CAUSE NO. 067-194022-02

AMERICAN AIRLINES, INC.,	§	**IN THE DISTRICT COURT**
	§	
Plaintiff,	§	
	§	
vs.	§	
	§	
FARECHASE, INC.	§	
	§	**TARRANT COUNTY, TEXAS**
Defendant.	§	
	§	
and	§	
	§	
SABRE, INC.,	§	
	§	
Intervenor.	§	**67th JUDICIAL DISTRICT**

DEFENDANT FARECHASE, INC.'S OPPOSITION TO PLAINTIFF'S MOTION FOR A TEMPORARY INJUNCTION

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I. INTRODUCTION

American Airlines ("AA") moves this Court for the extraordinary remedy of a preliminary injunction and requests both prohibitive and mandatory injunctive relief, in an attempt to thwart what it essentially alleges to be unfair business practices perpetrated by defendant FareChase. What this case is really about, however, is competition—FareChase's attempt to foster it, and AA's responsive attempt to stifle it.

FareChase has developed innovative software capable of "comparison shopping" on the Internet for air fare and related travel services. The FareChase software accomplishes all of the competitive goals that for over one hundred years, both federal and state law have protected. The FareChase software enhances market efficiencies and increases consumer choice by allowing its users to simultaneously search several websites at once so that they can quickly locate the lowest price or most convenient route. It fosters competition among suppliers of travel and travel-related products, including airfare, by making competitive prices on comparable

products readily available to the consumer. It allows suppliers to cut advertising and other marketing costs. In short, the FareChase software allows shoppers to search efficiently for the best deal, and allows suppliers to vie efficiently for their business.

AA now demands (1) that FareChase modify its innovative software so that it cannot be used to search AA.com; and (2) that FareChase take unidentified affirmative steps to prevent its licensees from using the software to access AA.com.[1]

Despite AA's claims of burden to its server -- a burden of which is has failed to produce any evidence -- it is plainly the competition, not the software, that threatens AA. AA filed this suit in an effort to prevent travelers from using FareChase software to retrieve publicly available fare and flight information posted on AA.com in a manner that allows travelers to efficiently compare AA's flight offerings with those of its competitors. Furthermore, AA filed this suit in an effort to prohibit the free flow of its fare information, so that AA could control the distribution of factual information in certain channels, in order to control costs in other segments of its business. In essence, AA now attempts to create a new cause of action to control unprotectable raw data that it chose to make public. Because AA is the world's largest airlines, the inability to obtain AA's fares will reduce significantly the benefit of the FareChase software.

If AA obtains the relief it seeks here, the result will be extraordinary indeed. The temporary injunction sought by AA would put FareChase in jeopardy of going out of business before a full trial on the merits, rendering for naught the time, expense and effort it sunk into developing and marketing the software, efforts that have been widely successful to date. It will cause FareChase to breach the several licensing agreements that it has executed with its licensees. And, it will bring an abrupt end to the competitive enhancements and corresponding consumer benefit that the software creates. AA seeks this extraordinary relief armed with nothing more than dubious legal theories premised generally on the novel idea that by searching

[1] AA recently confirmed that it was moving on all causes of action asserted in its Petition. AA's Petition asserts both mandatory and prohibitive relief. The only prohibitive relief it seeks, however, is to enjoin FareChase from accessing AA.com. The evidence establishes that FareChase does not search AA.com. Thus, AA's claim for prohibitive relief is moot, leaving only its request for mandatory relief.

AA.com and obtaining the publicly available fare information, FareChase trespasses on the website and misappropriates information. The evidence, however, does not support issuance of a temporary injunction.

The simple fact is that AA is unlikely to prevail on its novel and factually unsupported legal theories for each of its claims: AA alleges that because its website terms and conditions of use prohibit certain activities. However, the terms and conditions of use, upon which AA relies to support its breach of contract claim are hidden from sight, and users of its website are neither required to accept or *even read* those terms before searching fares or booking flights. Without mutual assent, there is no contract, and without a contract, there can be no breach. The evidence also fails to supports AA's claim for trespass, for among other reasons, the lack of harm to the property AA claims is trespassed – its website. Even after extensive discovery, there is no evidence that the FareChase software causes any harm to or burden on AA's computer servers – indeed, all evidence is to the contrary. Furthermore, AA's state law trespass theory implicates federal copyright law, and thus fails as a matter of law because it is preempted.

AA's remaining claims, misappropriation and violation of the Texas Harmful Access to Computer statute, fare no better. AA's misappropriation claim is preempted by the Copyright Act, and, even if it was not, the evidence precludes AA from establishing its elements. Simply put, common law misappropriation requires AA to show that it competes with FareChase. By no stretch of the imagination can this requirement be satisfied – no one seriously contends that AA, the nation's largest provider of air travel, competes in any market with FareChase, a software provider. And there is simply no legal or factual basis for applying the Texas statute here. Under the statute, a civil litigant must prove harm to its computer system. Again, this factual allegation is not supported by the evidence. Moreover, aside from the not surprising fact that there is not a single reported decision applying the statute to facts similar to those here, the interpretation urged by AA would render the statute unconstitutional. Thus, AA has no basis, legal or factual, to succeed on the merit of that claim.

Even if success on the merits was likely -- or in the case of AA's request for mandatory relief *unmistakable* -- AA cannot establish the type of noncompensable and irreparable injury required to support a temporary injunction. Indeed, AA has no evidence of harm caused by searches using the FareChase software, and AA itself placed a monetary value on the alleged harm in negotiations with FareChase prior to this litigation.

In determining the propriety of injunctive relief, the Court must also balance the equities. There is no question that the scale tips decidedly in FareChase's favor. The injunction that AA seeks, if granted, will essentially resolve this litigation. Not only does the injunction seek to resolve the ultimate issue here—the legal propriety of the software function—but it will also afford AA the full relief that it seeks—modification of the FareChase software to preclude access to AA.com. More importantly, granting the injunction that AA seeks will severely jeopardize FareChase's ability to continue as an ongoing concern. The inability to search for fares from the largest airline in the world may put FareChase in breach of its license agreements and will cripple the utility of its product.

Last, the injunctive relief that AA seeks is contrary to the public interest, which is an overriding consideration on this motion. There is no question that the FareChase software enhances market efficiencies, increases consumer choice and thus fosters competition among travel service suppliers. Indeed, several industry analysts have hailed the pro-competitive effects of this software. And, it is plainly this enhanced competition, not the software, that threatens AA. Discovery has confirmed that AA's motive in this litigation is to gain exclusive control over who can access webfares on AA.com so that AA can control the distribution of its webfares and, at the same time, shift its distribution costs back to travel agents. AA simply has no right to control data that it has made publicly available. Thus, its complaint that the FareChase software is interfering with its business plan is of no avail--a business cannot cry foul when its business plan is premised on conduct that finds no support in the law.

AA cannot prevail on the merits of its claims, and there is no evidence that it will suffer any hardship, let alone extreme hardship or burden, if the relief it seeks is denied. Even if AA could somehow prove likelihood of success on the merits, and it cannot, AA cannot establish the type of noncompensable and irreparable injury required to support a preliminary injunction. In weighing the unquestionable harm to FareChase against the purely speculative and lack of actual harm to AA, the balance tips sharply in favor of denying the requested relief. Consequently, AA's request for a preliminary injunction should be denied.

II. STATEMENT OF FACTS

A. The Parties

1. FareChase and Its Innovative, Pro-Competitive Software

a. General Company Overview

FareChase was co-founded in late 1999 by a group of individuals who combined their many years of experience in both the international travel marketing and sales industry and the high-end information systems and technology sector. It is a privately held, small company that, to date, relies primarily on third party financing to support its operations. In 2002, its revenues reached only approximately $600,000. And it has not yet shown a profit. Currently, FareChase employs approximately 27 employees.

