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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

FRANCISCO CHAVEZ, an individual;
and JOHN THOMPSON, an individual,

Plaintiffs,

v.

FEDERAL EXPRESS CORPORATION;
FEDERAL EXPRESS GROUND
PACKAGE SYSTEM, INC., Delaware
corporations; and DOES 1-100, inclusive,

Defendants.

Case No.: 16-CV-2154W (JLB)

**ORDER GRANTING IN PART AND
DENYING IN PART DEFENDANT’S
MOTION TO DISMISS THE FIRST
AMENDED COMPLAINT [DOCS. 14,
17]**

Pending before the Court is Defendant Federal Express Corporation’s (“FedEx Express”) motion to dismiss the First Amended Complaint (“FAC”). Plaintiffs Francisco Chavez and John Thompson oppose.

The Court decides the matter on the papers submitted and without oral argument. See Civ.L.R. 7.1 (d.1). For the reasons stated below, the Court **GRANTS IN PART** and **DENIES IN PART** FedEx’s motion to dismiss [Docs. 14, 17].

1 **I. BACKGROUND**

2 Plaintiffs Francisco Chavez and John Thompson are employees of the Naval Air
3 Warfare Center Aircraft Division Lakehurst (“Navair”) located at the 32nd Street Naval
4 Base in San Diego, California. (*FAC* [Doc. 8] ¶ 9.) Defendants FedEx Express is an all-
5 cargo interstate air carrier and Federal Express Ground Package System, Inc. (“FedEx
6 Ground”) is an all-cargo interstate ground carrier. (*Id.* ¶¶ 6, 7.)

7 This case arises from an interstate shipment containing hazardous materials that
8 exploded when its recipients began unloading the delivery. (*FAC* ¶ 9.) The shipment
9 originated in Florida, where Navair employees packaged and delivered the containers to a
10 FedEx Express ship center in Key West, Florida. (*Id.*) The container included hazardous
11 materials such as aerosols, silicon material, at least one fire extinguisher, powder, Mapp
12 gas, rust treatment material, flammable mastic adhesive, and rust oleum flammable
13 enamel. (*Id.*) The shipment was placed on a FedEx Express airplane and was flown to
14 San Diego, California. (*Id.*)

15 On or about March 7, 2016, FedEx Ground delivered the shipment to the Navair
16 facility at the 32nd Street Naval, where Chavez and Thompson began unloading the
17 container as instructed in the normal course of their employment. (*FAC* ¶ 10.) While
18 unloading the shipment, one of the containers exploded and seriously injured both
19 Plaintiffs. (*Id.* ¶¶ 10, 17.)

20 Chavez and Thompson allege an investigation by unnamed governmental agencies
21 determined that none of the subject containers displayed the hazardous material warnings
22 required by the Hazardous Material Transportation Act (“HMTA”), 49 U.S.C. § 5101, *et*
23 *seq.* (*FAC* ¶ 11.) Plaintiffs allege FedEx Express and FedEx Ground violated the HMTA
24 and related federal regulations when they: (1) allowed an untrained and unregistered
25 person to accept hazardous materials into interstate commerce; (2) failed to classify,
26 require appropriate packaging, require appropriate shipping paperwork, require proper
27 labeling marking and warning placards for the shipment; and (3) failed to inspect,
28 examine, scan, or discover the hazardous materials in the containers. (*Id.* ¶ 13(a)–(c).)

1 Chavez and Thompson also claim FedEx Express owed them a duty of care to
2 implement reasonable safety and security mechanisms to discover hazardous materials in
3 shipments so as not to expose others to an unreasonable risk of harm. (*FAC* ¶ 15.) They
4 further allege FedEx Express breached this duty when it: (1) failed to properly train, and
5 maintain retraining of their employees on the subjects of hazardous material recognition,
6 marking, labeling and shipping of hazardous material; (2) failed to ascertain whether the
7 shipment contained hazardous materials; (3) failed to require the shipper to submit the
8 appropriate paper work for the shipment of hazardous material; (4) failed to insure that
9 the material offered by the shipper was properly labeled and packaged; (5) endeavored to
10 ship “hazardous material” without the appropriate shipping papers, baling and markings
11 warning that the packages contained hazardous material; and (6) failed to warn Plaintiffs
12 upon delivery of the hazardous material. (*Id.* ¶ 16(a)–(f).)

13 On July 22, 2016, Chavez and Thompson filed a lawsuit against FedEx Express
14 and FedEx Ground in the San Diego Superior Court. (*See Compl.* [Doc. 1-2].¹) On
15 August 25, 2016, Defendants removed the case to this Court. (*See Notice of Removal.*)
16 Plaintiff then filed the FAC on September 19, 2016, asserting claims for (1) violation of
17 the HMTA and (2) state common law negligence. (*See FAC* [Doc. 8].) FedEx Express
18 now moves to dismiss the HMTA claim on the ground that there is no private right of
19 action under the statute, and the negligence claim on the basis that it is preempted by the
20 Airline Deregulation Act (“ADA”).

