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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

CALIFORNIA SHOCK TRAUMA
AIR RESCUE,

No. 2:09-cv-00090-MCE-JFM

Plaintiff,

v.

MEMORANDUM AND ORDER

STATE COMPENSATION INSURANCE
FUND, et al.,

Defendants.

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Plaintiff, California Shock Trauma Air Rescue ("Plaintiff" or "CALSTAR"), initiated this action against numerous Defendants seeking to recover compensation for services rendered. Presently before the Court are three Motions to Dismiss (Docket Nos. 107, 112, and 182) and a Motion to Consolidate (Docket No. 111). Plaintiff also filed a Motion for Summary Judgment (Docket No. 184), which is set for hearing on August 27, 2009.

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1 Additionally, California Association of Air Medical Services, et
2 al. ("Amici"), subsequently filed a Motion for Leave to File
3 Brief of *Amicus Curiae* (Docket No. 245) opposing dismissal of
4 this case.

5 For the following reasons, the Motion to Proceed as *Amicus*
6 *Curiae* is granted, the Motions to Dismiss for lack of subject
7 matter jurisdiction are granted, and all remaining Motions are
8 denied as moot.¹

9
10 **BACKGROUND²**

11
12 Plaintiff is an air ambulance provider rendering services
13 within and between California and Nevada. Plaintiff is certified
14 by the Federal Aviation Administration to operate as an air
15 carrier and to conduct common carriage operations. Defendants
16 are: 1) insurance companies providing workers' compensation
17 insurance within the State of California; and 2) employers who
18 are self-insured for workers' compensation insurance having
19 obtained a certificate of consent to self-insure against such
20 claims.

21 Plaintiff has and continues to provide, on request, air
22 ambulance services to employees of the Employer Defendants and to
23 employees of the employers insured by the Insurer Defendants.

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26 ¹ Because oral argument will not be of material assistance,
the Court ordered this matter submitted on the briefing. E.D.
27 Cal. Local Rule 78-230(h).

28 ² The following facts are taken, for the most part verbatim,
from Plaintiff's First Amended Complaint ("FAC").

1 After providing relevant services, Plaintiff sends an invoice to
2 the appropriate Insurer Defendant or Employer Defendant.

3 In this case, Plaintiff alleges that the Defendants have
4 paid only a portion of those invoiced amounts. According to
5 Plaintiff, Defendants have refused to pay the outstanding
6 balances, claiming that Plaintiff is limited to recovering only
7 those amounts set forth in California's Official Medical Fee
8 Schedule for ambulance services ("OMFS"), California Code of
9 Regulations, title 8, section 9789.80.

10 Thus, Plaintiff filed the instant action seeking to recover
11 those outstanding balances. According to Plaintiff, Defendants
12 cannot rely on the OMFS fee limitations because that state law is
13 preempted by the Federal Aviation Act of 1958, as amended by the
14 Airline Deregulation Act, 49 U.S.C. § 41713(b)(1) ("FAA/ADA").
15 As such, Plaintiff has brought causes of action for:

16 1) Declaratory Relief as to whether that state law is preempted;
17 2) Quantum Meruit; 3) Unjust Enrichment; and 4) Open Book
18 Account.

19 Plaintiff asserts jurisdiction is proper under 28 U.S.C.
20 § 1331 because this action allegedly arises under the FAA/ADA.
21 Defendants disagree and have moved to dismiss for lack of subject
22 matter jurisdiction. Also pending before this Court are the
23 above-mentioned Motions to Consolidate, Plaintiff's Motion for
24 Summary Judgment, and a Motion for Leave to File Brief by
25 putative *Amici*, each of which is also disposed of pursuant to
26 this Memorandum and Order.

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1 **STANDARD**

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3 In moving to dismiss for lack of subject matter jurisdiction
4 pursuant to Rule 12 (b) (1), the challenging party may either make
5 a "facial attack" on the allegations of jurisdiction contained in
6 the complaint or can instead take issue with subject matter
7 jurisdiction on a factual basis ("factual attack"). Thornhill
8 Publishing Co. v. General Tel. & Elect. Corp., 594 F.2d 730, 733
9 (9th Cir. 1979); Mortensen v. First Fed. Sav. & Loan Ass'n, 549
10 F.2d 884, 891 (3d Cir. 1977). If the motion constitutes a facial
11 attack, the Court must consider the factual allegations of the
12 complaint to be true. Williamson v. Tucker, 645 F.2d 404, 412
13 (5th Cir. 1981); Mortensen, 549 F.2d at 891. If the motion
14 constitutes a factual attack, however, "no presumptive truthfulness
15 attaches to plaintiff's allegations, and the existence of disputed
16 material facts will not preclude the trial court from evaluating
17 for itself the merits of jurisdictional claims." Thornhill, 594
18 F.2d at 733 (quoting Mortensen, 549 F.2d at 891).

