

**IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION**

MICHAEL W. WYNNE, SECRETARY, UNITED STATES AIR FORCE,	:	Civil Case No. 3:06-cv-0122
	:	
Plaintiff,	:	Judge Thomas R. Rose
vs	:	
COMMEMORATIVE AIR FORCE,	:	
Defendant.	:	

MOTION OF THE SECRETARY OF THE UNITED STATES AIR FORCE
FOR
SUMMARY JUDGMENT

Comes now Michael W. Wynne, Secretary of the United States Air Force, acting in his official capacity, by and through the United States Attorney for the Southern District of Ohio, and does, move this Court to grant Summary Judgment in his favor. The reasons and legal argument in support of this Motion are set forth in the accompanying Brief in Support.

Respectfully submitted,

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Brief in Support of
Secretary of the United States Air Force's
MOTION FOR SUMMARY JUDGMENT

This is an action seeking a declaratory judgment regarding the rights of the Government under a donation CERTIFICATE¹, which the Government contends is a contract. The dispute arises from the Defendant's failure to comply with the terms of the CERTIFICATE. The CERTIFICATE was a contractual document used by the Air Force during the 1960's to accomplish the donation of surplus military aircraft to museums and municipalities. In the case at bar an F-82-B "twin Mustang" fighter was donated to the Commemorative Air Force (formerly known as the Confederate Air Force)² by the Secretary of the Air Force acting through the Air Force Logistics Command and the United States Air Force Museum (now known as the National Museum of the United States Air Force) and the Military Aircraft Storage and Disposition Center at Davis Monthan AFB in Arizona. The government contends that the CAF attempted to sell, trade and/or transfer the aircraft to a third party without complying with the notice requirements of the CERTIFICATE. When the attempted sale of the F-82-B aircraft was discovered by employees of the National Museum of the United States Air Force, the Secretary of the Air Force exercised his rights under the terms of the donation CERTIFICATE and demanded the return of the rare and unusual Air Force aircraft. To date the Defendant CAF

¹The actual title of the donation agreement is "CERTIFICATE" it is a form of contract which was utilized by the Air Force during the mid-1960's when aircraft no longer needed for defense were donated to certain types of civic groups and museums.

² The Confederate Air Force changed its name to the Commemorative Air Force which is the present name for the same organization. Hereinafter CAF will be used to refer to the group regardless of which name they were using at the time.

refuses to comply with the directions of the authorized agents of the Secretary of the United States Air Force in further violation of the terms of the CERTIFICATE.

Various discussions and efforts to achieve non-judicial resolution of this matter occupied the parties for many months. Both the NMUSAF and the CAF filed suit in federal court in the Spring of 2006. The case in the Southern District of Ohio was stayed pending the resolution of jurisdiction and venue questions in the case filed by the CAF in the Central District of California. (doc 3 & 10) In April of 2007 this Court was notified by the CAF that the Court in California had dismissed that case. (doc. 13) A schedule was set for this case and the parties recently reported to the Court that discovery was completed with no problems. The parties are now engaged in cross motions for summary judgment.

JURISDICTION AND VENUE

Neither party disputes that the issues in this case are within the Court's subject matter jurisdiction under 28 U.S.C. §1345. The Plaintiff is the Secretary of the United States Air Force acting in his official capacity seeking to recover property of the United States Air Force; specifically F-82 B serial number 4465162. Proper venue has been previously determined to lie within the Southern District of Ohio.

BACKGROUND FACTS

The Secretaries of the military services are authorized by Congress to loan to museums and/or historical societies items of historical interest including artifacts and obsolete military combat equipment. 10 U.S.C. §2572. The Secretary of the Air Force has delegated this authority to The National Museum of the United States Air Force (Hereinafter NMUSAF) which is located

at Wright Patterson Air Force Base.³ That organization has responsibility for all Air Force and former Army Air Corps aircraft and equipment on loan to museums, municipalities, veterans' groups, etc. throughout the world.

