CAUSE NO. 2016-CI-06300

TITLE SOURCE, INC.,	§	**IN THE DISTRICT COURT OF**
	§	
PLAINTIFF,	§	
	§	
V.	§	**BEXAR COUNTY, TEXAS**
	§	
HOUSECANARY, INC., FORMERLY KNOWN AS CANARY ANALYTICS, INC.,	§	
	§	
DEFENDANT.	§	**73RD JUDICIAL DISTRICT**

MEDIA INTERVENORS' RULE 76a PETITION IN INTERVENTION AND BRIEF IN OPPOSITION TO MOTION TO SEAL RECORDS

TO THE HONORABLE JUDGE OF SAID COURT:

The Reporters Committee for Freedom of the Press (the "Reporters Committee") and the *Houston Forward Times* (the "*Houston Forward*") (collectively, the "Media Intervenors") respectfully file this Rule 76a Petition in Intervention and Brief in Opposition to Defendant's Motion to Seal Records, and show the Court as follows:

I.
JURISDICTION AND VENUE

Jurisdiction and venue are proper in Bexar County, Texas, because the underlying litigation is pending in Bexar County and a verdict has been reached in the case.

II.
INTERVENORS

The Reporters Committee is an unincorporated 501(c)(3) non-profit association dedicated to assisting journalists since 1970. Reporters Committee attorneys provide *pro bono* legal representation, *amicus curiae* support, and other legal resources to protect First Amendment

freedoms, court access, and the newsgathering rights of journalists. The Reporters Committee's office is located at 1156 15th Street NW, Suite 1250, Washington, D.C. 20005.

Houston Forward is the South's largest Black-owned and independently published newspaper. *Houston Forward* is dedicated to First Amendment freedoms and serves its readers as an information vehicle and the most trusted voice for African Americans in the city of Houston and throughout the southern region. *Houston Forward's* headquarters is located at 4411 Almeda Road, Houston, Texas 77004.

Media Intervenors are concerned by HouseCanary, Inc.'s post-hoc attempt to seal court records—consisting of exhibits entered into evidence—after they were used publicly at trial by the party now seeking to seal them. Media Intervenors are entitled to intervene in this action as a matter of right pursuant to Rule 76a. *See* TEX. R. CIV. P. 76a(7). Accordingly, Media Intervenors hereby intervene in this action to assert their rights of access to court records, including the documents sought to be sealed, and to contest any attempts at sealing the same.

III.
ARGUMENT AND AUTHORITIES

By its Motion to Seal, HouseCanary, Inc. ("HouseCanary") asks this Court to retroactively seal 30 exhibits (the "Exhibits") that were entered into evidence in open court during the trial that took place from January 2018 to March 2018. HouseCanary's request to retroactively seal the Exhibits should be rejected.

This is a case with national impact. The verdict was by far the largest in Bexar County history and is likely to be this year's largest verdict in any trade secret case in the United States—indeed, anywhere in the world. *See* Elle Mertens, *Inside 2018's Largest Trade Secrets*

Damages Award, Managing Intellectual Prop., April 12, 2018[1] (quoting experts who noted that U.S. trade secret verdicts have much higher damages than anywhere else in the world). The verdict has been reported on by both Texas and national news outlets.[2]

Press interest will certainly continue as the case progresses. Indeed, intervenor *Houston Forward* plans to devote considerable attention to the case. It is vital that the press be able to inform the public and affected industries about this case and help the public understand how our system of justice functions. Access to the Exhibits used by the jury in its deliberations and in reaching a verdict is essential to the news media's ability to explain that verdict to the public.

HouseCanary has not made the demanding showing necessary to deprive the public and the press of access to the Exhibits. In recognition of the important role that public access to judicial records plays in our system of justice, Rule 76a, the common law, and the First Amendment all provide a strong presumption that the public should have access to exhibits entered into evidence at trial. That presumption cannot be overcome here, especially when the Exhibits at issue were publicly filed at trial. HouseCanary raised no objection when the Exhibits were entered into evidence by Title Source, Inc. ("Title Source")—in fact, House Canary itself entered many of the Exhibits into evidence. And during trial, HouseCanary made no attempt to

[1] *Available at* https://tinyurl.com/y7bsmlph.

