

May 14, 1969

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Attorneys and Counsellors at Law
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Dear Mr. Rogers:

We refer to your letter of 18 April 1969 regarding the recording on 15 April 1969 of a document purporting to be a sublease of Civil Aircraft N804SW from the Flying Tiger Line, Inc. to "Viava", the Venezuelan National Airline. We further note that Flying Tiger obtained its interest in the aircraft as a lessee under a lease executed in 1965 with your client's predecessor. Our answers to the questions posed in your letter are as follows:

1. Q. Do the rules set forth in Section 49.17(d)(3) of the Federal Aviation Regulations apply to subleases as well as to assignments?
 - A. It is our opinion that the provisions of Section 49.17(d)(3) of the Federal Aviation Regulations do not apply to subleases. We base this opinion upon the traditional distinction between an assignment and a sublease and upon the expressed language of the regulation. Traditionally, the law has treated assignments and subleases as distinctly different legal transfers and has prescribed different rules for each. In this respect, we consider the traditional difference between an assignment and a sublease to be that in an assignment the assignor parts with his whole interest while in a sublease the sublessor transfers only a portion of his interest. We view this distinction applicable to Section 49.17(d)(3), and therefore do not consider that the term "assignment" as contained therein can reasonably be interpreted to include a "sublease". This conclusion is further re-enforced by the express language of that section which provides that it is "an assignment of the interest of the seller, bailor, or lessor under a contract of conditional sale" that is required to bear the assent in writing of the seller, etc. This language appears to us to expressly exclude a sublease since it pertains only to a transfer of the whole interest of the transferor.

2. Q. If Section 49.17(d)(3) does not apply to subleases, is there any provision in the regulations regarding subleases? Furthermore, may subleases be recorded without the consent of the lessor regardless of whether the basic lease is considered a conditional sales contract under the terms of the Act?
- A. There are no special provisions regarding subleases in Part 49 of the Federal Aviation Regulations. Rather, the only provisions applicable to subleases are those general provisions contained in Sections 49.11, 13, and 15. For this reason, we conclude that a sublease (as distinguished from an assignment) may be properly recorded without the consent of the original lessor. However, this should not be interpreted to mean that every document purporting to be a sublease may be so recorded without consent. As discussed above, the generally accepted distinction between a sublease and an assignment is not the title given to it by the parties but rather is the nature and amount of interest transferred by the transaction. In accordance with the traditional view, we consider that, where the "sublease" transfers the lessee's entire interest in the subject of the lease for the entire remaining term of the lease, the transaction is in effect an assignment and not a subletting. In such an instance, we believe that the transaction should be considered to constitute an assignment and therefore consent would be required before that document could be recorded by the Registry. On the other hand where the transfer only covers a portion of the lease term or transfers a lesser interest with the lessee retaining some rights or interest, the transaction should be treated as a sublease. In such an instance, no consent would be required for the recording of the document.

After carefully reviewing the sublease in question, we consider that it is not an assignment within the meaning of the guidelines set forth above. In this regard, we note that the sublessor has retained a rather substantial interest in the aircraft. For example, in the event of a default by the sublessee, Article 13 provides that the sublease will automatically terminate and that the sublessor will be entitled to possession of the aircraft. Similarly, the sublease specifically provides that title to the aircraft will remain in the sublessor, and as appropriate in the original lessor, during the term of the sublease. In connection with this, it appears that the sublessor will also possess sole title to the aircraft for a period of several months after the expiration of the basic lease and before the expiration of the sublease. In addition, we are of the opinion that the sublease transfers a lesser interest to the sublessee in several areas. This appears to be particularly so as regards the sublessee's option to purchase. As discussed in greater

detail in our answer to Question 5, we do not consider that the sublessee received an unrestricted option to purchase in the sense that it would be entitled to the aircraft upon compliance with all of the terms of the sublease. In direct contrast, the sublessor does possess such an unrestricted option to purchase as a result of the basic lease. Furthermore, we note that the sublessee has no right to assign or sublet the sublease (Article 17 of the sublease) whereas the sublessor was apparently given a right to assign in accordance with the provisions of Section 8(b) of the basic lease. In conclusion, we consider that the overall provisions of the sublease indicate that it was not an assignment. Therefore, we do not believe that the requirements of Section 49.17(d)(3) were applicable to this case.

