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United States District Court
For the Northern District of California

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

KATHLEEN HANNI, individually and on
behalf of all others similarly
situated,

Plaintiff,

v.

AMERICAN AIRLINES, INC.,

Defendant.

No. C 08-00732 CW
ORDER DENYING
PLAINTIFF'S
MOTION TO REMAND,
GRANTING
DEFENDANT'S
MOTION FOR LEAVE
TO FILE AN
AMENDED NOTICE OF
REMOVAL, GRANTING
IN PART
DEFENDANT'S
MOTION TO DISMISS
AND GRANTING
PLAINTIFF LEAVE
TO AMEND

_____ /

Plaintiff Kathleen Hanni has filed a motion to remand this case to state court. Defendant American Airlines, Inc. (AA) opposes the motion and has filed a motion for leave to file an amended notice of removal and a motion to dismiss the complaint. Plaintiff opposes Defendant's motions. The motions were heard on April 24, 2008. Having considered all of the papers filed by the parties and oral argument, the Court grants Defendant's motion for

1 leave to file an amended notice of removal, denies Plaintiff's
2 motion to remand, grants in part Defendant's motion to dismiss and
3 grants Plaintiff leave to amend.

4 BACKGROUND

5 On December 28, 2007, Plaintiff filed this putative class
6 action in Napa County Superior Court, alleging claims based on her
7 experiences on a December 29, 2006 American Airlines flight from
8 San Francisco, connecting at Dallas-Forth Worth Airport, to Mobile,
9 Alabama. Plaintiff alleges that the seven hour trip took over
10 fifty hours due to various delays, which included nine-and-one-half
11 hours confined on the airplane on the runway at the Austin, Texas
12 airport.

13 Plaintiff brings claims for false imprisonment, intentional
14 infliction of emotional distress, negligence, breach of contract
15 and intentional misrepresentation and seeks compensatory damages
16 "according to proof at trial" and punitive damages based on her
17 false imprisonment, emotional distress and intentional
18 misrepresentation claims. These claims are based on several
19 discrete actions or failures to act alleged by Plaintiff:

20 (1) Defendant's decision to allow Plaintiff's flight from San
21 Francisco to Dallas to depart in spite of the possibility of
22 thunderstorms in Dallas; (2) after the flight was diverted to
23 Austin, Defendant's refusal to permit passengers to leave the
24 airplane while it was on the runway in Austin; (3) Defendant's
25 failure "to supply the parked aircraft with essentials of water,
26 food, sanitary waste removal, light, and breathable or fresh air at
27 normal temperatures" while on the runway in Austin; (4) Defendant's

1 decision not to unload checked baggage when it allowed the
2 passengers off the airplane in Austin at 9:30 PM; (5) Defendant's
3 failure to provide payment for lodging, meals, ground
4 transportation and other expenses when the passengers were kept in
5 Austin overnight; and (6) Defendant's failure to allow passengers
6 to board their connecting flights in Dallas when they arrived the
7 following morning.

8 Plaintiff further alleges that Defendant caused the delays
9 through its "intentional or negligent lack of personnel, equipment,
10 and planning for ordinary weather disruptions by AA." Complaint
11 ¶ 63. Moreover, Plaintiff alleges that Defendant's decision to
12 keep the passengers on the airplane during the extended delay was
13 made "to avoid expenses and lawful obligations to passengers
14 associated with strandings, diversions and canceled flights and for
15 AA's and its officers, employees, agents and stockholders pecuniary
16 gain at the expense of Plaintiff and other passengers." Complaint

17 ¶ 64.

18 Defendant filed a notice of removal on January 31, 2008.

19 DISCUSSION

20 I. Notice of Removal and Motion to Remand

21 A defendant may remove a civil action filed in state court to
22 federal district court so long as the district court could have
23 exercised original jurisdiction over the matter. 28 U.S.C.
24 § 1441(a). District courts have original jurisdiction over all
25 civil actions "where the matter in controversy exceeds the sum or
26 value of \$75,000, exclusive of interest and costs, and is between
27 . . . citizens of different states." 28 U.S.C. § 1332(a). For

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1 purposes of class actions, "the claims of the individual class
2 members shall be aggregated to determine whether the matter in
3 controversy exceeds the sum or value of \$5,000,000, exclusive of
4 interest and costs." 28 U.S.C. § 1332(d)(2)(6). If at any time
5 before judgment it appears that the district court lacks subject
6 matter jurisdiction over a case previously removed from state
7 court, the case must be remanded. 28 U.S.C. § 1447(c). On a
8 motion to remand, the scope of the removal statute must be strictly
9 construed. See Gaus v. Miles, Inc., 980 F.2d 564, 566 (9th Cir.
10 1992). "The 'strong presumption' against removal jurisdiction
11 means that the defendant always has the burden of establishing that
12 removal is proper." Id. Courts should resolve doubts as to
13 removability in favor of remanding the case to state court. See
14 id.

