UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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

AIRPLANES LIMITED'S AND AIRPLANES U.S. TRUST'S MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S MOTION FOR PARTIAL JUDGMENT ON THE PLEADINGS AND IN SUP PORT OF THEIR CROSS-MOTION FOR JUDGMENT ON THE PLEADINGS

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Rules

Defendants Airplanes Limited and Airplanes U.S. Trust (together, "APG") respectfully submit this Memorandum of Law and the accompanying declarations of William M. McCann ("McCann Declaration") and Stephen M. Sinaiko ("Sinaiko Declaration") in opposition to the motion by plaintiff UMB Bank, National Association ("UMB") for partial judgment on the pleadings, and in support of APG's cross-motion for judgment on the pleadings.

Preliminary Statement

In support of its motion for partial judgment on the pleadings -- challenging APG's determination to maintain a cash reserve (the "Reserve") in respect of a contingent liability arising from litigation that has been pending since 2001 before courts in Brazil -- UMB misconstrues plain language in the APG indentures permitting APG to reserve for non-recurring expenses that were incurred in the course of APG's business and are anticipated to become payable in the future. The indentures authorized APG to maintain the Reserve, and UMB's arguments to the contrary defy common sense and commercial reality. For example:

- UMB's claim that the term "Expense" under the indentures excludes judgments, if accepted, would mean that APG could *never* pay *any* judgment (including the money judgment UMB itself seeks in this action). (UMB Br. at 15-17).

- UMB's equally far-fetched argument, that the indentures preclude APG from setting aside money to cover future judgments that are not absolutely certain, fails because the level of certainty that UMB seeks to require does not exist in real-world litigation. Anyhow, if the indentures actually worked as UMB posits, they would have authorized reserves only for expenses that "will" become due and payable in the future, rather than expenses "anticipated" to become so. (UMB Br. at 21-22).

Simply put, UMB's interpretation of the APG indentures is wrong on its face and absurd in its implications.

Apart from its spurious interpretation of the indentures, UMB accuses APG of being "set on a reserve no matter what the [indentures] provide[] for" and claims that APG "does

not really believe in its current made-for-litigation position" that the contingent liability underlying the Reserve "constitutes an Expense." (UMB Br. at 17). But UMB offers no evidence to substantiate its accusation. And there is no such evidence, because APG has at all times acted consistent with the indentures. APG's only interest here is in seeing its remaining cash distributed in accord with governing documents and the law.

UMB's resort to untenable arguments and unfair accusations demonstrates forcefully that its motion -- and, indeed, its lawsuit -- are meritless. Rather, it appears that this litigation is an effort by UMB, and the parties directing UMB, to halt the orderly winding up of APG's business and grab APG's remaining cash, to the exclusion of other creditors, including unsecured creditors whose claims rank higher in priority under the APG indentures than those of the holders of APG notes.

On the merits, we demonstrate below that the relevant indenture provisions, reasonably read, permit the establishment of the Reserve. By contrast, UMB offers no reasonable interpretation of those provisions calling for a contrary result. But even if UMB's reading were reasonable, the most that reading would do is establish ambiguity precluding judgment on the pleadings for either party as to UMB's claim related to the maintenance of the Reserve. (Point I, *infra*). Separately, unambiguous language in the indentures demonstrates that the other allegations of events of default in this case -- as to which UMB does not seek judgment on the pleadings -- are without merit. (Point II, *infra*). Accordingly, APG respectfully submits that the Court should either (i) deny UMB's motion for partial judgment on the pleadings, and grant APG's cross-motion for judgment on the pleadings in all respects; or, in the alternative (ii) deny both parties' motions for judgment on the pleadings with respect to UMB's claim related to the maintenance of the Reserve, and grant APG's cross-motion in all other respects.

Statement of Facts[1]

A. Creation and Structure of Airplanes Limited and Airplanes Trust

Airplanes Limited, a limited liability company formed under the laws of Jersey, Channel Islands, and Airplanes U.S. Trust ("Airplanes Trust"), a Delaware business trust, were established in 1995 as special purpose vehicles in connection with a securitization of aircraft and related assets. (Countercl. ¶ 137).[2] Although APG was in the business (through its subsidiaries) of acquiring, owning, leasing, and selling aircraft, at present APG owns no aircraft, either directly or indirectly, having sold the last of the aircraft in May 2016. (*Id*. ¶ 5).

Airplanes Limited and Airplanes Trust entered into trust indentures dated March 28, 1996, as amended (the "AL Indenture" and "AT Indenture," respectively), pursuant to which, over time, they each issued notes (the "Notes") divided into subclasses A-1 through A-9 and classes B, C, D and E. (*Id*. ¶ 138). Airplanes Limited and Airplanes Trust each provided a guarantee of the Notes issued by the other. (ALI Art. XII; ATI Art. XII). Moreover, the AL Indenture and the AT Indenture (together, the "Indentures") call for the creation of a number of bank accounts for APG, including a collection account (the "Collection Account") to hold lease receipts, aircraft sale proceeds and certain other money received by APG and its subsidiaries in

[1] Solely for purposes of the parties' cross-motions for judgment on the pleadings, APG draws its statement of the facts from the parties' pleadings and documents attached to or incorporated into them. *See*, *e.g.*, *Gioconda Law Group PLLC v. Kenzie*, 941 F. Supp. 2d 424, 427 (S.D.N.Y. 2013) ("In considering Rule 12(c) motions, district courts may take notice of 'the facts alleged in the complaint, documents attached to the complaint as exhibits, and documents incorporated by reference in the complaint.'") (citation omitted).

[2] "Am. Compl.," "Countercl.," "UMB Ans.," "Finestone Exh.," "Sinaiko Exh.," "Paes Decl.," "ALI," "ATI," and "ILA" refer, respectively, to the Amended Complaint that UMB filed in this action on October 31, 2016 (Dkt. No. 10); the Answer and Counterclaim that APG filed in this action on November 21, 2016 (Dkt. No. 19); the Answer that UMB filed in response to APG's counterclaim on December 12, 2016 (Dkt. No. 27); the Exhibits annexed to the declaration of Benjamin I. Finestone, which UMB submitted in support of its motion for partial judgment on the pleadings (Dkt. No. 31); the exhibits to the Sinaiko Declaration; the declaration of Antonio Tavares Paes, Jr., which APG submitted in support of its motion for a preliminary injunction (Dkt. No. 25); the Trust Indenture, dated as of March 28, 1996, governing notes issued by Airplanes Limited (Countercl. Exh. A); the Trust Indenture, dated as of March 28, 1996, governing notes issued by Airplanes Trust (Countercl. Exh. B); and the Intercompany Loan Agreement between Airplanes Limited and certain of its subsidiaries, dated March 28, 1996. A copy of the ILA is annexed as Exhibit A to the McCann Declaration.

the course of their operations, and an expense account (the "Expense Account") to hold money set aside to cover expenses of APG and its subsidiaries. (ALI § 3.01; ATI § 3.01).

