UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UMB BANK, NATIONAL ASSOCIATION, solely in its capacities as Senior Trustee and Security Trustee

Plaintiff,

vs.

AIRPLANES LIMITED and AIRPLANES U.S. TRUST

Defendants.

Case No.: 16-cv-7717 (PAE)

MEMORANDUM OF LAW IN SUPPORT OF RULE 12(C) MOTION OF UMB BANK, NATIONAL ASSOCIATION FOR PARTIAL JUDGMENT ON THE PLEADINGS

TABLE OF CONTENTS

PAGE

PRELIMINARY STATEMENT 1

FACTUAL BACKGROUND 4

A. The Notes And Certificates Offerings 4

B. The Intercompany Loans 5

C. The Transbrasil Litigation 5

D. Airplanes Limited's Unlawful Reserve 8

E. The Default Notices 11

F. Payment Priorities Under The Indenture 11

LEGAL STANDARD AND APPLICABILITY TO THE CURRENT DISPUTE 12

ARGUMENT 14

A. The Reserve Is Improper Under The Indenture 14

1. The Hypothetical Transbrasil Liability Is Not On Account Of An Expense 15

(a) The Hypothetical Transbrasil Liability Is Not A Fee, Cost, Or Expense Under The Indenture 15

(b) The Hypothetical Transbrasil Liability Was Not Incurred In The Course Of Permitted Business Activities 18

2. The Hypothetical Transbrasil Judgment Is Neither Currently Due And Payable, Nor Anticipated To Become Due And Payable 19

B. Defendants' Interpretation Ignores The Intent Of The Parties And Is Commercially Unreasonable 22

C. An Event Of Default Has Occurred Under The Indenture 24

CONCLUSION 24

TABLE OF AUTHORITIES

Page

Cases

Advocare Int'l L.P. v. Horizon Labs., Inc., No. CIV. 3:04-CV-1988-H,
2005 WL 1832116 (N.D. Tex. Aug. 2, 2005) 15

Al-Kasid v. L-3 Commc'ns Corp.,
No. 12-12948, 2013 WL 1688851 (E.D. Mich. Apr. 18, 2013) 21

Bank of New York Trust Co., N.A. v. Franklin Advisers, Inc.,
726 F.3d 269 (2d Cir. 2013) 13

BOKF, N.A. v. Caesars Entm't Corp.,
162 F. Supp. 3d 243 (S.D.N.Y. 2016) 14

Broder v. Cablevision Sys. Corp.,
418 F.3d 187 (2d Cir. 2005) 13

Brody v. Vil. of Port Chester,
No. 00 CIV. 7481 (HB), 2007 WL 704002 (S.D.N.Y. Mar. 7, 2007) 13

Burns Int'l Sec. Servs. v. Int'l Union, United Plant Guard Workers of Am.,
47 F.3d 14 (2d Cir. 1995) 12

Citibank, N.A. v. Morgan Stanley & Co., Int'l,
No. 09 Civ. 8197, 2010 WL 1948547 (S.D.N.Y. May 12, 2010) 13

In re Coudert Bros.,
487 B.R. 375 (S.D.N.Y. 2013) 14

Cyze v Banta Corp.,
No. 07 C 2357, 2009 WL 2905595 (N.D. Ill. Sept. 8, 2009) 21

Eternity Global Master Fund Ltd. v. Morgan Guar. Trust Co. of N.Y.,
375 F.3d 168 (2d Cir. 2004) 13

Goldman Sachs Grp., Inc. v. Almah LLC,
924 N.Y.S.2d 87 (App. Div. 1st Dep't 2011) 13

Greenwich Capital Fin. Prods., Inc. v. Negrin,
903 N.Y.S.2d 346 (App. Div. 1st Dep't 2010) 14

Kinek v. Paramount Commc'ns, Inc.,
22 F.3d 503 (2d Cir. 1994) 18

King v. Hartford Life & Acc. Ins. Co.,
414 F.3d 994 (8th Cir. 2005) 21

Kramer v. Time Warner Inc.,
937 F.2d 767 (2d Cir. 1991) 13

L-7 Designs, Inc. v. Old Navy, LLC,
647 F.3d 419 (2d Cir. 2011)....................13

LaSalle Bank N.A. v. Nomura Asset Capital Corp.,
424 F.3d 195 (2d Cir. 2005)....................13

Law Debenture Trust Co. of N.Y. v. Maverick Tube Corp.,
595 F.3d 458 (2d Cir. 2010)....................13

In re Martin Designs, Inc.,
No. 08-60431, 2013 WL 1195706 (Bankr. N.D. Ohio Mar. 22, 2013)....................15

Postlewaite v. McGraw-Hill, Inc.,
411 F.3d 63 (2d Cir. 2005)....................22

Revson v. Cinque & Cinque, P.C.,
221 F.3d 59 (2d Cir. 2000)....................13

SN Sands Corp. v. City & Cty. of San Francisco,
167 Cal. App. 4th 185, 83 Cal. Rptr. 3d 885 (Ct. App. 2008)....................21

Shammas v. Focarino,
990 F. Supp. 2d 587 (E.D. Va. 2014)....................16

Thompson v. Gjivoje,
896 F.2d 716, 721 (2d Cir. 1990)....................14

Viacom Int'l, Inc. v. Lorimar Prods., Inc.,
486 F. Supp. 95 (S.D.N.Y. 1980)....................17

Rules

Federal Rule of Civil Procedure 12(c)....................1

UMB Bank, National Association ("UMB Bank") in its capacities as: (i) Senior Trustee under that certain indenture (as supplemented, the "Indenture"), dated as of March 28, 1996, among Airplanes Limited as issuer of notes ("Notes"), Airplanes U.S. Trust ("U.S. Trust") as guarantor of the Notes, and Deutsche Bank Trust Company Americas (formerly known as Bankers Trust Company, "Deutsche Bank") as initial trustee of the Notes; and (ii) Security Trustee under that certain Security Trust Agreement dated as of March 28, 1996 (the "Security Trust Agreement"), respectfully submits this memorandum of law in support of its motion (the "Motion") pursuant to Federal Rule of Civil Procedure 12(c) for entry of an order granting UMB Bank partial judgment on the pleadings as to the claims asserted in the amended complaint [Doc. No. 10] ("Am. Compl.") against defendants Airplanes Limited and U.S. Trust (together, "Defendants").

PRELIMINARY STATEMENT

Airplanes Limited, through its subsidiaries, was primarily in the business of acquiring, leasing, and selling aircraft. To finance the acquisition of its subsidiaries' aircraft in 1996, Airplanes Limited issued approximately $3.68 billion of classes and subclasses of Notes, which were guaranteed by its affiliate, U.S. Trust. Since then, Airplanes Limited's subsidiaries have sold all of their aircraft and are no longer operating. Airplanes Limited's noteholders still have not been paid in full. The present action arises out of the fact that Airplanes Limited has unlawfully misclassified nearly $190 million, such that those funds have not been paid to reduce the hundreds of millions of dollars in principal owed to Airplanes Limited's noteholders.

