

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION**

**Repairify, Inc., d/b/a asTech,**

*Plaintiff,*

**v.**

**AirPro Diagnostics LLC,**

*Defendant.*

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**CIVIL ACTION NO. 4:19-CV-1370**

**DEFENDANT AIRPRO DIAGNOSTICS, LLC’S RESPONSE IN OPPOSITION TO  
PLAINTIFF’S APPLICATION FOR PRELIMINARY INJUNCTION**

Subject to, and without waiving its Motions to Dismiss filed pursuant to Federal Rules of Civil Procedure 12(b)(2) and 12(b)(3), and its Motion to Transfer Venue filed pursuant to 28 U.S.C. § 1404(a), Defendant AirPro Diagnostics, LLC (“AirPro”) files this Response in Opposition to Plaintiff Repairify, Inc.’s (“asTech”) Application for Preliminary Injunction, and respectfully requests that the Court deny asTech’s Application for the reasons set forth below.

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**I. INTRODUCTION, NATURE, AND STAGE OF PROCEEDING**

asTech filed this lawsuit on April 15, 2019. (DK. 1). On May 6, 2019, Plaintiff filed its Application for Preliminary Injunction and its Motion for Expedited Discovery. (DKs. 11-12, respectively). On May 15, 2019, Defendant AirPro filed its Motion to Dismiss, pursuant to Federal Rules of Civil Procedure 12(b)(2) and 12(b)(3), and in the alternative, a Motion to Transfer Venue to the Middle District of Florida, Jacksonville Division. (DK. 14).

The parties to this lawsuit are competitors in the remote vehicle diagnosis industry. Plaintiff asTech filed suit against Defendant AirPro in the Southern District of Texas, Houston Division after settling a lawsuit filed in the Middle District of Florida, Jacksonville Division, over the same allegations involving the same parties. asTech now seeks a preliminary injunction in an attempt to shut down its competitor's website on baseless claims that AirPro is disseminating false and misleading information about asTech's diagnostic tool. In short, asTech, a company believed to be hemorrhaging customers due to the poor performance of its inferior product, is attempting to use this lawsuit to litigate how its competitor can market its own product. asTech cannot compete with AirPro's scan tool in the open market, and cannot refute the claims made by AirPro (because they are true), so instead, asTech has launched another lawsuit in hopes the cost of litigation will harm AirPro's business. asTech's Application for Preliminary Injunction should be denied for several reasons:

First, this Court must not issue an injunction based upon affidavits alone where there are contested issues of fact relevant to the Court's decision. AirPro has controverted the lone affidavit in support of asTech's Application. AirPro is therefore entitled to an evidentiary hearing, including an opportunity to cross-examine asTech's witnesses and to present testimony and evidence in opposition, before any injunction can be issued. *See e.g., Heil Trailer Int'l Co. v. Kula*, 542 Fed.

Appx. 329, 334 (5th Cir. 2013); *Marshall Durbin Farms, Inc. v. Nat'l Farmers Org. Inc.*, 466 F.2d 353, 356 n.4 (5th Cir. 1971).

Second, asTech has failed to submit any proper evidence in support of its Application. asTech's Application is supported by a single, conclusory affidavit insufficient to support injunctive relief. As such, asTech has wholly failed to offer any competent evidence to support its Application. asTech alone bears the burden of establishing a right to preliminary injunctive relief. Accordingly, the Application must be denied in the absence of any competent evidentiary support.

Third, even if the Court were to consider asTech's controverted and conclusory affidavit, its sole evidence to support its Application, asTech has failed to carry its burden of showing: (a) that asTech is likely to succeed on the merits of its claims; (b) that asTech will suffer an irreparable harm if an injunction does not issue; (c) that the balance of harm weighs in favor of an injunction; or (d) that the public interest favors an injunction. For all of these reasons, asTech's Application for Preliminary Injunction should be denied.

## **II. STATEMENT OF ISSUES & STANDARD OF REVIEW**

Before the Court is the issue of whether asTech should be granted a preliminary injunction when its only evidence to support its Application is a single, conclusory, and controverted affidavit. A district court's orders regarding the issuance of a preliminary injunction is subject to an abuse of discretion standard of review. *Daniels Health Scis., LLC v. Vascular Health. Scis., LLC*, 710 F.3d 579, 582 (5th Cir. 2013).

## **III. ARGUMENTS AND AUTHORITIES**

### **A. Standard for a Preliminary Injunction.**

Because preliminary injunctive relief "is an extraordinary remedy," a decision to grant a preliminary injunction "is to be treated as the exception rather than the rule." *Mississippi Power*

*& Light Co. v. United Gas Pipe Line Co.*, 760 F.2d 618, 621 (5th Cir. 1985). In order to secure injunctive relief against AirPro, asTech must demonstrate (1) a substantial likelihood that it will succeed on the merits of its claims; (2) the existence of a substantial threat to asTech of imminent irreparable harm; (3) that the threatened harm outweighs any damage that the injunction may cause AirPro; and (4) that injunctive relief would not disserve the public interest. *Guy Carpenter & Co. v. Provenzale*, 334 F.3d 459, 464 (5th Cir. 2003). asTech cannot show that it is entitled to injunctive relief in this case and, accordingly, its application should be denied.

**B. Injunctive Relief May Not Issue Based Upon Controverted Affidavits Alone.**

Under the clearly settled law of this Circuit, asTech's request for injunctive relief cannot be resolved on the basis of affidavits alone, because AirPro has submitted a controverting affidavit showing that many of the key factual issues in this case are in dispute. Federal Rule of Civil Procedure 65 governs injunctions and restraining orders, and refers repeatedly to "the hearing" that a district court holds "on a motion for preliminary injunction." Fed. R. Civ. Pro. 65(a). Noting that Rule 65 "implies a hearing," the Fifth Circuit has repeatedly held that a motion for preliminary injunctive relief may be granted "without conducting an oral hearing ... exclusively in cases that involv[e] no genuine factual dispute." *Heil Trailer*, 542 Fed. Appx. at 334 (emphasis added) (citing *Marshall Durbin Farms*, 446 F.2d at 356). "In cases such as this one, however, where the parties' affidavit testimony is in direct contradiction as to material questions of fact," it is improper for the district court to grant injunctive relief on the basis of affidavits alone. *Heil Trailer*, 542 Fed. Appx. at 334. As set forth in the attached affidavit, AirPro's representative disputes key factual assertions by asTech CEO Doug Kelly. These factual disputes concern questions basic and material to the Court's decision, as all of the following statements alleged by Doug Kelly as false are completely controverted by AirPro's CEO Lonnie Margol:

- AirPro’s insider knowledge of asTech current device (*See **Exhibit A*** at ¶¶ 4-7);
- asTech’s limitations in performing ADAS calibrations in comparison to AirPro (*Id.* at ¶¶ 8-10);
- asTech’s limited ability “to Program and Flash Modules In-House” in comparison to AirPro (*Id.* at ¶ 11);
- asTech’s lack of an “Evergreen Warranty” as oppose to that offered by AirPro (*Id.* at ¶¶ 12-14);
- “CCIF 2016 Scan Tool Comparison Test” graphic (*Id.* at ¶ 15);
- AirPro’s website assertion that “if the dealer has the software, so does AirPro” (*Id.* at ¶ 16);
- AirPro’s website assertion that “because of fluctuations in internet connectivity, asTech is limited in its ability to remotely perform many ADAS calibrations” (*Id.* at ¶ 17);
- AirPro’s website assertion that “OEM Scan Tool Software Application resident directly on the AirPro Tool” (*Id.* at ¶¶ 18-19);
- AirPro’s website assertion that AirPro Services all 2019 and Prior Year Vehicles (except Tesla)” and that asTech does not (*Id.* at ¶¶ 20-21);
- AirPro “repeatedly suggests that the asTech Device is unsafe and poses ‘a critical matter of passenger safety’” (*Id.* at ¶ 22).