In addition to providing cross-guaranties of the Notes, APG pledged substantially all of its cash and certain other assets as collateral for the Notes, under a security trust agreement dated as of March 28, 1996, as amended (the "Security Trust Agreement"). (Countercl. ¶ 139). APG also entered into a pass-through trust agreement dated as of March 28, 1996, as supplemented and amended, that established a number of trusts, each of which purchased a class or subclass of the Notes and, in turn, sold to investors certificates (the "Certificates") representing undivided fractional interests in the class or subclass of Notes it held. (*Id.* ¶ 140). From March 28, 1996 through September 29, 2016, Deutsche Bank Trust Company Americas ("DBTCA") -- formerly known as Bankers Trust Company -- served as, *inter alia*, indenture trustee, pass-through trustee and security trustee under the governing documents. (*Id.* ¶ 141).

Using some of the proceeds from the initial sale of Notes and Certificates, Airplanes Limited purchased 95 percent of the issued share capital of an Irish company, Airplanes Holdings Limited ("Holdings") (previously known as GPA II Limited), and Airplanes Trust purchased all of the capital stock of AeroUSA, Inc. (*Id.* ¶ 142). After those purchases, APG owned indirectly a portfolio of 229 aircraft, related leases and other assets. (*Id.*).

Airplanes Limited also used some of the proceeds from the sale of Notes and Certificates to make loans to Holdings and certain of its other subsidiaries. (*Id.* ¶ 143). Airplanes Limited made certain of those loans under an intercompany loan agreement dated March 28, 1996 (the "ILA"), which is governed by Irish law. (*Id.*). Under the ILA, the borrower subsidiaries agreed to direct lessees and purchasers of the aircraft they owned to remit all lease and sale payments directly to the Collection Account, leaving the borrower subsidiaries without

any funds to meet their expenses. (*Id.*; ILA § 8.1). Accordingly, Airplanes Limited undertook under the ILA to pay those subsidiaries' expenses, using amounts in the Collection Account, consistent with the priority of payment provisions and other terms of the AL Indenture. (ILA §§ 12.2, 12.3). Moreover, given that one of the key purposes of the ILA was to ensure payment of the borrower subsidiaries' expenses, the ILA expressly provided that "[a]ll payments made under this Agreement shall be made *without set-off or counterclaim*." (*Id*. § 8.5) (emphasis added).

B. Priority of Payments Under the Indentures

Section 3.08 of both Indentures establishes the priority of payments for APG, and governs APG's obligation to make payments in respect of the Notes. That section contains two separate payment priority "waterfalls" -- one that applies in ordinary situations, and another that applies following the delivery by the indenture trustee of a default notice. (ALI §§ 3.08(a), (b); ATI §§ 3.08(a), (b)). Both of the "waterfalls" require APG, before making any other payments, to first apply funds in the Collection Account toward payment of "Expenses," a term that the Indentures, as relevant here, define to mean "any fees, costs or expenses incurred by [APG and its subsidiaries] in the course of the business activities permitted under section 5.02(e) of either Indenture." (ALI at 16; ATI at 16). Thus, the "waterfall" provisions in both Indentures provide, in pertinent part, that on each payment date, Airplanes Limited and Airplanes Trust each must "first" transfer from the Collection Account "to the Expense Account . . . an amount equal to the Required Expense Amount." (ALI §§ 3.08(a)(i), 3.08(b)(i); ATI §§ 3.08(a)(i), 3.08(b)(i)).

> In turn, both Indentures define "Required Expense Amount" to mean:
>
> (i) the amount of Expenses of [APG and its subsidiaries] due and payable on the Calculation Date relating to such Payment Date or reasonably anticipated to become due and payable before the end of the Interest Accrual Period beginning on such date, (ii) at the discretion of the Cash Manager, an amount necessary to provide for Permitted Accruals . . . and (iii) an amount determined by the Cash Manager to be necessary to maintain the Permitted Balance in the Expense Account after payment of

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

(ALI at 30; ATI at 30). Separately, both Indentures define "Permitted Accruals" to mean "accruals in respect of Expenses that are not regular, monthly recurring Expenses . . . of [APG and its subsidiaries] anticipated to become due and payable in any future Interest Accrual Period," and defines "Permitted Balance" to mean "a balance not to exceed at any time $10,000,000 to pay unanticipated Expenses." (ALI § 3.01(d); ATI § 3.01(d)).

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

A confidential offering memorandum dated March 8, 2001, and a publicly-filed prospectus dated April 26, 2001, expressly warned potential purchasers of subclass A-9 Certificates that, under the Indentures, the subclass A-9 Notes are subordinate to the expenses -- including contingent liabilities -- of APG and its subsidiaries. (Countercl. ¶ 127). For example, in a section entitled "Risk Factors," both of those documents stated that "[a]dministrative and lease expenses . . . in the ordinary course of business of [APG] rank senior in priority of payment to the [subclass A-9] notes . . . and will be paid out of [APG's] available funds before payments are made on the notes." (*Id.*). That section went on to state that "[a]ny claims on the subsidiaries of [APG]," which could include "any payment obligations to lessees *and other contingent liabilities, such as liabilities to third parties from operating and leasing . . . aircraft*," would likewise be "effectively senior to the subclass A-9 notes." (*Id.*) (emphasis added).