15 To support removal based on diversity jurisdiction in cases
16 where a plaintiff's state court complaint does not specify a
17 particular amount of damages, the removing defendant bears the
18 burden of establishing, by a preponderance of the evidence, that
19 the amount in controversy exceeds the threshold amount. Sanchez v.
20 Monumental Life Ins. Co., 102 F.3d 398, 404 (9th Cir. 1996).

21 Plaintiff argues that this case should be remanded to state
22 court because Defendant has not established that the amount in
23 controversy is the \$75,000 needed to support diversity jurisdiction
24 for her individual claim or the \$5 million needed to support
25 jurisdiction if this case is certified as a class action.
26 Defendant counters that shortly after filing the motion to remand,
27 Plaintiff's counsel wrote a settlement letter to Defendant offering
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1 to settle the case for a "global settlement amount" of \$5 million.

2 Defendant now moves to amend its notice of removal to include
3 reference to this letter. Plaintiff does not argue that Defendant
4 should not be permitted to amend its notice of removal or to submit
5 further evidence that removal was appropriate. Rather, Plaintiff
6 argues that the letter is not proper evidence for the Court to
7 consider. However, as Defendant points out, the Ninth Circuit has
8 held, "A settlement letter is relevant evidence of the amount in
9 controversy if it appears to reflect a reasonable estimate of the
10 plaintiff's claim." Cohen v. Petsmart, 281 F.3d 837, 840 (9th Cir.
11 2002). The Court will consider the letter as evidence and grants
12 Defendant's motion to file an amended notice of removal.

13 Plaintiff argues that Cohen is inapposite because it was
14 decided before the Class Action Fairness Act of 2005 (CAFA) went
15 into effect. However, the Ninth Circuit has continued to allow
16 reliance on settlement letters in post-CAFA class actions. See
17 Babasa v. LensCrafters, Inc., 498 F.3d 972, 975 (9th Cir. 2007).

18 Plaintiff next argues that the \$5 million settlement demand
19 does not defeat her motion to remand. She points out that the
20 letter seeks \$74,900 in damages on her behalf, which is less than
21 the \$75,000 necessary to establish diversity jurisdiction for an
22 individual case. Moreover, Plaintiff argues that the letter does
23 not establish that the amount in controversy exceeds \$5 million as
24 required by the CAFA because the \$5 million figure includes
25 attorneys' fees and costs. However, this Court agrees with other
26 district courts that have held that "an offer falling just below
27 the jurisdictional threshold tends to suggest that the amount in
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1 controversy exceeds this threshold, especially since parties
2 routinely offer and accept settlement amounts significantly below
3 the total amount placed into controversy." Osborne v. Sitton Motor
4 Lines, Inc., 2007 U.S. Dist. LEXIS 17076, *5 (W.D. Ky. 2007)
5 (internal quotation omitted).

6 The Court finds that Defendant has established that the amount
7 in controversy in either an individual case brought by Plaintiff or
8 a class action is sufficient to establish jurisdiction in this
9 Court.

10 II. Motion to Dismiss

11 A. Preemption

12 Defendant first argues that Plaintiff's claims should be
13 dismissed because they are preempted by the Federal Aviation Act
14 (FAA) and the Airline Deregulation Act (ADA).

15 Under the Supremacy Clause, state law that conflicts with
16 federal law has no effect. Cipollone v. Liggett Group, Inc., 505
17 U.S. 504, 516 (1992)(citing U.S. Const. art. VI, cl. 2). Federal
18 preemption of state law may be express or implied. Shaw v. Delta
19 Airlines, Inc., 463 U.S. 85, 95 (1983). "[W]ithin Constitutional
20 limits Congress may preempt state authority by so stating in
21 express terms." Pac. Gas & Elec. Co. v. State Energy Resources
22 Conservation & Dev. Comm'n, 461 U.S. 190, 203 (1983). Absent
23 explicit preemptive language, there are two types of implied
24 preemption, field preemption and conflict preemption. Crosby v.
25 Nat'l Foreign Trade Council, 530 U.S. 363, 372 (2000).

