NO. 14-03-01099

IN THE FOURTEENTH COURT OF APPEALS

FOR THE STATE OF TEXAS

AVCO CORPORATION, TEXTRON LYCOMING RECIPROCATING ENGINE DIVISION OF AVCO CORPORATION

V.

INTERSTATE SOUTHWEST LTD.

On Appeal From The 278th District Court of Grimes County Texas

BRIEF OF APPELLANT

OF COUNSEL:
Richard J. Bedell, Jr.
John L. Sinatra, Jr.
JONES DAY
901 Lakeside Avenue
Cleveland, OH 44114-1190
Telephone: (216) 586-3939
Facsimile: (216) 579-0212

Richard I. Werder, Jr.
JONES DAY
222 East 41st Street
New York, New York 10017-6702
Telephone: (212) 326-3939
Facsimile: (212) 755-7306

Brent J. Cahill
318 N. LaSalle Street
P. O. Box 270
Navasota, Texas 77868
Telephone: (936) 825-0239
Facsimile: (936) 825-2354

JONES DAY
Jack G. Carnegie
TBA No. 03826100
Scott W. Cowan
TBA No. 00786455
Joshua L. Fuchs
TBA No. 24029559
600 Travis Street, Suite 6500
Houston, Texas 77002
Telephone: (832) 239-3939

ATTORNEYS FOR DEFENDANT AVCO CORPORATION

Oral Argument Requested

IDENTITY OF PARTIES AND COUNSEL

Petitioner / Defendant:

Avco Corporation, Textron Lycoming Reciprocating Engine Division of Avco Corporation

Counsel for Petitioner / Defendant:

Jack G. Carnegie
TBA No. 03826100
Scott W. Cowan
TBA No. 00786455
Joshua L. Fuchs
TBA No. 24029559
Jones Day
600 Travis Street, Suite 6500
Houston, Texas 77002
Telephone: (832) 239-3939
Facsimile: (832) 239-3600

Of Counsel:

Richard I. Werder, Jr.
Ohio State Bar No. 0011533
222 East 41st Street
New York, New York 10017-6702
Telephone: (212) 326-3939
Facsimile: (212) 755-7306

Richard J. Bedell, Jr.
Ohio State Bar No. 0038891
John L. Sinatra, Jr.
Ohio State Bar No. 0070282
Jones Day
North Point
901 Lakeside Avenue
Cleveland, Ohio 44114-1190
Telephone: (216) 586-3939
Facsimile: (216) 579-0212

Brent J. Cahill
TBA No. 00796291
318 N. LaSalle Street
P.O. Box 270
Navasota, Texas 77868
Telephone: (936) 825-0239
Facsimile: (936) 825-2354

Respondent / Plaintiff:

Interstate Southwest, Ltd.

Counsel for Respondent / Plaintiff:

Leane Capps Medford
TBA No. 00796301
Harold H. Walker, Jr.
TBA No. 20702200
Martin E. Rose
TBA No. 17253100
Kenneth McKay Cunningham
TBA No. 24034158
Rose Walker, L.L.P.
1701 N. Market Street, Suite 200
Dallas, Texas 75202
Telephone: (214) 752-8600
Facsimile: (214) 752-8700

Carlton Bryan Cantrell
TBA No. 00793459
Cantrell & Cantrell, P.C.
1204 Sam Houston Avenue
Huntsville, Texas 77340
Telephone: (936) 730-8541
Facsimile: (936) 730-8535

Bruce McKissock
McKissock & Hoffman
1700 Market Street, Suite 3000
Philadelphia, Pennsylvania 19103-3930
Telephone: (215) 246-2101
Facsimile: (215) 246-2144

Additional Defendant:

Specialty Heat Treat, Inc.

Counsel for Additional Defendant:

Julia A. Cook
TBA No. 01196200
Raymond Kalmons
TBA No. 11083000
Jeffrey Hirsch
TBA No. 09716300
Schlanger, Mills, Mayer & Silver, L.L.P.
109 North Post Oak Lane, Suite 300
Houston, Texas 77024
Telephone: (713) 785-1700
Facsimile: (713) 785-2091

C.J. Kling
TBA No. 09716300
Naman, Howell, Smith & Lee, L.L.P.
111 University Drive, East, Suite 210
College Station, Texas 77840
Telephone: (979) 846-0300
Facsimile: (979) 846-0302

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Supp. CR. __	Supplemental Clerk's Record
1 RR __	Volume one of the Reporter's Record from Temporary Injunction Hearing
2 RR __	Volume two of the Reporter's Record from Temporary Injunction Hearing
Ex. P-__	Plaintiff / Respondent's exhibits to the Reporter's Record
Ex. D-__	Defendant / Petitioner's exhibits to the Reporter's Record
Demo. Ex. __	Demonstrative exhibits to the Supplemental Reporter's Record
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STATEMENT OF THE CASE

This is an accelerated appeal from a temporary anti-suit injunction obtained by plaintiff Interstate Southwest Ltd. (Southwest) enjoining Avco Corporation, the Textron Lycoming Reciprocating Engine Division (Lycoming), from proceeding in Pennsylvania with litigation against Interstate Forging Industries Inc., Citation Wisconsin Forging, LLC, and Citation Corporation, none of which is a party to this suit.

ISSUES PRESENTED

1. Did the trial court abuse its discretion in enjoining Lycoming from prosecuting a lawsuit it filed in Pennsylvania against three entities who are not parties to the instant suit?

2. Did the trial court have subject matter jurisdiction to issue the injunction?

I. STATEMENT OF FACTS

A. INTRODUCTION

In May 2003, Lycoming filed suit in Pennsylvania against Interstate Forging Industries Inc. (IFI), its successor Citation Wisconsin Forging, LLC (Citation Wisconsin), and their parent/alter ego, Citation Corporation (collectively, "the Pennsylvania defendants") seeking over $75 million in damages suffered by Lycoming as a result of defective aircraft engine crankshaft forgings manufactured by IFI. Ex. D-22 (Praecipe); Ex. D-3. Lycoming later filed a second suit seeking injunctive relief to specifically enforce a Master Supply Agreement ("MSA") between Lycoming and IFI. Ex. D-4; App. A.[1]

Subsequently, Southwest, which is not a party to the Pennsylvania litigation but is represented by the same counsel as the Pennsylvania defendants, sought and obtained an injunction in Texas court prohibiting Lycoming from prosecuting the Pennsylvania litigation against the Pennsylvania defendants and enforcing a Preliminary Injunction to which the Pennsylvania defendants had previously *agreed*. CR. 647-654; Ex. D-12; CR. 1532-1539 (Order Granting Temporary Injunction).

The Pennsylvania defendants are not parties to the Texas litigation filed by Southwest and Southwest is not a party to the Pennsylvania litigation. Nor are the claims in the Texas and Pennsylvania litigation the same. There is no legal basis on which Southwest could be entitled to enjoin out-of-state litigation to which Southwest is not even a party.

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[1] The MSA is included in the Reporter's Record at Ex. D-3 as an exhibit to the Complaint. It can also be found in the Clerk's Record at 690-711. For ease of reference, it is included in the Appendix and will be cited as "App. A."

This case is governed by a trilogy of Texas Supreme Court cases all of which involved facts more favorable to the issuance of an anti-suit injunction than the present case. Yet in all of those cases, the Texas Supreme Court reversed the anti-suit injunctions issued by the trial courts. The most recent of these cases is *Golden Rule Ins. Co. v. Harper*, 925 S.W.2d 649, 651 (Tex. 1996); *see also* CR. 1079-1114 (Lycoming's Brief in Opposition to Plaintiff's Application for Temporary Injunction). Despite its controlling effect, the trial court failed to follow *Golden Rule* and stated "I don't care what *Golden Rule* says, that's an incredible ruling." 2 RR 155.

The trial court's refusal to follow binding Supreme Court precedent was a clear abuse of discretion. This Court should reverse the injunction.

B. FACTUAL BACKGROUND

1. The Crankshaft Failures

Lycoming manufactures aircraft engines and sells them worldwide to general aviation aircraft manufacturers, such as Cessna and Piper. 2 RR 63. In 1995, Lycoming entered into the MSA with IFI to supply Lycoming's requirements for aircraft engine crankshaft forgings. App. A; 2 RR 64-65. Under the MSA, IFI is the exclusive supplier of crankshaft forgings essential for Lycoming to manufacture engines. App. A, ¶ 4.2; 2 RR 64-65. IFI signed an Addendum to the MSA in April 2001, extending it through May 2005. App. B.[2]

During 2001, Lycoming began receiving reports that IFI's crankshafts were failing during in-flight service. Ex. D-3, p. 7. The crankshafts failed because IFI violated

[2] The Addendum to the MSA is included in the Reporter's Record at Ex. D-3 as an exhibit to the Complaint. It can also be found in the Clerk's Record at 712-713. For ease of reference, it is included in the Appendix and will be cited as "App. B."

Lycoming's forging specification by exceeding the maximum forging temperature, which caused fractures and cracks in the crankshafts. *See* Ex. D-3, pp. 7-8. IFI's defective crankshafts have been implicated in several in-flight engine failures. Ex. D-3, p. 4.

Beginning in 2002, Lycoming conducted and the Federal Aviation Administration ("FAA") mandated three multi-million dollar recalls to replace these defective crankshafts. Ex. D-3, pp. 8-11. As a result, Lycoming has suffered over $75 million in damages and the losses continue to mount. Under the MSA, IFI owes Lycoming indemnification for all those claims and losses. App. A, ¶ 5.3.

2. The Texas Litigation

On May 2, 2003, Southwest, seeking to control the forum in which Lycoming would be required to litigate its claims, served Lycoming with this suit as a preemptive strike against Lycoming's anticipated suit in Pennsylvania against IFI, Citation Wisconsin and Citation Corporation. In its Original Petition, Southwest claimed that it had entered into the MSA. CR. 5-6, ¶ 12 (Original Petition). The undisputed reality is that Southwest did not even exist in 1995 when the MSA was executed. Nevertheless, Southwest alleged claims for:

1. declaratory judgment that Southwest is entitled to indemnity under the MSA for hypothetical future claims that may be asserted against it;
2. declaratory judgment that Southwest is not obligated to indemnify Lycoming even though Lycoming has never demanded indemnity from Southwest;
3. business disparagement as a result of Lycoming's position that IFI's crankshaft forgings were defective;
4. breach of contract for allegedly failing to pay for certain crankshafts under the MSA.

CR. 10-14 (Original Petition). Given that Southwest claims to be a party to the MSA, it must abide by the terms of the MSA. Southwest, however, filed its suit in direct violation of the MSA, which requires the parties to submit to a two-step dispute resolution process including "non-binding mediation *prior to* the commencement of any legal proceedings." App. A, ¶ 7.4.

Lycoming answered the Texas suit on May 23, 2003, pointing out, among other things that Southwest was not a party to the MSA and that the MSA was between Lycoming and IFI. CR. 104-112, ¶¶ 1-2 (Lycoming's Verified Original Answer).

On June 24, 2003, *after* Lycoming filed the Pennsylvania litigation, Southwest filed a first amended petition in Texas conceding that IFI, not Southwest, had entered into the MSA. CR. 194, ¶ 12. IFI, however, still did not join in the Texas action. Instead, in its amended petition, Southwest claimed that in October 1996, IFI sold and transferred all of its assets including the MSA to Southwest, after which Southwest -- unbeknownst to Lycoming -- supposedly was responsible for manufacturing the crankshaft forgings. CR. 196, ¶ 15. IFI then transformed itself into Citation Wisconsin and became a limited partner of Southwest.[3]

Like the filing of this suit, any delegation of performance of the MSA to Southwest was a flagrant violation of the MSA and is invalid. Section 7.3 of the MSA explicitly prohibits IFI from delegating its performance of the MSA to another entity. App. A, ¶ 7.3.