It cannot be disputed that the relevant question can and should be resolved on the pleadings. Airplanes Limited asserts that the funds are being withheld as a "reserve" (the "Reserve") to cover a *hypothetical* liability that it claims its subsidiary, Airplanes Holdings Limited, f/k/a GPA II Limited ("Airplanes Holdings"), *might* ultimately incur if Airplanes Holdings loses in ongoing litigation in Brazil against one of its former lessees, a defunct Brazilian airline called Transbrasil. Although judgment was entered against Airplanes Holdings in the litigation, as Defendants repeatedly admit, that judgment was reversed in several

substantial respects in 2013, and the 2013 reversal was reaffirmed in November 2016 when the Federal Court of Appeals of Brazil declined to entertain Transbrasil's appeal. As a result, Airplanes Holdings currently has no liability relating to the Transbrasil litigation. Nonetheless, Airplanes Limited has maintained (and inexplicably increased) the Reserve to cover this mere potential liability, and has classified the Reserve as having priority over Airplanes Limited's noteholders under the noteholders' own Indenture. Tellingly, over time, Airplanes Limited has shifted its position, reflecting a willingness to classify the Reserve in whichever way provides a putative basis to withhold the funds (all for the benefit of its subsidiary, Airplanes Holdings). Airplanes Limited refuses to pay its legitimate creditors and instead insists on maintaining the Reserve for a liability that simply does not exist. The Reserve is not supported by the Indenture's plain language

In the first instance, Airplanes Limited improperly classified the Reserve as part of a so-called Maintenance Reserve Amount. The Transbrasil litigation had nothing to do with aircraft maintenance. The Transbrasil litigation—commenced approximately fifteen years ago—stems instead from actions taken by GE Capital Aviation Services Limited ("GECAS"), which was Airplanes Holdings' aircraft servicer. Specifically, the litigation arose from GECAS's actions in seeking to *collect* on amounts *owed* to Airplanes Holdings and to certain of GECAS's other servicing clients unrelated to Airplanes Holdings, including GECAS's own affiliates.

In May 2016, Airplanes Limited sold the last of its aircraft. Airplanes Limited did not use the proceeds to make principal payments on the Notes. Rather, Airplanes Limited continued to withhold funds, even though the Indenture requires the Maintenance Reserve Amount to be zero once all aircraft have been sold. Undeterred and still intent on holding on to the funds, Airplanes Limited simply re-classified the Reserve as part of the "Required Expense Amount," which, under the Indenture has priority over principal payments on the Notes. Airplanes Limited acknowledges the Reserve is improper unless it falls within that definition, but the Reserve does not. To fall within the definition of "Required Expense Amount," the hypothetical Transbrasil liability (for which the Reserve is purportedly being held) must be both: (1) an "Expense" under

the Indenture; and (2) either currently due and payable or "anticipated to become due and payable." It is neither.

First, any hypothetical Transbrasil litigation liability is not an "Expense" because that term is limited to only "fees, costs and expenses incurred" in the course of specified permitted business activities, and does not cover "judgments" rendered or similar litigation liabilities. Unsurprisingly, the Indenture, in several places, respects the distinction between fees, costs, or expenses on the one hand, and liabilities or judgments obtained by adversaries, on the other hand.

Moreover, the hypothetical Transbrasil liability—to the extent liability ever arises—will not qualify as an "Expense" under the Indenture because it will not have been incurred in the course of Airplanes Limited's and its affiliates' permitted business activities under Section 5.02(e) of the Indenture. Rather, any such liability will arise from GECAS's conduct which a (now reversed) Brazilian court found had violated Brazilian law (in violation of the Indenture), and which that court characterized as "malicious" and "in bad faith." GECAS's alleged misconduct was not a permitted business activity of Airplanes Limited under the Indenture. And, GECAS acted not only for Airplanes Holdings, but also for other, unrelated lessors, including GECAS's own affiliates. To be certain, Defendants admit that no liability exists now following the favorable 2013 decision. To the extent GECAS's actions were to once again give rise to liability, however, such actions would fall well outside of the permitted business activities of Airplanes Limited and its affiliates.

Second, even if the hypothetical Transbrasil litigation liability did qualify as an "Expense" (it does not), under the plain terms of the Indenture, Airplanes Limited cannot reserve for it ahead of the noteholders unless that hypothetical expense is "anticipated to become due and payable." Airplanes Limited concedes that is not the case. In addition to the fact that the prior judgment against Airplanes Holdings was reversed, and such reversal was upheld in November 2016, leaving no current liability, Airplanes Limited itself admits that Transbrasil's claims are "highly uncertain" and lack "merit, fairness or rationale."

FACTUAL BACKGROUND[1]

A. The Notes And Certificates Offerings

Airplanes Limited and its subsidiaries were once in the business of acquiring, leasing, and selling aircraft. *See* Defendants' Answer and Counterclaim [Doc. No. 19] ("Ans.") ¶¶ 1, 20, 21, 23. In March 1996, Airplanes Limited acquired indirectly 206 aircraft, the leases on those aircraft, and other assets through its acquisition of 95% of the issued share capital of Airplanes Holdings from GPA Group plc. *Id.* ¶ 20, 142. Airplanes Limited and its subsidiaries have since sold all their aircraft and are in the process of winding down. *Id.* ¶¶ 5, 23, 57-58, 78-79, 128.

To finance (and later refinance) the acquisition of the aircraft and lease assets and its equity ownership in Airplanes Holdings and other subsidiaries, Airplanes Limited issued Notes consisting of Class A Notes, including subclasses A-1 through A-9, and Classes B, C, D, and E Notes.[2] *Id.* ¶¶ 1, 22, 138. Airplanes Limited sold certain of those Notes through trusts, pursuant to a pass-through trust agreement dated March 28, 1996, as amended. *Id.* ¶¶ 1, 22, 140. Under that agreement, the trusts issued certificates (the "Certificates") representing, among other things, interests in certain classes and subclasses of the Notes issued by Airplanes Limited, as well as the notes simultaneously issued by U.S. Trust. *Id.* ¶¶ 1, 22, 140. The Notes and Certificates were to be repaid indirectly from lease receipts, aircraft sale proceeds, and other funds received by Airplanes Limited and its subsidiaries through their operations. *Id.* ¶¶ 25, 138. Principal on the subclass A-9 and class B, C, and D Notes remains outstanding. *Id.* ¶¶ 26-27, 45.

To secure its obligations under the Notes, Airplanes Limited granted the Security Trustee a security interest in certain collateral (the "Collateral") under the Security Trust Agreement. *Id.* ¶ 139. The Collateral includes: (i) all funds or any other interest of Airplanes Limited held or

[1] Exhibits cited herein are attached to the accompanying Declaration of Benjamin I. Finestone.

[2] U.S. Trust was in substantially the same business as Airplanes Limited. *See* Ans. ¶ 142. U.S. Trust issued its notes pursuant to an amended and supplemented indenture (the "U.S. Trust Indenture"), which has materially identical terms to the Indenture. *Compare* Ex. A (Indenture) *with* Ex. B (U.S. Trust Indenture). The Notes issued by Airplanes Limited are guaranteed by U.S. Trust, and the notes issued by U.S. Trust are guaranteed by Airplanes Limited. Ans. ¶ 138.

required by the terms of the Indenture to be held in any Account (as defined in the Indenture), (ii) all deposit accounts possessed by the Security Trustee for or on behalf of the Secured Parties, and (iii) all of Airplanes Limited's right, title, and interest in and to all deposit accounts and all funds or other interests therein, including any proceeds thereof. Ex. C (Security Trust Agreement) § 2.01(c), (e), pp. 10-12. The Accounts that constitute Collateral include the Expense Account and the Collection Account (as defined in the Indenture), in which the Reserve is currently maintained, and any ledger and subledger accounts maintained in either of those accounts. *Id.* § 2.01(e), pp. 11-12 (granting security in Airplanes Limited's "right, title, and interest in and to all deposit accounts [and] all funds held therein"); *see also* Ex. A (Indenture) § 3.01(b), (d), pp. 52-55. The Secured Parties under the Security Trust Agreement include the "Airplanes Group Noteholders," but do not include Transbrasil or Airplanes Holdings. *Id.* at 3. The Security Trust Agreement provides for a "waterfall" among the Secured Parties as to the Collateral. *See id.* § 1.01, p. 7-8; *see also id.* Art. VII (setting forth agreements among the Secured Parties as to certain rights viz a viz the Collateral).

