

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

In re:

TRANSBRASIL S.A. LINHAS AÉREAS

Chapter 15

Case No. 11-19484-AJC

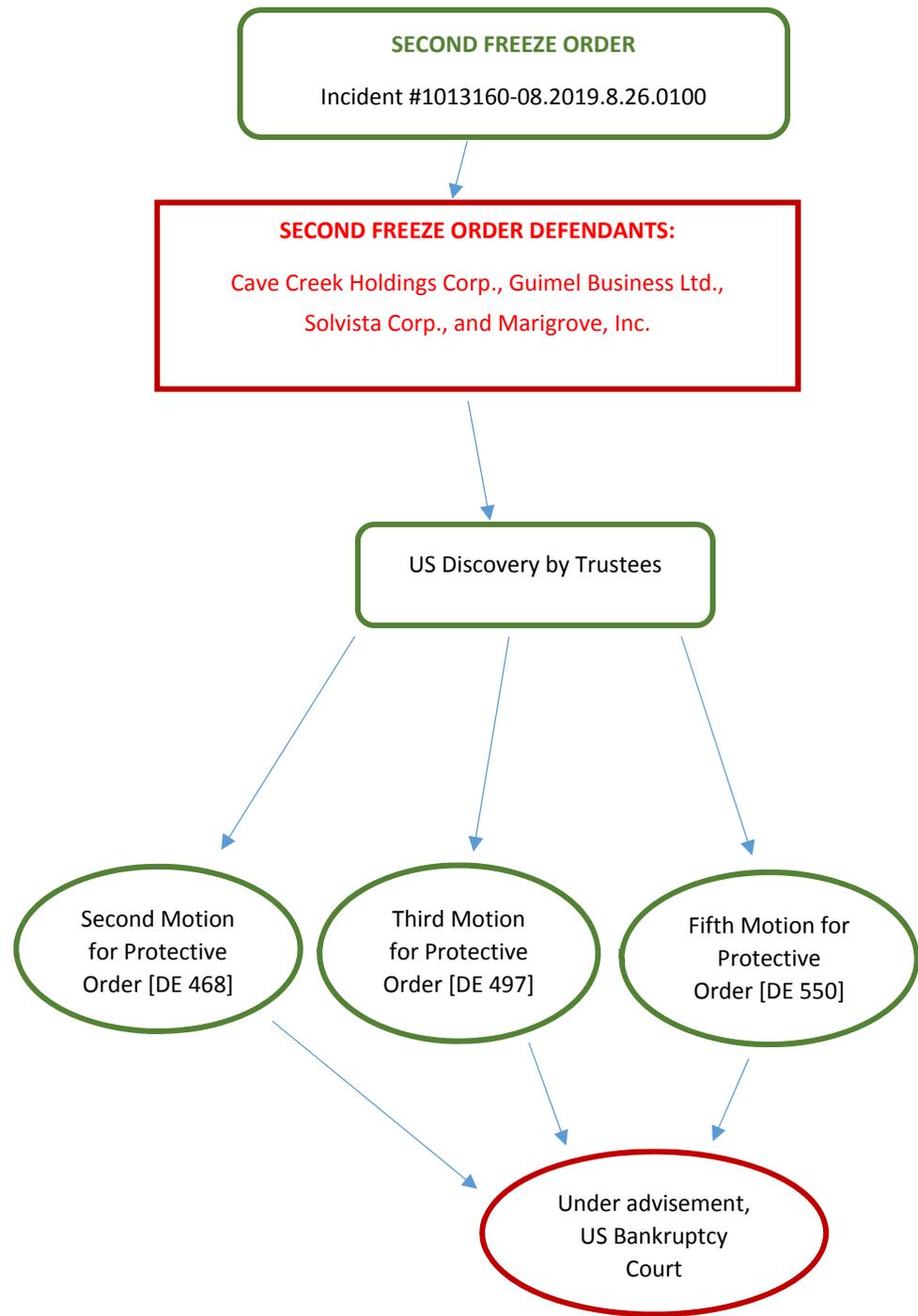
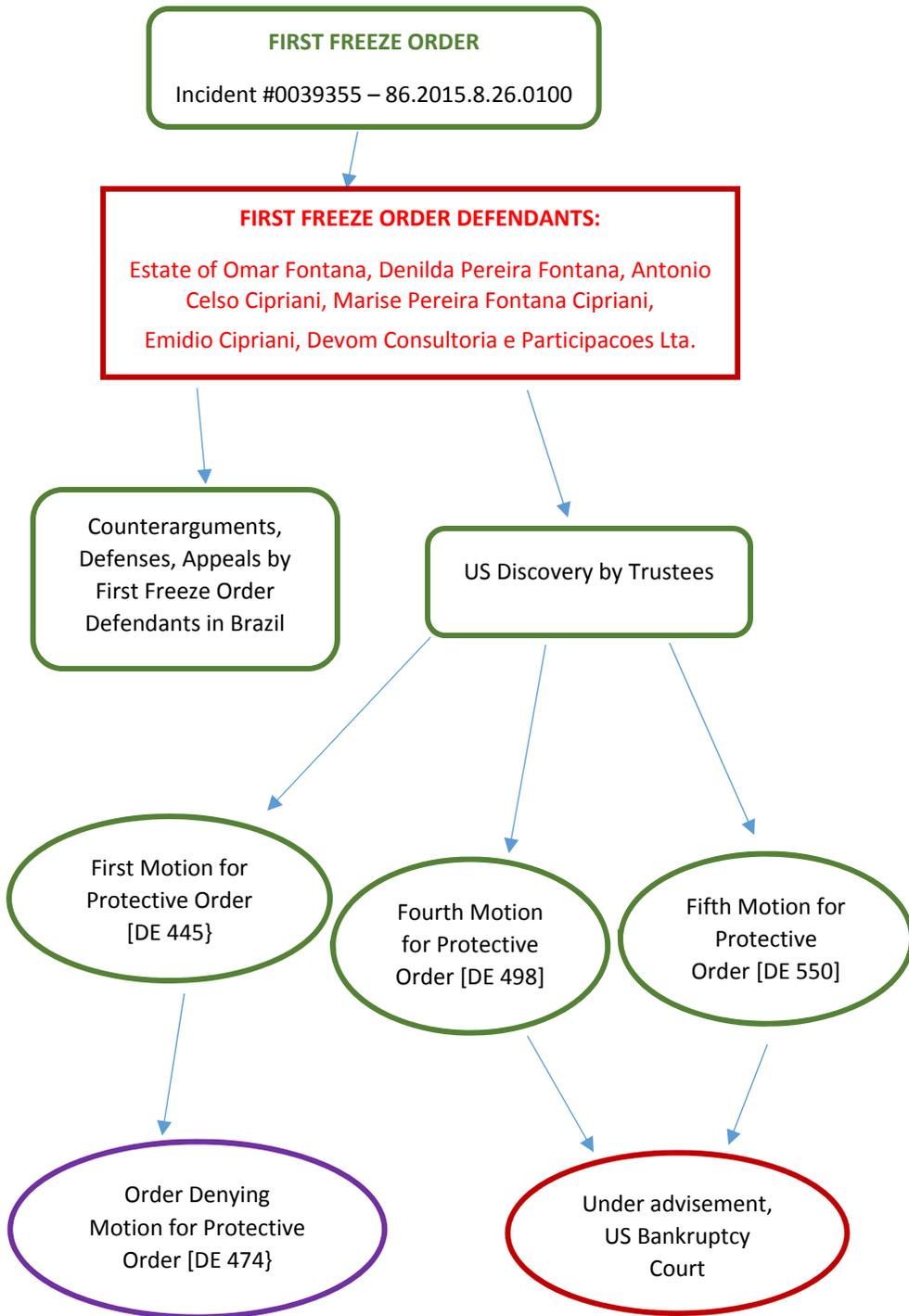
Debtor in a Foreign Proceeding.

