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 OPPOSITION TO
DEFENDANTS' MOTION FOR PRELIMINARY INJUNCTION

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UMB Bank, National Association ("UMB Bank") in its capacities as: (i) Senior Trustee under that certain indenture (as amended and 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 (f/k/a 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 opposes the motion for preliminary injunction [Doc. No. 23] ("Motion") filed by defendants Airplanes Limited and U.S. Trust (together, "Defendants").[1]

PRELIMINARY STATEMENT

Airplanes Limited was primarily in the business of acquiring, leasing, and selling aircraft through its subsidiaries. To finance the 1996 acquisition of its subsidiaries' aircraft, 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 secured noteholders still have not been paid in full, and Airplanes Limited is in default of its payment obligations to the noteholders. This action arises because Airplanes Limited violated the Indenture by misclassifying as "reserves" (the "Reserve") nearly $190 million owed to Airplanes Limited's noteholders.

UMB Bank, as Security Trustee for the secured noteholders, has a lien on all of Airplanes Limited's cash and bank accounts. Defendants have no other assets, employees, or operations and can never pay the noteholders what they are owed. In their Motion, Defendants seek to deplete the noteholders' collateral to: (1) compensate the Directors and Controlling Trustees[2] who have wrongfully caused the noteholders to go unpaid for years, and (2) fund Defendants' opposition to UMB Bank's attempts to realize upon its own collateral. Defendants' Motion is contrary to the plain language of the Indenture and the Security Trust Agreement. It is also contrary to common

[1] Capitalized terms not otherwise defined herein have the meanings ascribed to them in the Indenture. *See* Declaration of William McCann in Support of the Motion [Doc. No. 24] (the "McCann Decl.") Ex. A (Indenture).

[2] The Controlling Trustees of U.S. Trust are the same individuals that serve as Directors of Airplanes Limited.

sense: No secured creditor ever agrees to allow its collateral to be surcharged and used against it. Defendants' Motion also undermines an agreement that Defendants and their lawyers at Cohen & Gresser ("C&G") entered into with UMB Bank just a month ago that was designed to reach a prompt and efficient adjudication of UMB Bank's claims. In effect, Defendants now flout that agreement and ask this Court to pre-determine key issues without full due process.

The only parties that stand to suffer irreparable harm here are the noteholders. Defendants have no business to harm. Moreover, if Defendants are correct on the merits, the "Expenses" they seek to have paid will have priority. If Defendants are wrong, however, the noteholders' collateral cannot be replaced if it is paid out to a diaspora of junior and unsecured creditors. Defendants do not come close to meeting their burden for the extraordinary relief they seek.

Defendants cannot establish likelihood of success on the merits. Defendants assert that even if there has been an Event of Default under the Indenture, the payments they seek to make have priority over payments of principal to the noteholders. That is incorrect. Contrary to Defendants' cursory assertions, there plainly has been an Event of Default. As set forth in UMB's motion for judgment on the pleadings (the "12(c) Motion") [Doc. No. 30], Airplanes Limited's misclassification of nearly $190 million caused a payment default under Section 4.01(c) of the Indenture. As a result of that default, and others asserted in UMB's Amended Complaint, the secured noteholders have recourse to the collateral and the putative payees here do not, pursuant to the clear terms of the Security Trust Agreement (which Defendants ignore).

Defendants have failed to show irreparable harm. Defendants assert that their business may "collapse" if it can't pay the legal expenses and director/trustee compensation. This assertion rings hollow. There is nothing to collapse. Defendants have no assets (except the noteholders' cash collateral), no employees, and no operations.

Defendants also have failed to present any evidence to support their speculative assertion that C&G is on the verge of withdrawing as counsel or that they will be left without counsel to litigate this dispute (even assuming that this could constitute irreparable harm). Their assertions are also belied by the agreement that Defendants (and C&G) negotiated and signed, pursuant to

which they agreed on a briefing schedule on UMB Bank's 12(c) Motion and to cap C&G's fees and expenses to litigate that motion. As noted, the core issue here is the same as in the 12(c) Motion—whether an Event of Default has occurred on account of Defendants' failure to pay the noteholders based on the improper $190 million Reserve for a non-existent liability. Defendants now claim they cannot await resolution of that issue on the schedule they agreed to a month ago.

Finally, as noted, in stark contrast to Defendants, UMB Bank (and the noteholders) *will* suffer irreparable harm if Defendants are granted the relief they seek. Defendants will disperse the collateral to various parties, and UMB Bank will be left without an adequate remedy to recover any of it if UMB Bank is ultimately successful on the merits.

FACTUAL BACKGROUND

A. The Notes And Certificates Offerings

Airplanes Limited, through its direct and indirect subsidiaries, was once in the business of leasing and selling aircraft. 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 Limited ("Airplanes Holdings") from GPA Group plc. *Id.* ¶¶ 1, 22, 138. Airplanes Limited and its subsidiaries have since sold all their aircraft and no longer have ongoing operations. *Id.* ¶ 5, 23, 57-58, 78-79, 128.

