IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

SOUTHWEST AIRLINES CO.,	§	
	§	
Plaintiff,	§	
	§	
	§	
v.	§	CIVIL ACTION NO. 3:21-cv-00098-E
	§	
KIWI.COM, INC. AND KIWI.COM S.R.O.,	§	
	§	
Defendants.	§	

MEMORANDUM OPINION AND ORDER

Before the Court is Plaintiff Southwest Airlines Company's Motion for Preliminary Injunction (Doc. 18). After careful consideration, for reasons that follow, the Court grants the motion.

Background

Southwest filed this lawsuit against Defendants Kiwi.com, Inc. and Kiwi.com s.r.o. (collectively "Kiwi") in January 2021. The following allegations are taken from Southwest's First Amended Complaint. Since it began operating in 1971, Southwest has become one of the most-flown airlines in the United States, with more than 4,000 daily departures in peak travel seasons in 2019. Southwest maintains unique customer-friendly policies, including a "Bags Fly Free" policy (each customer can check two bags for free, subject to weight and size limits) and a "No Change Fees" policy (Southwest does not charge fees to change or cancel flights, though fare differences may apply).

Southwest offers and sells flights to the public through its website at www.southwest.com and its mobile application (collectively, "Southwest Digital Platforms"). Southwest maintains the

exclusive online distribution rights to sell Southwest tickets through the Southwest Digital Platforms and does not allow online travel agencies ("OTAs") to sell Southwest flights without express written approval. The Southwest Digital Platforms provide links to the "Terms and Conditions" for use of the Southwest website ("the Terms"), which govern use of the Southwest Digital Platforms. Users are alerted that "Use of the Southwest websites and our Company Information constitutes acceptance of our Terms & Conditions." The Terms expressly prohibit attempts to "page scrape" flight data and use of the website for any commercial purpose without authorization from Southwest.

Southwest alleges that Kiwi operates an OTA and has engaged in repeated, unlawful activity on the Southwest website, including unauthorized scraping of flight and pricing data and unauthorized sales of Southwest tickets. According to Southwest, Kiwi purchased tickets directly from Southwest's website and then resold the flights to over 170,000 customers. Southwest alleges Kiwi inflates Southwest fares and charges service fees that are not collected by Southwest. Southwest has sent written cease-and-desist demands in emails and letters to Kiwi's chief legal counsel and registered agents in the United States referencing the Terms. Kiwi has ignored the cease-and-desist letters. Southwest alleges that since filing this suit, it has implemented security measures in an effort to stop Kiwi's activities, but Kiwi has continued to hack the Southwest website and sell Southwest flights without permission.

Southwest asserts the following causes of action: (1) breach of contract/the Terms; (2) trademark infringement under 15 U.S.C. § 1114; (3) false designation of origin and unfair competition under 15 U.S.C. § 1125(a); (4) dilution under 15 U.S.C. § 1125(c); (5) violation of the Computer Fraud and Abuse Act (CFAA), 18 U.S.C. § 1030; (6) violation of the Texas Harmful Access by Computer Act; and (7) unjust enrichment. Southwest asks the Court for a preliminary

injunction prohibiting Kiwi's unauthorized sales of its flights. Southwest argues it is likely to succeed on the merits of its breach of contract claim and can establish the remaining requirements for injunctive relief.

Kiwi acknowledges it has been collecting and publishing Southwest's flight data for over seven years, but disputes that Southwest is entitled to injunctive relief. Kiwi argues Southwest has been aware of Kiwi's activities since September 2015, when it sent a cease-and-desist letter to Kiwi's predecessor Skypicker. According to Kiwi, Southwest's five-year-plus delay in seeking an injunction means Southwest cannot obtain injunctive relief.

