UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UMB BANK, NATIONAL ASSOCIATION, solely in its capacities as Senior Trustee and Security Trustee,	:	
Plaintiff,	:	Case No. 16 Civ. 7717 (PAE) (JLC)
- against -	:	
AIRPLANES LIMITED and AIRPLANES U.S. TRUST,	:	
Defendants.	:	

AIRPLANES LIMITED'S AND AIRPLANES U.S. TRUST'S MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION FOR A PRELIMINARY INJUNCTION

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Defendants Airplanes Limited and Airplanes U.S. Trust ("Airplanes Trust") respectfully submit this Memorandum of Law, the declarations of William McCann ("McCann Decl.") and Antonio Tavares Paes, Jr. ("Paes Decl.") and the accompanying exhibits ("Exh."), in support of their motion, pursuant to Fed. R. Civ. P. 65, for a preliminary injunction directing plaintiff UMB Bank, National Association ("UMB") to stop blocking defendants, in violation of governing agreements, from paying their own and their subsidiaries' critical expenses -- including expenses incurred in defending this action -- as they come due.

Preliminary Statement

By this motion, Airplanes Limited and Airplanes Trust (together, "APG") seek this Court's intervention to stop UMB from abusing its position as indenture trustee and security trustee to prevent adjudication of this case on the merits. Apparently recognizing that its claims against APG are baseless, UMB has invoked spurious default notices as a ground to refuse to allow APG to pay critical fees and expenses necessary to keep in place the fiduciaries and outside professionals through whom it operates. For example:

- UMB has blocked the individuals who serve as directors of Airplanes Limited and controlling trustees of Airplanes Trust from receiving compensation for their services;
- UMB has blocked payment of fees due to the law firms that, for many years, have advised APG and its fiduciaries on matters of Irish, Jersey and New York law -- other than fees for work related to the installation of UMB as, *inter alia*, indenture trustee and security trustee, and minimal fees for other work UMB and the parties directing UMB have approved; and
- UMB has capped at $125,000 APG's payments to its counsel *in this action* -- and conditioned that payment on, among other things, APG's waiver of its right to move to dismiss -- while simultaneously paying

> *well over $1 million* of APG's money to the counsel representing UMB before this Court.

UMB's refusal to allow APG to pay critical expenses violates the express terms of the governing documents, and threatens to leave APG without directors, controlling trustees or outside professionals, and hence unable to defend itself in this case or otherwise conduct its affairs. UMB's rationale for its conduct -- that APG supposedly is in default of its obligations -- is inaccurate and, in any event, irrelevant because the governing trust indentures and security trust agreement require APG to pay the expenses at issue here regardless of whether an event of default has occurred.

Accordingly, APG now must move for a preliminary injunction stopping UMB's wrongful interference with payment of these critical expenses when due, as the governing documents require and as APG routinely did for more than 20 years before the issuance of the spurious default notices. By this motion, APG seeks the unimpeded ability to pay only those expenses necessary to keep its directors, controlling trustees and outside professionals in place, and keep APG and its subsidiaries in compliance with applicable law, while this litigation is pending.

All of the prerequisites to entry of the preliminary injunction APG seeks are present here. First, UMB's misconduct threatens irreparable harm to APG by, among other things, depriving APG of its ability to defend this action. (Point I, *infra*). By contrast to the irreparable harm that APG will suffer if the expenses at issue on this motion are not paid, the injunction APG seeks will cause no harm to UMB because the governing trust indentures and security trust agreement require payment of APG's and its subsidiaries' expenses ahead of all other obligations *whether or not an event of default has occurred*. Thus, the balance of hardships overwhelmingly favors APG. (Point II, *infra*). The priority of payment provisions in the trust

indentures and security trust agreement likewise compel the conclusion that APG is all but certain to succeed on the merits of its request for a declaration that UMB must allow APG to pay its and its subsidiaries' expenses on a current basis. (Point III, *infra*). Accordingly, the Court should grant APG's motion and put an end to UMB's misconduct.

Statement of Facts

A. Creation and Structure of Airplanes Limited and Airplanes Trust

Airplanes Limited, a limited liability company formed under the laws of Jersey, Channel Islands, and Airplanes Trust, a Delaware business trust, were established in 1995 as special purpose vehicles in connection with a securitization of aircraft and related assets. McCann Decl. ¶ 2. Although APG was in the business (through its subsidiaries) of acquiring, owning, leasing, and selling aircraft, at present APG no longer owns any aircraft, either directly or indirectly, having sold the last of the aircraft in May 2016. *Id.*

Airplanes Limited and Airplanes Trust entered into trust indentures dated March 28, 1996, as amended (the "AL Indenture" and "AT Indenture," respectively), pursuant to which, over time, they each issued notes (the "Notes") divided into subclasses A-1 through A-9 and classes B, C, D and E. *Id.* ¶ 3 & Exhs. A, B. Airplanes Limited and Airplanes Trust each provided a guarantee of the Notes issued by the other. *Id.* Exh. A Art. XII; *id.* Exh. B Art. XII. Moreover, the AL Indenture and the AT Indenture (together, the "Indentures") call for the creation of a number of bank accounts for APG, including a collection account (the "Collection Account") to hold lease receipts, aircraft sale proceeds and certain other money received by APG and its subsidiaries in the course of their operations, and an expense account (the "Expense Account") to hold money set aside for the purpose of paying expenses of APG and its subsidiaries. *Id.* Exh. A § 3.01; *id*. Exh. B § 3.01.

