No. 067-194022-02

AMERICAN AIRLINES, INC.,	§	IN THE DISTRICT COURT OF
Plaintiff,	§ § §	
v.	§	
FARECHASE, INC.,	§ §	TARRANT COUNTY, TEXAS
Defendant,	§ §	
SABRE INC.,	§ §	
Intervenor.	§ §	67TH JUDICIAL DISTRICT

AMERICAN'S BRIEF IN SUPPORT OF
APPLICATION FOR TEMPORARY INJUNCTION

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Plaintiff American Airlines, Inc. seeks a temporary injunction prohibiting defendant FareChase, Inc. from illegally accessing and "scraping" American's AA.com® website ("AA.com"), either directly or indirectly through licensees and users of its software, without the express consent of American. American further requests that the injunction remain in effect until such time as the Court can hear and rule on American's request for similar permanent injunction relief.

In support of its application, American respectfully submits this brief as an overview of the evidence supporting injunctive relief and the claims on which American bases its request. At the hearing on February 12-13, 2003, American will present additional evidence and legal arguments in support of its request for injunctive relief.

I.   SUMMARY OF ARGUMENT

Defendant manufactures and licenses software that secretly enters AA.com and electronically extracts pricing and scheduling data. In this way, FareChase profits by enabling

unauthorized parties to redistribute American's webfares. This thwarts American's efforts to reduce its costs, build its customer goodwill, and improve its business.

Among the firms that currently use FareChase software is intervenor Sabre Inc. Working in conjunction with FareChase, Sabre has developed a product known as "Webfares by FareChase" that enables its subscribers to access and sell American's webfares through e-Voya, an Internet platform.

American tries to protect its website from scrapers through the terms of its AA.com User Agreement, which prohibits the use of automated devices to scrape the website and allows only non-commercial use of the data it contains. FareChase refuses to comply with the terms of the AA.com User Agreement, however, and instead has continued to directly access the site for its commercial purposes and license its software to third parties to scrape the site. In so doing, FareChase wrongfully appropriates valuable data and capacity on AA.com and infringes established property rights of American.

FareChase's conduct has forced American to block scrapers off the AA.com site with technological barriers directed at specified IP addresses. FareChase has responded by hiding its scrapers' identities through the use of fake IP addresses, thereby evading the blocking firewalls. As a result, it is impossible for American to prevent access by the FareChase software or even to know with certainty the extent of scraping due to the software. Discovery taken so far leaves no doubt that without immediate injunctive relief American faces the risk of serious and irreparable injury to its computer infrastructure, goodwill, and business plans.

American's concerns about the magnitude of the impending threat that FareChase software poses are amply justified. Although FareChase and Sabre have suggested that a massive dissemination of the software would not occur until the Court rules on American's

request for injunctive relief, it is clear that the rollout continues unabated. Indeed, extensive groundwork has been laid for immediate and widescale deployment of the software through Sabre and other licensees.

American comes to the Court to protect its webfares, its website, and even its very business. In contrast, the FareChase software, which scrapes at least 150 travel-related websites, easily can be modified to eliminate AA.com as a searchable site, so that the relief requested will not limit FareChase's ability to license its software to scrape consenting websites.

For these reasons, issuance of a temporary injunction is proper and necessary until such time as this Court can conduct a permanent injunction hearing.

II.   PROCEDURAL HISTORY

For the past six months, American has been fighting to protect its important business and property interests that are jeopardized by FareChase's conduct.

After FareChase refused written demands to stop scraping AA.com, American filed suit on July 24, 2002 for injunctive relief under Texas law. By agreement of the parties, American's temporary injunction hearing was scheduled for November 14-15, 2002.

Weeks before the scheduled hearing, American produced documents and made its witnesses available for deposition. In contrast, FareChase did not produce any witnesses for deposition, despite promising to do so, and provided only a handful of requested documents. Sabre, which intervened on October 1, 2002, likewise produced no witnesses for deposition nor any documents in advance of the November hearing.

Rather than proceeding with the agreed discovery and injunction hearing, FareChase sought delay. It improperly removed the case on November 1, 2002 to the Northern District of Texas. Eventually, upon American's motion, the Hon. John McBryde remanded this

case on December 6, 2002. Judge McBryde found that removal was defective at its inception, both because FareChase far exceeded the 30-day removal deadline, and was therefore untimely, and because it took actions in this Court that directly undercut its assertion of federal jurisdiction. During the pendency of this action in federal court, FareChase resisted all discovery requests.

Upon remand, American immediately moved for a TRO against FareChase on December 9, 2002. Based upon the express representations by FareChase and Sabre that the software would not be disseminated before a hearing on American's request for injunctive relief, however, American agreed to hold its TRO motion in abeyance. Thereafter, American finally was provided an opportunity to depose FareChase and Sabre witnesses.

III. RELEVANT FACTUAL BACKGROUND

A. The Airline Industry Is in Crisis.

The fact that the airline industry is in severe economic difficulty today is "common knowledge." (Harrell at 102:5-9)[1] "Airlines are in dire financial condition." (Keszler at 24:16-20; PX3 at 4) The industry has incurred record losses (Keszler at 25:8-10), and two major carriers have sought bankruptcy court protection. Of all U.S. carriers, American is losing the most money, roughly $500 million a quarter for the last three quarters (Kreeger at 30:4-12), including total net losses in 2002 of $3.5 billion. (PX137)

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[1] The prefix "PX" refers to Plaintiff's Exhibits, which are provided to the Court in a separate binder, with the exception of Exhibit 120A (a video recorded interview of FareChase CEO Lior Delgo) which will be offered at a later time. Deposition testimony cited herein is designated by the name of the deponent, followed by appropriate page and line references (e.g., Hyden at 86:12-19). Excerpted testimony is provided to the Court in a separate binder and includes testimony from the following witnesses: (1) Craig S. Kreeger, Vice President of Passenger Sales for plaintiff American (Exh. A); (2) Scott L. Hyden, Managing Director of Product Management for Interactive Marketing (Exh. B); (3) Lior Delgo, President of defendant FareChase (Exh. C); (4) Krista Pappas, Senior Vice President, Strategic Development & Partnerships, for defendant FareChase (Exh. D); (5) Ofer Shaked, Chief Technology Officer for defendant FareChase (Exh. E); (6) Robert W. Harrell, an expert witness retained by defendant FareChase (Exh. F); (7) Frederick Scholl, an expert witness retained by defendant FareChase (Exh. G); and (8) Ellen Keszler, Senior Vice President North America Travel Agency Solutions, for intervenor Sabre (Exh. H).

As a result, American is taking a hard look at all aspects of its business model, including the high cost of distributing airline tickets.

B.   Traditional Channels of Distributing Airline Tickets Entail Excessive Costs.

For the past twenty years, the primary method for distributing airline tickets in this country has been computer reservation systems ("CRSs"), of which Sabre is one. Annually, American pays roughly $400 million in fees to CRSs for booking and distributing its airline tickets, including $200 million to Sabre alone. (Kreeger at 150:16-23; Keszler at 37:22-38:1). In contrast to conditions among the beleaguered airlines (excepting, of course, Southwest Airlines), CRSs remain extremely profitable. Last year alone Sabre generated operating profits in excess of $400 million on revenues of $2 billion. (Keszler at 230:20-231:1)

CRS booking fees are not subject to normal competitive market pressures and are therefore excessively high. When airline tickets are purchased through a CRS, the booking fees are paid by the airline, not the travel agent who selects the CRS. In the absence of any incentive on the part of the agent to negotiate with the CRS to control costs, booking fees have consistently risen and are today a significant and growing expense for the airline industry. On average, booking fees paid to CRSs over the last several years have risen about seven percent per year, at a time (paradoxically) when the costs of the underlying technology have been decreasing. (Kreeger at 36:21-24) Even FareChase recognizes CRS booking fees to be "excessive." (Pappas at 48:4-9; PX28 at 20)

High booking fees not only contribute to American's financial losses, they also help place it at a competitive disadvantage to low-cost competitors such as Southwest Airlines, which rely heavily on their own websites to sell tickets directly to consumers. (Keszler at 51:17-23)

The need for fundamental change in the travel industry is self-evident. Even Sabre, which continues to profit from the current system -- and in fact just announced yet another increase in booking fees (Keszler at 38:7-10) -- acknowledges that the business model in today's travel industry is "broken" and would be "more stable if changed." (Keszler at 25:20-26:11; PX3 at 6)

C. FareChase Developed Software to Covertly Scrape Airline Websites.

FareChase develops, markets, manufactures, and licenses to third parties "screen-scraping" software programs that deploy "automated" electronic "robots" and "spiders" to enter targeted websites to find and "take" "webfares" and scheduling data.

These are not American's words; these are terms that FareChase and Sabre use themselves. According to a glossary in a Sabre report last November:

Terminology

Web fares -- non published airline fares available for booking only on the individual carrier websites. . . .

Fare Aggregator -- a company whose software gathers fares by querying other websites. . . .

FareChase -- the Fare Aggregator for this project. . . .

Screen Scraping -- taking content from the screen, translating and reformatting it into usable content for the new application. FareChase uses screen scraping programs to gather the information from other websites, then displays it in their own (FareChase's) format.

