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A Proposal to Amend Rule 76a to Reduce the Burden and Expense of Filing Court Records under Seal in Trade Secret Cases

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IN 2013, TEXAS JOINED THE MAJORITY OF OTHER STATES and adopted a Texas version of the Uniform Trade Secrets Act.[1] Before enactment of the Texas Uniform Trade Secrets Act (TUTSA), Texas had no central law governing trade secrets. Instead, Texas law on trade secrets was cobbled together from Texas common law, the Restatement of Torts, the Restatement (Third) of Unfair Competition, and the Texas Theft Liability Act. Much of this law was outdated (the Restatement of Torts was drafted in 1939) and simply was not designed for the technological developments of the modern era. Moreover, protection of trade secrets during litigation was problematic due to the cumbersome sealing requirements in Rule 76a of the Texas Rules of Civil Procedure. As a result, Texas businesses and those businesses looking to expand to Texas were left to guess what information Texas law would protect as a trade secret.

TUTSA codified and modernized Texas law on trade-secret misappropriation by providing a simple legislative framework for litigating trade-secret cases. Among other things, TUTSA provides unambiguous and updated standards for trade-secret misappropriation, a provision for recovery of attorney's fees, and a simplified means for obtaining injunctive relief and for protecting trade secrets during litigation.

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However, following the Texas Supreme Court's decision in *House Canary, Inc. v. Title Source, Inc.*,[2] one of TUTSA's main objectives—the efficient and effective protection of trade secrets during litigation—has not been fully realized. This paper will address sealing court records under Rule 76a of the Texas Rules of Civil Procedure, the development of court protective orders under TUTSA to protect the secrecy of trade secrets during litigation, the impact of the Texas Supreme Court's decision in *House Canary*, and a proposed rule change to address the burden and expense of sealing court records under Rule 76a in trade-secret cases.

In 1990, the Texas Supreme Court adopted Rule 76a in response to a legislative directive requiring the Court to "develop guidelines for courts to use in deciding whether to seal civil records."[3] Rule 76a "creates a presumption that all court records are open to the public and allows trial courts to seal court records . . . ."[4] A trial court is authorized to seal court records only upon a party demonstrating that it has a substantial interest that outweighs the presumption of openness, that the benefit of sealing the record will outweigh any adverse effects on public health or safety, and that there are no less restrictive means that will protect the party's specific interests.[5]

To meet these substantive standards, a party must comply with certain procedural requirements under Rule 76a. A party seeking a sealing order must first file a written motion and post public notice of the hearing "at the place where notices for meetings of county governmental bodies are required to be posted . . . ."[6] Among other things, the notice must inform the public of its right to intervene, the nature of the controversy, and the nature of the records sought to be sealed.[7] The hearing must be held not less than fourteen days after the motion is filed and the notice is posted.[8] The notice must state the time and place of the hearing and must contain a specific description of the nature of the case and the records sought to be sealed.[9] Immediately after posting such notice, the movant must file a verified copy of the posted notice with the clerk of the court in which the case is pending and with the Clerk of the Supreme Court of Texas.[10] At the hearing on the motion to seal, the movant must demonstrate that it has met the substantive requirements justifying a sealing order, at which time any

person has a right to intervene and an opportunity to be heard.[11] A motion to seal can be granted only by a separate, written order that sets out "the specific reasons" for sealing, the specific portions of records to be sealed, and the order's duration.[12] The trial court retains jurisdiction to alter or vacate its sealing order, but parties can move to reconsider an order on a motion to seal only upon a showing of changed circumstances materially affecting the order.[13]

Rule 76a applies to all "court records," including court records containing trade secrets.[14] The definition of court records broadly includes not only "all documents of any nature filed in connection with any matter before any civil court" but also "discovery, not filed of record, concerning matters that have a probable adverse effect upon the general public health or safety, or the administration of public office, or the operation of government . . . ."[15]

Texas was the first state to adopt sealing procedures like that prescribed in Rule 76a.[16] Along with the overall goal of promoting public access to judicial records, there were four primary concerns that motivated the adoption of Rule 76a.[17] First, the drafters of the rule believed that "greater access to civil judicial records promotes public health and safety . . . ."[18] The drafters also believed that "access to judicial records encourages greater integrity from attorneys and their clients."[19] For example, if documents are made public in one case, a party might be less likely to deny their existence in another.[20] It was also thought that if documents were lost, their existence in other cases might increase the likelihood of their discovery from other sources.[21] In addition, the drafters believed that access to court records would ensure greater integrity from the bench.[22] Finally, the drafters envisioned that providing the public greater access to court records would strengthen democracy as a whole.[23]

