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

TURNQUIST PARTNERS REALTORS, INC. d/b/a ENGEL & VÖLKERS AUSTIN,	§	**IN THE DISTRICT COURT**
Plaintiff,	§	
vs.	§	
ROBERT TURNER, ITCOA, LLC d/b/a INDEPENDENCE TITLE COMPANY, and SECURED LAND TRANSFER, LLC d/b/a INDEPENDENCE TITLE,	§	
Defendants.	§	
	§	**OF TRAVIS COUNTY, TEXAS**
ROBERT TURNER,	§	
Counter-Plaintiff	§	
Vs.	§	
TURNQUIST PARTNERS REALTORS, INC. d/b/a ENGEL & VÖLKERS AUSTIN,	§	
Counter-Defendant	§	**419TH JUDICIAL DISTRICT**

PLAINTIFF'S RESPONSE TO DEFENDANTS, ITCOA, LLC'S AND SECURED LAND TRANSFERS, LLC'S AMENDED MOTION FOR SUMMARY JUDGMENT

TO THE HONORABLE JUDGE OF THIS COURT:

Comes now, Plaintiff, Turnquist Partners Realtors, Inc. d/b/a Engel & Völkers Austin ("EVA") and file this their response to Defendants ITCOA, LLC's and Secured Land Transfers, LLC's (collectively, "Independence") Amended Motion for Summary Judgment and respectfully show the Court as follows:

I. INTRODUCTION AND SUMMARY OF ISSUES PRESENTED

As will be demonstrated below, the Court should deny Defendant's Traditional and No Evidence Motion for Summary Judgment for the following reasons:

A. While Escrow Agents only owe duties to parties to an escrow agreement, summary judgment should be denied because there is a fact issue as to whether the EVA Listing Agreements are incorporated and made part of the escrow agreement, making EVA a party to whom duties are owed.

B. There is fact issue as to whether Independence Title had a fiduciary duty to EVA to pay EVA its full commission because EVA was an exclusive agent of the Seller, EVA had express authority under the terms of its Listing Agreement to act on behalf of the Seller, and as such, Independence Title's duties to the Seller under its Escrow Agreement ran to EVA.

C. There is a fact issue as to whether EVA was a third-party beneficiary of the Real Estate Sale Contract which included the Escrow Agreement and whether Independence Title had a duty to pay those entitled to receive money at the closing, and whether Independence Title breached that duty.

D. There is a fact issue on EVA's claim for Promissory Estoppel, as Independence Title made numerous specific and definite promises to EVA in word and conduct, including, without limitation, that it would 'take care of EVA and its agents' and whether EVA has relied upon such specific promises and conduct by delivering business to Independence Title totaling over 80 million in real estate closings.

E. There is a fact issue on EVA claim for Negligence.

F. SUMMARY JUDGMENT EVIDENCE

Pursuant to the Texas Rules of Civil Procedure and in support of this Response to Defendants ITCOA, LLC and Secured Land Transfers, LLC's Amended Motion for Summary Judgment, Plaintiffs attach and incorporate for all purposes the following evidence:

1. Exhibit A: Affidavit of Michele Turnquist with Exhibits:

    a. A-1 to Turnquist Affidavit: TAR Listing Agreements for 5201 and 5203 Tortuga Trail, Austin, TX.
    b. A-2 to Turnquist Affidavit: Real Estate Sale Contracts for 5201 and 5203 Tortuga Trail, Austin, TX.

2. Exhibit B: Deposition Testimony of Carol Bellomy, dated November 4, 2019 (and any relevant excerpts attached).
3. Exhibit C: Deposition Testimony of Jay Southworth, dated November 7, 2019 (and any relevant excerpts attached).
4. Exhibit D: Closing instructions letter from Rex J. Zgarba, dated August 14, 2018.
5. Exhibit E: Closing instructions letter from Terrance L. Irion, dated August 14, 2018.
6. Exhibit F: Settlement Statements, dated August 15, 2018 for 5201 and 5203 Tortuga Trail, Austin, TX.
7. Exhibit G: Affidavit of Stacey Goodnight Dunn with Heritage Title Company.

Documents contained in Exhibits D through E above, were produced by Independence Title, in response to written discovery and pursuant to Tex. R. Civ. P. 193.7, notice is hereby given the documents are self-authenticated.