26 Courts will find a state law field-preempted if one of three
27 circumstances exist. First, state law is preempted where

1 "Congress' intent to supercede state law altogether may be found
2 from a scheme of federal regulation so pervasive as to make
3 reasonable the inference that Congress left no room to supplement
4 it." Pacific Gas and Elec. Co. v. State Energy Res. Conservation
5 and Dev. Comm'n, 461 U.S. 190, 204 (1983)(internal quotations
6 omitted). Second, courts will find state law field-preempted if
7 "the Act of Congress [] touch[es] a field in which the federal
8 interest is so dominant that the federal system [can] be assumed to
9 preclude enforcement of state laws on the same subject." Id.
10 Finally, state law will be field-preempted where "the object sought
11 to be obtained by the federal law and the character of the
12 obligations imposed by it may reveal" that the purpose of the law
13 is to occupy the field entirely. Id.

14 "[W]here Congress has not entirely displaced State regulation
15 in a specific area, State law will still be preempted to the extent
16 that it actually conflicts with federal law." Id. Conflict
17 preemption exists "when a state law actually conflicts with federal
18 law or when a state law stands as an obstacle to the accomplishment
19 and execution of the full purposes and objectives of Congress in
20 enacting the federal law." Montalvo v. Spirit Airlines, 508 F.3d
21 464, 470 (9th Cir. 2007).

22 Congressional intent is the "ultimate touchstone" of any
23 preemption analysis, express or implied. Gade v. Nat'l Solid
24 Wastes Management Ass'n, 505 U.S. 88, 96, 98 (1992). In
25 determining Congressional intent to preempt, a court must "begin
26 with the language employed by Congress and the assumption that the
27 ordinary meaning of the language accurately expresses the

1 legislative purpose," Morales v. Trans World Airlines, Inc., 504
2 U.S. 374, 383 (1992), because "[t]he first and most important step
3 in construing a statute is the statutory language itself." Royal
4 Foods Co., Inc. v. RJR Holdings, Inc., 252 F.3d 1102, 1106 (9th
5 Cir. 2001) (citing Chevron USA v. Natural Resources Defense
6 Council, 467 U.S. 837, 842-44 (1984)). As the Court explained in
7 Sprietsma v. Mercury Marine, 537 U.S. 51 (2002), the "task of
8 statutory construction must in the first instance focus on the
9 plain wording of the clause, which necessarily contains the best
10 evidence of Congress' pre-emptive intent." 537 U.S. at 62-63.

11 1. Federal Aviation Act

12 Defendant first argues that Plaintiff's claims are field-
13 preempted by the FAA. The FAA was enacted in response to "a series
14 of 'fatal air crashes between civil and military aircraft operating
15 under separate flight rules.'" United States v. Christensen, 419
16 F.2d 1401, 1404 (9th Cir. 1969) (quoting 1958 U.S.C.C.A.N. 3741,
17 3742). The Ninth Circuit has held that "[t]he FAA, together with
18 federal air safety regulations, establish complete and thorough
19 safety standards for interstate and international air
20 transportation that are not subject to supplementation by, or
21 variation among, the states." Montalvo, 508 F.3d at 474.

22 Therefore, the FAA and federal air safety regulations are the only
23 grounds on which an airline may be held liable for claims related
24 to safety.

25 Defendant argues that the Court should find that Plaintiff's
26 claims are preempted, characterizing the claims as an attempt "to
27 utilize state law to establish new legal requirements for health
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1 and safety services for passengers during lengthy diversions and
2 delays of flights." Motion at 6. Defendant notes that the
3 Plaintiff's claims stem from Defendant's decision to re-route her
4 flight due to safety concerns and the Federal Aviation
5 Administration's decision to shut down the Dallas Fort Worth
6 Airport.

7 To the extent that Plaintiff's claims are based on Defendant's
8 decision to re-route her flight from the Dallas Forth Worth Airport
9 to the Austin Airport rather than delaying or cancelling it, the
10 Court finds that they are preempted by the FAA. However, the bulk
11 of Plaintiff's claims relate to Defendant's actions and decision-
12 making after the flight had been diverted. The Court finds that
13 the complaint alleges these decisions were not directly related to
14 safety and were not the type regulated by federal air safety
15 regulations.

