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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

US AIRWAYS, INC., a Delaware corporation, *et al.*, *Plaintiff*, vs. Don ADDINGTON; John BOSTIC; Mark BURMAN; Afshin IRANPOUR; Roger VELEZ; and Steve WARGOCKI, on behalf of themselves and all other similarly-situated individuals, and US AIRLINE PILOTS ASS'N, an unincorporated association, *Defendants*.	CASE NO. 2:10-cv-01570-PHX-ROS **ADDINGTON PILOTS' RESPONSE IN OPPOSITION TO** ***USAPA'S MOTION TO DROP THE ADDINGTON DEFENDANTS, PURSUANT TO RULE 21* (DOC. #35)**

Don ADDINGTON; John BOSTIC; Mark BURMAN; Afshin IRANPOUR; Roger VELEZ; and Steve WARGOCKI (the "Addington Pilots"), on behalf of themselves and all other similarly-situated individuals, file this *Response In Opposition To USAPA's Motion To Drop The Addington Defendants, Pursuant To Rule 21 (Doc. #35)*. The Court should deny relief on this motion because the Addington Pilots are a proper direct defendant and are also properly joined under

Rules 19 and 20. This response is supported by the Memorandum of Points and Authorities that follows.

Dated this 21st day of September, 2010.

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MEMORANDUM OF POINTS AND AUTHORITIES

II. OVERVIEW

Many of the arguments made by USAPA in support of what it calls a Rule 21 motion to "drop" the Addington Pilots from the US Airways declaratory action are not relevant to application of Rule 21.[1] Although Rule 21 is "extremely broad," and may be applied to suits for declaratory judgment, 7 C. Wright, A. Miller, & M. Kane, *Federal Practice and Procedure* § 1682 (3d ed. 2010), it is merely "a mechanism for remedying either the misjoinder or nonjoinder of parties, *id.* at § 1683. To obtain Rule 21 relief, therefore, USAPA must show misjoinder. Parties are not misjoined, however, if both "preconditions for permissive joinder of parties set forth in Rule 20(a)" are satisfied. *Id.* at § 1683.[2] Both such preconditions are satisfied here for the Addington Pilots. Moreover, the Addington Pilots must be joined as necessary parties under Rule 19. USAPA, therefore, is not entitled to relief.

III. LEGAL ARGUMENT

The Addington Pilots first explain the relationship of declaratory judgment claims to claims for coercive relief.[3] They then demonstrate that they are proper direct defendants to the US Airways declaratory judgment action. Then, they demonstrate that, in addition, they are properly joined pursuant to both Rule 19 and Rule 20.

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[1] All references to "Rules" are the Federal Rules of Civil Procedure.

[2] Federal courts also use the term "misjoinder" when they dismiss a party to preserve diversity jurisdiction. *See Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 827 (1989) ("We decide today that a court of appeals may grant a motion to dismiss a dispensable party whose presence spoils statutory diversity jurisdiction."). The cases otherwise cited by USAPA are examples where the misjoined person has no claim to assert or defend. *See Letherer v. Alger Group, L.L.C.*, 328 F.3d 262, 268 (6th Cir. 2003) (noting that there was no claim for relief by or against the misjoined party); *Sabolsky v. Budzanoski*, 457 F.2d 1245, 1249 (3d Cir. 1972) (using misjoinder to explain the procedure for dismissing one but not all parties on a Rule 12(b)(6) motion to dismiss).

[3] "***[C]oercive relief.*** Active judicial remedy, either legal or equitable, that the government will enforce." *Black's Law Dictionary*, 1293 (7th ed. 1999).

A. Corresponding Coercive Claims.

1. Jurisdiction and joinder in a declaratory judgment claim follow jurisdiction and joinder in the corresponding claim for coercive relief.

"[T]he Declaratory Judgment Act does not by itself confer federal subject-matter jurisdiction." *North County Communications Corp. v. California Catalog & Technology*, 594 F.3d 1149, 1154 (9th Cir. 2010) (alteration marks omitted). Jurisdiction exists for declaratory relief, therefore, only "[i]f the declaratory judgment defendant could have brought a coercive action in federal court to enforce its rights." *United Food & Commercial Workers Local Union Nos. 137, 324, 770, 899, 905, 1167, 1222, 1428, & 1442 v. Food Employers Council, Inc.*, 827 F.2d 519, 523 (9th Cir. 1987) (alteration and quotation marks omitted). The Court, therefore, has jurisdiction over the US Airways declaratory judgment action only if it would have jurisdiction over corresponding actions for coercive relief brought by the defendants to the declaratory action.

