

LAWDRAGON

Revenge of the Hatchlings: How Susman Godfrey Won Almost \$1 Billion for HouseCanary



Photo of Kalpana Srinivasan and Max Tribble by Amy Cantrell.

By Katrina Dewey

This is the story of how to lose nearly a billion dollars in a lawsuit that should never have been filed. And how a counterclaim became the largest jury verdict in the illustrious history of Susman Godfrey.

*It is also a manual for disruptors on how to not get f****d in court by the disrupted.*

Beware of Emails from Dinosaurs

It sounds obvious. But in the new world of the disruptors and the disrupted, one must always know in which camp one sits.

Easy to say, as when you're a disruptor hunger is intense, and validation – and cash, dear God, please cash – from the disrupted is so very tempting.

So, on Dec. 3, 2013, when the founders of the recently conceived HouseCanary received an email from the chief appraiser of Title Source – the nation's largest independent company offering title insurance, valuations and closing services – saying they should talk, one can imagine a few rounds of tequila were had at HouseCanary.

They were on their way. Throughout the housing collapse that gripped the nation beginning in 2008, former Boston Consulting Group partner Jeremy Sicklick had pondered the problem of unreliable real estate appraisal data. His quest had taken him to Chris Stroud, a brilliant University of Texas computer scientist, who had spent a decade crunching data to create reliable predictive models. This modeling could then be applied to home resale prices for the \$35-trillion housing market, which Sicklick did when he connected with Stroud. The real estate appraisal software HouseCanary created includes a secret algorithm, an automated valuation model (AVM) that swiftly predicts property values, risks and expected changes by harnessing millions of data points about individual homes. Automation of appraisals is a vast step forward in the industry, which has traditionally relied on in-home inspections and laborious manual processes that make it hard to capture key metrics that can predict valuation shifts.

Within three days of that December email, HouseCanary and TSI became engaged – in a non-exclusive but meaningful way. They entered into the first of two agreements: a stringent Non-Disclosure Agreement binding Title Source and its affiliates including, Quicken Loans, the largest home mortgage company in the U.S. The companies agreed not to reverse engineer HouseCanary's models or their output, including AVMs and also agreed to not use HouseCanary's confidential information or trade secrets to create new products. For HouseCanary, the deal offered the possibility of access to a trove of appraisal data generated by TSI appraisers, allowing it to refine its analytics. And, of course, the lure of cash.

HouseCanary and TSI worked together for a year before entering into a second agreement, in January 2015: a Master Software License Agreement giving TSI the rights to try out HouseCanary's proprietary appraisal software called "HouseCanary Appraiser" for free for four months. After that period, TSI agreed to pay House Canary up to \$30 per appraisal to use the software. The software allowed an appraiser to take an iPad to a house, take pictures and automatically pull up all comparable sales based on underlying analytics.

"The underlying valuation technology is really what has always set HouseCanary apart and what made them very desirable for this big title appraisal company to work with," says Susman Godfrey partner Kalpana Srinivasan, who would come to be an expert with her partner Max Tribble in all things AVM.

The NDA was incorporated into the licensing agreement. And, for the next 10 months there was a lot of talk - but no cash - even after the four-month window to try out the product passed. But during this time, TSI began asking for more detailed information about the AVM, while assuring HouseCanary it wasn't developing its own. In November 2015, TSI and HouseCanary amended the Master Software License Agreement, again incorporating the NDA, giving TSI yet more

testing time and providing a flat-fee for use of the appraisal application. It also added licensing rights for House Canary's AVM so, among other things, Quicken Loans' bankers could access it for home valuation discussions. TSI later proposed a re-trade of the deal, retroactively getting rid of many restrictions on derivative products - and offering 80 percent less than the original contract price.

"It just made no sense and it definitely set off some flags," says Srinivasan. "Like, 'Why are you trying to undo these restrictions we've always had?' And so there started to be this feeling like, 'They must be developing something.'"