FareChase's business is software design and support. It has developed two software products: Web Automation and Market View. The Web Automation software allows users to simultaneously search several websites to obtain publicly available travel and fare information on the Internet for the purpose of Internet "comparison shopping" for travel products and services. The Market View software is an analytical tool that enables businesses and analysts in the travel industry to measure, monitor and benchmark competitive airfare pricing and search engine performance. One primary distinction between Market View and Web Automation is that Web Automation includes a booking function, whereas Market View does not.

FareChase has successfully marketed its products and has licensed its software to some of

the largest players in the travel industry, including Sabre, WorldSpan, Orbitz and American Express Travel. A variety of other businesses have licensed FareChase software for various purposes. Application service providers and corporate travel management groups have licensed FareChase's software products to provide solutions for businesses to coordinate their corporate travel in an efficient and cost-effective manner. Global distribution systems ("GDS"), such as Intervenor Sabre, have installed FareChase software to provide the travel agents and corporate travel managers who utilize their service with an additional option for providing prospective travelers with greater choice. Orbitz, LLC, an online travel agency, in which AA has a 26% ownership interest, has licensed the Market View product to monitor pricing in the travel market.

FareChase provides its licensees with software installation, service, support and updates. FareChase itself does not offer travel services. While its website, FareChase.com, includes a demonstration version of its software, FareChase is not a "destination website" and is not in the business of providing travel services. Its website is merely a channel to promote the licensing of its software.

FareChase generates its revenue by the licensing fees paid by its licensees for use, installation, maintenance and tailored development of its software. FareChase has a number of contracts with affiliates that have agreed to pay fees for bookings initiated through FareChase software. However, FareChase does not charge AA any fee whatsoever for searches or bookings made by a user of FareChase software. When a purchase is made from AA.com by a user of FareChase software, that purchase price is paid directly to AA and AA receives exactly the same fee as it would from a booking made by an Internet purchaser who was not using FareChase software. AA pays no GDS booking fees or travel agent commissions on such transactions.

Because FareChase is a small company, with limited funding, the revenue it generates from licensing its software is necessary for its continued operations. The value of FareChase's software to its licensees, is the ability of its licensees to search and retrieve airline fare and scheduling data from all airlines, including the world's largest carrier, AA. If the AA retriever were eliminated, the value of the software would drastically diminish. Moreover, the

preliminary injunction that AA requests could put FareChase in breach of the license agreements it has already entered into, and could also affect FareChase's ability to attract new licensees. In fact, this lawsuit, coupled with the threat of an injunction, has already caused one licensee to stop using FareChase software altogether. If the Court issues the preliminary injunction that AA requests, FareChase would likely go out of business – a far more irreparable injury than any that AA would face without its requested relief.

b. The Software—How it Works

Both Web Automation and Market View utilize the same core technology: a software search engine that performs "real-time" data retrieval. Basically, the software mimics the behavior of a human using the Internet through a web browser. The user requests the particular information that she seeks, such as a flight date and destination, and the FareChase software issues that request to the various websites and returns the specific information requested. The technical manner in which the FareChase software issues a request to a given website is nearly identical to the manner in which the user, working through a web browser, would issue the same request. The primary distinction between the FareChase software and using an ordinary web browser, is, of course, the FareChase licensed software's ability to search multiple sites simultaneously, thereby saving the end user time from having to visit each site separately.

Licensees of the WebAutomation software conduct searches and obtain information through the use of "data retrievers." Each data retriever is programmed to visit and retrieve data from a particular travel website, such as AA.com, United.com, etc. For example, the AA.com data retriever that is part of the FareChase software is programmed to, upon request of an end user, visit AA.com, provide AA.com with the specific travel parameters provided by the end user, and then retrieve and return the requested information back to the user. The FareChase software contains approximately 120-140 default data retrievers and thus can simultaneously search the many sites. All of the data retrievers are activated unless a licensee chooses something different. For example, a licensee who does not provide rental car service could have

the data retrievers that search rental car websites disabled. The software also contains a number of mechanisms that allow the licensees to customize their searches either across the board or on a search-by-search basis. In other words, if a licensee had a client who only flew on United, Delta or AA, the licensee has the ability to eliminate all other airlines from the searches performed for that particular client. Thus, the licensee has ultimate control over which websites it searches. *Id.* FareChase only includes the default data retrievers.

AA's claim for injunctive relief is premised in part on the manner in which these data retrievers function within the Internet. AA alleges that the data retrievers are "screen scrapers" and that "scraping" AA.com places an undue burden its servers, creating the risk of a computer crash and thus the potential for harm. The term "screen scraper" has different meanings depending on the context in which it is used. For example, screen scraping, "spidering" or "recursive crawling" can refer to retrieving information from several different web sources and storing that information in a specially created database. The user then searches the database for information rather than the individual supplier websites. Under this scenario, the "spiders" automatically access the supplier websites thousands of times per day in order to keep the independent databases up to date. The FareChase software, in contrast, searches a supplier web site only when queried by the user. And, it does not create an independent database for storing retrieved information. Instead, the FareChase software returns the information sought to the user, and if the user wants to book the service, the FareChase software escorts the user to the booking page of the supplier website. The user then books through the supplier website.

FareChase's Market View software uses the same basic underlying data retriever technology to obtain information. Whereas Web Automation is a transactional tool that facilitates booking travel services, Market View is an analytical tool that allows travel providers to automatically gather and analyze data about the industry and their competitors. Market View does not take the user through any of the booking components of a supplier web site.

2. AA, Its Website and Its Use of WebFares to Control Distribution Costs.

AA touts itself as the largest airline in the world. AA is a subsidiary of AMR Corporation, which in 2001, reported revenues of nearly $18 billion. Of that amount, $15.8 billion came from AA.

AA sells its airline tickets to purchasers directly, as well as through travel agents and other travel providers. At issue here is ticket sales through AA's website, AA.com. On AA.com, any member of the general public can obtain flight schedules, fares and availability, and can do so without logging in, without providing a password, and without agreeing to contractual terms and conditions of use.

Through its website, AA offers "webfares," some of which are discounted significantly. AA limits the distribution of webfares to its own website and a few other selected channels. It does not generally make its webfares available through standard distribution channels such as travel agents. According to AA, it is able to offer these discounted webfares because the distribution costs on AA.com are lower than those of the traditional global distribution system ("GDS") backed channels which are used by travel agents. *See,* section B, below. In its Original Petition, AA alleges that webfares "encourage consumers to use the AA.com website," AA's preferred distribution channel, "to purchase tickets." However, discovery has revealed that AA has developed a business plan that focuses on, in essence, *selling* access to its webfares to travel agents. Because the FareChase software threatens to interfere with this business plan, AA sued FareChase and filed the present motion.

B. The Airline Industry's Model Of Distribution—How the Money Flows

In order to understand AA's argument as well as its proposed business plan, it is necessary to understand generally how money flows in the travel industry. The cost of booking a flight is distributed among four participants: the customer, the travel agent, the travel agent's CRS vendor and the airline. The GDS is an integral part of a travel agent's business.

The GDS was born in 1974 when, in a time of regulated air travel, AA received government approval to persuade other major airlines to pool their resources to create a jointly owned computer reservation system that would provide subscribing travel agents with schedule, fare and seat availability information for every participating airline. The contemplated computer reservation system would also allow travel agents to send and receive airline booking data, book space on flights and automatically prepare tickets and advance boarding passes. While the originally contemplated joint computer reservation system collapsed in 1976 due to insufficient funding, United Airlines launched a proprietary computer reservation system that it called Apollo in the weeks following the collapse.[2] Apollo was capable of performing the functions anticipated by AA's proposed joint system. In response to Apollo, AA created its own proprietary system called Sabre, which was later spun off and is presently an entity separate from AA and an intervenor is this lawsuit. Other airlines followed suit, but Sabre quickly became the largest GDS, followed by United's Apollo. Because the airline industry was regulated, the primary GDSs, even though airline-owned, had to include the other airlines' information because it was often the case that a traveler would have to use more than one airline for a single trip. Because of the inter-airline exchange of passengers during regulated times, the airlines had to store each other's flight information because each airline had to act as an agent for other carriers in selling flights.