In an attempt to gain control over the disposal of equipment and supplies no longer needed by the armed forces, the Department of Defense issued the "Defense Disposal Manual", the 1964 Manual was designated DSAM 4160.1.⁴ The Manual, applicable to all of the armed services, placed restrictions on the methods of donation and types of surplus material which could be donated. In general the Manual called for the destruction of all fighter and bomber aircraft before they could be sold for scrap. A limited exception was made for donations to certain types of civic and veterans groups as well as non-profit museums.

In the summer of 1954 the Navy determined that the aircraft which is the subject of this litigation was no longer needed for its purposes and returned it to the Air Force. (Atch 2, encl 1) As it was also surplus to the operational needs of the Air Force and because there were requests for it and similar aircraft from Air Force base museums for use in their displays, control of the F-82 was transferred to the Air Force Museum. In October of 1954 the Air Force Museum released the F-82-B serial number 44-65162 to Lackland Air Force Base (Hereinafter Lackland

³ The terms and limitations on this delegation have changed over the years but for all periods relevant to the litigation the NMUSAF (previously known as the Air Force Museum) has been the Secretary's agent for donations made to museum and non-profit educational institutions. NMUSAF usually as a subordinate organization to the Air Force Logistics Command which has always been headquartered at WPAFB. For a period of time the Military Aircraft Storage and Disposal Center at Davis Monthan AFB in Arizona handled donation of aircraft to certain types of civic groups. It was a form from the Military Aircraft Storage Facility at Davis-Monthan AFB that was used as the CERTIFICATE in the donation of the F-82.

⁴ While the Manual has been edited over the years and changed numerical designations, all citations to the Manual in this brief are to the manual as it is believed to have existed in early 1966. A copy of the relevant portions of the manual is attached. (Atch. 1) The entire Manual dated January 1964 can be supplied to the Court if it is desired.

AFB) in San Antonio, Texas for use in Lackland AFB's museum program. (Id., and Atch 2, Encls. 2 & 3) The aircraft remained at Lackland AFB until 1966. It spent much of that time on static display at an outdoor location on the base.

In the Spring of 1966 the CAF became interested in acquiring an F-82 for its museum. Some preliminary conversations must have occurred, for in March of 1966 Robert W. Harper of the CAF wrote the Commander of the Military Training Center at Lackland AFB asking if the F-82 could be transferred to the CAF. The Training Center Commander, Major General H. K. Mooney, replied by letter dated 8 April 1966 stating, "[w]e have already advised the Air Force Museum at Wright-Patterson that Lackland has no objection to the transfer of one of our F-82's to the CAF. Therefore, I suggest that you advise the CAF to make a formal request for the F-82 from the Air Museum at Wright-Patterson." (Atch 2, Encl 4, also designated Depo Ex1.7)

A letter dated 14 April 1966 sent to Mr. H.C. Woodburn by Col. William F. Curry, the Director of the Air Force Museum, authorized the donation of F-82 number 44-65162 if that action was approved by the Commander, Lackland AFB. (Atch 2, Encl 5) The Commandeer of Lackland AFB was notified of this by a letter dated 15 April 1966. A copy of the April 14, 1966 letter from the NMUSAF director was included. The Commander of Lackland AFB was thus informed of the proposed trade and his concurrence was sought. (Atch 2, Encl 6) Another letter from Mr. H.C. Woodburn of the Aerospace Vehicle Distribution Office at Wright-Patterson AFB was sent to L. P. Nolan of the CAF on 15 April 1966. Mr Woodburn states that he has included a copy of his letter to the Commander of Lackland AFB and "two copies of a donation certificate for the F-82 under consideration. Request one copy of this certificate be returned to this Hq as soon as practicable." (Atch 2, Encl 7)

On April 18th 1966, L. P. Nolen signed as President of the Confederate Air Force Inc., a donation "CERTIFICATE" which stated in part:

In order to induce the United States Air Force (hereinafter referred to as the "Donor") to donate a F-82 aircraft, SN 44-65162 (hereinafter referred to as the "donated property" to be used for display to Confederate Air Force Museum (hereinafter referred to as the "Donee"), the Donee represents and warrants that it is a nonprofit chartered museum and that *the Donee accepts the donation of the donated property subject to the following terms and conditions, the due observance of which is essential to the validity and continuance of the donation:* [Empahsis added]:

. . .