[2] *See, e.g.*, Kristen Mosbrucker, *Inside the case in which SA jurors awarded $706M to a tech startup*, San Antonio Bus. J., April 4, 2018, https://tinyurl.com/y8mxzf5v; Erik Larson, *Quicken Loans Is Sued by Data Startup Claiming Trade Secrets Theft*, Bloomberg, March 18, 2018, https://tinyurl.com/y79tesa2; Cara Salvatore, *Jury Awards $706M Over Appraisal App Secrets Theft*, Law360, March 15, 2018, https://tinyurl.com/y8lou2xe; Dustin Walsh, *Payout in Gilbert title company case likely to be far less than jury's $706 million*, Crain's Detroit Bus., March 16, 2018, https://perma.cc/HTQ5-564E; Jacob Gaffney, *United Wholesale CEO declares huge HouseCanary settlement is "good for all of us"*, HousingWire, April 3, 2018, https://perma.cc/3EP8-S8YX; *HouseCanary Awarded $706.2 Million Verdict Against Amrock*, RISMedia, https://perma.cc/SX37-ECPU; J.J. Velasquez, *Local Tech Firm Wins $706M in Legal Fight with Quicken Loans Affiliate*, Rivard Report, March 15, 2018, https://perma.cc/43U7-2NBL. Additional examples of news reports about this case from Texas and around the country are provided *infra*.

seal—or even redact—any of these Exhibits. HouseCanary's extraordinary request that the Exhibits now be *retroactively* sealed is therefore baseless. If granted, it would undermine the fundamental principles upon which the presumptions of public access to court records are founded and would prevent the press from doing its job properly. For the reasons set forth herein, the Media Intervenors urge the Court to deny HouseCanary's Motion to Seal Records.

A. Public access to records in civil proceedings is essential to the proper functioning of the judicial system.

As the United States Supreme Court has recognized, open trials serve several important functions. Public access to trials enhances the quality and safeguards the integrity of the factfinding process, *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606 (1982), promotes both fairness and the appearance of fairness, *Press-Enter. Co. v. Superior Court*, 464 U.S. 501, 508 (1984), and plays a cathartic role by allowing a community to observe the administration of justice, *id.* at 508–09. Most importantly, access to trials ensures their legitimacy by fostering public trust in judicial proceedings. "People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing." *Richmond Newspapers v. Virginia*, 448 U.S. 555, 572 (1980). Public access to documents filed during a trial, including exhibits entered into evidence, serve these same important functions. Such materials "are often important to a full understanding of the way in which 'the judicial process and the government as a whole' are functioning." *Associated Press v. U.S. Dist. Court*, 705 F.2d 1143, 1145 (9th Cir. 1983) (quoting *Globe Newspaper Co.*, 457 U.S. at 606).

Public access to trials is no less critical in civil cases than in criminal ones. In civil as well as criminal matters, public oversight is necessary to serve as a check on the integrity of the

judicial system and ensure fairness. *See Grove Fresh Distribs. Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 897 (7th Cir. 1994) (noting that contribution of publicity to civil proceedings is just as important as criminal proceedings, if not more so), *superseded on other grounds as recognized by Bond v. Utreras*, 585 F.3d 1061, 1068 n.4 (7th Cir. 2009). In addition, "[c]ivil cases frequently involve issues crucial to the public," as in this pathbreaking intellectual property case. *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, 1179 (6th Cir. 1983). This case has received in-depth press coverage in San Antonio and Texas, in Michigan (where Amrock is located), and in national news outlets. *See* Patrick Danner, *San Antonio company HouseCanary wins $700M jury verdict*, San Antonio Express-News, Mar. 16, 2018[3]; Scott Graham, *Susman Team Wins $706.2M Trade Secret Verdict for Real Estate Valuation Client*, Tex. Lawyer, March 15, 2018[4]; JC Reindl, *Quicken Loans affiliate hit with $706M judgment from Texas jury*, Detroit Free Press, Mar. 15, 2018[5]; Scott Suttell, *IP Battle*, Crain's Cleveland Bus., March 16, 2018[6], https://tinyurl.com/y7aj76f3; Peter Rudegeair, *Startup Awarded $706 Million In Legal Tussle With Quicken Loans Affiliate*, Wall Street J., Mar. 16, 2018[7]; Erik Larson, *Title Insurer Amrock's Lawsuit Backfires to Tune of $706 Million*, Bloomberg, Mar. 17, 2018[8]. It is also being closely followed by experts in the intellectual property, mortgage finance, and startup communities, getting coverage from specialty news outlets around the country. *See, e.g.*, Ben Lane, *Amrock ordered to pay $706 million for stealing trade secrets from HouseCanary*, HousingWire, March

[3] *Available at* https://perma.cc/4KSZ-5B53.
[4] *Available at* https://tinyurl.com/yalvhv4h.
[5] *Available at* https://perma.cc/4ER2-3H6N.
[6] *Available at* https://perma.cc/SZ7B-CWH3.
[7] *Available at* https://on.wsj.com/2HEVnFW.
[8] *Available at* https://perma.cc/GL2M-QK4N.