B. The Intercompany Loans

Using proceeds from the Notes and Certificates, Airplanes Limited made loans to certain of its subsidiaries, including: (i) a $628 million loan to Airplanes Holdings pursuant to a Loan Agreement dated March 28, 1996; and (ii) a $3.39 billion intercompany loan facility entered into on March 28, 1996 by Airplanes Holdings and other aircraft lessors as borrowers and Airplanes Limited as lender. *See* Ans. ¶¶ 24, 143. Airplanes Holdings owes approximately $4 billion to Airplanes Limited on account of, among other things, these intercompany loans. Am. Compl. ¶ 77; *see also* Ex. D (2016 Annual Report) at 2, 8.

C. The Transbrasil Litigation

Airplanes Limited, Airplanes Holdings, GECAS, and AeroUSA, Inc. (a subsidiary of U.S. Trust) entered into a (since terminated) servicing agreement dated as of Match 28, 1996 (the "Servicing Agreement"). Ans. ¶ 28. GECAS's responsibilities under the Servicing Agreement

included, among others, negotiating, executing, and collecting rent on aircraft leases, and releasing and selling aircraft. Ex. E (Servicing Agreement) at Schedule 2.02(a).

In the 1990s, Airplanes Holdings leased two aircraft to Transbrasil, a now defunct Brazilian airline. Ans. ¶ 29. GECAS acted as servicer for those leases. *Id.* ¶¶ 29, 153. At the same time, five other entities also leased aircraft to Transbrasil, including: GECAS's affiliate, General Electric Capital Corporation ("GE Capital"), two of GE Capital's affiliates, AerCap Ireland Limited, and AerCap Leasing USA II Inc. (collectively with Airplanes Holdings, the "Transbrasil Lessors"). *See id.* ¶ 153; *see also* Ex. D (2016 Annual Report) at 13. GECAS was servicer for all of the leases entered into between the Transbrasil Lessors and Transbrasil. Ans. ¶ 153. Other than Airplanes Holdings, none of the Transbrasil Lessors are affiliates of Airplanes Limited. *See* Ex. D (2016 Annual Report) at 13.

Transbrasil defaulted on payment obligations under the Transbrasil leases. Ans. ¶¶ 30, 153. GECAS, on behalf of the Transbrasil Lessors, restructured the debt Transbrasil owed to them. *Id.* ¶ 153. Under the restructuring, Transbrasil issued a number of promissory notes to the Transbrasil Lessors as guarantees of the payment obligations under the restructured debt. *Id.* The promissory note issued to Airplanes Holdings was in the principal amount of $7,196,700. *Id.* ¶¶ 30, 153. Airplanes Holdings also held an approximately 42% interest in a joint promissory note in the principal amount of approximately $5.3 million (*i.e.*, approximately $2.23 million). *Id.* Thus, in total, Airplanes Holdings had less than $10 million at stake with respect to Transbrasil. Am. Compl. ¶ 30.

Transbrasil defaulted on its payment obligations under the promissory notes in 2000. Ans. ¶¶ 31, 154. Following that default, in July 2001, GE Capital (one of the Transbrasil Lessors) initiated an action in its own name seeking the declaration of the bankruptcy of Transbrasil, which was granted on appeal. Am. Compl. ¶ 33; *see also* Ex. D (2016 Annual Report) at 13.

In November 2001, GECAS, purporting to act on behalf of five of the Transbrasil Lessors (excluding GE Capital), unsuccessfully took steps toward initiating a *collection* proceeding

against Transbrasil. Ans. ¶¶ 31, 154, 155. Shortly thereafter, Transbrasil sought an injunction and commenced a lawsuit (the "Transbrasil Action") against all of the Transbrasil Lessors seeking: (a) a declaration that the promissory notes had already been paid by Transbrasil and were therefore invalid, and (b) the imposition of a penalty against Airplanes Holdings and the other Transbrasil Lessors of twice the amount of the promissory notes. *Id.* ¶ 154. Transbrasil also sought to have the Transbrasil Lessors indemnify Transbrasil for the losses resulting from the alleged wrongful collection of the promissory notes. *Id.*

Airplanes Holdings was not made aware that it had been named as a defendant in the Transbrasil Action until approximately 2010. *Id.* ¶ 32. GECAS at all times has directed the proceedings in the Transbrasil Action on behalf of Airplanes Holdings, including from approximately 2001, when those proceedings began, until Airplanes Limited and Airplanes Holdings first became aware of the proceedings. *Id.* ¶¶ 32, 155.

In May 2007, a trial court in Sao Paulo, Brazil ruled in favor of Transbrasil in the Transbrasil Action. *Id.* ¶¶ 34, 156. In February 2010, the Appellate Court of the State of Sao Paulo affirmed the trial court and entered judgment against the Transbrasil Lessors, including Airplanes Holdings (together, the "Transbrasil Judgment"). *Id.* The Transbrasil Judgment held Transbrasil Lessors liable for GECAS's violations of Article 1531 of the former Code of Civil Procedure and Article 940 of the new Code of Civil Procedure. Ex. F (Transbrasil Judgment) at 90.[3] It ordered the Transbrasil Lessors to pay Transbrasil twice the amount of the promissory notes, plus interest and damages due to GECAS's potentially illegal attempted collection of the promissory notes, including loss of profits and damages Transbrasil suffered as a result of the involuntary bankruptcy GE Capital filed against it. *Id.* at 90, 98. The court concluded GECAS had acted "malicious[ly]" in seeking to collect upon "already paid debt" and had litigated in "bad

[3] The Transbrasil Judgment stated: "In turn, as regards the material law, respondents' claim for collection of already paid debt became indisputable, as they incurred the sanction of article 1531 of the former Code of Civil Procedure and article 940 of the new one, and must bear the double payment of the unduly charged amount, as the debt was already cleared up." *Id.*

faith." *Id.* at 89-90. As a result of the Transbrasil Judgment, a lower Brazilian court issued two orders to pay (the "Orders to Pay"). Ans. ¶¶ 38, 157. Transbrasil asserted that $80 million of the Orders to Pay was directly attributable to Airplanes Holdings' share of certain promissory notes. *Id.* ¶ 157.

On June 8, 2010, GECAS, on behalf of Airplanes Holdings and other Transbrasil Lessors, filed two appeals against the Transbrasil Judgment. *Id.* ¶ 39. In October 2013, the Federal Court of Appeals of Brazil overturned the Transbrasil Judgment in several significant respects (the "2013 Reversal"). *Id.* ¶¶ 39, 158. Among other things, the 2013 Reversal unanimously overturned the order requiring Airplanes Holdings to pay a penalty of twice the amount of the promissory note to Transbrasil. Ex. G (2013 Reversal) at 20. The 2013 Reversal also dismissed Transbrasil's indemnity claim for losses related to the involuntary bankruptcy filing. *Id.* at 22-24.

