

In the  
**United States Court of Appeals**  
for the Eighth Circuit

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AVIDAIR HELICOPTER SUPPLY, INC.,

*Plaintiff-Appellant,*

v.

ROLLS-ROYCE CORPORATION,

*Defendant-Appellee.*

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Appeal from the United States District Court for the  
Western District of Missouri, No. 4:06-cv-00816.  
The Honorable **Ortrie D. Smith**, Judge Presiding.

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**BRIEF OF APPELLANT**  
**AVIDAIR HELICOPTER SUPPLY, INC.**

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## **SUMMARY OF THE CASE**

This case is a consolidation of two cases regarding the right to use technical information needed to overhaul or repair compressor case assemblies installed on certain Allison Model 250 C-20 series engines. The first case was filed in the U.S. District Court for the Western District of Missouri on September 29, 2006 (*AvidAir Helicopter Supply, Inc. v. Rolls-Royce Corporation*, Case #4:06-0816-CV). The second case was filed in the U.S. District Court for the Southern District of Indiana (*Rolls-Royce Corporation v. AvidAir Helicopter Supply, Inc.*, Case # 1:06-CV-1448). Ultimately, the cases were consolidated in the Western District of Missouri and Rolls-Royce was realigned as plaintiff but the parties were directed to use AvidAir and Rolls-Royce rather than Plaintiff and Defendant.

AvidAir requests oral argument because this case involves complex technical information for repairs and overhauls of a certain aircraft engine component. Twenty minutes is requested.

## **CORPORATE DISCLOSURE STATEMENT**

Pursuant to Fed. R. App. P. 26.1 and 8th Cir. R. 26.1A, AvidAir Helicopter Supply, Inc. states that there is no publicly held corporation owning 10% of more of its stock.

**TABLE OF CONTENTS**

SUMMARY OF THE CASE ..... i

CORPORATE DISCLOSURE STATEMENT ..... ii

TABLE OF AUTHORITIES ..... x

JURISDICTIONAL STATEMENT ..... 1

STATEMENT OF ISSUES ..... 2

STATEMENT OF THE CASE ..... 5

STATEMENT OF FACTS ..... 7

A. History Of Allison ..... 7

B. Public Availability Of R&O Information ..... 9

    1. DOILs And BookFaxes ..... 9

    2. DOIL 24, Revisions 1-11 ..... 10

C. Entry Of AvidAir Into The R&O Market ..... 11

D. The AMC Distribution System ..... 12

E. Rolls-Royce R&O Entry ..... 13

F. July 31, 1996 Rolls-Royce Announcement ..... 15

G.	DOIL 24, Revision 13 History .....	17
H.	Rolls-Royce’s Entry Into The Compressor Case Half R&O Market .....	19
I.	Rolls-Royce Directs Its Market Share Efforts At AvidAir .....	21
	SUMMARY OF ARGUMENT .....	28
	Argument .....	31
	Introduction .....	31
	ISSUES RAISED ON APPEAL .....	32
I.	The District Court Erred In Granting Partial Summary Judgment In Favor of Rolls-Royce Concerning DOIL 24, Revision 13, Finding That It Is A Rolls-Royce Protected Trade Secret .....	32
	Standard of Review .....	32
	Argument .....	33
	A. Consideration Of DOIL 24 Issues .....	33
	B. The Magistrate’s Report And Recommendation .....	34
	C. AvidAir’s Exceptions To The Magistrate’s Report And Recommendation .....	35

D.	The District Court’s June 23, 2009 Partial Summary Judgment Order concerning DOIL 24 . . . . .	36
E.	DOIL 24, Revision 13 Is Not A Rolls-Royce Protected Trade Secret . . . . .	37
1.	The 38 Words And 2 Numbers Added to DOIL 24, Revision 13, Are Not Trade Secrets and Do Not Elevate The Revision To Trade Secret Status . . . . .	37
2.	Revision 13 Is Not A “Compilation” Within the Meaning of the UTSA . . . . .	39
3.	The Summary Judgment Record Reflects Lack Of Efforts To Keep The Alleged New Information Secret . . . . .	40
a.	The Summary Judgment Record Contains Evidence That The DILs and DOILs, Including DOIL 24, Revision 13 Were Lawfully In The Possession Of Persons With No Obligation to Maintain It In Confidence Or To Return It To Rolls-Royce . . . . .	42
(1)	The Australian Air Force . . . . .	42
(2)	Airborne . . . . .	42
(3)	Cadorath Aerospace, Inc. . . . .	43
(4)	Alcor Engine Company, Inc. . . . .	43

(5) Timken Alcor Aerospace, Inc. . . . .	43
(6) Essential . . . . .	44
(7) Precision . . . . .	44
(8) Japanese Defense Agency (JDA), Shintoa Corporation and Aero Asahi . . . . .	45
4. The Summary Judgment Record Reflects That FAA Regulations Require That The New Items Claimed in Revision 13 Be Provided to AvidAir and Those Performing R&Os on Model 250 Series II Compressor Case Halves . . . . .	46
5. BookFax 97AMC059 Contains Only Form, Fit and Function Information That Is Required To Be Included In The Overhaul Manual . . . . .	47
II. The District Court Erred In Granting Partial Summary Judgment Determining That DOIL 24, Revision 12, DOIL 3, Revision 16, And DOIL 8, Revision 6, And BookFax 97AMC059 Are Rolls-Royce Protected Secrets . . . . .	48
Standard of Review . . . . .	48
Argument . . . . .	48
A. The District Court's Third Partial Summary Judgment Order . . . . .	48

B.	The Second Round of Partial Summary Judgment Motions .....	49
C.	Lack of Evidence of a Trade Secret .....	51
D.	DOIL 24, Revision 12 .....	53
E.	BookFax 97AMC 059 .....	53
III.	The District Court Erred In Issuing A Permanent Injunction February 23, 2011 Requiring AvidAir To Return All Copies Of DOIL 24, Revisions 12 And 13; DOIL 3, Revision 16; DOIL 8, Revision 6; And BookFax 97AMC059 To Rolls-Royce. ....	54
	Standard of Review .....	54
	Argument .....	55
A.	The Evidence at Trial Concerning the Alleged Three New Items Of Information Contained In DOIL 24, Revision 13; And The Model Technical Library Acquired From Precision Air Power. ....	56
B.	Revision 13 Dimensional Change To The 5th And 6th Stage Vanes .....	57
C.	Rolls-Royce Has Declared The DOILs Obsolete .....	58



D.	AvidAir Copies of DOIL 24, Revisions 12 And 13, DOIL 3, Revision 16, And DOIL 8, Revision 6, Acquired From Precision Air Power With Its Model 250 Technical Library On June 20, 2009 Should Not Be Included In The Injunction Order. ....	58
IV.	The District Court Erred In Failing To Enforce The Clear And Unambiguous Terms Of The National Airmotive Corporation 1994 AMC Agreement And The Precision Branch Agreement .....	60
	Standard of Review .....	60
	Argument .....	61
A.	The NAC 1994 AMC Agreement Contains No Enforceable Duty of Confidentiality or Return of DILs, DOILs, PMIs or BookFaxes. ....	63
B.	DILs, DOILs And Bookfaxes Do Not Appear On The Contract “Manual List” Until The NAC 1998 AMC Agreement Which Was Assigned By NAC On July 1, 1998 .....	64
C.	The Correct Interpretation of the AMC Agreement .....	64
V.	Whether The District Court Erred In Granting Partial Summary Judgment Dismissing AvidAir’s Count II (Antitrust) .....	65
	Standard of Review .....	65

Argument .....	65
A.    Claims Under Sherman 1 (15 U.S.C. §1) .....	66
B.    Claims Under Sherman 2 (15 U.S.C. §2) .....	67
C.    Antitrust Injury .....	70
VI.    The District Court Erred In Granting Partial Summary Judgment Dismissing AvidAir’s Count I (Tortious Interference) ..	72
Standard of Review .....	72
Argument .....	73
VII.    The District Court Erred In Denying AvidAir’s Leave To Amend Its Complaint To Include Issues Relating To Its Acquisition Of The Model 250 Technical Library Of Precision Air Power On June 20, 2009. ....	76
Standard of Review .....	76
Argument .....	78
CONCLUSION .....	81

**TABLE OF AUTHORITIES**

**CASES**

*A.L. Huber & Sons v. Robertson Plumbing*,  
760 S.W.2d 496 (Mo. App. 1988) ..... 4, 76

*American Can v. Mansukhani, et. al.*,  
742 F.2d 314 (7th Cir. 1984) ..... 31

*Amerinet, Inc. v. Xerox Corp.*,  
972 F.2d 1483 (8th Cir. 1992) ..... 68

*Amoco Production Co. v. Laird*,  
622 N.E.2d 912 (Ind. 1993) ..... 39

*Anderson v. Liberty Lobby*,  
477 U.S. 242 (1986) ..... 32

*Bailey v. First National Bank of Chadron*,  
741 N.W.2d 184 (Neb. Ct. App. 2007) ..... 5, 77

*Baum v. Helget Gas Products, Inc.*,  
440 F.3d 1019 (8th Cir. 2006) ..... 3, 61

*Celotex Corp. v. Catrett*,  
477 U.S. 317 (1986) ..... 32

*City of Beverly Hills v. Village of Velda Village Hills*,  
925 S.W.2d 474 (Mo. Ct. App. 1996) ..... 3, 61

*Credentials Plus, LLC v. Calderone*,  
230 F. Supp.2d 890 (N.D. Ind. 2002) ..... 37

<i>CVD, Inc. v. Raytheon Co.</i> , 769 F.2d 842 (1st Cir. 1985) .....	4, 70, 71
<i>Edwards v. Brian, et. al.</i> , 2010 U.S. App. LEXIS 18635 (8th Cir. 2010) .....	32, 48
<i>Fox Sports Net North, LLC. v. Minnesota Twins Partnership</i> , 319 F.3d 329 (8th Cir. 2003) .....	2, 38, 58
<i>General Industries Corp. v. Hartz Mountain Corp.</i> , 810 F.2d 795 (8th Cir. 1987) .....	4, 68
<i>Get Away Club v. Coleman</i> , 969 F.2d 664 (8th Cir. 1992) .....	32
<i>HDC Medical, Inc. v. Minntech Corporation</i> , 474 F.3d 543 (8th Cir. 2007) .....	70
<i>Healthcare Services of the Ozarks, Inc. v. Copeland</i> , 198 S.W.604 (MO 2006) .....	74
<i>Horizon Memorial Group v. Bailey</i> , 280 S.W.3d 657 (Mo. Ct. App. 2009) .....	73-74
<i>In re Iowa Freedom of Information Council</i> , 724 F.2d 658 (8th Cir. 1983) .....	2, 41
<i>In re Remington Arms Co., Inc.</i> , 952 F.2d 1029 (8th Cir. 1991) .....	2, 41
<i>Kearney &amp; Trecker Corp. v. Cincinnati Milacron, Inc.</i> , 562 F.2d 365 (6th Cir. 1977) .....	71

<i>Kennedy Bldg. Assocs. v. CBS Corp.</i> , 476 F.3d 530 (8th Cir. 2007) .....	3, 54
<i>Kewanee Oil Co. v. Bicron Corp.</i> , 416 U.S. 470 (1974) .....	31, 41
<i>Marmo v. Tyson Fresh Meats, Inc.</i> , 457 F.3d 748 (8th Cir. 2006) .....	76
<i>Masimo Corp. v. Tyco Care Group, L.P.</i> , 2006 U.S. Dist. Lexis 29977 (C.D. Ca. 2006) .....	68
<i>Mason v. Corr. Med. Servs. Inc.</i> , 559 F.3d 880 (8th Cir. 2009) .....	32
<i>Matsushita Electric Industries Co. v. Zenith Radio Corp.</i> , 475 U.S. 574 (1986) .....	33
<i>MicroStrategy, Inc. v. Business Objects, S.A.</i> , 661 F.Supp. 548 (E.D.Va. 2004) .....	38
<i>Minnesota Mining &amp; Mfg. v. Pribyl</i> , 259 F.3d 587 (7th Cir. 2001) .....	39-40
<i>Morgan v. Ponder</i> , 892 F.2d 1355 (8th Cir. 1989) .....	4, 70
<i>Nazeri v. Missouri Valley College</i> , 860 S.W.2d 303 (MO 1993) .....	73
<i>Penalty Kick Management, Ltd. v. Coca Cola Co.</i> , 318 F.3d 1284 (11th Cir. 2003) .....	2, 40

