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ORDER

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Lara J. Taylor

Printed Name

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74524.00001 - We Rep Complete Wireless and Maria Kim - $EOJ - [O Grant Defs M Atty Fees - P shall pay Defs Complete Wireless and Maria Kim a total of $342,948.00 in fees and costs, #180, dated 05/19/22]

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

GREGORY O. GARMONG,

Plaintiff,

vs.

TAHOE REGIONAL PLANNING AGENCY, *et al.*,

Defendant.

3:17-cv-00444-RCJ

ORDER

The Court dismissed this case finding that all of Plaintiff's thirty-four claims against all twenty-four defendants lacked reasonable bases in law or fact as they were all foreclosed by clear and binding precedent. Cumulatively, Defendants presently request an award of attorneys' fees totaling $773,897.69. The Court would ordinarily find that it is inappropriate to award attorneys' fees to a successful defendant in a civil rights case. However, given the nature of this case and Plaintiff's habit of raising frivolous claims, the Court awards Defendants' requested fee.

FACTUAL BACKGROUND

Plaintiff brought this case in 2017 with a thirty-two-page complaint that raised twenty-eight claims for relief. (ECF No. 1.) All Defendants moved to dismiss the Complaint, arguing that Plaintiff lacked standing; the Tahoe Regional Planning Agency (TRPA) Defendants are immune

from suit; there is no personal jurisdiction over the TRPA Defendants who reside in California; the Compact preempts all state law claims; Plaintiff failed to raise his claims of bias and fraud before the agency; dismissal is required under the Noerr-Pennington Doctrine and Nevada's Anti-SLAPP statute; and Plaintiff failed to state a claim upon which relief could be granted. (ECF Nos. 17, 33, 34.) The Court dismissed Plaintiff's initial complaint for lack of standing, declined to reach the arguments regarding the merits of Plaintiff's complaint, and granted leave to amend. (ECF No. 83.)

Plaintiff thereafter filed a 55-page First Amended Complaint ("FAC") that asserted thirty-four claims for relief and sought damages, attorney's fees, and other relief. (ECF No. 84). Plaintiff pressed the same claims in spite of the arguments that Defendants raised in their first motion to dismiss. In addition, Plaintiff raised six more claims based upon the same facts, which suffered from the same defects that Defendants argued in their initial set of motions to dismiss. Defendants again moved for dismissal on the same grounds. (ECF Nos. 101, 103, 104.) The Court again granted these motions for lack of standing, declining to reach the merits of Plaintiff's claims. (ECF No. 110.)

Plaintiff appealed. The Ninth Circuit reversed holding that Plaintiff could have Article III standing due to the alleged impact of the cell tower on his future use and enjoyment of the surrounding area. (ECF No. 122.) The Ninth Circuit did not address whether Plaintiff had standing to pursue any claim in particular but remanded for this Court to address each claim under this standard. (*Id.*)

On remand, the Court gave Plaintiff an opportunity to file another complaint. (ECF No. 132.) Plaintiff declined. (ECF No. 133.) The Court further gave the parties an opportunity to file briefs on the issue of standing as well as gave Defendants leave to refile their motions for dismissal. (ECF No. 135.)

Defendants again filed motions to dismiss, raising the same arguments as before: the TRPA Defendants are immune from suit; there is no personal jurisdiction over the TRPA Defendants who reside in California; the Compact preempts all state law claims; Plaintiff failed to raise his claims of bias, fraud and equal protection before the agency; dismissal is required under the Noerr-Pennington Doctrine and Nevada's Anti-SLAPP statute; and Plaintiff failed to state a claim upon which relief could be granted. (ECF Nos. 137, 141, 147.) In these motions, Defendants requested attorney fees under 42 U.S.C. § 1988(b).[1]

The Court agreed with Defendants' arguments on the merits and dismissed the case with prejudice. (ECF No. 159.) The Court further held that Plaintiff's claims lacked reasonable bases in law and fact and directed Defendants to file a motion for attorney fees.

Presently, Defendants move for attorney fees for all of the fees and costs they incurred in litigating this case. They raise three bases for attorney fees: 42 U.S.C. § 1988(b); Nev. Rev. Stat. § 18.010; and TRPA's Rules of Procedure 10.6.2.

