FILED
19-0673
2/18/2020 8:33 PM
tex-40942958
SUPREME COURT OF TEXAS
BLAKE A. HAWTHORNE, CLERK

No. 19-0673

In the Supreme Court of Texas

HOUSECANARY, INC. F/K/A CANARY ANALYTICS, INC.,
Petitioner,

v.

TITLE SOURCE, INC., REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, AND HOUSTON FORWARD TIMES,
Respondents.

On Petition for Review from the
Fourth Court of Appeals at San Antonio

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STATEMENT OF THE CASE

Nature of the Case:	This is an interlocutory appeal of an order retroactively sealing trial exhibits in a trade-secrets case after (i) Petitioner HouseCanary failed to abide by the requirements for sealing documents pursuant to the parties' agreed protective order; and (ii) the exhibits were introduced into evidence and discussed in open court during trial.
Trial Court:	73rd Judicial District Court of Bexar County, Texas; Honorable David A. Canales.
Trial Court's Disposition:	The trial court initially denied HouseCanary's post-trial motion to retroactively seal certain trial exhibits. (4CR8806, 9270). The court then granted HouseCanary's motion to reconsider and ordered some of those exhibits sealed, notwithstanding HouseCanary's failure to comply with the requirements of the parties' agreed protective order. (4CR 9430).
Court of Appeals:	Fourth Court of Appeals, San Antonio.
Court of Appeals' Opinion:	Opinion by Justice Martinez, joined by Justice Rios; concurring opinion by Chief Justice Marion. *Title Source, Inc. v. HouseCanary, Inc.*, Nos. 04-18-00509-CV, 04-18-00844-CV, 2019 WL 2996974 (Tex. App.—San Antonio July 10, 2019, pet. filed) ("Mem. Op.").

Court of Appeals' Disposition:

The Fourth Court reversed. Justice Martinez, writing for the majority, held that the trial court erred in sealing the exhibits when HouseCanary knowingly failed to follow the requirements of the parties' agreed protective order. Chief Justice Marion concurred in the judgment, writing separately to explain her view that the trial court also erred in retroactively sealing exhibits already used at trial and publicly disclosed in open court.

RESPONSE TO STATEMENT OF JURISDICTION

This case fails to present any question of law important to the jurisprudence of the state. *See* TEX. GOV'T CODE § 22.001(a). Contrary to HouseCanary's assertion (Pet. Br. 13, 23, 26), the Fourth Court's opinion does not turn on the application of the Texas Uniform Trade Secret Act's ("TUTSA") "preempt[ion]" provision, nor does it illustrate any "conflict" between Texas Rule of Civil Procedure 76a ("Rule 76a") and TUTSA. The court of appeals' decision did not turn on the interpretation of TUTSA, its interaction with Rule 76a, or on any statutory provision.

Instead, the Fourth Court based its decision on HouseCanary's undisputed failure to comply with the provisions of the protective order to which it had agreed to be bound. The Fourth Court noted that the parties had agreed in the protective order that Rule 76a would apply to the sealing of records, including the exhibits at issue. It is undisputed that HouseCanary failed to follow those agreed-upon procedures. The Fourth Court thus held that the trial court abused its discretion "when it sealed records without applying the Rule 76a standards and procedures as agreed and ordered in the [Stipulated Protective Order]." *See* Mem. Op. Because the outcome of this dispute turns on facts unique to this

case and to these parties, including the unique language of the parties' Stipulated Protective Order, this Court's review is unwarranted.

ISSUE PRESENTED

Did the Fourth Court of Appeals properly conclude that a party cannot retroactively seal trial exhibits after they have been entered into evidence and discussed in open court, when the movant fails to comply with the requirements for sealing those exhibits set forth in a stipulated protective order agreed to by the parties and entered by the trial court?

STATEMENT OF FACTS

A. HouseCanary and Title Source Enter Into a Stipulated Protective Order.

This appeal arises from a dispute between two major players in the residential valuation business: Amrock (formerly Title Source, Inc.), a title insurance and valuation company, and HouseCanary, Inc. ("HouseCanary"), a startup real estate analytics firm. (1CR26, 31). The two companies entered into a failed transaction for the development of a new type of software to perform housing appraisals and predict housing trends. (1CR26). Amrock accused HouseCanary of failing to deliver the promised software. (1CR26-27). HouseCanary accused Amrock of

misappropriating trade secrets it shared with Amrock during discussions about the proposed software. (1CR36-43).

Before trial, the parties agreed to, and the trial court entered, a Stipulated Protective Order (the "SPO") pursuant to Texas Rule of Civil Procedure 192.6 and TUTSA. The SPO "remain[ed] in effect through the conclusion of [the] litigation." (1CR253, 356-74).

The SPO contained specific provisions about the protection of confidential materials at trial. Under the SPO, a party seeking to keep confidential any sensitive materials used during trial must first obtain "a court order authorizing the sealing of the specific Protected Material at issue." (1CR272). Specifically, the SPO required the movant to file a motion to seal the information pursuant to Rule 76a within five business days after the materials were filed. (1CR273). If a party failed to file such a motion, the SPO offered no protection for any information that "becomes part of the public domain," including information that "becom[es] part of the public record through trial or otherwise." (1CR260).

In March 2018, a Bexar County jury sided with HouseCanary and awarded the company $706.2 million in damages—by far the largest

verdict in Bexar County history. (4CR9435). It was also the largest verdict in 2018 in any trade-secret case in the United States—indeed, in any case anywhere in the world.[1] The mammoth verdict, and the very public seven-week trial, garnered national attention. The story of that verdict has received in-depth press coverage across Texas[2], as well as in Michigan, where Amrock[3] is located. It has been covered by national news outlets, including The Wall Street Journal, Bloomberg, and others.[4] The verdict continues to be closely followed by experts in the intellectual

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[1]Elle Mertens, *Inside 2018's Largest Trade Secrets Damages Award*, MANAGING INTELLECTUAL PROP., April 12, 2018, <https://tinyurl.com/y7bsmlph> (quoting experts who noted that trade-secret cases in the verdict tend to have much higher damages than anywhere else in the world).

[2]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>; Scott Graham, Susman Team Wins $706.2M Trade Secret Verdict for Real Estate Valuation Client, TEX. LAWYER, March 15, 2018, <https://tinyurl.com/yalvhv4h>; Patrick Danner, San Antonio company HouseCanary wins $700M jury verdict, San Antonio Express-News, March 15, 2018, <https://tinyurl.com/yd9tqsyp>.