16 2. Airline Deregulation Act

17 Defendant next argues that Plaintiff's claims are explicitly
18 preempted by the ADA, which provides,

19 Except as provided in this subsection, a State,
20 political subdivision of a State, or political
21 authority of at least 2 States may not enact or enforce
22 a law, regulation, or other provision having the force
and effect of law related to a price, route, or service
of an air carrier that may provide air transportation
under this subpart.¹

23 49 U.S.C. § 41713(b)(1). In Morales v. Trans World Airlines, Inc.,
24 the Supreme Court interpreted "related to" to mean that actions
25 "having a connection with or reference to airline 'rates, routes,

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27 ¹The exceptions provided for are not relevant to the claims in
this case.

1 or services'" are preempted under the ADA. 504 U.S. 374, 378-79
2 (1992). However, the Supreme Court has never interpreted the term
3 "services" in the context of the ADA, see Northwest Airlines, Inc.
4 v. Duncan, 531 U.S. 1058 (2000) (O'Connor, J., dissenting from
5 denial of certiorari) (noting that "the meaning of the term
6 'service'" has not been addressed by the Supreme Court), and the
7 Ninth Circuit has defined the term narrowly, Charas v. Trans World
8 Airlines, Inc., 160 F.3d 1259, 1261 (9th Cir. 1998) (en banc).

9 In Charas, the Ninth Circuit held that the term "service"
10 refers to "the prices, schedules, origins and destinations of the
11 point-to-point transportation of passengers, cargo, or mail" but
12 not to "an airline's provision of in-flight beverages, personal
13 assistance to passengers, the handling of luggage, and similar
14 amenities." Id. at 1261. Therefore, Plaintiff argues that her
15 claims, which are not related to any actual transportation, are not
16 preempted by the ADA.

17 Defendant counters that the Supreme Court's recent decision in
18 Rowe v. New Hampshire Motor Transport Association, 128 S. Ct. 989
19 (2008), calls into question the Ninth Circuit's definition of
20 service. In Rowe, the Supreme Court interpreted the scope of
21 preemption related to the deregulation of trucking, which was
22 modeled after the preemption provision in the ADA. The Court found
23 that federal law preempts a state law that "forbids licensed
24 tobacco retailers to employ a 'delivery service' unless that
25 service follows particular delivery procedures." Id. at 995. The
26 state statute required such retailers to "'utilize a delivery
27 service' that provides a special kind of recipient-verification
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1 service" to ensure that:

2 (1) the person who bought the tobacco is the person to
3 whom the package is addressed; (2) the person to whom
4 the package is addressed is of legal age to purchase
5 tobacco; (3) the person to whom the package is addressed
6 has himself or herself signed for the package; and
7 (4) the person to whom the package is addressed, if
8 under the age of 27 has produced a valid government-
9 issued photo identification with proof of age.

10 Id. at 993-94.

11 Relying on its interpretation of the ADA preemption provision
12 in Morales, the Court in Rowe held that the state statute was
13 preempted even though it was directed at the tobacco retailers,
14 because it would require carriers "to offer tobacco delivery
15 services that differ significantly from those that, in the absence
16 of the regulation, the market might dictate." Id. at 996.
17 Defendant argues that this holding--that the Maine statute was
18 preempted because requiring a motor carrier to verify a recipient's
19 age is related to the "service" provided--undermines Plaintiff's
20 reliance on Charas. Defendant contends that under such an
21 interpretation of the term "service," "state requirements for food,
22 beverages, toilet service, electricity, baggage service,
23 transportation, overnight lodging, and the other type of matters
24 about which plaintiff complains in this action equally impinge on
25 an air carrier's service." Reply at 2.

26 As the Second Circuit recently noted, the Ninth Circuit's
27 definition of "service" in Charas does conflict with the Supreme
28 Court's subsequent opinion in Rowe, which "necessarily defined
'service' to extend beyond prices, schedules, origins, and
destinations." Air Transport Association of America, Inc. v.

1 Cuomo, 2008 U.S. App. LEXIS 6130, *12 (2d. Cir.). In Air
2 Transport, the Second Circuit found that New York state legislation
3 affirmatively "requiring airlines to provide food, water,
4 electricity, and restrooms to passengers during lengthy ground
5 delays does relate to the service of an air carrier and therefore
6 falls within the express terms of the ADA's preemption provision."
7 Id. at *13.