In addition to providing cross-guaranties of the Notes, APG pledged substantially all of its cash and certain other assets as collateral for the Notes, under the terms of a security trust agreement dated as of March 28, 1996, as amended (the "Security Trust Agreement"). *Id.* ¶ 4 & Exh. C. APG also entered into a pass-through trust agreement dated as of March 28, 1996, as supplemented and amended (the "Pass-Through Trust Agreement"), that established a number of trusts, each of which purchased a class or subclass of the Notes and, in turn, sold to investors certificates (the "Certificates") representing undivided fractional interests in the class or subclass of Notes it held. *Id.* ¶ 4 & Exh. D. From March 28, 1996 through September 29, 2016, Deutsche Bank Trust Company Americas ("DBTCA") -- formerly known as Bankers Trust Company -- served as indenture trustee, operating bank, pass-through trustee and security trustee under the governing documents. *Id.* ¶ 5.

Using proceeds from the initial sale of Notes and Certificates, Airplanes Limited purchased 95 percent of the issued share capital of an Irish company, now known as Airplanes Holdings Limited ("Holdings"), and Airplanes Trust purchased all of the capital stock of a Connecticut corporation, AeroUSA, Inc. *Id.* ¶ 6. Following those purchases, APG owned indirectly a portfolio of 229 aircraft, related leases and other assets. *Id.*

In addition to purchasing equity in Holdings, Airplanes Limited used some of the proceeds from the sale of Notes and Certificates to make loans to Holdings and certain of its other subsidiaries. *Id.* ¶ 7. Airplanes Limited made certain of those loans pursuant to an intercompany loan agreement dated March 28, 1996 (the "ILA"), which is governed by Irish law. *Id.* ¶ 7 & Exh. E. Under the ILA, the borrower subsidiaries agreed to direct lessees and purchasers of the aircraft they owned to remit all lease receipts and sale proceeds directly to the Collection Account -- an arrangement that left the borrower subsidiaries without any funds to

meet their expenses. *Id.* Exh. E §§ 8.1, 12.2, 12.3. Accordingly, Airplanes Limited undertook under the ILA to pay those subsidiaries' expenses, using amounts in the Collection Account, consistent with the priority of payment provisions and other terms of the AL Indenture. *Id.* ¶ 8 & Exh. E §§ 12.2, 12.3.

B. Priority of Payments Under the Indentures

Section 3.08 of both Indentures establishes the priority of payments for APG, and governs APG's obligation to make payments in respect of the Notes. That section contains two separate payment priority "waterfalls" -- one that applies in ordinary situations, and another that applies following the delivery by the indenture trustee of a default notice. *Id.* Exh. A §§ 3.08(a), (b); *id.* Exh. B §§ 3.08(a), (b).

Under both "waterfalls" -- that is, whether or not the indenture trustee has delivered a default notice -- APG, before making any other payments, must first apply funds in the Collection Account toward payment of "Expenses," a term that the Indentures, as relevant here, define to mean "any fees, costs or expenses incurred by [Airplanes Limited, Airplanes Trust or any of their subsidiaries] in the course of the business activities permitted under Section 5.02(e) of either Indenture." *Id.* Exh. A at 16; *id.* Exh. B at 16. Thus, sections 3.08(a)(i) and 3.08(b)(i) of both Indentures provide, in pertinent part, that on each payment date, Airplanes Limited and Airplanes Trust each must "first" transfer from the Collection Account "to the Expense Account . . . an amount equal to the Required Expense Amount." *Id.* Exh. A §§ 3.08(a)(i), 3.08(b)(i); *id.* Exh. B §§ 3.08(a)(i), 3.08(b)(i)

In turn, both Indentures define "Required Expense Amount" to mean:

> (i) the amount of Expenses of [Airplanes Limited, Airplanes Trust and their subsidiaries] due and payable on the Calculation Date relating to such Payment Date or reasonably anticipated to become due and payable before the end of the Interest Accrual Period beginning on such date, (ii) at

> the discretion of the Cash Manager, an amount necessary to provide for Permitted Accruals . . . and (iii) an amount determined by the Cash Manager to be necessary to maintain the Permitted Balance in the Expense Account after payment of the Expenses (on such Payment Date and during the next succeeding Interest Accrual Period) and provision for the Permitted Accruals.

Id. Exh. A at 30; *id.* Exh. B at 30. Separately, section 3.01(d) of both Indentures defines "Permitted Accruals" to mean "accruals in respect of Expenses that are not regular, monthly recurring Expenses . . . of [Airplanes Limited, Airplanes Trust and their subsidiaries] anticipated to become due and payable in any future Interest Accrual Period," and defines "Permitted Balance" to mean "a balance not to exceed at any time $10,000,000 to pay unanticipated Expenses." *Id.* Exh. A § 3.01(d); *id.* Exh. B. § 3.01(d).

The effect of these provisions in the Indentures is to prioritize, ahead of payments in respect of the Notes, (a) expenses of APG and its subsidiaries that are currently due and payable (or anticipated to become so within a month), (b) establishment of reserves for non-recurring expenses of those entities that are anticipated to become due and payable anytime in the future, and (c) establishment of a reserve of up to $10 million for unanticipated expenses of those entities.