2. Three sets of corresponding declaratory and coercive claims are cognizable under the RLA.

Three claims for coercive relief, cognizable under the RLA, have a corresponding declaratory judgment claim. *First*, the district court has jurisdiction over a coercive DFR claim that is brought by a member of a bargaining unit against a union. *Steele v. Louisville & Nashville R.R. Co.*, 323 U.S. 192, 207 (1944) (carrier was joined as defendant in DFR action).[4] The district court, therefore, has jurisdiction over the corresponding declaratory DFR claim that a union would bring against a member of the bargaining unit to establish the absence of such liability. The Addington Pilots cross claim is a coercive DFR claim against USAPA. No corresponding declaratory claim has been made.

[4] USAPA misconstrues authority as holding that the Addington Pilots lack standing to join US Airways in a DFR suit. The cases it cites are off point because they address suits against union members or union officers.

Second, the district court has jurisdiction over a coercive claim brought by a member of a bargaining unit against a carrier for knowingly cooperating with a union's DFR breach (hereinafter, a "DFR-Cooperation Claim"). *See*, *e.g.*, *Davenport v. Int'l Broth. of Teamsters, AFL-CIO*, 166 F.3d 356, 361-362 (D.C. Cir. 1999); *American Postal Workers Union, etc. v. American Postal Workers Union,* 665 F.2d 1096, 1104 n.18 (D.C. Cir. 1981). The district court, therefore, has jurisdiction over the corresponding declaratory DFR-Cooperation Claim that a carrier might bring against a member of the bargaining unit to establish the absence of such liability. The US Airways First Claim for Relief is this latter kind of declaratory claim.

Third, the district court has jurisdiction over a union's coercive claim against a carrier for breach of the duty "to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions" (hereinafter, an "Unfair Bargaining Claim"). 45 U.S.C. § 152 First. *See*, *e.g.*, *Air Line Pilots Ass'n Int'l v. Transamerica Airlines, Inc.*, 817 F.2d 510, 513 (9th Cir. 1987). The district court, therefore, has jurisdiction over the corresponding declaratory Unfair Bargaining Claim that a carrier might bring against a union to establish the absence of such liability. The US Airways Second Claim for Relief is this latter kind of declaratory claim.

This Court, in sum, can have jurisdiction over a coercive DFR claim brought by the Addington Pilots against USAPA, a declaratory DFR-Cooperation Claim brought by US Airways against the Addington Pilots, and a declaratory Unfair Bargaining Claim brought by US Airways against USAPA. If there are no defects to jurisdiction, these persons and entities are proper direct parties to such claims.

B. Addington Pilots Are Proper Defendants to the Second and Third Claims for Relief.

1. The corresponding coercive claim is a DFR-Cooperation Claim.

The US Airways Second and Third Claims for Relief, respectively, assume or test the DFR-Cooperation theory of liability. The Second Claim for Relief assumes

that US Airways would incur liability to the West Pilots if it knowingly acquiesced to a collective bargaining agreement that furthered USAPA's DFR breach. It seeks, in part, a declaratory judgment that US Airways would not incur liability under the DFR-Cooperation theory of liability because USAPA would ***not*** be in breach of its DFR for adopting and promoting a non-Nicolau seniority list. Doc. #1 at ¶ 48 (emphasis in original).

The Third Claim for Relief tests the validity of the DFR-Cooperation theory of liability. It tests the assumption that US Airways would be liable for knowingly acquiescing to a collective bargaining agreement that furthered USAPA's DFR breach. The claim seeks, in part, a declaratory judgment that US Airways would not be liable even if it knowingly acquiesced to a collective bargaining agreement that furthered USAPA's DFR breach. Doc. #1 at ¶ 56.

A single coercive relief claim corresponds to both the Second and Third Claims for Relief. This would be a coercive DFR-Cooperation claim brought by the Addington Pilots against US Airways. This claim would address the validity of the DFR-Cooperation theory of liability and USAPA's DFR breach. Courts have recognized the validity of the DFR-Cooperation theory of liability, but have not decided what elements are truly required to prove such a claim. For example, courts have not decided whether overt employer collusion is a requisite element of such claims or whether, under some circumstances, knowing acquiescence to a union's DFR breach can be sufficient to prove the claim. One court, for example, explained as follows:

> [A]n employer that knowingly acquiesces to union pressure and takes discriminatory action against an employee may be joined as a defendant. In each of these cases, the court required that the employer have actual notice of, or might reasonably be charged with notice of, the union's breach of duty to its members. The employer was then liable for retaliatory action taken against the plaintiff-employees in violation of their rights under the collective bargaining agreement or their organizational rights . . . .

American Postal Workers, 665 F.2d at 1104 n.18 (citations omitted).

