Exhibit A

FILED

OCT 30 2023

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

GREGORY GARMONG, Plaintiff-Appellant, v. TAHOE REGIONAL PLANNING AGENCY; et al., Defendants-Appellees.	No. 22-15869 D.C. No. 3:17-cv-00444-RCJ-WGC MEMORANDUM*

Appeal from the United States District Court
for the District of Nevada
Robert Clive Jones, District Judge, Presiding

Submitted October 6, 2023**
Las Vegas, Nevada

Before: RAWLINSON and OWENS, Circuit Judges, and PREGERSON,*** District Judge.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

*** The Honorable Dean D. Pregerson, United States District Judge for the Central District of California, sitting by designation.

Gregory Garmong filed this action to challenge the issuance of a permit by the Tahoe Regional Planning Agency (TRPA) for a cell phone tower. The district court dismissed Garmong's initial complaint and first amended complaint for lack of standing. We reversed and remanded. *See Garmong v. Tahoe Reg'l Plan'g Agency*, 806 F. App'x 568, 571–72 (9th Cir. 2020). On remand, the district court dismissed Garmong's amended complaint with prejudice for failure to state a claim. After we affirmed the dismissal, *see Garmong v. Tahoe Reg'l Plan'g Agency*, 2022 WL 16707187 (9th Cir. Nov. 4, 2022), the district court awarded attorney's fees to Appellees under 42 U.S.C. § 1988(b). Garmong appeals the district court's fee award. We have jurisdiction under 28 U.S.C. § 1291 and we affirm.

"We review a district court's award of attorney's fees under 42 U.S.C. § 1988 for an abuse of discretion, while any element of legal analysis which figures in the district court's decision is reviewed *de novo*. . . ." *Buffin v. California*, 23 F.4th 951, 958–59 (9th Cir. 2022) (citations, alteration, and internal quotation marks omitted).

1. The district court did not abuse its discretion in deciding that Garmong's claims were frivolous. *See Tutor-Saliba Corp. v. City of Hailey*, 452 F.3d 1055, 1061 (9th Cir. 2006) (reviewing the frivolousness determination for an

abuse of discretion). Contrary to Garmong's assertion, the district court's fee order and dismissal order are consistent. In both orders, the district court indicated that Garmong's claims "lacked [a] reasonable basis in law or fact." Although the dismissal order specified that "[Garmong's] constitutional claims" were frivolous, that statement was made in the context of the unavailability of fees under the Nevada Anti-SLAPP statutes. Elsewhere, the district court characterized all of Garmong's claims as frivolous.

"An action becomes frivolous when the result appears obvious or the arguments are wholly without merit. . . ." *Galen v. County of Los Angeles*, 477 F.3d 652, 666 (9th Cir. 2007), *as amended* (citations omitted); *see also Garmong*, 2022 WL 16707187, at *1–2 (discussing the lack of merit for Garmong's claims).

Garmong's assertion that the district court did not adequately address the frivolousness of each claim is foreclosed by *Citizens for Free Speech, LLC v. County of Alameda*, 953 F.3d 655, 658–59 (9th Cir. 2020) (explaining that "the district court describ[ing] the plaintiff's action as 'frivolous at the outset' in its fees order" and characterizing the action as without merit in the dismissal order was sufficient). *Id.* As the district court explained, Garmong has a history of asserting frivolous claims. *See In re Becraft*, 885 F.2d 547, 549–50 (9th Cir. 1989) (factoring a party's litigation history into the analysis). Garmong was notified of

the defects in his complaint and failed to remedy them. *See Garmong*, 2022 WL 16707187, at *1.

2. The district court did not abuse its discretion in awarding fees for all claims. Any error caused by the district court's application of *Tutor-Saliba* was harmless because our precedent supports the district court's decision. *See Cabrales v. Cnty. of Los Angeles*, 935 F.2d 1050, 1053 (9th Cir. 1991) ("If a plaintiff ultimately wins on a particular claim, she is entitled to all attorney's fees reasonably expended in pursing that claim. . . ."). And because the district court held that all of Garmong's claims were frivolous, Garmong's reliance on *Fox v. Vice*, 563 U.S. 826, 834–35 (2011) (addressing a complaint containing both frivolous and non-frivolous claims), is misplaced.