The truth and reasoning behind the above statements are explained in greater detail in section D(1) of this Response. The veracity of these claims are the key to all of asTech’s claims against AirPro. They are the only facts that matter at all. Given these disputes over key material facts, this is not a case where preliminary relief may issue on the basis of contested affidavits alone. In *Heil Trailer*, the Fifth Circuit held that it was error for the district court to grant preliminary

injunctive relief in a case alleging theft of trade secrets where the parties' affidavits disputed whether the information at issue was actually a trade secret or not. *See Heil Trailer*, 542 Fed. Appx. at 334. The Fifth Circuit held that because one side's witness had "testified by affidavit that it would be extremely difficult for competitors to acquire or duplicate" the alleged trade secret information, and the other side's witnesses "testified to the contrary" by affidavit, the district court erred by resolving the question without taking evidence at a hearing. *Id.* Similarly, the analysis needed in this case involves examining the veracity of AirPro's advertising statements in light of conflicting affidavits.

**C. asTech Fails to Present Any Competent Evidence in Support of Its Motion.**

Beyond a single, controverted, and conclusory affidavit, asTech has failed to provide any other evidence as to why its Application for Injunctive Relief should be granted. As previously stated, where the parties' affidavit testimony is in direct contradiction on key issues of material fact, it is improper for a district court to grant injunctive relief on the basis of contested affidavits alone. *Id.* That is exactly the case here. Before the Court are two affidavits that completely contradict each other. Setting aside asTech's contested affidavit, it has presented no other evidence as to why it would be successful on the merits of its claims. Interestingly, most of the statements asTech's alleges to be false are about asTech's own products. Nobody is in a better position to prove the alleged falsity of statements about asTech's product than asTech itself. Yet, asTech relies on a single affidavit. asTech does not provide any diagnostic reports or testing done on its own products to prove AirPro's statements to be false. All of the allegations contained in asTech's application are wholly conclusory and unsupported, and cannot support its claim for injunctive relief.

**D. Even if asTech's Improper Evidence Is Considered, asTech Fails to Carry Its Burden of Proving That It is Entitled to Preliminary Injunctive Relief.**

### **1. asTech Is Not Likely to Succeed on the Merits**

Not only does asTech fail to show that it will likely succeed on the merits, but the laundry list of statements asTech complains of as false are anything but. As a threshold matter, it is not clear in the Fifth Circuit if unsubstantiated comparative advertisements are considered per se false. To support its proposition, asTech cites to a 2005, unreported case out of the Western District of Texas, San Antonio Division, which in turn cites a Third Circuit case from 2002. *See* DK 11 at ¶ 13. This Court is not bound by decisions from other U.S. circuits nor are those circuits controlling. The Fifth Circuit Court of Appeals has not addressed the status of unsubstantiated comparative advertisements as per se false. Even if the Fifth Circuit would adopt that position, as explained below, nothing about the comparisons asTech complains of are unsubstantiated.

Of the laundry list of claims asTech's alleges are false and unsubstantiated, first on the list refers to misleading statements that AirPro has inside knowledge of the current asTech device. *See* DK 11 at ¶ 14, pg. 12. First of all, AirPro does not claim to have insider knowledge of the current asTech device. *See* **Exhibit A** at ¶ 4. The knowledge and information AirPro has acquired about the current asTech device comes from current and former users the device. *Id.* at ¶ 5. AirPro's team gained familiarity with asTech's device because they were present during the development of the "first generation" asTech device. *Id.* asTech's method relies on near perfect internet conditions to perform at acceptable levels as designed by the manufactures. *Id.* at ¶ 7. asTech customers informed AirPro representatives of a variety of issues with the asTech device. *Id.* Such issues include having to disconnect and re-connect the scan-tool, fluctuating internet issues, failed programming attempts, an inability to or declining to program modules, and vehicle coverage limitations. *Id.* These issues are indicative of the fact that conversion and transfer of vehicle data over the internet reduces the functionality of the asTech device. *Id.* AirPro's knowledge of the



inherent limitations presented by the current asTech device come from a combination of AirPro's familiarity with the original device and from current and former users of the current device. *Id.*

asTech next complains of AirPro's website stating that asTech "is limited in its ability to remotely perform ADAS Calibrations" as compared to AirPro. *See* DK 11 at ¶ 14, pg. 12. This is merely a statement of fact. For the asTech tool to work, two asTech devices must be connected to the internet continuously, one to the vehicle and one to a scan-tool. *See* **Exhibit A** at ¶ 8. According to former and current asTech users, they must have a vehicle connected to a cat5 cable and battery support during scanning functions. *Id.* This is significant because it makes the completion of a dynamic ADAS calibration, which requires a road test at speeds over thirty (30) miles-per-hour for several miles, impossible. *Id.* Even with the use of a cellular wireless hotspot, there is a risk that an asTech device connected to the vehicle will lose cellular signal due to tall buildings, overpasses, bridges, or random loss of signal. *Id.* This would end the scan session and result in a failed calibration. *Id.*

By contrast, the AirPro Device connects directly to the vehicle and does not require a continuous internet connection in order to perform a dynamic ADAS calibration with a road test. *Id.* at ¶ 9. An AirPro technician remotely connects to the AirPro Device and executes the necessary commands from directly connected Device. *Id.* Because the AirPro device is directly connected to the vehicle, the internet connection can be disconnected while performing the road test. *Id.* When the vehicle returns to the shop, the AirPro Device automatically reconnects to the internet and the AirPro technician can then review the data that confirms completion of the Dynamic ADAS calibration. *Id.* Additionally, former and current customers of the asTech device have reported that asTech declines to perform in-shop remote ADAS static calibrations using targets

and vehicle set up, whereas AirPro provides this service to shops that have the appropriate space and required targets *Id.* at ¶ 10.

Contrary to asTech’s claim, AirPro accurately states that asTech has a limited ability “to Program and Flash Modules In-House.” *See* DK 11 at ¶ 14, pg. 12. Over the course of the past three years, numerous asTech users informed AirPro representatives that asTech often told them asTech could not program or flash certain modules and that they would have to take the vehicle to the dealership. *See* **Exhibit A** at ¶ 11. Further, asTech’s own disclaimer states that “the asTech Device may not, in every circumstance, return the same information that would result from a scan performed with a directly connected OE scan tool. *See* **Exhibit B**. This directly supports the statement that the asTech device has limited programming capability since it is not the same as having a device directly connected. *See* **Exhibit A** at ¶ 11. On the other hand, AirPro has the capability to utilize the OEM factory software via a SAE J2534 tool directly connected to the vehicle to program and flash modules with no issues, as intended by the manufacturers. *Id.*