G. SUMMARY JUDGMENT STANDARD

A. Traditional Motion for Summary Judgment under TRCP 166(a(c).

The movant for summary judgment must show (1) there is no genuine issue of material fact and (2) that the movant is entitled to judgment as a matter of law. *See* TRCP 166(c); *see also Helix Energy Solutions Grp. v. Gold*, 522 S.W.3d 427, 431 (Tex.2017); *Kachina Pipeline Co. v. Lillis*, 471 S.W.3d 445, 449 (Tex. 2015); *Amedisys, Inc. v. Kingwood Home Health Care, LLC*, 437 S.W.3d 507, 511 (Tex. 2014); *Provident Life & Acc. Ins. v. Knott*, 128 S.W.3d 211, 215-16 (Tex. 2003) (fact is "material" only if it affects the outcome of suit under governing law; material fact issue is "genuine" only if evidence is such that a reasonable jury could find fact in favor of nonmovant). When the movant does not meet its burden of proof, burden does not shift to the nonmovant. *See Chavez v. Kansas City S. Ry.*, 520 S.W.3d 898,900 (Tex.2017) *M.D. Anderson Hosp. & Tumor Inst. v. Willrich*, 28 S.W.3d 22, 23 (Tex. 2000). The burden shifts to the nonmovant only after the movant has established that it is entitled to summary judgment as a matter of law. *See Chavez*, 520 S.W.3d at 900. The movant cannot rely on a legal presumption to shift

the burden of proof to the nonmovant. *Id.*; *see also Missouri-Kan.-Tex. R.R. v. City of Dallas*, 623, S.W.2d 296, 298 (Tex. 1981).

B. No Evidence Motion for Summary Judgment under TRCP 166(a).

To defeat a no-evidence motion for summary judgment, the nonmovant must prove there is a genuine issue of material fact on the elements challenged by movant. *See* TRCP 166a(i); *see also Boerjan v. Rodriguez*, 436 S.W.3d 307, 301 (Tex.2014). If the nonmovant presents more than a scintilla of evidence on the challenged elements, it is entitled to a trial on the merits. *See Ridgway v. Ford Motor Co.*, 82 S.W.3d 26, 29 (Tex.App.—San Antonio 2002). A nonmovant produces more than a scintilla when the evidence "rises to the level that would enable reasonable and fair-minded people to differ in their conclusions." *See Marsaglia v. UTEP*, 22 S.3d 1, 4 (Tex.App.—El Paso 1999, pet. denied). A nonmovant produces no more than a scintilla when the evidence is "so weak as to do no more than create a mere surmise or suspicion" of fact. *See Forbes, Inc. v. Granada Biosciences, Inc.*, 124 S.W.3d at 172.

IV. FACTUAL BACKGROUND OF THE DISPUTE

EVA and Defendant/Seller Robert Turner ("Turner") entered into two written listing agreements ("Listing Agreements") dated October 6, 2017 whereby Turner appointed EVA as its exclusive agent. The Listing Agreements covered the sale of two adjacent parcels of property located at 5201 and 5203 Tortuga Trail, Austin, Travis County, Texas ("Tortuga Properties").[1] 5201 Tortuga Trail was listed for $9,995,000.00 and 5203 Tortuga was listed for $2,995,000.00.[2]

Paragraph 5(A) of the Listing Agreements provided that when earned and payable, 'Seller would pay Broker 5% of the sales price and 4.5% if Kathryn Scarborough and Michele Turnquist

[1] *See* Exhibit A-1, Listing Agreements.
[2] *See* Exhibit A-1, p. 2, ¶ 3.

acts as intermediary between both buyer and seller'.[3] Paragraph 5(B) and (C) of the Listing Agreements provided as follows:

> ***B. Earned: Brokers' compensation is earned when any one of the following occurs during this Listing:***
>
> ***(1) Seller sells, exchanges, options, agrees to sell, agrees to exchange or agrees to option the Property to anyone at any price on any terms;***
> ***(2) Broker individually or in cooperation with another broker procures a buyer ready, willing and able to buy the Property at the Listing Price or at any other price acceptable to Seller; or***
> ***(3) Seller breaches this Listing.[4]***
>
> ***C. Payable: Once earned, Broker's compensation is payable either during this Listing or after it ends at the earlier of:***
>
> ***(1) The closing and funding of any sale or exchange of all or part of the Property;***
> ***(2) Seller's refusal to sell the Property after Broker's compensation has been earned;***
> ***(3) Seller's breach of this Listing; or***
> ***(4) At such time as otherwise set forth in this Listing.[5]***

In addition, in Paragraph 5(G) of the Listing Agreements Turner authorized the escrow or closing agent and directed the Broker to instruct the escrow or closing agent to collect and disburse the commission as follows:

> ***G. Escrow Authorization: Seller authorizes, and Broker may so instruct, any escrow or closing agent authorized to close a transaction for the purchase or acquisition of the Property to collect and disburse to Broker all amounts payable to Broker under this Listing.[6]***

[3] *See* Exhibit A-1, p. 2, ¶¶ 5(A) and 5(B).
[4] *See* Exhibit A-1, p. 2, ¶ 5(B).
[5] *See* Exhibit A-1, p. 2, ¶ 5(C).
[6] *See* Exhibit A-1, p. 3, ¶ 5(G).

