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UNITED STATES DISTRICT COURT

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. CV-10-1570-PHX-ROS

PLAINTIFF US AIRWAYS, INC.'S REPLY IN SUPPORT OF MOTION TO DISMISS COUNTER-CLAIM OF DEFENDANT US AIRLINE PILOTS ASSOCATION

INTRODUCTION

USAPA asserts two irreconcilable positions. On the one hand, it has filed a Counter-Claim seeking relief that cannot be granted in the absence of the West Pilots. On the other hand, it opposes joinder of the West Pilots to its Counter-Claim notwithstanding the Court's prior ruling that the West Pilots are necessary parties with respect to a virtually identical claim asserted by US Airways. USAPA cannot have it both ways.

USAPA argues that the West Pilots need only be parties to this action, rather than parties to its Counter-Claim, but the authority on which it relies does not support its position. Moreover, USAPA's action for a declaratory judgment requires the presence of a party with an adverse interest. USAPA and US Airways are not adverse regarding US Airways' non-liability to the West Pilots if it were to agree to USAPA's seniority demands. It is the West Pilots who are adverse on this issue, and the Court cannot grant effective relief on USAPA's Counter-Claim unless they are joined as parties to that claim.

USAPA also argues that if it has failed to name any necessary parties, they should be added as defendants rather than dismissing its Counter-Claim. But USAPA itself is unwilling to take that step. It requests leave to add only the six individual pilots named as defendants in US Airways' Complaint even though those pilots have been sued in their capacity as representatives of the proposed West Pilots class and even though effective relief on USAPA's Counter-Claim requires that the Court be able to bind all 1,900 West Pilots, not just six of them. Since USAPA is unwilling to amend its Counter-Claim in any manner that would cure its defect, dismissal is proper.

ARGUMENT

I. The West Pilots Must Be Defendants As To USAPA's Counter-Claim—Not Just Defendants As To US Airways' Complaint.

This Court previously ruled that "[t]he West Pilots are necessary given that the relief US Airways seeks cannot be granted in their absence." (Doc. No. 85 at 9.) That ruling specifically discussed the third cause of action in US Airways' Complaint. Because

USAPA concedes that cause of action is "virtually-identical" to its Counter-Claim (Doc. No. 99 at 1; *see also id.* at 4-5), the result should be the same here.

USAPA's argument that Rule 19 only requires necessary parties to be joined in an "action," broadly defined, but not with respect to individual "claims" asserted within the action (*see* Doc. No. 99 at 2-3), is not supported by the authority it cites. *EEOC v. Peabody Western Coal*, 400 F.3d 774 (9th Cir. 2005), on which USAPA places primary reliance, addressed a necessary party (the Navajo Nation) against whom the plaintiff could not assert a direct cause of action.[1] There is no such problem here: USAPA's Counter-Claim for declaratory judgment can be asserted directly against the West Pilots. Moreover, the eventual outcome of the *EEOC v. Peabody Western Coal* litigation was that the Navajo Nation had to be (and in fact was) named ***as a defendant*** on the claim at issue rather than merely being present in the lawsuit in some other capacity—the exact opposite of the result sought by USAPA with respect to the West Pilots.[2] The other decisions cited by USAPA are in accord. *See National Fair Housing Alliance v. Spanos Construction, Inc.*, 542 F. Supp. 2d 1054, 1067 (N.D. Cal. 2008) ("Defendants do not dispute that if their presence is necessary to afford full relief they may brought into this action ***as defendants***, notwithstanding their lack of liability under FHA.") (emphasis added); *Hi-Tech Rockfall Construction Co., Inc. v. County of Maui*, 2008 U.S. Dist. LEXIS 74438, at *18 (D. Haw. Sept. 24, 2008) (denying motion to dismiss "the Second claim" alleged

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[1] Specifically, the EEOC had filed a Title VII suit alleging that Peabody's contract with the Navajo Nation, which gave employment preferences to the Navajo, was unlawfully discriminatory. But the EEOC could not assert a direct claim against the Navajo Nation, which could not be sued under Title VII. *See* 400 F.3d at 778.

[2] In *EEOC v. Peabody Western Coal*, 400 F.3d at 780, the Ninth Circuit held generally that the Navajo Nation was a necessary party under Rule 19, but did not specify precisely how the Navajo Nation should be joined in the litigation given that the EEOC could not assert a direct claim against it. A subsequent appeal in the same case, which USAPA fails to cite, clarifies the matter. *See EEOC v. Peabody Western Coal*, 610 F.3d 1070 (9th Cir. 2010). On remand from the original appeal, the EEOC named the Navajo Nation as a defendant on its Title VII claim. The district court dismissed the Nation from the lawsuit on the ground that it could not be sued under Title VII. *Id.* at 1078. The Ninth Circuit reversed, and held that the Navajo Nation was a proper defendant. *Id.* at 1080.

against a necessary party, but granting that party's motion to dismiss five other claims because it was not "a necessary party ***to those claims***.") (emphasis added).

