

Appellate Case No: 10-3444

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IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT

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AVIDAIR HELICOPTER SUPPLY, INC.,  
*Appellant-Plaintiff,*

v.

ROLLS-ROYCE CORPORATION,  
*Appellee-Defendant.*

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Appeal from the United States District Court  
Western District of Missouri  
Case No: 1:06-cv-0816-ODS  
The Honorable Ortrie D. Smith, District Judge

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**BRIEF OF APPELLEE**  
**ROLLS-ROYCE CORPORATION**

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## CORPORATE DISCLOSURE STATEMENT

## CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

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Rolls-Royce Corporation

- (2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

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- i) Identify all its parent corporations, if any; and

Rolls-Royce North America Holdings Inc. is the parent through several subsidiaries.

- ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

None, but Rolls-Royce Group plc is publicly traded on the FTSE in the United Kingdom.

Attorney's Signature:  Date: November 4, 2010

Attorney's Printed Name: Alastair J. Warr

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). Yes  No

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s/ Alastair J. Warr

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## STATEMENT OF ISSUES

I. Whether the District Court correctly granted summary judgment in favor of Appellee Rolls-Royce Corporation (“Rolls-Royce”) ruling that its technical documents, namely Overhaul Information Letter (“OIL”) 24, Revisions 12 and 13; OIL-3, Revision 16; OIL-8, Revision 6; and BookFax 97-AMC-059, are protected trade secrets.

1. Ind. Code § 24-2-3-2
2. *Amoco Prod. Co. v. Laird*, 622 N.E.2d 912 (Ind. 1993)
3. *Northern Elec. Co. v. Torma*, 819 N.E.2d 417 (Ind. Ct. App. 2005)
4. *Zemco Mfg., Inc. v. Navistar Int’l Transp. Corp.*, 759 N.E.2d 239 (Ind. Ct. App. 2001)

II. Whether the District Court correctly issued a permanent injunction requiring Appellant AvidAir Helicopter Supply, Inc. (“AvidAir”) to return to Rolls-Royce all copies of the trade secret OIL-24, Revisions 12 and 13; OIL-3, Revision 16; OIL-8, Revision 6; and BookFax 97-AMC-059 that AvidAir had in its possession.

1. Ind. Code § 24-2-3-3(a)
2. *Ferrell v. Dunescape Beach Club Condominiums Phase I, Inc.*, 751 N.E.2d 702 (Ind. Ct. App. 2001)
3. *Wyeth v. Natural Biologics, Inc.*, 395 F.3d 897 (8th Cir. 2005)

III. Whether the District Court correctly granted summary judgment in favor of Rolls-Royce on AvidAir's tortious interference and antitrust claims where it is undisputed that Rolls-Royce had legitimate justification and a good faith basis for asserting the trade secrecy of its technical documents and AvidAir based its tortious interference and antitrust claims solely on a "sham litigation" theory.

1. *Rice v. Hodapp*, 919 S.W.2d 240 (Mo. 1996)
2. *Professional Real Estate Investors, Inc. v. Columbia Pictures Indus.*, 508 U.S. 49 (1993)
3. *CVD, Inc. v. Raytheon Co.*, 769 F.2d 842 (1st Cir. 1985)

IV. Whether the District Court correctly interpreted National Airmotive Corporation's Authorized Maintenance Center Agreement with Rolls-Royce and Precision Air Power's



Branch Agreement with National Airmotive Corporation in concluding that AvidAir could not lawfully acquire Rolls-Royce's trade secret technical documents from Precision Air Power.

1. *Baum v. Helget Gas Products, Inc.*, 440 F.3d 1019 (8th Cir. 2006)
2. *City of Beverly Hills v. Village of Velda Village Hills*, 925 S.W.2d 474 (Mo. Ct. App. 1996)
3. *Rougly v. Whitman*, 592 S.W.2d 516 (Mo. Ct. App. 1979)

V. Whether the District Court properly denied

AvidAir's motion for leave to amend its complaint eighteen months after the deadline for amending pleadings had passed and after summary judgment had been entered against AvidAir.

1. *Thompson-El v. Jonas*, 876 F.2d 66 (8th Cir. 1989)
2. *Northern States Power Co. v. Federal Transit Admin.*, 358 F.3d 1050 (8th Cir. 2004)
3. *Katsev v. Coleman*, 530 F.2d 176 (8th Cir. 1976).

## STATEMENT OF THE CASE

This case stems from AvidAir's unauthorized possession or misappropriation of Rolls-Royce's trade secrets embodied in certain technical documents related to the maintenance, repair, and overhaul of the Rolls-Royce Model 250 ("M250") engine.<sup>1</sup>

[JA-100]

On September 29, 2006, AvidAir filed a Complaint against Rolls-Royce in the Western District of Missouri alleging tortious interference with its contractual and business relationships and abuse of monopoly power under Sections 1 and 2 of the Sherman Act. AvidAir also sought a declaratory judgment that certain Rolls-Royce technical documents were in the public domain and not protected trade secrets. [JA-0035]

Rolls-Royce filed its own Complaint in the Southern District of Indiana and then an Amended Complaint against AvidAir alleging trade secret misappropriation and other trade

<sup>1</sup> In the M250 business, "maintenance" is work that is done to the engine while it is installed on an aircraft. "Repair" includes the inspection of a part or component and the refurbishment of that part or component. "Overhaul" is the disassembly, cleaning, inspection, reassembly, and testing of the engine. [Tr. p. 51, l. 20 - p. 52, l. 5].

secret-related claims. [Doc. 27-1; JA-0056] The two cases were consolidated in the Western District of Missouri. [A-4].

### **I. Summary Judgment Proceedings.**

After years of discovery, the District Court conducted a series of summary judgment proceedings focused on the trade secret status of certain Rolls-Royce technical documents. [JA-90, 105, 109, 3980, 4269] The documents included OIL-24, Revisions 12 and 13; OIL-3, Revision 16; OIL-8, Revision 6; and BookFax 97-AMC-059 (the “BookFax”). [JA-96, 4003-5, 5558] The District Court first considered whether OIL-24, Revision 13 was a protected trade secret and then extended its analysis and rationale to OIL-24, Revision 12; OIL-3, Revision 16; OIL-8, Revision 6 (collectively, the “Additional OILs”)<sup>2</sup> and the BookFax. The summary judgment proceedings also addressed AvidAir’s tortious interference and antitrust claims, both of which were premised solely on a “sham litigation” theory, *i.e.*, the assertion of allegedly “bogus” trade secrets by Rolls-Royce. [JA-0190]

<sup>2</sup> OIL-24, Revision 13 and the Additional OILs are sometimes referred to collectively herein as the “OILs.”

**A. The Parties' Cross-Motions for Partial Summary Judgment on the Trade Secret Status of OIL-24, Revision 13.**

On October 29, 2008, Rolls-Royce filed its Motion for Partial Summary Judgment on Count III of its Amended Complaint, Statement of Material Facts (“SMF”) and supporting evidence on the trade secret status of OIL-24, Revision 13. [JA-0090, 0091, 0096-0100, 0112-0198]. On November 26, 2008, AvidAir filed its Response to Rolls-Royce’s SMF. [JA-1345-1359]. On December 15, 2008, Rolls-Royce filed its Reply Suggestions in Support of its Motion for Partial Summary Judgment on the trade secret status of OIL-24, Revision 13. [JA-1559-1581]

After the initial round of summary judgment briefing, the District Court instructed the parties to provide additional evidence relating to OIL-24, Revision 13. [Doc. 138] Rolls-Royce filed a sealed exhibit highlighting exemplary new material in OIL-24, Revision 13 that had not been included in prior revisions of OIL-24. [Rolls-Royce Appendix “RRA”-12-22] AvidAir filed its response [JA-2047], and Rolls-Royce filed its

reply. [JA-2060-2078] AvidAir then filed an additional supplemental brief. [JA-2079] On February 11, 2009, the District Court conducted a summary judgment hearing examining the new information added to OIL-24, Revision 13. [Doc. 149, 157; Tr. 1-116]

On October 29, 2008, AvidAir filed its own Motion for Partial Summary Judgment on Counts I through V of Rolls-Royce's Amended Complaint and Count III of AvidAir's Complaint challenging the trade secret status of Rolls-Royce's technical documents. [JA-0553] On February 2, 2009, Rolls-Royce filed its opposition to AvidAir's Motion for Partial Summary Judgment as to OIL-24 only, including responses to AvidAir's factual allegations. [JA-1923, 1927-1937] Although AvidAir's initial summary judgment motion encompassed a number of Rolls-Royce technical documents, the District Court directed Rolls-Royce to respond only as to OIL-24, Revisions 1-13. [Doc. 132]

On March 3, 2009, after the summary judgment hearing, AvidAir filed yet another response to Rolls-Royce's Motion for

Partial Summary Judgment as to OIL-24, Revision 13. [JA-2141] Rolls-Royce objected to AvidAir's response as being untimely. [Doc. 155] On March 30, 2009, over Rolls-Royce's objection, the District Court ruled that it would consider the parties' arguments in its ruling on the cross-motions for partial summary judgment. [JA-3499]

On April 7, 2009, the Magistrate Judge issued a "Report Recommending the District Court (1) Grant Rolls-Royce Corporation's Motion for Partial Summary Judgment and (2) Grant in Part and Deny in Part AvidAir Helicopter Supply, Inc.'s Motion for Partial Summary Judgment" (the "Report"). [A-1]. The Magistrate Judge concluded as a matter of law that OIL-24, Revision 13 is a trade secret that AvidAir misappropriated. [A-9]

On June 23, 2009, after independently studying the summary judgment record, including the parties' exceptions to the Magistrate Judge's Report, the District Court granted Rolls-Royce's Motion for Partial Summary Judgment, and granted in part and denied in part AvidAir's Motion for Partial

Summary Judgment (“Summary Judgment Order #1”). [A-20]  
The District Court reviewed the summary judgment record *de novo*, endorsed the Magistrate Judge’s reasoning articulated in the Report, and supplemented the Report’s analysis. [A-20]  
The District Court declined to enter summary judgment in favor of Rolls-Royce as to OIL-24, Revision 12 because Rolls-Royce had not yet moved for summary judgment as to its trade secret status. [A-22]

On July 8, 2009, AvidAir filed a Motion to Reconsider Summary Judgment Order #1 (“Motion to Reconsider”).  
AvidAir claimed that it had acquired the M250 technical library of Precision Air Power (“Precision”), a former Authorized Maintenance Center branch affiliated with Rolls-Royce. [JA-3515] AvidAir acquired the M250 technical library, including OIL-24, Revision 13, after the Magistrate Judge issued his Report and pursuant to an asset purchase agreement that was signed after the District Court entered Summary Judgment Order #1. [JA-4344] Rolls-Royce opposed AvidAir’s Motion to Reconsider and argued that AvidAir’s acquisition of

documents from Precision did not undermine their trade secret status or compel the District Court to revisit its prior summary judgment ruling. [Doc. #209] The District Court denied AvidAir's Motion to Reconsider on September 23, 2009. [JA-3507; A-33]

**B. Rolls-Royce's Motion for Partial Summary Judgment on AvidAir's Antitrust Claim.**

On October 29, 2008, Rolls-Royce filed a separate Motion for Partial Summary Judgment on Count II (Antitrust) of AvidAir's Complaint, its Statement of Material Facts, and supporting evidence. [JA-0190, 0196-0205, 0226-0552] On July 20, 2009, AvidAir filed its response to Rolls-Royce's SMF. [JA-3953] Rolls-Royce subsequently replied to AvidAir's factual assertions. [JA-4285-4293]

On September 22, 2009, the District Court granted Rolls-Royce summary judgment on AvidAir's antitrust claim ("Summary Judgment Order #2"). [A-31-32] Because AvidAir admitted that the sole basis for its antitrust claim was Rolls-Royce's purported assertion of "bogus" trade secret rights and proffered no evidence or argument on any other theory, and



because Rolls-Royce had a good faith basis to assert its trade secret rights (and had prevailed on summary judgment with respect to OIL-24, Revision 13), the District Court reasoned that AvidAir's antitrust count failed as a matter of law. [A-31]

**C. The Parties' Cross-Motions for Partial Summary Judgment on the Trade Secret Status of the Remaining Technical Documents at Issue, and Rolls-Royce's Motion for Partial Summary Judgment on AvidAir's Tortious Interference Claim.**

On May 5, 2009, Rolls-Royce filed the balance of its Response in Opposition to AvidAir's Statement of Uncontroverted Material Facts addressing the trade secrecy of the Additional OILs and the BookFax. [JA-2238-2291] AvidAir filed its reply on June 3, 2009. [JA-3018] On June 15, 2009, Rolls-Royce filed its Response. [JA-3487-3496]

On July 24, 2009, following the entry of Summary Judgment Order #1, Rolls-Royce filed a new Motion for Partial Summary Judgment and supporting SMF addressing AvidAir's tortious interference claim and the trade secret status of the Additional OILs and the BookFax. [JA-3980, 3987-3994].

