UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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

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

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Defendants Airplanes Limited and Airplanes U.S. Trust (together, "APG") respectfully submit this Reply Memorandum of Law, and the declaration of Stephen M. Sinaiko ("Sinaiko Decl."), in further support of their motion for a preliminary injunction.[1]

Preliminary Statement

UMB does not dispute the key facts demonstrating APG's entitlement to the injunction it seeks. There is no dispute that, both before and after the issuance of a default notice, APG's and its subsidiaries' expenses are first in priority of payment under Article III of the Indentures that govern the Notes that APG issued. (McCann Decl. Exh. A §§ 3.08(a), (b); *id*. Exh. B §§ 3.08(a), (b)). Nor is there any dispute that the governing Security Trust Agreement authorizes distribution of the cash that APG pledged as collateral only "in accordance with Article VIII [of the Security Trust Agreement] *and Article III of the Indentures*." (*Id*. Exh. C § 3.01(b)) (emphasis added). These unambiguous contract terms establish that UMB has no right to block the payment, on a current basis, of the expenses necessary to allow APG to defend itself -- including counsel fees, director fees and D&O insurance premiums -- while UMB seeks a declaration by this Court that it is "*entitled*, in its capacity as Security Trustee, to exercise remedies against" APG's collateral. (Am. Compl. at 29) (emphasis added). And even if UMB ultimately proves its entitlement to exercise its remedies under the Security Trust Agreement, the unambiguous contract terms establish that, when it exercises those remedies, it will *still* have to pay the expenses at issue on this motion, before making any payments in respect of the Notes.

Unable to dispute these central facts, UMB resorts to misdirection and distortion of the record, in hopes of distracting the Court from the merits. For example:

- UMB falsely asserts that, by this motion, APG seeks "substantially the final relief [it] seek[s] in the Counterclaim." (UMB Br. at 10). But this motion does *not* ask the Court to grant APG's counterclaim for a

[1] Unless otherwise defined, capitalized terms have the meanings ascribed to them in our opening brief.

declaration that the facts UMB alleges fail to establish any event of default under the Indentures, or that APG is entitled to pay *all* of the expenses that it and its subsidiaries have incurred. Rather, APG now asks the Court to enjoin UMB from continuing to block *only* the payment of expenses necessary to keep APG's directors and counsel in place, so that the Court can adjudicate this action on the merits.

- UMB spends pages arguing that events of default have occurred under the Indentures -- an argument that, although APG disputes it, is irrelevant because, as we have demonstrated, APG's right under the Indentures to pay its critical expenses does not depend on whether any event of default has in fact occurred. (UMB Br. at 12-18).

- UMB falsely asserts that, because APG sold its last aircraft in May 2016, it is "no longer operating" and has "no business." (UMB Br. at 1, 24). But subsequent to May 2016, APG has continued to operate for the purpose of, among other things, winding up its business. (McCann Decl. ¶ 14).

- UMB ignores the irreparable harm APG would suffer if the premium on its D&O insurance policy -- which UMB apparently concedes is an "Expense" under the Indentures -- is not paid when due on March 11, 2017, causing APG's directors to resign.

- UMB does not deny that it has paid over $1 million of APG's money to the law firms representing UMB in this action. Rather, UMB misleadingly suggests (but does not say) that it made those payments because its counsel "increased the size of their retainers to cover the risks associated with [a] threatened bankruptcy filing [by APG]" and that "[u]pon the conclusion of this matter, any unused amounts will be returned to the [APG] accounts." (UMB Br. at 9 n.5). Of course, the $975,000 in retainers that UMB paid to its own counsel -- over *seven times* the $125,000 retainer that UMB allowed APG to pay to Cohen & Gresser ("C&G"), the counsel who have appeared in this action on APG's behalf -- speaks forcefully to the irreparable harm that UMB's misconduct is inflicting on APG. (Sinaiko Decl. Exhs. 5, 7). At any rate, UMB's characterization of the payments to its attorneys as "retainers" ignores the fact that, above and beyond retainers, those attorneys have received *nearly $875,000* of APG's money to pay their fees and disbursements. (*Id*. Exhs. 1-10).