<i>PepsiCo, Inc. v. Redmond</i> , 54 F.3d 1262 (7th Cir. 1995) .....	3, 54
<i>Religious Technology Center v. Netcom On-Line Consumer Services</i> , 923 F. Supp. 1231 (N.D. Ca. 1995) .....	41
<i>Roberson v. Hayti Police Dept.</i> , 241 F.3d 992 (8th Cir. 2001) .....	77
<i>Rolls-Royce Corporation v. Heros, Inc., et al.</i> , 2010 U.S. Dist. Lexis 119381 (N.D. Texas 2010) .....	<i>passim</i>
<i>Rolls-Royce v. Heros, Inc., et al.</i> , 2010 U.S. Dist. Lexis 118790 (N.D. Texas 2010) .....	3, 51-52
<i>Rouggly v. Whitman</i> , 592 S.W.2d 516 (Mo. Ct. App. 1979) .....	4, 61
<i>Ruckelshaus v. Monsanto Co.</i> , 467 U.S. 986 (1984) .....	38, 41
<i>Sheets v. Yamaha Motors Corp. U.S.A.</i> , 849 F.2d 179 (5th Cir. 1988) .....	41
<i>Simeone v. First Bank National Association</i> , 971 F.2d 103 (8th Cir. 1992) .....	60
<i>State ex. Rel. The Plain Dealer v. Ohio Department of Insurance</i> , 687 N.E.2d 661 (Ohio 1997) .....	3, 40
<i>Stehno v. Sprint Spectrum</i> , 186 S.W.3d 247 (MO 2006) .....	4, 73, 74

<i>Sunridge Development Corporation v. RB&amp;G Engineering</i> , 230 P.3d 1000 (Utah 2010) .....	5, 78
<i>Tops Markets, Inc. v. Quality Markets, Inc.</i> , 142 F.3d 90 (2nd Cir. 1998) .....	4, 66
<i>Tubos de Acero de Mexico v. American International Investment Corp.</i> , 292 F. 3d 471 (5th Cir. 2002) .....	40-41
<i>Tyler v. Harper</i> , 744 F.2d 653 (8th Cir. 1984) .....	33
<i>United States ex rel. Joshi v. St Luke’s Hospital, Inc.</i> , 441 F.3d 552 (8th Cir. 2006) .....	5, 77
<i>United States v. E.I. du Pont de Nemours &amp; Co.</i> , 351 U.S. 377 (1956) .....	68
<i>Winston Research Corp. v. Minnesota Min. &amp; Mfg Co.</i> , 350 F2d 134 (9th Cir. 1965) .....	2, 31

**OTHER AUTHORITIES**

Charles Alan Wright et al., <i>Federal Practice and Procedure</i> § 1484 at 598-600. (2nd Addition, 1990) .....	77
FAA Order 8110.54 .....	35
FAA Order 8620.2A .....	35
Federal Rules of Civil Procedure, Rule 8(a)(2) .....	80

Federal Rules of Civil Procedure, Rule 8(b) . . . . . 80

Federal Rules of Civil Procedure, Rule 15(a)(2) . . . . . 77

Federal Rules of Civil Procedure, Rule 15(d) . . . . . 77

Restatement of Torts § 757 . . . . . 31

Restatement (Second) of Contracts §206 . . . . . 61

Restatement (Second) of Torts § 768 (1979) . . . . . 73

**STATUTES**

14 C.F.R. § 21.50 . . . . . 14, 35, 46

14 C.F.R. § 43 . . . . . 11

14 C.F.R. § 33.4/14 C.F.R. § 33.4, Appendix A . . . . . 14, 35, 46

15 U.S.C. §1 . . . . . 66

15 U.S.C. §2 . . . . . 67

28 U.S.C. § 1291 . . . . . .12

28 U.S.C. § 1292(b) . . . . . 79

28 U.S.C. §1332 . . . . . 1

California CCP § 337 . . . . . 60



Indiana §24-2-3-5(1) ..... 81

Indiana § 24-1-3-3(a) ..... 37

Indiana § 24-2-3-3(a) ..... 31, 54

Indiana § 34-11-2-11 ..... 60

Mo. Rev. Stat. § 417.455.1 ..... 31, 37, 54

Utah § 78B-2-309 ..... 60

## **JURISDICTIONAL STATEMENT**

The United States District Court for the Western District of Missouri had jurisdiction over this civil action pursuant to 28 U.S.C. 1332 in that there was diversity of citizenship and the amount in controversy exceeded \$75,000.

AvidAir is a Missouri corporation with offices in Lee's Summit, Missouri. Rolls-Royce is a Delaware corporation with principal offices in Indianapolis, Indiana.

This Court has appellate jurisdiction pursuant to 28 U.S.C. §1291 in that this appeal is from a final judgment of the U.S. District Court for the Western District of Missouri entered on September 30, 2010 (A-66) and amended on October 20, 2010. (A-69) A notice of appeal was timely filed on October 29, 2010.

## STATEMENT OF ISSUES

- I. Whether the District Court erred in granting Partial Summary Judgment in favor of Rolls-Royce concerning DOIL 24, Revision 13, finding that it was a Rolls-Royce protected trade secret.

*-Penalty Kick Management, Ltd. v. Coca Cola Co.,*  
318 F.3d 1284 (11th Cir. 2003)

*-Fox Sports Net North, LLC. v. Minnesota Twins Partnership,*  
319 F.3d 329 (8th Cir. 2003)

*-In re Iowa Freedom of Information Council,*  
724 F.2d 658 (8th Cir. 1983)

*-In re Remington Arms Co., Inc.,*  
952 F.2d 1029 (8th Cir. 1991)

- II. Whether the District Court erred in granting Partial Summary Judgment determining that DOIL 24, Revision 12, DOIL 3, Revision 16 and DOIL 8, Revision 6 and BookFax 97AMC059 are Rolls-Royce protected secrets.

*-Winston Research Corp. v. Minnesota Min. & Mfg Co.,*  
350 F.2d 134 (9th Cir. 1965)

*-Rolls-Royce Corporation v. Heros, Inc., et al.,*  
2010 U.S. Dist. Lexis 119381 (N.D. Texas 2010)

*-Rolls-Royce v. Heros, Inc., et al.,*  
2010 U.S. Dist. Lexis 118790 (N.D. Texas 2010)

*-State ex. Rel. The Plain Dealer v. Ohio Department of Insurance,*  
687 N.E.2d 661 (Ohio 1997)

III. Whether the District Court erred in issuing a permanent injunction requiring AvidAir to return all copies of DOIL 24, Revision 12, DOIL 3, Revision 16 and DOIL 8, Revision 6, and BookFax 97AMC059 to Rolls-Royce.

*-Kennedy Bldg. Assocs. v. CBS Corp.,*  
476 F.3d 530 (8th Cir. 2007)

*-PepsiCo, Inc. v. Redmond,*  
54 F.3d 1262 (7th Cir. 1995)

IV. Whether the District Court erred in failing to enforce the clear and unambiguous terms of the National Airmotive Corporation 1994 AMC Agreement and the Precision Branch Agreement.

*-Baum v. Helget Gas Products, Inc.,*  
440 F.3d 1019 (8th Cir. 2006)

*-City of Beverly Hills v. Village of Velda Village Hills,*  
925 S.W.2d 474 (Mo. Ct. App. 1996)

*-Rouggly v. Whitman,*  
592 S.W.2d 516 (Mo. Ct. App. 1979)

V. Whether the District Court erred in granting Partial Summary Judgment  
dismissing AvidAir's Count II (Antitrust).

*-Tops Markets, Inc. v. Quality Markets, Inc.,*  
142 F.3d 90 (2nd Cir. 1998)

*-General Industries Corp. v. Hartz Mountain Corp.,*  
810 F.2d 795 (8th Cir. 1987)

*-Morgan v. Ponder,*  
892 F.2d 1355 (8th Cir. 1989)

*-CVD, Inc. v. Raytheon Co.,*  
769 F.2d 842 (1st Cir. 1985)

VI. Whether the District Court erred in granting Partial Summary Judgment  
dismissing AvidAir's Count I (Tortious Interference).

*-Stehno v. Sprint Spectrum,*  
186 S.W.3d 247 (MO 2006)

*-A.L. Huber & Sons v. Robertson Plumbing,*  
760 S.W.2d 496 (Mo. App. 1988)

VII. Whether the District Court erred in denying AvidAir Leave to Amend its Complaint to include issues relating to its acquisition of the Model 250 technical library of Precision Air Power on June 20, 2009.

*-United States ex rel. Joshi v. St Luke's Hospital, Inc.,*  
441 F.3d 552 (8th Cir. 2006)

*-Sunridge Development Corporation v. RB&G Engineering,*  
230 P.3d 1000 (Utah 2010)

*-Bailey v. First National Bank of Chadron,*  
741 N.W.2d 184 (Neb. Ct. App. 2007)

## **STATEMENT OF THE CASE**

This case is a trade secret case brought under the Uniform Trade Secrets Act of both Indiana and Missouri that involves a challenge by AvidAir to the District Court's multiple summary judgments holding that Rolls-Royce has protected trade secret information contained in repair and overhaul information embodied in certain revisions of DOIL publications that were first published in the early 1970s. Rolls-Royce does not contest that the information in revisions of DOILs published before mid 1994 are publicly

available. The DOILs at issue in this case primarily involve compressor case half repairs which were published during or after 1996.

The parties each filed partial summary judgment motions in 2008. (JA-0090 and JA-0553) The initial motions were handled by a Magistrate who bifurcated the issue of DOIL 24, Revisions 1-13 and issued a Report on April 7, 2009. (A-01) The District Court adopted the Magistrate's Report with supplemental findings on June 23, 2009. (A-20) Details of the Court's procedure are contained in the body of this brief.

A second round of summary judgment motions occurred in July 2009. (JA-3980, JA-4269) These motions resulted in summary judgment orders in favor of Rolls-Royce on AvidAir's antitrust claims on September 22, 2009 (A-30) on AvidAir's tortious interference claims and Rolls-Royce's claims involving DOIL 3 and DOIL 8 on September 28, 2009. (A-36) The District Court then set the issue of damages and injunctive relief for trial. Later the District Court added the additional issue of whether AvidAir had misappropriated Rolls-

Royce's trade secrets in DOIL 24, Revision 13 by its DER Repair procedure and by acquiring the Model 250 technical library of Precision Air Power.

Trial was held in September 2010 with the jury awarding damages to Rolls-Royce in the amount of \$350,000 and finding that AvidAir had not misappropriated Rolls-Royce trade secrets in establishing its DER repair procedure; and that AvidAir had not acted willfully or maliciously. (A-61) The District Court granted in part and denied in Part Rolls-Royce's request for a permanent injunction. (A-69)

AvidAir filed a timely notice of appeal on October 29, 2010.

## **STATEMENT OF FACTS**

### A. History Of Allison.

Allison was a division of General Motors that in the 1950s began development of the Model 250 engine for military and civilian use. (A-01) The Model Series II (C-20) engine is a derivative of Series I (C-18) that was added to Type Certificate E4CE. (JA- 2701) The Series II engine has three modules: compressor, accessory gear box and turbine section. (JA-0962) AvidAir's business involves primarily the repair and overhaul ("R&O") of the



Compressor Case Halves contained in the compressor module. (JA-6242/6333)

The R&O involves removal of the plastic lining, inspection and/or replacement of the six vane bands; dimensional and non-destructive inspection and reinstallation of the plastic. (JA-6185) General Motors sold the Allison division to newly formed Allison Engine Company, Inc., in 1993, whose stock was acquired by Rolls-Royce plc in 1995, and changed its name to Rolls-Royce Corporation (“Rolls-Royce”) in 2000. (A-01)

From the early 1970s through July 1, 1994, the Allison distribution system was comprised of nine distributors who maintained facilities to R&O Model 250 engines. (JA-0853) Each distributor was allowed to appoint other maintenance facilities, known as Service Centers through 1985 and Authorized Overhaul Maintenance Centers (“AMOCs”) through July 1, 1994. (JA-0854) As of February 1994, R&O of Model 250 engines was performed by Allison Distributors, AMOCs and independent shops. (JA-0857) On February 18, 1994, Rolls-Royce announced a plan to “Revise [its] Distribution System” and “Accelerate Allison Activities into the Used, Repaired, Surplus Markets,”

entering the R & O Aftermarket for the first time. Its plan was to begin with the R&O of Compressor Case Half repairs, combustion liners and nozzles. (JA-6415) On July 1, 1994, Allison terminated its nine Distributors.