From its initial contact with Turner, EVA worked over thirty months on his behalf marketing the properties, and on July 18, 2018 Turner and his wife Lesli Turner ("Turners") entered Into two separate real estate sale contracts ("Contracts") to sell the Tortuga Properties.[7] Both Contracts named "Independence Title-Carol Bellomy" as escrow agent to close the transactions.[8] EVA was named in the Contracts as the listing broker representing the Turners and its agent, Kathryn Scarborough, as the listing associate for EVA who were entitled to receive commissions. The buyer of the Tortuga Properties was listed as Lauree Z. Moffett[9] and she was not represented by any real estate broker and thus no cooperating broker was named in the Contracts.[10]

Prior to the closing that occurred on August 15, 2018 Carol Bellomy at Independence Title received disbursement instructions from EVA so that Independence Title could prepare the settlement statement and include the commission that was due and payable by Turner.[11] EVA delivered the disbursement authorization and commission amounts to Carol Bellomy in writing via email as requested and as was customary for EVA and Independence.[12] Immediately thereafter Turner notified Carol Bellomy and EVA via email that he disputed the commission and wanted to pay an amount different than what was set forth in the Listing Agreements, however, Turner never revoked EVA's authority or terminated the Listing Agreements.[13] In response, Carol Bellomy on behalf of Independence Title, requested a copy of the Listing Agreements for Independence Title Company's review.[14] Thereafter, both Turners' counsel and EVA's counsel sent written

[7] *See* Exhibit A, p. 5, ¶ 15 and Exhibit A-2, Contracts.
[8] *See* Exhibit A-2, p. 1, ¶ 5.
[9] *See* Exhibit A-2, p. 1, ¶ 1.
[10] *See* Exhibit A-2, p. 9 in the 5201 Tortuga Trail Contract and p. 7 of the 5203 Tortuga Trail Contract.
[11] *See* Exhibit B, Deposition Transcript of Carol Bellomy, p. 74, l. 1 – p. 75, l. - 25.
[12] *See* Exhibit A, ¶ 16.
[13] *See* Exhibit B, p. 96, l. 19 – p. 97, l. 13; *see also* Exhibit A, ¶ 20.
[14] *See* Exhibit B, p. 119, ll. 2 -5; *see also* p. 130, l. 6 – p. 132, l. 13; *see also* Exhibit A, ¶ 14.

instructions to Independence Title. EVA instructed Independence Title to disburse the commission to EVA under its authority set forth in the Listing Agreements or alternatively to escrow any disputed funds.[15] Turner's counsel then objected and claimed that a 2% commission was owed to EVA despite having no legal basis for such modification from the written Listing Agreement nor any written modification agreement thereto.[16] Turner refused to pay the amount instructed by EVA, Independence Title did not pay the amount as instructed by EVA or as set forth in the Listing Agreement despite reviewing the escrow authorization provision where Turner had authorized the escrow agent to disburse the commission to EVA as set forth in Paragraph 5(G) of the Listing Agreement and despite EVA and EVA's counsel directing them to do so.[17] Independence Title did not offer to nor did they escrow the balance of the commission that Turner refused to pay despite the 5% commission being set forth in the Listing Agreement and despite EVA's written instructions. 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 $336,000.00. Turner realized $8,276,299.28 out of the closing of the sale of the Tortuga Properties.[18]

V. TEXAS PUBLIC POLICY AND THE REAL ESTATE INDUSTRY

A. The Public Policy Pertaining to Written Commission Agreements.

In Texas, the sale, purchase, or lease of real estate through the agency of a person who receives money or its equivalent as a fee, commission, compensation, or profit may be and is regulated by the State. The Real Estate License Act ("RELA") has been adjudicated as a constitutional exercise of the policy power of the State to regulate private business that affects the

[15] See Exhibit D, Letter of Rex J. Zgarba; *see also* Exhibit A, ¶ 17.
[16] *See* Exhibit E, Terrance L. Irion.
[17] *See* Exhibit E, p. 2.
[18] *See* Exhibit F, Settlement Statements, p. 1.

