CAUSE NO. 2016-CI-06300

TITLE SOURCE, INC.,	§	**IN THE DISTRICT COURT OF**
	§	
***Plaintiff*,**	§	
	§	
	§	
v.	§	**BEXAR COUNTY, TEXAS**
	§	
HOUSECANARY, INC., f/k/a CANARY ANALYTICS, INC.,	§	
	§	
Defendant.	§	
	§	**73RD JUDICIAL DISTRICT**

PLAINTIFF'S MOTION FOR NEW TRIAL OR, IN THE ALTERNATIVE, REMITTITUR

TABLE OF CONTENTS

INTRODUCTION 1

LEGAL STANDARDS 5

ARGUMENT 6

I. New material evidence reveals the "house of cards." 6

A. The investigative findings to date reveal a collusive scheme to hide the true facts from Title Source, the jury, and this Court. 7

B. The newly discovered evidence amply justifies a new trial. 15

II. The jury was repeatedly exposed to improper and highly prejudicial jury argument and evidence that misled and inflamed the jury. 26

A. The integrity of Title Source and its lawyers was impugned throughout trial. 27

B. HouseCanary flagrantly violated the Court's order on Title Source's motion in limine. 34

C. HouseCanary's exhortations of the jury to return a verdict against "corporate America" and send a message in "the Wall Street Journal" were improper, prejudicial, and incurable. 36

D. Improperly admitted evidence crucial to key issues regarding liability and damages probably resulted in an improper verdict. 37

III. Unreliable testimony by HouseCanary's experts severely prejudiced Title Source. 41

A. Walter Bratic's opinions were inherently unreliable, speculative, and methodologically unsound. 42

B. Dr. Vernon Rhyne's opinions on three critical liability issues were unreliable. 55

C. Dan Manheim's testimony was conclusory and violated this Court's orders. 59

IV. The jury's damage awards are grossly excessive, arbitrary, factually insufficient, shocking to the conscience, and the product of bias, passion, and prejudice. 63

A. The jury's grossly excessive compensatory damages awards require a new trial. 65

TABLE OF CONTENTS
(continued)

Page

B. The jury's grossly excessive punitive damages award violates Texas law and the federal Constitution. 65

V. Numerous harmful errors pervaded the jury instructions. 68

A. The jury was erroneously instructed to find trade secret damages for breach of contract claims (Qs. 43-45). 68

B. The broad-form trade secret instructions violated *Casteel*. 69

C. The jury was erroneously instructed to measure the "value of the HouseCanary trade secrets to Title Source." 73

D. The jury was erroneously instructed with overlapping questions of contract liability. 74

E. The submission of HouseCanary's claims to the jury was erroneous because no evidence supports them. 75

VI. The evidence is factually insufficient to support the verdict on HouseCanary's TUTSA, fraud, and contract claims. 75

A. The evidence is too weak to support the jury's findings on HouseCanary's TUTSA claim. 75

B. The evidence is too weak to support the jury's findings on HouseCanary's fraud claim. 77

C. The evidence is too weak to support the jury's findings on HouseCanary's contract claim. 78

VII. The great weight and preponderance of the evidence demonstrates that HouseCanary breached the MSLA, Amendment One, and the NDA. 79

A. The great weight of the evidence is that HouseCanary failed to deliver a functional appraiser app by the agreed-upon deadline. 80

B. The great weight of the evidence was that HouseCanary breached the NDA by using the MSLA to solicit investment. 84

PRAYER 85

INDEX OF AUTHORITIES

Page(s)

Cases

Alexander v. Soloman,
15 S.W. 906 (Tex. 1891)....22

Allis-Chalmers Mfg. Co. v. Bd.,
118 S.W.2d 996 (Tex. Civ. App.—Amarillo 1938, no writ)....36

Am. Indem. Co. v. Hubbard,
196 S.W. 1011 (Tex. Civ. App.—Fort Worth 1917, no writ)....21

Amelia's Auto., Inc. v. Rodriguez,
921 S.W.2d 767 (Tex. App.—San Antonio 1996, no writ)....26, 30, 31, 32

Atchison, T. & S.F. Ry. Co. v. Francis,
227 S.W. 342 (Tex. Civ. App.—Amarillo 1921)....23

Atlas Copco Tools, Inc. v. Air Power Tool & Hoist, Inc.,
131 S.W.3d 203 (Tex. App.—Fort Worth 2004, pet. denied)....51, 52, 53

In re Attorney Gen. of Tex.,
195 S.W.3d 264 (Tex. App.—San Antonio 2006, no pet.)....5

Baribeau v. Gustafson,
107 S.W.3d 52 (Tex. App.—San Antonio 2003, pet. denied)....72

Bartush-Schnitzius Foods Co. v. Cimco Refrigeration, Inc.,
518 S.W.3d 432 (Tex. 2017)....76

Benge v. Williams,
548 S.W.3d 466 (Tex. 2018)....67, 69, 70

Bennett v. Reynolds,
315 S.W.3d 867 (Tex. 2010)....64

BP Am. Prod. Co. v. Marshall,
342 S.W.3d 59 (Tex. 2011)....17

Broders v. Heise,
924 S.W.2d 148 (Tex. 1996)....57

Brookshire Bros. Ltd. v. Aldridge,
438 S.W.3d 9 (Tex. 2014)....61

Brown v. Hopkins,
921 S.W.2d 306 (Tex. App.—Corpus Christi 1996, no writ)....26

Cain v. Bain,
709 S.W.2d 175 (Tex. 1986)....73, 75, 76

Cas. Underwriters v. Rhone,
132 S.W.2d 97 (Tex. 1939)....55

Chilson v. Metro. Transit Auth.,
796 F.2d 69 (5th Cir. 1986) 26

Circle Y of Yoakum v. Blevins,
826 S.W.2d 753 (Tex. App.—Texarkana 1992, pet. denied) 32

Citrin Holdings, LLC v. Minnis,
No. 14-11-00644-CV, 2013 WL 1928652
(Tex. App.—Houston [14th Dist.] May 9, 2013, pet. denied)....51

City of Keller v. Wilson,
168 S.W.3d 802 (Tex. 2005)....59

City of San Antonio v. Pollock,
284 S.W.3d 809 (Tex. 2009)....53

Coastal Transport Co., Inv. v. Crown Cent Petroleum Corp.,
136 S.W.3d 227 (Tex. 2004)....55, 58, 59

In re Columbia Med. Ctr. of Las Colinas, Subsidiary, L.P.,
290 S.W.3d 204 (Tex. 2009)....5

Cooper Tire & Rubber Co. v. Mendez,
204 S.W.3d 797 (Tex. 2006)....59, 60

Crnic v. Vision Metals, Inc.,
No. 14-03-01307-CV, 2005 WL 81629
(Tex. App.—Houston [14th Dist.] Jan. 6, 2005, no pet.)....32

Crown Life Ins. Co. v. Casteel,
22 S.W.3d 378 (Tex. 2000)....67, 68, 69, 71

DeClaris Assocs. v. McCoy Workplace Sols., L.P.,
331 S.W.3d 556 (Tex. App.—Houston [14th dist.] 2011, no pet.)....77

Delano v. Delano,
189 S.W. 972 (Tex. Civ. App.—Austin 1916, no writ)....19

DeSantis v. Wackenhut Corp.,
793 S.W.2d 670 (Tex. 1990)....75

Deveroex v. Nelson,
517 S.W.2d 658 (Tex. Civ. App.—Houston [14th Dist.] 1974) 72

Discovery Operating, Inc. v. BP Am. Prod. Co.,
311 S.W.3d 140 (Tex. App.—Eastland 2010, pet. denied) 37, 38

Dixie Gas & Fuel Co. v. Jacobs,
47 S.W.2d 457 (Tex. Civ. App.—Beaumont 1932, writ dism'd w.o.j.) 16

Douglas v. Walker,
92 S.W. 1026 (Tex. Civ. App. 1906, no writ)...20

Dow Chem. Co. v. Francis,
46 S.W.3d 237 (Tex. 2001)...76

Downer v. Aquamarine Operators, Inc.,
701 S.W.2d 238 (Tex. 1985)...5

Duncan Dev., Inc. v. Haney,
634 S.W.2d 811 (Tex. 1982)...38

E.I. du Pont de Nemours & Co. v. Robinson,
923 S.W.2d 549 (Tex. 1995)...40, 41, 57, 58

Educ. Mgmt. Services, LLC v. Tracey,
102 F. Supp. 3d 906 (W.D. Tex. 2015)..68

Educ. Mgmt. Servs. v. Cadero,
No. SA-14-CA-587, 2014 WL 12586781 (W.D. Tex. Nov. 18, 2014) 68

El Apple I, Ltd. v. Olivas,
370 S.W.3d 757 (Tex. 2012)...53

Elizondo v. Krist,
415 S.W.3d 259 (Tex. 2013)...47

Enbridge Pipelines (E. Tex.) L.P. v. Avinger Timber, LLC,
386 S.W.3d 256 (Tex. 2012)...40

Eyre v. Eastar Investments, Inc.,
12-18-00001-CV, 2018 WL 4766554
(Tex. App.—Tyler Oct. 3, 2018, no pet. h.) 5

Fortenberry v. Fortenberry,
582 S.W.2d 188 (Tex. Civ. App.—Beaumont 1979, writ ref'd n.r.e.) 36

Fraud-Tech, Inc. v. Choicepoint, Inc.,
102 S.W.3d 366 (Tex. App.—Fort Worth 2003, pet. denied) 41

Gammill v. Jack Williams Chevrolet, Inc.,
972 S.W.2d 713 (Tex. 1998)....................58

Gannaway v. Trinity Universal Ins. Co.,
85 S.W.2d 345 (Tex. Civ. App.—San Antonio 1935, writ ref'd)....................26, 48, 49, 73

Garza v. Alviar,
395 S.W.2d 821 (Tex. 1965)....................5

Georgia-Pacific Corp. v. United States Plywood Corp.,
318 F. Supp. 1116 (S.D.N.Y. 1970)....................48, 49

Glob. Water Grp., Inc. v. Atchley,
244 S.W.3d 924 (Tex. App.—Dallas 2008, pet. denied)....................70

Graham v. Scott,
547 S.W.3d 245 (Tex. App.—Houston [1st Dist.] 2017, pet. denied)....................39, 40

Grande Healthcare, L.P. v. Hawley,
284 S.W.3d 851 (Tex. 2009)....................65, 67

Greenberg Traurig of New York, P.C. v. Moody,
161 S.W.3d 56 (Tex. App.—Houston [14th Dist.] 2004, no pet.)....................57

GTE Sw., Inc. v. Bruce,
998 S.W.2d 605 (Tex. 1999)....................57

Halliday v. Lambright,
68 S.W. 712 (Tex. Civ. App. 1902, no writ)....................21

Harris Cty. v. Smith,
96 S.W.3d 230 (Tex. 2002)....................68, 71

Havner v. E-Z Mart Stores, Inc.,
825 S.W.2d 456 (Tex. 1992)....................63, 73

Hemmenway v. Skibo,
498 S.W.2d 9 (Tex. Civ. App.—Beaumont 1973, writ ref'd n.r.e.)....................32

Honda Motor Co. v. Oberg,
512 U.S. 415 (1994)....................64

Horizon Health Corp. v. Acadia Healthcare Co.,
520 S.W.3d 848 (Tex. 2017)....................63

Horne v. Stockton,
178 S.W. 962 (Tex. Civ. App.—Austin 1915, no writ)....................20

Hous. Unlimited, Inc. Metal Processing v. Mel Acres Ranch,
443 S.W.3d 820 (Tex. 2014)....41, 44, 45

Houston & Tex. Cent. Ry. Co. v. Forsyth,
49 Tex. 171 (1878)....23

Howsley & Jacobs v. Kendall,
376 S.W.2d 562 (Tex. 1964)....30

Hyundai Motor Co. v. Rodriguez ex rel. Rodriguez,
995 S.W.2d 661 (Tex. 1999)....72

K-Mart Corp. v. Honeycutt,
24 S.W.3d 357 (Tex. 2000)....56, 60

Kareh v. Windrum,
518 S.W.3d 496 (Tex. App.—Houston [1st Dist.] 2017, pet. granted) .... *passim*

Kendrix v. S. Pac. Transp. Co.,
907 S.W.2d 111 (Tex. App.—Beaumont 1995, writ denied) 30, 35

Lakeway Reg'l Med. Ctr., LLC v. Lake Travis Transitional LTCH, LLC,
No. 03-15-00025-CV, 2017 WL 672451
(Tex. App.—Austin Feb. 17, 2017, pet. denied)....44

Lee v. Dyke,
312 S.W.3d 191 (Tex. App.—Houston 2010, no pet.) 80

Lively v. Blackwell,
51 S.W.3d 637 (Tex. App.—Tyler 2001, pet. denied)....61

Living Ctrs. of Tex., Inc. v. Penalver,
256 S.W.3d 678 (Tex. 2008).... *passim*

Marathon Corp. v. Pitzner,
106 S.W.3d 724 (Tex. 2003)....59

Matter of Marriage of Yarbrough,
719 S.W.2d 412 (Tex. App.—Amarillo 1986, no writ)....23

Martinez v. Midland Credit Mgmt., Inc.,
250 S.W.3d 481 (Tex. App.—El Paso 2008, no pet.)....39

Maxcy v. Norsworthy,
49 S.W.2d 885 (Tex. Civ. App.—Galveston 1932, writ dism'd w.o.j.) 19

MBM Fin. Corp. v. Woodlands Operating Co.,
292 S.W.3d 660 (Tex. 2009)....81

McMurry v. McMurry,
4 S.W. 357 (Tex. 1887)....17, 21

Merrell Dow Pharmaceuticals, Inc. v. Havner,
953 S.W.2d 706 (Tex 1997)....50

Montgomery Ward & Co. v. Brewer,
416 S.W.2d 837 (Tex. Civ. App.—Waco 1967, writ ref'd n.r.e.)....29

Mustang Pipeline Co. v. Driver Pipeline Co.,
134 S.W.3d 195 (Tex. 2004)....77

Myriad Dev., Inc. v. Alltech, Inc.,
817 F. Supp. 2d 946 (W.D. Tex. 2011)....63, 75

Nissan Motor Co. Ltd. v. Armstrong,
145 S.W.3d 131 (Tex. 2004)....6, 27, 37

Noble Energy, Inc. v. ConocoPhillips Co.,
532 S.W.3d 771 (Tex. 2017)....78

Onstad v. Wright,
54 S.W.3d 799 (Tex. App.—Texarkana 2001, pet. denied)....33

Pac. Mut. Life Ins. Co. v. Haslip,
499 U.S. 1 (1991)....65

Payne v. Douglas,
241 S.W. 238 (Tex. Civ. App.—El Paso 1922, writ dism'd w.o.j.)....21

PopCap Games, Inc. v. MumboJumbo, LLC,
350 S.W.3d 699 (Tex. App.—Dallas 2011, pet. denied)....32

Pope v. Moore,
711 S.W.2d 622 (Tex. 1986)....62

Porras v. Craig,
675 S.W.2d 503 (Tex. 1984)....80

Postal Tel. Cable Co. of Texas v. Smith,
135 S.W. 1146 (Tex. Civ. App. 1911)....35

Precision Plating & Metal Finishing Inc. v. Martin-Marietta Corp.,
435 F.2d 1262 (5th Cir. 1970)....45

Reliance Steel & Aluminum Co. v. Sevcik,
267 S.W.3d 867 (Tex. 2008)....41, 54, 57, 58

Rhoden v. Booth,
344 S.W.2d 481 (Tex. Civ. App.—Dallas 1961, writ ref'd n.r.e.) 29

Romero v. KPH Consol., Inc.,
166 S.W.3d 212 (Tex. 2005)...67

Sessums v. State,
129 S.W.3d 242 (Tex. App.—Texarkana 2004, no pet.)..38

Smith v. Nelson,
53 S.W.3d 792 (Tex. App.—Austin 2001, pet. denied)...66

St. Jude Med. S.C., Inc. v. Janssen-Counotte,
No. A-14-CA-877-SS, 2014 WL 7237411 (W.D. Tex. Dec. 17, 2014) 70

Standard Fire Ins. Co. v. Reese,
584 S.W.2d 835 (Tex. 1979)...27, 31

Star Enter. v. Marze,
61 S.W.3d 449 (Tex. App.—San Antonio 2001, pet. denied) 72

Stark v. Leonard,
196 S.W. 708 (Tex. Civ. App.—Beaumont 1917, no writ) 26

State Farm Mut. Auto. Ins. Co. v. Campbell,
538 U.S. 408 (2003)...64, 65

Statewide Bank & SN Servicing Corp. v. Keith,
301 S.W.3d 776 (Tex. App.—Beaumont 2009, pet. abated)..66, 67

Steed v. Winder,
130 S.W.2d 403 (Tex. Civ. App.—Galveston 1939, no writ) 18, 20

Stewart v. Basey,
245 S.W.2d 484 (Tex. 1952)...66

Story Services, Inc. v. Ramirez,
863 S.W.2d 491 (Tex. App.—El Paso 1993, writ denied)...56

Sw. Energy Prod. Co. v. Berry-Helfand,
491 S.W.3d 699 (Tex. 2016)... *passim*

Szczepanik v. First S. Trust Co.,
883 S.W.2d 648 (Tex. 1994)...52

Terbay v. Pat Canion Excavating Co.,
396 S.W.2d 482 (Tex. Civ. App.—Austin 1965, writ ref'd n.r.e.) 22

Tex. Comm'n on Human Rights v. Morrison,
381 S.W.3d 533 (Tex. 2012)....................67, 68, 70

Tex. Emp'rs' Ins. Ass'n v. Butler,
287 S.W.2d 198 (Tex. Civ. App.—Fort Worth 1956, writ ref'd n.r.e.)....................33

Tex. Genco, LP v. Valence Operating Co.,
187 S.W.3d 118 (Tex. App.—Waco 2006, pet. denied)....................72

Texas Instruments, Inc. v. Teletron Energy Mgmt., Inc.,
877 S.W.2d 276 (Tex. 1994)....................50

Texas Motor Coaches v. McKinney,
186 S.W.2d 714 (Tex. Civ. App.—Dallas 1945, no pet.)....................22

Thota v. Young,
366 S.W.3d 678 (Tex. 2012)....................68

In re United Scaffolding, Inc.,
377 S.W.3d 685 (Tex. 2012)....................5

United Way of San Antonio, Inc. v. Helping Hands Lifeline Found., Inc.,
949 S.W.2d 707 (Tex. App.—San Antonio 1997, writ denied)....................51

Univ. Computing Co. v. Lykes-Youngstown Corp.,
504 F.2d 518 (5th Cir. 1974)....................45

Vick v. Schaff,
260 S.W. 916 (Tex. Civ. App.—Waco 1924, writ dism'd w.o.j.)....................23

Waffle House, Inc. v. Williams,
313 S.W.3d 796 (Tex. 2010)....................6, 14

Warner v. Hurt,
934 S.W.2d 404 (Tex. App.—Houston [14th Dist.] 1992, no writ)....................56

Washington v. Kellwood Co.,
No. 05-CV-10034 (SN), 2016 WL 5680374 (S.D.N.Y. Sept. 30, 2016)....................52

Weingarten Realty Inv'rs v. Harris Cty. Appraisal Dist.,
93 S.W.3d 280 (Tex. App.—Houston [14th Dist.] 2002, no pet.)....................53

Westmoreland v. Starnes,
No. 07-13-00364-CV, 2015 WL 1325530 (Tex. App.—Amarillo Mar. 24, 2015, pet. denied)....................20

Whirlpool Corp. v. Camacho,
298 S.W.3d 631 (Tex. 2009)....................41

In re Williams,
No. 12-06-00361-CV, 2007 WL 1241517 (Tex. App.—Tyler Apr. 30, 2007, no pet.) 16

Wilson v. Shanti,
333 S.W.3d 909 (Tex. App.—Houston [1st Dist.] 2011, pet. denied)....50

World Oil Co. v. Hicks,
103 S.W.2d 962 (Tex. 1937)....64, 65

Statutes

Tex. Civ. Prac. & Rem. Code Ann. § 134A.002....70, 74

Tex. Civ. Prac. & Rem. Code Ann. § 134A.004....43, 71

Tex. Civ. Prac. & Rem. Code Ann. § 134A.007....43

Other Authorities

Erik Larson, *Amrock Says $706 Million Verdict Brought Out the Whistle Blowers*, Bloomberg (July 20, 2018) 21

Patrick Danner, *Amrock Says Evidence Casts Doubt on $706M Bexar County*, My San Antonio (July 20, 2018) 21

Rules

Tex. R. Civ. P. 199.2....18

Tex. R. Civ. P. 277....67

Tex. R. Civ. P. 320....5, 62, 63

Tex. R. Civ. P. 324....6, 73

Tex. R. Civ. P. 326....5

Tex. R. Evid. 401 58

Tex. R. Evid. 403 29

Tex. R. Evid. 702 ....40, 41, 57

Tex. R. Evid. 801 40

Tex. R. Evid. 803 ....38, 39

Tex. R. Prof. Conduct 3.04 29

Treatises

28 Tex. Jur. 3d Damages § 71 66

INTRODUCTION

The day after the jury returned its unprecedented verdict, Title Source's CEO Jeff Eisenshtadt received an unsolicited, disturbing email from an anonymous whistleblower. "[J]eff," the email read, "i have first hand knowledge about your suit. i can never and will never be able to come forward as a witness but i can guide you." What followed was shocking:

> your recent loss was based on fallacies and spin. you need to be aware that there was collusion among some of your people and housecanary - like sicklick and petkovsky. you also need to know that you are correct in your comment that you were presented wire frames and apps that didn't function. you were lied to, repeatedly.
>
> the housecanary avm you are accused of stealing started out as an overlay on the black knight avm. housecanary never had any proprietary anything... its all a lie.

After receiving this bombshell information, Title Source immediately began investigating the email and its troubling allegations that HouseCanary committed a brazen fraud on this Court and that one of Title Source's trusted senior advisors colluded with HouseCanary. Despite numerous attempts by HouseCanary and its attorneys to obstruct Title Source's efforts to learn the truth, including an abortive attempt to enjoin the investigation, Title Source persevered—and what its investigation uncovered has blown this case wide open.

The whistleblower turned out to be a former HouseCanary executive, Anthony Roveda. Although Roveda was terrified of coming forward against HouseCanary, his conscience did not allow him to remain silent. Through Roveda and two other high-ranking HouseCanary executives who have since come forward as well, Title Source's post-trial investigation has uncovered substantial, material new evidence that from the inception of the parties' business relationship, HouseCanary executives colluded with Title Source's main witness, former Title Source Vice President & Chief Appraiser Jordan Petkovski. This scheme was designed to hide from Title Source and the Court the fact that HouseCanary had no proprietary technology and lied to Title Source repeatedly—holding out promises of a revolutionary app while exploiting its relationship with Title Source to keep its business afloat. To ensure Petkovski's cooperation, HouseCanary CEO Jeremy Sicklick dangled the prospect that Petkovski would ultimately be rewarded with a senior position and an equity stake in HouseCanary.

The investigation not only turned up evidence of this fraud, but also revealed the startling lengths to which HouseCanary has gone to cover it up. When it became clear that litigation would ensue, HouseCanary, with Petkovski's assistance, scurried to lock down potentially adverse witnesses and buy their silence with post-trial lucrative offers of employment and so-called "consulting agreements" (which HouseCanary co-founder Chris Stroud has since admitted have no legitimate purpose). The whistleblowers further revealed that HouseCanary perpetuated this fraud throughout this case and trial, as HouseCanary withheld key evidence and presented false trial testimony.

Had the jury known that HouseCanary was engaged in secret dealings calculated to avoid the truth about its products and the parties' dealings, it would surely have seen the case in a different light. HouseCanary's central narrative of a helpless start-up taken advantage of by "Corporate America" would have been destroyed. In reality, it was HouseCanary, with its behind-the-scenes machinations and powerful investors, that tried to pull one over on Title Source, the jury, and the Court. As a result of the continuing conspiracy to suppress the truth in this Court, Title Source was effectively litigating the case with one hand tied behind its back, blind to the fact that its key witness was part of a secret, self-serving arrangement with HouseCanary that allowed HouseCanary to advance its false statements with all other knowledgeable witnesses safely secured under the HouseCanary tent.

Of course, conspiracies by their very nature are designed and executed as a subterfuge, inherently precluding discovery of such evidence. Were it not for the original brave whistleblower, these troubling issues could have remained hidden from Title Source and this Court, and HouseCanary could have walked away with almost three-quarters of a billion dollars procured by fraud.

To avoid the impact of this new evidence, HouseCanary will likely argue that it is too late and that Title Source should have uncovered HouseCanary's scheme and Petkovski's duplicity sooner. But the law does not require Title Source to have assumed that its own team members were double agents. Nor was Title Source required to assume that HouseCanary's fraud would extend to its litigation conduct. It is now clear, in light of this shocking new evidence, that the jury's verdict is irredeemably tainted. And justice subverted is justice denied. If there is to be any liability imposed against Title Source—much less a massive judgment like the one entered here—it must be based on a new trial where the truth, the whole truth, and nothing but the truth can be presented.