**TRUSTEES' RESPONSE TO AMENDED JOINT MOTIONS FOR
PROTECTIVE ORDER FROM SUBPOENAS DUCES TECUM FOR
RULE 2004 EXAMINATIONS AND TO ABATE DISCOVERY [DE539, 550]**

Gustavo Henrique Sauer de Arruda Pinto and Alfredo Luiz Kugelmas (the “Trustees”), as Trustees of Transbrasil S.A. Linhas Aéreas (“Transbrasil”) file this response in opposition to the fifth joint motion for protective order (DE539, as amended by DE550, the “Fifth Joint Motion”) filed by a group of related parties against subpoenas related to certain orders of the Brazilian courts, and in support state:

1. This discovery saga has been going on so long that it is cumbersome to summarize in a narrative form. This discovery sought by the Trustees relates to two incidents or adversary proceedings in Brazil. In relation thereto, the Trustees have issued 16 subpoenas and the persons and companies who are additional defendants or implead defendants in those adversary proceedings have filed a motion for protective order in relation to each and every subpoena. Below is a graphic to assist the Court in understanding the relation of each of the five motions for protective order to the Brazilian Proceedings.¹

¹ All capitalized terms that are not defined herein shall have the meaning ascribed thereto in the Order Denying Motion for Protective Order, dated July 16, 2019 at DE474.



2. This Response addresses the Fifth Joint Motion for protective order in this discovery saga. Unlike the prior Joint Motions, this one relates to both the First and Second Freeze Orders because it seeks to strike two separate subpoenas to BOKF, N.A. d/b/a BOK Financial Corporation (DE 538, 547, the “Subpoenas”). One of the Subpoenas seeks information relating to the First Freeze Order Defendants and the other Subpoena seeks information relating to the Second Freeze Order Defendants.

3. The Trustees hereby incorporate by reference this Court’s Order Denying Motion for Protective Order [DE474], the arguments raised in response to the First, Second, Third and Fourth Joint Motions [DE451, 492, and 521], and their arguments at the hearings held on March 21, 2019, August 15, 2019, and October 1, 2019 [DE454, 499, and 531].

4. In addition, the Movants seek to rely upon statements of their counsel made at the hearing held in this Chapter 15 Case on October 1, 2019 relating to events in Brazil. At the October 1st hearing, the Movants ask this Court to review facts and evidence upon which the Brazilian courts had issued the First Freeze Order and the Second Freeze Order. Movants allege, through counsel and without providing any proof, that the R\$100 million government bailout “was not funded in cash.” Transc. ECF 531, p. 47, ln. 25; p. 46, lns. 10-16. Movants further allege that an intervening party, the governmental airport authority (Infraero), is in possession of the bankrupt’s missing accounting records. *Id.* at 46, lns 1-12. The record in this Chapter 15 Case does not contain any evidence supporting these allegations, and in any event, it is not appropriate for this Court to weigh the evidence relating to events in Brazil that either are under consideration or have already been considered in the Brazilian Proceedings.

5. The record in the Brazilian Proceedings shows that since at least November 16, 2017, the First Freeze Order Defendants have been responding and filing papers in an attempt to

dissolve or reverse the First Freeze Order. The argument made by the First Freeze Order Defendants that the R\$100 million bailout was not funded has been made and remains under the advisement of the Brazilian Bankruptcy Court. Furthermore, the argument that Infraero (the governmental airport authority) is in possession of Transbrasil's books and records is not at all consistent with the facts on the ground.

6. During the time when Transbrasil was still operational and before it was declared bankrupt, it missed several rent payments due for its airport real estate. Infraero therefore commenced a proceeding to evict Transbrasil from the airport real estate under its control. Transbrasil as a company and the individuals in control of it, were on notice of these eviction proceedings and in fact were given several opportunities to retrieve personal property both before and after the eviction was complete. In a letter dated 10 April 2002 (shortly before the Brazilian Appellate Court declared Transbrasil to be in bankruptcy), Infraero informed Transbrasil that its personal property, which had been duly inventoried when Infraero took possession of the airport facilities, was available to be retrieved by Transbrasil. See Composite Exhibit "1" attached hereto. Infraero's detailed inventory, also included in Composite Exhibit 1, does not include the mandatory books and records of Transbrasil. Furthermore, in letters dated 23 January 2003 and 31 January 2003, Infraero again informed Transbrasil that its personal property from the airports was available for retrieval. See Composite Exhibit "2" attached hereto.²

