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7 IN THE UNITED STATES DISTRICT COURT
8 FOR THE NORTHERN DISTRICT OF CALIFORNIA
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11 CHANNING JONES,

12 Plaintiff,

13 v.
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15 WARREN HAVENS,

16 Defendant.
17

Case No.: C-12-01606 JCS

**ORDER GRANTING PLAINTIFF'S
MOTION TO REMAND AND
DENYING DEFENDANT'S MOTION
TO STRIKE**

18
19 **I. INTRODUCTION**

20 This action arises out of a business dispute between Plaintiff Channing Jones and Defendant
21 Warren Havens. Defendant removed this case from state to federal court pursuant to 28 U.S.C. §§
22 1441 and 1446. Presently before the Court are Plaintiff's Motion for Remand ("Motion for
23 Remand") and Defendant's Motion to Strike Plaintiff's Reply ("Motion to Strike"). The Court finds
24 that the Motions are suitable for determination without oral argument pursuant to Civil Local Rule
25 7-1(b). Accordingly, the hearing on the Motion set for June 22, 2012 at 9:30 a.m. is VACATED.
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1 For the reasons stated below, the Court GRANTS Plaintiff's Motion for Remand and DENIES
2 Defendant's Motion to Strike.¹

3 **II. BACKGROUND**

4 **A. The Complaint**

5 On October 6, 2011, Plaintiff filed a complaint in Alameda County Superior Court alleging
6 various fraud claims. Complaint at *4. Plaintiff alleges that he invested heavily in Defendant's
7 limited liability companies ("LLCs") but, due to Defendant's fraudulent conduct, Plaintiff's interest
8 in the companies has been substantially diluted and reduced. *Id.* at *7. The business venture run
9 through the LLCs was designed for the purchase, management, and sale of telecommunications
10 spectrum under license from the Federal Communications Commission ("FCC"). *Id.* at *6. Plaintiff
11 alleges, *inter alia*, that Defendant "transferred interests in [LLCs] in which [P]laintiff had substantial
12 interests to other [LLCs] in which Plaintiff had little or no interest thereby substantially diluting
13 Plaintiff's interests and lessening the share of any profits to which Plaintiff would be entitled." *Id.*
14 The Complaint alleges damages due to Plaintiff having "not received the shares to which he was
15 entitled of proceeds of sales or leases of spectrum controlled by [LLCs] managed by Defendant in
16 which Plaintiff has invested and the interest in such [LLCs] to which Plaintiff is entitled based on his
17 investments in an amount in excess of \$41,000,000." *Id.* at *7.

18 **B. Defendant's Notice of Removal**

19 On March 30, 2012, Defendant removed this action to the United States District Court for the
20 Northern District of California, asserting that a March 26, 2012 filing by Plaintiff established
21 grounds for removal. Notice of Removal ¶ 3. Specifically, Plaintiff's Case Management
22 Conference Statement (the "CMC Statement") attaches Plaintiff's Demand for Arbitration and states
23 that the relief sought in the state court action is described in that document. *Id.* at ¶¶ 3-4 (citing
24 CMC Statement ¶ 4(b)). Defendant asserts that the Demand for Arbitration seeks a declaration of
25 Plaintiff's alleged rights to FCC licenses held by Defendant's LLCs, and an order compelling the
26 transfer to Plaintiff of certain FCC licenses held by Defendant's LLCs. From the CMC Statement,

27 ¹ The parties have consented to the jurisdiction of a United States Magistrate Judge pursuant
28 to 28 U.S.C. § 636(c).

1 Defendant contends he “first ascertained that the State Court Action asserts control over, challenges,
2 and seeks transfer of one or more FCC licenses, and therefore is subject to the exclusive jurisdiction
3 of the FCC and the federal courts.” *Id.* at ¶¶ 6, 10 (citing 47 U.S.C. §§ 151, 201 & 301 *et seq.*).

