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 IN FURTHER SUPPORT OF THEIR CROSS-MOTION FOR JUDGMENT ON THE PLEADINGS

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Defendants Airplanes Limited and Airplanes U.S. Trust (together, "APG") respectfully submit this Reply Memorandum in further support of their cross-motion for judgment on the pleadings.[1]

Preliminary Statement

In opposition to APG's cross-motion, UMB repeatedly distorts the pleadings and other documents before the Court. For example:

- UMB incorrectly asserts that the Transbrasil Litigation "concerns whether GECAS, Airplanes Holdings' authorized agent, violated Brazilian law, or acted with 'malice' or 'bad faith' in seeking to enforce the [Transbrasil Notes]." (Dkt. No. 52 at 8). But the October 2013 Decision -- on which UMB relies -- demonstrates that Transbrasil asserted a number of different claims against Holdings, only one of which depends on findings of "malice" or "bad faith" on the part of GECAS.

- UMB contradicts its Amended Complaint by arguing that the October 2013 Decision "reversed" a "prior judgment against [Holdings]," and that the rejection on November 23, 2016 of Transbrasil's appeal from the October 2013 Decision "render[s] *any* potential liability even more remote." (*Id*. at 3) (emphasis added). UMB's pleading alleges that the October 2013 Decision reversed prior rulings against Holdings only "in several significant respects." (Am. Compl. ¶ 39). The October 2013 Decision -- consistent with UMB's pleading, rather than its brief -- left in place certain prior findings against Holdings and held, in light of those findings, that Holdings faces liability for damages that Transbrasil will have the opportunity to prove in subsequent proceedings.

- UMB claims that "all parties agree that any judgment [against Holdings in the Transbrasil Litigation] is at best a remote possibility." (Dkt. No. 52 at 1). But APG acknowledged in its 2016 Annual Report -- which UMB submitted to the Court -- that Holdings faces liability to Transbrasil even if the October 2013 Decision remains undisturbed on further appeal.

Thus, while the parties' pleadings do not establish facts permitting this Court to evaluate the likelihood that the Brazilian Supreme Court will reverse or modify the October 2013 Decision in any respect, the Court need not address that issue.

[1] Unless otherwise defined, capitalized terms in this brief have the meanings ascribed to them in our opening brief. UMB responded to APG's cross-motion in briefs dated January 30, 2017 and February 6, 2017 (Dkt. Nos. 52, 54).

APG is entitled to the relief its cross-motion seeks. There is no serious dispute that any liability of Holdings in the Transbrasil Litigation would arise from efforts to collect monies owed by a lessee -- an activity at the core of the business that the Indentures authorize -- and would qualify as a "fee, cost or expense," and hence an "Expense," under the Indentures. Moreover, the October 2013 Decision demonstrates that a judgment against Holdings in the Transbrasil Litigation is not the mere "hypothetical" that UMB suggests, but rather falls well within the range of "anticipated" expenses for which the Indentures permit APG to reserve. (Point I, *infra*). The pleadings likewise fail to establish that an event of default has occurred by reason of entry of a judgment against Holdings, or by reason of Holdings' or APG's engaging in business activities beyond the Indentures' authorization. (Points II and III, *infra*). APG respectfully submits that the Court should grant its cross-motion for judgment on the pleadings in all respects. Alternatively, the Court should conclude that fact issues preclude judgment on the pleadings for either APG or UMB with respect to the supposed event of default that is the subject of UMB's Rule 12(c) motion, and grant APG's cross-motion in all other respects.

Argument

I. THE PLEADINGS DO NOT ESTABLISH A "PAYMENT DEFAULT"

UMB's claim that an event of default has occurred under Section 4.01(c) of the AL Indenture hinges on its assertion that Holdings' contingent liability in the Transbrasil Litigation does not meet the definition of a "Permitted Accrual" for which APG is entitled to set a reserve. (Dkt. No. 52 at 1). UMB contends that a future judgment against Holdings and in favor of Transbrasil cannot constitute an "Expense" -- which the AL Indenture defines as "any fee[], cost[] or expense[] incurred by [APG or its subsidiaries] in the course of the business activities permitted under Section 5.02(e) of either Indenture" -- that is "anticipated to become due and payable" in the future. (ALI at 16 & § 3.01(d)). UMB's arguments are meritless.