[3] A diagram of the relationships between Southwest and the Pennsylvania defendants was introduced as demonstrative exhibit W and is attached as App. E. Demo. Ex. W.

3. The Pennsylvania Litigation

On May 22, 2003, a month *before* Southwest amended its Texas petition to make any assertions regarding IFI, Lycoming initiated suit in Pennsylvania against IFI, its successor Citation Wisconsin and their parent/alter ego, Citation Corporation, by filing a Praecipe for Writ of Summons. Ex. D-22 (Praecipe). This was the first litigation to be filed in which IFI, Citation Wisconsin or Citation Corporation are parties.

Following issuance of the Writ of Summons, Lycoming filed two related complaints in Pennsylvania, both of which are pending before the same judge.[4]

The first complaint is an action at law seeking over $75 million in damages suffered as a result of the defective crankshaft forgings. Ex. D-3 ("the damages action"). The damages action also alleged that Citation breached the MSA by causing its subsidiary, Southwest, to file the Texas action in violation of the mediation clause in the MSA. Ex. D-3, ¶ 59-65. Accordingly, in the damages action, Lycoming asked the Pennsylvania court to enforce the mediation provision by staying Lycoming's own Pennsylvania action and, correspondingly, directing Citation to have Southwest dismiss the Texas action pending mediation as required by the MSA. Ex. D-5 (Lycoming's Motion for an Order Staying Action and Compelling Mediation). Lycoming, however, later withdrew its request for the Pennsylvania court to direct Citation to have Southwest temporarily cease prosecution of the Texas action. 2 RR 44-45, Ex. D-42 (supplemental motions).

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[4] Under Pennsylvania procedure, suit may be instituted either by filing a complaint or by filing a Praecipe for Writ of Summons and filing a complaint sometime later. Lycoming's complaint was filed on June 6, 2003, after service of the Writ of Summons.

Lycoming's other complaint was an action in equity, seeking injunctive relief requiring IFI to continue providing Production Crankshafts under the MSA. Ex. D-4 ("the equity action"). The equity action did not seek relief from Southwest and made no mention of the Texas action. *See* Ex. D-4.

Enforcement of the MSA is critical to Lycoming's survival. Lycoming cannot obtain crankshafts from any alternate source because it has an exclusive contract with IFI until May 4, 2005 (App. B), and because the manufacturing process must be certified by the FAA -- a lengthy and expensive procedure. 2 RR 74. Similarly, airframe manufacturers cannot simply substitute other engines in their aircraft because each airframe must be certified for a particular engine. 2 RR 105. Thus, without Production Crankshafts, Lycoming cannot manufacture engines. Without engines, aircraft manufacturers such as Cessna cannot build and sell aircraft. Given that Lycoming supplies some 70% of the general aviation aircraft industry, any interruption in IFI supplying crankshaft forgings has ripple effects with consequences for the entire aircraft industry. 2 RR 105.

In order to conduct the FAA-mandated recall campaign and provide replacement engines, Lycoming also needed about 1400 Replacement Crankshafts in addition to Lycoming's normal Production Crankshaft requirements. IFI, however, refused to supply Replacement Crankshafts under the MSA. 2 RR 66-67. Instead, for liability reasons, IFI insisted that a separate Replacement Crankshaft Agreement be executed with Southwest, a limited partnership in which IFI's successor, Citation Wisconsin, is a limited partner. 2 RR

67-68.[5] The Replacement Crankshaft Agreement signed in October 2002 has no effect on the MSA and expressly "does not govern the past or future production of any crankshafts other than the Replacement Crankshafts." Ex. P-31 at 2, ¶ 1; 1 RR 65-66.

On May 23, 2003, Citation Corporation, the ultimate parent of both IFI and Southwest, wrote to Lycoming, threatening (1) to cease all current production of crankshaft forgings, (2) to cancel all current and future orders for crankshafts and (3) to cease all procurement of raw materials to manufacture crankshafts. App. F.[6] Lycoming responded, pointing out that the MSA contains a dispute resolution procedure requiring mediation and specifically requires continued production during the dispute resolution process. App. G.[7] *See* App. A, ¶ 7.4. Citation, however, did not respond to Lycoming's letter. Accordingly, Lycoming was forced to file the equity action seeking enforcement of the MSA.

On June 12, 2003, the Pennsylvania court signed an Agreed Order For Preliminary Injunction in the equity action. The Agreed Injunction ordered that "pursuant to the May 4, 1995 Master Supply Agreement, Interstate Forging Industries, Inc., Citation Wisconsin Forging LLC and Citation Corporation shall produce and provide all crankshaft forgings

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[5] In 1996, Citation Corporation acquired the stock of IFI and then converted IFI to a limited liability company known as Citation Wisconsin Forging LLC. 1 RR 62-63; Ex. P-32. Citation Wisconsin then became the owner of ISW Texas Corporation, which is a limited partner in the entity known as Interstate Southwest Ltd. 1 RR 24; *See* Demo. Ex. W.

[6] The May 23, 2003 letter is included in the Reporter's Record at Ex. D-4 as an exhibit to the equity action. For ease of reference, it will be included in the Appendix and will be cited as "App. F."

[7] The response letter is included in the Reporter's Record at Ex. D-4 as an exhibit to the equity action. For ease of reference, it is included in the Appendix and will be cited as "App. G."

ordered by Avco's Textron Lycoming Division pursuant to the Master Supply Agreement." Ex. P-12. The injunction did not purport to require Southwest to do anything.[8]

Despite the fact that the Pennsylvania defendants *agreed* to the Preliminary Injunction requiring them to "produce and provide all crankshaft forgings ordered by Avco's Textron Lycoming Division pursuant to the [MSA]," they failed to do so. Accordingly, on August 13, 2003, Lycoming filed a motion for contempt in the Pennsylvania equity action to enforce the Agreed Injunction. Ex. D-6. The contempt motion sought no relief against Southwest. The Pennsylvania court set a hearing for August 22, 2003, which because of a funeral affecting the Court's schedule was continued to September 12, 2003. Ex. D-41.

Taking advantage of the delay, Southwest filed an application for a Temporary Restraining Order in the Texas case. CR. 647-654. Southwest asked the Texas court to enjoin Lycoming from enforcing the same Preliminary Injunction to which the Pennsylvania defendants, represented by the same counsel, had previously agreed. CR. 651-652.

4. The Anti-Suit Injunction

On September 5, 2003, on less than 3 hours notice to Lycoming's Rule 8 counsel, the Texas court signed a TRO enjoining Lycoming "from seeking the assistance of a foreign court to seize control over [Southwest's] manufacturing schedule and process" and ordering Lycoming "to immediately cease the prosecution of the ... Pennsylvania cases ... and to not

[8] Southwest claims that IFI no longer has the ability to manufacture crankshaft forgings, having transferred its assets to Southwest. That, however, does not change IFI's legal obligation. It also does not mean that Lycoming's Pennsylvania litigation necessarily impacts Southwest. If IFI complies with the Pennsylvania court's orders by asking Southwest to produce crankshafts, it is a matter of *choice*. It is not the only way IFI can comply with the order.

proceed with the hearing on the Motion for Contempt currently scheduled for September 12, 2003." CR. 891-893.

Lycoming, however, never sought to "seize control over [Southwest's] manufacturing schedule and process" and the pending Pennsylvania contempt hearing was not against Southwest. The purpose of the contempt hearing was to force the Pennsylvania defendants to comply with the Agreed Preliminary Injunction. Ex. P-12 (Agreed Injunction); Ex. D-6 (Lycoming's Motion for Contempt).

Incredibly, the Pennsylvania defendants took the position that the Agreed Injunction did not require them to do anything because it recited that "Nothing in this Order shall be construed to expand, limit or amend the provisions of the [MSA]." They reasoned that because the MSA had supposedly been assigned to Southwest, IFI was not obligated under the MSA and the Order did not re-impose the obligations IFI allegedly had assigned away. *See* CR. 648-649; Supp. CR. 67, ¶ 34.[9] Of course, that position is legally absurd. IFI could not unilaterally divest itself of contractual obligations by the expedient of assigning the contract to someone else. Tex. Bus. & Com. Code ann. § 2.210(a) ("No delegation of performance relieves the party delegating of any duty to perform or any liability for breach.") Nevertheless, the Pennsylvania defendants essentially contend that their agreement and the Pennsylvania court's Agreed Injunction were meaningless.

[9] In Appellee's Response in Opposition to Appellant's Emergency Motion for Relief from Denial of Supersedeas or, Alternatively, Motion to Suspend the Trial Court's Order, filed with this Court, Southwest made it clear that it believes that the agreed order in Pennsylvania imposed no obligations on the Pennsylvania defendants. *See* p. 10 of Southwest's response.

On September 8, 2003, Southwest's counsel wrote to the Judge in Pennsylvania informing him that Lycoming had been restrained from proceeding with the Pennsylvania actions, and asking "whether the September 12 hearing shall remain on the docket . . .". Ex. P-4. Later the same day, Lycoming's Pennsylvania counsel also wrote to the Pennsylvania court informing it of the Texas court's order. He noted that the order created "a substantial dilemma for Lycoming" because IFI's failure to produce crankshafts in compliance with the Agreed Preliminary Injunction threatened Lycoming with irreparable injury, while the TRO "prevents Lycoming from further prosecuting the [Pennsylvania] cases ... and from proceeding with the" pending contempt hearing. Ex. P-3. Lycoming also informed the Pennsylvania court that the Texas court had scheduled a temporary injunction hearing for September 17, 2003. *Id.* Finally, Lycoming told the Pennsylvania court that Lycoming would "refrain from any action that could be construed as a violation of the Texas court's order." *Id.*

Immediately afterward, Southwest's local counsel accused Lycoming of violating the TRO by sending the letter to the Pennsylvania court. Ex. P-2. *See* CR. 1051-1052 (response). To ensure that the Pennsylvania court did not misconstrue his earlier letter as requesting any relief, Lycoming wrote a second letter to the Pennsylvania court:

> As I am sure you understand from my letter of September 8, Lycoming does not intend to violate the Texas court's order in any way, shape, or form. Lycoming has been ordered by the Texas court not to appear at this Court's currently scheduled September 12 hearing on Lycoming's contempt motion, and will comply with the Texas court's order. As should have been clear from my prior letter, Lycoming IS NOT asking this Court to take or refrain from taking any action. We are simply trying our best to deal with a difficult situation.

Ex. P-1 (emphasis in original).

The following day, the Pennsylvania court ordered "the Parties [to] appear and be prepared to litigate the issues relating to the contempt on September 12, 2002 at 10:00 a.m." Ex. D-41.[10] As the basis for its Order, the court noted that "the parties have been attached for these proceedings since at least August 26, 2003; if not from the original Order scheduling the contempt hearing on August 14th."[11] *Id.*

Lycoming appeared before the Pennsylvania court as ordered. The Pennsylvania defendants' counsel, who also represents Southwest, made no mention of the Texas court's TRO and the hearing never proceeded on the merits. *See generally* Ex. D-39 (Contempt Hearing Transcript (Pennsylvania) 9/12/03); 1 RR 88-89. Instead, the parties reached a temporary resolution of the contempt issue by agreeing on a crankshaft production schedule. Ex. D-39, p. 34. That agreement was memorialized on the record and in another Agreed Order signed by the Pennsylvania court on September 12, 2003. Ex. D-39, pp. 47-49.