In 1978, Congress deregulated pricing and entry in the airline industry. The ability of airlines to freely enter and exit domestic routes and to set their own prices had two profound effects on the market: greatly enhanced competition among the airlines and greatly enhanced consumer choice. The increase in routes and customer choice increased consumer reliance on travel agents—consumers simply could not efficiently decipher all of the routes and make informed choices without the assistance of the travel agents and their GDSs. As a result, travel agents saw a dramatic and relatively immediate increase in their business and an enhanced reliance on GDSs.

[2] Apollo no longer exists.

Travel agent commission is one of the monetary components of the GDS distribution model. Even in the regulated market, airlines historically paid travel agents commissions for selling seats on their routes. Commissions, however, were regulated as well. In 1978, the Civil Aeronautic Board effectively deregulated international commissions, and, in 1980 it deregulated domestic commissions. Commissions thus began to rise as airlines began matching one another in order to prevent travel agents from shifting traffic to other airlines. By 1994, commissions reached 11.80 percent, exclusive of GDS fees.

GDS fees are the other monetary component of the GDS distribution model. Travel agents subscribe to a particular GDS, such as Sabre. The airlines pass fare and schedule information to the GDS and the GDSs then provide this information to their subscribers, the travel agents. The travel agents then, in turn, use the information in the GDS to serve their customers. The GDS provider charges travel agents either a nominal fee or no fee at all for the GDS service. Instead, the GDSs charge the airlines for the GDS services. The charges to the airline are in the form of a per-booking fee. In one of its last official acts in 1984, the CAB imposed regulations on the airlines and the GDSs they owned—all airline owned GDS had to offer unbiased displays and charge non-discriminatory (*i.e.*, uniform) booking fees. In response, the GDSs established "per-segment" fees. Because most airlines felt the need to subscribe to GDS' to remain competitive, they were required to pay these fees.

Then came the Internet--first website schedule and fare information and then direct booking capabilities. The Internet provides a lower distribution cost avenue of retail ticket sales than through traditional travel agents and GDSs because travelers can book flights directly on an airline's website. The Internet thus provides an avenue for airlines to bypass travel agent commissions and GDS fees completely. In fact, over the last few years since the Internet became a tool for direct distribution of airline tickets, airlines began decreasing the commissions paid to travel agents. Today, most, if not all, airlines pay no commissions to travel agents for the flights they book. There are also a number of newer airlines who have chosen direct sales, via the Internet and telephone, as their sole form of distribution, thereby

bypassing the need to participate in the GDS distribution channel. However, because most travel continues to be booked by travel agents, corporate travel managers or other entities utilizing GDS', many airlines grudgingly continue to pay fees for that distribution channel.

C. AA's EveryFare Program

It is down the commission and fee-free avenue of Internet distribution that AA wants to travel. But, AA wants to get there by take a slight, but significant, detour. AA has devised a business plan that allows it to *capitalize* on the Internet's free flow of information. Essentially, AA wants to sell access to its webfares, and the FareChase software stands in its way.

In September 2002—two months after AA files this lawsuit—AA announced a new program it called "EveryFare." While AA touts it as a way for travel agents to increase their business by providing their customers with webfares, it is really a mechanism through which AA can eventually shift all of its distribution costs, whether associated with webfares or not, to the travel agent. Travel agents that sign up for the EveryFare program are given *access* to the webfares on AA.com site – webfares that they could as easily access by visiting the site and conducting a search on their own. In exchange for such *access*, AA shifts the GDS booking fees from AA to the travel agency by requiring the travel agent pay a portion – the size of which will grow over the next few years – of each GDS fee for every AA flight that the travel agent books on AA, whether or not the flight was a "webfares". Thus, while the EveryFare Program purports to allow travel agents to access and sell AA's webfares, it at the same time increases the agency's per booking cost. By requiring the travel agent to pay a portion of the GDS fee, AA is decreasing its costs, but increasing the travel agent's costs. And, pursuant to the EveryFare contract, AA's contribution to the GDS fee diminishes over the five years, so that by the end of the contract term, the travel agency is absorbing nearly all of the GDS fees.

D. AA Has Known About FareChase For More Than Two Years

AA has known about FareChase and its software since at least January 2001 and has only

recently objected to the function of the FareChase software. In January 2001, AA was considering using similar technology to provide a comparison shopping function on AA.com. According to AA's internal research, "AA.com customers are active price-shoppers and expect complete, relatively unbiased fare information." For that reason, AA believed it made "sense for [them] to find ways to provide fare information which is as complete as possible, including the use of corroborative pricing information from other sites." However, in another internal report from January 2001, AA noted that one of the drawbacks of providing a comparison shopping tool on AA.com was that "AA fares may appear disproportionately higher to customers" if AA results did not appear at the top of the screen in most searches.

Moreover, in early 2001, FareChase's president met with AA to propose a commercial relationship in which AA would pay FareChase a referral fee for bookings made on AA.com by FareChase users. At that meeting, FareChase's president explained the FareChase technology to AA. While AA did not want to pay referral fees, it also did not object to FareChase's technology. Rather, AA was enthusiastic about the capability, the functionality, and the opportunity to distribute their AA.com fares through this new channel.

In early 2002, AA and FareChase entered into negotiations to license the FareChase MarketView product just months before AA filed the present lawsuit. Indeed, AA asked FareChase to provide a customized demonstration of travel supplier websites from which AA intended to search and retrieve price and scheduling comparison information. Negotiations progressed for nearly two months, with AA considering a licensing arrangement in the vicinity of $100,000 per year. Then, in mid-May, the negotiations stopped abruptly, when AA told FareChase that "the project [was] getting pushed back." In fact, just days later, FareChase received a cease and desist letter from AA claiming that by using the exact same searching and retrieving software, FareChase was making "unauthorized" use of the AA.com website and was "burden[ing] the capacity of [AA's] servers, adversely impact[ing] [AA's] ability to serve authorized users of AA.com, and may constitute computer trespass."

The following week, FareChase representatives met with AA representatives to discuss

AA's concerns. While FareChase had no obligation to remove AA.com from the list of websites that could be searched through the demonstration version of its software on www.farechase.com, it did so in an effort to avoid litigation. Thus, during the meeting, FareChase confirmed that it removed AA.com immediately following its receipt of the May 15 letter. However, AA claimed it was concerned that FareChase's licensees use of FareChase software was "causing a drain on [AA's] resources, burdening AA.com's servers." AA also claimed that FareChase was "unlawfully reselling [AA's] proprietary information." It was also at this meeting that AA first raised the proposal that FareChase compensate AA at a rate of $0.10 per search and $12.00 per booking made by users of FareChase software, an proposal that was reiterated several times in writing following that meeting.

FareChase, and later its outside counsel, attempted to clarify the FareChase technology and the use and control of FareChase software by its licensees to AA in two subsequent letters. FareChase also expressed its willingness to continue discussing an informal business resolution to the dispute. AA responded, however, by filing the present lawsuit.

III. LEGAL ARGUMENT

A. Mandatory Relief Requires a Showing, by Clear and Compelling Evidence, of and Unmistakable Right to Recover and Extreme Necessity or Hardship

AA's motion for a temporary injunction is based on the claims in its Petition. In its Petition, AA seeks an order compelling FareChase: (1) to prevent its licensees from "scraping" AA.com, (2) to prevent such "scraping" by its licensees and (3) to modify its software products to remove AA.com from the sites searched. Essentially, AA demands that FareChase remove the AA.com data retriever from its software so that the software default settings do not include AA.com. In order to comply with AA's proposed injunction, FareChase would have to both modify its software so that new licensees would not have AA.com as a default data retriever, and would have to modify the software of its current licensees to remove the AA.com data retriever. Because this requires FareChase to affirmatively engage in conduct, it is mandatory in nature. *See, Universal Health Services, Inc. v. Thompson*, 24 S.W.3d 570, 576 (Tex. App.—Austin

2000, no pet.). In order to obtain mandatory injunctive relief, AA must satisfy a very high evidentiary burden.