A. A Judgment Against Holdings in the Transbrasil Litigation Is "Anticipated to Become Due and Payable."

In response to APG's cross-motion, UMB has walked away from the contention in its moving brief that one may "anticipate" an event only if it is *certain* to occur in the future, and now takes the view that the term "'anticipate' . . . require[s] at least *some* degree of certainty ranging from probable to certain." (Dkt. No. 30 at 20-21; Dkt. No. 52 at 2) (emphasis in original). UMB's argument ignores dictionary definitions that APG cited in its opening brief -- for example, the definition of "anticipate" as meaning "to *guess* that something will happen, and be ready to deal with it" -- demonstrating that one may "anticipate" events that are neither "probable" nor "certain." (Dkt. No. 47 at 20) (emphasis added). Those definitions and common sense dictate that the word "anticipate" encompasses an event that, in light of known facts, is reasonably foreseeable even if not probable. But even under UMB's "probable to certain" test, a future judgment against Holdings in the Transbrasil Litigation is "anticipated."

Contrary to UMB's assertion, the November 23, 2016 decision of the Federal Court of Appeals of Brazil, which declined to disturb the October 2013 Decision, did not "render[] *any* potential liability [of Holdings to Transbrasil] . . . remote." (Dkt. No. 52 at 3) (emphasis added). In fact, UMB has alleged that the October 2013 Decision, rather than eliminate *all* of the liability that Holdings faced in the wake of the February 2010 Decision, merely "overturned the [February 2010 Decision] in several significant respects." (Am. Compl. ¶ 39). Thus, while the October 2013 Decision set aside the findings of "malice" and "bad faith" that underpinned the prior determination that Transbrasil was entitled to collect penalties from Holdings under former article 1531 of the Brazilian Civil Code ("Article 1531"), it did *not* disturb the prior finding -- with which Holdings and the other Lessors disagree -- that the Transbrasil Notes had been paid in full. Rather, the October 2013 Decision held that those notes

"could not have been protested, since the debt had been paid" and that the Lessors were "partially guilty of protesting the notes." (Finestone Exh. G ¶¶ 36, 83).

The October 2013 Decision further ruled that -- although Holdings would not be liable for penalties under Article 1531 or "losses due to . . . TRANSBRASIL's bankruptcy" -- the "losses caused jointly by the defendants due to the unjustified protest of the promissory notes, as requested by TRANSBRASIL . . . *will be duly assessed*" and that "[c]onsidering the promissory notes protest was irregular, *the defendants must redress the damages caused*." (*Id*. ¶¶ 106, 108, 122) (emphasis added). Thus, despite UMB's arguments, the October 2013 Decision did not extinguish "any potential liability" of Holdings. (Dkt. No. 52 at 3). Rather, it established that, subject to proof of damages, Holdings *has* liability to Transbrasil *whether or not* the Brazilian Supreme Court ultimately reinstates the prior findings of "malice" and "bad faith."[2]

UMB likewise is wrong that APG's "assertions . . . in its public annual reports" somehow "show" that liability of Holdings to Transbrasil "is not anticipated to become due and payable." (Dkt. No. 52 at 2). In fact, APG's statements -- which *UMB* has placed before the Court -- reflect the opposite. For example, APG's 2016 Annual Report, released months before UMB sued APG here, notes that the October 2013 Decision ruled "that the [Lessors] (including [Holdings]) should be liable to indemnify Transbrasil for the loss, if any, which it suffered as a result of the protest of the [Transbrasil Notes] between the date when such protest was effected and the date of filing of the request for bankruptcy (subject to Transbrasil providing satisfactory evidence of any such loss)." (Finestone Exh. D at 17). The 2016 Annual Report also states that "[i]f the October 2013 Decision is maintained in full after" the exhaustion of all appeals, then

[2] The October 2013 Decision also noted that the lower court decision on appeal "[did] not specify the losses to be indemnified," but instead "generically stat[ed] the defendants' liability" for penalties under Article 1531 and "for all losses suffered by [Transbrasil] (*to be assessed*), including loss of profits" -- indicating that the lower Brazilian courts will assess damages after the appellate proceedings conclude. (Finestone Exh. G ¶ 108) (emphasis added).