21 22 **II. LEGAL STANDARD**

23 The court must dismiss a cause of action for failure to state a claim upon which
24 relief can be granted. Fed.R.Civ.P. 12(b)(6). A motion to dismiss under Rule 12(b)(6)
25 tests the complaint’s sufficiency. See N. Star Int’l v. Ariz. Corp. Comm’n., 720 F.2d
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28 ¹ The Complaint is attached to the Notice of Removal [Doc. 1] as Exhibit A.

1 578, 581 (9th Cir. 1983). All material allegations in the complaint, “even if doubtful in
2 fact,” are assumed to be true. Id. The court must assume the truth of all factual
3 allegations and must “construe them in light most favorable to the nonmoving party.”
4 Gompper v. VISX, Inc., 298 F.3d 893, 895 (9th Cir. 2002); see also Walleri v. Fed.
5 Home Loan Bank of Seattle, 83 F.3d 1575, 1580 (9th Cir. 1996).

6 As the Supreme Court explained, “[w]hile a complaint attacked by a Rule 12(b)(6)
7 motion to dismiss does not need detailed factual allegations, a plaintiff’s obligation to
8 provide the ‘grounds’ of his ‘entitlement to relief’ requires more than labels and
9 conclusions, and a formulaic recitation of the elements of a cause of action will not do.”
10 Bell Atl. Corp. v. Twombly, 127 S.Ct. 1955, 1964 (2007). Instead, the allegations in the
11 complaint “must be enough to raise a right to relief above the speculative level.” Id. at
12 1964-65. A complaint may be dismissed as a matter of law either for lack of a cognizable
13 legal theory or for insufficient facts under a cognizable theory. Robertson v. Dean Witter
14 Reynolds, Inc., 749 F.2d 530, 534 (9th Cir. 1984).

16 **III. DISCUSSION**

17 **A. Hazardous Material Transportation Act Claim (1st Cause of Action)**

18 Fedex Express contends that the HMTA provides no private right of action. (*MTD*
19 [Doc. 14-1] 11:11–13:9.) Plaintiffs concede that they may not pursue their HMTA
20 claim. (*Opp.* [Doc. 22] 4:10–11). See also 49 U.S.C. § 5122; Borough of Ridgefield v.
21 New York Susquehanna & Western R.R., 810 F.2d 57, 58 (3d Cir. 1987). Accordingly,
22 this Court dismisses Plaintiffs’ HMTA cause of action.²

25 ² Plaintiffs request leave to amend the FAC to assert a negligence per se claim premised on the
26 violation of the HMTA. (*Opp.* [Doc. 22] 4:10–15.) Defendants dispute whether such a claim is
27 appropriate given that no private right of action exists. (*Reply* [Doc. 24] 7:15–20.) However, neither
28 party has provided authority on the issue and, accordingly, the Court need not decide at this time
whether Plaintiffs may assert a negligence per se claim based on the violation of the HMTA.

1 **B. State Negligence Claim (2nd Cause of Action)**

2 The ADA preemption clause, provides that a “State ... may not enact or enforce a
3 law, regulation, or other provision having the force and effect of law related to a price,
4 route, or service of an air carrier... .” 49 U.S.C.A. § 41713(b)(1). Fedex FedEx alleges
5 Chavez and Thompson’s negligence claim is preempted by this clause because the claim
6 is “related” to FedEx Express’s “services.” (*MTD* 7:16–11:10; *Reply* 3:5–5:16.) In
7 support of this argument, Fedex Express relies on Tobin v. Federal Express Corp., 775
8 F.3d 448 (1st Cir. 2014), which defined the term “service” as follows:

9 a “service” represents a “bargained-for or anticipated provision of labor
10 from one party to another,” thus leading to “a concern with the contractual
11 arrangement between the airline and user of the service.” [Citation omitted.]
12 Matters “appurtenant and necessarily included with the contract of carriage
13 between the passenger or shipper and the airline,” such as “ticketing,
boarding procedures, provision of food and drink, and baggage handling”
are all included under the mantle of “service.” [Citation omitted]

14 (*Id.* 7:21–24, citing Tobin at 453.) The primary problem with FedEx Express’s argument
15 is that Tobin is a First Circuit case that is at odds with Ninth Circuit law.