2. If at any time the donated property is no longer used for the purpose and/or end use for which it is donated *or retention of the property is no longer desired, title to the donated property shall, at the option of the Government, revert in the Air Force; provided however, that if the Government does not exercise said option within 60 days after receipt of written notice, it shall be deemed that the Government does not elect to exercise the option,* [Emphasis added]

. . .

4. Delivery of the donated property to the Donee, and the repossession of all or any part of the donated property by the Donor, shall be at no cost or expense to the Donor and the Donee shall pay all freight and transportation charges.

(Atch. 2, Encl 8) The annotation on the bottom right corner of the first page shows that the "Certificate" was a form created by the "Military Aircraft Storage and Disposition Center" located at Davis-Monthan AFB, Arizona and contains a version date of "Apr 65". (Id.) The signature of Mr. Nolen was certified by a Mr. A. L. Chubb, Secretary of the Confederate Air Force, Inc., the form was returned to the Air Force.

This form and the conduct of the parties is consistent with the Department of Defense Manual on Disposal of surplus defense equipment and supplies. Specifically forbidden from free and unrestricted donation were fighters and bombers. The Manual required demilitarization by mutilation of such aircraft. Item 8 paragraph c (1) states, "[t]he airframes will be mutilated

by destroying the wing attaching fittings or area, main landing gear attaching fittings or area, nose landing gear attaching fittings, engine suspension fittings or mounts,” (Atch 1, DSAM 4160.1 pg 3-XIV-12)

The exception to destructive aircraft demilitarization described above is a reversionary clause to the donation. Section 2 of Part 3 Chapter XIV D. 2 of the Manual states:

b. The disposition, without demilitarization, of property (other than classified material) listed in Attachment 1 is also authorized provided disposition is accomplished by any of the following methods:

. . . .
(7) By donation of condemned or obsolete combat material (e.g., combat aircraft, vessels, guns, projectiles, tanks, etc.) to municipal corporations, posts of recognized war veterans associations, etc., as authorized by 10 USC 2572, **All such donations will be made subject a special condition which prohibits further disposition (including redonation) of the items without prior approval of DSA or the Military Service concerned.**

(Atch 1, DSAM 4160.1 pg 3-XIV-5 & 6)

Some time after 1972 the Department of Defense policy covering donations of aircraft changed from one of conditional donation with a reversionary clause to loans. However, the museums and educational groups to which aircraft had previously been donated were not forced to return or alter the existing Certificates. Instead they were notified of the change and if they elected not to modify their donation certificate arrangement with the Air Force Museum they were merely reminded that the “the Air Force Museum . . . [was] responsible for these aircraft and must be contacted regarding their disposition at such time as a museum might not desire to retain them.” This Notice was sent by letter to Mr. Robert L. Griffin, the Assistant to the Executive Director of the CAF on 2 May 1980. (Atch 2, Encl.9; See also Atch 3, Depo of Chas. Metcalf, p11-12)

In late 2002, without notifying the USAFM or obtaining its permission, the CAF sold or traded the F-82 for an operational P-38 and the wreckage of another P-38. The Air Force Museum learned of the trade in the January 2003 issue of the magazine "Air Classics." The magazine was published in November of 2002. (Atch 2, Encl 10)

Major General (retired) Charles Metcalf, Director of the National Museum of the United States Air Force, sent a letter to Mr. Bob Rice, the Executive Director of the CAF, informing him that the attempted sale of the F-82 violated the terms of the conditional lease "Certificate." General Metcalf's letter, dated 2 December 2002, reminded the CAF that the aircraft was conditionally donated to that organization under the authority of 10 U.S.C. § 2572. The letter also reminded the CAF that paragraph two of the conditional donation certificate contained the provision that title to the F-82 could, at the Government's option, revert to the United States Air Force if the aircraft was no longer used for the purpose for which it was donated, or the CAF no longer desired to retain the F-82. The letter further stated:

This letter is formal notification that the U.S. Air Force Museum, as the sole executive agent on behalf of the Secretary of the Air Force for the donation and loan of historical property, is exercising the option to retain title to the aircraft as stated in paragraph 2 of the certificate. The F-82 may not be further transferred by the CAF and, as it has been deemed excess to the requirements of your organization, physical possession will be conveyed to the U.S. Air Force Museum. Please be advised [that] in accordance with paragraph 4 of the certificate, the CAF will be responsible for all freight and transportation charges involving the recovery.