"the calculation of possible damages to Transbrasil indicated by the October 2013 Decision *will be performed* in the context of the provisional enforcement proceeding filed by the former owners of Transbrasil in which they were originally seeking indemnification for the bankruptcy of Transbrasil and which now will be used for this purpose." (*Id*. at 16) (emphasis added). Separately, the 2016 Annual Report recognizes that, in Transbrasil's bankruptcy proceedings, a lower Brazilian court "order[ed] [Holdings] to pay court mandated legal fees, court costs and fines," that Holdings' appeal from that order was unsuccessful, and that the lower court "authorized Transbrasil and [its bankruptcy trustee] to initiate proceedings to collect the court mandated legal fees" after exhaustion of appeals from the October 2013 Decision. (*Id*. at 21).

Facts properly before the Court on APG's cross-motion establish that -- regardless of the outcome of any further appeals from the October 2013 Decision -- Holdings will face a proceeding in which Transbrasil may establish damages arising from GECAS's efforts to collect on the Transbrasil Notes, and to fix Holdings' liability for "court mandated legal fees, court costs and fines" relating to Holdings' proof of claim in Transbrasil's bankruptcy. Thus, a judgment against Holdings is "anticipated," even under UMB's unreasonably crabbed reading of that term, and this Court should so hold as a matter of law. At a minimum, the Court should conclude that fact issues preclude judgment on the pleadings for either APG *or* UMB on this point.

B. A Judgment Against Holdings in the Transbrasil Litigation Qualifies as an "Expense" Under the AL Indenture.

UMB similarly offers no persuasive response to our showing that any judgment Transbrasil recovers against Holdings in Brazil would be a "fee[], cost[] or expense[] . . . incurred . . . in the course of the business activities permitted by Section 5.02(e) of either Indenture." (ALI at 16). As APG has demonstrated, the words "cost" and "expense" easily encompass a judgment. (Dkt. No. 47 at 15-16). Moreover, because the Transbrasil Litigation

arises from efforts by GECAS (on behalf of Holdings) to collect on notes that Transbrasil issued in satisfaction of delinquent obligations under aircraft leases, any judgment against Holdings in that litigation arises from "accepting . . . promissory notes . . . of Lessees or their affiliates issued . . . in settlement of delinquent obligations . . . of such Lessees" -- a permitted business activity under both Indentures. (ALI § 5.02(e)(i); ATI § 5.02(e)(i); Dkt. No. 47 at 16-19). UMB's arguments to the contrary ignore common sense and undisputed fact.

In response to APG's opening brief, UMB repeats its prior, incorrect argument that, because the AL Indenture definition of "Expense" does not include the word "judgment," it cannot encompass any judgment entered against Holdings in the Transbrasil Litigation. (Dkt. No. 52 at 4-5). Apart from ignoring dictionary definitions of "cost" and "expense," UMB's interpretation, if adopted, would lead to the absurd result that APG could *never* satisfy *any* judgment. (*See* Dkt. No. 47 at 16). Recognizing this flaw in its position, UMB floats the notion that, even if the term "Expense" would not allow APG to pay judgments, APG *still* could satisfy judgments because the Indentures required APG to "procur[e] indemnity from lessees" and "maintain liability insurance policies to cover the risk of judgments and other Losses." (Dkt. No. 52 at 5). But the Indentures did not require APG to insure against *every* possible loss or liability. Rather, that section only required that APG obtain "airline hull insurance," "airline liability insurance," and "airline political risk insurance" that, respectively, protect against damage to the aircraft, liability to third parties (such as passengers) arising from operation of the aircraft, and political risks such as government expropriation of the aircraft. (ALI § 5.03(h); ATI § 5.03(h)). Likewise, the Indentures required APG to obtain indemnification from its lessees only against "losses or liabilities *arising from the use or operation of the Aircraft*." (ALI § 5.03(i); ATI § 5.03(i)) (emphasis added). Neither the insurance nor the lessee indemnity that the Indentures

required would protect APG or its subsidiaries against, or allow them to satisfy, commercial liabilities to lessees or other parties (like Transbrasil) with whom they transacted.[3]

