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11 UNITED STATES DISTRICT COURT  
12 NORTHERN DISTRICT OF CALIFORNIA  
13 SAN FRANCISCO DIVISION

14 JOSHU OSMANSKI,  
15 Plaintiff,

16 v.

17 CATHAY PACIFIC AIRWAYS LTD; and,  
18 USA BASING, LTD.,  
19 Defendants.

Case No. 3:15-cv-01254 JD

**MOTION TO AMEND AND MEMO-  
RANDUM IN SUPPORT THEREOF**

Date: September 30, 2015  
Time: 9:30 AM  
Place: Courtroom 11, 19th Floor  
The Honorable James Donato

Date Action Filed: March 17, 2015

20 Pursuant to Fed. Rule Civ. P. 15(a)(2) plaintiff, Joshu Osmanski, through his attorneys  
21 requests that the Court grant the motion for Leave to Amend Mr. Osmanski’s Complaint, Dkt. 1,  
22 and respectfully requests the motion be heard, without oral argument, on September 30, 2015, at  
23 9:30 AM.

**I. STATEMENT OF ISSUE & INTRODUCTION**

24 The issue is whether grounds exist to amend Plaintiff’s complaint so as to name David  
25 Lomax, the person who made the decision to fire Mr. Osmanski, as an individual defendant.

26 Defendants, Cathay Pacific Airways, Ltd. and USA Basing, Ltd. ("Defendants"),  
27 violated Joshu Osmanski’s rights under the Uniformed Services Reemployment Rights Act  
28 (“USERRA”), *inter alia*, by terminating his employment on account of his military service.

1 Defendants deny Mr. Osmanski's allegations. (Dkt. 26)

2 Defendants' discovery disclosures now reveal that USA Basing's Manager, David  
 3 Lomax (a) was the individual who made the decision to terminate Mr. Osmanski's employment,  
 4 (b) made that decision to terminate Mr. Osmanski's employment fully knowing that USERRA  
 5 barred Mr. Osmanski's military status and/or obligations from playing a part in such an action,  
 6 (c) knew that USERRA afforded Mr. Osmanski certain post-employment leave benefits but  
 7 knowingly chose not to confer them to Mr. Osmanski, and (d), purposefully caused false and  
 8 incomplete information about the true (military related) reasons for Mr. Osmanski's termination  
 9 to be conveyed to the California branch of the U.S. Department of Labor/VETS - - - the  
 10 government entity with whom Mr. Osmanski attempted to enforce his USERRA rights, as  
 11 allowed under 38 U.S.C. § 4322, following his termination from Cathay.  
 12

13  
 14 The acts of Mr. Lomax were focused at Mr. Osmanski's California-based USERRA  
 15 activities and had a direct, and adverse, effect on Mr. Osmanski's employment. And when an  
 16 employer's agent acts in a manner that adversely affects an employee then that agent is  
 17 personally liable under USERRA. Mr. Osmanski's Motion to Amend should be granted.  
 18

## 19 **II. ARGUMENT**

### 20 **A. MOTION TO AMEND STANDARD.**

21 "A party may amend its pleading only with the opposing party's written consent<sup>1</sup> or the  
 22 Court's leave. The Court should freely give leave when justice so requires." Fed. Rule Civ. P.  
 23 15(a) (2). The requirement that leave be freely given is "[a] mandate . . . to be heeded." *Foman*  
 24 *v. Davis*, 371 U.S. 178, 182 (1962). As such, the Ninth Circuit Court of Appeals recognizes a  
 25 "strong public policy permitting [leave for] amendment [of complaints]." *Outdoor Systems, Inc.*  
 26  
 27

28 <sup>1</sup> Defendants declined the Plaintiff's request to stipulate to this motion. (Crotty Decl. ¶2)

1 v. *City of Mesa*, 997 F.2d 604, 614 (9th Cir. 1993); *Scott v. Eversole Mortuary*, 522 F.2d 1110,  
 2 1116 (9th Cir. 1975). Leave to amend is normally granted unless prejudice is found. *Yellow*  
 3 *Bus Lines, Inc. v. Drivers, Chauffeurs & Helpers Local Union*, 639, 883 F.2d 132, 145 (D.C.  
 4 Cir. 1989).