8 However, the Ninth Circuit's opinion in Charas was based on
9 more than its definition of "service." The Charas court concluded
10 that

11 when Congress enacted federal economic deregulation of
12 the airlines, it intended to insulate the industry from
13 possible state economic regulation as well. It
14 intended to encourage the forces of competition. It
15 did not intend to immunize the airlines from liability
16 for personal injuries caused by their tortious conduct.

17 160 F.3d at 1266 (emphasis in original). It was in this context
18 that the Charas court held that "'service' does not refer to the
19 pushing of beverage carts, keeping the aisles clear of stumbling
20 blocks, the safe handling and storage of luggage, assistance to
21 passengers in need, or like functions." Id. The court reasoned
22 that "[t]o interpret 'service' more broadly is to ignore the
23 context of its use; and, it effectively would result in the
24 preemption of virtually everything an airline does. It seems clear
25 to us that this is not what Congress intended." Id.; see also
26 Montalvo, 508 F.3d at 475 (interpreting Charas to hold "that state
27 claims that do not significantly impact federal deregulation are
28 not preempted").

It is based on this interpretation of congressional intent

1 that other circuits have allowed personal injury claims against
2 airlines, even while interpreting "service" more broadly than the
3 Ninth Circuit does. For example, in Hodges v. Delta Airlines,
4 Inc., 44 F.3d 334 (5th Cir. 1995) (en banc), the Fifth Circuit held
5 that a passenger's negligence claim, based on injuries sustained
6 when a carton containing several bottles of rum fell out of an
7 overhead compartment and cut the passenger's arms and wrist, was
8 not preempted. In Hodges, the court held, "Elements of the air
9 carrier service bargain include items such as ticketing, boarding
10 procedures, provision of food and drink, and baggage handling, in
11 addition to the transportation itself." Id. at 336. Nonetheless,
12 the Fifth Circuit noted that "neither the ADA nor its legislative
13 history indicates that Congress intended to displace the
14 application of state tort law to personal physical injury inflicted
15 by aircraft operations, or that Congress even considered such
16 preemptions," and allowed the plaintiff's claim to proceed. Id. at
17 338; see also, Branche v. Airtran Airways, Inc., 342 F.3d 1248,
18 1257 (11th Cir. 2003) (adopting Hodges' definition of "service" but
19 holding that plaintiff's state whistle blower claim was not
20 preempted).

21 Moreover, Charas and Hodges, like this case, involved injured
22 passengers seeking compensation for past tortious conduct rather
23 than a challenge to a state statute creating an affirmative
24 requirement as in Rowe and Air Transport. Affirmative regulations
25 restricting how a carrier does business will by definition result
26 in a "direct substitution of [the state's] governmental commands
27 for competitive market forces." Rowe, 128 S. Ct. at 995. In

1 contrast, allowing individuals to recover for injuries suffered
2 does not create any such regulation. Further, while it is true
3 that allowing such state claims might lead to individuals from
4 different states recovering varying amounts depending on the
5 particular states' decisional law, there is no danger that allowing
6 such recovery could "lead to a patchwork of state
7 service-determining laws, rules, and regulations" that the
8 Rowe court found to be "inconsistent with Congress' major
9 legislative effort to leave such decisions, where federally
10 unregulated, to the competitive marketplace." Id. at 996.

11 Therefore the Court finds that, to the extent they are not
12 controlled by specific regulations, Plaintiff's claims are not
13 preempted by the ADA. However, as Defendant argues, some of
14 Plaintiff's claims involve issues about which the government has
15 promulgated regulations. Plaintiff alleges that Defendant should
16 have compensated her for lodging, meals, substitute transportation
17 and similar expenses. However, the Department of Transportation
18 has issued regulations requiring such compensation when the
19 expenses are due to an oversold flight but not when they are due to
20 bad weather. See 14 C.F.R. § 250. Therefore, the Court finds that
21 Plaintiff's claims related to such compensation are preempted.

22 Plaintiff also alleges a breach of contract claim based on two
23 documents, Defendant's Conditions of Carriage and its Customer
24 Service Plan.² Although Defendant acknowledges that the ADA does

25
26 ²As discussed below, Plaintiff's breach of contract claim is
27 dismissed to the extent it relies on the Customer Service Plan,
because that document explicitly states that it does not create any
28 contractual liability.