4 **C. The Motion for Remand**

5 On April 25, 2012, Plaintiff filed his Motion in which he argues that Defendant’s removal
6 was both untimely and substantively deficient. Motion for Remand, 1. Regarding timeliness,
7 Plaintiff contends that any FCC issue that exists in this case was revealed in his Complaint. *Id.* at 5.
8 The 30-day time limit to remove the case began upon filing the Complaint, rendering the removal
9 untimely, and mandating remand. *Id.*

10 Plaintiff also contends that subject matter jurisdiction is lacking because the issues in this
11 case do not give rise to a federal question. *Id.* Plaintiff states that his claims are state law claims
12 “arising out of a business dispute with the [D]efendant that happens to involve FCC licenses as the
13 business’ primary assets. . . . Plaintiff is seeking to recover his due from investments in a business
14 venture that bought and sold FCC licenses.” *Id.* at 6. Plaintiff denies that he is seeking to challenge
15 any determination by the FCC or seeking relief for the improper awarding of FCC licenses. *Id.* at 7.
16 Additionally, Plaintiff argues that federal jurisdiction is not established simply because the FCC
17 regulates spectrum licenses and those licenses are involved in this business dispute. *Id.* (citing *Fair*
18 *v. Sprint Payphone Servs.*, 148 F. Supp. 2d 622, 625-26 (D.S.C. 2001)).²

19 In response, Defendant rejects Plaintiff’s contention that the Complaint adequately revealed
20 all the FCC license issues in this action, thus making removal untimely. Defendant’s Opposition to
21 Plaintiff’s Motion for Remand (“Opposition”), 1-5. Defendant asserts that Plaintiff’s Demand for
22 Arbitration alleges for the first time that, contrary to the formal applications filed with the FCC,
23 Plaintiff’s “‘real’ ownership in the LLCs involved was and is, all along, different from that
24 represented to the FCC when the licenses were sought, and that the real party in interest is not the
25 LLCs but an ‘enterprise’ or ‘venture’ between Jones and Havens of which Jones is a ‘partner.’”
26 Opposition at 2. Defendant contends that this “effectively challenges the FCC license grants” and is
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28 ² Plaintiff also requests an award of fees and costs incurred as a result of the removal. *Id.* at 8.

1 grounds for removal. *Id.* Additionally, Plaintiff’s forms of relief sought in connection with the state
2 court action—detailed in the Demand for Arbitration and referenced in his CMC Statement—are:

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4 1. For a declaration establishing Claimant’s interest in the assets obtained by
5 Respondent with funds Claimant provided to Respondent, and any assets traceable to
6 such funds, including any FCC Licenses . . . and Respondent’s interest if any in such
7 assets and FCC Licenses;

8 . . .

9 4. For a constructive trust compelling Respondent to transfer to Claimant the FCC
10 Licenses obtained with the use of Claimant’s funds or traceable to such funds.

11 *Id.* (quoting Plaintiff’s Demand for Arbitration, 8). Defendant asserts that this makes it clear that
12 Plaintiff is seeking transfer of the FCC licenses, which was not apparent in the Complaint. *Id.*

13 Defendant also argues that removal was substantively proper because federal subject matter
14 jurisdiction exists for two reasons: 1) Plaintiff’s claims are completely preempted; and 2) the claims
15 depend on a substantial question of federal law. *Id.* at 6. Regarding complete preemption,
16 Defendant argues that because Plaintiff’s claims and remedies “involve” entry into the market they
17 are preempted by 47 U.S.C. § 332(c)(3)(A). *Id.* (citing, *inter alia*, *Bastien v. AT&T Wireless Servs.,*
18 *Inc.*, 205 F.3d 983 (7th Cir. 2000); *Telesaurus VPC, LLC v. Power*, 623 F.3d 998 (9th Cir. 2010)).
19 Defendant also claims that the FCC has “exclusive jurisdiction” over approval of ownership of its
20 licenses, which require disclosures “as to the ownership of the entity and control over such entity.”
21 *Id.* at 9. Defendant argues Plaintiff’s claims are preempted because he seeks to define the ownership
22 interest in the licenses outside of the FCC procedures. *Id.* Regarding a substantial question of
23 federal law, Defendant argues that seeking to transfer ownership of FCC licenses, and claiming a
24 majority interest in the LLCs which bid on the licenses, are substantial federal questions. *Id.* at 11-12
(citing *Am. Bird Conservancy v. FCC*, 545 F.3d 1190 (9th Cir. 2008)).³

25 In his reply, Plaintiff states that he does not “challenge the FCC’s grant of the licenses to the
26 LLCs or seek to transfer ownership of the licenses.” Plaintiff’s Reply in Support of Motion to
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28 ³ Defendant also argues that because at least one of the LLCs is a “maritime service company”
holding maritime licenses, this action should be governed by federal maritime law.

