IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

CC INVESTORS CORP., on behalf of itself and all others similarly situated,	:	
Plaintiff,	:	
v.	:	Civil Action No. 03-114-JJF
RAYTHEON COMPANY, RAYTHEON TRAVEL AIR COMPANY, FLIGHT OPTIONS, LLC, and FLIGHT OPTIONS INTERNATIONAL, INC.,	:	
Defendants.	:	

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Attorneys for Defendants Flight Options LLC and Flight Options International, Inc.

O P I N I O N

January 7, 2005

Wilmington, Delaware

Farnan, District Judge.

Pending before the Court is a Motion For Leave To File Its First Amended Answer And Counterclaim (D.I. 69) filed by Defendant Raytheon Travel Air Company ("Travel Air"). By its Motion, Travel Air requests leave to amend its answer and add a counterclaim against Plaintiff CC Investors Corp. ("CCI") alleging that CCI misappropriated Travel Air's trade secrets in violation of the Kansas Uniform Trade Secrets Act ("Kansas UTSA"), Kan. Stat. Ann. § 60-3320 et. seq. For the reasons set forth below, Travel Air's Motion For Leave To File Its First Amended Answer And Counterclaim will be granted, and the First Amended Answer And Counterclaim Of Raytheon Travel Air Company attached as an exhibit to the Motion shall be deemed filed.

BACKGROUND

CCI brought this action on behalf of itself and the putative class members against Travel Air, Travel Air's parent company, Raytheon Company (collectively, "the Raytheon Defendants"), Flight Options, LLC and Flight Options International, Inc. (collectively, the "Flight Option Defendants") alleging claims for breach of contract and common law fraud resulting from a business combination between the Raytheon Defendants and Flight Options, International, Inc. which resulted in the formation of Flight Options, LLC.

Various motions, including motions to dismiss, stay

discovery and transfer venue were filed and adjudicated by the Court. CCI then moved for class certification[1], and shortly thereafter, Travel Air filed the instant Motion For Leave To File Its First Amended Answer And Counterclaim. The Motion has been fully briefed and is ripe for the Court's review.

DISCUSSION

I. The Parties' Contentions

By its Motion, Travel Air seeks to amend its answer and file a counterclaim against CCI based on CCI's alleged misappropriation of Travel Air's trade secrets in violation of the "stranger" provision of the Kansas UTSA. Specifically, Travel Air alleges that CCI unlawfully acquired Travel Air's confidential and proprietary information from Terry L. Carr, the former contract manager for Travel Air. Travel Air alleges that Mr. Carr formed his own consulting firm in September 2002 and negotiated fractional aircraft contracts with Flight Options, LLC on behalf of Travel Air's former customers. In the course of these negotiations, Travel Air contends that Mr. Carr released confidential information to third-parties, including CCI and other former customers of Travel Air, without the consent of his former employer Travel Air. Travel Air alleges that CCI was aware of Mr. Carr's prior employment with Travel Air and knew or

[1] CCI's Motion For Class Certification (D.I. 64) is currently pending and will be addressed by the Court by separate Memorandum Opinion and Order.

should have known that Mr. Carr had a duty to safeguard any confidential information he received during his employment with Travel Air. Travel Air alleges that, despite this knowledge, CCI solicited, obtained and misappropriated confidential information from Mr. Carr in violation of the "stranger provision" of the Kansas UTSA which defines "misappropriation" as

> use of a trade secret of another without express or implied consent by a person who at the time of disclosure or use knew or had reason to know that his knowledge of the trade secret was derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use.

Kan. Stat. Ann. § 60-3320(2)(ii)(B)(III).

CCI has filed a response opposing Travel Air's motion on the grounds that (1) any amendment is futile because the proposed counterclaim cannot withstand a motion to dismiss, and (2) the amendment is being sought in bad faith to thwart CCI's ability to obtain class certification. Specifically, CCI contends that the Court "cannot make a 'just adjudication' under Rule 19 that there existed a valid confidentiality agreement or a trade secret" as that term is defined by Kansas statute, because the parties to the agreement, Raytheon Company and Terry Carr, are not parties to the counterclaim. (D.I. 71 at 1-2).