(PX68 at 5; Keszler at 239:10-240:2) Similarly, FareChase's top marketing executive, Krista Pappas, publicly has described its software as a "shopping bot" -- "Short for 'robot,' a bot is a software tool for sorting through data" -- that "spiders the Internet to search sites." (PX117 at 1-2)

Unlike robots that reach only the "surface web," FareChase software digs into the site more deeply. It goes to the "deep web," taking a user beyond a site's home page to deep transaction pages like the booking page found on airline websites. (Pappas at 87:21-88:18) The software "drills down to the availability level." (PX138 at 5) In fact, FareChase boasts of its ability to reach the "deep content" of airline websites, including webfares. (Pappas at 90:14-23)[2]

FareChase searches are conducted through "data retrievers" — site-specific software that enables a licensee to scrape a particular website. FareChase has developed some 150 data retrievers, each of which scrapes one site. Together these data retrievers search all 150 websites simultaneously, in "real time." (PX30 at 1) By design, FareChase software easily can be modified to activate or deactivate specific data retrievers, thereby affecting the ability of the software to search particular websites. (Pappas at 67:17-68:14; Shaked at 31:3-19; 45:5-23)

FareChase software conducts its scraping on a massive scale, with each server machine performing "roughly like 10,000 users intensively accessing sites." (PX28 at 17) After accessing the deep content of a website, FareChase's software "mines" that information and "retrieve[s]" and "present[s]" it to the user. (PX30 at 1) The software then deposits the user directly to the scraped site's booking page, bypassing all other screens of the website. (Pappas at 85:3-18)[3]

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[2] In this way, FareChase searches are qualitatively different from the type of electronic monitoring done by companies such as KeyNote, which merely pull up the home page of a site to time its accessibility. (Pappas at 84:18-85:18; 129:12-24)

[3] American's ability to understand the intricacies and vagaries of FareChase's software has been limited for several reasons: (1) FareChase has refused to disgorge its source code. (2) Its chief technology officer, Mr. Shaked, has been less than informed on many technical issues about the software. (3) The software development team was almost entirely fired by or otherwise left the company. Only one of the ten original developers is still at FareChase. (Shaked at 152:19-153:6) Moreover, the key co-developer and company co-founder, Boaz Behar, is no longer employed by Fare Chase. (Delgo at 32:24-33:16) This departure apparently was recent, since Mr. Behar was listed as part of management as late as September 2002. (PX28 at 26, 30)

D. The FareChase Software Illegally Accesses and Scrapes AA.com

In light of the AA.com User Agreement, FareChase denies that its software functions automatically, as a robot, to find and retrieve website data. (Delgo at 41:24-42:16; Scholl at 86:7-25) In fact, to a person, the FareChase witnesses have denied ever using, or even understanding, the word "robotic."[4]

The documents tell a different story. When writing about FareChase's "Web Automation" software, Sabre employees have said that it acts "as a robot," that it interrogates "multiple airline websites simultaneously," and that it "uses screen scraping programs to gather the information from other websites." (PX69 at 3; PX68 at 5) Not surprisingly, Sabre employees have referred to the software as "robotic." (Keszler at 242:15-243:4) In its own materials, FareChase likewise describes its software as "robotic type technology," which searches travel websites. (PX127 at 5) FareChase even posts on its own website a number of news articles that refer to its automated, robotic, screen-scraping software. *See* PX118 (*Travel Weekly* article regarding "screen scraper FareChase"); PX119 at 2 (*Red Herring* article quoting Delgo that FareChase specializes in "web automation").

Although masking hides the full extent of its activity, there is no question that FareChase and its software access and scrape AA.com. FareChase tracks the searches and bookings done with its software. During a one-week period in early December 2002, FareChase licensees performed over 9,000 searches using the software. (PX134 at 1) Sabre has conceded that it uses FareChase software to scrape AA.com. (PX139 at 3) In addition, FareChase admits

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[4]   Implausibly, FareChase's president, who is responsible for managing its relationships with its licensees (Delgo at 91:3-16), has claimed ignorance of such industry terms as "screen scraping," "spiders," "web bots," and "crawlers." (Delgo at 100:6-12)

that it repeatedly has accessed AA.com during the past six months in order to update its software as a means to insure the continuation of its scraping capabilities. (Shaked at 42:23-43:15)

More importantly, it is clear that plans have been laid for a massive deployment of the FareChase software in the coming months. FareChase already has licensed its software to over a dozen customers, several of whom are among the largest travel agencies in the world. (PX140 at 1-3)[5] These agreements present FareChase with a huge opportunity to distribute its software.

Indeed, FareChase estimates that use of its software will grow markedly this year. According to its projections, purchases of tickets with its software will rise to over 1300 per day by year end. (PX136 at FC01825) Because the *searches* for tickets far exceed the actual *purchases*, the scraping activity associated with FareChase software will grow at an even more exponential rate. As of December 17, 2002, for every purchase of a ticket using its software, there were about 165 searches (also known as the "look-to-book" ratio). (Delgo at 151:11-152:16; PX134 at 1) On that basis, the number of searches made by FareChase licensees in 2003 will rise from 1815 per day in January (11 average bookings/day multiplied by a look-to-book ratio of 165) to a staggering 216,480 searches/day by December.[6]

This activity not only would represent a significant increase in the use of AA.com's capacity, but it also would occur through the use of software which deeply scrapes the site, exposing AA.com to heightened levels of stress. Furthermore, because this scraping would

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[5] It appears that FareChase may have deceived at least one licensee during licensing agreement negotiations. The chief executive of Last Minute Travel, an Atlanta-based Internet travel agency, claimed in November 2002 that his company was "fraudulently induced" to enter into its licensing agreement. "FareChase actually knew it was embroiled in legal action with a leader in the airlines industry [American], but did not disclose that material fact to LMT during our contract negotiations or prior to contract signing." (PX92 at 1) FareChase responded by telling Last Minute Travel simply to "remove" the "problematic" AA.com data retriever and pay the license fees. (PX91)

[6] A chart of FareChase's projected monthly searches in 2003 is attached as PX141.

occur without consultation with American, its ability to plan for use of AA.com would be seriously impaired.[7]

E. Internet Fare Distribution Systems Are a Low-Cost Alternative.

Internet-based distribution systems for airline fares, such as AA.com, are a lower-cost alternative to traditional CRS-based distribution. Through AA.com, American's customers can use the World Wide Web to purchase tickets directly, without going through a CRS.

The AA.com website offers special low-priced webfares. These fares are not available to buy through high-cost CRSs, but instead are available through AA.com and other low-cost distribution channels, such as travel agents in American's "EveryFare" program and certain websites like Orbitz and Travelocity (a Sabre subsidiary) that have agreed to provide lower-cost distribution for all of American's fares. Today, webfares are a "standard" part of the U.S. airline business and are offered by all major airlines. (Harrell at 132:9-14)

American's webfares and website represent a major effort to lower distribution costs and provide customers with lower fares so that it can compete in the marketplace. As such, American has expended considerable resources in time, labor, equipment, and money to maintain and operate the site. Among other steps to satisfy its consumers, American extensively upgraded and relaunched its website in April 2002, making a capital investment of over $27 million and incurring expenses of over $4 million. (PX 142 at AA/FC 07124])

To be sure, webfares are extremely popular with the traveling public. (Pappas at 54:20-22) And for good reason -- they offer great value. As a result, the popularity of airline

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[7] The imminence of a massive deployment of FareChase software is also confirmed by its own revenue projections. According to FareChase, its revenue will quadruple between the first and fourth quarters of 2003, reaching a year-end total of $2 million. Its projected revenue then would grow over five-fold during 2004, totaling $11 million for the entire year. As an indication of the explosive growth it anticipates, FareChase's projected revenues for the second quarter 2004 will exceed its revenues for all of 2003. (PX136 at FC01830)

sites, where webfares are featured prominently, has burgeoned. AA.com, for example, has had as many as 1.1 million visitors on a single day and currently averages 750,000 daily visitors. (Hyden at 86:12-19) Of those daily visitors, 16,000 on average purchase tickets. (Hyden at 182:21-183:4) This growing popularity of airline websites has not gone unnoticed. According to Sabre estimates, ten percent of all airline tickets are currently sold directly from airline websites, a number that will increase to as much as 35 percent within four years. (Keszler 111:20-112:2)[8]

F. The EveryFare Program Is a Low-Cost Alternative.

American offers its webfares not only to its customers on AA.com, but also to anyone that will offer comparably low-cost distribution for all American fares. (Kreeger at 35:19-36:7)

In that spirit, under its new EveryFare program, American provides its webfares to participating travel agents who agree to pay the CRS booking fees directly, in exchange for a declining credit paid by American. (Kreeger at 71:7-72:17) By assuming responsibility for any difference between this credit and the CRS booking fee, travel agents will be incentivized to negotiate lower booking fees and patronize the CRS charging the lowest fee. By providing webfares, the EveryFare program benefits travel agents by growing their client base and slowing the erosion of business to the Internet. (Kreeger at 127:23-129:1) American benefits from the EveryFare program through a reduction in its booking fees, perhaps by as much as $200 million a year, within a five period, if all travel agents agree to participate. (Kreeger at 150:16-151:16)[9]

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[8] American's efforts to deliver better customer service through its website also have been commended in the industry. AA.com has been recognized for its excellence, receiving the Outstanding Website WebAward last September for the second time. (PX143)

[9] American's agreements with Travelocity and Orbitz contain comparable economic terms and provide similar cost savings. (Kreeger at 365:11-23)

EveryFare introduces competitive pressures into a marketplace where CRSs have reaped above-market profits for years. For well over a decade, CRS vendors have charged supracompetitive booking fees. Ultimately, this is bad for consumers. Above-market booking fees caused airfares to rise, because they are passed along to consumers in the form of higher ticket prices.

Not surprisingly, American's EveryFare initiative is disliked by CRSs. In Sabre's words, "we would be just as happy if the [EveryFare] program didn't exist." (Keszler at 119:12-120:1) In contrast, other observers in the travel industry recognize EveryFare for the paradigm-breaking step that it is. FareChase's retained airline expert, for example, has praised EveryFare as an attempt by one carrier to address the issue of high distribution costs in a "rather significant way," with a "new" and "innovative" program for the "long term." (Harrell at 99:21-100:8)

G. Webfares Are Being Targeted by CRSs.

Webfares already have caused CRSs to lose some "market dominance." (Pappas at 54:23-55:11; PX28 at 5) They also have become a significant issue for CRS-dependent travel agents who have not joined the EveryFare program. (Keszler at 45:20-46:3) Without access to webfares, travel agents cannot represent to the traveling public that they offer the lowest priced tickets. Consequently, as the popularity of airline websites and webfares have soared, travel agents have been asking increasingly about webfares. (Keszler at 80:8-11)

In contrast to the public, who is demanding lower prices and more webfares, CRSs would prefer for webfares -- just like EveryFare -- to disappear altogether. Sabre admits this: "it would be good for Sabre if there were less or no webfares in the marketplace today." (Keszler at 107:7-12) Indeed, forcing American to offer webfares through the high-cost computer systems maintained by CRSs, as Sabre's recent counterclaim seeks to do, would

accomplish that goal by destroying the economic incentive for offering low-priced webfares in the first place.

