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IN THE UNITED STATES DISTRICT COURT

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FOR THE DISTRICT OF ARIZONA

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TOD SANTEE and
SHERRY SANTEE, husband and wife,)

No. CV-09-207-TUC-CKJ

10

Plaintiffs,)

ORDER

11

vs.)

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MESA AIRLINES, INC., a corporation or)
other business entity; AMERICA WEST)
14 AIRLINES, INC., a corporation or other)
business entity; XYZ CORPORATIONS)
15 1-6, corporations or other business entities;)
JOHN DOE 1-3 and JANE DOE 1-3,)
16 individually and as husband and wife,)

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Defendants.)

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On July 13, 2009, Magistrate Judge Thomas D. Ferraro issued a Report and Recommendation [Doc. #27] in which he recommended that Plaintiffs' Motion for Remand [Doc. #19] be denied. On July 30, 2009, Plaintiffs Tod and Sherry Santee filed Objections to Report and Recommendation on Motion for Remand [Doc. #28]. On August 4, 2009, Defendants filed their Response to Plaintiffs' Objections to Magistrate Ferraro's Report and Recommendation [Doc. #29]. Plaintiffs' subsequently filed their Reply to Response to Objections to Report and Recommendation [Doc. #32].

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1 *Magistrate Judge’s Recitation of the Procedural and Factual History*

2 No objections having been made to the magistrate judge’s recitation of the procedural
3 and factual history, the Court adopts those recitations.

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5 *Analysis*

6 Federal courts are courts of limited jurisdiction. U.S. Const. art. III; *Kokkonen v.*
7 *Guardian Life Ins. Co. of America*, 511 U.S. 375, 377, 114 S.Ct. 1673, 1675, 128 L.Ed.2d
8 391 (1994). As such, there exists a “‘strong presumption’ against removal jurisdiction
9 [which] means that the defendant always has the burden of establishing that removal is
10 proper.” *Gaus v. Miles, Inc.* 980 F.2d 564, 566 (9th Cir. 1992) (citations omitted). The
11 removal statute is to be strictly construed against removal jurisdiction. *Id.* (citations
12 omitted). As such, “[f]ederal jurisdiction must be rejected if there is any doubt as to the right
13 of removal in the first instance.” *Id.*

14 As an initial matter, this Court must consider whether it has jurisdiction to hear
15 Plaintiffs’ claims. “The jurisdiction of federal courts is defined and limited by Article III of
16 the Constitution.” *Flast v. Cohen*, 392 U.S. 83, 94, 88 S.Ct. 1942, 1949, 20 L.Ed. 947
17 (1968). Additionally, jurisdiction may be conferred upon the federal courts by statute.
18 *Kokkonen*, 511 U.S. at 377, 114 S.Ct. at 1675. The United States Supreme Court also
19 recognizes several doctrines which define the constitutional and prudential limitations on the
20 federal courts’ power to hear cases. *Allen v. Wright*, 468 U.S. 737, 750, 104 S.Ct. 3315,
21 3324, 82 L.Ed.2d 556 (1984). Prior to invoking the power of the federal court, it must be
22 determined “whether the litigant is entitled to have the court decide the merits of the dispute
23 or of particular issues.” *Warth v. Seldin*, 422 U.S. 490, 498, 95 S.Ct. 2197, 2205, 45 L.Ed.2d
24 343 (1975).