B. Public Availability Of R&O Information.

1. DOILs And BookFaxes.

Prior to July 31, 1996, R&O information concerning the Model 250, Series II engine could be found in the 10W3 Overhaul Manual, Distributor Information Letters (“DILs,” also known as AMC-ILS), Distributor Overhaul Information Letters (“DOILs,” also known as AMC-OILs), BookFaxes and Commercial Service Letters (“CSLs”). (JA-4494 and 4496) Allison published 42 DOILs, starting in 1970 with the stated purpose of providing overhaul specifications. (JA-0980) DOILs were updated from time to time through revisions. (JA-1150-1152)

“For many years, Allison made no serious efforts to control information about how to properly repair or overhaul compressors....there was no agreement requiring AMOCs, distributors or other recipients to maintain the confidentiality of DILs and DOILs...This led to the development of overhaul shops that were not authorized by Allison, but that were nonetheless able to complete FAA-acceptable repairs because

the DILs and DOILs were easily and freely copied or transferred from shop to shop.” (A-02)

2. DOIL 24, Revisions 1-11.

The Model 250 Series II 10W3 Overhaul Manual (JA-6216) directs maintenance personnel to use DOIL 3 and DOIL 24 in the R&O of Series II Compressor Case Halves. (JA-6279)

Information contained in DOIL 24, Revisions 1-10, are not Rolls-Royce trade secrets because Rolls-Royce and its predecessors “did not take appropriate steps to maintain their secrecy.” (A-08) DOIL 24, Revision 10, was issued on August 30, 1995, after Rolls-Royce acquired the stock of Allison. (JA-0880)

“The Record [Summary Judgment record] clearly establishes that Rolls-Royce took no effort to maintain the secrecy of these revisions [1-10], there were no agreements with those who received the revision requiring that secrecy be maintained or restricting their transfer and the documents themselves contain no warnings or disclaimers.” (A-08)

DOIL 24, Revision 11, issued January 15, 1996 is also in the public domain. (TTR Vol. III, p. 487)

### C. Entry Of AvidAir Into The R&O Market.

AvidAir commenced its R&O business of Model 250 Series II Compressor Case Halves in 1994 as a FAA Certified Repair Station, established pursuant to 14 C.F.R. § 43. (JA-0605-0606) It began business with machinery and DOIL 24, Revisions 1-3, that had been sold by the United States at a Defense Property Disposal Region Office Sale (A-03) and DOIL 24, Revisions 4-7, it had acquired from persons helping set up the business. (TTR Vol. II p. 347-352) From the outset of its business, AvidAir returned its R&O Series II Compressor Case Halves to service as part # 23057142. The part number was a return to service change authorized by DOIL 24, Revision 7, and CEB-1317 (JA-2181-2183) as the result of a new plastic in the case halves. (JA-2181-2183) Revision 7 authorizes the same part number and configuration as subsequent revisions of DOILs 24, through revision 13. (TTR Vol. II, P.334-339) (JA-5198-5203) At the time of AvidAir's entry into the Compressor Case Half R&O market, there were only five or six other companies in the world performing R&O of Series II Compressor Case Halves. (JA-0893)

D. The AMC Distribution System.

On July 1, 1994, Allison terminated all distributors and AMOCs and began the process of appointing Authorized Maintenance Centers. ("AMCs") The AMCs included National Airmotive Corporation ("NAC"), who executed its 1994 AMC Agreement on November 30, 1994. (JA-5109-5119 and JA-6591-6745) NAC's 1994 Agreement was signed by Allison and returned to NAC by letter, dated January 5, 1995. (JA-5109) The NAC 1994 Agreement contained the names of four companies that it identified as "Branches." (JA-5116) The Branches (Precision Air Power, Essential Turbines, Airborne and Helipower) were former AMOCs appointed by NAC. (JA-0854 and 0857) Precision entered into a Branch Agreement under which it lawfully received DILs, DOILs and other Model 250 technical information from 1994 until its termination in February 1999, with Rolls-Royce's full knowledge and consent. Rolls-Royce does not dispute that Precision lawfully received DOILs. (JA-3082/5819/4478/4831) The NAC 1994 AMC Agreement, drafted by Allison, contained no provision requiring it to maintain DILs, DOILs or BookFaxes in

confidence, refrain from redistribution of the documents or return the documents at the termination of its AMC Agreement. (JA-5109-5119) Neither DILs, DOILs nor BookFaxes were on the “Manual List” attached to the 1994 AMC Agreement on page 112 of the “Additional Provisions” that identified the “Manuals” that were subject to the confidentiality provisions in the AMC Agreement. The Branch Agreement between NAC and Precision contained no restriction on Precision’s use or transfer of DILs, DOILs, BookFaxes or other Model 250 technical information received from NAC. (JA-4815-1833)

E. Rolls-Royce R&O Entry.

During 1995, Rolls-Royce developed overhaul procedure OHP 72-30-21 for Compressor Case Halves, which its chief engineers understood would be inserted in the publicly available 10W3 Overhaul Manual. (JA-0711-712/781/1519-1523) On January 8, 1996, Rolls-Royce issued DOIL 24, Revision 11. (JA-4569-4618) The OHP 72-30-21 specified that the technical information to be used in the R&O of Series I and II Compressor Case Halves was (1) the 10W3 Overhaul Manual; and (2) DOIL 24, Revision 11. (JA-3670) On May 26,

1996 Rolls-Royce issued Revision B to compressor case R&O procedure 72-30-21, which continued the direction to use 10W3 Overhaul Manual and DOIL 24, Revision 11. (JA-2794) On October 8, 2000, Rolls-Royce advised the FAA that OHP 73-30-21, Revision B, contained the Instructions for Continued Airworthiness (“ICAs”) for the R&O of Series II compressor cases pursuant to 14 C.F.R. §21.50 and 14 C.F.R. § 33.4; and that entirety of DOILs and DILs were also ICAs for Model 250 engines. (JA-0693-0696)

On June 27, 1996, Michael Boling issued an Allison Series II Compressor Case Repair Business Plan designed to create a revenue stream for Allison by entering the aftermarket compressor case assembly business. The Boling Business Plan described the Series II compressor case assembly as a “two piece, matched assembly consisting of an 347 and 410 stainless external housing with a series of fixed compressor vane assemblies and a plastic gas path coating.” (JA-0892) Boling described the Process Concept(s):

“[as] The cleaning and inspection processes along with a special cleaning, fluorescent penetrate inspection, brush plating, welding criteria and special plastic application are referenced in the applicable Allison Overhaul and DOIL Manuals.” (JA-0893)

As of the time of the Boling Business Plan, the Worldwide Compressor Case Half repair business was being performed by six of the twenty-seven AMCs and AvidAir. Boling determined that there were 3,500 Series I and 12,000 Series II engines in service that would need a case change every 1500 to 2000 hours of operation. (JA-0893) He estimated the customer base to be 3,500 customers worldwide. (JA-0893)

The Boling Plan contemplated Allison controlling the case half cores and providing vanes and the use of the OHP for Compressor Case Halves. (JA-0893-0894)

F. July 31, 1996 Rolls-Royce Announcement.

Rolls-Royce announced to the public that it was going to change the way it did business because “the practice of unauthorized companies manufacturing Rolls-Royce engine parts has become a concern to Rolls-Royce.” The public was informed that “to protect Rolls-Royce proprietary information...” part and assembly modification instructions will no longer be contained in Commercial Engine Bulletins and that engine owners would



have to take parts and assemblies to AMCs for modification. (JA-1045) Rolls-Royce simultaneously announced to the AMC organization that it was going to embark on an effort to “prevent the unauthorized flow of Allison proprietary technical information to unauthorized facilities...” part and assembly rework instructions were removed from publicly available commercial engine bulletins and placed in Parts Modification Instructions (“PMIs”). Further PMIs, DILs and DOILs would include a Proprietary Rights Legend claiming ownership of all “technical data and information embodied” in the document. (JA-3667/3601) Subsequent to July 31, 1996, Rolls-Royce began, for the first time, placing proprietary rights legends on DOILs, DILs, Overhaul Manuals and other Model 250 Series technical information. (JA-3601/5169) On October 31, 1996, Rolls-Royce issued Revision 12 to DOIL 24. Revision 12 was substantially identical to Revision 11, except for format. (JA-6497/6509) Rolls-Royce documents reflect that it was aware that AMC-OIL 24, Revision 11, contained no property rights legend. (JA-5887)

G. DOIL 24, Revision 13 History.

In late 1996 or early 1997 the Japanese military [Japanese Defense Agency (“JDA”)] experienced an issue with Series II compressor vanes. Rolls-Royce engineers determined during the summer of 1997 that the vane problem was a grinding error but to pacify the JDA, a minor change to the length of the 5th and 6th stage vanes and other minor changes would be made. (JA-0707/2827-2828)

On August 27, 1997, September 9, 1997, September 22, 1997 and October 3, 1997 the JDA was provided the details by Rolls-Royce of the dimension change to 5th and 6th stage vane, the details of the slight cleaning change and modification to inspection procedure, all of which they were told would be included in the Overhaul Manual. At the time this information was provided, the JDA and Shintoa Corporation operated without any duty of confidentiality to Rolls-Royce to keep the information in confidence. (JA-0707, 2099, 2102, 2104-2108/2829-2843) On October 6, 1997, Rolls-Royce distributed BookFax 97AMC059 to persons throughout the world that contained the

details of the vane length reduction to the 5th and 6th stage vanes. The BookFax contains no proprietary rights legend and Rolls-Royce has no record of the specific persons to whom the BookFax was sent. (JA-2844) On October 31, 1997, Rolls-Royce issued Revision 13 to DOIL 24, which in 38 words and 2 numbers, placed on 3 pages of the 103 page DOIL 24 added the vane length change to the 5th and 6th stage vanes, directions concerning cleaning and the directions to the inspection of Compressor Case Halves to the information contained in twelve prior revisions of DOIL 24. (JA- 2871-2873) Rolls-Royce produced no record of persons to whom it distributed Revision 13, nor of the cost of creating the additional information it inserted in DOIL 24, Revision 13, or PRPL 2-B002. (JA-2852-2853) The record reflects that DOIL 24, Revision 13 (and DOIL 3, Revision 16, and DOIL 8, Revision 6) were lawfully provided to at least the Australian military (JA-1141/1178), Precision (JA-1310/5875/4348/3074), Airborne (JA-4653/1318/2978-2979) and Essential. (JA-4619) Rolls-Royce produced no evidence of a duty on their part to maintain the documents in confidence or to return them.

#### H. Rolls-Royce's Entry Into The Compressor Case Half R&O Market.

Rolls-Royce initially entered the Compressor Case Half R&O Aftermarket by dividing the work between Rolls-Royce Aero division located in Indianapolis Plant 5 and Standard Aero, a Rolls-Royce AMC based in Winnipeg, Canada, providing the labor and re-plastic application. (JA-0939/2793/2797) Prior to 1996, Standard Aero was not in the Compressor Case Half R&O business. (JA-3221) Rolls-Royce supplied the vanes and controlled the cores. (JA-0893/0939) On January 31, 1999, Rolls-Royce outlined its goals and requirements for 250 business development which included joint development with the AMCs with an intent to "recapture" the millions of dollars being lost to third party repair facilities. Rolls-Royce also acknowledged that "Major changes are going to be proposed by the aftermarket team with regard to the control of technical data." (JA-3675) On January 22, 1999, Rolls-Royce was aware that Model 250 technical information was widely available in the industry. (JA-3067) On March 23, 1999, Rolls-Royce assigned Fesler, its AMC Manager, with the task of

“obsoleting” the DILs and DOILs. (JA-3069) On June 17, 2000 Rolls-Royce developed additional plans to recapture the R&O market including a “compressor exchange program” developed by its Helicopter Aftermarket Team by using its monopoly over the vane band assemblies that Allison/Royce had enjoyed since the 1960s to gain a market share in the aftermarket Compressor Case Half market. (JA-3718)

Standard Aero was selected by Boling to perform compressor case overhauls pursuant to OHP 72-30-21. The initial OHP and Revision B designated the public AMC-OIL 24, Revision 11, to be used. (JA-3670) When DOIL 24, Revision 13, was issued, Standard Aero refused to change from DOIL 24, Revision 11, indicating to Rolls-Royce that the dimension change to the 5th and 6th stage vanes did not work. (JA-3738) On August 25, 2000 Rolls-Royce and Standard Aero entered into an agreement for Standard Aero to R&O Series II compressors cases for Aviall, Rolls-Royce’s parts distributor to sell to the public. Rolls-Standard and Standard Aero would share the profit from the compressor case program. (JA-3745-3746) The agreement provided

that the compressor cases be R&O pursuant to DOIL 24, Revision 11. (JA-3730-3734) The agreement was amended on December 18, 2001 to allow Standard Aero to get special pricing from Aviall. (JA-3743-44)

I. Rolls-Royce Directs Its Market Share Efforts At AvidAir.

On April 11, 2002, Rolls-Royce, Aviall and Standard Aero reviewed the financial and market share results of their joint venture in the Series II Compressor Case Program for the period of August 2000 to December 31, 2001. (JA-3745-3751) The summary included Rolls-Royce considering its options for Market Share in the Compressor Case Half R&O aftermarket. (JA-3749) Rolls-Royce considered terminating the current compressor case exchange program being operated by Rolls-Royce; withdrawing AMC-OIL 24; release of a PMI to AMCs with improved procedures, including updates to AMC-OIL 24 and single band replacement; reducing vane list prices; reducing the price of exchange case halves; and marketing vane bands through Aviall. (JA-3749) Rolls-Royce concluded that it would gain substantial benefits from a change in the Compressor Case Program.