UMB's efforts at misdirection cannot conceal its violations of the Indentures, or undermine APG's showing that a preliminary injunction barring further such violations is appropriate.

Argument

UMB incorrectly asserts that, on this motion, APG seeks a "mandatory injunction," and therefore must satisfy a heightened standard. (UMB Br. at 10). But there is no dispute that, for twenty years prior to the issuance of the spurious default notices in this case, APG routinely paid its and its subsidiaries' expenses as they came due, pursuant to the Indentures. (McCann Decl. ¶¶ 17, 18). And, as this Court has held, preliminary injunctions, like the one APG seeks, that enforce a contractual obligation to pay litigation costs and expenses simply maintain the status quo, and are subject only to the ordinary injunction standard. *See*, *e.g.*, *XL Specialty Ins. Co. v. Level Glob. Inv'rs, L.P.*, 874 F. Supp. 2d 263, 271-72 (S.D.N.Y. 2012) (Engelmayer, J.) (preliminary injunction for litigation costs "is prohibitory, not mandatory"). In any event, APG's strong showings of likelihood of success on the merits, irreparable harm, and balance of the hardships satisfy either standard.[2]

I. UMB HAS NOT REBUTTED APG'S SHOWING THAT IT IS LIKELY TO SUCCEED ON THE MERITS

A. APG's Director Fees, D&O Policy Premiums and Attorneys' Fees Are "Expenses" Under the Indentures.

UMB does not dispute that fees earned by APG's directors and premiums on APG's D&O insurance policy are "incurred . . . in the course of the business activities permitted under Section 5.02(e)" of the Indentures, and hence meet the Indentures' definition of "Expenses." (McCann Decl. Exh. A at 16; *id*. Exh. B at 15). But astonishingly, UMB claims that attorneys' fees (and, presumably, other expenses) related to the defense of this action are *not* "Expenses" under the Indentures. The argument is meritless.

[2] Not surprisingly, the lone case UMB cites on this point is irrelevant because it involved a request for relief entirely different from what APG seeks here. *See Cacchillo v. Insmed, Inc.*, 638 F.3d 401, 406 (2d Cir. 2011) ("mandatory injunction" standard applied to motion for injunction directing drug manufacturer to petition the FDA and provide a particular drug to movant).

According to UMB, any attorneys' fees related to the defense of this litigation are not expenses that APG incurs in the course of "financing or refinancing" aircraft through the issuance of securities -- one of the business activities that Section 5.02(e)(iii) of the Indentures authorizes -- because "[l]itigating 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*)." (UMB Br. at 21). But to the contrary, financing a business sometimes requires litigation with lenders. And UMB's position, if accepted, would lead to the absurd conclusion that APG was *never* entitled to spend money defending *any* claim, however frivolous, that UMB (or any holder of Certificates) might assert. In any event, UMB makes no effort to rebut APG's showing that attorneys' fees related to the defense of this action are expenses incurred in connection with business activities authorized under section 5.02(e)(i) of the Indentures. (*See* APG Br. at 21).[3]

B. The Post-Default Notice Payment Waterfall Under Section 3.08(b) Applies and Gives Priority to Expenses.

UMB's argument that "Expenses" are no longer entitled to payment priority also fails. UMB does not and cannot dispute that Section 3.08(b) of the Indentures, which sets forth the payment waterfall following delivery of a default notice, gives first payment priority to "Expenses." Instead, UMB manufactures a universe in which the default payment waterfall ceases to apply "once the Security Trustee exercises the rights of a secured party," and gives way to provisions in the Security Trust Agreement that supposedly conflict with the default payment waterfall in Section 3.08(b) of the Indenture. (UMB Br. at 19). UMB is wrong on all counts.