AvidAir filed its response on August 31, 2009. [JA-4403]. Rolls-

Royce replied to AvidAir's factual assertions on September 17, 2009. [JA-4949-4975]

On September 28, 2009, the District Court granted in part and denied in part the parties' remaining cross-motions for partial summary judgment ("Summary Judgment Order #3").

[A-36] The District Court applied its logic and reasoning with respect to OIL-24, Revision 13 and concluded, among other things, that OIL-3, Revision 16; OIL-8, Revision 8; OIL-24, Revision 12; and the BookFax are protected trade secrets. [A-

42] The District Court further determined that because Rolls-Royce had a legal right to protect its trade secrets, it did not tortiously interfere with AvidAir's contractual and business relationships. [A-44] The District Court also concluded that Rolls-Royce had a good faith basis to assert trade secret claims even as to the documents that it determined had lost trade secret protection. [A-45]

## **II. AvidAir's Motion For Leave To Amend Its Complaint.**

On July 8, 2009, in conjunction with its Motion to Reconsider the District Court's Summary Judgment Order #1,

AvidAir filed a Motion for Leave to Amend its Complaint. [JA-3509] AvidAir sought leave to insert new allegations regarding numerous other Rolls-Royce technical documents that it never had or used, and that had not been litigated in the proceedings leading up to Summary Judgment Order #1. [JA-3508]

AvidAir requested leave to amend its Complaint after entry of Summary Judgment Order #1 and eighteen months after the January 8, 2008 deadline for amending the pleadings under the governing case management plan. [Doc. 49] The District Court denied AvidAir's Motion for Leave on September 29, 2009. [A-33]

### **III. Jury Trial And Post-Trial Proceedings Regarding Injunctive Relief.**

The District Court scheduled a jury trial to address the remaining issues, most notably damages. On July 23, 2010, Rolls-Royce moved the District Court to take judicial notice of adjudicated facts. [JA-5079]. On August 10, 2010, the District Court granted Rolls-Royce's motion in part.<sup>3</sup> [RRA-1] On August 3, 2010, Rolls-Royce filed its objections to AvidAir's

<sup>3</sup> The list of adjudicated facts is at RRA-4.

designations of deposition excerpts to be used at trial. [JA-5239-5436] The parties filed a Joint Stipulation of Facts. [JA-5556-5562]

The District Court conducted a jury trial on September 7-9, 2010, and the jury awarded Rolls-Royce damages of \$350,000. [A-66] On September 30, 2010, following post-trial briefing, the District Court entered a permanent injunction ordering AvidAir to deliver all copies of OIL-24, Revision 13 and the Additional OILs in its possession or control to Rolls-Royce. [A-65] The District Court modified the permanent injunction on October 20, 2010 to include the return of all copies of the BookFax to Rolls-Royce. [A-69-70] AvidAir initiated this appeal.

## **STATEMENT OF FACTS**

### **I. Factual Background.**

Rolls-Royce's M250 engine is a gas turbine engine that today powers about 14,000 aircraft, mostly civilian and military helicopters. [JA-101] The original version of the M250 was introduced more than forty years ago by the Allison Gas

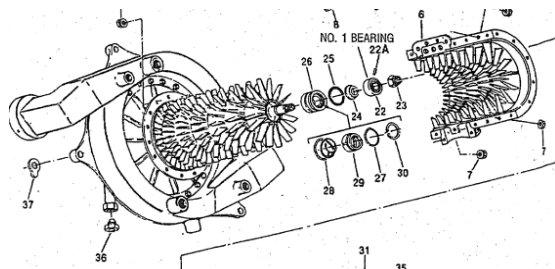
Turbine Division of General Motors, Rolls-Royce's predecessor.<sup>4</sup> [JA-101] The M250 family of engines has grown and expanded over the years to include dozens of separate engines. [JA-963-4] Each M250 engine has thousands of separate parts that Rolls-Royce designed and manufactured itself or through third-party suppliers. [JA-101] Rolls-Royce has expended and continues to expend engineering resources modifying the M250 and its component parts in order to meet and improve technology and performance. [JA-0116, ¶ 13] Rolls-Royce's ongoing efforts with respect to the M250 have resulted in changes in the design of many of its component parts as well as the procedures for maintenance, repair, and overhaul of the M250 engine and its component parts. [Id.]

## **II. The Compressor Case Overhaul Business.**

The M250 component relevant to this case is the compressor case assembly. [JA-102] AvidAir's sole business is performing compressor case repairs. [JA-0228, ll. 12-21] The compressor case includes two halves that house a compressor

<sup>4</sup> Rolls-Royce and its predecessors are referred to collectively as "Rolls-Royce."

rotor. [JA-102] The compressor rotor spins within the compressor case halves to compress the air flow before mixing it with fuel for combustion. [JA-102] The compressor rotor includes a number of blades that extend outwardly from a central hub (rotor vanes). [JA-102] The compressor case halves include six sets of vanes that extend inwardly (stator vanes) and a plastic composition that lines the interior. [JA-102] A compressor case schematic is shown below. [JA-6332-5 for photographs]



Overhauls and repairs for the M250 compressor case must be performed in accordance with procedures authorized by Rolls-Royce, the holder of the Federal Aviation Administration (“FAA”) type certificate for the M250. [JA-5560] The trade secret documents at issue in this case, the OILs and the

BookFax, contain information on how to repair components of M250 engines, including the compressor case assembly. [JA-5560] OIL-24, Revision 13 was the principal document describing the detailed salvage repair process for M250 engine compressor cases. [JA-0118 *et seq.*]

Rolls-Royce manages a worldwide network of independently-owned Authorized Maintenance Centers (“AMCs”) previously called the AMC Network and now known as the First Network. [JA-102] Before 1994, Rolls-Royce called these facilities “Distributors.” [JA-102] To meet customer demands for quality and reliability, Rolls-Royce provided technical information such as OIL-24, Revision 13 to First Network members to ensure they have Rolls-Royce’s current engineering knowledge and support. [JA-102] The members of the First Network compete with each other and with other companies outside of the First Network, like AvidAir, for business. [JA-0263, ll. 18-19; -0280, ll. 2-7]

Several AMCs perform compressor case overhauls, including Hants & Sussex, Standard Aero, Samsung, and Rolls-

Royce Engine Services Oakland (“RRESO”).<sup>5</sup> [JA-0252, l. 2 to -0253, l. 22; -0262, ll. 8-24] The decision to become an AMC is voluntary, and there are legitimate benefits to being an AMC, including the use of the Rolls-Royce name, discounts on documents and publications, and engineering support. [JA-0275, l. 19 -0276, l. 17] Rolls-Royce does not perform compressor case overhauls, does not compete with AvidAir for compressor case overhauls, and its share of the market for compressor case overhaul business is zero.<sup>6</sup> [JA-0263, ll. 7-9; -0280, ll. 1-17]

### **III. The Trade Secrets.**

#### **A. OIL-24, Revision 13.**

OIL-24, Revision 13 is a Rolls-Royce proprietary document. [JA-0096, 0112-0113, 0115] OIL-24, Revision 13 details technical instructions for multiple processes and steps involved in the repair and salvage of M250 compressor cases, including plastic coating burnout, inspection of the compressor

<sup>5</sup> RRESO is technically a Service Center rather than an AMC, but this distinction is immaterial for purposes of this appeal. [JA-0196]

<sup>6</sup> AvidAir’s economist mistakenly used the term “overhauls” instead of the correct term “repairs”. *See note 1, supra.*



case, replacement of the compressor case vane and band assemblies, repairing pilot bores, painting and sealing, setting vane angles, plastic coating replacement, and grinding of vane tips. [JA-0117-0118, 130] Revision 13 is the product of years of commercial research and development of the M250 engine, including many changes and modifications to its compressor case. [JA-0116, ¶ 13.] Rolls-Royce employs multiple engineers who developed these changes and modifications. [JA-0116, ¶ 13.]

It is undisputed that OIL-24, Revision 13 contains commercially valuable new information that did not appear in prior revisions of OIL-24. [2/11/2009 Tr. pp. 13-17; pp. 21-24; p. 27; pp. 54-57; JA-0564-5] Revision 13 includes at least the following changes from prior revisions: a dimensional change for fifth stage vanes, a dimensional change for sixth stage vanes, a changed procedure for cleaning burned-out case halves including a new step for cleaning the airfoils, added requirements for measuring and recording, and added inspection criteria for adjusted vanes. [JA-2006, ¶ 8; SA-15-23;

JA-0182 l. 5 to 0183, l. 1, and -0185, l. 20 to -0186, l. 1; JA-1551; JA-2062-3] These changes and additions from prior revisions of OIL-24 resulted from Rolls-Royce's engineering efforts and testing and are significant and material. [JA-0116, ¶ 13] For example, Rolls-Royce expended engineering talent to analyze a field report of rub between the rotor vanes and the stator vanes, and that effort resulted in the validation and approval of a vane dimension change before issuing OIL-24, Revision 13. [JA-2015-2016]

**B. AvidAir's Use of OIL-24, Revision 13.**

AvidAir's president and founder, testifying as his company's Rule 30(b)(6) designee, admitted that AvidAir could not approve a compressor case for return to service without OIL-24, Revision 13. [JA-0178 l. 25 to -0179, l. 2; 0233, l. 25 - 0234, l. 2] AvidAir used OIL-24, Revision 13 to repair hundreds of M250 compressor cases and authorize their return to service. [JA-5557, 6209] AvidAir used the new, valuable information contained in OIL-24, Revision 13 in performing hundreds of compressor case overhauls. [JA-0182, 52, l. 23 - 0183, l. 1; 0237,

l. 23 - 0238, l. 1] AvidAir admits that it is economically valuable to represent to customers that it repaired compressor cases in accordance with OIL-24, Revision 13. [2/11/2009, Tr., p. 97, lines 17-25]