1 not preempt routine breach of contract claims, it argues that
2 Plaintiff's claim is preempted because it alleges, among other
3 things, a "breach of the implied covenant of good faith and fair
4 dealing." FAC ¶ 93. In American Airlines, Inc. v. Wolens, the
5 Supreme Court held that the ADA "confines courts, in
6 breach-of-contract actions, to the parties' bargain, with no
7 enlargement or enhancement based on state laws or policies external
8 to the agreement." 513 U.S. 219, 233 (1995). Therefore,
9 Plaintiff's breach of contract claim is preempted to the extent it
10 is based on a breach of the implied covenant of good faith and fair
11 dealing.

12 Finally, Defendant argues that Plaintiff's claim for punitive
13 damages is preempted because "[s]tate law punitive damages are
14 based on state policy decisions." Motion at 17. However, the
15 cases Defendant cites are those in which courts found that punitive
16 damages for contract claims were preempted under Wolens. Plaintiff
17 does not seek punitive damages based on her breach of contract
18 claim. To the extent Plaintiff seeks punitive damages on tort
19 claims that are not preempted by the ADA, the prayer for damages is
20 not independently preempted.³

21 B. Failure to State a Claim

22 In the alternative, Defendant argues that each of Plaintiff's
23 causes of action should be dismissed for failure to state a claim.

24 A complaint must contain a "short and plain statement of the
25

26 ³As discussed further below, the Court grants Defendant's
27 motion to dismiss each of the claims upon which Plaintiff seeks
28 punitive damages.

1 claim showing that the pleader is entitled to relief." Fed. R.
2 Civ. P. 8(a). When considering a motion to dismiss under Rule
3 12(b)(6) for failure to state a claim, dismissal is appropriate
4 only when the complaint does not give the defendant fair notice of
5 a legally cognizable claim and the grounds on which it rests. See
6 Bell Atl. Corp. v. Twombly, __ U.S. __, 127 S. Ct. 1955, 1964
7 (2007). In considering whether the complaint is sufficient to
8 state a claim, the court will take all material allegations as true
9 and construe them in the light most favorable to the plaintiff. NL
10 Indus., Inc. v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986).

11 When granting a motion to dismiss, the court is generally
12 required to grant the plaintiff leave to amend, even if no request
13 to amend the pleading was made, unless amendment would be futile.
14 Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv. Inc., 911
15 F.2d 242, 246-47 (9th Cir. 1990). In determining whether amendment
16 would be futile, the court examines whether the complaint could be
17 amended to cure the defect requiring dismissal "without
18 contradicting any of the allegations of [the] original complaint."
19 Reddy v. Litton Indus., Inc., 912 F.2d 291, 296 (9th Cir. 1990).
20 Leave to amend should be liberally granted, but an amended
21 complaint cannot allege facts inconsistent with the challenged
22 pleading. Id. at 296-97.

23 1. Applicable Law

24 Plaintiff has plead her claims under California law.
25 Defendant argues, without citation, that Texas rather than
26 California law should apply to Plaintiff's claims. For purposes of
27 this motion, the Court will consider both State's laws.

1 2. False Imprisonment

2 Under either California or Texas law, false imprisonment
3 consists of "the nonconsensual, intentional confinement of a
4 person, without lawful privilege." Fermino v. Fedco, Inc., 7 Cal.
5 4th 701, 715 (1994); see also, Wal-Mart Stores, Inc. v. Rodriguez,
6 92 S.W.2d 502, 506 (Tex. 2002). Defendant argues that Plaintiff
7 alleges no facts to support a finding that she validly withdrew her
8 consent to remain on the aircraft. However, Plaintiff alleges that
9 a bus came to the airplane but could only hold fifteen people and
10 "all passengers who [did] not have Austin as a final destination
11 were rejected and forced to remain in the aircraft against their
12 will." Complaint ¶ 13. Plaintiff also alleges that she "and other
13 passengers express[ed] their desire to exit the aircraft but
14 Captain Fodero claim[ed] to be powerless to permit deboarding due
15 to AA management." Id. at ¶ 18. Taken as true, these allegations
16 form a sufficient basis to establish that Plaintiff withdrew her
17 consent.