Ironically, in its Application, it is asTech that falsely claims it provides the same warranty coverage as AirPro’s Evergreen Warranty. *See* DK 11 at ¶ 14, pg. 12-13. AirPro’s Evergreen Warranty not only replaces or updates the device’s software free of charge, but it also replaces any AirPro *hardware* component due to failure or because that component has become obsolete. *See* **Exhibit A** at ¶ 12-13. This ensures AirPro’s customers are protected from the hardware or software becoming incompatible when new vehicle communication protocols are developed. *Id.* at ¶ 13. AirPro has found no evidence of a warranty provided by asTech providing for hardware replacements free of charge should the current asTech hardware need updating or replacement due to obsolescence. *Id.* By way of example, in the summer of 2016, asTech launched the asTech2 to add medium speed Controller Area Network (“CAN”) bus that was not required in vehicles of

prior model years.<sup>1</sup> *Id.* at ¶ 14. asTech customers were required to purchase the updated units to service those vehicles that required this feature. *Id.* Clearly, asTech charges its customers for new hardware when the old hardware has become obsolete. The point of AirPro’s Evergreen Warranty is that users are not charged for new hardware when the old hardware has become obsolete. *Id.* at ¶ 12.

asTech claims that the graphic from the CCIF 2016 Scan Tool Comparison Test is false and misleading, and that asTech’s own testing shows these results as inaccurate. *See* DK 11 at ¶ 14, pg. 13. However, asTech failed to include its own test result that proves the inaccuracy of the graphic in question. The graphic is publicly available and has been displayed as part of a test performed by a Canadian collision trade organization known as CCIF. *See* **Exhibit A** at ¶ 15. AirPro did not participate in the test nor was it aware that test was being conducted. *Id.* The CCIF test compared three categories of scan tools: OE Assisted, Aftermarket, and the OEM Tool. *Id.* The asTech device falls under the OE Assisted category. *Id.* Both the OE Assisted and Aftermarket categories failed to display the results of the OEM Tool. *Id.* However, only the OE Assisted missed the safety system control module Diagnostic Trouble Code (“DTC”). *Id.*

asTech contends that AirPro’s claim that “if the dealer has the software, so does Airpro” is false. *See* DK 11 at ¶ 14, pg. 13. Again, this is objectively verifiable. The industry Memorandum of Understanding dictates that “each manufacturer shall provide diagnostic repair information to each aftermarket scan tool company and each third party service information provider with whom the manufacturer has appropriate licensing, contractual or confidentiality agreements for the sole purpose of building aftermarket diagnostic tools.” *See* **Exhibit C** at 5. In addition, the

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<sup>1</sup> CAN bus is a communications network standard used to allow device communication in certain applications.

Memorandum provides that commencing in model year 2018, “manufactures of motor vehicles sold in the United States shall provide access to their onboard diagnostic and repair information system, as required under this section, using an off-the-shelf personal computer with sufficient memory, processor speed, connectivity and other capabilities as specified by the vehicle manufacturer and a non-proprietary vehicle interface device that complies with the Society of Automotive Engineers SAE J2534.” *Id.* The above referenced Memorandum and the Massachusetts Right to Repair Act provide that OEMs make the same vehicle tools, information, and scan-tool applications, which are immediately available to franchised dealers, also be made available to any vehicle owner or repairer. *See Exhibit A* at ¶ 16. AirPro utilizes a validated J2534 pass thru device, and this gives AirPro access to all OEM applications as the dealers. *Id.*

asTech also disputes AirPro’s statement that fluctuations in internet connectivity limit asTech’s ability to remotely perform ADAS calibrations. *See* DK 11 at ¶ 14, pg. 13. As stated on AirPro’s website, “[w]hen conditions are desirable valuable data and procedures can be performed. However, the Internet and conversion of data is not reliable enough for anyone to claim true OEM scan-tool functionality regardless of the tool being used. Because of time delays, and the inherent fluctuation of internet transmission or congested internet traffic, data packets can be dropped, re-arranged or delivered out of order causing skewed, inaccurate or incomplete data transmission between a vehicle and a scan-tool when transmitted over the internet. Therefore, *the reliability of the asTech to accurately calibrate vehicle safety systems on a consistent basis can be compromised due to these ongoing, uncontrollable factors.*” *See Exhibit A* at ¶ 17 (emphasis added). The very first words of asTech’s Scan Report Disclaimer reads as follows: “Remotely diagnosing vehicles has limitations that are outside the control of asTech.” *See Exhibit B*, asTech’s own disclaimer concedes the very point asTech is disputing.

asTech disputes the portion of AirPro’s website stating that “OEM Scan Tool Software Application resident directly on the AirPro Tool.” *See* DK 11 at ¶ 14, pg. 13. However, this is an accurate description and highlights a key difference between the two devices. *See* **Exhibit A** at ¶ 18. OEM scan-tool applications are purchased, installed, licensed and utilized on the AirPro tool as intended by OEM’s. *Id.* In fact, AirPro has published receipts for multiple OEM Software licenses on its website. *Id.* at ¶ 19. Engineers from General Motors and Subaru tested the AirPro Device and validated their respective GDS-2 software resident. *Id.*

Next, asTech’s attacks AirPro’s assertion that AirPro services all 2019 and prior year vehicles (except Tesla) and asTech does not. *See* DK 11 at ¶ 14, pg. 13. The statement is accurate regarding the most common vehicles that are repaired in a collision center on a daily basis. *See* **Exhibit A** at ¶ 20. AirPro’s website states that “[t]he AirPro has approximately 98% vehicle coverage from 1996 to current (2019) because of its unique combination of OEM and independent proprietary software.” *Id.* at ¶ 21. By comparison, asTech’s own coverage chart reveals the extent of its limitations. *See* **Exhibit D**, asTech does not provide coverage for any 2018 or 2019 Jaguars and Land Rovers/Range Rovers, certain 2009 BMW models, certain 2009 and 2010 Hyundai models, certain 2009 and 2010 Jaguar models, certain 2009 and 2010 Kia models, certain 2009, 2010, and 2017 Land Rover/Range Rover models, certain 2009 and 2010 Mercedes-Benz models, certain 2009 Mini models, certain 2017-2019 Mitsubishi models, and certain 2009-2013 Volvo models. *See id.*

asTech’s claims that AirPro’s website and Chuck Olsen’s letter suggest that the asTech device is unsafe and poses “a critical matter of passenger safety” are deliberately taken out of context. *See* **Exhibit A** at ¶ 22. Vehicle scanning in general and the transparency of the services performed are “a critical matter of passenger safety.” *Id.* asTech wants to hide from the fact that

according to the results of the CCIF test, the asTech Device missed a side airbag module Diagnostic Trouble Code, which is major safety concern. *Id.* Based on the preceding paragraphs, all of the statements that asTech has claimed to be false or misleading have been sufficiently explained as to their accuracy and reliability, especially when considering asTech's lack of suitable evidence. Therefore, asTech's likelihood of success on the merits is zero.

## **2. asTech Fails to Show Irreparable Harm**

asTech's contention that the Court can presume irreparable injury is an inaccurate description of the relevant case law. *See T-Mobile US, Inc. v. AIO Wireless LLC*, 991 F. Supp. 2d 888, 927-28 (S.D. Tex. 2014) (detailing cases on both sides of this issue and describing the presumption in the Fifth Circuit as "somewhere between shaky and reaffirmed"); *ADT, LLC v. Capital Connect, Inc.*, 145 F. Supp. 3d 671, 695-96 (N.D. Tex. 2015) (detailing the split in decisions within the Fifth Circuit on this issue). In light of the Supreme Court's decision in *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388 (2006), which eliminated a presumption of irreparable harm in patent infringement cases, this Court should not presume irreparable harm in false advertising claims under the Lanham Act (or for any other claims). As a result of the decision in *eBay*, numerous courts have held that plaintiffs in Lanham Act cases are not entitled to a presumption of irreparable harm. *See, e.g., Ferring Pharms. v. Watson Pharms.*, 765 F.3d 205, 217 (3d Cir. 2014); *Herb Reed Enters. LLC v. Fla. Entm't Mgmt., Inc.*, 736 F.3d 1239, 1249 (9th Cir. 2013).