[3]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://tinyurl.com/y9l7sv9q>; JC Reindl, Quicken Loans affiliate hit with $706M judgment from Texas jury, Detroit Free Press, March 15, 2018, <https://tinyurl.com/y76gjrxo>.

[4]Peter Rudegeair, Startup Awarded $706 Million In Legal Tussle With Quicken Loans Affiliate, The Wall St. J, March 16, 2018, <https://tinyurl.com/y8pkbcym>; Erik Larson, Quicken Loans Is Sued by Data Startup Claiming Trade Secrets Theft, Bloomberg, March 18, 2018, <https://tinyurl.com/y79tesa2>; Laurel Caulkins, Amrock Ordered to Pay $706 Million in Trade Secrets Case, Bloomberg /Quint, March 17, 2018, <https://tinyurl.com/y7pox56w>; Cara Salvatore, Jury Awards $706M Over Appraisal App Secrets Theft, Law360, March 15, 2018, <https://tinyurl.com/y8lou2xe>; HouseCanary Awarded $706.2 Million Verdict Against Amrock, RISMedia, <https://tinyurl.com/y7jfswty>; J.J. Velasquez, Local Tech Firm Wins $706M in Legal Fight with Quicken Loans Affiliate, Rivard Report, March 15, 2018, <https://tinyurl.com/y8nuw2nd>.

property, mortgage finance, and startup communities and has also captured the attention of specialty news outlets around the country.[5]

B. HouseCanary Fails to Follow the SPO's Provisions to Protect the Confidentiality of its Purported Trade Secrets at Trial.

Throughout the highly publicized seven-week jury trial, during which HouseCanary alleged that its "core" trade secrets were at stake, HouseCanary did little to protect its alleged trade secrets from disclosure. Both parties successfully moved to seal certain exhibits reflecting their computer source code pursuant to the SPO's provisions. (*See, e.g.*, 32RR128.) It is undisputed, however, that the eight exhibits that are the subject of the sealing order at issue and which HouseCanary alleges contain its "core" trade secrets—PX49, PX64, DX95, DX342, DX561, DX759, DX800 & DX835 (the "Exhibits")—were entered into evidence and discussed in open court, either by HouseCanary itself or without objection from HouseCanary. (4CR9352-55). HouseCanary

[5]Martins, supra note 1; Ben Lane, Amrock ordered to pay $706 million for stealing trade secrets from HouseCanary, HousingWire, March 15, 2018, <https://tinyurl.com/yammcrqc>; Jacob Gaffney, United Wholesale CEO declares huge HouseCanary settlement is "good for all of us", HousingWire, April 3, 2018,https://www.housingwire.com/articles/43007-united-wholesale-ceo-declares-huge-housecanary-settlement-is-good-for-all-of-us/; Emma Hinchliffe, HouseCanary wins $706M after getting sued by Quicken Loans affiliate, Inman, March 15, 2017, <https://tinyurl.com/yb5jp4t6>;; Radhika Ojha, HouseCanary Wins $706.2 Mn Verdict Against AMROCK Inc., DSnews, <https://tinyurl.com/y7futbsb>.

affirmatively relied on some of these exhibits to support its claims at trial, including PX64, an email attaching HouseCanary's "data dictionary," which HouseCanary referenced in its opening statement and discussed repeatedly through several of its witnesses in open court. (4CR9354). The Exhibits also included DX759—a document describing HouseCanary's "similarity score" and "valuation suitability score"—which both parties repeatedly discussed throughout trial. (*Id.* at 3).

Several of the Exhibits were also displayed during witnesses' questioning, at greatly magnified scale, on the court's projection system, within full view of the judge, jury, courtroom personnel, and the gallery. (4CR9341). And the Exhibits were freely referenced and discussed by all parties in open court. (4CR9352-55). At no time during the seven-week trial did HouseCanary ask that these Exhibits be sealed pursuant to the SPO or request that the courtroom be closed during portions of the trial when the Exhibits were shown or discussed. Nor did the trial court enter any order that modified the SPO or "quarantined" the Exhibits. (Pet. Br. 20).

C. HouseCanary Files a Post-Trial Retroactive Motion to Seal, Which the Trial Court Initially Denied.

More than a month after the jury's verdict, HouseCanary made its first attempt to shield its supposedly "core" trade secrets by moving under Rule 76a to retroactively seal the eight Exhibits, along with 22 other trial exhibits that included "HouseCanary Financials," "Data Vendor Contracts," and a "Presentation to [the] Board of Directors." (4CR8806-10).

In its motion, HouseCanary admitted that all the exhibits it sought to retroactively seal, including those it alleged contained trade secrets, were subject to Rule 76a's presumption that court records are "open to the general public." (4CR8810). HouseCanary did not object to the application of Rule 76a, nor did it suggest that any source of law might supplant Rule 76a. HouseCanary also did little to explain what trade secrets it claimed were contained within the exhibits it sought to seal, relying instead on generalized assertions that they "reflect HouseCanary's data dictionary" and unspecified "information about HouseCanary's analytics, including its similarity score and complexity score models." (4CR8809). And HouseCanary made no attempt to show that any of the exhibits contained sufficient detail to actually risk the

disclosure of its alleged trade secrets; HouseCanary simply asserted that some unspecified portions of some unspecified number of the more than 30 exhibits it sought to seal were designated "confidential." (4CR8809).

HouseCanary's motion also failed to explain why the drastic remedy of a sealing order was necessary and why no "less restrictive means than sealing"—such as redaction—would be sufficient. TEX. R. CIV. P. 76a(1). Perhaps most importantly, HouseCanary made no effort to explain why sealing was appropriate *after* the exhibits had already been publicly disclosed in open court during the trial.

D. The Media Intervenors Intervene.

When HouseCanary filed its Rule 76a motion to seal, the Reporters Committee for Freedom of the Press and the *Houston Forward Time*s (collectively, the "Media Intervenors") intervened. (4CR8949). The Reporters Committee for Freedom of the Press is an unincorporated 501(c)(3) nonprofit 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. *Houston Forward Times* is the South's largest

Black-owned and independently published newspaper. It is dedicated to First Amendment freedoms and serves its readers as an information vehicle and the most trusted voice for African Americans in Houston and throughout the southern region. (4CR8950).

The Media Intervenors and Title Source opposed HouseCanary's sealing effort. (4CR8949). The Media Intervenors did so to assert the public's interests in accessing the trial exhibits that HouseCanary sought to retroactively seal. The Media Intervenors argued that HouseCanary had waived any right to seal the exhibits after allowing their introduction into evidence and use in open court. And they urged that any attempt to retroactively seal the exhibits would violate the First Amendment and Texas law and prevent news organizations from fully informing the public about this important case. (4CR8951).