15, 2018[9]; Emma Hinchliffe, *HouseCanary wins $706M after getting sued by Quicken Loans affiliate*, Inman, March 15, 2017[10]; Paul Muolo, *Short Takes: Legal Matter*, Inside Mortgage Finance, March 16, 2018[11]; Radhika Ojha, *HouseCanary Wins $706.2 Mn Verdict Against AMROCK Inc*., DSnews, Mar. 19, 2018[12]. The public thus has an especially strong interest in court records in this case.

B. Rule 76a, common law, and the First Amendment each create a strong presumption of public access to exhibits entered into evidence at trial.

Rule 76a contains stringent substantive standards for the sealing of court records and procedural safeguards of the public's right to access open court records. Rule 76a(1) establishes that "court records" are "presumed to be open to the general public" and "may be sealed only upon a showing of all of the following":

> (a) a specific, serious and substantial interest which clearly outweighs:
>
> > (1) this presumption of openness;
> >
> > (2) any probable adverse effect that sealing will have upon the general public health or safety;
>
> (b) no less restrictive means than sealing records will adequately and effectively protect the specific interest asserted.

The definition of "court records" found in Rule 76a(2) unquestionably applies to exhibits introduced into evidence at a civil trial. TEX. R. CIV. P. 76a(2); *see also Dallas Morning News v.*

[9] *Available at* https://perma.cc/3ZDL-NS4R.
[10] *Available at* https://tinyurl.com/yb5jp4t6.
[11] *Available at* https://tinyurl.com/yaxvudb4.
[12] *Available at* https://tinyurl.com/y7futbsb.

Fifth Court of Appeals, 842 S.W.2d 655, 659 (Tex. 1992) (stating that "exhibits introduced into evidence are *a fortiori* court records").

The common law also creates a presumption of access to trial exhibits. *Belo Broad. Corp. v. Clark*, 654 F.2d 423, 429 (5th Cir. 1981); *see also Littlejohn v. BIC Corp.*, 851 F.2d 673, 678 (3d Cir. 1988). "It is clear that the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents." *Nixon v. Warner Commc'ns*, 435 U.S. 589, 597 (1978) (footnote omitted); *see also SEC v. Van Waeyenberghe,* 990 F.2d 845, 848 (5th Cir. 1993) (recognizing that the common law establishes a presumption of public access to judicial records). The common law presumption of access may be overcome only if the interests favoring nondisclosure overcome the public's right of access. *Van Waeyenberghe*, 990 F.2d at 848. Accordingly, a court's "discretion to seal the record of judicial proceedings is to be exercised charily." *Fed. Sav. & Loan Ins. Corp. v. Blain*, 808 F.2d 395, 399 (5th Cir. 1987).

Finally, the First Amendment gives rise to a strong presumption in favor of public access to exhibits introduced into evidence. The Fifth Circuit has recognized that the Constitution requires "untrammeled access" to information contained within trial exhibits. *Belo Broad. Corp.*, 654 F.2d at 427 (recognizing that "[c]onstitutional requirements are fully satisfied by the kind of untrammeled access to the information" contained within audiotapes introduced into evidence at trial, since transcripts of the tapes were prepared and distributed to the press). Other federal appellate courts have similarly found a First Amendment right of access to trial exhibits. *See In re Associated Press*, 172 F. App'x 1, 4 (4th Cir. 2006) (citing *In re Time Inc.*, 182 F.3d 270, 271 (4th Cir.1999)); *Matter of N.Y. Times Co.*, 828 F.2d 110, 114 (2d Cir. 1987) (stating

that First Amendment right of access applies to exhibits submitted in connection with a suppression hearing); *Matter of Cont'l Illinois Sec. Litig.*, 732 F.2d 1302, 1308 (7th Cir. 1984) (recognizing a First Amendment and common law right to access exhibits submitted into evidence in open court). Because there is a First Amendment right of access to exhibits introduced into evidence, "there is a presumption that they should remain open, absent specific, substantive findings . . . that closure is necessary to protect higher values and is narrowly tailored to serve such goals." *In re Hearst Newspapers, L.L.C.*, 641 F.3d 168, 181 (5th Cir. 2011).