The Fifth Circuit has never expressly held that the *eBay* decision does not apply to Lanham Act claims. In the only decision in which the Fifth Circuit explicitly considered the viability of a presumption of irreparable harm in Lanham Act cases in light of *eBay*, the court refused to decide the issue. *See Paulsson Geophysical Servs., Inc. v. Sigmar*, 529 F.3d 303, 313 (5th Cir. 2008)

(“[w]e have no need to decide whether a court may presume irreparable injury upon finding a likelihood of confusion in a trademark case, a difficult question considering the Supreme Court's opinion in *eBay*.”). However, a recent Fifth Circuit case affirmed a Western District of Texas decision that had abandoned the presumption of irreparable injury, calling it “plainly inconsistent with the Fifth Circuit's false advertising precedent, which requires a plaintiff to prove irreparable injury in addition to proving falsity.” *Eastman Chem. Co. v. PlastiPure, Inc.*, 969 F. Supp. 2d 756, 767-68 (W.D. Tex. 2013), *aff'd*, 775 F.3d 230 (5th Cir. 2014).

asTech cites *Greater Houston Transportation Co. v. UberTechs., Inc.*, 155 F. Supp. 3d 670, 705 (S.D. Tex. 2015), for the proposition that irreparable harm can be presumed in a false advertising case. *Greater Houston's* support for that proposition is from *Abraham v. Alpha Chi Omega*, 708 F.3d 614 (5th Cir. 2013), in which the court stated that irreparable injury can be presumed when there is evidence of a likelihood of confusion, relying solely on a treatise from 2001, which was prior to the *eBay* decision, and in which the court did not address the ongoing viability of that presumption in light of *eBay*.

When considering the conflicting case law on this issue and the current trend against applying a presumption of irreparable harm, the Court should not presume irreparable injury based solely on any likelihood of success on asTech's claims that AirPro's advertisements are false. Especially in light of the fact that asTech has failed to provide any evidence beyond conclusory statements of any imminent and irreparable harm asTech will suffer absent injunctive relief. Furthermore, an injury is “irreparable” if it cannot be compensated by monetary damages. *See Deerfield Med. Ctr. V. City of Deerfield Beach*, 661 F.2d 328, 338 (5th Cir. 1981). Again, asTech has failed to prove why monetary damages would be inadequate to compensate it for any alleged “injuries.” In fact, in asTech's Complaint, asTech claimed these alleged wrongful activities by

AirPro restarted in late 2018 and January of 2019. *See* Dk. 1 at ¶ 37-38. Even though asTech complains that the “damage” it has suffered from AirPro’s alleged actions was irreparable and imminent, asTech waited over four months, until April 15, 2019, to file suit. *See* Dk. 1.

### **3. asTech Fails to Show that the Balance of the Harms or Public Interest Favors an Injunction**

The balance of harms weighs against injunctive relief because asTech has not proved it has suffered any harm, and the burden on AirPro would be far too great. As stated above, asTech is neither entitled to a presumption of irreparable harm nor has it presented any evidence, beyond a single controverted affidavit, of the harm it claims to have suffered. In fact, asTech waited for at least four months before filing suit, which works against its baseless assertion that it is suffering imminent and irreparable harm. The only “harm” asTech is suffering is healthy and fair competition in the marketplace from a competitor with a superior product. On the other hand, the preliminary injunction would prevent AirPro from operating its business as it sees fit, and would allow asTech to litigate how a competitor can conduct its business. The freedom to operate a legitimate business is a protected liberty interest. *Thinkstream, Inc. v. Adams*, 251 Fed. Appx. 282, 284 (5th Cir. 2007). While asTech wants to rely on baseless allegations that AirPro is engaging in false advertising practices and disseminating false information, these allegations have no basis in reality. Marketing and advertising, especially via the Internet, are critical aspects of operating a business. Granting injunctive relief in favor of asTech would allow asTech to have a stranglehold and a say in the legitimate marketing efforts of one of its biggest competitors.

The balance of harms also weighs against injunctive relief because an injunction will disturb rather than maintain the status quo. Under Texas law, maintenance of the status quo is a legitimate purpose for injunctive relief. *Wenner, et al v. Texas Lottery Commission*, 123 F.3d 321, 326 (5th Cir. 1997) (preliminary injunctions favor the status quo until final relief available.) The



status quo here is to allow the parties to continue operating as they have for months, with AirPro being allowed to continue advertising on its website and disseminating important information to potential consumers and others who operate within the industry. This status-quo should be maintained until asTech can present legitimate evidence to support its claims against AirPro. As previously stated, asTech has been aware of AirPro's marketing efforts for months before it commenced this litigation, so any claims of imminent and irreparable harm ring hollow.

Lastly, the public interest weighs against granting asTech a preliminary injunction. "Basic to the faith that a free economy best promotes the public weal is that goods must stand the cold test of competition; that the public, acting through the market's impersonal judgment, shall allocate the Nation's resources and thus direct the course its economic development will take." *Times-Picayune Pub. Co. v. United States*, 73 S. Ct. 872, 878 (1953). AirPro is competing against asTech in the automotive remote diagnostic industry. asTech has been in the industry much longer than AirPro, and is now frustrated by AirPro's growth and success. The public interest favors providing consumers the best product at the best price point. Granting injunctive relief for asTech will hamper this goal, and ultimately hurt the consumers and the public.

#### IV. CONCLUSION

For the foregoing reasons, AirPro respectfully requests that the Court deny asTech's Application for Preliminary Injunction in its entirety.

Respectfully submitted,

/s/ Brett M. Chisum

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Brett M. Chisum

*Attorney-in-Charge*

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214-741-4717 Facsimile  
**Attorneys for Defendant AirPro  
Diagnostics, LLC**

**CERTIFICATE OF SERVICE**

Pursuant to the Federal Rules of Civil Procedure and the Local Rules of the Southern District of Texas, a copy of the foregoing has been served on all counsel of record through the Court's electronic filing system on May 28, 2019.

/s/ Brett M. Chisum  
Brett M. Chisum

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION**

Repairify, Inc., d/b/a asTech,

*Plaintiff,*

v.

AirPro Diagnostics LLC,

*Defendant.*

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**CIVIL ACTION NO. 4:19-CV-1370**

**APPENDIX OF EXHIBITS TO DEFENDANT AIRPRO DIAGNOSTICS, LLC'S  
RESPONSE IN OPPOSITION TO PLAINTIFF'S APPLICATION FOR PRELIMINARY  
INJUNCTION**

Defendant AirPro Diagnostics, LLC attaches this Appendix of Exhibits to its Response in Opposition to Plaintiff's Application for Preliminary Injunction pursuant to Judge Procedure 6B.