5 In this matter, the last day to amend pleadings is August 28, 2015. (Dkt. 38) The  
 6 discovery cut off is May 17, 2016, and trial is not until December 12, 2016. *Id.* There is no  
 7 prejudice to any party by allowing the amendment of the complaint.  
 8

9 **B. PLAINTIFF'S MOTION TO AMEND SHOULD BE GRANTED TO INCLUDE MR. LOMAX AS A**  
 10 **DEFENDANT.**

11 *I. USERRA allows for supervisors to be sued individually.*

12 The USERRA imposes joint and several liability upon employers as both individuals  
 13 and entities. *Novak v. Mackintosh*, 919 F. Supp. 870, 878 (D.S.D. 1996). 38 U.S.C. § 4303(4)  
 14 (A) (i); 20 C.F.R. § 1002.5(d)(1)(i). USERRA defines an employer broadly. *Id.*

15 [T]he term "employer" means any person, institution, organization,  
 16 or other entity that pays salary or wages for work performed **or**  
 17 **that has control over employment opportunities**, including--  
 18 (i) a **person**, institution, organization, or other entity to whom the  
 19 employer has delegated the performance of employment-related  
 responsibilities; [...]

20 38 U.S.C. § 4303(4) (A) (i) (emphasis added in bold).

21 Further, individual supervisors and other "persons" are properly named defendants in  
 22 USERRA actions. *Brandsasse v. City of Suffolk, Va.*, 72 F. Supp. 2d 608, 618 (E.D. Va. 1999)  
 23 (personnel director proper defendant in USERRA suit for failure to promote plaintiff). *Carter v.*  
 24 *Siemens Bus. Servs., LLC*, 2010 U.S. Dist. LEXIS 92354 (N.D. Ill. Sept. 2, 2010)(human  
 25 resources consultant who recommended employment related-decisions was a proper defendant  
 26 in USERRA suit); *Baldwin v. City of Greensboro*, 2010 U.S. Dist. LEXIS 82278 (M.D.N.C.  
 27  
 28

1 Aug. 12, 2010)(denying motion to dismiss individual defendants who had direct influence on  
2 employment–related decisions).

3 2. *Mr. Lomax is individually liable under USERRA.*

4 Mr. Lomax, exercising decision making authority analogous to that of the *Brandsasse*  
5 individual defendant, made the decision to terminate Mr. Osmanski’s employment. (Crotty  
6 Decl. at Ex. A *citing* Interrogatory No. 2) Mr. Lomax not only made the decision to terminate  
7 Mr. Osmanski’s employment, but did so after playing a key role in investigating Mr.  
8 Osmanski’s service in the military and responding to Mr. Osmanski’s military related  
9 communication. *See infra*. Defendants’ recent discovery disclosures revealed the following as  
10 to Mr. Lomax’s involvement in the investigation and decision to terminate Mr. Osmanski’s  
11 employment:  
12  
13

14 As a starting point, Cathay admits that on March 15, 2011, Mr. Osmanski’s military  
15 commander, Douglas Cochran, informed Dave Lomax that USERRA provided Mr. Osmanski  
16 certain employment protections. (*Compare* Dkt. 1, ¶22, *with* Dkt. 26, ¶22) Mr. Osmanski’s  
17 PAC<sup>2</sup> ¶¶ 27 -31, alleges that following Mr. Cochran’s May 15, 2011, communication Cathay,  
18 Mr. Lomax and others did the following:  
19

- 20 • Upon information and belief, Cathay and Mr. Lomax, now on  
21 notice that Mr. Osmanski was protected by USERRA, began  
22 devising a scheme to terminate Mr. Osmanski’s employment  
because of “misuse of USERRA.” (PAC ¶27)
- 23 • Sometime before October 3, 2011, Cathay employee Philip Herbert  
24 contacted the US Consulate in Hong Kong’s military Office of  
25 Liaison Administration (OLA) in order to file what the company  
describes as a “complaint” regarding Mr. Osmanski’s alleged  
26