3. Garmong's contention that the district court admitted "heavily redacted" fees is forfeited. *See AMA Multimedia, LLC v. Wanat*, 970 F.3d 1201, 1213 (9th Cir. 2020) ("[W]e generally will not consider arguments raised for the first time on appeal. . . .") (citation omitted). In any event, the redactions did not prevent the court from ascertaining the nature of the legal work performed. Garmong's arguments raised for the first time in his reply brief are also forfeited because Appellees had no opportunity to respond. *See Autotel v. Nevada Bell Telephone Co.*, 697 F.3d 846, 852 n. 3 (9th Cir. 2012).

AFFIRMED.

Exhibit B

FILED

DEC 7 2023

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

GREGORY GARMONG,

Plaintiff-Appellant,

v.

TAHOE REGIONAL PLANNING AGENCY; JOHN MARSHALL; BRIDGET CORNELL; JOANNE MARCHETTA; JIM BAETGE; JAMES LAWRENCE; BILL YEATES; SHELLY ALDEAN; MARSHA BERKBIGLER; CASEY BEYER; TIMOTHY CASHMAN; BELINDA FAUSTINOS; AUSTIN SASS; NANCY MCDERMID; BARBARA CEGAVSKE; MARK BRUCE; SUE NOVASEL; LARRY SEVASON; MARIA KIM; COMPLETE WIRELESS CONSULTING, INC.; VERIZON WIRELESS, INC.; CROWN CASTLE,

Defendants-Appellees.

No. 22-15869

D.C. No.
3:17-cv-00444-RCJ-WGC
District of Nevada,
Reno

ORDER

Before: RAWLINSON and OWENS, Circuit Judges, and PREGERSON,* District Judge.

The panel unanimously voted to deny the Petition for Rehearing.

* The Honorable Dean D. Pregerson, United States District Judge for the Central District of California, sitting by designation.

Judges Rawlinson and Owens voted to deny, and Judge Pregerson recommended denying, the Petition for Rehearing En Banc and Appellant's Petition to En Banc Court to Reconcile Panel Decisions and for Clarification of Review Procedures.

The full court has been advised of the Petition for Rehearing En Banc and Appellant's Petition to En Banc Court to Reconcile Panel Decisions and for Clarification of Review Procedures, and no judge of the court has requested a vote.

The Petition for Panel Rehearing; Petition for Rehearing En Banc, filed November 13, 2023, is DENIED. Appellant's Petition to En Banc Court to Reconcile Panel Decisions and for Clarification of Review Procedures, filed November 14, 2023, is DENIED.

No further petitions for rehearing will be accepted in this appeal.

Exhibit C

FILED

MAR 30 2020

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

GREGORY GARMONG, Plaintiff-Appellant, v. TAHOE REGIONAL PLANNING AGENCY; et al., Defendants-Appellees, and TIM CARLSON; E. CLEMENT SHUTE, Jr., Defendants.	No. 18-16824 D.C. No. 3:17-cv-00444-RCJ-WGC MEMORANDUM*

Appeal from the United States District Court
for the District of Nevada
Robert Clive Jones, District Judge, Presiding

Submitted March 26, 2020**
Las Vegas, Nevada

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* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Before: W. FLETCHER, BYBEE, and WATFORD, Circuit Judges.

Plaintiff Gregory Garmong filed this action in district court, challenging a decision by the defendant Tahoe Regional Planning Agency ("TRPA") to issue a permit allowing a cell tower to be built in a mostly undeveloped area under the agency's purview. The district court dismissed Garmong's complaint due to his failure to establish Article III standing to bring his claims, but granted him leave to amend. Garmong filed a first amended complaint, which the district court again dismissed for lack of Article III standing. The district court dismissed with prejudice and ordered the case closed. Garmong urges that this was error, on both substantive and procedural grounds. We have jurisdiction under 28 U.S.C. § 1291, and we reverse.

1. We review de novo a district court's conclusion that a plaintiff lacks Article III standing. *Braunstein v. Ariz. Dep't of Transp.*, 683 F.3d 1177, 1184 (9th Cir. 2012). To satisfy Article III standing, a plaintiff must first show an injury in fact that is (a) concrete and particularized and (b) actual or imminent. *Bernhardt v. County of Los Angeles*, 279 F.3d 862, 868 (9th Cir. 2002) (citing *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180 (2000)). Plaintiffs alleging a statutory violation must still establish a concrete injury. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016).