(Atch 2, Encl 11)

To date the CAF has refused to comply with the terms of the Certificate and the directions of the NMUSAF Director to return the aircraft to the Air Force. The F-82 aircraft remains in the possession of the CAF.

The Plaintiff anticipates that the Defendant CAF will attempt to argue that they acquired full title to the aircraft and that the FAA Registration indicates that they or one of their subordinate organizations are the sole title holder. The NMUSAF asserts the CAF contentions, while facially accurate, are inconsistent with the stated intentions of the parties and without weight or merit. The following facts are included to shed light upon that potential issue.

Almost immediately after taking custody of the aircraft the CAF began preparations to move it across the road from Lackland AFB to Kelly AFB. Lackland was an academic training base and did not have a runway. (Atch 2, Encl 12) They also began asking permission of the USAF to ferry fly the aircraft to the “Rebel Field” in Mercedes, Texas where they could complete a more extensive renovation. In a June 7, 1966 letter to “Colonel” L.P. Nolen of the CAF, Major General Mooney, USAF informed “Colonel” Nolen that he would need permission of the Air Force and FAA certification of airworthiness. According to Air Force Major General Mooney permission was required to fly the aircraft because it was only “donated” to them. (Atch 2, Encl 13)

On the 24th of August 1967 Mr. L.P. Nolen “Colonel CAF” wrote to the Headquarters USAF at the Pentagon and asked permission to fly the aircraft to the Confederate Air Force Museum, Mercedes, Texas. His letter did add that the primary mission of the Confederate Air Force was to restore and maintain in flying condition a complete collection of WW II combat aircraft. (Atch 2, Encl 15)

Col. Ben H. Roberts wrote back on September 4, 1967 stating that the Air Force General Counsel had, in June of that year, rendered a determination that all surplus USAF aircraft donated under 10 U.S.C. §2572 contain a “no fly” clause. Col. Roberts stated that Air Force policy must be in accord with that determination, but, because of the timing of the donation of

the F-82 (prior to June 1967) he was referring the question to the General Counsel's Office.
(Atch 2, Encl 14)

On the 26th of October 1967 Col Ben Roberts writing for the Chief of Staff of the Air Force granted the CAF permission for the CAF "to remove F-82 aircraft ... from Kelly AFB, Texas by flight, provided all other provisions pertaining to aircraft flight from Air Force installations are satisfied." This was in response to a letter of 24 August 1967 from L.P. Nolen of the CAF to Headquarters of the Air Force seeking permission to ferry fly the aircraft from Kelly AFB. The letter stated that "[t]his aircraft will be restored its original condition and made available for display and flight with other aircraft of the CAF fleet." The letter also asserted that the primary mission of the CAF was to restore and maintain "in flying condition [emphasis in original] a complete collection of WW II combat aircraft. (Atch 2, Encl 15)

Thus, by the fall of 1967 it had been determined that it would be appropriate for the Air Force to grant the CAF permission for a one time ferry flight to remove the F-82 from Kelly AFB, Texas to Rebel Field, Mercedes, Texas. However, the permission required the CAF to abide by all the other provisions pertaining to aircraft flight from Air Force installations are satisfied. One of those provisions was certification of the aircraft by the FAA.

General Gerrity, Commander of the Air Force Logistics Command, sent the CAF a letter dated 13 Jan 1968, informing them "since the donation certificate executed with respect to the P-82 did not contain a "no fly" clause, the Confederate Air Force is under no Air Force restriction on flying the airplane." (Atch 2, Encl 17)

On 4 January 1968 the CAF sent a letter to Mr. Frey, then Chief of the Research Division of the Air Force Museum. In the letter the CAF states that it has finished repairing the F-82 and they are returning the technical manuals which they had used to repair the aircraft. The letter

also states that they “now have permission to fly it.” (Atch1, Encl 16) One of the items which had to be satisfied was the FAA’s certification and license for the aircraft. To further that end the CAF requested help from the Air Logistics Command at WPAFB.