[3] Separately we note that, in August 2016, Quinn Emanuel Urquhart & Sullivan, LLP ("Quinn") -- which currently represents UMB in this action but, at the time, represented the Directing Certificate Holders -- approved a payment to itself, from APG, of over $250,000 to cover fees relating to Quinn's and an Irish law firm's representation of the Directing Certificate Holders in connection with the disputes that are now the subject of this action. (Sinaiko Decl. Exhs. 1, 2). Quinn's approval of that payment demonstrates that, contrary to the position it now takes on behalf of UMB, it regards attorneys' fees related to this action as "Expenses" for purposes of the Indentures.

UMB relies on Section 3.01(b) of the Security Trust Agreement, which provides:

> All 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 Indentures.

(McCann Decl. Exh. C § 3.01(b)). According to UMB, this provision applies "once the Security Trustee exercises the rights of a secured party." (UMB Br. at 19). But under the plain language of Section 3.01 of the Security Trust Agreement, application of that provision actually is triggered by, *inter alia,* the delivery of a default notice -- the same event that triggers application of the payment waterfall under Section 3.08(b) of the Indentures. (McCann Decl. Exh. C § 3.01). Thus, contrary to UMB's argument, Section 3.08(b) of the Indentures and Section 3.01(b) of the Security Trust Agreement do not operate *sequentially*, with one applying before "rights" are "exercised" and the other applying thereafter. Instead, those provisions must be read *in harmony*. This is why, even if the Security Trustee exercises its remedies under Section 3.01(b) of the Security Trust Agreement, it still must apply the collateral for the benefit of the Secured Parties "in accordance with . . . Article III of the Indentures," thereby giving effect to the post-default notice payment waterfall in Section 3.08(b) of the Indentures. (*Id.*).

Moreover, even if UMB were correct that exercising its remedies under the Security Trust Agreement rendered the post-default notice payment waterfall under the Indentures inapplicable, UMB has not exercised remedies here. While UMB is empowered under the Security Trust Agreement to seize and distribute the collateral following delivery of a default notice, UMB -- apparently doubting that events of default have occurred -- instead filed this lawsuit seeking, *inter alia,* a judicial declaration that it "is *entitled*, in its capacity as Security Trustee, to *exercise remedies* against" APG's collateral. (Am. Compl. at 29) (emphasis added).

UMB cannot claim that it has exercised its remedies under the Security Trust Agreement while simultaneously asking this Court for a declaration that it is permitted to do so. And given that UMB chose litigation rather than self-help, it may not ignore the post-default notice payment waterfall under the Indentures so as to block APG from defending itself against the litigation UMB elected to bring.[4]

Finally, UMB's further argument -- that applying the payment waterfall in Section 3.08(b) of the Indentures would "turn commercial finance on its head" by "giving putative unsecured creditors priority on the collateral of secured creditors" -- simply ignores the governing documents. (UMB Br. at 20). UMB contractually agreed to limit its remedies as a secured party by giving Expenses the highest payment priority under both the Indentures *and* the Security Trust Agreement. That those Expenses might be subordinated in the absence of those contractual limitations is completely immaterial. UMB's argument, by inviting this Court to ignore the reference in Section 3.01(b) of the Security Trust Agreement to Article III of the Indentures, violates the "cardinal rule that a contract should not be read to render any provision superfluous." *Reyes v. Metromedia Software, Inc.*, 840 F. Supp. 2d 752, 756 (S.D.N.Y. 2012) (*citing Scholastic, Inc. v. Harris*, 259 F.3d 73, 83 (2d Cir. 2001)).

II. APG WILL SUFFER IRREPARABLE HARM IN THE ABSENCE OF AN INJUNCTION

In our opening papers, we established that UMB's wrongful refusal to permit APG to pay critical expenses will irreparably harm APG by preventing it from defending this action. (APG Br. 18-20). The arguments UMB offers in response lack even the slightest merit.