Pursuant to the 2013 Reversal, the Brazilian courts cancelled the Orders to Pay in or about February 2014 and August 2014. Ans. ¶ 41. As Defendants admit, presently there is no judgment against Airplanes Holdings and the Orders to Pay remain cancelled. *Id.* ¶¶ 41, 159, 166. Transbrasil appealed from both the 2013 Reversal and the cancellation of the Orders to Pay. *Id.* ¶¶ 42, 158. The 2013 Reversal was reconfirmed on November 23, 2016 when the Federal Court of Appeals declined to entertain Transbrasil's appeal of the October 2013 Reversal (the "November 2016 Order"). *See* Declaration of Antonio Tavares Paes, Jr. in Support of Defendants' Motion for a Preliminary Injunction, ¶ 5, dated December 9, 2016 (the "Paes Decl.") [Doc. No. 25].

D. Airplanes Limited's Unlawful Reserve

On March 31, 2010, Airplanes Limited first publicly disclosed the Transbrasil Judgment in its annual report. *Id.* ¶ 44. It stated the Transbrasil Action "could result in a loss of up to $15 million plus interest and legal costs." Ex. H (2010 Annual Report) at 44. Accordingly, Airplanes Limited made a provision of only $15 million in its financial statements on account of

the Transbrasil Judgment. Ans. ¶ 44. At that time the outstanding principal balance on the A-8 and A-9 Notes was $75 million and $683 million, respectively. *Id.*

Notwithstanding the establishment of the Transbrasil litigation provision in its 2010 financial statements, Airplanes Limited allowed the outstanding principal balance on the A-8 Note to be paid in full on November 15, 2010. *Id.* ¶ 45. The following year, as of March 31, 2011, Airplanes Limited remained of the view that the Transbrasil Action "could result in a loss of up to $15 million." Ex. I (2011 Annual Report) at 44. At that time, the outstanding principal balance on the A-9 Note was $627 million. Ans. ¶ 46.

Beginning in July 2012, however, notwithstanding Airplanes Limited's assertion that Airplanes Holdings "has strong defenses against the substantive issues raised" in the Transbrasil Action, Airplanes Limited suspended payments of principal on the A-9 Note. *Id.* ¶¶ 2, 47. Instead, funds that would have been used to pay the A-9 Note were diverted to establish the Reserve and fund ever-increasing Reserve targets. *See id.* ¶ 147. Specifically, Airplanes Limited caused the cessation of payments of principal on the A-9 Note from July 16, 2012 until January 15, 2013 in order to establish and fund the Reserve up to a $110 million target to cover Airplanes Holdings' Transbrasil liability, if and when such liability became due. *Id.* ¶¶ 48, 162. Airplanes Limited initially classified the Reserve as part of the "Maintenance Reserve Amount" under the Indenture, increasing that amount from $45 million to $110 million. *See id.* ¶¶ 49, 162. As reflected by its name, the Maintenance Reserve Amount related to maintaining the condition and operability of aircraft, including performing maintenance upon repossession of aircraft from defaulted lessees and bringing the aircraft up to industry standards to make them more marketable to new lessees.[4] *See, e.g.*, Ex. J (April 26, 2001 A-9 Notes Prospectus) at 145 ("The required maintenance reserve amount . . . may be increased or decreased . . . in light of

---

[4] That the purpose of the Maintenance Reserve Amount was for aircraft maintenance is further confirmed by the fact that under the Indenture that amount must be reduced to zero once all of the aircraft are sold. *See* Ex. A (Indenture) § 1.01, p. 22. Airplanes Limited has not explained how the hypothetical Transbrasil liability related to aircraft maintenance—nor could it.

significant changes in, among other things, the condition of the aircraft, the terms and conditions of future leases, the financial condition of the lessees or prevailing industry conditions.").

At the same time that it increased the Maintenance Reserve Amount to $110 million, Airplanes Limited's provision for the Transbrasil litigation in its March 31, 2012 consolidated financial statements was only increased from $15 million to $19 million. Ex. K (2012 Annual Report) at 48.

On October 8, 2013, notwithstanding its continued assertions that the Transbrasil Judgment "lacked merit, fairness or rationale," Airplanes Limited determined to increase the Reserve to $140 million, again causing the suspension of the required payments on the A-9 Note on October 15, 2013 until December 15, 2014. Ans. ¶¶ 2, 49. Two weeks later the 2013 Reversal was issued, which should have caused an elimination of the unlawful Reserve. *See id.* ¶ 50. Nevertheless, Airplanes Limited again caused the suspension of payments on the A-9 Note and Certificates on November 16, 2015 and *increased the Reserve to $190 million*. *Id.* ¶¶ 51, 162. Scheduled principal payments on the A-9 Note and Certificates have been suspended ever since. *Id.* ¶ 51.

In May 2016, Airplanes Limited sold the last of its aircraft. Since that sale, Airplanes Limited and its subsidiaries have not held any direct or indirect ownership interest in any aircraft. *Id.* ¶¶ 5, 23, 57-58, 78-79, 128. Because the Indenture requires the Maintenance Reserve Amount to be zero once all aircraft have been sold, Airplanes Limited—undeterred and still intent on holding on to the funds—continued its pretense by reclassifying the Reserve as a "Required Expense Amount" on account of a putative "Expense." *Id.* ¶ 58.

Airplanes Limited continues to maintain that the claims asserted by Transbrasil against Airplanes Holdings in the Transbrasil Action "lack merit, fairness or rationale." *Id.* ¶ 2. Airplanes Limited has classified the Transbrasil Action as a "*highly uncertain* contingent liability of Airplanes Limited's subsidiary [Airplanes] Holdings." *Id.* ¶ 128 (emphasis added). Indeed, in its latest Annual Report, Airplanes Limited disclosed that at the same time it is maintaining the

$190 million Reserve, it has taken only a $3 million provision for the Transbrasil Litigation in its financial statements. Am. Compl. ¶ 52; Ex. D (2016 Annual Report) at F-12.

E. The Default Notices

On June 28 and July 29, 2016, Plaintiff's predecessor, Deutsche Bank—at the direction of the controlling A-9 Certificateholders through the relevant transaction documents—delivered default notices (the "Default Notices") declaring Events of Default and accelerating the A-9 Note under the Indenture in respect of the Transbrasil Judgment, the commission of unauthorized business activities, and the failure to make required payments on the A-9 Note. Am. Compl. ¶¶ 88-89; *see also* Exs. L & M (Default Notices). The Certificateholders also directed Deutsche Bank to exercise remedies. Ex. L (June Default Notice) at Ex. A., pp. 3-4. Deutsche Bank, in its capacity as Security Trustee, froze the Collateral (including the account holding the Reserve) for the benefit of the Secured Parties. *Id.* at 2. Plaintiff is pursuing this action as part of its enforcement of the remedies.

F. Payment Priorities Under The Indenture

Section 3.08(a) of the Indenture governs the priority of payments prior to a Default Notice being delivered thereunder.[5] Section 3.08 requires Airplanes Limited to make monthly payments to the relevant pass-through trustee on account of outstanding principal of the Note issued by Airplanes Limited to such trustee. Ex. A (Indenture) § 3.08(a)(v); § 3.08(b)(ii). Following the 2010 payment in full of the principal of the Subclass A-8 Note, the relevant pass-through trustee was the trustee holding the class A-9 Note (the "A-9 Noteholder"). Under Section 3.08(a), only four categories of payments take priority over the required principal payments to the A-9 Noteholder: (i) an amount equal to the Required Expense Amount; (ii) certain required interest payments on the Notes and swap payments relating to the Notes; (iii) an amount equal to the sum of the Maintenance Reserve Amount and the Miscellaneous Reserve

[5] A "Default Notice" under the Indenture is a "notice given by Holders representing a majority of the aggregate Outstanding Principal Balance of the Senior Class of Notes . . . declaring all Outstanding principal of and accrued and unpaid interest on the Notes to be immediately due and payable." *See* Ex A (Indenture) § 1.01, p. 14.

