UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 17-35315

Memorandum Disposition Issued March 8, 2023
M. Margaret McKeown, Eric D. Miller, and Salvador Mendoza, Jr. Circuit Judges

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KIRK NYBERG,

Plaintiff - Appellant,

v.

PORTFOLIO RECOVERY ASSOCIATES, LLC,

Defendant -Appellee.

Appeal from United States District Court
District of Oregon, Portland Division
The Honorable Paul Papak
3:15-cv-01175-PK

PETITION OF APPELLEE PORTFOLIO RECOVERY ASSOCIATES, LLC's FOR PANEL REHEARING

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DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Defendant-Appellee Portfolio Recovery Associates, LLC declares that it is a Delaware limited liability company and is a wholly owned subsidiary of PRA Group, Inc., a publicly traded company. No publicly held corporation owns 10% or more of PRA Group, Inc. stock.

Date: March 23, 2023

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STATEMENT OF BASIS FOR REHEARING

Appellee respectfully submits that, in the judgment of its counsel, panel rehearing of this Court's decision in *Nyberg v. Portfolio Recovery Associates, LLC*, 2023 U.S. App. LEXIS 5500, 2023 WL 2401067 (9th Cir. Mar. 8, 2023) (Mem. Disp.)[1] is appropriate for the following reasons:

1. The panel that issued the decision overlooked or misapprehended a material point of law or fact when it remanded the matter to the District Court to determine whether Article III standing exists, because this Court's jurisprudence is clear that this Court has an independent duty, and is obligated, to consider whether it has jurisdiction.

[1] A copy of the unpublished memorandum disposition is attached hereto as **Appendix A** and will be cited as "Mem. Disp." hereafter.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

Rules

Other

ARGUMENT

I. STANDARD OF REVIEW

A petition for panel rehearing may be granted if the panel that issued the decision "overlooked or misapprehended" a "material point of law or fact." Fed. R. App. P. 40(a)(2). "The purpose of petitions for rehearing, by and large, is to ensure that the panel properly considered all relevant information in rendering its decision. . . ." *Armster v. United States Dist. Court for the Cent. Dist. of Cal.*, 806 F.2d 1347, 1356 (9th Cir. 1986); *see Hitchcock v. Wainwright*, 777 F.2d 628, 629 (11th Cir. 1985) ("The focus of the petition for rehearing is thus to enable the court to correct its mistakes.") (Johnson, Kravitch, JJ, dissenting from denial of pet. for reh'g *en banc*).

II. PANEL REHEARING IS NECESSARY BECAUSE THE COURT HAS AN INDEPENDENT DUTY TO CONSIDER WHETHER ARTICLE III STANDING EXISTS AND THUS SHOULD NOT HAVE REMANDED THE CASE TO THE DISTRICT COURT TO DETERMINE APPELLANT'S STANDING TO SUE

The panel correctly stated that an Article III standing challenge can, as here, be raised for the first time on appeal; that Plaintiff-Appellant Kirk Nyberg ("Appellant") bore the burden of proving he had standing; and that to do so, Appellant needed to prove "he suffered a concrete injury." Mem. Disp. at 2.

Defendant-Appellee Portfolio Recovery Associates, LLC ("Appellee") does not take issue with any of these points.

Appellee respectfully submits, however, that the panel erred in its statement that "[b]ecause standing was not raised below, [Appellant] did not have an opportunity to present 'specific facts' supporting his standing," and in the panel's resultant decision to "remand the case to the district court to address [Appellant's] standing." *Id.* at 3. By electing to remand the matter instead of addressing and resolving the standing issue, the panel "overlooked or misapprehended" a "material point of law or fact."