[4] Indeed, if UMB were correct, the holders of more than 50 percent of *any* class of Certificates could fabricate an event of default, direct the delivery of a default notice, file of a declaratory judgment action and use the fact of the default notice as a basis to deny APG the ability to pay its defense costs -- thereby shutting down APG despite the absence of any legitimate event of default.

First, UMB attempts to characterize the risk that C&G will seek to withdraw if it cannot be paid as "nothing more than speculation." (UMB Br. at 22). And UMB falsely asserts -- not surprisingly, without evidentiary support -- that C&G "is currently acting on contingency, willing to accept the risk of payment until after this case concludes." (*Id.*). Putting aside UMB's fabrication of the terms on which APG retained C&G, UMB's analysis stands logic on its head. There is nothing speculative about the notion that a law firm will not work for free. Rather, it would be speculative to assume that an unpaid law firm would *not* seek to withdraw. And the fact that UMB has authorized payment of *some* of APG's legal fees does not mitigate the irreparable harm APG faces if it is left without counsel to defend it in this action.

Second, UMB offers the equally false assertion that APG and C&G somehow "agreed" that the $125,000 payment that UMB authorized would be "sufficient" compensation for counsel's work on this matter through the briefing on UMB's motion for judgment on the pleadings. (UMB Br. at 22). Neither APG nor C&G agreed to any "cap" on APG's legal expenditures in connection with this lawsuit. To the contrary, the November 2016 letter agreement between UMB and APG expressly states that it is without prejudice to the rights of all parties. (McCann Decl. Exh. I at 2). The notion that APG would agree to a $125,000 "cap" is particularly preposterous in light of the substantial sums UMB has paid to its own law firms using APG's money.[5]

Third, UMB mistakenly attempts to distinguish cases, cited in our opening brief, holding that nonpayment of defense costs constitutes irreparable harm, on the ground that those cases involved insurance policies. (UMB Br. at 23; APG Br. at 18-19). But it is immaterial

[5] Moreover, contrary to UMB's assertion, there was no pre-negotiated "briefing schedule" with respect to its motion for judgment on the pleadings. (*See* UMB Br. at 22). UMB agreed that APG would have at least 30 days to respond to UMB's motion, whenever UMB cared to file it. (*See* McCann Decl. Exh. I). But the timing of the motion was always within UMB's control.

whether the contract entitling APG to its litigation costs is an insurance policy or a trust indenture. And as we have shown, the Indentures expressly provide for APG's right to payment of those expenses. As in the cases APG cited, the litigation UMB has commenced is an existential threat to APG, and APG's inability to defend itself would cause irreparable harm.[6]

Fourth, UMB fails entirely to address the irreparable harm that APG will suffer if its directors resign -- an obvious risk in light of the non-payment of their directors' fees and D&O insurance premiums. No rational person would serve as a director of a significant company without D&O coverage. The cases cited in APG's opening memorandum amply establish this uncontroversial proposition, and UMB does not bother to address them. Instead, UMB dismisses the notion of any potential harm from the absence of D&O coverage on the ground that "no one is currently suing the . . . Directors." (UMB Br. at 23). Putting aside the nonsensical suggestion that a director requires no D&O coverage until he or she is actually sued, UMB disingenuously ignores that two months ago, in a letter dated October 28, 2016, *UMB itself* threatened to sue the directors -- stating that it had "formed the view that, in due course, there will be a sustainable claim against [them]" -- and requested that APG provide notice of the threat to the providers of the very insurance UMB now claims is unnecessary. (McCann Decl. Exh. J). Against that backdrop, UMB's suggestion to this Court that a lawsuit against APG's directors is "speculative and remote" is simply astonishing. (UMB Br. at 23).