Mandatory injunctions are granted only in cases of extreme hardship. *RP&R, Inc. v. Territo*, 32 S.W.3d 396, 401 (Tex. App.—Houston [14th Dist.] 2000, no pet.), *citing, Haynie v. General Leasing Co., Inc.,* 538 S.W.2d 244, 245 (Tex. Civ. App.—Dallas 1976, no writ). And, the burden of proving extreme hardship is high—the applicant must submit clear and compelling evidence of extreme necessity or hardship. *Id.*; *see, LeFaucheur v. Williams*, 807 S.W.2d 20, 22 (Tex. App.—Austin 1991, no writ); *Texas Pipeline Co. v. Burton Drilling Co.,* 54 S.W.2d 190, 194-95 (Tex. Civ. App.—Dallas 1932, no writ) (explaining mandatory temporary injunction appropriate only upon showing of "urgent and paramount necessity"). *See also, Thomas v. Hale County*, 531 S.W.2d 213, 215 (Tex. Civ. App.—Amarillo 1975, no writ) (holding that "[o]rdinarily a mandatory injunction will not be granted before final hearing, and not even then except under *pressing necessity to prevent serious damage* which would ensue from the withholding of the writ, or where necessary to effectuate the decree"), *emphasis added, citing, White v. State*, 122 S.W.2d 714, 717 (Tex. App.—Fort Worth 1938, no writ).

In addition to showing extreme hardship or burden, a party seeking mandatory relief must show a "clear and unmistakable" right to recover on the law and on the facts. *Texas Pipeline* at 194. A mere "probability" of success on the merits is not enough. *See, Surko Enter., Inc. v. Borg-Warner Acceptance Corp.,* 782 S.W.2d 223, 225 (Tex. App.—Houston[1st Dist.] 1989, no writ) (explaining probable right to recovery on application for prohibitive injunction). Here, AA cannot satisfy even the lesser "probable right to recover" and "probable injury" standards for prohibitive relief, let alone the heightened standards for mandatory relief.

B. The Evidence Precludes AA from Establishing That it is Likely to Succeed on the Merits, Let Alone a "Clear and Unmistakable" Right to Recover On Any of Its Causes of Action

AA has indicated that it will move for a temporary injunction based on all of the causes of action set forth in its Petition—trespass, common law misappropriation, breach of contract

and harmful access by computer. In order to prevail, then, AA must point to evidence that establishes its clear and unmistakable right to recover under these theories. For the reasons discussed more fully below, AA fails to meet its weighty burden. Indeed, AA cannot satisfy even the lesser "likelihood of success" standard applicable to prohibitive injunctions.

1. AA Cannot Prevail On Its Trespass Claim

AA relies on a novel interpretation of the ancient tort of trespass to chattels and then attempts to use that novel theory as the basis for its claim for extraordinary relief. Setting aside the impropriety of basing extraordinary equitable relief upon novel theories, the evidence precludes AA from establishing the elements of trespass under Texas law. And, even though AA is sure to rely on the few cases from other jurisdictions enjoining conduct based upon a computer "trespass," these cases do not help AA escape the requirements of Texas trespass law and, in fact, are inapplicable to the facts at issue here. Further, even if AA could establish the elements of trespass on this record, which it cannot, AA's trespass claim still fails because it is preempted by the Intellectual Property Clause of the United States Constitution.

a. The Evidence Precludes AA from Establishing the Elements of Trespass to Chattels

Trespass to chattels is the wrongful interference with the use or possession of personal property. *Omnibus Int'l, Inc. v. AT&T, Inc.*, 2002 WL 31618413 (Tex. App.—Dallas Nov. 21, 2002, no pet. h.), *citing, Jarvis v. S. W. Bell Tel. Co.*, 432 S.W.2d 189, 191 (Tex. Civ. App.—Houston[14th Dist.] 1968, no writ). "For liability to attach, the wrongful interference must either be accompanied by *actual damage* to the property or *deprive the owner of its use for a substantial period.*" *Id*, at *4, emphasis in original, *citing, Zapata v. Ford Motor Credit Co.*, 615 S.W.2d 198, 201 (Tex. 1981) (recognizing no liability for trespass to chattels unless "wrongful detention is accompanied by actual damage to the property or deprives the owner of its use for a substantial period of time").

AA asserts that retrieval of factual data from of the AA website with FareChase software

constitutes trespass against its personal property. To support this claim, AA argues that the FareChase data retrievers' entry into and search of AA.com strains its servers and *potentially* could cause harm. *See,* Complaint at 16 ("[t]he strain caused by FareChase's and its licensee's 'scraping' activities adversely impacts the performance of the AA.com website"); ("[use of FareChase software] places untold burdens on American's Internet infrastructure and increases the risk of a system malfunction or 'crash' of the website"). The elements of trespass to chattels, however, are (1) wrongful interference with the use or possession of property and (2) actual damage or deprivation of use of a substantial period. *Omnibus International* at *4. Merely alleging strain and possible harm thus does not satisfy the elements required to show trespass to chattels under Texas law.

AA alleges that the FareChase data retrievers enter AA.com without consent and that the entry of the data retrievers burdens the infrastructure of the website. Both AA's own witnesses and FareChase's expert testified consistently that the FareChase software has caused no actual damage AA's computer infrastructure—at best, AA fears *potential* harm which is not enough to satisfy the elements of trespass.

Nor does AA have any evidence that FareChase's data retrievers deprived AA of the use of its servers for any amount of time, let alone a substantial period of time. In fact, the evidence is that AA's servers are running at only forty percent capacity at their most constrained point and that AA has not once received customer complaint regarding the failure of AA.com to function properly.

AA has also asserted that the "harm" caused by use of FareChase software was a slow down in initiating user sessions on its site due to the "blocking" AA started to employ to prohibit access to its site by FareChase and its licensees, and the costs and employee time associated therewith. Not only does this argument fail because any slow down to the site was due to AA's own self-help actions in setting up the blocking -- blocking which largely did not commence until after AA's filed its Petition – but AA's "expert" later conceded that the blocking had not actually caused any perceived slow down to the site and was not costing AA any additional

expenses.[3] FareChase's expert confirmed that there was no evidence of a slowdown caused by blocking. None of AA's claims of "harm" satisfy the requirement under Texas law.

Omnibus International is dispositive. In *Omnibus,* plaintiff alleged that it had received thousands of facsimile advertising from defendant, sent without permission. *Id.* at *1. Plaintiff sued defendants on various theories, including trespass to chattels. The court granted summary judgment in favor of the defendants on the trespass claim, noting that on the facts presented, plaintiff could not establish injury or dispossession as required under Texas law:

> Omnibus alleged and offered evidence that AT&T wrongfully commandeered its facsimile machines. By doing so, AT&T dispossessed Omnibus's use of the machines and misappropriated its paper and toner when printing the advertisements. Neither the pleadings nor the summary judgment evidence allege actual damage occurred to Omnibus's facsimile machine or that the printing of facsimile advertisements deprived Omnibus of the use of its facsimile machine for a substantial period of time. *See, Zapata*, 615 S.W.2d at 201. Accordingly, we resolve the fourth issue against Omnibus.

Id. at *4.