On April 15, 2002, Rolls-Royce published revisions to the 10W3 Overhaul Manual, which AvidAir purchased, that included an instruction for Compressor Case Half R&O that DOIL 3 and DOIL 24 be used. (JA-6279) AvidAir continued to certify on the return to service document (8130-3) that the product was airworthy and R&O was in accordance with the 10W3 Overhaul Manual and DOIL 24 (JA-2160). During the period of 1997 through September 2010, AvidAir paid Rolls-Royce and/or Aviall approximately \$65,000.00 [TTR Vol. III, p. 46] for the purchase of Model 250 Overhaul Manuals and revisions needed to R&O Series II Compressor Case Halves.

On May 10, 2002, Rolls-Royce was in the process of planning the future of its R&O network, which includes an IP retrieval plan of all Model 250 technical information including DILs and DOILs and all their revisions; and BookFaxes on December 31, 2003. Rolls-Royce claimed proprietary rights to all documents and all revisions. (JA 4527-28)

In July 2002, Rolls-Royce began an effort to stop AvidAir from competing in the Series II Compressor Case Half R&O business.

On July 23, 2002, Rolls-Royce commenced the “plug the hole” action against AvidAir which Rolls-Royce described as an action “which allows us to ensure that our process is not used to install unapproved vanes in the compressor case assemblies.” (JA-3785) The actual reason for Rolls-Royce control of vanes was to enhance sales by Rolls-Royce and its AMC Network. (JA-3715) This effort to interfere with AvidAir’s Compressor Case Half R&O business by keeping AvidAir from using DOIL 24 started with an audit of an AvidAir AMC customer(JA-3785) and included Rolls-Royce compiling “a list of the serial numbers overhauled by AvidAir to date [and] a list of customers that these parts were overhauled for or shipped to.” (JA-3786-3787) On August 23, 2002, Rolls-Royce sent BookFax 02AMC045 to persons located throughout the world designed to interfere with AvidAir’s R&O business by advising them that AvidAir’s R&O Compressor Case Halves were not to be used by AMCs and announced that AMC-OIL 24, was not used by unauthorized facilities. (JA-0732) At the time of the BookFax, AvidAir was the only non-Rolls-Royce affiliated repair facility in the world that performed



R&O to Series II Compressor Case Halves. By letter dated August 7, 2002, Rolls-Royce counsel demanded that AvidAir cease and desist from use of DOIL 24 and falsely represented that DOIL 24 had never been publicly available and was a Rolls-Royce trade secret. (JA-5877) Rolls-Royce counsel renewed the demand on August 22 (JA-5878) and again on September 20, 2002 (JA-5879-5881). AvidAir counsel responded to Rolls-Royce's demands on October 4, 2002 indicating that AvidAir disagreed with Rolls-Royce's claim of proprietary rights to the DOILs, including DOIL 24 and invited Rolls-Royce to participate in a Declaratory Judgment action if Rolls-Royce disagreed. (JA-5882-5883) Rolls-Royce did not respond until September 2006, again claiming proprietary rights to DOIL 24 and all revisions. (JA-0076-0078)

By letter dated January 31, 2003, Rolls-Royce falsely represented to the FAA that DOIL 24, Revision 7 was needed to install the current abradable plastic in Series II Compressor Case Halves, part number 23057142, and was Rolls-Royce proprietary information not possessed by AvidAir and that DOIL

24, Revision 13 was needed to return the case halves to service as part number 23057142. (JA-5198-5203/2158-2159)

On February 28, 2003 Rolls-Royce continued to implement a plan to recapture the Model 250 technical information that included cancellation of DOILs and DILs (JA-6389) and re-issuing them under a different name. (JA-4514)

AvidAir became aware of DOIL 24, Revision 13, in late February 2003 as a result of communications from the FAA about Rolls-Royce's January 31, 2003 letter. AvidAir then acquired Revision 13 from a customer. AvidAir determined there was nothing new in Revision 13 other than a minor dimension change to two vanes, which it considered to be "form, fit and function" information Rolls-Royce was required by law to provide to those who performed R&O to Series II Compressor Case Halves. (JA-2714/2730/2732/0974/1526/6510/6511/2715/4331)

On February 21, 2003, AvidAir explained to the FAA its position concerning its use of DOIL 24, including its understanding of the federal

regulations relating ICAs. (JA 2161) When AvidAir received Revision 13, it recognized that it included “form, fit and function” information concerning the 5th and 6th stage vanes that should have been provided as ICA. (TTR Vol. III, p. 490-492) Rolls-Royce cannot dispute that it understands that the 10W3 Engine Overhaul Manual is required to provide “(2) cleaning and inspection methods and techniques...” and “(3) details of fits and clearances” to engine owners and persons responsible for maintaining and repairing Compressor Case Halves contained in DOIL 24, Revision 13. (JA-6390 and 6392)

The Rolls-Royce plan continued to be implemented through 2003 with its efforts to gather all DILs, DOILs and PMIs from members of the Rolls-Royce distribution system (“First Network”). (JA-0840)

On December 31, 2003, Rolls-Royce cancelled all DILs, DOILs and PMIs in its continued efforts to retrieve them from the field. (JA-6389) On January 1, 2004, the information formerly contained in the DILs, DOILs and PMIs were reissued as PRPLs. (JA-0841-0844) On May 13, 2004, Rolls-Royce publicly announced that DILs, DOILs and PMIs were obsolete, unuseable and should

be destroyed. (JA-5884) By letter dated September 14, 2006, Rolls-Royce again claimed that AvidAir could not use DOIL 24 and demanded that it cease and desist, and return all DOIL 24, Revision 13, and “all other Rolls-Royce/Allison overhaul information letters, information letter, part drawings, engineering specifications and the like in its possession.” (JA-0077)

During discovery, Precision produced the Model 250 technical library that it had acquired during the period of 1994-1999 from NAC. (JA-4961-4962) By letter dated November 31, 2007, Rolls-Royce counsel demanded return of Precision’s Model 250 technical library. Rolls-Royce counsel advised Precision:

“You should also be aware that DOILs and DILs were replaced with Part Repair Procedure Letters in May 2004 and are thereby rendered obsolete. DOILs and DILs should not be used for any purpose since May 2004. The continued use of these documents is inappropriate and raises concerns relating to the reliability and safety of engines containing work performed according to these documents after May 2004.” (JA-4394)

It should be noted that DOIL 24, Revision 13 is identical to the newly issued PRPL 2-B002. (Hr’g TTR of 2/11/2009 at 37, Dkt. 157)(JA-3247)

## **SUMMARY OF ARGUMENT**

The principal theme of AvidAir's argument is that Rolls-Royce knowingly took public information in DOIL 24, added three minor changes and a proprietary rights legend, then claimed rights to all of the information as a part of its July 31, 1996 "change the way we do business" plan. (JA-1045 and 3667) AvidAir contends that Rolls-Royce's effort to recapture the information in DOIL 24 was part of its overall plan to capture the Compressor Case Half R&O Aftermarket.

AvidAir contends that the three items of "new information" in DOIL 24, Revision 13 (JA-2228-2229) are not new, have no commercial value, provide Rolls-Royce no competitive advantage and does not convert DOIL 24, Revision 13, into trade secret compilation. Further, the alleged "new information" in Revision 13 was publicly provided to foreign militaries and others without restriction. Finally, Revision 13 and the other DILs and DOILs at issue were lawfully provided by NAC, an AMC, with Rolls-Royce's knowledge, to Precision Air Power and others, without restriction. AvidAir

has provided numerous examples of persons who possess DILs and DOILs without restriction. Rolls-Royce has simply failed to provide evidence of a duty of confidentiality or restriction on the DILs and DOILs that were distributed by NAC. Rolls-Royce has likewise failed to meet its burden of coming forward with evidence that DOIL 3, Revision 16, DOIL 8, Revision 6, contain "new information" which converts the entire DOILs into protected trade secrets.

AvidAir contends that the NAC 1994 AMC Agreement does not include DILs, DOILs and BookFaxes as "Manuals" subject to confidentiality and to be returned. The District Court properly concluded that paragraphs 1.49, 6.2 and 13.8 did not include DILs and DOILs. That interpretation should be confirmed, especially in light of the contract provisions omitted by Rolls-Royce (e.g. manual list at p. 112 (A-84), the mutual release provision (JA-6597), and the one year limit barring claims. (A-80) Additionally, Rolls-Royce claims are barred under the Agreement, even if they existed.

Finally, the antitrust claims and tortious interference claims were dismissed on the basis of the District Court's conclusions about DOIL 24, Revision 13. If those conclusions are reversed, its dismissal of AvidAir Count I and II should likewise be reversed. Even if the conclusions are not reversed, Rolls-Royce anti-competitive conduct and interference, claiming rights which it did not have to information in DILs and DOILs occurred long before AvidAir possessed DOIL 24, Revision 13. AvidAir has provided evidence on each element of its antitrust and tortious interference claims.

The District Court's injunction is also inappropriate given the fact that Rolls-Royce contended at trial that the cleaning and inspection methods in revision 13 (two of the three "new" items of information identified by the Magistrate) and AvidAir's Designated Engineering Representative ("DER") Repairs were identical. The jury's findings of no misappropriation and the Court's finding that "the universe of publicly available information is quite vast...with Craig Rookstool's experience, suggests Rookstool was fully

capable of developing an acceptable process for overhauling compressors” (A-63) is strong evidence that no injunctive relief is appropriate.

## **Argument**

### Introduction

The principal purpose of the law relating to trade secrets under the Restatement of Torts § 757 and the Uniform Trade Secret Act adopted by numerous states, including Missouri [Mo. Rev. Stat. §417.455.1] and Indiana [Statute § 24-2-3-3(a)] is “to encourage innovation and development, and the law should not be used to suppress legitimate competition. *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470 481-82 (1974).” *American Can v. Mansukhani, et. al.*, 742 F.2d 314, 329 (7th Cir. 1984).

Trade secret protection should not exceed “beyond the limits needed to protect genuine trade secrets. *Winston Research Corp. v. Minnesota Min. & Mfg Co.*, 350 F2d 134, 143, 144 (9th Cir. 1965).” *Id. at 329.*



## ISSUES RAISED ON APPEAL

- I. The District Court Erred In Granting Partial Summary Judgment In Favor of Rolls-Royce Concerning DOIL 24, Revision 13, Finding That It Is A Rolls-Royce Protected Trade Secret. (A-1)(A-20).

### Standard of Review

The standard for reviewing Summary Judgment orders of the District Courts is *de novo*. See *Edwards v. Brian, et. al.*, 2010 U.S. App. Lexis 18635 (8th Cir. 2010) citing *Mason v. Corr. Med. Servs. Inc.*, 559 F.3d 880, 884 (8th Cir. 2009). On the issue of the parties' cross motions for Summary Judgment concerning the trade secret status of DOIL 24, Revisions 1-13, Rolls-Royce bears the burden at trial. Accordingly, AvidAir must only point to absence of evidence on any essential element of Rolls-Royce's claim that DOIL 24, Revision 13, is a Rolls-Royce protected trade secret. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). Once AvidAir does so, Rolls-Royce must come forward with evidence of each element of its claim that Revision 13 is a Rolls-Royce protected trade secret sufficient to establish the existence of a genuine issue of material fact. See *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986); and *Get Away Club v. Coleman*, 969 F.2d 664 (8th Cir. 1992). Evidence must be viewed

in a light most favorable to the non-moving party, who does not bear the burden of proof, and must afford such party all reasonable inferences from the evidence. *Matsushita Electric Industries Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588-89 (1986); and *Tyler v. Harper*, 744 F.2d 653, 655 (8th Cir. 1984).

## **Argument**

### A. Consideration of DOIL 24 Issues.

On December 8, 2008, the Magistrate was assigned the responsibility of establishing a procedure for resolving the parties' Motions for Partial Summary Judgment on trade secret issues. The Magistrate elected to bifurcate DOIL 24, Revisions 1-13 issues. Rolls-Royce was directed to identify differences in Revision 13 that did not exist in prior revisions, and AvidAir was directed to respond to each designation.

On February 2, 2009 AvidAir responded to the six items Rolls-Royce identified. (JA-2047) On February 9, 2009, Rolls-Royce filed a chart summarizing the position of Rolls-Royce and AvidAir concerning information Rolls-Royce contends to be new in Revision 13. (JA-2060) A hearing was held on February 11, 2009, during which the parties discussed cleaning methods

(Hr'g TTR of 2/11/2009 p.14-21); inspection with magnification (Hr'g TTR of 2/11/2009 p.21-25); vane dimensions (Hr'g TTR of 2/11/2009 p.54-61); and DOIL 24, Revision 13 in possession of the Australian military (Hr'g TTR of 2/11/2009 p.58-61).

Rolls-Royce offered no argument nor provided evidence that the information it alleged to be new constituted a trade secret on its own; or had any unique quality or commercial value on its own.