C. The Transbrasil Litigation

For many years, Airplanes Limited's subsidiary Holdings has been embroiled in various proceedings before courts in Brazil (the "Transbrasil Litigation") involving Transbrasil, a now-defunct Brazilian airline to which Holdings had leased two aircraft. (*Id.* ¶ 152). The Transbrasil Litigation began in or about 2001, when GE Capital Aviation Services, Limited ("GECAS"), which acted as servicer for the leases, began efforts to collect on promissory notes (the "Transbrasil Notes") that Transbrasil issued to a number of aircraft lessors, including Holdings (together, the "Lessors"), after GECAS restructured Transbrasil's debt to those Lessors. (*Id.* ¶ 153-54). In response, Transbrasil commenced a number of actions against the Lessors, including one in which it claimed that it had already repaid the Transbrasil Notes and they therefore were invalid, and sought statutory penalties and damages. (*Id.* ¶ 154). APG first became aware of the Transbrasil Litigation from GECAS in or about 2010. (*Id.* ¶ 155).

In or about May 2007, a lower court in Sao Paulo issued a decision (the "May 2007 Decision") in favor of Transbrasil on certain of Transbrasil's claims against the Lessors. (*Id.* ¶ 156). The Appellate Court of the State of Sao Paulo issued a decision in February 2010 (the "February 2010 Decision") confirming the May 2007 Decision, expanding certain elements of that decision, allowing for later calculation of the amounts that the Lessors owed to Transbrasil as statutory penalties and indemnification, and confirming the Lessors' obligation to pay court costs and court-mandated legal fees to Transbrasil's counsel. (*Id.*). In June 2012, while appeals from the February 2010 Decision were pending, a lower court in Sao Paulo issued two orders (the "Orders to Pay") directing payment of money by the Lessors into court, to secure the judgment Transbrasil anticipated recovering on certain of its claims. (*Id.* ¶ 157).

Of the payments that the Orders to Pay required, approximately 160 million Brazilian Reais (approximately $80 million at that time) was directly allocable to Holdings.

(*Id.*). The Orders to Pay also directed the Lessors to make a further payment of approximately 118 million Brazilian Reais (approximately $59 million at that time) in respect of a promissory note issued in favor of a Lessor other than Holdings, in which Holdings had an interest. (*Id.*). However, it was not possible to attribute any particular part of that amount to any particular Lessor, and the Orders to Pay did not contain any provision for joint liability. (*Id.*). The amounts set forth in the Orders to Pay addressed only some of the items of damages that Transbrasil sought to recover from Holdings and the other Lessors. (*Id.*).

In October 2013, the Federal Court of Appeals of Brazil issued a ruling (the "October 2013 Decision") that reversed, in large part, the May 2007 Decision and the February 2010 Decision. (*Id.* ¶ 158). In light of the October 2013 Decision, the lower court in Sao Paulo cancelled the Orders to Pay in 2014. (*Id.*). Transbrasil appealed from the October 2013 Decision and the cancellation of the Orders to Pay. (*Id.*). After a hearing on November 23, 2016, the Federal Court of Appeals declined to entertain Transbrasil's appeal from the October 2013 Decision, leaving that decision intact. (Paes Decl. ¶ 5). However, because the Federal Court of Appeals has not yet published its decision in connection with the November 23, 2016 rulings, the time for Transbrasil to either seek clarification of those rulings, or take a further appeal to the Supreme Court of Brazil, has not yet begun to elapse. (*Id.*). Thus, while there is not currently any judgment against Holdings in connection with the Transbrasil Litigation, it remains possible that the Transbrasil Litigation will ultimately result in substantial liability for Holdings. (Countercl. ¶ 159). Such liability could be equal to, or greater than, the amounts that had been fixed in the Orders to Pay. (*Id.*).

D. The Reserves Set for APG

Because of the provisions in the Indentures and the ILA regarding payment of APG's expenses and those of its subsidiaries, APG has, subsequent to the issuance of the

February 2010 Decision, taken steps to maintain the Reserve in an amount that, in its view, would be sufficient to permit the payment of, among other things, any judgment that might be rendered against Holdings in the ongoing litigation. (*Id.* ¶ 160). The Reserve has increased over time for a number of reasons, including that, as APG's subsidiaries have gradually sold their aircraft, APG's ability to count on future cash flows as a source from which to pay future expenses has diminished. (*Id.* ¶ 161).[3]

Thus, in its annual report released on or about June 29, 2012, shortly after the issuance of the Orders to Pay, APG announced that it had determined to increase its liquidity reserve from $45 million to $110 million in light of, among other things, Holdings' potential liability to Transbrasil. (*Id.* ¶ 162). Subsequently, in a press release on October 8, 2013, APG announced that it had determined that its liquidity reserve should be further increased to $140 million. (*Id.*). And on November 2, 2015 -- when there were just nine aircraft remaining in the APG portfolio -- the liquidity reserve was increased to $190 million. (*Id.*).[4]

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[3] UMB claims that APG somehow "shifted its position" by carrying the Reserve by way of the "Maintenance Reserve Amount" under the Indentures until May 2016 -- when, upon the sale of APG's last aircraft, the Indentures required reduction of the "Maintenance Reserve Amount" to zero -- and then "reclassifying" the Reserve as part of the "Required Expense Amount" under the Indentures. (UMB Br. at 2, 10, 17). But the litigation that necessitated the Reserve did not end when APG sold its last aircraft. That litigation remains ongoing today. Thus, rather than a *shift* of position, APG's decision to continue to hold the Reserve by way of the "Required Expense Amount" reflects that its position as to the need for the Reserve remained *constant*. Separately, there is no merit to UMB's claim (irrelevant, in any event, to the issues now before the Court) that it was never appropriate for APG to carry the Reserve by way of the "Maintenance Reserve Amount." (UMB Br. at 2, 9). UMB bases that claim on its unsupported assertion that the "Maintenance Reserve Amount" could be used only for aircraft maintenance. (*Id.* at 9). The limitation that UMB posits on the "Maintenance Reserve Amount" is nowhere found in the Indentures. Rather, the Indentures place *no* limits on the reasons for which APG may set aside money in the "Maintenance Reserve Amount," and permit APG to increase or decrease that amount in its discretion. (ALI at 22-23; ATI at 22).