AA has not, and cannot, produce any evidence of actual harm to its servers. Nor can it show that the FareChase software deprived AA of the use of its servers for any substantial period of time. Thus, AA cannot establish trespass to chattels as a matter of law.

b. The Two Reported Decisions that Apply Trespass Theories to Websites Are Not Analogous to the Present Situation and Do Not Aid AA

In aid of its effort to concoct a viable cause of action, AA will undoubtedly point to two fairly recent decisions--*eBay, Inc. v. Bidder's Edge, Inc.*, 100 F. Supp. 2d 1058 (N.D. Cal. 2000) and *Register.com, Inc. v. Verio, Inc.*, 126 F. Supp. 2d 238 (S.D.N.Y. 2000) –that enjoined computer access on trespass theories. While both the *eBay* and *Verio* decisions have some superficial appeal, closer scrutiny reveals that neither involved facts analogous to the facts here—the technologies at issue were different, and the underlying circumstances were different. More importantly, neither *eBay* nor *Verio* were decided under Texas trespass law, and, in fact,

[3] During deposition testimony, AA made claims of employee and consultants' opportunity costs, but to date has provided no proof of any such costs.

those decisions rest on law that is inconsistent with Texas trespass law. Thus, AA's reliance on these two cases is misplaced.

(1) AA Cannot Rely on Breach of Its Terms and Conditions to Establish Trespass; Unlike in *Verio*, There is No Requirement that AA.com Users Agree to Terms and Conditions Before Searching for, or Even Booking, Flights

The *Verio* decision, in which the court enjoined a computer trespass, turned in part on the undisputed fact that Verio had to "accept" the terms and conditions of use posted on Register.com's site before it could access the data it was using from that site. Register.com's user agreement expressly prohibited use of the information on its site for certain purposes, including the manner in which Verio was using the information for marketing. In an obvious attempt to mold the facts here to fit within *Verio*, AA has asserted a cause of action for breach of the terms and conditions posted on its website, and has relied in part on this alleged breach to support its trespass theory—because AA's terms and conditions prohibit "robotic" activity, AA argues that FareChase is violating the terms of use and consequently gaining unauthorized access to the site, which constitutes trespass.

While the argument worked in *Verio*, it fails here for the simple reason that AA's Terms and Conditions of Use are not enforceable under Texas contract law. It is axiomatic that the enforceability of a contract requires both and offer and "acceptance of the offer." *See J.I. Case Threshing Mach. Co. v. Howth*, 293 S.W. 800, 801 (Tex. 1927) (holding that one cannot be bound to a contract to which he has not given assent). Mutual assent is thus an essential element of contract formation. *Austin v. Strong*, 1 S.W.2d 872, 876 (Tex. 1928). *Verio* does not alter this basic principle of contract law, and, in fact, relies upon it.

The corollary to mutual assent is, of course, the conspicuousness of the contract terms to be enforced. Texas law, like the law of most states, enforces only conspicuous contract terms. *Banzhaf v. ADT Security Systems Southwest, Inc.*, 28 S.W.3d 180, 189 (Tex. App.—Eastland 2000, pet. denied). To be conspicuous, "something must appear on the face of the [contract] to

attract the attention of a reasonable person when he looks at it." *Dresser Industries, Inc. v. Page Petroleum, Inc.*, 853 S.W.2d 505, 508 (Tex. 1993). Stated differently, "a term or clause is conspicuous when it is so written that a reasonable person against whom it is to operate ought to have noticed it." *Dresser* at 510; *see also*, TEX. BUS. & COM. CODE § 1.201(10).

In accord with this basic premise of contract law, the terms and conditions of use at issue in *Verio* were conspicuously located on Register.com's homepage, and access to the information from the website that Verio was using was conditioned on express assent to those terms and conditions. *Verio* at 245. Specifically, the concluding line of the terms and conditions stated "by submitting this query, you agree to abide by these terms." *Id.* at 248. There was no way around the terms and conditions--the only way to access the database that Verio was using was to click the "I accept" button at the end of the terms and conditions. Thus, there was no question that by submitting a query and accessing the database, as Verio repeatedly did, the user was manifesting its assent to the terms and conditions of use. *Id.* Indeed, Verio stipulated that it accepted the terms and conditions by submitting its searches. *Id.*

This case is in sharp contrast. Unlike Register.com's website, AA's terms and conditions of use are not printed on its home page. In fact, a user can access all of the information on the site including booking tickets, without ever seeing, let alone agreeing to, AA's Terms and Conditions of Use, or even a reference to them.[4] Thus, a user of FareChase software, or any user of AA.com for that matter, can access the fare and schedule information without ever seeing AA's Terms and Conditions. In order to access AA's Terms and Conditions, the user must click on the "Legal" link, a tiny link located along with several other links at the bottom of the webpage. Once "Legal" is clicked on, the terms and conditions of use appear. The "Legal" button is neither itself conspicuous on the homepage, and, even if it were, there mere word

[4] The sole exception is members of AA's frequent flier program AAdvantage. In order to access their frequent flier information, AAdvantage members must first "accept" the terms and conditions of use. Even AAdvantage members, however, can search for and book flights without accepting the terms and conditions of use if they do not navigate through the AAdvantage portion of the website.

"Legal," without any reference to terms and conditions of use, certainly does not alert the user that his or her use is subject to legal or other limitations.

At least one Court has analyzed the enforceability of inconspicuous website terms and conditions. *Specht v. Netscape Communications Corp.*, 306 F. 3d 17, 35 (2d Cir. 2002). *Specht* held that inconspicuous terms and conditions are not enforceable. *Id.* The "click through" agreement at issue in *Specht* was striking similar to AA's Terms and Conditions. *Id.* In *Specht*, the website agreement at issue was hidden behind a link that could only be seen by scrolling down to the bottom of the home page. *Id.* The Court in *Sprecht* found those hidden terms and conditions of use to be unenforceable on the record before it because the elements of conspicuous notice and mutual assent were absent:

> Reasonably conspicuous notice of the existence of contract terms and unambiguous manifestation of assent to those terms by consumers are essential if electronic bargaining is to have integrity and credibility. We hold that a reasonably prudent offeree in plaintiffs' position would not have known or learned, prior to acting on the invitation to download, of the reference to SmartDownload's license terms hidden below the "Download" button on the next screen.

*Id.*at 35.

This case is analogous to *Specht* in that a visitor to AA.com can search for and book air tickets without ever seeing the Terms and Conditions, let alone assenting to them—they are hidden behind a "Legal" button that does nothing to notify the user that they exist. Thus, the result here should be the same as the result in *Specht*. The Terms and Conditions are unenforceable on this record.

(2) Unlike the Software at issue in *eBay*, the FareChase Software Does Not Recursively Crawl AA.com

AA also takes great pains to use the facts of *eBay* as a blueprint for this case. In *eBay*, the Court enjoined Bidder's Edge from "recursively crawling" eBay's website, satisfied that eBay had fulfilled its burden of establishing that it was likely to succeed on the merits of its claim and that the evidence was sufficient to show irreparable harm. In order to apply *eBay* to this case, however, AA must ignore the critical distinction between *eBay* and this case: the

FareChase software does not "recursively" crawl AA.com in the same manner that the Bidders Edge software recursively crawled eBay[5]. In fact, eBay admitted that if Bidder's Edge used real time querying rather than recursive crawling, there would have been no litigation:

> It appears that the primary dispute was over the method BE uses to search the eBay database. eBay wanted BE to conduct a search of the eBay system only when the BE system was queried by a BE user. This reduces the load on the eBay system and increases the accuracy of the BE data. BE wanted to recursively crawl the eBay system to compile its own auction database.

eBay at 1062.