Amount; and (iv) an amount not in excess of the Minimum Hedge Payment, if any, to a Swap Provider. *Id.* § 3.08(a)(i)-(iv).

For the reasons described herein, the Reserve does not fall within any of these four categories. As an initial matter, the Reserve clearly does not fall within categories (ii) or (iv), because Defendants do not (and could not) contend that the hypothetical Transbrasil liability is an interest payment, swap payment, or Minimum Hedge Payment to a Swap Provider. The Reserve also cannot fall within category (iii), because Airplanes Group sold all of its aircraft on May 6, 2016, and the Indenture requires that the Maintenance Reserve Amount and the Miscellaneous Reserve Amount be reduced to zero as of that date. *See id.* § 1.01, pp. 22-24; *see also* Ans. ¶ 58.

Accordingly, the Indenture requires that the funds in the Reserve must be paid to the noteholders on account of their outstanding principal in accordance with the Indenture, unless Defendants can properly classify the Reserve as falling within the first category, the "Required Expense Amount." *See id.* § 3.08(a)(v). The same is true under section 3.08(b), which—subject to the rights of the Secured Parties under the Security Trust Agreement and the subordination provisions contained in the Indenture and the Notes—governs the priority of payments under the Indenture *after* a Default Notice is delivered thereunder. Under that section, the Required Expense Amount is the only category that (absent a Default Notice and the exercise of remedies) takes priority over the required principal payments to the A-9 Noteholder. *See id.* § 3.08(b)(i).

LEGAL STANDARD AND APPLICABILITY TO THE CURRENT DISPUTE

In this Motion, UMB Bank seeks a judgment that the Reserve does not fall within the "Required Expense Amount" under the plain language of the Indenture. Defendants similarly recognize that is the current dispute. Ans. ¶¶ 144-147.

The interpretation of the Indenture—including whether the Reserve falls within the "Required Expense Amount"—presents a pure question of law that can properly be decided on the pleadings. A party is entitled to judgment on the pleadings when it is clear that no material issues of fact remain and the moving party is entitled to judgment as a matter of law. *Burns Int'l*

Sec. Servs. v. Int'l Union, United Plant Guard Workers of Am., 47 F.3d 14, 16 (2d Cir. 1995). It is well-settled that courts interpret indentures under a basic rules of contract law. *Bank of New York Trust Co., N.A. v. Franklin Advisers, Inc.*, 726 F.3d 269, 276 (2d Cir. 2013). The meaning of an unambiguous contract is a pure question of law for a court to decide. *Revson v. Cinque & Cinque, P.C.*, 221 F.3d 59, 66 (2d Cir. 2000). Whether or not a writing is ambiguous is also a pure legal question, *Eternity Global Master Fund Ltd. v. Morgan Guar. Trust Co. of N.Y.*, 375 F.3d 168, 178 (2d Cir. 2004), and as such "properly disposed of through a motion for judgment on the pleadings." *Citibank, N.A. v. Morgan Stanley & Co., Int'l*, No. 09 Civ. 8197, 2010 WL 1948547, at *4 (S.D.N.Y. May 12, 2010).

On a Rule 12(c) motion, a court may consider the pleadings as well as any documents relied upon in the pleadings, including documents attached and incorporated by reference as well as documents that are "integral" to the complaint. *L-7 Designs, Inc. v. Old Navy, LLC*, 647 F.3d 419, 422 (2d Cir. 2011). A court may "also consider . . . matters of which judicial notice may be taken, such as public documents." *Brody v. Vil. of Port Chester*, No. 00 CIV. 7481 (HB), 2007 WL 704002, at *4 (S.D.N.Y. Mar. 7, 2007); *Kramer v. Time Warner Inc.*, 937 F.2d 767, 774 (2d Cir. 1991) (court may take judicial notice of public disclosure documents, including annual reports).

Under New York law, a contract is ambiguous only if "the provisions in controversy are reasonably or fairly susceptible of different interpretations or may have two or more different meanings." *Goldman Sachs Grp., Inc. v. Almah LLC*, 924 N.Y.S.2d 87, 90 (App. Div. 1st Dep't 2011) (citation omitted); *see also Broder v. Cablevision Sys. Corp.*, 418 F.3d 187, 197 (2d Cir. 2005). A contract is not ambiguous simply because the parties ask the Court to construe it differently. *Law Debenture Trust Co. of N.Y. v. Maverick Tube Corp.*, 595 F.3d 458, 467 (2d Cir. 2010).

When interpreting a contract, "words and phrases should be given their plain meaning, and the contract should be construed so as to give full meaning and effect to all of its provisions." *LaSalle Bank N.A. v. Nomura Asset Capital Corp.*, 424 F.3d 195, 206 (2d Cir.

2005); *see also Greenwich Capital Fin. Prods., Inc. v. Negrin*, 903 N.Y.S.2d 346, 348 (App. Div. 1st Dep't 2010) (courts construe agreements "in a manner that accords the words their fair and reasonable meaning and achieves a practical interpretation of the expressions of the parties") (citation omitted). New York courts commonly refer to dictionary definitions to determine the plain and ordinary meaning of terms. *BOKF, N.A. v. Caesars Entm't Corp.*, 162 F. Supp. 3d 243, 246 (S.D.N.Y. 2016). As noted by this Court, however, "a court need not turn a blind eye to context." *See In re Coudert Bros.*, 487 B.R. 375, 390 (S.D.N.Y. 2013). Instead, words should be interpreted giving "due consideration to 'the surrounding circumstances [and] apparent purpose which the parties sought to accomplish.'" *Id.* (quoting *Thompson v. Gjivoje*, 896 F.2d 716, 721 (2d Cir. 1990)).

ARGUMENT

A. The Reserve Is Improper Under The Indenture

The Indenture is clear and should be enforced as written: the Reserve does not qualify as part of the "Required Expense Amount," and thus the funds cannot be held in the Expense Account. Rather, the funds must be used to pay outstanding principal to the noteholders in accordance with the payment priorities set forth in Section 3.08 of the Indenture.[6]

The Indenture defines the "Required Expense Amount" to include three items determined on each Payment Date:

> (i) 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;
>
> (ii) at the discretion of the Cash Manager, an amount necessary to provide for Permitted Accruals (other than accruals in respect of Modification Payments); 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

[6] As noted, Section 3.08 is also subject to the subordination provisions in the Indenture and the Notes, as well as the terms of the Security Trust Agreement.

> such Payment Date and during the next succeeding Interest Accrual Period) and provision for the Permitted Accruals.

Ex. A (Indenture) § 1.01, p. 30. The Reserve does not fit within any of these three categories. The result is also the same under the U.S. Trust Indenture, which contains materially identical provisions. *See* Ans. ¶¶ 144-148.