To finance (and later refinance) the acquisition of the aircraft, lease assets, and 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.[3] *Id.* ¶¶ 1, 22, 140. Airplanes Limited sold certain of those Notes through trusts, pursuant to a pass-through trust agreement dated March 28, 1996, as amended and supplemented. *Id.* Under that agreement, the trusts issued certificates (the "Certificates") representing, among other things,

[3] U.S. Trust was in the same business as Airplanes Limited. Am. Compl. ¶ 23 n.1. U.S. Trust issued its notes pursuant to an amended and supplemented indenture, which has materially identical terms to the Indenture. *See* McCann Decl. 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. Am. Compl. ¶ 23.

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.* 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.

Airplanes Limited is insolvent. Amended Complaint [Doc. 10] ("Am. Compl.") ¶ 27. Principal on the subclass A-9 and class B, C, and D Notes remains unpaid. Ans. ¶¶ 26-27, 45.

B. The Security Trust Agreement

To secure its obligations under the Notes, Airplanes Limited granted the Security Trustee collateral (the "Collateral") under the Security Trust Agreement (the "Security Trust Agreement"). *Id.* ¶ 92; *see also* McCann Decl. Ex. C. The Collateral includes all of Airplanes Limited's cash, funds, and accounts. *Id.* § 2.01(c), (e). 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. *Id.* § 2.01(e) (granting security in Airplanes Limited's "right, title, and interest in and to all deposit accounts [and] all funds held therein"); *see also id.* Ex. A (Indenture) § 3.01(b), (d). The Secured Parties under the Security Trust Agreement include the "Airplanes Group Noteholders," but do not include Airplanes Limited, its affiliates, or their Controlling Trustees or Directors. McCann Decl. Ex. C (Security Trust Agreement) at 3.

C. The Transbrasil Litigation

Airplanes Limited and Airplanes Holdings retained GE Capital Aviation Services Limited ("GECAS") as servicer for the aircraft lessors pursuant to a (now terminated) servicing agreement. Ans. ¶ 28. GECAS's responsibilities as servicer included, among others, negotiating, executing, and collecting rent on aircraft leases, and releasing and selling aircraft. Am. Compl. ¶ 28.

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"), and two of its affiliates (collectively with Airplanes Holdings,

the "Transbrasil Lessors"). *Id.* ¶ 153. GECAS was servicer for all of these leases. *Id.* Other than Airplanes Holdings, none of the Transbrasil Lessors are affiliates of Airplanes Limited.

Transbrasil defaulted on its payment obligations under the Transbrasil leases and GECAS, on behalf of the Transbrasil Lessors, agreed to restructure Transbrasil's debt. *Id.* ¶¶ 30, 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.* 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.

Transbrasil defaulted on the notes in 2000. *Id.* ¶¶ 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.

In November 2001, GECAS, purporting to act on behalf of the Transbrasil Lessors (excluding GE Capital), unsuccessfully attempted to collect from Transbrasil. Ans. ¶¶ 31, 154, 155. Shortly thereafter, Transbrasil sought an injunction and sued 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 ("Transbrasil Action"). *Id.* ¶ 154.

GECAS did not inform Airplanes Holdings 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. 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, "Transbrasil Judgment"). *Id.* The Transbrasil Judgment ordered the Transbrasil Lessors to pay Transbrasil twice the amount of the promissory notes, plus interest and damages suffered by Transbrasil due to GECAS's attempted collection of the promissory notes, including loss of profits and damages Transbrasil suffered as a result of GE Capital's involuntary bankruptcy filing against it. Am. Compl. ¶ 34. The court concluded that GECAS had acted "malicious[ly]" in seeking to collect upon "already paid debt" and had litigated in "bad faith." *Id.*

As a result of the Transbrasil Judgment, a lower Brazilian court issued orders to pay ("Orders to Pay"). Ans. ¶¶ 38, 157. Transbrasil asserted that $80 million of the Orders to Pay was attributable to Airplanes Holdings' share of certain promissory notes. *Id.* The Orders to Pay also directed payment of $59 million attributable to another lessor's note, on which Airplanes Limited claims Airplanes Holdings might be liable if the Transbrasil Judgment is reinstated. *Id.* ¶ 157.

On June 8, 2010, GECAS 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. Am. Compl. ¶ 40.

Pursuant to the 2013 Reversal, the Brazilian courts cancelled the Orders to Pay in 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 the Motion [Doc. No. 25] (the "Paes Decl.") ¶ 5.

D. Airplanes Limited's Unlawful Reserve

On March 31, 2010, Airplanes Limited first disclosed the Transbrasil Judgment in its annual report, stating that it "could result in a loss of up to $15 million plus interest and legal costs." Am. Compl. ¶ 44. Airplanes Limited made a provision of only $15 million in its financial

statements for 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 financial statements, Airplanes Limited allowed the 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." Am. Compl. ¶ 45. The outstanding principal balance on the A-9 Note was $627 million. Ans. ¶ 46.

Beginning in July 2012, 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. Funds that would have been used to pay the A-9 Note were diverted to establish the Reserve and fund ever-increasing Reserve targets. *Id.* ¶ 147. Airplanes Limited caused the cessation of payments of principal on the A-9 Note from July 16, 2012 until January 15, 2013 to establish and fund the Reserve up to $110 million 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. *Id.* ¶¶ 49, 162. As reflected by its name, the Maintenance Reserve Amount related to maintaining the condition and operability of the 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. *Id.* ¶ 56. Airplanes Limited has not explained how the hypothetical Transbrasil liability related to aircraft maintenance—nor could it.[4]

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. Am. Compl. ¶ 56.