27 <sup>2</sup> PAC means Mr. Osmanski’s Proposed Amended Complaint, a copy of which is attached to Mr.  
28 Crotty’s declaration filed herewith. The proposed additions to the complaint are underlined.  
(Crotty Decl. Ex. B)

1 military leave abuse. (PAC ¶28; Crotty Decl at Ex. C *citing* CX –  
2 00095)

- 3
- 4 • The OLA military attaché with whom Mr. Herbert and other  
5 Cathay employees and agents worked with regarding the  
6 company’s plan to terminate Mr. Osmanski’s employment was  
7 U.S. Air Force Lieutenant Colonel Dan King. *Id.* at ¶29.
  - 8 • Lt Col King was an active duty (not reserve) Air Force officer who  
9 was not an attorney, not trained in USERRA, not qualified to offer  
10 opinions on USERRA, not aware of the military commitments  
11 inherent to military reserve fighter pilots (like Mr. Osmanski), and  
12 not authorized to collect information on the military activity of a  
13 military officer (read: Osmanski) and disclose that information to  
14 the agents of Cathay - - - whose majority shareholder is Air China  
15 Limited, a Chinese owned company. *Id.* at ¶30.
  - 16 • Upon information and belief, Cathay caused Lt Col King (a F-15  
17 fighter pilot) and U.S. Navy Captain Alexander Butterfield (an  
18 active duty Navy intelligence officer also assigned to the U.S.  
19 Consulate in Hong Kong) to misuse United States Property and  
20 resources (including misuse of rank, position, or authority) to  
21 conduct an unlawful and unauthorized investigation on Mr.  
22 Osmanski by, among other things, collecting information on Mr.  
23 Osmanski’s military unit’s command structure, training schedules,  
24 and personnel rotations. *Id.* at ¶31.

25 Cathay further admits that Mr. Osmanski informed it, in October 2011, of a service-  
26 related injury Mr. Osmanski incurred. (*Compare* Dkt. 1, ¶30 *with* Dkt. 26, ¶¶30) Mr.  
27 Osmanski’s PAC further alleges, and the evidence shows, that Mr. Osmanski informed Cathay  
28 of his service-related injury on October 2, 2011. Mr. Herbert then informed U.S. Air Force  
Lieutenant Colonel Daniel King (described above) of the incident:

On October 3, 2011, Mr. Herbert transmitted, to Mr. Lomax and other  
Cathay employees, Lt. Col. King’s and Captain Butterfield’s (incorrect)  
legal conclusion that Cathay “may terminate FO Osmanski with  
prejudice” because of Mr. Osmanski’s “flagrant use of the USERRA  
which requires a reservist to contact his employer and return within a  
reasonable period of time.” (PAC ¶38; Crotty Decl. at Ex. C)

1 Cathay admits that Mr. Lomax decided to terminate Mr. Osmanski's employment on or  
 2 about April 23, 2012. (Crotty Decl. at Ex. A *citing* Cathay Response to Interrogatory No. 2)  
 3 Cathay's discovery documents show that, also on or about April 23, 2012, Mr. Lomax knew that  
 4 USERRA afforded Mr. Osmanski certain leave benefits but that Mr. Lomax knowingly decided  
 5 to deprive Mr. Osmanski of those benefits. (PAC ¶¶52, 53; Crotty Decl. at Ex. D *citing* CX  
 6 0000267)  
 7

8 Cathay admits that on or about May 1, 2012, Mr. Lomax received a discrimination  
 9 complaint that Mr. Osmanski filed with the Employer Support for Guard and Reserve (ESGR).  
 10 (*Compare* Dkt. 1, ¶46, *with* Dkt. 25, ¶46) Cathay's discovery documents show that on May 3,  
 11 2012, Lt Col King informed Cathay that the OLA's earlier opinions regarding Mr. Osmanski  
 12 and USERRA were not "legal advice" but that Mr. Lomax nonetheless ratified its decision to  
 13 terminate Mr. Osmanski's employment. (PAC ¶¶58, 59; Crotty Decl. at Ex. E *citing* CX  
 14 0000117)  
 15

16 Lastly, Cathay admits that Mr. Osmanski filed a complaint with the California branch of  
 17 the US Department of Labor/VETS. (*Compare* Dkt. 1, ¶48 *with* Dkt. 26, ¶48) Cathay's  
 18 discovery documents show Mr. Lomax received Mr. Osmanski's DOL/VETS complaint and  
 19 forwarded the same to Lt Col King with the following comments:  
 20

21 [t]his is the termination of Omsanski due his constant inability to  
 22 comply with Company policy or procedures. US part time Mil guy  
 23 who went deep and silent when we tried to contact<sup>3</sup> him – on  
 24 several occasions he only gave a day or two notice<sup>4</sup> of 'Mil Duty.'

