CAUSE NO. D-1-GN-18-007069

TURNQUIST PARTNERS REALTORS, INC. D/B/A ENGEL & VÖLKERS AUSTIN, *Plaintiff,*	§	**THE DISTRICT COURT OF**
v.	§	**TRAVIS COUNTY, TEXAS**
ROBERT TURNER, ITCOA, L.L.C. D/B/A INDEPENDENCE TITLE COMPANY, and SECURED LAND TRANSFERS, LLC d/b/a INDEPENDENCE TITLE, *Defendants.*	§	**419th JUDICIAL DISTRICT**

DEFENDANTS ITCOA, LLC AND SECURED LAND TRANSFERS, LLC'S REPLY IN SUPPORT OF THEIR AMENDED MOTION FOR SUMMARY JUDGMENT

Defendants ITCOA, LLC and Secured Land Transfers, LLC (collectively, "**Independence**") file their Reply in Support of Their Amended Motion for Summary Judgment and respectfully show the Court as follows:

I.
INTRODUCTION AND SUMMARY OF REPLY

Engel & Volkers attempts a deep cut against the grain of established Texas law that limits those to whom an escrow agent owes a duty. Its fantastical theories for manufacturing a duty owed to it by Independence fail for the following reasons:

1. The Listing Agreements between Engel & Volkers and Turner do not create a fiduciary relationship between Independence and Engel & Volkers, because Independence was not a party to the Listing Agreements, and the Listing Agreements were not incorporated into the real sales contracts by which Independence was appointed escrow agent.

2. Simply because Independence may have had the ***right*** to rely on Engel & Volkers' instructions regarding the disbursement of commissions over Turner's objection does not mean that Independence owed any ***duty*** to Engel & Volkers.

3. Engel & Volkers cannot claim a duty owed to it as a third-party beneficiary of the real sales contracts because those contracts do not show a clear and unequivocal expression of the contracting parties' intent to directly benefit Engel & Volkers. In examining a real estate sales contract with remarkably similar language, the court in *Lesieur v. Fryer* held that the seller's broker was not a third-party beneficiary to the sales contract.

Engel & Volkers' promissory estoppel claim fares no better. Michelle Turnquist's allegations that Independence promised it "would take care of me" and similar vague statements are not evidence of sufficiently definite and specific promises of future action that can support a claim of promissory estoppel. And there is no evidence—much less explanation—of any detrimental reliance by Engel & Volkers on those vague alleged promises.

For those reasons, discussed more fully below and in Independence's motion for summary judgment, the Court should grant a summary judgment dismissing Engel & Volkers' claims against Independence.

II.
ARGUMENT AND AUTHORITY

A. Engel & Volkers Has Produced No Evidence That Independence Owed It A Duty.

1. Independence was not a party to the Listing Agreements, and the Listing Agreements were not a part of the real estate sales contracts.

As established in the Motion, Engel & Volkers was not a party to the real estate sales contracts that appointed Independence as escrow agent and established the escrow agreement, and therefore Independence owed it no duty.[1] Engel & Volkers, however, argues that because it was a party to the Listing Agreements, and because the Listing Agreements are somehow part of the real estate sales contracts, Independence owes it a duty. That novel attempt to create a duty fails.

[1] Defendants ITCOA, LLC and Secured Land Transfers, LLC's Amended Motion for Summary Judgment ("**Motion**") at 9-11.

First, the Listing Agreement was not incorporated into the real estate sales contracts. For a contract to incorporate another instrument, it must do more than merely mention the document. *Bob Montgomery Chevrolet, Inc. v. Dent Zone Co.*, 409 S.W.3d 181, 189 (Tex. App.—Dallas 2013, no pet.) "The language in the signed document must show the parties intended for the other to become part of the agreement." *Id*. *See also* 17A C.J.S. *Contracts* § 402 (2011) ("For an incorporation by reference to be effective, it must be clear that the parties to the agreement had knowledge of and assented to the incorporated terms.") (quoted by *Bob Montgomery Chevrolet*, 409 S.W.3d at 189)). Here, the real estate sales contracts do not show that Turner and the buyer intended for the Listing Agreements to become part of the agreements—in fact, they don't even mention the Listing Agreements. Paragraph 22 of those contracts expressly enumerates the other documents that are a part of the "entire agreement."[2]