To assist the CAF in obtaining FAA certification a letter dated 17 January 1968 was written by Mr. Woodburn on ‘command letterhead’ and addressed “To Whom it May Concern” certifying that the F-82 had been donated by the USAF to the CAF and that the donee had been authorized to move the aircraft from Kelly AFB, Texas to Mercedes, Texas “by flight under the provisions of appropriate civil flight regulations.” Mr. Woodburn included the first letter with a second letter addressed to “Colonel” Nolen of the CAF and stated that the transfer certificate was provided to assist in obtaining an FAA certification and license for the operation of the aircraft. (Atch 2, Encl 18 & 19)

Utilizing the transfer certificate sent them by Mr. Woodburn the CAF was able to register the F-82 with the FAA and fly it. The CAF flew the aircraft on numerous occasions until October of 1987 when it crashed. It was partially restored and has been moved on several occasions by the CAF in an attempt to raise money to complete restoration.

Flying the F-82, something that has not actually happened in twenty years is not the issue at hand. As Major General Metcalf stated during his deposition, “[t]he substance of the issue is the abrogation of the conditional donation by the Confederate Air Force. . . . Flying , all of that, had no bearing on the situation. They tried to sell the airplane that did not belong to them.” (Atch 3, Metcalf Deposition p29)

SUMMARY OF ARGUMENT

The Air Force believes this to be a straight forward case of contract interpretation. However, it is anticipated that the CAF will argue that the aircraft had been in their possession

for such a long time that the Air Force's interest in the aircraft, whatever it may have been after the donation, no longer is viable. It is anticipated that the CAF will argue that shortly after the Air Force turned over physical control of the aircraft to the CAF it also gave the CAF papers and permissions so that the CAF could register the aircraft as belonging to the CAF with the FAA. It is also anticipated that the CAF will argue the conduct of the parties from that time forward demonstrate a mutual belief that the aircraft was the property of the CAF. The Air Force denies these assertions by the CAF.

Donation of Fighters without restrictions beyond power of AF Employees

No employee of the federal government, including those employed by the NMUSAF, is authorized to give away government property. There are restrictions on the disposition of surplus government property. In January of 1964 the Department of Defense issued a comprehensive set of instructions regarding disposal of excess and surplus property of the Department of Defense [Hereinafter DoD]. The Manual, designated DSAM 4160.1 (Attachment 1 to this Motion is a selection of pages copied from the January 1964 version of the Manual), prohibited the disposal of military type aircraft. Chapter XIV Part 3 of the Manual addresses the requirements of "demilitarization."

The Manual states in section B entitled "Policy" that it is the policy of the DoD to demilitarize or mutilate certain surplus military items being disposed of in the United States. . . . Such items are listed in Attachments 1 and 2 and will be demilitarized prior to their disposition as surplus or foreign excess, ... "(Atch 1, DSAM 4160.1, pg 3-XIV-3) Attachment 1 referred to above is a section of the Manual entitled "Demilitarization and/or Mutilation Requirements for Surplus Military Items Located in the United States." Specifically forbidden from free and

unrestricted donation are fighters and bombers. The sections of Attachment 1 entitled “Item 7” and “Item 8” distinguish between aircraft of a commercial nature, “Cargo (passenger, freight, transport) and helicopters....” and those of a military nature. Item 8, which requires demilitarization by mutilation, deals with “bombers, tankers, fighters” Item 8 states, “the airframes will be mutilated by destroying the wing attaching fittings or area, main landing gear attaching fittings or area” (Atch 1, DSAM 4160.1 pg 3-XIV-12)

The only exception to aircraft demilitarization by mutilation as described above is contained within section 2 of Part 3 Chapter XIV D. 2 which states:

b. The disposition, without demilitarization, of property (other than classified material) listed in Attachment 1 is also authorized provided disposition is accomplished by any of the following methods:

...