[4] UMB incorrectly suggests that APG's Reserve is unnecessary or overstated because "at the same time [APG] is maintaining the $190 million Reserve, it has taken only a $3 million provision for the Transbrasil Litigation in its financial statements [for the year ended March 31, 2016]." (UMB Br. at 10-11). But APG prepared the financial statements on which UMB relies "in conformity with United States of America generally accepted accounting principles." (Finestone Exh. D at F-5). Thus, the provision in APG's financial statements for the Transbrasil Litigation reflects application of U.S. GAAP rules for reporting contingent liabilities. By contrast, APG established the Reserve to ensure that it will have enough cash to satisfy its obligation, under the Indentures and the ILA, to pay its own and its subsidiaries' expenses -- including, among other things, defense costs and any judgment in the Transbrasil Litigation -- in priority to payments in respect of the Notes. UMB's argument based on APG's financial statements is irrelevant. There is likewise no merit to UMB's suggestion that the Reserve is unnecessary because

E. The Baseless Default Notices, UMB's Replacement of DBTCA and the Commencement of this Action

Nearly four years after APG announced the increase of its liquidity reserve to $110 million, by letter dated June 16, 2016 (the "June 16 Direction"), certain holders of Certificates corresponding to subclass A-9 Notes (the "Directing Certificate Holders") directed DBTCA, as indenture trustee, to issue a notice to APG and others of (a) two purported events of default under the AL Indenture; (b) purported events of default under the AT Indenture, pursuant to the cross-default provision in section 4.01(e) of the AT Indenture, arising from the purported events of default under the AL Indenture; and (c) a purported covenant breach under the AL Indenture that, unless corrected within 30 days, would ripen into an event of default under the AL Indenture and, due to the cross-default provision in section 4.01(e) of the AT Indenture, under the AT Indenture as well. (*Id.* ¶ 163). The June 2016 Direction further instructed DBTCA to accelerate the outstanding principal balance of, and accrued interest on, the subclass A-9 Notes and, in its capacity as security trustee, exercise its remedies under the Security Trust Agreement by taking substantially all of the over $193 million then in APG's Expense Account and Collection Account, applying that money to the subclass A-9 Notes, and leaving behind just $2 million "for purposes of paying unpaid accrued and future fees and expenses incurred by [DBTCA as] the Pass-Through Trustee, Indenture Trustee and Security Trustee." (*Id.*).

By letter dated June 28, 2016 (the "June 28 Letter"), as the Directing Certificate Holders had directed, DBTCA notified APG of the supposed events of default and covenant breach that the June 16 Direction described, and purported to declare the outstanding principal

APG has said it believes Holdings "has strong defenses against the substantive issues raised" in the Transbrasil Litigation and that Transbrasil's claims against Holdings "lack[] merit, fairness or rationale." (UMB Br. at 9, 10). APG's public assessment of Transbrasil's claims does not alter APG's obligation to retain cash for the purpose of paying defense costs and any judgment in the pending litigation.

balance of, and accrued interest on, the subclass A-9 Notes to be immediately due and payable. (*Id.* ¶ 164). And by letter dated July 29, 2016 (the "July 29 Letter") -- again at the direction of the Directing Certificate Holders -- DBTCA asserted that the supposed covenant breach alleged in the June 28 Letter had ripened into an event of default under the AL Indenture, as well as under the cross-default provision in the AT Indenture. (*Id.*).

The June 16 Direction, the June 28 Letter and the July 29 Letter (together, the "Purported Default Notices") assert that supposed events of default have occurred because:

- The May 2007 Decision, the February 2010 Decision and the Orders to Pay -- which the Brazilian courts reversed or vacated nearly *two years* (or more) before DBTCA received the June 16 Direction -- somehow constitute *as of today* "a judgment rendered against Holdings in excess of $100 million in connection with the Transbrasil litigation," and hence a default under section 4.01(h) of the AL Indenture (*Id*. ¶ 166);

- Airplanes Limited breached section 4.01(c) of the AL Indenture by "fail[ing] to pay an amount (other than interest) when due and payable in connection with a Note," because it somehow improperly held cash in the Reserve -- which it otherwise could have paid in respect of the subclass A-9 Notes -- as part of the "Required Expense Amount" (*Id*. ¶ 167);

- By its very "involvement in the Transbrasil Litigation" -- including incurring expenses related to the Transbrasil Litigation and establishing the Reserve -- Airplanes Limited somehow engaged in an activity that section 5.02(e) of the AL Indenture does not permit (*Id*. ¶ 168); and

- By paying and/or reserving for Holdings' defense costs and contingent liability in the Transbrasil Litigation, Airplanes Limited violated the prohibition in section 5.02(e)(ii) of the AL Indenture on "guaranteeing or otherwise supporting the obligations and liabilities of any [subsidiary]," if doing so "would materially adversely affect the Noteholders." (*Id*. ¶ 169).

Perhaps betraying its own view that the Purported Default Notices are utterly meritless, DBTCA never acted on the June 16 Direction to the extent it called for exercise of remedies under the Security Trust Agreement against APG's cash collateral. (*Id.* ¶ 170).

On and after September 29, 2016, at the insistence of the Directing Certificate Holders, UMB assumed DBTCA's roles as indenture trustee, pass-through trustee and security trustee. (*Id.* ¶¶ 170-71). UMB commenced this action on October 3, 2016 -- immediately after stepping into DBTCA's shoes -- and filed its Amended Complaint on October 31, 2016, seeking, among other relief, a money judgment against APG and declarations that certain events of default under the Indentures have occurred, and that the Indentures and the Security Trust Agreement therefore allow UMB to seize APG's remaining cash and pay the bulk of it to the subclass A-9 Note holders. (Dkt. Nos. 1, 6, 10). On November 21, 2016, APG filed its Answer, as well as a Counterclaim seeking declarations that (i) none of the purported events of default asserted by UMB in fact constitutes an actual event of default under the Indentures; (ii) UMB has no right under the Indentures or the Security Trust Agreement to accelerate the outstanding principal balance of, and accrued interest on, any of the Notes; (iii) UMB has no right to exercise any remedies under the Security Trust Agreement; and (iv) whether or not an event of default has occurred, the Indentures require UMB to allow APG to pay its and its subsidiaries' expenses as they come due. (Dkt. No. 19 at 51).

F. The Parties' Cross-Motions for Judgment on the Pleadings

On its motion pursuant to Fed. R. Civ. P. 12(c), UMB asks the Court to rule in its favor only as to its claim that an event of default has occurred because Holdings' contingent liability in the Transbrasil Litigation does not fall within the definition of "Required Expense Amount" under the Indentures. (UMB Br. at 24). But as we demonstrate, Holdings' contingent liability to Transbrasil falls easily within that definition. And as we further demonstrate, the other purported events of default that UMB alleges likewise do not constitute actual events of default under the Indentures. Accordingly, the Court should deny UMB's limited motion and grant judgment on the pleadings in favor of APG as to all of UMB's claimed events of default.