Applicable Law

The purpose of a preliminary injunction is "merely to preserve the relative positions of the parties until a trial on the merits can be held." *University of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981). A preliminary injunction is an extraordinary remedy that should be granted only if the movant establishes (1) a substantial likelihood of success on the merits; (2) a substantial threat of irreparable injury if the injunction is not issued; (3) that the threatened injury if the injunction is denied outweighs any harm that will result if the injunction is granted; and (4) that the grant of an injunction will not disserve the public interest. *Texans for Free Enter. v. Tex. Ethics Comm'n*, 732 F.3d 535, 536–37 (5th Cir. 2013); *see also* FED. R. CIV. P. 65. "The decision to grant or deny a preliminary injunction is discretionary with the district court." *Miss. Power & Light Co. v. United Gas Pipe Line*, 760 F.2d 618, 621 (5th Cir. 1985). A plaintiff is not required to prove its entitlement to summary judgment in order to establish a substantial likelihood of success on the merits for preliminary injunction purposes. *Byrum v. Landreth*, 566 F.3d 442, 446 (5th Cir. 2009). But the movant must make a clear showing that the injunction is warranted, and the issuance of a

preliminary injunction "is to be treated as the exception rather than the rule." *Miss. Power & Light*, 760 F.2d at 621.

Analysis

Success on the Merits

Southwest contends it is likely to succeed on its breach of contract claim. It maintains the Terms of its website are a valid contract between the parties.

To establish a breach of contract claim under Texas law, a plaintiff must prove (1) the existence of a valid contract; (2) the plaintiff's performance or tendered performance; (3) the defendant's breach of the agreement; and (4) the plaintiff's resulting damages. *Southwest Airlines Co. v. BoardFirst, L.L.C.*, No. 3:06-CV-0891-B, 2007 WL 4823761, at *4 (N.D. Tex. Sept. 12, 2007) (Boyle, J.) (citing *Dorsett v. Cross*, 106 S.W.3d 213, 217 (Tex. App.—Houston [1st Dist.] 2003, pet. denied)). Southwest asserts this Court should find that Kiwi is contractually bound by the Terms just as another district judge in the Northern District of Texas found in the *BoardFirst* case.

In *BoardFirst*, Southwest sued BoardFirst for allegedly violating the terms and conditions of Southwest's website. *BoardFirst*, 2007 WL 4823761, at *1. BoardFirst's business was to assist, for a fee, Southwest passengers in securing boarding passes with a high priority boarding group. It did so by logging onto Southwest's website to check passengers in. *Id.* Southwest sent cease-and-desist letters to BoardFirst apprising it that Southwest's terms and conditions prohibit the use of its website for commercial purposes. *Id.* at *2. When BoardFirst continued operations, Southwest filed a lawsuit alleging breach of contract and other claims. In seeking summary judgment on its contract claim, Southwest argued the terms of its website created a binding contract with BoardFirst once BoardFirst began using the website with knowledge of the terms. *Id.* at *4.

The district court found that BoardFirst had knowledge of the terms at the time its founder received the first cease-and-desist letter from Southwest. *Id.* Southwest asserted that BoardFirst effectively manifested its acceptance of Southwest's offer to use the website subject to the terms by continuing to use the website after having actual knowledge of the terms. The district court agreed and ruled that BoardFirst was bound by the contractual obligations imposed by the terms. *Id.* at *7.

Kiwi responds that in the fourteen years since the *BoardFirst* case was decided, the law has "shifted significantly." Kiwi argues that "Courts, scholars, and commentators broadly agree there is a clear distinction between public and private data, and that private companies cannot unilaterally restrict public access to publicly available information." Kiwi asserts the leading federal precedent on the accessibility of public data is a Ninth Circuit case, *hiQ Labs v. LinkedIn*, 938 F.3d 985 (9th Cir. 2019). LinkedIn, the professional networking website, sought to prevent competitor hiQ from collecting and using information from the public profiles of LinkedIn users. The district court granted hiQ's request for a preliminary injunction, forbidding LinkedIn from denying hiQ access to publicly available LinkedIn member profiles. The appellate court considered, among other things, whether hiQ's state law claims were preempted by the CFAA which LinkedIn argued hiQ violated. *Id.* at 999. The CFAA states that whoever intentionally accesses a computer without authorization or exceeds authorized access and obtains information from any protected computer shall be punished by fine or imprisonment. 18 U.S.C. § 1030(a)(2)(C). In *hiQ*, the "pivotal CFAA question" was whether once hiQ received LinkedIn's cease-and-desist letter, any further scraping and use of LinkedIn's data was without authorization under the meaning of the CFAA. *hiQ*, 938 F.3d at 999. If so, hiQ could not succeed on any of its state law claims and was not entitled to a preliminary injunction. *Id.* The Ninth Circuit upheld the preliminary injunction, finding it likely that when a computer network generally permits public

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