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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

US Airways, Inc., a Delaware Corporation,

Plaintiff,

v.

Don ADDINGTON, an individual; John 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. 2:10-cv-01570-PHX-ROS

DEFENDANT USAPA'S RESPONSE IN OPPOSITION TO PLAINTIFF'S RULE 12(B)(7) MOTION TO DISMISS USAPA'S COUNTERCLAIM

I. INTRODUCTION

US Airways, Inc. ("US Airways" or "company") admits that it "agrees with" the Counterclaim filed by the US Airline Pilots Association ("USAPA"). (Doc. # 98-1 at 2:10). Nevertheless, the company has moved to dismiss the Counterclaim because US Airways claims that USAPA failed to join a necessary party, i.e. "the West Pilots".[1] Yet there can be no dispute that the "West Pilots" are presently a party to this action. Hence, there is no absent party that needs to be joined pursuant to Rule 19. The company's sole argument in support of their motion is that "complete relief in this action … cannot be granted in the West Pilots' absence." (Doc. # 98-1 at 6:23). This argument ignores relevant Ninth Circuit precedent interpreting Rule 19, however, which is necessary to any evaluation of a motion to dismiss brought pursuant to Rule 12(b)(7). The "West Pilots" are not "absen[t]" from this litigation simply because USAPA did not file a direct claim against them, and they cannot be "joined," because they are *already a party* to this litigation. Therefore, as a present party, even without a direct claim against them by USAPA, the "West Pilots" are bound by the results of this action under the principles of res judicata. This is especially true here where the company's "virtually-identical" claim was brought directly against the "West Pilots."

However, assuming *arguendo*, that the Court decides the West Pilots are necessary parties to USAPA's Counterclaim (in addition to the action in general), then the proper relief is not dismissal but to join co-defendants as a Rule 19 party to USAPA's existing Counterlcaim.

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[1] USAPA employs the term "West Pilots" to refer to the six individual pilots as named in the company's complaint, referred to by the court as a "subset" of the pre-merger America West pilot group and noting that then, as now, no class has been certified.

ARGUMENT

1) The "West Pilots" Are Currently a Party to this Action and Therefore the Absence of a Claim Against Them by USAPA Does Not Diminish the Potential for Complete Relief

The company's 12(b)(7) motion is based on the false premise that the lack of a direct claim (here USAPA's Counterclaim) against the West Pilots renders them somehow "absent" from this litigation and therefore jeopardizes the ability of this Court to afford "complete relief in this action" or perhaps prejudices the West Pilots' representation. (Doc. # 98-1 at 6:23). The company's fear is misplaced. The West Pilots are already parties to this action. Therefore any 12(b)(7) analysis of the feasibility of Rule 19 joinder is wholly unnecessary whether or not a certain claim in the action has been brought against the West Pilots.

The company argues that USAPA's Counterclaim should be dismissed because this court has previously determined that "the West Pilots are necessary parties *to a claim* seeking a declaratory judgment regarding the question whether US Airways can be held liable to them if it were to agree to a non-Nicolau seniority list…" (Doc. #98-1 at 2:21) (emphasis added). However, what this Court *actually* held was that the West Pilots are necessary parties "*to this suit*." (Doc. 85 at 9) (emphasis added). The distinction between being necessary to this suit as opposed to USAPA's new claim is an important one because, "by definition, the parties to be joined under Rule 19 are those against whom no relief has formally been sought but who are 'so situated as a practical matter as to impair the effectiveness of relief that may be granted to the parties who are present." *National Fair Housing Alliance v. Spanos Construction, Inc.*, 542 F. Supp. 2d 1054, 1067 (N.D. Cal.

2008) (*citing EEOC v. Peabody Western Coal Co.*, 400 F.3d 774, 781 (9th Cir. 2005)). Therefore, the company errs in its 12(b)(7) motion by arguing that the West Pilots are a necessary party to USAPA's *counterclaim*, whose absence from *that* claim necessitates its dismissal. The appropriate analysis is whether they are necessary to this *action*. And that is a finding this Court has already made that resulted in the West Pilots' continued presence in this litigation. So, in effect, the West Pilots have already been joined for purposes of Rule 19, thereby rendering the company's motion moot or merely inapposite. For this reason, also, the West Pilots suffer no prejudice on account of an inability to represent themselves.

In *EEOC v. Peabody Western Coal*, 400 F.3d 774, 781 (9th Cir. 2005) ("*Peabody*"), the EEOC brought suit against a mining company based on allegations of discriminatory Navajo Nation hiring preferences. Peabody Coal argued its hands were tied pointing to its mining lease with the Navajo Nation, because it contained an employment provision that restricted Peabody's hiring to members of the Navajo Nation. Accordingly, Peabody Coal moved pursuant to Rule 12(b)(7) to dismiss the claim for failure to join the Navajo Nation as a necessary party. They argued that dismissal was proper because, in their case, joinder was infeasible under Rule 19 because the EEOC could not state a direct claim, under Title VII, against the Navajo Nation as a matter of law. The district court agreed and dismissed the claim for failure to join the Navajo Nation as a necessary party.

On appeal the Ninth Circuit reversed. In so doing the Ninth Circuit explained that *it matters not whether there is a direct claim* against an absent party sought to be joined under Rule 19. Rather, the appropriate focus is whether the absent party can be joined *in the action* in order to "accord complete relief between those who are already parties." *Id*.

> The [Navajo] Nation fits this definition – it is a party against which relief has not formally been sought but is so situated that effectiveness of relief for the present parties will be impaired if it is not joined. We hold that its joinder is feasible. *See* Fed. R. Civ. P. 19(a).

