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21 **UNITED STATES DISTRICT COURT**
22 **DISTRICT OF ARIZONA**

23 US Airways, Inc., a Delaware
24 Corporation,

25 Plaintiff,

26 v.

27 Don Addington, an individual; John
28 Bostic, an individual; Mark Burman, an
individual; Afshin Iranpour, an
individual; Roger Velez, an individual;
and Steve Wargocki, an individual, on
behalf of themselves and all other
similarly-situated individuals,

and

US Airline Pilots Association, an
unincorporated association,

Defendants.

Case No. CV-10-1570-PHX-ROS

**PLAINTIFF US AIRWAYS, INC.'S
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
MOTION TO DISMISS COUNTER-
CLAIM OF DEFENDANT US AIRLINE
PILOTS ASSOCIATION**

INTRODUCTION

1
2 Defendant US Airline Pilots Association (“USAPA”) has filed a counterclaim
3 against plaintiff US Airways, Inc. (“US Airways”) asserting a single cause of action under
4 the Declaratory Judgment Act, in which USAPA seeks “a declaration that regardless of
5 whether it would constitute a breach of USAPA’s duty of fair representation for USAPA
6 to insist upon or to enter into a collective bargaining agreement that does not incorporate
7 the Nicolau Award, that US Airways would *not* be liable to any individual pilot(s)
8 employed by US Airways under the Railway Labor Act or otherwise if it were to enter
9 into such a collective bargaining agreement.” (Doc. No. 88 at 23 Prayer for Relief ¶ 1
10 (emphasis added).) US Airways agrees with USAPA’s position on this point. Indeed, US
11 Airways’ own Complaint contains a cause of action seeking a virtually-identical
12 declaration. But US Airways properly named the West Pilots, who are adverse to both
13 USAPA and US Airways on that claim as a defendant, whereas USAPA did not.

14 This Court has already held that the West Pilots are necessary parties to this action
15 and to the very claims that USAPA purports to be pursuing. USAPA unsuccessfully
16 moved to drop the West Pilots from US Airways’ claim for a declaratory judgment by
17 arguing that they were improper parties. This Court held: “The West Pilots are necessary
18 given that the relief US Airways seeks cannot be granted in their absence.” (Doc. No. 85
19 at 9.) USAPA’s attempt to assert a similar claim without naming the West Pilots as a
20 defendant disregards the letter and logic of this Court’s prior order.

21 Because, as this Court previously ruled, the West Pilots are necessary parties to a
22 claim seeking a declaratory judgment regarding the question whether US Airways can be
23 held liable to them if it were to agree to a non-Nicolau seniority list, USAPA’s counter-
24 claim should be dismissed for failure to join a necessary party pursuant to Federal Rule of
25 Civil Procedure 12(b)(7).

STATEMENT OF FACTS

1
2 The following facts are taken from the admissions and allegations in USAPA’s
3 Answer and Counterclaim. (Doc. No. 88.) The allegations are assumed to be true solely
4 for purposes of this motion.¹

5 In 2005, US Airways and America West Airlines merged. (Doc. 88 at 10 ¶ 5.) At
6 the time of the merger, the Air Line Pilots Association (“ALPA”) was the collective
7 bargaining representative for both the US Airways pilots (the “East Pilots”) and the
8 America West Pilots (the “West Pilots”). (*Id.* at 11 ¶ 8.) The merger raised the issue as to
9 how seniority would be integrated between the East Pilots and West Pilots. (*Id.* ¶ 6.)
10 That question was submitted to ALPA-sponsored arbitration, in which the two parties
11 were the US Airways Pilot Merger Representatives and the America West Pilot Merger
12 Representatives. (*See id.* ¶ 11.) The arbitration culminated in a May 2007 decision
13 known as the “Nicolau Award.” (*Id.* at 13 ¶ 21.) “[A] majority of East Pilots strenuously
14 objected to the Nicolau Award and opposed its implementation.” (*Id.* at 14 ¶ 28 (*quoting*
15 *Addington*, 606 F.3d at 1178).)

16 Thereafter, the East Pilots formed USAPA. (*Id.* at 15 ¶ 38.) USAPA was (and is)
17 constitutionally committed to date-of-hire seniority principles that are different than the
18 seniority-integration principles applied in the Nicolau Award. (*Compare id.* at 16 ¶ 42
19 (noting USAPA’s constitutional “‘objective’ of ‘maintaining uniform principles of
20 seniority based on date of hire and the perpetuation thereof’) *with id.* at 13 ¶ 22 (“Nicolau
21 disregarded date-of-hire seniority principles in favor of granting super seniority to more
22 junior West pilots”).) USAPA eventually won an election against the incumbent union,
23 ALPA, and, on April 18, 2008, it was certified by the National Mediation Board as the
24 collective bargaining representative for all pilots employed by US Airways (i.e., both the
25 East Pilots and the West Pilots). (*Id.* at 16 ¶ 44.)