Specifically, this Court has repeatedly and consistently recognized that even when an Article III standing challenge is raised for the first time on appeal, this Court must resolve the question itself. Thus, this Court has "an **independent duty** to assure that standing exists." *See Washington Envt'l Council v. Bellon*, 732 F.3d 1131, 1139 (9th Cir. 2013) (emphasis added) (cited at Mem. Disp. at 2). Although this Court generally will not address or resolve issues that were raised for the first time on appeal, standing is different. As the Court explained in *Teamsters Local Union No. 117 v. Washington Dep't of Corr.*, 789 F.3d 979 (9th Cir. 2015) (McKeown, J.), this court is "**required to consider**" a standing challenge even if it is raised for the first time on appeal "and apart from whether it was argued or addressed below." *Id.* at 985 (emphasis added). Indeed, "[s]tanding is a **threshold**

requirement, without which neither the district court **nor this court** has jurisdiction." *Arakaki v. Hawaii*, 314 F.3d 1091, 1097 (9th Cir. 2002) (emphasis added); *see Maricopa-Stanfield Irrigation & Drainage Dist. v. United States*, 158 F.3d 428, 433 (9th Cir. 1998) (stating that "because 'Article III standing is a jurisdictional prerequisite,' . . . we **must consider** standing whether or not the issue was raised in the district court") (emphasis added). Simply put, this Court is obligated to address and resolve Article III standing questions raised for the first time on appeal because they "implicate[] jurisdiction." *City of Oakland v. Lynch*, 798 F.3d 1159, 1163 (9th Cir. 2015), citing *Laub v. United States Dep't of Interior*, 342 F.3d 1080, 1085 (9th Cir. 2003). Significantly, the Court did not remand the standing inquiry to the district court in any of these cases.

Here, remand is not appropriate because Appellant already had both the opportunity and the obligation to "present specific facts" to the district court to support his standing, both at the pleading stage, and at the summary judgment stage. "A plaintiff must demonstrate standing for each claim he or she seeks to press and for each form of relief sought. . . . The plaintiff also bears the burden of proof to establish standing 'with the manner and degree of evidence required at the successive stages of the litigation.'" *Washington Envt'l Council*, 732 F.3d at 1139 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)).

In other words, although general allegations may be sufficient to establish standing at the pleading stage, they will not suffice at the summary judgment stage, as was the case here. *See id.*; *see also* Mem. Disp. at 2 ("The district court granted [Appellee's] motion for summary judgment and dismissed [Appellant's] claims."). At that juncture, Appellant was obligated to "set forth by affidavit or other evidence specific facts" that establish the elements of standing. *See Washington Envt'l Council*, 732 F.3d at 1139 (internal quotation marks and quoted citation omitted); *Arakaki*, 314 F.3d at 1097 ("In order to have standing at the summary judgment stage, plaintiffs must 'set forth by affidavit or other evidence specific facts,' . . . , showing that they have suffered an 'injury in fact' that is fairly traceable to the action they seek to challenge."). Colloquially speaking, when faced with a summary judgment motion, as Appellant was here, the plaintiff must "put up or shut up" on standing.

Although the panel acknowledged its duty to determine whether Appellant had carried his burden of establishing standing, its decision to remand the matter improperly delegated that responsibility to the district court and was based on the panel's conclusion that "[Appellant] did not have an opportunity to present 'specific facts' supporting his standing." Mem. Disp. at 3. Respectfully, this was both factually and legally incorrect.

The panel's premise is factually incorrect because both parties moved for summary judgement in the district court. *See* ER – 275 (Dkt. Nos. 49, 50). Appellant thus had two opportunities to present evidence demonstrating he had standing: in support of his own motion and in opposition to Appellee's motion. He should not be given a third opportunity.

The panel's premise is also legally incorrect. Contrary to the panel's decision, it is of no moment that "standing was not raised below." Mem. Disp. at 3. As the Court has explained, "a party is not excused from establishing standing simply because the opposing party did not tumble to the issue until the appeals stage." *Teamsters Local Union No. 117*, 789 F.3d at 986 (McKeown, J).[2] This makes perfect sense, given that every court is duty-bound to ensure that it has jurisdiction, regardless whether the issue is raised by a party. Before this Court can remand this case, it must satisfy itself that Appellant has Article III standing

[2] In his Reply brief on appeal, Appellant argued that "remand is appropriate to develop a factual record on the issue at standing [sic] was not addressed in the motions for summary judgment and not addressed by the District Court," and says he "was not on notice that one had to prove standing . . . ." Reply Br. at 1, 4. He cited no Ninth Circuit authority to support his argument. Instead, he relied upon an unpublished decision of the Eleventh Circuit, *Banks .v Secretary of HHS*, No. 21-11454, 2021 U.S. App. LEXIS 22086 (11th Cir. July 26, 2021) (per curiam). There, the appellate court determined that the record before it was "incomplete" and there were factual disputes "material to resolving the standing question" and thus remanded "to the district court for additional jurisdictional factfinding and a ruling on the issue of Article III standing in the first instance." *Id.* at **1, 10-11.

