

No. 04-19-00044-CV

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IN THE COURT OF APPEALS  
FOR THE FOURTH DISTRICT OF TEXAS  
AT SAN ANTONIO

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**TITLE SOURCE, INC.,  
APPELLANT**

v.

**HOUSECANARY ANALYTICS, INC.  
f/k/a CANARY ANALYTICS, INC.,  
APPELLEE**

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On Appeal from Cause No. 2016-CI-06300,  
In the 73rd Judicial District Court of Bexar County, Texas

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**BRIEF OF AMICUS CURIAE  
PHOENIX CENTER FOR ADVANCED LEGAL &  
ECONOMIC PUBLIC POLICY STUDIES**

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## INTEREST OF AMICUS CURIAE

The Phoenix Center for Advanced Legal & Economic Public Policy Studies is a non-profit 501(c)(3) organization that studies broad public-policy issues related to governance, social and economic conditions, with a particular emphasis on the law and economics of the digital age. Among other topics the Phoenix Center studies and comments upon is the need to respect and preserve due process and the integrity of the legal system—a central issue on appeal in this case. To this end, the Phoenix Center has filed amicus briefs with various appellate courts and with the United States Supreme Court in cases in which we believe significant due process issues are at stake. The Phoenix Center, therefore, has an established interest in the outcome of this proceeding and believes that its perspective on the issues will assist the Court in resolving this case.

The Phoenix Center has no direct financial interest in the outcome of this litigation. No counsel for any party authored this brief in whole or in part; and no entity or person aside from amicus curiae and its members, made any monetary contribution intended to fund the preparation or submission of this brief.

## SUMMARY OF ARGUMENT

As the United States Supreme Court recognized almost one hundred and fifty years ago, when a party has been prevented from exhibiting a full case due to fraud or deception by their opponent, then justice requires a reviewing court to reopen the case. This case is no exception. Thus, the central (and correct) question before this Court is whether HouseCanary's pattern of fraud and deception prevented the Appellant from exhibiting a full case to the jury to such an extent as to result in a miscarriage of justice. Reviewing the record in this case, the answer to that question is a resounding "yes."

Fortunately, this Court has the ability to right this wrong and restore integrity to the legal process by sending a clear message that such rampant and deliberate fraudulent schemes will not be tolerated in Texas. It should proceed to do so and allow a full and fair opportunity for a jury to rule on the facts previously concealed from this litigation.

## ARGUMENT AND AUTHORITIES

### **A. Introduction**

The underlying lodestar of the American judicial system is the notion of due process. *See, e.g., Snyder v. Com. of Mass.*, 291 U.S. 97, 116 (1934) (Cardozo, J.) (“[d]ue process of law requires that the proceedings shall be fair...”). But fairness is a two-way street. While we certainly expect judges to act as neutral arbiters, we must also expect the litigants to respect the judicial process and to conduct themselves honestly. The newly-discovered evidence indicates that HouseCanary’s conduct in this case, however, was far from honorable.

As the Appellant details extensively in its brief, the evidence of HouseCanary’s conduct in this case far exceeded the bounds of acceptable behavior. (*See, e.g.,* Appellant’s Brief at pp. 15-19; pp. 66-74 VII.) Indeed, this is not a case about mere discovery abuses. Instead, due to the courage of a whistleblower disgusted with HouseCanary’s conduct, it was discovered immediately after trial that HouseCanary’s surreptitious deeds in this case ran the gamut from having a “fifth column” inside the Appellant’s circle of trust, to withholding key information during discovery, to directing witnesses to make gross misrepresentations about

the readiness, functionality and availability of its products, and even going so far as to paying off witnesses via lucrative “consulting” contracts.

*Id.* As explained in detail below, given the extent and scope of the evidence of HouseCanary’s now-exposed fraud, the Appellant—through no fault of its own—was unable to present a complete case to the jury. Accordingly, due process requires this Court to either reverse and render or, at minimum, grant a new trial.

**B. Evidence Shows HouseCanary’s Fraud Was Not a Series of Isolated Incidents but a Deliberately Planned and Executed Scheme**

As the United States Supreme Court recognized almost one hundred and fifty years ago, when a party has been prevented from exhibiting a full case due to fraud or deception by their opponent, then justice requires a reviewing court to reopen the case. *See, e.g., U.S. v. Throckmorton*, 98 U.S. 61, 65-66 (1878). Indeed, as the U.S. Supreme Court observed in its seminal case of *Hazel-Atlas Co. v. Hartford-Empire Co.*, 322 U.S. 238 (1944):

From the beginning there has existed alongside the term rule a rule of equity to the effect that under certain circumstances, one of which is after-discovered fraud, relief will be granted against judgments regardless of the term of their entry. This equity rule, which was firmly established in English practice long before the foundation of our Republic, the courts have



developed and fashioned to fulfill a universally recognized need for correcting injustices which, in certain instances, are deemed sufficiently gross to demand a departure from rigid adherence to the term rule.