After announcing the agreement, Southwest's counsel also agreed on the record that the new Order could be enforced by *either party* in the Pennsylvania court and that Southwest would "not raise with any other forum the issue that this Court does not have authority to enter this order..." Ex. D-39, p. 48. Southwest then promptly violated this agreement by using the Pennsylvania court's proceeding with its contempt hearing to argue in the Texas court that Lycoming should be enjoined from proceeding in Pennsylvania. CR.

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[10] Immediately, Lycoming informed the Texas court of the Pennsylvania court's order and requested emergency relief. CR. 1015. Lycoming also requested that a hearing be set before the Pennsylvania contempt hearing. CR. 1012. The Texas court, however, did not hold a hearing or make any ruling on Lycoming's request for emergency relief.

[11] Both of these dates were *before* the TRO was signed on September 5, 2003.

1454 (Brief in Support of Plaintiff's Application for Injunctive Relief); 2 RR 123-125, 132-134.

On September 25, 2003, the Texas court adopted verbatim, over Lycoming's objections, the Temporary Injunction Order and all 23 findings of fact and conclusions of law drafted by Southwest's counsel. *See* CR. 1516-1529 (Lycoming's Objections to Proposed Order). The injunction ordered Lycoming to "desist and refrain from prosecuting" the Pennsylvania litigation and required Lycoming:

> to move to vacate any pending settings of all hearings, withdraw any pending motions and discovery, and within 7 (seven) days of the date of this order, file any pleadings or other papers necessary to obtain a stay, abatement or dismissal (without prejudice) of the Pennsylvania Lawsuits pending final judgment of this Court."

CR. 1538 (Order Granting Temporary Injunction).

The trial court abused its discretion in rendering this order. Indeed, it lacked subject matter jurisdiction to render this order. This Court should reverse the injunction.

II. SUMMARY OF ARGUMENT

The trial court's injunction is contrary to an unbroken string of Texas Supreme Court cases reversing anti-suit injunctions against proceedings in sister states. *Golden Rule Ins. Co. v. Harper*, 925 S.W.2d 649, 651 (Tex. 1996); *Christensen v. Integrity Ins. Co.*, 719 S.W.2d 161, 163 (Tex. 1986); *Gannon v. Payne*, 706 S.W.2d 304, 306 (Tex 1986). In all three cases, jurisdiction first attached in the Texas court. In all three cases, the same matters were at issue in both Texas and the foreign court. And in all three cases, the same relevant parties were involved. Despite these factors, in all three cases the Texas Supreme Court reversed orders enjoining parallel out of state proceedings.

Here, jurisdiction over IFI, Citation Wisconsin and Citation Corporation, and Lycoming's claims against them, first attached in the Pennsylvania court. The Pennsylvania defendants are not parties in the Texas litigation. Conversely, Southwest is not a party in the Pennsylvania litigation. Nor are the claims the same in the Texas and Pennsylvania litigation. Therefore, the injunction is erroneous as a matter of law. *See* CR. 1079-1114.

For example, the Supreme Court in *Christensen* reversed an anti-suit injunction because, "While both proceedings here undoubtedly concern the same general subject matter, Christensen's California lawsuit raises issues and involves parties that differ from those in the Texas litigation." 719 S.W.2d at 163. Similarly, the court of appeals in *Tri-State Pipe and Equipment, Inc. v. Southern County Mut. Ins. Co.*, held: "Even when an anti-suit injunction is warranted, it must be specific and limited, **barring suit only on the same claims against the same defendants**." 8 S.W.3d 394, 401 (Tex. App.-Texarkana 1999, no pet.) (emphasis added).[12]

Southwest has cited no case, and Lycoming is aware of none, where, as here, someone has been permitted to enjoin prosecution of an out of state case to which it was not even a party.

The trial court flatly refused to follow this line of cases, including *Golden Rule*:

> THE COURT: ... *Golden Rule* is a disturbing case as far as I'm concerned in trying to apply the law to the facts. But I can't believe we have reached that point where the courts are going to permit two state courts to have the same

[12] *See also American Alliance Ins. Co. v. Frito-Lay, Inc.*, 788 S.W.2d 152, 153 (Tex. App.-Dallas 1990, writ dism'd) (holding that an anti-suit injunction can only be warranted where "the subsequent suit involves the same cause of action" and reversing an anti-suit injunction where one suit involved the insurer's duty to defend and the other involved the insurer's duty to indemnify.)

> proceeding going on at the same time. That is incredible to me. I don't care what *Golden Rule* says, that's an incredible ruling.

2 RR 155.

The trial court's conscious refusal to follow binding Supreme Court precedent was a clear abuse of discretion which requires reversal. That error was compounded by the fact that Southwest's case principally seeks a declaration of non-liability. This is nothing more than an exercise in forum shopping seeking to control the forum in which Lycoming's claims will be litigated. The Texas Supreme Court has held that courts should decline to exercise jurisdiction over suits seeking a declaration of non-liability. *Abor v. Black*, 695 S.W.2d 564, 566 (Tex. 1985) ("we hold that the trial court should have declined to exercise such jurisdiction because it deprived the real plaintiff of the traditional right to choose the time and place of suit.") Here, not only did the court improperly exercise jurisdiction over Southwest's anticipatory declaratory judgment claims, but went to the unprecedented length of using them as justification for enjoining Lycoming.

The Supreme Court made clear in *Golden Rule* and its predecessors that comity requires courts to exercise the power to enjoin foreign suits sparingly and only in very special circumstances. *Golden Rule*, 925 S.W.2d at 651. Injunctions against proceedings in other states are permitted in only four circumstances, none of which are present here.

First, there is no threat to the court's jurisdiction. Southwest is not a party to the Pennsylvania litigation and therefore, the Pennsylvania court cannot make an order directly against Southwest that could possibly interfere with the Texas court's ability to adjudicate Southwest's claims. Second, neither the Texas nor the Pennsylvania cases implicate any

important public policy. Third, Southwest's counsel conceded that there is no multiplicity of suits. 2 RR 118. Finally, Southwest is not being subjected to vexatious or harassing litigation. Southwest is a party to only one suit; the one it filed.

Southwest also failed to demonstrate immediate irreparable harm. As one court held in reversing an anti-suit injunction: "A trial court abuses its discretion in granting a temporary injunction unless it is clearly established by the facts that one seeking such relief is threatened with an actual irreparable injury if the injunction is not granted." *Manufacturers' Hanover Trust Co. v. Kingston Investors Corp.*, 819 S.W.2d 607, 611 (Tex. App.-Houston [1st Dist.] 1991, no writ).

Not only was the injunction wrong on the merits, but the court lacked subject matter jurisdiction to issue the injunction. Standing and ripeness are components of subject matter jurisdiction. Southwest lacks standing to enjoin prosecution of a suit to which it is not a party and in which no relief is sought against it. The Pennsylvania damages action seeks only damages against the Pennsylvania defendants, not Southwest. Similarly, the Pennsylvania equity action seeks only to enforce the MSA against the Pennsylvania defendants, not Southwest.

Finally, Southwest's claims predicated on the MSA are not ripe. Specifically, Southwest seeks a declaratory judgment that it and IFI are entitled to contractual indemnity, but Southwest has not alleged and cannot allege that any liability has been incurred on the narrow grounds under which the MSA would provide indemnity. The case law is clear that a claim for indemnity is not ripe unless and until a liability has been incurred.

III. ARGUMENT

A. STANDARD OF REVIEW

The standard of review is abuse of discretion. The abuse of discretion standard, however, "has different applications in different circumstances." *Walker v. Packer*, 827 S.W.2d 833, 839 (Tex. 1992). The application of that standard depends on the scope of discretion afforded to the trial court and the nature of the error. With regard to the resolution of factual issues, a court of appeals may reverse if the trial court's decision was "arbitrary and unreasonable" or it "could reasonably have reached only one decision." *Id.* at 840.

"On the other hand, review of a trial court's determination of the legal principles controlling its ruling is much less deferential. A trial court has no 'discretion' in determining what the law is or applying the law to the facts. Thus, a clear failure by the trial court to analyze or apply the law correctly will constitute an abuse of discretion...." *Id.* In short, the trial court has no discretion to misapply the law. Therefore, when a court incorrectly construes or refuses to follow the law, or fails to correctly apply the law to the facts, the abuse of discretion standard essentially amounts to a *de novo* review.

In the present case the trial court: (1) made fact findings that were arbitrary and unreasonable; and (2) misapplied the applicable legal principles. The trial court therefore abused its discretion in issuing the anti-suit injunction.

B. SOUTHWEST DID NOT MEET THE PREREQUISITES FOR ENTITLEMENT TO AN ANTI-SUIT INJUNCTION.

Under controlling Supreme Court precedent, the trial court's discretion to issue an anti-suit injunction precluding the litigation of cases in sister states is extremely limited. "The principle of comity requires that courts exercise the power to enjoin foreign suits 'sparingly, and only in very special circumstances.'" *Golden Rule*, 925 S.W.2d at 651. "An anti-suit injunction is appropriate in four instances: 1) to address a threat to the court's jurisdiction; 2) to prevent the evasion of important public policy; 3) to prevent a multiplicity of suits; or 4) to protect a party from vexatious or harassing litigation. The party seeking the injunction must show that 'a clear equity demands' the injunction." *Id.* (citing *Gannon*, 706 S.W.2d at 307).

Here, Southwest relies on variations of the same few allegations over and over in an attempt to satisfy these prerequisites for an anti-suit injunction. Specifically, Southwest first relies on the claim that in the Pennsylvania damages action, Lycoming sought to enforce the MSA's requirement that mediation must be pursued before the commencement of litigation and therefore sought both a stay of its own action and to have Citation direct Southwest to dismiss this action pending mediation. That request for relief, however, was withdrawn before the temporary injunction hearing and would not support enjoining the Pennsylvania litigation in any event. 2 RR 44-45. *See Gannon*, 706 S.W.2d at 307.

Southwest also relies on the fact that the Pennsylvania court ordered the parties to appear for the contempt hearing after the Texas court issued its TRO. But, as the Texas Supreme Court has recognized, a "foreign court cannot be compelled to recognize such an

injunction...". *Id.* at 306-07. Moreover, at the hearing, the Pennsylvania court did nothing to interfere with the Texas court's jurisdiction. In fact, its order -- which was agreed to by Southwest's counsel -- was expressly "without prejudice to the rights of any of the parties as may pertain to any litigation in this or any other forum." Ex. D-39, p. 48 (Contempt Hearing Transcript (Pennsylvania) 9/12/03).

1. There Is No Threat To The Texas Court's Jurisdiction.

Not only is there no threat to, or interference with, the Texas court's jurisdiction, exactly the opposite is true; the Texas court is improperly interfering with the Pennsylvania court's jurisdiction.

(a) The Pennsylvania litigation is the first litigation filed involving the Pennsylvania defendants.

Southwest's argument that the Pennsylvania litigation is a threat to the Texas court's jurisdiction began by relying heavily on the assertion that the Texas action was filed first. *See* CR. 647-648 (Plaintiff's Application for Temporary Restraining Order and Supplemental Petition for Injunctive Relief); CR. 1452 (Brief in Support of Plaintiff's Application for Injunctive Relief); 2 RR 120, 126, 132. That argument is specious both factually and legally.