B. The Magistrate's Report And Recommendation (JA-2218).

The Magistrate recommended: (1) that the District Court sustain AvidAir's Motion concerning DOIL 24, Revisions 1-10, and enter a Declaratory Judgment that they were in the public domain; (2) denial of AvidAir's Motion concerning Revisions 11 and 12; (3) Revision 13 [as a whole] "derives independent economic value from not being generally known;" (JA-2226) (No supporting evidence was identified and no finding of value was made concerning the "new" information.) (4) "Rolls-Royce provided Revision 13 only to AMCs, and the AMCs were required to sign agreements prohibiting

dissemination of Revision 13...”; (JA-2226-2227) and (5) that there are at least three items in Revision 13 that are not in publicly available revisions. (JA-2227) and (JA-2693-2695)

The Magistrate’s recommendation that DOIL 24, Revision 13, is a trade secret was premised on the assumption that the three changes (in cleaning method, inspection and vane length) “...are the only basis for differentiating Revision 13 from publicly available (non-trade secret) versions.” (JA-2227)

C. AvidAir’s Exceptions To The Magistrate’s Report And Recommendation (JA-2688).

AvidAir filed exceptions to the Magistrate’s report which included reference to its Narrative Statement of Facts (JA-0555/2688), again brought the existence of 14 C.F.R. § 21.50 and 14 C.F.R. § 33.4, Appendix A to the Court’s attention, provided additional federal regulations (FAA Order 8110.54) which require the information in all of DOIL 24 and PRPL 2-B002 to be provided as ICAs, brought FAA Order 8620.2A to the Court’s attention on the issue of whether AvidAir is required to follow manufacturer’s instructions. (JA-5101 and 5210??) AvidAir again brought the public disclosure of the “new”

information contained in Revision 13 to the JDA, Shintoa Corporation, Australian Military and others. (JA-0707/0785-0786/2099/2102/2104-2106/6569-6570) Finally, AvidAir identified five entities that had unrestricted possession of DOIL 24, Revision 13. (JA-1141/1178/1310/5875/4348/3074/4653/1318/2978-2979)

D. The District Court's June 23, 2009 Partial Summary Judgment Order concerning DOIL 24 (JA-3497) (A-20).

The District Court overruled the objections of the parties and adopted the Magistrate's Report and Recommendation concerning entry of Summary Judgments for both AvidAir and Rolls-Royce. The District Court then proceeded to supplement its order by interpreting the NAC 1994 AMC Agreement excerpts provided by Rolls-Royce as applicable sections of the AMC Agreement. (JA-0162-0173). Without all of the relevant provision of the 1994 Agreement, the District Court correctly determined that the Policy Manual was not a contractual document. In fact, it is only to be used as the fifth alternative source for interpreting ambiguities and inconsistencies in the AMC Agreement. (JA-5236) The District Court then proceeded to correctly

determine that the “Additional Provisions” were incorporated into the Agreement and that paragraphs 1.49, 6.2 and 13.8 of the “Additional Provisions” did not include protection for DILs and DOILs. (A-23-25)

The interpretation of the NAC 1994 AMC Agreement is more fully discussed in Issue VI.

- E. DOIL 24, Revision 13 Is Not A Rolls-Royce Protected Trade Secret.
  - 1. The 38 Words And 2 Numbers Added to DOIL 24, Revision 13, Are Not Trade Secrets and Do Not Elevate The Revision To Trade Secret Status (JA-2228-2229).

Under the Uniform Trade Secrets Act (“UTSA”) of both Missouri (Mo. Rev. Stat. §417.455.1) and Indiana [Statute §24-1-3-3(a)], a trade secret is defined as:

“(1) it is information, (2) which derives independent economic value, (3) that is not generally known, or readily ascertainable by proper means by other persons who can obtain economic value from its disclosure or use, and (4) is the subject of efforts to maintain its secrecy.” *Credentials Plus, LLC v. Calderone*, 230 F. Supp.2d 890, 900 (N.D. Ind. 2002)

Rolls-Royce offered no credible evidence that the three items of new information “derived independent economic value.” “Value” under the UTSA means provides a “competitive advantage” to Rolls-Royce. In order for

information to be a trade secret it must have a commercial value which has been described by the U.S. Supreme Court as being “the value of a trade secret lies in the competitive advantage it gives its owner over competitors.”

*Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1002, 1011 n. 15 (1984) Obsolete

information that provides no competitive advantage is not commercially

valuable and cannot constitute a trade secret. *Fox Sports Net North, LLC v.*

*Minnesota Twins Partnership*, 319 F.3d 329, 336 (8th Cir. 2003) (where the 8th

Circuit stated: “obsolete information cannot form the basis for a trade secret

claim because the information has no economic value.”). See also

*MicroStrategy, Inc. v. Business Objects, S.A.*, 661 F.Supp. 548, 555 (E.D.Va. 2004)

In this case, Rolls-Royce obsoleted all DOILs and DILs, including DOIL 24,

Revision 13 on December 31, 2003 (JA-3749/6389/0841-0844) and reissued

them the following day as PRPLs. The world was notified of their

obsolescence on May 14, 2003 and told that they were unusable. (JA-0845)

Following the District Court’s Summary Judgment concerning Revision 13, Rolls-Royce contended that AvidAir’s DER Repair contained cleaning and

inspection methods that were identical to the new cleaning and inspection methods contained in Revision 13; and therefore claimed a second misappropriation of Rolls-Royce's trade secrets. (JA-4964 )The jury's finding of "did not use AMC-OIL 24, Revision 13, in formulating its DER Repair Process" (JA-5664) incorporated into the Court's final judgment (JA-5746-5747) concerning the cleaning and inspection methods in AvidAir's DER repairs could only mean that the information was not new and was readily ascertainable by AvidAir.

2. Revision 13 Is Not A "Compilation" Within the Meaning of the UTSA.

As a general rule, "a trade secret can exist in a combination of characteristics and components, each of which, by itself, is in the public domain, but the unified process and operation of which, in a unique combination, affords a competitive advantage and is a protectable secret." See *Amoco Production Co. v. Laird*, 622 N.E.2d 912, 919-20 (Ind. 1993) AvidAir does not dispute that under appropriate circumstances, a compilation of public information can be a trade secret. See *Minnesota Mining & Mfg. v. Pribyl*, 259



F.3d 587, 595-96 (7th Cir. 2001). This concession does not mean that Rolls-Royce can simply change the color of the cover page, place a proprietary rights legend on the document claiming ownership to all information “embodied” therein, make other non- substantive minor changes and add a relatively small amount of new information “in an effort to recapture the entire document as a trade secret.” *Rolls-Royce Corporation v. Heros, Inc., et al.*, 2010 U.S. Dist. Lexis 119381 (N.D. Texas 2010) at page 15. (A-73) To be protected as a compilation the new information must be combined in a unique manner which results in increased value to the information. See *Penalty Kick Management, Ltd. v. Coca Cola Co.*, 318 F.3d 1284, 1291 (11th Cir. 2003). Where, as here, simply compiling public information into a new document does not result in a trade secret. *State ex. Rel. The Plain Dealer v. Ohio Department of Insurance*, 687 N.E.2d 661, 675 (Ohio 1997).

3. The Summary Judgment Record Reflects Lack Of Efforts To Keep The Alleged New Information Secret.

To be a trade secret, information cannot be generally known and must be subjected to reasonable efforts to maintain secrecy. *Tubos de Acero de Mexico*

*v. American International Investment Corp.*, 292 F. 3d 471, 483 (5th Cir. 2002) “A disclosure of a trade secret to others who have no obligation of confidentiality extinguishes the property right in the trade secret” (quoting *Sheets v. Yamaha Motors Corp. U.S.A.*, 849 F.2d 179, 183 (5th Cir. 1988)). Once a trade secret enters the public domain, the possessors exclusive rights to the secret are lost. See *Kewanee Oil Co. v. Bicron Corp.* 416 U.S. 470, 475-476 (1974). See also *Ruckelshaus* at 1002 (holding that public disclosure of trade secret information “extinguishes” the owner’s property right in the information). *In re Iowa Freedom of Information Council*, 724 F.2d 658, 662 (8th Cir. 1983)(stating that if trade secrets “are disclosed or revealed they are destroyed”); and *Religious Technology Center v. Netcom On-Line Consumer Services*, 923 F. Supp. 1231, 1254 (N.D. Ca. 1995). Once trade secrets are lost they cannot be recaptured. See *In re Remington Arms Co., Inc.*, 952 F.2d 1029, 1033 (8th Cir. 1991) Further, the DOILs “[c]annot be trade secrets if they are essentially the same as documents in the public domain.” *Rolls-Royce Corporation v. Heros, Inc., et al.*, 2010 U.S. Dist. Lexis 119381, 13 (N.D. Texas 2010). (A-72)

- a. The Summary Judgment Record Contains Evidence That The DILs and DOILs, Including DOIL 24, Revision 13 Were Lawfully In The Possession Of Persons With No Obligation to Maintain It In Confidence Or To Return It To Rolls-Royce.

(1) *The Australian Air Force*. The Australian Military possessed the entire set of DILs and DOILs, including DOIL 24, Revision 13, from at least 1994 until 2007 when they were retrieved by Chris Ankrom. (JA-1062/1069/1141) Rolls-Royce has not disputed that the Australian Military was in lawful possession of the documents with the knowledge of Rolls-Royce. Further, Rolls-Royce has presented no evidence that the Australian Military was under any duty of confidentiality. (Hr'g TTR of 2/11/09, p. 58-61 and 68-69 at Dkt. 157) (A-87)

(2) *Airborne, Vancouver*, 10-3071 No. 5 Road, Richmond, British Columbia, Canada. Airborne acquired and possessed the DILs and DOILs, including DOIL 24, Revision 13, from the NAC during the period of 1994 through 1999 when it was one of the four NAC Branches appointed under the 1994 AMC Agreement. (JA-1318-1319/2978) .

Rolls-Royce had knowledge of Airborne's 1994 designation as a NAC Branch and that it possessed DILs and DOILs. (JA-2978-2979/2984) Rolls-Royce presented no evidence that Airborne's possession of the documents were restricted.

(3) *Cadorath Aerospace, Inc.*, Dallas, Texas. Cadorath possessed DILs and DOILs, including DOIL 24, Revision 13, which had been acquired from NAC. Rolls-Royce was provided with written notice that Cadorath Dallas possessed DILs and DOILs in May 1998. Rolls-Royce provided no evidence that Cadorath was under any duty of confidentiality. (JA-0777-0778)

(4) *Alcor Engine Company, Inc.*, Chandler, Arizona. Alcor acquired the Cadorath Model 250 Technical library, including DILs and DOILs, including DOIL 24, Revision 13, in late of 1999. (JA-0787 and 0792)

(5) *Timken Alcor Aerospace, Inc.*, Chandler, Arizona. Timken acquired DILs and DOILs, including DOIL 24, Revision 13, from Alcor on April 29, 2004. It openly possessed and used them in its business of R&O Model 250 parts and components, including Series II Compressor Case Halves. Rolls-Royce was

made aware of the fact that Timken possessed and used the DILs and DOILs, including DOIL 24, Revision 13, in March 2005 but made no effort to retrieve them until September 2008. (JA-3107 and 0795).

(6) *Essential*, 576 O'Connell Avenue, Dorval, Quebec, Canada. Openly possessed DILs and DOILs, including DOIL 24, Revision 12, which it had received from the NAC during the period of 1994 through February 1999 as an AMC Branch. (JA-1314 and 4619) Rolls-Royce failed to produce any evidence of a duty of confidentiality or obligation of return.

(7) *Precision*, #20 South 2400 West International Airport, Salt Lake City, Utah. Precision possessed a Model 250 technical library that included BookFaxes, PMIs, DILs and DOILs, including DOIL 24, Revision 13, that had been lawfully acquired by Precision from NAC during the period of 1994-1999. (JA-4961-4962) Precision characterizes its acquisition and possession of the Model 250 technical library as being unrestricted and that Rolls-Royce made no effort to retrieve the DILs and DOIL until late 2007, after they were produced for inspection in third party discovery. (JA-3074-3077 and 4394-4395)

Precision was never provided a copy of the NAC 1994 AMC Agreement nor Rolls-Royce Policy Manual and had no knowledge of their contents. (JA-3074-3077/1306-1309/TTR Vol. III, p.630-633) The Precision Branch Agreement (JA-4814-4830) contains no duty of confidentiality concerning the Model 250 technical library obtained, including BookFaxes, DILs, DOILs and PMIs received from NAC during the period 1994 through February 1999 when the Branch relationship terminated. (JA-5819-5837/5139)

(8) *Japanese Defense Agency (JDA), Shintoa Corporation and Aero Asahi.* The Summary Judgment record and the record at trial reflects that during the period of August 27, 1997 through October 3, 1997 Rolls-Royce provided the JDA, Shintoa Corporation and Aero Asahi unrestricted details of the “new information” identified by the Magistrate in his report.(JA-0707/2108/2829-2843/2827-2828)(JA-0780-0781)(JA-6568-6569); (JA-3328-3331) and (JA-0785-0786) The McKain presentation on October 3, 1997 was attended by numerous persons, including operators. Rolls-Royce has failed to provide the identity

of those who attended or of any non-disclosure agreements concerning the information that was disclosed. (JA-2099) Information about the dimension change to the 5th and 6th stage vanes was known by Aero Asahi, a Japanese operator.(JA-2101-2104) Rolls-Royce counsel conceded that no non-disclosure agreement could be found. (Hr'g TTR of 2/11/09, at p. 59, Dkt. 157)

4. The Summary Judgment Record Reflects That FAA Regulations Require That The New Items Claimed in Revision 13 Be Provided to AvidAir and Those Performing R&Os on Model 250 Series II Compressor Case Halves.