Under Rule 76a, the common law, and the First Amendment, the party moving for sealing has the burden to rebut the presumption of access to court records. *See Bank of Am. Nat'l Trust & Sav. Ass'n v. Hotel Rittenhouse Assocs.*, 800 F.2d 339, 344 (3d Cir. 1986); *360 Mortg. Grp., LLC v. Bivona-Truman*, No. 1:14-CV-847-SS, 2016 WL 7616575, at *1 (W.D. Tex. May 24, 2016) (citing *LEAP Sys., Inc. v. MoneyTrax, Inc.*, 638 F.3d 216, 221–22 (3d Cir. 2011)); *Upjohn Co. v. Freeman*, 906 S.W.2d 92, 96 (Tex. App.–Dallas 1995, no writ). HouseCanary has failed to overcome their burden.

C. Once publicly filed in open court, exhibits cannot be retroactively sealed.

Because the Exhibits were publicly filed in open court, with no motion to seal at the time they were admitted into evidence, there is no interest, let alone a "higher value," that can justify their retroactive sealing. As the Supreme Court has stated, "A trial is a public event. What transpires in the court room is public property." *Craig v. Harney*, 331 U.S. 367, 374 (1947). Accordingly, members of the media and the public are free to report whatever occurs in open court. *Estes v. Texas*, 381 U.S. 532, 541–42 (1965).

Texas courts have refused to seal records filed in open court. The Houston Court of Appeals, for example, denied a request to seal documents under Rule 76a after they were publicly filed. In *Environmental Procedures, Inc. v. Guidry*, it held that an appellee waived its right to seal documents under Rule 76a when the documents were publicly filed in the Court of Appeals. 282 S.W.3d 602, 636 (Tex. App.—Houston [14th Dist.] 2009, pet. denied). The appellate court was especially concerned with the long delay between when the appellants, with the appellee's knowledge, "asked the district clerk to file these unsealed court records" and when the appellee finally sought to have those records sealed. *Id.* (noting that the unsealed documents had been on file with the court of appeals for more than four months); *see also Stroud Oil Props., Inc. v. Henderson*, No. 2-03-003-CV, 2003 WL 21404820 at *3 (Tex. App.—Fort Worth June 19, 2003, pet. denied) (holding that appellees failed to show a specific, serious and substantial interest under Rule 76a in sealing record containing information they contended was protected by attorney-client privilege when the information was disclosed in open court).

Courts around the country also routinely reject attempts to seal evidence that was admitted at an open proceeding. In a case with facts similar to those here, *Littlejohn v. BIC Corp.*, the Third Circuit rejected the defendant's argument that public disclosure of exhibits introduced into evidence at trial could be prohibited because the defendant had relied upon a promise of confidentiality in a protective order governing discovery. 851 F.2d at 680. The Court noted that the defendant had failed to raise the issue of confidentiality when the defendant became aware, before trial, of the plaintiff's intent to use confidential documents at trial and failed to object when the exhibits were referred to during trial or entered into evidence. *Id.* The Court stated: "It is well established that the release of information in open court 'is a publication

of that information and, if no effort is made to limit its disclosure, operates as a waiver of any rights a party had to restrict its future use.'" *Id.* (quoting *Nat'l Polymer Prods. v. Borg-Warner Corp.*, 641 F.2d 41, 412 (6th Cir. 1981)).

Other federal courts have similarly rejected attempts to retroactively seal records that have been introduced into evidence or otherwise used at a public trial. *See, e.g.*, *Weiss v. Allstate Ins. Co.*, Civil Action No. 06-3774, 2007 WL 2377119 at *5 (E.D. La. Aug. 16, 2007) (declining to place under seal exhibits that "were made a part of the public record at trial, nearly four months ago, without objection by any party"); *Rambus, Inc. v. Infineon Techs. AG*, No. Civ.A. 3:00CV524, 2005 WL 1081337 at *3 (E.D. Va. May 6, 2005) (finding common law right of access to demonstrative exhibits was not overcome when exhibits were used at a hearing and tendered to the Court for use in deciding dispositive motions). Federal district courts in Texas have refused to claw back records that were publicly filed in order to place them under seal. *See Dickey's Barbecue Pit, Inc. v. Neighbors*, Civil Action No. 4:14-cv-484, 2015 WL 13466613 at *3 (E.D. Tex. June 5, 2015) (stating that "[t]he court will not allow exhibits that have already been made part of the public record to remain sealed"); *Elbertson v. Chevron, U.S.A., Inc.*, Civil Action No. H-10-0153, 2010 WL 4642963 at *2 (S.D. Tex. Nov. 9, 2010) (refusing to seal court records after settlement and stating that "when, as here, the public has already had access to documents, that is a factor weighing in favor of continued public access").