On May 11, 2018, the trial court properly denied HouseCanary's motion from the bench. (4CR8949, 9288).

E. HouseCanary Seeks "Reconsideration," Asserting New Arguments for Retroactive Sealing of a Smaller Number of Exhibits.

One day after the trial court denied its motion to retroactively seal trial exhibits under Rule 76a, HouseCanary filed what it styled a motion

for "reconsideration" that was, in reality, a complete reinvention of its position. (4CR9305). HouseCanary abandoned its arguments as to 22 of the trial exhibits, focusing solely on the eight Exhibits it alleged contained the "most sensitive [trade] secrets." (4CR9272).

HouseCanary also changed its legal justification for sealing. Despite its earlier admission that the Exhibits were subject to Rule 76a and its presumption that court records remain "open to the public" (4CR8810), HouseCanary asserted that it was not "renew[ing] [any] challenge under Rule 76a." (4CR9278). Instead, it moved for "reconsideration" solely on a new ground: the secrecy preservation section of TUTSA. HouseCanary argued for the first time that this provision "supplant[ed]" Rule 76a, upon which its initial sealing motion was based (4CR9273, citing TEX. CIV. PRAC. & REM. CODE § 134A.007(c)), simply because HouseCanary had "alleged" that trade secrets were involved. Specifically, HouseCanary argued that TUTSA reversed the "presumption" against sealing, converting Rule 76a's "presumption of openness" into a "presumption" of secrecy. Accordingly, even though HouseCanary had made no attempt to explain what trade secrets were implicated, or why sealing the Exhibits in their entirety was necessary

to shield trade secrets from disclosure (4CR9272, 9274), HouseCanary argued that it had an automatic right to a retroactive sealing order to protect these alleged trade secrets and no "balancing" of private and public interests was required. (4CR9274). And HouseCanary made no effort to obey either the substantive or procedural requirements of Rule 76a.

Both Title Source and the Media Intervenors opposed HouseCanary's renewed effort. The Media Intervenors explained that TUTSA's protections did not displace Rule 76a's rules for sealing orders. (4CR9306-08). The Media Intervenors further asserted that any attempt at retroactive sealing would be inconsistent with their First Amendment right to access exhibits in the court's file—which have historically remained public even after the trial has ended. (4CR9306-08).

F. The Trial Court Orders Certain Trial Exhibits Sealed and Prohibits Dissemination of Sealed Materials.

Despite Title Source's and the Media Intervenors' opposition, the trial court issued an order on July 3, 2018 (the "Sealing Order") "pursuant to Tex. Civ. Prac. & Rem. Code § 134A.001 et seq.," specifying that HouseCanary's eight asserted "Core Trade Secret Exhibits" "shall be sealed in their entirety." (4CR9430). The trial court also ordered

references to the eight "Core Trade Secret Exhibits" be redacted in six *other* exhibits not mentioned in HouseCanary's reconsideration motion, PX108, PC345, DC101, DC136, DX421, and DX828 (the "Six Additional Exhibits"). *Id.* Notably, HouseCanary did not even request any relief from the trial court related to the Six Additional Exhibits.

As stated in the Sealing Order, the trial court determined that these "exhibits contain[ing] 'trade secrets'" should be redacted "because they contain information, in whole or in part, from the Core Trade Secret Exhibits." (4CR9430). The Sealing Order further stated that "the Court issues a protective order that is similar in form to the protective orders previously signed and entered in this case" and that it "applies to all persons . . . who receive actual notice of this Order by personal service, verbal or written notice, or otherwise." (*Id.*). This appeal followed.

G. The Court of Appeals Reverses the Sealing Order.

The Fourth Court reversed the Sealing Order in a memorandum opinion. Mem. Op., at *6, *10. It "determine[d] that Rule 76a applied to HouseCanary's request to seal the exhibits at issue because the [SPO] mandates the use of Rule 76a." *Id.*, at *6. The court held that HouseCanary could not demand retroactive sealing of exhibits it had

entered into evidence during a public trial, because HouseCanary had failed to follow the procedures in Rule 76a to obtain a sealing order, and "[i]t is undisputed that the trial court did not apply Rule 76a when it decided HouseCanary's motion to reconsider whether to seal the exhibits at issue." *Id.*, at *9. The court therefore concluded that "[t]he trial court abused its discretion by sealing the exhibits at issue without applying the Rule 76a standards and procedures." *Id.*

The court of appeals' conclusion that Rule 76a's standards and procedures were applicable to HouseCanary's sealing effort did not, as HouseCanary contends, flow from any holding about the "interplay" between Rule 76a and TUTSA. (Pet. Br. 15.) Nor did that conclusion result from any "conflict" between the two, (*id.*) or any conclusion about whether one "supplants" the other. Mem. Op., at *3-4.

The court of appeals' decision was instead based entirely on well-settled "contract principles" applied to the SPO, the enforceability of which "HouseCanary does not dispute." *Id.*, at *6. The court of appeals concluded that the parties had determined in the SPO "the procedures and standards that apply when a party seeks permission from the trial

court to file material under seal," and held that "[t]he SPO mandates the use of Rule 76a"—even for sealing requests made "at trial." *Id.*, at *6, *8.

The court of appeals also concluded "TUTSA does not override the SPO," it facilitates it. *Id.*, at *6. This is because, as the court explained, "Section 134A.006(a) of TUTSA," cited in the first line of the SPO, provides that a "court shall preserve the secrecy of an alleged trade secret by reasonable means," and "[t]here is a presumption in favor of granting protective orders." *Id.*, at *9 (citation omitted). The court of appeals determined that is exactly what the trial court did here when it "implemented section 134A.006(a) through" the SPO: It "acted on the presumption in favor of granting protective orders by granting a protective order." *Id.*

For these reasons, the court of appeals concluded that the trial court reversibly erred "when *it ignored the [SPO]* and ordered exhibits sealed without application of the Rule 76a standards and procedures" referenced therein. *Id.*, at *9 (emphasis added).

SUMMARY OF ARGUMENT

The court of appeals correctly set aside the Sealing Order based on its findings that: (1) HouseCanary failed to comply Rule 76a, as required by the SPO; and (2) TUTSA does not conflict with the SPO.

Those decisions were entirely correct and present no issue deserving further review. The court of appeals' decision to set aside the Sealing Order was based entirely on HouseCanary's undisputed failure to comply with the Rule 76a standards and procedures that the SPO unambiguously requires, and to which HouseCanary had voluntarily agreed. The interpretation of that protective order, which is unique to the parties in this case, presents no legal issue of larger significance to the jurisprudence in the state.