With regard to the Pennsylvania defendants, the Texas suit was not the first to be filed. The Pennsylvania litigation is the first litigation filed in which IFI, Citation Wisconsin and Citation Corporation are parties, and those entities still are not parties to the Texas litigation.

When Lycoming filed the Pennsylvania litigation in May 2003, there were no claims related to any of the Pennsylvania defendants in this case. It was only *after* Lycoming filed

the Pennsylvania litigation, *after* the Pennsylvania court had already acquired jurisdiction over the Pennsylvania defendants and the issues related to them and *after* the Pennsylvania court signed its Agreed Preliminary Injunction against the Pennsylvania defendants on June 12, 2003, that Southwest amended its petition to allege an assignment and to attempt to assert IFI's rights in the Texas litigation. *Compare* CR. 2-16 (Original Petition) *with* CR. 191-207 (Southwest's First Amended Original Petition, filed June 26, 2003). Even then, however, IFI did not join in the Texas litigation.

Thus, in any relevant sense, the Pennsylvania litigation was filed first. By subsequently amending its petition to assert claims on behalf of IFI, Southwest is attempting to undermine the Pennsylvania court's earlier acquired jurisdiction over the Pennsylvania defendants and the issues related to them. If anything, the Texas court is improperly interfering with the Pennsylvania court's earlier acquired jurisdiction. The Texas court has *no jurisdiction*, much less "dominant jurisdiction" over the defendants in the Pennsylvania suit or Lycoming's claims against them.

Moreover, even if the Texas case had been the first filed case involving the Pennsylvania defendants, it still would be improper to allow it to preempt the Pennsylvania litigation because Southwest's filing of the Texas case was unadulterated forum shopping. *See* CR. 133-145 (Lycoming's Motion to Dismiss). The centerpieces of Southwest's complaint are declaratory judgment claims seeking (1) a declaration of non-liability to Lycoming for the damages Lycoming suffered as a result of the defective crankshafts and (2) a declaration that Southwest is entitled to indemnity if and when it ever suffers a liability

related to the defective crankshafts. Supp. CR. 57-79 (Third Amended Petition); 2 RR 159-160. Neither request for declaratory judgment is proper.

The Texas Supreme Court has held that a court should decline to exercise jurisdiction over an action seeking a declaration of non-liability because it deprives the real plaintiff of its traditional right to chose the time and place of suit. *Abor v. Black*, 695 S.W.2d at 566 ("we hold that the trial court should have declined to exercise such jurisdiction because it deprived the real plaintiff of the traditional right to choose the time and place of suit.")[13] *See* CR. 140-141 (Motion to Dismiss). This is precisely what is going on here. Indeed, in the hearing on Lycoming's motion for supersedeas, the judge fully recognized -- and Southwest's counsel confirmed -- that the real point of Southwest's suit was as a preemptive strike against Lycoming's Pennsylvania claim against the Pennsylvania defendants for $75 million:

> THE COURT: Then we have two states. Which state is going to decide who gets seventy-five million dollars or if anyone gets seventy-five million or any part thereof. That is the ultimate issue in the case.
>
> * **
>
> MR. WALKER: The bottom line is, Judge, we try the case here. If we establish that the company that has made all of these forgings did it properly in accordance with their specs and had nothing to do with the recall and nothing to do with the seventy-five million dollars he gets a goose egg. ...

Supersede RR 16-17; *see also* 2 RR 159-160.

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[13] *See Space Master Intern., Inc. v. Porta-Kamp Mfg. Co., Inc.*, 794 S.W.2d 944, 948 (Tex. App .- Houston [1st Dist.] 1990, no writ)(affirming dismissal of declaratory judgment action in favor of contract actions in other states on the basis that a party "should not be allowed to use declaratory relief as a forum shopping device."); *Mission Ins. Co. v. Puritan Fashions Corp.*, 706 F.2d 599, 602 n.3 (5th Cir. 1983) (affirming dismissal of anticipatory declaratory judgment suit in favor of later-filed California contract action: "Anticipatory suits are disfavored because they are an aspect of forum shopping."); *i2 Technologies US, Inc. v. Lanell*, 2002 WL 1461929 at *7-9 (N.D. Tex. July 2, 2002) (dismissing declaratory judgment claim in favor of later-filed Massachusetts action; factors to be weighed include: (1) whether there is a pending action in another forum in which all matters in controversy may be litigated, (2) whether the suit was anticipatory of defendants suit filed elsewhere, (3) the existence of forum shopping, (4) whether inequities exist

This impropriety is compounded by the fact that, in order to get its suit on file before Lycoming sued the Pennsylvania defendants, Southwest, while claiming to be a party to the MSA, flagrantly violated the MSA's contractual requirement that "the parties shall enter into non-binding mediation prior to the commencement of any legal proceedings." App. A, ¶ 7.4. Southwest should not be allowed to benefit from a "first to file" argument predicated on its own breach of the same contract to which it now claims to be a party.

Finally, as discussed further below, the Texas court lacks subject matter jurisdiction over Southwest's request for declaratory relief concerning its right to indemnity. Southwest's claim is not ripe because it has not alleged, and cannot allege, that it or IFI has actually suffered any liability falling within the narrow scope of the MSA's indemnity clause. *Firemen's Ins. Co. of Newark, N. J. v. Burch*, 442 S.W.2d 331, 333 (Tex. 1968) (Dismissing for lack of jurisdiction a declaratory judgment claim seeking ruling on duty to indemnify where no liability had yet been incurred.)

In sum, the trial court abused its discretion in (1) enjoining Lycoming on the basis that the Texas case was the first filed when, in fact, the Pennsylvania case was the first filed case involving the Pennsylvania defendants and (2) allowing Southwest to proceed with an anticipatory declaratory judgment action designed purely to forum shop and to deprive the real plaintiff, Lycoming, of its traditional right to select the forum in which its claims will be litigated.

(continued...)

in allowing plaintiff to gain precedence in time or change in forums, (5) whether the court is a convenient forum for parties and witnesses, and (6) whether retaining the suit would serve judicial economy).

(b) Even if the Texas case were the first filed, it would not matter.

In Texas, the doctrine that the court where the first suit is filed acquires dominant jurisdiction only applies where two suits are filed in the same state. It has no application to suits filed in different states. This is demonstrated by the fact that in *Golden Rule*, *Christensen* and *Gannon*, suits were first filed in Texas and yet, in all three cases, the Texas Supreme Court reversed the anti-suit injunctions. Indeed, the Supreme Court in *Gannon* explicitly recognized that one sovereign cannot be dominant over another and that each has concurrent jurisdiction: "Obviously, anti-suit injunctions prohibiting litigants from proceeding in out-of-state courts necessarily involve *two sovereigns with concurrent jurisdiction* to decide the controversy." 706 S.W.2d at 306 (emphasis added).

Similarly, in *Manufacturers Hanover v. Kingston*, the court of appeals reversed an anti-suit injunction because the necessary prerequisites were not met. In doing so, the court expressly found it unnecessary to consider whether the Texas suit should be treated as filed first. 819 S.W.2d at 612.

Despite this, in an attempt to invoke "dominant jurisdiction," Southwest relied heavily on dicta from the Corpus Christi court of appeals' split opinion in *London Market Ins. v. American Home Assurance Co.*, 95 S.W.3d 702 (Tex. App.--Corpus Christi 2003, no pet.).[14] *London's* conclusion affirming the injunction, however, ultimately was based on the fact that

[14] Southwest also relied on *Armstrong v. Steppes Apts., Ltd.*, 57 S.W.3d 37 (Tex. App. --Fort Worth 2001, pet. denied) and *Gurvich v. Tyree*, 694 S.W.2d 39 (Tex. App.--Corpus Christi 1985, no writ). *Armstrong* mentioned but did not specifically rely on dominant jurisdiction in making its decision. *Gurvich* was decided before the Texas Supreme Court handed down *Gannon, Christianson* and *Golden Rule,* which eliminated dominant jurisdiction as a consideration in anti-suit injunctions involving proceedings in sister states. Moreover, *Gurvich* clearly states that an anti-suit injunction may only be issued when the suits are "between the same parties." 694 S.W.2d at 43. Thus, *Gurvich* supports Lycoming. Significantly, it reversed the anti-suit injunction at issue in that case.

the insurance company's filing of the second suit violated the service of suit clause in the contracts at issue. *Id.* at 709-10. Here, if any party violated a similar clause it was Southwest, which filed the Texas action in direct violation of the MSA's dispute resolution provision requiring mediation *before* filing suit. App. A, ¶ 7.4. Thus, the analysis in *London* actually undermines Southwest's position in this case.

Moreover, the dissent in *London* accurately tracks the Texas Supreme Court's holding in *Golden Rule* and concludes that the plaintiff did not establish "special circumstance so as to constitute an irreparable miscarriage of justice." *London*, 95 S.W.3d at 710-12.

In addition, even if the Texas case were to be considered the first filed, it would be irrelevant because the Pennsylvania and Texas cases do not involve the same parties. There is absolutely no law authorizing Southwest to obtain an anti-suit injunction against litigation to which it is not even a party. There is, however, ample authority precluding it from doing so. *Tri-State Pipe v. Southern County Mut.*, 8 S.W.3d at 401 ("Even when an anti-suit injunction is warranted, it must be specific and limited, **barring suit only on the same claims against the same defendants**.") *Accord, Christensen*, 719 S.W.2d at 163.

(c) The Pennsylvania litigation in no way threatens the Texas court's jurisdiction

Southwest's other argument that the Pennsylvania litigation constitutes a threat to the Texas court's jurisdiction is based on the false assertion that in the Pennsylvania litigation, "Lycoming actively attacks this Court's jurisdiction and threatens this Court's ability to reach the merits of the case ... by litigating similar issues in a parallel proceeding ...." CR. 1452. As a matter of law, however, the potential application of *res judicata* or collateral estoppel

As a matter of law, however, the potential application of *res judicata* or collateral estoppel does not constitute a threat to the Texas court's jurisdiction. The Supreme Court views the applicability of *res judicata* or collateral estoppel as a safeguard eliminating the threat of inconsistent judgments:

> In *Gannon*, we did not accept the argument that pursuing a declaratory judgment action in a Canadian court on issues that could have been brought as defenses in the first filed Texas proceeding was a waste of resources, let alone that such additional expense would justify an injunction against the Canadian proceedings. *Gannon*, 706 S.W.2d at 307-08. Nor did we agree that the risk of inconsistent judgments was a significant one, since "the second forum is usually obliged to respect the prior adjudication ...," so that "even if both proceedings continue, there should be only one judgment recognized in both forums."

Golden Rule, 925 S.W.2d at 650-651. Thus, *res judicata* is not an interference with a court's jurisdiction any more than is, for example, the statute of limitations. Rather, it is simply another legal doctrine a court applies in properly exercising its jurisdiction. The Texas court recognized that the Pennsylvania court was not trying to interfere with the Texas court's jurisdiction. 2 RR 50-51.

Even mirror image suits, which these are not, will not support an injunction: "[W]e have never accepted the notion that a mirror image proceeding is sufficiently different from an ordinary single parallel proceeding to justify an injunction." *Id.*

Southwest also argued that Lycoming violated the TRO entered by the Texas court, by continuing to seek redress in Pennsylvania. 2 RR 120-125. Lycoming, however, did not "seek redress in Pennsylvania." On the contrary, Lycoming explicitly told the Pennsylvania court:

> ... Lycoming does not intend to violate the Texas court's order in any way, shape, or form. Lycoming has been ordered by the Texas court not to appear at this Court's currently scheduled September 12 hearing on Lycoming's contempt motion, and will comply with the Texas court's order. As should have been clear from my prior letter, Lycoming IS NOT asking this Court to take or refrain from taking any action. We are simply trying our best to deal with a difficult situation.

