereof.
 - As appointed or Government counsel, I certify that I have submitted a CJA Form 24 or e-filed a CAND 435 Transcript Order Form and that payment arrangements have been made or will be made today authorizing preparation of the transcript at the expense of the United States. I agree to recommend payment for work done prior to cancellation of this order.

By signing below, I certify that I will order and make payment arrangements today for all transcripts designated on this form not already e-filed.

/s Charles Hokanson
 Signature of Attorney or Pro Se Party

UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF CALIFORNIA CAND 435 (CAND Rev. 7/2013)				TRANSCRIPT ORDER Please use one form per court reporter. <i>CJA counsel please use Form CJA24</i> Please read instructions on next page.					COURT USE ONLY DUE DATE:					
1a. CONTACT PERSON FOR THIS ORDER Charles W. Hokanson				2a. CONTACT PHONE NUMBER (562) 316-1476			3a. CONTACT EMAIL ADDRESS CWHokanson@TowerLawCenter.com							
1b. ATTORNEY NAME (if different) same				2b. ATTORNEY PHONE NUMBER (562) 316-1476			3b. ATTORNEY EMAIL ADDRESS CWHokanson@TowerLawCenter.com							
4. MAILING ADDRESS (INCLUDE LAW FIRM NAME, IF APPLICABLE) 4401 Atlantic Ave, Ste 200 Long Beach, CA 90807				5. CASE NAME Teixeira v. County of Alameda					6. CASE NUMBER 12-cv-03288-WHO					
7. COURT REPORTER NAME (FOR FTR, LEAVE BLANK AND CHECK BOX)→ <input checked="" type="checkbox"/> FTR				8. THIS TRANSCRIPT ORDER IS FOR:										
				<input checked="" type="checkbox"/> APPEAL		<input type="checkbox"/> CRIMINAL		<input type="checkbox"/> In forma pauperis (NOTE: Court order for transcripts must be attached)						
				<input type="checkbox"/> NON-APPEAL		<input checked="" type="checkbox"/> CIVIL		<input checked="" type="checkbox"/> CJA: Do not use this form; use Form CJA24						
9. TRANSCRIPT(S) REQUESTED (Specify portion(s) and date(s) of proceeding(s) for which transcript is requested), format(s) & quantity and delivery type:														
a. HEARING(S) (OR PORTIONS OF HEARINGS)				b. SELECT FORMAT(S) (NOTE: ECF access is included with purchase of PDF, text, paper or condensed.)					c. DELIVERY TYPE (Choose one per line)					
DATE	JUDGE (initials)	TYPE (e.g. CMC)	PORTION If requesting less than full hearing, specify portion (e.g. witness or time)	PDF (email)	TEXT/ASCII (email)	PAPER	CONDENSED (email)	ECF ACCESS (web)	ORDINARY (30-day)	14-Day	EXPEDITED (7-day)	DAILY (Next day)	HOURLY (2 hrs)	REALTIME
09/04/13	WHO	Mot	(all)	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
				<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
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				<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
				<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
10. ADDITIONAL COMMENTS, INSTRUCTIONS, QUESTIONS, ETC:														
ORDER & CERTIFICATION (11. & 12.) By signing below, I certify that I will pay all charges (deposit plus additional).										12. DATE				
11. SIGNATURE /S Charles Hokanson										02/07/2014				
DISTRIBUTION: <input type="checkbox"/> COURT COPY <input type="checkbox"/> TRANSCRIPTION COPY <input type="checkbox"/> ORDER RECEIPT <input type="checkbox"/> ORDER COPY														

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INSTRUCTIONS

Use this form to order the transcription of proceedings. **CJA counsel should use Form CJA24.** Before completing this form, please visit cand.uscourts.gov/transcripts for complete transcript ordering information. **THESE INSTRUCTIONS SUPPLEMENT THE WEBSITE INFORMATION.**

1. Complete a separate order form for each case number for which transcripts are ordered.
2. Complete a separate order form for each court reporter who reported proceedings in the case.
3. Complete Items 1-12. Keep a copy of your completed order form for your records.
4. E-file this form in the U.S. District Court CM/ECF system. **Exceptions to e-filing:** (a) sealed cases/proceedings; (b) non-parties; (c) pro se parties who are not e-filers. In such cases, mail or hand-deliver a hard copy addressed to the court reporter c/o the Clerk's Office at the Court division where the proceeding was held.
5. Email the court reporter (email list available at cand.uscourts.gov/courtreportercontact) promptly after this Transcript Order Form is e-filed to obtain the amount of the required deposit. Deliver payment to the court reporter promptly. Upon receipt of the deposit, the court reporter will begin work on the transcript. **Exceptions:** (a) orders for FTR transcripts and (b) daily trial transcript orders.
6. Unless prepayment is waived, delivery time is computed from the date the court reporter receives the deposit, authorized CJA 24 Form, authorization from Federal Public Defender's Office or, for transcripts ordered by the U.S. government, from the date of receipt of the DCN number.
7. The deposit fee is an estimate. Any overage will be refunded; any shortage will be due from you.

ITEM-BY-ITEM INSTRUCTIONS (ITEMS 1-12):

- Items 1-3 In fields 1a, 2a & 3a, please provide the contact name and information for the person responsible for ordering the transcript. In a law office, this is usually a paralegal or administrative assistant, not the attorney. In fields 1b, 2b & 3b, provide the attorney name and contact info, if the attorney is not the contact person.
- Items 5-6. Only one case number may be listed per order.
- Item 7. Visit cand.uscourts.gov/transcripts for instructions for determining the name of the court reporter who reported the proceeding or if the proceeding was audiorecorded. If minutes have not been filed, contact judge's courtroom deputy.
- Item 8. Check appeal OR non-appeal AND criminal OR civil. **In forma pauperis:** a court order specifically authorizing transcripts is required before transcripts may be ordered *in forma pauperis*.
- Item 9a. List specific date(s) of the proceedings for which transcript is requested. A transcript of only a portion of a proceeding may be ordered, if the description is clearly written to facilitate processing. Under "type," indicate briefly what type of proceeding it was, such as "motion," "sentencing," or "CMC."
- Item 9b. Select desired **FORMAT(S)** for transcript. There is an additional charge for each format ordered. Visit cand.uscourts.gov/transcriptrates for details. Unlock ECF/web access is included at no extra charge with each of the other formats.
- Item 9c. There are 6 **DELIVERY TYPES** to choose from (times are computed from date of receipt of the deposit fee or DCN number). **NOTE:** Full price may be charged only if the transcript is delivered within the required time frame. For example, if an order for expedited transcript is not completed and delivered within 7 calendar days, the 14-day *delivery* rate would be charged.
- TRANSCRIPT DELIVERY TIMES:**
- ORDINARY — 30 calendar days.
 - 14-DAY — 14 calendar days.
 - EXPEDITED — 7 calendar days.
 - DAILY (NEXT DAY) — Following adjournment and prior to the normal opening hour of the court on the following morning whether or not it actually is a court day.
 - HOURLY (SAME DAY) — within two (2) hours.
 - REALTIME — A draft unedited, uncertified transcript produced by a certified realtime reporter as a byproduct of realtime to be delivered electronically during proceedings or immediately following adjournment.
- Item 11. Sign in this space to certify that you will pay all charges (the deposit plus any additional charges.) An electronic or conformed (/s/) signature is acceptable.
- Item 12. Enter the date of signing the order and certification.