UMB also lamely contends that any judgment against Holdings in the Transbrasil Litigation would necessarily arise from "tortious," "malicious," or "bad faith" conduct by GECAS, and hence could not be "incurred in the course of a permitted business activity under Section 5.02(e)." (Dkt. No. 52 at 1, 8; Am. Compl. ¶¶ 65-66). APG has denied that allegation in its Answer and Counterclaim, and its denial is consistent with the October 2013 Decision, which set aside findings that GECAS had acted with "malice" or "in bad faith" but held that Holdings nevertheless will have liability to Transbrasil, if Transbrasil is able to establish damages arising from the challenged collection efforts. (Countercl. ¶¶ 65-66). Thus, even if UMB were correct that a judgment against Holdings premised on a violation of Article 1531 would not be "in the course of" a permitted business activity, its argument would fail.

As a matter of law, any judgment against Holdings in the Transbrasil Litigation would be an "Expense" as the Indentures define that term. Alternatively, factual disputes exist on this point. Thus, as to this point, the Court should either grant APG's cross-motion for judgment on the pleadings, or deny both APG's and UMB's motions.

II. THE COURT SHOULD REJECT UMB'S "JUDGMENT DEFAULT" CLAIM

The pleadings fail to establish that any court has ever issued a "judgment or order for the payment of money in excess of $100,000,000" against APG or any of its subsidiaries, or that such a judgment was not remedied years before UMB commenced this action. UMB thus has not sufficiently alleged an event of default under Section 4.01(h) of the AL Indenture.

[3] This argument also ignores the fact that APG could distribute funds it received pursuant to a lessee indemnity or an insurance policy only pursuant to the payment waterfalls in Sections 3.08(a) and (b) of the Indentures. Thus, APG could use the proceeds of a lessee indemnity or insurance policy to satisfy a judgment *only* if the Indentures' definition of "Expense" includes judgments. UMB's further argument -- that APG could "discuss a waiver" with UMB if it ever needed to pay a judgment -- only underscores again that, in UMB's view, the Indentures do not allow APG to pay *any* judgments. (Dkt. No. 52 at 6).

As to the former element, UMB (a) points to the $165 million and $198.5 million damages calculations that Transbrasil's bankruptcy trustee and former owner presented in Brazil; and (b) claims that the Orders to Pay somehow established an "amount due" of "approximately $139 million." (Dkt. No. 54 at 2). But there is no allegation that any court ever adopted -- let alone directed Holdings to pay -- the amounts that Transbrasil's bankruptcy trustee and former owner demanded. Nor did the Orders to Pay direct Holdings to pay $139 million. Rather, the Orders to Pay directed a payment of approximately $80 million that was attributable to Holdings, and a further payment of $59 million as to which Holdings' share was uncertain. (Compl. ¶ 38; Countercl. ¶ 157). In any event, the Orders to Pay were vacated by August 2014.

UMB also has failed to plead that, even if an event of default under Section 4.01(h) previously occurred, any such event of default was not remedied years ago by the October 2013 Decision and the *vacatur* of the Orders to Pay. UMB's argument -- that simply reserving funds in respect of a contingent liability violates Section 4.01(h) -- is illogical. If no judgment had ever been entered in the Transbrasil Litigation, and yet APG found such liability sufficiently foreseeable as to warrant reserving for it, there could be no question that the mere act of reserving would not implicate Section 4.01(h). And the impact of any reserving decision on UMB would be the same whether or not APG set that reserve in respect of a *prior* judgment. It would make no sense for the parties to have intended Section 4.01(h) to prevent the reserving of funds to satisfy a potential judgment, but *only* where a judgment had previously been in force. The Court should reject UMB's argument.