The Age of Nonperformance, aka Choking Off Funds

In the dinosaur manual for how to capture and eat your prey, there are illustrations of entrepreneur hatchlings with bright, shiny eyes looking longingly upward at the Tyrannosaurus Rex, with a cartoon bubble that says, "Wow, look at how strong and how powerful. And we can work together!" And the T-Rex, to the side says, "Hey Millie, we got another live one here! Shall we starve him first and then eat him, or just eat him right now?"

The hungry upstart never, ever performs well enough. That gives the aging, established company grounds to bleed it dry, either killing it outright, or stealing its innovation to effectively kill it or force it to sell for nothing. The disrupted takes what it wants and either 1) does not pay; 2) sues for nonperformance; or 3) both. Because, you know, what the hell.

Title Source chose door number three. On April 12, 2016, Title Source sued HouseCanary in Texas state court claiming HouseCanary did not perform under the license agreement and later added a claim that HouseCanary breached the NDA by revealing its confidential licensing agreement with TSI in conjunction with its investment-raising efforts.

What TSI omitted in its complaint? That it had hacked HouseCanary's data, downloaded 150,000 valuation reports with millions of accompanying data points in the months before filing suit, and built its own model behind HouseCanary's back.

"TSI had assured them over and over again that 'We are not interested in developing our own valuation models, similarity score, complexity score. We don't have any interest in trying to do that,'" says Tribble. "And at the exact same time they said that - before, during and after - they were doing it all the way along. They were using our data and trying to develop their own model. And they were comparing the output of our model to the output of their model, to see when they varied the inputs how close they could get to replicating, to reverse engineering our automated valuation model.

"In our minds, they were like a dinosaur. And they could see that the whole trend in the industry is going away from appraisals that take two weeks and going more towards these valuation models that return values instantly," says Tribble.

When TSI sued, it did so with a vengeance intended to destroy HouseCanary. Sicklick was confronted by a process server at an industry event in New Orleans as he came down the stairs

from a presentation on April 14, 2016. TSI didn't even send the email terminating the contract until April 19.

For several weeks after filing suit, TSI continued making requests to the HouseCanary system to download valuation reports, discovery would later show. "They were continuing to download even after they sued us," says Tribble.

"They would also send in requests from fake addresses, but you could tell the addresses came from TSI," lowering the HouseCanary hit rate below the required 80 percent, added Srinivasan.

On the day Sicklick was served in New Orleans, a search was submitted named: "Wiping the vendor wipes the fee."

Dinosaurs never were subtle.

The Hatchlings Strike Back

A funny thing happened on the way to TSI raptor-like pillaging and wiping out the hatchlings. Turns out, the hatchlings knew a big, bad law firm that was quite experienced with the dinosaur racket.

While Stroud was a classic academic nerd on whose tech skills an enterprise could be built, Sicklick was a well-connected former banker with deep contacts. So as the months had ground on with no payment from TSI, Sicklick talked to his board. And one board member had prior experience with Tribble and Srinivasan.

Susman Godfrey only takes a tiny percent of the cases presented to the partnership, most of which are on contingency. Because the firm typically pays for the cases itself, there is a high bar for potential plaintiffs to cross over. HouseCanary, however, came in as a rare hourly billing case because it started out as a defense side case and was quickly brought in by the enormously respected trial team of Tribble and Srinivasan.

On May 9, 2016, Susman Godfrey filed a counterclaim for HouseCanary against TSI claiming breach of contract and fraud. Tribble acknowledges the company would likely have never sued for nonpayment had TSI not sued first – a staggering acknowledgment of the high price exacted by TSI's approach. In June 2017, HouseCanary added its claim for trade secret misappropriation, based on its sharing of information, even as TSI continued to deny it had developed competing technology.

The rest of 2017 brought discovery and key battles over source code and other minutiae on which great verdicts live and die. It also brought the addition of a "local" legend, Ricardo Cedillo of Davis, Cedillo & Mendoza. Born in San Buenaventura, Coahuila, Mexico, and raised in San Antonio, Cedillo has tried hundreds of cases and is one of Texas' most renowned trial lawyers. He became acquainted with Susman Godfrey decades earlier, trying cases as co-counsel with Lee Godfrey, loaning them his conference room in San Antonio and referring cases to each other.