Because this case is properly resolved on the basis of the SPO—and only the SPO—this case in no way involves the manufactured "conflict" that HouseCanary urges between Rule 76a and TUTSA—a purported conflict that the Fourth Court expressly declined to address. And if the Court were to entertain HouseCanary's argument asserting such a conflict, it should still affirm the court of appeals' judgment. This is because no such conflict exists: Rule 76a and TUTSA simply do different

things: Rule 76a covers sealing orders; TUTSA covers protective orders. Rule 76a's requirements would thus govern HouseCanary's request for sealing at issue in this case even in the absence of the SPO. TUTSA would *not* govern. HouseCanary's undisputed failure to follow those requirements is fatal to its sealing effort, and cannot overcome Rule 76a's presumption of openness.

Additionally, the First Amendment would independently require affirmance of the court of appeals' opinion and the rejection of HouseCanary's misguided retroactive sealing demand. This Court should therefore reaffirm the long tradition of public access to judicial records dictated by the First Amendment and find that a presumption of openness applies under the United States Constitution and the Texas Constitution. The presumption of openness requires that any attempt to seal exhibits that have been publicly entered into evidence be subject to heightened scrutiny. HouseCanary's inadequate effort to demonstrate any need—let alone a compelling one—for sealing exhibits that have been entered into evidence and discussed in open court does not approach satisfying that standard.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY HELD THAT THE TRIAL COURT ABUSED ITS DISCRETION IN ENTERING THE SEALING ORDER.

The court of appeals correctly determined that the entry of the Sealing Order was an abuse of discretion because HouseCanary failed to comply with the requirements of the SPO. The SPO comprehensively addressed the parties' sealing obligations and required compliance with Rule 76a's procedural and substantive requirements. There is no dispute that HouseCanary failed to comply with the standards to which it agreed in the SPO, and the court of appeals correctly concluded that this failure was ultimately fatal to its sealing request. That holding was entirely correct, and entirely unique to these parties and the facts of this case, presenting no broader jurisprudential principle deserving of this Court's attention.

A. The Court of Appeals Correctly Held that the SPO Incorporated Rule 76a's Procedural and Substantive Sealing Standards, Which HouseCanary Did Not Follow.

HouseCanary bills this case as raising "an important question of first impression" about the interplay between TUTSA and Rule 76a, on the issue of records-sealing in trade-secret cases and supposed "conflicts" between the rights and obligations imposed by each. (Pet. Br. 15). But

that framing focuses on a holding the court of appeals did not make. The court saw no need to consider how TUTSA interacts with Rule 76a, and it certainly found no "conflict" between them.[6]

Instead, the court of appeals' conclusion that the trial court erred in sealing the Exhibits flowed directly from the plain language of the SPO. The SPO required the parties to comply with Rule 76a's standards for any materials the parties wanted to file under seal. Mem. Op., at *10. The parties made no exception in the SPO for alleged trade secrets or for filing at trial. It is undisputed that the parties agreed to the SPO and the trial court signed the order.

The court of appeals' determination that "TUTSA does not override the SPO" was also entirely correct. Mem. Op., at *6. As the court of appeals noted, the SPO vindicates, rather than violates, TUTSA's requirements that trial courts protect trade secrets. The court explained

[6] Indeed, the court of appeals did not even address whether TUTSA curtails the Supreme Court's rulemaking authority to enact procedural and substantive sealing requirements like Rule 76a, as HouseCanary claims. (Pet. Br. 14–15, quoting Mem. Op., at *9). The court considered that issue solely in the context of HouseCanary's contention that TUTSA supplanted Rule 76a's right of interlocutory appeal—a contention HouseCanary has now abandoned. (Br. of Appellee at 22, No. 04-18-00844-CV). And it specifically emphasized that it was "tak[ing] no position on whether" TUTSA "conflict[ed] with the Rules on other matters" outside of those interlocutory appellate rights. Mem. Op., *4.

that "Section 134A.006(a) of TUTSA" cited in the first line of the SPO, provides that a "court shall preserve the secrecy of an alleged trade secret by reasonable means," and "[t]here is a presumption in favor of granting protective orders." *Id.*, at *9 (citation omitted). The court of appeals determined that is exactly what the trial court did here when it "implemented section 134A.006(a) through" the SPO; it "acted on the presumption in favor of granting protective orders by granting a protective order." *Id.*

The court of appeals also properly rejected HouseCanary's claims that matters related to sealing trial exhibits are beyond the SPO's scope. HouseCanary argued below that it was not required to comply with Rule 76a with respect to the Exhibits because: (1) the SPO did not apply beyond discovery; and (2) the SPO did not apply to requests to seal trial exhibits because a party "offers" rather than "files" evidence. As the court of appeals correctly determined, the SPO applied at trial because it expressly states that it governs proceedings "through the conclusion of [the] litigation." Mem. Op., *6-7. The court of appeals was likewise correct to reject HouseCanary's contention that the SPO's provisions for "filing" documents do not apply to "offer[ing] them at trial." *Id.* Material is "on

file" after exhibits are introduced and filed by the court reporter with the court clerk, as they were in this case. *See Lance v. Robinson*, 543 S.W.3d 723, 733 (Tex. 2018); Mem. Op., at *8 (explaining that once "the evidence is admitted, the court reporter *files* the evidence with the clerk of court") (emphasis added).

And HouseCanary fares no better in its attempt to claim that the trial court "modif[ied]" the SPO's provisions (Pet. Br. 33)—an argument that was never raised below, and which conflicts with the undisputed fact that the trial court never even entertained, much less approved, any modification to the sealing order.

In short, the court of appeals correctly exercised its discretion in determining that the trial court erred by failing to apply Rule 76a (as required by the SPO) in granting HouseCanary's motion to seal. *See Chandler v. Hyundai Motor Co.*, 844 S.W.2d 882, 885 (Tex. App.—Houston [1st Dist.] 1992, no writ) ("Rule 76a does not reserve discretion to the trial court whether to comply with its provisions."); *see also Gen. Tire, Inc. v. Kepple*, 970 S.W.2d 520, 526 (Tex. 1998) (Rule 76a sealing orders are reviewed for abuse of discretion). The court of appeals' decision should therefore be affirmed.