[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* McCann Decl. Ex. A (Indenture) § 1.01, p. 22.

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. *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 and, since that sale, Airplanes Limited and its subsidiaries have not owned any aircraft. *Id.* ¶¶ 57-58, 78-79, 128. Because the Indenture requires the Maintenance Reserve Amount to be zero once all aircraft have been sold, Airplanes Limited—still intent on holding on to the funds—merely reclassified the Reserve as a "Required Expense Amount" on account of a putative "Expense." *Id.* ¶¶ 5, 58.

Airplanes Limited continues to maintain that Transbrasil's claims "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.

E. The Default Notices

On June 28 and July 29, 2016, UMB Bank'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. Ans. ¶¶ 88-89; *see also* McCann Decl. Exs. G & H (Default Notices). The Certificateholders also directed Deutsche Bank to exercise remedies. *Id.* Ex. F (June Direction Letter), pp. 3-4. In accordance with that

instruction, Deutsche Bank, as Security Trustee, froze the Collateral (including the account holding the Reserve) for the benefit of the Secured Parties. *Id.* Ex. G (June Default Notice) at 2. UMB Bank is pursuing this action as part of its enforcement of the remedies.

F. Payment Priorities Under The Indenture And Security Trust Agreement

Under Section 3.08(b) of the Indenture, only four categories of payments take priority over the required principal payments to the A-9 Noteholder following a notice of default: (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 Amount; and (iv) an amount not in excess of the Minimum Hedge Payment, if any, to a Swap Provider. McCann Decl. Ex. A (Indenture) § 3.08(b)(i)-(iv). *However*, once the Security Trustee takes steps to exercise remedies with respect to Collateral, the Security Trust Agreement requires that "[a]ll cash proceeds received by the Security Trustee in respect of any sale of, collection from, or other realization upon all or any part of the STA Collateral may, in the discretion of the Security Trustee, be held by the Security Trustee as collateral for, and/or then or at any time thereafter applied in whole or in part by the Security Trustee for the benefit of *the Secured Parties* against, all or any part of the *Secured Obligations* in accordance with Article VIII of this Agreement and Article III of the Indenture." *Id.* Ex. C (Security Trust Agreement) §3.01, pp. 19-20 (emphasis added). The Security Trust Agreement and Indenture define "Secured Parties" as any Secured Swap Provider, Service Provider, and the Airplanes Group Noteholders. *Id.* at 3; *id.* Ex. A (Indenture) § 1.01, p. 31. None of these include Airplanes Limited's affiliates, Directors, Controlling Trustees, or legal professionals.

PROCEDURAL BACKGROUND

UMB Bank commenced this action on October 3, 2016. On November 9, 2016, after Airplanes Limited threatened to file for bankruptcy,[5] the parties entered into a letter agreement

[5] In the Motion, Defendants claim that UMB Bank has paid from the Collateral over $1 million to its counsel in connection with this lawsuit. This is not true. When Defendants threatened to file for bankruptcy, counsel for UMB Bank increased the size of their retainers to cover the risks associated with the threatened bankruptcy filing. Upon conclusion of this matter, any unused amounts will be returned to the accounts holding the Collateral.

(the "Letter Agreement"), pursuant to which UMB Bank agreed (without prejudice and solely so that it could obtain an orderly ruling from this Court), among other things, to fund a $125,000 retainer (the "Retainer") to Cohen & Gresser LLP ("C&G") in connection with its representation of Defendants in this action. *See* McCann Decl. Ex. I (Letter Agreement), p. 2. The parties further agreed that the Retainer would only be used for the payment of fees and expenses incurred by C&G in connection with answering the Amended Complaint, opposing and/or responding to the 12(c) Motion, and any other work required to comply with any rules of procedure governing this action. *Id.* Defendants agreed not to oppose the filing of the 12(c) Motion. *Id.* In exchange, UMB Bank agreed to extend Defendants' time to respond to the 12(c) Motion. *Id.* C&G negotiated the Letter Agreement before it was signed and before C&G made an appearance in this action.

APPLICABLE LEGAL STANDARD

A preliminary injunction is "one of the most drastic tools in the arsenal of judicial remedies," *Grand River Enter. Six Nations v. Pryor*, 481 F.3d 60, 66 (2d Cir. 2007), and therefore "may only be awarded upon a clear showing that the [movant] is entitled to such relief." *Winter* v. *Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). To prevail, the movant must demonstrate: "(a) irreparable harm and (b) either (1) likelihood of success on the merits or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief." *Jackson Dairy, Inc. v. H.P. Hoods & Sons, Inc.*, 596 F.2d 70, 72 (2d Cir. 1979). Where, however, as here, the movant seeks a *mandatory* injunction, meaning one that would alter the status quo by commanding some positive act, an injunction may "issue only upon a clear showing that the moving party is entitled to the relief requested, or where extreme or very serious damage will result from a denial of preliminary relief." *Cacchillo v. Insmed, Inc.*, 638 F.3d 401, 406 (2d Cir. 2011).