In addition to this case, Plaintiff has a history of bringing baseless claims. For example, Plaintiff brought suit against the Nevada Supreme Court and its justices for ruling against him in another case, which was dismissed by this District Court and affirmed by the Ninth Circuit. *Garmong v. Nevada Supreme Ct.*, 713 F. App'x 656 (9th Cir. 2018). For this reason, courts——including this one—have previously held that Plaintiff has raised frivolous claims wasting litigants' resources as well as judicial resources and awarded attorney fees on at least two occasions. *Garmong v. Lyon Cty.*, No. 3:17-CV-00701-RCJ-CBC, 2019 WL 320567, at *1 (D. Nev. Jan. 24, 2019), *aff'd*

[1] Only the Private-Party Defendants requested attorney fees in their motions. Plaintiff claims that the TRPA Defendants cannot therefore move for attorney fees now but cites to no authority for this assertion. The TRPA Defendants could have still moved for attorney fees separately under Fed. R. Civ. P. 54(d). The Court thus denies this argument from Plaintiff.

sub nom. Garmong v. Cty. of Lyon, 807 F. App'x 636 (9th Cir. 2020); *Garmong v. Rogney & Sons Const.*, 130 Nev. 1180 (2014).

LEGAL STANDARD

Courts in this country follow the American rule regarding attorney fees: that is, each party is generally responsible to pay for its own representation. *Key Tronic Corp. v. United States*, 511 U.S. 809, 814–15 (1994). This general rule may, however, be altered by contract or the legislature. *Id.* Relevant to the case at hand are three rules that do so alter this custom: 42 U.S.C. § 1988(b); Nev. Rev. Stat. § 18.010; and TRPA's Rules of Procedure 10.6.2.

Section 1988(b) allows for parties to recover reasonable attorney fees upon prevailing in a 42 U.S.C. § 1983 case. Courts should nonetheless be reluctant to award attorney fees to a prevailing § 1983 defendant because "Congress and the courts have long recognized that creating broad compliance with our civil rights laws, a policy of the 'highest priority' requires that private individuals bring their civil rights grievances to court." *Harris v. Maricopa Cty. Superior Ct.*, 631 F.3d 963, 971 (9th Cir. 2011) (quoting *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968)). To prevent discouraging potential plaintiffs from pursuing their civil rights claims, a court should therefore only award attorney fees to a prevailing defendant in such cases in "'exceptional circumstances' where the court finds that the plaintiff's claims are 'frivolous, unreasonable, or groundless.'" *Braunstein v. Arizona Dep't of Transp.*, 683 F.3d 1177, 1187 (9th Cir. 2012) (quoting *Harris v. Maricopa Cnty. Superior Court,* 631 F.3d 963, 971 (9th Cir. 2011)).

For claims brought under Nevada law, Nevada authorizes an award of attorney fees to prevailing parties under similar circumstances. Section 18.010 states, in pertinent part:

> [T]he court may make an allowance of attorney's fees to a prevailing party . . . , when the court finds that the claim . . . of the opposing party was brought or maintained without reasonable ground or to harass the prevailing party. The court shall liberally construe the provisions of this paragraph in favor of awarding attorney's fees in all appropriate situations.

Lastly, the TRPA rules of procedure provide that certain costs shall be paid by a plaintiff in a legal action requiring such fees. Section 10.6.2 provides:

> Any Agency cost related to preparation of the administrative record, including but not limited to the use of resources or staff time to gather documents, organize and create and index to the administrative record, conduct a privilege review of the administrative record, shall be borne by the plaintiff(s) in the legal action.

In awarding attorney fees, a court needs to assess the fees' reasonableness. To make this determination, a court calculates the "lodestar" amount by multiplying "the number of hours the prevailing party reasonably expended on the litigation by a reasonable hourly rate." *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). A reasonable hourly rate is determined by the "prevailing market rates in the relevant community" for a practitioner with similar "experience, skill, and reputation." *Gonzalez v. City of Maywood*, 729 F.3d 1196, 1205 (9th Cir. 2013). "The lodestar amount is presumptively the reasonable fee amount." *Van Gerwen v. Guarantee Mut. Life Co.*, 214 F.3d 1041, 1045 (9th Cir. 2000). A court may nonetheless adjust the lodestar fee, either up or down, upon the consideration of the following factors:

> (1) the time and labor required, (2) the novelty and difficulty of the questions involved, (3) the skill requisite to perform the legal service properly, (4) the preclusion of other employment by the attorney due to acceptance of the case, (5) the customary fee, (6) whether the fee is fixed or contingent, (7) time limitations imposed by the client or the circumstances, (8) the amount involved and the results obtained, (9) the experience, reputation, and ability of the attorneys, (10) the 'undesirability' of the case, (11) the nature and length of the professional relationship with the client, and (12) awards in similar cases.

