FILED

JUN 27 2022

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ARNOLD LEONG,

Plaintiff-Appellee,

v.

WARREN C. HAVENS,

Defendant-Appellant,

v.

ENVIRONMENTEL LLC; et al.,

Defendants-Appellees,

SUSAN L. UECKER,

Receiver-Appellee.

No. 20-17481

D.C. No. 4:20-cv-08091-JST
Northern District of California,
Oakland

ORDER

Before: TASHIMA, FRIEDLAND, and BADE, Circuit Judges.

We treat appellant's petition for panel rehearing (Docket Entry No. 40) as a motion for reconsideration of the March 16, 2022 order, and deny the motion. *See* 9th Cir. R. 27-10.

Appellant's motions for an extension of time to file a petition for rehearing (Docket Entry Nos. 38, 39) are denied as unnecessary.

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Appellant's motions filed at Docket Entry Nos. 41 and 42 are denied to the extent the motions seek relief in this case. The motions filed in Appeal Nos. 19-16043, 20-17455, and 20-17456 have been addressed in those dockets.

No further filings will be entertained in this closed case.

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D.C. No. 4:20-cv-08091-JST
Northern District of California,
Oakland

ORDER

Before: TASHIMA, FRIEDLAND, and BADE, Circuit Judges.

Upon a review of the record and the responses to the January 18, 2022 order to show cause, we conclude that the questions raised in this appeal are so insubstantial as not to require further argument. *See United States v. Hooton*, 693 F.2d 857, 858 (9th Cir. 1982) (stating standard).

We summarily affirm the district court's order remanding the action to state

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court. *See* 28 U.S.C. §§ 1333 (admiralty or maritime jurisdiction), 1442 (removal of action against federal officers); *BP P.L.C. v. Mayor & City Council of Baltimore*, 141 S. Ct. 1532, 1537-38 (2021) (holding that where the notice of removal cites 28 U.S.C. § 1442 as one of the grounds for removal, § 1447(d) authorizes a court of appeals to review the whole of the district court's remand order).

Appellant's request for clarification, set forth in his response to the January 18, 2022 order to show cause, is denied.

Appellant's request for an extension of time to file the opening brief, set forth in his response to the January 18, 2022 order to show cause, is denied as moot.

AFFIRMED.

FILED

JAN 18 2022

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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Plaintiff-Appellee,

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No. 20-17481

D.C. No. 4:20-cv-08091-JST
Northern District of California,
Oakland

ORDER

Before: TALLMAN and NGUYEN, Circuit Judges.

The September 3, 2021 order to show cause is discharged.

Appellant's motion to proceed in forma pauperis (Docket Entry No. 31) is denied as unnecessary because appellant paid the fees for this appeal.

Appellant's "motion to suspend or for a continuation" (Docket Entry No. 27), motion for issuance of an order to show cause (Docket Entry No. 29), and

motion for appointment of counsel (Docket Entry No. 30) are denied. No motions for reconsideration, clarification, or modification of these denials shall be filed or entertained.

Appellant's motion to seal documents (Docket Entry No. 33) in support of his motions is granted. The Clerk will maintain Docket Entry No. 33 under seal.

A review of the record suggests that this appeal may be appropriate for summary disposition under Ninth Circuit Rule 3-6(a). *See United States v. Hooton*, 693 F.2d 857, 858 (9th Cir. 1982).

Within 21 days after the filing date of this order, appellant must show cause why summary affirmance of the district court's order granting remand is not appropriate. A response may be filed within 10 days after service of the memorandum.

If appellant does not comply with this order, this appeal will be automatically dismissed by the Clerk for failure to prosecute. *See* 9th Cir. R. 42-1.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

SEP 3 2021

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

ARNOLD LEONG,

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WARREN C. HAVENS,

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SUSAN L. UECKER,

Receiver-Appellee.

No. 20-17481

D.C. No. 4:20-cv-08091-JST
Northern District of California,
Oakland

ORDER

A review of the record suggests that this court may lack jurisdiction over this appeal because the order challenged on appeal does not appear to be final or appealable. *See Kunzi v. Pan Am. World Airways, Inc.*, 833 F.2d 1291, 1293 (9th Cir. 1987) (order remanding a removed action to state court for lack of subject matter jurisdiction is not reviewable).