public interest. *See* Tex. Occ. Code §§ 1101.001-1101.006; *see also Henry S. Miller Co. vs. Treo Enterprises*, 585 S.W.2d 674, 675 (Tex. 1979). The purpose of RELA is to eliminate or reduce fraud on the public by unlicensed, scrupulous, or unqualified persons. *Id.* The State seeks to protect the public by licensing people, who receive or expect to receive money or its equivalent for the service of selling, purchasing or leasing real property on behalf of another. Through this licensing, the State can regulate that activity. The requirements of RELA and its regulations governing contracts where real estate brokers or salespersons agree to perform services are not mere licensing requirements. They are also substantive directives that must be followed in analyzing the contracts entered into by brokers and salespersons. *See Perl v. Patrizi*, 20 S.W.3d, 76, 80 (Tex. App.—Texarkana 2000, pet. denied). It is unlawful for any person to act as a broker or sales person without first having obtained a real estate license from the Texas Real Estate Commission ("TREC").

Likewise, RELA requires that a licensed real estate broker must meet three requirements in order to collect a commission for services provided in a real estate transaction:

1. Proof of licensure[19];
2. A signed agreement regarding the commission to be paid naming the broker to whom the commission is to be paid[20]; and
3. Certain mandatory warnings must be provided to the purchaser.[21]

Full performance under an oral brokerage commission agreement does not take that agreement out of RELA's statute of frauds provision. *See Wingo v. Farley*, 318 S.W2d 955, 958-959 (Civ. App.—Amarillo 1958, no writ.). Moreover, a real estate broker cannot recover under

[19] Tex. Occ. Code § 1101.806(b)(1).
[20] Tex. Occ. Code § 1101.806(c).
[21] Tex. Occ. Code § 1101.806(d).

the doctrine of quantum meruit for his or her performance under an oral commission agreement. *Id*; *see also McKellar vs. Marsac*, 778 S.W.2d 573, 575-576 (Tex. App.—Houston [1st Dist.] 1989 no writ) (recovery based on allegation of an oral agreement that seller would pay amount found fair at trial held equivalent to a claim for quantum meruit and denied). Similarly, the doctrine of part performance will ordinarily not remove an oral contract for a brokerage commission from the statute of frauds. In the event that the terms of a listing agreement are modified at any time by a seller and its broker, RELA requires that any such modification must therefore also be in writing if it in any way affects the right of the broker to earn, or the duty of the owner to pay, a commission. The only exception to this is that during its original term, a listing contract may be extended by verbal agreement, but the verbal agreement may not in any other way modify or amend the original contract.[22] Because real estate brokers and salespersons can be expected to know about the requirement for written agreements, there is no equitable justification for allowing them to escape the statutory requirements on the basis of part performance. *See Brice v. Eastin*, 691 S.W.2d 54, 56-57 (Tex. App.—San Antonio 1985, no writ). RELA's strict statute of frauds requirement that all agreements, and any modifications thereto, to pay commissions to real estate brokers in Texas be in writing have the added effect of protecting the brokerage industry allowing brokers who have complied with RELA and the statute of frauds requirements for their listing agreements to fully enforce payment of their earned commissions.

The relationship between an owner of property and his or her real estate agent is fiduciary in nature and is the relationship between principals and agents generally. *See Si Kyu Kim v. Hartstan, Ltd.*, 286 S.W.3d 629, 634 (Tex. App.—El Paso 2009, Pet filed); *see also Southern Cross Industries, Inc. v. Martin*, 604 S.W.2d 290, 292 (Civ. App.—San Antonio 1980, ref. n.r.e.); Tex.

[22] *See Dickey v. Bird*, 366 S.W.2d 859, 861 (Civ. App.—Amarillo 196, ref. n.r.e.).

Occ. Code § 1101,557(a). The fiduciary relationship continues as long as the agent continues to perform services on behalf of, and with the consent of the property owner, even if the listing agreement has terminated. *See West v. Touchstone*, 620 S.W.2d 687, 690-691 (Civ. App.—Dallas 1981, ref. n.r.e.).

B. Real Estate Industry Practices Concerning Payment of Written Commission Agreements and The Role Of Title Insurance Companies.