Id. at 783. *See also Hi-Tech Rockfall Construction Co., Inc. v. County of Maui*, 2008 U.S. Dist. LEXIS 74438, at *18 (D. Haw. Sept. 24, 2008) ("this Court concludes that despite the fact that Hi-Tech is not seeking relief directly from Janod, Janod is a necessary party … under Rule 19(a)(1)(B)").

The case law in the Ninth Circuit is clear. A direct claim against a party is not a prerequisite to joining that party to the litigation under Rule 19. In fact, in *Peabody*, the Ninth Circuit directed the joinder of the Navajo Nation so that the Nation would be "bound by res judicata" *id*. at 780, *despite the fact* that no party to the action had a cognizable claim against it:

> The judgment will not bind the Navajo Nation in the sense that it will directly order the Nation to perform, or refrain from performing, certain acts. But it will preclude the Nation from bringing a collateral challenge to the judgment.

Id. The same concept holds true in this case.

It is immaterial, for purposes of Rule 19, whether USAPA has stated a direct claim against the West Pilots. The company brought this action against both USAPA and the West Pilots. This Court effectively affirmed the "joinder" of the West Pilots when it determined that they were a necessary party for purposes of Rule 19. As a current and active party to this litigation, any decision in this action "will preclude [the West Pilots] from bringing a collateral challenge to the judgment" *id*. – despite the absence of any direct claim against them by USAPA. Moreover, unlike the Navajo Nation in *Peabody*, which was bound by res judicata despite no direct claims against it, the company's Count III was

brought directly against the West Pilots and, as explained by the company, that Count is "*virtually identical*" to USAPA's Counterclaim (Doc. # 98-1 at 2)(emphasis added). The West Pilots are already a party to this action. They are directly bound by its outcome. The absence of a claim against them by USAPA in no way diminishes the Court's ability to grant complete relief. Therefore, because there is no absent party to be joined, the company's 12(b)(7) motion is misplaced and should be denied.

2) If the Court Does Determine that the West Pilots are a Necessary Party to USAPA's Counterclaim, Then the Proper Remedy Is to Join Them as Rule 19 Defendants

"A Rule 12(b)(7) motion to dismiss for failure to join a party will be granted *only if* the court determines: (1) joinder of the party is not possible, *and* (2) the party is 'indispensable.'" *Lacombe v. Bullhead City Hospital Corp*., 2008 U.S. Dist. LEXIS 121386, at *4 (D. Ariz. Jan. 23, 2008) (*citing Brosnahan v. Pozgay*, 2007 U.S. Dist. LEXIS 3287, at *2 (S.D. Cal. Jan. 17, 2007); *Shermoen v. United States*, 982 F.2d 1312, 1317 (9th Cir. 1992)). Therefore, even if the Court were to find that the West Pilots are both necessary and "indispensable" parties to USAPA's counter-claim (*Shermoen*, 982 F.2d at 1317),[2] the appropriate remedy, according to the cases interpreting Rule 12(b)(7), is not dismissal of the Counterclaim but rather to add the omitted parties. Moreover, case law confirms that a dismissal will be granted only when the defect cannot be cured. *See Gorsuch v. Fireman's Fund Ins. Co*., 360 F.2d 23 (9th Cir. 1966); *Sever v. Glickman*, 298 F. Supp. 2d 267, 275 (D. Conn. 2004).

[2] There is no precise formula for determining whether a particular non-party is necessary to an action. *Biagro Western v. Helena*, 160 F. Supp. 2d 1136, 1142 (9th Cir. 2001) (*citing Bakia v. County of Los Angeles*, 687 F.2d 299, 301 (9th Cir. 1982) (the determination is heavily influenced by the facts and circumstances of each case")).

If a dismissal is granted, it should be granted without prejudice to refiling with the proper parties added. *See Dredge Corp. v. Penny*, 338 F.2d 456, 464 (9th Cir. 1964). Furthermore, the moving party has the burden of persuading the court that dismissal is proper. *See Davis v. United States*, 192 F.3d 951, 958 (10th Cir. 1999). Typically, where an absent party can be added and the court determines they should be, the court will either order the pleadings amended or dismiss conditional on the non-moving party's failure to cure the defect. *See e.g.*, *Jota v. Texaco Inc.,* 157 F.3d 153, 162 (2d Cir. 1998) (court orders pleadings amended); *White v. Sneaer*, 313 F. Supp. 1100 (E.D. Pa. 1970) (same); *Richmond Lace Works, Inc. v. Epstein*, 31 F.R.D. 150 (S.D.N.Y. 1962) (same); *Natal v. Christian & Missionary Alliance*, 878 F.2d 1575 (1st Cir. 1989) (conditional dismissal); *Rosen v. Texas Co*., 161 F. Supp. 55 (S.D.N.Y. 1958) (same).

Here, the defect – if the Court finds one – could certainly be cured by amending USAPA's pleading. Thus, if the Court were to reach the conclusion that the omission of the West Pilots actually requires dismissal of USAPA's Counterclaim, then USAPA hereby requests leave to amend its pleading in order to add the West Pilots as Rule 19(a) defendants to its sole Counterclaim count.

Respectfully submitted:

Dated: July 25, 2011 By: ***/s/ Nicholas Granath***

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CERTIFICATE OF SERVICE

Case No. 2:10-CV-01570-PHX-ROS

I hereby certify that on this day of July 25, 2011, I electronically transmitted the foregoing document and all its attachments to the U.S District Court Clerk's Office using the ECF System for filing and transmittal.

By: ***/s/ Nicholas Granath, Esq.***