**C. The Additional OILs.**

AvidAir obtained and possessed the Additional OILs, namely OIL-3, Revision 16 (issued October 15, 1997); OIL-8, Revision 6 (issued October 31, 1997); and OIL-24, Revision 12 (issued October 31, 1996). [JA-4012, 4016-4129, 4130-4152, 4153-4188] The Additional OILs, like OIL-24, Revision 13, are proprietary documents prepared and owned by Rolls-Royce. [JA-4013, ¶ 5] The Additional OILs contain economically valuable information comprising technical data and instructions to repair M250 components. [JA-4013, ¶ 6, 4016-4129, 4130-4152, 4153-4188]

The information in the Additional OILs includes, *inter alia*, (i) metallizing processes including flame spray coating processes, plasma coating processes, thermal coating processes, and parameters for application of multiple specific coatings

(OIL-3, Revision 16); (ii) magnetic particle inspection and fluorescent penetrant inspection including procedures and parameters for such inspections relative to multiple specific components (OIL-8, Revision 6); and (iii) repair and salvage processes for the compressor case preceding OIL-24, Revision 13. (OIL-24, Revision 12). [JA-4013 ¶ 7, 4016-4129, 4130-4152, 4153-4188] Although the Additional OILS are now superseded as a result of a change in Rolls-Royce's document management system, the information contained in the Additional OILS continues to have technical relevance and economic value. [Tr. p. 81, ll. 5-22]

**D. The BookFax.**

The BookFax was a notice of a change to OIL-24, Revision 12 that became part of OIL-24, Revision 13. [JA-5558] The BookFax served as an interim notification to the AMCs of the changes in the 5<sup>th</sup> and 6<sup>th</sup> stage vane clearances from Revision 12 to Revision 13 of OIL-24, both of which had proprietary rights legends. [JA-4339; Tr. 249, ll. 14-16, 20-23] AvidAir had

Revision 12 for about 6 years before it obtained a copy of the BookFax. [Tr. 249, ll. 17-19]

**IV. Rolls-Royce's Adequate Measures to Protect the OILs and the BookFax.**

Rolls-Royce used a combination of security measures to protect the OILs and the BookFax. First, it placed restrictive markings on the OILs. Second, it limited distribution of the OILs and the BookFax to certain authorized recipients. Third, it imposed contractual restrictions on those recipients prohibiting the distribution of the OILs and the BookFax.

**A. Proprietary Rights Legends.**

The front page of OIL-24, Revision 13 displays the following conspicuous notice:

**PROPRIETARY RIGHTS LEGEND**

The technical data and information embodied herein are the property of and proprietary to Allison Engine Company, and shall not, without prior written permission of Allison Engine Company, be disclosed in whole or in part to third parties. This legend shall be included on any reproduction of this technical data in whole or in part.

[JA-0118] The subsequent pages of OIL-24, Revision 13 contain

the notice “Allison Proprietary Document.” [JA-0121] The front pages of the Additional OILs bear the same proprietary rights notice as OIL-24, Revision 13. [JA-4016, 4130, 4153, 5557] The copies of OIL-24, Revision 13 and the Additional OILs in AvidAir’s possession had the same proprietary rights legend, and AvidAir saw that legend when it obtained the copies of these OILs but chose to ignore them. [JA-0179]

**B. Limited Distribution.**

Rolls-Royce provided OIL-24, Revision 13 and the Additional OILS exclusively to its AMCs. [JA-0113 and JA-4013, ¶ 9] Rolls-Royce restricted the distribution of BookFaxes to AMCs, Authorized Repair Facilities, and less than thirty of its own employees, all under a duty of confidentiality. [JA-4327, ¶ 5, 4334-5, 2002] AvidAir was not on the distribution list for OIL-24, was never an AMC, and was not able to purchase OIL-24 from an authorized source. [JA-0180, 4014] Rolls-Royce never authorized AvidAir to possess or use OIL-24, Revision 13, the Additional OILs, or the BookFax. [JA-0115, ¶ 9; 4014, ¶ 12]

**C. Contractual Restrictions.**

Starting in 1994, each AMC entered into an Authorized

Maintenance Center Agreement (“AMC Agreement”), which incorporated Additional Provisions Applicable to Authorized Maintenance Center Agreement (“Additional Provisions”) and an Authorized Maintenance Center Policy Manual (“AMC Policy Manual”).<sup>7</sup> [JA-0163, 0164, 0166] The AMC Agreement governed the AMCs when Rolls-Royce issued OIL-24, Revision 13, the Additional OILs and the BookFax. [Id.]

The Additional Provisions prohibited AMCs from distributing and reproducing Rolls-Royce technical documents:

Authorized Maintenance Center will be furnished applicable Operations (and Maintenance) Manuals, Overhaul Manuals and Illustrated Parts Catalogs free of charge during the first three (3) years of this Agreement. Thereafter, Authorized Maintenance Center will procure these Manuals from Allison. During the term of this Agreement, Allison will provide to Authorized Maintenance Center the Policy Manual, copies of Products, Modules and Parts Price List, Term of Sale Statement(s), customer support Bulletins, general technical data and other Manuals (as referenced in the Manual List) as Allison shall deem necessary

<sup>7</sup> The term “Agreement” is defined as “[t]he Authorized Maintenance Center Agreement, including the principle Agreement that is executed by Authorized Maintenance Center and Allison, the Policy Manual, the Additional Provisions, the Statements and all related agreements and addenda as referenced in this Agreement.” [JA-0164, ¶ 1.2] As used in this Brief, AMC Agreement has the same definition and includes the Additional Provisions and the Policy Manual.

and as may be required by Authorized Maintenance Center in support of their Business Operation(s). Such material may be Allison proprietary and may bear appropriate copyright and Marks restrictions. No distribution of this material is to be made outside Authorized Maintenance Center Business Operation(s) except as provided in each document, the Policy Manual or as specifically Authorized by Allison. This material will be distributed to Authorized Maintenance Center pursuant to the Policy Manual.

[JA-0167, ¶ 6.2] (emphasis added).

The AMC Policy Manual likewise prohibited AMCs from reproducing technical manuals:<sup>8</sup>

Reproduction of Manuals in whole or in part, is prohibited, except as provided within the respective copyright release document(s), or within the Manual itself. Allison controls the publication and distribution of Manuals by reserving the rights to exclusive publishing and printing. Additionally, Allison controls the timely printing and distribution of revisions deemed to be of critical nature.

[JA-0171, § 7.1(A)]. The AMC Policy Manual limited the use of OIL-24, Revision 13 and the Additional OILs (formerly called Distributor Overhaul Information Letters or “DOILs”) by

<sup>8</sup>The term “Manuals” is defined as “[t]echnical documents prepared and distributed by Allison.” [JA-0165, ¶ 1.49; JA-0173, § 7.5.6] The list of Manuals is exemplary and not exhaustive. [Tr. P. 133]



mandating that “DOILs are issued exclusively to Authorized Maintenance Centers approved by Allison.” [JA-0172, § 7.2.4]

**D. AvidAir’s Possession of the OILS and the BookFax.**

Rolls-Royce never authorized AvidAir to possess the OILs. [JA-4014, ¶ 12] AvidAir did not acquire the OILs from an authorized source. [JA-0229, ll. 17-22 and JA-0231, ll. 14-17; JA-0550, ll. 17-19; JA-3993, A-16] AvidAir obtained OIL-24, Revision 13 from David Rain. [JA-0229, ll. 17-22 and JA-0231, ll. 14-17; JA-0550, ll. 17-19] AvidAir could not specifically recall the sources of the Additional OILs but thought it was Kevin Peterson, Steve Hartley or George Hicks. [RRA-33]. Rolls-Royce never authorized Rain, Peterson, Hartley or Hicks to provide them to AvidAir. [JA-1589, 4014, ¶ 13; 2329, 2332]

AvidAir received the BookFax from Rain in February 2003. [JA-4325, ¶ 14] Rain obtained the BookFax from an AMC in Sweden called Patria Ostermens (“Patria”). [JA-4325, ¶ 14] Patria had a contractual duty to maintain the BookFax in confidence. [JA-4327, ¶ 4 and 4329-4332]

## **V. The Alleged Public Sources.**

### **A. The Presentation to the Japanese Military and Military Contractors.**

Rolls-Royce made confidential presentations to the Japanese Defense Agency (“JDA”) regarding the vane dimensions that it marked “Allison Proprietary”. [JA-1876, ¶ 7 and JA-2004, ll. 7-19] There were two meetings: one with Mitsubishi Heavy Industries (“MHI”), a Rolls-Royce AMC, and one with MHI and JDA.<sup>9</sup> [JA-0708, ll. 19-21] AvidAir did not obtain any of the confidential information presented at these meetings from the Japanese military or MHI. [A-12]

### **B. Timken and Alcor.**

In 2004, Rolls-Royce sued Alcor Engine Company (“Alcor”) and Timken Aerospace (“Timken”) for trade secret misappropriation. [JA-1587-9] Alcor surrendered its DOILs and other documents to Rolls-Royce pursuant to a Confidential Settlement Agreement (“Alcor CSA”). [JA-1589, ¶ 10] The Alcor CSA included a schedule of Publicly Available Information

<sup>9</sup> AvidAir references without specificity two other companies, Shintoa Corporation and Aero Asahi. Aero Asahi was part of MHI. Shintoa served as Rolls-Royce’s agent in Japan at the time. [JA-5309-5312].

(“PAI List”). [JA-1589, ¶ 12] OIL-24, Revision 13, the Additional OILs and the BookFax are not on the PAI List. [JA-1589, ¶ 12; 1604-1800]

Timken and Rolls-Royce also settled their litigation with a Confidential Settlement Agreement (“Timken CSA”). [JA-1589, ¶ 14-15] The Timken CSA included a duty of confidentiality not to disclose Rolls-Royce’s technical information (including OILs). [JA-1824, ¶ 3.1 and 1858, ¶ 6] A subsequent stipulated consent judgment confirmed that Timken was prohibited from using the OILs at issue in this appeal. [RRA-23-27]

**C. Precision Air Power.**

Precision operated as a branch of NAC, a Rolls-Royce AMC. [JA-1885, ¶ 24] NAC was governed and restricted by an AMC Agreement. [JA-2406] Precision’s Branch Agreement with NAC required it to act in accordance with and not contrary to NAC’s contractual obligations to Rolls-Royce. [JA-1912] These obligations included the requirement to maintain Rolls-Royce’s OIL-24, Revision 13 and the Additional OILs as

confidential. [JA-1882 to 1885, ¶¶ 16-21 and 24 and JA-1900 to 1922] On November 30, 2007, Rolls-Royce informed Precision of its trade secret claim and reminded Precision of its confidentiality obligations under the AMC Agreement and Branch Agreement and that any disclosure of Rolls-Royce's proprietary information to unauthorized third-parties would constitute a violation of Precision's duty of confidentiality. [JA-4394-5]

After the Magistrate Judge issued his Report on April 7, 2009 recommending partial summary judgment on Rolls-Royce's trade secret misappropriation claim, AvidAir acquired Precision's M250 technical library pursuant to an asset purchase agreement. [JA-5558] The Bill of Sale was signed by AvidAir and Precision months after the Magistrate Judge issued his Report and after the District Court entered Summary Judgment Order #1. [JA-4344]