One controversial aspect of Rule 76a is the exception to the presumption of openness for unfiled discovery in cases "originally initiated to preserve bona fide trade secrets or other intangible property rights."[24] The drafters of Rule 76a explained that this exception was included because "[a] genuine trade secret is certainly the type of 'specific, serious and substantial interest' that should be considered in the balancing process mandated by paragraph 1 of Rule 76a."[25] While such an exception was well intended, whether something is a trade secret is often a central issue—if not the crucial fact issue—in a trade-secrets case. Requiring a party to prove a "bona fide" trade secret to seal unfiled discovery under Rule 76a(2)(c), a party risks being unable to secure, at an early stage, a court's protection from public disclosure of the very evidence necessary for a party to prove its trade-secret claim—*i.e.* the existence of a trade secret.

The Texas Legislature enacted TUTSA after the Texas Supreme Court's adoption of Rule 76a. The primary goal of the legislation was to "[provide] a simple legislative framework for litigating trade secret issues in Texas."[26] The drafters of TUTSA sought to achieve this goal in several different ways. TUTSA provides "consistent and predictable" standards for trade-secret cases.[27] The definition of a trade secret was modernized to address "current business practices and technologies . . . ."[28] Additionally, updated statutory standards clarified what business practices were proper and when they would constitute trade-secret misappropriation.[29] Finally, TUTSA provides standards for obtaining injunctive relief and for the recovery of attorney's fees.[30]

One primary concern was the difficulty in applying Rule 76a's sealing procedures in trade-secret cases.[31] Consequently, the drafters of TUTSA sought to displace "the cumbersome procedures outlined in [Rule] 76a, which requires public notice and the public's opportunity to be heard."[32] With the adoption of TUTSA, the Legislature sought to provide litigants the ability to bring their trade-secret claims to court without the fear of disclosing the very information they are trying to keep secret.[33]

The plain language of the statute makes clear that the Legislature intended for courts to actively protect a party's trade-secret information at all stages of the litigation.[34] TUTSA provides that "a court shall preserve the secrecy of an alleged trade secret by reasonable means."[35] To encourage courts to do so, TUTSA contains a statutory presumption in favor of granting protective orders to preserve the secrecy of trade secrets.[36] "Protective orders may include provisions limiting access to confidential information to only the attorneys and their experts, holding in camera hearings, sealing the records of the action, and ordering any person involved in the litigation not to disclose an alleged trade secret without prior court approval."[37] Additionally, while TUTSA includes a presumption that a party may assist their counsel in the presentation of their case, "[a]t any stage of the action, the court may exclude a party and the party's representative or limit a party's access to the alleged trade secret of another party" after balancing certain factors.[38]

TUTSA explicitly contemplates that courts should resolve any conflicts between TUTSA's provisions and the Texas Rules of Civil Procedure in favor of TUTSA.[39] Thus, by enacting TUTSA, the Legislature intended to resolve a conflict between

two competing public policy interests: (1) public access to court records and (2) trade-secret protection for a litigant's alleged trade secrets at any stage of the litigation.[40] By specifically including language that ensured TUTSA displaced all conflicting laws, the Legislature pronounced that it had weighed these public policy interests in favor of sealing certain court records—*i.e.*, those that disclose a litigant's alleged trade secrets—in actions governed by TUTSA.[41] For nearly eight years after the adoption of TUTSA, many believed that Rule 76a no longer applied to trade-secret cases.

In 2021, the Texas Supreme Court sought to resolve certain conflicts between TUTSA and Rule 76a in *HouseCanary, Inc. v. Title Source, Inc.*[42] Title Source sued HouseCanary for breach of contract, and HouseCanary asserted a counterclaim for trade-secret misappropriation.[43]

Following trial, the jury found in favor of HouseCanary.[44] HouseCanary later filed a motion to seal several trial exhibits.[45] Title Source and two intervening media organizations opposed this motion arguing that nearly all of the exhibits HouseCanary was seeking to seal were freely discussed in open court.[46] Originally, the trial court denied HouseCanary's motion.[47] However, HouseCanary moved for the trial court to reconsider its ruling relying on TUTSA as its basis for sealing the exhibits.[48] The trial court ultimately sealed the records, and Title Source and the media organizations appealed.[49]

Requiring a party to comply with Rule 76a's sealing procedures each time a party seeks to seal a court record containing trade-secret information greatly increases the burden and the cost of trade-secret litigation.