Argument

Well-settled law establishes that parties seeking judgment on the pleadings under Fed. R. Civ. P. 12(c) must carry a heavy burden. This Court has held that "because hasty or imprudent use of this summary procedure . . . violates the policy in favor of ensuring to each litigant a full and fair hearing on the merits of his or her claim or defense," judgment on the pleadings is inappropriate "unless the movant clearly establishes that no material issue of fact remains to be resolved and that he is entitled to judgment as a matter of law." *Gioconda*, 941 F. Supp. 2d at 427. In conducting the Fed. R. Civ. P. 12(c) analysis, courts "accept[] as true all of the non-moving party's well-pleaded factual allegations and draw[] all reasonable inferences in favor of the non-moving party." *GE Funding Capital Market Servs., Inc. v. Nebraska Inv. Finance Auth.*, 2016 WL 4784002, at *2 (S.D.N.Y. Sept. 14, 2016). Thus, where (as here) a plaintiff moves for judgment on the pleadings, "the facts as alleged in [defendant's] answer and counterclaims are assumed to be true." *Life Product Clearing, LLC v. Angel*, 530 F. Supp. 2d 646, 648 (S.D.N.Y. 2008); *see also Aluminum Co. of Am. v. Toba Adjustments, Inc.*, 1998 WL 120355, at *1 (S.D.N.Y. Mar. 18, 1998) (denying plaintiff's motion for judgment on pleadings where defendant's answer presented facts that would entitle defendant, not plaintiff, to relief).

This Court has recognized that "a motion for judgment on the pleadings 'can be particularly appropriate in breach of contract cases involving legal interpretations of the obligations of the parties.'" *Wells Fargo Bank, N.A. v. Wrights Mills Holdings, LLC*, 127 F. Supp. 3d 156, 168 (S.D.N.Y. 2015) (Engelmayer, J.) (*quoting VoiceAge Corp. v. RealNetworks, Inc.*, 926 F. Supp. 2d 524, 529 (S.D.N.Y. 2013)). A court interpreting a contract in the context of a motion for judgment on the pleadings "must consider whether any terms of that agreement are ambiguous; that is, a term about which reasonable minds could differ." *Hudson Bay Master Fund Ltd. v. Patriot National, Inc.*, 2016 WL 6906583, at *4 (S.D.N.Y. Nov. 21, 2016) (*citing*

Seiden Associates v. ANC Holdings, Inc., 959 F.2d 425, 428 (2d Cir. 1992)). Whether ambiguity exists is a question of law for the Court to resolve. *Hudson Bay*, 2016 WL 6906583, at *4 (*citing W.W.W. Assocs. v. Giancontreri*, 77 N.Y.2d 157, 162 (1990)). The existence of such ambiguity "makes judgment on the pleadings inappropriate." *Id*.

Here, UMB urges the Court to grant partial judgment on the pleadings, based on unreasonable interpretations and misapplications of the Indentures. But read reasonably, the relevant contract language establishes beyond cavil that none of the purported defaults that UMB alleges -- including the one that is the subject of UMB's motion -- in fact constitutes an event of default under the Indentures. Accordingly, the Court should grant APG's motion for judgment on the pleadings. At a minimum, if the Court were to accept UMB's interpretations as reasonable, the parties' competing interpretations would establish that the relevant provisions of the Indentures are ambiguous, compelling denial of UMB's motion.

I. APG PROPERLY RESERVED FOR HOLDINGS' CONTINGENT LIABILITY IN THE TRANSBRASIL LITIGATION

In order to succeed on its motion, UMB must carry the burden of showing that the definitions in the Indentures of "Expenses" and "Permitted Accruals," and hence the definition of "Required Expense Amount," are unambiguous and exclude any liability of Holdings to Transbrasil. UMB claims that those items cannot be "Expenses," because they are neither "fees, costs or expenses" nor "incurred by [APG and its subsidiaries] in the course of the business activities permitted under section 5.02(e) of either Indenture." (ALI at 16; ATI at 16). UMB further claims that those items are not "Permitted Accruals" because they are not "anticipated to become due and payable in a future Interest Accrual Period." (ALI § 3.01(d); ATI § 3.01(d)). The arguments are specious. To the contrary, those words in the Indentures unambiguously *permit* APG to reserve for Holdings' contingent liability relating to the Transbrasil Litigation.

A. Holdings' Exposure in the Transbrasil Litigation Meets the "Fees, Costs or Expenses" Prong of the Indenture Definition of "Expenses."

UMB does not dispute that the words "fees," "costs" and "expenses" in the Indentures' definition of "Expenses," given their plain meaning, encompass the attorneys' fees and other costs that Holdings may incur in defending the Transbrasil Litigation. And while UMB contends that the "plain and ordinary meanings" of those words "unequivocally establish[] that the definition of 'Expenses' does not include a 'judgment,'" UMB bases that contention on a smattering of carefully-selected dictionary definitions. (UMB Br. at 15-16). But UMB ignores dictionary definitions of "cost" and "expense" that undercut its position. For example, the Merriam-Webster and American Heritage dictionary definitions of "expense" include "financial burden or outlay: cost," "a cause or occasion of expenditure" and "[s]omething requiring the expenditure of money." (Sinaiko Exhs. 1, 2). Similarly, the MacMillan Dictionary and dictionary.com definitions of "cost" include "an outlay or expenditure of money, time, labor, trouble, etc." and "the amount of money that is needed in order to buy, pay for, or do something." (Sinaiko Exhs. 3, 4). These definitions establish -- contrary to UMB's contentions -- that the words "expense" and "cost" easily include judgments.