Precision conveyed to AvidAir "as, where is, and with all faults" its "technical library, binders/bulletins" as shown in a "photo spread". [JA-4341 to 4346; Tr. p. 248, ll. 1-7] Precision

and AvidAir agreed that Rolls-Royce “might seek legal action against Seller [Precision] and/or the Principals for and in connection with Buyer [AvidAir] acquiring the Purchased Assets from Seller”. [JA-4341] AvidAir indemnified Precision from any claim relating to proprietary Rolls-Royce documents. [JA-4342, ¶ 1]

The copies of OIL-3, Revision 16; OIL-8, Revision 6, and OIL-24, Revision 13 that AvidAir acquired from Precision display the same proprietary rights legends discussed above. [JA-5558] AvidAir’s counsel sequestered the documents that AvidAir bought from Precision pending resolution of this case. [Tr. 41, ll. 4-9] Relying on this acquisition, AvidAir filed its Motion to Reconsider the District Court’s Summary Judgment Order #1 on July 8, 2009. [JA-3507]

**D. Other AMC Branches, the Australian Military and Cadorath Aerospace.**

Three additional branches existed under NAC, namely Helipower Services, Airborne Engines and Essential Turbines. The same restrictions of confidentiality under the AMC Agreements and Branch Agreements that bound Precision

applied to these Branches. [JA-1882 to 1885, ¶¶ 16-21 and 24 and JA-1900 to 1922] Helipower Services returned its technical documents to Rolls-Royce and acknowledged that, as a Branch AMC, it was obligated to maintain DOILs as confidential. [JA-2654 *et seq.*] Airborne Engines has likewise honored the confidentiality restrictions. [JA-2525] Essential Turbines had contractual obligations to maintain the confidentiality of the OILs and did not provide any OILs to AvidAir. [JA-0229, 0231, 0550, 1881-1885 and 1897-1922]

AvidAir claims the Australian military and Cadorath Aerospace were unrestricted sources of OILs. AvidAir did not designate admissible evidence demonstrating that Cadorath was an unrestricted source of the OILs. [JA-2246,2247; 1867, ll. 18-25; 1868, l. 14 to 1867, 1.5; 0795, ¶¶ 5-6; 1870, ll. 14-18; 1871, ll. 14-25; 1872, l. 24 to 1873, l. 19] AvidAir's designated evidence did not support its contention that the Australian military was an unrestricted source of OILs. [JA-2260; 1141 *et seq.*; 2075; 2076-78, ¶¶ 1, 2, 11; 0953 (p. 28, ll. 17-23); A-12]

**VI. Rolls-Royce's Legitimate Business Practices In Connection With Its Technical Data And Assertion Of Trade Secrets.**

Rolls-Royce enforced its trade secret rights against AvidAir because it continued to exploit OIL-24, Revision 13 despite Rolls-Royce's demands to cease and desist. [JA-0056 *et seq.*] Rolls-Royce enforced its trade secret rights against other companies who misappropriated its trade secrets, including those trade secrets embodied in OIL-24, Revision 13. [JA-1587-1590, 1592-1602 and 2654-2676] Rolls-Royce had legitimate business justification to assert its trade secret claims, which the District Court underscored with its favorable trade secret summary judgment rulings. [A-30 & 44] Rolls-Royce asserted and prevailed on its trade secret claim in good faith. [JA-0551-2; A-19, 40-42, 65-66]

## SUMMARY OF ARGUMENT

This appeal is the latest in a series of attempts by AvidAir to evade the consequences of its undisputed use and possession of Rolls-Royce proprietary information. The Magistrate Judge and the District Court considered and rejected AvidAir's evidence and arguments several times. When AvidAir did not prevail on the existing facts before the District Court, it tried, albeit ineffectively, to manufacture a question of material fact and evade liability through a belated acquisition – in fact a second misappropriation - of documents the District Court had determined were Rolls-Royce's trade secrets. On appeal, AvidAir rehashes its old arguments, repackages its assertions into new theories of liability which it failed to argue or support before the District Court, and ignores its prior admissions supporting the trade secrecy of Rolls-Royce's information. The District Court was right to rule in Rolls-Royce's favor, and this Court should affirm the District Court's decisions in all respects.



The District Court correctly granted Rolls-Royce's motions for partial summary judgment concluding that OIL-24, Revision 13, the Additional OILS and the BookFax are trade secrets that AvidAir misappropriated. OIL-24, Revision 13 was the document that AvidAir used to repair and authorize the return to service of hundreds of compressor cases. The Magistrate Judge applied well-settled principles of trade secret law to the undisputed facts and concluded that OIL-24, Revision 13 comprised a combination of publicly-available matter and new, secret information. The Magistrate Judge also concluded that Revision 13 had economic value in part because AvidAir admitted that it could not conduct business without OIL-24, Revision 13 and referenced it each time it authorized the return to service of a repaired compressor case generating substantial profits.

Rolls-Royce used a combination of measures to protect the secrecy of OIL-24, Revision 13. Those measures included the use of a conspicuous restrictive rights legend, restrictive distribution to AMCs and contractual prohibitions on further

distribution or disclosure. AvidAir failed to demonstrate a genuine issue of material fact in this regard. The Magistrate Judge concluded that these measures were reasonable under the circumstances.

After considering the parties' exceptions to the Report and reviewing the record *de novo*, the District Court adopted the Report in its entirety and added further analysis. The next logical step involved taking the District Court's work product with respect to OIL-24, Revision 13 and applying it to the Additional OILs and the BookFax. There is no reasonable dispute that the Additional OILs and the BookFax comprise economically valuable information. Rolls-Royce used the same secrecy measures to protect the Additional OILs that it used for OIL-24, Revision 13. AvidAir failed to demonstrate that it legitimately acquired, or could have legitimately acquired, the Additional OILs or the BookFax from an authorized source. The undisputed evidence allowed the District Court to reach the same conclusions for the Additional OILs and the BookFax

that it reached with respect to OIL-24, Revision 13. The District Court did not err in its analysis and rulings.

After the jury returned its verdict on damages, the District Court heard further evidence supporting Rolls-Royce's request for injunctive relief. The District Court considered that evidence and issued a permanent injunction ordering AvidAir to return to Rolls-Royce all copies of OIL-24, Revisions 12 and 13; OIL-3, Revision 16; OIL-8, Revision 6; and the BookFax and directing AvidAir to account for the same. The injunction represents the least restrictive means to protect Rolls-Royce's trade secrets without undue harm to AvidAir.

The District Court also correctly resolved AvidAir's tortious interference and antitrust claims on summary judgment. AvidAir predicated both its tortious interference and antitrust claims on the theory that Rolls-Royce used this litigation as a sham to assert "bogus" trade secret rights. Because Rolls-Royce prevailed on its trade secret claim over several documents and had a good faith basis for asserting

rights in documents ultimately not found to be trade secrets, AvidAir could not prevail on either count as a matter of law.

The tortious interference claim required AvidAir to prove “lack of justification”, which it could not do given the prior findings of trade secrets. The antitrust claim required AvidAir to prove by clear and convincing evidence Rolls-Royce’s purported “knowing assertion of invalid trade secrets”. Given the prior rulings, AvidAir could not, as a matter of law, prevail on its sole antitrust theory. The District Court properly granted summary judgment on both counts.

AvidAir mischaracterizes the District Court’s interpretation of the NAC AMC agreement. AvidAir quotes passages from the Report which discussed the distributor agreements existing before 1994. But, the 1994 and 1998 era AMC agreements contain reasonable restrictions prohibiting the public disclosure of OILs and BookFaxes. [A-38] Precision acquired the OILs that it conveyed to AvidAir from NAC under the Branch Agreement, which incorporated the AMC Agreement, Additional Provisions and AMC Policy Manual.

Precision was not an unrestricted source of OILs. [A-34]

AvidAir's belated acquisition of OILs from Precision did not absolve it of liability for the misappropriation of Rolls-Royce's trade secrets. AvidAir's acquisition of OILs from Precision was a second misappropriation of documents previously adjudicated to be trade secrets.

AvidAir also assigns error to the District Court's denial of its motion to amend its Complaint to introduce new documents into the litigation. The District Court has broad discretion on such matters and did not abuse that discretion. AvidAir waited eighteen months after the deadline for amending pleadings and after Summary Judgment Order #1 had been entered before seeking leave to amend. The District Court did not err when it denied AvidAir's attempt to broaden the scope of its Complaint at that late juncture.

The District Court devoted substantial resources over four years to resolve this case. As the protracted history of this case demonstrates, the rulings that AvidAir now challenges on appeal were the product of a thorough, logical, and reasoned

investigation by the District Court. The District Court protected Rolls-Royce's trade secrets without going beyond the limits necessary to ensure such protection. The District Court's rulings and judgment should be affirmed in all respects.

## ARGUMENT

### **I. The District Court Correctly Granted Partial Summary Judgment That OIL-24, Revision 13, The Additional OILS, And The BookFax Are Trade Secrets.**

AvidAir appeals the District Court's decision that OIL-24, Revision 13, the Additional OILs, and the BookFax were trade secrets entitled to protection as a matter of law. AvidAir does not challenge any ruling with respect to its misappropriation of OIL-24, Revision 13, the Additional OILs, and the BookFax, and instead focuses on the trade secret status of these documents. Given the undisputed evidence that it used and profited from its use of OIL-24, Revision 13 and possessed the Additional OILs and the BookFax, AvidAir cannot feasibly argue it did not misappropriate these documents. [JA-5556 *et seq.*] Therefore, Rolls-Royce addresses the trade secret status of OIL-24, Revision 13, the Additional OILs and the BookFax

and the legal ramifications naturally flowing from the District Court's trade secret rulings. The uncontroverted material facts and the law support the District Court's judgment.

**A. Standard Of Review On Summary Judgment.**

If there is no genuine issue as to any material fact, the moving party is entitled to a judgment as a matter of law.

*Williams v. City of St. Louis*, 783 F.2d 114, 115 (8th Cir. 1986).

The Court must view the evidence in the light most favorable to the non-moving party, giving that party the benefit of all inferences that may be reasonably drawn from the evidence.

*Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S.

574, 588-89 (1986); *Tyler v. Harper*, 744 F.2d 653, 655 (8th Cir.

1984), *cert. denied*, 470 U.S. 1057 (1985). A party opposing a

motion for summary judgment "may not rest upon the mere

allegations or denials of the . . . pleadings, but . . . by affidavits

or as otherwise provided in [Rule 56], must set forth specific

facts showing that there is a genuine issue for trial." Fed. R.

Civ. P. 56(e).

Only genuine disputes about material facts can prevent entry of summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Get Away Club, Inc. v. Coleman*, 969 F.2d 664 (8th Cir. 1992). "[W]hile the materiality determination rests on the substantive law, it is the substantive law's identification of which facts are critical and which facts are irrelevant that governs." *Anderson*, 477 U.S. at 248.

Reasonable inferences are drawn in favor of a non-moving party; however, the mere existence of some alleged factual dispute will not defeat a properly supported summary judgment motion; the dispute must be genuine. *Celotex v. Catrett*, 477 U.S. 317, 325, 106 S.Ct. 2548, 2553-54, 91 L.Ed.2d 265 (1986); *Anderson*, 477 U.S. at 248. A factual dispute is genuine only if it would allow a reasonable jury to return a verdict for the nonmoving party. *Id.*; *Matsushita Elec. Indus. v. Zenith Radio*, 475 U.S. 574, 587, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986) .