*Id.* at 244. Thus, the central (and correct) question before this Court is whether HouseCanary’s pattern of fraud and deception prevented the Appellant from exhibiting a full case to the jury to such an extent as to result in a miscarriage of justice? Reviewing the record in this case, the answer to that question is a resounding “yes.” *See, e.g., Waffle House v. Williams*, 313 S.W. 3d 796, 813 (Tex. 2010) (a new trial is appropriate when newly-discovered evidence (1) has come to a party’s knowledge since the trial; (2) the failure to discover the evidence was not due to a lack of diligence on behalf of said party; (3) the evidence is not cumulative, and (4) the evidence is so material it probably would produce a different result if a new trial were granted.)

By any reasonable account, the record makes clear that HouseCanary’s subterfuge against the Appellant was not a series of isolated incidents. In fact, HouseCanary engaged in a “deliberately planned and executed scheme” to prevent the Appellant from mounting an effective case. *See Hazel-Atlas*, 322 U.S. at 245. HouseCanary’s conduct is far from a case of run of the mill, over-zealous “Rambo-Lawyering” (*see, e.g., David R.*

Hague, *Fraud on The Court and Abusive Discovery*, 16 NEV. L. J. 707, 708 (2016)). By engaging in such a deliberately planned and executed scheme (particularly during the litigation process), HouseCanary's actions in this case have, in the words of Justice Felix Frankfurter, "defiled" the "very temple of justice." *Universal Oil Products v. Root Refining*, 328 U.S. 575, 580 (1946)(Frankfurter, J.).

Equally as important, equity demands that this Court not blame the Appellant for failing to expose HouseCanary's scheme during discovery. Indeed, given the extent of HouseCanary's deliberately planned and executed scheme, it is difficult to understand how the Appellant "should have been expected to do more than it did to uncover the fraud." *See Hazel-Atlas*, 322 U.S. at 246. Texas law is clear that a "litigant should be able to rely on discovery responses provided by his opponent in determining what other discovery, if any, to pursue." *Westmoreland v. Starnes*, No. 07-13-00364-CV, 2015 WL 1325530, at \*3-4 (Tex. App.—Amarillo Mar. 24, 2015, pet. denied). Moreover, as the Appellant points out in its brief, the diligence requirement is "relaxed" by a "showing of fraudulent misrepresentation or concealment by the adverse party" where breach of fiduciary duty is at issue. *See* Appellant Brief at 68

(citations omitted). Accordingly, the sheer extent of HouseCanary's fraud in this case "demands the exercise of the historic power of equity" and, as such, this Court should set aside the lower court's ruling. *Hazel-Atlas, supra*, 322 U.S. at 246.

**C. As the Exposure of HouseCanary's Fraud Was Immediate, HouseCanary's Right to "Finality" of Judgment Will Not be Harmed**

One of the hallmarks of the American justice system is the desire for "finality." The rationale is straightforward: as a general rule, we do not want to endlessly re-litigate cases. If so, then the "number of suits would be without limit and the litigation endless...." *Throckmorton*, 98 U.S. at 69.

In this particular case, however, given that a whistleblower courageously exposed HouseCanary's scheme just one day after the jury rendered its verdict, such concerns about endless litigation are not present. Unlike the fact pattern (for example) in *Throckmorton*, this is not a case where new evidence of fraud was presented decades after the original trial (*see, e.g., id.*); this is a case where HouseCanary's extensive fraud was revealed *immediately* after the jury rendered its verdict due to the troubled conscience of a concerned citizen outraged by what occurred

at trial—fraudulent conduct, by the way, which was subsequently corroborated by several other independent witnesses and contemporaneous documentary evidence that had previously not been produced. *See, e.g.,* Appellate Brief at p. 69. Accordingly, as HouseCanary’s extensive fraud was exposed in a timely and relevant matter, any claim that the jury’s verdict must stand to protect “finality” simply does not hold water. To the contrary, given HouseCanary’s deliberately planned and executed scheme, due process warrants a new trial.

**D. Either Reversing and Rendering or Granting a New Trial Provides an Equitable Remedy to HouseCanary’s Fraud**

Had not HouseCanary engaged in a naked scheme to conceal material facts, there is a high probability the Appellant would have presented compelling evidence from which a jury would reach a different result. *See, e.g., Waffle House*, 313 S.W. 3d at 813. Fortunately, this Court has the discretion to right this wrong.

As pointed out by Professor David R. Hague of the South Texas College of Law, courts have great latitude to remedy egregious cases of fraud. As Professor Hague observes:

While some misconduct might fall short of furnishing a basis for setting aside a judgment and dismissal with prejudice, other indiscretions may warrant such a harsh remedy. Courts possess plenary authority “to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.” As a result, examination of the options of the court confronted by misconduct—whether that is taking additional steps beyond setting aside the judgment such as ordering dismissal or imposing sanctions—is an important component to process litigation to a just and equitable conclusion.

Hague, 16 NEV. L. J. at 739 (footnotes omitted). The equities of this case warrant this Court to exercise that discretion in full.