If the proper course of action in *EEOC v. Peabody Western Coal* was to name a necessary party as a defendant (even in the face of a statute preventing the Navajo Nation from being held directly liable) so as to ensure that Peabody Western Coal could invoke the preclusive effect of a judgment in the EEOC's action in future proceedings involving the Navajo Nation, *see* 610 F.3d at 1079-80, USAPA offers no persuasive explanation for why it should not be required to name the West Pilots as defendants on its Counter-Claim against US Airways. Nor does USAPA cite any authority in support of its assertion that parties in a lawsuit are bound by res judicata with respect to claims as to which they are not a party. To eliminate any uncertainty as to whether the West Pilots would be bound by the results of USAPA's Counter-Claim, they should be named as defendants. *See, generally, Schutten v. Shell Oil Co.*, 421 F.2d 869, 874 (5th Cir. 1970) ("The watchwords of Rule 19 are 'pragmatism' and 'practicality.'").

Indeed, the nature of USAPA's Counter-Claim demands it. USAPA's Counter-Claim is for a declaratory judgment to the effect that "US Airways would ***not*** be liable" to any pilot employed by US Airways (which includes the West Pilots) if it were to agree to a collective bargaining agreement with USAPA that does not implement the Nicolau Award. (Doc. No. 88 at 20 ¶ 67 (emphasis added).) To state a claim under the Declaratory Judgment Act, however, USAPA must establish that "there is a substantial controversy between parties having ***adverse legal interests***, and the controversy is of sufficient immediacy and reality to warrant declaratory relief." *Hal Roach Studios v. Richard Feiner & Co.*, 896 F.2d 1542, 1555 (9th Cir. 1990) (emphasis added). US Airways is not adverse to USAPA with respect to a declaration of US Airways' non-liability. The West Pilots are. Thus, the West Pilots are not merely necessary parties to this action; they are necessary parties to USAPA's Counter-Claim.

II. The West Pilots *Class* Must Be Defendants As To USAPA's Counter-Claim—Not Just The Individually-Named Pilots.

Presumably recognizing the possibility of this Court (again) finding the West Pilots to be necessary parties, USAPA alternatively "requests leave to amend its pleading in order to add the West Pilots as Rule 19(a) defendants to its sole Counterclaim count." (Doc. No. 99 at 6.) But on a closer examination of USAPA's Opposition, that is not what USAPA has actually requested.

Although effective relief cannot be granted with respect to USAPA's Counter-Claim unless all of the approximately 1,900 West Pilots are bound by the judgment (as they would in a certified class action), USAPA requests leave to amend only to add the six individual pilots named in US Airways' Complaint. (*See id.* at 1 n.1 (defining the term "West Pilots," for purposes of its Opposition, as "the six individual pilots as named in the company's complaint").) USAPA's attempt to redefine the "West Pilots" at this stage of the litigation ignores the history of this case. In its Complaint, US Airways defined the "West Pilots" as the pilots employed by America West Airlines, Inc. prior to its merger with US Airways, and it alleged its claims against a class of West Pilots. (*See* Doc. No. 1 at 1, 6-7.) In response, USAPA moved to drop the West Pilots, but this Court found them to be necessary parties:

> US Airways' complaint requests, among other things, a declaration that it could not be held liable in a suit by the West Pilots against US 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 Airways seeks cannot be granted in their absence.

(Doc. No. 85 at 9 (emphasis in original).) Nothing in this Court's Order suggests that only the six individual pilots are necessary parties, and the logic of the Court's decision suggests just the opposite—namely, that all of the West Pilots are necessary parties.

While USAPA could name a defendant class of all the West Pilots, and thereby bring before the Court the necessary parties to resolve its Counter-Claim, USAPA has not

requested permission to do so—indeed, it actively opposes certification of the West Pilot class. (*See* Doc. No. 92.) Accordingly, if the Court were to grant USAPA's alternative request for leave to amend to add the six pilots as defendants, the Court should do so only on the condition that USAPA name them as representatives of the proposed West Pilots class as alleged in US Airways' Complaint.

CONCLUSION

For all of the foregoing reasons, and for the reasons set forth in its motion to dismiss, US Airways respectfully requests that the Court dismiss USAPA's Counter-Claim pursuant to Rule 12(b)(7) of the Federal Rules of Civil Procedure or, in the alternative, grant leave for USAPA to amend its Counter-Claim to add the six individual pilots as representatives of the proposed West Pilots class.

Dated: August 4, 2011.

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CERTIFICATE OF SERVICE

I hereby certify that on August 4, 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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