In Texas, the majority of real estate transactions are closed and funded by title insurance companies and such title companies and their escrow officers are strictly regulated by the Texas Department of Insurance. It has become customary course of dealing for title companies to require written commission disbursement authorization instructions ("CDAs") from real estate brokers just prior to closing which are written directives from the listing brokers as to the amount of the commission to be paid and disbursed pursuant to their authority under the terms of their listing agreements. The CDA that title companies receive from brokers authorize and allow title companies to issue checks to real estate agents at closing. In the event of any dispute related to the payment of such commissions by any parties, title companies have several options available to them including but not limited to refusing to close the transaction, escrowing disputed amounts pursuant to an escrow agreement, paying the brokerage commission pursuant to the written listing agreement, or paying amounts as instructed by a broker under their listing agreement. Should title companies depart from such practices and substitute their judgment for that of a written listing agreement and fail to pay what is set forth in such listing agreements or as directed by the broker, then the written listing agreements obtained by brokers in accordance with RELA would have no force and effect as title companies could modify those terms by paying different commission amounts at any time with instructions from a seller on the eve of closing. In effect, by doing so, they facilitate a seller's breach of a listing agreement. Such conduct would do away with CDAs

and listing agreements and could serve to crater the entire brokerage community forcing brokers to sue their sellers at every turn for nonpayment of their commissions while title companies stand by stating that they have no liability. Such practice would nullify and void RELA and the policy behind Texas real estate brokers' rights to have their commissions paid by sellers when earned and payable pursuant to their written listing agreements.

C. The Special Duties of Escrow Officers.

Escrow officers who are employed by title companies are licensed in Texas subject to established regulations and laws governing their business[23]. An escrow transaction is a fiduciary relationship that imposes "special duties" in common law for the escrow agent. *See Bell v. Safeco Title Ins. Co.*, 830 S.W.2d 157, 161 (Tex. App.—Dallas 1992, writ denied). Unlike other fiduciary relationships, an escrow agent owes fiduciary duties to all parties to the transaction. *See Zimmerman v. First American Title Co.*, 790 S.W.2d 690, 695 (Tex. App.—Tyler 1990, writ denied); *see also Capital Title Co. v. Donaldson*, 739 S.W.2d 384, 389 (Tex. App.—Houston [1st Dist.] 1987, no writ). Those duties consist of 1) the duty of loyalty; 2) the duty to make full disclosure, and 3) the duty to exercise a high degree of care to conserve the money and pay only those entitled to receive it. *See FSB v. Walker*, 451 S.W.3d 490, 499 (Tex. App.—Dallas 2014, no pet.). In Texas, title companies close the majority of real estate transactions and are charged with acting in their capacity as escrow agents taking instructions from lenders, brokers, and other third parties related to the transaction and disbursing monies in accordance with those instructions. In most such instances, real estate brokers are paid their commissions directly from the title

[23] *See* Texas Insurance Code § 2652.051.

company who disburses such commissions pursuit to written instructions (CDAs) from the brokers as set forth in their written listing agreements.[24]

VI. ARGUMENT AND AUTHORITY

A. EVA agrees with Independence Title that fiduciary duties only flow to parties to an escrow agreement; however, there is a fact issue as to what documents comprise the escrow agreement in the transaction and whether EVA is a party to the escrow agreement, and summary judgment is improper.

Here, the facts establish that there is a fact issue as to whether the Listing Agreements constitute part of the escrow agreement. When the dispute arose, Independence Title asked for and reviewed the Listing Agreements because the TREC Real Estate Contracts did not contain all essential terms relative to the disbursements agreed to by the parties. Independence Title looked to the Listing Agreements to understand its duties as escrow agents to determine who should be paid. Because there is a fact issue on whether the Listing Agreements are part of the escrow agreement, summary judgment is improper. There is a fact issue on whether EVA is a party to the escrow agreement and whether Independence Title owed a duty to ensure that EVA be paid its commission due.

1. Escrow agents and Escrow Agreements in General

An escrow agent is a third party depositary of an escrow. *See Smith v. Daniel*, 288 S.W. 528, 531 (Tex. Civ. App.—Beaumont 1926, writ dism'd). It is a neutral third party which holds documents or other property (often instruments, such as deeds, or funds) until the occurrence of a specified event, at which time the agent makes disbursement or delivery in accordance with the parties' instructions. *See Hudgins v. Krawetz*, 558 S.W.2d 131, 133-34 (Tex. Civ. App.— San Antonio 1977, no writ). An escrow agent is an impartial stakeholder. *See Bell v. Safeco Title Ins.*

[24] *See* Exhibit A, ¶ 5.

Co., 830 S.W.2d 157, 161 (Tex. App. – Dallas 1992, writ denied). An *escrow* is a document or other property held by a third party until the occurrence of an event, at which time the third party delivers the document or property as instructed. The purpose for requiring a promisor to place documents or property in escrow is to protect the promisee by having a neutral third party hold the deposited items or funds until the happening of an agreed event. *See Vector Indus., Inc. v. Dupre*, 793 S.W.2d 97, 101 (Tex. App.—Dallas 1990, no writ). An escrow must be supported by a valid underlying contract. *La Roe v. Davis*, 333 S.W.2d 222, 224 (Tex. Civ. App.—Amarillo 1960, no writ).