So it came as no huge surprise when just before Thanksgiving, Cedillo got a call from Tribble as he was driving to prep a client for a deposition. Cedillo cleared the conflict check on TSI and asked Tribble to send him whatever he needed to parachute in on a very tight fuse. Cedillo also headed to his local Barnes & Noble and bought every "Dummies" book he could find – Machine Learning for Dummies, Regression Analysis for Dummies. "I wasn't going to build an algorithm or anything but I learned enough to help a jury understand what the experts were talking about," he says. He also pushed Tribble on the contingency arrangement. "I told him I thought we could hit big, adding that "I'm not always right on these things but I'm never in doubt!" Cedillo said.

On Jan. 29, 2018, Judge David A. Canales took the bench in the historic Bexar County Courthouse in downtown San Antonio to start jury selection.

Officially, of course, that should have meant meal time for dino. But that's not how things turned out with this bunch of hatchlings.

It's Not Easy for a Dinosaur to Hide its Tracks

Returning to our dinosaur manual for entrepreneurs, we'll now turn to the section on combat. And, while it is true that, in general, dinosaurs have the upper appendage in any such battle due to their size and predatory nature, it is also true that for a smart dino tracker, it's pretty easy to sneak up on them as they're taking a break smoking and having a cocktail with the mastodons. And then all that's left is to deploy the right weapons. In this case, some really smart lawyers, 12 dedicated jurors and a careful judge.

And, the humble Cedillo acknowledges, that if there's one thing he knows how to do, it's how to pick a jury in San Antonio.

The team of Tribble, Srinivasan and Cedillo easily worked through dividing up components of the case, assisted by Susman lawyers Matt Behncke, Elisha Barron, Rocco Magni and Bryce Barcelo, alongside Stacy Schulze, a longtime firm paralegal, who has seen it all. The judge also facilitated a full record by allowing any lawyer to make a point without requiring just one lawyer from each team to speak on a particular subject.

As the plaintiff, TSI began its case with CEO Jeffrey Eisenshtadt. And the first question TSI counsel from Greenberg Traurig, asked was, "How do you feel after hearing that opening?"

"I'm angry," Eisenshtadt answered, "because I've heard so many lies and misrepresentations."

"Why did you file this case?"

"We filed to stand up for our team members. We call all our employees team members. We filed this case to stand up for our team members. If we had gotten this appraisal software, then our appraisers could have made a lot more money. That's what we did it for," Eisenshtadt testified.

In its case in chief, TSI offered a variety of explanations for what went wrong – from claiming HouseCanary never provided it an app to "it functions somewhat but it didn't comply with all the

specifications in the contract.” Or, what Max Tribble characterized as “My dog didn’t bite you. You provoked my dog. And I don’t even have a dog.”

Cedillo masterfully handled a number of the cross-examinations and explained, “It’s not that I’m that good. It’s that their witnesses were so bad. When a guy flat out lies, and contradicts what he said five minutes ago, and when a guy refuses to agree with you on what is written on a printed page that’s on the screen that the jury is looking at - and the jury is listening to my question and looking at this guy, and their mouth is dropping and they’re shaking their heads and stifling giggles, because this guy won’t agree to basic English and grammar and that a comma separates things in a list – hell, yeah, I know how to make fun of people like that.

“What they don’t understand is that the bigger the fish, the more unforgiving people are. They think, ‘Look, wait a minute, you’re head of the company. You’ve got degrees in English. You’ve got business degrees. You’ve got years and years of experience. I mean, come on.’ I was able to capitalize on what they were giving us. And they gave us a lot.”

The dance of the duplicitous dinosaurs continued when the tables turned to the HouseCanary counterclaim. The House Canary team focused on proving that TSI had downloaded more than 150,000 House Canary home value reports which came with millions of accompanying data points; had gathered intelligence on the AVM; and had copied wholesale HouseCanary’s data dictionary – which contained key data points and inputs for valuing homes.

And despite being specifically prohibited in every agreement from developing its own AVM, TSI had done just that using HouseCanary’s AVM – its centerpiece incorporating vast inputs about individual houses, including number of bedrooms, square footage, number of chimneys – and an algorithm prioritizing which of those is most important in determining the value of a house.