Taking webfares through FareChase software is one way for CRSs to protect their lucrative market dominance. Because of the growing popularity of online sales by airline websites, and other initiatives to reduce booking fees like EveryFare, Sabre faces the prospect that the supracompetitive profits it derives from booking fees will be eroded. According to Sabre projections, its partnership with FareChase could allow Sabre to avoid a loss of at least $100 million in booking revenue by 2005. (Keszler at 185:10-15)

Sabre has wasted no time to install the FareChase software. It is now available to nearly 7500 of its travel agencies, by means of Sabre's e-Voya web-based platform. (Keszler at 140:19-141:5) Sabre also plans to make FareChase software available to its international travel agents, by means of its e-Voya platform. (Keszler at 171:14-172:1)

All told, the reality is that FareChase software will be installed on thousands of CRS computers, each with the capability to scrape AA.com on an ongoing basis. According to FareChase's own projections, the FareChase software will be increasingly utilized throughout 2003, reaching a total of over 215,000 daily searches by December 2003. Accordingly, American faces a significant threat of imminent harm.

H. American Protects AA.com Through its User Agreement.

Given the significant investment American has made in AA.com, and the proven value of websites, including as low-cost distributors, American protects access to its site with a user agreement. The provisions by which American protects its site are common to countless other websites, including those associated with FareChase and Sabre.

The AA.com User Agreement states that, "[i]n return for gaining access to the Site and using it, [the user] agree[s] to be bound by [the Agreement] without limitation or qualification." (PX1 at 1) It permits only "personal, non-commercial use" of the fares contained on the AA.com website. (*Id.* at 2) Thus, travel agents and CRSs with which they are associated cannot use AA.com to sell or book webfares absent American's consent. Additionally, the Agreement prohibits misuse of AA.com, including monitoring or copying content by using "any robot, spider, or other automatic device" without American's consent. (*Id.* at 3) The User Agreement is accessible from each page displayed while booking a ticket on AA.com, through the icon "Legal." *See www.aa.com.*

Notably, websites maintained by FareChase and Sabre have identical terms. Thus, they specify that a visitor to the site is bound by virtue of access to or use of the site:

- The user agreement for FareChase's website (*www.farechase.com*) provides that the "terms and conditions set forth below govern your use of the site and are legally binding on you." (PX34)

- The user agreement for the website of Travelocity (*www.travelocity.com*), the Internet travel agency business of Sabre, provides that "[b]y using this site, you signify your assent to these terms and conditions." (PX79)

- The user agreement for the website of GetThere (*www.getthere.com*), another Sabre business, provides that "[b]y accessing this site, you are signifying your assent and agree to the user agreement" and, as a result, the user agreement represents "a binding contract between you and GetThere." (PX80)

Provisions prohibiting misuse of the site, including robots, spiders, and automated devices, and allowing only non-commercial use, are also on websites maintained by FareChase and Sabre:

- The FareChase user agreement provides, "You agree that you will not use any robot, spider, other automated device . . . to access or use the Site in any way"; it also limits the website to "personal use." (PX34)

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- The user agreement for the "WebFares by FareChase" product prohibits the use of any "robot" or "spider" to access the e-Voya portal in any way. (PX23 at S/AA 001797)

- Sabre's Travelocity website provides, "You may not use any 'robot,' 'spider' or other automatic device . . . to monitor or copy any of the Web pages, data or content found on this site." (PX79)

- Sabre's GetThere website agreement allows use of its site "only for your personal, informational, internal, noncommercial use." (PX80)

In other words, the key terms of AA.com's User Agreement are used by all parties to this case to protect their respective websites.[10]

I.   FareChase Is Harming and Taking Unfair Advantage of AA.com.

FareChase is a free-rider on the significant investment American made in AA.com. As such, its improper actions provide it with an unfair advantage at American's expense. FareChase has not invested in creating a computer system and website capable of maintaining, storing, and providing access to airfare and scheduling data, including webfares, on an ongoing, substantial basis. Nor has it invested in the maintenance and support of such a website or in the resources dedicated to producing the fares at issue. Instead, FareChase pirates information by covertly accessing and using AA.com capacity for free -- taking advantage of property that American has invested substantial resources in building and maintaining.

FareChase software harms American by burdening AA.com in three significant ways. First, scraping by the software uses capacity on AA.com, burdening the site and depriving legitimate users of capacity on the site. Second, American has been required to implement blocking protections to bar IP addresses associated with screen scrapers. Because FareChase

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[10]   In fact, FareChase instructs users of its website that the copying or printing of information from another party's website (e.g., AA.com) is subject to the terms and conditions of that party's website. (PX34 at FC 00475) Sabre even goes further and extracts a promise from users of its "WebFares by FareChase" product to abide by the user agreement of any website searched with the software. (PX23)

software includes a masking feature to disguise the scraper's identity, blocking techniques can be only partially successful at best. Third, the software frustrates American's efforts to build customer goodwill in AA.com, through an informative, user-friendly, speedy site.

1. American's loss of capacity of AA.com

American plans for its website to have certain capacity based on predicted patterns of use. In particular, American expects the site to be used by individuals, who have typical patterns of use, such as what times they visit, what parts of the site they visit, and what types of searches they perform. In the few instances where automated users are allowed to access the website, it is because American plans for such use and has determined that it is commercially beneficial.

Each time FareChase software spiders AA.com, it consumes capacity and disrupts the standard pattern of use for the site. This "stress" on the system, which FareChase privately concedes, is worse when the targeted website does not cooperate with FareChase. (Pappas at 107:19-108:16; PX28 at 24)

Moreover, increasing volumes of robotic crawling has the potential to cause delays for legitimate users of AA.com or, worse, a crash of the system making it unavailable, damaging the reputation and goodwill that AA.com enjoys with the public. The number of searches by FareChase software in a seven-week period in late 2002 exceeded 54,000 searches. (PX134) While not yet large, in relation to the total activity conducted on AA.com, it nonetheless stresses the website and increases the potential of system malfunctions and loss of goodwill.

Further installations of FareChase software pose even greater risks to AA.com. The intense scraping of AA.com that would ensue from the projected deployment of the software

would increase the likelihood of delays, crashes, and the resulting loss of consumer goodwill. By December 2003, FareChase scrapers will be making over 215,000 daily searches on AA.com. The next year is even worse. Based on FareChase projections, the scraping would increase five-fold during 2004. (PX136 at FC 01830)

Beyond that, FareChase has "many competitors that are offering similar functionality to what FareChase is offering." (Delgo at 32:3-20) These companies include Agentware, Sidestep, Qixo, FareWeasel, Dolphin, Farequest, TRX, and Excambria. (Delgo at 103:2-104:17; PX125 at 1; PX126 at 2; PX127 at 6) The common "link that ties these companies and FareChase together" is their "robotic type technology" to scrape travel websites. (PX127 at 5) Thus, if FareChase is not enjoined, all of its many competitors will attack AA.com in a veritable feeding frenzy of robotic searches.

2.   American's steps to protect AA.com

To keep FareChase scrapers off the AA.com website, and to protect its webfares, American has been forced to set up technological barriers to their entry.

These blocking techniques work by identifying the IP address of a user visiting the website, comparing the address to a list of IP addresses that American can identify as associated with a known scraper -- e.g., FareChase or its licensees -- and then blocking access if the scraper is recognized. This technology burdens AA.com by occupying system capacity, hindering system performance, and slowing down the response time for legitimate users of AA.com. (Hyden at 158:14-20, 160:5-17)

FareChase knows all about blocking. It has devised a simple but effective way to evade airline website blocking techniques. Simply by "masking" or disguising the identity of the scraper, through the use of so-called "proxy" servers, FareChase neutralizes the sites' blocking

firewalls. (PX18 at S/AA 001908) Hiding the identity of electronic visitors is a tried-and-true technique of "spam" and similar email companies. (PX145 at 2)

The surreptitious purpose of masking is self-evident. As FareChase acknowledges, masking is the e-commerce equivalent of putting on "a different face" to mask the IP address, "[j]ust like at Halloween . . . that makes it impossible to know who the searcher is." (Pappas at 143:6-16)

IP masking was incorporated into the FareChase software because it knew that some websites object to scraping. In its 2002 Business Plan, FareChase noted that certain websites "may not welcome FareChase's searches," and some already were "unhappy with our searches." (PX28 at 24) FareChase concluded that "Potential Hostility" from these sites was among the "Critical Risks" to its success that "need[ed] to be proactively managed." (Id.)

FareChase's concerns became reality during the Sabre rollout. Both American and United Airlines indicated that they intended to block "fare bots" directed at their sites. Sabre immediately asked FareChase to implement the masking tool to ensure that "we have a technical solution in place to bypass their [American's and United's] efforts." (PX19 at S/AA 002690) In fact, Sabre's interest in masking began early in its relationship with FareChase, with the masking feature (euphemistically called "IP Address Visibility") listed as a "High Priority" item as part of its work with FareChase. (PX17 at S/AA 001915)

In "proactively manag[ing]" the hostility of objecting websites, FareChase's masking feature has been successful. Last September, FareChase told Sabre that "AA is not blocking us at all right now" and e-Voya "is getting webfares from AA.com." (PX19 at S/AA 002689) In addition to what it did for Sabre, it appears that FareChase provided similar assistance to its licensee Outtask, roughly during the same time period. (PX110 at FC 00583)

These masking techniques require American to expend considerable time and resources to try to ferret out IP addresses belonging to scrapers. Ultimately, it is an impossible task. Scrapers can change IP addresses at will, and apparently do, according to FareChase. (Shaked at 185:21-186:7) FareChase implements the change, and has custody of the new addresses, yet it refuses to divulge the information to American. (Shaked at 183:8-184:21) Without the IP addresses, the scraping essentially cannot be blocked. (Shaked at 181:17-182:18)

3. American's loss of goodwill in AA.com

By occupying increasing capacity on AA.com, FareChase could cause legitimate users of AA.com to experience delays, crashes, and other system malfunctions. As a result, customers are likely to become frustrated and dissatisfied with their website experience, thereby damaging AA.com's reputation and goodwill in the estimation of the traveling public. In so doing, FareChase deprives American of the benefit of the substantial investment it has made in AA.com. The value of operating a website that is well designed and well marketed (like AA.com) is beyond dispute. Indeed, Sabre tells its own travel agents that such a website can increase both revenues and operating efficiencies. (Keszler at 60:24-63:19)

FareChase also damages American's goodwill by transporting users of AA.com directly to its booking page. Consequently, the user is not exposed to various preliminary pages of AA.com, which contain important information concerning American and its business and thereby aid American in establishing an ongoing relationship with its customers. This so-called "deep-linking" feature of the FareChase software impairs American's ability to interact with its best customers, thereby damaging its goodwill. (Kreeger 31:20-22; 117:20-118:19)

Finally, FareChase's conduct threatens American's reputation. The FareChase software displays American's fare and scheduling data in a manner that suggests the airline's approval. In that way, every use of the software potentially affects American's reputation with

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travel agents and other users and consumers. Every glitch in the program also could reflect on AA.com's reputation for reliability and technical excellence.