CCI also contends that Travel Air's motion was filed in bad faith because it is filed only on behalf of Travel Air, and not on behalf of Raytheon Company. CCI contends that this demonstrates bad faith, because (1) Travel Air was not a party to

the original contract, (2) there is no allegation that the original contract was assigned to Travel Air, (3) there is no allegation that Travel Air succeed to the interests of Beechcraft under the contract, and (4) Travel Air is unable to pay any judgments against it arising from Kansas Statute § 60-3323, which provides for an award of counsel fees where there has been a bad faith claim of misappropriation of trade secrets, because Travel Air's assets have been transferred to Flight Options, LLC. CCI also contends that the timing of Travel Air's Motion suggests bad faith, because the Motion was filed two weeks after the filing of CCI's motion for class certification. In this regard, CCI contends that the Motion is an improper attempt to create a non-typicality defense to class certification.

II. Whether Travel Air Should Be Granted Leave To Amend Its Answer And Add A Counterclaim

A. Standard For Granting Leave To Amend

Pursuant to Federal Rule of Civil Procedure 13(f), a defendant is permitted to amend its answer to add a counterclaim that was omitted due to "oversight, inadvertence, or excusable neglect, or when justice requires." Fed. R. Civ. P. 13(f). Rule 13(f) is interpreted liberally, and the language permitting amendment "'when justice requires' is especially flexible and allows the court to exercise its discretion and permit amendment whenever it seems desirable to do so." Perfect Plastics Indus. v. Cars & Concepts, 758 F. Supp. 1080, 1081-1082 (W.D. Pa. 1991)

(citations omitted). The decision whether to grant leave to amend under Rule 13(f) is governed by a standard similar to that which governs leave to amend under Rule 15(a). In this regard, leave to amend should be freely given, absent undue prejudice, bad faith, dilatory motives, undue delay or futility of the amendment. Anderson v. General Motors Corp., 2004 WL 725208, *3 (D. Del. Mar. 29, 2004) (citing In re Burlington Coat Factory Sec. Lit., 114 F.3d 1410, 1434 (3d Cir. 1997)).

B. Whether Leave To Amend Should Be Denied Based On The Failure To Join An Indispensable Party

CCI contends that Travel Air should be denied leave to amend its answer and add its counterclaim, because necessary parties have not been joined as required by Federal Rule of Civil Procedure 19(b) which provides for the dismissal of a claim if a party who cannot be joined is "regarded as indispensable." To determine if a party is indispensable, the court must consider first whether the party is "necessary" under Rule 19(a), and next, if the party is necessary, whether it is also indispensable under Rule 19(b). Daynard v. Ness, Motley, Loadholt, Richardson & Poole P.A., 184 F. Supp. 2d 55, 79 (D. Mass 2001), rev'd on other grounds, 290 F.3d 42 (1st Cir. 2002). Rule 19(a) defines a "necessary" party in terms of whether the joinder of that party is compulsory. In pertinent part, Rule 19(a) provides:

> A person . . . shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the

> person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.

The inquiry under Rule 19(a)(1) is "limited to whether the court can grant complete relief to the persons who are already parties to the action." Janney Montgomery Scott, Inc. v. Shepard Niles, Inc., 11 F.3d 399, 405-406 (3d Cir. 1993). In this case, the Court concludes that complete relief can be granted without the joinder of Mr. Carr, who is an alleged joint-tortfeasor with CCI. As joint-tortfeasors for the misappropriation of trade secrets, any liability between Mr. Carr and CCI would be joint and several[2], and therefore, complete relief can be granted in the absence of the joinder of Mr. Carr. Janney, 11 F.3d at 405-406. Indeed, it is well-established that joint tortfeasors are not necessary parties. See Daynard v. Ness, Motley, Loadholt, Richardson & Poole P.A., 184 F. Supp. 2d 55, 79 (D. Mass 2001), rev'd on other grounds, 290 F.3d 42 (1st Cir. 2002); 4 Moore's Federal Practice 19.06[1] (3d ed. 2001).