22. **AGREEMENT OF PARTIES:** This contract contains the entire agreement of the parties and cannot be changed except by their written agreement. Addenda which are a part of this contract are (Check all applicable boxes):

- ☐ Third Party Financing Addendum
- ☐ Seller Financing Addendum
- ☐ Addendum for Property Subject to Mandatory Membership in a Property Owners Association
- ☐ Buyer's Temporary Residential Lease
- ☐ Loan Assumption Addendum
- ☐ Addendum for Sale of Other Property by Buyer
- ☐ Addendum for Reservation of Oil, Gas and Other Minerals
- ☐ Addendum for "Back-Up" Contract
- ☐ Addendum for Coastal Area Property
- ☐ Addendum for Authorizing Hydrostatic Testing
- ☐ Addendum Concerning Right to Terminate Due to Lender's Appraisal
- ☐ Environmental Assessment, Threatened or Endangered Species and Wetlands Addendum
- ☐ Seller's Temporary Residential Lease
- ☐ Short Sale Addendum
- ☐ Addendum for Property Located Seaward of the Gulf Intracoastal Waterway
- ☐ Addendum for Seller's Disclosure of Information on Lead-based Paint and Lead-based Paint Hazards as Required by Federal Law
- ☐ Addendum for Property in a Propane Gas System Service Area
- ☒ Other (list): Seller's Disclosure Notice & Building Permit & related Addendums

[2] Motion at Exhibit A-3, 5201 Tortuga Contract at ¶ 22; Exhibit A-4, 5203 Tortuga Contract at ¶ 22.

The Listing Agreement is not among those documents designated as part of parties' "entire agreement," not even in a space marked "Other" for documents other than the standard sales contract addenda. The contracts further recognize that "[a]ll obligations of the parties for payment of brokers' fees are contained in separate written agreements."[3]

Furthermore, Independence in no way shape or form was a party to the Listing Agreements. It's not a signatory to those agreements or even mentioned in them, and there's no evidence that Independence ever agreed to be bound by any of their terms. In order to be part of a binding contract, "the parties must agree to the same thing, in the same sense, at the same time." *Angelou v. African Overseas Union*, 33 S.W.3dd 269, 279 (Tex. App.—Houston [14th Dist.] 2000, no pet.). A party's assent to a contract "must comprehend the whole proposition . . . ." *Guajardo v. Hitt*, 562 S.W.3d 768, 778 (Tex. App.—Houston [14th Dist.] 2018, pet. denied). And one court long ago correctly noted, "everyone has a right to select and determine with whom he will contract and another cannot be thrust upon him without consent." *Kinman v. Howard*, 465 S.W.2d 400, 401 (Tex. Civ. App.—Waco 1971, no writ).

Simply because Independence's escrow agent, Carol Bellomy, asked to review the Listing Agreements when she received conflicting instructions from Turner and Engel & Volkers on the amount of commissions due is not evidence of Independence's agreement to be bound by the terms of the Listing Agreements. Engel & Volkers cannot manufacture a duty by imposing upon Independence a contract to which it never assented.

[3] Motion at 9-11 and Exhibit A-3, 5201 Tortuga Contract at ¶ 8; Exhibit A-4, 5203 Tortuga Contract at ¶ 8.

2. Merely because Independence may have had the *right* to rely on instructions from Engel & Volkers, acting as Turner's agent, does not mean that Independence owed a *duty* to Engel & Volkers.