III. APG HAS NOT BREACHED THE INDENTURES' "PERMITTED BUSINESS ACTIVITIES" COVENANT

UMB asserts that APG's "involvement in the Transbrasil Action through its agent, GECAS" is an activity that Section 5.02(e) of the AL Indenture does not permit,

constituting an independent event of default. (Am. Compl. ¶ 86). Specifically, UMB alleges that "GECAS's conduct was determined [by a Brazilian court] to be 'improper,' 'unreasonable,' and, at one point, in 'bad faith.'" (*Id.*). But UMB bases its allegations about GECAS's conduct on a purported regurgitation of the aspects of the February 2010 Decision that the October 2013 Decision overturned. Notably, UMB never alleges that GECAS actually acted maliciously or in bad faith; UMB alleges only that a Brazilian court found that GECAS did so. Thus, UMB asserts an event of default based solely on characterizations of GECAS's conduct in a decision that was successfully appealed. The absence of any allegations about GECAS's actual conduct is fatal to UMB's claim that such conduct constitutes an event of default.

But even if UMB could prove that GECAS did, in fact, act maliciously or in bad faith, UMB's claim still would be legally insufficient because such activity by *GECAS* would be immaterial to Section 5.02(e), which addresses the business activities in which *APG and its subsidiaries* may engage. Holdings' retention of GECAS to act as servicer for its aircraft leases was at the heart of the business activities that Section 5.02(e) of the Indentures authorizes. 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).

It is undisputed that Holdings did not instruct GECAS to act maliciously or unlawfully. In light of the October 2013 Decision in the Transbrasil Litigation, neither APG nor UMB has any basis to believe or allege that GECAS did so. UMB's allegation that *Holdings* acted outside the scope of its permitted business activities thus fails as a matter of law.[4]

[4] UMB also claims that "[e]ven if Airplanes Limited ultimately establishes that GECAS did not act maliciously or in bad faith, there would still be an Event of Default if GECAS violated Brazilian law." (Dkt. No. 54 at 4). Not only has UMB failed to allege that GECAS, in fact, violated Brazilian law, but the Amended Complaint seeks no declaration that such an event of default has occurred.

As to UMB's assertion that APG's maintenance of the reserve itself is an unauthorized business activity, UMB does not dispute that the AL Indenture provides for the payment of APG's expenses from the Collection Account, and for reserving for such expenses, in priority to all other items. (ALI §§ 3.01(d), 3.08). Nor does UMB dispute Airplanes Limited's undertaking to pay Holdings' expenses under the ILA. (ILA §§ 8.1, 12.2, 12.3). Rather, UMB's argument consists of the statement that "the Reserve is not for an Expense, and nothing in the ILA supports Defendants' position." (Dkt. No. 54 at 5). This alleged event of default thus rises or falls with UMB's assertion that APG's anticipated liability in the Transbrasil Litigation does not constitute an "Expense" under the Indentures. Because, as shown above and in APG's opening memorandum, such liability falls squarely within the definition of "Expense," APG is entitled to judgment on the pleadings as to this purported event of default as well.[5]

Conclusion

For all of the foregoing reasons, and those set forth in APG's opening papers, APG respectfully requests that the Court grant its cross-motion for judgment on the pleadings.

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February 13, 2017

Respectfully submitted,

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[5] UMB also wrongly contends that APG "has no obligation to reserve for its subsidiaries' future expenses," because the ILA only obliges APG "to pay -- subject to the terms of the Indenture[s] -- expenses that have been incurred and that are already due and payable or expected to become due within one month." (Dkt. No. 52 at 9-10) (*citing* ILA §§ 12.2, 12.3). This argument ignores the fact that APG established a reserve for Holdings' contingent liability in the Transbrasil Litigation pursuant to the *Indentures*, not the ILA, and that the Indentures *expressly* permit APG to set reserves for its subsidiaries' expenses that are "anticipated to become due and payable" in the future. (ALI § 3.01(d); ATI § 3.01(d)).