With respect to Rule 19(a)(2), the Court must consider what effect resolution of the suit will have on the absent party. As

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[2] See e.g. Miles, Inc. v. Cookson America, Inc., 1994 WL 6767861 (Del. Ch. 1994); SAP America v. Zoldan, 1999 WL 907569, *5 (E.D. Pa. 1999).

a practical matter, the inquiry under Rule 19(a)(2)(i) requires the Court to consider whether a decision by this Court would have a preclusive effect in any subsequent action brought against Mr. Carr. For issue preclusion specifically, Mr. Carr would need to be found to be in privity with CCI, and no such argument regarding privity has been made in this case. Under Rule 19(a)(2)(ii), the Court must consider whether the absence of Mr. Carr would expose CCI to the "substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest." In this regard, CCI contends that if it is found liable to Travel Air, it could lose a subsequent contribution suit against Mr. Carr making CCI responsible for all of Travel Air's damages. As the Third Circuit has recognized, the possibility that a party may bear the whole loss if it is found liable is not the type of "double liability" contemplated by Rule 19(a)(2)(ii). Janney, 11 F.3d at 411; Field v. Volkswagenwerk AG, 626 F.2d 293, 298 (3d Cir. 1980) (recognizing that "the possibility that [a party] might have a right of reimbursement, indemnity, or contribution against [the absent party] is not sufficient to make the [absent party] indispensable to the litigation"). Similarly, the mere "possibility that a subsequent adjudication may result in a judgment that is inconsistent as a matter of logic [does not] trigger the application of Rule 19." Field, 626 A.2d at 301-302. Because

Mr. Carr is not a necessary party under Rule 19(a), the failure to join Mr. Carr cannot be considered the failure to join an indispensable party under Rule 19(b).

As for Raytheon Company, CCI contends that the Court cannot make a determination as to whether a valid confidentiality agreement exists without the joinder of Raytheon Company. At this juncture, the Court cannot agree with CCI's contention. Travel Air's counterclaim is not based on the period of time that Mr. Carr was employed with Beechcraft, which later became known as Raytheon Company. Rather, Travel Air's counterclaim pertains to the time during which Mr. Carr was employed by Travel Air. It is in his capacity as contract manager with Travel Air that Travel Air contends that Mr. Carr acquired the confidential information which was later improperly disclosed by Mr. Carr to CCI. Although Travel Air asserts the confidentiality agreement between Mr. Carr and Beechcraft in support of its claim of misappropriation of trade secrets, Travel Air also contends that even absent the confidentiality agreement, Mr. Carr was bound by Kansas law not to disclose Travel Air's trade secrets. Based on these allegations, the Court cannot conclude that Raytheon Company is an indispensable party to the counterclaim.[3]

[3] Travel Air's standing to bring suit under the terms of the confidentiality agreement may well be in question, as there is no allegation by Travel Air that it was a third party beneficiary or assignee of the confidentiality agreement. However, in the Court's view, the question of standing requires

In sum, the Court concludes that neither Mr. Carr nor Raytheon Company is an indispensable party to this litigation, and therefore, Travel Air's failure to join Raytheon Company and Mr. Carr does not preclude Travel Air from asserting its counterclaim against CCI. Accordingly, the Court concludes that no basis exists under Rule 19 to deny Travel Air's motion to amend its answer and add a counterclaim.

C. Whether Leave To Amend Should Be Denied Based On Futility Of The Amendment For Failure To Adequately Plead The Existence Of A Trade Secret

As to CCI's second argument concerning whether Travel Air has adequately pled the existence of a trade secret such that the addition of the counterclaim is not futile, the Court must apply the standard applicable to motions to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b). See e.g. Ragin v. Harry Macklowe Real Estate Co., 126 F.R.D. 475, 478 (S.D.N.Y. 1989). Under this standard, leave to add a counterclaim "should be denied only if it appears beyond doubt that the defendants can prove no set of fact supporting their claim that entitled them to relief." Id. In making this determination, the Court "must accept as true the allegations in the complaint and all reasonable inferences that can be drawn therefrom." Langford v. City of Atlantic City, 235 F.3d 845, 847

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more factual detail than is available at this stage of the litigation, and therefore, the Court believes that this question is best left to a later stage of the proceedings for resolution.

(3d Cir. 2000).