and that this Court thus has jurisdiction. Without jurisdiction, this Court is powerless to do anything other than dismiss the appeal. *See generally Gator.com Corp. v. L.L. Bean, Inc*., 398 F.3d 1125, 1128-29 (9th Cir. 2005).

In choosing to avoid deciding the standing question, the panel relied on *Williams v. Boeing Co.* 517 F.3d 1120, 1128 (9th Cir. 2008) and *Frank v. Gaos*, 139 S. Ct. 1041, 1046 (2019) (per curiam). Respectfully, that reliance was misplaced.

In *Williams*, this Court addressed the standing question on appeal and, based on the allegations in the plaintiffs' complaint, concluded that the plaintiffs had sufficiently alleged standing.[3] In other words, consistent with its jurisprudence, this Court decided, one way or the other and based on the information in the record, whether the plaintiffs had standing to proceed.

Here, in contrast, the panel concluded it was "unclear" based on "the allegations in [Appellant's] complaint . . . whether [Appellant] suffered a concrete injury-in-fact sufficient to confer Article III standing." Mem. Disp. at 3. Because this appeal arose from the district court's grant of summary judgment, however,

[3] The district court in *Williams* had concluded that the claim at issue was time-barred "before Plaintiffs were given the opportunity to present evidence in support of the claim." 517 F.3d at 1128. Here, in contrast, Appellant had every opportunity to present evidence in support of his claims and to establish standing, either in support of his own summary judgment motion or in opposition to Appellee's summary judgment motion.

the panel should have examined the evidentiary record presented by Appellant to determine whether he had "set forth by affidavit or other evidence specific facts" sufficient to establish standing rather than examining Appellant's complaint.[4]

Regardless, if it was "unclear" whether Appellant had carried his burden, the panel should have concluded he had not. Put differently, Appellant (as plaintiff in this case) either demonstrated standing or he did not. If the panel was unclear on whether Appellant met his burden, then he did not meet it, and this Court must conclude that it does not have jurisdiction over this appeal.

Finally, in *Frank v. Gaos*, the Supreme Court "remanded for the *courts* below to address" standing, noting that the parties had raised "a wide variety of legal and factual issues not addressed in the merits briefing before us or at oral argument." 139 S. Ct. at 1046. In doing so, the Court explained that it was "'a court of review, not of first view.'" *Id.*, quoting *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005). *Frank* is distinguishable on at least two grounds.

First, here, the parties thoroughly addressed the standing issue in the briefs and would have been prepared to discuss the issue had this Court conducted oral argument. Second, unlike in *Frank* and *Cutter*, there is no need for this Court to

[4] Furthermore, Appellant presented various arguments in his Reply brief as to why he had standing, *see* Reply Br. at 5-10, which this Court could have considered in light of the evidence he submitted to the district court to determine whether Appellant met his burden.

make any factual findings. Rather, it simply needs to decide whether, based on the evidentiary record, Appellant carried his burden of proof on standing. Furthermore, the principle that appellate courts are courts of review conflicts irreconcilably with this Court's duty to ensure that it has jurisdiction. Only this Court can answer that question, not the district court. And nothing in *Frank* prohibits this Court from doing so. Indeed, the Supreme Court explicitly said that the appellate court could resolve the standing question "in the first instance." *Id.* at 1046.

Respectfully, the panel overlooked or misapprehended a material point of law or fact when it remanded the matter to the district court to determine whether Article III standing exists. The panel should grant Appellee's petition for rehearing and decide the standing question. If the Court concludes Appellant lacks standing, it should dismiss this appeal for lack of standing under Article III of the United States Constitution. Should the Court determine Appellant has standing, the district court's grant of summary judgment in favor of Appellee should be affirmed or, alternatively, remanded for further proceedings to address issues presented to but not decided by the district court.