Srinivasan presented a document showing that TSI came to House Canary and said, “We could really use your help learning how to slice and dice” TSI’s vast historical data, which TSI had been storing with a third party. “They didn’t realize, really until they started working with HouseCanary, how much you could do with that,” says Srinivasan.

The HouseCanary lawyers also presented a Powerpoint they had found on the Internet – which had not been turned over by TSI in discovery – from an internal TSI presentation that had been made at a Quicken Loans Technology Conference held in September 2016, entitled “Title Source Automated Valuation Model.”

“They had a whole Powerpoint about their own competing valuation model and about what kind of logic they were using,” says Srinivasan. “We thought, ‘Holy cow, this is directly contradictory to every single thing we’ve been told.’”

TSI had denied it had any automated valuation model or similarity score or complexity score in discovery, going so far as to produce an empty folder entitled “similarity score” at the source-code review. And they tried to tell the jury, “The fact that it’s empty is consistent with our

position that there never was one.’ Even though their main programmer dude testified live at trial, ‘Yes. We had one. I saw it on Ryan Yang’s laptop,’” says Tribble.

To underscore their point, they got the audio from that Quicken Loans presentation and played it at trial. Sad dinosaurs.

No, no, We're NOT Hiding in the Cabinet!

The combination of the massive downloads; the incriminating emails about pilfering HouseCanary’s data far and wide; the emails about literally copying HouseCanary’s data dictionary - because Dinos had a brain the size of a Walnut; and the Powerpoint made an impact on the jury, which seemed to grow wary of TSI’s claims. Take as a case in point TSI’s decision to battle over whether that original NDA had even been signed. TSI counsel showed an unsigned version to their witnesses, who testified they did not sign it. On the night before the last day of trial, however, the HouseCanary team found the fully executed document attached to a document on TSI’s privilege log – and prepared to introduce it as they wrapped up with TSI’s rebuttal witnesses.

“We said, ‘We’ve tried to be efficient and respectful of your time. Although that’s been difficult, given the nature of TSI’s assertions in this case and of their witnesses,’” explains Tribble. Tribble says his team asked the jurors to think about how many days the proceedings focused on the NDA, with TSI and their witnesses claiming it was never signed. “Lo and behold, on the final day of trial we find the fully executed agreement,” he says.

As the judge was reviewing the documents - including TSI’s pleading asserting there was a valid enforceable NDA as of Dec. 2013 and a TSI motion for a directed pleading that the NDA had never been signed - the rebuttal witness left the courtroom.

“They’re like, ‘Oh, we’re not going to call him anymore,’” Srinivasan remembers. And it wasn’t just the witness who left, the in-house counsel and CEO did as well. Two of the witnesses had not even been released by the court. So the HouseCanary team asked the judge to reopen the evidence so they could publish the signed document to the jury.

Tribble passed Srinivasan a note: TSI has left the building.

Which, as things turned out was not a bad decision. Because as the dinos may have learned from the theory they went extinct when hit by an asteroid, that’s pretty much what was about to happen. The judge sent the case to the 12-person jury and – despite a very long set of jury instructions – the jury quickly asked a question: Can we award more than \$403.2M in punitive damages, and “if so what would be the max amount we can give?”

And that is the type of question most lawyers will wait their entire lives for.

“We were all real professional poker face. You never know,” says Srinivasan in recalling their internal gasp at what the question could portend. “It could be just one juror ruminating about it.”

But it wasn't. The jury found unanimously that TSI had misappropriated trade secrets, violated the NDA and engaged in fraud by telling HouseCanary it was not developing its own AVM. The jury awarded \$201.6M for stealing trade secrets, and double that – \$403.2M – as punitive damages for misappropriation. It awarded \$33.8M for fraud and double that, \$67.6M in punitive damages for fraud. The jury rejected all of TSI's claims against HouseCanary.

Cedillo – who never left San Antonio until he went to Harvard Law School - had urged the team to not shy away from presenting its large damages number to what could be assumed to be a modest San Antonio jury. "If we're entitled to it, I was very confident that we could get them to see that we were entitled to it, and to write in the big number."