**B. The District Court Correctly Concluded that OIL-24, Revision 13 Is a Trade Secret.**

A trade secret is information, including but not limited to, technical or nontechnical data, a formula, pattern, compilation, program, device, method, technique, or process, that derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Ind. Code § 24-2-3-2; Mo. Rev. Stat. § 417.453(4); *Hydraulic Repair and Exch. v. KM Specialty Pumps, Inc.*, 690 N.E.2d 782, 785-86 (Ind. Ct. App. 1998); and *Burk v. Heritage Food Serv. Equip., Inc.*, 737 N.E.2d 803, 813 (Ind. Ct. App. 2000).

Both Indiana and Missouri have adopted the Uniform Trade Secrets Act (“UTSA”), and both states approve reliance on decisions from other states that have adopted the UTSA. *Amoco Production Co. v. Laird*, 622 N.E.2d 912, 917-18 (Ind. 1993); *Lyn-Flex West, Inc. v. Dieckhaus*, 24 S.W.3d 693, 697-98 (Mo. Ct. App. 1999). Rolls-Royce proved the existence of trade

secrets misappropriated by AvidAir. Ind. Code § 24-2-3-2;  
*Zemco Mfg., Inc. v. Navistar Int'l Transp. Corp.*, 759 N.E.2d  
239, 245-46 (Ind. Ct. App. 2001).

The Court determines as a matter of law what information constitutes trade secrets. *Coleman v. Vukovich*, 825 N.E.2d 397, 405 (Ind. Ct. App. 2005). There is no reasonable dispute that the OILs and BookFax meet the “information” prong of the trade secret analysis. To help determine that OIL-24, Revision 13 contained new and valuable information that is not publicly available, the District Court here asked the parties to identify and address the differences between Revision 13 and its predecessors. [A-4] This effort revealed at least three items in Revision 13 that are not in publicly available revisions. [A-10] Though it now attempts to contest that these new items of information are economically valuable, AvidAir cannot escape its prior binding admission to the contrary.

(1) **Information deriving independent economic value.**

OIL-24, Revision 13 contains information describing how to salvage and repair a M250 compressor case assembly. [JA-0112, 0113 and 0115] OIL-24, Revision 13 includes methods, techniques, and processes for, *inter alia*, plastic coating burnout, inspection of the compressor case, replacement of the compressor case vane and band assemblies, repairing pilot bores, painting and sealing, setting vane angles, plastic coating replacement, and grinding of vane tips. These items of information fall under several of the exemplary statutory categories of trade secret information. [JA-0120, 0121] Additionally, Revision 13 comprises a compilation of information, a further example of a statutory trade secret. There is no genuine dispute that Revision 13 qualifies as information that can be protected as a trade secret. [A-9]

Revision 13 represents the culmination of years of commercial development of the M250, including many changes and modifications to the compressor case. [JA-0116] These changes and modifications resulted from engineering

development efforts by Rolls-Royce's many engineers. [JA-0116] Revision 13 contains a mix of publicly available information combined with new information. [A-13] As the District Court recognized, the fact that some or even most of the information is publicly available does not prevent Revision 13 from being a trade secret. [A-13]

AvidAir's admissions that it used the new information in Revision 13; had access to prior, outdated revisions of OIL-24 but sought and obtained Revision 13 to avoid scrutiny by the FAA; and that it could not return compressor cases to service without Revision 13 and the new information it contains establish the value of the new information contained in, and in the overall compilation of, Revision 13. [JA-0178-9, 0182, 0233, 0234, 0237-8, and 02/11/2009 Tr. p. 97, lines 17-25]

On appeal AvidAir argues a supposed lack of evidence that the undisputedly new technical information Rolls-Royce developed and incorporated into Revision 13 derived independent economic value in and of itself. [Brief of Appellant, p. 34] At the same time, AvidAir argues that the incorporation

of the new information to create a new and updated Revision 13 cannot be a trade secret compilation. [Brief of Appellant, p. 39] These contentions contradict the record. The undisputed summary judgment record established that this new information was valuable; so much so that AvidAir could not authorize the return to service of compressor cases without OIL-24, Revision 13. [9/9/2010 Tr. p. 235].

The record also dispels AvidAir's argument that the information in Revision 13 is obsolete. Before Revision 13 was adjudicated a trade secret, AvidAir's actions and testimony demonstrated that it was indispensable to its business. Only after an adverse summary judgment ruling did AvidAir try to deny the value of Revision 13 and the new information it incorporates. AvidAir's conduct belies its argument on appeal, and its binding 30(b)(6) admissions contradict its current denials. There is no genuine dispute that the new information in Revision 13 has independent economic value and that this value is particularly strong by virtue of its integration into the complete technical context of Revision 13.

A trade secret derives independent economic value if competitors would gain “some advantage” or “a competitive edge” from obtaining it. *Ackerman v. Kimball Int'l, Inc.*, 634 N.E.2d 778, 783-84 (Ind. Ct. App. 1994), *vacated in part and affirmed in part*, *Ackerman v. Kimball Int'l, Inc.*, 652 N.E.2d 507, 508 (Ind. 1995). Revision 13 provided AvidAir with significant economic advantages because it earned about \$3.5 Million in net profit using Revision 13. [Tr., p. 2346, ll. 14-15; p. 255, ll. 1-7; p. 274, ll. 1-14; p. 530, ll. 4-15] AvidAir used Revision 13 to perform M250 compressor case overhauls and without Revision 13 could not authorize the return to service of repaired compressor cases. [JA-0178-9] Rolls-Royce engineers spent years developing and refining Revision 13. [JA-0116] AvidAir bypassed the time-consuming and expensive engineering process required to create and refine a compressor case salvage process. There is no genuine dispute that Revision 13 has independent economic value.

A “compilation” may be a trade secret, and case law further emphasizes that even a combination of non-secrets may

itself constitute a protectable secret citation. *Laird*, 622 N.E.2d at 919-20. Trade secrets frequently contain elements that by themselves may be in the public domain but taken together qualify as trade secrets. *Id.* 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 unique combination, affords a competitive advantage and is a protectable secret. *Id.* “[T]he effort of compiling useful information is, of itself, entitled to protection even if the information is otherwise generally known.” *Northern Elec. Co. v. Torma*, 819 N.E.2d 417, 426 (Ind. Ct. App. 2005) .

If a compilation of public information can deserve trade secret protection, then public information combined with additional secret information, like OIL-24 Revision 13, must also deserve trade secret protection. Both the new and valuable individual components of Revision 13 and the overall compilation itself enjoy trade secret status by virtue of the time, effort and resources that must be expended to replicate

the new information and the overall compilation of which it forms a part. *Laird*, 622 N.E.2d 918-19; *Torma*, 819 N.E.2d at 426; *Dieckhaus*, 24 S.W.3d at 699.

**(2) Not generally known or readily ascertainable.**

The record established that neither the uncontroverted new and valuable information in Revision 13, nor the overall compilation, is generally known or readily ascertainable.

AvidAir had no evidence that Revision 13 was in the public domain. [JA-0175, 0184, 0188-9] Rolls-Royce provided Revision 13 exclusively to its AMCs. [JA-0116] Rolls-Royce prohibited AMCs from reproducing or distributing Revision 13, and obligated AMCs to return Revision 13 if they left the Network. [JA-0172] Revision 13 bears a prominent notice that it is proprietary to Rolls-Royce and shall not be disclosed to third parties. [JA-0118] These reasonable secrecy measures prevented Revision 13 from becoming generally known or readily ascertainable. The fact that AvidAir or any other source saw the prominent proprietary rights notice on OIL-24, Revision 13 and chose to ignore it does not render the document



generally known or readily ascertainable. [JA-0179]

The summary judgment record did not support AvidAir's contention that the Cadorath, Alcor, and Timken (who serially possessed the same restricted copy of Revision 13) were unrestricted sources of any OIL or BookFax. [JA-2246,2247; 1867, ll. 18-25; 1868, l. 14 to 1867, l.5; 0795, ¶¶ 5-6; 1870, ll. 14-18; 1871, ll. 14-25; 1872, l. 24 to 1873, l. 19] The restricted copy of Revision 13 which Alcor purportedly obtained from Cadorath and then transferred to Timken, was ultimately returned to Rolls-Royce in connection with the Timken CSA. [JA-1589; RRA-23]

The summary judgment record established that the Australian military had restricted copies of the OILs, as it too, returned Revision 13 to Rolls-Royce pursuant to a confidentiality obligation. [JA-2260; 1141 et seq.; 2075; 2076-78, ¶¶ 1, 2, 11; 0953 (p. 28, ll. 17-23); A-12] The evidence that AvidAir cites demonstrates that the documents possessed by the Australian Military were restricted and returned to Rolls-Royce.

Likewise, the four branches operating under NAC's AMC Agreement were not unrestricted sources of OILs and owed confidentiality obligations stemming from their Branch Agreements, which incorporated the AMC Agreements. [JA-1882 to 1885; 1900-1922]

AvidAir's arguments about the confidential disclosure to the JDA find no support in the record. [Brief of Appellant, p. 53] The presentation AvidAir discusses was marked confidential and proprietary. [JA-1876, 2004] The participants in those meetings had duties of confidentiality. [JA-5309-5312] None of the participants was a source of the documents that AvidAir had. [A-12] The evidence relied upon by AvidAir [JA-707, 2099, 2102, 2104-8, 2829-2843] does not support its assertions and shows that the presentation was confidential.

Revision 13 is also not readily ascertainable through proper means. "[I]nformation requiring substantial investment of time, expense, or effort to acquire is 'not readily ascertainable' where acquiring information is 'not simple or easy to accomplish.'" *Ackerman*, 634 N.E.2d at 783-84; *Laird*,

622 N.E.2d at 919 (Ind. 1993); *U.S. Land Services, Inc. v. U.S. Surveyor*, 826 N.E.2d 49, 63-64 (Ind. Ct. App. 2005). Even where parts of a trade secret may be found in public sources, the fact that lengthy effort was required to compile the trade secret indicates that the compiled trade secret is not readily ascertainable. *Torma*, 819 N.E.2d 417, 426 (Ind. Ct. App. 2004). AvidAir conceded that it would be an “enormously expensive” and “elaborate process” to reverse engineer Revision 13 to obtain FAA approval for the same repair process, *i.e.* to ascertain the information through proper means. [2/11/2009 Tr., p. 9-10] Revision 13 is not generally known or readily ascertainable.

**(3) Reasonable Efforts to Maintain Its Secrecy.**

The owner of a trade secret must take reasonable measures to protect its secrecy. *Zemco*, 759 N.E.2d at 246 (Ind. Ct. App. 2001). Extravagant measures need not be taken, and absolute secrecy is not required. *Id.* Reasonable measures may account for the circumstances relating to a particular trade secret. *Id.* “A trade secrets plaintiff need not prove that every

element of an information compilation is unavailable elsewhere.” *Laird*, 622 N.E.2d at 919.

The availability of predecessor DOILs does not mean Revision 13 lacks trade secret protection. AvidAir proffered immaterial issues regarding different documents known as DOILs. [JA-0039] An argument based on DOILs fails as a matter of law. For example, OIL-24, Revision 3 is a document that has been found to be in the public domain, and the general public has the right to use that particular Revision 3. Revision 13 includes new information not found in Revision 3, and AvidAir used this new information in its business. [A-11, 12, 18] As the District Court explained, the fact “that DILs and DOILs are freely available within the industry . . . does not establish *Revision 13* is freely available.” [A-10] (emphasis in original).