As the holder to the Type Certificate, Rolls-Royce is responsible for ICAs for the Model 250 Series engines (JA-0963-0964) 14 C.F.R. §21.50. The ICAs must be prepared in accordance with FAR Part 33.4 and “changes to the Instructions for Continued Airworthiness shall be made available to any person required by this chapter to comply with any of those instructions.”(JA-0794 and 0977) Appendix A to Part 33- Instructions for Continued Airworthiness a33.3 (b)(1) and a33.3(b)(2) provides the required format for the ICAs, to include in the Engine Overhaul Manual:

1. Disassembly information including the order and method of assembly for overhaul.

2. Cleaning and inspection instructions...
3. Details of all fits and clearances...
4. Details of repair methods for worn or otherwise substandard parts...
5. BookFax 97AMC059 Contains Only Form, Fit and Function Information That Is Required To Be Included In The Overhaul Manual.

Rolls-Royce Chief Engineer and its Project Engineer both concede that the vane length information concerning the 5th and 6th stage vanes is clearly form, fit and function information that should be included in the Overhaul Manual. (JA-0711-0712/1523); and (JA-781/1519) The BookFax contains no proprietary rights legend. (JA-4895) Further, Rolls-Royce has failed to meet its burden of presenting evidence of the identities of persons to whom the BookFax was provided.



- II. The District Court Erred In Granting Partial Summary Judgment Determining That DOIL 24, Revision 12, DOIL 3, Revision 16, And DOIL 8, Revision 6, And BookFax 97AMC059 Are Rolls-Royce Protected Secrets. (A-36).

### **Standard of Review**

The standard for reviewing Summary Judgment orders of the District Courts is *de novo*. See *Edwards* at Lexis 18635. (See *Issue I for review and Summary Judgment standards.*)

### **Argument**

- A. The District Court's Third Partial Summary Judgment Order (A-36).

On September 28, 2009, the District Court granted Partial Summary Judgment in favor of Rolls-Royce finding that DOIL 3, Revision 16; DOIL 8, Revision 6; DOIL 24, Revision 12 and Bookfax 97AMC059 were Rolls-Royce trade secrets that had been misappropriated by AvidAir. (A-45) The District Court held that Rolls-Royce was not required to present "the detail of any new information that is included [in these documents or], the cost of development or the actual new value..." (A-40) The District Court found AvidAir had misappropriated the DOILs and BookFax because "...the

undisputed facts in the Record also demonstrate AvidAir knew or had reason to know these documents were obtained from or through a party who owed Rolls-Royce a duty to maintain their secrecy.” (A-43) To support its findings that a duty existed, the District Court quoted the Magistrate’s April 7, 2009 Report and Recommendation. (A-01)

The District Court did not reconcile or analyze the inconsistency between its Order and findings of June 23, 2003. (A-23-24) Neither the Magistrate nor the District Court considered the actual 1994 AMC Agreement between NAC and Rolls-Royce or the effect of the Manual list attached to the “Additional Provisions” at page 112 (A-84) in the 1994 Agreement or the one year time limit (A-80) for making claims under the agreement.

B. The Second Round of Partial Summary Judgment Motions.

On July 24, 2009, AvidAir filed a Renewed Motion for Partial Summary Judgment concerning DOILs 3, 4 and 8; and BookFax 97AMC059. (JA-4269) AvidAir incorporated by reference its Statement of Uncontroverted Facts (JA-0555) filed October 29, 2008 and additional Statement of Uncontroverted

Facts. (JA-3120) Rolls-Royce filed a Motion for Partial Summary Judgment on July 24, 2009 concerning OIL 3, Revision 16, OIL 8, Revision 6 and OIL 24, Revision 12. (JA-3980) Rolls-Royce supported its Motion with a Statement of Controverted Facts (JA-3984), incorporating its Statement of Facts. (JA-3989)

By the time of these motions, AvidAir had made the Court and Rolls-Royce aware that it had purchased the Model 250 equipment, inventory and technical library from Precision Air Power, which included DILs, DOILs, PMIs, and BookFaxes, including DOIL 24, Revision 13, DOIL 3, Revision 16, and DOIL 8, Revision 6. (JA-4961) Rolls-Royce's claim that Precision possessed the DILs and DOILs with Restrictions is based on Rolls-Royce's Response to AvidAir's Statement of Fact #235 (JA-4962):

"Precision Air Power was a Branch AMC subject to the restricts of the AMC Agreement, Additional Provisions and Policy Manual. Doc. 171..." (JA-4962)

For reasons stated under issue IV, the NAC 1994 AMC Agreement placed no duty of confidentiality. Further, the legend is false because substantially

all of the functionally identical information contained in the DOILs is publicly available.

Rolls-Royce failed to dispute that neither NAC nor Rolls-Royce asked that the Precision technical library be returned upon the February 1999 termination of the Branch Agreement. (JA-3400-3403)

C. Lack of Evidence of a Trade Secret.

AvidAir incorporates by reference the legal standard for trade secrets provided in issue I. Rolls-Royce failed to provide evidence that any new evidence in DOIL 3, Revision 16 or DOIL 8, Revision 6, was in fact new, unique or had any value on its own that would constitute a trade secret or that it was a unique addition that would transform the publicly available information into a trade secret. In this case, all that Rolls-Royce attempted to prove was that some new information was added and the DOILs are therefore protected compilations. The District Court's reasoning and conclusions were explicitly rejected by the Chief Judge of the U.S. District Court for the Northern District of Texas in *Rolls-Royce v. Heros, Inc., et al.*, 2010 U.S. Dist.

Lexis 118790 (N.D. Texas 2010) (A-75); *Heros at Lexis* 119381 at 4, (A-71) reconsideration denied November 8, 2010. In the *Heros* case the Texas Court considered Rolls-Royce's position that the adding of public information transformed DOIL 3, Revision 16, DOIL 8, Revision 6, and other DOILs into Rolls-Royce's protected trade secrets. The Texas Court found that evidence, most of which is in the record of this case, of DOILs in the public domain is overwhelming and largely uncontroverted. *Heros* at 14, n 31. The Texas Court found that "a reasonable jury could not find that Rolls-Royce transformed DOILs into AMC-OILs by compiling public information in a unique and value-producing manner. Instead, it could only find that Rolls-Royce took a document in the public domain, made some cosmetic changes, and added a relatively small amount of new information in an effort to recapture the entire document as a trade secret." *Heros*, at 14. (e.g. "For instance, although AMC-OIL 3, (Rev. 16) states that it is a "COMPLETE revision," it notes that only substantive change is to "Add[] Section 34," which consists of nine pages added to the end of a 114 page document." *Heros* at 18 (A-74)

D. DOIL 24, Revision 12.

At the close of Rolls-Royce's evidence, the District Court sustained AvidAir's Rule 50(a) motion for judgment concerning DOIL 24, Revision 11, issued January 15, 1996. (TTR Vol. II, p.302) Summary Judgment should not have been entered without a comparison of new information in Revision 12 that was not contained in Revision 11. In fact, there were only five minor non-functional cosmetic changes. (JA-5496)

E. BookFax 97AMC 059.

Although the BookFax was not included in Rolls-Royce's Motion for Partial Summary Judgment, it was included in the Court's order. The BookFax only contains information about the vane length change to the 5th and 6th stage vanes which were provided to the JDA and Shintoa Corporation without restriction on September 22, 1997 and October 3, 1997. (JA-0707/2099/2102/2104-2106) Additionally, Rolls-Royce failed to provide evidence of persons to whom the 1997 BookFax was sent and the BookFax fails to meet the Court's criteria of having a proprietary rights legend.

III. The District Court Erred In Issuing A Permanent Injunction February 23, 2011 Requiring AvidAir To Return All Copies Of DOIL 24, Revisions 12 And 13; DOIL 3, Revision 16; DOIL 8, Revision 6; And BookFax 97AMC059 To Rolls-Royce.

### **Standard of Review**

The standard of review for entry of a permanent injunction is abuse of discretion. *Kennedy Bldg. Assocs. v. CBS Corp.*, 476 F.3d 530, 533 (8th Cir. 2007).

“A district court abused its discretion when it bases its decision on a legal error or a clearly erroneous finding of fact.” AvidAir acknowledges that the Court has wide latitude in formulating injunctive relief commensurate with the nature and extent of the violation of trade secrets.

Injunctions should “be narrowly tailored and never more extensive in scope than reasonably necessary...” *PepsiCo, Inc. v. Redmond*, 54 F.3d 1262, 1272 (7th Cir. 1995). They “shall be terminated when the trade secret has ceased to exist but may be continued...to eliminate commercial advantage...” Ind. Statute §24-2-3-3(a). See also Mo. Rev. Stat. §417.455.1.

## Argument

At the close of the jury trial, an evidentiary hearing was held to receive additional evidence dealing solely with the issue of whether or not a permanent injunction was appropriate, and if so, the scope of the injunction. At trial, AvidAir possessed DOIL 24, Revisions 12 and 13, DOIL 3, Revision 16, DOIL 8, Revision 6 and BookFax 97AMC059 which (1) it possessed at the time of filing of the Complaint and (2) a second set of the same DOILs which had been acquired on June 20, 2009 with the Precision technical library.

Contrary to the District Court's Pretrial Order (A-35) the permanent injunction included a requirement that AvidAir return all copies of DOIL 24, Revision 13, DOIL 24, Revision 12, DOIL 3, Revision 16, DOIL 8, Revision 6, including copies acquired from Precision; and BookFax 97AMC059. The Court made no interpretation of the 1994 AMC Agreement between NAC and Rolls-Royce or of the other relevant provisions of the AMC Agreement to determine whether the Branch Agreement applied to Precision.



A. The Evidence at Trial Concerning the Alleged Three New Items Of Information Contained In DOIL 24, Revision 13; And The Model Technical Library Acquired From Precision Air Power.

At trial Rolls-Royce undermined the Magistrate's findings concerning the value of "new information" which it used to declare that Revision 13 was a trade secret. In particular, Rolls-Royce asked its expert, Thomas Piercy to testify about DOIL 24, Revision 13, Section IV, subsection 3, dealing with cleaning the "burned out case halves." (TTR p. 168-173) Piercy testified that the process in AvidAir's DER repair was "identical," contained no differences and achieved the "same result" as the Revision 13 cleaning procedures, particularly item 3. (TTR Vol. II p. 218-219) Rolls-Royce also asked Piercy to compare AvidAir's DER repair procedure for use of magnification in crack inspection to the Revision 13, Section IV, Subsection 4, use of magnification in the inspection for cracks. (TTR Vol. I, p. 153-155) On cross examination Piercy conceded that use of the prescribed 50X magnification was not new. (TTR Vol. II, p. 207) AvidAir provided testimony that the cleaning and magnification inspection methods, which Piercy claimed were virtually identical to those contained in Revision 13, were derived from DOILs AvidAir

had when it established its business and from 15 years experience. (TTR VOL III, p. 531) AvidAir's cleaning and inspection methods are the same methods it had used since the commencement of the business in 1994. (TTR Vol. II, p. 353-354) (JA-5664) (A-69-70)

B. Revision 13 Dimensional Change To The 5th And 6th Stage Vanes.

At trial, Rolls-Royce introduced testimony of Thomas Piercy concerning the vane length issue in Revision 13 and communications with the JDA and Shintoa Corporation. Rolls-Royce offered RRC Exhibit 33. (JA-6215) The exhibit and Piercy's testimony clearly establishes that the change was made for a customer (JDA) with no duty of confidentiality. Piercy acknowledged that Project Engineer, Sally Randall and Chief Engineer of Small Engines, Ted McKain, were more knowledgeable about the vane length issue than he was. When AvidAir sought to cross examine Piercy about his testimony concerning Rolls-Royce's communications with JDA and Shintoa Corporation, Rolls-Royce objection was sustained by the District Court. (TTR Vol.II, 203) The District Court also excluded the Summary Judgment evidence, including the

deposition testimony of Sally Randall and Ted McKain; and AA exhibits 129, 130, 132, 133, 134, 135 and 136 which made it clear that the “new information” revision was provided without restriction to the JDA and Shintoa Corporation.