The court of appeals reversed.[50] The court held that the trial court abused its discretion in granting the motion to seal because HouseCanary did not comply with the substantive and procedural requirements of Rule 76a, which the parties had agreed to follow in their stipulated protective order.[51]

The Texas Supreme Court affirmed, determining that TUTSA did not displace Rule 76a in its entirety.[52] The court found that because "TUTSA does not provide an independent, self-contained pathway for sealing court records,"[53] TUTSA only displaces the substantive sealing standards of Rule 76a and leaves the procedural mechanisms of the rule wholly intact.[54] The court reasoned that "unlike Rule 76a, which provides both standards and procedures, TUTSA prescribes no procedures for parties or courts to follow in using these means."[55] The court acknowledged that TUTSA controls over the Texas Rules of Civil Procedure when there is a conflict.[56] The court determined, however, that no conflict existed between TUTSA and Rule 76a's procedures because the Legislature did not provide any procedures for a court to use to seal trade secrets under TUTSA.[57]

The supreme court concluded that because the trial court did not apply the non-displaced provisions of Rule 76a in ruling on the motion to seal, it abused its discretion in granting that motion.[58] The court therefore affirmed the portion of the court of appeals' judgment that reversed the sealing order and remanded for the trial court to exercise its discretion under the applicable provisions of both TUTSA and Rule 76a.[59]

As a result of the supreme court's decision, parties seeking to seal records containing alleged trade secrets are no longer required to show a specific, serious, and substantial interest that outweighs the presumption of openness and any adverse health or safety effects of sealing.[60] The court found that these substantive provisions in Rule 76a(1) were in conflict with TUTSA's presumption in favor of protective orders to protect alleged trade secrets.[61] But the court held that there are several procedural aspects of Rule 76a that still apply in trade-secret cases: The rule's public notice and hearing requirements; the requirement that a movant must "show no less restrictive means will adequately and effectively protect its interest in secrecy"; the "bar on motions to reconsider absent changed circumstances"; and the right to appeal.[62] Although the supreme court concluded that TUTSA's presumption in favor of granting protective orders controlled, the court was careful to note that this presumption and the duty it imposes on trial courts to preserve trade secrets does not displace Rule 76a's procedures.[63] The court also predicted that "TUTSA's presumption favoring protective orders may increase the likelihood of a motion to seal being granted in the first place, but nothing in TUTSA promises a quick second bite at the apple in the trial court."[64]

Rule 76a, however, "imposes detailed, difficult procedures on a movant seeking sealing."[65] Requiring a party to comply with Rule 76a's sealing procedures each time a party seeks to seal a court record containing trade-secret information greatly increases the burden and the cost of trade-secret litigation. A written motion must be filed, a hearing on the motion must be set and posted, a verified copy of the posted notice must be filed with the clerk of the court in which the case is pending and with the clerk of the Supreme Court of Texas, and proof

must be offered at the hearing that no less restrictive means than sealing records will adequately and effectively protect the specific interest asserted in protecting the secrecy of the identified trade-secret information.[66]

Trade-secret litigation often involves filing numerous court records containing trade-secret information. Among other things, litigants frequently file trade-secret information in applications for temporary restraining orders, motions for preliminary injunction, motions to compel, motions for protective order, motions for summary judgment, motions to exclude expert witnesses, and in exhibits offered at hearings and in trial. Thus, compliance with Rule 76a involves an extremely burdensome process for both the parties and the court because a hearing is required each time a party intends to file "court records" containing trade-secret information.[67] And the cost and expense involved in sealing each court record containing trade-secret information can easily mount over the course of the litigation.[68]

Requiring compliance with Rule 76a's sealing procedures has also created certain unintended consequences. Under Rule 76a(2)(c), "court records" is defined as "all documents of any nature filed in connection with any matter before any civil court . . . [and] . . . discovery, not filed of record . . . except discovery in cases originally initiated to preserve bona fide trade secrets or other intangible property rights."[69] Rule 76a, however, fails to define the phrase "bona fide trade secrets."[70] This language conflicts with TUTSA's requirement that a court preserve the secrecy of an "alleged trade secret" by reasonable means.[71] Under TUTSA, "[t]he duty to preserve the secrecy of trade secrets runs to both proven trade secrets and alleged trade secrets."[72] Thus, unlike the current version of Rule 76a requiring proof of a "bona fide trade secret," TUTSA "applies to trade secrets even if only alleged."[73] This lack of clarity incentivizes defendants to question whether a plaintiff initiated a bona fide trade-secret misappropriation claim "to avoid an implied admission that it has been sued over trade secrets that are protectible."[74] Thus, Rule 76a's confusing and ambiguous text encourages gamesmanship and delay.