B. HouseCanary Cannot Satisfy Rule 76a's Sealing Standards.

Despite what HouseCanary suggests (Pet. Br. 30), there is no question that HouseCanary failed to follow Rule 76a's procedures, as the SPO required, at any point with respect to the Exhibits, including when it moved the trial court to reconsider whether to seal the Exhibits. HouseCanary brought its reconsideration motion solely under TUTSA. HouseCanary failed to post public notice pursuant to Rule 76a(3), failed to have a hearing on the motion to seal in open court pursuant to Rule 76a(4), and failed to obtain an order sealing the Exhibits pursuant to Rule 76a(5), among other things. Nor did HouseCanary make any attempt to satisfy Rule 76a's substantive sealing requirements. HouseCanary did nothing to demonstrate that it had any "serious and substantial interest" in sealing that could overcome Rule 76a's "presumption of openness." Rule 76a(1). Rather, HouseCanary simply claimed an "automatic" right to sealing under TUTSA.

That is because HouseCanary knew it could not satisfy the requirements. Rule 76a does not permit retroactive sealing of documents that have already been entered into evidence in open court—because, as courts in Texas applying Rule 76a (and courts around the country

applying similar standards) have held, parties have no "serious and substantial interest," (Rule 76a(1)(a)), in sealing documents that are already public.

The Fourteenth 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*, the court held that an appellee waived its right to seal documents under Rule 76a when the documents were publicly filed in the court of appeals. *See Envtl. Procedures, Inc. v. Guidry*, 282 S.W.3d 602, 636 (Tex. App.—Houston [14th Dist.] 2009, pet. denied). The 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 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) (mem. op.) (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 information was disclosed in open court).

Courts around the country have also repeatedly rejected attempts to seal evidence that was admitted during an open proceeding. In a case with facts similar to this case, *Littlejohn v. BIC Corp.*, the Third Circuit rejected the defendant's argument that public disclosure of exhibits introduced at trial could be sealed because the defendant had relied on a promise of confidentiality in a protective order. *See Littlejohn v. BIC Corp.*, 851 F.2d 673, 680 (3d Cir. 1988). The Third Circuit 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 had failed to object when the exhibits were referenced 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 418, 421 (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.*, 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 hearing and tendered to court for use in deciding dispositive motions). Notably, federal 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*, No. 4:14-CV-484, 2015 WL 13466613, at *3 (E.D. Tex. June 5, 2015) ("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.*, No. H10-0153, 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").

HouseCanary has never confronted this unbroken line of authority. Instead, it attempts to overcome the irresistible conclusion that the Exhibits became public after their disclosure in open court by inventing a "quarantine[ing]" order that simply does not exist. (Pet. Br. 20). HouseCanary never requested such an order, and there is no evidence any such order was ever entered, or what its precise terms might be.

In attempting to prove otherwise, HouseCanary plucks out of context a few sentences from the hearing on its motion to reconsider. But these statements *never* refer to the trial court's treatment of exhibits during the trial. They refer only to its treatment of media requests to view exhibits *after* the trial concluded. And when the trial court said it was resisting disclosing exhibits because it was "not in a position to figure out what I think should be sealed and shouldn't be sealed," that was not a suggestion that there had been an order throughout the case that sealed all the exhibits during trial.[7] Rather, the trial court was acknowledging that there were sealing orders entered by other judges in the case, and the court did not want to disclose anything until it determined if those

[7] Indeed, such an order would have been violated when the Exhibits were discussed in an open courtroom without any protection against public disclosure.

other, actual orders covered the exhibits. (Pet. Br. App. C at 33-34). Indeed the court recognized that some of the trial exhibits should be available to the public: "[I]t's not that I'm intentionally not letting people see things that should be accessible to the public, but there's– again, up until today, there has been a true open question to me about what is covered [by the previous orders] and what's not . . . ." (*Id.* at 36).

Yet even if HouseCanary had presented any evidence of an order throughout trial that sealed exhibits, this order would have also been subject to Rule 76a. And an unwritten order, of unspecified terms, entered without notice or opportunity for the public to be heard, and without any evidentiary showing of the interests the order would protect could never comply with Rule 76a's requirements.

In sum, the court of appeals was entirely correct to conclude that HouseCanary's sealing request was procedurally and substantively defective, on the terms that the parties had agreed would govern such sealing requests. And that basic failure means this case presents no consideration of the "trial court's application of TUTSA's mandate." (Pet. Br. 15.) And if it involves the "precise strictures of Rule 76a," it is only because HouseCanary agreed to abide by those strictures. (*Id.*) It is

therefore an issue of importance only to the parties, and not one that will develop the jurisprudence of the state.

C. Nothing in TUTSA Supplants Rule 76a.

The court of appeals did not need to address any "interplay" between TUTSA and Rule 76a because it correctly determined that the SPO agreed to by the parties required the parties to comply with Rule 76a. But even if the court below were to entertain HouseCanary's contention that TUTSA provides HouseCanary an automatic right to sealing and that TUTSA "supplants" Rule 76a's procedural and substantive standards, that contention would be incorrect. Rather, TUTSA contemplates sealing through Rule 76a—because the Legislature recognized in crafting TUTSA that Rule 76a applies to all sealing requests. And there is "conflict" between Rule 76a and TUTSA's protections that would cause the latter to supplant the former. *See* TUTSA § 134A.007(c). To the contrary, they complement each other.

TUTSA and Rule 76a do different things. Rule 76a provides parties with a mechanism to obtain a sealing order—to shield exhibits filed in the court's record from public view. TUTSA, on the other hand, addresses the protection of trade secrets through pretrial "protective order[s]"

governing the handling of materials exchanged between the parties during discovery that may never appear in the court's record.

Texas civil procedure has long maintained a distinction between sealing orders and protective orders. Protective orders constrain parties' handling of witnesses and documents during discovery. Originally, they were governed exclusively by former Rule of Civil Procedure 166b, which authorized trial courts to issue protective orders to protect sensitive information, such as trade secrets, during discovery. *See Gen. Tire, Inc.*, 970 S.W.2d at 523–24 (citing former Rule 166b). The provisions of former Rule 166b are now incorporated into Rules 192.1–192.7, 193.5, and 195.1–195.7, with Rule 192.6 governing protective orders that limit and condition discovery to ensure protection against "invasion of personal, constitutional, or property rights." TEX. R. CIV. P. 192.6(b)(4). Sealing orders, on the other hand, have always been covered under Rule 76a, and have always concerned treatment of documents in "court files" and "court records," *not* discovery.

The Legislature made use of this longstanding distinction when it crafted TUTSA and limited § 134A.006(a) to "protective orders." And there are good reasons why it did so, and why it applied different

presumptions to sealing orders and protective orders. It makes sense that sealing orders are presumptively unavailable, because the public has a First Amendment right of access to judicial proceedings. *See* Section II.A. Thus, a high threshold must be met before the public can be excluded from those proceedings. And because the presumption against sealing is ultimately mandated by the First Amendment, it cannot be supplanted by Section 134A.006, or any other statute—even if Section 134A.006 purported to do so. *See Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982) (holding that a Massachusetts statute mandating closure of a trial during testimony of a minor rape victim violates the First Amendment presumption of access to criminal trials).