<b>IDENTIFIER</b>	<b>EXHIBIT DESCRIPTION</b>	<b>RECORD PAGES</b>
A	Affidavit of Lonnie E. Margol	Appendix 001 – Appendix 007
B	asTech Scan Report Disclaimer	Appendix 008
C	Industry Memo of Understanding	Appendix 009 – Appendix 015
D	asTech Coverage Chart	Appendix 016

Respectfully submitted,

/s/ Brett M. Chisum \_\_\_\_\_

Brett M. Chisum

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/s/ Brett M. Chisum  
Brett M. Chisum

# EXHIBIT A

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION**

**Repairify, Inc., d/b/a asTech,**

*Plaintiff,*

**v.**

**AirPro Diagnostics LLC,**

*Defendant.*

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**CIVIL ACTION NO. 4:19-CV-1370**

**AFFIDAVIT OF LONNIE E. MARGOL**

Before me the undersigned authority personally appeared, Lonnie E. Margol, who, after being duly sworn, deposes and states as follows:

1. I am over 18 years of age and am fully competent to make this Affidavit. I have never been convicted of a felony or a crime of moral turpitude.

2. I make the following statements based on personal knowledge of the facts stated herein.

3. I am the CEO of AirPro Diagnostics, LLC (“AirPro Diagnostics”).

4. AirPro does not claim to have insider knowledge of the current asTech Device.

5. Information that AirPro has acquired about the current asTech Device’s capabilities have been shared with AirPro representatives from current or former asTech users who are or were seeking other options to pre- and post-scanning, calibrations, diagnostic capabilities, and programming.

6. AirPro’s team is aware of asTech’s patent method, and were present during the development that brought the “first generation” asTech Device to market.

7. asTech’s method relies on near perfect internet conditions for a scan-tool to perform

at acceptable capabilities as designed by the manufactures. asTech customers seeking alternative sources of remote diagnostics have mentioned to AirPro representatives a variety of issues with the asTech Device, such as having to disconnect and re-connect the scan-tool, fluctuating internet issues, failed programming attempts, an inability to or declining to program modules, and vehicle coverage limitations of the asTech remote method. These issues are all indications that the conversion and transfer of scan-tool/vehicle data over the internet reduces the functionality of a scan-tool to something less than its original design and intent. AirPro acknowledges asTech can perform scanning functions to a point in assisting in diagnostics or retrieving and clearing trouble codes. However, the inherent limitations of the method do still exist.

8. AirPro is aware that for the asTech tool to work, two asTech Devices must be connected to the internet continuously. One device must be connected to the vehicle and one to a scan-tool. As reported to AirPro by current and former asTech users, the asTech customer must have a vehicle connected to a cat5 cable and battery support during scanning functions. This makes the completion of a dynamic ADAS calibration requiring a road test over 30 miles-per-hour for several miles impossible. Even if the asTech Device was paired wirelessly to a cellular hot spot during the dynamic road-testing calibration, the asTech Device that is connected to the vehicle and is communicating with the scan tool in a separate location will risk the loss of cellular signal from tall buildings, overpasses or bridges, or any other random loss of cellular internet access. This would end the scan-tool session and will result in a failed calibration.

9. AirPro's device is a scan-tool connected directly to the vehicle and does not require a continuous internet connection (neither hardware cat5 connection nor Wi-Fi) to carry out a dynamic ADAS calibration with road test. An AirPro technician remotely connects to the AirPro Device scan-tool and executes the calibration command from the directly connected scan-tool with road test instructions. Since the AirPro tool is directly connected to the vehicle, the Wi-Fi

connection can be disconnected while the road test portion is completed off-line, without an internet connection. When the driver returns to the shop, the AirPro Device automatically reconnects to the internet and the AirPro technician is able to log into the AirPro Device to review the data that confirms and documents the Dynamic ADAS calibration has been completed.

10. It has also been reported by former and current asTech customers that asTech declines to perform in-shop remote ADAS static calibrations using targets and vehicle set up. AirPro currently provides this service to shops that have the appropriate space and required targets. AirPro staff members also provides training, coaching and assistance in acquiring the correct ADAS target tools.

11. In the last three years, former and current asTech users contacted AirPro for information about AirPro's services and have informed AirPro representatives that asTech would commonly tell them that they could not program or flash certain modules and that they would have to take it to the dealership. The statement on asTech's disclaimer mentions that "the asTech Device may not, in every circumstance, return the same information that would result from a scan performed with a directly connected OE scan tool," which directly supports the statement that the asTech Device has limited programming capability since it is not the same as having the scan-tool directly connected. AirPro has the capability to utilize the OEM factory software via a SAE J2534 tool directly connected to the vehicle to program and flash modules with no issues, as intended by the manufacturers.

12. AirPro offers the Evergreen Warranty to replace any AirPro hardware component due to failure or obsolescence. AirPro just finished upgrading its hardware fleet with updated OEM compatible communication interfaces to address emerging automotive communication advancements that includes multiple medium speed CAN data lines, Flexible Data rates (FD-CAN) and secure gateway module communication capabilities that were introduced in mid-2018.



13. This Evergreen Warranty protects AirPro customers from the hardware or software becoming incompatible when new vehicle communication protocols are developed and introduced to the automotive market. AirPro has not heard, been informed of, or seen a description of an Evergreen Warranty on asTech's website describing of any no-charge hardware replacement should the current asTech hardware need new development or replacement due to obsolescence.

14. In the summer of 2016, asTech launched the asTech2 to add medium speed CAN bus that was not required on most previous model years vehicles. As told to AirPro by current and former asTech customers, those customers were required to purchase the updated units to service vehicles that required this capability. In addition, around December 2016, asTech discontinued support and services for the original asTech1. This required asTech customers to purchase the updated unit to continue asTech services.

15. The graphic from the "CCIF 2016 Scan Tool Comparison Test" is publicly available and has been displayed as part of a test performed by a Canadian collision trade organization known as CCIF. AirPro was not aware of nor participated in that comparison. Three tools were described as OE Assisted, Aftermarket, and "OEM Tool". Neither the OE Assisted results, nor the Aftermarket results contained the same information as that reported by the OEM Tool. Only the OE Assisted missed the safety system (airbag) control module Diagnostic Trouble Code (DTC). The asTech Device falls under the OE Assisted category.

16. The Massachusetts Right to Repair Act and the industry Memorandum of Understanding dictate that OEMs make the same vehicle tools, information, and scan-tool applications, which are immediately available to franchised dealers, also be made available to any vehicle owner or repairer. Since AirPro utilizes a validated J2534 pass thru device, it has access to all OEM applications at the same time as the dealers.

17. AirPro's claim in response to describing differences between AirPro and asTech is

as follows and is posted on the AirPro website: “To connect to either a scan-tool or a vehicle for internet protocol conversions and transmission of scan-tool commands over the internet to a vehicle and/or for a vehicle to respond to a scan-tool for data requests or output commands, such as critical calibrations or tests, the internet and IT infrastructure conditions need to be perfect for reliability. When conditions are desirable valuable data and procedures can be performed. However, the Internet and conversion of data is not reliable enough for anyone to claim true OEM scan-tool functionality regardless of the tool being used. Because of time delays, and the inherent fluctuation of internet transmission or congested internet traffic, data packets can be dropped, rearranged or delivered out of order causing skewed, inaccurate or incomplete data transmission between a vehicle and a scan-tool when transmitted over the internet. Therefore, the reliability of the asTech to accurately calibrate vehicle safety systems on a consistent basis can be compromised due to these ongoing, uncontrollable factors.”

18. “OEM Scan Tool Software Application resident directly on the AirPro Tool” is an accurate description and a key point in describing the differences between the AirPro Device and the asTech Device. OEM scan-tool applications are purchased, installed, licensed and utilized on the AirPro tool as intended by OEM’s.