ARGUMENT

Defendants have failed to establish that they are entitled to injunctive relief. Defendants do not seek to maintain the status quo. Rather, they ask the Court to *permanently* alter the rights of the parties by awarding Defendants substantially the final relief they seek in the Counterclaim—

payment of funds from the Secured Parties' collateral—at the preliminary-injunction stage in advance of proper due process.[6] This alone is reason to deny the Motion. *See Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981) ("it is generally inappropriate for a federal court at the preliminary-injunction stage to give a final judgment on the merits"); *WarnerVision Entertainment Inc. v. Empire of Carolina, Inc.*, 101 F.3d 259, 261 (2d Cir. 1996) ("The purpose of a preliminary injunction is *not* to give the [movant] the ultimate relief it seeks.") (emphasis added); *see also Dover Steel Co. v. Hartford Acc. and Indem. Co.*, 806 F. Supp. 63, 67-68 (E.D. Pa. 1992) (rejecting attempt to collect debt by means of preliminary injunction and stating that "[t]o award plaintiffs the $125,000 payment they seek now would be tantamount to making available to plaintiffs the financial fruits of victory when their right to obtain judgment remains at issue").

Defendants also have not met their burden of proving cause for a preliminary injunction. Defendants are unlikely to succeed on the merits of their Counterclaim and they have not shown they will suffer irreparable harm if they are denied relief. If Defendants are correct, the putative Expenses will enjoy priority vis-à-vis the Noteholders' collateral, which greatly exceeds the amount of any such claims. The opposite is true if Defendants are wrong. The Noteholders will be irreparably harmed if the Court enters an order compelling UMB Bank to disburse the funds securing the Noteholders' rights to payment. Because Defendants have no other assets, the Noteholders will never be able to recover the money spent by Defendants. It will be lost.

A. Defendants Have Failed To Show Any Likelihood Of Success On The Merits

Defendants are not entitled to injunctive relief because they have not established a likelihood of success on the merits. *See Duka v. U.S. S.E.C.*, No. 15 CIV. 357 RMB SN, 2015 WL 5547463, at *11 (S.D.N.Y. Sept. 17, 2015) ("Where [movant] fails to establish a likelihood of success on the merits, the Court 'need not reach' the remaining elements."). Defendants argue

[6] In this case, the status quo is preservation of the Secured Parties' collateral pending a final determination of this Court. Defendants seek to alter the status quo by forcing UMB Bank to distribute the Secured Parties' collateral to holders of unsecured debt. Thus, to be entitled to preliminary injunctive relief Defendants must meet the standard for mandatory injunctions. However, even under the more relaxed standard, Defendants' request for relief must be denied because Defendants cannot show likelihood of success on their Counterclaim, irreparable injury, or that the equities weigh in their favor.

they will succeed on the merits because the fees payable to their Directors, Controlling Trustees, and litigation professionals fall within the definition of "Expenses" under the Indenture and are therefore entitled to first-in-line payment under the Indenture. Mot. at 22. Defendants are incorrect. First, Defendants altogether ignore that the Noteholders are Secured Parties under the Security Trust Agreement, and have priority over the Directors and Controlling Trustees as well as any of Defendants' legal professionals. Second, contrary to Defendants' arguments, payments to legal professionals relating to this litigation are not "Expenses" under the Indenture.

1. The Payments That Defendants Seek To Make Are Unsecured And Not Entitled To Priority Because An Event Of Default Has Occurred

Defendants argue that the payments they seek to force UMB Bank to make have "first priority" under the Indenture, even if "events of default had occurred," and even if a "Default Notice has been delivered." Mot. at 22. Defendants also assert—albeit in conclusory fashion—that no Event of Default has occurred. Defendants are incorrect on both points.

(a) Events of Default Have Occurred

Defendants' continual misclassification of the Reserve has caused required payments on the A-9 Note to be wrongfully withheld, resulting in an Event of Default under the Indenture. As discussed further the 12(c) Motion [Doc. 30], the Reserve violates the Indenture because it does not fall within the definition of "Required Expense Amount." *See* 12(c) Motion at 11-12. The "Required Expense Amount" must be on account of an "Expense" under the Indenture that is either currently due and payable or "anticipated to become due and payable." *See id.* at 14-15, 19-20. The hypothetical Transbrasil liability (for which the Reserve is being held) does not qualify.

(i) The Hypothetical Transbrasil Liability Is Not An "Expense"

The Indenture defines "Expenses" 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)." McCann Decl. Ex. A, § 1.01, p. 16. The hypothetical Transbrasil liability is not 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, which is "[a] charge for labor or services, esp. professional services." Black's Law Dictionary (10th ed. 2015); *Advocare Int'l L.P. v. Horizon Labs., Inc.*, No. CIV. 3:04-CV-1988-H, 2005 WL 1832116, at *4 (N.D. Tex. Aug. 2, 2005) (defining "fee" as "payment for an act or service").

- **"Cost:"** The hypothetical Transbrasil liability is not a cost, which is "[t]he amount paid or charged for something; price or expenditure." Black's Law Dictionary (10th ed. 2015).