1 Remand (“Reply”), 4. Plaintiff further states that “[t]o the extent that the arbitration claim refers
2 imprecisely to transferring the licenses themselves, rather than establishing the ownership of the
3 LLCs to reflect Mr. Jones’s investments, its language can readily be amended as the arbitration
4 claim has not advanced beyond preliminary stages.” *Id.* at 4 n.1. Plaintiff also argues, *inter alia*,
5 that there is no preemption, complete or otherwise, because such preemption is not provided in the
6 FCC statute cited by Defendant and because Plaintiff’s relief does not include transferring ownership
7 of FCC licenses. Rather, Plaintiff seeks money damages from proceeds of sale of spectrum, and he
8 seeks to adjust his ownership interest in the LLCs in a manner commensurate with his investment.
9 *Id.* at 7.

10 **III. ANALYSIS**

11 **A. Legal Standard Governing Removal**

12 “Except as otherwise expressly provided by Act of Congress, any civil action brought in a
13 State court of which the district courts of the United States have original jurisdiction, may be
14 removed by the defendant or the defendants, to the district court of the United States for the district
15 and division embracing the place where such action is pending.” 28 U.S.C. § 1441(a). Original
16 jurisdiction may be based on diversity or the existence of a federal question, as set forth in 28 U.S.C.
17 §§ 1331 and 1332. Subject matter jurisdiction under 28 U.S.C. § 1332(a)(1), based on diversity,
18 requires complete diversity of citizenship and an amount in controversy in excess of \$75,000.
19 Subject matter jurisdiction under 28 U.S.C. § 1331, based on the existence of a federal question,
20 requires a civil action to arise under the constitution, laws, or treaties of the United States. “If at any
21 time before final judgment, it appears that the district court lacks subject matter jurisdiction, the case
22 shall be remanded.” 28 U.S.C. § 1447(c).

23 The Ninth Circuit “strictly construe[s] the removal statute against removal jurisdiction.”
24 *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992) (citations omitted). Thus, “[f]ederal
25 jurisdiction must be rejected if there is any doubt as to the right of removal in the first instance.” *Id.*
26 (citation omitted). “The ‘strong presumption’ against removal jurisdiction means that the defendant
27 always has the burden of establishing that removal is proper.” *Id.*

1 Removal pursuant to 28 U.S.C. § 1441 is governed by the “well-pleaded complaint rule,”
2 which provides that federal jurisdiction exists only when a federal question is presented on the face
3 of the plaintiff’s properly pleaded complaint. *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987).
4 This rule makes the plaintiff the master of its claim in that the plaintiff may avoid federal jurisdiction
5 by exclusive reliance on state law. *Id.* Further, “it is now settled law that a case may not be
6 removed to federal court on the basis of a federal defense, including the defense of pre-emption,
7 even if the defense is anticipated in the plaintiff’s complaint, and even if both parties concede that the
8 federal defense is the only question truly at issue.” *Id.*