19. AirPro has published on the “Truth Campaign” receipts for multiple OEM Software licenses. This is an objectively verifiable fact. General Motors engineers tested the AirPro Device and validated their GDS-2 software resident as did the engineers at Subaru.

20. The statement on AirPro’s website that states AirPro “Services all 2019 and Prior Year Vehicles (except Tesla) is accurate regarding all the most common vehicles that are repaired in a collision center on a daily basis.

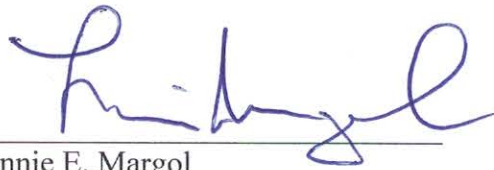
21. AirPro’s website states: “The AirPro has approximately 98% vehicle coverage from 1996 to current (2019) because of its unique combination of OEM and independent proprietary

software. Yes, AirPro uses both OEM and independent proprietary diagnostic software. The scan-tool software is directly connected to a vehicle and remotely accessed by AirPro Diagnostics' highly skilled diagnostic specialists to interface with a vehicle's control module network and systems to perform the various diagnostic procedures required on today's vehicles".

22. With regards to asTech's claim that Airpro repeatedly suggested that the asTech Device is unsafe, that is taken out of context. Vehicle scanning and transparency of services performed are "a critical matter of passenger safety." The fact is, according to the results of the CCIF test, the asTech Device missed a side airbag module DTC, which is a huge safety concern.

*[Remainder of Page Left Intentionally Blank]*

**FURTHER AFFIANT SAYETH NOT**

  
Lonnie E. Margol

STATE OF FLORIDA  
COUNTY OF DUVAL

Sworn to and subscribed before me this 25 day of May, 2019. Such person did take an oath and: *(Notary must check applicable box).*

<input type="checkbox"/>
<input checked="" type="checkbox"/>
<input type="checkbox"/>

is/are personally known to me.

produced a current Florida driver's license as identification.

produced \_\_\_\_\_ as identification.

{Notary Seal must be affixed}



  
SIGNATURE OF NOTARY

BRUNO SANGSTER  
Name of Notary *(Typed, Printed or Stamped)*

# EXHIBIT B

## DISCLAIMERS

## Astech Scan Report Disclaimer

asTech™ makes every attempt to provide the most reliable information available through the use of the asTech™ device, however;

- Remotely diagnosing vehicles has limitations that are outside the control of asTech™ and the Master Technicians employed by asTech™. Information gathered through the asTech™ device is done so remotely, and therefore asTech™ and its employees cannot be responsible for omission or errors caused by the information provided, or not provided, by the customer.
- All work performed by asTech™ will be in accordance with OEM specifications and defaults. This includes, but is not limited to, any repairs, calibrations, integrations, programming and set points as indicated by the OEM by way of their designated sources of such information. asTech™ is not responsible for any damage that results from, or to, aftermarket parts or modifications from OEM factory specifications.
- While every attempt is made to provide accurate information on the Scan Report, the asTech™ device may not, in every circumstance, return the same information that would result from a scan performed with a directly connected OE scan tool.
- asTech™ Master Technicians will utilize the asTech™ device to return the vehicle to factory default settings.
- asTech™ Master Technicians will indicate on the scan report their name and the OEM Scan Tool used to scan the vehicle.
- Despite the best efforts of the Master Technicians employed by asTech™, and the functions of the asTech™ device, some vehicles will require dealer service in order to be repaired. Instances where a vehicle may need additional work from a dealership could include Warranty work on modules, Collision Avoidance System programming where targets are needed, Programming where modules could potentially be damaged, and/or Programming keys.
- Variations between vehicles according to the make, model and trim level, may limit the information provided by the asTech™ device.
- Depending on the condition of the vehicle and the extent of the damage, and other factors outside the control of asTech™, the asTech™ device may not communicate with every system on the vehicle being scanned.
- asTech™ and its employees are not responsible for any intentional or unintentional misuse of the asTech™ device, or data provided on the Scan Report, by the end user. Shops are responsible for complying with all local and state regulations.
- At times the Master Technician working for asTech™ will request that a vehicle be "road tested." Failure to "road test" a vehicle when the Master Technician has requested it may lead to incomplete or inaccurate scan results.
- asTech™ offers completion scans to insure technicians that vehicles have been successfully repaired. If a shop fails to request a completion scan, systems on the vehicle that have not been repaired/reset may not be found. Completion scans are intended to finalize repairs, but do not guarantee that all systems have been repaired/reset. asTech™ makes no warranty that the vehicle is repaired.
- asTech™ is not responsible for any changes made to the vehicle after the asTech™ device is disconnected.

# EXHIBIT C



**AUTO ALLIANCE**  
DRIVING INNOVATION®

**AAIA**®  
**Automotive Aftermarket**  
Industry Association

**GlobalAutomakers**



## **MEMORANDUM of UNDERSTANDING**

The Automotive Aftermarket Industry Association (“AAIA”), Coalition for Auto Repair Equality (“CARE”), Alliance of Automobile Manufacturers (“Alliance”) and Association of Global Automakers (“Global Automakers”) (“the Original Parties”) enter into this Memorandum of Understanding (MOU) on this Fifteenth (15th) day of January, 2014 and voluntarily agree as follows:

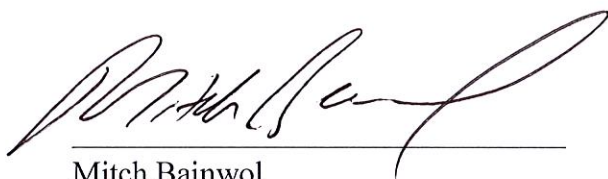
1. The Original Parties fully support this MOU and attached “Right to Repair” (R2R) agreement (“R2R Agreement”). Automobile manufacturer members of the Alliance and Global Automakers indicate their individual company’s agreement to comply with the MOU and R2R Agreement in all fifty (50) States and the District of Columbia through their individual letters of endorsement.
2. Until such time as the provisions of Section 2(c)(i) (common interface device) of the R2R Agreement have been fully implemented, with respect to model year 2018 and newer vehicles, for two years or January 2, 2019, whichever is earlier, and provided the OEMs comply with the MOU during this period, CARE and AAIA agree to continue to work with other Original Parties to fully implement the MOU and to oppose and not to fund or otherwise support, directly or indirectly, any new state R2R legislation.
3. The Original Parties agree to work to strongly encourage any new entrants to the U.S. automotive market or to R2R issues to become signatories to the MOU.
4. The Original Parties agree to work together to resolve any future or related R2R issues that might otherwise be the subject of state legislation and, subject to the mutual consent of the Original parties, amend the MOU and R2R Agreement to include these additional matters.
5. Once the Original Parties have signed on to the MOU, additional parties may join but any amendments or revisions to the terms of the MOU and R2R Agreement, triggered by admission of additional participants, shall require consent of the Original Parties.
6. The Original Parties agree to meet as needed and at least semi-annually, to assess how the MOU is operating, address operational concerns and discuss any other matters relevant to R2R or the MOU or future amendments or parties to the MOU. In the event that one of



the Original Parties concludes that, due to changed circumstances, the MOU or R2R Agreement may no longer be viable, that party shall, upon thirty (30) days written notice to the other three Original Parties, call a meeting to discuss the need for the MOU and R2R Agreement to continue.