Ex. P-1 (emphasis in original).

Subsequently, Lycoming appeared before the Pennsylvania court only because it was ordered to do so. Ex. D-41. Even then, however, no hearing took place on the merits. The entire first half of the hearing was occupied by a discussion of the fact that the Judge knew one of the potential witnesses and therefore might not be able to preside over a hearing where the credibility of that witness might have to be resolved by the Judge. *See* Ex. D-39. Before any testimony was taken, the hearing recessed temporarily. Ex. D-39, p. 34. When the hearing reconvened, the parties announced they had reached an agreement regarding a production schedule which temporarily resolved the issue. *See* Ex. D-39, pp. 47-49.

It is also undisputed that the agreement reached at the hearing did not harm Southwest. 1 RR 90; 2 RR 10-12; Ex. D-7 (Lunsford Affidavit). Indeed, Southwest's counsel agreed to put the same production schedule in the Texas court's temporary injunction in order to obtain a reduced bond. 2 RR 168-169. Notably, Southwest then violated that agreement by leaving out two key provisions of the agreement. *See* CR. 1525 (objection to proposed finding 20).[15]

[15] Specifically, the Temporary Injunction Order drafted by Southwest's counsel and signed by the Court neglected to include the following provisions: 1. The work in progress at the crankshaft production facility will be completed within 30 days and delivered promptly thereafter to Lycoming. 2. Lycoming may send an appropriate overseer of production to the production facility. Obviously, the timing provision is critical given that Lycoming cannot produce engines without crankshafts.

Further, if the only interference with the court's jurisdiction relates to the claimed violation of the TRO, it shows that at the time the TRO was signed, there was no interference with the court's jurisdiction as should have been required to support the issuance of the TRO in the first place. That is, Southwest is bootstrapping by attempting to support the Temporary Injunction based on the alleged violation of an invalid order.

Finally, even if this Court finds that there is some basis to support the court's interference finding, the injunction should have been no broader than necessary to prevent such interference. There was no conceivable justification for enjoining Lycoming from pursuing both the Pennsylvania damage action and the Pennsylvania equity action in their entirety. *See* pp. 37-39, *infra*. *Gannon*, 706 S.W.2d at 307.

2. There Is No Violation Of An Important Public Policy.

Southwest's argument that some important public policy justified an anti-suit injunction was based on the Open Courts provision of the Texas Constitution. 2 RR 125; CR. 1453-1455. Southwest argued that Lycoming sought to "prevent[] [Southwest], a Texas citizen from access to the Texas courts." CR. 1453.

There is no violation of the Open Courts provision. As Southwest itself recognized, the Open Courts doctrine affords only three specific protections: "First, courts must be actually open and operating. Second, citizens must have access to courts unimpeded by unreasonable financial barriers. Third, ... the legislature may not abrogate the right to assert well established common law cause of action." CR. 1454. Here, the Texas court is obviously open and operating. Southwest has access to that court unimpeded by any financial barrier. And, the legislature has done nothing that is at issue here.

Southwest is in court and vigorously prosecuting its claim and the continuation of the Pennsylvania litigation would not preclude Southwest from continuing to do so.

If anything, Southwest is violating important public policies by (1) using a declaratory judgment action as a preemptive strike to forum shop (*see Abor v. Black,* p. 19-21, *supra.)* and (2) filing this action as an alleged party to the MSA while simultaneously violating of the dispute resolution requirements of the MSA. App. A, ¶ 7.4. The Open Courts provision does not guarantee anyone the right to forum shop or to file and prosecute an action in contravention of a contractual dispute resolution clause.

It is the policy of Texas to encourage and enforce contractually agreed upon alternative dispute resolution procedures. For example, *Weekley Homes, Inc. v. Jennings*, 936 S.W.2d 16, 17 (Tex. App.--San Antonio 1996, writ denied), involved a contract that required the parties to "first mediate the Disputes" before arbitrating. Although the arbitration clause was enforceable, the court of appeals held that Weekley was not entitled to compel arbitration before complying with the mediation requirement. Similarly, here, to the extent Southwest seeks relief as an alleged party to the MSA, it (at a minimum) is obligated to first comply with the mediation requirement before filing suit. Thus, Lycoming's attempt to enforce the MSA's mediation requirement was in no way a violation of Texas public policy.

3. There Is No Multiplicity Of Suits Against Southwest.

There is no multiplicity of suits against -- or even involving -- Southwest. In fact, there are no suits *against* Southwest at all. It is undisputed that Southwest is a party to only one suit; the one it filed. *See* Exs. D-3, D-4; Supp. CR. 57-79 (Third Amended Petition); 2

RR 22-23. Further, even if Southwest were a party to the Pennsylvania litigation, it would not constitute a "multiplicity" entitling Southwest to an anti-suit injunction: "A single parallel proceeding in a foreign forum ... does not constitute a multiplicity nor does it, in itself create a clear equity justifying an anti-suit injunction." *Golden Rule*, 925 S.W.2d at 651.

In its Brief in Support of its Application for Injunctive Relief, Southwest did not rely on a multiplicity of suits as a ground for granting the injunction. *See* CR. 1449-1461. In fact, Southwest's counsel conceded on the record that there is no multiplicity of suits:

> MR. ROSE: Your Honor, the multiplicity of lawsuits is where I think Mr. Cowan has focused and may focus later. We don't focus on that at all. Really that is not at issue here.

2 RR 118. Despite this admission, Southwest's counsel drafted the temporary injunction order with a finding that "the Pennsylvania lawsuits constitute more than a single parallel proceeding...". CR. 1535, ¶ 16. Given the undisputed facts and Southwest's counsel's admission, this finding is erroneous as a matter of law.

4. There Is No Vexatious And Harassing Litigation Against Southwest.

Given the fact that Lycoming has not filed any litigation whatsoever against Southwest, Lycoming cannot possibly be guilty of pursuing "vexatious or harassing" litigation against Southwest.

The only cases Southwest cites where anti-suit injunctions were upheld involve situations where the party seeking the injunction is also a party to the other supposedly vexatious and harassing litigation. Southwest has cited no case, and Lycoming is aware of

none, that has enjoined litigation as vexatious and harassing to someone who was not even a party to that litigation. Nevertheless, the court concluded that "the prosecution of the Pennsylvania Lawsuits is vexatious and harassing to [Southwest]" CR. 1535, ¶ 19. This conclusion is erroneous as a matter of law.

The case law makes clear that to justify an anti-suit injunction on the basis that the other litigation is "vexatious or harassing" requires a showing that the other litigation was *filed for the purpose* of vexing or harassing the other party. *See e.g. Christensen v. Integrity Ins. Co.*, 719 S.W.2d 161, 163 (Tex. 1986) ("there is no indication that Christensen filed suit *for purposes of* vexation or harassment.") (emphasis added); *Tri-State Pipe v. Southern County Mut.*, 8 S.W.3d at 401 ("nor did it show that Tri-State had stated that it *intended* to institute other suits *for the purpose* of harassment. Absent such evidence, injunctive relief is inappropriate.") (emphasis added).

Here, Lycoming could have, but did not, sue Southwest in Pennsylvania. Moreover, at the time Lycoming instituted suit in Pennsylvania against IFI, Citation Wisconsin and Citation Corporation, there were no claims pending in the Texas suit that involved any of those entities. As already shown, Southwest first added claims relating to IFI only *after* Lycoming filed the Pennsylvania litigation. *Compare* CR. 2-16 (Southwest's Original Petition) *with* CR. 191-207 (Southwest's First Amended Petition). Thus, the Pennsylvania litigation could not have been for the purpose of harassing Southwest.

Moreover, Lycoming had ample basis to sue IFI, Citation Wisconsin and Citation Corporation. The letter from Citation Corporation threatening to cease crankshaft production is ample justification for the Pennsylvania equity action. *See* App. F.

The $75 million in damages suffered by Lycoming as a result of the FAA-mandated recall is ample justification for the Pennsylvania damages action. This is true regardless of whether IFI assigned the MSA to Southwest because IFI still remains legally obligated under the MSA. Article 2.210 of the UCC explicitly provides first, that contractual duties may not be delegated if the contract prohibits delegation and second, that even where contractual duties are delegated, the original contracting party retains both its duty to perform and its liability for any breach:

> (a) A party may perform his duty through a delegate *unless otherwise agreed* or unless the other party has a substantial interest in having his original promisor perform or control the acts required by the contract. *No delegation of performance relieves the party delegating of any duty to perform or any liability for breach.*

Tex. Bus. & Com. Code Ann. art. 2.210(a) (emphasis added).

Here, the MSA contains an explicit anti-delegation clause:

> 7.3 Assignment. [IFI] will not delegate or subcontract any of the work or duties to be performed hereunder without prior written consent of [Lycoming].

App. A, ¶ 7.3.

Accordingly, IFI's duty to manufacture the crankshaft forgings cannot have been validly delegated to Southwest. But even more importantly, even assuming that the duty to manufacture the crankshaft forgings was properly delegated to Southwest, it would not relieve IFI from its duty to perform the MSA or its liability for the defective forgings. Therefore, Lycoming had every right to sue IFI, its successor Citation Wisconsin and Citation Corporation in Pennsylvania.

If anything, Southwest's adding claims to the Texas litigation relating to IFI *after* Lycoming filed suit in Pennsylvania was for the purpose of harassing Lycoming, preventing

Lycoming from prosecuting its claims against the Pennsylvania defendants in Lycoming's chosen forum and undermining the Pennsylvania court's jurisdiction.

In an attempt to show vexation or harassment, Southwest claimed, without any supporting evidence, that "In the Pennsylvania action, Lycoming has not sought to litigate the merits of their claim, but has refused to conduct discovery regarding the underlying allegations." CR. 1455. This is both nonsensical and false.

Ordinarily, a claim of vexation or harassment deals with *excessive* or duplicative discovery, not the supposed failure to perform discovery. Moreover, whatever Lycoming is doing in the Pennsylvania litigation does not involve Southwest. Given that Southwest is not a party to that litigation, it cannot be vexatious or harassing to Southwest.

Further, with regard to the Pennsylvania defendants, Lycoming is (or was until the injunction) proceeding normally with discovery, while the counsel for Southwest and the Pennsylvania defendants were doing everything possible to stonewall it.[16]

Southwest also argued that "Lycoming's motion for contempt, requests for expedited injunctive relief, and refusal to allow any continuances reflect the vexatious and harassing nature of Lycoming's actions in Pennsylvania." CR. 1455. Again, this argument makes no sense.

There was no motion for contempt against Southwest in the Pennsylvania litigation. If the Pennsylvania defendants who *were* the subject of the motion for contempt had any

[16] For example, Lycoming produced documents to the Pennsylvania defendants and served discovery requests on the Pennsylvania defendants. The Pennsylvania defendants requested an extension of time to produce documents in the Pennsylvania litigation, which Lycoming granted. Rather than use the extension in good faith to compile and produce the documents, however, Southwest's counsel used the extension to obtain the injunction from the Texas court.

claim that the motion was vexatious or harassing, they were free to assert that argument in the Pennsylvania court (which they never did). They were not free to have Southwest assert it for them in a foreign court where they had not even made an appearance.