The taint of the fraud pervading the entire trial, moreover, was turbocharged by other incendiary and improper conduct by HouseCanary and its attorneys. HouseCanary improperly and repeatedly attacked the integrity of Title Source's counsel throughout trial—culminating in accusations during closing argument that Title Source and its counsel lied to the jury. These attacks were especially audacious given what we now know—that HouseCanary's case was built on a foundation of fraud. HouseCanary presented other prejudicial and misleading evidence calculated to inflame the jury against Title Source, in flagrant violation of the Court's order on Title Source's motion in limine. Indeed, HouseCanary's lawyers went so far as to exhort the jurors to send a message to corporate America "in the Wall Street Journal" based on a manufactured tale of an innocent start-up victimized by Title Source, notwithstanding the company's reputation as a good corporate citizen. This toxic combination of fraud on the Court and inflammatory tactics explains how HouseCanary led the jury so far astray, convincing it to return a verdict in favor of HouseCanary on all counts and to award grossly excessive and unconstitutional damages.

The jury also was presented with unreliable and irrelevant testimony from HouseCanary's three experts on critical issues going to damages and liability. Indeed, a careful analysis of the entire record demonstrates that the evidence to support HouseCanary's claims and damages awards was so weak that the verdict is plainly wrong and manifestly unjust. In the end, the record was spoiled by collusion, *ad hominem* attacks on Title Source and its lawyers, and other problems. To preserve the integrity of the judicial process, this Court should grant a new trial for at least seven independent reasons, each of which alone warrants a new trial and collectively demand one:

1. Newly discovered evidence shows that HouseCanary, by colluding with Title Source's main witness among other things, committed fraud on the Court, which led to a tainted jury verdict.

2. Sustained attacks on the integrity of Title Source and its lawyers throughout the trial were calculated to arouse the jury's passion, and Title Source was severely prejudiced by the admission—over Title Source's objections and in violation of this Court's Orders—of inflammatory and misleading evidence.

3. The jury should not have been allowed to hear unreliable and irrelevant opinions offered by HouseCanary's three experts—Walter Bratic, R. Vernon Rhyne, and Dan Manheim—and a new trial is required so the jury can weigh the evidence without the prejudice of these experts' inadmissible testimony.

4. The damages awarded are excessive for numerous independent reasons—and, in particular, the punitive damages awards are the result of HouseCanary's counsel inflaming the jury's passion and prejudice against Title Source based on a false story that is unsustainable on the record before the jury, and untenable in light of the new evidence about HouseCanary's conduct.

5. The jury instructions contained harmful errors that led to the rendition of an improper verdict—including confusing and overlapping instructions lacking key definitions and directing the jury to measure damages for HouseCanary's breach of contract claim using trade secret damage measures.

6. There is not sufficient evidence to support liability—not for the misappropriation claim, because Title Source never acquired any of HouseCanary's purported trade secrets, much less used them—and not for the fraud and breach of contract claims, because they merely repackage the misappropriation claim.

7. The overwhelming weight of the evidence on Title Source's contract claim shows that HouseCanary breached the parties' Master Software Licensing Agreement ("MSLA") by failing to deliver a working app capable of completing appraisals in the field, and that HouseCanary breached its confidentiality obligations under the parties' Non-Disclosure Agreement ("NDA") by disclosing the existence and terms of the MSLA to third parties.

Under Texas law, no trial suffering from this litany of flaws can serve as the basis for liability or damages—certainly not the staggering, unprecedented award that HouseCanary seeks to cash in on here. Although HouseCanary surely will protest that the product of a seven-week trial should not be set aside, that is what the new trial standard requires in the long-term furtherance of fair play in the judicial system. The jury should have been allowed to know the true facts about HouseCanary and its web of under-the-table relationships carefully spun to hide its failings—but HouseCanary's deception prevented that from happening. HouseCanary has only itself to blame for creating the grave improprieties that have now come to light, and for the way it conducted itself at trial. Fundamental fairness demands either a new trial or, at minimum and in the alternative, substantial remittitur.

LEGAL STANDARDS

This Court can order a new trial for any number of reasons, including in the interest of justice. *In re United Scaffolding, Inc*., 377 S.W.3d 685, 687 (Tex. 2012); *In re Attorney Gen. of Tex.*, 195 S.W.3d 264, 269 (Tex. App.—San Antonio 2006, no pet.). Although a trial court's disposition of a new trial motion is reviewed for abuse of discretion, a court abuses its discretion when it "act[s] without reference to any guiding rules or principles or" when its "actions were arbitrary or unreasonable under the circumstances of the case." *Eyre v. Eastar Investments, Inc*., 12-18-00001-CV, 2018 WL 4766554, at *4 (Tex. App.—Tyler Oct. 3, 2018, no pet. h.) (citing *Downer v. Aquamarine Operators, Inc*., 701 S.W.2d 238, 241-42 (Tex. 1985)). By contrast, in granting a new trial, "a trial court does not abuse its discretion so long as its stated reason . . . (1) is a reason for which a new trial is legally appropriate (such as a well-defined legal standard or a defect that probably resulted in an improper verdict); and (2) is specific enough to indicate that the trial court did not simply parrot a pro forma template, but rather derived the articulated reasons from the particular facts and circumstances of the case at hand." *United Scaffolding*, 377 S.W.3d. at 688–89.

A new trial should be ordered if "the evidence is factually insufficient, i.e., the evidence supporting the finding is so weak or the evidence to the contrary is so overwhelming that the finding should be set aside." *Garza v. Alviar*, 395 S.W.2d 821, 823 (Tex. 1965). Similarly, new trials should "be granted to a party . . . when damages are 'manifestly' too small or too large, and for 'good cause.'" *In re Columbia Med. Ctr. of Las Colinas, Subsidiary, L.P.*, 290 S.W.3d 204, 210 (Tex. 2009) (quoting Tex. R. Civ. P. 320, 326). A new trial is also warranted if erroneously admitted evidence "probably (though not necessarily) resulted in an improper judgment." *Nissan Motor Co. Ltd. v. Armstrong*, 145 S.W.3d 131, 144 (Tex. 2004).

A new trial is also warranted where (1) new evidence has come to the moving party's knowledge since the trial; (2) it was not owing to the want of due diligence that the evidence did not come sooner; (3) the evidence is not cumulative or impeaching; and (4) the evidence is so material that it would probably produce a different result if a new trial were granted. *Waffle House, Inc. v. Williams*, 313 S.W.3d 796, 813 (Tex. 2010); Tex. R. Civ. P. 324(b)(1).[1]

ARGUMENT

I. New material evidence reveals the "house of cards."

During trial, HouseCanary portrayed itself as the victim of a large, established, powerful corporation—a classic David-and-Goliath tale (despite the Court's Order in Limine prohibiting precisely this line of argument). In HouseCanary's telling, it had successfully developed a mobile application to complete home appraisals in the field (the "Appraiser App"), the Appraiser App was market-ready, its automated valuation model ("AVM") was proprietary and "top of the pack," and its data was nationwide and accurate. HouseCanary argued that any problems with its products were not only someone else's fault, but also that HouseCanary had fallen victim to Title Source's efforts to steal its trade secrets. As the verdict reflects, the jury bought HouseCanary's story wholesale. In fact, so convinced of HouseCanary's blamelessness—and Title Source's malfeasance—the jury awarded massive, record-setting punitive damages.

Yet it is now clear that HouseCanary's story is a work of pure fiction, not fact. It began to collapse the day after trial ended. Offended by the verdict, a former HouseCanary executive

---

[1] At the hearing on Title Source's motion for judgment notwithstanding the verdict, the Court indicated that this motion is the appropriate vehicle to raise these issues. (9/21/2018 Hearing Tr. 25.) (stating that "the issues that have arisen since trial or that were brought to your attention by the witnesses that have come to you . . . is a motion for new trial issue").

emailed Title Source's CEO anonymously. According to the whistleblower's first-hand, insider account, HouseCanary's story was "all a lie" based on "fallacies and spin," made possible by "collusion" between Sicklick and Petkovski. Ex. 1, Declaration of Anthony Roveda ("Roveda Decl.") at 6. Title Source promptly launched an investigation into the shocking email and unlocked the truth. Among other things, the investigation led to other former HouseCanary executives, who finally agreed to come forward—at their own risk and as a matter of conscience—to reveal the details of the scheme. What Title Source learned through the investigation, and could not have known previously, was that, with the clandestine assistance of Jordan Petkovski—the Title Source executive who oversaw every aspect of the HouseCanary relationship—HouseCanary consistently misrepresented the origin of its technology, covered up the failure to deliver that technology, and put evidence of those failings out of reach.

When a verdict is so tainted by fraud and collusion, the interests of justice do not allow it to stand. The new evidence here, discovered after the verdict, could not have reasonably been uncovered by Title Source before trial. Indeed, Title Source could not have been expected to suspect such a scheme between HouseCanary and one of its trusted senior executives, especially one so carefully hidden by the co-conspirators. Nor could it have uncovered—without the benefit of those with first-hand knowledge—the extent to which HouseCanary has gone to cover its tracks. As now discovered, the evidence not only reveals new facts directly contradicting the core evidence HouseCanary put on at trial, but it also casts much of what was presented at trial in an entirely different light. Thus, it is more than probable that the jury's verdict would have been different had it known of HouseCanary's scheming and Petkovski's double-dealing. A new trial is required.

A. The investigative findings to date reveal a collusive scheme to hide the true facts from Title Source, the jury, and this Court.

On March 15, 2018, the day after the jury rendered its record-breaking verdict, Title Source's CEO received an unsolicited email from an anonymous whistleblower. The email read:

> [J]eff, i have first hand knowledge about your suit. i can never and will never be able to come forward as a witness but i can guide you.

> your recent loss was based on fallacies and spin. you need to be aware that there was collusion among some of your people and housecanary - like sicklick and petvkosky. you also need to know that you were correct in your comment that you were presented wire frames and apps that didn't function. you were lied to. repeatedly.
>
> the housecanary avm you are accused of stealing started out as an overlay on the black knight avm. housecanary never had any proprietary anything... its all a lie.

Ex. 1, Roveda Decl. at 6.

Prompted by this email, Title Source's post-trial investigation has uncovered evidence of a collusive scheme between HouseCanary and Petkovski. Petkovski was a trusted senior executive on whom Title Source relied to oversee every aspect of the relationship with HouseCanary and to present part of its case during trial. Title Source expects to establish the facts detailing the scheme at the hearing on this motion. None of this evidence was presented to the jury—and had it not been for the original whistleblower, it would have remained hidden from Title Source and this Court. Now that it has come to light, it must be heard—and compels a new trial.

1. *The day after the verdict, an anonymous whistleblower revealed the improper secret relationship between HouseCanary and Title Source's Chief Appraiser.*

On receiving the anonymous email, Eisenshtadt tried to arrange a meeting with the whistleblower to discuss the email's allegations. The whistleblower replied that he was "in a very difficult predicament" and was "not sure a meeting is possible." Ex. 1, Roveda Decl. at 6. He explained, "there are people involved on the defendant's side that are very powerful so i need to be extremely careful." *Id.* The whistleblower offered to call Eisenshtadt instead on a "blocked number" on the condition that Eisenshtadt "not record the call." *Id.* But as the whistleblower later explained in his declaration, he ultimately "did not call Mr. Eisenshtadt at the appointed time and stopped communicating with him" because the whistleblower "feared retaliation from [HouseCanary] or from people associated with the company." *Id.* ¶ 11.

When the whistleblower stopped corresponding with Eisenshtadt, Title Source began to investigate the email's disturbing allegations on its own. The investigative trail led to HouseCanary's former Director of Appraiser Experience, Anthony Roveda, the subject-matter expert who guided the testing of the Appraiser App. When contacted by Title Source, Roveda acknowledged he sent the email and confirmed its substance through a sworn declaration. In particular, he explained that "HouseCanary was able to deceive Title Source for a long period of time in part because of what I believed to be an improper relationship between Mr. Sicklick and the Title Source executive in charge of the HouseCanary relationship, Jordan Petkovski." Ex. 1, Roveda Decl. ¶ 13. Before Roveda stepped forward, Title Source had no knowledge about this relationship or even a hint of the double-dealing that has now been uncovered. Neither HouseCanary's own witnesses nor Petkovski himself made Title Source or the jury aware of it.

Having learned from Roveda about the collusion between Petkovski and HouseCanary, Title Source began investigating the extent of their relationship—and reassessing existing evidence through this new lens. Title Source also identified a number of former HouseCanary employees, including two senior-level executives who were closely involved with the Title Source relationship—HouseCanary's former Managing Director of Analytics and Data, Rob Walker, and its former Vice President of Business Development, Daniel Majewski. Their sworn declarations, together with other evidence Title Source has recently uncovered, have permitted Title Source to reevaluate its prior understanding of facts, and reconstruct much of what really happened between Petkovski and HouseCanary. *See* Ex. 2, Declaration of Rob Walker ("Walker Decl."); Ex. 3, Declaration of Daniel Majewski ("Majewski Decl.").

This new evidence confirms that at some point before October 2014, when HouseCanary formally pitched the Appraisal App to Title Source, Sicklick and Petkovski engaged in negotiations for Petkovski to join HouseCanary in a senior sales capacity and receive an equity stake in the company. Ex. 4, Transcript of Hearing at 643–46, 656, *HouseCanary Inc. v. Quicken Loans, Inc.*, No. 5:18-CV-519-FB (W.D. Tex. Oct. 29, 2018) ("10/29 Fed. Hearing Tr."). The new evidence also confirms that more than a year later, and at least until the end of the relationship between the two companies, Sicklick planned to have Petkovski join HouseCanary. *See* Ex. 1, Roveda Decl. ¶ 14; Ex. 2, Walker Decl. ¶ 17; Ex. 3, Majewski Decl. ¶ 15.

Because Sicklick and Petkovski kept this arrangement secret from Title Source and the Court, the jury never heard about it. It was only after Title Source presented evidence of this arrangement to this Court in its post-trial motions that Sicklick admitted under oath in HouseCanary's federal case against Quicken Loans that he and Petkovski had, in fact, discussed employment with and equity in HouseCanary, Ex. 4, 10/29 Fed. Hearing Tr. at 643–46, 656, an opportunity that Petkovski aggressively pursued.

This undisclosed inducement, which existed since the early days of the parties' relationship, led Petkovski to systematically put his interests with HouseCanary over those of Title Source (to which Petkovski owed a fiduciary duty), to misrepresent the origin and readiness of the Appraiser App, to cover up the failings of the AVM, and ultimately to testify falsely before this Court.

2. *HouseCanary and Petkovski colluded to misrepresent to Title Source the origin and readiness of its Appraiser App.*

As the Court heard during trial, in October 2014, HouseCanary representatives went to Title Source's offices in Detroit and presented a concept for a mobile appraiser application. But what the Court and the jury did not hear—because Title Source was kept in the dark about the true facts— is that HouseCanary, in concert with Petkovski, falsely promoted the concept for the App to Title Source as its own. Ex. 5, Declaration of Mike Brocker-Querio ("Brocker-Querio Decl.") ¶ 8. It was not. Newly discovered evidence now confirms that Petkovski and HouseCanary had previously held a series of secret in-person meetings during which Petkovski gave HouseCanary the concept for the Appraiser App and outlined the core functionality and essential elements of the app—none of which HouseCanary knew about before these meetings. *See* Ex. 3, Majewski Decl. ¶ 11.

In October 2014, HouseCanary also represented to Title Source—again, in concert with Petkovski—that it had the necessary data to power its Appraiser App. PX 7. The newly discovered evidence, which was unavailable to Title Source at the time, confirms that HouseCanary did not, in fact, have the data to power the App. Ex. 3, Majewski Decl. ¶¶ 18–21.

In addition to misrepresenting the true origins of the concept for the Appraiser App, "HouseCanary misled Title Source repeatedly about the readiness of the App." Ex. 1, Roveda Decl. ¶ 7; *see also* Ex. 5, Brocker-Querio Decl. ¶ 9. Indeed, Sicklick expressly "instructed" Chris Zaloumis, one of HouseCanary's product managers, "to make misrepresentations to TSI about the status of HouseCanary products." Ex. 2, Walker Decl. ¶ 14. The Appraiser App had been initially planned for rollout in August 2015, but it was not ready by that date. Ex. 5, Brocker-Querio Decl. ¶ 12; DX 96. The investigation has revealed, moreover, that in September 2015, HouseCanary's Head of Sales, Tom Ciulla, told his senior staff that the Appraiser App would in fact not be ready for roll-out until Spring 2016 at the earliest. Ex. 3, Majewski Decl. ¶ 26. As a result, Ciulla directed his staff to stop marketing the product. *Id.* Yet at trial, HouseCanary repeatedly told the jury that the App *was* ready by August 2015. *E.g.*, (Stroud 2/26/18 AM 72, 74).

We also now know that HouseCanary's former Vice President of Business Development, Daniel Majewski, informed Petkovski repeatedly of this situation. As Majewski explains: "On more than one occasion beginning in early Fall 2015, I shared with Petkovski the fact that the timeline for rolling out the Appraiser App had been pushed back from the original expectations to Spring 2016 at first and then later to Summer 2016." Ex. 3, Majewski Decl. ¶ 26. Yet Petkovski withheld this revised timeline from Title Source. Ex. 5, Brocker-Querio Decl. ¶ 12. Instead, Petkovski and HouseCanary repeatedly told Title Source that the roll-out was imminent. *Id.* ¶ 12. Petkovski thus falsely testified that—unbeknownst to Title Source—he was "shocked" to learn that the Appraiser App was not ready for rollout in January 2016. (Petkovski 2/15/18 PM 102). At this time, however, Title Source had no reason to doubt the trustworthiness of one of its valued senior executives.

Moreover, Petkovski and HouseCanary advanced a false narrative that any delay in the roll-out of the Appraiser App was due only to problems with the "handshake" between the application and FNC. HouseCanary promoted this same false narrative at trial to the jury and to this Court. *E.g.*, (2/6/18 AM 81, 104); *see* also DX 126 (email from Sicklick claiming that the app "is ready to being working with TSI," but that "there are still a few bugs with FNC submission"). In reality, the new evidence shows that the roll-out was not late because of an FNC "handshake" issue; it was behind schedule because "the core features of the App were either not fully functional or not yet built; and [] HouseCanary did not have the data necessary to power the App's analytics." Ex. 3, Majewski Decl. ¶ 19. This "gap between [HouseCanary's] public-facing statements about its products, including the Appraiser App, "and the technical market reality," led HouseCanary's former managing Direct of Analytics and Data, Robert Walker, to conclude that HouseCanary was a "house of cards." Ex. 2, Walker Decl. ¶ 13.

These misrepresentations were part of a concerted strategy by HouseCanary. Understandably, the emotional strain of them caused Zaloumis to "lose sleep." Ex. 2, Walker Decl. ¶ 14. Nonetheless, Zaloumis lied as instructed to by Sicklick both to Title Source and at his deposition—falsehoods that HouseCanary then covered up when it offered Zaloumis a lucrative "consulting agreement" prior to trial. Ex. 6, Zaloumis Depo. Ex. 34 ("Zaloumis Consulting Agreement"). And it is clear why HouseCanary was willing to pay, for its misrepresentations had the intended effect: HouseCanary induced Title Source into signing the MSLA in January 2015.

But that was not enough. In a March 21, 2015 exchange of emails between HouseCanary's President, Brent West, and Sicklick, West noted that HouseCanary would need additional cash by early 2016 unless it could effectively roll out the Appraiser App to at least 1,000 appraisers. PX 36. As explained above, HouseCanary and Petkovski knew by September 2015 that the Appraiser App would not be market-ready, let alone effectively provided to that many appraisers within that timeframe. Because under the MSLA Title Source was to pay only per appraisal completed through the App, this delay meant that HouseCanary would not receive any revenue from Title Source in the near term. The need to find a way to produce revenue for HouseCanary and save its business triggered the next phase of the fraud, described below.

3. *HouseCanary and Petkovski similarly misrepresented the accuracy of HouseCanary's AVM.*

In order to salvage HouseCanary's financial situation, HouseCanary and Petkovski extended their scheme of deception beyond the Appraiser App. They conspired to introduce to Title Source a new suite of products, which they then used to induce Title Source to enter into an amended agreement that would provide a guaranteed revenue source for HouseCanary while it continued to struggle to stand up the Appraiser App. PX 3. Several of these products, including the Value Report, were based on an AVM that HouseCanary was purportedly developing. By making the Value Report the focus of Amendment Number One to the Master Software License Agreement, HouseCanary and Petkovski restructured the agreement so that Title Source would start paying HouseCanary either $5 or $10 million a year, depending on what it delivered. DX 100. Thus, the replacement revenue generated by Amendment One—a contract that Petkovski pushed internally at Title Source—would be just the stopgap that HouseCanary needed to survive. And because Amendment One contained very loose accuracy requirements, HouseCanary would be entitled to revenue regardless of any deficiencies in the HouseCanary AVM—of which, it turned out, there were plenty.

At trial, Stroud testified under oath that its AVM "was at the top of the pack in both coverage and accuracy." (Stroud 2/26/18 PM 182.) Yet the newly discovered evidence reveals that HouseCanary's AVM was far from ready during the course of the parties' relationship—and it was not accurate. As Rob Walker, HouseCanary's former Managing Director of Analytics and Data, avers in his declaration, although "Stroud testified [to the jury] that beginning in January 2016, HouseCanary was providing a 'homegrown' AVM to TSI," Walker "did not believe that HouseCanary had a working, stand-alone HouseCanary AVM [] or a 'home-grown' HouseCanary AVM" during his employment from March 2015 to March 2016. Ex. 2, Walker Decl. ¶ 16. In particular, Walker and Majewski revealed that the proprietary AVM had been tested by a third party, Platinum Data Solutions, and the results of that test demonstrated that the HouseCanary AVM was not accurate. *Id.* ¶ 11; Ex. 3, Majewski Decl. ¶ 30. These failures stemmed in part from HouseCanary's lack of know-how in building an AVM and in part from HouseCanary's lack of data. Ex. 2, Walker Decl. ¶¶ 8, 11. But HouseCanary never produced the test results during discovery in this case—notwithstanding Title Source's specific request that HouseCanary produce "[a]ll documents and/or communications referring or relating to any testing of any HouseCanary AVM(s)." Ex. 7, Pl.'s RFP No. 7, Q. 37 (Jun. 30, 2017). Instead, on the stand Stroud falsely claimed that the testing results were "great for us." (Stroud 2/26/18 PM 116).

This claim was key to HouseCanary's theory of misappropriation. As Title Source demonstrated to the jury—complete with eighteen boxes of files—Title Source had millions of its own historical appraisals with which to train an AVM. The only conceivable reason Title Source would have used HouseCanary's AVM outputs instead of its own appraisals—the undisputed "ground truth" of a property's value—would have been that the HouseCanary AVM was somehow more accurate or had broader coverage than Title Source's own data. Neither, it turns out, were true. In truth—as HouseCanary's expert admitted—Title Source did not train its AVM on HouseCanary's data or AVM outputs. (Rhyne 3/6/18 PM 39–40). And in fact, as Majewski has now explained, HouseCanary was well aware that it lacked the necessary data to make its products work nationwide, and was relying on Petkovski to procure that data from Title Source and other third parties. Ex. 3, Majewski Decl. ¶ 22. When Sicklick demanded Title Source's historical appraisal data—falsely claiming that HouseCanary was entitled to the data under Amendment One (a claim this Court correctly rejected)—Petkovski pressured Title Source internally to hand over the data as well. DX 220.

As with the Appraiser App, Petkovski had been told by HouseCanary that the HouseCanary AVM was failing. Ex. 3, Majewski Decl. ¶ 31. Yet Petkovski falsely represented to his colleagues at Title Source that HouseCanary's failing AVM—along with other nonexistent products—could be used to replace a suite of "legacy" products at Title Source. DX 246.

B. The newly discovered evidence amply justifies a new trial.

The new evidence outlined above meets all four elements of the standard for new trial: (1) Title Source was not aware of the new evidence until after the trial; (2) it was not owing to the want of due diligence that the evidence did not come to light sooner; (3) it is not cumulative or merely impeaching, but contradicts core evidence that was presented to the jury; and (4) it is so material that it would probably produce a different result if a new trial were granted, given that the new evidence goes to key elements of liability and damages. *See Waffle House, Inc.*, 313 S.W.3d at 813.

We address each element in turn below.

1. *The evidence of fraud and collusion is newly discovered; it came to light only following trial.*

The first indication that fraud had tainted the jury's verdict came the day after trial, when Roveda—aware of the truth and shocked by the jury's verdict—felt compelled to anonymously contact Title Source. As set forth in detail above, Roveda's email alerted Title Source, for the first time, to the undisclosed relationship between HouseCanary and Petkovski, and to the extent of the failures of the Appraiser App. This revelation led to the discovery of additional new evidence, and cast previously known facts and events in a fundamentally different, new light.

Title Source cannot be faulted for failing to discover this evidence before trial. The only people who could have surfaced this information earlier were under HouseCanary's control—either because they were HouseCanary employees or shareholders, were co-conspirators with HouseCanary, or had been effectively silenced through HouseCanary non-disclosure agreements, consulting agreements, or lucrative offers of employment. Roveda's email thus presented the first opportunity for Title Source to penetrate HouseCanary's cone of silence. Now armed with insider information that the co-conspirators systematically sought to protect, Title Source was finally able to unlock the truth.

Further, one of the main reasons why the fraud remained undetected up to and during trial was that it involved the perfect partner—Jordan Petkovski, an otherwise trusted senior Title

Source executive. For years, Title Source relied on Petkovski for honest, accurate information about its appraisal business. And, until Roveda's email, Title Source had every reason to do so. Petkovski was one of its most senior officers, who oversaw every aspect of the Title Source relationship with HouseCanary, and the most knowledgeable person regarding issues raised in this litigation. The new evidence has revealed, however, that Petkovski abused Title Source's trust and then lied to cover up his tracks. Petkovski's responsibility for the management of the HouseCanary relationship, which he abused, nonetheless allowed him to operate undetected. He directed Title Source resources to support HouseCanary's products (including by giving them valuable contracts), gave HouseCanary access to key vendors and data, and later made personnel decisions that would effectively sideline people who might have detected the fraud.