1. The Hypothetical Transbrasil Liability Is Not On Account Of An Expense

To fit within any of the three categories enumerated above, the Reserve must be on account of an "Expense," as that term is defined in the Indenture. That is because all three categories of Required Expense Amount are on account of Expenses.[7] "Expenses" is defined only as "any fees, costs or expenses incurred by any Airplanes Group Member in the course of the business activities permitted under Section 5.02(e)" of the Indenture. *Id.* § 1.01, p. 16. Thus, to come within this definition the hypothetical Transbrasil liability must be: (1) a fee, cost, or expense and (2) incurred in the course of the business activities permitted by the Indenture. The hypothetical Transbrasil liability fails to meet either of those criteria.

(a) The Hypothetical Transbrasil Liability Is Not A Fee, Cost, Or Expense Under The Indenture

The hypothetical Transbrasil liability does not constitute a "fee," "cost," or "expense." "[F]ees," "costs," and "expenses" connote separate concepts with distinct meanings. *In re Martin Designs, Inc.*, No. 08-60431, 2013 WL 1195706, at *7 (Bankr. N.D. Ohio Mar. 22, 2013) ("As terms of art 'fees,' 'expenses,' and 'costs,' and similar words and phrases, impress separate and distinct meanings."). Giving these terms their plain and ordinary meanings unequivocally establishes that the definition of "Expenses" does not include a "judgment."

- **"Fee:"** The hypothetical Transbrasil liability is not a fee. Black's Law Dictionary defines "fee" as "[a] charge for labor or services, esp. professional services." Black's Law Dictionary (10th ed. 2015). *See also Advocare Int'l L.P. v. Horizon Labs., Inc.*,

---

[7] *See id.* § 1.01, p. 30 (defining the first category under the Required Expense Amount to be certain "Expenses"); *see id.* § 3.01(d) (defining "Permitted Accruals," which is the second category under Required Expense Amount, to be certain "accruals in respect of Expenses"); *id.* (defining "Permitted Balance," which is the third category under Required Expense Amount, to be certain "unanticipated Expenses").

No. CIV. 3:04-CV-1988-H, 2005 WL 1832116, at *4 (N.D. Tex. Aug. 2, 2005) (defining the term "fee" as "payment for an act or service").

- **"Cost:"** Nor does the hypothetical Transbrasil liability fall within the ordinary meaning of cost. Cost means "[t]he amount paid or charged for something; price or expenditure. *Cf.* expense." Black's Law Dictionary (10th ed. 2015).

- **"Expense:"** Finally, the hypothetical Transbrasil judgment is not an expense. Black's Law Dictionary states that the term "expense" means: "An expenditure of money, time, labor, or resources to accomplish a result; esp., a business expenditure chargeable against revenue for a specific period. *Cf.* Cost." *Id.* Indeed, courts have used Merriam-Webster to the term "expense" as: "The amount of money that is needed to pay for or to buy something. An amount of money that must be spent especially regularly to pay for something. Something on which money is spent. An act or instance of expending. Something expended to secure a benefit or bring about a result." *Shammas v. Focarino*, 990 F. Supp. 2d 587, 591 (E.D. Va. 2014).

The Expenses definition omits reference to a "liability," "judgment," or "order." By contrast, the Indenture's definition of Losses separately includes: "any loss, ***cost***, charge, ***expense***, interest, ***fee***, payment, demand, ***liability***, claim, action, proceeding, penalty, fine, damages, ***judgment***, ***order*** or other sanction other than Taxes." Ex. A (Indenture) § 1.01, p. 22. Other sections similarly separate and distinguish between costs and expenses on the one hand, and liabilities on the other. *See id.* § 4.04(c) (requiring under certain circumstances Noteholders to offer the Senior Trustee "an indemnity . . . against any costs, expenses and liabilities . . . "); *id.* § 6.04, p. 98 (differentiating between "costs, expenses, and liabilities" in context of an indemnity). Sophisticated parties drafted the Indenture with precision. The definition of Expense could easily have been written to incorporate liabilities, judgments, and orders; it was not. Instead the drafters carefully drew distinctions between these plain and ordinary terms, reinforcing their intent to respect their separate meanings.

UMB Bank's reading of the Expense definition is supported by other provisions of the Indenture and common sense. The Noteholders agreed to be junior to certain fees, costs, and expenses of entities operating Airplanes Group's business, amounts that are relatively predictable and quantifiable, and which benefitted the Noteholders' collateral. They did not, however, agree to be junior to tort (or other litigation) liabilities to litigation opponents, amounts that are

inherently unforeseeable and unquantifiable. Illustrative of the foregoing, Article X of the Indenture governs subordination, and provides that the Notes are subordinated only to "Expenses payable *to the Service Providers* pursuant to this Indenture and the Relevant Documents."[8] *See* Ex. A (Indenture) § 10.01(a) (emphasis added). The definition of "Service Providers" in the Indenture does not include Transbrasil or any other lessee. *See id.* § 1.01, p. 33. Rather, the Service Providers are the third-party entities through which Airplanes Group conducted every aspect of its ordinary business operations. Ex. J (April 26, 2001 A-9 Notes Prospectus) at 20 ("We have no employees or executive management resources of our own and rely solely on the servicer, administrative agent, cash manager and other service providers for all aircraft servicing, leasing, re-leasing, sales and other executive and administrative functions . . . ."). Because the Service Providers operated the entirety of Airplanes Group's business, it is not surprising that under the Indenture, Airplanes Limited was permitted to pay (ahead of the Noteholders) the fees, costs, and expenses the Service Providers incurred in operating the business.

Indeed, Airplanes Limited's conduct in first treating the hypothetical Transbrasil liability as a Maintenance Reserve Amount (when the Transbrasil Action had nothing to do with airplane maintenance) reflects that Defendants have been set on a reserve no matter what the contract provides for. "The practical interpretation of a contract . . . manifested by the [parties'] conduct subsequent to its formation for any considerable length of time before it becomes a subject of controversy, is entitled to great, if not controlling weight in the construction of the contract." *Viacom Int'l, Inc. v. Lorimar Prods., Inc.*, 486 F. Supp. 95, 98 n.3 (S.D.N.Y. 1980) (citing cases). Airplanes Limited's past conduct shows it does not really believe in its current made-for-litigation position that the hypothetical liability constitutes an Expense.

---

[8] The Indenture defines "Relevant Documents" to include agreements entered into with the Service Providers, including the Administrative Agency Agreement, the Cash Management Agreement, and the Servicing Agreement. *See* Ex. A (Indenture) § 1.01, p. 30.

(b) The Hypothetical Transbrasil Liability Was Not Incurred In The Course Of Permitted Business Activities

The hypothetical Transbrasil liability also fails to qualify as an "Expense" for the independent reason that if it ever becomes due and payable, it would not have been incurred in the course of a permitted business activity under Section 5.02(e) of the Indenture. Instead, it would be a result of GECAS's violations of Brazilian law in acting on behalf of the Transbrasil Lessors. Specifically, the Transbrasil Judgment—before it was overturned—held that "the Respondents" (*i.e.*, the Transbrasil Lessors, including Airplanes Holdings) violated the Brazilian Code of Civil Procedure in their "malicious" attempts to collect from Transbrasil. *See supra*, pp. 7-8.