Rolls-Royce prohibited AMCs from reproducing or distributing OIL-24, Revision 13. [JA-0164, 0166-8, 0172] Rolls-Royce marked the front page of OIL-24, Revision 13 with a proprietary rights notice that prohibits disclosure to

unauthorized third parties and marked the subsequent pages with an additional proprietary rights notice. [JA-0118, 0125] Courts have recognized these types of security measures as “not only reasonable, [but] more than was required by the [Uniform Trade Secret] Act.” *Zemco*, 759 N.E.2d at 246, 248 (Ind. Ct. App. 2001). There is no genuine dispute that Rolls-Royce used reasonable measures -- long-recognized in trade secret law -- to protect the secrecy of Revision 13.

**C. AvidAir Cannot Defeat The Trade Secret Status of OIL-24, Revision 13 By Characterizing It As an Instruction For Continued Airworthiness.**

AvidAir asserts that OIL-24, Revision 13 cannot be a trade secret because FAA Instructions for Continued Airworthiness (“ICA”) regulations require it be made available to the public in accordance with 14 C.F.R. § 21.50(b). AvidAir’s argument is procedurally and substantively flawed.

First, AvidAir’s declaratory judgment action did not seek a declaration regarding the parties’ obligations under the FAA’s ICA regulations. [JA-0050; A-25]. The District Court rejected

AvidAir's ICA argument, which would have injected a new, unpleaded claim for relief into the litigation.

Second, AvidAir's characterization of its designated evidence was erroneous, incomplete and failed to support this argument. AvidAir cites to JA-5101 and 5210 in support of this argument. [Brief of Appellant, p. 35] The first document is AvidAir's brief in support of motion in limine. The second reference is to part of a report from Rolls-Royce's expert. Neither document supports the proposition that AvidAir claims.

The FAA Inspector who visited AvidAir did not express any opinion that OIL-24, Revision 13 was ICA or that it was not a protected trade secret. The FAA Inspector's statement is silent as to ICA and supports the District Court's ruling that Rolls-Royce had expended considerable resources to develop its technical data:

The FSDO's [Flight Standards District Office] general opinion is that the OEM's should make all their repair information/data available to all. However, the OEM is not obligated to provide it freely to all since it involves considerable resources to develop and approve

such repairs and there are other methods available to restore the product to an airworthy condition.

[JA-0779]

The FAA has never expressed, as an agency policy or rule, the position that “the OEM’s should make all their repair information/data available to all”. [*Id.*] The FAA is aware of and has not objected to Rolls-Royce’s practice of restricting Revision 13 and other technical data that is not ICA. [JA-1970 *et seq.*] As the District Court recognized, “AvidAir has not established (or even suggested) the FAA has determined Rolls-Royce’s submission is unacceptable or otherwise violates the regulation” regarding ICA. [A-25-26]

Third, the District Court’s treatment of AvidAir’s ICA argument comports with the well-settled principle that courts give deference to agencies to interpret their own regulations. *Shalala v. St. Paul-Ramsey Med. Ctr.*, 50 F.3d 522, 527 (8th Cir. 1995); *Borden v. Administrator of the Federal Aviation Administration*, 849 F.2d 319, 321 (8th Cir. 1988). Consistent with this authority, the District Court concluded that any

complaints about Rolls-Royce's compliance with the FAA's regulations must be made to the FAA, not adjudicated in federal court. [A-26]

Based on the summary judgment record and the proper deference accorded to an agency's interpretations of its rules, the District Court did not err when it refused to enlarge the scope of the FAA's ICA regulations beyond the accepted industry practice that has existed for decades.

**D. The District Court Correctly Applied its Ruling Regarding OIL-24, Revision 13 to the Additional OILs and BookFax.**

The District Court applied its analysis of Revision 13 to the Additional OILs and the BookFax. [A-36 *et seq.*] AvidAir suggests that the District Court erred in addressing the BookFax because Rolls-Royce's did not introduce it in summary judgment briefing. (Brief of Appellant, p. 53) Rolls-Royce presented admissible evidence that the BookFax was a trade secret in response to AvidAir's renewed motion for partial summary judgment. [JA-4306-8] The District Court was entitled to decide whatever issues could be resolved as a matter



of law on the record before it and did not err addressing the BookFax. *Brown v. St. Louis Police Department of the City of St. Louis*, 691 F.2d 393, 396 (8th Cir. 1982).

**(1) Information deriving independent economic value.**

The Additional OILs and the BookFax contain valuable information that took years and considerable effort to develop. [JA-4013-4, 4016 *et seq.*, 4130 *et seq.*, 4253 *et seq.* and 6035]

**(2) Not generally known or readily ascertainable.**

For the same reasons as OIL-24, Revision 13 discussed *supra* at pp. 39-41, the Additional OILs and the BookFax are not generally known and are not readily ascertainable through proper means.

**(3) Reasonable measures to protect secrecy.**

Rolls-Royce used the same reasonable measures to protect the Additional OILs, which are not generally known or readily ascertainable through legitimate means. [JA-4014] Rolls-Royce protected the Additional OILs as trade secrets through AMC Agreements that restricted distribution and imposed an affirmative duty to return the same to Rolls-Royce and through

proprietary rights legends on the documents. [JA-0164, 0166-8, 0172]

Without citation to supporting evidence, AvidAir claims the BookFax was widely distributed. [Brief of Appellant, p. 17-18] The summary judgment record does not support this assertion. The designated evidence was undisputed and showed very limited distribution of the BookFax. [JA-4334] Even though the BookFax lacked a legend, it served as an interim notification between OIL-24, Revision 12 and Revision 13, both of which had prominent legends. AvidAir had both Revisions 12 and 13 when it received the BookFax. AvidAir knew, or had reason to know, that the BookFax came from a source having a duty of confidentiality. As a matter of law, such measures are reasonable. [A-27]

## **II. The District Court Properly Issued An Injunction Requiring AvidAir To Return The Trade Secret OIL-24, Revision 13, The Additional OILs, And The BookFax To Rolls-Royce.**

### **A. Standard of Review.**

A district court has wide latitude in fashioning injunctive relief. *PepsiCo, Inc. v. Redmond*, 54 F.3d 1262, 1272 (7th Cir.

1995). This Court reviews the grant of a permanent injunction for abuse of discretion. *Planned Parenthood Minnesota, North Dakota, South Dakota v. Rounds*, 530 F.3d 724, 733 (8th Cir. 2008) (en banc). “An abuse of discretion occurs where the district court rests its conclusion on clearly erroneous factual findings or erroneous legal conclusions.” *Id.* (citation omitted).

The UTSA authorizes courts to enjoin actual or threatened misappropriation. Ind. Code § 24-2-3-3(a); Mo. Rev. Stat. 417.455.1; *Wyeth v. Natural Biologics, Inc.*, 395 F.3d 897, 902 (8th Cir. 2005). Affirmative acts to protect a trade secret may be compelled by court order. Ind. Code § 24-2-3-3(c); Mo. Rev. Stat. 417.455.3. The scope of an injunction should be commensurate with the violation of trade secrets. 2 *Callman on Unfair Competition, Trademarks and Monopolies*, § 14:39. The court may bind the parties, the parties’ officers, agents, servants, employees, and attorneys, and other persons who are in active concert or participation with the parties and its officers, agents, servants, employees, and attorneys. Fed. R. Civ. P. 65(d)(2).

In granting a permanent injunction, a court considers: (1) whether the plaintiff prevailed on the merits; (2) whether plaintiff's remedies at law are inadequate; (3) whether the threatened injury to the plaintiff outweighs the threatened harm a grant of relief would occasion upon the defendant; and (4) whether the public interest would be disserved by granting relief. *Ferrell v. Dunescape Beach Club Condominiums Phase I, Inc.*, 751 N.E.2d 702, 712-13 (Ind. Ct. App. 2001); *State ex rel. Dir. of Revenue v. Gabbert*, 925 S.W.2d 838, 839 (Mo. banc 1996); *U.S. v. Green Acres Enterprises, Inc.*, 86 F.3d 130, 133 (8th Cir. 1996).

**B. Rolls-Royce Prevailed on the Merits.**

Rolls-Royce prevailed on the merits with respect to OIL-3, Revision 16; OIL-8, Revision 6; OIL-24, Revisions 12 and 13; and the BookFax. [A-20 *et seq.*; A-36 *et seq.*] These determinations support the injunction requiring AvidAir to return all copies of Rolls-Royce's trade secret OILs and the BookFax.

### C. Inadequate Remedy at Law.

The greatest loss that results from a misappropriation is the loss of the right not to divulge a trade secret, regardless of price. *3M v. Pribyl*, 259 F.3d 587, 609 (7th Cir. 2001). The purpose of a permanent injunction is to protect trade secret owners from the ongoing damages caused by the future use of trade secrets, rather than to compensate for those damages. *Pribyl*, 259 F.3d at 607-08; *Synergetics Inc. v. Hurst*, 477 F.3d 949, 961 (8th Cir. 2007).

Unless AvidAir is enjoined from possession or use of the trade secret documents it misappropriated, Rolls-Royce's right to ensure that its trade secrets are not distributed to or used by unauthorized recipients, and of the right to decide the terms and conditions under which it puts them to use will be irreparably harmed. AvidAir's violation of these rights cannot be compensated with damages alone as permitting such future use would erode the value of Rolls-Royce's trade secrets.

In spite of Summary Judgment Order #1, AvidAir misappropriated OIL-24, Revision 13 a second time by

acquiring it from Precision after it had already been adjudicated a trade secret as a matter of law. These documents had the same proprietary rights legends recognized by the District Court in its summary judgment rulings. AvidAir knew that the Court considered and rejected its argument that Precision was a legitimate source. [A-26-7] A permanent injunction was necessary to prevent AvidAir from continuing to possess Rolls-Royce's trade secrets and purposefully ignoring Rolls-Royce's security efforts, thereby eroding the value in those trade secrets. Rolls-Royce would have suffered irreparable harm unless the District Court ordered AvidAir to return to Rolls-Royce (and account for) all copies of the OILs and the BookFax.

**D. Injury to Rolls-Royce Outweighs any Purported Harm to AvidAir.**

The balance of the hardships weighs in favor of the injunction. The injunction prohibits further misappropriation of Rolls-Royce trade secrets and protects the technical information that Rolls-Royce makes available only to members of its authorized network. *Boeing Co. v. Sierracin Corp.*, 738 P.2d

665, 680-681 (Wash. 1987) (injunction prohibiting use of plaintiff's drawings and specifications and prohibiting for reverse engineering use of defendant's employee who had access to them was sufficiently clear and was appropriate as to duration and scope).