26
27 ¹ Additional factual background is contained in the Court’s May 31, 2011 Order
28 (*Doc. No. 85 at 1-3*) and in the Ninth Circuit’s decision in *Addington v. US Airline Pilots*
Ass’n, 606 F.3d 1174, 1177-1179 (9th Cir. 2010).

1 On September 4, 2008, the West Pilots sued USAPA based on their contention that
2 USAPA's intent not to seek implementation of the Nicolau Award's seniority list was a
3 violation of USAPA's duty of fair representation ("DFR") to the West Pilots. (*Id.* at 17
4 ¶ 51.) After a trial, the Court ruled that USAPA had in fact breached its DFR to the West
5 Pilots and entered a permanent injunction directing USAPA to implement the Nicolau
6 Award. (*Id.* at 18 ¶ 54.) USAPA appealed, and the Ninth Circuit reversed, finding that
7 the West Pilots' claim was not ripe. (*Id.* ¶ 57.)

8 USAPA contends that the Ninth Circuit's decision in *Addington* justifies and
9 confirms its position that it is "free to negotiate for and agree to a collective bargaining
10 agreement which does not incorporate the Nicolau Award." (*See id.* at 1 ¶ 3 (quoting and
11 admitting allegation in Compl. [Doc. No. 1] ¶ 3).) The West Pilots, on the other hand,
12 asserted that "it would be a breach of USAPA's duty of fair representation [to the West
13 Pilots] if USAPA were to enter into a combined collective bargaining agreement with US
14 Airways that did not incorporate the Nicolau Award" (*id.* at 7 ¶ 57 (quoting and
15 admitting allegation in Compl. ¶ 57)), and threatened US Airways with liability for
16 "facilitat[ing]," or "assist[ing]," USAPA's alleged breach of the DFR if it were to accept a
17 non-Nicolau seniority list. (*Id.* at 5 ¶ 33; Compl. ¶ 33.)

18 PROCEDURAL HISTORY

19 Faced with competing and mutually-exclusive demands from the West Pilots and
20 USAPA, US Airways brought the instant lawsuit seeking a declaratory judgment
21 regarding its rights and obligations with respect to USAPA's proposal for a non-Nicolau
22 seniority list. US Airways named as defendants both USAPA and the West Pilots (to be
23 represented by the same six individuals who had been certified to represent the class of
24 West Pilots in the prior *Addington* litigation). US Airways seeks alternative declarations
25 to the effect that: (i) "entry into a collective bargaining agreement that does not
26 incorporate the Nicolau Award would constitute a breach of USAPA's duty of fair
27 representation to the West Pilots and therefore US Airways is prohibited from accepting
28 or implementing a non-Nicolau seniority list"; *or* (ii) "entry into a collective bargaining

1 agreement that does not incorporate the Nicolau Award would not constitute a breach of
 2 USAPA's duty of fair representation to the West Pilots and therefore US Airways is not
 3 prohibited from accepting or implementing a non-Nicolau seniority list"; *or*
 4 (iii) "regardless of whether USAPA's continued insistence on and/or entry into a
 5 collective bargaining agreement which does not incorporate the Nicolau Award would
 6 constitute a breach of USAPA's . . . duty of fair representation to the West Pilots, US
 7 Airways would not be liable to the West Pilots under the Railway Labor Act or otherwise
 8 if it were to enter into a collective bargaining agreement with USAPA that did not
 9 incorporate the Nicolau Award." (Doc. No. 1 at ¶ 5 (emphasis omitted).)

10 In response to US Airways' Complaint, USAPA filed a motion to drop the West
 11 Pilots pursuant to Rule 21 of the Federal Rules of Civil Procedure. (Doc. No. 35.)
 12 Therein, USAPA argued that the West Pilots had been "misjoined because they are 'not
 13 necessary for the relief that the Complaint seeks.'" (May 31, 2011 Order [Doc. No. 85]
 14 at 8 (*quoting* Doc. No. 35 at 4).) The relief sought in US Airways' Complaint included, as
 15 the third cause of action, an alternative declaration that "US Airways would not be liable
 16 to the West Pilots under the Railway Labor Act or otherwise if it were to enter into a
 17 collective bargaining agreement with USAPA that did not incorporate the Nicolau
 18 Award." (Doc. No. 1 at ¶ 5.) US Airways and the West Pilots separately opposed
 19 USAPA's motion. (Doc. Nos. 48, 60.) They argued, among other things, that the West
 20 Pilots were necessary parties.

21 This Court denied USAPA's motion to drop the West Pilots. As this Court
 22 explained:

23 Pursuant to Federal Rule of Civil Procedure 19, a party is a necessary party
 24 if "complete relief cannot be granted in its absence." *Disabled Rights*
 25 *Action Committee v. Las Vegas Events, Inc.*, 375 F.3d 861, 879 (9th Cir.
 26 2004). US Airways' complaint requests, among other things, a declaration
 27 that it could not be held liable in a suit by the West Pilots against US
 28 Airways and a prohibition on the West Pilots from filing such a suit. If the
 West Pilots were *not* parties to this suit, any decision would not be binding
 on them. In other words, if the West Pilots were dropped, they would not
 be bound by the outcome here and would be free to file their suit against
 US Airways. This would defeat a core goal of US Airways seeking
 declaratory relief. The West Pilots are necessary given that the relief US

1 Airways seeks cannot be granted in their absence. The motion to dismiss
2 the West Pilots will be denied. (Doc. No. 85 at 9 (emphasis in original).)