Because the FareChase software searches in real-time, AA cannot rely on *eBay* to establish imminent and irreparable harm. The FareChase software searches AA.com only when the FareChase licensee queries AA.com. The FareChase software does not download information from AA.com from which it compiles its own database. The evidence is undisputed that the searches, when requested, and the bookings, when made, are made on AA.com. The FareChase software mimics the behavior of a human user, searching in real-time rather than recursively, but allows the user to search multiple travel websites simultaneously. AA has produced no evidence that the FareChase software places any burden on its computer greater than that created by a human user searching AA.com for flights. In fact, AA has produced no evidence that the FareChase software has overly burdened or harmed AA's computers, or that it could cause such harm. And, because the FareChase software does not burden AA's computers, AA has no such evidence. Because the premise underlying the *eBay* Court's grant of injunctive relief was the potential for harm, which is absent here, AA's reliance on eBay is misplaced and its application fails.

c. AA's Cannot Prevail on the Merits of its Trespass Claim Because That Claim is Preempted by the Intellectual Property Clause of the United States Constitution

Even if AA could show actual damage or deprivation of use for a substantial period, which it plainly cannot, AA still cannot establish that its right to recovery is clear and

[5] A recursive crawling method was also used by the defendant in *Verio*, further distinguishing that case from the facts here. *Verio*, 126 F. Supp. 2d 238 (S.D.N.Y. 2000).

unmistakable because its trespass claim is preempted by the Intellectual Property Clause of the United States Constitution. The undisputed facts disclose that the FareChase software does nothing more than retrieve publicly available fare information and distribute that information to the FareChase user. While AA's complaint couches its grievance in terms of burden to its computer servers, AA's witnesses have testified time and time again that AA's real concern is not actual or potential burden to its servers, but the software's ability to distribute AA's webfares through channels that AA does not favor. The propriety of copying and distributing data is a matter subject to the federal copyright laws, not state tort common law.

What AA is really attempting to do here is to bootstrap legal protection for public data using the state law theory of trespass, knowing that the federal copyright laws simply do not protect raw data. This, however, AA cannot do. The fact that raw data is not protected by the federal copyright laws does not allow AA to rely on a state law theory to support its claim. To the contrary—the very fact that the copyright laws do not protect this information is the fact that subjects this claim to the copyright laws.

The Intellectual Property Clause of the United States Constitution grants only Congress the authority to protect works of authorship. The Supreme Court has confirmed a clear constitutional directive to "promote national uniformity in the realm of intellectual property." *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 162 (1989). In accordance with this directive, Congress has enacted a comprehensive statutory scheme that preempts the field. States thus do not have the authority to override federal copyright objectives by "protect[ing] that which Congress intended to be free from restraint." *Goldstein v. California*, 412 U.S. 546, 559 (1973). Rather, the Supremacy Clause of the United States Constitution requires that state law be preempted when there is a conflict between the state law and the federal intellectual property system. *Bonito Boats*, 489 U.S. at 156 (holding that Constitutional preemption precludes states enforcing statutes that conflict with the federal policy favoring free competition in ideas which do not merit intellectual property protection).

Congress intended raw facts to be free from restraint. *See Feist Publications, Inc. v. Rural Telphone Service Co., Inc.*, 499 U.S. 340, 353 (1991). AA's attempt to protect raw data, then, is a clear attempt to circumvent federal intellectual property laws. AA attempts to avoid the Intellectual Property Clause of the United States Constitution by presenting its claim as a state law cause of action. However, if AA was allowed to so easily circumvent the act and the constitution, the policies behind uniform national intellectual property laws would be destroyed. *Id.; see also, Bonito Boats*, 489 U.S. at 162. AA's claim for trespass simply cannot survive preemption.

2. AA Cannot Prevail on its Misappropriation Claim because that Claim is Preempted, and, Even if it Was Not, the Evidence does Not Satisfy Its Elements.

a. AA's Claim for Misappropriation is Preempted by Federal Copyright Law

AA cannot prevail on the merits of its common law misappropriation claim under either the unmistakable right to recover standard for mandatory relief, or the lesser likelihood of success standard required for prohibitive relief. AA's theory of misappropriation is that the FareChase software wrongfully copies fare and schedule information from AA.com and distributes that information in a manner that AA disfavors.[6] Copying and distribution of data falls squarely within the federal Copyright Act, codified at 15 U.S.C. § 100 et seq. and is thus preempted by federal law.

Section 301 of the Copyright Act states expressly that federal law occupies the entire field of protecting works of authorship. 15 U.S.C. § 301 ("no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any state"). Section 106 defines the statutorily protected rights; holders of copyrights have the exclusive right to *reproduce, distribute,* perform and display works of authorship. 17 U.S.C. § 106, *emphasis added.* While the Copyright Act does not address expressly treatment of works that do not fall

[6] FareChase does not take the position that its software "copies" data in the manner anticipated by AA's terms and conditions of use. Nonetheless, AA's theory relies on this "copying" and is thus subject to preemption.

within section 106, the United States Supreme Court has. It is settled that compilations of raw data, regardless of how difficult to compile, do not fall within section 106 and are not protected by the Copyright Act. *Feist* at 363-64. But, this does not mean that states are free to regulate the copying and distribution of raw data through actions brought under state law. To the contrary, the Supreme Court has also held that because raw data is not protected by federal copyright law, such data is entitled to *no* protection, state or federal:

> [R]aw facts may be copied at will. This result is neither unfair nor unfortunate. It is the means by which copyright advances the progress of science and art.

Feist at 350. Thus, a compilation of uncopyrightable facts, such as AA's fare and schedule information, cannot be protected by state law without running afoul of federal copyright law. *Feist* at 349 (holding "facts and ideas . . . are free for the taking . . . [T]he very same facts and ideas may be divorced from the context imposed by the author, and restated or reshuffled by second comers . . . . [i]t is the essence of copyright"); *see, Stipelcovich v. Directv, Inc.,* 129 F. Supp. 2d 989, 991 (E. D. Tex. 2001) (noting action preempted by Copyright Act if complaint seeks remedy expressly granted by Copyright Act, claim requires construction of Copyright Act or claim presents case where distinctive policy of the Copyright Act requires that federal principles control the claim), *citing, T.B. Harms Co., v. Eliscu*, 339 F.2d 823, 828 (2d Cir. 1964). Thus, the preemptive force of the Copyright Act extends to anything that falls within the scope of the Copyright Act, whether protected by it or not.

State law claims that are "equivalent" to a Copyright claim (in that it requires proof of the same elements) are preempted. Thus, AA can escape the preemptive effect of *Feist* and the Copyright Act only if it can establish that the state law misappropriation cause of action that it asserts requires proof of an "extra element," or an element not required under the Copyright Act to establish copyright protection. *Computer Mgt. Assistance Co. v. Robert F. DeCastro, Inc.*, 220 F.3d 396, 404 (5th Cir. 2000); *see, Daboub v. Gibbons*, 42 F.3d 285, 288-89 (5th Cir. 1995).

It is already settled, however, that state law misappropriation does not, under the circumstances present here, require proof of an extra element. *See, Alcatel USA, Inc. v. DGI*

Technologies, Inc., 166 F.3d 772, 787 (5th Cir. 1999) (holding common law misappropriation claim preempted because no extra element involved). Courts in this Circuit consistently hold that common law misappropriation claims based on the copying and distribution of writings are preempted. *Alcatel* at 789-89 (holding allegations of copying and distributing software and manuals and use of the information in the preparation of a derivative competitive work preempted by Copyright Act); *Daboub,* 42 F.3d 285, 290 (holding misappropriation claim centering on copying and distribution of lyrics preempted by Copyright Act.), *compare, Brown v. Ames*, 201 F.3d 654, 658 (5th Cir. 2000) (holding misappropriation claim not preempted because claim based on misappropriation of name or likeness which does not fall within the subject matter of copyright). This holds true even if the common law misappropriation claim complains of copying and distributing of writings that are ultimately found to be uncopyrightable. *Alcatel* at 77-78, *see Feist* at 1289-90. Thus, regardless of whether AA's fare and schedule information is a work of authorship afforded Copyright protection or a compilation of raw data that is not afforded Copyright protection, its claim for misappropriation is preempted. Consequently, AA cannot establish either an unmistakable right to recover or a likelihood of success on the merits of its misappropriation claim.

b. Even if not Preempted, AA Cannot Establish the Elements of a Misappropriation Claim

Common law misappropriation has three elements: (1) the creation by plaintiff of a product through extensive time, labor, skill and money; (2) the use of that product by defendant in competition with plaintiff thereby giving defendant a competitive advantage because it was unburdened by the expenses incurred by plaintiff in the creation of the product; and (3) commercial damages caused by the misappropriation. *Alcatel,* 166 F.3d at 788; *Aldrige v. The Gap Stores, Inc.*, 866 F. Supp. 312, 313 (N. D. Tex 1994) (McBryde, J.); *The Capella Group, Inc. v. International Assoc. of Businesses,* Case No. 4:02-CV-17-Y (slip op. N. D. Tex. Sept. 5, 2002) (Means, J.).