7. The Original Parties agree that should a state(s) pass a law relating to issues covered by this MOU and R2R Agreement, after the effective date of the MOU and R2R Agreement, any automobile manufacturer member of the Alliance and Global Automakers may elect to withdraw its letter of endorsement for the MOU and R2R Agreement partially or entirely for the impacted state(s).

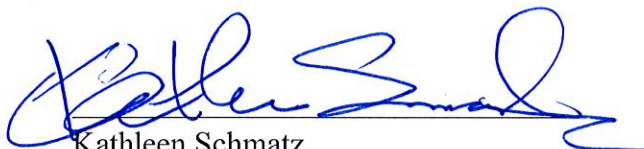
Signed on this 15<sup>th</sup> day of January, 2014:



Mitch Bainwol  
President & CEO  
Alliance of Automobile Manufacturers



Michael Stanton  
President & CEO  
Association of Global Automakers



Kathleen Schmatz  
President & CEO  
Automotive Aftermarket Industry Association



Ray Pohlman  
President  
Coalition for Auto Repair Equality

## **R2R AGREEMENT**

**Section 1.** As used in this agreement, the following words shall, unless the context clearly indicates otherwise, have the following meanings:

**“Dealer”**, any person or business who, in the ordinary course of its business, is engaged in the business of selling or leasing new motor vehicles to consumers or other end users pursuant to a franchise agreement and who has obtained a license, as required under applicable law, and is engaged in the diagnosis, service, maintenance or repair of motor vehicles or motor vehicle engines pursuant to said franchise agreement.

**“Franchise agreement”**, a written arrangement for a definite or indefinite period in which a manufacturer or distributor grants to a motor vehicle dealer a license to use a trade name, service mark or related characteristic and in which there is a community of interest in the marketing of new motor vehicles or services related thereto at wholesale, retail, leasing or otherwise.

**“Fair and Reasonable Terms”** Provided that nothing in this MOU and R2R Agreement precludes an automaker and an owner or independent repair shop who is subject to the agreement from agreeing to the sale of information and tools on any other terms on which they agree, in determining whether a price is on “fair and reasonable terms,” consideration may be given to relevant factors, including, but not limited to, the following:

- (i) The net cost to the manufacturer’s franchised dealerships for similar information obtained from manufacturers, less any discounts, rebates, or other incentive programs.
- (ii) The cost to the manufacturer for preparing and distributing the information, excluding any research and development costs incurred in designing and implementing, upgrading or altering the onboard computer and its software or any other vehicle part or component. Amortized capital costs for the preparation and distribution of the information may be included.
- (iii) The price charged by other manufacturers for similar information.
- (iv) The price charged by manufacturers for similar information prior to the launch of manufacturer web sites.
- (v) The ability of aftermarket technicians or shops to afford the information.
- (vi) The means by which the information is distributed.
- (vii) The extent to which the information is used, which includes the number of users, and frequency, duration, and volume of use.
- (viii) Inflation.

**“Immobilizer system”**, an electronic device designed for the sole purpose of preventing the theft of a motor vehicle by preventing the motor vehicle in which it is installed from starting without the correct activation or authorization code.

**"Independent repair facility"**, a person or business that is not affiliated with a manufacturer or manufacturer's authorized dealer of motor vehicles, which is engaged in the diagnosis, service, maintenance or repair of motor vehicles or motor vehicle engines;

**"Manufacturer"**, any person or business engaged in the business of manufacturing or assembling new motor vehicles.

**"Dispute Resolution Panel (DRP)"**, a 5-person panel established by the Original Parties comprised of the following: one Alliance representative, Alliance member or Alliance designee, one Global Automakers representative, Global Automakers' manufacturer member or Global Automakers designee, two representatives of the independent vehicle repair industry to be selected and mutually agreed upon by AAIA and CARE, and one DRP Chair. The DRP Chair shall be an independent professional mediator with no affiliation to any of the Original Parties, shall be selected by unanimous consent of the Original Parties and shall be funded in equal amounts by each of the Original Parties. The Original Parties shall, at one of the two annual meetings, have an opportunity to revisit their respective representative or ask the Original Parties to revisit the person acting as DRP Chair.

**"Motor vehicle"**, any vehicle that is designed for transporting persons or property on a street or highway and that is certified by the manufacturer under all applicable federal safety and emissions standards and requirements for distribution and sale in the United States, but excluding (i) a motorcycle; (ii) a vehicle with a gross vehicle weight over 14,000 pounds; or (iii) a recreational vehicle or an auto home equipped for habitation.

**"Owner"**, a person or business who owns or leases a registered motor vehicle.

**"Trade secret"**, anything, tangible or intangible or electronically stored or kept, which constitutes, represents, evidences or records intellectual property including secret or confidentially held designs, processes, procedures, formulas, inventions, or improvements, or secret or confidentially held scientific, technical, merchandising, production, financial, business or management information, or anything within the definition of 18 U.S.C. § 1839(3).

## **Section 2.**

(2)(a). Except as provided in subsection (2)(e), for Model Year 2002 motor vehicles and thereafter, a manufacturer of motor vehicles sold in United States shall make available for purchase by owners of motor vehicles manufactured by such manufacturer and by independent repair facilities the same diagnostic and repair information, including repair technical updates, that such manufacturer makes available to its dealers through the manufacturer's internet-based diagnostic and repair information system or other electronically accessible manufacturer's repair information system. All content in any such manufacturer's repair information system shall be made available to owners and to independent repair facilities in the same form and manner and to the same extent as is made available to dealers utilizing such diagnostic and repair information system. Each manufacturer shall provide access to such manufacturer's diagnostic and repair information system for purchase by owners and independent repair facilities on a daily, monthly and yearly subscription basis and upon fair and reasonable terms.

**(2)(b)(i)** For Model Year 2002 motor vehicles and thereafter, each manufacturer of motor vehicles sold in the United States shall make available for purchase by owners and independent repair facilities all diagnostic repair tools incorporating the same diagnostic, repair and wireless capabilities that such manufacturer makes available to its dealers. Such tools shall incorporate the same functional repair capabilities that such manufacturer makes available to dealers. Each manufacturer shall offer such tools for sale to owners and to independent repair facilities upon fair and reasonable terms.

**(ii)** Each manufacturer shall provide diagnostic repair information to each aftermarket scan tool company and each third party service information provider with whom the manufacturer has appropriate licensing, contractual or confidentiality agreements for the sole purpose of building aftermarket diagnostic tools and third party service information publications and systems. Once a manufacturer makes such information available pursuant to this section, the manufacturer will have fully satisfied its obligations under this section and thereafter not be responsible for the content and functionality of aftermarket diagnostic tools or service information systems.

