

FILED IN
4TH DISTRICT COURT
STATE OF UTAH
UTAH COUNTY
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David B. Watkiss, Esq. (#3401)
Anthony C. Kaye, Esq. (#8611)
James W. Stewart, Esq. (#3959)
Boyd L. Rogers, Esq. (#10095)
Matthew L. Moncur, Esq. (#9894)
BALLARD SPAHR ANDREWS & INGERSOLL, LLP
One Utah Center, Suite 600
201 South Main Street
Salt Lake City, Utah 84111-2221
Telephone: (801) 531-3000
Facsimile: (801) 531-3001

Attorneys for Plaintiffs The Canopy Group, Inc.
and Raymond J. Noorda and Lewena Noorda, as
Trustees of the Noorda Family Trust

**IN THE FOURTH JUDICIAL DISTRICT COURT
UTAH COUNTY, STATE OF UTAH**

**THE CANOPY GROUP, INC., a Utah
corporation, and RAYMOND J. NOORDA
and LEWENA NOORDA, as Trustees of the
NOORDA FAMILY TRUST,**

Plaintiffs,

vs.

**RALPH J. YARRO III, an individual,
DARCY G. MOTT, an individual, and
BRENT D. CHRISTENSEN, and individual,**

Defendants.

**MEMORANDUM IN OPPOSITION TO
DEFENDANTS' MOTION TO DISMISS
FOR FAILURE TO PLEAD AS
COMPULSORY COUNTERCLAIM**

HEARING REQUESTED

Case No.: 050400245

Honorable Anthony W. Schofield

Plaintiffs The Canopy Group Inc. ("**Canopy**") and Raymond J. Noorda ("**Mr. Noorda**")
and Lewena Noorda ("**Mrs. Noorda**"), as Trustees of the Noorda Family Trust (the "**Trust**")

(collectively, “**Plaintiffs**”), by and through their undersigned counsel, respectfully submit this Memorandum in Opposition to Defendants’ Motion to Dismiss for Failure to Plead as Compulsory Counterclaim (this “**Motion**”).

PRELIMINARY STATEMENT

On January 20, 2005, some four days prior to the filing of this action, Defendants Ralph J. Yarro III (“**Yarro**”), Darcy G. Mott (“**Mott**”) and Brent D. Christensen (“**Christensen**”) (collectively, the “**Yarro Defendants**”) filed a Complaint and Jury Demand (the “**Yarro Complaint**”) with this Court (Civil No. 050400205; hereinafter the “**Yarro Action**”). Named Defendants in the Yarro Complaint include Val Noorda Kreidel, Terry Peterson, William Mustard, the Trust, Mr. Noorda, Mrs. Noorda, and ten John Doe parties. (*see* Yarro Complaint). On February 9, 2005, the Yarro Defendants filed and served an Amended Complaint and Jury Demand. After the Yarro Defendants amended their complaint, defendants named in the Yarro Complaint had until Thursday, February 24, 2005 to file responsive pleadings in that action. On February 24, 2005, Plaintiffs filed an Answer and Counterclaim to the Yarro Complaint which incorporated by reference Plaintiffs’ original Complaint and the nine causes of action asserted therein.

On February 15, 2005, The Yarro Defendants filed this Motion, asking the Court to dismiss this action on the grounds that it should have been filed as a compulsory counterclaim to the Yarro Complaint. In so moving, not only have the Yarro Defendants ignored the plain meaning and purpose of Utah R. Civ. P. 13(a), but they have, in effect, wasted this Court’s and the Parties’ time by seeking a meaningless and moot order. The Yarro Defendants’ motion seeks

an order that would compel Plaintiffs to bring this action as a counterclaim to the Yarro Complaint, even though Plaintiffs have already done so. Indeed, Plaintiffs have sought to promote judicial efficiency by asking the Court to consolidate this action and the Yarro Action.¹ This Motion, which is based on a fundamental misinterpretation of Utah R. Civ. P. 13(a), should therefore be denied and the Court should instead enter an order consolidating this action with the Yarro Action.