AvidAir has no legally cognizable harm. The District Court ordered AvidAir to return the trade secrets, but it did not enjoin AvidAir from performing compressor case repairs. [A-62] AvidAir cannot continue to possess, use or disclose Rolls-Royce's trade secrets without committing further misappropriation. Allowing AvidAir to possess, use, or disclose Rolls-Royce's trade secrets would result in escalating irreparable harm to Rolls-Royce by depriving it of the right to control its trade secrets, and eroding their value through disclosure and exploitation by others. Rolls-Royce invested considerable time and money developing the OILs and the BookFax and is entitled to protect this investment. [A-15]

**E. An Injunction Serves the Public Interest.**

The District Court's enforcement of the law served the public interest. *Kozuch v. CRA-MARVideo Center, Inc.*, 478 N.E.2d 110, 114 (Ind. Ct. App. 1985). The public interest favors granting an injunction to ensure that misappropriation does not continue. To provide a complete remedy and foreclose the possibility of further misappropriation, the District Court ordered AvidAir to deliver all copies of OIL-24, Revision 13, the Additional OILs, and the BookFax that were in its possession or control to Rolls-Royce. [A-65, 70]

If the District Court did not enjoin AvidAir's misappropriation of Rolls-Royce's trade secrets, the incentive to develop new products and processes would be stymied. Companies like Rolls-Royce that invest time, money and human capital to develop intellectual property would lose profits to free riders unwilling to invest similar time and effort. The permanent injunction serves the public interest by upholding the incentive to invest and by rewarding



technological development which are significant policy objectives of trade secret law.

**III. The District Court Correctly Granted Partial Summary Judgment Dismissing AvidAir's Tortious Interference And Antitrust Claims Given Rolls-Royce's Good Faith Basis For And Legitimate Interest In Asserting Trade Secret Protection Over Its Technical Documents.**

**A. Standard of Review.**

If there is no genuine issue as to any material fact, the moving party is entitled to a judgment as a matter of law.

*Williams v. City of St. Louis*, 783 F.2d 114, 115 (8th Cir. 1986).

Because AvidAir carries the burden of proof on its tortious interference claim, Rolls-Royce is entitled to summary judgment if there is an absence of evidence on any essential element of the claim. *Celotex*, 477 U.S. 317, 325 (1986).

**B. AvidAir's Tortious Interference Count Fails Because AvidAir Did Not Offer any Evidence to Show Lack of Justification.**

To avoid summary judgment, AvidAir had to present admissible evidence showing (1) a contract or valid business expectancy, (2) defendant's knowledge of the contract or relationship, (3) a breach induced or caused by defendant's

intentional interference, (4) absence of justification; and (5) damages. *Dieckhaus*, 24 S.W.3d 693, 700 (Mo. App. 1999).

Tortious interference claims fail where a defendant's actions are motivated by a legitimate interest as this precludes showing the absence of justification. *Smith v. Biomet, Inc.*, 384 F. Supp. 2d 1241, 1249 (N.D. Ind. 2005) (plaintiff must show that defendant acted *exclusively* to harm plaintiff's business interest); *Economation, Inc. v. Automated Conveyor Sys., Inc.*, 694 F. Supp. 553, 562 (S.D. Ind. 1988) ("existence of a legitimate reason for the defendant's actions will provide the necessary justification to preclude judgment for the plaintiff in the tort action."); *Mfg. Direct LLC, v. DirectBuy, Inc.*, 2006 WL 2095247 at \*9 (N.D. Ind. July 26, 2006); *United Consumers Club, Inc. v. Bledsoe*, 441 F.Supp.2d 967, 981 (N.D. Ind. 2006), *amended in part and adhered to in part*, *United Consumers Club, Inc. v. Bledsoe*, (N.D. Ind. Aug. 14, 2006); *Macke Laundry Service Ltd. Partnership v. Jetz Service Co., Inc.*, 931 S.W.2d 166, 181 (Mo. App. 1996) (no liability if defendant had an unqualified legal right to take the action of which plaintiff

complains); *Stehno v. Sprint Spectrum, L.P.*, 186 S.W.3d 247, 252 (Mo. 2006).

AvidAir failed to offer any evidence -- to show the absence of justification -- an essential element of its tortious interference claim. *Dieckhaus*, 24 S.W.3d at 700. The alleged conduct involved legitimate competition and meritorious claims of trade secret misappropriation. Rolls-Royce did not employ wrongful means or an unlawful restraint of trade. Rolls-Royce's actions served its interest in supporting its licensed affiliates in and enforcing its legitimate trade secrets. *Briner Elec. Co. v. Sachs Elec. Co.*, 680 S.W.2d 737, 741 (Mo. App. 1984).

Rolls-Royce acted to further its legitimate business and legal interests. The District Court concluded that because Rolls-Royce had legitimate trade secrets that it was entitled to protect, it was justified in its actions. [A-44] The only possible result was to enter summary judgment on AvidAir's tortious interference claim. AvidAir cannot, as a matter of law, establish one of the necessary elements required to prevail on its tortious interference count.

Summary Judgment Order #3 resolved AvidAir's tortious interference claim. [A-30-32] The District Court also concluded that its rulings against Rolls-Royce with respect to certain documents do not substantiate a lack of good faith. [A-44] The District Court applied prevailing Missouri law establishing the five elements for this tort. *Rice v. Hodapp*, 919 S.W.2d 240, 245 (Mo. 1996). The District Court did not err when it held Rolls-Royce's actions were "legally justified." [A-44]

**C. AvidAir's Antitrust Count Fails Because AvidAir Did Not Show a Sham Litigation Involving Knowing and Willful Assertion of "Bogus" Trade Secrets.**

AvidAir limited its antitrust claim to Rolls-Royce's assertion of alleged "bogus" trade secrets. [JA-0266, l. 9 to JA-0267, line 1, JA-0268 lines 6-15]. AvidAir had to present admissible evidence "in addition to the other elements of an antitrust violation, by clear and convincing evidence, that the defendant asserted trade secrets with the knowledge that no trade secrets existed." *CVD, Inc. v. Raytheon Co.*, 769 F.2d 842, 851 (1st Cir. 1985). AvidAir had to demonstrate, by clear and convincing evidence, that Rolls-Royce had no trade secrets, and

that Rolls-Royce brought its trade secret claims in bad faith knowing that its allegations were a sham. [*Id.*]

AvidAir's proffered antitrust expert, Christopher Pflaum, limited AvidAir's antitrust claim to one involving "sham litigation," *i.e.*, the use of a "bogus" patent or trade secret to monopolize a market. [JA-0266, l. 9 to JA-0267, line 1, JA-0268 lines 6-15] Pflaum conceded that his opinions, both with respect to a market analysis and antitrust damages, were premised solely on Rolls-Royce's assertion of purportedly invalid intellectual property rights. [*Id.*] He did not identify or consider any other basis for AvidAir's antitrust claim or alleged damages. [*Id.*] It is undisputed that Rolls-Royce has trade secrets embodied in the OILs and BookFax. [*Supra* pp. 10-13 and A-30]

The existence of trade secrets precluded AvidAir's antitrust claim premised on a "sham litigation" theory as a matter of law. *Professional Real Estate Investors v. Columbia Pictures Indus.*, 508 U.S. 49, 60 (1993). AvidAir's antitrust claim failed because it did not show any sham assertion of

trade secrets and because Rolls-Royce prevailed on its trade secret misappropriation claim with respect to several documents. [A-30]

AvidAir's antitrust claim would have failed even if Rolls-Royce had not prevailed on its trade secret claim. AvidAir failed to designate clear and convincing evidence that Rolls-Royce asserted its trade secret claim with knowledge that no trade secret existed. There is no question that Rolls-Royce asserted its trade secret claim in good faith, as underscored by the favorable summary judgment rulings.

The District Court also correctly rejected AvidAir's theory that its antitrust claim could survive summary judgment because Rolls-Royce did not prevail on all aspects of its trade secret claim. Absolute victory on every document asserted as a trade secret is not a prerequisite to avoiding sham litigation. A reasonable belief that a claim is valid suffices. *Professional Real Estate*, 508 U.S. at 62-3. The District Court did not err in granting summary judgment on AvidAir's antitrust claim.

AvidAir attempts to raise new theories of antitrust liability on appeal. (Brief of Appellant pages 66-71). AvidAir did not advance these theories in the District Court and they are waived on appeal. *Fenton v. Fayette School Dist.*, 875 F.2d 191, 193 (8th Cir. 1989). These new arguments cannot serve as a basis to reverse summary judgment.

Waiver notwithstanding, AvidAir's new theories are irrelevant to its antitrust claim premised exclusively on the alleged sham assertion of trade secret rights. [Brief of Appellant, p. 71] The nature of Rolls-Royce's distributor relationship with Aviall, its business practices with respect to the First Network members, or any other number of allegations included in Appellant's Brief have nothing to do with whether Rolls-Royce had a good faith basis for asserting trade secret claims against AvidAir. The narrow scope of AvidAir's antitrust claim makes any other theory of antitrust liability irrelevant.

AvidAir does not identify even a theoretical antitrust injury stemming from any activity other than the assertion of

trade secret rights. Only disputes about material facts can prevent entry of summary judgment. *Anderson*, 477 U.S. at 248. Even if considered, AvidAir's new arguments raised for the first time on appeal do not warrant reversal of summary judgment.

AvidAir's new theory of antitrust liability also fails as a matter of law because the undisputed evidence shows Rolls-Royce does not participate in the market for compressor case repairs. *Minnesota Association of Nurse Anesthetists v. Unity Hosp.*, 208 F.3d 655, 662 (8th Cir. 2000); *Flegel v. Christian Hosp. Northeast-Northwest*, 804 F. Supp. 1165, 1174 (E.D. Mo. 1992); *Murrow Furniture Galleries, Inc. v. Thomasville Furniture Indus., Inc.*, 889 F.2d 524, 528 (4th Cir. 1989). This is a salient, dispositive fact that AvidAir omits from its briefing. Rolls-Royce does not perform compressor case repairs and does not compete with AvidAir for compressor case repairs. [JA-0263, ll. 7-9; -0280, ll. 1-17] Rolls-Royce's share of the market for compressor case repairs is zero. *Id.* Rolls-Royce cannot have engaged in unlawful, anti-competitive conduct in the only



market in which AvidAir operated. Therefore, AvidAir's new allegations of so-called anti-competitive conduct cannot undo the District Court's summary judgment in Rolls-Royce's favor.

**IV. The District Court Correctly Interpreted NAC's AMC Agreement And Precision's Branch Agreement In Concluding That AvidAir Could Not Properly Acquire Rolls-Royce's Trade Secret Technical Documents Through An Asset Purchase From Precision.**

AvidAir acquired additional copies of the trade secret OILs from Precision. [A-1 and A-20] The District Court rejected this acquisition as a defense. Precision obtained Rolls-Royce's OILs under obligations of confidentiality and nondisclosure, and complied with these obligations until selling-out to AvidAir. AvidAir even indemnified Precision for misappropriation liability after it became clear that Rolls-Royce had valid trade secrets and would hold Precision responsible for disclosing the same. [JA-4342]

AvidAir now recycles its failed argument alleging error in the interpretation of the 1994 AMC Agreement and Precision's Branch Agreement. AvidAir combines an erroneous statute of limitations argument with its contradictory and flawed theory

that Precision did not have a nondisclosure obligation in the first instance. AvidAir resorted to parol evidence to explain the obligations of Precision, the entity it now indemnifies. [Brief of Appellant, pp. 58-64 and Tr. 628] These arguments should again be rejected.