Courts considering the meaning of those words have reached the same conclusion. *See Chevron U.S.A., Inc. v. United States*, 20 Cl. Ct. 86, 88 (1990) (contract provision stating that parties would share "*costs* incurred in . . . operation" of petroleum-producing property required defendant to pay portion of judgment taken against plaintiff) (emphasis added); *Mears v. Lake County Council*, 709 N.E.2d 747, 749 (Ind. App. 1999) (under statute requiring county to pay "expenses" relating to operation of correctional facility, "expenses" included "legal costs

incurred in defending [action against employees of facility], *and the payment of any judgment that might be entered against the Employees*.") (emphasis added).[5]

UMB's further argument -- that, because the Indentures include the word "judgment" in their definition of "Losses" but not in their definition of "Expenses," the Court should conclude that the intent of the Indentures was to *exclude* judgments from "Expenses" -- fails for a number of reasons. First, this argument ignores the fact that the words "costs" and "expenses," which the definition of "Expenses" includes, are broad enough to encompass a judgment. More fundamentally, UMB ignores the fact that the defined term "Losses" appears just a handful of times in each of the Indentures, and is completely absent from their payment waterfall provisions. (ALI § 3.08; ATI § 3.08). Thus, the interpretation that UMB urges, under which judgments are "Losses" but not "Expenses," would leave APG unable *to ever satisfy any judgment*. There is no reason to believe that the drafters of the Indentures intended to create entities that could not pay judgments rendered against them. And given that UMB has asserted damages claims against APG in this action, it appears that even UMB does not believe the Indentures work in that fashion. (Am. Compl. ¶¶ 106-11). The Court should decline UMB's invitation to interpret the Indentures in a manner that leads to an absurd result.

B. Holdings Incurred Its Contingent Liability to Transbrasil in the Course of Permitted Business Activities.

The Court also should conclude as a matter of law that Holdings will have incurred any liability arising from the Transbrasil Litigation "in the course of the business activities permitted under section 5.02(e) of either Indenture." (ALI at 16; ATI at 16). In

[5] Although UMB cites three cases in support of its argument on this point -- *Shammas v. Focarino*, 990 F. Supp. 2d 587 (E.D. Va. 2014); *In re Martin Designs, Inc.*, 2013 WL 1195706 (Bankr. N.D. Ohio Mar. 22, 2013); and *Advocare Int'l, L.P. v. Horizon Labs, Inc.*, 2005 WL 1832116 (N.D. Tex. Aug. 2, 2005) -- none of those cases considered the question whether the words "fee," "cost" or "expense" could encompass a judgment. Accordingly, these cases are irrelevant here.

particular, the business activities that section permits include "leasing . . . of the Aircraft and entering into all contracts and engaging in all related activities incidental thereto, including . . . permitting [Holdings] to accept, exchange or hold . . . promissory notes . . . of Lessees in settlement of delinquent obligations." (ALI § 5.02(e)(i); ATI § 5.02(e)(i)). The Transbrasil Litigation arose from APG's permitting Holdings to hold promissory notes that Transbrasil issued to satisfy delinquent obligations under its leases with Holdings. (Am. Compl. ¶¶ 30-31; Countercl. ¶¶ 30-31, 154). Thus, any judgment against Holdings in the Transbrasil Litigation falls comfortably within the Indentures' definition of "Expenses." UMB's arguments to the contrary are meritless.

UMB does not dispute -- nor could it -- that the authorization in section 5.02(e) of the Indentures of "all related activities incidental" to "leasing . . . of Aircraft," including "permitting [Holdings] to accept, exchange or hold . . . promissory notes . . . of Lessees in settlement of delinquent obligations," would extend to engaging in litigation with an aircraft lessee arising from efforts to collect on a note that the lessee issued to satisfy its payment obligations. Reading section 5.02(e) to *prohibit* this sort of activity would lead to the absurd result that APG or its subsidiaries could accept promissory notes in satisfaction of lessee obligations, but could never seek to collect on such notes if the lessee defaulted on them. Instead, UMB contends that any liability of Holdings in the Transbrasil Litigation would not arise from a permitted business activity because "it would be a result of GECAS's violations of Brazilian law in acting on behalf of [Holdings and the other Lessors]." (UMB Br. at 18). UMB both misinterprets the Indentures and improperly relies on unsupported factual assertions.

UMB's argument boils down to an assertion that GECAS's conduct in relation to the Transbrasil Litigation was not a permitted business activity under section 5.02(e) of the

Indentures. But *GECAS's* activities are immaterial to that section, which addresses the business activities in which *APG and its subsidiaries* may engage. And the only activity of *Holdings* giving rise to the Transbrasil Litigation was Holdings' retention of GECAS to act as servicer for its aircraft leases -- an activity that indisputably falls within the ambit of section 5.02(e). Indeed, the Servicing Agreement between GECAS and APG expressly provided that, in performing its services for APG and its subsidiaries, GECAS would "comply in all material respects with all laws, rules and regulations" applicable to it. (Finestone Exh. E § 5.02).

If, as UMB asserts, any judgment against Holdings in the Transbrasil Litigation would necessarily arise out of a ruling that GECAS acted maliciously or in bad faith, such a ruling would not mean that *Holdings* acted with malice or bad faith. UMB has not alleged that Holdings did so. To the contrary, it is undisputed that Holdings was not even aware of the Transbrasil Litigation until approximately 2010 -- nine years after it began -- and that GECAS directed the proceedings in the Transbrasil Litigation on Holdings' behalf. (Countercl. ¶ 155; UMB Ans. ¶ 31).

Moreover, the factual premise underlying UMB's argument -- that any judgment in the Transbrasil Litigation would necessarily arise out of "bad faith" by GECAS -- is itself faulty. UMB's only basis for this assertion is an unofficial translation of the February 2010 Decision that UMB did not attach to its complaint, and the accuracy of which APG has not admitted. (*See* Finestone Exh. F). And although UMB alleges that the May 2007 Decision and February 2010 Decision could not be reinstated absent such a finding of "bad faith" by GECAS, APG denied that allegation. (*See* Am. Compl. ¶ 65-66; Countercl. ¶ 65-66). Accordingly, that supposed "fact" cannot form the basis for a judgment on the pleadings in UMB's favor. *See*

Gioconda, 941 F. Supp. 2d at 427 (movant under Fed. R. Civ. P. 12(c) "impliedly admits . . . the falsity of its own assertions that have been denied by [the non-movant]").