By any reasonable standard, given the outsized amount of the jury’s verdict (as the Appellant points out, it was the largest in Bexar County history (Appellant’s Brief at p. 1)), this case can hardly be considered a typical contractual dispute. In fact, given that the alleged misappropriation of technology HouseCanary licensed to Title Source was only one part of a \$5 million contract, it would be safe to say that the verdict was *absurdly* large. *C.f.*, Richard Epstein, *Jackpot Justice in Texas*, FORBES (September 12, 2018) (“But [HouseCanary] never backed that claim up with financial estimates of either the increased volume or profitability of [the Appellant’s] business. Competitive forces in a mature market always tamp down on off-the-wall profit claims.”) But, as demonstrated above, this absurd verdict was, in large part, the result of

HouseCanary's deliberately planned and executed scheme to hide controverting evidence and to prevent the Appellant from mounting a complete case. For this reason, this Court should reverse and render the trial court's judgment below. If this Court elects not to go that far, however, then granting a new trial is nonetheless an equitable and just result in this case.

**E. Granting Equitable Relief in this Case will do Much to Restore Confidence in Texas' Judicial System and Promote the Texas Economy**

Public confidence in a fair and effective judicial system is crucial to a functioning economy. *See generally*, K.W. Dam, *The Judiciary and Economic Development*, COASE-SANDOR WORKING PAPER SERIES IN LAW AND ECONOMICS, University of Chicago Law School (2006) at 1 (“One conclusion widely agreed upon, not just in the economic literature but also among lawyers and legal scholars, is ... that the judiciary is a vital factor in the Rule of Law and more broadly in economic development.”). As noted in a paper presented at conference at the University of Texas School of Law (and subsequently published in an academic journal):

the violation of the norm of procedural fairness through corruption can have an adverse effect on economic activity. First, if individuals cannot be confident of equal treatment by

the judicial system, then the courts cease to be a dependable institution for dispute resolution. Parties are forced back on the costly alternative of private enforcement, and investment and trade suffer accordingly. Second, rent-seeking and corruption raise costs for producers and consumers by diverting resources into the rent-seeking process. Third and most importantly, corruption and rent-seeking introduce policy distortions that constitute barriers to long-run growth: monopolies, restrictions on entry, protectionism, misallocation of government spending, and *private expropriation of assets through managerial malfeasance*.

S. Haggard and Lydia Tiede, *The Rule of Law and Economic Growth: Where Are We?*, The University of Texas School of Law, Conference on Measuring the Rule of Law, March 25-26, 2010 at pp. 10-11 (citations omitted and emphasis supplied) (available at: <https://law.utexas.edu/conferences/measuring/The%20Papers/ruleoflawconference.Haggard&Tiede.Rule%20of%20Law.March13.2010.pdf> and published at 39 WORLD DEVELOPMENT 673 (2011)). Like it or not, public confidence that Texas has a fair and effective judicial system is now at stake in this case.

Texas prides itself as a state that is “open for business.” *See generally*, “Go Big in Texas”, Texas Economic Development Corporation and Office of the Governor (<https://businessintexas.com>). In fact, one of the prime attributes the State of Texas’s official webpage touts is “Texas’ fair legal

system.” (See *id.*, <https://businessintexas.com/why-texas/fair-legal-system>.) Should this Court condone HouseCanary’s well-documented surreptitious “managerial malfeasance” into the Appellant’s operations, however, then such a ruling would send a chilling signal to the market that Texas jurisprudence remains the “Wild West.” Accordingly, this Court must allow a full and fair opportunity for a jury to rule on the facts previously concealed from this litigation.

### CONCLUSION

*Ceteris paribus*, this case should have been a straightforward litigation over a contractual dispute between two parties. Yet, thanks in large part to HouseCanary’s deliberately planned and executed fraudulent scheme, the Appellant instead finds itself in a legal “Twilight Zone” by owing HouseCanary nearly \$740 million in damages for HouseCanary’s failure to live up to its contractual commitments. Given the scale and scope of HouseCanary’s newly-discovered and *corroborated* fraud, this result is neither equitable nor just.

Fortunately, this Court has the ability to right this wrong and restore integrity to the legal process by sending a clear message that such



rampant and deliberate fraudulent schemes will not be tolerated in Texas. It should proceed to do so and allow a full and fair opportunity for a jury to rule on the facts previously concealed from this litigation.

For the reasons set forth herein, the Phoenix Center joins the Appellant in urging this Court either to reverse and render or, at minimum, grant a new trial.

### **PRAYER**

WHEREFORE, PREMISES CONSIDERED, Amicus Curiae The Phoenix Center for Advanced Legal & Economic Public Policy Studies, respectfully requests that the Court reverse the judgment in HouseCanary, Inc. f/k/a Canary Analytics, Inc.'s favor and remand this proceeding to the District Court for trial, and such other relief, both legal and equitable, to which it is entitled.

Respectfully submitted,

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I certify that on February 5, 2020, this document was electronically filed with the Court of Appeals for the Fourth District of Texas at San Antonio using the electronic case filing system, which will send notification to the following attorneys of record:

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## CERTIFICATE OF COMPLIANCE

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