**A. Standard of Review.**

Summary judgment based upon the interpretation of a contract is proper where the contract is unambiguous and its meaning is readily apparent from the face of the document. *Baum v. Helget Gas Products, Inc.*, 440 F.3d 1019, 1022 (8th Cir. 2006). The parties' disagreement about a contract interpretation does not create ambiguity where the terms are otherwise clear. *Id.* At 1023; *City of Beverly Hills, v. Village of Velda Village Hills*, 925 S.W.2d 474, 476 (Mo. Ct. App. 1996). In construing a contract, courts consider the entire contract, subsidiary agreements, the parties' relationship and the subject matter of the contract. *Rougly v. Whitman*, 592 S.W.2d 516, 519 (Mo. Ct. App. 1979).<sup>10</sup>

<sup>10</sup> The District Court considered and rejected AvidAir's argument about the Branch Agreements and the Branches on at least five different occasions. First, in the Report, the District Court recited that the 1994

**B. Obligations of Confidentiality under the 1994 AMC Agreement Apply to Revision 13 and All Other Technical Manuals Marked with Restrictive Legends.** The 1994

AMC Agreement imposes obligations of confidentiality and nondisclosure on Revision 13 and all other technical manuals marked with restrictive proprietary rights legends. AvidAir's contrarian arguments lack factual and legal support, and the Court should reject them.

The 1994 AMC Agreement is uncontroverted and unambiguous. The 1994 AMC Agreement incorporated the Additional Provisions and AMC Policy Manual. [JA-0163, 0164, 0166] The AMC Agreement, Additional Provisions, and AMC Policy Manual governed the AMCs when Rolls-Royce issued OIL-24, Revision 13, the Additional OILs and the BookFax.

[Id.] The Additional Provisions prohibited AMCs from

AMC Agreements “(1) required the return of any proprietary documents furnished by Allison at the end of the parties’ relationship, (2) acknowledged that technical data and other materials (including DILs and DOILs) were proprietary property of Allison, and (3) prohibited the AMC from disseminating such information to other parties.” [A-2]. The District Court also addressed this argument in Summary Judgment Order #1. [A-23 and 24] The District Court revisited the argument when it denied AvidAir’s motion to reconsider. [A-38, 41, 42, including note 4] The District Court again addressed the argument in its Order Granting in Part and Denying in Part Parties’ Motions *in Limine*. [A-50] The District Court also discussed the Branch agreement limitations when it granted injunctive relief. [A-62, note 1]

distributing and reproducing a broadly defined set of Rolls-Royce technical documents, including the defined term Manuals, customer support bulletins and general technical data. [JA-0167, ¶ 6.2] The AMC Policy Manual prohibited AMCs from reproducing technical manuals. [JA-0171, § 7.1(A)]. The AMC Policy Manual limits the use of OILs. [JA-0172, § 7.2.4] These provisions establish that Rolls-Royce restricted its technical documents, including Manuals and documents embodying technical data in general such as OILs, and prohibited copying, disclosing or distributing them to unauthorized sources.

AvidAir attempts to limit these restrictions to an exemplary list of Manuals which it claims excludes Revision 13. The restrictions discussed above broadly apply to technical data in general and are not limited to Manuals. The list of Manuals cited by AvidAir is neither exclusive nor exhaustive. [Tr. p. 133] Because Revision 13 post-dates the 1994 AMC Agreement, the fact that it is not listed as a Manual cannot logically be used to demonstrate it was not restricted under that AMC Agreement.

The same is true of the Additional OILs, and the BookFax which were promulgated after the 1994 AMC Agreement.

There is no genuine dispute that the 1994 AMC Agreement imposes obligations of confidentiality and nondisclosure applicable to Revision 13, the Additional OILs and the BookFax. These obligations extended to Precision which operated as a Branch AMC pursuant to a separate agreement.

**C. Precision's Obligations of Confidentiality under the Branch Agreement Incorporating the 1994 AMC Agreement and the Legends on the OILS.**

Precision had a duty to maintain the secrecy of the OILs based upon both the contractual restrictions imposed by Rolls-Royce and the restrictions imposed by the proprietary rights legends appearing on the face of the trade secret OILs. [A-34, 35, 50, 51, pp. 26-8 *supra*].

The trade secret OILs that AvidAir acquired from Precision had conspicuous proprietary rights legends prohibiting their unauthorized disclosure. [A-34, 50] Precision's Branch Agreement incorporated NAC's AMC Agreement with

Rolls-Royce, including the Additional Provisions. [Tr. 667, lines 1-12]. Precision had a duty to refrain from any act that would cause a breach of the AMC Agreement. [Tr. 669, lines 5-13].

AvidAir claims the Branch Agreement contains no express confidentiality provisions, but AvidAir ignores the fact that the Branch Agreement incorporates the AMC Agreement containing the aforementioned restrictions. [JA-4815]

Therefore, the confidentiality requirements of the AMC Policy Manual bound Precision. [JA-1882 to 1885, ¶¶ 16-21 and 24 and JA-1900 to 1922]

AvidAir seeks to avoid the unambiguous obligations imposed on Precision by arguing that it inherited a statute of limitations defense from Precision through an asset purchase. (App. Br. p. 60). This argument is flawed. First, the statute of limitations did not start to run until Precision violated its confidentiality obligations to Rolls-Royce by transferring trade secrets to AvidAir. Second, AvidAir's statute of limitations argument undermines its claim that Precision did not have any confidentiality obligations. Were there no such obligations, the

statute of limitations would be irrelevant. The undisputed facts show that the duty of confidentiality was real and clear, and that AvidAir did not and could not have purchased the statute of limitations defense it now seeks to invoke.

AvidAir also seeks to invoke the parol evidence testimony of Precision's former owner, Mr. Brandt, whom it now indemnifies. AvidAir claims that Precision could not have had the obligations imposed by the AMC Agreements merely because Brandt did not recall seeing a copy of the 1994 AMC Agreement. (App. Br. pp. 58-60) Mr. Brandt's parol evidence recollection and the question of whether Precision ever received or retained a fully-executed copy of the 1994 AMC Agreement are irrelevant. The Branch Agreement that Precision signed referenced and incorporated the 1994 AMC Agreement. Precision complied with the obligation of confidentiality stated on the restrictive proprietary rights legend displayed on the face of OIL-24, Revision 13, and maintained it in confidence until AvidAir (then already liable for misappropriation) agreed to indemnify Precision against claims by Rolls-Royce.

**D. AvidAir’s Litigation Conduct Reinforces the Conclusion that its Arguments about Precision are Erroneous.**

After the Report issued and at the time of Summary Judgment Order #1, AvidAir orchestrated the acquisition of OILs from Precision. [JA-4341-4346] After the District Court’s June 23, 2009 Order, Precision signed documents recognizing that Rolls-Royce has claims against Precision relating to the proprietary documents. [Id.] Precision sold the proprietary technical documents to AvidAir “as, where is, and with all faults”. [Id.] Precision made no representation that it had the unrestricted right to transfer proprietary Rolls-Royce documents. [Id.]

The copy of OIL-24, Revision 13 that Precision produced in discovery has the same restrictive legend endorsed by the District Court in its Report and Order. [JA-4348] AvidAir indemnified and held Precision harmless for any liability to Rolls-Royce associated with the transfer of proprietary Rolls-Royce documents. [JA-4342] The controlling documents do not support the parol evidence submitted through the self-serving



testimony of AvidAir and Mr. Brandt that these proprietary Rolls-Royce documents were conveyed “without restriction”. AvidAir’s transaction with Precision was an attempt to circumvent the impact of the Report and Summary Judgment Order #1. This transaction was a shrewd maneuver by Precision to shift its liability to AvidAir after receiving notice from Rolls-Royce of its claims. [JA-4342]

AvidAir used this transaction when it moved the District Court to reconsider Summary Judgment Order #1, but the District Court rejected AvidAir’s arguments that Precision was an unrestricted source. [A-34]. Clearly, Precision was not. Based on the undisputed contractual restrictions governing the AMCs and the conspicuous proprietary rights legend on the OILs , including OIL-24, Revision 13, the District Court was right to reject AvidAir’s arguments. As the District Court explained: “The Court has determined the documents were trade secrets based on contractual agreements Rolls-Royce had with recipients and the proprietary rights legend contained on

the face of the documents, and the Court will not allow the issue to be relitigated before the jury.” [A-50]

The District Court did not err in its application of the clear and unambiguous terms of the AMC Agreement or the Branch Agreement. AvidAir’s post-hoc transactions and parol evidence cannot change the controlling contracts or create an issue of fact. The District Court’s judgment on this issue should be affirmed.

**V. The District Court Properly Denied AvidAir Leave To Amend Its Complaint.**

**A. Standard of Review.**

The standard of review for motions for leave to amend is abuse of discretion. *Marmo v. Tyson Fresh Meats, Inc.*, 457 F.3d 748, 755 (8th Cir. 2006). The policy favoring allowance of amendment to pleadings is not absolute. *Thompson-El v. Jones*, 876 F.2d 66, 67 (8th Cir. 1989). The Federal Rules of Civil Procedure “do not entitle parties to manufacture claims, which were not pled, late into the litigation for the purpose of avoiding summary judgment.” *Northern States Power Co. v. Federal Transit Admin.*, 358 F.3d 1050, 1057 (8th Cir. 2004). The Rules

do not permit parties to ignore applicable scheduling deadlines.

*Rouse v. Farmers State Bank of Jewell, Iowa*, 866 F. Supp.

1191, 1198 (N.D. Iowa 1994) (“Additional discovery and trial preparation which results from late amendment constitutes prejudice of sufficient magnitude to deny a motion to amend”); Fed. R. Civ. P. 16(b) (scheduling order shall not be modified except upon showing of good cause).

**B. The District Court Acted Within its Discretion When It Denied AvidAir’s Belated Request To Amend Its Complaint To Avoid Summary Judgment.**

On July 8, 2009, almost eighteen months after the District Court’s January 8, 2008 deadline for amending pleadings and about two weeks after the District Court entered Summary Judgment Order # 1 in favor of Rolls-Royce, AvidAir moved to amend its Complaint to include allegations related to the Precision technical library transaction. [JA-2507 and Doc. # 49] The District Court found AvidAir’s motion untimely and that AvidAir had not shown good cause to amend its Complaint to encompass a transaction with Precision that occurred long

after the case had been filed and, in fact, after summary judgment had been entered against AvidAir. [A-35]

The District Court was well within its discretion to deny AvidAir's belated request and transparent attempt to avoid summary judgment. Allowing AvidAir to amend its Complaint at that late stage in the litigation would have prejudiced Rolls-Royce, wasted judicial resources that had already been expended, and contradicted the interests of justice. *Katsev v. Coleman*, 530 F.2d 176, 178 (8th Cir. 1976) (denying motion for leave to amend complaint requested too late, one month after submission of case on summary judgment); *Rouse*, 866 F. Supp. at 1198 (denying motion for leave to amend complaint filed ten months after deadline to amend pleadings had passed). The relief AvidAir requested would have wasted the District Court's prior work to narrow the issues for trial and would have interjected scores of new documents in to this case resulting in further expense and delay. The District Court did not abuse its discretion by denying AvidAir's belated attempt to amend its complaint to avoid summary judgment.

## CONCLUSION

Rolls-Royce respectfully requests that the Court affirm the District Court's rulings and judgment in all respects.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I certify that on May 19, 2011, a redacted copy of the foregoing Brief of Appellee was electronically filed with the Clerk of the Eighth Circuit Court of Appeals using the appellate CM/ECF system. A complete copy of the Brief of Appellee was served by First Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following: I certify that the participants listed below are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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## CERTIFICATE OF COMPLIANCE

The foregoing Brief of Appellee complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) as it contains 13,935 words, excluding the parts exempted by Fed. R. Civ. P. 32(a)(7)(B)(iii). This Brief complies with the typeface requirement of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) as it has been prepared in a proportionally spaced typeface using Word 2007 in 14 point Century Type.

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