In addition, once revealed, the fraud gave previously known facts and events a very different significance. For example, on April 6, 2016—after the relationship between Title Source and HouseCanary had broken down, and only a few days before Title Source filed this lawsuit—Sicklick, Stroud, and HouseCanary Board Member/investor Mark Dyne exchanged a series of emails. Ex. 8, Email from C. Stroud to J. Sicklick & M. Dyne (Apr. 6, 2016). In that exchange, Sicklick injects into the record of the litigation what we now know to be two knowingly false claims necessary to cover up the conspiracy: (1) HouseCanary was not interested in hiring Petkovski; and (2) Steve O'Brien had successfully completed hundreds of appraisals on a fully functional Appraiser App. As is evident from the email, there were two people who could contradict these false assertions: Petkovski and O'Brien. The new evidence demonstrates that Sicklick already had Petkovski in his pocket through the collusion and he therefore presented little risk of revealing the truth. As for O'Brien, Sicklick immediately put in motion efforts to "lock (him) down" with his own lucrative employment offer, DX 622, which guaranteed O'Brien nearly triple what O'Brien was being paid by Title Source at the time.[2]

[2] When HouseCanary sought to hire Steve O'Brien on the eve of this litigation, it offered O'Brien a guaranteed minimum of $240,000 in salary and bonuses his first year. Ex. 9, O'Brien Depo. at 16. By contrast, O'Brien earned $85,000 during his last full year of

Viewed through the prism of the new evidence of fraud, this email now can be seen for what it truly was: a transparent effort to create a false paper trail with manufactured evidence.

2. *Title Source could not have uncovered the fraud before trial.*

The normal diligence requirement "is relaxed" by a "showing of fraudulent misrepresentation or concealment by the adverse party." *In re Williams*, No. 12-06-00361-CV, 2007 WL 1241517, at *2–3 (Tex. App.—Tyler Apr. 30, 2007, no pet.); *Dixie Gas & Fuel Co. v. Jacobs*, 47 S.W.2d 457, 462 (Tex. Civ. App.—Beaumont 1932, writ dism'd w.o.j.) (diligence requirement satisfied where fraudulent conduct prevented discovery of new evidence); *McMurry v. McMurry*, 4 S.W. 357, 360 (Tex. 1887) (where party "was prevented, by the fraud of the adverse party, from fully presenting all of her case at the time the decree was entered" it was "without any want of diligence on the part of herself or counsel"). Similarly, a party's fraudulent concealment of the facts giving rise to a cause of action tolls the statute of limitations "until the fraud is discovered or could have been discovered with reasonable diligence." *BP Am. Prod. Co. v. Marshall*, 342 S.W.3d 59, 67 (Tex. 2011).

This precedent confirms what common sense recognizes—fraudulent, clandestine conduct is, by its very nature, intended to be secret and difficult to discover. Sicklick and Petkovski's plan is a textbook example. Petkovski took pains to hide information from Title Source, including remaining silent as he heard HouseCanary repeat his own ideas back to Title Source as their own innovations.

HouseCanary also took deliberate steps to prevent this illicit scheme from coming to light. For example, HouseCanary offered key witnesses and former employees lucrative "consulting contracts" in exchange for their silence. Ex. 1, Roveda Decl. ¶ 18; Ex. 2, Walker Decl. at 15. Stroud has since confirmed as much under oath, admitting that HouseCanary "started offering these [post-trial consulting agreements] to *all* previous employees after they were [purportedly] being harassed by private investigators." Ex. 11, Transcript of Hearing at

---

employment at Title Source, with no bonuses awarded. Ex. 10, Title Source 2015 Annual Review for Steve O'Brien at 2.

310, *HouseCanary Inc. v. Quicken Loans, Inc.*, No. 5:18-CV-519-FB (W.D. Tex. Oct. 23, 2018) ("10/23 Fed. Hearing Tr.") (emphasis added). These arrangements were offered to former employees even though Stroud "d[idn't] have any idea" what "kind of consulting" the former employees were going to do. *Id.* at 312. For instance, HouseCanary offered Rob Walker an "Independent Consultant Agreement" that would have compensated him $250 an hour to "[p]rovid[e] assistance to HouseCanary" related to this litigation. Ex. 2, Walker Decl. at 15. But as Walker put it, "the offer was actually an attempt to get me 'under contract' to HouseCanary and to prevent me from speaking to [Title Source]." *Id.* ¶ 20. Roveda, for his part, was also offered a "consulting" agreement, by none other than Steve O'Brian, pursuant to which Roveda would be "paid handsomely" if he agreed to "be protected by HouseCanary." Ex. 1, Roveda Decl. ¶ 18. Roveda understood this offer "to mean [he] would be 'paid handsomely' to provide testimony favorable to HouseCanary and/or not providing negative information about the company to Title Source." *Id*. He described the arrangement as "payola or bought testimony." *Id*.

These post-trial agreements are not legitimate attempts to compensate witnesses for the reasonable time and expenses of testifying. Instead, a leading Texas ethics expert has opined that these agreements "raise[ ] serious issues of legal ethics and potentially bad-faith conduct in litigation" because they are improper attempts to thwart Title Source's investigation by "prevent[ing] former employees from cooperating or providing evidence." Ex. 12, Declaration of Charles Herring, Jr. ¶ 6. The timing of the agreements—"after the jury verdict and after HouseCanary was aware that Title Source had undertaken post-trial factual investigation"—"suggests that HouseCanary was trying to prevent Title Source from gathering information from potential fact witnesses." *Id.* ¶ 7.

In another blatant example of HouseCanary's effort to conceal the fraud, Petkovski and Sicklick colluded to deprive Title Source of its most knowledgeable witness regarding the failings of the Appraiser App, Steve O'Brien. O'Brien had been Title Source's principal tester on the Appraiser App, and, as the Court is aware, authored a series of damning reports detailing the shortcomings of the Appraiser App. On April 1, 2016, shortly after Petkovski learned that Title Source intended to sue HouseCanary (and just before Petkovski left Title Source), he purported to authorize Sicklick to hire O'Brien away from Title Source, at three times O'Brien's salary while at Title Source. This is part of a strategy that Sicklick would describe to colleagues as "lock[ing] . . . up" O'Brien. DX 622.

HouseCanary continued its deception into trial. As the Court will recall, HouseCanary identified Chris Stroud as its corporate representative. In that capacity, Stroud was obligated to "testify as to matters that are known or reasonably available to the organization," Tex. R. Civ. P. 199.2(b)(1), and the "presumption of law would seem to be that all witnesses are testifying to the truth," *Steed v. Winder*, 130 S.W.2d 403, 405 (Tex. Civ. App.—Galveston 1939, no writ). Based on Stroud's sworn deposition testimony as the corporate representative—testimony he did not seek to correct at any point prior to trial—Title Source called Stroud in its case-in-chief. But on the witness stand, HouseCanary ambushed Title Source when Stroud repeatedly told the jury the exact opposite of what he had testified to in his deposition. *See, e.g.*, (Stroud 2/26/18 AM 72) (admits to changing testimony about whether the app existed in late 2014); *id.* at 77 (admits to changing testimony about existence of appraiser app as of January 29, 2015 when agreement was signed); *id.* (changes testimony about whether HouseCanary had licensing agreements with MLS companies as of January 2015); *id.* at 78 (changes testimony about number of HouseCanary employees); *id.* at 104 (changes testimony about when first version of HouseCanary Appraiser App launched); *id.* at 113–14 (changes testimony about when value outputs were first available); (Stroud 2/26/18 PM 17–18) (changes testimony as to whether HouseCanary passed off the Black Knight AVM as its own); *id.* at 206–07 (changes testimony about whether HouseCanary developed a complexity score).

Even if there were no evidence of fraud or concealment—and there is abundant evidence of that here—Stroud's unanticipated about-face on the stand on all of these core issues is an independent reason why Title Source is entitled to a new trial. Title Source had relied on Stroud's admissions in preparation for trial, calling Stroud during its case in chief to prove its claims. Title Source, however, was shocked when Stroud recanted his prior sworn testimony. Where a party like Title Source "had no means . . . of knowing that any . . . refuting testimony would . . . be required, or could be produced," a new trial is in order. *Maxcy v. Norsworthy*, 49 S.W.2d 885, 887 (Tex. Civ. App.—Galveston 1932, writ dism'd w.o.j.). Here, by the time Stroud testified, the trial was well underway, Title Source had limited time left to present its case, and HouseCanary's witnesses, who could have refuted these claims, were out-of-state, outside of the reach of this Court's subpoena power, and unavailable for testimony. *See Delano v. Delano*, 189 S.W. 972, 974–75 (Tex. Civ. App.—Austin 1916, no writ) (new trial required where "it could not have been anticipated that appellee . . . would so change his testimony . . . when he did not mention that fact on the trial of that case, though closely questioned with reference to the whole transaction; so that this is the first time that appellant had notice of any such claim, and hence could not have been prepared to controvert it"); *Douglas v. Walker*, 92 S.W. 1026, 1027–28 (Tex. Civ. App. 1906, no writ) (where party "could not for[e]see" witness's trial testimony, no negligence in failing to discover contradicting evidence before trial).

Importantly, Title Source does not bear the burden of protecting itself against the possible duplicity of a deponent, especially a corporate designee. Courts do not require a party to second-guess every piece of information it receives during discovery in deciding what additional discovery should reasonably be pursued:

> A litigant should be able to rely on discovery responses provided by his opponent in determining what other discovery, if any, to pursue. . . . He need not be placed in a position of wondering whether the response is incomplete or inaccurate and weighing whether additional, economically burdensome, and potentially wasteful discovery efforts should also be pursued. . . . Litigants are entitled to rely on the discovery responses provided them. That they do is not basis for later arguing that they should have known better.

Westmoreland v. Starnes, No. 07-13-00364-CV, 2015 WL 1325530, at *3–4 (Tex. App.—Amarillo Mar. 24, 2015, pet. denied); *see also Steed*, 130 S.W.2d at 404–05 ("[W]e think that in a case like this, where a verdict is shown to rest alone upon the false testimony of a party at interest, the rules in regard to cumulative testimony, and the failure to exercise due diligence to procure it, should not be applied[.]" (quotation omitted)). Here, Stroud admitted that the app was not ready as promised, and Title Source took him at his sworn word.

Title Source similarly had no reason to think, until Roveda came forward, that Petkovski's testimony should be treated with suspicion. Title Source was not aware that Petkovski had secretly been working to advance HouseCanary's interests all along. The law does not require paranoia. Accordingly, although Title Source knew that Roveda, Walker, and Majewski had worked at HouseCanary, Title Source did not know that their testimony would be any different from Stroud's deposition testimony, or would reveal an improper relationship between HouseCanary and Title Source's own witness. *See Horne v. Stockton*, 178 S.W. 962, 964 (Tex. Civ. App.—Austin 1915, no writ) (new trial granted based on newly discovered evidence because, even though movant knew of witness, it did not know witness's testimony would be material until trial); *cf. Halliday v. Lambright*, 68 S.W. 712, 714 (Tex. Civ. App. 1902, no writ) ("The willful giving of false testimony by a party to an action in relation to a matter affecting the issue to be tried is fraud of the most pernicious character, and for such conduct the party injured by it is entitled to have the cause remanded." (quoting *McMurry*, 4 S.W. at 358–59)).

In any event, reaching out to Roveda before trial would have been futile. Roveda did not come forward sooner (or even initially reveal his identity) out of understandable fear of "people involved on [HouseCanary's] side that are very powerful." Ex. 1, Roveda Decl. at 6. And Roveda's concerns seem well-founded in light of HouseCanary's response to this investigation. Before even hearing his name, counsel for HouseCanary had already begun a public campaign to discredit him, telling reporters that the whistleblower was likely "a disgruntled employee." Ex. 13, Erik Larson, *Amrock Says $706 Million Verdict Brought Out the Whistle Blowers*, Bloomberg (July 20, 2018).[3] HouseCanary even went so far as to question his "mental state."

[3] https://www.bloomberg.com/news/articles/2018-07-20/amrock-says-706-million-verdict-brought-out-the-whistle-blowers.

Ex. 14, Patrick Danner, *Amrock Says Evidence Casts Doubt on $706M Bexar County* Verdict, My San Antonio (July 20, 2018).[4] This behavior is consistent with HouseCanary's response to the entire investigation, which it has sought to derail at every turn through tactics such as threats of physical force against Title Source's attorneys, Ex. 15, Email from M. Tribble to D. Prichard (July 12, 2018); unfounded cease-and-desist letters, Ex. 16, Letter from M. Tribble to W. Foley (July 9, 2018); Ex. 17, Letter from M. Tribble to M. Nino (July 9, 2018); and an untenable request for a temporary restraining order, which HouseCanary subsequently withdrew, to prevent the reasons for and preliminary results of Title Source's investigation from coming out.

It is a "matter of general knowledge" that "persons who have knowledge with reference to a case pending, or on trial, will refrain from disclosing the same because they do not wish to be witnesses. But after the trial the restraint is removed, and they will talk more freely." *Payne v. Douglas*, 241 S.W. 238, 240 (Tex. Civ. App.—El Paso 1922, writ dism'd w.o.j.) (quoting *Am. Indem. Co. v. Hubbard*, 196 S.W. 1011, 1013 (Tex. Civ. App.—Fort Worth 1917, no writ)). It was only the shocking injustice of the jury's verdict that prompted Roveda to contact Title Source—and even then, he did so understanding the risks he ran of being retaliated against given this small, close-knit professional community. Ex. 1, Roveda Decl. ¶¶ 9, 11.

Nor were there many others Title Source could have sought out. HouseCanary had effectively "lock[ed] down" all the key witnesses. DX 622. O'Brien, as explained, was now a HouseCanary employee thanks to Petkovski. Other former HouseCanary employees were already under lucrative "consulting" agreements. *E.g.*, Ex. 6, Zaloumis Consulting Agreement. As to those for whom HouseCanary had not secured an official agreement, including Roveda and Daniel Majewski, HouseCanary's counsel nonetheless claimed it represented them. Ex. 18, Def.'s Resp. to Pl's RFD at 12 (Aug. 16, 2017). As a result, due to HouseCanary's preclusive tactics, there was no one who would have revealed the truth of the scheme before trial.[5] It was

[4] https://www.mysanantonio.com/business/local/article/HouseCanary-hearing-13091829.php.

[5] As of the filing of this motion, the full extent of the fraud and the identity of all who participated in it, including in the course of the proceedings before this Court, is still under

only when certain employees were no longer at HouseCanary that, emboldened by Roveda's decision to step forward, they agreed to speak up.

In sum, Title Source did not "close [its] eyes to evidence available by the exercise of reasonable diligence," *Texas Motor Coaches v. McKinney*, 186 S.W.2d 714, 717 (Tex. Civ. App.—Dallas 1945, no pet.), but rather was deliberately deceived, *see Terbay v. Pat Canion Excavating Co*., 396 S.W.2d 482, 490–91 (Tex. Civ. App.—Austin 1965, writ ref'd n.r.e.). Indeed, HouseCanary actively took steps to prevent Title Source (as well as the jury and this Court) from learning the truth. It would be unjust in the extreme if a party to a conspiratorial scheme could succeed in misleading an opposing party and then get away with it by trying to hide behind the due-diligence requirement. Not surprisingly, that is not the law in Texas—as over a hundred years of precedent recognizes. *See*, *e.g.*, *Alexander v. Soloman*, 15 S.W. 906, 908–09 (Tex. 1891) (where party "could not be reasonably expected" to have inquired into material evidence discovered after trial, new trial is in order); *Houston & Tex. Cent. Ry. Co. v. Forsyth*, 49 Tex. 171, 178–79 (1878) ("newly-discovered evidence [that] did not come to the knowledge of [defendant] until after the trial" and "could not have done so" absent extensive inquiry into "every one with whom the plaintiff might have conversed" justified new trial); *Atchison, T. & S.F. Ry. Co. v. Francis*, 227 S.W. 342, 346 (Tex. Civ. App.—Amarillo 1921), *aff'd*, 253 S.W. 819 (Tex. 1923) (even where new trial motion "does not show sufficient diligence," material evidence discovered after trial that would have been nearly impossible to discover beforehand "required the trial court grant the motion"); *Vick v. Schaff*, 260 S.W. 916, 921 (Tex. Civ. App.—Waco 1924, writ dism'd w.o.j.) ("In the absence of something to indicate a probability of such knowledge, we do not think it was necessary to a claim of diligence . . . that [party moving for new trial] should show that he had [investigated the issue before trial].").

---

investigation. Title Source reserves the right to supplement this filing as new information or witnesses become available and to present that information and witnesses at the evidentiary hearing on this motion.

3. *The newly discovered evidence is neither cumulative nor merely impeaching.*

Taken together, the newly discovered evidence outlines a coordinated scheme of collusion and fraud that bears no resemblance to the story HouseCanary told the jury or the evidence that the jury had before it. *See Matter of Marriage of Yarbrough*, 719 S.W.2d 412, 415 (Tex. App.—Amarillo 1986, no writ) (cumulative evidence proves the same facts as other evidence). Among other things, the jury never heard about the secret scheme between Sicklick and Petkovski. It never heard admissions from key HouseCanary employees—including Roveda, HouseCanary's subject-matter expert for testing the Appraiser App's functionality. It never heard HouseCanary's Vice President of Business Development admit that "during the testing[,] the Appraiser App failed to identify and rate comparable sales with the degree of accuracy required for it to be used in an actual appraisal setting," or that he had been instructed in 2015 to stop selling the app because of its deficiencies. Ex. 3, Majewski Decl. ¶¶ 23, 27. It never heard about Sicklick's instructions to HouseCanary executives to affirmatively mislead Title Source about the readiness of its products. Ex. 2, Walker Decl. ¶ 14. It never heard about the results of third-party testing on HouseCanary's AVM, because HouseCanary withheld this evidence during discovery. And, importantly, the jury was deprived of the opportunity to view the facts that it did have through the prism of this new evidence of fraud.

All of this bears directly on the merits of the parties' dispute and indeed the integrity of the entire proceedings; it does not merely impeach the credibility of HouseCanary witnesses. But the new evidence is more than the sum of its parts. It decimates the story HouseCanary told the jury—from opening until closing—that HouseCanary was a small, visionary start-up victimized by "corporate America."[6]

Moreover, HouseCanary's knowledge of the scheme gave it a decisive tactical litigation advantage. For instance, HouseCanary's counsel discredited Petkovski's testimony in the eyes

[6] HouseCanary repeated that message throughout trial in direct violation of this Court's order in limine. *See infra* pp. 35–36.

of the jury by cross-examining him about his discussions with Sicklick in December 2013, but did not ask him about any interactions between December 2013 and October 2014, of which we now know there were many.[7] Had counsel done so (and had Petkovski answered truthfully), Petkovski would have revealed the full extent of his improper secret relationship with HouseCanary—a relationship that HouseCanary and Petkovski had worked diligently to conceal.

4. *The newly discovered evidence would likely change the result if considered in a new trial.*

There can be little doubt that this new evidence, had it been presented to the jury, would probably have led to a different result. The admissions from not one but *three* senior HouseCanary executives that its Appraiser App was not functional, and that they had been instructed to misrepresent the state of the Appraiser App to Title Source, would have destroyed HouseCanary's defense to Title Source's breach of contract claims—which were, after all, how this case began. The evidence of the scheme between Sicklick and Petkovski would have rendered HouseCanary's fraud claim untenable. And the jury likely would not have awarded damages—let alone punitive damages—had it known that HouseCanary was not the innocent victim it purported to be, but in fact had conspired with Petkovski all along to induce Title Source into a contract on which it could not deliver. Indeed, had Title Source known the truth early on, it is doubtful that it would have entered into any contract with HouseCanary in the first place, and this case would never have transpired at all.

---

[7] For example, on May 14, 2014, Petkovski had dinner with Sicklick, Stroud, and other representatives from HouseCanary in Detroit. Ex. 19, Email from. J. Sicklick to J. Petkovski, H. Graham, & B. Kunka (May 15, 2014); Ex. 20, Email from J. Sicklick to J. Petkovski (May 13, 2014); Ex. 21, Email from J. Sicklick to C. Stroud & J. Petkovski (May 14, 2014). Similarly, on September 22, 2014, Petkovski flew to California and met privately with Sicklick at the Balboa Bay Club in Newport Beach. Ex. 22, Email from J. Petkovski to J. Sicklick (Sept. 21, 2014). Later that evening, Petkovski and Sicklick met with ValueScape's Mark Linne for dinner. *Id.* The following day, Petkovski had dinner with Sicklick and representatives from CoreLogic. Ex. 23, Email from J. Sicklick to J. Petkovski (Sept. 18, 2014). In addition to these in-person meetings, Petkovski and Sicklick were in regular phone and email contact about the concept for the Appraiser App before October 2014—interactions that Petkovski denied under oath had occurred. Ex. 24, Email from J. Sicklick to J. Petkovski (Sept. 8, 2014).

It is also probable that the jury would have come out differently on HouseCanary's trade secrets claim. In the face of eighteen boxes of Title Source's historical appraisals and HouseCanary's own expert's admission that Title Source did not train its AVM using HouseCanary's Value Reports (Rhyne 3/6/18 AM 119), HouseCanary's sole rejoinder was that Title Source wanted to use the Value Reports because of their accuracy and superior coverage (HouseCanary closing 3/14/18 AM 22). Yet the new evidence suggests, among other things, that independent third-party testing found that the HouseCanary AVM was *not* accurate—evidence that HouseCanary withheld from Title Source during discovery. It is also quite likely that without a single reason, however tenuous, for *why* Title Source would have used HouseCanary's AVM outputs to train MyAVM, the jury would have disbelieved HouseCanary's misappropriation claim—particularly if the jury had known about HouseCanary's relationship with Petkovski. Finally, in light of all of the misrepresentations regarding the AVM, the jury also would have been hard-pressed to find that HouseCanary even owned protectable trade secrets.

In sum, the newly discovered evidence of HouseCanary's fraud and deceit—stemming from its scheme with Petkovski since the beginning of the parties' relationship and lasting until after trial—could not have been known before trial, is not cumulative or merely impeaching, and would likely have led to a different outcome. To allow the verdict to stand in the face of such evidence would be to sanction a gross miscarriage of justice. A new trial is warranted. *See, e.g.*, *Chilson v. Metro. Transit Auth.*, 796 F.2d 69, 71–72 (5th Cir. 1986); *Gannaway v. Trinity Universal Ins. Co.*, 85 S.W.2d 345, 347 (Tex. Civ. App.—San Antonio 1935, writ ref'd); *Stark v. Leonard*, 196 S.W. 708, 719 (Tex. Civ. App.—Beaumont 1917, no writ) (a new trial is required if evidence discovered after trial would make material trial testimony "not true").

II. The jury was repeatedly exposed to improper and highly prejudicial jury argument and evidence that misled and inflamed the jury.

The taint of the fraud and collusion that undergirds the entire trial proceeding is exacerbated by additional inflammatory conduct by HouseCanary at trial that independently call for a new trial. Rather than let the evidence speak for itself, HouseCanary's counsel deluged the jury with conspiracy theories, character assassination, and irrelevant yet highly prejudicial evidence.

Any one of these improprieties requires a new trial. Taken together, the effect is overwhelming. The improper argument and evidence not only resulted in the jury's exorbitant punitive damages award, but also tainted the entire proceeding. A new trial is required. *Brown v. Hopkins*, 921 S.W.2d 306, 319 (Tex. App.—Corpus Christi 1996, no writ) ("Texas law recognizes that multiple errors, even if considered harmless taken separately, may result in reversal and remand for a new trial if the cumulative effect of such errors is harmful.").

A. The integrity of Title Source and its lawyers was impugned throughout trial.

"Attacks upon the integrity of opposing counsel are categorically prohibited" in Texas—and work an incurable harm that requires a new trial. *Amelia's Auto., Inc. v. Rodriguez*, 921 S.W.2d 767, 773 (Tex. App.—San Antonio 1996, no writ) (reversing lower court and granting new trial for attacks on opposing counsel's integrity during witness questioning). Similarly, "[u]nsupported, extreme, and personal attacks on opposing parties and witnesses can . . . compromise the basic premise that a trial provides impartial, equal justice." *Living Ctrs. of Tex., Inc. v. Penalver*, 256 S.W.3d 678, 681 (Tex. 2008). Yet HouseCanary repeatedly accused Title Source and its counsel of being liars who literally bought and paid for witnesses—going so far as to tell the jury that Title Source and its attorneys created "a house of lies that has been perpetrated in this court." (HouseCanary closing 3/14/18 PM 13).[8] Although these attacks occurred throughout the trial, two were particularly egregious—and each independently mandates a new trial.

[8] That assertion is ironic in light of the new evidence indicating that, as it turns out, HouseCanary was "lock[ing] . . . down" potential witnesses by hiring them or paying them not to testify. DX 622; Ex. 25, Zaloumis Depo. at 275–80.

First, on March 2, in violation of the Court's orders, HouseCanary played a video clip in which a disgruntled former Title Source employee (Charles Watson) insinuated that Title Source witnesses' testimony was "bought and paid for" by its counsel. (Watson 3/2/18 PM 159–61). This extraordinarily prejudicial testimony—based entirely on hearsay—should never have been shown to the jury and irredeemably tainted their view of the facts and of Title Source's counsel. *See Nissan Motor Co.*, 145 S.W.3d at 148 (a new trial is required if inadmissible "evidence improperly admitted" "probably resulted in an improper judgment").