C. The Transbrasil Litigation

For many years, Airplanes Limited's subsidiary Holdings has been embroiled in various proceedings before courts in Brazil (the "Transbrasil Litigation") involving Transbrasil, a now-defunct Brazilian airline to which Holdings had leased two aircraft. Paes Decl. ¶ 2. The Transbrasil Litigation began in or about 2001, when GE Capital Aviation Services, Limited ("GECAS"), which acted as servicer for the leases, began efforts to collect on promissory notes (the "Transbrasil Notes") that Transbrasil issued to a number of aircraft lessors including Holdings (together, the "Lessors"), after GECAS restructured Transbrasil's debt to those

Lessors. *Id.* In response, Transbrasil commenced a number of actions against the Lessors, including one in which it claimed that it had already repaid the Transbrasil Notes and they therefore were invalid, and sought statutory penalties and damages. *Id.*

In or about May 2007, a lower court in Sao Paulo issued a decision (the "May 2007 Decision") in favor of Transbrasil on certain of Transbrasil's claims against the Lessors. *Id.* ¶ 3. The Appellate Court of the State of Sao Paulo issued a decision in February 2010 (the "February 2010 Decision") confirming the May 2007 Decision, expanding certain elements of that decision, allowing for later calculation of the amounts that the Lessors owed to Transbrasil as statutory penalties and indemnification, and confirming the Lessors' obligation to pay court costs and court-mandated legal fees to Transbrasil's counsel. *Id.* In June 2012, while appeals from the February 2010 Decision were pending, Transbrasil obtained from a lower court in Sao Paulo two orders (the "Orders to Pay") directing payment of money by the Lessors into court, to secure the judgment Transbrasil anticipated recovering on certain of its claims. *Id.* Of the payments that the Orders to Pay required, approximately 160 million Brazilian Reais (approximately $80 million at that time) was directly allocable to Holdings. *Id.* The Orders to Pay also directed the Lessors to make a further payment of approximately 118 million Brazilian Reais (approximately $59 million at that time) in respect of a note in favor of a Lessor other than Holdings, in which Holdings had an interest. *Id.* However, it was not possible to attribute any particular part of that amount to any particular Lessor, and the Orders to Pay did not contain any provision for joint liability. *Id.* The amounts set forth in the Orders to Pay addressed only some of the items of damages that Transbrasil sought to recover from Holdings and the other Lessors. *Id.*

In October 2013, the Federal Court of Appeals of Brazil issued a ruling (the "October 2013 Decision") that reversed, in large part, the May 2007 Decision and the February 2010 Decision. *Id.* ¶ 4. In light of the October 2013 Decision, the lower court in Sao Paulo cancelled the Orders to Pay in 2014. *Id.* However, Transbrasil has appealed from the October 2013 Decision and the cancellation of the Orders to Pay, and has not yet exhausted those appeals. *Id.* Thus, while there is not currently any judgment against Holdings in connection with the Transbrasil Litigation, it remains possible that the Transbrasil Litigation will ultimately result in substantial liability for Holdings. *Id.* Such liability could be equal to, or greater than, the amounts that had been fixed in the Orders to Pay. *Id.*[1]

D. The Reserves Set for APG

Because of the provisions in the Indentures and the ILA regarding payment of APG's expenses and those of its subsidiaries, APG has, subsequent to the issuance of the February 2010 Decision, taken steps to maintain cash reserves that, in its view, are sufficient to permit the payment of, among other things, any judgment that might be rendered against Holdings in the ongoing litigation. McCann Decl. ¶ 8. The reserves have increased over time for a number of reasons, including that (a) as the proceedings in Brazil have stretched on, the estimate of Holdings' potential liability for prejudgment interest and defense costs has risen; and (b) as APG and its subsidiaries have gradually sold their aircraft, APG's ability to count on future cash flows as a source from which to pay future expenses has diminished. *Id.*

[1] After a hearing on November 23, 2016, the Federal Court of Appeals declined to entertain Transbrasil's appeal from the October 2013 Decision, leaving that decision intact. Paes Decl. ¶ 5. However, because the Federal Court of Appeals has not yet published its decision in connection with the November 23, 2016 rulings, the time for Transbrasil to either seek clarification of those rulings, or take a further appeal to the Supreme Court of Brazil, has not yet begun to elapse. *Id.*

Thus, in its annual report released on or about June 29, 2012, shortly after the issuance of the Orders to Pay, APG announced that it had determined to increase its liquidity reserve from $45 million to $110 million in light of, among other things, Holdings' potential liability to Transbrasil. *Id.* ¶ 9. Subsequently, in a press release on October 8, 2013, APG announced that it had determined that its liquidity reserve should be further increased to $140 million. *Id.* And on November 2, 2015 -- when there were just nine aircraft remaining in the APG portfolio -- the liquidity reserve was increased to $190 million. *Id.*

E. The Baseless Default Notices

Nearly four years after APG announced the increase of its liquidity reserve to $110 million, by letter dated June 16, 2016 (the "June 16 Direction"), certain holders of Certificates corresponding to subclass A-9 Notes (the "Directing Certificate Holders") directed DBTCA, as indenture trustee, to issue a notice to APG and others of (a) two purported events of default under the AL Indenture; (b) purported events of default under the AT Indenture, pursuant to the cross-default provision in section 4.01(e) of the AT Indenture, arising from the purported events of default under the AL Indenture; and (c) a purported covenant breach under the AL Indenture that, unless corrected within 30 days, would ripen into an event of default under the AL Indenture and, due to the cross-default provision in section 4.01(e) of the AT Indenture, under the AT Indenture as well. *Id.* Exh. F at 2-3 & n.2. The June 2016 Direction further instructed DBTCA to accelerate the outstanding principal balance of, and accrued interest on, the subclass A-9 Notes and, in its capacity as security trustee, exercise its remedies under the Security Trust Agreement by taking substantially all of the over $193 million then in APG's Expense Account and Collection Account, applying that amount to the subclass A-9 Notes -- and, hence, to the corresponding Certificates -- while leaving behind just $2 million "for

purposes of paying unpaid accrued and future fees and expenses incurred by [DBTCA as] the Pass-Through Trustee, Indenture Trustee and Security Trustee." *Id.* at 3-4.