- **"Expense:"** The hypothetical Transbrasil liability is not an expense, which is "[a]n expenditure of money, time, labor, or resources to accomplish a result; esp., a business expenditure chargeable against revenue for a specific period." *Id.* Merriam-Webster defines "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." McCann Decl. 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"). Sophisticated parties drafted the Indenture with precision. The definition of Expense could have incorporated liabilities, judgments, and orders; it did not. Instead the drafters carefully drew distinctions between these plain and ordinary terms, reinforcing their intent to respect their separate meanings.

The hypothetical Transbrasil liability also fails to qualify as an "Expense" because, 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. Before it was overturned, the Transbrasil Judgment found violations of the Brazilian Code of Civil Procedure due to GECAS's "malicious" attempts to collect from Transbrasil. *See* 12(c) Motion at pp. 7-8. Malicious debt collection actions 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. McCann Decl. Ex. A § 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 somehow relate to typical business activities of the company, are not permitted. Airplanes Limited and its subsidiaries are subject to operating covenants in the Indenture, including that Airplanes Limited will "comply, and cause each Issuer Subsidiary to comply, in all material respects with all Applicable Laws." *Id.* § 5.03(b). Applicable Laws 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 Brazilian law.

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. The only Transbrasil Lessor that is part of Airplanes Group is Airplanes Holdings. Any liability attributable to the other Transbrasil Lessors cannot have arisen from business activities of Airplanes Group. Airplanes Limited has

never articulated—nor could it—what portion of any hypothetical Transbrasil liability would arise from the business activities of Airplanes Holdings as opposed to the other Transbrasil Lessors.

(ii) The Hypothetical Transbrasil Liability Is Neither 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 the Required Expense Amount. The Indenture defines the "Required Expense Amount" to include three categories determined on each Payment Date. 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. . . ." McCann Decl. Ex. A, § 1.01, p. 30. The "Payment Date" means the 15th day of each month. *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,"[7] which 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.[8]

Here, the hypothetical Transbrasil liability fails to satisfy any of these criteria. It is not currently due and payable. As Defendants' admit, 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" means "to look forward to ***as certain***:

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[7] 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* McCann Decl. Ex. A (Indenture) § 1.01, p. 30.

[8] *See* McCann Decl. Ex. A (Indenture) § 1.01, p. 16.

expect." *See* Merriam-Webster.com, accessed 12/23/16 at http://www.merriam-webster.com/dictionary/anticipate (emphasis added); American Heritage Dictionary (5th ed. 2016) (defining "anticipate" as "[t]o see as a ***probable*** occurrence; ***expect***") (emphasis added).

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 "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. 6), 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" and that "it has strong defenses against the substantive issues raised" by Transbrasil. *See supra*, p. 8. Defendants cannot now argue that 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*, p. 8, 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." McCann Decl. Ex. A (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.

(iii) The Improper Reserve Has Caused An Event Of Default

Section 4.01(c) of the Indenture 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. . . .

Id. § 4.01(c). Because the Reserve is improper and not on account of an Expense that is anticipated to become due and payable, 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.

(iv) Other Events Of Default Have Occurred

Section 4.01(h) of the Indenture lists as an Event of Default when "any judgment or order for the payment of money in excess of $100,000,000 shall be rendered." Thus, the Transbrasil Judgment and the Orders to Pay (totaling in excess of $100 million) constitute Events of Default under the Indenture. While the Transbrasil Judgment has been reversed, and Defendants argue that reversal also caused reversal of the Event of Default (Mot. 10-11), Defendants continue to hold the improper Reserve for that judgment as if it were still in effect. Defendants' continued holding of the improper Reserve belies any claim that the default has been "remedied" from the perspective of the Noteholders, whom Defendants refuse to repay Mot. at 11. Defendants also have breached section 5.02(e) by engaging in activities that the Indenture does not permit. Defendants' conduct that gave rise to the Transbrasil litigation was not a permitted business activity, giving rise to an Event of Default. *See* McCann Decl. Ex. A, § 4.01(d).

(b) The Putative "Expenses" Are Unsecured And Not Entitled To Priority Upon An Event of Default

If an Event of Default occurs under the Indenture, then controlling noteholders can direct the Indenture Trustee to deliver a Default Notice to accelerate the principal and interest under the Notes. *See* McCann Decl. Ex. A, § 4.02(a), pp. 71-72. That is precisely what happened here: UMB Bank's predecessor, Deutsche Bank, at the direction of the A-9 Noteholder, delivered two Default Notices to Defendants asserting Events of Default. *See supra*, pp. 8-9. Defendants perfunctorily assert that those Default Notices were "baseless" and insist they are also irrelevant. Defendants argue that Section 3.08(b) of the Indenture governs priority of payments after a Default Notice and that Expenses are given priority under that section. Mot. at 23. Thus, according to Defendants, whether an Event of Default occurred is irrelevant. Defendants are wrong.

Section 3.08(b) of the Indenture addresses priority after a Default Notice is delivered. Delivery of a Default Notice also triggers rights under the Security Trust Agreement. That agreement provides that "[u]pon delivery of a Default Notice pursuant to Section 4.02 of either Indenture . . . [t]he Security Trustee may exercise in respect of the STA Collateral . . . all the rights

and remedies of a secured party upon default under the [New York Uniform Commercial Code]." Security Trust Agreement § 3.01(a).