Second, during closing argument, HouseCanary doubled down on its attacks against Title Source's counsel in explicit, unequivocal terms—telling the jury that Title Source and its attorneys told "outright lies" and had built "a house of lies." (HouseCanary closing 3/14/18 PM 13). These attacks are absolutely barred by Texas law—with the Texas Supreme Court singling out as especially inappropriate "[t]he use in argument of the epithet[] 'liar.'" *Standard Fire Ins. Co. v. Reese*, 584 S.W.2d 835, 840 (Tex. 1979). As demonstrated below, HouseCanary's repeated use of that epithet to attack Title Source and its counsel is sufficient, without more, to warrant a new trial—but in conjunction with the video clip insinuating that Title Source's counsel "bought and paid for" its witnesses, it virtually compels one. (Watson 3/2/18 PM 159).

1. *Inadmissible, highly prejudicial video testimony inflamed the jury.*

HouseCanary showed the jury an undesignated, inadmissible, and extraordinarily prejudicial video clip falsely accusing Title Source's attorneys of tampering with witnesses by compensating them in return for favorable testimony—thus requiring a new trial. The video deposition testimony of a disgruntled former Title Source employee, Watson, claimed that Title Source's attorneys tampered with witnesses by offering payments in return for favorable testimony—surprising Title Source, the Court, and, visibly, the jury. The excerpt included the following exchange, the last thing played for the jury on Friday, March 2:

> A. …There was some talk that if I would be, you know, represented by Title Source or my time would be used, I would want to be compensated, as were some other folks who came and gave their time, but considering that, as well, **I would**

> **also just rather not have to feel like my words are bought and paid for**. I want to just come and speak what the truth is and—and just continue to try to do what the right thing is.
> Q. Who were the other folks that you understand were compensated?
> A. I understood Jordan Petkovski was given some modest compensation for his time.
> Q. And where did you hear that?
> A. It was just what I had heard from – I forget the name of the fellow who **worked at Greenberg Traurig**, but had been trying to convince me as to why, you know, I need to be represented, you know, apart from it and apart from Title Source's representing Title Source, but they also need to represent me in case anything where to happen to me. . . . And that's when he said, well, we paid for Jordan to come in. . . . no paperwork was furnished to me to – to sign any agreement saying you can represent me and pay me for it. And I'm glad that was the case, because then I can come in here and **say what the truth is and not feel like I have to, you know, kind of withhold information**.

(3/2/18 PM 159–161) (emphasis added). The theme of this testimony—that Title Source's counsel had colluded with its former employees to elicit false testimony—was reiterated during HouseCanary's closing argument. *See infra* pp. 31–33.

There can be no doubt that Title Source would have objected to this clip being played had it been permitted to do so.[9] Courts take an exceptionally dim view of unsubstantiated allegations of witness tampering. *Living Ctrs.*, 256 S.W.3d at 681 ("[A]ccusing the opposing party of manipulating a witness, without evidence of witness tampering, can be incurable, harmful argument."); *see, e.g.*, *Montgomery Ward & Co. v. Brewer*, 416 S.W.2d 837, 847–48 (Tex. Civ. App.—Waco 1967, writ ref'd n.r.e.) (reversing and rendering because of an unfounded accusation that "counsel had persuaded witnesses to perjure themselves"). Yet the sole basis for

[9] Respecting the Court's instruction not to interrupt video depositions while they were being played for the jury, under penalty of contempt, Title Source did not object during the clip but did so immediately afterwards. *See* (3/2/18 AM 100) (Court instructing counsel that video depositions "should be played straightforward and straight through," and that the Court was "not going to be stopping this trial for a video deposition."); (3/2/18 PM 165) ("[Title Source's Counsel: [W]e didn't want to interrupt because we understand your Honor's instructions about the depositions being played. Court: No, no, no, fair enough."). Given the incurable nature of the prejudice, however, a new trial would be required even without objection. *Rhoden v. Booth*, 344 S.W.2d 481, 487 (Tex. Civ. App.—Dallas 1961, writ ref'd n.r.e.) ("The introduction of the testimony was incurable error. It was permissible for appellant to object to this type of error for the first time on motion for new trial.").

Watson's accusation that Title Source's counsel were seeking to have testimony "bought and paid for" was his third-hand account of what he had heard about another witness; as he admits, he never actually received any agreement.

Moreover, the prejudicial clip suffered from a host of evidentiary issues. To begin with, it contained inadmissible hearsay. The clip included repeated discussion of purported out-of-court statements of unidentified third parties: Watson claimed that "[t]here was some talk" from an unknown individual that Title Source would compensate him for his testimony, and further asserted that Title Source's witnesses, including Jordan Petkovski, were compensated for their time based only what he "had heard from . . . the fellow who worked at Greenberg Traurig." (Watson 3/2/18 PM 159–61). The prejudicial clip was also substantially more misleading and unfairly prejudicial than probative, *see* Tex. R. Evid. 403; indeed, the clip had no probative value whatsoever. Under the Texas Rule of Professional Conduct 3.04, witnesses may be reimbursed for expenses incurred by testifying—precisely the courtesy Title Source extended to all its witnesses. Against this, the unfair prejudice to Title Source from Watson's accusation, unsupported by competent evidence, that Title Source was compensating witnesses improperly to influence or buy testimony is self-evident.

The problems with this patently prejudicial clip do not end there. The testimony had never been designated for use at trial, *see* Ex. 26, Def.'s Depo. Desigs. (Dec. 27, 2017), so showing it to the jury violated the Court's Orders and caused unfair surprise. *See* Ex. 27, Agreed Scheduling Order (Jun 8, 2017) (requiring all deposition excerpts to be designated by January 10, 2018). While HouseCanary cited the prejudicial video clip as support for an "Objection" to a designation by Title Source (in which Watson simply stated that he was not represented by Title Source), Ex. 28, Def.'s Objs. & Counter Desigs. to Pl.'s Depo. Desigs. (Jan. 3, 2018), HouseCanary never affirmatively designated Watson's inflammatory testimony for use at trial.[10]

---

[10] The Scheduling Order is not the only order of this Court that HouseCanary violated by playing the prejudicial clip. The Court's Limine Order mandates that "no person should make statements or comments in front of the venire or jury about the time or circumstances

Only a new trial can remedy the prejudice. Indeed, the violation of the Court's Order, standing alone, warrants new trial. *Kendrix v. S. Pac. Transp. Co.*, 907 S.W.2d 111, 114 (Tex. App.—Beaumont 1995, writ denied) (reversing and granting new trial because prejudicial testimony was admitted "in direct violation of a court order"). And the Court's curative instruction—given three days later, when the trial resumed, (3/5/18 AM 17)—could not, and did not, unring the bell. "Unwarranted attacks against the integrity of opposing counsel are generally considered to be incurable." *Amelia's Auto.*, 921 S.W.2d at 773; *see Howsley & Jacobs v. Kendall*, 376 S.W.2d 562, 566 (Tex. 1964) ("petitioners' case was irretrievably prejudiced" when opposing counsel suggested "that someone else"—*i.e.*, "a 'battery of lawyers'"—"was testifying through the lips" of a witness). So too are unsubstantiated allegations of witness tampering. *Living Ctrs.*, 256 S.W.3d at 681 ("[A]ccusing the opposing party of manipulating a witness, without evidence of witness tampering, can be incurable, harmful argument.").

Because HouseCanary presented inadmissible, undesignated, and highly prejudicial evidence "in direct violation of a court order," a new trial is required. *Kendrix*, 907 S.W.2d at 114.

2. ***HouseCanary's counsel engaged in highly prejudicial attacks against Title Source and its counsel that further inflamed the jury's passion and prejudice.***

After attacking the integrity of Title Source's counsel during trial, HouseCanary doubled down during closing argument—going so far as to claim that Title Source constructed "a house of lies that has been perpetrated in this court." (HouseCanary closing 3/14/18 PM 13). These attacks on Title Source and its counsel directly contravene Texas Supreme Court precedent and mandate a new trial. *See Living Ctrs.*, 256 S.W.3d at 681 ("[J]ury argument that strikes at the appearance of and the actual impartiality, equality, and fairness of justice rendered by courts is incurably harmful not only because of its harm to the litigants involved, but also because of its

---

under which either party consulted or retained attorneys." Ex. 29, Order on Mot. in Limine at 7 (Feb. 1, 2018) ("Limine Order"). The prejudicial clip plainly involves the circumstances in which witnesses retained attorneys.

capacity to damage the judicial system."); *Standard Fire*, 584 S.W.2d at 840 (prohibiting "[t]he use in argument of the epithets, 'liar,' 'fraud,' 'faker,' 'cheat,' and 'imposter'"); *Amelia's Auto.*, 921 S.W.2d at 773 ("Not only is criticism or abuse of counsel disdained by Texas courts, but it is in violation of the Texas Rules of Civil Procedure and the Canons of Ethics.").

HouseCanary's closing argument was shot through with repeated accusations that Title Source and its lawyers "have been lying from the get-go." (HouseCanary closing 3/14/18 PM 67). HouseCanary's counsel started off by accusing Title Source's counsel of asking "false and misleading questions and answers" that "were designed to mislead and confuse you." *Id.* at 12–13. They went on to tell the jury that Title Source and its counsel had built "*a house of lies* that has been perpetrated in this court." *Id.* at 13 (emphasis added). Title Source repeatedly objected to these "[a]ttacks on counsel," *see id.* at 13–14, and the Court instructed HouseCanary's counsel to "[r]ephrase" and "move on," *id.* at 14, but the harm was already done—and it was incurable.

The Court's instruction did not even stop HouseCanary's counsel from attacking Title Source's counsel by name, arguing that "everything you heard from Mr. Wahby was a head fake as presented by his witnesses." (HouseCanary closing 3/14/18 PM 65). The attacks continued when HouseCanary's counsel said that "[t]hese are outright lies[,] [a]nd Mr. Wahby has the nerve to stand here and start telling you . . . ." *Id.* at 66. After the Court overruled Title Source's objection to "trying the lawyers," HouseCanary continued to harp on Mr. Wahby: "He has the nerve to say that we were up here lying. They have been lying from the get-go." *Id.* at 66–67.[11]

These repeated attacks upon the integrity of Title Source and its counsel were incurable and require a new trial. *PopCap Games, Inc. v. MumboJumbo, LLC*, 350 S.W.3d 699, 721 (Tex.

[11] HouseCanary's counsel sought to further fuel the jury's distrust of Title Source's counsel by warning the jury on four separate occasions that Title Source's counsel was trying to "fool" the jury. *See* (HouseCanary closing 3/14/18 PM 24) ("Don't be fooled."), *id.* at 25 (same), *id.* at 42 (same). These were "incurable jury arguments" that were "so inflammatory that their harmful nature cannot be cured by an instruction to disregard"—and need not even have been objected to at the time. *Crnic v. Vision Metals, Inc.*, No. 14-03-01307-CV, 2005 WL 81629, at *3 (Tex. App.—Houston [14th Dist.] Jan. 6, 2005, no pet.) (internal citation and quotation marks omitted).

App.—Dallas 2011, pet. denied) (incurable improper jury arguments include "unsupported accusations of witness tampering by the opposing party, and unsupported, extreme, and personal attacks on opposing parties and witnesses" such as "the use of inflammatory epithets such as 'liar' and 'cheat'"). Such argument is particularly egregious when directed at opposing counsel. *Amelia's Auto.*, 921 S.W.2d at 773; *Circle Y of Yoakum v. Blevins*, 826 S.W.2d 753, 758 (Tex. App.—Texarkana 1992, pet. denied), *abrogated on other grounds by State Farm Fire & Cas. Co. v. Morua*, 979 S.W.2d 616 (Tex. 1998) ("Charges that opposing counsel . . . was untruthful are highly improper and are generally considered to be incurable."). And when an objection is overruled—as it was when HouseCanary claimed Wahby was involved in "outright lies"—the harm is magnified: "[O]verruling of the objection was calculated to impress the jury that the argument was permissible." *Hemmenway v. Skibo*, 498 S.W.2d 9, 14 (Tex. Civ. App.—Beaumont 1973, writ ref'd n.r.e.) (granting new trial based on improper argument). But not even "an instruction from the court or retraction of the argument could . . . remove its effects," and a new trial is necessary. *Living Ctrs.*, 256 S.W.3d at 680–81 (remanding for a new trial due to criticism of defendants' counsel and other inflammatory remarks made during plaintiff's closing argument); *Amelia's Auto.*, 921 S.W.2d at 773 (reversing and granting new trial because of "[a]ttacks upon the integrity of opposing counsel"); *Circle Y of Yoakum*, 826 S.W.2d at 759 (concluding that "improper argument caused the rendition of an improper verdict" and remanding case for a new trial); *Tex. Emp'rs' Ins. Ass'n v. Butler*, 287 S.W.2d 198, 200–02 (Tex. Civ. App.—Fort Worth 1956, writ ref'd n.r.e.) (unwarranted attack on integrity of opposing counsel was incurable argument requiring new trial).

HouseCanary's counsel's repeated attacks are precisely the kind of "[u]nsupported, extreme, and personal attacks on opposing parties" that "compromise the basic premise that a trial provides impartial, equal justice" and merit a new trial. *Living Ctrs.*, 256 S.W.3d at 680.

B. HouseCanary flagrantly violated the Court's order on Title Source's motion in limine.

HouseCanary's deliberate attempts to stoke juror prejudice against Title Source were evident at other times during trial. HouseCanary solicited prejudicial testimony—that Title Source allegedly engaged in misconduct during discovery and that Title Source was "bullying" HouseCanary—in direct violation of the Court's Order on Motions in Limine. These actions undermined the whole purpose of in limine motions, which is "to prevent the other party from asking prejudicial questions and introducing prejudicial evidence in front of the jury without first asking the court's permission." *Onstad v. Wright*, 54 S.W.3d 799, 805 (Tex. App.—Texarkana 2001, pet. denied). The harm done by HouseCanary's highly prejudicial violations of the motion in limine was incurable—thus justifying a new trial—because "instructions to the jury would not eliminate the danger of prejudice." *Id*.

The Court's Orders expressly *prohibited* HouseCanary from referring to Title Source's alleged misconduct during discovery and litigation. *See* Ex. 29, Limine Order at 3 (ruling that "[a]ny reference to motions filed by either party prior to trial and/or orders entered by this Court, including those related to discovery disputes" was off-limits); *id.* at 6 (ruling that "[a]ny reference in the presence of the jury that Plaintiff delayed or was slow in providing information or documentation to Defendant after plaintiff, or any party herein, asserted their claim or any reference to the length of time it took for Plaintiff to respond to any request for information" was off-limits). But that did not stop HouseCanary. HouseCanary's counsel repeatedly—and flagrantly—violated those Orders. *See, e.g.*, (Eisenshtadt 2/1/18 PM 6) ("Q. . . . By the way, you're aware, sir, that Title Source never turned over to HouseCanary any of the information or a copy of the Title Source complexity score. Are you aware of that?"), *id.* at 42 ("Q. [re. Ryan's work papers] Do you know that's never been shown to HouseCanary?"), *id.* at 102 ("Q. . . . [T]this document was obtained from the personal files of Jordan Petkovski. This document, Title Source didn't even have a copy of it to give us as they're obligated to do."), (Stroud 2/26/18 PM 193) ("Q. And was this document [Title Source's AVM PowerPoint presentation], before you had located it online, produced to HouseCanary in this litigation? A. No, it was not.")[12]; (Rosenberg 3/1/18 AM 37) ("Q. Will you admit that TSI produced a folder for its Similarity Score and that folder -- and that folder was empty?").

Although Title Source objected, (Stroud 2/26/18 PM 193), and the Court admonished HouseCanary's counsel about this tactic—"Mr. Behncke, what happened with the mentioning of the litigation issue in front of the jury," *id.* at 213—HouseCanary's counsel brazenly asserted "that's not the last time that this Court is going to be presented and this jury is going to be presented with evidence of things that they have purposefully hidden, of events that we were never made aware of as they're obligated to make us aware of during the normal course of discovery," *id.* at 215. Even when the Court reminded HouseCanary's counsel that "I have *already told you* . . . I don't believe that's going to come in," *id.* at 218 (emphasis added), HouseCanary's counsel still did not relent—telling the Court that "[y]ou are going to be presented with that evidence," *id*. Although HouseCanary's counsel promised to "approach the bench," the Court noted that counsel "certainly didn't approach the bench before talking about that." *Id*. In fact, that Court was so "taken aback" that it "didn't even wait for [Title Source] to ask to strike that to the jury." *Id*. HouseCanary's counsel was unrepentant—and even attempted to minimize its own misconduct by accusing Title Source of "making a mountain out of a molehill." *Id.* at 216. Title Source would have been entitled to a mistrial upon the objection it made then, and it is entitled to a new trial now. *See Kendrix*, 907 S.W.2d at 114 (when evidence was presented in violation of order in limine, "[t]he trial court should have ruled decisively and granted a mistrial").

HouseCanary's counsel further violated the Court's order by referring to Title Source "bullying" HouseCanary. Ex. 29, Limine Order at 5. Specifically, HouseCanary's counsel twice asserted that Title Source was "bullying" HouseCanary into giving Title Source its data

[12] Although the Court sustained Title Source's objection that the exchanged violated a motion in limine and instructed the jury to disregard the question, it did not instruct the jury to disregard the witness's answer. (Stroud 2/26/18 PM 193).

(Eisenshtadt 2/1/18 AM 40),[13] and elicited testimony from Jeremy Sicklick that Title Source was a "bully" and "wanted to put us out of business . . . [a]nd [that] [Title Source] w[as] just going to beat us up," (Sicklick 3/7/18 PM 96–98).[14] HouseCanary's counsel only exacerbated the problem by then calling attention to the "word" bully and asking Sicklick to rephrase without using "that word." *Id.* at 97. Because this prejudicial testimony violated the Court's orders and could not be cured by an instruction to disregard, a new trial is required. *Kendrix*, 907 S.W.2d at 114.

C. HouseCanary's exhortations of the jury to return a verdict against "corporate America" and send a message in "the Wall Street Journal" were improper, prejudicial, and incurable.

Over a century of Texas precedent prohibits counsel from encouraging a jury to use a case to send a message to the broader business community—rather than adjudging the evidence before it. This rule is critical to the sound administrative justice, because such language is "highly improper and calculated to arouse the passions and prejudices of the jury, and cause[s] them to render a larger verdict than would otherwise have been rendered." *Postal Tel. Cable Co. of Texas v. Smith*, 135 S.W. 1146, 1147 (Tex. Civ. App. 1911), *aff'd*, 135 S.W. 1147 (Tex. 1911) (granting new trial where jury was told that "the only way to hold these companies in line and make them give good service is to punish them by putting a money fine on them; that wakes them up; that touches them"). Texas courts have not hesitated to order new trials based on similar language. *E.g.*, *Allis-Chalmers Mfg. Co. v. Bd.*, 118 S.W.2d 996, 1000 (Tex. Civ. App.—

---

[13] During his cross-examination of Jeff Eisenshtadt, HouseCanary's counsel stated that "HouseCanary pretty much let you know that they weren't going to be *bullied* into giving you more access to data. And after they told you that they weren't going to get *bullied* into it, that's when you went nuclear and filed termination letters and lawsuits, right?" (Eisenshtadt 2/1/18 AM 40) (emphasis added). The Court sustained Title Source's objection to these references, but did not instruct the jury to disregard counsel's statements. *Id*. at 40–41.

[14] Although the Court instructed the jury to disregard Sicklick's testimony that Title Source was a "bully," (Sicklick 3/7/18 PM 97), the Court did not instruct the jury to disregard Sicklick's testimony that Title Source "wanted to put us out of business. Like, that was pretty clear. And they were just going to beat us up." *Id.* at 98–99.

Amarillo 1938, no writ) ("I want you to go out and return a verdict in this case that will teach these big implement companies not to trespass upon our private citizens' lands and destroy and tear up their property."); *Fortenberry v. Fortenberry*, 582 S.W.2d 188, 190 (Tex. Civ. App.—Beaumont 1979, writ ref'd n.r.e.) ("The word has got to go out from the courtroom.").

"[U]nless a court trial is to take on the atmosphere of a Roman Circus, counsel must be restrained in the use of inflammatory words," *Fortenberry*, 582 S.W.2d at 190.—including HouseCanary's inflammatory appeals to the jury in this case to "stand[ ] up and . . . tell[ ] Corporate America I've had enough of this," (HouseCanary closing 3/14/18 PM 72). HouseCanary repeatedly told the jury that they had to rule in its favor to "tell[] the United States of America and the business community that this community, Bexar County, Texas, is where we draw the line on corporate unethical behavior." *Id*. HouseCanary's counsel further inflamed the jury's passion by repeatedly exhorting it to crack down on "corporate unethical behavior" throughout America instead of simply deciding the case based on the evidence before them: "[T]his isn't about settling the disputes between one party and another." *Id.* at 71–72; *see also id.* at 72 ("[S]tand[ ] up and . . . tell[ ] Corporate America" by putting this case "in the Wall Street Journal.").

These exhortations of the jury were calculated to, and plainly did, inflame the jury's passion and prejudice to award damages based on emotion, rather than the evidence—and over a century of Texas precedents demands a new trial in these circumstances. *See*, *e.g.*, *Fortenberry*, 582 S.W.2d at 190 (such argument was "truly inflammatory and improper," and "the harm was already done" as soon as it was made).

D. Improperly admitted evidence crucial to key issues regarding liability and damages probably resulted in an improper verdict.

In addition to the fraud problems and various ways in which HouseCanary sought to stage a judicial circus instead of litigating appropriately, HouseCanary also introduced a barrage of improper evidence, over Title Source's repeated objections, designed to mislead the jury.[15] Three instances were especially harmful, because the improper evidence was "crucial to a key issue." *Discovery Operating, Inc. v. BP Am. Prod. Co.*, 311 S.W.3d 140, 170 (Tex. App.—Eastland 2010, pet. denied). Any one of these warrants a new trial—and certainly together, they require one. *Nissan Motor Co.*, 145 S.W.3d at 144 (stating that "evidence improperly admitted" requires a new trial if it "probably resulted in an improper judgment").

1. *The "wipe the vendor" spreadsheet was highly prejudicial.*

Over Title Source's hearsay objection, the Court admitted a spreadsheet (DX1072) purporting to contain the addresses of all the properties for which Title Source requested value reports from HouseCanary's servers—including many addresses that appeared to be invalid. (Sicklick 3/9/18 AM 92). HouseCanary ambushed Title Source with the spreadsheet—which spanned several thousand printed pages—only the day before introducing it at trial, (Sicklick 3/7/18 PM 89), so Title Source had no ability to even meaningfully review it, much less investigate its accuracy. HouseCanary used the spreadsheet to try to show that Title Source deliberately sought to lower the hit rate of HouseCanary's API below the contractual requirement of 80% by requesting value reports for fake addresses in order to trigger its termination rights under the parties' agreement. (Sicklick 3/9/18 AM 96–97). HouseCanary admitted that the spreadsheet was prepared for litigation (Sicklick 3/7/18 PM 90)—in fact, it was created just a week before it was introduced at trial, *id.* at 88. Because this spreadsheet was admittedly prepared for litigation—and *not* "kept in the course of a regularly conducted business activity" when "making the record was a practice of that activity" (Tex. R. Evid. 803(6))—it did not qualify for the business documents exception to the hearsay rule and should not have been

[15] Indeed, some jurors *were* confused. When the Court asked each juror individually if the verdict was their "individual verdict as to each answer and to the entire verdict," Juror Eva Brown responded that she was "confused" because she "didn't hear from FNC," the vendor Title Source uses to manage the appraisal process—indicating a lack of familiarity with the parties and issues in the case. *See* (3/14/18 AM 116).

admitted. *E.g.*, *Sessums v. State*, 129 S.W.3d 242, 249 (Tex. App.—Texarkana 2004, no pet.) ("A letter written in preparation for litigation is not qualified as a business record under Rule 803(6).").[16]

HouseCanary belabored the details of this improperly admitted spreadsheet—asking Sicklick "what was the weirdest address that you recall that was sent in as an invalid address from TSI?" (Sicklick 3/7/18 PM 94)—all in an effort to paint Title Source in a bad light and inflame the jury. Given its highly prejudicial nature—and the effect to which it was used—the improperly admitted spreadsheet "probably caused" the rendition of an improper verdict, entitling Title Source to a new trial. *Discovery Operating*, 311 S.W.3d at 169.

2. ***The unauthenticated and improperly admitted Pingdom report was the only evidence on a crucial element of the case.***

Similarly, the improper admission of the Pingdom report, DX 182, which purported to document "the availability of the Appraiser software from October of 2015 to April 2016," over Title Source's hearsay objection (Poindexter 3/2/18 AM 56), also probably caused the rendition of an improper verdict. The Pingdom report was the *only* evidence HouseCanary offered to rebut Title Source's contention that HouseCanary failed to meet Amendment One's "uptime" requirement, which, in turn, enabled Title Source to "immediately terminate" the agreements. *See, e.g.*, (Title Source opening 1/31/18 AM 47). The "uptime" requirement specified that the app had to be "reachable" so that "Appraisers can access their respective Appraisals, and can complete Appraisals." PX 3 at 16. HouseCanary argued that the Pingdom report showed an "uptime of 99.9 percent," as evidence that it met the uptime requirement. (Rhyne 3/6/18 AM 164).