By letter dated June 28, 2016 (the "June 28 Letter"), as the Directing Certificate Holders had directed, DBTCA notified APG of the supposed events of default and covenant breach that the June 16 Direction described, and purported to declare the outstanding principal balance of, and accrued interest on, the subclass A-9 Notes to be immediately due and payable. *Id.* Exh. G at 2. In addition, the June 28 Letter advised that DBTCA "intend[ed] to retain the Collateral [under the Security Trust Agreement] intact and refrain from distributing amounts from the [Collection Account and the Expense Account] pending further discussion regarding remedies and appropriate direction from" holders of the subclass A-9 Certificates. *Id.* And by letter dated July 29, 2016 (the "July 29 Letter") -- again at the direction of the Directing Certificate Holders -- DBTCA asserted that the supposed covenant breach alleged in the June 28 Letter had ripened into an event of default under the AL Indenture, as well as under the cross-default provision in the AT Indenture. *Id.* Exh. H at 2.

The June 16 Direction, the June 28 Letter and the July 29 Letter (together, the "Purported Default Notices") assert that a number of supposed events of default under the Indentures have occurred. The Court need not address the accuracy of those assertions in order to adjudicate this motion. But in any event, the Purported Default Notices are utterly without merit.

First, the Purported Default Notices assert that the May 2007 Decision, the February 2010 Decision and the Orders to Pay somehow constitute "a judgment rendered against Holdings in excess of $100 million in connection with the Transbrasil Litigation," and hence an event of default under section 4.01(h) of the AL Indenture. *Id.* Exh. G at 2. But section 4.01

expressly states that an event of default "shall be deemed to exist and continue so long as, but only so long as, it shall not have been remedied." *Id.* Exh. A § 4.01 (emphasis added). Since the October 2013 Decision reversed the May 2007 Decision and the February 2010 Decision, and the lower Brazilian court cancelled the last of the Orders to Pay in August 2014, any possible event of default under section 4.01(h) of the AL Indenture had ceased to exist nearly two years before DBTCA sent the June 28 Letter.

Second, the Purported Default Notices contend that, but for the supposed mischaracterization of Holdings' defense costs and contingent liability in the Transbrasil Litigation as Expenses (within the meaning of the AL Indenture), and the consequent increase in APG's liquidity reserve, there would have been cash in the Collection Account with which to make payments on the subclass A-9 Notes. *Id.* Exh. G at 2. Based on that false premise, the Purported Default Notices assert that an event of default has occurred under section 4.01(c) of the AL Indenture because Airplanes Limited "fail[ed] to pay an amount (other than interest) when due and payable in connection with a Note." *Id.* But the Transbrasil Litigation arose from efforts by or on behalf of Holdings to collect on promissory notes that Transbrasil issued in respect of unpaid amounts due under aircraft leases, which is a permitted business activity under the AL Indenture. See *id.* Exh. A § 5.02(e)(i) (authorizing "owning, holding, . . . managing, operating, leasing, re-leasing and . . . selling or otherwise disposing of" aircraft and "engaging in all related activities incidental thereto, including from time to time accepting . . . promissory notes . . . of Lessees . . . issued . . . in settlement of delinquent obligations . . . of such Lessees . . . in the ordinary course of business."). Thus, expenses incurred in connection with the Transbrasil Litigation, and any potential liability of Holdings in that litigation, are costs "incurred . . . in the

course of the business activities permitted" and fall comfortably within the AL Indenture's definition of "Expenses." *Id.* Exh. A at 16.

Third, the Purported Default Notices assert that Airplanes Limited, through the very existence of the Transbrasil Litigation, somehow breached section 5.02(e)(i) of the AL Indenture by engaging in activities that section does not permit. *Id.* Exh. F at 2. But because the Transbrasil Litigation arose from efforts by and on behalf of Holdings to collect on promissory notes that Transbrasil issued in respect of unpaid amounts due under aircraft leases, any "involvement in" that litigation lies at the heart of the authorization under section 5.02(e)(i) of the AL Indenture.

Fourth, the Purported Default Notices assert that Airplanes Limited, by paying and/or reserving for Holdings' defense costs and potential liability in the Transbrasil Litigation, somehow violated the prohibition in section 5.02(e)(ii) of the AL Indenture on "guaranteeing or otherwise supporting the obligations and liabilities of any [Airplanes Limited subsidiary]" where doing so "would materially adversely affect the Noteholders." *Id.* Exh. F at 2-3; *id.* Exh. A § 5.02(e)(ii). But the language of that section makes no mention of, and therefore does not prohibit, the payment of subsidiary expenses, and section 3.08 of the AL Indenture provides unequivocally for payment from the Collection Account, in priority to all other items (including Note principal and interest), of the expenses of APG and its subsidiaries. *Id.* Exh. A § 3.08. Moreover, under the ILA, certain Airplanes Limited subsidiaries (including Holdings) caused all lessees and purchasers of their aircraft to remit lease receipts and sale proceeds directly to the Collection Account, leaving those subsidiaries without funds to meet their own expenses, in exchange for Airplanes Limited's undertaking to pay those expenses using amounts in the Collection Account, consistent with the terms of the AL Indenture. *Id.* Exh. E §§ 12.2, 12.3.