Holdings' retention of GECAS as servicer of its leases was a permitted business activity under section 5.02(e) of the AL Indenture. UMB's unsupported assertions that *GECAS* acted improperly, and that any judgment necessarily would arise out of a ruling that GECAS violated Brazilian law, are immaterial. UMB's argument fails.[6]

C. Holdings' Expenses Related to the Transbrasil Litigation Are Anticipated to Become Due and Payable.

Although UMB repeatedly characterizes Holdings' liability in the Transbrasil Litigation as "hypothetical," the possibility of such liability is very real. (*See*, *e.g.*, UMB Br. at 15, 20, 21). UMB's dismissive treatment of the potential magnitude of Holdings' contingent liability ignores the Orders to Pay -- entered in 2012 before they were cancelled in 2014 -- that UMB acknowledges could have required Holdings to pay at least $80 million and perhaps more. (Am. Compl. ¶ 38; *see also* pages 7-8, *supra*). Indeed, UMB itself has confirmed that Holdings is subject to a contingent, rather than "hypothetical," liability by asserting (albeit incorrectly) that an event of default has occurred by reason of a $100 million *judgment* against Holdings in the Transbrasil Litigation. (Am. Compl. ¶¶ 84-85). And that contingent liability did not disappear following the October 2013 Decision or the cancellation of the Orders to Pay, given the undisputed fact that Transbrasil has not exhausted its appeals. (Countercl. ¶ 158; UMB Ans. ¶ 34; Paes Decl. ¶ 5).

[6] UMB also makes the odd argument that "Airplanes Limited has never articulated . . . 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 [Lessors]." (UMB Br. at 19.) There is no allegation in UMB's Amended Complaint, however, that any portion of the Reserve has ever related to any contingent liability in the Transbrasil Litigation of any Lessor other than Holdings. Accordingly, UMB's argument is immaterial to its motion.

Nevertheless, in the face of this very real contingent liability, UMB claims that the Indentures bar APG from reserving for such liability as a "Permitted Accrual" because it is not "anticipated to become due and payable in any future Interest Accrual Period." (UMB Br. at 20.) In support of that position, UMB offers the extraordinary assertion that a contingent liability is "anticipated" *only* if it is *100 percent certain* to become due and payable. (UMB Br. at 20-21). UMB is wrong. If the Indentures intended to achieve the result UMB suggests, they would have defined "Permitted Accruals" to include non-recurring expenses that "will" become due and payable, rather than expenses "anticipated" to become so.

Contrary to UMB's position, a future event need not be certain in order to be "anticipated." UMB's reliance on isolated snippets from dictionary definitions of "anticipate" ignores definitions that contradict its position. Thus, Merriam-Webster defines "anticipate" as including "to give advance thought, discussion, or treatment to" and "to foresee and deal with in advance: forestall." Sinaiko Exh. 5. Similarly, the American Heritage Dictionary definition of "anticipate" includes "[t]o deal with beforehand; act so as to mitigate, nullify, or prevent." Sinaiko Exh. 6. And the MacMillan Dictionary definition of "anticipate" includes "to guess that something will happen, and be ready to deal with it." Sinaiko Exh. 7. These definitions confirm that an event that is foreseen, even if not certain to occur, is "anticipated." Thus, APG has reasonably given forethought to the possibility that Holdings will incur a substantial judgment, and has taken appropriate measures -- *i.e.*, reserving funds -- to prevent any adverse impact that may befall APG as a result of a failure to satisfy such a judgment.

The cases that UMB cites for the definition of "anticipate" do not suggest otherwise. UMB cites to a completely inapposite analysis of whether an insured's motorcycle death was "accidental" in *King v. Hartford Life & Acc. Ins. Co.*, 414 F.3d 994 (8th Cir. 2005),

but fails to acknowledge that it is citing to the *dissent*. (UMB Br. at 21). The Court in *Al-Kasid v. L-3 Commc'ns Corp.*, 2013 WL 1688851 (E.D. Mich. Apr. 18, 2013), interpreted a contractual pay rate based on an "anticipated 12 hour work day" as prohibiting the plaintiff from billing for more than 12 hours. *Id.* at *6-8. The Court based its conclusion on the facts that the contract provided for billing "additional" hours on travel days, and plaintiff testified that he *agreed* with the employer's interpretation. No similar factors influence interpretation of the Indentures here.

In *Cyze v. Banta Corp.*, 2009 WL 2905595 (N.D. Ill. Sept. 8, 2009) the court held that an employment contract provision requiring severance benefits if the employee was terminated "in anticipation of" a change in control of the company applied only where the employers "know of an impending, rather than speculative, change in control." *Id.* at *6. The court determined that the parties' intent was to protect executives who might be dismissed in advance of a takeover in order to reduce the buyer's acquisition cost. *Id.* Such facts are not analogous to the Indenture provisions at issue here. Finally, in *SN Sands Corp. v. City & Cty. of San Francisco*, 167 Cal. App. 4th 185, 193 (Ct. App. 2008), the court held that a municipal law requiring that a city's Board of Supervisors approve contracts involving "anticipated expenditures" of more than $10 million necessitated looking at the probability of expenditures that might elevate a project's cost above the $10 million mark; the court did not impose the requirement of 100% certainty that UMB claims here.

Under UMB's view of the Indentures, APG could not reserve for a contingent litigation liability unless there was a final judgment for which all appeals were exhausted. And until that point, APG would have to impair its ability to satisfy the judgment by making payments to Note holders. No rational counterparty would have been willing to deal with APG, if APG had been subject to such a restriction.

D. UMB's Remaining Arguments Concerning APG's Reserve in Respect of the Transbrasil Litigation Are Likewise Meritless.

Apart from its strained and unreasonable interpretation of the Indentures' definitions of "Permitted Accruals" and "Expenses," UMB offers two further arguments that simply ignore the commercial reality of APG's business.

UMB suggests that it is somehow "commercially unreasonable" to interpret the Indentures as allowing APG to pay judgments ahead of Note repayments, because such an interpretation "rides roughshod over the Noteholders' security interests." (UMB Br. at 23). Of course, this argument flies in the face of the offering memorandum and prospectus for the subclass A-9 Certificates, which expressly warned that "Expenses" of APG and its subsidiaries, including contingent liabilities of APG's subsidiaries, would be effectively senior to the Notes. (Countercl. ¶ 127). Apart from its inconsistency with offering documents, UMB's argument is commercially unreasonable. From its inception in 1995, the ability of APG and its subsidiaries to engage in its business -- and generate cash flows with which to make payments in respect of the Notes -- depended on the willingness of third parties to engage in transactions (such as aircraft leases) with them. But under UMB's construction of the Indentures, third parties would have no effective legal remedy against APG or its subsidiaries following an event of default under the Indentures, because APG would be obliged to pay all of its assets over to Note holders and hence unable to satisfy a judgment. No rational third party would do business with an entity subject to restrictions of that nature, not least because third parties would have no knowledge of whether an event of default was likely to occur. That is why the waterfall provisions in the Indentures prioritize payment of "Expenses," even if unsecured, ahead of payments in respect of the Notes, both before and after an event of default.