Engel & Volkers makes much of the fact that because it had the authority to act on behalf of Turner as its client, Independence had the right to rely on Engel & Volkers' instruction regarding disbursement of commissions—even if those instructions conflicted with Turner's. Setting aside Engel & Volkers' bold statement that its instructions somehow trumped Turners, its argument confuses ***right*** with ***duty***. Whether a title company has the ***right*** to rely on the authority of a principal's agent does not establish a ***duty*** owed by the title company to the agent. *See, e.g., Simms v. Lakewood Village Property Owners Ass'n, Inc.*, 895 S.W.2d 779, 787 (Tex. App.—Corpus Christi 1995, no writ) ("The terms 'right" and "duty' are not synonymous . . . .").

The opinion on which Engel & Volkers relies for its erroneous logical leap—*Jarvis v. K & E Re One, LLC*—never addressed the issue of whether the title company involved in that case owed a duty to someone who was not a party to the escrow agreement. 390 S.W.3d 631, 642 n.3 (Tex. App.—Dallas 2012, no pet.) (. . . "[W]e need not decide whether an escrow agent owes a duty to a non-party to the underlying contract . . . ."). Whether Independence may have had the right to rely on Engel & Volkers' instruction over Turner's is irrelevant to whether Independence owed Engel & Volkers any duty.

3. There is no clear and unequivocal expression of intent to confer third-party beneficiary status on Engel & Volkers.

Engel & Volkers' claim to third-party beneficiary status is foreclosed by *Lesieur v. Fryer*, discussed in Independence's Motion.[4] The court in *Lesieur*, reviewing a real estate sales contract with remarkably similar language to the contracts in this case, held the listing broker was not a

[4] Motion at 10.

party to that contract. 325 S.W.3d 242, 252 (Tex. App.—San Antonio 2010, pet. denied). As Engel & Volkers does in this case, the listing broker in *Lesieur* argued he was a third-party beneficiary of the sales contract, and the court rejected that claim. *Id*. at 253. The court recognized the legal standards for a finding of third-party beneficiary status, explaining—

> There is a presumption against conferring third-party beneficiary status on noncontracting parties. … Therefore, any doubts as to whether a party is a third-party beneficiary are resolved against the existence of a third-party beneficiary. … In deciding whether a third party may enforce a contract between others, the contracting parties' intent controls. … The parties to the contract must to confer a direct benefit upon the alleged third-party beneficiary, and that intent "must be clearly and fully spelled out or enforcement by the third party will be denied." … The fact that incidental benefits may flow from a contract to a third-party does not confer third-party beneficiary status on that party that would allow him to enforce the contract. … A third party may only enforce a contract when the parties to the contract "intend to secure some benefit for the third party and entered into the contract directly for the third party's benefit."

Id. at 252-53 (citations omitted).

In light of those standards, the court concluded that the seller and buyer "clearly did not enter into the contract for the sale of the property directly for the benefit of the relators." *Id*. at 253. The court noted that the sales contract had a provision addressing broker commissions identical to those in the 5201 Tortuga Contract and the 5203 Tortuga Contract.[5]

> In fact, paragraph eight of the contract affirmatively belies the possibility that the Lesieurs and the Fryars intended to confer a direct benefit on Cynthia Morales, doing business as Morales Realty, or Gonzales. That paragraph is entitled "BROKERS' FEES" and states, "***All obligations of the parties for payment of brokers' fees are contained in separate written agreements***." Accordingly, there was no intent the relators directly benefit from the contract; rather, there was a separate agreement for their benefit. That the contract authorizes the escrow agent to pay the brokers' fees directly from the closing proceeds does not establish a specific intent to secure a direct benefit; rather, that was merely an incidental benefit flowing from the contract . . . .

Id. at 253 (emphasis added).

[5] Motion at Exhibit A-3, 5201 Tortuga Contract at ¶ 8; Exhibit A-4, 5203 Tortuga Contract at ¶ 8.