It also makes sense to have a presumption in favor of protective orders in the context of discovery in trade-secret cases. Section 134A.006(a)'s presumption in favor of protective orders alleviates the burden on parties to prove the existence of trade secrets merely to exchange information in discovery without risk of its disclosure. Section 134A.006 therefore "provides the ability for aggrieved parties to pursue their rights in court without fear of having to disclose the very information they are trying to keep secret." MARK J. OBERTI, JOSEPH Y.

AMHAD & HANNA NORVELL, *2017 Update: Suing or Defending the Departing Texas Employee*, STATE BAR WEBCAST, at 79-80 (2017). And, generally speaking, the First Amendment presumption of access does not apply to materials merely exchanged between parties during civil discovery. *See, e.g.*, *Cipollone v. Liggett Group, Inc.*, 785 F.2d 1108, 1118–20 (3d Cir. 1986) (explaining that the standard for entering discovery protective order under the Federal Rules of Civil Procedure is "good cause").

Accordingly, the different presumptions in TUTSA and Rule 76a do not make them incompatible, as HouseCanary suggests. (Pet. Br. 20, 26). Nor do the different showings required by TUTSA and Rule 76a—the natural consequence of those different presumptions—put them in conflict. (Pet. Br. 20, 26). The substantive showing Rule 76a requires poses no barrier to the protection of true trade secrets either, because, as HouseCanary notes, in an appropriate case, a party could demonstrate that the protection of its true trade secrets is a "serious and substantial interest" sufficient to overcome the presumptive right of access. (Pet. Br. 25.) And it likewise makes no difference that TUTSA and Rule 76a impose obligations on different participants in the litigation process, with

TUTSA placing responsibilities "on the court" while Rule 76a's responsibilities are imposed "on the party seeking sealing." To the contrary, the very fact that TUTSA and Rule 76a focus on different people simply serves to highlight how they do different things.

Accordingly, every effort HouseCanary makes to generate conflict between TUTSA and Rule 76a simply serves to reinforce their compatibility. And because TUTSA and Rule 76a operate in different spheres, there is no risk that the parade of horribles HouseCanary advances will come to pass if the court of appeals' decision is left undisturbed. Trial courts will not be forced into "assist[ing] . . . misappropriation," (Pet. Br. 25), nor will they be rendered "powerless to seal evidence." Nor, for that matter, will it become harder for judges to handle the press of their responsibilities during trial. (*Id.*) Trade-secrets cases will proceed as they always have—aided by protective orders that streamline the discovery process and sealing orders issued consistently with Rule 76a. Accordingly, maintaining the distinction between TUTSA's protections for protective orders and sealing orders will not harm trade secrets, trade-secret holders, or the trial courts charged with protecting them.

Finally, maintaining the distinction between TUTSA's protections for protective orders and sealing orders is the only way to maintain the constitutionality of TUTSA itself. That is because if TUTSA purported to overrule the "presumption of openness" grounded in the First Amendment, it could not survive. *See Globe Newspaper Co.*, 457 U.S. at 607 (overturning a state statute automatically sealing the testimony of minor victims of sexual assault and holding that, under the First Amendment, public access may be restricted only on a case-by-case basis and if closure is necessitated by a compelling government interest and the denial of access is narrowly tailored to serve that interest).

In sum, Section 134A.006 and Rule 76a work together in harmony. Both provisions serve different, complementary purposes, and are carefully crafted to avoid any constitutional conflict. Thus, while TUTSA may "control" over "[t]he Texas Rules of Civil Procedure" in the event one "conflicts" with the other, it does not override Rule 76a's provisions here. And because HouseCanary disclaimed any intent to rely on Rule 76a and made no attempt to satisfy its presumption or the balancing between private and public interests it demands, the Sealing Order should not have been granted.

II. TUTSA Neither Supersedes Nor Supplants the Presumption of Openness Required By the First Amendment.

The court of appeals' decision can be affirmed based solely on HouseCanary's failure to comply with the express provisions of the SPO. Separate and apart from such analysis, the court of appeals' decision is also correct based on the First Amendment right of access to exhibits filed in open court. Decades of authority recognize the long tradition of public access to judicial records and the presumption of openness under both the United States Constitution and the Texas Constitution. This presumption requires that any attempt to seal exhibits publicly entered into evidence are subject to heightened scrutiny.

This right protects public access to judicial records that have "'historically been open to the press and general public'" and to which public access "'plays a significant positive role in the functioning of the particular process in question.'" *Sullo & Bobbitt, P.L.L.C. v. Milner*, 765 F.3d 388, 392–93 (5th Cir. 2014) (per curiam); *see also Craig v. Harney*, 331 U.S. 367, 374 (1947) ("A trial is a public event. What transpires in the court room is public property.").

This constitutional right of access to exhibits is rooted in a long tradition, "one that predates the Constitution itself." *United States*

v. Mitchell, 551 F.2d 1252, 1260 (D.C. Cir. 1976). It vindicates both the "citizen's desire to keep a watchful eye on the workings of public agencies," as well as the news media's "intention to publish information concerning the operation of government." *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 598 (1978) (internal citations omitted).

Indeed, this right is essential for the proper functioning of the judicial system. It enhances the quality and safeguards the integrity of the fact-finding process, *Globe Newspaper Co.*, 457 U.S. at 606, promotes both fairness and the appearance of fairness, *Press-Enter. Co. v. Superior Court*, 464 U.S. 501, 508 (1984) ("*Press-Enterprise I*"), plays a cathartic role by allowing a community to observe the administration of justice, *id.* at 508–09, and fosters public trust in the judicial system, *Richmond Newspapers v. Va.*, 448 U.S. 555, 572 (1980). "As with other branches of government, the bright light cast upon the judicial process by public observation diminishes possibilities for injustice, incompetence, perjury, and fraud." *Littlejohn*, 851 F.2d at 678. And HouseCanary has not demonstrated any overriding reason that could overcome the First Amendment's strong presumption that the Exhibits should be available to the public.