Even if its claim is not preempted, AA cannot prevail because the evidence does not support the elements of the tort. There is no evidence that FareChase used the software "in competition" with AA, or that AA has suffered any commercial damages caused by the misappropriation. Even if AA's claim could survive preemption, AA cannot satisfy its burden of proving that it will succeed on the merit of this claim.

3. AA Cannot Establish An Unmistakable Right to Recover on Its Claim for Violation of the Harmful Access to Computer Statute

AA's Petition includes a claim for violation of Texas Penal Code section 33.02, which can be civilly prosecuted under Texas Civil Practice and Remedies Code section 143.001. Texas Penal Code section 33.02 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."

AA simply cannot show that it is likely to succeed on the merits of this claim, let alone establish an unmistakable right to recover. The statute, by its language, is clearly directed toward hacking or other unauthorized access to and deletion or corruption of the data contained therein. The sole published case applying the statute confirms this interpretation. That case, a criminal action, involved an employee of the Dallas Fire Department, who on her last day of work after difficulties with her supervisors, intentionally corrupted several files on her work computer. *Mitchell v. State*, 12 S.W.3d 158 (Tex. App.—Dallas 2000, no pet.).

Conversely, FareChase created a software solution that allows travelers, either directly or through their agents, simultaneously search multiple travel websites who are seeking those same travelers business. AA is now asserting that the users of FareChase software violate a criminal statute by accessing AA's publicly published website, to retrieve fare information that AA made available to the public, and to book air transport tickets that AA has offered for sale to the public. Plainly, this conduct is not the type intended to be prohibited under a criminal statute.

Moreover, even if this statute applied to the type of access to the AA.com website made by a FareChase software user, it is the end-user that accesses the website, not FareChase. FareChase merely develops and licenses software that is used to search public travel websites. It is not the entity performing the act of initiating any specific search or booking, and therefore, FareChase cannot be held liable for accessing any AA computer, even if this statute did cover such conduct.

Furthermore, section 143.001, which provides a civil cause of action under this statute, allows the recovery of damages only upon a showing of injury proximately caused by a violation of section 33.01. As discussed above in detail, AA has no evidence of injury and thus cannot prevail on this claim.

C. The Evidence Defeats a Showing of Extreme Necessity or Hardship

In addition to showing an unmistakable right to recover, AA must also prove, by clear and compelling evidence, that it has extreme need for the requested relief or that it will suffer extreme hardship if the requested relief is not granted. This showing is akin to that required for prohibitive relief albeit subject to a higher evidentiary burden. AA must establish imminent harm, irreparable injury and lack of adequate remedy at law and must establish the extremity of these factors by clear and compelling evidence. That evidence, however, does not exist.

1. AA Cannot Establish Imminent Harm

It is settled that under Texas law, "[a] prerequisite for injunctive relief is the threat of imminent harm." *Operation Rescue-National v. Planned Parenthood of Houston and Southeast Texas, Inc.*, 975 S.W.2d 546, 554 (Tex. 1998), *quoting, Frey v. DeCordova Bend Estates Owners Ass'n*, 647 S.W.2d 246, 248 (Tex. 1983). Mere "fear or apprehension of the possibility of injury alone is not a basis for injunctive relief." *Mother & Unborn Baby Care of North Texas, Inc. v. Doe*, 689 S.W.2d 336, 338 (Tex. App.—Fort Worth 1985, writ dism'd w.o.j.). There is simply no "imminent" threat of harm here. AA itself has admitted that it has no evidence that FareChase or use of FareChase software has placed any undue burden on its website

infrastructure. And, FareChase's expert has testified that there is no evidence of harm to AA.com caused by the FareChase software. Although AA has claimed, and will likely claim here, that it fears the harm "will be exacerbated by the new alliances FareChase is forming," such prospective possibility is not the showing of immediate harm required to support the issuance of a preliminary injunction.

AA has claimed in the past that exigent circumstances exist here and that the "impending threat that FareChase poses to [its] computer systems" constitutes an imminent threat of harm. AA has pointed to two pieces of "evidence" to support this claim that it faces imminent harm. First, it claims that "FareChase . . . [and] Sabre have publicly proclaimed their intent to install tens-of-thousands of additional copies" of FareChase software in the "immediate future." However, the press release issued by FareChase and Sabre concerning their licensing arrangement was issued on April 29, 2002, nearly ten months ago, and was also claimed by AA as a basis for its Original Petition. AA's other "evidence" is a document produced by FareChase during discovery, entitled "FareChase Revenue Model," which is merely an undated financial forecast for the *entire 2002 year*, that includes potential revenue projections from the license agreement between FareChase and Sabre. Indeed, according to this document, the "imminent" roll-out AA fears would have begun more than three months ago. However, the letter from counsel for Sabre dated November 15, 2002, establishes that this is not the case.

2. AA Cannot Establish Irreparable Injury

In addition to imminent harm, AA must establish that it will suffer irreparable injury if the injunction is not granted. AA has not evidence of harm, and will not be able to produce any because FareChase's software does not interfere with its website. Furthermore, use of FareChase software actually enhances AA's business by providing prospective travelers, who might not otherwise take the time to visit the AA.com site, with a tool that allows that traveler to comparison shop in an efficient and accurate manner. If that traveler chooses to book an AA

flight discovered by using the FareChase software, AA will acquire a sale it might not have otherwise.

The "irreparable injuries" must be "actual and substantial" not just a mere possibility. AA cannot establish irreparable injury because FareChase's software does not interfere with its website. Furthermore, use of FareChase software actually enhances AA's business by providing prospective travelers, who might not otherwise take the time to visit the AA.com site, with a tool that allows that traveler to comparative shop in an efficient and accurate manner. If that traveler than chooses to book an AA flight discovered by using FareChase, AA will acquire a sale it might not have otherwise.

3. AA Cannot Establish Lack of Adequate Legal Remedy

"Lack of adequate remedy at law" means an injury for which there is no legal measure of damages available, that is, a noncompensable injury. *Universal Health Services, Inc. v. Thompson*, 24 S.W.3d 570, 577 (Tex. App.–Austin 2000, no pet.), *citing, Texas Indus. Gas Phoenix Metallurgical Corp.*, 828 S.W.2d 529, 533 (Tex. App.–Houston[1st Dist.] 1992, no writ). In order to satisfy the lack of legal remedy prong, AA must establish that is has been injured in a manner for which there is either no real legal measure of damages, or no measure that can be determined with a sufficient degree of certainty. *Id.* Stated differently, the injury must be truly noncompensable. *Universal Health Services,* 24 S.W.3d at 577, *citing, Texas Indus. Gas* at 533. Examples of noncompensable injury include customer loss, loss of goodwill and loss of office stability. *See, Martin v. Linen Sys. for Hosps., Inc.*, 671 S.W.2d 706, 710 (Tex. App.–Houston[1st Dist.] 1984, no writ) (citing examples). Compensable injury, or adequate legal relief, on the other hand, is one that is complete, practical and as efficient to the prompt administration of justice as is equitable relief. *Universal Health* at 577.