Finally, UMB's contention that APG somehow delayed in bringing this motion, demonstrating that it faces no irreparable harm, is false. While UMB claims that APG has been

[6] UMB's reliance on *Johnson v. Couturier*, 572 F.3d 1067 (9th Cir. 2009), for the proposition that refusal to allow APG to pay the costs of defending this action would not result in irreparable harm, is misplaced. To the contrary, the *Johnson* court *recognized* that the ERISA fiduciaries in that case would suffer grave harm as a result of an injunction that barred them from obtaining advancement of defense costs, but nevertheless affirmed the injunction based on its determination that the underlying indemnification agreement was likely void under ERISA, such that the defendants ultimately would not be entitled to payment of defense costs and the balance of equities tipped against them. *Id.* at 1082. Here, by contrast, UMB does not challenge the validity of the payment waterfall provisions in the Indentures, which the Security Trust Agreement incorporates.

"without the ability to access the Accounts since June 28, 2016," various payment agreements subsequent to that date have permitted APG to pay various expenses, including fees due to its cash manager, administrative agent and outside counsel. (UMB Br. at 24; Sinaiko Decl. Exhs. 1, 8-10). UMB did not file this action until October 3, 2016. After UMB commenced suit, APG sought to resolve the defense costs issue consensually with UMB, resulting in the November 9, 2016 letter agreement authorizing payment of the $125,000 retainer to C&G. (McCann Decl. Exh. I). APG filed this motion exactly one month later, on December 9, 2016. And, putting aside defense costs, the premium on APG's D&O insurance policy does not come due until early 2017. (McCann Decl. ¶ 17). The record reflects that APG is not guilty of *any* delay in seeking relief from this Court, let alone delay sufficient to defeat its showing of irreparable harm.[7]

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

UMB has failed to rebut our showings that (a) the post-default notice waterfall in Section 3.08(b) of the Indentures applies while this action is pending, and prioritizes the payment of the expenses at issue on this motion; and (b) the Security Trust Agreement likewise requires UMB to pay those expenses, ahead of payments in respect of the Notes, in the event it ever establishes its entitlement to exercise remedies as a secured party. Thus, the preliminary injunction that APG seeks cannot harm UMB, because it will only require payments that UMB must make in any event. Given the irreparable harm APG will suffer if its critical expenses remain unpaid during the pendency of this action, the balance of hardships strongly favors APG.

[7] The Second Circuit's decision in *Citibank, N.A. v. Citytrust*, 756 F.2d 273 (2d Cir. 1985), which UMB cites on this point, is readily distinguishable. In *Citibank,* the defendant had been infringing a trademark for four years before the plaintiff brought suit and sought an injunction. *Id*. at 277. Here, the irreparable harm flows from APG's inability to defend this lawsuit, and APG brought this motion promptly after the suit was commenced.

IV. THE COURT SHOULD NOT REQUIRE APG TO POST A BOND

Finally, contrary to UMB's assertion, no bond is required in this case. The Second Circuit has long recognized that district courts are "vested with wide discretion in the matter of security" and may "require no bond where there has been no proof of likelihood of harm." *Doctor's Assocs., Inc. v. Stuart*, 85 F.3d 975, 985 (2d Cir. 1996) (*citing Ferguson v. Tabah*, 288 F.2d 665, 675 (2d Cir. 1961)); *see also*, *e.g.*, *N.Y. City Triathlon, LLC v. NYC Triathlon Club, Inc.*, 704 F. Supp. 2d 305, 345 (S.D.N.Y. 2010) (no bond required absent showing of harm from injunction where likelihood of success on the merits was overwhelming). These authorities apply here. UMB cannot make the required showing of harm because the injunction APG seeks will simply require UMB to comply with its contractual obligations. Moreover, requiring APG to provide a bond would be inconsistent with the very purpose of the payment priority waterfalls in the Indentures (which the Security Trust Agreement incorporates by reference) -- ensuring that APG is, at all times, able to meet its expenses. Under these circumstances, the Court should not require a bond.

Conclusion

For all of the foregoing reasons, and those set forth in our opening papers, APG respectfully requests that the Court grant its motion in all respects.

Dated: New York, New York
December 30, 2016

Respectfully submitted,

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