J.   FareChase Is Harming American's Fare Distribution Strategy.

FareChase targets CRSs and large travel agencies as potential customers for its software. (Pappas at 93:21-94:7)

By targeting the "largest channels of distribution," FareChase intends to make its software available to "tens of millions of users per month." (Pappas at 101:3-8; PX28 at 21) Its plan continues to be to "aggressively" market its scraping software:

> Q.   And is it correct that FareChase's current business strategy is to aggressively market its Web Automation software?
>
> A.   Yes.
>
> Q.   And to roll it out to as many licensees and potential users as it physically can do in the coming 12 and 24 months? . . .
>
> A.   Our plans are to implement our software on as many potential licensees, yes.

(Delgo at 176:7-24) These FareChase users are high-cost distributors who have refused to reduce American's high distribution costs.

The scraping of AA.com by FareChase and its licensees undermines American's ability to use webfares to encourage low-cost distribution channels. If webfares can be taken for free by high-cost distributors, American cannot create incentives to drive down booking fees. Without these low-priced webfare incentives, American's goal of constructing a new lower-cost business model is significantly and irreparably impaired.

The risk that FareChase poses to the EveryFare program is particularly acute. Although the program has had some success so far, with about ninety travel agencies signing on, that success has been hampered and will be jeopardized if, in the absence of injunctive relief,

FareChase makes its AA.com data retriever widely available. Travel agents will have no incentive to agree to assume a direct role in lowering booking fees, if those webfares are obtainable by other means. (Kreeger at 281:24-282:17) American would lose the considerable investment it has made in developing and marketing EveryFare, as well as the opportunity to direct its webfares to those who are willing to offer long-term savings on all fares.

K.   American Has Requested FareChase to Stop.

On May 15, 2002, American notified FareChase that its use of AA.com was in violation of the User Agreement and demanded that it cease its unauthorized use of the site. At the same time, assuming that use of the software was limited in scope, American invited FareChase to discuss a mutually satisfactory arrangement for access to AA.com. (PX146) Thereafter, in a face-to-face meeting, American again requested that FareChase cease its unauthorized access to AA.com. American also offered to discuss the possibility of a license agreement that would permit FareChase to pay for limited access to AA.com.[11]

During the course of the discussions, American became aware of facts that created considerable doubt as to whether any agreement could be reached with FareChase, barring a change in FareChase's basic business strategy. First, FareChase disclosed that, while AA.com had been removed from the list of sites searched by FareChase directly (from *www.farechase.com*), its licensees were still using FareChase software to scrape AA.com. (PX149) Second, FareChase represented that software provided to its licensees simply could not

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[11]   American is not the only airline to have resisted or objected to FareChase scraping. Early on, United Airlines instituted blocking measures against the scraping. (PX101 at S/AA 002792) Continental Airlines also has objected, saying that "unauthorized access" by the FareChase software "causes Continental direct harm and violates Continental's rights in [its] website and [its] proprietary data and information." (PX147 at FC 02039) Similarly, Northwest Airlines has objected. (Keszler at 273:1-12) Even Southwest Airlines appears to be taking a dim view of screen-scraping of its website. (PX148 at AA/FC 03550)

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be altered to remove the AA.com data retriever. Finally, and most disturbing to American, FareChase admitted that its software already had been widely distributed and its relationship with certain licensees was more advanced than American had realized, including an eight-month partnership with Sabre. (PX150 at AA/FC 06815, 09133)

American promptly demanded that FareChase take steps to insure that its licensees were not scraping AA.com, including replacing distributed software or providing American the identity of all licensee IP addresses so that blocking could be implemented. At that time, as well as later, American informed FareChase that it sought compensation for each booking and search transaction performed by FareChase or its licensees on AA.com. (PX149; PX151 at AA/FC 08137)

FareChase rebuffed the requests, and this lawsuit was filed on July 24, 2002.[12]

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[12] Significantly, FareChase's recalcitrant attitude developed only recently. Early on its then-CEO announced publicly that it only would scrape sites that consented. In a 2001 *Business Week Online* video interview, Mr. Delgo pointed out the "very good" reaction he was getting from the "big airlines," due to his company's cooperative "attitude":

> Host: Have you managed to strike deals with any of the big airlines – United, Continental, American?
>
> Delgo: It's too soon for us to announce any kind of deals, but I can tell you that we did sign with close to a dozen and the *reaction we are getting from them is very good and I think it's mostly because we are listening to what they have to say . . . I think it's the attitude of sitting with them and saying we will not search you if you don't want to be searched* and you have to understand that we bring tons of business to your site and you are in the business of selling from your sites, so why not?

(PX120 at 3-4; PX120A) He then added an example of his company's cooperativeness:

> Host: Has anyone told you, "no we don't want to be searched?
>
> Delgo: Yeah, Travelocity. They sent us a simple letter, a very polite letter, saying we're not yet ready. You guys are new. It's a new technology. We need to learn more about that and maybe then. *Immediately we just dropped them from the site . . . .*

(PX120 at 4; PX120A) Similarly, in its 2002 Business Plan, FareChase committed to "continue to work with them [objecting websites] in order to reach an agreement that is acceptable for all parties." (PX28 at 24) Regrettably, this early cooperativeness of FareChase no longer exists.

IV. REQUIREMENTS FOR A TEMPORARY INJUNCTION

A trial court has broad discretion to grant an application for a temporary injunction. *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 204 (Tex. 2002). The only question in a temporary injunction hearing is whether the movant is entitled to preservation of the status quo of the subject matter of the suit pending trial on the merits. *Transport Co. of Texas v. Robertson Transports, Inc.*, 261 S.W.2d 549, 556 (Tex. 1953). To obtain a temporary injunction, the movant must: (1) plead a cause of action against the defendant; (2) prove a probable right to the relief sought; and (3) a probable, imminent, and irreparable injury in the interim. *Butnaru*, 84 S.W.3d at 204.

A. General Injunction Standards

1. Probable right of recovery

A temporary injunction hearing is not to be used to resolve the merits of the lawsuit. *DeVilbiss v. West*, 600 S.W.2d 767, 768 (Tex. 1980); *Executive Tele-Communication Systems, Inc. v. Buchbaum*, 669 S.W.2d 400, 402 (Tex. App.--Dallas 1984, no writ). In establishing a probable right of recovery, the movant need not establish that he will prevail at trial; rather, the evidence need only *tend* to support a right of recovery by the movant. *Camp v. Shannon*, 348 S.W.2d 517, 519 (Tex. 1961). The probable right of recovery element means only that a bona fide issue as to the movant's right to recovery must be shown. *183/620 Group Joint Venture v. SPF Joint Venture*, 765 S.W.2d 901, 904 (Tex. App.--Austin 1989, writ dism'd w.o.j.).

The existence of conflicting evidence does not preclude the granting of a temporary injunction. *Davis v. Huey*, 571 S.W.2d 859, 862 (Tex. 1978). Moreover, the trial court has the discretion to grant a temporary injunction and reserve difficult questions of law and

fact for full development at trial. *Liberty Mut. Ins. Co. v. Mustang Tractor & Equip. Co.*, 812 S.W.2d 663, 666 (Tex. App.--Houston [14th Dist.] 1991, no writ); *Keystone Life Ins. Co. v. Marketing Mgmt., Inc.*, 687 S.W.2d 89, 92 (Tex. App.--Dallas 1985, no writ). For example, the existence of a potential affirmative defense does not preclude the granting of a temporary injunction. *Keystone*, 687 S.W.2d at 93; *see also DeVilbiss*, 600 S.W.2d at 768 (holding that a "trial court is not authorized to determine the merits of the plea in bar [based on the affirmative defense of res judicata] in a hearing on an application for a temporary injunction").

2. Probable, imminent, and irreparable injury

Probable injury involves the concepts of irreparable injury, inadequate legal remedy, and imminent harm. *See, e.g., Miller Paper Co. v. Roberts Paper Co.*, 901 S.W.2d 593, 597 (Tex. App.--Amarillo 1995, no writ). An injury is irreparable if the injured party cannot be adequately compensated in damages or if the damages cannot be measured by any pecuniary standard. *Butnaru*, 84 S.W.3d at 204. A party has "no adequate remedy at law if damages are incapable of calculation or if the defendant is incapable of responding in damages." *Texas Indus. Gas v. Phoenix Metallurgical Corp.*, 828 S.W.2d 529, 533 (Tex. App.--Houston [1st Dist.] 1992, no writ). In addition, a legal remedy is inadequate if an award of damages may come too late. *Miller Paper*, 901 S.W.2d at 597.[13]

3. Status quo

The purpose of a temporary injunction is to maintain the status quo. *Butnaru*, 84 S.W.3d at 204. The status quo is defined as "the last, actual, peaceable, non-contested status which preceded the pending controversy." *Universal Health Servs., Inc. v. Thompson*, 24

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[13] A temporary injunction is proper if "irreparable injury to real or personal property is threatened, irrespective of any remedy at law." Tex. Civ. Prac. & Rem. Code Ann. § 65.011(5)(Vernon 1997). In any event, even if an inadequate legal remedy were a requirement in this case, the evidence demonstrates that American does not have an adequate remedy at law.