Garmong's first amended complaint was in part based on alleged procedural violations committed by the TRPA. Environmental plaintiffs like Garmong can establish an injury in fact "by showing a connection to the area of concern sufficient to make credible the contention that the person's future life will be less enjoyable . . . if the area in question remains or becomes environmentally degraded." *Ecological Rights Found. v. Pac. Lumber Co.*, 230 F.3d 1141, 1149 (9th Cir. 2000). Garmong alleged that in the past he has used the area around the cell tower for personal fitness, recreation, and nature-study, and that he plans to continue doing so in the future. He further alleged that the cell tower will "interrupt the view path for one of [his] primary locations to enjoy Lake Tahoe vistas in peaceful contemplation." The TRPA's own documents support the plausibility of this allegation.

Having satisfied the injury requirement, Garmong must also show that his injury is fairly traceable to the challenged conduct of the TRPA and that it is likely his injury will be redressed by a favorable decision of a court. *Bernhardt*, 279 F.3d at 868–69. However, "[w]here, as here, claims rest on a procedural injury, the causation and redressability requirements are relaxed." *Ctr. for Biological Diversity v. Mattis*, 868 F.3d 803, 817 (9th Cir. 2017) (internal quotation marks omitted). Garmong has cleared these low barriers. He alleges that the TRPA has

failed to consider its own regulations, and asks that a court prohibit the permit from being "legally . . . maintained." Accordingly, we hold that Garmong alleged facts sufficient to establish Article III standing.

Our inquiry does not end there. We must also ask whether a statute confers standing on Garmong to bring his claims. *Cetacean Cmty. v. Bush*, 386 F.3d 1169, 1175 (9th Cir. 2004). The TRPA Compact, by which the agency is governed, allows "[a]ny aggrieved person [to] file an action in an appropriate court of the States of California or Nevada or of the United States alleging noncompliance with the provisions of [the] compact or with an ordinance or regulation of the agency." An "aggrieved person" includes anyone who appeared in person before the agency at an appropriate administrative hearing to object to the action being challenged. Garmong attended the public hearing on the cell tower proposal and gave public comment, as well as appealed the resultant decision to the TRPA Board of Directors, which unanimously denied the appeal. Accordingly, we hold that Garmong had statutory standing to bring his claim.

2. Garmong's amended complaint alleged thirty-four claims for relief. When the district court dismissed Garmong's amended complaint for lack of Article III standing, it did so without conducting a claim-by-claim analysis. This was error. *See Davis v. Fed. Election Comm'n*, 554 U.S. 724, 734 (2008)

("Standing is not dispensed in gross." (internal quotation marks omitted)); *Allen v. Wright*, 468 U.S. 737, 752 (1984) ("[T]he standing inquiry requires careful judicial examination of a complaint's allegations to ascertain whether the particular plaintiff is entitled to an adjudication of the particular claims asserted."), *abrogated on other grounds by Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014). Upon remand, the district court need not repeat its standing analysis for claims that rely on the same underlying injury, but should analyze whether Garmong has standing for each category of claims asserted in his amended complaint. *See Valley Outdoor, Inc. v. City of Riverside*, 446 F.3d 948, 952–53 (9th Cir. 2006) (analyzing categories of claims on a claim-by-claim basis).

3. In a hearing prior to its dismissal of Garmong's complaint for the second and final time, the district court assured Garmong that it would grant him leave to further amend his complaint. However, it entered its dismissal without waiting for an amended complaint. This was an abuse of discretion. *See Lopez v. Smith*, 203 F.3d 1122, 1130 (9th Cir. 2000) (en banc). Federal Rule of Civil Procedure 15(a)(2) provides that courts "should freely give leave when justice so requires." More important, the district court reneged on an explicit assurance without explanation. In similar situations we have previously granted relief. *See, e.g.*, *United States v. Buchanan*, 59 F.3d 914, 918 (9th Cir. 1995) ("Litigants need to be

able to trust the oral pronouncements of district court judges."). Accordingly, upon remand, the district court should give Garmong the option of further amending his complaint.

4. Finally, Garmong appeals the district court's denial of his motion for a preliminary injunction. The district court did not conduct a standalone analysis for the preliminary injunction; rather, it relied on its reasoning from an earlier decision denying a temporary restraining order requested by Garmong. Furthermore, the district court denied Garmong's motion for a preliminary injunction in the same sentence that it concluded that he lacked standing, making it difficult to determine the extent to which its standing determination factored into the denial. We therefore vacate the district court's denial and instruct the district court to conduct an appropriate analysis of the request for a preliminary injunction.

REVERSED and REMANDED. Costs are taxed against the defendants. *See* FED. R. APP. P. 39(a)(3).