Within 21 days of this order, appellant shall move for voluntary dismissal of

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this appeal or show cause why it should not be dismissed for lack of jurisdiction. If appellant elects to show cause, appellees may respond within 10 days.

If appellant does not comply with this order, the Clerk will dismiss this appeal pursuant to Ninth Circuit Rule 42-1.

Briefing is suspended pending further order of the court.

FOR THE COURT:

MOLLY C. DWYER
CLERK OF COURT

By: Michelle Kim-Szrom
Deputy Clerk
Ninth Circuit Rule 27-7

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

ARNOLD LEONG,

Plaintiff,

v.

WARREN HAVENS, et al.,

Defendants.

Case No. 20-cv-08091-JST

ORDER GRANTING MOTION TO REMAND

Re: ECF No. 8

Once again, Defendant Warren Havens has removed this case from the Alameda County Superior Court. ECF No. 1. The Court remanded the same action to that court two months ago for lack of jurisdiction. *See Leong v. Havens*, Case No. 20-cv-05236-JST, ECF No. 70. Havens's stated grounds for renewed removal of this case are meritless and demonstrate disregard for the Court's prior order. The Court will grant the motion to remand.

I. BACKGROUND

This is a dispute over various spectrum licenses held by entities controlled and managed by Havens. The case was filed in 2002 and is now before this Court on Havens's fifth notice of removal. ECF No. 1; *see also* Case No. 4:15-cv-02463-YGR, ECF No. 1; Case No. 4:18-cv-03603-JST, ECF No. 1; Case No. 4:18-cv-05751-JST, ECF No. 1; Case No. 20-cv-05236-JST, ECF No. 1. Detailed discussions of the background to this case can be found in the prior remand orders, Case No. 4:15-cv-02463-YGR, ECF Nos. 23, 27; Case No. 4:18-cv-03603-JST, ECF No. 50; Case No. 4:18-cv-05751-JST, ECF No. 69; Case No. 20-cv-05236-JST, ECF No. 70, and in the Court's order declaring Havens to be a vexatious litigant, issued earlier today, ECF No. 37.

Havens removed the case most recently on November 17, 2020. ECF No. 1. After the case was reassigned to the undersigned, Plaintiff Arnold Leong filed a motion to remand on

November 25, 2020.[1] ECF No. 8. Havens filed an opposition to the motion on December 7, 2020, ECF No. 21, as well as a supplementary "letter," ECF No. 22, and Leong replied on December 9, 2020, ECF No. 23. On December 10, 2020, Havens filed an "Amended Notice of Removal." ECF No. 25.

II. LEGAL STANDARD

"[A]ny civil action brought in a [s]tate court of which the district courts of the United States have original jurisdiction, may be removed by [a] defendant . . . to [a federal] district court." 28 U.S.C. § 1441(a). A case must be removed "within 30 days after receipt by the defendant . . . of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is . . . removable." *Id.* § 1446(b)(3). Following removal, if the district court determines that it lacks jurisdiction, the action must be remanded back to state court. *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 134 (2005). There is a "strong presumption" against finding removal jurisdiction, which "means that the defendant always has the burden of establishing that removal is proper." *Gaus v. Miles*, 980 F.2d 564, 566 (9th Cir. 1992) (citation omitted). The Court "resolves all ambiguity in favor of remand to state court." *Hunter v. Philip Morris USA*, 582 F.3d 1039, 1042 (9th Cir.2009) (citation omitted).

III. DISCUSSION

Havens's removal of this case is once again improper. First, the removal is untimely. Generally, a notice of removal must be filed within thirty days after service of the initial complaint or summons. 28 U.S.C. § 1446(b)(1). However, "if the case stated by the initial pleading is not removable, a notice of removal may be filed within 30 days" after the defendant receives any paper "from which it may first be ascertained that the case is one which is . . . removable." *Id.* § 1446(b)(3).