7. It seems doubtful that these critical books would have been inadvertently abandoned during the eviction, particularly since they are not listed in the inventory. Moreover, if the books had been lost, Transbrasil's former shareholders would have jumped at the opportunity

² Exhibits 1 and 2 are in Portuguese, with English translations to be filed as soon as they are available.

to retrieve them. However, that does not appear to have transpired.

8. It is the role of the finder of facts to weigh the evidence and determine what it means that the mandatory accounting books were not presented. It is inappropriate for this Court, while sitting in an ancillary capacity under chapter 15, to act as a *de facto* appellate court for the courts in the foreign main proceedings. The fact-intensive review requested by the Movants at the October 1st hearing would constitute a fracture in the foundation of chapter 15 – that is, a system of modified universalism requires mutual respect among courts and jurisdictional limits. For this Court to review arguments that have been raised or could have been raised in Brazil regarding events that transpired in Brazil, exceeds the limits of an ancillary court’s role.

9. The Brazilian Appellate Court, in a decision rendered after the First Freeze Order Defendants had been given an opportunity to be heard, found that the “supposedly lost” accounting books were critical in that they “ought to show the destination of the monies and assets[.]” DE437, p. 10. The Brazilian Appellate Court concluded that the suspicious transfers and cash deposits, when coupled with the failure to present the mandatory books “gives credence to allegations that the destination of these large transfers was concealed and the amounts were apparently embezzled by the [First Freeze Order Defendants].” *Id.*

10. The Brazilian Bankruptcy Court, after noting the “Cipriani Group’s” use of black market currency dealers from BANESTADO to send Transbrasil’s cash abroad and the receipt of funds from those black market currency dealers by the Second Freeze Order Defendants, commented that the failure to present the accounting books indicates the intentional nature of the acts committed:

[N]oteworthy is the fact that [Transbrasil’s] accounting books were not presented, indicating the intention to omit the destination of the assets in the period immediately before the decree of bankruptcy.

DE460, p. 22.

11. Based its assessment of the volumes of evidence presented by the Trustees, the Brazilian Bankruptcy Court implements measures designed to prevent the transfer of any assets held by the Second Freeze Order Defendants in Brazil and seeks assistance from this Court relating to those assets outside the Brazilian territory. The Second Freeze Order orders the Trustees to do the following:

[R]equest the attachment and lien of real and personal property of CAVE CREEK HOLDINGS CORP., GUIMEL BUSINESS LTD., SOLVISTA CORP. and MARIGROVE INC., located in the United States of America and/or under the jurisdiction of such country, which will be considered, provisional and in limine, as debtors for the effects of the provisions of Chapter 15 of the US Bankruptcy Code, provided that, since it is not final judicial relief, the remedies taken by the Bankruptcy Estate and its representatives must be restricted to the impediment of divestiture and asset encumbrance, maintaining the Defendants in the administration of their assets, although under the supervision of the Court responsible for the supplemental bankruptcy filed in the United States of America.

ECF 460, p. 27-28.

12. The Subpoenas and other discovery efforts seek information necessary to implement this mandate and to preserve the status quo during the litigation, as well as information that could be relevant to the underlying and ongoing dispute on whether to extend the effects of Transbrasil's bankruptcy to the First and Second Freeze Order Defendants.

WHEREFORE, the Trustees respectfully request that this Court deny the Fifth Joint Motion and enter any such other and further relief as the Court deems just and proper under the circumstances.

Dated this 6 December 2019.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was filed and sent via electronic filing using the CM/ECF system with the Clerk of the Court which sent e-mail notification of such filing to all CM/ECF participants in this case on December 6, 2019.

By: /s/ Nyana Abreu Miller
Nyana Abreu Miller

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