The Addington Pilots have standing to bring a coercive DFR-Cooperation claim against US Airways. US Airways, therefore, can bring a declaratory DFR-Cooperation claim against the Addington Pilots. US Airways, therefore, properly named the Addington Pilots as defendants in their Second and Third Claims for Relief.

2. The Second Claim for Relief is ripe.

USAPA suggests that US Airways does not have a ripe claim.[5] For purpose of deciding ripeness, the Court asks "whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 127 (2007). Declaratory judgment actions are ripe where they address a dispute that is "definite and concrete, touching the legal relations of parties having adverse legal interests." *Id.* This analysis, in turn, must focus on "the precise legal question to be answered." *Yahoo! v. La Ligue Contre Le Racisme*, 433 F.3d 1199, 1212 (9th Cir. 2006). Hence, "[d]epending on the legal question, the case may be ripe or unripe." *Id*. Whatever the question, ripeness "evaluate[s] both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149 (1967).

Because the US Airways declaratory action asks different questions than were asked in *Addington v. U.S. Airline Pilots Ass'n*, 606 F.3d 1174 (9th Cir. 2010), the

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[5] The Addington Pilots object to USAPA ripeness argument because it fails to apply legal authority or standards. See LRCiv. 7.2(b) (memorandum shall set forth authorities relied upon). *E.E.O.C. v. Eagle Produce, L.L.C.*, No. CV-06-1921, 2008 WL 2796407, at *2 (D. Ariz. July 18, 2008) ("Parties must come forward with their points and authorities in support of or in opposition to a motion.") (citing LRCiv 7.2(b), (c)). The Court, however, can and should dismiss a claim *sua sponte* if it lacks ripeness. *See Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541-42 (1986) (finding that jurisdictional issues can be addressed *sua sponte* by the court). The Addington Pilots address ripeness on that basis, without waiving their objection to the adequacy of USAPA's argument.

analysis of the ripeness of the US airways declaratory claims need not follow the *Addington* analysis. *See id.* at 1180, n.1 (holding there could be "an unquestionably ripe DFR suit, once a contract is ratified"). In *Addington*, the plaintiffs sought a ruling on USAPA's liability. In the US Airways action, the plaintiff seeks a ruling on its own liability. The difference in the two actions is that the potentially liable party in *Addington* (USAPA) did not assert hardship if adjudication were delayed while the potentially liable party in the US Airways action (US Airways) does assert such hardship. Moreover, *Addington* did not address hardship to US Airways. Hence, notwithstanding the *Addington* ripeness ruling, the Court can and should find the US Airways declaratory action is ripe.

C. Rule 20 Joinder is Proper.

The Addington Pilots are properly joined under Rule 20(a) because their claim both arises from the same events as US Airways' Unfair Bargaining Claim and shares common issues of law and fact.

1. Rule 20 permits joinder of persons with claims that arise from the same event and share common issues.

The Rules provide for permissive joinder of a person, as either a plaintiff or defendant, as follows:

> **(a) Persons Who May Join or Be Joined.**
>
> (1) *Plaintiffs*. Persons may join in one action as plaintiffs if: (A) they assert any right to relief jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and (B) any question of law or fact common to all plaintiffs will arise in the action.
>
> (2) *Defendants*. Persons — as well as a vessel, cargo, or other property subject to admiralty process in rem — may be joined in one action as defendants if: (A) any right to relief is asserted against them jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and (B) any question of law or fact common to all defendants will arise in the action.

Rule 20(a)(1), (2).

"The purpose of Rule 20 is to promote trial convenience and expedite the final determination of disputes, thereby preventing multiple lawsuits." *Mosley v. Gen. Motors Corp.*, 497 F.2d 1330, 1332 (8th Cir. 1974) (citation and alteration marks omitted). By its terms, Rule 20 requires that the party to be joined has a claim arising from the same events and has at least one issue in common. *See id.* at 1334. The issue in common need not be the predominant issue in either claim. *Id.* (holding that the rule does not establish a "qualitative or quantitative test for commonality").

2. The Pilots' DFR claim is properly joined under Rule 20 to the declaratory Unfair Bargaining Claim.

The Addington Pilots and US Airways both assert claims that arise out of the same event—USAPA's adoption and promotion of a date-of-hire seniority scheme. These claims also raise an issue in common—whether USAPA's adoption and promotion of a date-of-hire seniority scheme was a DFR breach. In effect, proof of the DFR claim would establish an affirmative defense to the coercive Unfair Bargaining Claim. This is readily demonstrated.