**(2)(c)(i)** Commencing in Model Year 2018, except as provided in subsection (2)(e), manufacturers of motor vehicles sold in the United States shall provide access to their onboard diagnostic and repair information system, as required under this section, using an off-the-shelf personal computer with sufficient memory, processor speed, connectivity and other capabilities as specified by the vehicle manufacturer and:

**(a)** a non-proprietary vehicle interface device that complies with the Society of Automotive Engineers SAE J2534, the International Standards Organizations ISO 22900 or any successor to SAE J2534 or ISO 22900 as may be accepted or published by the Society of Automotive Engineers or the International Standards Organizations; or,

**(b)** an on-board diagnostic and repair information system integrated and entirely self-contained within the vehicle including, but not limited to, service information systems integrated into an onboard display, or

**(c)** a system that provides direct access to on-board diagnostic and repair information through a non-proprietary vehicle interface such as Ethernet, Universal Serial Bus or Digital Versatile Disc. Each manufacturer shall provide access to the same on-board diagnostic and repair information available to their dealers, including technical updates to such on-board systems, through such non-proprietary interfaces as referenced in this paragraph. Nothing in this agreement shall be construed to require a dealer to use the non-proprietary vehicle interface (i.e., SAE J2534 or ISO 22900 vehicle interface device) specified in this subsection, nor shall this agreement be construed to prohibit a manufacturer from developing a proprietary vehicle diagnostic and reprogramming device, provided that the manufacturer also complies with Section 2(c)(i) and the manufacturer also makes this device available to independent repair facilities upon fair and reasonable terms, and otherwise complies with Section 2(a).

**(2)(c)(ii)** No manufacturer shall be prohibited from making proprietary tools available to dealers if such tools are for a specific specialized diagnostic or repair procedure developed for

the sole purpose of a customer service campaign meeting the requirements set out in 49 CFR 579.5, or performance of a specific technical service bulletin or recall after the vehicle was produced, and where original vehicle design was not originally intended for direct interface through the non-proprietary interface set out in (2)(c)(i). Provision of such proprietary tools under this paragraph shall not constitute a violation of this agreement even if such tools provide functions not available through the interface set forth in (2)(c)(i), provided such proprietary tools are also available to the aftermarket upon fair and reasonable terms. Nothing in this subsection (2)(c)(ii) authorizes manufacturers to exclusively develop proprietary tools, without a non-proprietary equivalent as set forth in (2)(c)(i), for diagnostic or repair procedures that fall outside the provisions of (2)(c)(ii) or to otherwise operate in a manner inconsistent with the requirements of (2)(c)(i).

**(2)(d)** Manufacturers of motor vehicles sold in the United States may exclude diagnostic, service and repair information necessary to reset an immobilizer system or security-related electronic modules from information provided to owners and independent repair facilities. If excluded under this paragraph, the information necessary to reset an immobilizer system or security-related electronic modules shall be obtained by owners and independent repair facilities through the secure data release model system as currently used by the National Automotive Service Task Force or other known, reliable and accepted systems.

**(2)(e)** With the exception of telematics diagnostic and repair information that is provided to dealers, necessary to diagnose and repair a customer's vehicle, and not otherwise available to an independent repair facility via the tools specified in 2(c)(i) above, nothing in this agreement shall apply to telematics services or any other remote or information service, diagnostic or otherwise, delivered to or derived from the vehicle by mobile communications; provided, however, that nothing in this agreement shall be construed to abrogate a telematics services or other contract that exists between a manufacturer or service provider, a motor vehicle owner, and/or a dealer. For purposes of this agreement, telematics services include but are not limited to automatic airbag deployment and crash notification, remote diagnostics, navigation, stolen vehicle location, remote door unlock, transmitting emergency and vehicle location information to public safety answering points as well as any other service integrating vehicle location technology and wireless communications. Nothing in this agreement shall require a manufacturer or a dealer to disclose to any person the identity of existing customers or customer lists.

**Section 3.** Nothing in this agreement shall be construed to require a manufacturer to divulge a trade secret.

**Section 4.** Notwithstanding any general or special law or any rule or regulation to the contrary, no provision in this agreement shall be read, interpreted or construed to abrogate, interfere with, contradict or alter the terms of any franchise agreement executed and in force between a dealer and a manufacturer including, but not limited to, the performance or provision of warranty or recall repair work by a dealer on behalf of a manufacturer pursuant to such franchise agreement.

**Section 5.** Nothing in this agreement shall be construed to require manufacturers or dealers to provide an owner or independent repair facility access to non-diagnostic and repair information



provided by a manufacturer to a dealer, or by a dealer to a manufacturer pursuant to the terms of a franchise agreement.

**Section 6.** If an independent repair facility or owner believes that a manufacturer has failed to provide the information or tool required by this MOU, he may challenge the manufacturer's actions by first notifying the manufacturer in writing. The manufacturer has thirty (30) days from the time it receives the reasonably clear and specific complaint to cure the failure, unless the parties otherwise agree. If the complainant is not satisfied, he has thirty (30) days to appeal the manufacturer's decision to the DRP. The DRP shall be convened by the Chair within thirty (30) days of receipt of the appeal of the manufacturer's decision. The DRP will attempt to reach agreement between the parties. If unsuccessful, the DRP shall convene and issue its decision. The decision must be issued within 30 days of receipt of the appeal of the manufacturer's decision, unless otherwise agreed to by the parties. The DRP decision shall be disseminated to the complainant, the manufacturer, and the Original Parties. If the manufacturer and complainant still cannot reach agreement, the complainant may take whatever legal measures are available to it.

# EXHIBIT D

# COVERAGE CHART

Version 3.5 (March 2019)



Though Research and Development is ongoing, and our coverage chart continues to expand, there are a few models in some Manufacturer's lineups that we are unable to communicate with. Any vehicle that we are unable to communicate with will result in a "no-charge" situation.

Manufacturer	2019	2018	2017	2016	2015	2014	2013	2012	2011	2010	2009
Acura	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Audi	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
BMW	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	!
Buick	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Cadillac	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Chevrolet	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Chrysler	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Dodge	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Ford	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
GMC	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Honda	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Hummer	No longer in production										
Hyundai	✓	✓	✓	✓	✓	✓	✓	✓	✓	!	!
Infiniti	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Jaguar	X	X	✓	✓	✓	✓	✓	✓	✓	!	!
Jeep	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Kia	✓	✓	✓	✓	✓	✓	✓	✓	✓	!	!
Range Rover / Land Rover	X	X	!	✓	✓	✓	✓	✓	✓	✓	!
Lexus	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Lincoln	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Mazda	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Mercedes-Benz	✓	✓	✓	✓	✓	✓	✓	✓	✓	!	!
Mercury	No longer in production										✓
Mini	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	!
Mitsubishi	!	!	!	✓	✓	✓	✓	✓	✓	✓	✓
Nissan	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Pontiac	No longer in production										✓
Ram	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Scion	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Subaru	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Toyota	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Volvo	✓	✓	✓	✓	✓	✓	!	!	!	!	!
Volkswagen	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓

## Legend

- ✓ Full coverage
- ! Model Dependent
- X No coverage



**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION**

**Repairify, Inc., d/b/a asTech,**

*Plaintiff,*

**v.**

**AirPro Diagnostics LLC,**

*Defendant.*

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**CIVIL ACTION NO. 4:19-CV-1370**

**ORDER ON PLAINTIFF REPAIRIFY, INC.'S APPLICATION FOR PRELIMINARY  
INJUNCTION**

Came to be heard this day is Plaintiff Repairify, Inc.'s Application for Preliminary Injunction Hearing (herein after, "the Application"). After considering the Application, the supporting evidence, the responses, and the arguments of Counsel, the Court is of the opinion that the Plaintiff will be denied injunctive relief at this time.

It is therefore ORDERED, that Plaintiff's Application for Preliminary Injunction be DENIED.

All relief not expressly granted is denied.

**SO ORDERED.**

SIGNED: The \_\_\_\_ day of \_\_\_\_\_, 2019.

\_\_\_\_\_  
**UNITED STATES DISTRICT JUDGE**

Approved and Entry Requested:

/s/ Brett M. Chisum

Brett M. Chisum

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