Given the "amount of emphasis placed on the erroneous[ly]" admitted Pingdom report, which was "calculated to overcome" Title Source's otherwise uncontroverted evidence that the

[16] The hearsay exception for summaries of business records that are prepared for trial does not apply, because the spreadsheet is not a "summary" of underlying business records and HouseCanary never made the underlying records available to Title Source before moving to admit it. *See Duncan Dev., Inc. v. Haney*, 634 S.W.2d 811, 812 (Tex. 1982).

app was *not* capable of being used to "complete [a]ppraisals," *see infra* pp. 77–81, there can be little question that its admission "probably resulted in an improper judgment." *Graham v. Scott*, 547 S.W.3d 245, 249 (Tex. App.—Houston [1st Dist.] 2017, pet. denied). And its admission was erroneous. To be admissible as business record, a document like the Pingdom report, which was created by a third party and not kept in the course of the proponent's business, must be authenticated by a "qualified witness" with "personal knowledge of the [third-party's] record-keeping policies." *Martinez v. Midland Credit Mgmt., Inc.*, 250 S.W.3d 481, 484–85 (Tex. App.—El Paso 2008, no pet.) (quoting Tex. R. Evid. 803(6)). HouseCanary did not properly authenticate the Pingdom report, and its admission was therefore error.

HouseCanary sought to authenticate the Pingdom report through the testimony of Mike Poindexter, HouseCanary's Vice-President of Product Engineering, *see* (Poindexter 3/2/18 AM 54–55), but his testimony made clear that he had *no* knowledge of *how* Pingdom recorded the data or prepared the report and had *no* "knowledge of [Pingdom's] record-keeping policies," and was thus not qualified to authenticate the report. *See id.* at 47–50 (testifying that he only had "an understanding of how [the Pingdom data] was available to [HouseCanary]").

3. *Sicklick's prejudicial, improper use of his cell phone on the stand to look up answers probably resulted in an improper verdict.*

After Title Source's counsel questioned HouseCanary CEO Sicklick about a HouseCanary value report for a property in Dallas that listed as a comparable a property worth over 60 times as much, among other deficiencies, (Sicklick 3/8/18 PM 39–48); *see* PX 532, HouseCanary's counsel on redirect sought to have Sicklick explain away the deficiencies in his company's product by testifying about the characteristics of the property's neighborhood. But, as Sicklick testified, he did not have personal knowledge of that area, and had previously relied on his app to find the answers. (Sicklick 3/9/18 AM 37) ("I looked at my app. I've not been to these."). The Court properly sustained Title Source's hearsay objection as to this testimony. *Id.* Yet, over Title Source's repeated hearsay objections, Sicklick was permitted to use his personal cell phone to find and relay the answers—essentially, to Google the answers on the stand. *Id.* at 39–44.

This is far outside the bounds of fair and appropriate trial practice. In fact, Title Source is aware of no other case where a witness has been allowed to use a smartphone to look up answers to aid their testimony while on the stand. This line of testimony was patently improper, and its accuracy could not be properly tested as Title Source did not have access to the app. Just as relaying what he had previously seen online was hearsay, so too was relaying the same out-of-court statements live on the stand. *See* Tex. R. Evid. 801(d).

The highly prejudicial nature of Sicklick's inadmissible testimony is plain, as it was the only thing HouseCanary offered to rebut Title Source's evidence that HouseCanary's analytics provided incomplete and inaccurate data and selected poor comparables. *See* (Sicklick 3/8/18 PM 39–48); *see also Graham*, 547 S.W.3d at 249 (improperly admitted evidence more likely to be harmful if there was "contrary evidence the improperly admitted evidence was calculated to overcome"). The improper admission of this testimony probably caused the rendition of an improper verdict, and a new trial is warranted.

III. Unreliable testimony by HouseCanary's experts severely prejudiced Title Source.

A new trial is warranted for the additional, independent reason that Title Source was prejudiced by the unreliable testimony of HouseCanary experts Walter Bratic, V. Thomas Rhyne, and Dan Manheim. Their testimony failed to meet the standards established in *E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549, 556 (Tex. 1995) and Texas Rule of Evidence 702, and was essential to the jury's verdict. The Court should order a new trial so the jury can weigh the evidence without the prejudice of this inadmissible testimony.

It is imperative that the trial court "act as an evidentiary gatekeeper to screen out irrelevant and unreliable expert evidence." *Enbridge Pipelines (E. Tex.) L.P. v. Avinger Timber, LLC*, 386 S.W.3d 256, 262 (Tex. 2012). This responsibility requires courts "to rigorously examine the validity of facts and assumptions on which the testimony is based, as well as the principles, research, and methodology underlying the expert's conclusions and the manner in which the principles and methodologies are applied by the expert to reach the conclusions." *Whirlpool Corp. v. Camacho*, 298 S.W.3d 631, 637 (Tex. 2009). The significance of the court's gatekeeper function has been underscored by the Texas Supreme Court, which has observed that juries are predisposed to "accept the opinion of an expert witness as true simply because of his or her designation as an expert." *Robinson*, 923 S.W.2d at 553.

"For an expert's testimony to be admissible under Texas Rule of Evidence 702, the party offering the expert's testimony bears the burden of proving that the witness is qualified, that the expert's opinion is relevant to the issues in the case, and that the opinion is based upon a reliable foundation." *Fraud-Tech, Inc. v. Choicepoint, Inc.*, 102 S.W.3d 366, 381 (Tex. App.—Fort Worth 2003, pet. denied). "Expert testimony is unreliable if there is simply too great an analytical gap between the data [relied upon] and the opinion proffered." *Hous. Unlimited, Inc. Metal Processing v. Mel Acres Ranch*, 443 S.W.3d 820, 835 (Tex. 2014) (quotations omitted). And "[e]xpert testimony is conclusory if there is no factual basis for it or if the basis offered does not, on its face, support the opinion." *Kareh v. Windrum*, 518 S.W.3d 496, 510 (Tex. App.—Houston [1st Dist.] 2017, pet. granted). Error in admitting improper expert testimony on critical issues is grounds for a new trial. *Reliance Steel & Aluminum Co. v. Sevcik*, 267 S.W.3d 867, 873 (Tex. 2008) (if "erroneously admitted" evidence was "crucial to a key issue, the error was likely harmful"); *see also Sw. Energy Prod. Co. v. Berry-Helfand*, 491 S.W.3d 699, 705, 721 (Tex. 2016) (because testimony of damages expert was unreliable, there was insufficient evidence to support the full verdict and the court "revers[ed] and remand[ed] the breach-of-contract and misappropriation-of-trade-secret claims for a new trial").

Under these familiar, well-established standards, the expert opinion at issue is unreliable, inadmissible, and ample grounds for a new trial.

A. Walter Bratic's opinions were inherently unreliable, speculative, and methodologically unsound.

The entirety of Bratic's testimony was improper because each of his three opinions—the $201.6 million "investment value" opinion, the alternative $64.1 million "reasonable royalty" opinion, and the $33.8 million "lost profits" opinion—was speculative, unsupported, and inherently unreliable. Because the jury adopted each of these inadmissible opinions as the measure of damages for HouseCanary's misappropriation, fraud, and breach of contract claims, properly excluding Bratic's testimony requires a new trial. *See* Ex. 30, Jury Charge Q. 13, 28, 39, 43–45.

1. *Bratic's opinion regarding the value of HouseCanary's trade secrets to Title Source should have been excluded.*

Bratic's nearly identical "prudent investor" and "reasonable royalty" opinions concerning the purported "value of HouseCanary's trade secrets to Title Source" were methodologically flawed, rife with speculation, and contained "too great an analytical gap between the data relied on and the expert's opinion" he offered, making it unreliable and "not probative evidence." *Sw. Energy*, 491 S.W.3d at 717. Neither opinion was connected to any objective data or evidence about what a party would actually pay for use of HouseCanary's five purported trade secrets. *See id*. at 720 (rejecting damages expert testimony because it "paints an incomplete and misleading picture about the royalty terms a willing buyer and seller would negotiate"). Bratic claimed Title Source would have paid over $200 million (or $64 million) for use of HouseCanary's five purported secrets—even though Title Source contracted to pay a mere $5 million to use all of those "secrets" *in addition to* other technology without paying on a per-use basis. Bratic could not point to any licensing agreement—or anything else—that valued HouseCanary's technology at more than $5 million, and his invented trade secret damage numbers are wholly unreliable.

Numerous errors infected Bratic's opinions and rendered them unreliable, including: (1) the above-referenced disregard of objective evidence of the value of the trade secrets, (2) his failure to connect his opinion to any evidence of harm to HouseCanary, (3) his failure to substantiate his claim that Title Source would pay tens or hundreds of millions of dollars so that a separate company, Quicken Loans, could have access to value reports, and (4) his use of numerical inputs for his calculations that were wholly unconnected to the data. Each flaw is fatal and renders Bratic's damages opinion unreliable and irrelevant.[17]

First, Bratic contravened the command of the Texas Supreme Court by ignoring objective evidence of value—and opining that the purported trade secrets were worth more than *twenty-five times* the price Title Source actually paid for a bundle of technology that included, but was not limited to, the supposed secrets. In *Southwest Energy*, 491 S.W.3d at 720, the Supreme Court held that a damage expert's opinion was unreliable and no evidence because the expert ignored the value placed on the trade secrets in an "exemplary" contract. The contract included a formula that the plaintiff and another party had agreed upon for calculating the amount she would be paid for oil wells discovered using her secret methods—but her damage expert ignored the contract's methodology when calculating the damages owed by the defendants for using the plaintiff's misappropriated secrets to discover wells. *See id*. According to the Texas Supreme Court, ignoring this objective evidence of the price a party would pay for use of the trade secrets rendered the expert's opinion unreliable: a court "cannot excuse the absence of objective evidence that places the compensation structure in context and bears directly on 'the amount that a person desiring to use the trade secret would be willing to pay for its use.'" *Id*. at 721 (granting new trial after striking damage expert's testimony).

Bratic's opinions suffer from the same malady as the expert's in *Southwest Energy*—they completely ignored the objective evidence that Title Source had only contracted to pay a mere $5 million per year to use HouseCanary's technology, not, as he claimed, $152.46 million or $48.51

[17] Furthermore, Bratic's "prudent investor" opinion is legally barred by TUTSA, which governs claims accruing on or after September 1, 2013. *See, e.g., Sw. Energy*, 491 S.W.3d at 711 n.7. TUTSA only allows for damages that reflect "the actual loss . . . and the unjust enrichment caused by misappropriation," or in the alternative, the "imposition of liability for a reasonable royalty." JNOV at 53 n.15 (quoting TUTSA § 134.004 and citing *Sw. Energy*, 491 S.W.3d at 711 n.7). Because TUTSA displaces all other available remedies, TUTSA § 134A.007, the Court erred in permitting Bratic to opine about the value of HouseCanary's trade secrets to Title Source. Further, even when investor value is properly considered, it is not the value to the alleged infringer that is to be measured, but rather what a "reasonably prudent investor would have paid for the trade secret." *See Sw. Energy*, 491 S.W.3d at 711.

million per year. Bratic admitted that "in this case there were actual negotiations and actual agreements entered" for the trade secrets; specifically, Amendment One granted Title Source rights to a variety of technology, including HouseCanary's "AVM, the Value Report, [and] the API," which use was "not limited" by Title Source, for only "$5 million a year." (Bratic 3/12/18 AM 84–85). Yet, despite this direct objective evidence of the amount Title Source would pay for the trade secrets, which covers all of the "uses" that Bratic purported to value, Bratic instead claimed that Title Source would pay either $152.46 million (as a "prudent investor") or $48.51 million (in "reasonable royalties") per year. Ex. 31, Bratic Demonstrative at 34, 54. This is nonsensical. And other objective, uncontroverted evidence confirms that Bratic's calculations are completely unmoored from reality: Not only are competing AVMs available for free, but HouseCanary also paid less than $1 million per year to license *two* different AVMs from Black Knight for unlimited use, and Title Source paid only $1.2 million per year to FNC, another technology vendor, to use one of its AVMs. (Bratic 3/12/18 AM 27–29, 37, 48–49, 120). Under *Southwest Energy*, Bratic's disregard of objective evidence that "bears directly on 'the amount that a person desiring to use the trade secret would be willing to pay for its use,'" makes his opinion unreliable, and a new trial must be granted. *Sw. Energy*, 491 S.W.3d at 721.

Second, Bratic's opinions are disconnected from any harm *caused* to HouseCanary. Bratic's opinions represent the purported (and highly inflated) value of unknown technology at a random time, not damages *caused* by misappropriation of specific trade secrets. A damages expert must connect his damage figure with evidence showing that the purportedly tortious conduct *caused* that amount of damages. *Hous. Unlimited, Inc. Metal Processing*, 443 S.W.3d at 827, 833–35 (damage expert's testimony should have been excluded because she failed to show the "amount [of damages] . . . caused by the defendant's conduct"); *cf. Lakeway Reg'l Med. Ctr., LLC v. Lake Travis Transitional LTCH, LLC*, No. 03-15-00025-CV, 2017 WL 672451, at *6 (Tex. App.—Austin Feb. 17, 2017, pet. denied) (There must be a "'direct causal link' between the misconduct, the plaintiff's injury, and the damages awarded."). "A contrary approach would allow parties with the burden of proof on a particular fact (such as causation) to avoid the obligation to put forth evidence by simply instructing their expert to assume the fact in forming their opinions." *Hous. Unlimited, Inc. Metal Processing*, 443 S.W.3d at 833. Yet Bratic did not connect either of his opinions with conduct that purportedly harmed HouseCanary.

Moreover, assuming that it continues to be a valid damages methodology post-TUTSA, it is only appropriate to measure the total "investment value" of a trade secret when the *entire* value of the trade secret has been destroyed through publication. *See Precision Plating & Metal Finishing Inc. v. Martin-Marietta Corp.*, 435 F.2d 1262, 1263 (5th Cir. 1970) (applying "investment value" theory, because defendant "made such public disclosure of the [secret] process as to amount to a complete destruction of the value of the process"); *cf. Univ. Computing Co. v. Lykes-Youngstown Corp.*, 504 F.2d 518, 535 (5th Cir. 1974) (explaining total trade secret value "is an appropriate measure of damages only when the defendant has in some way destroyed the value of the secret"). Not only did Bratic concede that the five HouseCanary trade secrets were not destroyed, Ex. 32, Bratic Preliminary Expert Report ("Bratic PER") ¶ 67, but he never established a causal link between the purported harm and his damages figure. There is no evidence that HouseCanary lost a single sale as a result of the alleged misconduct, or that Title Source ever marketed or sold MyAVM. Thus, Bratic's $201.6 million investment value opinion necessarily *overstates* the harm caused by the purported misappropriation and is not a reliable measure of damages here.

Nor did Bratic connect his $64.1 million "reasonable royalty" opinion to any harmful conduct. A royalty represents the harm caused at the time a misappropriator steals a trade secret and uses it rather than paying for it. *See Sw. Energy*, 491 S.W.3d at 711 (royalty must represent "what a willing licensor and licensee would have settled on as the value of the trade secret at the beginning of the infringement"). Bratic needed to show that Title Source caused harm by misappropriating all five trade secrets in January 2015—the date he used to value them—without paying for them, but Bratic did not point to any unpaid-for use of trade secrets at that time. Indeed, some trade secrets did not even exist (and Title Source could not have used them) until

over a year later. *See, e.g.*, Rhyne 3/6/18 AM 112 (AVM outputs were not disclosed to Title Source until July
28, 2015). His opinion about the purported lump-sum value of all five trade secrets in January 2015 is unrelated to any evidence of misappropriation or harmful conduct—and does not represent "what the parties would have agreed to as a fair price for licensing the defendant to put the trade secret to the use the defendant intended at the time the misappropriation took place." *Sw. Energy*, 491 S.W.3d at 711 (quotations omitted).

Third, Bratic's "prudent investor" and "reasonable royalty" opinions contain a fatal analytical gap: The absence of evidence that Title Source would pay anything, much less millions of dollars, so a *third party* could use an AVM. *See Sw. Energy,* 491 S.W.3d at 717 ("We are not required . . . to ignore fatal gaps in an expert's analysis or assertions that are simply incorrect.") (citation omitted). Bratic's opinions depend on his claim that Title Source would pay HouseCanary $11, or $3.50, per use so that *Quicken Loans*—a non-party—could use HouseCanary's trade secrets millions of times. (Bratic 3/12/18 AM 43). But there was no evidentiary basis to support Bratic's assertion that Title Source would pay any amount—much less tens or hundreds of millions of dollars—so that a third party could use HouseCanary's technology. This is outlandish, and conclusory, because "there is no factual basis for it [and] the basis offered does not, on its face, support the opinion." *Kareh*, 518 S.W.3d at 510.

Bratic's explanation for why he included Quicken Loans' use of value reports in his calculation is utterly lacking. While admitting "that Quicken Loans is a separate corporation" and not party to any licensing agreement with Title Source, (Bratic 3/12/18 AM 43), he nevertheless insisted that Title Source would pay for Quicken Loans to use trade secrets because the "Title Source AVM is available to Quicken Loans." (Bratic 3/9/18 PM 111). But even if that is true, the key question—why Title Source would pay hundreds of millions of dollars to benefit a third party, without receiving a penny of reimbursement—remains unanswered, making "[Bratic's] explanation or offered basis [] facially defective," *Kareh*, 518 S.W.3d at 516.[18]

Indeed, at Bratic's *Robinson* hearing, the Court noted that "Quicken Loans would be a third party," (1/24/18 87), and repeatedly pressed HouseCanary's counsel to justify Bratic's assumption that Title Source would derive cost savings based on such a third party's anticipated use of HouseCanary's technology, calling it "very speculative" and "a stretch." *See id.* at 85, 87, 89–91. The Court rightly "struggle[d]" with the fact that Bratic was "using a third party's potential use or appropriation of this stuff . . . , that's not a party to the contract, certainly not a party to the case" to support his valuation. *Id.* at 89. Yet Bratic could never explain why Title Source would pay for such third-party use without receiving a monetary benefit itself—he repeated the claim that Title Source makes products for Quicken Loans, but did not explain why Title Source would give away money so Quicken Loans could benefit. (Bratic 3/9/19 PM 101).

The absence of evidence that Title Source would ever provide Quicken Loans millions of value reports *for free* when it would cost Title Source hundreds of millions of dollars to do so is a "fatal analytical gap" that renders Bratic's opinion unreliable. *Elizondo v. Krist*, 415 S.W.3d 259, 265 (Tex. 2013); *see also Sw. Energy*, 491 S.W.3d at 717 ("[A]n opinion is conclusory and cannot be considered probative evidence if it lacks a factual basis or is made in reliance on a basis that does not support the opinion.").

Fourth, Bratic's calculations contained other serious errors, each of which renders his opinion unreliable:

- The 13.86 million "use" numbers Bratic plugged into his faulty equation were purely speculative. There is no evidence that Title Source would use HouseCanary's trade secrets to complete 660,000 appraisals; to the contrary, the evidence showed that appraisers are *prohibited by professional rules and regulations from using AVMs during*

[18] HouseCanary has now sued Quicken Loans directly in a separate lawsuit in federal court, and that is where, if at all, this issue should be litigated, rather than speculating about it here. *See HouseCanary Inc. v. Quicken Loans, Inc.*, No. 5:18-CV-519-FB (W.D. Tex. filed May 25, 2018).

appraisals. JNOV at 57–62.[19] Bratic's claim that Quicken Loans would conduct 13,200,000 banker transactions per year (55,000 per day) is belied by the record evidence which shows that AVMs would only be used for a small (but unquantified) subset of prospective customer leads that progressed to the application stage of the loan refinance process. *Id.*[20] Indeed, Sicklick's recent testimony (under oath) in the federal court case that HouseCanary brought against non-party Quicken Loans confirms that Bratic's numbers are inaccurate and wildly inflated: Sicklick admitted that HouseCanary understood that what Quicken Loans and Title Source "were looking for was how to build more and better information into the appraisal and valuation process to be able to value homes more accurately, because they were dealing with a lot of repurchase demands at the time," Ex. 11, 10/23 Fed. Hearing Tr. at 397, and that the companies informed HouseCanary that they needed "good valuations to address this repurchase demand problem" for "somewhere between three and four thousand mortgages and related appraisals a day," *id.* at 399. This testimony exposes how flawed Bratic's assumption is that Quicken Loans *alone* would use 55,000 valuations per day in connection with customer leads. Sicklick's testimony is precisely the kind of "admission against interest made by the successful party after the trial has been concluded . . . [that] [is] grounds for a new trial." *Gannaway*, 85 S.W.2d at 347.

- Bratic's $11-per-transaction value for his "prudent investor" opinion also has no basis in evidence or reality. JNOV at 62–64. Bratic derived this figure from a bullet point in an email indicating that in 2015, Title Source paid an unspecified vendor $11 for use of a limited, highly specialized composite of multiple AVMs that it only used for an idiosyncratic, limited purpose "outside of the production workflow" (*i.e.*, the business of appraisals and mortgage lending). (Petkovski 2/20/18 PM 16–17). In addition, the $11 figure is contradicted by the undisputed evidence that Title Source *was not willing to pay $11* for bulk value reports because that would "obviously be cost prohibitive." JNOV at 62–64. Furthermore, there is no evidence linking the $11 valuation to any of HouseCanary's purported trade secrets and therefore no basis to use that valuation (which relates to an entirely distinct product sold by a third party) as a substitute or proxy for the

[19] Title Source incorporates its argument, authorities, and evidence from its July 11, 2018 Motion for Judgment Notwithstanding the Verdict (JNOV) to support its arguments that a new trial is warranted.

[20] HouseCanary all but conceded that Bratic's data was insufficient concerning Title Source's anticipated use of appraisal, value and AVM reports, and that Bratic's calculation fails to account for the overlap between Quicken Loans' and Title Source's anticipated use of value reports. Def.'s Opp. to Mot. to Exclude Bratic at 17, 22 (Jan. 19, 2018). To deflect from these deficiencies, HouseCanary complained that Title Source did not produce documents concerning its historical use of value reports during discovery. *Id.* HouseCanary could have sought the Court's assistance if it believed that Title Source did not comply with its discovery obligations—but it did not. Its failure to do so is no exception to the rule that "[d]amage estimates . . . cannot be based on sheer speculation." *Sw. Energy*, 491 S.W.3d at 711–12.

valuation of each of HouseCanary's purported trade secrets. In Texas, an expert cannot claim that the cost of one product can be adopted as the value of a separate product, unless those products are actually the same. *See, e.g.*, *Sw. Energy*, 491 S.W.3d at 720.

- Bratic's alternative \$3.50-per-transaction value for his "reasonable royalty" opinion is similarly disconnected from the data, as that reflects the approximate price to purchase *up to 50* "value reports" from HouseCanary's website. *See* JNOV at 64–66.[21] Bratic testified that HouseCanary would *not* have charged Title Source this \$3.50 rate because Title Source would receive a lower bulk price because it would be purchasing *14 million* value reports. (Bratic 3/12/18 AM 77). In addition, Bratic provided no explanation as to why the various trade secrets (whose outputs make up only small pieces of a value report) would be worth the same as a full value report itself. Neither Bratic nor HouseCanary demonstrated that the allegedly misappropriated trade secrets were sufficient for Title Source to generate full value reports. Nor could they. Moreover, even if Title Source had paid the inflated \$3.50 for the 150,000 value reports it had allegedly received from HouseCanary, that would have amounted to damages of \$525,000, not more than 122 times that amount.

- Bratic's alternative \$3.50-per-transaction value for his "reasonable royalty" opinion is also unsupported because HouseCanary now advertises on their website that they will provide, even for small retail customers, an AVM value for \$1 per use. *See* Ex. 33, *Why HouseCanary AVM*, HouseCanary.[22] This, too, is exactly the kind of "admission against interest made by the successful party after the trial has been concluded . . . [that] [is] grounds for a new trial." *Gannaway*, 85 S.W.2d at 347. As Title Source is by no means a small retail customer, if Title Source were to have negotiated a per-use cost, the amount

---

[21] Bratic claims that he came up with the \$3.50 royalty rate by analyzing 15 factors set forth in a 1970s federal patent infringement case, *Georgia-Pacific Corp. v. United States Plywood Corp*., 318 F. Supp. 1116 (S.D.N.Y. 1970), Ex. 31, Bratic Demonstrative at 52, yet he misapplied several of the *Georgia-Pacific* factors. For example, although Bratic states that a hypothetical negotiation "would result in TSI obtaining a non-exclusive license to the HouseCanary Trade Secrets only," he concludes "this factor would have a neutral impact on a negotiated royalty between the parties." Ex. 32, Bratic PER ¶ 90. That is plainly wrong. "There is . . . a world of difference between a restricted license . . . and, on the other hand, an unrestricted license." *Georgia-Pacific*, 318 F. Supp. at 1138. And although the eighth factor considers "established profitability of the product made under the patent; its commercial success; and its current popularity," *id*. at 1120, Bratic cited HouseCanary's projected revenue from 2015 through 2019 and Title Source's purported recognition of the "potential economic benefits" of HouseCanary's technology in concluding this factor had an "upward impact" on the reasonable royalty rate, while simultaneously ignoring HouseCanary's actual, and much smaller, revenue from the very same products. Ex. 32, Bratic PER ¶¶ 97–99. Moreover, the Texas Supreme Court has never adopted the *Georgia-Pacific* factors. *See Sw. Energy*, 491 S.W.3d at 711–13.

[22] https://www.housecanary.com/real-estate-data-api/automated-valuation-model-avm (last visited Sept. 8, 2018).

would have been less than $1 per use—and definitively not anywhere close to the $3.50 that Bratic estimated.