19

20 **ANALYSIS**

21

22 As a threshold matter, this Court grants the *Amici* Motion
23 for Leave to File Brief of *Amicus Curiae* (Docket No. 245).
24 Nevertheless, having reviewed all briefing submitted both in
25 support and in opposition of Defendants' instant Motions, the
26 Court now grants Defendants' Motions to Dismiss for lack of
27 subject matter jurisdiction as well. Accordingly, all remaining
28 Motions are denied as moot.

1 **1. Plaintiff's Federal Declaratory Relief Claim**

2
3 Plaintiff contends that, pursuant to 28 U.S.C. § 1331, this
4 Court has original jurisdiction over its first cause of action
5 for declaratory relief, and consequently, has supplemental
6 jurisdiction over the state law claims. This Court disagrees,
7 finds jurisdiction over Plaintiff's Declaratory Relief Claim
8 lacking, and, in turn, finds 28 U.S.C. § 1367 inapplicable.

9 "The district courts shall have original jurisdiction of all
10 civil actions arising under the Constitution, laws, or treaties
11 of the United States." 28 U.S.C. § 1331. "Even though state law
12 creates [Plaintiff's] causes of action, its case might still
13 'arise under' the laws of the United States if a well-pleaded
14 complaint established that its right to relief under state law
15 requires resolution of a substantial question of federal law in
16 dispute between the parties." Franchise Tax Bd. of the State of
17 Cal. v. Constr. Laborers Vacation Trust for S. Cal., 463 U.S. 1,
18 13 (1983). Plaintiff asserts that such is the case here.

19 However, while the facts of this case make for awkward
20 jurisdictional analysis, this Court disagrees. In a typical case
21 of this nature, in which one party is asserting preemption as a
22 basis of federal jurisdiction, a plaintiff claims that a
23 defendant violated state law and the defendant responds by
24 raising a preemption defense. In those cases, the plaintiff
25 typically requests a declaration more specific to the facts
26 relevant to its underlying claims. For example:

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1 Plaintiff's Complaint asserted that "[t]here was at the
2 time of the levies alleged above and continues to be an
3 actual controversy between the parties concerning their
4 respective legal rights and duties. The Board
5 [appellant] contends that defendants [CVLT] are
6 obligated and required by law to pay over to the Board
7 all amounts held ... in favor of the Board's delinquent
8 taxpayers. On the other hand, defendants contend that
9 section 514 of ERISA preempts state law and that the
10 trustees lack the power to honor the levies made upon
11 them by the State of California." Franchise Tax Board,
12 463 U.S. at 6, quoting App. 8-9.

13 Plaintiffs "invoked the Federal Declaratory Judgment
14 Act for a declaration that the contracts were still 'in
15 effect and binding upon the parties thereto.'" Skelly
16 Oil Co. v. Phillips Petroleum Co., 339 U.S. 667, 671
17 (1950).

18 It is well-established that the federal courts lack jurisdiction
19 over such claims.

20 Indeed, "a federal court does not have original jurisdiction
21 over a case in which the complaint presents a state-law cause of
22 action, but also asserts that federal law deprives the defendant
23 of a defense he may raise, or that a federal defense the
24 defendant may raise is not sufficient to defeat the claim."

25 Franchise Tax Bd., 463 U.S. at 10 (1983), citing Taylor v.
26 Anderson, 234 U.S. 74, 75-76 (1914); Louisville & Nashville R.
27 Co. v. Mottley, 211 U.S. 149 (1980); Tennessee v. Union &
28 Planters' Bank, 152 U.S. 454 (1894). "[A] right or immunity
created by the Constitution or laws of the United States must be
an element, and an essential one, of the plaintiff's cause of
action.'" Id., quoting Gully v. First Nat'l Bank, 299 U.S. 109,
112 (1936). Moreover, "if, but for the availability of the
declaratory judgment procedure, the federal claim would arise
only as a defense to a state created action, jurisdiction is
lacking.'"

1 Id. at 16, quoting 10A C. Wright, A. Miller & M. Kane, Federal
2 Practice and Procedure § 2767, at 744-745 (2d ed. 1983).

3 Thus, had Plaintiff gone the traditional route, seeking, for
4 example, a declaration that Defendants are required by law to pay
5 in full the amounts invoiced, then the instant jurisdictional
6 question would not appear to be so complicated. Rather, had
7 Plaintiff requested a declaration more specific to the instant
8 facts, Defendants would be expected to defend on the grounds that
9 the payments already made comport with the California OMFS, at
10 which time Plaintiff anticipates it would argue that the OMFS is
11 preempted.