16 Within the Ninth Circuit, “the scope of [ADA] preemption has been a source of
17 considerable dispute since its enactment.” Charas v. Trans World Airlines, Inc., 160 F.3d
18 1259, 1263 (9th Cir. 1998). For example, Lathigra v. British Airways, 41 F.3d 535 (9th
19 Cir. 1994), held that the ADA did not preempt a state-law claim for negligent
20 reconfirmation because it was only tenuously connected with the ADA and did not
21 undermine the goals of airline deregulation. *Id.* at 540. The next year, however, Harris v.
22 American Airlines, Inc., 55 F.3d 1472 (9th Cir. 1995), interpreted “service” broadly and
23 held the ADA preempted a female passenger’s state-law tort claim against an airline for
24 continuing to serve alcohol to an intoxicated passenger. Harris reasoned that the claim
25 was preempted because plaintiff’s “allegations pertain directly to a ‘service’ the airlines
26 render: the provision of drink.” Harris, 55 F.3d at 1476. Although this broad
27 interpretation of “service” was consistent with Tobin, Harris has been overruled.
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1 In Charas, 160 F.3d 1259, the Ninth Circuit again reconsidered the circumstances
2 under which the ADA preempts certain state law claims. The case involved five
3 consolidated appeals arising from personal injury actions filed against airlines. All of the
4 plaintiffs were passengers who suffered injuries because of a physical hazard created, or
5 not reasonably prevented, by the different airlines. Id. The injuries resulted from
6 conditions such as: luggage falling from an overhead bin; luggage being left in the aisle
7 by a flight attendant; a service cart being pushed into plaintiff’s shoulder by a flight
8 attendant; failure to provide adequate assistance disembarking from the plane; and
9 impermissibly refusing boarding to a blind passenger. Id. at 1261–62. In each case, the
10 district court found the state-law tort claim was preempted under the ADA. Id.

11 The Ninth Circuit began by overruling Harris’s interpretation of the ADA
12 preemption clause as contrary to congressional intent. Charas, 160 F.3d at 1263. The
13 court then discussed the only two Supreme Court cases that had addressed the scope of
14 the preemption clause (Morales v. Trans World Airlines, Inc., 504 U.S. 374 (1992), and
15 American Airlines, Inc. v. Wolens, 513 U.S. 219 (1995)), and interpreted the cases as
16 suggesting that state-law tort claims “are not within the intended reach of the
17 preemption.” Id. at 1264. The Ninth Circuit then evaluated the language of section
18 1305(a)(1)³ and two other statutory provisions regulating air carriers. While the
19 preemption clause demonstrated that “Congress’s ‘clear and manifest purpose’ in
20 enacting the ADA was to achieve... ‘maximum reliance on competitive market forces’”
21 (id. at 1265 (citing Wolens, 513 U.S. at 230)) the other two statutory provisions—19
22 U.S.C. § 41112(a) requiring airlines to maintain bodily injury insurance, and 49 U.S.C. §
23 40120 preserving state tort remedies—demonstrated that congress did not intend to
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27 ³ The preemption clause was previously found in section 1305(a)(1) of the Airline Deregulation Act. In
28 1994 it was amended and incorporated into the Federal Aviation Administration Authorization Act of
1994, 49 U.S.C. § 41713(b).

1 preempt all state tort claims (*id.* at 1265). Finally, the court looked at the context in
2 which the term “service” was used, and concluded:

3 Airlines’ “rates” and “routes” generally refer to the point-to-point transport
4 of passengers. “Rates indicates price; “routes” refers to courses of travel. *It*
5 *therefore follows that “service,” when juxtaposed to “rates” and “routes”*
6 *refers to such things as the frequency and scheduling of transportation, and*
7 *to the selection of markets to or from which transportation is provided* (as
8 in, “this airline provides service from Tucson to New York twice a day.”)
9 To interpret “service” more broadly is to ignore the context of its use; and it
effectively would result in the preemption of virtually everything an airline
does. It seems clear to use that that is not what Congress intended.

10 *Id.* at 1265–1266 (emphasis added).

11 Charas’s interpretation of “service” is clearly at odds with Tobin’s broad
12 interpretation of the term. While Tobin definition of the term includes “boarding
13 procedures, provision of food and drink, and baggage handling,” Charas’s definition does
14 not. *Id.* at 1261–62.

15 Here, Chavez and Thompson’s negligence claims are based on FedEx Express’s
16 alleged failure, among other things, to warn that the containers included hazardous
17 material. (*FAC* ¶ 16(a)–(f).) Under Charas, because the claims does not implicate things
18 such as the frequency and scheduling of transportation, or the selection of markets,
19 Chavez and Thompson’s negligence cause of action is not preempted.

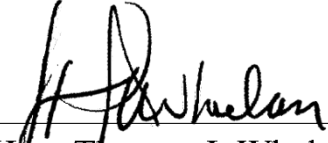
20 21 **IV. CONCLUSION & ORDER**

22 For the foregoing reasons, the Court **GRANTS IN PART** and **DENIES IN PART**
23 FedEx Express’s motion to dismiss [Docs. 14, 17] and **DISMISSES** the first cause of
24 action for violation of the HMTA. To the extent Plaintiffs intend to amend the FAC to
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1 add a cause of action for negligence per se, the second amended complaint must be filed
2 on or before March 15, 2017.⁴

3 **IT IS SO ORDERED.**

4 Dated: March 1, 2017

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6 Hon. Thomas J. Whelan
7 United States District Judge

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⁴ Defendant also filed a motion to dismiss the original Complaint. (*See MTD* [Doc.5].) The motion was rendered moot by Plaintiffs' filing of the FAC.