9 There is, however, a corollary to the well-pleaded complaint rule, known as the “artful
10 pleading doctrine.” *See Lippitt v. Raymond James Fin. Servs., Inc.*, 340 F.3d 1033, 1041 (9th Cir.
11 2003). The doctrine provides that “[a]lthough the plaintiff is master of his own pleadings, he may
12 not avoid federal jurisdiction by omitting from the complaint allegations of federal law that are
13 essential to the establishment of his claim.” *Hansen v. Blue Cross of Cal.*, 891 F.2d 1384, 1389 (9th
14 Cir. 1989) (quoting *Paige v. Henry J. Kaiser Co.*, 826 F.2d 857, 860 (9th Cir. 1987)). “Under the
15 artful pleading doctrine, ‘a plaintiff may not defeat removal by omitting to plead necessary federal
16 questions in a complaint.’” *Lippitt*, 340 F.3d at 1041 (quoting *Franchise Tax Bd. of the State of Cal.*
17 *v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 22 (1983)). The doctrine allows courts to “delve
18 beyond the face of the state court complaint and find federal question jurisdiction” by
19 “recharacteriz[ing] a plaintiff’s state-law claim as a federal claim.” *Precision Pay Phones v. Qwest*
20 *Comm’n’s Corp.*, 210 F. Supp. 2d 1106, 1112–13 (N.D. Cal. 2002) (Chen, J.). However, the
21 doctrine is to be invoked “only in exceptional circumstances as it raises difficult issues of state and
22 federal relationships and often yields unsatisfactory results.” *Salveson v. W. States Bankcard Ass’n*,
23 731 F.2d 1423, 1427 (9th Cir. 1984). Courts have used the artful pleading doctrine in: 1) complete
24 preemption cases, and 2) substantial federal question cases. *See Lippitt*, 340 F.3d at 1041.

25 **B. Whether Removal was Timely**

26 **1. Background Law**

27 The time periods for removal of a state court action to federal court are set forth in 28 U.S.C.
28 § 1446(b), which provides as follows:

1 The notice of removal of a civil action or proceeding shall be filed within thirty days after the
2 receipt by the defendant, through service or otherwise, of a copy of the initial pleading
3 setting forth the claim for relief upon which such action or proceeding is based, or within
4 thirty days after the service of summons upon the defendant if such initial pleading has then
5 been filed in court and is not required to be served on the defendant, whichever period is
6 shorter.

7 If the case stated by the initial pleading is not removable, a notice of removal may be filed
8 within thirty days after receipt by the defendant, through service or otherwise, of a copy of an
9 amended pleading, motion, order or other paper from which it may first be ascertained that
10 the case is one which is or has become removable, except that a case may not be removed on
11 the basis of jurisdiction conferred by section 1332 of this title more than 1 year after
12 commencement of the action.

13 28 U.S.C. § 1446(b). In other words, there are “two thirty-day windows during which a case may be
14 removed—during the first thirty days after the defendant receives the initial pleading [hereinafter,
15 “the first thirty-day window”] or during the first thirty days after the defendant receives a paper
16 ‘from which it may first be ascertained that the case is one which is or has become removable’ if ‘the
17 case stated by the initial pleading is not removable [hereinafter, “the second thirty-day window].”
18 *Harris v. Bankers Life & Cas. Co.*, 425 F.3d 689, 692 (9th Cir. 2005) (quoting 28 U.S.C. § 1446(b)).

19 **2. Application of Law to Facts**

20 The parties dispute whether the Demand for Arbitration attached to Plaintiff’s CMC
21 Statement revealed new information, not present in the Complaint, from which it may first be
22 ascertained that the case is one which is or has become removable. The Court finds that the Demand
23 for Arbitration revealed for the first time that Plaintiff sought particular remedies that, according to
24 Defendant, made the case removable; namely, Plaintiff’s request to seek a proprietary transfer of the
25 FCC licenses and a declaration of his ownership interest in the LLCs.

26 Although Plaintiff clarified in his Reply that he is not now seeking transfer of the FCC
27 licenses, the Demand for Arbitration plainly states that such a remedy was sought by Plaintiff at the
28 time. Additionally, the Demand for Arbitration also seeks declaratory relief pertaining to Plaintiff’s
ownership interest in the LLCs. This was also not sought in the Complaint. Although the Complaint
alleges that Plaintiff’s current ownership interest in the LLCs is not accurate, and that he has been

1 damaged by Defendant's conduct in reducing his ownership interest, the Complaint seeks only
2 money damages in connection with these allegations. Defendant, however, bases removal, in part,
3 on Plaintiff's attempt to adjust the ownership interest in the LLCs, which Defendant was unaware of
4 until he received the CMC Statement. Removal is not based on his claim for money damages. Thus,
5 because Defendant removed within the second thirty-day window following receipt of the CMC
6 Statement, removal was not procedurally defective.