Similarly, there was no "request for expedited injunctive relief" against Southwest in the Pennsylvania litigation. The only request for injunctive relief was against the Pennsylvania defendants to require them to comply with the MSA. Further, the result of Lycoming's request for injunctive relief was an *Agreed* Injunction. Ex. P-12. Southwest cannot possibly show how it, or even the Pennsylvania defendants, were vexed or harassed by something the Pennsylvania defendants agreed to do.

The Pennsylvania defendants subsequently violated the *Agreed* Injunction making Lycoming's contempt motion necessary. Ex. D-6 (Lycoming's Motion for Contempt). The result of that motion was another *agreed* order. Ex. D-39, pp. 47-49.

Southwest's argument about a supposed "refusal to allow any continuances" also makes no sense. Given that Southwest is not a party to the Pennsylvania litigation, there is nothing to be "continued" concerning Southwest. Moreover, there were continuances in the Pennsylvania litigation. For example, the contempt hearing originally scheduled for August 22, 2003 was continued to September 12, 2003. Ex. D-41. Southwest used that time to obtain a TRO from the Texas court on September 5, 2003. CR. 891-894.

(continued...)

The day after the discovery was to be produced in Pennsylvania, Southwest obtained the TRO and, on the basis of the TRO, refused to make the scheduled production.

In addition, Lycoming gave the Pennsylvania defendants an extension of time to answer discovery, which they then used to avoid responding to discovery altogether in the Pennsylvania litigation.

During the temporary injunction hearing, Southwest also argued that an injunction was justified as a result of Lycoming's request to stay its own action pending mediation and to require Citation to have Southwest do the same as required by the dispute resolution provisions of the MSA. *See* 2 RR 126-128. This is neither vexatious and harassing nor an interference with the Texas court's jurisdiction. Given that Southwest claims it is a party to the MSA, Southwest cannot dispute the fact that it brought suit in violation of the dispute resolution provisions in the MSA, which require "non-binding mediation prior to the commencement of any legal proceedings to resolve any dispute arising out of this agreement." App. A, ¶ 7.4. Nor does Southwest dispute the fact that officers of Citation caused it to do so. For Lycoming to attempt to correct Citation's violation of the MSA is hardly vexatious.

Perhaps more important, however, is the fact that before the temporary injunction hearing, Lycoming withdrew its request to have the Pennsylvania court order Citation to have Southwest dismiss its suit pending mediation. 2 RR 45, Ex. D-42. In addition, Lycoming stipulated in open court that it would not in the future request such relief from the Pennsylvania court. 2 RR 152. The Texas Supreme Court in *Gannon* considered an almost identical situation and held that it would not support an anti-suit injunction:

> In his pleading filed in the Canadian court, Gannon requested "A Judgment, Order or Declaration permanently enjoining Payne from suing the Plaintiffs." However, in an amended motion to stay proceedings in the Texas court,

> Gannon stipulated that he would eliminate his request for injunctive relief in the Canadian suit. The Texas trial court could have delayed issuing its injunction and allowed Gannon an opportunity to comply with this stipulation. In any case, the trial court could have more narrowly drawn its injunction to permit proceedings that were not inconsistent with its continued jurisdiction. Moreover, there is no evidence the Canadian court has attempted to carve out exclusive jurisdiction in this case. We must rely on the court system of a sister common law jurisdiction to recognize the same rule of comity we now apply.

706 S.W.2d at 307 (citation omitted.) This holding applies here.[17]

Lycoming's request in the Pennsylvania damages action to have the Pennsylvania court enforce the mediation-before-litigation provision of the MSA cannot justify a blanket injunction preventing Lycoming from proceeding with any aspect of both Pennsylvania suits. *See* 2 RR 152.

5. There Is No Irreparable Miscarriage Of Justice.

"Merely because the suits present identical issues does not make their proceeding an 'irreparable miscarriage of justice.'" *Golden Rule*, 925 S.W.2d at 652. Here, however, the issues being litigated are not even identical. When the Court signed the Temporary Injunction:

- Lycoming had not demanded a dime from Southwest.
- Lycoming had not sued Southwest for damages in the Pennsylvania damages action.
- Lycoming had not sought any relief from Southwest in the Pennsylvania equity action.

Given these indisputable facts, allowing Lycoming to proceed in Pennsylvania cannot possibly result in an irreparable miscarriage of justice against Southwest.

6. The Principle of Comity Precludes the Injunction as a Matter of Law.

The Supreme Court held in *Golden Rule*:

> [W]e have never accepted the notion that a mirror image proceeding is sufficiently different from an ordinary single parallel proceeding to justify an injunction. ... This approach fails to give adequate weight to the principle of comity and threatens to allow the exception to swallow the rule. As we have said before, "if the principle of comity is to have any application, a single parallel proceeding ... cannot justify issuing an anti-suit injunction."

925 S.W.2d at 651-52.

The trial court concluded that the principle of comity was outweighed by "the complete disregard of this Court's Temporary Restraining Order by Lycoming and the Pennsylvania Court." CR. 1535, ¶ 17. The court's findings articulate no other basis for disregarding comity. This conclusion is wrong logically, factually and legally.

There is no finding of any factor outweighing the principle of comity *at the time the TRO was signed.* CR. 891-894. Therefore, the TRO was necessarily erroneous. It should never have been issued unless there were factors outweighing comity at that point in time; yet the court found no such factors. Logically, the court cannot overcome comity considerations by relying on the TRO, which itself was issued in violation of the comity principle.

Factually, as already shown, there was no disregard of the TRO. The only thing that took place in the Pennsylvania court after the Texas court signed the TRO *was initiated by IFI's local counsel in Pennsylvania* who wrote to the Judge presiding over the Pennsylvania

(continued...)

[17] In fact, much like the Canadian court in *Gannon,* the Pennsylvania court never attempted to carve out exclusive jurisdiction for itself. It expressly stated that its actions were "without prejudice to the rights of the parties

litigation, asking whether the contempt hearing would still go forward. Ex. P-4. Lycoming's Pennsylvania counsel responded with two letters, both of which made absolutely clear that Lycoming was not seeking any relief from the Pennsylvania court and would not violate the Texas court's TRO. Exs. P-3, P-1 (quoted *supra* at p. 25.)

The Pennsylvania court then ordered the parties to appear for the hearing. Three things are significant about that hearing. First, Southwest's counsel, who was present at the hearing representing the Pennsylvania defendants, never once mentioned the Texas court's TRO or objected to Lycoming's presence at the hearing. *See generally* Ex. D-39.

Second, as noted, the hearing never reached the merits. Instead, the parties agreed that the contempt issue would be "held in abeyance" because they had agreed to a crankshaft production schedule through the end of the year 2003. Ex. D-39 , p. 34-35. *See* p. 25, *supra.*

Third, the parties agreed they would attempt to agree on a production schedule for the year 2004 and that "If this agreement cannot be reached by November 15, 2003, *either party* may request the Court to reconvene a conference and/or hearing on this matter." Ex. D-39, p. 48. The parties also agreed to the following:

> This order is entered without prejudice to the rights of any of the parties as may pertain to any pending litigation in this or any other forum, period.
>
> *It is agreed*, however, that for the purposes of the entry of this order, *that the Defendants will not raise with any other forum the issue that this Court does not have authority to enter this order* concerning the production schedule for the remaining calendar year 2003 and the other things specifically addressed in this order, period. Counsel, that would be my proposal. Any suggested word changes?

(continued...)

as may pertain to any pending litigation in this or any other forum." Ex. D-39, p. 48.

Mr. Bedell [Lycoming's counsel]: That's fine Your Honor.

Mr. Smith [IFI's local counsel]: That takes care of it.

Mr. Walker [IFI and Southwest's counsel]: *No, Your Honor.*

Ex. D-39, p. 48.

This plainly is not an interference with the Texas court's jurisdiction as it is expressly "without prejudice" to any party's rights in any litigation pending in "any other forum." Moreover, it was agreed upon by Southwest's counsel.

Despite the fact that Southwest's own counsel participated in, facilitated and agreed on the order that "either party" could reconvene the hearing if a production schedule were not reached for 2004 and that he would "not raise with any other forum the issue that this Court does not have authority to enter this order...," Southwest promptly violated both the order and this agreement by using the Pennsylvania court's order as a basis for the temporary injunction. CR. 1454; 2 RR 123-125, 132-134. Southwest is not entitled to an injunction based on something it fully participated in, facilitated and agreed to in Pennsylvania.

Finally, the court's conclusion that the principle of comity is outweighed is legally wrong. The rights of a court in a sister state to properly exercise its first-acquired jurisdiction over IFI, Citation Wisconsin or Citation Corporation cannot possibly be outweighed by litigation in a court with no jurisdiction whatsoever over those entities.

C. ALTERNATIVELY, THE INJUNCTION WAS OVERLY BROAD.

Even if some injunction could be justified, the injunction rendered by the trial court was too broad. *See* 2 RR 152; CR. 1538-1539 (Order Granting Temporary Injunction). It

was not only far broader than necessary to protect any conceivable interest held by Southwest, it also impermissibly interfered with Lycoming's exercise of its lawful rights.

An injunction should be no broader than necessary. As this Court recently held, "A temporary injunction is an extraordinary remedy and should be carefully regulated." *Kaufmann v. Morales*, 93 S.W.3d 650, 655 (Tex. App.--Houston [14th Dist.] 2002, no pet.) (*citing Camp v. Shannon*, 348 S.W.2d 517, 519 (Tex. 1961), and reversing injunction as overly broad). It should not be "so broad as to 'prohibit the enjoyment of lawful rights.'" *Id.* *Accord Kulkarni v. Braeburn Valley West Civic Ass'n, Inc.*, 880 S.W.2d 277, 278 (Tex. App. --Houston [14th Dist.] 1994, no writ) (reversing injunction).

This principle applies with particular force to anti-suit injunctions: "Even when an anti-suit injunction is warranted, it must be specific and limited, barring suit **only on the same claims against the same defendants**." *Tri-State Pipe v. Southern County Mut.*, 8 S.W.3d at 401 (emphasis added). *See Gannon,* 706 S.W.2d at 307 ("the trial court could have more narrowly drawn its injunction to permit proceedings that were not inconsistent with its continued jurisdiction."); *Harbor Perfusion, Inc. v. Floyd*, 45 S.W.3d 713, 718 (Tex. App.--Corpus Christi 2001, no pet.) (reversing overly broad anti-suit injunction).

Thus, for example, the court in *Tri -State* reversed an anti-suit injunction because, like the injunction at issue in this case, "the injunction bars not only the claims at issue in this litigation but also additional claims, and for this reason is overly broad." 8 S.W.2d at 402.

If any injunction could possibly be justified, it would only extend to precluding Lycoming from taking steps in Pennsylvania that attempt to require Southwest to do, or refrain from doing something in the Texas suit. *See* 2 RR 152. Southwest has no basis for

enjoining Lycoming from suing and recovering damages from IFI, Citation Wisconsin or Citation Corporation. Nor does Southwest have any basis for enjoining Lycoming from specifically enforcing the MSA against IFI, Citation Wisconsin or Citation Corporation. This is true regardless of whether there was an assignment of the MSA. Tex. Bus. & Com. Code Ann. § 2.210.[18]

D. THE COURT LACKED SUBJECT MATTER JURISDICTION

Whether the court below had subject matter jurisdiction is a legal question reviewed under the *de novo* standard. *City of Houston v. Northwood Mun. Utility Dist. No. 1*, 73 S.W.3d 304, 308 (Tex. App.- Houston [1st Dist.] 2001, pet. denied) (emphasis added). It is Southwest's burden to establish subject matter jurisdiction. This Court is to consider not only the pleadings, but the evidence relevant to jurisdiction as well. *Chambers County v. TSP Development, Ltd.*, 63 S.W.3d 835, 837 (Tex. App.--Houston [14th Dist.] 2002, pet. denied).