REPLY TO YARRO DEFENDANTS' "STATEMENT OF FACTS"

In an effort to support their flawed interpretation of Utah R. Civ. P. 13(a), the Yarro Defendants' Memorandum in Support of Defendants' Motion to Dismiss for Failure to Plead as Compulsory Counterclaim (the "**Yarro Memo**") attempts to paint this action and the Yarro Complaint as being so factually similar as to compel the filing of this action as a counterclaim to the Yarro Complaint. While Plaintiffs dispute the Yarro Defendants' characterization of the claims asserted in this action and the Yarro Action, Plaintiffs also assert that the facts asserted therein are of no import to this Court in ruling on this Motion. Plaintiffs state that the only facts the Court need consider in ruling on this Motion are the following:

1. The Yarro Defendants filed the Yarro Complaint on January 20, 2005.
2. This action was filed on January 24, 2005.

¹ True and correct copies of Plaintiffs' Motion to Consolidate and Memorandum in Support of Motion to Consolidate, both of which are dated February 14, 2005, are attached hereto as Exhibits A and B.

3. The Yarro Defendants served an amended Complaint in the Yarro Action on February 9, 2005.

4. On February 15, 2005, Plaintiffs filed their Motion to Consolidate this action and the Yarro Action.

5. Plaintiffs filed an Answer and Counterclaim in the Yarro Action on February 24, 2005, which incorporated by reference Plaintiffs' original complaint and the nine causes of action asserted therein. A true and correct copy of Plaintiffs' Answer and Counterclaim in the Yarro Action is attached hereto as Exhibit C.

ARGUMENT

I. The Yarro Defendants' Motion is Based on a Misinterpretation of Utah R. Civ. P. 13(a).

The Yarro Defendants' Motion relies on a flawed interpretation of Utah R. Civ. P. 13(a). While the Yarro Defendants claim that Rule 13(a) required Plaintiffs to bring their claims as a counterclaim in the Yarro Action, this overly technical interpretation of that rule is contrary to its plain language and case law. Utah R. Civ. P. 13(a) states as follows:

A pleading shall state as a counterclaim any claim which **at the time of serving the pleading** the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject-matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. But the pleader need not state the claim if (1) at the time the action was commenced the claim was the subject of another pending action, or (2) the opposing party brought suit upon his claim by attachment or other process by which the court did not acquire jurisdiction to render a personal judgment on that claim, and the pleader is not stating any counterclaim under this Rule 13.

(emphasis added). The plain language of Rule 13(a) indicates that its requirements apply *when the party seeking to bring claims files a responsive pleading*. Thus, the rule “only requires a compulsory counterclaim if the party who desires to assert a claim has served a pleading.” *Bluegrass Hoisery, Inc. v. Speizman Industries, Inc.*, 214 F.3d 770, 772 (6th Cir. 2000) When, however, “the rules do not require a pleading . . . the compulsory counterclaim requirement of Rule 13(a) is inapplicable. *Id*; see also *Nat’l Union Fire Ins. Co. of Pittsburgh, PA. v. Jett*, 118 F.R.D 336, 337 (S.D.N.Y. 1988) (“Rule 13(a) requires that a compulsory counterclaim be raised in a pleading.”)

Utah Courts have also applied Rule 13(a) according to its plain language, which only requires claims to be brought as compulsory counterclaims when a responsive pleading has been filed. In *Raile Family Trust v. Promax Dev. Corp*, a case relied on by the Yarro Defendants, the Utah Supreme Court addressed a case in which the defendant argued that claims brought by the Plaintiff were barred by Rule 13(a) because the Plaintiff was obligated to assert those claims as counterclaims at the time Plaintiffs had filed their answer in an earlier action. 24 P.3d 980, 982-83 (Utah 2001). The Utah Supreme Court concluded that the claims were compulsory counterclaims and thus barred from being brought in a subsequent action under Rule 13(a), but only after noting that the Plaintiffs had answered and raised affirmative defenses and therefore “had the obligation under rule 13(a) to raise any available counterclaims arising out of the same transaction.” *Id.* at 983.

Here, the Yarro Defendants ask this Court to dismiss this action pursuant to Rule 13(a) despite the fact that at the time the Motion was filed, Plaintiffs had not only not filed a

responsive pleading in the Yarro Action, but their time to do so had not expired. Indeed, some five days prior to the filing of their Motion, the Yarro Defendants amended the Yarro Complaint, thus giving Plaintiffs ten days from the date of that amendment to file a responsive pleading pursuant to Utah R. Civ. P. 15(a).² The Yarro Defendants have cited no authority indicating that Rule 13(a) would bar the claims brought in this Action when Plaintiffs have not filed or been required to file any responsive pleading in the Yarro Action. Therefore, this Motion should be denied.