Without an amendment to Rule 76a, litigants will continue to face the potential loss of their trade secrets through public disclosure while attempting to preserve them, protracted disputes over whether a claimed trade secret is a "bona fide" trade secret, and costly and cumbersome procedures necessary to seal numerous court records containing trade-secret information over the course of the litigation.[75]

A relatively simple amendment to Rule 76a—clarifying certain language in paragraph 2(c) and adding a new paragraph 10—can alleviate many of these issues and concerns.

> **Proposed Amendment to Rule 76a:**
> 2. **Court Records.** For purposes of this rule, court records means:
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> (c) discovery, not filed of record, concerning matters that have a probable adverse effect upon the general public's health or safety, or the administration of public office, or the operation of government, except discovery in cases alleging trade-secret misappropriation. ~~originally initiated to preserve bona fide trade secrets or other intangible property rights.~~
>
> 10. **Standards for Sealing Trade Secrets.** In cases alleging trade-secret misappropriation, a party seeking to seal court records containing alleged trade secrets must comply with the notice and hearing procedures in paragraphs 3–4 or the temporary sealing procedures in paragraph 5 and must demonstrate that no less restrictive means than sealing the entire record (such as redacting portions of the record, limiting access, ordering non-disclosure, or granting a protective order) will adequately and effectively protect the party's interest in secrecy. If the court authorizes the sealing of court records, the court may seal future court records containing alleged trade secrets under a protective order authorized by Rule 192.6 and TEX. CIV. PRAC. & REM. CODE §134A.006(a).

The proposed amendment appropriately balances the public's interest in open court records and a party's interest in effectively and efficiently protecting trade secrets during litigation. Under the proposed amendment, the public will retain the right to be heard at an initial public hearing where the court will consider the movant's sealing motion. If a court authorizes the sealing of court records containing trade secrets and enters a protective order under Rule 192.6 and TEX. CIV. PRAC. & REM. CODE §134A.006, the court may later enter subsequent sealing orders under the court's protective order without the need for further public notices or hearings. Under the proposed procedure, parties and the court are no longer required to serially comply with Rule 76a's burdensome sealing procedures each time a party seeks to seal a court record containing trade-secret information. The public, nevertheless, retains the right under Rule 76a to intervene to object to or appeal the court's sealing orders.[76] The proposed amendment also preserves the relevant nondisplaced substan-

tive provisions of Rule 76a as required by *HouseCanary*.[77] Finally, the proposed amendment compliments and is not in conflict with TUTSA's provisions.[78]

One of the primary objectives of TUTSA was to remove the cumbersome, time-consuming, and expensive procedures of Rule 76a from trade-secret litigation. The proposed amendment would relieve trade-secret litigants from the burden and expense of providing notice and participating in a public hearing each time a party seeks to seal a court record containing trade-secret information. The Texas Supreme Court should consider amending Rule 76a to achieve these objectives.

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1 *Trade Secrets Act*, UNIFORM LAW COMMISSION, https://www.uniformlaws.org/committees/community-home?CommunityKey=3a2538fb-e030-4e2d-a9e2-90373dc05792 (last visited June 25, 2022).

2 *See HouseCanary, Inc. v. Title Source, Inc.*, 622 S.W.3d 254 (Tex. 2021).

3 Robert C. Nissen, *Open Court Records in Products Liability Litigation Under Texas Rule 76a*, 72 TEX. L. REV. 931, 935 (1994); *see also Gen. Tire Inc. v. Kepple*, 970 S.W.2d 520, 523 (Tex. 1998).

4 *Gen. Tire*, 970 S.W.2d at 523.

5 *See* TEX. R. CIV. P. 76a(1).

6 *Id.* (3).

7 *Id.*

8 *Id.* (4).

9 *Id.* (3).