As an initial matter, "malicious" debt collection actions and "bad faith" litigation are not permitted business activities under section 5.02(e) of the Indenture, regardless of whether they were "incidental" to the leasing of the Aircraft. Ex. A (Indenture) § 5.02(e). Moreover, GECAS, acting as Airplanes Holdings' agent, did not even inform its principal it was named in a lawsuit until 2010—nine years later! Ans. ¶ 32. Taking actions in violation of governing laws, and violating duties every agent owes its principal, regardless of whether those actions relate in some way to typical business activities of the company, are not permitted. To be sure, the business activities of Airplanes Limited and its subsidiaries are subject to certain operating covenants in the Indenture, one of which provides that Airplanes Limited will "comply, and cause each Issuer Subsidiary [which includes Airplanes Holdings] to comply, in all material respects with all Applicable Laws." Ex. A (Indenture) § 5.03(b). The Indenture defines Applicable Laws to include, "with respect any Person, all laws, rules, regulations and orders of governmental regulatory authorities applicable to such Person." *Id.* § 1.01, p. 4.

Here, if Airplanes Holdings is found liable to Transbrasil, that liability would arise from violations of the Brazilian Code of Civil Procedure. The scope of permitted business activities of Airplanes Limited and its subsidiaries must be read in accordance with the covenant that Airplanes Group would operate its business in compliance with Applicable Law. *See Kinek v.*

Paramount Commc'ns, Inc., 22 F.3d 503, 509 (2d Cir. 1994), *as amended on denial of reh'g* (June 13, 1994) ("Well established principles of contract construction . . . require that all provisions of a contract be read together as a harmonious whole, if possible."). Otherwise, collecting aircraft lease payments through theft would be a "permitted business activity" simply because it related to the leasing of aircraft. That reading of the Indenture would be absurd.

Of course, to the extent the lower Brazilian court misapprehended GECAS's conduct in the Transbrasil Judgment, and the 2013 Reversal stands, then there is no need for a Reserve in any event. In other words, if GECAS acted permissibly, there is no "Expense" even under Airplanes' flawed interpretation because there is no judgment or resulting liability. If there is a putative "Expense," it would arise from "improper" collection actions in contravention of Brazilian law. That could not give rise to an "Expense" under the Indenture, as this would be outside of the permitted business activities thereunder. Either way, there is no Expense to justify the Reserve.

In addition, any liability incurred in the Transbrasil Action is attributable to GECAS's actions, which were on behalf of *all* of the Transbrasil Lessors. *See* Ex. D (2016 Annual Report) at 13-23. The only Transbrasil Lessor that is part of Airplanes Group is Airplanes Holdings. Any liability attributable to the other Transbrasil Lessors cannot possibly have arisen from any business activities of Airplanes Group. Airplanes Limited has never articulated—nor could it—what portion of any hypothetical Transbrasil liability can be characterized as arising from the business activities of Airplanes Holdings as opposed to one of the other Transbrasil Lessors.

2. The Hypothetical Transbrasil Judgment Is Neither Currently Due And Payable, Nor Anticipated To Become Due And Payable

Even if the hypothetical Transbrasil liability qualifies as an "Expense" (it does not), it still fails to fall within any of the three aforementioned categories of Required Expense Amount. As noted, the Indenture defines the "Required Expense Amount" to include three categories determined on each Payment Date. *See supra*, pp. 14-15; Ans. ¶¶ 146-148. The first category includes "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. . . ." Ex. A (Indenture) § 1.01, p. 30. The "Payment Date" means the 15th day of each month, commencing from May 15, 1996. *Id.* at p. 26. The Interest Accrual Period is defined as the period between each monthly Payment Date. *Id.* at pp. 20-21.

The second category of the "Required Expense Amount" is a balance made up of "Permitted Accruals,"[9] which the Indenture defines to include "accruals in respect of Expenses that are not regular, monthly recurring Expenses, . . . if any, of Airplanes Group anticipated to become due and payable in any future Interest Accrual Period . . . ." *See id.* § 3.01(d). Thus, the first two categories cover: (1) current Expenses; (2) Expenses anticipated to become due and payable in the short term (*i.e.*, within the next 30 day period); and (3) a balance to cover Expenses anticipated to become due and payable prior to the Final Maturity Date of the Notes, which is March 15, 2019.[10]

Here, the hypothetical Transbrasil liability fails to satisfy any of these criteria. It is not currently due and payable under any reading of the Indenture. Airplanes Limited does not assert otherwise, and admits that the Transbrasil Judgment has been reversed and the Orders to Pay have been and remain cancelled by the 2013 Reversal. *See* Ans. ¶¶ 41, 159, 166.

Nor is the hypothetical Transbrasil liability anticipated to become due and payable at all, let alone within 30 days or by March 15, 2019. The term "anticipate" is defined as "to look forward to ***as certain***: expect." *See* Merriam-Webster.com, accessed Nov. 25, 2016 at http://www.merriam-webster.com/dictionary/anticipate (emphasis added); *see also* American Heritage Dictionary (5th ed. 2016) (defining "anticipate" in relevant part to mean "[t]o see as a ***probable*** occurrence; ***expect***") (emphasis added).

---

[9] The second category of the "Required Expense Amount" includes "at the discretion of the Cash Manager, an amount necessary to provide for Permitted Accruals . . . ." *See* Ex. A (Indenture) at § 1.01, p. 30.

[10] *See* Ex. N (Indenture Supp. No. 2), p. 7 (defining the Final Maturity Date as March 15, 2019).

Courts routinely have applied this plain meaning of "anticipate." *See, e.g.*, *King v. Hartford Life & Acc. Ins. Co.*, 414 F.3d 994, 1015 (8th Cir. 2005) (adopting the definition "to look forward to as certain: expect"); *Al-Kasid v. L-3 Commc'ns Corp.*, No. 12-12948, 2013 WL 1688851, at *7 (E.D. Mich. Apr. 18, 2013) (finding "that it is more reasonable to interpret the term 'anticipate' as meaning 'looking forward to as certain' or 'expect'"); *Cyze v Banta Corp.*, No. 07 C 2357, 2009 WL 2905595, at *3 (N.D. Ill. Sept. 8, 2009) (to act in "anticipation" "requires a knowledge of a certain future event and not mere speculation about a possible event"). At least one court has examined the plain meaning of the phrase "anticipated expenditures," and held that it "must be based on more than the mere possibility of incurring an expenditure." *SN Sands Corp. v. City & Cty. of San Francisco*, 167 Cal. App. 4th 185, 193, 83 Cal. Rptr. 3d 885, 892 (Ct. App. 2008). In so holding, the court defined "anticipated" as meaning "to look forward to as certain." *Id.*

Here, in light of the 2013 Reversal, the cancellation of the Orders to Pay, and the November 2016 Order (*see supra*, p. 8), Airplanes Limited does not "look forward to as certain" or "expect" the hypothetical Transbrasil liability to become due and payable at any point in time or in any amount. To the contrary, Airplanes Limited admits that the hypothetical Transbrasil liability is a "***highly uncertain*** contingent liability of Airplanes Limited's subsidiary [Airplanes] Holdings," Ans. ¶ 128 (emphasis added), and that it merely "remains ***possible*** that the Transbrasil Litigation will ultimately result in liability for [Airplanes] Holdings." *Id.* at ¶ 159 (emphasis added); *see also id.* ¶ 156 (asserting that "[Airplanes] Holdings has faced, and continues to face, substantial ***potential*** liability arising from the Transbrasil Litigation") (emphasis added). Airplanes Holdings' attorney in the Transbrasil Action, Mr. Paes, acknowledges that "there is not currently any judgment against [Airplanes] Holdings in connection with the Transbrasil Litigation," and that it merely "*remains possible* that the Transbrasil Litigation will ultimately result in substantial liability for Holdings." *See* Paes Decl. ¶ 4 [Doc. No. 25] (emphasis added). As noted, the mere possibility of liability is not enough for such liability to be anticipated to become due and payable.