12 At best, such a claim would seek resolution of a federal
13 question anticipated to be raised as a rebuttal to an expected
14 defense. Since it is well-established that the anticipation of a
15 defense is insufficient to establish federal question
16 jurisdiction, "even if the defense is anticipated in the
17 plaintiff's complaint, and even if both parties admit that the
18 defense is the only question truly at issue," Franchise Tax Bd.,
19 463 U.S. 14, Plaintiff's jurisdictional argument, which is even
20 more attenuated, must likewise fail. Id. at 10 (the assertion
21 that "federal law deprives the defendant of a defense he may
22 raise" is insufficient to invoke federal jurisdiction).

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1 Therefore, in light of the above analysis, and in an attempt
2 to couch its preemption claim in an offensive posture, Plaintiff
3 seeks instead a declaration that "California Labor Code Section
4 5307.1 and the Official Medical Fee Schedule for ambulance
5 services, California Code of Regulations, title 8, section
6 9789.70, are preempted by the provisions of the Federal Aviation
7 Act of 1958, as amended by the Airline Deregulation Act, 49
8 U.S.C. section 41713(b)(1)." FAC, 14:16-20. Accordingly, by way
9 of analogy, Plaintiff contends this Court has jurisdiction under
10 the slightly different rules of Shaw v. Delta Air Lines, Inc.,
11 463 U.S. 85 (1983), and its progeny.

12 In Shaw, the plaintiffs initiated three actions against
13 state agencies and officials, seeking declarations that various
14 state laws were preempted by ERISA. Id. at 92. The Supreme
15 Court determined its jurisdiction over those claims was proper,
16 stating, in part, "It is beyond dispute that federal courts have
17 jurisdiction over suits to enjoin state officials from
18 interfering with federal rights. A plaintiff who seeks
19 injunctive relief from state regulation, on the ground that such
20 regulation is pre-empted by a federal statute which, by virtue of
21 the Supremacy Clause of the Constitution, must prevail, thus
22 presents a federal question which the federal courts have
23 jurisdiction under 28 U.S.C. § 1331 to resolve. This Court, of
24 course, frequently has resolved pre-emption disputes in a similar
25 jurisdictional posture." Id. at 96 n.14.

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1 In that same note, the Shaw Court distinguished its
2 Franchise Tax Board decision, which was rendered that same day,
3 by pointing out that the Shaw plaintiffs sought a declaration
4 that state law was preempted, while the Franchise Tax Board
5 plaintiffs sought a declaration that state law was not preempted.
6 Id. Relying on the Shaw footnote, Plaintiff makes the analytical
7 leap to the conclusion that, since Plaintiff in this case seeks a
8 declaration that state law is preempted, this Court has
9 jurisdiction. The flaws in this argument are two-fold and inter-
10 related. First, Plaintiff's requested relief is improper when
11 directed at the instant Defendants. Second, because Plaintiff
12 has asserted the instant declaratory relief claim against
13 improper Defendants, its instant claim does not present a
14 justiciable case or controversy.

15 Plaintiff is quite correct that the Shaw Court exercised
16 jurisdiction over an action seeking a declaration that state law
17 was preempted. However, jurisdiction in Shaw and its progeny was
18 premised on the Court's power to enjoin state officials from
19 interfering with federal rights. When a suit is initiated
20 against a state official to challenge a state law as preempted by
21 federal law, jurisdiction is proper under Shaw because the
22 preemption question is one that directly concerns the state's
23 power to legislate in a manner inconsistent with some federal
24 mandate. Indeed, "the Supremacy Clause itself provides subject
25 matter jurisdiction for the federal court."

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1 Harding v. Summit Med. Ctr., 41 Fed. Appx. 83, 85 (9th Cir. 2002)
2 (unpublished disposition), citing Hydrostorage, Inc., v. N. Cal.
3 Boilermakers Local Joint Apprenticeship Comm., 891 F.2d 719, 724-
4 25 (9th Cir. 1989), abrogated on other grounds in Engine Mfrs.
5 Ass'n v. South Coast Air Quality Mgmt. Dist., 498 F.3d 1031 (9th
6 Cir. 2007).

7 However, in this case, Plaintiffs have sued only insurers
8 and self-insured employers. Thus, rather than properly
9 challenging the State's power to enforce the OMFS, Plaintiffs ask
10 this Court, in an action against third-parties, to declare that
11 state law is preempted by federal law. Nevertheless, since none
12 of the present Defendants have "the ability to enact or enforce
13 state laws," neither can they interfere with Plaintiff's rights
14 under the Supremacy Clause.³ Id. The instant Defendants are
15 simply the wrong parties against whom to assert such a claim.