- Bratic's period for calculating the expected use of trade secrets—2017 through the end of 2018—lacks any evidentiary foundation. JNOV at 67–68.
- Both of Bratic's calculations assumed that misappropriation occurred before many of the trade secrets even existed. *See Sw. Energy*, 491 S.W.3d at 711 (damages must represent what misappropriator would pay "at the beginning of the infringement"); (Bratic 3/9/18 PM 132, 144) (Bratic claimed all five trade secrets were misappropriated in "January 2015," which was "shortly after the Master License Services Agreement was executed"). No purported trade secret was shared with Title Source until months after January 2015—and at least one was not shared until March of 2016. *See* JNOV at 67 n.26.

As it is required to do, when the Court "independently evaluate[s] [the record] in determining if [Bratic's] opinion itself is reliable," *Merrell Dow Pharmaceuticals, Inc. v. Havner*, 953 S.W.2d 706, 713 (Tex 1997), it will find that the facts do not support Bratic's "prudent investor" and "reasonable royalty" opinions. Because Bratic's trade secrets opinions are infected with numerous analytical gaps and are "[un]reliable at each and every step," *Wilson v. Shanti*, 333 S.W.3d 909, 913 (Tex. App.—Houston [1st Dist.] 2011, pet. denied), Title Source is entitled to a new trial without Bratic's unreliable, inadmissible, and speculative testimony. *Sw. Energy*, 491 S.W.3d at 705 (because damages expert was unreliable, "[w]e therefore reverse and remand the breach-of-contract and misappropriation-of-trade-secret claims for a new trial").

2. *Bratic's opinion on lost profit damages should have been excluded.*

Bratic's lost profits opinion was similarly unreliable and irrelevant because it was based on nothing more than guesswork. *See* JNOV at 69-72; Reply ISO JNOV at 26-27. Bratic calculated his $33.8 million lost profits opinion by adding together (1) what Title Source would have paid to HouseCanary if the contract had remained in place for three years, minus his estimate of HouseCanary's costs, and (2) projected profits that HouseCanary could have earned from independent third-party appraisers who he believed would have adopted the (never-delivered) appraisal app merely because Title Source chose to use it. *See* JNOV at 69-70. His analysis is "[un]reliable at each and every step," making it "inadmissible," *Wilson*, 333 S.W.3d at 913, and is emblematic of why "[p]rofits which are largely speculative, as from an activity dependent . . . on promotion of untested products . . . or on the success of a new and unproven enterprise, cannot be recovered." *Texas Instruments, Inc. v. Teletron Energy Mgmt., Inc*., 877 S.W.2d 276, 279 (Tex. 1994).

First, Bratic's assumption that the parties' contract would have remained in effect for the full three-year term is baseless—the contract indisputably was terminable at Title Source's discretion after a single year, and Title Source indisputably terminated the contract in fewer than three years. PX 3 § 7.3; (Bratic 3/9/18 PM 164). Because of the termination provision, HouseCanary was only guaranteed to recover a single year's payment under the contract—and Bratic's persistence in using a three-year term despite definitive evidence to the contrary is precisely the kind of speculative expert testimony that is unreliable and inadmissible. *Atlas Copco Tools, Inc. v. Air Power Tool & Hoist, Inc*., 131 S.W.3d 203, 206–09 (Tex. App.—Fort Worth 2004, pet. denied) (expert's lost-profits calculation speculative because it assumed contract that automatically renewed every year would be renewed for six consecutive years despite letter terminating contract); *United Way of San Antonio, Inc. v. Helping Hands Lifeline Found., Inc.,* 949 S.W.2d 707, 711–12 (Tex. App.—San Antonio 1997, writ denied) ("[T]he mere hope for funding renewable at the discretion of another party will not support recovery of any future funds the other party could withhold at its discretion.").

Second, Bratic's opinion that HouseCanary would have a profit margin of 95% on its contract with Title Source for 2016, 2017, and 2018 is unreliable and conclusory. Bratic relied on internal projections (DX245) for 2016 that refer to "95%+ margin economics" and interviews with HouseCanary personnel to conclude that HouseCanary would have had a 95% profit margin on the contract for 2016 through 2018. (Bratic 3/9/18 PM 173). Expert testimony that relies on an internal projection is inadmissible absent evidence that the data is reliable. *Citrin Holdings, LLC v. Minnis*, No. 14-11-00644-CV, 2013 WL 1928652, at *11 & n.16 (Tex. App.—Houston [14th Dist.] May 9, 2013, pet. denied) (op.). Here, the record shows that using a 95% profit is wildly optimistic and bears no relationship to HouseCanary's actual economic situation: HouseCanary's actual profits for 2016 and 2017 were negative. DX 390; (Sicklick 3/8/18 AM

82). The 95% projected profit margin diverges so significantly from HouseCanary's actual margins that it is rendered unreliable. Indeed, "the offered support" actually "contradicts" Bratic's opinion. *Kareh*, 518 S.W.3d at 516. The internal summary that Bratic relied on reflects that HouseCanary was expecting to receive \$8.38 million in revenue under contract for 2016, but had a fixed cost structure of roughly \$10–\$12 million annually. Using simple math, HouseCanary was projected to *lose* \$2 million per year—a negative profit margin.

Third, Bratic's projection of the profits HouseCanary would earn from 10,000 *independent* panel appraisers—almost \$29.4 million—is entirely speculative and conclusory because not only is it calculated using the erroneous 95% profit margin, JNOV at 71 n.28, but Bratic also offered "no basis for the opinion" that 10,000 independent panel appraisers actually would use HouseCanary's software to complete appraisals for Title Source or other companies, *Kareh*, 518 S.W.3d at 516. Bratic acknowledged that Title Source "had 20,000 total appraisers" yet his decision to "use[] 10,000 panel appraisers" for his calculations, (Bratic 3/12/18 AM 67), is seemingly plucked out of thin air, as there is no "competent evidence" in the form of "objective facts, figures, or data," such as usage or adoption rates by anyone else, to support this assumption "with reasonable certainty." *Atlas Copco Tools, Inc.*, 131 S.W.3d at 206.

Even on its face, the 10,000 figure is vastly overblown. Panel appraisers were not obligated to use HouseCanary software for their appraisals but rather "could choose whether or not they wanted to use it," and Title Source does not control the panel appraisers, who are independent contractors, facts that Bratic readily conceded at trial. (Bratic 3/12/18 AM 68, 72). Without evidence that any of these panel appraisers would use the technology, Bratic's claim that HouseCanary could have expected to earn profits on such usage for any length of time is "purely speculative and conclusory." *Szczepanik v. First S. Trust Co.*, 883 S.W.2d 648, 650 (Tex. 1994) (finding evidence of lost profits relating to loss of fees due to transfer of retirement accounts to another financial institution "purely speculative and conclusory" because "the individual account holders could transfer their accounts to another trustee or retirement fund manager at any time" destroying expectation of "earn[ing] profits on those accounts for any period of time"); *Washington v. Kellwood Co*., No. 05-CV-10034 (SN), 2016 WL 5680374, at *6 (S.D.N.Y. Sept. 30, 2016), aff'd, 714 F. App'x 35 (2d Cir. 2017) ("There is simply no non-speculative evidence that Sunday Players could have captured one fifth of the compression apparel market in one year. Trial evidence showed that Nike, an established brand, spent $30 million in advertising to get from three and a half percent of the market to five or six percent. . . . Washington's belief that Sunday Players could somehow become a multimillion dollar company overnight is just as 'wildly speculative' as the salesman's belief that he could sell water for $15 a bottle.").

The lack of explanation as to *why* 10,000 independent panel appraisers (50 percent of Title Source's total available panel appraisers) would nonetheless use the software for *all* their appraisals also left the jury bereft of "'sufficient information to make a meaningful evaluation' of his opinion." *Kareh*, 518 S.W.3d at 517 (quoting *El Apple I, Ltd. v. Olivas*, 370 S.W.3d 757, 762 (Tex. 2012)). "Absent a meaningful explanation, jurors are left with simply taking the expert's word for it that the claimed basis supports the opinion." *Id*. Such conclusory opinion is inadmissible: damages cannot be based "on the *ipse dixit* of a credentialed witness." *City of San Antonio v. Pollock*, 284 S.W.3d 809, 816 (Tex. 2009). And, once again, Bratic's assumption is belied by the evidence in the record. It assumes the existence of a working app, which HouseCanary never delivered. *See* (Poindexter 3/1/18 PM 118) (Poindexter agreeing that he "never saw a real appraisal being completed by an appraiser and submitted"); (Brocker-Querio 2/6/18 PM 28–29) (Brocker-Querio stating that no one at Title Source ever used the "appraisal software to conduct a full, real appraisal"); *see also infra* pp. 77–81.

The jury adopted Bratic's lost profits damages opinion for both fraud and breach of contract damages. *See* Ex. 30, Jury Charge Q. Nos. 13, 28. Without Bratic's opinion, HouseCanary had no other evidence to "prove [lost profits]," and therefore failed to "prove the loss through competent evidence with reasonable certainty." *Atlas Copco Tools, Inc.*, 131 S.W.3d at 206. Because that opinion was unreliable and irrelevant—deficiencies that could not have been cured by cross-examination, *Weingarten Realty Inv'rs v. Harris Cty. Appraisal Dist*., 93 S.W.3d 280, 284–85 (Tex. App.—Houston [14th Dist.] 2002, no pet.)—Title Source is entitled a new trial.

B. Dr. Vernon Rhyne's opinions on three critical liability issues were unreliable.

Rhyne's opinions went to three critical issues on liability: (1) whether Title Source impermissibly reverse engineered HouseCanary's trade secrets; (2) whether HouseCanary satisfied its obligations under the parties' agreements to deliver a working app to Title Source, and (3) whether Title Source misappropriated HouseCanary trade secrets. None of these opinions was admissible, and because each of them bore directly on "key issue[s]" in the case, their admission requires a new trial. *See Reliance Steel*, 267 S.W.3d at 873.

1. *Rhyne's opinion on reverse engineering was nothing more than his own* **ipse dixit.**

Rhyne's opinion that Title Source "used confidential information they [sic] obtained from HouseCanary to reverse engineer the HouseCanary products and, as a result, they [sic] accelerated the development of their [sic] own AVM and similarity score," (Rhyne 3/6/18 AM 107), was the cornerstone of HouseCanary's theory of misappropriation. During opening statements, HouseCanary's counsel told the jury that this case is about Title Source "taking our confidential information and trying to reverse engineer our products until they eventually developed their own automated valuation model." (HouseCanary opening 1/31/18 AM 57). During closing argument, HouseCanary's counsel used the term "reverse engineer" or "reverse engineering" twenty-two times, claiming that Title Source had used a "magic machine" to reverse engineer HouseCanary's models. (HouseCanary closing 3/14/18 PM 15, 23, 31, 34–36, 38–40, 42). But Rhyne's opinion that there was evidence of such reverse engineering is pure *ipse dixit* and should have been excluded. And there can be little question that it affected the jury's verdict on HouseCanary's TUTSA claim, as there was no other evidence of reverse engineering. A new trial is therefore required.

Rhyne's reverse-engineering opinion is wholly conclusory because "the offered support"—his source code review and Yang's activities—ultimately "contradict [his] opinion."

Kareh, 518 S.W.3d at 516. Instead of indicating reverse engineering, Rhyne's analysis of the methodology and source code for MyAVM and comparison of MyAVM to HouseCanary's models caused him to conclude that:

- There was *no evidence* of "any fingerprints, any clues, any reference to any HouseCanary technology" in MyAVM. (Rhyne 3/6/18 PM 87).
- MyAVM was *not* "related to the HouseCanary AVM." (Rhyne 3/6/18 AM 119).
- Contrary to HouseCanary's claim that Title Source was essentially pouring Coke into a "magic machine" to train the machine to produce more Coke, (HouseCanary closing 3/14/18 PM 62),[23] "Title Source *did not* use any HouseCanary data to train MyAVM." (Rhyne 3/6/18 PM 40) (emphasis added); *see also id.* at 39–40 (admitting that he "know[s] that Title Source did not use HouseCanary data to train its MyAVM product").

Moreover, Rhyne admitted that it was "equally likely" that Yang was *not* attempting to reverse engineer HouseCanary's AVMs at all, but was instead attempting to build an independent model. (Rhyne 3/6/18 PM 103). Testimony that it is "equally likely" that Yang did or did not attempt to reverse engineer HouseCanary's AVMs is irrelevant because "it [literally] does not tend to make the existence of a material fact '*more probable or less probable*.'" *Coastal Transport Co., Inv. v. Crown Cent Petroleum Corp.*, 136 S.W.3d 227, 232 (Tex. 2004) (internal citation omitted) (emphasis added). Because Rhyne disregards undisputed evidence to the contrary, his ultimate opinion that there *was* reverse engineering is nothing more than the *ipse dixit* of an expert. *Id*. (stating that "a claim will not stand or fall on the mere *ipse dixit* of a credentialed witness"); *Cas. Underwriters v. Rhone*, 132 S.W.2d 97, 99 (Tex. 1939) (holding that a witness's statements were "but bare conclusions and therefore incompetent").[24] Its admission warrants a new trial.

---

[23] Stroud's testimony under oath in HouseCanary's federal case against Quicken Loans confirms that HouseCanary's theory of reverse engineering is limited to the idea of "training a machine to do" something. Ex. 11, 10/23 Fed. Hearing Tr. at 290.

[24] HouseCanary's counsel ignored the lack of evidentiary support for Rhyne's reverse-engineering opinion and persisted at closing with his misleading analogy that Title Source was essentially pouring Coke into a "magic machine" to train the machine to produce more Coke. (HouseCanary closing 3/14/18 PM 62).

2. *Rhyne's testimony that HouseCanary delivered a working app was unreliable and based on unsound methodology.*

Rhyne's opinion that HouseCanary delivered a working app to Title Source, (Rhyne 3/6/18 AM 106–07), is unreliable because it is not based on a proper method for testing sophisticated software programs and Rhyne lacked data to support his opinion.

Rhyne's opinion that "there was deliverable code, that worked, available . . . it was there and delivered to . . . TSI," (Rhyne 3/6/18 AM 99), was based entirely on a source code review conducted by Rhyne, his son, and Dan Manheim. *Id.* at 85–86. At his *Robinson* hearing, however, Rhyne acknowledged the risk that "[i]f there's just a flaw in the code, it . . . won't properly compile." (Rhyne 2/23/18 AM 21); *see also id*. at 23 (agreeing that "one semi colon will prevent" the code from executing properly). Yet Rhyne admitted that he never verified if the code actually worked—he "didn't run [the code] to see if there were any runtime errors" or "logic errors" in it, *id*. at 22, and he "never saw any of the Source Code base actually compile," *id*. at 20. There is simply "too great an analytical gap between the [possibly flawed, unverified] data [Rhyne] relied on and [his] opinion [that the code actually worked]," making it unreliable and "not probative evidence." *Sw. Energy*, 491 S.W.3d at 717.

3. *Rhyne's opinion that Title Source's emails showed it "used confidential information from HouseCanary" was not the proper subject of expert testimony.*

Rhyne's opinion that Title Source "used confidential information from HouseCanary to accelerate their development of . . . their AVM product," (Rhyne 3/6/18 AM 65), and other purported models, *see* (Rhyne 3/6/18 PM 124, 128), was based solely on his inexpert review of the plain language of emails and evidence that the jury was capable of interpreting on its own. Rhyne's opinion was not proper expert testimony at all, but inadmissible lay opinion on a question that should have been left to the jury.

"When the jury is equally competent to form an opinion about the ultimate fact issues or the expert's testimony is within the common knowledge of the jury, the trial court should exclude the expert's testimony." *K-Mart Corp. v. Honeycutt*, 24 S.W.3d 357, 360 (Tex. 2000);

see also Story Services, Inc. v. Ramirez, 863 S.W.2d 491, 499 (Tex. App.—El Paso 1993, writ denied) ("It is error to admit opinion evidence on an issue where no specialized or technical knowledge is necessary."). Rhyne's testimony that Title Source used HouseCanary's data to develop its own models was based entirely on his review of Title Source emails. *See* (Rhyne 3/6/18 PM 121–29). But the jury was at least as capable as Rhyne of interpreting the meaning of these straightforward communications between co-workers, which required no technical expertise. Rhyne offered no "special knowledge concerning" these email communications that would have assisted the jury. *Warner v. Hurt*, 934 S.W.2d 404, 406 (Tex. App.—Houston [14th Dist.] 1992, no writ). Accordingly, Rhyne's lay opinion regarding the emails' meaning was inadmissible. *See Broders v. Heise*, 924 S.W.2d 148, 152–53 (Tex. 1996) ("[T]he proponent of the testimony has the burden to show that the expert possess[es] special knowledge as to the very matter on which he proposes to give an opinion.") (second alteration in original, quotation omitted).

Admission of the testimony on the critical issue of Title Source's purported use of HouseCanary's data, cloaked with Rhyne's designation as an "expert," likely impacted the verdict. *Greenberg Traurig of New York, P.C. v. Moody*, 161 S.W.3d 56, 99 (Tex. App.—Houston [14th Dist.] 2004, no pet.) ("Expert witnesses can have an extremely prejudicial impact on the jury, in part because of the way the jury perceives a witness labeled as an expert. . . . Consequently, a jury more readily accepts the opinion of an expert witness as true simply because of his or her designation as an expert." (quoting *Robinson*, 923 S.W.2d at 553)). *See Reliance Steel*, 267 S.W.3d at 873 ("if erroneously admitted or excluded evidence was crucial to a key issue, the error was likely harmful," and a new trial is required).

"Where, as here, the issue involves only general knowledge and experience rather than expertise, it is within the province of the jury to decide, and admission of expert testimony on the issue is error." *GTE Sw., Inc. v. Bruce*, 998 S.W.2d 605, 620 (Tex. 1999). The erroneous admission of Rhyne's testimony that Title Source purportedly used HouseCanary's data, based on nothing more than emails that the jury was equally capable of reading, was both erroneous and harmful—and a new trial is necessary to remedy the harm.

C. Dan Manheim's testimony was conclusory and violated this Court's orders.

Manheim presented two opinions to the jury: (1) MyAVM contained a similarity score; and (2) Title Source was not storing code in the manner of a sophisticated software company. Both are unreliable, rendering them inadmissible under Rule 702. Worse still, Manheim's testimony was calculated to make the jury believe that Title Source concealed evidence, violating the Court's Order on Motions in Limine. The testimony was highly prejudicial, and the error from its admission "was likely harmful," *see Reliance Steel*, 267 S.W.3d at 873, requiring a new trial.

1. *Manheim's opinion that MyAVM contained a similarity score was irrelevant and unreliable.*

Manheim stated that his opinion that Title Source's MyAVM contained a similarity score, (Manheim 3/6/18 AM 24), was based primarily on his review of information from Yang's laptop.[25] Specifically, Manheim pointed the jury to the empty folder entitled "similarity score," *id.* at 39–40, and drew the conclusion that MyAVM had a similarity score because "a developer would only create that folder if they're going to put source code in that folder," *id.* at 25. This opinion is irrelevant and unreliable for at least four reasons.

First, because Manheim's testimony turned on the presence of an empty folder, such testimony is "not relevant evidence, because it does not tend to make the existence of a material fact 'more probable or less probable.'" *Coastal Transport Co.*, 136 S.W.3d at 232 (citing Tex. R. Evid. 401). As Manheim conceded, there are a "lot of different explanations as to why there is a similarity folder outside of [there] having to be Source Code for it," (Manheim 3/6/18 AM 43),

[25] Manheim also claimed that he had "looked at" Title Source's "complexity" model (Manheim 3/6/18 AM 13), but, as he admitted, he saw no evidence of any such model in Title Source's MyAVM product, *id*. at 44 ("I did not see Source Code for it.").

and that "that folder just could have been created manually for any reason whatsoever," *id.* at 43–44.

Although Manheim insists that the presence of the folder proves the existence of a similarity score, he did not "explain[] or exclude[] other possibilities" before concluding that his theory was the correct one. *Gammill v. Jack Williams Chevrolet, Inc.*, 972 S.W.2d 713, 727 (Tex. 1998). As in *Gammill*, where the Texas Supreme Court rejected testimony from an expert failing to explain why the evidence he relied upon to support his theory was "not at least as consistent" with another theory, Manheim's "opinions are little more than 'subjective belief or unsupported speculation.'" *Id.* at 728 (quoting *Robinson*, 923 S.W.2d at 557); *see also id.* ("Assuming [the expert] was correct, he has offered nothing to suggest that what he believes *could have* happened actually *did* happen."). Manheim's opinion—which is admittedly based on evidence that "could give rise to any number of inferences, none more probable than another," *Marathon Corp. v. Pitzner*, 106 S.W.3d 724, 729 (Tex. 2003) (internal quotation marks omitted)—is "incompetent evidence" and "cannot support a judgment," *Coastal Transport Co.*, 136 S.W.3d at 232.

At the end of the day, the connection Manheim purported to identify between the folder and its supposed contents relied on conjecture only, and is "unsupported by any measurements, testing, [or] references to peer-reviewed studies," or any other means separating it from rank speculation. *Cooper Tire & Rubber Co. v. Mendez*, 204 S.W.3d 797, 806 (Tex. 2006).

Second, Manheim's testimony is also unreliable because the evidence he cited in support of his conclusion that MyAVM contained a similarity score contradicts that very conclusion. Manheim testified that he believed there was a similarity score in MyAVM based on his "two Source Code reviews and the testimony in the trial and documents," such as "the presentation that [Wang] gave at a Quicken Loans Conference." (Manheim *Robinson* 3/5/18 AM 57).

But that evidence does not support—and in fact contradicts—Manheim's testimony:

- As Manheim conceded, the presentation—the only document referred to by Manheim in his testimony—was a proposal and not representative of any code he reviewed. (Manheim 3/6/18 AM 35–37).

- Both Dr. Wang and Yang testified that Yang did not model MyAVM. (C. Wang 2/28/18 AM 152; Yang 3/2/18 PM 80).
- Both Dr. Wang and Yang testified that there was no similarity score in MyAVM. (C. Wang 2/28/18 PM 66, 141; Yang 3/2/18 PM 80–81).
- Following his "source code review," Manheim conceded that he found no similarity score in MyAVM. (Manheim 3/6/18 AM 22) ("When I was conducting my code review, I couldn't—I didn't see any evidence of [a] similarity score. The only thing I found was one folder called 'Similarity Score,' and that folder was empty.").

Thus, Manheim's testimony is "based on certain assumptions about the facts," but there is overwhelming "evidence showing those assumptions were unfounded." *Cooper Tire*, 204 S.W.3d at 804 (quoting *City of Keller v. Wilson*, 168 S.W.3d 802, 813 (Tex. 2005)). The fact that Manheim claimed to rely on evidence—such as the presentation and *his own review of the MyAVM source code*—that clearly "undermines his hypothesis is another reason for concluding that his testimony was unreliable." *Id.*

To be sure, Manheim testified that in his opinion, "[b]ased on [his] experience," the representations Wang made in the presentation that Title Source's AVM would use a similarity score did not "sound like a proposal." (Manheim 3/6/18 AM 50). But regardless of what the presentation "sound[ed] like" to Manheim, the actual code he reviewed conclusively contradicted his speculation. As Manheim conceded again and again, he *"didn't see any evidence of a similarity score."* *Id.* at 22 (emphasis added). "[T]he actual Source Code for MyAVM [does not] *have any reference to the Similarity Code—or to any similarity code*." (Manheim *Robinson* 3/5/18 AM 80) (emphasis added). The only basis for Manheim's about-face conclusion that there was a similarity score source code in MyAVM "was his own say-so," and that does not pass muster under Texas law. *Cooper Tire*, 204 S.W.3d at 806.

Third, Manheim's opinion concerning the similarity score also boils down to telling a perfectly capable jury how to interpret a simple piece of evidence: the empty folder. Because the jury was "equally competent to form an opinion" about the folder, *K-Mart*, 24 S.W.3d at 360, the Court should have excluded his testimony entirely.

According to Manheim, the empty folder contained a similarity score because "a developer would only create that folder if they're going to put source code in that folder." (Manheim 3/6/18 AM 25). But Manheim agreed he was speculating. (Manheim 3/6/18 AM 43–44 ("that folder just could have been created manually for any reason whatsoever"). The jury "did not need [his] assistance" and was "equally competent to form" their own opinions about what significance should be attributed to an empty folder. *K-Mart*, 24 S.W.3d at 360. Manheim's opinion is no different from that deemed inadmissible in *K-Mart*. In that case, the Texas Supreme Court concluded that expert testimony that K-Mart's low-hanging rails encouraged people to sit on them was inadmissible because "the jury's collective common sense could ably assist it in determining whether people would likely sit on the lower railing." *Id.* at 361.

Fourth, the underlying purpose of his testimony was to accuse Title Source of spoliation: HouseCanary introduced Manheim's testimony about a "missing" similarity score to encourage the jury to speculate that Title Source concealed information from HouseCanary in discovery. *See, e.g.*, (Wahby 3/5/18 AM 88–91). This testimony was unrelated to the merits of the case, violated the Court's Order on Motions in Limine, and was highly prejudicial.

HouseCanary relied on *Brookshire Bros. Ltd. v. Aldridge*, 438 S.W.3d 9 (Tex. 2014), to argue that "reference[] to missing evidence"—even when it may be due to a party's spoliation—is not entirely "foreclosed." *See, e.g.*, (Barron 3/5/18 AM 91–92). But rather than help HouseCanary, *Brookshire* demonstrates that Manheim's testimony should have been excluded.