C. Rolls-Royce Has Declared The DOILs Obsolete.

On May 13, 2004, Rolls-Royce announced that the DILs and DOILs, including DOIL 24, Revision 13, were obsolete, unusable and should be destroyed. (JA-2778) Since they have been declared obsolete and Rolls-Royce has offered no evidence of commercial advantage, there is no purpose for entry of an injunction to protect a trade secret. *Fox Sports* at 336. (JA-4394-4395)

D. AvidAir Copies of DOIL 24, Revisions 12 And 13, DOIL 3, Revision 16, And DOIL 8, Revision 6, Acquired From Precision Air Power With Its Model 250 Technical Library On June 20, 2009 Should Not Be Included In The Injunction Order.

AvidAir’s additional evidence presented to the Court on the injunction issue included the testimony of Precision’s principal owner, Bob Brandt who testified about the sale of the Precision’s Model 250 business assets to

AvidAir, including its entire Model 250 technical library. (TTR Vol. III, p. 649-654) Since Rolls-Royce has acknowledged that Precision lawfully acquired its Model 250 technical library, including the DOILs, at issue is whether Precision had a duty of confidentiality or a duty to return the documents following its February 1999 termination. Brandt identified the 1994 Branch Agreement (JA-4815 and TTR Vol. III, p. 636) He testified that Precision had never been provided a copy of the NAC 1994 AMC Agreement and had no knowledge about its contents and that neither NAC nor Rolls-Royce requested the DOILs be returned until late 2007 after Precision had produced the documents in discovery. (TTR Vol. III, p. 647)(JA-5840-5841) (JA-4478) Brandt testified that he considered the DILs and DOILs to be unrestricted. (TTR Vol. III, p. 628-631)

The District Court's Injunction Order without analysis refers only to paragraphs 1.49, 6.2 and 13.8 of the incomplete generic 1994 AMC Agreement. The District Court injunction order reflects no interpretation or analysis of whether the NAC 1994 AMC Agreement binds Precision, and if so, why Rolls-Royce claims are not barred by the one year provision contained in the AMC

Agreement. In addition, the District Court order reflects no evaluation of whether the Branch Agreement imposes a duty of confidentiality or return, or whether all claims are barred by California Statute of Limitations CCP § 337, the Utah statute § 78B-2-309 or the Indiana Statute § 34-11-2-11.

IV. The District Court Erred In Failing To Enforce The Clear And Unambiguous Terms Of The National Airmotive Corporation 1994 AMC Agreement And The Precision Branch Agreement.

### **Standard of Review**

The interpretation of a contract is a question of law, reviewed de novo. *Simeone v. First Bank National Association*, 971 F.2d 103 (8th Cir. 1992). In Missouri; (1) “the cardinal rule in contract interpretation is to ascertain and give effect to the true intent of the parties;”(2) “Unless the contract is ambiguous, the parties’ intent is determined by the language of the contract alone, not extrinsic or parol evidence;”(3) that the parties disagree about the contract’s interpretation does not, by itself, create an ambiguity;” and (4) “the test is whether the disputed language, in the context of the entire agreement is reasonably susceptible of more than one construction giving the words their plain and ordinary meaning as understood by a reasonable average person.”

*Baum v. Helget Gas Products, Inc.*, 440 F.3d 1019, 1023 (8th Cir. 2006) In the event of an ambiguity, the contract is construed against the drafter pursuant to Missouri's doctrine of *contra proferentum*. See *City of Beverly Hills v. Village of Velda Village Hills*, 925 S.W.2d 474, 477 (Mo. Ct. App. 1996). The rule of construction against the drafter is a "rule of construction requiring that ambiguous language be construed against the party responsible for its use is based more on the concept of appropriate allocation of blame for faulty language than an attempt to ascertain true intent or meaning." *Rouggly v. Whitman*, 592 S.W.2d 516, 523 (Mo. Ct. App. 1979). See also Restatement (Second) of Contracts §206.

## **Argument**

The issue of contract interpretation is handled as a separate issue since the issue has relevance to each of the issues being raised on appeal. The initial contract at issue is the 1994 AMC Agreement between Allison and NAC which Allison sent to NAC by letter dated January 5, 1995. (A-79-A84) Proper interpretation of the NAC 1994 AMC Agreement is important to the general

issue of whether NAC had a contractual duty to protect the confidentiality and return the DOILs since NAC was the initial supplier of the DOILs in AvidAir's possession at the commencement of this litigation and to the general issue of whether DOILs were in the public eye because of NAC's unrestricted distribution copies to persons throughout the aviation community. At the time of the Magistrate's Report and Recommendation (A-1) and the first Summary Judgment Order (JA-3497-3506), all Rolls-Royce had provided the Court were incomplete excerpts from the form 1994 Agreement, Additional Provisions, and Policy Manual. In the interpretation of the 1994 AMC Agreement excerpts, neither the District Court nor the Magistrate identified the rules of construction that were employed, the law that applied, whether an ambiguity existed or whether provisions were being construed against Allison as the drafter of the AMC Agreement. AvidAir presumes that Missouri law was applied since Rolls-Royce did not assert that Indiana law should apply pursuant to the terms of the AMC Agreement or California law should apply pursuant to the terms of the Branch Agreement.

A. The NAC 1994 AMC Agreement Contains No Enforceable Duty of Confidentiality or Return of DILs, DOILs, PMIs or BookFaxes. (JA-6591-6745).

1. The following clear and unambiguous provisions of the NAC 1994 AMC Agreement are those AvidAir believes are relevant to the issue of whether DILs, DOILs and BookFaxes are subject to a duty of confidentiality and return.

a. "SEVENTH: ADDITIONAL PROVISIONS." (JA-0163)

b. "EIGHTH: TERM." (JA-0163)

c. " TENTH: LIMITATION OF DAMAGES." (JA-0163)

d. "Additional Provisions." (JA-0164)

(1) "1.49. Manuals." The Manual, Catalog and Price List, an attachment to this Agreement, identifies the Manuals (JA-0165)

(2) "6.2. MANUALS, BULLETINS AND TECHNICAL DATA." (JA-0167)

(3) "13.8. RESPONSIBILITIES OF AUTHORIZED MAINTENANCE CENTER." (JA-0168)

(4) "AGREEMENT ADDENDUM, AGREEMENT STATEMENT AND REFERENCE LIST." (A-84)

(a) "MANUAL, CATALOG, AND PRICE LIST"



B. DILS, DOILS And Bookfaxes Do Not Appear On The Contract "Manual List" Until The NAC 1998 AMC Agreement Which Was Assigned By NAC On July 1, 1998. (JA-5743)

The 1998 AMC Agreement is the first version of the AMC Agreement employed after Rolls-Royce acquired the Allison stock. The adding of DILs, DOILs and BoxFaxes to the Manual List is clearly part of Rolls-Royce's recapture plan including its July 31, 1996 announcement that Rolls-Royce was changing the way it did business.

C. The Correct Interpretation of the AMC Agreement.

AvidAir respectfully submits that the Agreement is clear and unambiguous and that the correct interpretation is that it imposes no duty of confidentiality or return of DILs or DOILs. If the Court determines that an ambiguity exists it should be construed against Rolls-Royce. Further the available intrinsic evidence throughout the records support a finding that no confidentiality exists.

V. Whether The District Court Erred In Granting Partial Summary Judgment Dismissing AvidAir's Count II (Antitrust). (A-30).

### **Standard of Review**

The standard for review is *de novo*. See Issue I.

### **Argument**

The District Court, made the factual determination that because it had determined that DOIL 24, Revision 13, contained Rolls-Royce trade secrets and Summary Judgment on Revisions 11 and 12 had been denied, Rolls-Royce did not engage in false representations and sham litigation to protect invalid or non-existent trade secrets. The primary support for District Court's ruling was its "prior holdings." (A-31) If they are reversed, this Summary Judgment should likewise be reversed. The District Court held that the reason Rolls-Royce's was not a sham, as to Revisions 1-10, was that "there was a reasonable chance that it could have been valid." (A-31) No authority was cited and the conclusion was inconsistent with the record of wide spread availability of DOILs and knowledge of William Fesler, the AMC manager. (JA-3344-3345, 3349, 3352 and 4478) AvidAir submits that issues of fact exist

and summary judgment should have been denied since AvidAir has met its burden of presenting evidence on each element of its Anti-Trust claims.

A. Claims Under Sherman 1 (15 U.S.C. §1).

To avoid Summary Judgment, AvidAir is required to provide evidence that there was (1) an agreement between at least two entities; (2) an intent to unreasonably restrain competition; and (3) resulted in injury to competition. *Tops Markets, Inc. v. Quality Markets, Inc.*, 142 F.3d 90, 95-96 (2nd Cir. 1998). In opposition to Rolls-Royce's Motion, AvidAir provided evidence in response to Rolls-Royce's Statements of Undisputed Fact, supported by evidence. (JA-3953-3954) AvidAir further presented additional Statement of Facts supported by evidence. (JA-3638-3652)

In November 1999, Rolls-Royce and Aviall entered into a distribution agreement whereby Aviall would distribute parts and technical data. The 1999 agreement with Aviall and subsequent amendments, including the compressor case exchange program involving Standard Aero, fulfills the first requirement of an agreement between two or more parties. (JA-3726-

3728/3730-3734) The agreement, relating to compressor cases involved a complex arrangement whereby Aviall would sell the compressor cases, Rolls-Royce would control the cores and vanes; Standard Aero overhauled the compressor cases and got the vanes at no cost; and profits would be split between Rolls-Royce and Standard Aero. (JA-3731)

Rolls-Royce's 2000 Compressor Case Plan, (JA-3717-3725/3729), the plan summary; (JA-3745-3751) and the CY2002 Marketing Plan demonstrate Rolls-Royce's intent to unreasonably restrain competition. Likewise, Seniors Meetings between Aviall and Rolls-Royce reflect a clear intent to increase market shares in a mature market that can only come from AvidAir and the few other market participants. (JA-3767-3784) These exhibits fulfill the requirement of providing evidence of intent to unreasonably restrain competition.

B. Claims Under Sherman 2 (15 U.S.C. §2).

Monopolization under Sherman 2 requires the showing that Rolls-Royce possesses monopoly power in the relevant market (Worldwide Series II

compressor case R&O) and that Rolls-Royce willfully acquired or maintained that power. *Amerinet, Inc. v. Xerox Corp.*, 972 F.2d 1483 (8th Cir. 1992). Monopoly power has been defined as the power to control prices and exclude competition. *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 391 (1956). There is no set percentage as to how much of the relevant market must be foreclosed. It must be substantial enough to freeze AvidAir and others from the relevant market. *Masimo Corp. v. Tyco Care Group, L.P.*, 2006 U.S. Dist. Lexis 29977 (C.D. Ca. 2006).

Liability under Sherman 2 can also arise from the employment of methods, means, and practices of predatory or anti-competitive conduct, which create an attempted monopolization. *General Industries Corp. v. Hartz Mountain Corp.*, 810 F.2d 795, 806, 807 (8th Cir. 1987) To establish attempted monopolization a plaintiff must prove:

“(1) a specific intent by the defendant to control prices or destroy competition; (2) a predatory or anti-competitive conduct undertaking by the defendant directed to accomplishing the unlawful purpose; and (3) a dangerous probability of success.” *Id* at 801.

Here the record reflects that Rolls-Royce, as the original equipment manufacturer, possesses and has willfully maintained monopoly power in the worldwide market for Model 250 Series II compressor vanes and compressor case R&O, with the power to control prices and exclude competition.

Specifically, AvidAir's expert economist, Dr. Christopher Pflaum, opined that Rolls-Royce possessed a monopoly of power over 85% of the Series II compressor case R&O Aftermarket through its First Network, Rolls-Royce Engine Services, its affiliates and its agreements with Aviall. The basis for this calculation is contained in Dr. Pflaum's report (JA-3855-3913) and Dr. Pflaum's opinion is supported by the higher overall market share reported by Aviall/Rolls-Royce in their June 14, 2004 Seniors Meeting. (JA-3791) Rolls-Royce controls or attempts to control every aspect of the First Network operations through its AMC Agreements, policy manuals, setting of discounts for purchase of parts through Aviall, periodic audits, fines, control of repair activities and embodiment reporting requirements and fees. (JA-6591-6745)

Rolls-Royce's intent to destroy competition and anti-competitive acts through direct attacks on AvidAir, starting with the "plug the hole" email (JA-3785-3787) is demonstrated throughout the record. (JA-6459-6482; 3851-3854)(JA-3839-3846/3849-3850/3946-3947)

"Anti-competitive conduct is conduct without legitimate business purpose that makes sense only because it eliminates competition." *HDC Medical, Inc. v. Minntech Corporation*, 474 F.3d 543 (8th Cir. 2007)

AvidAir respectfully submits that, as a matter of law, Rolls-Royce's claim that the information in DOIL 24, Revisions 1-11 lacks valid or legitimate business purpose or justification; was made in bad faith; and makes sense only because it eliminates competition. *Morgan v. Ponder*, 892 F.2d 1355, 1358 (8th Cir. 1989).