Thus, the Purported Default Notices' claim that section 5.02(e)(ii) of the AL Indenture somehow prohibits Airplanes Limited from paying or reserving for its subsidiaries' expenses not only lacks support in the language of that section, but also ignores the language and structure of the governing transaction documents.

F. Events Subsequent to the Issuance of the Purported Default Notices

DBTCA never acted on the June 16 Direction to the extent it called for exercise of remedies under the Security Trust Agreement against APG's cash collateral. *Id.* ¶ 11. However, despite the fact that Expenses are at the top of the post-default notice payment "waterfall" under section 3.08(b) of both Indentures, DBTCA refused subsequent to June 28, 2016 to allow APG to pay any of its expenses without the consent of the Directing Certificate Holders. *Id.* In August 2016, the Directing Certificate Holders conditioned their willingness to consent to select further expense payments on APG's agreement to cooperate with the replacement of DBTCA by UMB. *Id.* On and after September 29, 2016, UMB assumed DBTCA's roles as indenture trustee, operating bank, pass-through trustee and security trustee. *Id.*

On October 3, 2016, immediately after stepping into the shoes of DBTCA, UMB commenced this action against APG seeking, among other relief, a declaration that the Indentures and the Security Trust Agreement allow UMB to seize APG's remaining cash and pay the bulk of it to the subclass A-9 Note holders -- despite the fact that, under the Indentures' priority of payment provisions, payments in respect of the subclass A-9 Notes (and hence the corresponding Certificates) rank *below* the expenses to be covered by APG's reserves. (Dkt. Nos. 1, 6). UMB filed an Amended Complaint on October 31, 2016. (Dkt. No. 10).

On November 21, 2016, APG filed its Answer, as well as a Counterclaim seeking a declaration that (i) none of the events of default asserted by UMB in fact constitutes an actual

event of default under the Indentures; (ii) UMB has no right under the Indentures or the Security Trust Agreement to accelerate the outstanding principal balance of, and accrued interest on, any of the Notes; (iii) UMB has no right to exercise any remedies under the Security Trust Agreement; and (iv) whether or not an event of default has occurred, the Indentures require UMB to allow APG to pay its and its subsidiaries' expenses as they come due. (Dkt. No. 19 at 51).

Since bringing this action, UMB has paid more than $1 million of APG's money to law firms representing UMB and the Directing Certificate Holders. *Id.* ¶ 12. APG's litigation expenses, however, have been another matter altogether. APG has retained Cohen & Gresser LLP ("C&G") to represent it in preparation for, and in defense of, this litigation. *Id.* Yet UMB has refused to authorize the payment of fees to C&G, except for a $125,000 retainer to be used exclusively for (i) filing an answer to the Amended Complaint; (ii) opposing UMB's anticipated motion for judgment on the pleadings, and (iii) other work required by rule or by the Court. *Id.* ¶ 12 & Exh. I at 2-3. UMB expressly conditioned its authorization of this payment to C&G on APG's waiver of its right to move to dismiss the Amended Complaint, as well as its waiver of any objection to the method of service of the Amended Complaint. *Id.* Exh. I at 2-3.

APG has liability insurance that it believes will cover a portion of its legal fees in connection with this litigation. *Id.* ¶ 13. However, APG's insurance policy has a deductible of $250,000 that must be met before even that partial coverage is triggered, leaving a $125,000 gap between the deductible and the retainer authorized by UMB, as well as APG's required share of expenses incurred after the deductible is met. *Id.* Moreover, the restrictions UMB has imposed prevent APG from using the authorized $125,000 to compensate C&G for work such as the

drafting of the Counterclaim, the preparation of this motion, and the handling of any of the myriad day-to-day issues that arise in connection with the lawsuit. *Id.* Exh. I at 2-3.

UMB also has strictly limited APG's ability to pay the attorneys and other advisors that provide services to APG on a regular basis, permitting payment only for services that further the Certificate holders' interest in this litigation (such as substituting UMB for DBTCA in its various roles under the Indentures, the Pass-Through Trust Agreement and the Security Trust Agreement) and minimal additional work that UMB and the Directing Certificate Holders have approved. *Id.* ¶ 14. The winding up of APG is a highly complicated endeavor, involving numerous issues under the laws of multiple jurisdictions, including Ireland, Jersey and New York, and requiring input from counsel in each of these jurisdictions. *Id.* Moreover, although APG has no employees -- and thus relies on its third-party service providers to carry out its day-to-day activities -- UMB has refused to allow APG to pay, inter alia, contractually-mandated fees due to APG's cash manager and administrative agent; Holdings' share of the fees and expenses of Brazilian counsel relating to the ongoing defense of the Transbrasil Litigation; and, incredibly, fees due to the Canadian law firm that, before the Purported Default Notices were ever served, assisted subsidiaries of APG in selling their final six aircraft and thus bringing approximately $41.5 million into APG. *Id.* ¶ 15.[2]

Meanwhile, UMB's counsel, who also serves as counsel to the Directing Certificate Holders, has threatened litigation against APG's directors and controlling trustees. *Id.* Exh. J. In addition, UMB has refused to authorize payment of fees APG owes to its directors and controlling trustees (and to the directors of various APG subsidiaries) for their services. *Id.* ¶

[2] Additionally, in order to represent APG effectively in this litigation, C&G has required, and continues to require, substantial input from APG's other legal advisors on a number of issues. McCann Decl. ¶ 16. But UMB has refused to allow payment of *any* fees to firms other than C&G for any services rendered in connection with this action. *Id.*