18 Defendant also argues that Plaintiff fails to allege facts to
19 establish that Defendant lacked the legal authority to keep the
20 passengers on the airplane. Plaintiff argues that Defendant lied
21 about the reasons it was keeping passengers on the airplane.
22 Therefore, Plaintiff asserts that Defendant kept the passengers on
23 the plane through false pretenses. However, this does not address
24 the question of whether Defendant was acting with lawful privilege
25 when it kept Plaintiff on the plane. The Court grants Defendant's
26 motion to dismiss Plaintiff's false imprisonment claim. If
27 Plaintiff can allege, consistent with her original complaint,
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1 additional facts sufficient to establish that Defendant lacked
2 legal authority to keep her on the airplane, she may replead this
3 claim in her first amended complaint.

4 2. Intentional Infliction of Emotional Distress

5 Under California law, the elements of a cause of action for
6 intentional infliction of emotional distress (IIED) are (1) extreme
7 and outrageous conduct; (2) intended to cause or done in reckless
8 disregard for causing; (3) severe emotional distress; and
9 (4) actual and proximate causation. See Cervantez v. J.C. Penney
10 Co., Inc., 24 Cal. 3d 579, 593 (1979). The conduct must be so
11 extreme as to "exceed all bounds of that usually tolerated in a
12 civilized community," id., and the distress so severe "that no
13 reasonable [person] in a civilized society should be expected to
14 endure it." Fletcher v. W. Nat'l Life Ins. Co., 10 Cal. App. 3d
15 376, 397 (1970). Under Texas law, "a plaintiff must establish
16 that: (1) the defendant acted intentionally or recklessly; (2) the
17 defendant's conduct was extreme and outrageous; (3) the defendant's
18 actions caused the plaintiff emotional distress; and (4) the
19 resulting emotional distress was severe." Hoffmann-La Roche, Inc.
20 v. Zeltwanger, 144 S.W.3d 438, 445 (Tex. 2004).

21 Plaintiff has not alleged intentional conduct sufficiently
22 extreme to support a claim for IIED. Plaintiff acknowledges that
23 Defendant was initially responding to inclement weather at the
24 Dallas Fort Worth Airport when it re-routed her airplane and that a
25 substantial number of flights were similarly disrupted. In light
26 of this situation, Defendant's actions cannot be said to have
27 "exceed[ed] all bounds of that usually tolerated in a civilized
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1 community." See Cervantez, 24 Cal. 3d at 593. Moreover, Plaintiff
2 has not alleged that Defendant acted with the intent of causing her
3 distress. Defendant's motion to dismiss Plaintiff's IIED claim is
4 granted. If Plaintiff can allege, consistent with her original
5 complaint, additional facts to support her claim, she may replead
6 this claim in her first amended complaint.

7 3. Negligence

8 Defendant argues that Plaintiff has not identified any duty
9 owed by it to her, independent of the duties set forth in the
10 Conditions of Carriage, which forms the basis for Plaintiff's
11 breach of contract claim. Under both California and Texas law,
12 absent the breach of an independent extra-contractual duty,
13 negligence claims are not permitted where a defendant's conduct
14 violates a contractual duty. See Robinson Helicopter Co. v. Dana
15 Corp., 34 Cal. 4th 979, 990-91 (2004); DeWitt County Elec. Coop.,
16 Inc. v. Parks, 1 S.W.3d 96, 105 (Tex. 1999). The Court grants
17 Defendant's motion to dismiss Plaintiff's negligence claim.
18 Plaintiff may replead this claim if she can allege facts sufficient
19 to establish the existence of a duty beyond that created by the
20 contract.

21 3. Breach of Contract

22 As Defendant argues, Plaintiff's reliance on the Customer
23 Service Plan is misplaced because the document expressly states
24 that it "does not create contractual or legal rights." Terrell
25 Decl., Ex. B at 20. Therefore, Plaintiff's breach of contract
26 claim is dismissed to the extent it relies on the Customer Service
27 Plan. Because amendment would be futile, the dismissal of this
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1 portion of the claim is with prejudice.⁴

2 Defendant next argues that Plaintiff's breach of contract
3 claim based on the Conditions of Carriage also fails as a matter of
4 law because all of the damages she claims are expressly excluded by
5 the terms of the document. Moreover, Defendant contends that it
6 does not guarantee its schedule and expressly disclaims liability
7 for weather-related delays. Plaintiff argues that the complaint
8 "provides sufficient notice of the alleged breaches" but states
9 that she agrees "to provide Defendant with a more definite
10 statement setting forth further details of the breaches of contract
11 cause of action." Opposition at 24. As currently plead, the
12 complaint does not state a claim for breach of contract. Plaintiff
13 may replead this claim with further detail regarding Defendant's
14 failure to comply with specific terms of the Conditions of
15 Carriage.