Kerr v. Screen Extras Guild, Inc., 526 F.2d 67, 70 (9th Cir. 1975) (abrogated on other grounds).

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ANALYSIS

I. Attorney Fees Shall Be Awarded

Defendants' requested recovery of the costs and fees they incurred in litigating this case is authorized by 42 U.S.C. § 1988(b) and Nev. Rev. Stat. § 18.010.[2] First, as the Court found in its order granting dismissal, all of Plaintiff's claims were "frivolous, unreasonable, or without foundation." (ECF No. 159 at 16.) Plaintiff challenges this conclusion of the Court, claiming his suit "raises important new issues." (ECF No. 179 at 12.) To avoid duplicating the entirety of this Court's granting dismissal, the Court will briefly explain why Plaintiff is incorrect.

Plaintiff raised fourteen constitutional claims under the theories of procedural due process and equal protection. All of these claims were barred by clear precedent on numerous occasions. In order to allege a violation of a one's procedural due process rights, a plaintiff must assert sufficient facts showing "(1) a deprivation of a constitutionally protected liberty or property interest, and (2) a denial of adequate procedural protections." *Brewster v. Bd. of Educ. of Lynwood Unified Sch. Dist.*, 149 F.3d 971, 977 (9th Cir. 1998).

Plaintiff claimed to have a property interest in the permit not being issued but this is untrue. "A property interest arises only where there is a legitimate claim of entitlement, not merely an abstract need or desire for the particular benefit." *Roybal v. Toppenish Sch. Dist.*, 871 F.3d 927, 931 (9th Cir. 2017) (citing *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972)). A constitutional property interest cannot be based upon an "an indirect impact." *Dumas v. Kipp*, 90 F.3d 386, 392 (9th Cir. 1996). As such, a government entity has "no independent constitutional duty to safeguard . . . neighbors from the negative consequences—economic, aesthetic or otherwise—of . . . [a] construction project" it permitted. *Shanks v. Dressel*, 540 F.3d 1082, 1088 (9th

[2] As the Court finds that the Defendants' requested attorney fees are authorized by these statutes, it declines to reach whether fees are proper under TRPA's Rules of Procedure 10.6.2. Defendants admit this relief is an "alternative request . . . [,] not additive." (ECF No. 168 n.1.)

Cir. 2008). Accordingly, in *Shanks*—as here—where a government reviewing body has discretion to approve or deny a permit application, a party "is not constitutionally entitled to insist on compliance with the procedure itself." *Id.* at 1092. Based upon this clear precedent, Plaintiff has not and cannot successfully assert a property interest in the approval or denial of the Permit.

He further claimed to have a liberty interest in the denial of the Permit, a contention that was likewise defective. "Process is not an end in itself. Its constitutional purpose is to protect a substantive interest to which the individual has a legitimate claim of entitlement." *Olim v. Wakinekona*, 461 U.S. 238, 250 (1983). An "expectation of receiving process is not, without more, a liberty interest protected by the Due Process Clause." *Id.* at 250–51 n. 12. "A liberty interest may arise from the Constitution itself, by reason of guarantees implicit in the word 'liberty.'" *Wilkinson*, 545 U.S. at 221. A state may also "create[] a protected liberty interest by placing substantive limitations on official discretion." *Olim*, 461 U.S. at 249. As such, the entirety of Plaintiff's procedural due process claims were nonstarters because Plaintiff could not show a protected interest.

As to the equal protection claims, Plaintiff raised a class-of-one theory. Such a claim arises where the plaintiff was (1) "intentionally treated differently from others similarly situated" and (2) "there is no rational basis for the difference in treatment." *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000). Under the rational basis test, the plaintiff bears the high burden of having to prove the classification is not rationally related to any legitimate government interest. *Schweiker v. Wilson*, 450 U.S. 221, 230 (1981). "[A] classification neither involving fundamental rights nor proceeding along suspect lines is accorded a strong presumption of validity." *Heller v. Doe by Doe*, 509 U.S. 312, 319 (1993). Plaintiff could not possibly satisfy either element.

Plaintiff contended that he was similarly situated with the Private-Party Defendants, (*see, e.g.*, ECF No. 84 ¶ 264) but this is incorrect. Plaintiff admits these Defendants were the applicants

for the Permit, while he was the opponent of the Permit. They therefore held the opposite interests in the application process.