(7) By donation of condemned or obsolete combat material (e.g., combat aircraft, vessels, guns, projectiles, tanks, etc.) to municipal corporations, posts of recognized war veterans associations, etc., as authorized by 10 U.S.C. 2572, **All such donations will be made subject a special condition which prohibits further disposition (including redonation) of the items without prior approval of DSA or the Military Service concerned.** (emphasis added)

(Atch 1, DSAM 4160.1 pg 3-XIV-5-6)

As a consequence of the above DOD provisions, the options available to the Air Force officers and employees, when they released the F-82 to the Confederate Air Force were limited to mutilation of the aircraft to a great extent or donate it with a restriction. That small restriction being a limit on CAF’s freedom to transfer the aircraft without the Air Force’s approval. Even if the Air Force Museum personnel and Major General Mooney had intended to release/give/sell the entire ownership interest and title to the F-82 to the CAF such an act would be beyond their powers as agents of the government. The action would have been ultra vires.

“As a matter of law, a contract with the Government cannot be enforced, unless the representative who entered into or ratified a contract on behalf of the Government had actual authority to make the promise therein and bind the Government.” Land Grantors in Hendeson, Union and Webster Counties, Ky vs U.S., 64 Fed. Cl. 661 (2005)

Whatever the form in which the Government functions, anyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority. The scope of this authority may be explicitly defined by Congress or be limited by delegated legislation, properly exercised through the rule-making power. And this is so even though, as here, the agent himself may have been unaware of the limitations upon his authority. See, e.g., Utah Power & Light Co. v. United States, 243 U.S. 389, 409, 37 S.Ct. 387, 391, 61 L.Ed. 791; United States v. Stewart, 311 U.S. 60, 70, 61 S.Ct. 102, 108, 85 L.Ed. 40, and see, generally, In re Floyd Acceptances, 7 Wall. 666, 19 L.Ed. 169

Federal Crop Ins. Corporation v. Merrill, 332 U.S. 380, 384 68 S.Ct. 1 (1947)

If a government employee could act beyond the boundaries of his authority he could usurp the authority of Congress over expenditures. See, Carter vs. U.S., 33 F.3d 791 (7th Cir. 2003) The DoD Regulations governing the requirements to be imposed on donations of aircraft were beyond the power of Air Force Officers or employees to alter or amend. The limitations placed upon the actions of the DoD employees controls the scope of the powers those employees can fully exercise.

No one other than the Museum Director acting on behalf of and under the instructions given by the Secretary of the Air Force has authority to “give away” aircraft. No one other than the Secretary of the Air Force or Congress has authority to release any restrictions on their use. The Manual was issued by the Department of Defense and placed restrictions upon the employees of the Air Force power to give and or sell interests in government property. The CAF

could not acquire complete title to the aircraft no matter what the actions of the Air Force Officers and civilian employees were.

FAA Title Meaningless between two parties claiming ownership

As stated earlier the Secretary of the Air Force anticipates that the CAF may attempt to argue that because it holds the title Certificate to the aircraft from the FAA. However, the applicable federal statute pertaining to FAA Certificates, 49 USC 44103 (c) states,

(c) Certificates as evidence.--A certificate of registration issued under this section is--

- (1) conclusive evidence of the nationality of an aircraft for international purposes, but not conclusive evidence in a proceeding under the laws of the United States; and
- (2) not evidence of ownership of an aircraft in a proceeding in which ownership is or may be in issue.

Clearly, federal law precludes the use of the FAA Certificate to establish the ownership of the F-82 as between the CAF and the United States Air Force.

OPINION of Plaintiff's Expert Lawyer

Plaintiff's expert states that his background arises from his time as an employee of the Secretary of the Navy office. Plaintiff cites no experience with the Air Force. Furthermore his lack of familiarity with the facts of the case is apparent from his speculation on page 2 of his opinion that the fact the CERTIFICATE was a "on a form from the Air Force's salvage facility strongly suggests that the CAF's action saved this aircraft from salvage." The documentation cited by the Secretary above clearly establishes that the aircraft was resting peacefully on a concrete pad at Lackland AFB before the CAF took an interest in it.