25  
 26 <sup>3</sup> USERRA contains no provision that requires an employee to accommodate an employer by  
 27 responding to an employer's communication when that employee is on military duty. *See* 20  
 28 C.F.R. § 1002.104.

<sup>4</sup> Giving a day or two's advance notice does not violate the law. In fact, "USERRA does not  
 specify how far in advance notice must be given to the employer." 20 C.F.R. § 1002.85(d).

1 Turns out he was volunteering<sup>5</sup> to fly USN F18s instead of coming  
2 here to complete his training. A constant underachiever who was  
3 struggling with the training and was mis-using<sup>6</sup> USERRA regs to  
4 hide from the fact that he was, in all probability, going to get  
5 chopped. (PAC ¶¶63-65, 67; Crotty Decl. at Ex. F *citing*  
6 CX0000481-483)

7 Cathay admits to opposing Mr. Osmanski's DOL/VETS complaint, Dkt. 26, ¶50.  
8 Nevertheless, its June 15, 2012, opposition to the DOL/VETS does not, *inter alia*, contain Mr.  
9 Lomax's admission that Mr. Osmanski was "mis-using USERRA" by "volunteering to fly USN  
10 F18s instead of coming here to complete his training" and makes no mention of Mr. Osmanski's  
11 February 29, 2012, request to return to work.

12 The above allegations and evidence show Mr. Lomax controlled Mr. Osmanski's  
13 employment opportunities at Cathay and purposefully availed himself to this Court's  
14 jurisdiction.

15 3. *This Court possesses specific jurisdiction over Mr. Lomax.*

16 A court possesses specific jurisdiction over a foreign individual defendant provided the  
17 following elements are met:

18 (1) The non-resident defendant must purposefully direct his activi-  
19 ties or consummate some transaction with the forum or resident  
20 thereof; or perform some act by which he purposefully avails him-  
21 self of the privilege of conducting activities in the forum, thereby  
22 invoking the benefits and protections of its laws;

23 <sup>5</sup> USERRA makes no distinction as to whether a military reservist is compelled to serve or  
24 volunteers to serve. 38 U.S.C. § 4312(h). And such voluntary service should be encouraged,  
25 especially during this time in our Nation's history when our country, without increasing taxes or  
26 levying a draft, continues to wage combat operations in Iraq, Afghanistan, East Africa, Yemen,  
27 the Philippines, and elsewhere.

28 <sup>6</sup> No "mis-use of USERRA" defense exists. Under USERRA's anti-discrimination/retaliation  
provisions the defendant bears the burden of showing it would have subjected the employee to an  
adverse employment action in the absence of the employee's military obligation. 38 U.S.C. §  
4311(c)(1)&(2). Under USERRA's re-employment provision the employer bears the burden of  
showing that changed circumstances made re-employing the returning servicemember  
impossible or unreasonable. 38 U.S.C. § 4312(d).

1 (2) the claim must be one which arises out of or relates to the de-  
2 fendant's forum-related activities; and  
3 (3) the exercise of jurisdiction must comport with fair play and  
substantial justice. *Brainerd v. Governors of the Univ. of Alberta*,  
873 F.2d 1257, 1259 (9th Cir. 1989).

4 The plaintiff bears the burden of establishing elements (1) and (2). Element (1), above,  
5 “requires a finding that the defendant ‘[has] performed some type of affirmative conduct which  
6 allows or promotes the transaction of business within the forum state,’” *Sher v. Johnson*, 911  
7 F.2d 1357, 1362 (9th Cir.1990)), or that the out-of-state defendant performed an injurious act,  
8 knowing that “the brunt of that injury would be felt by” someone in the forum state. *Calder v.*  
9 *Jones*, 465 U.S. 783, 789–90 (1984).