Additionally, Plaintiff's underlying grievance for this claim is the following: "TRPA failed to give . . . notice until after the Project Review Process was substantially completed, . . . resulting in an unfair advantage to the Private-Party Defendants." (ECF No. 84 ¶ 225.) He admits, however, he received notice of the hearing before the issuance of the permit, participated in the final hearing, appealed the grant of the Permit, filed a statement on appeal and appeared before the Legal Committee and the Governing Board to advocate for his position. (*Id.* ¶¶ 28, 49, 51–52.) Despite the obvious rationality of having an initial review by TRPA before holding a public hearing to receive objections, Plaintiff nonetheless posited there was no rational basis for giving notice to the public after an initial review by TRPA.

As for Plaintiff's Nevada state-law claims against the Private-Party Defendants, they too are without any merit and were therefore "brought and maintained without reasonable ground." In these claims, except Claim 30, Plaintiff complained that these Defendants petitioned the government—the TRPA—to build a cell phone tower. These claims were clearly barred by the *Noerr-Pennington* Doctrine as explained in this Court's order granting dismissal. Plaintiff made two contentions this doctrine did not apply, which were repeatedly foreclosed by binding precedent: (1) The doctrine does not apply to false claims. *But see, e.g.*, *Kottle v. Nw. Kidney Centers*, 146 F.3d 1056, 1060 (9th Cir. 1998) (affirming the grant of a motion to dismiss premised upon the *Noerr-Pennington* doctrine despite allegations of false statements). (2) The doctrine only applies to anti-trust petitions. *But see, e.g.*, *Leadbetter v. Comcast Cable Commc'ns, Inc.*, No. C05-0892RSM, 2005 WL 2030799, at *4 (W.D. Wash. Aug. 22, 2005) (noting that the Supreme Court and other courts have applied the *Noerr-Pennington* Doctrine outside of the antitrust context since at least the early nineteen-eighties).

As for Claim 30, Plaintiff attempted to sue Defendant CWC alleging that it failed to register to do business in Nevada. Assuming that this is true, the claim is clearly not cognizable under the statute. The statute requiring registry of business in Nevada does not provide for a private cause of action—only fines. Nev. Rev. Stat. § 80.055.

As for the remainder of the claims, that the TRPA Defendants failed to comply with the Compact in the issuance of the permit and they violated state laws, these claims were also frivolous. As the Court explained, the Compact restricts claims against it and its agents for "challenges [of] an adjudicatory act or decision of the agency to approve or disapprove a project, the scope of judicial inquiry shall extend *only* to whether there was prejudicial abuse of discretion." (ECF No. 19 Ex. 1 at Art. VI(j)(5) (emphasis added).) The Court correctly held that this provision preempted the state laws and effectively eliminated the various claims that these Defendants failed to comply with the Compact.[3]

For these reasons, all of Plaintiff's claims in this case were frivolous and without reasonable grounds. Plaintiff has therefore wasted numerous hours of time for the litigants in this case as well as this Court's finite resources. This finding provides that attorney fees are proper here, overcoming the policy of not wanting to discourage potential plaintiffs from asserting their civil rights. It is especially true here because Plaintiff has a record of repeatedly bringing frivolous cases and even having attorney fees awarded against him on more than one occasion.

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[3] Defendants do not point to a statute authorizing recovery of fees of costs for alleged violations of the Compact. However, the TRPA Defendants' litigation of these claims overlapped with the state law claims—that the same provisions of the Compact limited suit of their issuance of the permit to judicial review in accordance with Art. VI(j)(5) of the Compact. As such, reduction of attorney fees on this basis would be improper. *See Tutor-Saliba Corp. v. City of Hailey*, 542 F.3d 1055, 1064 (9th Cir. 2006) (holding that attorney fees should not be segregated even if fees should only be awarded for litigation of some but not all claims if all of the claims were argued together).

II. Reasonable Figure

Finding that the Court has authority to issue attorney fees against Plaintiff, the Court turns to the reasonableness of the requested figure. As instructed by the Ninth Circuit, the Court starts with the lodestar figure. Defendants have calculated this figure to be $206,618.80 for the TRPA Defendants, $224,330.89 for Defendants Crown Castle and Verizon, and $342,948.00 for Defendants Complete Wireless and Maria Kim. Plaintiff neither objects to the hourly rates charged nor the hours worked in this case. The Court also fails to find fault in Defendants' calculation of this figure.