Engel & Volkers chooses to completely ignore *Lesieur*, and instead relies on *Gainey v. Minoo, LLC*, 02-09-00171-CV, 2019 WL 6768128, at *14 (Tex. App.—Fort Worth December 12, 2019, no pet.). That opinion, however, does not support its plea for third-party beneficiary status. The court in that case held that a seller's real estate agents were third-party beneficiaries of a sales contract between the seller and the buyer—a contract markedly different than the sales contracts at issue in this case—and as a result were entitled to enforce an arbitration provision in that contract. *Id*. 2019 WL 6768128, at *14. It observed that the real estate agents "figure prominently" in the sales contract in that case and were repeatedly referenced in it. *Id*. at *11. Moreover, the sales contract specifically described the agents' duties, and included an indemnity provision for the parties to hold the agents harmless from claims based on representations about the property. *Id*. at *12. Accordingly, the court held that the agents were third-party beneficiaries of the contract entitled to enforce its arbitration provision. *Id*. at *13.

Unlike the agents in *Gainey*, Engel & Volkers in no way "figures prominently" in the 5201 Tortuga Contract and the 5203 Tortuga Contract. Those contracts contain no specific description of either its duties with respect to the sale of the properties or its entitlement to any commissions. Nor do they contain any provisions which Engel & Volkers has the right to enforce. Engel & Volkers' reliance on *Gainey*, therefore, is misplaced.

As with the sales contract in *Lesieur*, the 5201 Tortuga Contract and the 5203 Tortuga Contract do not show "a clear and unequivocal expression of the contracting parties' intent to directly benefit" Engel & Volkers. *Tawes v. Barnes*, 340 S.W.3d 419, 425 (Tex. 2011). Accordingly, there is no evidence that Independence owed Engel & Volkers a duty as a third-party beneficiary of those contracts.

4. *Zimmerman v. First Am. Title Ins. Co.* is plainly distinguishable and does not support a duty owed to Engel & Volkers.

Engel & Volkers also cites *Zimmerman v. First Am. Title Ins. Co.* as authority for a duty owed to it by Independence.[6] Its reliance on that case is misplaced.

In *Zimmerman*, the parties to a real estate contract for the sale of 48 lots agreed that the seller's agent would be conveyed one of the lots "free and clear" of any liens or encumbrances in lieu of a commission. 790 S.W.2d 690, 693 (Tex. App.—Tyler 1990, writ denied). However, contrary to that agreement, the title company who facilitated the closing of that transaction transferred the lot to the agent subject to a deed of trust in favor of a bank, and the agent sued the title company for violations of the Deceptive Trade Practices Act, breach of contract, breach of fiduciary duty, and negligence. *Id*. The court rejected the title company's argument that the agent was not a party to the real estate sales contract and, therefore, it owed the agent no duty, noting that the agent was a signatory under the contract and "the possessor of legal rights under it."[7] *Id*. at 694.

Engel & Volkers ignores this critical distinction. Unlike the agent in *Zimmerman*, it was not a signatory to the real estate sales contracts in this case, it was not the transferee of any real property under the contracts, and it was not granted rights to enforce any of its terms. As discussed above, those contracts expressly recognize that any broker commission rights were governed by "***separate written agreements***," agreements to which Independence was not a party. *Zimmerman* does not support Engel & Volkers' claim that Independence owed it a duty.

---

[6] Plaintiff's Response to Defendants, ITCOA, LLC's and Secured Land Transfers, LLC's Amended Motion for Summary Judgment ("**Response**") at 29-30.

[7] The court in *Gary E. Patterson & Assoc., P.C. v. Holub*—which recognized that an escrow agent does not owe a duty to a non-party creditor of a party to an escrow agreement—also distinguished *Zimmerman* on the basis that the agent in that case was actually a party to the escrow agreement. 264 S.W.3d 180, 203 (Tex. App.—Houston [1st Dist.] 2008, pet. denied).

B. Engel & Volkers Has Not Produced Evidence That It Relied On A Sufficiently Specific And Definite Promise Of Future Action By Independence.

1. Turnquist's allegation that Independence said it "would take care of me" and other nebulous promises are not sufficiently specific and definite.

In support of its promissory estoppel claim, Engel & Volkers offers the following affidavit testimony of one of its agents, Michelle Turnquist ("**Turnquist**")—

> - Throughout the years, I was repeatedly told and promised that Independence Title would "take care of me" and my clients, offer superior service, and ensure a smooth closing.[8]
>
> - Lacey [Bowen], along with Melinda Carroll, promised me that I would be taken care of if I referred them business.[9]

None of those alleged promises are sufficient to support a claim of promissory estoppel.