The Addington Pilots claim that USAPA breached its DFR because it rejected the Nicolau Award and adopted and promoted its date-of-hire seniority list for improper reasons. This is stated in their *Answer and Counterclaim* as follows:

> 85. The duty of fair representation precluded USAPA from casting aside the Nicolau Award solely to benefit East Pilots at the expense of West Pilots.
>
> 86. The duty of fair representation precluded USAPA from casting aside the Nicolau Award without having a legitimate union objective motivating its actions.
>
> 87. USAPA adopted and promoted its date-of-hire seniority list for no reason other than to favor the East Pilots at the expense of the West Pilots.
>
> . . .
>
> 89. USAPA, therefore, breached its duty of fair representation.

Answer and Counterclaim at ¶¶ 85-87, 89. Doc. #34.

US Airways claims, in its declaratory Unfair Bargaining Claim, that it is excused from making every reasonable effort to agree on terms with USAPA because USAPA

is insisting on a seniority list that would further its DFR breach. This is stated in its First Claim for Relief as follows:

> US Airways seeks a declaratory judgment to the effect that: … (b) entry into a collective bargaining agreement between US Airways and USAPA which does not incorporate the Nicolau Award would constitute a breach of USAPA's duty of fair representation to the West Pilots in violation of the Railway Labor Act and therefore US Airways is prohibited from accepting or implementing a non-Nicolau seniority list.

Complaint at ¶ 39 (doc. #1).

On one hand, the Addington Pilots seeks a judgment as to whether USAPA acted in bad faith when it cast aside the Nicolau Award and adopted and promoted its date-of-hire seniority list. On the other hand, US Airways seeks a judgment as to whether it would be excused for refusing to acquiesce to USAPA's date-of-hire seniority list because USAPA acted in bad faith when it cast aside the Nicolau Award and adopted and promoted its date-of-hire seniority list. Both claims arise from the same event—USAPA's adoption and promotion of a date-of-hire seniority list. Both claims will decide whether this event establishes a DFR breach. Hence, both elements of Rule 20(a) are satisfied. This permits joinder of the Addington Pilots.

D. Rule 19 Joinder is Proper.

The Addington Pilots are properly joined under Rule 19 because their claim could create inconsistent obligations for US Airways.

1. Rule 19(a) requires joinder to avoid inconsistent obligations.

A person must be joined as a party if "that person claims an interest relating to the subject of the action and . . . disposing of the action in the person's absence may . . . leave an existing party subject to substantial risk of incurring . . . inconsistent obligations because of the interest." Rule 19(a)(1)(B)(ii). The purpose for Rule 19, then, is to avoid inconsistent obligations.

Obligations are inconsistent if "a party is unable to comply with one court's order without breaching another court's order concerning the same incident. Inconsistent results, by contrast, occur when a defendant successfully defends a claim in one forum, yet loses on another claim arising from the same incident in another forum." *Delgado v. Plaza Las Americas, Inc.*, 139 F.3d 1 (1st Cir. 1998). As long as inconsistent results would not impose inconsistent obligations, Rule 19 does not require joinder.

2. The Addington Pilots are Rule 19(a) necessary parties to the US Airways Unfair Bargaining Claim.

US Airways has two potentially conflicting obligations. One obligation arises from a duty that US Airways owes to USAPA "to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions." 45 U.S.C. § 152 First. US Airways would arguably be liable for breach of this duty under a theory of Unfair Bargaining, if it refused to consider USAPA's position on seniority.

The other obligation arises from a duty that US Airways owes to the Addington Pilots when it knows that USAPA is demanding contract terms that further its DFR breach. US Airways would be liable for breach of this duty under a theory of DFR-Cooperation, if it acquiesced to such demands. The Addington Pilots have indicated that they will make such a claim and will hold US Airways "liable for facilitating, or assisting, USAPA's alleged breach of the duty of fair representation if it were to accept a non-Nicolau seniority list." *Complaint* at § 33 (alteration and quotation marks omitted).

These two claims set out above, the declaratory Unfair Bargaining Claim and the DFR-Cooperation Claim, potentially create inconsistent obligations. The first claim could result in an order directing US Airways to accept USAPA's non-Nicolau seniority list. The second claim could result in an order precluding US Airways from accepting such a list. Conflicting obligations, therefore, could be imposed on US

Airways if the Unfair Bargaining Claim and DFR-Cooperation Claim were decided separately. These claims, therefore, must be decided together. This requires Rule 19 joinder.

IV. CONCLUSION

The Addington Pilots are proper direct defendants on a declaratory judgment claim. They are properly joined pursuant to Rules 19 and 20. The Addington Pilots, therefore, respectfully ask the Court to deny relief on USAPA's motion.

Dated this 21st day of September, 2010.

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CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of September 2010, I electronically transmitted the foregoing document to the U.S. District Court Clerk's Office by using the ECF System for filing and transmittal.

By */s/ Andrew S. Jacob*