AA has admitted that if it suffers any harm at all, then that harm is compensable by monetary damages. AA proposed that FareChase compensate it for searches and bookings made on the AA.com website by FareChase or its licensees in the amount of $0.10 per search and

$12.00 per booking figures in three subsequent writings. Certainly AA cannot now argue that its claimed harm is irreparable when it was willing to accept compensation.[7] Without a showing of either imminent or irreparable harm, issuance of a temporary injunction would be unwarranted.

D. In Balancing the Equities, the Scale Tips Decidedly in Favor of Farechase

"When the questions to be ultimately decided are serious and doubtful, the legal discretion of the judge should be influenced largely by the balance of equities between the parties." *Texas Pipeline,* 54 S.W.2d at 194. In balancing the equities, the Court should determine which of the parties will suffer the greater detriment or inconvenience by the action of granting or denying the injunction. *Id.* In cases such as this one, where substantial doubt as to the propriety of injunctive relief exists, the balancing of the equities is a factor of controlling importance. *Id.*

FareChase is a small start-up company with very limited funding that has been carefully rationed to allow it to cover overhead expenses, as it develops and markets its software to its initial group of licensees. The revenue from the licensing of its two software products is necessary to continue operations. If FareChase is required to modify these products to eliminate the largest airline in the world, then it will likely be in breach of its existing license agreements and will be severely impeded in efforts to market its product to new licensees.

To date, FareChase has licensed WebAutomation to less than ten companies, including third party intervenor Sabre, Inc., and is in the process of negotiating with others. To date, one potential licensee, with whom FareChase had executed a contract, decided not to go forward with the contract and launch the FareChase software. The articulated reason for its decision was the existence of this lawsuit and the issues raised by AA. In short, the potential licensee did not want to risk exposure to similar litigation.

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[7] Even AA admitted the alleged harm caused to its business model by FareChase software users access to its webfares is simply an economic matter. During deposition testimony, AA noted that it had licensed access to its webfares to at least two travel distribution websites because "those specific distributors had agreed to a set of economics." (Kreeger depo).

While AA has not proved it faces either imminent or irreparable harm, issuance of an injunction could seriously injure FareChase, even to the point of putting it out of business, prior to it receiving a full and fair trial on the merits. The balance of hardships tips strongly in favor of denying the injunction AA seeks.

E. The Public Interest is Aligned with the Free Flow of Public Information; thus AA's Request for Injunctive Relief Must Be Denied

In considering AA's motion for a preliminary injunction, the court has a duty to consider the public interest in its balancing. If public necessity, public health or public convenience outweigh any resulting private injury, the injunction should be refused. *See, Mitchell v. Temple*, 152 S.W.2d 1116, 1117 (Tex. Civ. App.—Austin 1941, writ ref'd w.o.m.) (finding the public harm that would incur from enjoining the operation of a sewage plant would be greater harm than that occurring if the injunction did not issue.) There are two public interests at issue here: the interest in maintaining the free flow of public information over the Internet and the interest in fostering, rather than eliminating, competition in an already fiercely competitive market. The two are necessarily interrelated, as the ready access to commercial information on the Internet fosters competition.

AA has asked the court to create a new cause of action, that would give AA the right to control publicly available information. Such an extension of the law could have debilitating impact on the way the Internet functions and is contrary to the public interest. The Internet functions as a "giant computer 'network of networks'" to connect users to a body of information "as diverse as human thought." *PSINET Inc. v. Chapman*, 167 F. Supp. 2d 878, 883 (W. D. Vir. 2001); *ACLU v. Reno*, 929 F. Supp. 824, 842 (E.D. Pa. 1996) The success of the Internet, and on competitive commerce over the Internet, depends on the free flow of this information. However, in requesting this injunction, AA is asking this court to enjoin the free flow of pricing and travel information that AA itself has made publicly available through Internet. AA has concocted a non-existent "harm" as its basis for making this request, while in truth, AA merely seeks to

curtail competition by making it more difficult for consumers to compare alternative air travel options.

The Federal Trade Commission has stated that "[c]ompetition is fostered both by the sellers vying for [ ] business and shoppers seeking the best deal." Federal Trade Commission, *Promoting Competition, and Protecting Consumers: A Plain English Guide to Antitrust Laws* (1999), <http://www.ftc.gov/bc/compguide/keep.htm>. The nature of the Internet makes it an especially efficient medium for fostering such competition, because it allows sellers from all over the world to promote their business, and it allows buyers to obtain information from a wide variety of sources offering the items that they wish to purchase. Thus, the availability of effective software tools that allow the average consumer to feasibly gather product comparison information are essential to the success of a competitive e-commerce environment.

As one major airline recently testified to the National Commission to Ensure Consumer Information and Choice in the Airline Industry (the "Commission"), "[t]he travel distribution landscape is undergoing significant change" through the Internet, which "is available to anyone with a computer." After noting the existence of "robot" software in the market that eliminates the need for consumers to manually search for the best flights and process, the airline stated that "[d]irect access to all of this information provides significant consumer benefits." *Id.*

Orbitz, LLC, the online "travel agent" founded by AA and four other major airlines, which has recently been under much scrutiny by the Commission, recently testified that the Commission should:

> [b]e of technology innovation and consumer choice. Technological progress has made massive contributions to our nation's productivity. Let it continue to do so in the travel industry. Let free market competition work in the travel distribution channel so prices fall and new technologies flourish."

Surely Orbitz and its major shareholder AA do mean to limit the right of technological progress and consumer choice only to the companies and business they control. As Orbitz stated, "travel agents, in particular small travel agents, need to be given meaningful, competitive choices among the computer systems the must use to view travel suppliers inventory and book reservations for

customers." *Id.* AA cannot now argue that travel agents should be limited to choosing its onerous EveryFare program, which requires a commitment through the December 31, 2007 to cover booking fees previously paid by AA, simply so that the agent can access webfares and make those fares available to its customers.

Issuance of the injunction AA requests would threaten to eliminate many of the benefits of the Internet, as it would allow individual merchants to interfere with the free flow of price and product information and would stifle competition. A ruling that AA can enjoin prospective traveler's use of software that simply automates the process of searching for unprotectable raw data about product pricing and availability, that AA has already made publicly available on the Internet, would entice other online businesses to use similar theories to hinder the flow of information. Companies like AA who already hold enormous market shares would have a special incentive to shut down companies like FareChase, who provide tools that allow consumers to comparison shop. These mega-companies would be able to rely on their strong market influence and brand names to ensure customers come to their website, while smaller competitors are left with a disadvantage. Because manually gathering information from individual websites can be complicated and tedious, many consumers will remain ignorant about less expensive or better alternatives that are available elsewhere.

The Internet and e-commerce offer the possibility of improving the quality and quantity of information available to consumers, and of cutting transaction costs to the benefit of all involved. However, a ruling by this Court that allows big business to enjoin the use of innovative search tools such at that developed by FareChase would prevent consumers from efficiently obtaining the type of information the keeps the market competitive. Such an action would also endanger the most basic functions on which the Internet is based. The public interest weighs heavily against the issuance of the injunction AA now seeks.

IV. CONCLUSION

Based on the foregoing law and argument, FareChase respectfully requests that the Court

deny AA's application for a preliminary injunction. In short, AA is unlikely to succeed on the merits of its trespass claim. Furthermore there is no imminent threat of any harm, let alone irreparable harm, to AA whether through burden to AA's servers or through an intended "deployment" of FareChase software. Thus, AA's application should be denied.

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Certificate of Service

I hereby certify that a true and correct copy of the foregoing was served by hand delivery on Gregory P. Blaies, R. H. Wallace, David E. Keltner, Bill F. Bogle, and by facsimile on John R. Keville, Joseph P. Lavelle and R. Paul Yetter on February 3d, 2003.

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