Mr. Sullivan, the CAF expert, asserts that the CAF “transferred title to the F-82 and other flying inventory to the American Heritage Flying Museum, Inc. a non-profit corporation that is affiliated with the CAF but with its own board of directors and management.” Sullivan opinion page 3. Mr Sullivan asserts that the transfer from one CAF activity to another was recorded with the FAA and it did not note a reversionary interest.

Disregarding the fact that the two organizations are closely affiliated and operating under the rather large umbrella of the CAF organizational structure, Mr. Sullivan’s point seems to be that because the CAF got away with one transfer the NMUSAF is precluded from exercising its rights under the CERTIFICATE when the CAF did it again. This makes no sense whatsoever in the context of public policy.

Much of Mr. Sullivan’s Opinion is in fact a legal opinion and takes the form of a legal argument. Because this is the role of Defendant’s counsel and outside the proper role of an expert in district court, especially an expert who admits his expertise comes from a different organization at a different time (mid 1970's vice mid 1960's), the Plaintiff will address only a small portion of Mr. Sullivan’s legal analysis.

On page 5 of his Opinion attorney Sullivan offers a legal opinion that the reversionary clause should be construed “narrowly.” He offers a United States Supreme Court case interpreting a South Carolina contract and that state’s statutes as standing for the proposition that clauses in real property deeds are covenants rather than conditions. However, the matter at issue is a contract between the federal government and a nonprofit organization. Federal contract law applies not a statute passed by the State of South Carolina with regard to extending a canal. Furthermore, the subject clause was required by DOD regulation. The CAF sought out the F-82 and eagerly agreed to be bound by the minimal restrictions imposed by the CERTIFICATE.

Furthermore, there is good cause for the continued vitality of the clause in question. The federal government, under its duty to provide for the common defense, comes into possession of large quantities of military equipment. The policy balance between public safety and making fighter and bomber aircraft available to civic and patriotic organizations similar to the CAF was the minimal restriction of the reversionary clause. The Government, in this case the representative of the Secretary of the Air Force, reasonably imposed upon those who desired to gain possession of its combat aircraft a minor restriction. The DoD only reserved the right to determine what organizations acquired these lethal-by-design aircraft. Public policy and good sense supports the clause.

Plaintiff's expert lawyer asserts on page 8 of his brief that the breach by the CAF was not material. The Air Force disagrees with this conclusion. The rules imposed by the Department of Defense required either the reversionary clause or mutilation of the aircraft. The CERTIFICATE only contains four paragraphs. The first deals with the CAF keeping the aircraft in good repair and appearance, the second is the reversionary clause, the third deals with indemnification of the Air Force and the fourth paragraph assigns the cost of delivery and repossession to the CAF. In such a simple and straightforward document it is inappropriate to just toss out one fourth of it. This is especially true given the fact that without that paragraph the Air Force would not have been able to grant the CAF's wish. The F-82 would have remained at Lackland AFB until it was turned into scrap or mutilated. The reversionary clause is a significant portion of the agreement between the CAF and the United States Air Force.

SUMMARY

The documentation, the law and the facts lead to the inescapable conclusion that the CAF violated the terms of the Donation CERTIFICATE. The reversionary clause was required by

law to be included in any donation of a fighter or bomber which did not include significant mutilation of the aircraft. Any action or promise on the part of an employee of the Department of Defense to the contrary is an action or promise beyond the powers of that employee.

WHEREFORE, the Plaintiff Secretary is entitled to a judgment directing possession of the aircraft be returned to the NMUSAF immediately because Defendant CAF, in attempting to sell the aircraft, violated the terms of the donation CERTIFICATE and the Director of the NMUSAF timely notified the CAF that he was exercising the option under the CERTIFICATE by seeking return of physical possession of the aircraft. Furthermore, the Secretary asserts that all costs of recovering the aircraft and transporting it to an appropriate location is to be assigned to Defendant under the terms of the CERTIFICATE of donation.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion for Summary Judgment was served this 31 day of March 2008.

s/Patrick D. Quinn
PATRICK D. QUINN (0022602)
Assistant United States Attorney