16 4. Fraud

17 Defendant argues that Plaintiff's fraud claim is not plead
18 with sufficient particularity. "In all averments of fraud or
19 mistake, the circumstances constituting fraud or mistake shall be
20 stated with particularity." Fed. R. Civ. P. 9(b). The allegations
21 must be "specific enough to give defendants notice of the
22 particular misconduct which is alleged to constitute the fraud
23 charged so that they can defend against the charge and not just
24 deny that they have done anything wrong." Semegen v. Weidner, 780

25
26 ⁴At the hearing, Plaintiff argued that she only relied on the
27 Customer Service Plan to the extent it was explicitly integrated
28 into the Conditions of Carriage. If this is so, Plaintiff shall
clarify that position in her amended complaint.

1 F.2d 727, 731 (9th Cir. 1985). Statements of the time, place and
2 nature of the alleged fraudulent activities are sufficient, Wool v.
3 Tandem Computers, Inc., 818 F.2d 1433, 1439 (9th Cir. 1987),
4 provided the plaintiff sets forth "what is false or misleading
5 about a statement, and why it is false." In re GlenFed, Inc., Sec.
6 Litig., 42 F.3d 1541, 1548 (9th Cir. 1994). Scierter may be
7 averred generally, simply by saying that it existed. See id. at
8 1547; see Fed. R. Civ. P. 9(b) ("Malice, intent, knowledge, and
9 other condition of mind of a person may be averred generally").

10 Plaintiff argues that she has sufficiently identified the
11 statements she alleges are fraudulent. However, as the basis for
12 this claim, she has alleged only that Defendant "assert[ed] a
13 weather emergency". She has not identified who made this statement
14 or how she intends to prove that the statement was false when made.
15 Moreover, under either California or Texas law, Plaintiff must
16 demonstrate that she relied to her detriment on the allegedly
17 fraudulent statements. Seeger v. Odell, 18 Cal. 2d 409, 414
18 (1941); Sanchez v. Liggett & Myers, Inc., 187 F.3d 486 (5th Cir.
19 1999). Plaintiff has not made any such allegation. Plaintiff's
20 fraud claim is dismissed with leave to amend. In order to restate
21 these claims against Defendant, Plaintiff must plead "'the who,
22 what, where, and how' of the misconduct charged," Vess v.
23 Ciba-Geigy Corp. USA, 317 F.3d 1097, 1106 (9th Cir. 2003) (quoting
24 Cooper v. Pickett, 137 F.3d 616, 627 (9th Cir. 1997)). Plaintiff
25 must also identify who made the allegedly misleading statements,
26 how she will prove that they were knowingly false when made, and
27 how she relied on those statements to her detriment.

United States District Court
For the Northern District of California

CONCLUSION

For the foregoing reasons, the Court GRANTS Defendant's motion for leave to file an amended notice of removal (Docket No. 28), DENIES Plaintiff's motion to remand (Docket No. 20) and GRANTS in part Defendant's to dismiss (Docket No. 25).⁵ Plaintiff may file an amended complaint consistent with this order within twenty days of the date of this order. In her opposition to the motion to dismiss Plaintiff mentions various claims that she wishes to add to her complaint. Rule 15(a) of the Federal Rules of Civil Procedure provides, "A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served." A motion to dismiss is not a "responsive pleading" within the meaning of Rule 15. CRST Van Expedited, Inc. v. Werner Enters., Inc., 479 F.3d 1099, 1104 n.3 (9th Cir. 2007); Crum v. Circus Circus Enters., 231 F.3d 1129, 1130 n.3 (9th Cir. 2000). Therefore, Plaintiff may include additional claims in her amended complaint.

IT IS SO ORDERED.



CLAUDIA WILKEN
United States District Judge

Dated: 4/25/08

⁵Defendant's motion to strike the declarations of Kathleen Hanni and Paul Hudson (Docket No. 41) is DENIED without prejudice. The Court did not rely on any improper or inadmissible evidence in deciding this motion.