Defendants argue that after a Default Notice is delivered, and after the Security Trustee exercises any rights as to the Collateral, the Security Trustee must still pay all of Defendants' "Expenses" first in accordance with Section 3.08(b) of the Indenture. Mot. at 23. Defendants, however, take words in the Security Trust Agreement out of context. They argue that if the Security Trustee seizes collateral it must apply that collateral "in accordance with Article VIII of this Agreement *and Article III of the Indentures*." (Mot. at 23) (quoting Security Trust Agreement §3.01(b), p. 20) (emphasis by Defendants). Defendants omit key language in Section 3.01(b).

The Security Trust Agreement actually provides that once the Security Trustee exercises the rights of a secured party, cash held by the Security Trustee shall "then or at any time thereafter [be] applied in whole or in part by the Security Trustee for the benefit of *the Secured Parties* against, all or any part of the *Secured Obligations* in accordance with Article VIII of this Agreement and Article III of the Indenture." *Id.* § 3.01(b) (emphasis added). Defendants ignore that the Security Trustee does not exercise remedies for just anyone's benefit—it does so for the benefit of the Secured Parties, and to satisfy the Secured Obligations. The Indenture's definition of "Secured Parties" does *not* include Airplanes Limited, its affiliates, its "Controlling Trustees" or "Directors," or their legal professionals. [9] *See id.*, pp. 13, 14. Similarly, the Secured Obligations are defined narrowly as obligations to the Secured Parties under "the Service Provider Documents, the Airplanes Group Notes and the Secured Swap Agreements." Security Trust Agreement § 2.02. The payments at issue here do not arise under any of those documents.

The Security Trust Agreement also provides for its own "waterfall" as to the Collateral through the definitions of "Senior Obligations" and "Subordinated Obligations." Security Trust Agreement § 1.01, p. 7-8; *see also id.* Art. VII (setting forth agreements among the Secured Parties

[9] While the "Service Provider" definition includes "each of the Cash Manager" and the "Administrative Agent," *see* McCann Decl. Ex. A (Indenture) § 1.01, p. 33, Defendants represented in the Motion that they have elected not to ask the Court for permission to pay such expenses while the litigation is pending. *See* Mot at 17 n.3.

as to certain rights vis-à-vis Collateral). This is consistent with the subordination provisions in the Indenture and the Notes, pursuant to which the Notes are subordinated not to all Expenses thereunder, but instead only to "Expenses payable *to the Service Providers* pursuant to this Indenture and the Relevant Documents."[10] *See* McCann Decl. Ex. A (Indenture) § 10.01(a) (emphasis added). The only obligations senior to the Class A Noteholders are the Secured Swap Provider Obligations and the Service Provider Obligations. *See* McCann Decl. Ex. C (Security Trust Agreement), p. 7. As noted, those are not at issue here.

Defendants' argument thus ignores the rights of the Noteholders as Secured Parties who were granted property interests in Defendants' funds; the Directors, Controlling Trustees, and legal professionals were not. Instead, Defendants seek to turn commercial finance on its head—giving putative unsecured creditors priority on the collateral of secured creditors. The agreements simply do not support their assertions.

Indeed, UMB Bank's interpretation makes perfect sense. When a notice of default has been issued, but before the Security Trustee takes action to enforce the Secured Parties' rights, Defendants are entitled under section 3.08(b) of the Indenture to continue to pay (legitimate) Expenses in the ordinary course. This accords with section 4.02 of the Indenture, which provides: "*[a]t any time after* the Senior Trustee has declared the Outstanding Principal Balance of the Notes to be due and payable *and prior to the exercise of any other remedies* … Holders of a majority of the aggregate Outstanding Principal Balance of the Senior Class of Notes, by written notice to the Issuer, the Senior Trustee and the Cash Manager, may rescind and annul such declaration" if, among other things, defaults are cured. McCann Decl. Ex. A (Indenture) § 4.02, p. 72 (emphasis added). Once, however, the Security Trustee takes action to exercise remedies and enforce the Secured Parties' rights, the Security Trust Agreement controls.

[10] 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* McCann Decl. Ex. A (Indenture) § 1.01, p. 30.

Here, as noted, the Security Trustee has exercised and is still in the process of exercising remedies on behalf of the Secured Parties. UMB Bank's predecessor, in its capacity as Security Trustee, delivered the Default Notices and seized the collateral (*supra*, pp. 8-9). UMB Bank is now holding the Collateral pending this Court's determination as to whether the Reserve is improper under the Indenture, and whether an Event of Default has occurred thereunder.

2. Fees Payable To Litigation Professionals Are Not An "Expense"

The payments purportedly owed to Defendants' legal counsel, including C&G, for expenses incurred in this litigation are not entitled to be paid for an independent reason. The term "Expense" is defined in the Indenture 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. McCann Decl. Ex. A (Indenture) § 1.01, p. 16 (emphasis added). Defendants argue that this litigation arises from the "financing or refinancing" of aircraft through the issuance of securities. *See* Mot. at 21. That is illogical. Litigating against your secured creditor is not part of the financing of your business (and is not something any lender would have agreed to *ex ante*). The notion that a secured party would agree to subordinate itself to costs incurred by the borrower to defend against that secured party's enforcement action is absurd. *See InterDigital Commc'ns Corp. v. Nokia Corp.*, 407 F. Supp. 2d 522, 530 (S.D.N.Y. 2005) ("'A contract should not be interpreted to produce a result that is absurd, commercially unreasonable or contrary to the reasonable expectations of the parties'"). In any event, Defendants' have no further business to finance. They have sold all of their aircraft and are winding down.