### C. Antitrust Injury.

In *CVD, Inc. v. Raytheon Co.*, 769 F.2d 842, 851 (1st Cir. 1985), the First Circuit found that the assertion of a trade secret claim, in bad faith with intent to restrain competition, is the type of "offense" the antitrust laws are designed to prevent. The First Circuit went on to identify *CVD* injury as follows:

“The injury to CVD, legal expenses incurred in attempting to resolve Raytheon’s bad faith claims, reflects the anti-competitive effect of acts with an anti-competitive intent...; *Kearney & Trecker Corp. v. Cincinnati Milacron, Inc.*, 562 F.2d 365, 374 (6th Cir. 1977).

In support of its injury and damages, AvidAir relies upon the opinion of Dr. Christopher Pflaum whose report at pages 23-28 (JA-0441-0446) concluded that competition in general and with AvidAir in particular was adversely impacted by conduct of Rolls-Royce in claiming protected proprietary trade secrets in all information contained in Model 250 DILs and DOILs, including DOIL 24 and revisions thereto. Consumers were harmed by having to pay substantially higher prices for R&O Series II compressor cases and AvidAir was prevented from utilizing its capacity to R&O Series II compressor cases for embodiment by AMCs and other Rolls-Royce facilities.

Dr. Pflaum analyzed AvidAir’s losses resulting from Rolls-Royce’s anti-competitive, as set out in his report at pages 24-29 (JA-0442-0447) and Appendices 2-6. (JA-0466-0476). His determination for the reasons stated is



that AvidAir sustained actual lost profits in the sum of \$4.0 million and would sustain future lost profits, the present value of which is \$1.7 million.

VI. The District Court Erred In Granting Partial Summary Judgment Dismissing AvidAir's Count I (Tortious Interference). (A-36)

### **Standard of Review**

The District Court granted Summary Judgment dismissing AvidAir's Tortious Interference claims on the basis of the Court's conclusion that the uncontested facts demonstrated Rolls-Royce's actions were "legally justified" and that "Rolls-Royce had a legal right to protect its trade secrets." (A44) The District Court's finding ignores the fact that many of the wrongful acts that AvidAir alleges constitute tortious interference occurred before AvidAir was aware of the existence of DOIL 24, Revision 13, and involved acts of misrepresentation of fact and restraint of trade involving Revisions of DOIL 24 in which Rolls-Royce had no trade secrets to protect. Its good faith conduct in trying to recapture and control technical data to assist it in entering the Compressor Case Half R&O business is at least a jury question. In any event,

if the Court's Summary Judgment on DOIL 24, Revision 13, is reversed, its Summary Judgment on tortious interference should likewise be reversed.

## **Argument**

Missouri law relevant to Rolls-Royce's argument on tortious interference emanates from the *Restatement (Second) of Torts* § 768 (1979) where it was recognized that employment of "improper means" or "unlawful restraint of trade." In order to prove a claim for tortious interference, a plaintiff must provide proof of "(1) a valid business expectancy; (2) defendant's knowledge of the relationship; (3) a breach induced or caused by defendant's intentional interference; (4) absence of justification; and (5) damages." *Stehno v. Sprint Spectrum*, 186 S.W.3d 247, 250 (MO 2006) citing *Nazeri v. Missouri Valley College*, 860 S.W.2d 303, 316 (MO 1993). It is undisputed that AvidAir carries the burden of affirmatively demonstrating lack of justification.

Improper means are those that are independently wrongful, such as threats, violence, trespass, defamation, misrepresentation of fact, restraint of trade or other wrongful act recognized by statute or the common law.

AvidAir bears the burden of presenting evidence that Rolls-Royce lacked justification for its interference. *Horizon Memorial Group v. Bailey*, 280 S.W.3d 657, 662 (Mo. Ct. App. 2009). See also *Stehno at 253*. AvidAir must also provide evidence that raises a question of fact as to whether Rolls-Royce acted in “good faith.” See *Healthcare Services of the Ozarks, Inc. v. Copeland*, 198 S.W.604, 614 (MO 2006). Improper means include misrepresentations of fact and restraint of trade. *Stehno at 252*.

The Summary Judgment record reflects that Rolls-Royce’s indirect interference with AvidAir commenced in 1996 with its entry into the R&O Aftermarket and Compressor Case Program. (JA-0888-0898) Its direct interference in July 2002 is evidenced by its July 23, 2002 “plug the hole” email and its collection of information on AvidAir customers. (JA-3785-3787) The August 23, 2002 BookFax is likewise directed at AvidAir’s continued use of DOIL 24. (JA-0725-0729) The Barbieri letter contain false statements about Rolls-Royce’s trade secret rights to all of DOIL 24. (JA-0725-0729) The Rohm January 31, 2003 letter to the FAA about AvidAir contains the false

representation that DOIL 24, Revision 7, is a Rolls-Royce trade secret and that Revision 13 is needed to return the compressor cases to service as part number 23057142. (JA-6459-6482) In fact, part number 23057142 can be assigned using DOIL 24, Revisions 7 or later. (JA-5201) All of these acts were committed prior to the time AvidAir was aware of or possessed Revision 13. (JA-2161) At minimum, AvidAir has raised an issue of fact as to whether Rolls-Royce's interference making claims to proprietary rights to all DOIL 24 revisions 1-11 was wrongful and unjustified.

Rolls-Royce's cancellation of all DILs and DOILs on May 13, 2004 and continuing to claim them to be obsolete, unuseable and unsafe is a false representation with the intent of interfering at AvidAir's R&O business. (JA-5884)(JA-4394-4395)(JA-3717-3725) The cancellation was not directed at protecting legitimate trade secrets, rather to control all R&O data, regardless of whether it is a legitimate trade secret.

Rolls-Royce Chief Airworthiness Engineer, Haerr was even aware that Rolls-Royce was only changing the names of AMC-ILS and AMC-OILs to

PRPLs and that “Technical content will be unchanged - only the document number will change.” Mr. Haerr was copied on this e-mail. (JA-3266)

In assessing damages from tortious interference, Missouri follows the “but for” test. *A.L. Huber & Sons v. Robertson Plumbing*, 760 S.W.2d 496, 499 (Mo. App. 1988) AvidAir has demonstrated its capacity for R&O of Series II compressor cases, the market for Series II R&O and its ability to provide R&O on a worldwide basis. (See Rolls-Royce analysis of the Series II compressor case market Exhibits 315 (JA-3717-3729), 317 (JA-3729) and 322 (JA-3745-3751/3730-3734) and market analysis of Michael Molish (JA-4666-4734) and damage analysis of Christopher Pflaum. (JA-4735-4793)

VII. The District Court Erred In Denying AvidAir’s Leave To Amend Its Complaint To Include Issues Relating To Its Acquisition Of The Model 250 Technical Library Of Precision Air Power On June 20, 2009.

### **Standard of Review**

The standard of review for motions for leave to amend is abuse of discretion. *See Marmo v. Tyson Fresh Meats, Inc.*, 457 F.3d 748, 755 (8th Cir. 2006). If leave to amend is denied on the basis of futility, review of the

underlying legal conclusion that an amendment is futile is *de novo*. See *United States ex rel. Joshi v. St Luke's Hospital, Inc.*, 441 F.3d 552, 555, 557-558 (8th Cir. 2006).

Amendments and supplemental pleadings are authorized in the Federal Rules of Civil Procedure, Rule 15(a)(2) which directs that "the Court should freely give leave when justice so requires." Rule 15(d) also authorizes supplemental pleadings concerning "...any transaction, occurrence, or event that happened after the date of the pleading to be supplemented." Futility, undue delay, bad faith and unfair prejudice are accepted reasons for denying a motion to amend or to supplement pleadings. See *Bailey v. First National Bank of Chadron*, 741 N.W.2d 184 (Neb. Ct. App. 2007). Further, "the burden of proof of prejudice is on the party opposing the amendment." *Roberson v. Hayti Police Dept.*, 241 F.3d 992, 995 (8th Cir. 2001). Failure to state a *bona fide* reason for denial reason of leave to amend has been recognized as a basis for a finding of abuse of discretion. Charles Alan Wright et al., *Federal Practice and Procedure* §1484 at 598-600 (2nd Addition, 1990).

## Argument

Following the District Court's report and first Partial Summary Judgment Order (JA-3497-3506) AvidAir sought leave to file its First Amended Complaint (JA-3507-3514) to add issues resulting from AvidAir's acquisition of Precision's library. (JA-4535-4568)

Precision entered into a written "Branch Agreement" with NAC, dated December 1994 (JA-4814-4833) which reflects no duty to NAC or Rolls-Royce to protect the confidentiality of the DOILs, including DOIL 24, Revision 13. (JA-5819-5834) Rolls-Royce was aware of the Precision's Branch Agreement and Precision's termination as an NAC Branch in February 1999 (JA-4961-4962/5840-5841); yet failed to make any effort to retrieve DOILs until November 2007. (JA-4394-4395)(JA-4478)

AvidAir acquired by assignment all of Precision contractual rights to the Precision technical library that Precision enjoyed under its "Branch Agreement" with NAC and stands in its shoes. See *Sunridge Development Corporation v. RB&G Engineering*, 230 P.3d 1000 (Utah 2010).

At the time of motion to amend the pleadings, July 8, 2009, (JA-3507-3514) neither the Magistrate nor the District Court had made any analysis or finding as to whether Precision had any duty to NAC or Rolls-Royce concerning the DILs and DOILs. The District Court abused its discretion by denying the Motion to Amend and limiting the issues to DILs and DOILs possessed by AvidAir at the time of the filing of the Complaint (JA-3507-3514)(A-79) without making any finding of futility or prejudice to Rolls-Royce. The abuse of discretion was compounded on October 29, 2009 when the District Court denied AvidAir's motion for leave to appeal pursuant to 28 U.S.C. §1292(b) (A-86) and again on November 29, 2009, allowed Rolls-Royce to unilaterally conduct discovery on the issue of whether AvidAir's acquisition of the Precision's technical library was an additional misappropriation. (JA-5008) The abuse of discretion was further compounded by the District Court's denial of AvidAir's request (JA-5012-5018) that, if Rolls-Royce was claiming that it misappropriated anything as a result of the Precision Air Power acquisition, that it be required to amend its pleadings to provide allegations



pursuant to F.R.C.P. Rule 8(a)(2) and (3); and AvidAir be given the opportunity to answer the new allegations and assert affirmative defenses pursuant to Rule 8(b). (JA-5034-5036) The issues should not have been included in this case by inference.

The end result of the District Court's abuse of discretion was that it failed to interpret and enforce the NAC 1994 AMC Agreement or the Precision Branch Agreement in accordance with standards for contract interpretation established by the Eighth Circuit or determine whether the AMC Agreement applied to Precision and if so, were Rolls-Royce's claims, if any, barred by the one year provision in the Agreement.

## **CONCLUSION**

For the above and foregoing reasons, AvidAir respectfully submits that the Summary Judgments, the jury verdict awarding damages and the permanent injunction entered by the Court be reversed and the case be remanded to the District Court with directions to enter judgment in favor of AvidAir on Rolls-Royces misappropriation claims and in favor of AvidAir on its request for Declaratory Judgment that all DILs, DOILs, including all revisions and PRPLs issued on January 1, 2004, including subsequent revisions be declared to be publicly available information and provided to AvidAir. AvidAir further requests that the District Court be directed to promptly set a date for a jury trial for AvidAir's Anti Trust and Tortious Interference claims; and bad faith claim under Indiana Code §24-2-3-5(1). Finally, AvidAir respectfully requests that this Court interpret the NAC 1994 AMC Agreement by declaring that the Agreement does not impose a duty of confidentiality or return of DILs, DOILs, including revisions, or BookFaxes, and that Rolls-Royce is forever barred from pursuing such claims against NAC, Precision or AvidAir; or if factual issues still exist concerning the Precision technical library, AvidAir

should be permitted to Amend its Complaint and assert its affirmative defenses.

Dated this 2nd day of March, 2011.

Respectfully submitted,

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## Certificate of Service

I hereby certify that on March 2, 2011, the foregoing Brief of Appellant was electronically filed with the Clerk for the United States Court of Appeals for the Eighth Circuit by using the appellate CM/ECF system. I certify that all participants (listed below) in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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## Certificate of Compliance

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,941 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Corel Word Perfect 12 in 14 point Palatino Linotype.

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### **Circuit Rule 28A(h) Certification**

The undersigned hereby certifies that I have filed electronically, pursuant to Circuit Rule 28A(h), a version of the brief and addendum in non-scanned PDF format. I hereby certify that the file has been scanned for viruses and that it is virus-free.

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