The verdict was the largest in the U.S. for most of 2018, until Mark Lanier won a \$4.6B from a St. Louis jury for proving talcum powder caused cancer. HouseCanary is the largest verdict in Bexar County history, and the largest ever for Susman Godfrey.

Srinivasan says the case was a bit of a sleeper on the firm's docket; it started the year with partner Bill Carmody turning in a stellar performance as lead counsel for Uber in its gigantic battle with Waymo, only to have the case settle mid-trial. And, in typical Susman Godfrey fashion, the year turned into a bang-bang of trial activity on plaintiff and defense for what some consider the best trial corps in the U.S.

There is little doubt that TSI's conduct at trial contributed to the huge verdict.

"It showed that these people are not playing straight," Srinivasan says. "Having your witnesses get up there and not fronting the bad documents with them that you know you're going to see in court, not addressing this bad testimony that, frankly, I don't even know how you could address it, about these things not existing that plainly existed."

But dinosaurs never learn. Obviously. They're extinct.

And that's perhaps the footnote on the tale of the hatchlings versus the dinos. Near the end of the trial, on Feb. 23, the Susman-Cedillo team found a press release announcing that Title Source was rebranded to Amrock.

"They thought the trial would already be over. The CEO didn't attend trial that week because he had all these press conferences," says Tribble. And in the press release, the former TSI announced it was now a valuation analytics company called Amrock. It turned out, TSI had also filed for trademark protection a year earlier.

"They had been starting to do that even at the tail end of their relationship with us and never disclosed it," Srinivasan says. "It turned out this rebranding had been 18 months, two years in the works."

Since the jury's verdict, there have been motions galore and new lawsuits. Among them, HouseCanary has filed suit against Quicken Loans and other affiliates for its role in ripping off

its trade secrets. And, Amrock and Quicken Loans both have recently disclosed they have shut down their competing AVM – the one HouseCanary says is based on its trade secrets.

Susman Godfrey and Cedillo also had to return to the Bexar County Courthouse to defend their verdict and pursue House Canary's federal claims against Quicken Loans, this time against a team of new lawyers led by Ted Boutrous and Randy Mastro of Gibson Dunn & Crutcher. It was an effort the HouseCanary lawyers found to be a little like, "you're walking in late on this movie," to put it in the nicest way. Still, the judge – who in late October had entered judgment for nearly \$740 million with interest accruing daily – held a hearing on claims of fraud made by alleged whistleblowers.

To Cedillo, the effort was pure p.r. in a world made Trumpian. "This exceeded common sense. It exceeded decency. It was something that I've never seen before, and I'm doing this for 40 years now," he said. He noted too, that the first set of defense dinos were nowhere to be seen. Which, it turns out, was fine as the judge dismissed all TSI's claims, again.

After four days of hearings in December and January, Judge Canales confirmed it. The dinos were dead. At least to him.

And so, while it's not yet a billion-dollar verdict, if it stands up, it's pretty likely the tally will cross that line. As of mid April 2019, the verdict is closing in on \$800M with interest, which accrues at about \$100,000 a day.

And, one more thing. Max Tribble's father was a skilled card player, as is Max, who has vivid memories of a night with a suitcase of money, guarding the door and his father's winnings as a young child in a Vegas hotel room. As luck would have it, a month before trial started – in December 2017 – Susman Godfrey converted the case to a contingency matter. That decision required approval from the entire firm, in its customary manner. HouseCanary was running out of cash and it was becoming hard to prepare for trial on a billable hour basis. The partners approved the conversion, according to managing partner Neal Manne for several reasons. The firm wanted to stretch to help the client, and thought the case presented a good opportunity.

"We had a lot of confidence in ourselves and felt the firm should bet on ourselves," he says. "And also Max has brought home a lot of big wins. And with Kalpana, there was kind of a dream team."

And now the entrepreneur's manual on defending against dinos has a new conclusion that brings hope to hatchlings everywhere: You may be bigger, you may be stronger, but the right lawyers can level the playing field and kick your ass.

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