17. Based on UMB's approach to the payment of expenses, APG has every reason to fear that UMB also will block payment of the premiums necessary to maintain APG's D&O liability insurance, which will come due in early 2017, thus depriving APG of coverage -- critical to the retention of directors and controlling trustees -- that has been in place for over 20 years. *Id.*

Prior to the delivery of the Purported Default Notices, DBTCA routinely applied the funds in the Collection Account and Expense Account to pay the expenses of APG and its subsidiaries and did not dispute its contractual obligation to do so. *Id.* ¶ 18. Since the delivery of the Purported Default Notices, however, DBTCA and now UMB have required protracted negotiations in anticipation of every expense payment, subjecting APG to their whim as they pick and choose which expenses they will agree to allow APG to pay. *Id.* This conduct not only has required APG's advisors to incur substantial costs in conducting these negotiations, but also leaves APG's directors and controlling trustees without any assurance that the expenses APG and its subsidiaries are necessarily incurring will be paid. *Id.*

As of November 30, 2016, APG's unpaid expenses total approximately $1,532,830, excluding payments due to GECAS for Holdings' share of defense costs relating to the Transbrasil Litigation, and excluding contractually-mandated fees due to APG's administrative agent and cash manager. *Id.* ¶ 19. These unpaid expenses include $349,837 in fees due (through September 30, 2016) to directors and controlling trustees of APG and its subsidiaries, and $1,084,816 in fees and expenses due to APG's legal advisors. *Id.* Payment of APG's expenses, and those of its subsidiaries, is essential not only to APG's ability to defend

itself in this litigation, but also to its ability to complete its winding up in accordance with its contractual and other legal duties.[3]

Argument

Well-settled case law establishes that a preliminary injunction should issue upon the movant's showing of "irreparable harm and either (a) a likelihood of success on the merits or (b) sufficiently serious questions going to the merits and a balance of hardships tipping decidedly in its favor." *Kamerling v. Massanari*, 295 F.3d 206, 214 (2d Cir. 2002) (citing *Otokoyama Co. v. Wine of Japan Imp., Inc.*, 175 F.3d 266, 270 (2d Cir.1999)). APG undoubtedly is faced with irreparable harm: If UMB continues to obstruct the payment of APG's expenses and those of its subsidiaries, APG will be unable not only to defend itself in this litigation, but to conduct its affairs until the litigation can be resolved.

While APG's Counterclaim is likely to succeed in its entirety, and UMB's Amended Complaint is likely to fail on the merits, this Court barely need look beyond the balance of hardships because the Indentures and the Security Trust Agreement require that expenses be paid *even after delivery of a valid default notice*. UMB thus cannot possibly claim that the payment of such expenses threatens it with hardship at all. And for the same reason, APG's request for a declaration that the Indentures require UMB to allow APG to pay its and its subsidiaries' expenses as they come due is all but certain to succeed on the merits.

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[3] Holdings' defense costs in the ongoing Transbrasil Litigation and contractually-mandated fees due to APG's administrative agent and cash manager are Expenses under the Indentures -- and thus at the top of the payment priority "waterfalls" in section 3.08(a) and (b) of both Indentures (senior to all payments in respect of the Notes). However, those expense items are sufficiently intertwined with the underlying merits of UMB's claims in this action that APG has elected not to ask the Court on this motion -- which is tailored to focus only on those expenses that are immediately critical to APG's ability to defend itself and conduct its affairs while the litigation is pending -- to enjoin UMB from continuing to block APG from paying them.

I. NONPAYMENT OF EXPENSES THREATENS IRREPARABLE HARM TO APG

Courts find irreparable harm where "but for the grant of equitable relief, there is a substantial chance that upon final resolution of the action the parties cannot be returned to the positions they previously occupied." *Brenntag Int'l Chems., Inc. v. Bank of India*, 175 F.3d 245, 249 (2d Cir.1999). Here, absent equitable relief, it will be impossible to subsequently return the parties to the positions they previously occupied because (1) APG's inability to pay its attorneys will prevent this case from reaching the merits, and (2) even if APG were able to defend itself in this litigation, inability to pay the expenses necessary to keep its directors, controlling trustees and outside professionals in place, and comply with applicable laws (such as tax laws), would leave APG unable to conduct its day-to-day business while the litigation is pending.

First, if APG is unable to pay C&G, as required by the Indentures, C&G will be forced to file a motion to withdraw that, if granted, would leave APG without representation. Beyond the meager $125,000 retainer UMB has authorized for C&G, APG currently has no means of paying any of the legal expenses it is incurring to defend this action -- including any fees to the law firms assisting and advising C&G -- until after APG has met the $250,000 deductible under its liability insurance policy. Even then, APG will not be able to pay the uninsured portion of incurred expenses without injunctive relief. As a result, absent the injunctive relief APG has requested, it will soon be unable to continue to defend this litigation.

In such circumstances, courts regularly conclude that parties are irreparably harmed if they are denied their contractual right to litigation funding. In *In re WorldCom, Inc. Sec. Litig.*, 354 F. Supp. 2d 455, 469 (S.D.N.Y. 2005), the court granted a preliminary injunction compelling the payment of litigation costs, noting that "[t]he failure to receive defense costs [under an insurance policy] when they are incurred constitutes 'an immediate and direct injury.'"