> Under Kansas law, a trade secret is broadly defined as
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> information, including a formula, pattern, compilation, program, device, method, technique, or process, that
>
> (i) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, or other persons who can obtain economic value from its disclosure or use, and
>
> (ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Kan. Stat. Ann. § 60-3320(4). Examining the allegations of the counterclaim in light of this definition and the standard governing a motion to dismiss under Rule 12(b)(6), the Court concludes that Travel Air has alleged the existence of trade secrets so as to form the basis of its claim for misappropriation of trade secrets. Included in its counterclaim are allegations that Mr. Carr provided CCI with comments that were based either in whole or part on confidential and sensitive financial and/or propriety information he acquired during his employment at Travel Air, and that Mr. Carr expressed an opinion as to whether the revised interchange rates that took effect in March 2002 were justified based on the increased cost of owning and maintaining the fractional aircraft, and that his opinion on this topic was based on confidential and sensitive financial and/or propriety information. (D.I. 69, Exh. 1, Counterclaim at ¶ 13-14. In the Court's view these allegations, taken as true, are sufficient to

state a claim at this juncture that the information provided to CCI from Mr. Carr constituted trade secrets.

C. Whether Leave To Amend Should Be Denied On The Grounds That The Counterclaim Was Asserted In Bad Faith

Having concluded that Travel Air's motion for leave to amend should not be denied on the basis of futility, the Court must next consider whether Travel Air has asserted its counterclaim in bad faith as CCI contends. Specifically, CCI contends that the counterclaim was filed two weeks after CCI's motion for class certification in an attempt to create a non-typicality defense to class certification. However, CCI presents no evidence, other than the timing of Travel's Air's Motion To Amend, to substantiate its allegation, and the Court is not persuaded that the timing of the Motion is sufficient to demonstrate bad faith. Travel Air's counsel has represented to the Court that Travel Air's attorneys began preparing the counterclaim well before the motion for class certification was filed and that it waited to file the counterclaim in order to receive supporting documents from Mr. Carr. Further, the Court observes that under CCI's proposed scheduling order, CCI filed its motion for class certification several months before it anticipated it would be filed. In these circumstances, the Court is not persuaded that the counterclaim was filed in bad faith as a response to CCI's motion for class certification. Further, the Court is not persuaded that Travel Air's motion to add a valid counterclaim

should be denied because that counterclaim may negatively affect CCI's ability to seek class certification.[4] Accordingly, the Court concludes that CCI has not demonstrated that leave to amend should be denied on the basis of bad faith, and therefore, the Court will grant Travel Air's motion to amend its answer and add a counterclaim.

CONCLUSION

For the reasons discussed, the Court will grant Travel Air's Motion For Leave To File Its First Amended Answer And Counterclaim.

An appropriate Order will be entered.

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[4] CCI also contends that Travel Air's failure to bring this action on behalf of Raytheon Company demonstrates bad faith, because Travel Air has no assets, and therefore cannot be subject to a claim under Kansas Stat. Ann. § 60-3323, which provides for an award of attorneys fees where there has been a bad faith claim of misappropriation of trade secrets. Given the allegations in the counterclaim, the Court cannot conclude that the failure to join Raytheon Company demonstrates a bad faith attempt to circumvent Kansas law. As the Court previously noted, Travel Air's counterclaim alleges that the confidential information at issue was acquired by Mr. Carr during his employment with Travel Air, not Raytheon Company.

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CC INVESTORS CORP., on behalf of itself and all others similarly situated,	:	
Plaintiff,	:	
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RAYTHEON COMPANY, RAYTHEON TRAVEL AIR COMPANY, FLIGHT OPTIONS, LLC, and FLIGHT OPTIONS INTERNATIONAL, INC.,	:	
Defendants.	:	

O R D E R

At Wilmington, this 7th day of January 2005, for the reasons set forth in the Opinion issued this date;

IT IS HEREBY ORDERED that:

1. The Motion For Leave To File Its First Amended Answer And Counterclaim (D.I. 69) filed by Defendant Raytheon Travel Air Company is GRANTED.

2. The First Amended Answer And Counterclaim Of Raytheon Travel Air Company attached to the aforementioned Motion (D.I. 69, Exh. 1) is deemed filed.

JOSEPH J. FARNAN, JR.
UNITED STATES DISTRICT JUDGE