Turning to the *Kerr* factors, the Court finds that, on the whole, the factors favor finding the lodestar figure to be reasonable and does not require adjustment.

A. The time and labor required

The Defendants (as well as this Court) spent vast amounts of time weeding through the quagmire that was Plaintiff's original and amended complaints. Plaintiff brought suit against a great multitude of parties with dozens of claims. This necessitated much time and labor favoring a finding of that the hours expended, as reflected in the lodestar, were reasonable.

B. The novelty and difficulty of the questions involved

The claims were clearing faulty from the outset as Plaintiff should have known. This factor favors a finding that the lodestar does not need to be adjusted to remain reasonable.

C. The skill requisite to perform the legal service properly

As this case was not novel and difficult, there was no special skill required in arguing this case, favoring a finding of that an upward adjustment of the lodestar is not appropriate in this matter.

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D. The preclusion of other employment by the attorney due to acceptance of the case

Some counsel attests that this case precluded them from working on matters for which they charge a higher rate. (ECF No. 168 Ex. 1 ¶19 (I 0006); Ex. 2 ¶23 (II 0358).) This factor therefore favors a finding that the lodestar represents a reasonable award of fees.

E. The customary fee

The highest rate charged by an attorney in this case was $570, but he discounted roughly ten percent of his hours worked at no charge, has 25 years of experience, and is based in San Francisco. This rate as well as the others is customary, favoring a finding of reasonableness of the lodestar.

F. Whether the fee is fixed or contingent

The fees were fixed. As such, the lodestar does not need to be adjusted upward, as counsel did not undertake any financial risk in agreeing to defend this matter.

G. Time limitations imposed by the client or the circumstances

There were no client-imposed time limitations, but Plaintiff did move for emergency injunctive relief, necessitating strict deadlines imposed by this Court for part of the case. This factor overall favors a finding of that the lodestar reflects a reasonable award of fees.

H. The amount involved and the results obtained

Defendants did successfully litigate this case, obtaining a highly desirable result for their clients—dismissal of all claims. This factor favors a finding of reasonableness of the lodestar.

I. The experience, reputation, and ability of the attorneys

The Court finds that the attorneys defending this case are experienced, have good reputations, and exhibited proficiency as lawyers. (ECF No. 168 Ex. 1 ¶¶ 3–4 (I 0002); Ex. 2 ¶¶ 3–5 (II 0354); Ex. 3 ¶¶ 27–28 (III 0506); Ex. 4 ¶¶ 4–5 (III 0584).) The Court therefore finds this factor favors a finding of reasonableness of the lodestar.

J. The 'undesirability' of the case

The Court does not find this case to be undesirable. This factor favors neither a finding that the lodestar should be adjusted upward or downward.

K. The nature and length of the professional relationship with the client

Some of the firms have represented their clients for lengthy periods of time. Snell & Wilmer has been representing Verizon Wireless for approximately twelve years. (ECF No. 168 Ex. 3 ¶ 30 (III 0507).) Newmeyer & Dillion has represented Crown Castle and its affiliated entities in at least sixty separate matters over the past ten years. (ECF No. 168 Ex. 2 ¶ 6 (III 0354).) This factor therefore favors a finding of that the lodestar is, itself, reasonable and need not be adjusted.

L. Awards in similar cases

The Court is not aware of any case that is like this one, so it finds this factor has no weight in determining whether the lodestar in this matter is reasonable.

As the Court finds that an attorney fee award is proper in this case and lodestar represents a reasonable award of attorneys' fees for the litigation of this case, it will award this figure. *Quesada v. Thomason*, 850 F.2d 537, 539 (9th Cir. 1988) (holding fees should only be changed upon limited success or the hours spent were unreasonable).

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CONCLUSION

IT IS HEREBY ORDERED that Defendants' Motion for Attorney Fees (ECF No. 168) is GRANTED.

IT IS FURTHER ORDERED that Plaintiff shall pay Defendants 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, and Larry Sevison a total $206,618.80 in attorney fees and costs.

IT IS FURTHER ORDERED that Plaintiff shall pay Defendants Crown Castle and Verizon Wireless, Inc. a total $224,330.89 in attorney fees and costs.

IT IS FURTHER ORDERED that Plaintiff shall pay Defendants Complete Wireless Consulting, Inc. and Maria Kim a total $342,948.00 in attorney fees and costs.

IT IS SO ORDERED.

Dated May 19, 2022.

ROBERT C. JONES
United States District Judge