S.W.3d 570, 577 (Tex. App.--Austin 2000, no pet.). This definition dictates that the parties be restored to the position held or rights possessed prior to the conduct that precipitated the temporary injunction. *Id.* at 577. The status quo is not maintained if any judgment ultimately rendered is ineffectual. *Inex Indus., Inc. v. Alpar Res., Inc.,* 717 S.W.2d 685, 686-87 (Tex. App.--Amarillo 1986, no writ). Moreover, the status quo is not "the state of affairs which would permit a continuing violation of the law." *T&R Assoc., Inc. v. City of Amarillo* , 601 S.W.2d 178, 180 (Tex. App.--Amarillo 1980, no writ). *See also Salazar v. Gallardo,* 57 S.W.3d 629, 634 (Tex. App.--Corpus Christi 2001, no pet.).

American has pleaded the following causes of action against FareChase: trespass to personalty; breach of contract; violation of Tex. Penal Code Ann. § 33.02; misappropriation; and civil conspiracy. As set forth below, the evidence before the Court shows that American has a probable right to recover on each of these causes of action against FareChase.

B.   American Is Likely to Succeed on the Merits of its Trespass Claim.

1.   **Applicable legal standards**

To establish a trespass to personalty, a plaintiff must show an unlawful injury to, or interference with, possession of property. *Russell v. Am. Real Estate Corp.,* 89 S.W.3d 204, 210 (Tex. App.--Corpus Christi 2002, no pet.); *Jamison v. Nat. Loan Investors, L.P.,* 4 S.W.3d 465, 469 n.2 (Tex. App.--Houston [1st Dist.] 1999, pet. denied).

Texas follows the rule that "destruction, injury, or any unlawful interference, however slight, with the enjoyment by another of his personal property, is a trespass, warranting an action for damages." *Jimmerson v. Norris Fence Co.,* 482 S.W.2d 670, 673 (Tex. Civ. App.--Texarkana 1972, no writ). Significantly, a trespass is any act which exceeds the scope of any authority or consent which may have been granted. *Murphy v. Fannin County Elec. Coop, Inc.,*

957 S.W.2d 900, 903-04 (Tex. App.--Texarkana 1997, no pet.); *see also Brite v. Pfeil*, 334 S.W.2d 596, 597-98 (Tex. Civ. App.--San Antonio 1960, no writ)(holding that a detention of personalty lawfully obtained, after demand, is a wrongful act constituting a trespass).

Although case law regarding Internet issues is relatively new, courts have aggressively applied the doctrine of trespass to protect the property rights of website owners. In particular, courts have recognized the inherent value of capacity on a computer system, holding that where unauthorized use causes a reduction of capacity, regardless of how slight, a trespass has occurred. *See, e.g., Ebay, Inc. v. Bidder's Edge, Inc.*, 100 F. Supp. 2d 1058 (N.D. Cal. 2000); *Register.com v. Verio, Inc.*, 126 F. Supp. 2d 238 (S.D.N.Y. 2000); *America Online Inc. v. LCGM, Inc.*, 46 F. Supp. 2d 444 (E.D. Va. 1998); *CompuServe, Inc. v. Cyber Promotions, Inc.*, 962 F. Supp. 1015 (S.D. Ohio 1997); *Oyster Software, Inc. v. Forms Processing, Inc.*, 2001 WL 1736382 (N.D. Cal. 2001).

a.   eBay, Inc. v. Bidder's Edge, Inc.

The decision in *eBay, Inc. v. Bidder's Edge, Inc.* is directly on point. In that case, the website owner, eBay, initially entered into a ninety-day agreement whereby Bidder's Edge ("BE") could scrape data from the eBay website. When a license agreement could not be reached, BE refused to stop its robotic scraping. 100 F. Supp. 2d at 1062-63. eBay brought suit and sought a preliminary injunction based on trespass to chattels. *Id.* at 1069.

The court found that there could be both "system harm," i.e., *potential harm* to the eBay computer system, and "reputational harm" to eBay as a result of BE's activities. *Id.* at 1064. The court concluded that the potential harm to eBay was a significant factor in favor of granting preliminary injunctive relief. *Id.* at 1064-65. The court recognized that although BE's current activity resulted in only a small increase in load on the eBay system, if BE were not

enjoined, other companies might similarly start scraping eBay's system, resulting in irreparable harm in the form of lost profits and customer goodwill. *Id.* at 1066.

Balancing the harms, the court then analyzed the elements of trespass to chattels under California law, which requires (consistent with Texas law) that: (1) the defendant intentionally interfered with the plaintiff's possessory interest in its computer system without authorization; and (2) the defendant's unauthorized use proximately resulted in damage to the plaintiff. *Id.* at 1069-70. The court noted that "eBay's [website] servers are private property" and that eBay did not generally permit crawling or scraping of its website. *Id.* at 1070. The court also found that the defendant's activities generated electronic signals that were sufficiently tangible to support a trespass cause of action. *Id.* at 1069.

The *eBay* court likened the right to exclude others granted by a patent to the right to exclude others (i.e., to prevent a trespass) "granted" by the ownership of personal property -- such as a computer system. *Id.* at 1066. Under the same reasoning applicable in patent infringement actions, the court noted:

> If preliminary injunctive relief against an ongoing trespass to chattels were unavailable, a trespasser could take a compulsory license to use another's personal property for so long as the trespasser could perpetuate the litigation. . . . BE's ongoing violation of eBay's *fundamental* property right to exclude others from its computer system potentially causes sufficient irreparable harm to support a preliminary injunction.

Id. at 1067 (emph. added).

The *eBay* court found that the increased burden on eBay's computer system caused by BE's unauthorized searches was not substantial. However, the court recognized that even a negligible interference with a plaintiff's property interest in its computer system is sufficient to prevail under a trespass to chattels claim:

> Although eBay appears unlikely to be able to show a substantial interference at this time, *such a showing is not required.* Conduct that

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does not amount to a substantial interference with possession, but which consists of intermeddling with or use of another's personal property, is sufficient to establish a cause of action for trespass to chattel. . . . [I]t is undisputed that eBay's server and its capacity are personal property, and that BE's searches use a portion of this property. *Even if, as BE argues, its searches use only a small amount of eBay's computer system capacity, BE has nonetheless deprived eBay of the ability to use that portion of its personal property for its own purposes.* The law recognizes no such right to use another's personal property. Accordingly, BE's actions appear to have caused injury to eBay and appear likely to continue to cause injury to eBay. If the court were to hold otherwise, it would likely encourage other auction aggregators to crawl the eBay site, potentially to the point of denying effective access to eBay's customers.

Id. at 1070-71 (emph. added). Accordingly, the court preliminarily enjoined the defendants from accessing eBay's computer systems with any robots or other automated querying programs without eBay's written consent. *Id.* at 1073.

b.   Register.com, Inc. v. Verio, Inc.

Similarly, in *Register.com, Inc. v. Verio, Inc.*, a federal district court engaged in a like analysis under New York law and found that the plaintiff was entitled to preliminary injunctive relief. The court held that, under New York law, "[o]ne who uses a chattel with the consent of another is subject to liability in trespass for any harm to the chattel which is caused by or occurs in the course of any use exceeding the consent." 126 F. Supp. 2d at 249.

In determining whether Verio's use of "search robots" constituted a trespass, the court noted that Verio was clearly on notice, through the filing of the lawsuit and other communications, that Register.com did not consent to the use of such search robots. *Id.* Accordingly, the court held that "Verio's future use of a search robot to access the database exceeds the scope of Register.com's consent, and Verio is liable for any harm to the chattel (Register.com's computer systems) caused by that unauthorized access." *Id.*

Having determined that Verio's use of search robots was unauthorized, the court next determined whether Register.com had made a sufficient showing that such unauthorized use

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had caused harm to its computer system. *Id.* at 249. In commenting on the evidence of harm produced by Register.com, the court noted that "[a]lthough Register.com's evidence of any burden or harm to its computer system . . . is imprecise, *evidence of mere possessory interference is sufficient to demonstrate the quantum of harm necessary to establish a claim for trespass to chattels.*" *Id.* at 250 (emph. added).

The court further noted that, for the same reasons applicable in the *eBay* case, "[t]here is no adequate remedy at law for an ongoing trespass and without an injunction the victim of such trespass will be irreparably harmed." *Id.* Accordingly, the court granted a preliminary injunction. *Id.* at 249-51.

c. America Online, Inc. v. LCGM, Inc.

America Online, Inc. v. LCGM, Inc. likewise applies the doctrine of trespass to unauthorized access to a computer system. In that case, defendant LCGM collected the names of AOL customers through the use of automated search devices and thereafter sent unsolicited email ("spam") to those customers. AOL brought suit, alleging that LCGM's conduct violated the terms of the site's user agreement and constituted a trespass to AOL's computer system. 46 F. Supp. 2d at 446-48.

In granting AOL's motion for summary judgment on its trespass claim, the court relied on the fact that LCGM's activities interfered with AOL's possessory interest in its computer system by occupying its capacity. *Id.* at 451-52. Moreover, the court observed that defendant's unauthorized use of AOL's computers to send unsolicited emails may have injured AOL's business goodwill as well. *Id.* at 449, 451-52.

d. CompuServe, Inc. v. Cyber Promotions, Inc.

In *CompuServe, Inc. v. Cyber Promotions, Inc.*, the defendant caused unsolicited emails to be sent through CompuServe's computers to its customers. CompuServe brought suit

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seeking a preliminary injunction under the doctrine of trespass, alleging that the defendant's activities violated the terms of its user agreement and that CompuServe had specifically informed defendant that it objected to its activities. In granting the preliminary injunction, the court found that the defendant's actions consumed capacity on CompuServe's computers thereby diminishing their value and damaged CompuServe's reputation and goodwill. 962 F. Supp. at 1022-23.

e. Oyster Software, Inc. v. Forms Processing, Inc.

In *Oyster Software, Inc. v. Forms Processing, Inc.*, plaintiff asserted that defendant had trespassed on its website by using scraping software to copy its "megatags" (i.e, the code used to describe the contents on an Internet website to a search engine) as a means to re-direct searches to its own site. 2001 WL 1736382 at *1-2. The defendant moved for summary judgment on the trespass claim, arguing that plaintiff had presented no evidence that the use of scraping software interfered with the basic function of plaintiff's computer system. The court denied the motion, finding that the mere fact that defendant's conduct was an unauthorized use of plaintiff's computer system stated a cause of action for trespass. *Id.* at *12.