3. Q. If Section 49.17(d)(3) is applicable to subleases, under what exception was the sublease recorded?
 - A. In view of our answers to Questions 1 and 2, this question is moot.
4. Q. Does the sublease in question come within the purview of Section 47.43(a)(4) of the Federal Aviation Regulations?
 - A. After carefully reviewing the provisions of Section 47.43(a)(4), we do not consider it to be applicable to this case. Specifically, for the reasons stated in Question 5, we do not consider that the aircraft is presently owned by a person who is not a citizen of the United States. We also do not find any bad faith or attempt to avoid compliance with Section 501 of the Federal Aviation Act of 1958 in this transaction.
5. Q. Under the terms of the Federal Aviation Act, should not the sublessee (Viasa) be considered the "owner of the aircraft as a conditional vendee"?
 - A. It is our opinion that the sublessee is not a conditional vendee within the meaning of the Federal Aviation Act and therefore should not be considered as the owner of the aircraft in question. As you point out in your letter, our regulations do provide that the lessee of an aircraft under a contract of conditional sale is deemed to be the owner of an aircraft. It is also true that Section 101(16) of the Federal Aviation Act of 1958 (49.U.S.C. 1301(16)) does define a conditional sale as including those contracts for the leasing of an aircraft which include an option to purchase the aircraft provided that the lessee agrees to pay as compensation a sum substantially equivalent to the value of the aircraft. However, this definition of a conditional sale also requires that the contract provide that the lessee "is bound to become or has the option of becoming the owner thereof upon full compliance with the terms of the contract".

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In view of this latter requirement, it is our opinion that, in order to constitute a conditional sale, the option to purchase must be an unqualified one in the sense that its exercise is not conditioned upon the actions of any party other than the lessee. For this reason, we have held that, where the exercise of an option to purchase is conditioned upon the consent of the lessor, the transaction is not a conditional sale within the meaning of the act. Viasa's option to purchase appears to us to be such a qualified option since it is dependent upon the sublessor's (Flying Tiger) performance of numerous conditions contained in the basic lease. For example, the sublessor must renew the lease for two renewal periods of two years each; exercise its option as to all of the equipment covered by the basic lease; and give six months notice that it intends to exercise its option with respect to the first aircraft covered by the basic lease. In addition, the sublessor would have to avoid any of the events listed in Section 16 of the basic lease which could result in a termination of its rights under that lease including its option to purchase. Until such time as all of these conditions are met by the sublessor, Viasa's exercise of its option appears to be wholly dependent upon conditions beyond its control. In this respect, we do not consider that Viasa's option to purchase is one by which it is bound to become or has the option of becoming the owner upon full compliance of the terms of the contract. Accordingly, we do not consider Viasa to be the "owner" of the aircraft in question within the meaning of the Federal Aviation Act of 1958.

6. Q. Can the aircraft in question now registered to Flying Tiger Lines, Inc. be considered as properly registered under the Act?

A. Prior to the execution of the sublease in question, Flying Tiger was the registered owner of the aircraft. This was based upon the fact that Flying Tiger was a conditional vendee in that it was the lessee of the aircraft with an option to purchase within the meaning of the act. As discussed above, we do not believe that the sublease resulted in a change of ownership. Therefore, it is our opinion that the aircraft is properly registered at the present time. We should note, however, that at such time as Flying Tiger has performed all of the required conditions of the basic lease, it may well be that Viasa would be a conditional vendee so as to be considered the owner. Similarly, should the basic lease terminate for some reason, it would seem that the lessor (Grayhound) would be the owner. We have advised the Aircraft Registry that, if any of these events occur, action should be taken to change the registration of the aircraft, if deemed appropriate.

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We hope that the above discussion will be of assistance to you. If you have any further questions or if you desire to meet with us concerning this matter, please feel free to contact us.

Sincerely,

ORIGINAL SIGNED BY
FREDERICK C. WOODRUFF

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General Attorney, AC-7.2

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