In arguing that Holdings' debt to APG somehow makes it unreasonable for APG to reserve for Holdings' contingent liability in the Transbrasil Litigation, UMB ignores the ILA. (UMB Br. at 23). By its explicit terms, the ILA prohibits APG from avoiding payment of the borrower subsidiaries' expenses by setting them off against those subsidiaries' debts to APG. (ILA § 8.5). While UMB may believe it is "unreasonable" and "illogical" for APG to comply with its contractual obligations to Holdings to ensure that Holdings' expenses are paid, UMB cannot pick and choose which of APG's contractual obligations it will honor.[7]

II. UMB'S OTHER CLAIMS OF EVENTS OF DEFAULT ALSO FAIL AS A MATTER OF LAW

As we have shown, APG is entitled to judgment on the pleadings as to UMB's claim that, as a result of the establishment of the Reserve, a payment default occurred under section 4.01(c) of the AL Indenture. (Point I, *supra*). Under the plain language of the Indentures, UMB also cannot establish any of the three other events of default alleged in the Purported Default Notices. Accordingly, the Court should grant judgment on the pleadings in APG's favor as to those purported events of default as well.

First, there is no merit to UMB's claim that the May 2007 Decision, the February 2010 Decision and the Orders to Pay constitute, as of today, a judgment rendered against Holdings in excess of $100 million in connection with the Transbrasil Litigation, and hence an event of default under section 4.01(h) of the AL Indenture. (Am. Compl. ¶¶ 84-85). That section expressly states that an event of default "shall be deemed to exist and continue so long as, *but only so long as*, it shall not have been remedied." (ALI § 4.01) (emphasis added). But as

[7] UMB wrongly claims that section 4.01(h) of the AL Indenture -- which provides that, under certain circumstances, an event of default occurs if a money judgment larger than $100 million is entered against APG or one of its subsidiaries -- somehow suggests that the Court should read the Indentures as providing that judgments against APG would not be "Expenses" with payment priority over the Notes. (UMB Br. at 23). UMB has it backward. Only if judgments *are* "Expenses" that rank above the Notes in payment priority and thus deplete the collateral securing the Notes, would Note holders need the ability to declare an event of default if a judgment were entered against APG.

UMB admits, the October 2013 Decision reversed the May 2007 Decision and the February 2010 Decision, and the lower Brazilian court cancelled the last of the Orders to Pay in August 2014. (Am. Compl. ¶¶ 40-41, 85). Thus, even if an event of default under section 4.01(h) of the AL Indenture had previously occurred -- which APG does not concede -- any such default ceased to exist nearly *two years* before the Directing Certificate Holders sent the June 16 Direction.[8]

Second, UMB alleges that, as a result of its "involvement" in the Transbrasil Litigation, Airplanes Limited somehow breached section 5.02(e) of the AL Indenture by engaging in activities that section does not permit. (Am. Compl. ¶ 86). But, as UMB has admitted, the Transbrasil Litigation arose from efforts by and on behalf of Holdings to collect on promissory notes that Transbrasil issued in respect of unpaid amounts due under aircraft leases. (Am. Compl. ¶¶ 29-31). For that reason, any "involvement" of Airplanes Limited in the Transbrasil Litigation lies at the heart of the authorization under section 5.02(e)(i) of the AL Indenture. (*See* Point I(B), *supra*).

Third, the Purported Default Notices -- but not the Amended Complaint -- assert that Airplanes Limited, by paying and/or reserving for Holdings' defense costs and potential liability in the Transbrasil Litigation, somehow violated the prohibition in section 5.02(e)(ii) of the AL Indenture on "guaranteeing or otherwise supporting the obligations and liabilities of any [Airplanes Limited subsidiary]" where doing so "would materially adversely affect the Noteholders." (Finestone Exh. M at 3; ALI § 5.02(e)(ii)). But the language of that section makes no mention of, and therefore does not prohibit, payment of (or reserving for) subsidiary

[8] UMB suggests that, notwithstanding the reversal years ago of the May 2007 Decision, the February 2010 Decision and the Orders to Pay, the supposed default under section 4.01(h) of the AL Indenture has not been remedied because "Airplanes Limited is maintaining a $190 million reserve on account." (Am. Compl. ¶ 85). But a default under section 4.01(h) of the AL Indenture exists *only* where "any judgment or order for the payment of money in excess of $100,000,000 shall be rendered against [APG or its subsidiaries]." (ALI § 4.01(h)). There is no textual basis for UMB's assertion that establishment of a reserve by APG could constitute a default under that section.

expenses. Rather, the AL Indenture provides unequivocally for payment of the expenses of APG and its subsidiaries from the Collection Account, and reserving for such expenses, in priority to all other items (including Note principal and interest). (ALI §§ 3.01(d), 3.08). Moreover, under the ILA, governed by Irish law, certain Airplanes Limited subsidiaries (including Holdings) caused all lessees and purchasers of their aircraft to remit lease and sale payments directly to the Collection Account, leaving those subsidiaries unable to pay their own expenses, in exchange for Airplanes Limited's undertaking to pay those expenses using amounts in the Collection Account, consistent with the terms of the AL Indenture. (ILA §§ 8.1, 12.2, 12.3). Thus, any claim that section 5.02(e)(ii) of the AL Indenture somehow prohibits Airplanes Limited from paying or reserving for its subsidiaries' expenses not only lacks support in the language of that section, but also ignores the language and structure of the governing transaction documents.[9]

Conclusion

For all of the foregoing reasons, the Court should deny UMB's motion, and grant APG's cross-motion, for judgment on the pleadings.

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Respectfully submitted,

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[9] Because UMB has failed to establish that *any* event of default occurred under the AL Indenture, UMB also cannot establish an event of default under the cross-default provision in section 4.01(e) of the AT Indenture. Thus, APG is entitled to all of the declaratory relief it seeks by its counterclaim.