Defendants' admissions are consistent with the 2013 Reversal and the November 2016 Order. Those admissions are also consistent with the Defendants' view that Transbrasil's claims "lacked merit, fairness or rationale." *See* Ex. D (2016 Annual Report) at 5. Moreover, the admissions are consistent with Airplanes Holdings' belief that "it has strong defenses against the substantive issues raised" by Transbrasil. *Id.* at 21. Defendants cannot now argue that, for purposes of interpreting the Indenture, they believe Airplanes Holdings' defenses in the Transbrasil litigation are "certain" or "expected" to fail. Such a fundamental contradiction confirms that the Transbrasil liability is not an "anticipated" Expense. Moreover, the fact that Airplanes Limited took an accounting provision of only $3 million for the hypothetical Transbrasil liability, *supra*, pp. 10-11, belies any assertion that Airplanes Limited "looks forward to as certain" or "expects" a liability of anywhere near $190 million.

Therefore, assuming *arguendo* that the hypothetical Transbrasil liability constitutes an Expense (it does not), the Expense at best is "unanticipated" and could fall only within the third category of Required Expense Account. Under that category, and absent an exercise of remedies under the Security Trust Agreement, Defendants would be entitled, at most, to maintain a reserve in an amount "not to exceed at any time $10,000,000." *Id.* (Indenture) § 3.01(d), p. 54. Beyond this finite amount, the provision of the Indenture does ***not*** provide Defendants a basis for withholding payments currently due and properly owing to the Noteholders.

B. Defendants' Interpretation Ignores The Intent Of The Parties And Is Commercially Unreasonable

Because the hypothetical Transbrasil liability is not an Expense and does not fall within the definition of "Required Expense Amount" under the Indenture, the Reserve is improper, and that should be the end of the inquiry. But, in addition, Defendants' interpretation of the Indenture should be rejected because it is at odds with the intent of the parties as expressed throughout the Indenture and would lead to absurd results. *See Postlewaite v. McGraw-Hill, Inc.,* 411 F.3d 63, 69 (2d Cir. 2005) (holding that the court should reject "[t]his interpretation of

the contract [which] ignores not only common sense but also the objective, rational, and reasonable expectations of [the parties] entering into arms-length agreements").

Defendants' interpretation of the Indenture rides roughshod over the Noteholders' security interests by permitting Transbrasil—a hypothetical *unsecured* judgment creditor of Airplanes Holdings—to be paid ahead of a *secured* creditor of Airplanes Limited using the very collateral securing the Noteholders' claims (the funds in the Expense Account). *See supra*, pp. 4-5 (discussing the Security Trust Agreement). It would be preposterous to conclude that the parties negotiated to provide an unanticipated litigation adversary with an unlimited security interest in collateral. Indeed, the Indenture reflects the opposite intent, permitting the Noteholders to declare an Event of Default when any judgment or order is rendered (and not cured) against any Airplanes Limited subsidiary in excess of $100 million. *See* Ex. A (Indenture) § 4.01(h). Upon such an event (or any Event of Default), the Noteholders can accelerate the debt and exercise remedies against their collateral. *Id.* §§ 4.02, 4.03. According to Defendants, however, the Noteholders' security interests can be thwarted so long as Airplanes Limited declares that any potential judgment that could trigger such an Event of Default is an "Expense" and thus is paid ahead of secured Noteholders.

In other words, the Noteholders bargained for the ability to foreclose on their collateral if a tort judgment were rendered, not to afford priority to this unforeseen adversary. Defendants advocate a commercially unreasonable reading of the Indenture, which must be rejected.

Defendants' interpretation is also unreasonable in light of the more than $4 billion that Airplanes Holdings owes to Airplanes Limited on account of intercompany loans. *See supra*, p. 5. Airplanes Holdings is no longer operating and thus has no way to satisfy that debt. It is ludicrous for Airplanes Limited to anticipate funding a hypothetical Expense for the benefit of a subsidiary that owes it billions of dollars. Even if Airplanes were correct about everything discussed thus far, it would be illogical to conclude that Airplanes Limited would ever pay its subsidiary on account of its subsidiary's judgment when that same subsidiary owes Airplanes Limited $4 billion.

C. An Event Of Default Has Occurred Under The Indenture

Defendants' continual misclassification of the Reserve has caused the required payments on the A-9 Note to be wrongfully withheld. That has resulted in an Event of Default under Section 4.01(c) of the Indenture, which provides that the following constitutes an Event of Default:

> (c) failure to pay any amount (other than interest) when due and payable in connection with any note, to the extent that there are, at such time, funds available for such payment in the Collection Account, and the continuance of such default for a period of two Business Days or more. . . .

Ex. A (Indenture) § 4.01(c). Because the Reserve is improper and not on account of an Expense, there are "funds available" for payment of principal owed to the A-9 Noteholder in the Collection Account. Those funds have been wrongfully withheld for more than two Business Days. Accordingly, an Event of Default has occurred. As such, and as a result of the Default Notice issued by Deutsche Bank in respect thereof (*see supra*, p. 11), all accrued and unpaid interest and all principal outstanding on the A-9 Note became immediately due and payable. Ex. A (Indenture) § 4.02(a).[11] In addition, because the A-9 Note has been accelerated, U.S. Trust's guarantee of the A-9 Note has become immediately due and payable. *Id.* § 12.01.

CONCLUSION

For the reasons set forth above, UMB Bank respectfully submits that the Court should decide this case on the pleadings and find that: (1) based on the plain language of the Indenture and the materially identical U.S. Trust Indenture, any hypothetical Transbrasil liability is not an Expense, and any reserve for such hypothetical liability does not fall within the "Required Expense Amount"; (2) UMB Bank, in its capacity as Security Trustee, is entitled to distribute the Reserve to the Class A noteholders; (3) an Event of Default has occurred under the Indenture as a result of Airplanes Limited's misclassification of the Reserve; and (4) the A-9 Note and U.S. Trust's guarantee thereof is immediately due and payable as a result of that Event of Default.

---

[11] Although it asserts in the Amended Complaint that additional Events of Default have occurred under the Indenture (*see* Am. Compl. ¶¶ 83-91), UMB Bank does not seek judgment on the pleadings as to those.

Dated: New York, New York
December 22, 2016

QUINN EMANUEL URQUHART
& SULLIVAN, LLP

/s/ Benjamin I. Finestone

Jonathan E. Pickhardt
Benjamin I. Finestone
Elinor Sutton
Lindsay Weber
51 Madison Avenue, 22nd Floor
New York, New York 10010
Telephone: (212) 849-7000
Facsimile: (212) 849-7100
jonpickhardt@quinnemanuel.com
benjaminfinestone@quinnemaunel.com
elinorsutton@quinnemanuel.com
lindsayweber@quinnemanuel.com

Matthew R. Scheck
865 S. Figueroa St., 10th Floor
Los Angeles, California 90017
Telephone: (213) 443-3000
Facsimile: (213) 443-3100
matthewscheck@quinnemanuel.com

KELLEY DRYE & WARREN LLP

/s/ Eric R. Wilson

Eric R. Wilson
William S. Gyves
101 Park Avenue
New York, NY 10178
Telephone: (212) 808-7800
Facsimile: (212) 808-7897
ewilson@kelleydrye.com
wgyves@kelleydrye.com

Attorneys for UMB Bank, National Association, as Senior Trustee and Security Trustee