The court's injunction was predicated on the notion that certain issues in the Texas suit -- most notably, issues raised by Southwest's declaratory judgment claims -- overlapped with certain issues in the Pennsylvania litigation. As discussed above, the mere fact of overlapping issues cannot justify an anti-suit injunction. But, in addition, the Texas court

[18] The injunction is overly broad for another reason as well: it exceeds the relief requested in Southwest's Third Amended Petition. That Petition only requested a TRO restraining Lycoming "from directly or indirectly litigating issues related to the manufacture of crankshaft parts under the [MSA] ... including but not limited to an Order enjoining ... Lycoming from any further prosecution of [the Pennsylvania litigation]" and requested that the TRO then be enlarged into a temporary injunction. Supp. CR. 69-70. *See also* CR. 1456 (Brief in Support of Plaintiff's Application for Injunctive Relief.) The trial court not only granted that relief, it went further and granted relief Southwest had not requested. Specifically, it required Lycoming to withdraw all pending discovery, and move to stay, abate or dismiss the Pennsylvania litigation. The court lacked jurisdiction to grant relief that Southwest did not request. *Fairfield v. Stonehenge Association Co.*, 678 S.W.2d 608, 611 (Tex. App.--Houston [14th Dist.] 1984 , no writ).

lacked subject matter jurisdiction over those purportedly overlapping issues, which necessarily impacts the propriety of the anti-suit injunction.

Further, Southwest lacked standing to enjoin litigation to which it is not a party. Accordingly, the court also lacked subject matter jurisdiction to issue the injunction.

1. The Court Lacked Subject Matter Jurisdiction Over The Claims For Declaratory Relief.

Standing and ripeness are both essential to the existence of subject matter jurisdiction. *Texas Ass'n of Business v. Texas Air Control Bd.*, 852 S.W.2d 440, 443 (Tex. 1993) ("Standing is implicit in the concept of subject matter jurisdiction."); *Patterson v. Planned Parenthood of Houston and Southeast Texas, Inc.*, 971 S.W.2d 439, 442 (Tex. 1998) ("Ripeness, like standing, is a threshold issue that implicates subject matter jurisdiction.")

(a) Southwest lacks standing

One who is not a party or third party beneficiary to a contract lacks standing to sue on the contract. *Cozad v. Roman*, 570 S.W.2d 558, 561 (Tex. Civ. App.--Corpus Christi 1978, no writ). Southwest concedes it did not execute the MSA. CR. 194, ¶ 12. In an attempt to establish standing, however, Southwest now contends that IFI "assigned the MSA" to Southwest. CR. 196, ¶ 15.

At the outset, it is important to understand that even if there were a valid assignment, it would not constitute any sort of defense to Lycoming's claims in the Pennsylvania litigation against IFI, Citation Wisconsin and Citation Corporation. The law is crystal clear that even if IFI assigned its rights under the MSA to Southwest, IFI would still retain its duty to perform under the MSA and would remain liable to Lycoming for any breach of the MSA.

Tex. Bus. & Com. Code ann. § 2.210(a) ("No delegation of performance relieves the party delegating of any duty to perform or any liability for breach.") Nor would it give Southwest standing to enjoin the Pennsylvania litigation to which it is not a party.

On the other hand, if there is no valid assignment, Southwest lacks standing to assert *any* claim based on the MSA. Thus, the assignment issue can in no way advance Southwest's position with regard to the injunction at issue here; it can, however, be fatal to Southwest's position.

Southwest bases its "assignment" argument on an October, 1996, "Bill of Sale and Assignment and Assumption Agreement" between IFI and Southwest, which contains the following language:

> **Assignment.** The Corporation [IFI] hereby transfers and assigns to the Partnership [Southwest] all of its right title and interest (the "Rights") in the ... contracts related to the Division.... The Corporation warrants to the Partnership that the Corporation has good right to assign and transfer to the Partnership the *Rights* hereby assigned *subject to any necessary consents*.

Ex. D-25 (emphasis added). The language of this purported assignment says nothing about the MSA specifically. Moreover, on its face, this only purports to be an assignment of "*Rights*" in certain unspecified contracts, such as IFI's right to future payments. It does not purport to be a delegation of duties.

This interpretation is consistent with the MSA itself, which expressly prohibits the delegation of IFI's duties under the MSA. Paragraph 7.3 of the MSA states:

> **Assignment**. Seller [IFI] will not delegate or subcontract any of the work or duties to be performed hereunder without the prior written consent of the Buyer [Lycoming].

App. A, ¶ 7.3. Notably, the assignment language relied on by Southwest is expressly "subject to any necessary consents." Thus, it would not be effective until any necessary consents were obtained.

It is undisputed that Lycoming never gave written consent for IFI to delegate or subcontract its duties under the MSA to Southwest or anyone else. 1 RR 51. In fact, while the court found that there was an assignment, it also found that Lycoming only knew, or had reason to know, of the purported assignment on October 14, 2002, seven years after the assignment document was executed. CR. 1533 (FF 5, 9).[19] There is no finding or evidence that Lycoming knew or should have known of any assignment before 2001 *when the defective crankshafts were manufactured*, which is the relevant time period.[20] 1 RR 59-60.

Given the fact that (1) the purported assignment is expressly "subject to any necessary consents," (2) the MSA explicitly requires written consent to assignment by Lycoming and (3) the court found that Lycoming first knew nor should have known of the purported

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[19] The court did not find that Lycoming had *actual knowledge* of the assignment. The reality is that Lycoming did not learn of the existence of Southwest as a separate entity until October, 2002, and even then had no knowledge of the purported assignment. 2 RR 67-69; 2 RR 72-73. In fact, Southwest did not even refer to any assignment in its original petition; rather it alleged, falsely, that it had entered into the MSA. *See* CR. 2-16. The first time Lycoming learned of the assignment was after Southwest filed this lawsuit. 2 RR 85-87; *see* CR. 104-115 (Lycoming's Original Answer).

[20] The court also found that after Lycoming supposedly learned of the purported Assignment in October 2002, Lycoming "either consented to its terms, waived the right to complain of its execution and effect, or is estopped from asserting lack of consent as a defense." CR. 1533 (FF 9). First, there is no pleading of either waiver or estoppel and Lycoming objected to this finding on that basis. CR. 1520-1521. Second, there is absolutely no evidence of Lycoming's "consent" to the terms of the assignment or of waiver (a voluntary relinquishment of a known right) or of the necessary elements of estoppel. The only evidence is that Lycoming never even saw the assignment until after this litigation was instituted when Southwest filed its first amended petition, which is the first time it alleged any assignment. *Compare* CR. 2-16 (Original Petition) *with* CR. 191-207 (First Amended Petition). 2 RR 85-87. Third, even if this finding were accepted in its entirety, it only applies after October 2002 which is the earliest the court found that Lycoming "knew or should have known" of the assignment. Thus, the finding establishes that there was no actual or implied consent at the relevant time. Obviously, Lycoming cannot have "consented," "waived" or be "estopped" before it had reason to know of the assignment.

assignment in October 2002, there could not have been any consent or any valid assignment during the relevant time.

The evidence establishes that for seven years after the MSA was executed, IFI systematically led Lycoming to believe that IFI was the entity responsible for the production of crankshafts under the MSA. For example, while the assignment supposedly took place in 1996, in April 2001 IFI (not Southwest) signed an addendum to the MSA extending the MSA for five years beginning May 4, 2000 and ending on May 4, 2005. App. B. IFI, not Southwest, issued all of the test certificates required by the FAA for the crankshaft forgings. 2 RR 88-89; Ex. D-14. The crankshaft forgings continued to be manufactured in the same building and none of the signage on the building referenced Southwest. 1 RR 15-16; Ex-Y. IFI, not Southwest, issued all invoices and accepted all payments for the crankshaft forgings. 2 RR 89-91; Ex D-17. Even Southwest's original petition said nothing about any assignment. *See* CR. 2-16.

James Pike, Lycoming's director of materials who is responsible for production control, including crankshafts, testified that:

- He never heard of Southwest before this litigation was instituted (2 RR 85);
- He reviewed all of Lycoming's correspondence files related to the MSA since 1995 and did not see any reference to Southwest in any of the documents -- the only references were to IFI, Citation and Citation Navasota (2 RR 85-87);
- He was unable to locate any notification regarding the purported assignment and no one ever told him of an assignment (2 RR 87);
- IFI, not Southwest, issued all of the certificates of conformance, which accompany every shipment of crankshafts and which are required to insure Lycoming and the FAA that the crankshafts are per specification (2 RR 88-89; Ex. D-15);

- IFI, not Southwest, issued all invoices for the crankshaft forgings (2 RR 89-91; Ex. D-17);
- Until August 2003, the invoices uniformly instructed Lycoming to make payment to IFI, and after August 2003, the invoices instructed Lycoming to make payment to "Citation Navasota" -- Lycoming was never instructed to pay Southwest (2 RR 89-91);
- Lycoming always paid IFI, never Southwest. *Id.* [21] *See* 2 RR 90-91.

The testimony of Mike Everhart, Lycoming's Vice President of Operations, was to the same effect. He testified that the MSA was with IFI. 2 RR 64. He also testified that after the recall necessitated by IFI's defective crankshafts, IFI was unwilling to manufacture Replacement Crankshafts under the MSA because of liability concerns. 2 RR 66-67. Instead, Ed Buker, CEO of Citation Corporation, the ultimate parent of both IFI and Southwest, insisted on a separate Replacement Crankshaft Agreement with a separate entity, Southwest. 2 RR 67-68. The first time Mr. Everhart ever heard of Southwest was when the Replacement Crankshaft Agreement was negotiated in October 2002. 2 RR 67-68. Even then, however, he was not told of any assignment and the execution of the Replacement Crankshaft Agreement with Southwest expressly did not affect IFI's responsibilities under the MSA. 2 RR 67-69.

Mr. Everhart also testified that the identity of the entity responsible for making the crankshafts was important to Lycoming for a number of reasons ranging from flight safety to the seller's financial ability to satisfy any potential liabilities. 2 RR 69-72. He never consented to any assignment of the MSA from IFI to Southwest. 2 RR 72-73.

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[21] Southwest's witness, Jeff Bell, admitted that all invoices and payments were with IFI, not Southwest, and the funds were allocated to Southwest solely through *intra*-company transactions between IFI and Southwest to which

Southwest alleges that IFI executed the Addendum extending the MSA through 2005 as Southwest's agent. Supp. CR. 63, ¶ 21. Nothing in the Addendum, however, indicates it is being executed for anyone other than IFI. *See* App. B.[22] All of this evidence demonstrates that, in fact, there was no assignment. Rather, Citation Corporation is belatedly using the purported assignment to attempt to shift potential liabilities to an entity with less assets. *See* 1 RR 66-67. Because the evidence proves that there was no assignment, and could be no assignment without Lycoming's consent, Southwest lacks standing to sue on the MSA.

(b) Even if there were an assignment, the court would not have jurisdiction over Southwest's declaratory judgment claims.