CONCLUSION

For each of the foregoing reasons, Appellee respectfully submits that the Court should grant rehearing.

Respectfully submitted,

SIMMONDS & NARITA LLP
TOMIO B. NARITA
JEFFREY A. TOPOR

Dated: March 23, 2023

By s/Jeffrey A. Topor
Jeffrey A. Topor
Attorneys for Appellee
Portfolio Recovery Associates, LLC

CERTIFICATE OF COMPLIANCE PURSUANT TO NINTH CIRCUIT RULE 40-1 FOR CASE NUMBER 17-35315

I am one of the attorneys for Appellee. Pursuant to Ninth Circuit Rule 40-1, I certify that this Petition of Appellee for Panel Rehearing complies with the type-volume limitation of Ninth Circuit Rule 32-1(a)(4)(A) because it contains 1,966 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), as determined by the word processing system used to prepare the brief, Word for Microsoft 365. I further certify that the brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in proportionally spaced typeface using Word for Microsoft 365 in Times New Roman 14-point font.

Respectfully submitted,

SIMMONDS & NARITA LLP
TOMIO B. NARITA
JEFFREY A. TOPOR

Dated: March 23, 2023

By s/Jeffrey A. Topor
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Appendix A

NOT FOR PUBLICATION

FILED

MAR 8 2023

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

KIRK J. NYBERG, Plaintiff-Appellant, v. PORTFOLIO RECOVERY ASSOCIATES, LLC, Defendant-Appellee.	No. 17-35315 D.C. No. 3:15-cv-01175-PK MEMORANDUM*

Appeal from the United States District Court
for the District of Oregon
Paul J. Papak II, Magistrate Judge, Presiding

Submitted December 9, 2022**
Seattle, Washington

Before: McKEOWN, MILLER, and MENDOZA, Circuit Judges.

Kirk Nyberg appeals the district court's dismissal of his claims brought under the Fair Debt Collection Practices Act ("FDCPA"). We have jurisdiction under 28 U.S.C. § 1291 and remand to the district court to evaluate Nyberg's

* 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).

standing to sue in federal court.

Nyberg filed a complaint against Portfolio Recovery Associates, LLC ("PRA"), claiming that PRA violated the FDCPA by bringing a state-court action against Nyberg to collect an alleged credit-card debt. The district court granted PRA's motion for summary judgment and dismissed Nyberg's claims.

PRA contends for the first time on appeal that this case must be dismissed for lack of Article III standing. Although PRA did not advance these objections below, we may consider them here, since "a jurisdictional defect is a non-waivable challenge that may be raised on appeal." *Wash. Envt'l Council v. Bellon*, 732 F.3d 1131, 1139 (9th Cir. 2013). Standing is an "essential and unchanging part of the case-or-controversy requirement of Article III," *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992), and "a jurisdictional prerequisite to the consideration of any federal claim," *Gerlinger v. Amazon.com*, 526 F.3d 1253, 1255 (9th Cir. 2008).

Nyberg, the party invoking federal court jurisdiction, "bears the burden of establishing the elements of Article III jurisdiction." *Patel v. Facebook, Inc.*, 932 F.3d 1264, 1270 (9th Cir. 2019). To establish Article III standing, Nyberg must show, *inter alia*, that he suffered a concrete injury. *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2203 (2021). "Traditional tangible harms, such as physical harms and monetary harms" are concrete injuries, as are intangible harms with a "close historical or common-law analogue." *Id.* at 2204.

Because standing was not raised below, Nyberg did not have an opportunity to present "specific facts" supporting his standing. *See Williams v. Boeing Co.*, 517 F.3d 1120, 1128 (9th Cir. 2008). Looking instead to the allegations in Nyberg's complaint, *see id.*, it is unclear whether Nyberg suffered a concrete injury-in-fact sufficient to confer Article III standing. We accordingly remand the case to the district court to address Nyberg's standing. *See Frank v. Gaos*, 139 S. Ct. 1041, 1046 (2019) (per curiam).

REMANDED.

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of March, 2023, I filed the foregoing Petition for Rehearing with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to all registered CM/ECF users.

Date: March 23, 2023

By s/Jeffrey A. Topor
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