2. FareChase has committed trespass to chattels.

FareChase has trespassed on American's computer systems by invading those systems with automated, robotic devices in violation of the terms of the AA.com User Agreement, for the purpose of obtaining American's fare and scheduling information.

a. American's computer system

American has made a considerable investment in designing, developing and maintaining the AA.com website. Under Texas law, "personal property is defined broadly to include *everything* that is subject to ownership not falling under the definition of real estate."

San Antonio Area Found. v. Lang, 35 S.W.3d 636, 640 (Tex. 2000) (emph. added). As a matter of law, American's computer systems, servers (including system or server capacity), and the AA.com website constitute personal property and, thus, any interference with them is actionable under a trespass to chattels claim.

b. FareChase's use of robots

FareChase intentionally created its software to cross the boundaries of the AA.com website and ferret out information in violation of the AA.com User Agreement, which prohibits the use of robots, spiders, and other automated search devices and limits use of the website to personal and non-commercial purposes. In so doing, FareChase occupies valuable system capacity to which it is not entitled and subjects AA.com to the possibility of system malfunctions.

In addition, by making webfares offered on AA.com available to high-cost distribution channels like Sabre, FareChase interferes with American's efforts to use its webfares as an incentive to convert high-cost distribution channels into low-cost channels for all of its fares. FareChase also intentionally interferes with American's possessory interest in AA.com by accessing the site to update its software to insure that it maintains its scraping functionality.

FareChase possesses the ability to easily prevent its robots from scraping the AA.com website, but has instead chosen to capitalize on its ability to trespass on the AA.com website by advertising and subsequently licensing the software to its customers for that very purpose. Accordingly, FareChase created an intentional trespass by causing its software to unlawfully access and extract data from the AA.com website.

c. FareChase's conduct constitutes trespass to chattels

As set forth previously, Texas follows the rule that "destruction, injury, or any unlawful interference, however slight, with the enjoyment by another of his personal property, is

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a trespass, warranting an action for damages." *Jimmerson*, 482 S.W.2d at 673. As described below, FareChase and its software harms American's property and interferes with its possessory interest in that property in three distinct and separate ways: (1) by causing a loss of system capacity; (2) by obligating American to implement blocking techniques to prevent access by known scrapers; and (3) by diminishing American's customer goodwill.

(i)   Loss of capacity

Each use of FareChase software injures AA.com and interferes with American's possessory interest in its website. Whether FareChase software is used to access and take webfares and other information from AA.com for free, or to access and update the functionality of the software, a portion of AA.com's capacity is occupied. As a result, American and legitimate users of AA.com are deprived of the ability to access and use that capacity, while FareChase and its licensees, who have no legal right or authority to access the capacity, trespass on that capacity for commercial purposes.

The loss of capacity from unauthorized accessing and scraping also disrupts American's ability to plan for the use of its website, both in terms of capacity and patterns of use. This has the potential to cause delays for legitimate users of AA.com or even crashes of the website, damaging the reputation and goodwill that American enjoys with the traveling public.

While FareChase's masking efforts prevent American from knowing the full extent of scraping activity directed at AA.com, it nevertheless remains the case that *any* activity that results in a loss of capacity to AA.com states a cause of action for trespass. *See eBay*, 100 F. Supp. 2d at 1071 ("Even if, as [defendant] argues, its searches use only a small amount of eBay's computer system capacity, [defendant] has nonetheless deprived eBay of the ability to use that portion of its personal property for its own purposes. The law recognizes no such right to use another's personal property"). *See also Register.com.*, 126 F. Supp. 2d at 250.

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FareChase's ongoing access to AA.com, which violates the terms of the AA.com User Agreement and is otherwise unauthorized, establishes that it wrongfully occupies system capacity and thereby trespasses.

(ii)   Blocking

In response to the scraping activities of FareChase and its licensees, American has been forced to institute blocking techniques to protect the AA.com website.

As a result, American has been required to dedicate both time and resources to identifying known scrapers and to implementing the technology itself. The expense associated with these efforts, regardless of whether it can be measured with precision, is a form of harm to both American and its computer system which is sufficient to establish trespass liability. *See Hotmail Corp. v. Van$ Money Pie Inc.*, 1998 WL 388389 at *7 (N.D. Calif. 1998) (additional personnel costs constitutes form of harm).

In addition, these blocking techniques burden AA.com by occupying system capacity and potentially hindering system performance and slowing the site's response time. The resulting harm to AA.com and the interference with American's possessory interest in AA.com state a cause of action for trespass. *See eBay,* 100 F. Supp. 2d at 1071; *Register.com.,* 126 F. Supp. 2d at 250.

Even worse, American's investment in these procedures is, in many instances, futile because FareChase has incorporated into its software a feature that masks the identity the user accessing AA.com, thereby evading American's blocking techniques in their entirety. Thus, American faces a never-ending burden of trying to protect its system from unauthorized but undetectable users.

(iii)   Loss of goodwill

American suffers an ongoing loss of goodwill in three respects that is attributable to FareChase and its software. Each harm supports injunctive relief for trespass.

First, by occupying capacity on AA.com, FareChase potentially causes legitimate visitors to AA.com to experience delays, crashes, and other system malfunctions, all of which damage the reputation and goodwill of AA.com in the estimation of the traveling public. FareChase thereby deprives American of the benefit of the substantial investment it has made in AA.com in order to increase its appeal to consumers.

Second, by making webfares available to high-cost distribution channels, such as CRSs and their customers, FareChase and its software cause a decrease in the traveling public's willingness to book travel by way of AA.com, damaging American's goodwill with its customers. Moreover, if the FareChase software is made widely available throughout the travel industry, then American cannot create incentives to drive down the current exorbitant booking fee costs, for the creation of a new business model for the distribution of airline tickets.

Third, by "deep-linking" to the booking page of AA.com and eliminating a user's exposure to other pages of the site, FareChase interferes with American's efforts to provide consumers with information concerning products and business. As a result, American's relationship with its customers is impaired, harming its goodwill.

In similar situations, courts have held that a trespass to chattels claim is established where the owner of a computer system has suffered a loss of goodwill. *See e.g., America Online, Inc. v. IMS*, 24 F. Supp. 2d 548, 550 (E.D. Va. 1998) (goodwill of Internet service provider harmed where defendant marketing company trespassed on computer server by sending unauthorized emails to subscribers); *Hotmail Corp.*, 1998 WL 388389, at * 7 (granting

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preliminary injunction to online computer service whose goodwill harmed by trespass); *CompuServe Inc.* 962 F. Supp. at 1023 (same).

3. FareChase is liable for aiding and abetting licensee trespasses.

In addition to protecting against direct interference with personal property, Texas law imposes trespass liability on one who aids, assists, or encourages a trespass or subsequently ratifies it, even without personal participation in the actual trespass. *Parker v. Kangerga*, 482 S.W.2d 43, 47 (Tex. Civ. App.–Tyler 1972, writ ref'd n.r.e.); *Oxford v. Williams Co., Inc.*, 137 F. Supp. 2d 756, 760 (E.D. Tex. 2001); *Moreland v. Hawley Indep. School Dist.*, 169 S.W.2d 227, 233 n.1 (Tex. Civ. App.–Eastland 1943, no writ) (applying respondeat superior law to determine trespass liability). Thus, where one party actually commits a trespass, but another party commands, encourages, incites, aids, abets, assists, or directs it, both are liable for trespass. *Parker*, 482 S.W.2d at 47.

FareChase is liable for all unauthorized accesses and uses of AA.com committed by its licensees because FareChase aids, abets, assists, and encourages such unauthorized access and use. FareChase developed its software for the very purpose of surreptitiously accessing, monitoring, and obtaining information by automated means, knowing that this violates the AA.com User Agreement and that American does not consent to such access. Further, FareChase markets and licenses its software knowing that the software will be used for commercial purposes, again in violation of the AA.com User Agreement.

4. Injunctive relief against an ongoing trespass is proper.

A temporary injunction is appropriate to prevent an ongoing trespass to personal property. By statute, a temporary injunction is authorized if "irreparable injury to real or

personal property is threatened, irrespective of any remedy at law." Tex. Civ. Prac. & Rem. Code Ann. § 65.011(5)(Vernon 1997).

The "cases clearly establish that when a person repeatedly trespasses on one's property, the remedy of injunction is appropriate to restrain such continued trespasses." *Bass v. Champion Int'l Corp.*, 787 S.W.2d 208, 211 (Tex. App.–Beaumont 1990, no writ). *See also Hastings Oil Co. v. Texas Co.*, 234 S.W.2d 389, 398 (Tex. 1950) ("where the trespass is continuous in its nature, constantly adding to the injury, the legal remedy is inadequate").[14] Similarly, the *eBay* and *Register.com* courts also held that no adequate remedy at law exists for an ongoing trespass to personal property, thereby necessitating that the courts enjoin the offensive behavior. *See Register.com*, 126 F. Supp. 2d at 250; *eBay*, 100 F. Supp. 2d at 1067. Thus, this Court would be well within Texas law to enjoin FareChase from committing an ongoing trespass.

C. American Is Likely to Succeed on the Merits of its Breach of Contract.

FareChase apparently labors under the belief that it is not bound by American's User Agreement because it is possible to access the website without having to "click" on the User Agreement, or read it. However, FareChase cannot point to any fundamental, inherent, constitutional, statutory, or other right to use the property of another without the owner's consent. Moreover, the use of a computer system without the owner's consent is expressly prohibited by law, and is a crime. *See* Tex. Penal Code Ann. Section 33.02(a)(Vernon Supp.

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[14] Although these cases deal with trespass to real property, there is no principled distinction between a repeated or continuous trespass to realty and a repeated or continuous trespass to personalty. This conclusion is made manifest by the very terms of Section 65.011(5), which states injunctive relief is proper regarding threatened, irreparable harm to either realty or personalty.

2003).[15] Consequently, any person who accesses American's website and system is a mere licensee who is bound by the conditions of use established by American.

American's conditions of use are stated in the User Agreement, which is accessible from AA.com's home page and each succeeding page under the icon, "Legal." The AA.com User Agreement obligated FareChase to use the data contained on the AA.com website only for "personal, non-commercial use." Additionally, FareChase agreed that it would not misuse the website, including copying the content by using "any robot, spider, or other automatic device." FareChase has breached, and continues to breach, the User Agreement through improper access to and use of the website.