Even if there were an assignment, Southwest's pleadings and the MSA still must be examined to determine whether Southwest has standing to assert the claims it is attempting to assert and whether those claims are ripe.

Count IX of Southwest's Third Amended Petition, entitled contribution and indemnity, alleges:

> [Southwest] has been named in at least one suit that seeks damages for injuries caused by the failed crankshafts.... [Southwest] anticipates that it may be named in numerous other suits ... and that it will continue to incur the cost of its defense and may eventually be subjected to judgment.

(continued...)

Lycoming was not privy. He also admitted that none of this information was made available to Lycoming. 2 RR 109-112.

[22] Even assuming IFI was surreptitiously acting as agent for Southwest as an undisclosed principal, IFI would still be directly liable under the MSA as extended by the Addendum. *Dodds v. Charles Jourdan Boutique, Inc.*, 648 S.W.2d 763, 766 (Tex. App.-Corpus Christi 1983, no writ) ("One who acts as agent for another in making a contract is individually liable thereon if, *at the time of making the contract*, he fails to disclose his agency and the identity of his principal.") (emphasis added) *Accord Burch v. Hancock*, 56 S.W.3d 257, 261-62 (Tex. App.--Tyler 2001, no pet.). In sum, IFI remains liable on the MSA as extended by the Addendum. The Assignment is irrelevant to IFI's liability or Lycoming's right to sue IFI.

> Under Section 5.3 of the MSA ... [Southwest] is entitled to be indemnified by Lycoming ... for all damages ... incurred by [Southwest] ....

Supp. CR. 73, ¶ 63-64.[23] Count XI of Southwest's Third Amended Petition is similar to Count IX except it seeks a declaration that *both* Southwest and IFI are entitled to indemnity under the MSA. Supp. CR. 76, ¶ 76(2) ("IFI and [Southwest] are entitled to indemnity from ... Lycoming pursuant to Section 5.3 of the MSA.") These counts do not seek monetary recovery for any existing loss.

The provision in the MSA requiring Lycoming to indemnify IFI is extremely limited. It states that "Buyer [Lycoming] shall indemnify ... Seller [IFI] ... where liability is based solely on a defect in design and/or a defect in the warnings or instructions provided by Buyer without any negligence on the part of Seller." App. A, ¶ 5.3. Thus, it is impossible to determine whether a duty to indemnify exists unless and until some third party sues IFI and IFI actually suffers a liability "based solely on a defect in design and/or a defect in the warnings or instructions provided by Buyer without any negligence on the part of Seller." Southwest does not and cannot allege that it or IFI has been sued on this narrow basis, much less that either of them has actually suffered a liability on this narrow basis. Thus, Southwest's claim for declaratory judgment that it or IFI is entitled to indemnity is not ripe.

If Southwest or IFI incur no liability, or if the liability is not within the narrow scope of the indemnity clause, any ruling on the indemnity issue would be completely hypothetical and would amount to nothing more than an advisory opinion. *Firemen's Ins. Co. of Newark,*

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[23] The caption to Count IX suggests that Southwest is also seeking a declaration that it is entitled to contribution. The law is clear, however, claims for contribution may only be asserted in the underlying suit in which a claim is asserted against Southwest. *Casa Ford v. Ford*, 951 S.W.2d 865, 874-75 (Tex. App.--Texarkana 1997, pet. denied).

N. J. v. Burch, 442 S.W.2d 331, 333 (Tex. 1968) (Dismissing as "purely academic," a declaratory judgment claim seeking ruling on duty to indemnify where no liability had yet been incurred.)[24] As this Court held,

> A justiciable controversy does not exist and an advisory opinion is being sought if a party requests a court to render a declaratory judgment premised upon the happening of a future, hypothetical event. The possibility that liability triggering indemnity will be incurred in a pending action is a future hypothetical event within the meaning of this rule.

Stop 'N Go Markets of Texas, Inc. v. Executive Sec. Systems, Inc. of America, 556 S.W.2d 836, 837(Tex. Civ. App.--Houston [14th Dist.] 1977, no writ). *Accord Boorhem-Fields, Inc. v. Burlington N. R.R. Co.*, 884 S.W.2d 530, 539 (Tex. App.--Texarkana 1994, no writ).

Similarly, the court in *Granite Const. Co., Inc. v. Bituminous Ins. Companies*, 832 S.W.2d 427, 429 (Tex. App.--Amarillo 1992, no writ), held: "[T]he trial court was without jurisdiction to render any determination regarding [a] duty to pay a judgment or settlement resulting from [an] as yet unlitigated action. Such a determination is dependent upon a contingent situation, which does not present a justiciable issue in a declaratory judgment action, and, therefore, is an advisory opinion, which the court is not empowered to render."

Much the same is true for Southwest's claim for declaratory judgment that IFI and Southwest are not required to indemnify Lycoming for third party claims. *See id.*

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[24] The Supreme Court created a limited exception to the rule in *Burch*, in *Farmers Texas County Mut. Ins. Co. v. Griffin*, 955 S.W.2d 81, 84 (Tex. 1997). There, the Supreme Court held that an insurer could seek a declaratory judgment on its duty to indemnify "before the insured's liability is determined in the liability lawsuit when the insurer has no duty to defend *and the same reasons that negate the duty to defend likewise negate any possibility the insurer will ever have a duty to indemnify*." (emphasis in original). That exception does not apply here. *See Foust v. Ranger Ins. Co.*, 975 S.W.2d 329, 331-32 (Tex. App.-- San Antonio 1998, pet. denied) (distinguishing *Griffin*, and holding that "any judgment attempting to declare the liability of an insurance company relating to damages that *might be* assessed against the insured in an underlying case is advisory and beyond the power and jurisdiction of the trial court to render.") (emphasis in original).

Moreover, the hypothetical rulings Southwest seeks have the potential to give rise to inconsistent adjudications. Even assuming Southwest succeeded in convincing a Texas jury that there was "a defect in design and/or a defect in the warnings or instructions provided by Buyer" and that IFI was not negligent, those findings would not be binding on a plaintiff who sued IFI and Lycoming based on the defective crankshafts. Thus, regardless of what a Texas court or jury might find, a court and jury in some other action filed by an injured plaintiff might find otherwise. Indeed, if IFI and Lycoming were sued in multiple suits by several different plaintiffs, there is no guarantee that each of those suits would result in the same findings. Conceivably, one jury could find that IFI was negligent in producing a particular crankshaft at issue in one case and another jury could find that IFI was not negligent in producing a different crankshaft at issue in another case.

In sum, Southwest's declaratory judgment claims relating to indemnity are not ripe and the court therefore lacked subject matter jurisdiction to adjudicate them.

2. The Court Lacked Subject Matter Jurisdiction To Issue The Injunction.

Even if Southwest has standing to sue on the MSA by virtue of the claimed assignment such that the court had subject matter jurisdiction over some of Southwest's claims, Southwest still lacked standing to enjoin the prosecution of the Pennsylvania litigation to which it is not a party.

For standing to exist, a party must be directly and personally aggrieved. Specifically, the party must show that (1) it has sustained, or is in immediate danger of sustaining, some direct injury as a result of the wrongful act of which it complains; (2) it has a direct

relationship between the alleged injury and claim sought to be adjudicated; (3) it has a personal stake in the controversy; and (4) (a) the challenged action has caused it some injury in fact or (b) it is an appropriate party to assert the public's interest in the matter as well as its own interest. *Walston v. Lockhart*, 62 S.W.3d 257, 264 (Tex. App.-Waco 2001, pet. denied).

Here, Southwest has no personal stake in the Pennsylvania litigation because it is not a party to that litigation. Similarly, Southwest cannot suffer a direct injury from the prosecution of the Pennsylvania litigation against the Pennsylvania defendants because that litigation seeks no relief against Southwest. *See M.D. Anderson Cancer Center v. Novak*, 52 S.W.3d 704, 707-07 (Tex. 2001) (party lacked standing to sue based on allegedly fraudulent scheme where party was not injured by the scheme).

In sum, even if Southwest has standing to prosecute some portion of the Texas suit, it has no standing to enjoin the Pennsylvania litigation.

IV. CONCLUSION

Lycoming requests that this Court hold that:

(1) The trial court erred in exercising jurisdiction over Southwest's anticipatory declaratory judgment claims seeking a declaration of non-liability. *Abor v. Black*, 695 S.W.2d 564, 566 (Tex. 1985).

(2) The trial court lacked subject matter jurisdiction over Southwest's (a) claims for declaratory judgment relating to the indemnity provisions in the MSA, (b) common law indemnity or contribution for as yet nonexistent potential liabilities and (c) claim for an

injunction precluding litigation to which Southwest is not a party. *Firemen's Ins. Co. of Newark, N. J. v. Burch*, 442 S.W.2d 331, 333 (Tex. 1968).

(3) The trial court abused its discretion in issuing the temporary injunction. Alternatively, Lycoming requests that this Court reverse the temporary injunction issued by the trial court as being overly broad.

Lycoming also requests such other relief to which it may be entitled.

Dated: October 24, 2003

Respectfully submitted,

Jack G. Carnegie
TBA No. 03826100
Scott W. Cowan
TBA No. 00786455
Joshua L. Fuchs
TBA No. 24029559
JONES DAY
600 Travis Street, Suite 6500
Houston, Texas 77002
Telephone: (832) 239-3939
Facsimile: (832) 239-3600

Attorneys for Defendant
AVCO Corporation

Of Counsel:

Richard J. Bedell, Jr. (OH 0038891)
John L. Sinatra, Jr. (OH 0070282)
JONES DAY
North Point
901 Lakeside Avenue
Cleveland, OH 44114-1190
Telephone: (216) 586-3939
Facsimile: (216) 579-0212

Richard I. Werder, Jr. (OH 0011533)
JONES DAY
222 East 41st Street
New York, New York 10017-6702
Telephone: (212) 326-3939
Facsimile: (212) 755-7306

Brent J. Cahill (TX 00796291)
318 N. LaSalle Street
P.O. Box 270
Navasota, TX 77868
Telephone: (936) 825-0239
Facsimile: (936) 825-2354

CERTIFICATE OF SERVICE

I hereby certify that, on October 28, 2003, the foregoing document was served by certified mail, return receipt requested on counsel of record as set forth below:

Harold H. Walker, Jr.
Martin E. Rose
Leane Capps Medford
Rose Walker, L.L.P.
1701 N. Market Street, Suite 200
Dallas, TX 75202

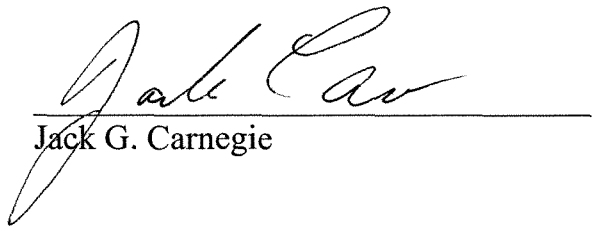
Carlton Bryan Cantrell
Cantrell & Cantrell, P.C.
1204 Sam Houston Avenue
Huntsville, TX 77340

Bruce McKissock

McKissock & Hoffman
1700 Market Street, Suite 3000
Philadelphia, PA 19103-3930

Julia A. Cook
Raymond Kalmons
Jeffrey Hirsch
Schlanger, Mills, Mayer & Silver, L.L.P.
109 North Post Oak Lane, Suite 300
Houston, TX 77024

C.J. Kling
Naman, Howell, Smith & Lee, L.L.P.
111 University Drive, East, Suite 210
College Station, TX 77840



Jack G. Carnegie