7 **C. Whether Federal Subject Matter Jurisdiction Exists**

8 The parties here are not of diverse citizenship, and the face of Plaintiff's Complaint raises
9 only state law claims. Thus, the only plausible basis for removal is jurisdiction based on complete
10 preemption or the presence of a substantial federal question. The Court addresses both possible
11 bases in turn.

12 The Court, however, will not address Defendant's arguments regarding federal subject matter
13 jurisdiction to the extent they are based on Plaintiff's earlier request to have Defendant's FCC
14 licenses transferred to Plaintiff. Even if the Court would have had jurisdiction over Plaintiff's claims
15 that sought such relief, Plaintiff has clearly dropped his pursuit of these claims, and they are
16 therefore no longer a part of this case. *See* Reply at 4 n.1.

17 **1. Complete Preemption**

18 **a. Background Law**

19 The complete preemption doctrine applies where "the pre-emptive force of a statute is so
20 'extraordinary' that it 'converts an ordinary state common-law complaint into one stating a federal
21 claim for purposes of the well-pleaded complaint rule.'" *Caterpillar*, 482 U.S. at 393 (quoting
22 *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, 65 (1987)); *see Franchise Tax Bd.*, 463 U.S. at 22 ("[I]f
23 a federal cause of action completely pre-empts a state cause of action any complaint that comes
24 within the scope of the federal cause of action necessarily 'arises under' federal law."); *see also*
25 *Fayard v. Ne. Vehicle Servs., LLC*, 533 F.3d 42, 45 (1st Cir. 2008) ("Complete preemption is a
26 short-hand for the doctrine that in certain matters Congress so strongly intended an exclusive federal
27 cause of action that what a plaintiff calls a state law claim is to be recharacterized as a federal
28 claim.") (emphasis original).

1 The Supreme Court has applied the doctrine in only three contexts: labor contracts under the
2 Labor Management Relations Act, 1947 (“LMRA”), 29 U.S.C. § 185, *Avco Corp. v. Aero Lodge No.*
3 *735*, 390 U.S. 557 (1968); claims for benefits from plans regulated by ERISA, *Metro. Life Ins. Co. v.*
4 *Taylor*, 481 U.S. 58, 67 (1987); and usury claims against federally chartered banks, *Beneficial Nat’l*
5 *Bank v. Anderson*, 539 U.S. 1 (2003). In *Beneficial*, the Supreme Court clarified when removal was
6 proper under complete preemption:

7
8 In the two categories of cases where this Court has found complete preemption-certain
9 causes of action under LMRA and ERISA-*the federal statutes at issue provided the exclusive*
10 *cause of action for the claim asserted and also set forth procedures and remedies governing*
11 *that cause of action.*

Id. at 8 (emphasis added); *see also Lippitt*, 340 F.3d at 1042 (quoting same).

12 **b. Application of Law to Facts**

13 Defendant argues that 47 U.S.C. § 332(c)(3)(A) completely preempts Plaintiff’s state law
14 fraud claims. The statute reads in relevant part:

15 (3) State Preemption

16
17 (A) Notwithstanding sections 152(b) and 221(b) of this title, no State or local government
18 shall have any authority to regulate the entry of or the rates charged by any commercial
19 mobile service or any private mobile service, except that this paragraph shall not prohibit a
20 State from regulating the other terms and conditions of commercial mobile services. Nothing
21 in this subparagraph shall exempt providers of commercial mobile services (where such
22 services are a substitute for land line telephone exchange service for a substantial portion of
the communications within such State) from requirements imposed by a State commission on
all providers of telecommunications services necessary to ensure the universal availability of
telecommunications service at affordable rates.

23 47 U.S.C. § 332(c)(3)(A). This statute has two prongs: a “rate” prong and a “market entry” prong.
24 *See Telesaurus VPC, LLC v. Power*, 623 F.3d 998 (9th Cir. 2010). Defendant argues that Plaintiff’s
25 claims are completely preempted under the “market entry” prong because he seeks market entry “by
26 getting an assignment of the licenses (and in essence challenging the award of the licenses).”
27 Opposition at 9 (citing *Bastien v. AT&T Wireless Services, Inc.*, 205 F.3d 983 (7th Cir. 2000)
28 (finding complete preemption where plaintiff’s contract claims challenged market entry and rates)).