10 *Id.*

11 *Id.* (7).

12 *Id.* (6).

13 *Id.*

14 TEX. R. CIV. P. 76a(2)(a) (subject to limited exceptions not applicable here); *HouseCanary*, 622 S.W.3d at 260 (holding that "court records" under Rule 76a may include trade secrets).

15 TEX. R. CIV. P. 76a(2)(a).

16 Lloyd Doggett & Michael J. Mucchetti, *Public Access to Public Courts: Discouraging Secrecy in the Public Interest*, 69 TEX. L. REV. 643, 684–85 (1991).

17 Doggett & Mucchetti, *supra* note 16, at 648.

18 *Id.*

19 *Id.*

20 *Id.*

21 *Id.*

22 *Id.* at 650–51.

23 *Id.* at 652.

24 TEX. R. CIV. P. 76a(2)(c).

25 Doggett & Mucchetti, *supra* note 16, at 673–74.

26 House Comm. on Tech., Bill Analysis, Tex. S.B. 953, 83rd Leg., R.S. at 1 (2013).

27 S. Comm. on State Affairs, Bill Analysis, Tex. C.S.S.B. 953, 83rd Leg. RS (July 11, 2013).

28 *Id.*

29 *Id.*

30 *Id.*

31 Joseph F. Cleveland, Jr. & J. Heath Coffman, *The Texas Uniform Trade Secrets Act*, 45 TEX. J. BUS. L. 323, 329 (2013).

32 *Id.*

33 *Id.*

34 TEX. R. CIV. PRAC. & REM. CODE §134A.006(a).

35 *Id.*

36 *Id.*

37 *Id.*

38 *See id.* (b).

39 TEX. CIV. PRAC. & REM. CODE § 134A.007(c); House Comm. On Tech, Bill Analysis, Tex. S.B. 953, 83rd Leg., R.S. at 2 (2013) ("The bill clarifies that, to the extent that its provisions conflict with the Texas Rules of Civil Procedure, the bill's provisions control).

40 *See id.*

41 *See id.*

42 *HouseCanary, Inc. v. Title Source, Inc.*, 622 S.W.3d 254 (Tex. 2021).

43 *Id.* at 256.

44 *Id.* at 257.

45 *Id.*

46 *Id.*

47 *Id.*

48 *Id.*

49 *Id.*

50 *Title Source, Inc. v. HouseCanary, Inc.*, 603 S.W.3d 829, 841 (Tex. App.—San Antonio 2019, pet. granted).

51 *Id.*

52 *HouseCanary*, 622 S.W.3d at 256.

53 *Id.*

[54] *Id.* at 261–263.
[55] *Id.* at 260.
[56] *Id.* at 261.
[57] *Id.* at 261–62.
[58] *Id.* at 256.
[59] *Id.*
[60] *Id.* at 261.
[61] *Id.*
[62] *Id.* at 261–63.
[63] *Id.* at 263 ("Rule 76a governs . . . whether a public written motion to seal documents is required, who gets notice of that request and an opportunity to respond, whether a hearing is conducted and is open to the public, whether a sealing order is public . . . whether such an order can be appealed.").
[64] *Id.* at 262.
[65] *HouseCanary*, 622 S.W.3d at 271 (Hecht, C.J., concurring in the judgment).
[66] TEX. R. CIV. P. 76a (1)(b); *HouseCanary*, 622 S.W.3d at 261.
[67] Jennifer S. Sickler & Michael F. Heim, *The Impact of Rule 76a: Trade Secrets Crash and Burn in Texas*, TEX. INTELL. PROP. L. J. 95, 97–98 (1993) ("[C]ompelling courts to hold open hearings and to make written findings before they can seal court records is time-consuming for the judiciary and costly to litigants.").
[68] *Id.*
[69] TEX. R. CIV. P. 76a (2)(c).
[70] Sickler, *supra* note 67, at 96–97.
[71] TEX. CIV. PRAC. & REM. CODE § 134A.006(a).
[72] *HouseCanary*, 622 S.W.3d at 271 (Hecht, C.J., concurring in the judgment).
[73] *Id.*
[74] Sickler, *supra* note 67, at 97–98.
[75] *Id.*
[76] TEX. R. CIV. P. 76a (4), (8).
[77] *HouseCanary*, 622 S.W.3d at 261–63.
[78] TEX. CIV. PRAC. & REM. CODE § 134A.007(c).