FareChase's claim that it is not bound by the User Agreement is disengenious, at best. FareChase is in the Internet business and has its own website, and a website agreement with conditions of use almost identical to American's. Furthermore, FareChase's stance is contrary to law established long prior to the Internet. For example, courts have upheld licensing agreements attached to airline and concert tickets, which become enforceable once the user boards the plane or attends the concert. *See Pollstar v. Gigmania, Ltd.*, 170 F. Supp. 2d 974, 981 (E.D. Cal. 2000)(citing *ProCD v. Zeidenberg*, 86 F.3d 1447 (7th. Cir. 1996)); *see also Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 594-95 (1991)(holding that a forum selection clause on the back of a cruise ticket is a non-negotiated form contract that is valid as long as it is fundamentally fair); *Western Union Telegraph Co. v. Vann*, 288 S.W. 541, 543 (Tex. Civ. App.–Austin 1926, no writ); *Ketcheson v. Southern Pac. Co.*, 46 S.W. 907, 908 (Tex. Civ. App. 1898).

In *Western*, the recipient of a telegram was held bound by the terms stated on the back of the form filled out by the sender, which required notice of any claim to be presented in

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[15] Although FareChase would like to hold itself above the law, it cannot. Every person is charged with knowledge of the law.

writing within ninety-five days after the cause of action accrued. 288 S.W. at 543. In *Ketcheson*, the court held that a passenger was deemed to have assented to the terms and conditions printed on the back of a railroad ticket by his use of the ticket. 46 S.W. at 908. There was no evidence that the passenger had read the terms or expressly accepted them. On the contrary, the passenger had indicated a lack of agreement by refusing to sign the ticket after having been asked by the railroad to do so on more than one occasion. *Id.*

More recently, the court in *Barnett v. Network Solutions, Inc.*, 38 S.W.3d 200, 204 (Tex. App.--Eastland 2001, no pet.), held that parties to an electronic contract are not excused from the "consequences attendant upon a failure to read the contract." The court in *Register.com* held that a paragraph on a website stating that the user agrees to abide by the terms set forth in the agreement was enforceable even though the user did not have to click on an icon to accept the terms. 126 F. Supp. 2d at 248.

The clear principle of those cases is applicable here: one cannot accept the use of another's property without being bound by the owner's terms of use.

Some courts have categorized licensing agreements for software and website providers into three categories: (1) shrinkwrap; (2) clickwrap; and (3) browsewrap, apparently adopting computer and Internet lingo. *See Specht v. Netscape Communications Corp.*, 306 F.3d 17, 22 n.4 (2d Cir. 2002); *Pollstar*, 170 F. Supp. 2d at 981. A shrinkwrap license typically appears on the shrinkwrap packaging of computer software. *See Specht*, 306 F.3d at 22 n.4. The user is typically deemed to assent to the terms of the agreement upon breaking the shrinkwrap seal and using the software. *Id.* A clickwrap license, on the other hand, is one found on the Internet that requires a user to click on a word or symbol and express acceptance of the site's licensing terms before further accessing the site. *Id.* A browsewrap license, in contrast, appears

on the site, but does not require the user to "click," or otherwise express assent, or even to read the agreement, before proceeding. *Pollstar*, 170 F. Supp. 2d at 981. However, the agreement appears on the website. *Id.* As stated above, AA.com's User Agreement is referred on each page of its website in a footer entitled "Legal."

In *Pollstar*, the court refused to hold that a browsewrap agreement is per se unenforceable and invalid. A browsewrap agreement may be valid and enforceable even though the user is not immediately confronted with it. *See id.* at 982. People "sometimes enter into a contract by using a service without first seeing the terms." *Id.* Thus, a browsewrap agreement is not unenforceable simply because the user did not read the terms of it. *See id.*

Aside from the AA.com User Agreement, American gave actual notice to FareChase months ago that its and its licensees' access and use of AA.com was not permitted. Even if FareChase's earlier trespasses on American's system had been made in ignorance of the User Agreement (which is unlikely), it is immaterial. As the owner of AA.com, American is entitled to allow or not allow access by others to its property, and to establish conditions of entry, just as the owner of a home or business is entitled to allow or not allow others to enter and to dictate the conditions of entry. If a store has a sign posted that prohibits certain activity, such as carrying a gun, a violator may be ejected, or service may be refused, even if the customer does not see or read the sign. There can be no room for argument after the person is told by the owner that his action is prohibited.

FareChase has been told before, but its mulish behavior requires American to ask this Court to enforce the message -- **FareChase is not welcome on AA.com.**

Regardless of whether FareChase was aware of the User Agreement upon its first or any subsequent trespass on AA.com, American's seeks to enjoin *further entry* by FareChase.

FareChase cannot now be heard to say that it is unaware of, or is not bound by, AA.com's conditions of use. Texas law is clear that if FareChase accesses the website, it is bound by the User Agreement.

Any reliance by FareChase upon *Specht* is grossly misplaced. The issue there was whether the plaintiffs, users of software downloaded from the Internet, were bound by an arbitration agreement unknown to them prior to the download. It was not a suit to enjoin use of a plaintiff's property by someone who had been advised of, but did not comply with, the owner's conditions of use. The plaintiffs there had already paid for the software and opened it before learning of the arbitration clause. The court declined to enforce the clause because there had not been sufficient notice to place the plaintiffs on inquiry or constructive notice of the agreement's terms prior to the download. *Specht*, 306 F.3d at 32. Significantly, however, the *Specht* court distinguished *Register.com*, saying:

> But *Verio* is not helpful to defendants. There, the plaintiff's terms of use of its information were well known to the defendant, which took the information daily with full awareness that it was using the information in a manner prohibited by the terms of the plaintiff's offer. The case is not closely analogous to ours.

For the same reasons, the *Specht* case is not closely analogous to ours. Here, American's "terms of use of its information [are] well known to the defendant [FareChase], which [takes or aids and abets taking] the information daily with full awareness that it [is] using the information in a manner prohibited by the terms of the plaintiff's [User Agreement]."

American is entitled to a temporary injunction prohibiting FareChase from continuing to enter and unlawfully use American's website.

D. **American Is Likely to Succeed on the Merits of Its Claim That FareChase Has Violated Tex. Penal Code § 33.02**

Section 33.02 of the Texas Penal Code provides that "a person commits an offense if the person knowingly accesses a computer, computer network, or computer system without the effective consent of the owner." Tex. Penal Code Ann. § 33.02(a)(Vernon Supp. 2003).[16] Texas law also provides civil remedies for such violations:

> A person who is injured or whose property has been injured as a result of a violation under Chapter 33, Penal Code, has a civil cause of action if the conduct constituting the violation was committed knowingly or intentionally.

Tex. Civ. Prac. & Rem. Code Ann. § 143.001(a)(Vernon 1997). American has a probable right of recovery on its claim that FareChase has violated Section 33.02.

1. FareChase has violated section 33.02.

FareChase employees knowingly and intentionally access[17] American's computer system for the purpose of updating its software for distribution to its licensees. FareChase knows that accessing American's system for this commercial purpose violates AA.com's User Agreement, and FareChase knows that American does not consent to such access. The same harm or injury described above resulting from FareChase's trespass also applies to the violation of Section 33.02. Thus, FareChase has violated section 33.02 and American has a probable right of recovery on its cause of action under section 143.001(a).

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[16] By its terms, a violation of Section 33.02(a) does not require harm to the system illegally accessed. Under the statute, a violation is a Class B misdemeanor, unless the actor obtains a benefit, defrauds or harms another, or alters, damages, or deletes property. Tex. Penal Code Ann. § 33.02(b). If the actor engages in such aggravated conduct, the classification of the offense is raised anywhere from a Class A misdemeanor to a first degree felony, depending on the amount involved. Tex. Penal Code Ann. § 33.02(b).

[17] "Access" is defined to include "to approach, instruct, communicate with, . . . retrieve or intercept data from, . . . or otherwise make use of any resource of a . . . computer system." Tex. Penal Code Ann. § 33.01(1) (Vernon Supp. 2003).

2.   FareChase is criminally responsible for its software users' conduct.

Section 7.01 of the Texas Penal Code provides, in part:

(a)   A person is criminally responsible as a party to an offense if the offense is committed by his own conduct, by the conduct of another for which he is criminally responsible, or by both.

(b)   Each party to an offense may be charged with commission of the offense.

Tex. Penal Code Ann. § 7.01(a)-(b)(Vernon 1994). Section 7.02 of the Code further provides:

(a)   A person is criminally responsible for an offense committed by the conduct of another if:

(1)   acting with the kind of culpability required for the offense, he causes or aids an innocent or nonresponsible person to engage in conduct prohibited by the definition of the offense;

(2)   acting with the intent to promote or assist the commission of the offense, he solicits, encourages, directs, aids, or attempts to aid the other person to commit the offense; or

(3)   having a legal duty to prevent commission of the offense and acting with intent to promote or assist its commission, he fails to make a reasonable effort to prevent commission of the offense.

Tex. Penal Code Ann. § 7.02(a)(Vernon 1994).

Not only has FareChase violated section 33.02 by its own conduct, FareChase is criminally responsible under section 33.02 each time a user of its software accesses AA.com without American's consent. FareChase knows that its software will be used by its licensees to access AA.com and that American does not consent to such access. In spite of this culpable knowledge, FareChase causes or aids its licensees to access AA.com without American's consent by providing the software to the user and thereafter assisting in its implementation.

Moreover, even though FareChase can easily remove from its software the feature which effects the unlawful access of AA.com, FareChase refuses to do so. It thus consciously

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and intentionally refuses to prevent violations of section 33.02. FareChase's refusal is clearly motivated by its intent to promote and aid violations of section 33.02 for its own financial gain.

Accordingly, FareChase is criminally responsible for violations of section 33.02 committed by its licensees. *See* Tex. Penal Code Ann. § 7.01(b)(Vernon 1994). Thus, American has a probable right of recovery on its cause of action under section 143.001(a).