25 It is well established that “parties cannot . . . create federal court subject matter
26 jurisdiction by stipulation.” *Holman v. Laulo-Rowe Agency*, 994 F.2d 666, 668 n.1 (9th Cir.
27 1993) (citing *Neirbo Company v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165, 60 S.Ct. 153,
28 84 L.Ed. 167 (1939)). Therefore, an agreement between the parties to submit to federal

1 jurisdiction is insufficient to confer the same upon this Court. Section 1441, 28 U.S.C.,
2 delineates which actions are removable. “Except as otherwise expressly provided by Act of
3 Congress, any civil action brought in a State court of which the district courts of the United
4 States have original jurisdiction, may be removed by the defendant or the defendants to the
5 district court of the United States for the district and division embracing the place where such
6 action is pending.” 28 U.S.C. § 1441(a). As such, federal jurisdiction exists only where
7 there is either diversity of citizenship or federal-question jurisdiction. *Caterpillar, Inc. v.*
8 *Williams*, 482 U.S. 386, 392, 107 S.Ct. 2425, 2429, 96 L.Ed.2d 318 (1987); 28 U.S.C. §
9 1441(a).

10 “The presence or absence of federal-question jurisdiction is governed by the ‘well-
11 pleaded complaint rule,’ which provides that federal jurisdiction exists only when a federal
12 question is presented on the face of the plaintiff’s properly pleaded complaint.” *Caterpillar,*
13 *Inc.*, 482 U.S. at 392, 107 S.Ct. at 2429 (internal citations omitted). A corollary to the well-
14 pleaded complaint rule is the doctrine of complete preemption. *Id.* at 393, 107 S.Ct. at 2430.
15 While removal based upon the defense of federal preemption is impermissible, if “the pre-
16 emptive force of a statute is so ‘extraordinary’ that it ‘converts an ordinary state common-law
17 complaint into one stating a federal claim for purposed of the well-pleaded complaint rule”
18 removal is proper. *Id.*

19 As noted in Magistrate Judge Ferraro’s Report and Recommendation, complete pre-
20 emption is very rare. “The test [for complete preemption] is whether Congress clearly
21 manifested an intent to convert state law claims into federal-question claims.” *Wayne v.*
22 *DHL Worldwide Express*, 294 F.3d 1179, 1184 (9th Cir. 2002) (quoting *Holman v. Laulo-*
23 *Rowe Agency*, 994 F.2d 666, 668 (9th Cir. 1993)). In *Wayne*, the Ninth Circuit Court of
24 Appeals considered whether the Airline Deregulation Act of 1978 (ADA) provides a basis
25 for federal jurisdiction under the complete preemption doctrine and unequivocally held that
26 it does not. *Id.* at 1184. Thus, this Court must look to the face of Plaintiffs’ well-pleaded
27 complaint to determine whether or not federal-question jurisdiction exists.

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1 Plaintiffs' Complaint alleges negligent handling of Plaintiff Tod Santee's custom
2 wheelchair and negligence by Defendants in their alleged failure to timely replace the custom
3 wheelchair with another custom wheelchair resulting in physical injury to Plaintiff Tod
4 Santee. Compl. at 3. Plaintiffs' Complaint further alleges lost wage, emotional distress and
5 loss of consortium claims. Compl. at 3-4. The Ninth Circuit has expressly held that the word
6 "service" in the ADA's preemption clause "was not intended to include an airline's provision
7 of in-flight beverages, personal assistance to passengers, *the handling of luggage*, and similar
8 amenities." *Charas v. Trans World Airlines, Inc.*, 160 F.3d 1259, 1261 (9th Cir. 1998)
9 (emphasis added). The *Charas* court concluded "that when Congress enacted *federal*
10 economic deregulation of the airlines, it intended to insulate the industry from possible *state*
11 economic regulation as well. . . . It did not intend to immunize the airlines from liability for
12 personal injuries caused by their tortious conduct." *Id.* at 1266 (emphasis in original). As
13 such, the face of Plaintiffs' well-pleaded complaint fails to assert a federal cause of action.