1 Plaintiff's claims do not fall under the "market entry" prong. In the context of a state tort
2 action, the Ninth Circuit defined the "market entry" prong as follows:

3
4 Just as § 332(c)(3)(A) preempts claims that require a court to substitute its judgment for the
5 agency's with respect to the reasonableness of a particular rate, § 332(c)(3)(A) also preempts
6 claims that require a court to substitute its judgment for the agency's with regard to a market-
7 entry decision. In other words, § 332(c)(3)(A) preempts a state tort action that would require
8 a court to engage in an assessment or reexamination of the FCC's regulatory determination
9 regarding a mobile service's entry into the market.

8 *Telesaurus*, 623 F.3d at 1008. There, the court found that plaintiff's tort claim essentially asked the
9 court to find that defendant's use of spectrum was "wrongful" or "unlawful" under its FCC license.
10 *Id.* at 1010. The court held that such a claim would effectively require a reexamination of the FCC's
11 exclusive authority to control licensing decisions, and therefore the claim fell under the "market
12 entry" prong. *Id.*

13 Defendant has cited no authority for the proposition that Plaintiff's potential change in
14 ownership interest in the LLCs comes within § 332(c)(3)(A)'s "market entry" prong. His fraud
15 claims do not require an assessment or reexamination of an FCC regulatory determination, including
16 the LLCs' original award of the licenses. To be sure, the FCC does regulate the transfer of FCC
17 licenses and the transfer of control of the corporations holding those licenses, pursuant to 47 U.S.C.
18 § 310(d). That subsection reads as follows:

19
20 No construction permit or station license, or any rights thereunder, shall be transferred,
21 assigned, or disposed of in any manner, *voluntarily or involuntarily*, directly or indirectly, *or*
22 *by transfer of control of any corporation holding such permit or license*, to any person *except*
23 *upon application to the Commission* and upon finding by the Commission that the public
24 interest, convenience, and necessity will be served thereby. Any such application shall be
25 disposed of as if the proposed transferee or assignee were making application under section
26 308 of this title for the permit or license in question; but in acting thereon the Commission
27 may not consider whether the public interest, convenience, and necessity might be served by
28 the transfer, assignment, or disposal of the permit or license to a person other than the
proposed transferee or assignee.

26 47 U.S.C. § 310(d) (emphasis added). But Plaintiff does not challenge an application to the
27 Commission to change ownership or control of FCC licenses. Rather, Plaintiff's fraud claims allege
28

1 that Defendant has misrepresented Plaintiff's interest in the LLCs and has wrongfully induced
2 Plaintiff into investing in the LLCs.

3 That Plaintiff's requested relief includes a declaration of his interest in the LLCs does not
4 require a court to substitute its judgment for the agency's. As an initial matter, it is not clear that
5 Plaintiff claims an interest in the LLCs such that he would be the controlling owner of the companies
6 if his requested relief is granted. Nor is it apparent that Plaintiff otherwise seeks transfer of control
7 of the LLCs. Because section 310(d) plainly states that an application need only be filed to the FCC
8 when transferring control of any corporation holding FCC licenses, it therefore may be entirely
9 unnecessary for the FCC to play any role whatsoever in this dispute. However, even if such a
10 transfer of control would result from Plaintiff's requested relief, that transfer would be wholly
11 contingent on FCC approval—a familiar process recognized by the FCC. The FCC has approved
12 courts issuing remedial orders in private disputes that would only become effective upon a
13 successful involuntary transfer application under section 310(d). *See In re: Arecibo Radio Corp.*,
14 101 F.C.C. 2d 545 (1985) (holding that it was not a violation of FCC policy for a court to order
15 licensees to petition the FCC for a transfer of licenses or, if they would not, have the Marshal apply
16 for the transfer in the licensees' names). The FCC has consistently stated in the section 310(d)
17 context that