A. The Right of Access Applies to Civil Proceedings.

Contrary to what HouseCanary's contends (Pet. Br. 31-32), the First Amendment right of access applies to all types of judicial records, including civil proceedings and associated records and documents. *See Courthouse News Serv. v. Planet*, 750 F.3d 776, 786 (9th Cir. 2014) ("[F]ederal courts of appeals have widely agreed that [the First Amendment] extends to civil proceedings and associated records and documents"); *see also N.Y. Civil Liberties Union v. N.Y.C. Transit Auth.*, 684 F.3d 286, 305 (2d Cir. 2012) (permitting a right of access to administrative civil infraction proceedings); *see also Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1061 (3d Cir. 1984) (the First Amendment secures a right of access to civil proceedings); *In re Cont'l Ill. Sec. Litig.*, 732 F.2d 1302, 1308 (7th Cir. 1984) (noting a right of access in shareholder derivative suits); *Brown & Williamson Tobacco Corp. v. Fed. Trade Comm'n*, 710 F.2d 1165, 1177 (6th Cir. 1983) (the First Amendment limits judicial discretion to seal documents in a civil case).

No other federal appellate court has reached a contrary result. In support of its claim that the First Amendment right of access does not apply to records from civil proceedings, HouseCanary relies on dicta from

a single case from 1985, *In re Reporters Committee for Freedom of the Press*, 773 F.2d 1325 (D.C. Cir. 1985) ("*In re Reporters Committee*"). (Pet. Br. 32.)[8] However, "[t]he D.C. Circuit has neither recognized nor rejected that the First Amendment affords the public a right of access to civil proceedings." *In re Guantanamo Bay Detainee Litig.*, 624 F. Supp.2d 27, 35 (D.D.C. 2009). *In re Reporters Committee* held only that no violation of any First Amendment right of access occurred when a district court refused to release documents related to summary-judgment motions after those motions were denied—pre-trial and prejudgment. 773 F.2d at 1339. Not only was the statement by then-judge Scalia quoted by HouseCanary dicta, but HouseCanary elides key portions of the quoted language, in which then-Judge Scalia stated: "The principle [of the First Amendment right of access] has *not yet* been applied to access to civil trials (*though the Court has perhaps intimated that it*

[8] HouseCanary also cites *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 33 n.19 (1984), for the proposition that the U.S. Supreme Court has "recogniz[ed] that access to court records 'customarily is subject to the control of the trial court.'" (Pet. Br. 32.) The footnote in *Seattle Times* to which HouseCanary cites concerns discovery materials, not court records filed with a court during judicial proceedings. 467 U.S. 20 at 33 n.19. Indeed, in *Seattle Times*, the U.S. Supreme Court addressed only the issue of whether parties to civil litigation have a First Amendment right to disseminate, in advance of trial, information gained *through the pretrial discovery process*. *Id.* at 22.

obtains there, *see Richmond Newspapers*, 448 U.S. at 580 n. 17, 100 S.Ct. at 2829 n. 17), much less to access to records in civil trials . . . ." *Id.* at 1331 (emphasis added). As explained above, since *In re Reporters Committee* was decided, courts that have addressed the issue have recognized that the First Amendment right of access does apply to civil proceedings and records.

While the Fifth Circuit has never expressly analyzed the applicability of the First Amendment right of access to civil trials, a footnote in *Doe v. Stegall* immediately following the court's citation of *Richmond Newspapers* clearly indicates that the First Amendment right recognized by the Fifth Circuit derives from the general applicability of *Richmond Newspapers* to civil trials:

> The *Richmond Newspapers* case addressed the closure of a criminal trial. The [plurality] opinion by Chief Justice Burger expressly left open the question of the public's right to attend civil trials, but noted that "historically both civil and criminal trials have been presumptively open."

Doe v. Stegall, 653 F.2d 180, 185 n.10 (5th Cir. Unit A 1981). As suggested by this footnote, the Fifth Circuit appears to have "reasoned implicitly" that the First Amendment guarantees a public right of access

to civil trials. *See Doe v. Santa Fe Indep. Sch. Dist.*, 933 F. Supp. 647, 649 (S.D. Tex. 1996) (citing *Stegall*, 653 F.2d at 185 & n.10).

The First Amendment right of access to civil trials has also been recognized by Texas state courts. *See Tex. Appleseed v. Spring Branch Indep. Sch. Dist.*, No. 01-11-00605-CV, 2012 WL 1379649, at *1 (Tex. App.—Houston [1st Dist.] 2012, no pet.) (recognizing First Amendment right of access to civil trials). HouseCanary fails to establish why these authorities are not applicable to this case.

B. The Right of Access Applies to Exhibits In Evidence.

HouseCanary is likewise incorrect to contend that the First Amendment does not extend to its effort to seal trial exhibits. To the contrary, the First Amendment right of access has been explicitly held to apply to exhibits introduced into evidence. *See Belo Broad. Corp. v. Clark*, 654 F.2d 423, 427 (5th Cir. 1981) (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); *see also 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) (finding a First Amendment right of access to exhibits filed in support of pretrial motions)); *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 Ill. Sec. Litig.*, 732 F.2d 1302, 1309 (7th Cir. 1984) (recognizing a First Amendment and common law right to access document submitted into evidence in open court).

Public access to documents filed in connection with judicial proceedings, including exhibits, promotes the same vital First Amendment interests as access to the proceedings themselves. This is because judicial records "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). The interests served by public access to judicial records do not diminish after a trial has concluded. To the contrary, as the Third Circuit has noted, "[a]t the heart of the Supreme Court's right of access analysis is the conviction that the public should have access to *information*[.]" *United States v. Antar*, 38 F.3d 1348, 1360 (3d Cir. 1994). Openness is thus

"ongoing"; it is "a status rather than an event." *Id.* Indeed, the leading Supreme Court cases recognizing and applying the First Amendment right of access to judicial proceedings all address access to proceedings that had long since concluded. *See, e.g.*, *Press–Enterprise I*, 464 U.S. at 504 (finding First Amendment right of access to transcript of *voir dire* proceedings that petitioner had sought after *voir dire* had concluded and the defendant had been convicted and sentenced); *Press–Enter. Co. v. Superior Court*, 478 U.S. 1, 4 (1986) (*Press-Enterprise II*) (finding First Amendment right of access to transcript of a preliminary hearing sought after the hearing had concluded); *Richmond Newspapers*, 448 U.S. at 563 (finding First Amendment right of access to a criminal trial that had "long since ended"); *Globe Newspaper Co.*, 457 U.S. at 602–03 (striking down as violative of the First Amendment a Massachusetts statute that required the exclusion of the press and general public during the testimony of a minor victim in a sex-offense trial, even though trial at issue had concluded).