14 In their Objections to the R& R, Plaintiffs assert that their June 5, 2008
15 correspondence [Doc. #5, Exh. 2] and Defendants' June 17, 2008 response [Doc. #19-1, Exh.
16 2] constitute adequate grounds for demonstrating a federal claim. As Magistrate Judge
17 Ferraro recognized, whether or not Defendants' standard of care arises from a federal
18 standard does not vitiate a state law cause of action. *See R & R* at 6; *Merrell Dow*
19 *Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804, 106 S.Ct. 3229, 92 L.Ed.2d 650 (1986).
20 The *Merrell Dow* Court discerned that "the presence of the federal issue as an element of the
21 state tort is *not* the kind of adjudication for which jurisdiction would serve congressional
22 purposes and the federal system." *Merrell Dow*, 478 U.S. at 814, 106 S.Ct. at 3235
23 (emphasis added). Furthermore, Defendants' June 17 response reiterates their position of
24 defensive preemption, which does not present grounds for removal.

25 Plaintiffs further assert that their Request for Admissions "made it unequivocally clear
26 that Plaintiffs were *asserting* a claim arising out of federal law." Obj. to R & R at 4.
27 Contrary to Plaintiffs' claims, their Request for Admissions seek Defendants' acquiescence
28 that they breached a federal standard of care, the claim asserted remains a state law

1 negligence cause of action. Plaintiffs also rely on their February 6, 2008 Response to
2 Defendants' Motion for Partial Summary Judgment Re: Negligent Claim Handling [Doc. #9-
3 3] to demonstrate the presence of a federal cause of action. This reliance is misplaced. The
4 Department of Transportation [DOT] regulations regarding an airlines handling of
5 wheelchairs as baggage may represent the standard of care to which Defendants were bound
6 to perform. As noted previously, this is insufficient to sustain federal-question jurisdiction.
7 Alternatively, the regulations may be relevant in a contractual dispute; however, the United
8 States Supreme Court has stated that it is not plausible "that Congress meant to channel into
9 federal courts the business of resolving, pursuant to judicially fashioned federal common law,
10 the range of contract claims relating to airline rates, routes, or services. The ADA contains
11 no hint of such a role for the federal courts." *American Airlines, Inc. v. Wolens*, 513 U.S.
12 219, 232, 115 S.Ct. 817, 825, 130 L.Ed.2d 715 (1995). Accordingly, "The ADA's
13 preemption clause, § 1305(a)(1), read together with the FAA's savings clause stops States
14 from imposing their own substantive standards with respect to rates, routes, or services, but
15 not from affording relief to a party who claims and proves that an airline dishonored a term
16 the airline itself stipulated." *Id.* at 232-33, 115 S.Ct. at 826. The Court further recognized
17 that it is improper to "foist on the DOT work Congress has neither instructed nor funded the
18 Department to do." *Id.* at 234, 115 S.Ct. at 826.¹

19 Plaintiffs' well-pleaded complaint does not assert an alleged federal cause of action.
20 Subsequent documents do not assert any federal cause of action either. Defendants have
21 clearly asserted preemption as a defense, but this is not grounds for removal jurisdiction of
22 this Court. Moreover, because the parties cannot stipulate to federal jurisdiction, the Court
23 finds that it is without federal-question jurisdiction and this case shall be remanded.

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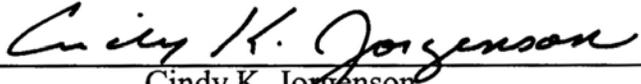
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27 ¹The Ninth Circuit recognizes ADA preemption regarding limited liability provisions
28 of common carriers; however, heretofore Plaintiffs have not alleged a breach of contract
claim. This issue has only arisen in Defendants' preemption defense.

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Accordingly, IT IS HEREBY ORDERED:

1. The Report and Recommendation [Doc. #27] is ADOPTED in part and REJECTED in part.
1. This case is REMANDED to Pima County Superior Court (Cause # CV2007-3583);
2. The Clerk of the Court shall mail a certified copy of this Order to the Clerk of the Pima County Superior Court; and
3. The Clerk of the Court shall then close its file in this matter.

DATED this 4th day of February, 2010.



Cindy K. Jorgenson
United States District Judge