II. The Relief Sought by the Yarro Defendants is Moot.

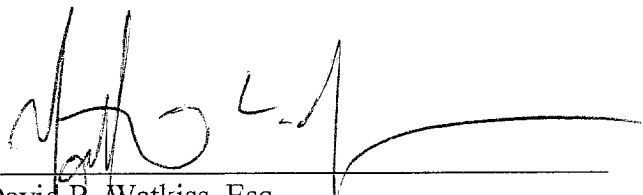
By this Motion, the Yarro Defendants ask the Court to dismiss this action and require Plaintiffs' claims to be asserted as Counterclaims in the Yarro Action. Plaintiffs time to serve a responsive pleading in the Yarro Action did not expire until Thursday, February 24, 2004. On that date, Plaintiffs filed their Answer, and a Counterclaim which incorporated by reference the nine causes of action brought by Plaintiffs in this action, and asserted two additional claims. Therefore, the Yarro Defendants are wasting this Court's time by demanding that this action be filed as a Counterclaim *when Plaintiffs have already done so*. Moreover, Plaintiffs have moved for consolidation of this action and the Yarro action pursuant to Utah R. Civ. P. 42(a). Thus, this Motion, which does nothing to promote judicial efficiency and seeks only moot relief should be denied.

² Interestingly, the Yarro Memo makes no mention of the fact that the Yarro Defendants amended their Complaint, and attaches the original Yarro Complaint, rather than the amended Yarro Complaint, as an exhibit.

CONCLUSION

For the foregoing reasons, the Yarro Defendants' Motion should be denied, and the Court should enter an order consolidating this action and the Yarro Action.

DATED this 28th day of February 2005.

A handwritten signature in black ink, appearing to read 'David B. Watkiss', is written over a horizontal line.

David B. Watkiss, Esq.

Anthony C. Kaye, Esq.

James W. Stewart, Esq.

Boyd L. Rogers, Esq.

Matthew L. Moncur, Esq.

BALLARD SPAHR ANDREWS & INGERSOLL, LLP
Attorneys for Plaintiffs The Canopy Group, Inc.
and Raymond J. Noorda and Lewena Noorda, as
Trustees of the Noorda Family Trust

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **MEMORANDUM IN
OPPOSITION TO DEFENDANTS' MOTION TO DISMISS FOR FAILURE TO PLEAD
AS COMPULSORY COUNTERCLAIM** was served to the following this 28th day of
February 2005, in the manner set forth below:

☐ Hand Delivery

☒ U.S. Mail, postage prepaid

☐ Federal Express

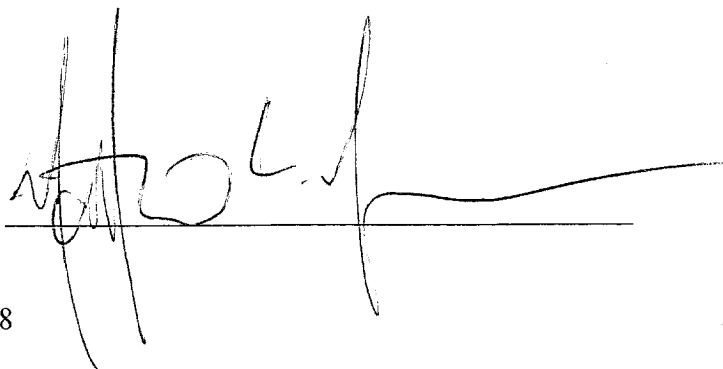
☐ Certified Mail, Receipt No. _____, return receipt requested

Stanley J. Preston, Esq.
Michael R. Carlston, Esq.
Maralyn M. Reger, Esq.
SNOW, CHRISTENSEN & MARTINEAU
10 Exchange Place, 11th Floor
P.O. Box 45000
Salt Lake City, Utah 84145

Blake D. Miller, Esq.
MILLER & GUYMON, P.C.
165 South Regent Street
Salt Lake City, Utah 84111

Blaine J. Benard, Esq.
Eric G. Maxfield, Esq.
HOLME ROBERTS & OWEN, LLP
299 South Main Street, Suite 1800
Salt Lake City, Utah 84111

Jeffrey S. Facter, Esq.
SHEARMAN & STERLING LLP
525 Market Street
San Francisco, California 94105

A handwritten signature in black ink, appearing to read 'Jeffrey S. Facter', is written over a horizontal line.