Id. (quoting *Wedtech Corp. v. Fed. Ins. Co.*, 740 F. Supp. 214, 221 (S.D.N.Y. 1990)). The court continued:

> Every party, including each director defendant, requires effective representation. It is impossible to predict or quantify the impact on a litigant of a failure to have adequate representation at this critical stage of litigation. The ability to mount a successful defense requires competent and diligent representation.

Id.; *see also, e.g., XL Specialty Ins. Co. v. Level Glob. Inv'rs, L.P.*, 874 F. Supp. 2d 263, 273 (S.D.N.Y. 2012) (granting preliminary injunction requiring payment of defense costs under insurance policy because "if XL is not directed to resume paying those costs, the Insureds are likely to suffer 'extreme or very serious damage,' the highest of the standards the Second Circuit uses to measure irreparable harm"); *In re Adelphia Commc'ns Corp.*, No. 02–41729, 2004 WL 2186582, at *6-7 (S.D.N.Y. Sept. 27, 2004) (upholding, despite bankruptcy proceeding, release of funds to pay for legal defense, because failure to do so would likely result in irreparable harm).

Second, even if counsel continued to represent APG in this action without payment, APG will collapse if it is unable to pay expenses necessary to keep its directors, controlling trustees and outside professionals in place, and comply with laws applicable to APG and its subsidiaries -- again, making it impossible for this Court to subsequently return the parties to the positions they previously occupied. In the event that the directors of Airplanes Limited and controlling trustees of Airplanes Trust (together, the "Board") resign, there will be no fiduciaries to make decisions on APG's behalf. And because APG has no employees and operates only through its service providers and advisors, APG would be unable to execute on any decisions of the Board in the absence of its outside professionals.

The expenses necessary to keep the Board in place include premiums necessary to maintain APG's D&O insurance policy. Absent D&O insurance coverage, the members of the

Board would be compelled to resign to avoid the risk of personal liability, leaving APG without fiduciaries to direct its operations. *See WorldCom*, 354 F. Supp. 2d at 469 ("Unless directors can rely on the protections given by D&O policies, good and competent men and women will be reluctant to serve on corporate boards."). Moreover, it is difficult to imagine that a new Board could be put in place for such a complex entity with litigation pending and no D&O insurance in place.

In the case of such a collapse, the Court would not be able to put the pieces back together again. Not surprisingly, courts have concluded that action that threatens to drive a party out of business constitutes a threat of irreparable harm that cannot be cured with damages after the business has been destroyed. *See*, *e.g.*, *Semmes Motors, Inc. v. Ford Motor Co.*, 429 F.2d 1197, 1205 (2d Cir. 1970) (destruction of business would be irreparable harm that could not be compensated by damages); *Ahmed v. U.S.*, 47 F. Supp. 2d 389, 400-01 (W.D.N.Y. 1999) (same); *Fed. Mar. Comm'n v. Austl./U. S. Atl. and Gulf Conference, A/S Atlanttrafik*, 337 F. Supp. 1032, 1037-38 (S.D.N.Y. 1972) (same).

II. THE BALANCE OF HARDSHIPS OVERWHELMINGLY FAVORS GRANTING THE PRELIMINARY INJUNCTION

While APG is likely to succeed on the merits, as shown below, a movant for preliminary relief need only establish "sufficiently serious questions going to the merits" where, as here, the balance of hardships tips decidedly in its favor. *Kamerling*, 295 F.3d at 214. UMB will incur no hardship whatsoever if it is required to allow APG to pay its and its subsidiaries' expenses, because UMB is obligated to do so under the Indentures *even if its assertion of events of default, entitling UMB to serve the Purported Default Notices, proves meritorious.*

A. The Items APG Seeks By This Motion Are "Expenses" Due and Payable Under the Indentures.

Both Indentures define "Expenses" to mean "any fees, costs or expenses incurred by any Airplanes Group Member in the course of the business activities permitted under Section 5.02(e)," with exceptions not relevant here. McCann Decl. Exh. A at 16; *id.* Exh. B at 15. Section 5.02(e)(i) of both Indentures provides that APG's permitted business activities include "owning, holding, converting, maintaining, modifying, managing, operating, leasing, re-leasing and, subject to the limitations set forth in Section 5.02(g) hereof, selling or otherwise disposing of the Aircraft and entering into all contracts and engaging in all related activities incidental thereto." Moreover, under section 5.02(e)(iii) of both Indentures, the permitted business activities include "financing or refinancing the business activities described in clause (i) of this covenant through the offer, sale and issuance of any securities of the Issuer or the Guarantor." And both Indentures, at section 5.02(e)(v)(C), authorize "causing the dissolution" of subsidiaries.[4]

APG's expenses fall squarely within these definitions. With regard to fees incurred in connection with this litigation, section 5.02(e)(iii) of both Indentures permits "financing or refinancing" aircraft through the issuance of securities, and this litigation arises out of APG's issuance of Notes to finance the acquisition of aircraft. Moreover, section 5.02(e)(i) of both Indentures permits "all related activities incidental" to owning, managing, leasing, and disposing of aircraft -- including the holding of promissory notes -- and this litigation challenges APG's financial decisions incidental to such activity (*i.e.*, collecting debts from Transbrasil, a delinquent lessee).

[4] The AL Indenture originally included language excepting Holdings from this provision, but a 2010 amendment to the AL Indenture deleted that exception. McCann Decl. Exh A § 5.02(e)(v); *id*. Exh. K at 6-7.

Meanwhile, fees payable to APG's service providers and other advisors -- including fees associated with this litigation -- represent the routine operational costs of APG. APG has no employees and operates through these entities at the direction of the Board. Working with service providers and other advisors has therefore always been incidental to APG's business of managing, leasing and disposing of aircraft, and it remains critical in this period following the disposition of the final aircraft.