[1] Havens argues that the motion was not properly served upon him. ECF No. 21 at 2. The Court credits Defendants' proof of service, which states that Havens was served both by email and by regular mail, ECF No. 8 at 18, and disbelieves Havens's declaration regarding the lack of proper service. In any event, Havens filed a timely opposition and suffered no prejudice. *See Bay Valley Prof'l Ctr., LLC v. Schmidt*, No. 14-cv-02067-BLF, 2014 WL 2467017, at *1 n.1 (N.D. Cal. June 2, 2014) (rejecting defendant's allegations of improper service of a motion to remand because the defendant joined in an opposition to the motion and was therefore not prejudiced).

Havens points to two "new actions" which he argues "show the grounds for removal herein not previously shown or found in the Superior Court Case." ECF No. 1 at 2-3. The "new actions" that Havens identifies are (1) a report sent to him by the Receiver detailing the Receiver's and Receiver's counsel's fee statements and accounting, and (2) the Plaintiff's ex parte motion to enforce the arbitration award following the last remand order. *Id.* at 2. Havens argues that these documents reveal that the Receiver is or is planning to "sell off the subject FCC licenses . . . and to liquidate the assets of the subject receivership legal entities." *Id.* Nothing about these actions confers jurisdiction on the Court – and even if they did, Havens fails to show how either document represents the first filing that put him on notice that the case was removable. *See* 28 U.S.C. § 1446(b)(3); *see also Garay v. Sw. Airlines Co.*, No. 19-cv-05452-PJH, 2019 WL 6977114, at *7 (N.D. Cal. Dec. 20, 2019) (finding defendant could not rely on § 1446(b)(3) removal where it "fail[ed] to provide any proof that the information . . . in support of defendant's subsequent removal was *not* available to defendant at the time of its initial . . . removal" (emphasis in original)). In short, the removal is untimely and there is no "amended pleading, motion, order or other paper" that has revealed any new grounds for removal. The case must be remanded on this basis alone.

Second, even if they were properly before the Court, Havens's jurisdictional arguments are meritless. He raises two new bases for removal: (1) federal officer removal pursuant to 28 U.S.C. § 1442, and (2) district court original jurisdiction for admiralty, maritime and prize cases pursuant to 28 U.S.C. § 1333. ECF No. 1 at 5. He also argues that he is entitled to remove the case to federal court because the "[Federal Communications Commission] has exclusive jurisdiction," *id.* at 19, an argument the Court has already rejected numerous times, *see, e.g.*, Case No. 20-cv-05236, ECF No. 70 at 3, and need not address again.

As for the other two asserted bases for the Court's jurisdiction, a state action is removable under Section 1442 when it is directed against "any officer (or any person acting under that officer) of the United States or of any agency thereof, in an official or individual capacity, for or relating to any act under color of such office." 28 U.S.C. § 1442(a)(1).

Havens might be able to establish jurisdiction if he were actually a federal officer, but he is

not. Havens argues that he is a "federal officer or agent" because he was "designated . . . to be co-prosecutor, with the FCC Enforcement Bureau hearing staff, in a certain long-running case," and because the entities he controls were given "Private Commons" status by the FCC. ECF No. 1 at 5, 12. Even assuming these facts are true, the argument fails. Havens has not shown that either designation equates to that of a "federal officer or agent" under § 1442(a)(1). Nor does he cite any relevant authority, offering instead assertions that "designation of Havens to prosecute the matters the Commission described extensively in its Hearing Designation Order . . . met all four prongs of the Standard for removal," *id.* at 11-12, and that "the FCC grant of 'Private Commons' authority . . . is in fact . . . a type of 'federal-agent' authorization," *id.* at 12. These assertions are simply legally untrue. Havens is engaged in a private enterprise where he "makes his own decisions, follows his own best judgment, collects his own fees and runs his own business." *Cammer v. United States*, 350 U.S. 399, 405 (1956). He is not a federal officer.