As pointed out in the Motion, promissory estoppel requires "'an actual promise' 'that is sufficiently specific and definite such that it would be reasonable and justified for the promisee to rely on it as a commitment to future action.'" *Ogle v. Hector*, No. 03-16-00716-CV, 2017 WL 3379107, at *2 (Tex. App.—Austin 2007, Aug. 2, 2017, pet. denied) (mem. op.) (citations omitted). Moreover, "[a] promise must also be more than speculation of future events, a statement of hope, an expression of opinion, an expectation, or an assumption." *Esty v. Beal Bank S.S.B.,* 298 S.W.3d 280, 305 (Tex. App.—Dallas 2009, no pet.)

Here, Turnquist's allegations that Independence said it "would take care of me," along with other similar nebulous statements, are at best hopeful speculation, expectation, and assumption, and are not sufficiently definite and specific promises of future action that can support a claim of promissory estoppel. Other cases have held similar vague promises were insufficient to support a promissory estoppel claim. For example, in *Ellen v. F.H. Partners, LLC*,

[8] Response at Exhibit A, Affidavit of Michele Turnquist ("**Turnquist Aff.**") at ¶ 6.
[9] *Id*. at ¶ 10.

the plaintiff asserted a promissory estoppel claim against her lender after it foreclosed on her home. No. 03-09-00310-CV, 2010 WL 4909973, at *1 (Tex. App.—Austin Dec. 1, 2010, no pet.) (mem. op.). She alleged that when she asked the lender to delay foreclosure in order to give her more time to refinance the debt, a representative of the lender told her that was "doable." *Id*. The Austin Court of Appeals held the lender's statement that the plaintiff's proposal was "doable" was "too vague and indefinite" to support a claim of promissory estoppel. *Id*. at *6. *See also Gilmartin v. KTVT-Channel 13*, 985 S.W.2d 553, 559 (Tex. App.—San Antonio 1998, no pet.) (holding employer's statement that employment for more than one year was "doable" was insufficient to support employee's promissory estoppel claim).

In *Gillum v. Republic Health Corp.*, the court addressed promises that had even more substance than those alleged by Turnquist, and held a hospital's statements to a physician that it had a commitment "to upgrade the hospital's facilities," "make the level of patient care rise," and "build a new addition to the hospital facility" were not sufficient to support a physician's claim of promissory estoppel. 778 S.W.2d 558, 570 (Tex. App.—Dallas 1989, no writ).

And in *Simulis, L.L.C. v. Gen. Elec. Capital Corp.*, the court noted that "vague, indefinite promises of future business" cannot support a claim of promissory estoppel, and held the defendant's promises that the plaintiff would "receive business," and that the volume of business would be a "company maker" for the plaintiff were insufficient to support that claim. No. 14-06-00701, 2009 WL 1747483, at *2, (Tex. App.—Houston [14th Dist.] April 17, 2008, no pet.) (mem. op.).

Likewise, Turnquist's allegations that Independence promised it would "take care of me", "offer superior service," and "ensure a smooth closing," are too vague and do not provide any clear commitment of future action by Independence to pay Engel & Volkers a disputed portion

of Turner's sales proceeds over his objection, or any other particular action. As such, they are not sufficiently specific and definite to support Engel & Volkers' promissory estoppel claim.

And, whatever subjective meaning or expectations that Turnquist placed on those alleged statements are not evidence of a specific and definite promise. She attempts to ascribe her own meaning to Independence's vague promises when she testifies—

> ***For me***, when I was promised that Independence Title would provide me with superior service and 'take care of me' that meant that they would follow industry practice and ensure that I am paid whatever commission is due me and follow the CDA.[10]

That subjective interpretation of Independence's alleged vague promises is not sufficient to support a promissory estoppel claim. *Collins v. Allied Pharmacy Mgmt., Inc.*, 871 S.W.2d 929, 938 (Tex. App.—Houston [14th Dist.] 1994, no writ) (holding plaintiffs could not rely on their subjective expectations of employer's promise to support promissory estoppel claim).