The *Brookshire* court *reversed* a trial court because the trial court admitted purported evidence of spoliation—and held that "evidence bearing solely on whether a party spoliated evidence" is inadmissible. 438 S.W.3d at 26. Although a party "may present indirect evidence" about the content of evidence that is known to be *actually* "missing"—like a "document, photo, or recording" that was known to exist, but was destroyed—there simply is no such "missing" evidence here. *Id*. HouseCanary cannot claim that the *absence* of evidence of misappropriation in the MyAVM source code it reviewed somehow proves that such evidence *did* exist but was destroyed: "Where, as here, the only basis for the accusation consists of speculation and conjecture and a reasonable explanation for the missing evidence exists, such an accusation can unfairly taint the jurors' perception of the alleged spoliator as one who is dishonest and deceitful." *Lively v. Blackwell*, 51 S.W.3d 637, 642 (Tex. App.—Tyler 2001, pet. denied).

Because Manheim's testimony has no evidentiary value and serves only to insinuate spoliation, it was inadmissible. *Brookshire*, 438 S.W.3d at 26; *Lively*, 51 S.W.3d at 642 ("In such a situation, it is legitimate and proper to exclude evidence of alleged spoliation."). It also violated the Court's Orders prohibiting any references to resolved discovery disputes. *See* Ex. 29, Limine Order at 3, 6; *see supra* p. 34. It should not have been admitted, and its admission warrants a new trial.

IV. The jury's damage awards are grossly excessive, arbitrary, factually insufficient, shocking to the conscience, and the product of bias, passion, and prejudice.

Having sown the wind with the seeds of fraudulent testimony and inflammatory attacks on Title Source and its counsel, HouseCanary reaped the whirlwind of compensatory and punitive damages awards that are grossly excessive by any standard. Texas law authorizes new trials in precisely these situations where "the damages are manifestly . . . too large." Tex. R. Civ. P. 320. "In determining whether damages are excessive, trial courts and courts of appeals should employ the same test as for any factual insufficiency question." *Pope v. Moore*, 711 S.W.2d 622, 624 (Tex. 1986).

Although Title Source believes a new trial is necessary, at a minimum, and only in the alternative, the Court should at least suggest a remittitur to reduce the damages to an amount that is not excessive. The Court "should examine all the evidence in the record to determine whether sufficient evidence supports the damage award" and may remit "if some portion is so factually insufficient or so against the great weight and preponderance of the evidence as to be manifestly unjust." *Pope*, 711 S.W.2d at 624. The only objective measure of damages that could possibly be sustained on this record is $2 million, the cap set on damages in the parties' contract. *See* PX

3 § 8. Accordingly, and only in the alternative to a new trial, the Court should suggest remittitur in the amount of $704.2 million for an award of $2 million.

A. The jury's grossly excessive compensatory damages awards require a new trial.

The sheer excessiveness of the compensatory damages is patent: The damages awarded for the misappropriation claim amount to more than 100 times the total revenue that HouseCanary earned for the sale of all of its products (not just those containing these alleged trade secrets) to all of its customers over the same period, (Bratic 3/12/18 AM 86), and the damages awarded for the breach of contract claim are more than 6 times the agreed-upon $5 million contract price. As set forth in detail in the JNOV motion, JNOV at 52–75, and as demonstrated above, *see supra* pp. 41–53, the compensatory damages for HouseCanary's TUTSA, fraud, and breach of contract claims were based entirely on Bratic's faulty opinions, lack sufficient evidentiary support for the same reasons articulated below, *see infra* pp. 73–76, and violate the "one satisfaction rule," which "limits a plaintiff's recovery to one of several overlapping theories."[26] *Myriad Dev., Inc. v. Alltech, Inc.*, 817 F. Supp. 2d 946, 983 (W.D. Tex. 2011). A thorough review of the record reveals how incredibly weak the evidence is to support the astonishing and record-breaking damages awarded. Ex. 30, Jury Charge Q. 13, 28, 39, 43–45. Despite this flawed record, the jury got swept up in HouseCanary's prejudicial and inflammatory rhetoric—and its experts' unreliable and improper opinions. This is precisely why Texas authorizes a new trial as a corrective measure for "good cause" and when damages are "manifestly . . . too large." Tex. R. Civ. P. 320.

B. The jury's grossly excessive punitive damages award violates Texas law and the federal Constitution.

There can be no doubt that a new trial is required because the punitive damages awards are grossly excessive and are based on emotion and caprice. Tex. R. Civ. P. 320. Title Source is proud of its reputation as a good corporate citizen, but the company was unfairly impugned by

[26] Because this Court applies a lower standard when reviewing for factual sufficiency than for JNOV, *e.g.*, *Havner v. E-Z Mart Stores, Inc.*, 825 S.W.2d 456, 462 (Tex. 1992), this Court's denial of JNOV does not preclude the grant of a new trial. At the very least, a new trial is warranted for the reasons set out in the JNOV and above. *Id*.

HouseCanary and its inflammatory tactics. As Title Source previously explained, the punitive damages award violates Texas law because there is no evidence that Title Source acted with malice by intending to cause HouseCanary "substantial injury that was 'independent and qualitatively different' from the compensable harms associated with the underlying causes of action." *Horizon Health Corp. v. Acadia Healthcare Co*., 520 S.W.3d 848, 867 (Tex. 2017) (citation omitted). There is a lack of evidence that Title Source willfully and maliciously misappropriated HouseCanary's trade secrets, Ex. 30, Jury Charge Q. 41, 42, or otherwise engaged in intentionally fraudulent or malicious conduct in connection with Amendment One, *id.* Q. 14, 15. JNOV at 75–77. To paper over this absence of crucial evidence, HouseCanary openly violated this Court's Orders by repeatedly referencing Title Source's discovery and litigation conduct as evidence of wrongdoing. *See supra* pp. 33–35. But Texas law is clear that "exemplary damages are not meant to redress wrongdoing that *occurs* in litigation," *Bennett v. Reynolds*, 315 S.W.3d 867, 875 (Tex. 2010), and the Court's Order correctly *prohibited* this prejudicial line of argument. *See* Ex. 29, Limine Order at 3 (ruling that "[a]ny reference to motions filed by either party prior to trial and/or orders entered by this Court, including those related to discovery disputes" were off-limits). These improper arguments undoubtedly inflamed the jury and led to the rendition of an excessive punitive damages award.

The only conceivable explanation for the jury's unprecedented $470,800,000 punitive damages verdict is that it was the product of bias, passion, prejudice, and improper evidence. That much becomes obvious when the award is compared to the value of the parties' original contract—$5 million. The punitive damages award here is ***over 94*** times that amount—and there can be little doubt why the jury rendered such an unconstitutionally excessive award. The record is replete with improper, incendiary, and irrelevant statements by HouseCanary's counsel, including exhortations that the jury award punitive damages in an amount that would send a message to "Corporate America," and irrelevant, misleading, and prejudicial evidence that inflamed the jury against Title Source. *See supra* pp. 26–40. At the very least, a new trial is required. *See Honda Motor Co. v. Oberg*, 512 U.S. 415, 433 (1994) (stating that the Due Process

Clause of the Fourteenth Amendment prohibits "lawless, biased or arbitrary verdict[s]"); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 423 (2003) (to accord with Due Process, "[a] defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business"); *Bennett*, 315 S.W.3d at 873 ("[A] a grossly excessive award offends due process because it furthers no legitimate purpose and constitutes an arbitrary deprivation of property.") (internal quotation marks omitted).

Indeed, the sheer size of the punitive damages award—in and of itself—establishes prejudice and passion because it is "so flagrantly excessive that it cannot be accounted for on any other [lawful] ground." *World Oil Co. v. Hicks*, 103 S.W.2d 962, 964 (Tex. 1937). And here, shortly after deliberations commenced, the jury even asked the Court if it could "give *more* than 403.2 millions [sic]" and asked "what would be the *max amount* we can give?" (3/14/18 AM 104–05) (emphases added). While the trial took seven weeks and involved voluminous evidence, the jury took only hours to render a verdict on a 45-question charge. As the Texas Supreme Court has observed, "[t]here are cases where a shockingly excessive verdict, and the record as a whole, leave no room for doubt that the minds of the jurors were so controlled and dominated by passion and prejudice as made them incapable of, or entirely unwilling, to consider a case on its merits. The remedy in such a case is to set the verdict aside and refuse remittitur." *World Oil*, 103 S.W.2d at 964. This is such a case.

The punitive damages award is excessive under the U.S. Constitution, as well, because the Due Process Clause "prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor" and requires "the measure of punishment [to be] both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered." *State Farm*, 538 U.S. at 416, 426. *See* U.S. Const. amend. XIV, § 1. Title Source's conduct lacks the requisite reprehensibility to sustain these large punitive damages awards, which are wildly disproportionate to any harm that HouseCanary purportedly suffered, and the ratio between the amount of punitive and compensatory damages far exceeds the 1-to-1 constitutional maximum permitted on these facts, where the compensatory damages award is undeniably "substantial," *State Farm*, 538 U.S. at 425, and satisfies the twin goals of punitive damages—punishment and deterrence, *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 21 (1991); *see also* JNOV at 77–80.

For all these reasons, a new trial is appropriate given that the punitive damages award was wildly excessive.

V. Numerous harmful errors pervaded the jury instructions.

The jury instructions were riddled with problems that went to the core of the case. *See Grande Healthcare, L.P. v. Hawley*, 284 S.W.3d 851, 855–56 (Tex. 2009) (jury instruction errors were harmful and justified a new trial where they "relate[] to [] contested, critical issue[s]"). The jury received confusing, overlapping instructions lacking key definitions and was directed to use improper measures of damages. Such errors are necessarily incurable and necessitate a new trial. *See id.* at 856.

A. The jury was erroneously instructed to find trade secret damages for breach of contract claims (Qs. 43-45).

Over Title Source's objection, the jury was instructed to award damages for Title Source's alleged breach of the NDA, MSLA, and Amendment One using measures that are prohibited by law. *See* Ex. 30, Jury Charge Q. 43–45; *see* (3/14/18 AM 25–27) (objecting that the instructed measures "are not recoverable for breach of contract").

To calculate damages for Questions 43 through 45, the jury was directed to consider "[t]he value of the HouseCanary trade secrets to Title Source at the time of Title Source's breach" and "[t]he price that a willing buyer and a willing seller would have agreed on, at the time of Title Source's breach . . . as a fair price for Title Source's use of the trade secret." Ex. 30, Jury Charge Q. 43–45. But, as a general matter, these are measures of trade secret damages.[27] *See Sw. Energy*, 491 S.W.3d at 711 (identifying value to the defendant and a reasonable royalty as trade secret damage measures). In fact, the jury was directed to use these

---

[27] As discussed above, the value of HouseCanary's trade secrets to Title Source is an impermissible measure of damages in this TUTSA case. *See supra* note 17.

measures when assessing misappropriation damages. *Compare* Ex. 30, Jury Charge Q. 39, *with id.* Q. 43–45.

Trade secret damage measures are not appropriate breach-of-contract measures because these claims "are governed by different theories." *Smith v. Nelson*, 53 S.W.3d 792, 795 (Tex. App.—Austin 2001, pet. denied); *see also* JNOV at 74. Indeed, the Texas Pattern Jury Charges approves of seven types of contract damages, none of which include the value to the defendant or a reasonably royalty. Tex. Pattern Jury Charges § 115.4. Instead, "[t]he universal rule for measuring damages for the breach of a contract is just compensation for the loss or damage *actually sustained*." *Stewart v. Basey*, 245 S.W.2d 484, 486 (Tex. 1952) (emphasis added). Contract damages are intended to "restore the non-breaching party to the same economic position in which it would have been had the contract not been breached—thus giving the party the benefit of its bargain." *Statewide Bank & SN Servicing Corp. v. Keith*, 301 S.W.3d 776, 785–86 (Tex. App.—Beaumont 2009, pet. abated); *see also* 28 Tex. Jur. 3d Damages § 71 (same). Contract damages properly focus on the value of the contract *to the non-breaching party*—not the breaching party. *See Keith*, 301 S.W.3d at 785–86.

The jury instructions here got it backwards. The jury was directed to consider "[t]he value . . . to Title Source"—not HouseCanary. Ex. 30, Jury Charge Q. 43–45. *See also Sw. Energy*, 491 S.W.3d at 711 (reasonable royalty measure is "a proxy for the value of what the defendant appropriated"). It is impossible for these measures of damages to "giv[e] [HouseCanary] the benefit of its bargain," *Keith*, 301 S.W.3d at 785–86, meaning it was legally erroneous to instruct the jury to find trade secret damage measures for breach of contract. Because this erroneous instruction necessarily led to the rendition of an improper verdict—the jury found the wrong types of damages for Title Source's purported breach of contract—a new trial is in order. *See Hawley*, 284 S.W.3d at 856.

B. The broad-form trade secret instructions violated *Casteel*.

Although "broad-form questions" should be submitted "whenever feasible," Tex. R. Civ. P. 277, they "cannot be used to 'put before the jury issues that have no basis in the law or the evidence.'" *Tex. Comm'n on Human Rights v. Morrison*, 381 S.W.3d 533, 537 (Tex. 2012) (quoting *Romero v. KPH Consol., Inc.*, 166 S.W.3d 212, 215 (Tex. 2005)). Under the *Casteel* doctrine, "a new trial is required when a trial court submits a broad-form liability question containing both valid and invalid theories of liability because the . . . court cannot determine whether the jury relied on an invalid theory." *Id.* at 534–35 (citing *Crown Life Ins. Co. v. Casteel*, 22 S.W.3d 378, 389 (Tex. 2000)). A "presumption-of-harm rule *must be applied*" "when the question allows a finding of liability based on evidence that cannot support recovery." *Benge v. Williams*, 548 S.W.3d 466, 475 (Tex. 2018) (emphasis added).

The Texas Supreme Court has also clarified that lump-sum damages awards can result in error, requiring a new trial. Where the instructions "mixed valid and invalid elements of damages in a single broad-form submission, . . . such error [i]s harmful because it prevent[s] the appellate court from determining 'whether the jury based its verdict on an improperly submitted invalid' element of damage." *Harris Cty. v. Smith*, 96 S.W.3d 230, 233–34 (Tex. 2002) (quoting *Casteel*, 22 S.W.3d at 388).

1. *Questions 37 & 38 contained* Casteel *errors.*

a. *Casteel* error in improper means instructions.

As in *Casteel*, where the jury was offered multiple "independent grounds for liability with one answer blank for the defendant's liability," *Thota v. Young*, 366 S.W.3d 678, 691 (Tex. 2012), here the jury was instructed on three separate theories of misappropriation but asked a single question: whether "Title Source misappropriate[d] HouseCanary's trade secrets." Ex. 30, Jury Charge Q. 38. Two of the three theories required acquisition by improper means, *id.*, yet as Title Source argued at the charge conference, there was "no evidence of improper means" of acquisition *whatsoever* because "Title Source obtained the alleged trade secrets properly under the agreements between the parties," (3/14/18 AM 21).

Where, as here, a party receives trade secrets freely under a contract, they are not acquired by improper means, notwithstanding allegations that the agreement was subsequently breached. *E.g.*, *Educ. Mgmt. Services, LLC v. Tracey*, 102 F. Supp. 3d 906, 914 (W.D. Tex.

2015) ("Plaintiff admits that it willingly disclosed trade secrets to Defendant pursuant to those Agreements. The fact that Defendant later allegedly breached the confidentiality provisions of the Agreements is irrelevant to the method by which he obtained access to the trade secrets in the first instance."); *Educ. Mgmt. Servs. v. Cadero*, No. SA-14-CA-587, 2014 WL 12586781, at *2 (W.D. Tex. Nov. 18, 2014) (where "[p]laintiff disclosed trade secrets to the [d]efendant pursuant to [an] agreement," no allegation of acquisition by "improper means"). As a matter of law, because everything Title Source received was freely given under the parties' contract, nothing Title Source obtained was by improper means. Consequently, there was "no basis in the law" for the use of a broad-form question that instructed the jury to consider acquisition by improper means. *See Tex. Comm'n on Human Rights*, 381 S.W.3d at 537 ("A broad-form question cannot be used to 'put before the jury issues that have no basis in the law or the evidence.'") (citation omitted).

As in *Casteel*, because of the broad-form question, it is impossible to tell whether the jury based its verdict on an invalid theory of misappropriation (acquisition by improper means) or a valid theory. *See Casteel*, 22 S.W.3d at 388. The only remedy is a new trial, because"[t]o hold this error harmless would allow [Title Source] to be held liable without a judicial determination that a factfinder actually found that [Title Source] should be held liable on proper, legal grounds." *Id.*

b. *Casteel* error in overlapping trade secrets instructions.

Questions 37 and 38 also asked the jury, *inter alia*, whether Title Source misappropriated "HouseCanary AVMs" and "Complexity Score," without any further clarification. Ex. 30, Jury Charge Q. 37–38. Each of these terms, however, was used in *different* ways throughout trial by HouseCanary's own witnesses. HouseCanary presented evidence as to two different types of complexity scores—the "appraisal complexity score," *e.g.*, (Stroud 2/26/18 AM 132), and the "property score," *e.g.*, (Rhyne 3/6/18 AM 114). To make matters more confusing, the "property score" was also referred to as the "valuation suitability score." *E.g.*, (Stroud 2/26/18 PM 162). Likewise, HouseCanary also presented evidence that it had three different AVMs—a Regression

AVM, Cascade AVM, and HouseCanary AVM—which were built at different points in time and based on different methodological approaches. *Id.* at 178, 191. Thus, as Title Source argued at the charge conference, the "terms listed . . . are vague and nebulous, misleading, impossible for the Jury to determine . . . what they're being asked to do." (3/14/18 AM 21); *see also id.* at 19. As a result, it is impossible to know on *which* complexity score model or *which* AVM the jury based its verdict.

Because Questions 37 and 38 "allow[ed] a finding of liability based on evidence that cannot support recovery," it was improper to use them. *Benge*, 548 S.W.3d at 475. As Title Source argued in its JNOV motion, there is no evidence supporting a finding of liability for either of the complexity scores or any of the AVMs. HouseCanary did not own a trade secret in either of the two complexity scores discussed at trial. JNOV at 41, 43 n.12. The appraisal complexity score was never even developed, (Stroud 2/26/18 AM 125), and a high-level PowerPoint presentation outlining the concept does not constitute a trade secret. *See Glob. Water Grp., Inc. v. Atchley*, 244 S.W.3d 924, 930 (Tex. App.—Dallas 2008, pet. denied); JNOV at 41. It is also undisputed that the other "complexity score"—the property score—was wholly owned and developed by third-party Black Knight. (Stroud 2/26/18 PM 32–33). HouseCanary's own expert admitted that there is no evidence that Title Source ever developed its own complexity score, let alone one as part of MyAVM. (Rhyne 3/6/18 PM 87, 99–101). Similarly, it is undisputed that at least one of the AVMs—the Cascade AVM, the primary AVM used to generate valuations during the contract—was a combination of two different AVMs licensed from Black Knight, (Stroud 2/26/18 PM 19–21), not an independent AVM developed and owned by HouseCanary. *See* Tex. Civ. Prac. & Rem. Code Ann. § 134A.002(3-a) (defining "owner"); *St. Jude Med. S.C., Inc. v. Janssen-Counotte*, No. A-14-CA-877-SS, 2014 WL 7237411, at *15 (W.D. Tex. Dec. 17, 2014) (plaintiff "has not shown" that it "actually owned those trade secrets"); *see also* JNOV at 21–22.

Furthermore, there is no evidence that Title Source misappropriated *any* of the AVMs or complexity scores because it never acquired the underlying source code or analytics for any of them. *See* JNOV at 19–27, 40–42 and *infra* pp. 73–74. And there was no evidence of reverse engineering either.

Of course, for the Court to find *Casteel* error as to Question Nos. 37 & 38, an evidentiary basis needs to be lacking for *only one* of the two complexity scores or *one* of the three AVMs because the "court cannot determine whether the jury found liability on an improper basis." *Benge*, 548 S.W.3d at 476. That is certainly the case here, and a new trial is required. *See id.*; *Tex. Comm'n on Human Rights*, 381 S.W.3d at 534–37 ("[R]etrial is the only option.").

2. *Question 39 contained Casteel error.*

Despite the fact that the jury was asked in Questions No. 37 and 38 whether Title Source misappropriated five distinct trade secrets, Question No. 39 instructed the jury to calculate damages caused by any misappropriation as a lump sum. Title Source objected on the grounds that "there are *Harris County v. Smith* issues in attributing and tying, causally, the damages to the liability assertions." (3/14/18 AM 22). Plainly, the use of a lump-sum damages award here makes it impossible "to isolate and attribute particular damages to the particular claimed trade secrets." *Id.*

While Title Source maintains that there is no evidence supporting the misappropriation of *any* of the five purported trade secrets, *see* JNOV at 15–44 and *infra* 73–74, if the Court concludes that the evidence is lacking as to any individual trade secret, then the broad-form submission of damages is harmful error. There is no way of "determining 'whether the jury based its verdict on an improperly submitted invalid' element of damage." *Harris Cty.*, 96 S.W.3d at 234 (citing *Casteel*, 22 S.W.3d at 388). A new trial on damages is therefore required.

C. The jury was erroneously instructed to measure the "value of the HouseCanary trade secrets to Title Source."

The jury was erroneously instructed to calculate damages for trade secret misappropriation based on the "value of the HouseCanary trade secrets to Title Source at the time of Title Source's misappropriation." Ex. 30, Jury Charge Q. 39. This is not a proper measure of damages under TUTSA, which only allows for damages that reflect "the actual loss .

. . and the unjust enrichment caused by misappropriation," or in the alternative, the "imposition of liability for a reasonable royalty." Tex. Civ. Prac. & Rem. Code Ann. § 134A.004; *see also Sw. Energy*, 491 S.W.3d at 711 n.7 ("Remedies available under the Act include injunctive relief; damages measured by actual loss plus unjust enrichment not included in computing actual loss; a reasonable royalty; and exemplary damages capped at two times actual damages."); *see also supra* note 17. Even when the value to the defendant is appropriately used as a measure of damages, it is to "be measured by . . . the value a reasonably prudent investor would have paid for the trade secret"—not by the value to the alleged infringer. *See Sw. Energy*, 491 S.W.3d at 711.

D. The jury was erroneously instructed with overlapping questions of contract liability.

It was confusing and misleading to ask the jury whether both the NDA, Ex. 30, Jury Charge Q. 30, and the MSLA, *id.* Q. 17, were breached. Because the NDA is incorporated into the MSLA, any breach of the NDA is necessarily a breach of the MSLA. Question 30 thus overlaps with Question 17. *See* (3/14/18 AM 14–15, 24–25); PX 2, Ex. A, § 8. Absent a qualifying instruction, it was improper to submit duplicative questions. *Tex. Genco, LP v. Valence Operating Co.*, 187 S.W.3d 118, 125 (Tex. App.—Waco 2006, pet. denied) (error to submit "superfluous" questions). Indeed, a "trial court . . . should not confuse the jury by submitting differently worded questions that call for the same factual finding," as was the case here. *Hyundai Motor Co. v. Rodriguez ex rel. Rodriguez*, 995 S.W.2d 661, 665–66 (Tex. 1999); *see also Star Enter. v. Marze*, 61 S.W.3d 449, 459 (Tex. App.—San Antonio 2001, pet. denied) (same).

Because Question 30 overlaps with Question 17, by extension the jury's award of damages for breach of the NDA, Ex. 30, Jury Charge Q. 43, also overlaps with its award of damages for breach of the MSLA, *id* Q. 44. At a minimum, it is impossible to tell whether the jury intended the awards to cover the same breaches. Thus, the jury's answers to Questions 30 and 43 should have been disregarded. *See Tex. Genco, LP*, 187 S.W.3d at 125 (holding that the "trial court erred in refusing to disregard the answer" to duplicative question). Rendition of judgment based on these questions was inappropriate and should be reversed. *Id.*[28]

E. The submission of HouseCanary's claims to the jury was erroneous because no evidence supports them.

As Title Source argued in its JNOV motion, JNOV at 15–51, and discusses in detail below, *see infra* pp. 73–76, there is a complete lack of evidence to support the jury's verdict on HouseCanary's misappropriation, fraud, and contract claims. As a result, the "[C]ourt's submission of [all of these] issues to the jury [wa]s error." *Deveroex v. Nelson*, 517 S.W.2d 658, 661 (Tex. Civ. App.—Houston [14th Dist.] 1974), *aff'd*, 529 S.W.2d 510 (Tex. 1975); *see also Baribeau v. Gustafson*, 107 S.W.3d 52, 58 (Tex. App.—San Antonio 2003, pet. denied) ("Controlling issues must be . . . supported by *some evidence* in order to be submitted to the jury.") (emphasis added).

VI. The evidence is factually insufficient to support the verdict on HouseCanary's TUTSA, fraud, and contract claims.

Even if HouseCanary's experts are not excluded, the jury's finding of liability on House Canary's TUTSA, fraud, and contract claims is so factually insufficient that a new trial is required. *See* Tex. R. Civ. P. 324(b). A review of the record shows that the "evidence is so weak as to make the verdict clearly wrong and manifestly unjust." *See Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986). Title Source more than satisfies this standard, which is less demanding than the no-evidence standard of proof for JNOV. *E.g.*, *Havner*, 825 S.W.2d at 462.