18 [t]he Commission's long-standing policy is to accommodate the actions of state courts,
19 thereby avoiding conflicts between state and federal authority, unless a public interest
20 determination under the Act would compel a different result. Indeed, the U.S. Supreme Court
21 has stated that "the principle of fair accommodation between State and Federal authority . . .
22 should be observed" if the state's laws "can be effectively respected while at the same time
23 reasonable opportunity is afforded for the protection of that public interest" which underlies
24 licensing decisions. The Commission thus defers to judicial determinations in many areas,
25 including bankruptcy matters, private disputes, and the interpretation and enforcement of
26 contracts for the sale of a broadcast station. The Commission, however, retains exclusive
27 authority to license broadcast stations, and when a state court's decision is contrary to
28 Commission policy, the Commission is neither bound by the state court order nor need take
action to allow the order to be carried out.

In re: Rivera Radio Co., Inc., 2012 WL 1995950 (F.C.C. Jun. 4, 2012) (quoting *Radio Station WOW*
v. Johnson, 326 U.S. 120, 132 (1945); citing *In re: Arecibo Radio Corp.*, 101 F.C.C. at 549); *see*

1 *also In re: Gresham Commc'ns, Inc.*, 2011 WL 3792847, at *4 (F.C.C. Aug. 25, 2011); *Phoenix*
2 *Leasing Inc. v. Sure Broad., Inc.*, 89 F.3d 846, at *2 (9th Cir. 1996) (approving, in an unpublished
3 decision, the district court's order directing the receiver to apply for an involuntary transfer of
4 licenses with the FCC following resolution of a private contract dispute).

5 Because the FCC procedures and requirements laid out in section 310(d) are separate and
6 subsequent to court proceedings that may result in the involuntary transfer of control of the LLCs,
7 determination of Plaintiff's fraud claims do not constitute "market entry." *See Telesaurus*, 623 F.3d
8 at 1008.

9 **2. Substantial Federal Question**

10 **a. Background Law**

11 In addition to complete preemption, the artful pleading doctrine allows federal courts to
12 retain jurisdiction over state law claims that implicate a substantial federal question. *Grable & Sons*
13 *Metal Prods. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 312 (2005). "A state cause of action invokes
14 federal question jurisdiction only if it 'necessarily raise[s] a stated federal issue, actually disputed
15 and substantial, which a federal forum may entertain without disturbing any congressionally
16 approved balance of federal and state judicial responsibilities.'" *Nevada v. Bank of Am. Corp.*, 672
17 F.3d 661, 674 (9th Cir. 2012) (quoting *Grable & Sons*, 545 U.S. at 314). "The doctrine captures the
18 commonsense notion that a federal court ought to be able to hear claims recognized under state law
19 that nonetheless turn on substantial questions of federal law, and thus justify resort to the experience,
20 solicitude, and hope of uniformity that a federal forum offers on federal issues." *Grable & Sons*, 545
21 U.S. at 312. "This type of federal question jurisdiction applies to a 'special and small category' of
22 cases." *Nevada*, 672 F.3d at 674 (quoting *Empire Healthchoice Assurance v. McVeigh*, 547 U.S.
23 677, 699 (2006)).

24 **b. Application of Law to Facts**

25 Plaintiff's fraud claims do not "necessarily raise a . . . substantial" issue of federal law.
26 *Grable & Sons*, 545 U.S. at 314. Defendant's reliance on *American Bird Conservancy v. FCC*,
27 545 F.3d 1190 (9th Cir. 2008) is premised on the mistaken belief that Plaintiff's claims challenge the
28 granting of the licenses. Because Plaintiff's claims are not artfully pled so as to avoid challenging

1 FCC orders through the proper administrative procedures, the Court finds that the holding of
2 *American Bird* does not apply.

3 Although the regulation of ownership and control of FCC licenses and the companies that
4 hold them is an important federal task, the Court does not find that Plaintiff's fraud claims raise a
5 substantial question of federal law conferring federal subject matter jurisdiction. As discussed
6 above, ultimate authority to decide if ownership or control will change remains with the FCC. Thus,
7 the resolution of this question, if it needs to be decided, will comport with the "congressionally
8 approved balance of federal and state judicial responsibilities." *Grable & Sons*, 545 U.S. at 314.