2. Engel & Volkers did not detrimentally rely on Independence's alleged vague promises.

Aside from the absence of a definite and specific promise, Engel & Volkers has not produced evidence—much less explained—how it detrimentally relied on Independence's vague alleged promises. In fact, the damages it seeks in this lawsuit belie such a claim of reliance.

As the Third Court of Appeals has recognized, only reliance damages are recoverable under promissory estoppel, while expectancy damages are not. *Bechtel Corp. v. CITGO Products Pipeline Co.*, 271 S.W.3d 898, 926-27 (Tex. App.—Austin 2008, "'Reliance damages, similar to out-of-pocket recovery, reimburse one for expenditures made toward the execution of the contract in order to restore the status quo before the contract.'" *Id*. at 926 (quoting *Hart v. Moore*, 952 S.W.2d 90, 97 (Tex. App.—Amarillo 1997, pet. denied)). Expectancy damages, on

[10] Response at Exhibit A, Turnquist Aff. at ¶ 10 (emphasis added).

the other hand, place the claimant in the same position it claims it would have been in had the promise been kept. *Id*. at 928.

Here, Engel & Volkers seeks only expectancy damages. In its Response, the only damage it identifies as having suffered in reliance on Independence's vague promises is the additional amount of $336,000 in commissions allegedly owed under its Listing Agreements with Turner.[11] In essence, Engel & Volkers seeks to be placed in the same position it claims it would have been had Independence kept its implicit promise to disburse from Turner's sales proceeds the full amount of commissions it contends was owed. That is precisely the nature of expectancy damages, which it cannot recover under its promissory estoppel claim.

And while Engel & Volkers argues that it relied on Independence's promises by sending it over $70 million in real estate closings in 2018, it doesn't explain how directing those transactions to Independence was a ***detriment*** to Engel & Volkers.[12] In other words, when Engel & Volkers contends that it could have directed that business to another title company, it does not explain how it was harmed by not doing so. Put yet another way, simply complaining that it sent more business to Independence doesn't show how Engel & Volkers made less money or incurred additional expenses it otherwise would not have.

Engel & Volkers has failed to produce evidence showing that it detrimentally relied on any sufficiently specific and definite promise of Independence, and the Court should grant a summary judgment dismissing that claim.

[11] Response at 7 ("As a result of the actions of Turner and Independence Title, EVA has not been paid the remaining balance as set forth in the listing agreement which totals $336,000.) and Exhibit A, Turnquist Aff. at ¶ 19 (same).
[12] *Id*. at 28.

PRAYER

Based on the foregoing, and the evidence, authority and argument set forth in the Motion, Independence respectfully requests that the Court grants its Amended Motion for Summary Judgment and enter an order dismissing Engel & Volkers' claims against Independence and awarding Independence any further relief to which it is entitled in law or in equity

Respectfully submitted,

/s/ Jeffrey J. Hobbs

JEFFREY J. HOBBS
State Bar No. 24012837
ARMBRUST & BROWN, PLLC
100 Congress Avenue, Suite 1300
Austin, Texas 78701
Telephone (512) 435-2300
Facsimile (512) 435-2360
jhobbs@abaustin.com

ATTORNEYS FOR DEFENDANTS ITCOA, LLC and SECURED LAND TRANSFERS, LLC

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing instrument to be delivered via electronic service and e-mail to the following on January 21, 2020:

Rex J. Zgarba
rzgarba@coatsrose.com
Racy L. Haddad
rhaddad@coatsrose.com
COATS ROSE P.C.
2700 Via Fortuna, Suite 350
Austin, Texas 78746

Jeffrey G. Henry
jeff.henry@sprouselaw.com
SPROUSE SHRADER SMITH PLLC
805 Las Cimas Parkway.
Las Cimas III, Suite 350
Austin, Texas 78746

/s/ Jeffrey J. Hobbs