B. Defendants Have Failed To Meet Their Burden Of Establishing Irreparable Harm

"In the absence of a showing of irreparable harm, a motion for a preliminary injunction should be denied." *Rodriguez ex rel. Rodriguez v. DeBuono*, 175 F.3d 227, 233-34 (2d Cir. 1999) (internal quotation marks and citation omitted). Defendants argue that irreparable harm will result if an injunction is not imposed because Defendants will be unable to pay (i) their attorneys in the instant action, preventing this case from reaching the merits; and (ii) their Directors and

Controlling Trustees, leaving Defendants unable to conduct their day-to-day business. These unsupported assertions do not constitute irreparable harm.

1. Defendants' Alleged Inability To Retain Litigation Counsel Is Illusory

Defendants allege that absent a preliminary injunction, they will not be able to pay litigation expenses, thereby preventing this case from reaching the merits. Mot. at 18. Assuming this is true or qualifies as putative irreparable harm, this argument is based on nothing more than speculation, and is therefore insufficient to support a claim for preliminary injunctive relief. *See Grand River Enter. Six Nations, Ltd. v. Pryor*, 481 F.3d 60, 66 (2d Cir. 2007) ("[t]o satisfy the irreparable harm requirement, [movants] must demonstrate that absent preliminary injunction they will suffer an injury that is neither remote nor speculative, but actual and imminent").

First, Defendants have not offered any evidence that C&G is on the verge of withdrawing as counsel, or that Defendants will be left without representation if and when it does. Indeed, C&G is currently acting on contingency, willing to accept the risk of payment until after this case concludes. At a minimum, this Motion should be adjourned until when—and if—C&G files a motion seeking permission to withdraw as attorney of record from this case.

Second, Defendants and C&G knew about (and in fact negotiated for) the $125,000 cap and a briefing schedule on the 12(c) Motion *before* C&G agreed to enter an appearance on behalf of Defendants in this litigation. If C&G did not think that it could adequately represent Defendants in this action on a $125,000 retainer it should have turned down the role, and Defendants and C&G should not have agreed that amount was sufficient. Moreover, as noted (*supra*, pp. 8-9), if any Event of Default occurred under the Indenture, Defendants will not succeed on the merits of their Counterclaim. The 12(c) Motion necessarily will resolve whether the payment default occurred under the Indenture, and Defendants and C&G specifically agreed to a briefing schedule on the 12(c) Motion. Now they claim they cannot await resolution on the schedule to which they agreed. Such tactics cannot be the basis for a preliminary injunction. It also is disingenuous for C&G to have entered this action based on a pre-negotiated briefing schedule and budget only to turn around

and threaten to pull out of the case because UMB Bank is not willing to advance additional fees. The parties already have agreed that it is feasible and appropriate for UMB Bank to advance this case on an accelerated basis to seek a judgment on the pleadings. In other words, this case is already set up for quick resolution, negating any need for preliminary injunctive relief.

Finally, the cases cited by Defendants to support their argument that an inability to pay defense costs constitutes irreparable harm are inapposite.[11] The Indenture is not an insurance policy. As explained above, Defendants are not contractually entitled to *any* coverage under the Indenture for their legal defense. There is nothing unfair about this result; this is how litigation works. *Cf. Johnson v. Couturier*, 572 F.3d 1067, 1081-82 (9th Cir. 2009) (holding balance of hardships favored preliminary injunction *prohibiting advancement of defense costs* to corporate directors; noting "if the preliminary injunction is upheld, Defendants will be forced either: (1) to find a way to pay for their own defense and seek recovery after trial; (2) to find attorneys willing to accept the risk of payment after trial; (3) to continue litigation without representation; or (4) to settle"; nonetheless finding that while "these options are accompanied by real and difficult consequences for each Defendant … any such consequences are outweighed by the potential hardship to Plaintiffs if advanced defense costs are not reimbursed") (emphasis added).

As for Defendants' assertion that they need to pay D&O insurance premiums to keep their Directors in place (Mot. at 19-20), no one is currently suing the Controlling Trustees or Directors, let alone suing them for criminal misconduct. Defendants already have taken the position that any notion of such a lawsuit is entirely speculative and remote.

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[11] *See In re WorldCom, Inc. Sec. Litig.*, 354 F. Supp. 2d 455, 458 (S.D.N.Y. 2006) (finding irreparable harm under D&O policy that contained "explicit language requiring the insurer to advance costs" prior to the final disposition of the claim; noting that the underlying litigation was "massive" and at a "critical stage," and thus it was "impossible to predict or quantify the impact on a litigant of a failure to have adequate representation"); *XL Specialty Ins. Co. v. Level Glob. Inv'rs, L.P.*, 874 F. Supp. 2d 263, 273 (S.D.N.Y. 2012) ("failure to receive defense costs under a professional liability policy at the time they are incurred constitutes an immediate and direct injury sufficient to satisfy the irreparable harm requirement" where insureds were "confronted by criminal charges" and thus not only subject to "monetary liability, but of prosecution and a loss of liberty"); *In re Adelphia Commc'ns Corp.*, 2004 WL 2186582, at *6-7 (S.D.N.Y. Sept. 27, 2004) (upholding release of funds, despite asset freeze, given "serious nature of the charges" and "the pressing and immediate need for criminal defense funds").