An escrow agreement is the instructions given to a third party depositary of an escrow. It is an agreement made for the purpose of preserving documents or property so they will be available for disbursement or delivery when authorized. *See EMC Mortg. Corp. v. Jones*, 252 S.W.3d 857, 868 (Tex. App.—Dallas 2008, no pet. h.) To create an escrow, the parties must agree on the terms under which the escrow agent is to retain the deposited documents or property and to make disbursement or delivery of the deposited items. In Texas, an escrow agent is generally appointed through a specific written instrument which describes the legal obligations undertaken. *See Chapman Children's Trust v. Porter & Hedges, L.L.P.*, 32 S.W.3d 429, 438 (Tex. App.—Hous. [14th Dist.] 2000, pet. denied). Where there is a formal escrow agreement in place, an escrow agent has the duty to follow the agreed terms of the underlying contract and the absolute duty to carry out the terms of the agreement creating the escrow agency. *See Watkins v. Williams*, 869 S.W.2d 383 (Tex. App.—Dallas 1993, no writ). Texas courts will imply an escrow agency relationship by conduct absent a formal escrow agreement where the third party accepts documents, funds, or property for disbursement at closing. *See City of Fort Forth v. Pippen*, 439 S.w.2d 660, 665 (Tex. 1969); *Albright v. Lay*, 474 S.W.2d 287, 291 (Tex. Civ. App.—Corpus Christi 1971, no writ).

Unlike other fiduciary relationships, an escrow agent owes fiduciary duties to all parties to the transaction. *See Zimmerman v. First American Title Co.*, 790 S.W.2d 690, 695 (Tex. App.—Tyler 1990, writ denied. The duty to all parties exists regardless of whether all parties pay the escrow agent for its services. *See Martin v. Lou Poliquin Enterprises, Inc.*, 696 S.W.2d 180, 183-85 (Tex. App.—Houston [14th Dist.]1985, writ ref'd n.r.e.). Generally, the duties owed by escrow agents to buyer and seller of real property to be the duties of loyalty, full disclosure, and the exercise of a high degree of care in conserving the funds placed in escrow. *See FSB v. Walker,* 451 S.W.3d *at 499.*

Additionally, the essence of the escrow agent's role in a transaction is his or her neutrality. *See Gonzalez v. American Title Co.*, 104 S.W.3d 588, 598 (Tex. App.—Houston [1st Dist.] 2003, pet. denied). As a neutral third-party stakeholder, the escrow agent serves as the central depository for documents and funds being collected and disbursed in closing real estate transactions. *See Bell,* 830 S.W.2d at 161. As part of the duty of neutrality, the escrow agent cannot perform duties for one party without the express consent of the other parties. *See Charles J. Jacobus & Billie J. Ellis, Jr., Texas Title Insurance* § IV-1 (2d Ed. 1996).

2. Duties Run to Parties to Escrow Agreement; but here, there is a fact issue as to what constituted the "Escrow Agreement" and Whether EVA was a Party to the Escrow Agreement.

EVA agrees that as a matter of law, escrow agent liability will not expand to strangers to the escrow agreement and to the purchase and sale agreement. An escrow agent's duties only run to those set out in the escrow agreement and generally an escrow agent's duties runs only to parties to that agreement. *See e.g., Gary E. Patterson & Assoc., P.C. v. Holub*, 264 S.W.3d 180, 203 (Tex. App. – Hous. [1st Dist.] 2008, pet. denied) (escrow agent does not owe duty to non-party creditor

of a party to the escrow agreement); *see also Trahan v. Lone Star Title Co. of El Paso, Inc.*, 247 S.W.3d 269, 287 (Tex. App.—El Paso 2007, pet. denied) ("an escrow agent's duties are strictly limited and the scope of the agent's duties are defined by the escrow agreement").

However, summary judgment is improper because there is a fact issue as to what constituted the "escrow agreement," and the identity of all parties to that escrow agreement to whom duties are owed. EVA asserts that there is a fact issue as to whether the escrow agreement is comprised of both the sale agreements *and the listing agreements*, which necessarily creates a fact issue as to whether EVA is a party to the escrow agreement and entitled to receive its commissions under the escrow agreement. Because there is a fact issue, summary judgment must be denied.