Accordingly, this case is very different from *Dallas Morning News v. Fifth Court of Appeals*, 842 S.W.2d 655 (Tex. 1992), upon which both HouseCanary and the trial court extensively relied. (Pet. Br. 34.) In that

case, newspapers and public access organizations claimed "an absolute right" under the First Amendment "to immediate physical access to inspect and copy any and all exhibits in the underlying trial of the case"—including documents that Upjohn, their owner, alleged to contain "trade secrets and confidential business information." 842 S.W.2d at 657, 659. HouseCanary is wrong when it states that the exhibits at issue in that case were "admitted . . . at trial." (Pet. Br. 34.) They were not. After the trial court refused a pretrial request to seal the exhibits, "the court of appeals issued a temporary order limiting disclosure to those persons involved in preparing the case for trial" while it considered the Upjohn's appeal of the trial court's refusal to seal. 842 S.W.2d at 657 (emphasis added). Thus, unlike HouseCanary, *see* Section I.B., *infra*, the trade-secret holder in Dallas Morning News took steps before disclosure to protect its alleged trade secrets. Furthermore, Media Intervenors claim nothing like the "absolute" right of access to judicial records that members of the press sought in *Dallas Morning News*; they seek access to exhibits that were entered into evidence in open court—exhibits to which the First Amendment's presumption of access applies and has not been overcome. *Dallas Morning News* is inapplicable.

C. Trade Secrets Are Not Automatically Excluded from the Right of Access Requirement.

Nor does the mere fact that the Exhibits involve trade secrets make the First Amendment inapplicable, as HouseCanary contends. (Pet. Br. 32.) On the contrary, the First Amendment right of access applies to all exhibtis, and can be overcome "only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest." *Press-Enter. I*, 464 U.S. at 510. HouseCanary contends that trade secrets are automatically an exception to the constitutionally mandated right of access that automatically overcomes the presumption of openness. While it is true that the preservation of trade secrets *might* justify the exclusion of the public from at least some segments of a civil trial, exclusion is not automatic or absolute, as HouseCanary proposes.

HouseCanary cites nothing to the contrary. (Pet. Br. 33.) Each of the cases it cites either involved trade secrets that had actually been kept secret, or did not address the impact of public disclosure on the ability to obtain an order sealing records allegedly containing trade secrets. *See Rudd Equip. Co. v. John Deere Constr. & Forestry Co.*, 834 F.3d 589, 593–94 (6th Cir. 2016) (not addressing impact of public disclosure of

trade secrets on sealing, which was not at issue); *Baxter Int'l, Inc. v. Abbott Labs.*, 297 F.3d 544, 546, 548 (7th Cir. 2002) (denying a motion to seal court records where the parties' joint motion "made no effort to justify the claim of secrecy" and noting that the parties did not "contend that any document contains a protectable trade secret").

And *In re M-I L.L.C.*, 505 S.W.3d 569 (Tex. 2016), on which HouseCanary places particular emphasis, is particularly inapposite. That is because *In re M-I L.L.C.* never actually confronted any First Amendment arguments—the parties did not raise any. And even as *In re M-I L.L.C.* recognized that reasonable limitations on access may be imposed to protect certain interests, such as the preservation of trade secrets, those limitations must be "balance[ed]" against due process and the presumption of openness. *Id.* at 577. Accordingly, it is no authority for the idea that trade secrets somehow stand *outside* that balance. *In re M-I L.L.C.* also recognizes that while those reasonable limitations may take many forms, including granting protective orders similar to the SPO to provide the parties an opportunity to preserve their trade secrets, those protections are not automatic. *See id.* at 578. It remains the parties' obligation to comply with any protective order issued by the court

to protect trade secrets. Because HouseCanary failed to do so in this case, the court of appeals correctly set aside the trial court's Sealing Order.

HouseCanary nevertheless contends that it did not waive trade secret protection because the Exhibits were not "on file," nor "made public." Under Texas law, however, documents that are offered and admitted in open court are "on file." *See Robinson*, 543 S.W.3d at 733 (determining material is "on file" after exhibits were introduced at a preliminary injunction hearing and filed by court reporter with court clerk); *see also Stark v. Morgan*, 602 S.W.2d 298, 304 (Tex. App.—Dallas 1980, writ ref'd n.r.e.) (holding exhibit "offered" at prior temporary injunction hearing was "on file with the court"). Thus, documents that are "on file" and not sealed are part of the court's public record. *See id.*

Under Texas law, the documents that are the subject of the trial court's Sealing Order were "on file" and, as explained supra, they were not sealed at the time they were admitted in open court, or anytime thereafter. HouseCanary's public filing of the Exhibits renders it impossible for HouseCanary to now demonstrate that sealing is essential to preserve any values that may be higher than the First Amendment right of access.

D. HouseCanary Could Have (But Failed to) Protect Its Trade Secrets In a Manner that Comports with the First Amendment Right to Access By Complying with Rule 76a and the SPO.

The constitutional right of access is embodied in Rule 76a, which is motivated by the same concerns of access to civil judicial records and the presumption of openness. *See* LLOYD DOGGETT & MICHAEL J. MUCCHETTI, *Public Access to Public Courts: Discouraging Secrecy in the Public Interest*, 69 TEX. L. REV. 643, 648–52 (Feb. 1991) (explaining that Rule 76a was motivated by the understanding that greater access to civil judicial records promotes public health and safety, encourages greater integrity from attorneys, clients, and judges, and "strengthens democracy"). Rule 76a(1) sets forth the presumption that court records are "open to the general public." And it requires a balancing of public and private interests before that presumption can be overcome. Rule 76a provides that exhibits "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.

TEX. R. CIV. P. 76a.

Rule 76a(2) defines "court records" as "all documents of any nature filed in connection with any matter before any civil court," except for "(1) documents filed with a court in camera, solely for the purpose of obtaining a ruling on the discoverability of such documents; (2) documents in court files to which access is otherwise restricted by law; [and] (3) documents filed in an action originally arising under the Family Code." TEX. R. CIV. P. 76a. As this Court has recognized, "exhibits introduced into evidence are *a fortiori* court records." *Dallas Morning News*, 842 S.W.2d at 659.

As explained above, HouseCanary has not and cannot demonstrate a serious and substantial interest to justify sealing of the Exhibits. *See supra* Section I.B. HouseCanary could have avoided this entire issue by simply complying with the SPO and Rule 76a at the time the Exhibits were admitted into evidence at trial. HouseCanary's failure to do so does not alter the First Amendment right of access or the importance of the presumption of openness. Because the court of appeals properly

recognized and applied these vital constitutional guarantees, the decision below should be affirmed.

PRAYER

This Court should affirm the decision below setting aside the trial court's Sealing Order.

Respectfully submitted,

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