2. Any "Harm" To Defendants' Business Is Not Irreparable

Defendants cannot establish that denial of a preliminary injunction would cause irreparable damage to their business—*there is no business*. Defendants freely admit that Airplanes Limited and its subsidiaries sold the last of their aircraft in May 2016 and are in the process of winding up. Defendants do not have "day-to-day" business operations to fund.[12]

Furthermore, Defendants have been without the ability to access the Accounts since June 28, 2016. Yet, they waited more than six months to bring this Motion, arguing only now that they need access to the funds to conduct business activities "day-to-day." This delay alone confirms that a preliminary injunction is not warranted in this case. *Citibank, N.A. v. Citytrust*, 756 F.2d 273, 276 (2d Cir. 1985) ("Preliminary injunctions are generally granted under the theory that there is an urgent need for speedy action to protect the [movant's] rights. Delay in seeking enforcement of those rights, however, tends to indicate at least a reduced need for such drastic, speedy action.").

C. The Balance Of Equities Strongly Weigh In UMB Bank's Favor

Defendants' proposed injunction would require UMB Bank to pay out the funds at the heart of this dispute to numerous parties, leaving it unable to recover that money if it ultimately succeeds on the merits. *In re First Connecticut Small Bus. Inv.*, 118 B.R. 179, 184 (Bankr. D. Conn. 1990) ("If the debtor uses the deposits before BBC is able to have its motion for relief from stay heard, BBC would be irreparably harmed by the loss of its collateral."). Defendants have no assets other than the cash in the Accounts and have not posted a bond. By contrast, if the preliminary injunction is denied any harm to Defendants is speculative, and at best minimal. There is more than sufficient cash in the accounts, and Defendants assert that the putative Expenses enjoy priority ranking to those funds. If Defendants are right on the merits, their Expenses will have priority.

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[12] Defendants' cases are easily distinguishable. Each concerned a business with "ongoing" operations, not one that was in the process of winding up. *See Semmes Motors, Inc. v. Ford Motor Co.*, 429 F.2d 1197, 1207 (2d Cir. 1970) (finding right to continue operating a family-run car dealership is not measurable entirely in monetary terms); *Ahmed v. U.S.*, 47 F. Supp. 2d 389, 400-01 (W.D.N.Y. 1999) (finding irreparable harm where "disqualification from the Food Stamp Program [would] force the store out of business"); *Fed. Maritime Comm'n v. Australia/US Atl. & Gulf Conf., A/S Atlanttrafik*, 337 F. Supp. 1032 (S.D.N.Y. 1972) (issuing a preliminary injunction where maritime industry would be subject to sudden economic pressure if carriers were not enjoined from setting new rates and where injunctive relief would serve the public interest).

D. Defendants' Inability To Post Bond Requires Denial Of The Motion

Under Rule 65(c) of the Federal Rules of Civil Procedure, "[n]o restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained." The security required by Rule 65(c) provides the enjoined party with a source of compensation when a court determines, after a decision on the merits, that the movant was not entitled to the preliminary relief. *See Blumenthal v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 910 F.2d 1049, 1054-55 (2d Cir. 1990) ("[T]he theory underlying [the bond requirement is] that the applicant consent[s] to liability up to the amount of the bond, as the price for [the injunction]."). The bond or other security posted ensures that funds exist to compensate a party for wrongful enjoinment. *Interlink Int'l Fin. Servs., Inc. v. Block*, 145 F. Supp. 2d 312, 314 (S.D.N.Y. 2001).

UMB Bank will suffer monetary harm if forced to advance to Defendants their professional fees. *See Medafrica Line, S.P.A. v. Am. W. African Freight Conference*, 654 F. Supp. 155, 156 (S.D.N.Y. 1987) ("A party has been 'wrongfully enjoined' under Rule 65(c) if it is ultimately found that the enjoined party had at all times the right to do the enjoined act"). Accordingly, if a preliminary injunction is granted, a bond is required to secure the Secured Parties' rights to payment if they ultimately prevail. *See Stonewall Ins. Co. v. Asbestos Claims Mgmt. Corp.*, 73 F.3d 1178, 1219 (2d. Cir. 1995) ("the insured must repay any defense costs advanced if the facts ultimately show that the claim was not covered").

Defendants admit that they have no assets other than the money in the Accounts. Because Defendants cannot comply with the bond requirements set by Rule 65(c), the Motion should be denied. *Kamine/Besicorp Allegany L.P. v. Rochester Gas & Elec. Corp.*, 908 F. Supp. 1194, 1208 (W.D.N.Y. 1995) ("inability to post a bond" supports denial of preliminary injunction).

CONCLUSION

For the reasons set forth above, UMB Bank respectfully requests that Defendants' Motion for preliminary injunction be denied in its entirety.

Dated: New York, New York
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