Independence Title argues that the Real Estate Contracts are the only "escrow agreement" between buyer and seller and the title company. However, looking to the Real Estate Contracts alone is insufficient. The Real Estate Contracts fail to provide <u>any terms</u> and conditions related to the obligation of the parties vis-a-vis Independence Title and in fact, except for the provisions in the Contracts related to the Seller's delivery of the title policy to the Buyer, the Escrow Agent is only mentioned twice: Once in Paragraph 5 when it is designated to accept and hold earnest money and once at the end of the Contracts where it disclaims liability and states that the escrow agent is <u>not</u> a party to the Contract, is not liable for any party's non-performance of the Contract, and is not liable for interest on or loss of the earnest money.[25] Put simply, the standard TREC

[25] *See* Exhibit A-2, Real Estate Sale Contracts, Paragraphs 5 and 18. Note, that Independence Title is not a party to this Contract yet they have moved for attorneys' fees related to a contract that they are not a party to.

contract does not contain all essential terms to determine the terms of the escrow agreement, to ascertain the obligations of the parties[26].

The fact is belied by unique facts and circumstances present in this case. In fact, when Independence Title was made aware of the commission dispute between Turner and EVA, it reviewed the Contracts but it immediately asked for a copy of the Listing Agreement (which EVA provided) so that it could fully ascertain the amount of the commission, the terms under which the commission would be paid and the authorization it had been given in Paragraph 5(G) and by EVA.[27]

3. Looking to the Listings Agreement is Not Improper Extrinsic Evidence.

In Texas, where a written agreement does not include the entire agreement of the parties, parol evidence is admissible to show collateral agreements that are not inconsistent with and that do not vary or contradict the integrated, unambiguous terms of the writing. *See Jack H. Brown & Co. v. Toys "R" Us, Inc.* 906 F.2d 169, 175 (5th Cir. 1990); 159 Tex. 166, 317 S.W.2d 30, 32 (1958); *see also Weinacht v. Phillips Coal Co.*, 673 S.W.2d 677, 680 (Tex. App.—Dallas 1984, no writ). A contemporaneous collateral agreement, though it refer to the same subject matter, and may affect the rights of the parties under the written contract, may be proven only if not inconsistent with the integrated contract. *See Beijing Metals & Minerals Import/Export Corp. v. American Bus. Ctr., Inc.*, 993 F.2d 1178, 1184 (5th Cir. 1993) (quoting *Conner v. Ma*, 444 S.W.2d 948, 952 (Tex. Civ. App.—Austin 1969, writ ref'd .r.e.)). *See also, Bob Robertson, Inc. v. Webster*, 679 S.W.2d 683, 688-689 (Tex. App.—Houston [1st Dist.] 1984 , no writ) (finding that

[26] Ironically, Jay Southworth, past President of Independence Title testified that Independence Title maintains 'form' written escrow agreements that they recommend that parties use when escrowing funds with them and such agreements presumably have been drafted by attorneys and set forth numerous specific obligations of the parties and the title company, as escrow agent, is in fact a party to such escrow agreements. *See* Exhibit C, p. 94, l. 18 – p. 97, l. 9.
[27] *See* Exhibit A, ¶ 17.

admission of separate parol evidence to establish the date of delivery was permissible, because the written contract referred repeatedly to "delivery" but made no provision for the date of delivery).

Moreover, for a court to determine that a written agreement is not fully integrated, it must decide as a matter of law that (1) the writing is facially incomplete and requires extrinsic evidence to clarify, explain, or give meaning to its terms, or (2) when viewed in light of the circumstances surrounding its execution, the writing does not appear to be the complete embodiment of the terms relating to the subject matter of the writing. *See Garner v. Redeaus*, 678 S.W.2d 124, 128 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.) (quoting 2 Charles T. McCormick & Roy R. Ray, Texas Law of Evidence, Civil and Criminal § 1611 (1st ed. 1937)); *Warren Bros. Co. . A.A.A. Pipe Cleaning Co.*, 601 S.W.2d 436, 438 (Tex. Civ. App.—Houston [1st Dist.] 1980, writ ref'd n.r.e.). It can be clear from the face of a writing that it is incomplete and cannot be more than a partially integrated agreement. Incompleteness may also be shown by other writing, which may or may not become part of a completely or partially integrated agreement. Or it may be shown by any relevant evidence oral or written, that an apparently complete writing never became fully effective. *Restatement (Second) of Contracts § 210 cmt. C* (emphasis added). An agreement may be facially incomplete because, inter alia, (1) numerous blanks in the written agreement are not filled in, (2) the written agreement explicitly refers to and incorporates another document, or (3) the agreement omits necessary terms. *See Texas Builders v. Keller*, 928 S.W.2d 479, 481-482 (Tex. 1996).