3 USAPA has now brought a counter-claim against US Airways seeking relief that is
4 virtually identical to that sought in the Third Claim for Relief in US Airways' Complaint:
5 "USAPA seeks a declaratory judgment declaring that in the event that US Airways and
6 USAPA enter into a collective bargaining agreement that does not implement the Nicolau
7 Award, that US Airways would not be liable to USAPA or any pilot employed by US
8 Airways, under the Railway Labor Act or otherwise."² (Doc. No. 88 at 20 ¶ 67.) But
9 USAPA has not named the West Pilots as a defendant on its counter-claim.

10 ARGUMENT

11 US Airways brings this motion to dismiss pursuant to Rule 12(b)(7) of the Federal
12 Rules of Civil Procedure, which authorizes dismissal of an action for "failure to join a
13 party under Rule 19." Rule 19 requires the joinder of necessary parties, and states
14 specifically that a person must be joined as a party if, "in that person's absence, the court
15 cannot accord complete relief among existing parties." Fed. R. Civ. Proc. 19(a)(1)(A).
16 Rule 19 also requires joinder of a person who claims an interest in the subject matter of
17 the lawsuit if that person's absence may "(i) as a practical matter impair or impede the
18 person's ability to protect the interest; or (ii) leave an existing party subject to a
19 substantial risk of incurring double, multiple, or otherwise inconsistent obligations
20 because of the interest." Fed. R. Civ. Proc. 19(a)(1)(B). A person who satisfies either of
21 these alternative tests is a necessary party. *See, e.g., Dawavendewa v. Salt River Agric.*
22 *Improvement & Power Dist.*, 276 F.3d 1150, 1154-55 (9th Cir. 2002).

23 As this Court has already held, complete relief in this action – and specifically with
24 respect to US Airways' potential liability to the West Pilots if it were to agree to
25 USAPA's demands for a non-Nicolau seniority list – cannot be granted in the West Pilots'
26 absence. (Doc. No. 85 at 9 ("The West Pilots are necessary given that the relief US

27 ² USAPA's reference in its counter-claim to "any pilot employed by US Airways"
28 necessarily includes the West Pilots.

1 Airways seeks cannot be granted in their absence.”.) This ruling, which is the law of the
2 case, makes perfect sense because it is the West Pilots – and not USAPA – who assert that
3 US Airways could be held liable if it were to agree to a non-Nicolau seniority list
4 (Addington Pilots Answer and Cross-Claim [Doc. No. 34] at 5 ¶¶ 48, 56), and US
5 Airways is therefore in need of a judicial declaration regarding that potential liability
6 which is binding *on the West Pilots*.

7 By inexplicably failing to name the West Pilots as defendants, USAPA is asking
8 this Court to issue a declaratory judgment that US Airways cannot be held liable to “any
9 pilot employed by US Airways” (Doc. No. 88 at 20 ¶ 67), including the West Pilots,
10 without permitting the West Pilots to assert contrary arguments on their own behalf. But
11 “it is futile to attempt the adjudication of interests not represented before the court,” *see*
12 *Dredge Corp. v. Penny*, 338 F.2d 456, 464 (9th Cir. 1964), and neither USAPA nor US
13 Airways can adequately represent the West Pilots’ interests here because both contend
14 that US Airways *cannot* be held liable for the very conduct the West Pilots claim is
15 prohibited. (*See, e.g.*, Compl. ¶ 58; Doc. No. 88 at 21 ¶ 72 (“Any potential agreement
16 with US Airways and USAPA on a non-Nicolau seniority list cannot be the result of
17 actionable ‘collusion’ between US Airways and USAPA in any alleged breach of
18 USAPA’s duty of fair representation, in the circumstances presented by US Airways’
19 Complaint and this Counterclaim, as a matter of law.”), and at 23 ¶ 1.)

20 Accordingly, for the same reasons identified by this Court with respect to US
21 Airways’ own claim, the West Pilots are necessary parties to USAPA’s counter-claim.
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CONCLUSION

For all of the foregoing reasons, plaintiff US Airways respectfully requests that the Court grant this motion and dismiss USAPA’s counter-claim pursuant to Rule 12(b)(7) of the Federal Rules of Civil Procedure.

Dated: July 8, 2011.

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CERTIFICATE OF SERVICE

I hereby certify that on July 8, 2011, the foregoing document was electronically transmitted to the United States District Court Clerk's Office using the CM/ECF System for filing and transmittal.

/s/ Robert A. Siegel

Robert A. Siegel

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