These fees also are incurred in the course of the permitted business activity of "entering into all contracts and engaging in all related activities incidental" to the disposition of the aircraft and "causing the dissolution" of subsidiaries.[5] APG's recurring and ongoing expenses include not only legal fees associated with the management of a complex group of companies operating under the laws of several different sovereigns and fees due to Board members, but also D&O insurance premiums. Without such insurance, APG's directors and controlling trustees would be compelled to resign and APG would not be able to operate. These expenses have always been incidental to APG's business of owning, leasing and disposing of aircraft, and they remain critical in this period following the disposition of the final aircraft as the vehicle approaches the end of its life. Thus, all of these costs are incurred in the course of permitted business activities and, accordingly, are "Expenses" under the Indentures.

B. Expenses Are First in Priority of Payment Under the Indentures, Even if a Default Notice Has Been Delivered.

The delivery of the Purported Default Notices does not relieve UMB of its obligation to allow APG to pay its and its subsidiaries' expenses. To the contrary, section

[5] APG has incurred fees, for example, in attempting to reach an agreement with GECAS that would effectively cap Holdings' potential liability in the Transbrasil Litigation, enable APG to reduce its liquidity reserve (and hence distribute money in respect of Notes and Certificates), and facilitate the liquidation of Holdings. McCann Decl. ¶ 14.

3.08(b) of each Indenture provides that expenses are entitled to the same first-position payment priority following the delivery of a valid default notice.

Section 3.08(b) of each Indenture establishes the order of priority for payments following delivery of a default notice. That section provides that "all amounts on deposit in the Collection and Expense Accounts shall be applied by the Cash Manager in the following order of priority: (i) *First*, to the Expense Account *for distribution by the Cash Manager* or, in certain cases, directly to the relevant Expense payees, an amount equal to the Required Expense Amount . . ." McCann Decl. Exh. A § 3.08(b)(i) (emphasis added); *id.* Exh. B. § 3.08(b)(i) (emphasis added). The Indentures define "Required Expense Amount" to include "the amount of Expenses of Airplanes Group due and payable on the Calculation Date relating to such Payment Date or reasonably anticipated to become due and payable before the end of the Interest Accrual Period beginning on such date." *Id.* Exh. A at 30; *id.* Exh. B at 30. Moreover, the Security Trust Agreement provides that, if the Security Trustee seizes APG's collateral, it must apply that collateral "in accordance with Article VIII of this Agreement *and Article III of the Indentures*." *Id.* Exh. C § 3.01(b) (emphasis added).

Thus, under the Indentures and the Security Trust Agreement -- *even if UMB were correct that events of default had occurred* -- the first priority is the application of funds to the Expense Account for, among other things, "the amount of Expenses of Airplanes Group due and payable." Only after the Required Expense Amount is retained for the purpose of paying Expenses may APG make principal or interest payments in respect of the Notes (and, hence, the Certificates). Accordingly, even if UMB were to prevail in this action, and were permitted to seize APG's cash collateral and apply it pursuant to the Security Trust Agreement, UMB still

would be required to ensure that APG's and its subsidiaries' expenses are paid before paying any principal or interest on the Notes.

APG has a clear right under the Indentures and the Security Trust Agreement to pay its and its subsidiaries' expenses (as it always has). UMB would suffer no hardship from the Court's enforcement of that right.

III. APG IS LIKELY TO SUCCEED ON THE MERITS OF ITS COUNTERCLAIM FOR A DECLARATION DIRECTING UMB TO STOP BLOCKING EXPENSE PAYMENTS

For the reasons shown above, APG is entitled under the Indentures and the Security Trust Agreement to pay its and its subsidiaries' expenses even in the wake of a default notice. Accordingly, APG is all but certain to prevail on the merits with respect to its request for a declaration to that effect. While APG is also likely to succeed on the merits of its request for a declaration that none of the purported events of default UMB asserts has occurred, and that UMB's request for a declaration to the contrary is likely to fail, the Court need not reach that issue in order to grant APG's motion. The expenses APG seeks to pay are obligations that must be paid under the Indentures regardless of the validity of the Purported Default Notices, and UMB's improper obstruction of their payment, if permitted to continue, will -- exactly as UMB and the Directing Certificate Holders apparently intend -- leave APG unable to defend itself in this Action.[6]

[6] Because UMB is obligated -- whether or not it prevails on its claims in this Action -- to allow APG to pay the expense items at issue on this motion, the Court should not require APG to post security in the event this motion is granted, as there is no scenario under which UMB could ultimately be found to have been "wrongfully enjoined or restrained" under Fed. R. Civ. P. 65(c). In any event, any security posted by APG necessarily would be paid out of the very bank accounts that UMB already controls, rendering such security pointless.

Conclusion

UMB's selective refusal to pay the expenses of APG and its subsidiaries is an abuse of its position as security trustee and threatens irreparable harm to APG, which will be unable to survive -- let alone defend itself in litigation -- if those expenses are not paid. Moreover, UMB is contractually obligated to ensure that these expenses are paid using APG's funds even if UMB prevails on the merits of the Amended Complaint. Accordingly, APG respectfully requests that the Court grant its motion and enjoin UMB from continuing to block payment of the expenses necessary to keep its and its subsidiaries' directors, controlling trustees and outside professionals in place, and keep APG and its subsidiaries in compliance with applicable law, while this litigation is pending.

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Respectfully submitted,

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