Here, the Exhibits were entered into evidence in open court. HouseCanary did not move to seal the Exhibits it offered into evidence or object to the public filing of any of the Exhibits offered in evidence by Title Source. It was not until *after* the trial—and after the jury delivered a verdict on March 14, 2018—that HouseCanary raised any objection whatsoever to the public

disclosure of the Exhibits. HouseCanary cannot demonstrate a specific, serious and substantial interest or higher value—let alone a compelling interest, as required by the First Amendment—that justifies now sealing the Exhibits.

HouseCanary cannot, as it attempts to do, rely on the fact that the Exhibits were designated as "Confidential" or "Highly Confidential – Attorney's Eyes Only" under the Stipulated Protective Order to justify retroactive sealing of the Exhibits. For one thing, Section 2 of the Stipulated Protective Order provides that once materials are published, "including becoming a part of the public through trial or otherwise," they are not subject to its protections. To prevent public disclosure from destroying any privacy interest HouseCanary might have in the Exhibits, Section 11.3 of the Stipulated Protective Order required that HouseCanary "comply with Texas Rule of Civil Procedure 76A," including obtaining "a court order authorizing the sealing of the specific Protected Material at issue" before that publication occurred. HouseCanary was thus required to make a motion to seal, and make the showing required under Rule 76a, at the time it offered the Exhibits into evidence. TEX. R. CIV. P. 76a(1).[13]

"Once the evidence has become known to the members of the public, including representatives of the press, through their attendance at a public session of court, it would take the most extraordinary circumstances to justify restrictions on the opportunity of those not

[13] The Stipulated Protective Order cannot, as it purports to do, operate as a "temporary sealing order" under Rule 76a because it fails to comply with the requirements of Rule 76a(5). The Stipulated Protective Order makes no "showing of compelling need from specific facts shown by affidavit or by verified petition that immediate and irreparable injury will result to a specific interest of the applicant before notice can be posted and a hearing held as otherwise provided" in Rule 76a. In addition, the Stipulated Protective Order does not "set the time for the hearing required by" Rule 76a(4) nor "direct[s] that the movant immediately give the public notice required by" Rule 76a(3). In any event, even if the Stipulated Protective Order could operate as a temporary sealing order, which it cannot, HouseCanary failed to file a motion to seal the Exhibits within five business days of the filing of the Exhibits, as the Stipulated Protective Order requires. *See* Stipulated Protective Order at § 11.3.

physically in attendance at the courtroom to see and hear the evidence. . . ." *Application of Nat'l Broad. Co., Inc*., 635 F.2d 945, 952 (2d Cir. 1980). Having filed the Exhibits in open court or failed to object to Title Source's filing of the Exhibits in open court, HouseCanary cannot now put the genie back in the bottle. Because HouseCanary cannot satisfy the demanding standards of Rule 76a, common law, or the First Amendment to justify sealing the Exhibits, its motion to seal must be denied.

V.
CONCLUSION

For the foregoing reasons, the Media Intervenors respectfully request this Court to deny Defendant's Motion to Seal Records, and to grant all further relief to which it is entitled.

Respectfully submitted,

/s/ Joshua A. Romero
Joshua A. Romero
Bar No. 24046754
Jromero@jw.com
Megan Davis
Bar No. 24105779
Mndavis@jw.com

JACKSON WALKER L.L.P.
100 Congress Ave., Suite 1100
Austin, Texas 78701
Tel: (512) 236-2035
Fax: (512) 391-2189

Amanda Crouch
Bar No. 24077401
Acrouch@jw.com

JACKSON WALKER L.L.P.
112 E. Pecan Street, Suite 2400
San Antonio, Texas 78205
(210) 978-7784
(210) 242-4684 – Fax

ATTORNEYS FOR THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS

J. Carl Cecere
Bar No. 24050397
ccecere@cecerepc.com

CECERE PC
6035 McCommas Blvd.
Dallas, Texas 75206
(469) 600-9455

ATTORNEY FOR THE HOUSTON FORWARD TIMES

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing document has been served upon counsel of record on this 9th day of May, 2018.

*/s/ Joshua A. Romero*_____
Joshua A. Romero