9 Faced with a similar situation, the court in *D.B. Zwirn Special Opportunities Fund, L.P. v.*
10 *Tama Broad., Inc.*, 550 F. Supp. 2d 481 (S.D.N.Y. 2008), remanded a case where the plaintiff sought
11 defendant's assets, which included companies holding FCC licenses, as damages for defendant's
12 breach of contract. *Id.* at 488. The court found that federal subject matter was not present since the
13 core of plaintiff's claims was comprised solely of state law questions; the need to seek FCC approval
14 of Plaintiff's remedies was not enough to avoid remand. *Id.* ("Although determining the appropriate
15 relief to which plaintiff is entitled—should plaintiff succeed in its action—may require some
16 interpretation of the Communications Act and will involve seeking the approval of the FCC, it is still
17 the contracts, and not federal law, that the plaintiff seeks to have enforced.") (internal quotations
18 omitted). The same is true here. Plaintiff's claims do not ask the state court to enforce federal law
19 and instead raise state law issues of liability. The final decision on any transfer of control of the
20 LLCs is left to the FCC. Accordingly, no substantial federal question exists upon which removal
21 may be based.⁴

22 **D. Whether Fees and Costs Should be Awarded**

23 Pursuant to 28 U.S.C. § 1447(c), "[a]n order remanding the case may require payment of just
24 costs and any actual expenses, including attorney fees, incurred as a result of the removal." 28
25 U.S.C. § 1447(c). The Supreme Court has held that, "[a]bsent unusual circumstances, courts may

26 ⁴ Defendant's argument that federal jurisdiction exists because the FCC licenses owned by at
27 least one of the LLCs are commercial maritime licenses, and therefore governed by federal maritime
28 law, is rejected by the Court. *See* Opposition at 12. Defendant's argument is conclusory and not
supported by any relevant authority. Moreover, the Court fails to see how Plaintiff's claims would
fall under federal maritime jurisdiction.

1 award attorney's fees under § 1447(c) only where the removing party lacked an objectively
2 reasonable basis for seeking removal. Conversely, when an objectively reasonable basis exists, fees
3 should be denied." *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 141 (2005). The *Martin* Court
4 explained that "district courts retain discretion to consider whether unusual circumstances warrant a
5 departure from the rule in a given case." *Id.* In *Lussier v. Dollar Tree Stores, Inc.*, the Ninth Circuit
6 cautioned that "removal is not objectively unreasonable solely because the removing party's
7 arguments lack merit, or else attorney's fees would always be awarded whenever remand is granted."
8 518 F.3d 1062, 1065 (9th Cir. 2008). Rather, the objective reasonableness of the removal depends
9 on the clarity of the applicable law and whether such law "clearly foreclosed" the defendant's
10 arguments for removal. *Id.* at 1066–67.

11 Plaintiff requests fees and costs incurred as the result of removal. The Court DENIES
12 Plaintiff's request in light of the complexity of the FCC and complete preemption issues.

13 **E. Whether the Court Should Strike Plaintiff's Reply as Untimely**

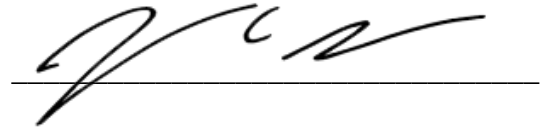
14 Defendant moves to strike Plaintiff's Reply on the basis that the pleading was filed two days
15 late and therefore untimely. Apparently, the parties agreed to a two-day extension of the filing date
16 for the Reply, but Plaintiff did not present a stipulation reflecting the change in briefing schedule to
17 the Court. Because Defendant does not claim he was prejudiced in any way by the late filing to
18 which he agreed and because the Court finds the Reply pertinent to the outcome of the Motion to
19 Remand, Defendant's Motion to Strike is DENIED.

1 **IV. CONCLUSION**

2 For the reasons stated, the Court GRANTS Plaintiff's Motion for Remand, and DENIES
3 Defendant's Motion to Strike. Accordingly, the Court REMANDS the case to state court.

4 IT IS SO ORDERED.

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6 Dated: June 19, 2012

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10 JOSEPH C. SPERO

11 United States Magistrate Judge
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