He could also establish jurisdiction under Section 1442 if he could show that he was "act[ing] under the direction of a federal officer." *City of Livingston v. Dow Chem. Co.*, No. 05-cv-03262 JSW, 2005 WL 2463916, at *3 (N.D. Cal. Oct. 5, 2005). In order to establish jurisdiction in that manner, a defendant must demonstrate that "(a) it is a 'person' within the meaning of the statute; (b) there is a causal nexus between its actions, taken pursuant to a federal officer's directions, and plaintiff's claims; and (c) it can assert a 'colorable federal defense.'" *Durham v. Lockheed Martin Corp.*, 445 F.3d 1247, 1251 (9th Cir. 2006). But Havens has not shown that the conduct alleged against him in the underlying lawsuit was "taken pursuant to a federal official's directions." *Durham,* 445 F.3d at 1251. Nor has Havens shown that he acted under a federal agent, which requires him to show that a federal officer had "direct and detailed control" over him. *Fung v. Abex Corp.*, 816 F. Supp. 569, 572 (N.D. Cal. 1992). Havens devotes large sections of his opposition brief to the FCC's regulatory structure, but "merely being subject to federal regulations, even if extensive, is insufficient to demonstrate that a private litigant 'acted under the direction of a federal officer.'" *City of Livingston*, 2005 WL 2463916 at *3. The Court therefore rejects this basis for removal.

Which brings the Court to Havens's last asserted basis for federal jurisdiction – admiralty.

Federal district courts have exclusive original jurisdiction over a civil case that arises in admiralty. 28 U.S.C. § 1333. "Two distinct tests have evolved for determining the reach of this jurisdictional grant: a locality test for tort claims and a subject matter test for contract claims." *Simon v. Intercontinental Transp. (ICT) B.V.*, 882 F.2d 1435, 1440 (9th Cir. 1989). To establish jurisdiction for a maritime tort claim, a court "must determine whether the tort occurred on navigable water or whether injury suffered on land was caused by a vessel on navigable water." *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 534 (1995). To establish jurisdiction over a maritime contract claim, "[t]he character of the work is determinative of the question whether the agreement was maritime and the jurisdiction properly laid in admiralty." *Hinkins S. S. Agency, Inc. v. Freighters, Inc.*, 498 F.2d 411, 412 (9th Cir. 1974).

Havens argues that "Plaintiff's challenges to defendant Havens's actions that involve the subject nationwide 'AMTS' licenses . . . are subject to Havens'[s] defense and removal grounds under federal maritime admiralty jurisdiction over navigable waters activity." ECF No. 1 at 28. He selectively cites *Lu Junhong v. Boeing Co.*, 792 F.3d 805 (7th Cir. 2015), a Seventh Circuit case which addressed admiralty jurisdiction over tort claims arising from injuries occurring at the seawall between the ocean and land. *See* ECF No. 1 at 28. But Havens makes no argument that the claims asserted against him in the state court case were based on injuries related to maritime activities or related to agreements for the performance of maritime services. *See Executive Jet Aviation, Inc. v. City of Cleveland,* 409 U.S. 249, 261, 268 (1972) ("It is far more consistent with the history and purpose of admiralty to require also that the wrong bear a significant relationship to traditional maritime activity."); *Kennedy v. H & M Landing, Inc.*, 529 F.2d 987, 988 (9th Cir. 1976) ("Calling a contract a maritime contract does not make it one."). Because the claims in the underlying case are not federal maritime claims, the Court also rejects this basis for removal.[2]

//

[2] Havens appears to have asserted federal jurisdiction based on a similar theory in an earlier case involving the same licenses. *See Jones v. Havens*, Case No. 12-cv-01606-JSC, ECF No. 32 at 13 n.4. The court rejected the argument as "conclusory," "not supported by any relevant authority," and because it "fail[ed] to see how Plaintiff's claims would fall under federal maritime jurisdiction." *Id.*

CONCLUSION

Havens has not established any grounds that make removal proper. This action is therefore REMANDED to Alameda County Superior Court. The six pending administrative motions, ECF Nos. 12, 28, 29, 32, 34, 36 are denied as moot.

IT IS SO ORDERED.

Dated: December 21, 2020

JON S. TIGAR
United States District Judge