16 Viewed from another perspective, Plaintiff's declaratory
17 relief claim simply does not present the justiciable case or
18 controversy that is a prerequisite to an assertion of this
19 Court's jurisdiction. To the contrary, if the Court were to
20 grant Plaintiff its requested declaratory relief, it would be
21 required to issue an impermissible advisory opinion.

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26 ³ Though some of the Defendants are local entities or
27 agencies, they were not sued in their enforcement or legislative
28 capacities, but, instead, as self-insured employers. Thus, the
question of whether, under a different set of facts, a suit
against those entities would be proper is not currently before
the Court.

1 While “[i]t is clear that a conflict between a state statute and
2 federal regulations presents a justiciable controversy,” National
3 Labor Relations Bd. v. North Dakota, 504 F. Supp. 2d 750, 754 (D.
4 N.D. 2007), citing Conference of Fed. Sav. and Loan Ass’ns v.
5 Stein, 604 F.2d 1256, 1259 (9th Cir. 1979), under the above
6 analysis, that controversy is capable of federal adjudication, in
7 other words is ripe, only when the State is a party to the action.
8 See Harding, 41 Fed. Appx. 83 at 85. Such is not the case here.

9 Instead, the instant preemption question takes root in the
10 parties’ current dispute only through analysis of Plaintiff’s
11 state law claims and then, as discussed above, only by way of a
12 rebuttal to a defense. Accordingly, any controversy that may
13 exist under Plaintiff’s first cause of action, which serves only
14 to assert a response to an anticipated defense, is even more
15 attenuated than it might be directly under an analysis of the
16 state law claims.

17 Accordingly, when distilled to its essence, resolution of
18 Plaintiff’s declaratory relief claim, at least between the
19 current parties, would require the Court to issue nothing more
20 than an advisory opinion as to preemption of the OMFS. It is
21 well-established that this Court lacks the power to do so. See
22 MedImmune, Inc. v. Genentech, Inc., 549 U.S. 118, 126-127 (2007)
23 (reiterating the requirement that “the dispute be ‘definite and
24 concrete, touching the legal relations of parties having adverse
25 legal interests’; and that it be ‘real and substantial’ and
26 ‘admi[t] of specific relief through a decree of a conclusive
27 character, as distinguished from an opinion advising what the law
28 would be upon a hypothetical state of facts.’”),

1 quoting Aetna Life Ins. Co. of Hartford, Conn. v. Haworth, 300
2 U.S. 227, 240-241 (1937). As such, this Court lacks subject
3 matter jurisdiction over Plaintiff's first cause of action.

4 The Court is not persuaded otherwise by Plaintiff's
5 observation that this preemption issue, under these facts, would
6 never arise directly as a defense because the State of California
7 will likely never institute proceedings to enforce the OMFS
8 against Plaintiff, and Defendants will likely never be motivated
9 to pursue coercive claims against Plaintiff, either of which
10 scenarios could change the jurisdictional analysis. Even
11 assuming, *arguendo*, that Plaintiff is correct, the boundaries of
12 this Court's jurisdiction remain unchanged. While Plaintiff
13 appears to presume that if its argument cannot be raised as a
14 defense, it must be part and parcel of its affirmative claim for
15 relief, for jurisdictional purposes, the very unlikelihood that
16 Plaintiff's argument could even be raised as a defense, let alone
17 an affirmative claim, renders the possibility of jurisdiction in
18 this Court even more remote. Accordingly, this Court is not
19 empowered to entertain Plaintiff's first claim for relief.

20

21 **2. Plaintiff's State Law Claims**

22

23 Finally, Plaintiff contends that its state law claims,
24 themselves, arise under federal law. However, as previously
25 stated, in the context of Plaintiff's state law claims, the
26 preemption argument will arise, if at all, only as a rebuttal to
27 an anticipated defense.

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1 Accordingly, this Court also lacks jurisdiction independently
2 over Plaintiff's state law claims. See Franchise Tax Bd., 463
3 U.S. at 13-14.

4
5 **CONCLUSION**

6
7 In sum, the *Amici* Motion for Leave to File Brief (Docket
8 No. 245) is GRANTED. Nevertheless, this Court lacks subject
9 matter jurisdiction over Plaintiff's First Amended Complaint.
10 Therefore, Defendants' Motions to Dismiss (Dockets No. 107, 112,
11 and 182) are GRANTED, and Defendants' Motion to Consolidate
12 (Docket No. 111) and Plaintiff's Motion for Summary Judgment
13 (Docket No. 184) are DENIED as moot. All future hearing dates
14 are ordered vacated and the Clerk of the Court is directed to
15 close the file.

16 IT IS SO ORDERED.

17 Dated: July 23, 2009

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20 MORRISON C. ENGLAND, JR.
21 UNITED STATES DISTRICT JUDGE
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