E. American Is Likely to Succeed on the Merits of Its Misappropriation Claim.

To recover under its misappropriation claim, American must show: (1) American created the AA.com website and its computer system through the investment of extensive time, skill, and money; (2) FareChase uses AA.com and American's computer system and American's fare and scheduling information in competition with American and gains a special advantage because FareChase is burdened with little or none of the expenses incurred by American; and (3) that American has suffered commercial damages. *United States Sporting Products, Inc. v. Johnny Stewart Game Calls, Inc.*, 865 S.W.2d 214, 217-18 (Tex. App.--Waco 1993, writ denied).

1. American has invested substantial time and money in AA.com.

American has invested extensive time, labor, skill, and financial resources into the creation and maintenance of AA.com and its related computer systems, including system capacity, as well as the fare and scheduling information contained therein.

2. FareChase misappropriates American's property.

Unlike American, FareChase has not devoted time or financial resources developing an Internet website with sufficient capacity to maintain, store, and display airfare and scheduling information on an ongoing, substantial basis like AA.com. Nor has FareChase

invested time and financial resources in the creation of the data contained on AA.com, including fares and scheduling information.

Instead, FareChase's software unlawfully misappropriates American's computer system, including its system capacity, and American's fare and scheduling information. In so doing, FareChase and its licensees wrongfully compete with American in the distribution of webfares and in developing and maintaining customer loyalty and goodwill. By making American's webfares available to high-cost distributors, FareChase and its licensees also thwart American's strategy of using webfares to lower distribution costs for all fares. As a result, FareChase and its licensees reap significant financial benefits at American's expense.

3. American is damaged by FareChase's misappropriation.

FareChase's use and misappropriation of American's property damages American by thwarting American's low-cost distribution strategy, occupying system capacity, and jeopardizing the integrity of AA.com and its related computer systems.

F. American Is Likely to Succeed on the Merits of Its Conspiracy Claim.

Under Texas law, the elements of a claim for conspiracy are (1) two or more persons, (2) an object to be accomplished, (3) a meeting of the minds on the object or course of action, (4) one or more unlawful, overt acts, and (5) damages as a result. *Massey v. Armco Steel Co.*, 652 S.W.2d 932, 934 (Tex. 1983).

FareChase and its licenses, including Sabre, have entered into a conspiracy to access AA.com without American's consent through the use of FareChase's software. FareChase and Sabre know that American does not consent to the use of FareChase software to access AA.com, as evidenced by their knowledge of the terms of the AA.com User Agreement (which substantially mirror their own) and by American's repeated demands that they cease their

unauthorized accessing of AA.com. American has also demanded that other FareChase licensees, in addition to Sabre, cease their unauthorized accessing and scraping of AA.com.

In furtherance of their conspiracy, FareChase and its licensees have committed overt, unlawful acts. These acts include efforts by FareChase and its licensees to equip the software with the ability to mask the identity of its user and FareChase's accessing of AA.com for the purpose of updating its software. In addition, it is undisputed that Sabre is using FareChase's software to wrongfully access American's system. All of these acts are unlawful because they constitute a trespass on American's personal property, breach the terms of the AA.com User Agreement, misappropriate property belonging to American, and violate section 33.02 of the Texas Penal Code.

As a result of the civil conspiracy entered into by FareChase and its licensees, American is damaged by the thwarting of its low-cost distribution strategy, by the loss of capacity on AA.com, and by increased risk of system malfunctions and loss of customer goodwill. Accordingly, American has a probable right of recovery on its conspiracy claim.

V. AMERICAN HAS A PROBABLE, IMMINENT, AND IRREPARABLE INJURY

A. The Threat of Harm To American Is Imminent.

FareChase enables and encourages its licensees to access and "scrape" the AA.com website thousands of times per day, every day. FareChase's software consumes system capacity and potentially prevents American and its legitimate consumers from utilizing that capacity. The constant, ongoing scraping enabled by FareChase -- in violation of the AA.com User Agreement -- has the potential to strain the system, slow down the website's operation, and adversely affect the website's performance.

The scraping by FareChase software is already significant and, in the absence of injunctive relief, will increase markedly in the near future. FareChase software is currently licensed to over a dozen companies, many with world-wide operations, who collectively have the potential to install the software on tens of thousands of computers. In that regard, FareChase software was used by its licensees to conduct over 54,000 searches in late 2002. (PX134 at 1) Among those licensees is Sabre, who has already made the software available to some 7500 users of its e-Voya platform and plans to distribute the software to its international travel agents soon.

In addition, FareChase projects that its software soon will be even more widely available. Based on its own estimates, the scraping activities of its licensees will rise throughout the coming year, with their daily searches exceeding 215,000 by December 2003. Access to AA.com on this scale, which would occur through scraping software rather than human users, would increase the volume of activity on AA.com by over 28 percent, in comparison to its current daily average hits of 750,000. Furthermore, with FareChase's revenues projected to grow five-fold in 2004, the scraping would grow accordingly. The potential harm to American is clearly imminent.

Finally, American is threatened with imminent harm by FareChase's ongoing accessing of AA.com to update its software. (Shaked at 41:5-42:13) Like scraping, this accessing of the cite by FareChase violates the terms of the AA.com User Agreement and wrongfully occupies system capacity.

B.   The Threat of Harm To American Is Irreparable.

The harm American will suffer is irreparable in that FareChase's software undermines the efficiency and efficacy of the AA.com website. The accessing and scraping by

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FareChase's software, and American's attempts to block such scraping, occupy system capacity and will potentially burden the system. Consequently, without injunctive relief, the website may soon operate at a slower pace, which will deter ever-impatient consumers from using the site and will lead to customer dissatisfaction.

In addition to burdening the website, the "scraping" caused by FareChase's software has the potential to significantly interfere with American's goals of serving its customers and lowering its distribution costs. As a result, American will be deprived of its opportunity to devise a new business model that will lower its distribution costs and increase its competitiveness. Moreover, the impaired functioning of the AA.com website due to scraping by FareChase's software will result in lost marketing opportunities for American. The cumulative effects of FareChase's software scraping the AA.com website tarnish American's reputation, goodwill, and customer loyalty.

American is also losing business opportunities because travel agents that receive the FareChase software are unlikely to agree to the terms of American's EveryFare[SM] program.

> An irreparable injury exists when unfair competition deprives the initial producer of a fair opportunity to market its product. Lost opportunity to create or gain control of a new market may result in unquantifiable losses for which there is no adequate remedy at law.

Garth v. Staktek Corp., 876 S.W.2d 545, 549 (Tex. App.--Austin 1994, writ dism'd w.o.j.) For all these reasons, American will suffer considerable irreparable injuries in the absence of a temporary injunction.

Moreover, the risk of harm to AA.com will grow many-fold if injunctive relief is denied, as more scrapers will thereafter begin to access the site. *See eBay,* 100 F. Supp. 2d at 1066; *Register.com,* 126 F. Supp. 2d at 250-51. Already FareChase's many competitors are poised on the sidelines, ready and able to jump into the attack on AA.com. As the capacity

occupied on AA.com by scrapers increases, legitimate users of AA.com could experience delays, crashes, and other system malfunctions.

American should not be required to seek injunctive relief only *after* a disaster strikes. Obviously, the time to deter illegal conduct is before it takes place. The holdings in *eBay* and *Register.com* are consistent with the proper application of maintaining the status quo, which can never be the state of affairs that allows a party (or that would encourage countless others) to continue to engage in conduct that ultimately is determined to be a violation of the law. *See Salazar*, 57 S.W.3d at 634; *City of Amarillo*, 601 S.W.2d at 180. It simply would be improper to allow FareChase to continue to engage in wrongful, indeed criminal, conduct until the trial is held.

Even if an inadequate remedy at law were required in this case,[18] damages are inadequate to address American's harm, and, thus, American has no adequate remedy at law. Damages "are inadequate when difficulty arises in calculating [them] or when an award arrives too late." *Amalgamated Acme Affiliates, Inc. v. Minton*, 33 S.W.3d 387, 396 (Tex. App.--Austin 2000, no pet.); *see also Butnaru*, 84 S.W.3d at 204 ("An injury is irreparable if the injured party cannot be adequately compensated in damages or if the damages cannot be measured by any certain pecuniary standard.").

The illegal accessing of American's system by FareChase's software threatens the efficiency and functionality of AA.com and undermines American's reputation and ability to service its customers through its website. Consequently, American, already facing serious financial pressures, will continue to suffer lost business opportunities and diminished goodwill if the temporary injunction is not granted. "One cannot assign a dollar value to a company's loss

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[18] An inadequate remedy at law is not necessary if irreparable injury to personal property is threatened. *See* Tex. Civ. Prac. & Rem. Code Ann. § 65.011(5)(Vernon 1997).

of clientele, good will, . . . marketing techniques, and investment strategies." *David v. Bache Halsey Stuart Shields, Inc.*, 630 S.W.2d 754, 757 (Tex. App.--Houston [1st Dist.] 1982, no writ); *see also Martin v. Linen Sys. For Hosps., Inc.*, 671 S.W.2d 706, 710 (Tex. App.--[1st Dist.] 1984, no writ). Thus, these damages are extremely difficult to calculate and leave American with an inadequate remedy at law.

CONCLUSION

Recent court decisions illustrate that traditional common law doctrines can be applied to enjoin unauthorized use and access of websites. Texas law comports with the results reached in these cases. Quite simply, the Internet -- and the companies that profit from it -- are not above the law.

American faces the same imminent, irreparable harm to its computer system that these cases found sufficient to necessitate the issuance of injunctive relief. Given that American can establish a likelihood of prevailing on the merits of its claims under Texas law, we respectfully submit that this Court should likewise enjoin FareChase from illegally accessing and scraping AA.com, either directly or indirectly through licensees and users of its software, without the express consent of American.

Dated: February 3, 2003

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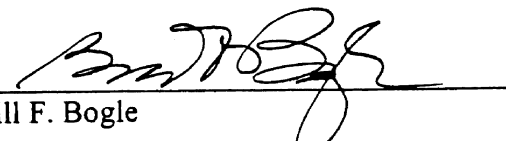Bill F. Bogle
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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing was furnished by facsimile, hand-delivery, and/or overnight mail to all counsel of record on this 3rd of February, 2003.

_____
Bill F. Bogle

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