10  
11 Here, Mr. Lomax performed an injurious act by misleading the DOL/VETS as to the  
12 true military related reason for Mr. Osmanski’s firing and did so knowing that the brunt of the  
13 act would be felt in California. The parties agree Mr. Osmanski filed a DOL/VETs complaint,  
14 with the DOL’s California division, in early-June 2012. (*Compare* Dkt. 1, ¶48 with Dkt. 26,  
15 ¶48) Cathay employee Fatima Larios transmitted the DOL/VETs complaint to David Lomax on  
16 or about June 2, 2012. (Crotty Decl. at Ex. F *citing* CX 0000483)<sup>7</sup> Mr. Lomax subsequently  
17 exchanged the DOL/VETs information with U.S. Air Force Lieutenant Colonel Dan King who,  
18 in response to Mr. Lomax’s email, stated that it was “odd [Mr. Osmanski] selected Monterrey,  
19 California” to file his DOL/VETs complaint. *Id.* at CX 000481.

20  
21  
22 Mr. Lomax, knowing that Mr. Osmanski filed his DOL/VETs complaint in California,  
23 caused Cathay to communicate false and incomplete information to the California branch of the  
24 DOL/VETs which the DOL/VETs relied on in determining that Mr. Osmanski’s USERRA  
25 claim was insufficient. (PAC ¶¶71-72) The false information Mr. Lomax directed at the  
26  
27

28 <sup>7</sup> CX 00483 references a Mr. Chao, the DOL/VETs investigator.



1 DOL/VETs included the allegation that Mr. Osmanski did not communicate with Cathay and  
2 was lying about the voluntary nature of his military obligations even though the true reason for  
3 Mr. Osmanski's dismissal was because, in Mr. Lomax's own words, "[Mr. Osmanski] was  
4 volunteering to fly USN F18s instead of coming here to complete his training" - - - conduct in  
5 the form of voluntary military service that is unquestionably protected under 38 U.S.C. §  
6 4312(h). (Crotty Decl. at Ex. F *citing* CX 000481) By directing false and incomplete  
7 information to the California DOL/VETs division Mr. Lomax intended that the brunt of his false  
8 and incomplete statements would be felt in California and be used to Mr. Osmanski's  
9 disadvantage. *Calder*, 465 U.S. at 789-90. As a result, Mr. Osmanski alleges that Mr. Lomax's  
10 acts constitute retaliation under USERRA. (PAC ¶89)  
11  
12

13 As to element (2), Mr. Osmanski's USERRA claims against Mr. Lomax (and his  
14 employers Cathay and USA Basing, Ltd.) arise out of Defendants' forum related USERRA  
15 activities. Mr. Osmanski utilized 38 U.S.C. § 4322 when he filed his California DOL/VETS  
16 complaint against Cathay. Cathay contested Mr. Osmanski's DOL/VETS complaint in  
17 California and Mr. Osmanski's PAC alleges Mr. Lomax caused Cathay to contest the DOL/VETS  
18 complaint via the above referenced false and incomplete information. Further, Cathay admits  
19 that this Court has jurisdiction over it for the purpose of the above-referenced action. (Dkt. 26,  
20 ¶4)  
21

22 Mr. Lomax knew Mr. Osmanski filed a DOL/VETS complaint in California. Mr. Lomax  
23 caused false and incomplete information allegedly justifying Mr. Osmanski's termination to be  
24 transmitted to the California DOL/VETS knowing that the brunt of such false and incomplete  
25 information would be felt in California and would disadvantage Mr. Osmanski. In so acting Mr.  
26 Lomax purposefully availed himself to the jurisdiction of this Court.  
27  
28

**III. CONCLUSION**

Plaintiff's Motion for Leave to Amend his Complaint should be granted.

DATED this 25th day of August 2015.

/s/ Matthew Z. Crotty

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**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing was electronically served by CM/ECF to the following on this August 25, 2015.

Steven R. Onstot

Thomas G. Jarrard

Michael B. Love

Angela N. O'Rourke

Daniel B. Pasternak

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/s/ Matthew Z. Crotty

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