A. The evidence is too weak to support the jury's findings on HouseCanary's TUTSA claim.

The liability findings on the TUTSA claims are unsupported for multiple, independent reasons: (1) the lack of evidence that HouseCanary owned any of the five purported trade

---

[28] Title Source notes that there appears to be a typographical error in the Final Judgment signed on October 25, 2018. The start date for the accrual of prejudgment interest should be May 19, 2016, the date HouseCanary filed and served its counterclaim, not May 9, 2016. Because the amount of prejudgment interest is nonetheless accurate (apparently calculated using the correct start date) Title Source does not seek a modification of this aspect of the judgment.

secrets—the "HouseCanary AVMs," the "Similarity Score," the "Data Dictionary," the "Data Compilation," or the "Complexity Score" (Q. 37); (2) the lack of evidence that Title Source ever acquired (by "improper means" or otherwise) any trade secrets from HouseCanary, because HouseCanary gave Title Source nothing more than industry-standard concepts, generalized descriptions, and outputs from HouseCanary's models[29]—none of which qualify as a trade secret under TUTSA, Ex. 30, Jury Charge Q. 37–38;[30] (3) the lack of evidence that Title Source used any of HouseCanary's purported trade secrets, *id.* Q. 38 (rather, even HouseCanary's own expert admitted that Title Source did *not* use any of HouseCanary's trade secrets in MyAVM, *see supra* pp. 54–55); (4) the legal irrelevance of Title Source's development of HVE—an "incredibly simple," "one-page" formula that was never commercialized or used for any other purpose and that bears no relationship to MyAVM, *id.*; (5) the lack of any evidence that Title Source reverse engineered HouseCanary's purported trade secrets, *id.*; and (6) the lack of any evidence of any harm or damages resulting from the alleged misappropriation of specific trade secrets, *id.* JNOV

[29] As HouseCanary recently conceded in the federal litigation, its "trade secrets" are "the underlying data, algorithms"—not the outward-facing frames. Ex. 34, Transcript of Hearing at 545, *HouseCanary Inc. v. Quicken Loans, Inc.*, No. 5:18-CV-519-FB (W.D. Tex. Oct. 24, 2018). At the same hearing, HouseCanary also agreed to unseal a document that fulsomely describes its similarity score (the last page of DX 481, which is the same as DX 342). Ex. 35, Transcript of Hearing at 820–21, HouseCanary Inc. v. Quicken Loans, Inc., No. 5:18-CV-519-FB (W.D. Tex. Oct. 29, 2018). This is the very same document that HouseCanary claimed represented its core trade secrets on the similarity score. *See* Def.'s Mot. to Reconsider Whether to Seal Certain Core Materials (May 14, 2018). This action strips any (remaining) secrecy concerning the similarity score and amounts to an outright concession that the similarity score is not a trade secret. *Gannaway*, 85 S.W.2d at 347.

[30] Underscoring this point is contemporaneous evidence suggesting that HouseCanary was not concerned about protecting its purported trade secrets. HouseCanary conceded at trial that it never verified whether Title Source actually signed the NDA it purportedly relied on to protect its confidential and trade secret information. (Sicklick 3/8/18 AM 13–14). It then proceeded to share its purported trade secrets in open court, without any attempt to close the court room. Then it later conceded that a document describing one of its purportedly core trade secrets—the similarity score—could be unsealed, *see supra* note 29. Tex. Civ. Prac. & Rem. Code Ann. § 134A.002(6) (to qualify as a trade secret, the owner of technology must have taken "reasonable measures . . . to keep the information secret").

at 15–45. Again, certain opinions of HouseCanary's experts Rhyne and Manheim were improperly admitted for the reasons identified above and are therefore insufficient evidence of liability. *See supra* pp. 53–61. Further, there is insufficient evidence to support the jury's verdict that "Title Source willfully and maliciously misappropriated HouseCanary's trade secrets," Ex. 30, Jury Charge Q. 41, because there is no evidence that Title Source specifically intended to harm HouseCanary. This lack of factual sufficiency warrants a new trial.

B. The evidence is too weak to support the jury's findings on HouseCanary's fraud claim.

There is also insufficient evidence to support the jury's verdict, Ex. 30, Jury Charge Q. 11–12, 14) that Title Source committed fraud against HouseCanary in connection with Amendment One. JNOV at 46–47; JNOV Reply at 15–17. HouseCanary's fraud claim was—by its own argument—based on "the same facts" as its misappropriation claim, (Tribble 3/14/18 PM 20), and fails for the same reasons.[31] *See supra* pp. 73–74; JNOV at 46. HouseCanary's theory that Title Source fraudulently induced it to enter the contract so that Title Source could misappropriate its trade secrets is also unsupported by sufficient facts. At trial, HouseCanary identified no "material misrepresentations" or any reliance on any particular representation or inducement to enter the contract and did not present evidence of fraudulent intent supporting any of its theories. JNOV Reply at 15–16; *see also DeSantis v. Wackenhut Corp.*, 793 S.W.2d 670, 688 (Tex. 1990) (outlining elements of fraud). There is also insufficient evidence that Title Source acted with any amount of "malice or fraud" in relationship to HouseCanary whatsoever, Ex. 30, Jury Charge Q. 14.

HouseCanary relies on emails where Title Source expressed interest in obtaining HouseCanary "data," as indications of intent, but that is hardly surprising when HouseCanary and Title Source had ongoing discussions about whether Title Source should license all of

---

[31] Even if there were any merit to HouseCanary's fraud claim, which there is not, the "one satisfaction rule" applies to prevent duplicative recovery. *See Myriad Dev.*, 817 F. Supp. 2d at 983.

HouseCanary's data. *See* DX 1024 at 9, 20; JNOV Reply at 16. But it defies common sense that Title Source would enter into a $5 million contract for a whole host of products—thereby exposing itself to liability—for the sole purpose of misappropriating HouseCanary data, most of which is publicly available, and most of which it never even received. Indeed, Title Source received "less than 0.2% of the value reports that could have been generated by the data compilation." *See* JNOV at 40. In short, HouseCanary failed to support either its fraud by misappropriation or fraudulent inducement claims. JNOV at 46–47. Conspiracy theories do not equal sufficient evidence. Based on the paucity of evidence to support it, the fraud verdict was "clearly wrong and manifestly unjust." *Cain*, 709 S.W.2d at 176.

C. The evidence is too weak to support the jury's findings on HouseCanary's contract claim.

Because there is insufficient evidence to support HouseCanary's TUTSA claim, HouseCanary's breach of contract claim—which is just a repeat of the TUTSA claim—fails too. *See supra* pp. 73–74. Specifically, factually insufficient evidence supports the jury's finding that Title Source failed to comply with the Master Software License Agreement, Ex. 30, Jury Charge Q. 17, that Title Source failed to comply with Amendment One, *id.* Q. 23, that Title Source failed to comply with the Non-Disclosure Agreement, *id.* Q. 30, and that Title Source failed to comply with Section 7.2 of Amendment One, *id.* Q. 36.

HouseCanary's fallback theories that Title Source failed to comply with the agreements' notice-and-cure provisions and did not pay for HouseCanary's services or roll out the Appraiser App fare no better. The great weight of the evidence demonstrates that HouseCanary breached the MSLA and Amendment One by failing to deliver a working appraiser app. *See infra* 77–81. Title Source was therefore entitled to exercise its right to "immediately terminate" the agreements and was relieved from any further obligation to perform under the contract. *See* *Bartush-Schnitzius Foods Co. v. Cimco Refrigeration, Inc.*, 518 S.W.3d 432, 436 (Tex. 2017) ("[W]hen one party to a contract commits a material breach of that contract, the other party is discharged or excused from further performance."). Likewise, the theory that Title Source breached the agreements by failing to inform employees of the restrictions in the NDA cannot support the verdict because there is a lack of evidence of any resulting damages. Since the evidence of breach is "so weak as to make the verdict clearly wrong," *Cain*, 709 S.W.2d at 176, Title Source should be granted a new trial on HouseCanary's contract claims.

VII. The great weight and preponderance of the evidence demonstrates that HouseCanary breached the MSLA, Amendment One, and the NDA.

Not only is there insufficient evidence to support HouseCanary's theory of liability, the great weight of the evidence actually demonstrates that HouseCanary breached its contractual obligations to Title Source under the MSLA, Amendment One, and NDA by failing to deliver a working app and by using the MSLA to solicit investors. There was no persuasive evidence to the contrary. Because the jury's findings against Title Source are "against the great weight and preponderance of the evidence," a new trial is proper. *Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 242 (Tex. 2001).

A. The great weight of the evidence is that HouseCanary failed to deliver a functional appraiser app by the agreed-upon deadline.

HouseCanary was contractually obliged to deliver a working appraiser app to Title Source that was capable of being "deployed in the field" on both iPad and desktop browsers by November 1, 2015. PX 2 at 7. According to the MSLA, this meant that an appraiser needed to be able to use the app to complete an appraisal from start through signature on the four most common Fannie Mae forms. *Id.* at 15–16. The app was also required to be able to access data from "700+ MLS boards," PX 3 at 11, so as to provide coverage across over 80 percent of property sales in the United States, (Eisenshtadt 2/5/18 AM 32). It was also required to have all the other features listed in Exhibit B to the MSLA. PX 2 at 15–16. But the evidence at trial indisputably showed that HouseCanary never delivered Title Source a working app. This breach was a material because it "deprived [Title Source] of the expected benefit which [Title Source] reasonably expected" from the MSLA and Amendment One. *Mustang Pipeline Co. v. Driver Pipeline Co.*, 134 S.W.3d 195, 199 (Tex. 2004).

First, the app was not "deployed in the field" by November 1, 2015, the contractual deadline, PX 3 at 7, or by any other "reasonable time," *DeClaris Assocs. v. McCoy Workplace Sols., L.P.*, 331 S.W.3d 556, 563 (Tex. App.—Houston [14th dist.] 2011, no pet.). That is because "deploy[ment]" required an app that could be used by appraisers "in the field," yet HouseCanary never delivered anything that had progressed past the testing phase. *See* Pl.'s. Directed Verdict Mot. 4-8 (Mar. 12, 2018); Pl.'s Partial Summ. J. Mot. 14-16 (Dec. 29, 2017); *see also* PX 332 (email from HouseCanary dated April 6, 2016, proposing rolling out a still-incomplete app in June 2016).

Second, the test version of the app that HouseCanary did deliver did not have all of the features specified in the contract, and therefore could not be used to complete an appraisal. *See* JNOV at 80–82. In particular, the parties' respective experts *agreed* after they reviewed the source code for HouseCanary's app as it existed between November 2015 and April 2016 that some contractual requirements were missing from the app altogether:

- Dr. Rhyne, HouseCanary's expert, testified that the app during that period "didn't have the three forms, and they didn't have the sketch on the mobile application," and thus did not meet the contractual specifications. (Rhyne 3/6/18 AM 107). He also testified that he had "never seen the [source] code from 2015 or '16 run," *id.* at 161, and was unable to say that the code would have even successfully compiled, *id.* at 158.

- Dr. Rosenberg, Title Source's expert, also concluded that the code could not "perform all of the features and functionality" required by the MSLA. (Rosenberg 2/28/18PM 189). He cited comments in the code that indicated the app was unfinished, such as a comment left by a HouseCanary programmer to "make [a portion of code] suck less," *id.* at 190, and that the number of files indicated the project was still in the development phase, *id.* at 181–85.

It was undisputed that the missing mobile sketch feature was needed for the appraiser to draw or "sketch" floor plan drawings without which "appraisals couldn't be completed." (Poindexter 3/1/18 PM 119). Because the absence of that feature made it impossible for the app to complete appraisals, it "prevent[ed] the parties from accomplishing the purpose of the contract." *Noble Energy, Inc. v. ConocoPhillips Co.*, 532 S.W.3d 771, 777 (Tex. 2017). HouseCanary's CEO admitted that he knew "having those [forms] complete [would] be *critical* to rolling [the app] out across Title Source." (Sicklick 3/8/18 AM 146) (emphasis added). In fact, even if the app had been functional (and it was not), Title Source would not have been able to use it across the full geographic scope of its business, because the app only had access to "just over 220" MLS boards. (Stroud 2/26/18 M 54).

Third, the testimony of every appraiser who personally tested the app during the parties' relationship was that the app was not capable of performing an appraisal—and therefore was not in a state to be "deployed in the field."

- Ken Bellew, a Title Source staff appraiser whom HouseCanary employees shadowed in April 2015, testified that he "w[as] not able to put the report together" using the HouseCanary app. (Bellew 2/14/18 AM 62). The HouseCanary employees, who observed Bellew attempting to use the app, concluded they needed to "go back to the drawing board." *Id*. And indeed, HouseCanary's own summary of their day with Bellew noted that implementing his suggested changes would push back the completion date of the app by at least two months. DX 78.

- Steve O'Brien, a Title Source staff appraiser who tested the app's ability to suggest comparables over a period of months, in October 2015 described the app as "a car without an engine." DX 169. In February 2016, O'Brien expressed concern that even April 15 "may be too early" for the roll-out. PX 255. Shortly after expressing these doubts, O'Brien was brought in-house at HouseCanary. *See supra* note 2.

- Michelle Waller, a Title Source staff appraiser, tried the app on March 9, 2016 (five months past the contractual deadline) during the Phoenix test led by HouseCanary. (Waller 2/22/18 PM 29–30). She testified that the app was so deficient that if Title Source had required her to use it, she "would [not] continue to work for Title Source." *Id.* at 50–51. She criticized the app for not properly "auto-fill[ing]" property details or "provid[ing] [a] map of the subject property," PX 2 at 15, and for reporting incorrect information about properties, (Waller 2/22/18 PM 39, 43).

- Scott Gary, who also attended the Phoenix test, testified that the app was not one he "could use [for his] appraisal work," (Gary 2/22/18 PM 118–19), because the app suggested inappropriate comparables, failed to identify relevant comparable sales, did not properly pull data about the suggested comparables, and made inadequate adjustments to suggested comparables, *id.* at 97–101, 107–108. Although the app was supposed to "enable[] [the] appraiser to measure and document [the property's] footprint," PX 2 at 15, Gary could not even draw a basic rectangle after "about 30, 45 minutes" of trying. (Gary 2/22/18 PM 95).

Fourth, the app's numerous deficiencies were contemporaneously documented and acknowledged by HouseCanary itself:

- On January 29, 2016—three months past the contractual deadline—an internal HouseCanary email from Jim Adams, one of the app's product managers stated bluntly that the app "is not ready to roll out to customers" because "[t]here are far too many defects to release now." DX 418. Another email sent by Adams on the same day stated that the app had "~32 defects" that needed to be fixed first. DX 417.

- On February 20, 2016—nearly four months past the deadline—an email from Chris Zaloumis, another of the app's product manager, detailed a plan to deal with "blocker bugs"—that is, bugs that were so significant that they "blocke[d]" the app from being released—between March 21 and April 22, 2016, meaning the app would not be launched until May. DX 474.

- The feedback from the Phoenix session in early March—which, again, was already more than four months past the deadline—spanned multiple whiteboards (Waller 2/22/18 PM 46); (Gary, 2/22/18 PM 113), and resulted in three pages of notes, *see* DX 584 (noting among much else that comps selection was the "[h]ighest priority" because "recent sales or listings should be on our comp list but [are] not")—which may not even have been comprehensive (Gary 2/28/18 PM 124).

- On March 19, 2016—over four months past the deadline and after the parties' relationship had started to deteriorate—Zaloumis acknowledged that Title Source's "criticism on Appraiser is fair," that the app was "not in Production," and that

HouseCanary "ha[d] work to do to get the product ready" because the app was not in a state where it would be proper to charge money for it. PX 309.

- Nearly a month later, on April 6, 2016, Tiffany Yang, who took over as Title Source's contact person on the HouseCanary side, still did not foresee having a "minimal viable product" until June 2016—and even that product would not have regression, a contractual requirement. PX 332.

HouseCanary may have produced visually impressive PowerPoint presentations and controlled demonstrations of the app, *see, e.g.*, DX 479 (Mike Brocker-Querio stating that the "look and feel" of the app was "seriously cool"), but this is irrelevant as to whether the app was actually capable of completing appraisals in the field. That is, an app can be visually pleasing but not actually *function*. And the great weight of the evidence shows that it did not.[32] It appears that HouseCanary took its cue from Hollywood, creating a stage set with attractive store fronts but nothing behind them. Or—as they say in Texas—HouseCanary was all hat and no cattle. The jury's finding that HouseCanary did not materially breach the MSLA, Ex. 30, Jury Charge

[32] Poindexter's live demonstration of the app at trial in 2018 does not prove otherwise. The claims at issue concern how the app functioned at the time of the parties' relationship in 2015 and 2016—not how the app functioned *two years later*. When there is a dispute over the state of an item at a particular point in time, evidence of the item's state at a *different* point in time is legally irrelevant. *See Lee v. Dyke*, 312 S.W.3d 191, 195–99 (Tex. App.—Houston 2010, no pet.) (evidence of purchase price is legally irrelevant to current fair market value). A common-sense example proves the point: the law would not permit a jury to go to the intersection where an accident allegedly occurred weeks ago because a traffic light allegedly was not working, and, upon seeing that the light works presently, to conclude that it must have worked in the past. Although Title Source did not object to the admission at trial, "[i]rrelevant evidence, even when admitted without objection, will not support a judgment." *Porras v. Craig*, 675 S.W.2d 503, 505 (Tex. 1984). This Court therefore cannot consider Poindexter's demonstration of the 2018 app in assessing whether HouseCanary fulfilled its contractual obligations regarding the appraiser app. Indeed, Poindexter himself admitted that the app in 2016 was missing contractual features, such as the mobile sketch functionality, (Poindexter 3/1/18 PM 125), and the three forms, *id.* at 107. And he acknowledged that without those features, an appraiser "couldn't complete an appraisal." *Id.* at 119. He further acknowledged that HouseCanary internally did not plan on completing those features until "the end of April" 2016—six months late. *Id.* at 148; *see* DX 433.

Q. 16, and Amendment One, *id.* Q. 22, thus cannot stand, and this court should grant a new trial on Title Source's MSLA and Amendment One claims.[33]

B. The great weight of the evidence was that HouseCanary breached the NDA by using the MSLA to solicit investment.

The NDA prohibited HouseCanary from disclosing "Confidential Information"—which included both the existence and terms of the MSLA—apart from the NDA's stated purpose of "facilitat[ing] discussion about, and the evaluation of, a potential business relationship between the Parties." PX 1 at 1. The great weight of the evidence shows, however, that HouseCanary disclosed the existence and terms of the MSLA to potential investors, flagrantly breaching the NDA in an attempt to infuse cash into its failing business, on at least seven occasions. *See* (Sicklick 3/8/18 AM 115–16) (discussing PX 19); *id.*at 107 (discussing PX 15); (Sicklick 3/8/18 PM 94) (discussing DX 1027); (Stroud 2/26/18 AM 94) (discussing PX 424-Q); *id.* at 96 (discussing PX 424-R); *id.* at 98 (discussing PX 424-U); *see also* PX 358; PX 424-S.

HouseCanary's breach was material because Title Source viewed the NDA as vital to "protecting ourselves and protecting our client information." (Eisenshtadt 2/5/18 PM 55). *See MBM Fin. Corp. v. Woodlands Operating Co.*, 292 S.W.3d 660, 664 (Tex. 2009) ("We agree nominal damages are available for breach of contract, as this Court has stated at least a dozen times."). Based on this record, the jury's finding, Ex. 30, Jury Charge Q. 29, that HouseCanary did not breach the NDA is thus against the great weight of the evidence, and a new trial is required.

* * *

In short, the interests of justice overwhelmingly command a new trial here. That is true for at least seven independent reasons. The newly discovered evidence of fraud and collusion

---

[33] Title Source anticipates that HouseCanary will rehash its litany of excuses for failing to deliver a functional app (*e.g.*, it was Title Source's fault). *See* Def's. Opp. to JNOV at 93 (Aug. 13, 2018). But these arguments go to whether HouseCanary's breaches of the MSLA and Amendment One were excused—a question the jury did not answer, because it found (wrongly) that there was no breach at all.

that tainted the jury verdict is enough to require a new trial. The prejudicial arguments and evidence with which HouseCanary inflamed and misled the jury are enough to require a new trial. The unreliable, irrelevant, and prejudicial expert testimony advanced by HouseCanary is enough to require a new trial. The grossly excessive and unconstitutional damages, rooted in HouseCanary's inflammatory tactics and false narrative, require a new trial. The harmful errors in the jury instructions also produced an improper verdict and require a new trial. And the absence of evidence factually sufficient to support the verdict on liability renders the judgment invalid regardless of any other issue. Last but not least, the overwhelming weight of the record evidence shows that HouseCanary breached its contract with Title Source because it never had any propriety technology in the first place. Each of these reasons are enough to grant a new trial and, taken together, forcefully compel one.

PRAYER

For the foregoing reasons, the Court must order a new trial. In the alternative, the Court should grant remittitur in the amount of $704.2 million for an award of $2 million and eliminate the punitive damages award entirely.

Dated: November 13, 2018

Respectfully submitted,

/s/ Catherine M. Stone

Catherine M. Stone
State Bar No. 19286000
LANGLEY & BANACK, INC.
745 E. Mulberry Avenue, Suite 700
San Antonio, TX 78212
Telephone: (210) 736-6600
Facsimile: (210) 735-6889
cstone@langleybanack.com

Veronica S. Lewis
State Bar No. 24000092
Allyson N. Ho
State Bar No. 24033667
Andrew P. LeGrand
State Bar No. 24070132
GIBSON, DUNN & CRUTCHER, LLP
2100 McKinney Avenue
Dallas, TX 75201-6912
Telephone: (214) 698-3100
Facsimile: (214) 571-2936
vlewis@gibsondunn.com
alegrand@gibsondunn.com

Helgi C. Walker*
GIBSON, DUNN & CRUTCHER, LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036-5306
Telephone: (202) 955-8500
Facsimile: (202) 530-9595
hwalker@gibsondunn.com

Randy M. Mastro*
GIBSON, DUNN & CRUTCHER, LLP
200 Park Avenue
New York, NY 10166-0193
Telephone: (212) 351-3825
Facsimile: (212) 351-5219
rmastro@gibsondunn.com

David M. Prichard
State Bar No. 16317900
PRICHARD YOUNG
10101 Reunion Place, Suite 600
San Antonio, TX 78216
Telephone: (210) 477-7401
Facsimile: (210) 477-7450
dprichard@prichardyoungllp.com

Jeffrey B. Morganroth*
MORGANROTH & MORGANROTH, PLLC
344 North Old Woodward Avenue, Suite 200
Birmingham, MI 48009
Telephone: (248) 864-4000
Facsimile: (248) 864-4001
jmorganroth@morganrothlaw.com

Peter S. Wahby
State Bar No. 24011171
Stephanie R. Smiley
State Bar No. 24066097
Samuel G. Davison
State Bar No. 24084280
Allison M. Stewart
State Bar No. 24102538
GREENBERG TRAURIG, LLP
2200 Ross Avenue, Suite 5200
Dallas, TX 75201
Telephone: (214) 665-3673
Facsimile: (214) 665-3601
wahbyp@gtlaw.com
smileys@gtlaw.com
davisons@gtlaw.com
stewarta@gtlaw.com

Manuel Peláez-Prada
State Bar No. 24027599
FLORES & PELÁEZ PRADA, PLLC
22211 IH-10 W., #1206
San Antonio, TX 78257
Telephone: (210) 361-0070
Facsimile: (210) 693-1312
mpp@stormlex.com

*admitted *pro hac vice*

Attorneys for Plaintiff Title Source, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of November 2018, the foregoing document was served on the following counsel of record in accordance with the Texas Rules of Civil Procedure:

ATTORNEYS FOR HOUSECANARY:

Max L. Tribble
Matt Behncke
Rocco Magni
Bryce T. Barcelo
Joseph S. Grinstein
Jonathan J. Ross
SUSMAN GODFREY
1000 Louisiana St., Suite 5100
Houston, TX 77002-5096
mtribble@susmangodfrey.com
mbehncke@susmangodfrey.com
rmagni@susmangodfrey.com
bbarcelo@susmangodfrey.com
jgrinstein@susmangodfrey.com
jross@susmangodfrey.com

Kalpana Srinivasan
SUSMAN GODFREY LLP
1901 Avenue of the Stars, Suite 950
Los Angeles, CA 90067-6029
ksrinivasan@susmangodfrey.com

Elisha Barron
SUSMAN GODFREY LLP
1301 Ave. of the Americas, 32nd Floor
New York, NY 10019
ebarron@susmangodfrey.com

Ricardo Cedillo
DAVIS, CEDILLO & MENDOZA, INC.
755 E. Mulberry Street, Suite 500
San Antonio, TX 78212
rcedillo@lawdcm.com

David M. Gunn
BECK REDDEN, LLP
1221 McKinney Street, Suite 4500
Houston, TX 77010
dgunn@beckredden.com

R. Laurence Macon
THE MACON LAW FIRM, PLLC
750 Rittiman Road
San Antonio, TX 78209
larry@maconlawfirm.net

Wallace B. Jefferson
ALEXANDER DUBOSE JEFFERSON TOWNSEND
515 Congress Avenue, Suite 2350
Austin, TX 78701-3562
wjefferson@adjtlaw.com

Thomas R. Philips
BAKER BOTTS, LLP
98 San Jacinto Blvd., Suite 1500
Austin, TX 78701
tom.phillips@bakerbotts.com

ATTORNEYS FOR THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS:

Joshua A. Romero
Megan Davis
JACKSON WALKER, LLP
100 Congress Avenue, Suite 1100
Austin, TX 78701
jromero@jw.com
mndavis@jw.com

Amanda Crouch
JACKSON WALKER, LLP
112 E. Pecan Street, Suite 2400
San Antonio, TX 78205
acrouch@jw.com

ATTORNEY FOR THE HOUSTON FORWARD TIMES:

J. Carl Cecere
CECERE PC
6035 McCommas Blvd.
Dallas, TX 756206
ccecere@cecerepc.com

/s/ Catherine M. Stone
CATHERINE M. STONE