Likewise, under Texas law a party need not plead ambiguity in order for the trial court to consider extrinsic evidence of circumstances surrounding the formation and execution of an agreement. The Texas Supreme Court has stated in both *City of Pinehurst vs. Spooner Addition Water Co.* and *Sun Oil Co v. Madeley* that ambiguity need not be pleaded by either party in order

to permit the trial court to look at extrinsic evidence of circumstances surrounding the formation and execution of the agreement. *See Sun Oil Co. v. Madeley*, 626 S.W.2d 726, 731-32 (Tex. 1981); *see also City of Pinehurst v. Spooner Addition Water Co*, 432 S.W.2d 515, 518-519 (Tex. 1968). The Texas Supreme Court's decision in *Columbia Gas Transmission Corp. v. Newulum Gas, Ltd.* reaffirmed the use of evidence of surrounding circumstances to choose between competing constructions of an unambiguous contract.

Based upon *Columbia Gas, Madeley and City of Pinehurst*, a trial court may (1) hear and consider evidence of the circumstance surrounding the formation and execution of the contract and (2) apply the rules of construction whenever the parties disagree as to the proper construction of the writing.

B. There is fact issue as to whether Independence Title had a fiduciary duty to EVA to pay EVA its full commission because EVA was an exclusive agent of the Seller, EVA had express authority under the terms of its Listing Agreement to act on behalf of the Seller, and as such, Independence Title's duties to the Seller under its Escrow Agreement ran to EVA.

EVA is entitled to prevail on its claims for breach of fiduciary duty and negligence against Independence as Independence owed EVA a fiduciary duty, or alternatively, it owed EVA a duty of care. EVA was acting under a written Listing Agreement that it had executed with Turner, granting EVA express authority as a Seller's broker/agent and to act on Seller's behalf. In the Listing Agreement, Turner had 1) expressly appointed EVA as its exclusive agent, 2) under Paragraph 5(G) had instructed Independence Title to disburse the commission to EVA as set forth in the Listing Agreement, and 3) had even authorized its agent (EVA) to instruct Independence to disburse the commission set forth in the Listing Agreement to EVA (which EVA also did prior to closing). Specifically, Paragraph 5(G) stated:

> ***G. Escrow Authorization: Seller authorizes, and Broker may so instruct, any escrow or closing agent authorized to close***

> ***a transaction for the purchase or acquisition of the Property to collect and disburse to Broker all amounts payable to Broker under this Listing.***[28]

Independence had a fiduciary duty to the Seller to disburse the commission as set forth as the Seller had instructed in the Listing Agreement and it had a fiduciary duty to EVA who was acting on behalf of and AS the Seller as set forth in the written Listing Agreement. Independence had a copy of the Listing Agreement because when the dispute arose, they asked for it and EVA provided it to them.[29] EVA, acting as Turner's agent under such appointment, instructed Independence in writing to disburse the commission to them pursuant to their authority to act on Turner's behalf and per his very specific grant of authority in Paragraph 5(G) of the Listing Agreement. The Listing Agreement is a valid contract that meets the requirements of the Real Estate License Act for licensed brokers in Texas and it was signed by the Seller and EVA which entitled EVA to earn a commission in Texas pursuant to the Listing Agreement. *Id.* Independence breached its fiduciary duty to EVA by failing to disburse the commission to EVA as instructed by both Turner and EVA.

1. Under Texas Law, an agent with express authority is authorized to act on behalf of its principal and a title company has a right to rely upon that authority in disbursing payments related to a real estate transaction.

The relationship between an owner of property and his or her real estate agent is fiduciary in nature, as is the relationship between principals and agents generally. *See Si Kyu Kim vs. Harstan, Ltd.,* 286 S.W.3d 629, 634 (Tex. App.—El Paso 2009, pet. filed); Tex. Occ. Code § 1101.57(a). Thus, the relationship between the real estate agent and the principal is governed not only by the contractual agreements between them, but also by the principles of agency that impose

[28] *See* Exhibit A-1, p. 3, ¶ 5(G).
[29] *See* Exhibit A, ¶ 17.

fiduciary obligations on the real estate broker or salesperson. *See Wilson v. Donze*, 692 S.W.2d 734, 739-740 (Tex. App.—Fort Worth 1985, no writ). An agent's authority to act on behalf of a principal depends on some communication by the principal either to the agent (actual or express authority) or to the third party (apparent or implied authority). *See Gaines v. Kelly*, 235 S.W.3d 179, 182 (Tex. 2007). Actual authority is authority a principal (1) intentionally confers upon an agent; (2) intentionally allows the agent to believe it possesses; or (3) by act of due care allows the agent to believe he possesses. *See Jarvis v. K & E Re One, LLC*, 390 S.W.3d 631 (Tex.App.—Dallas [5th Dist.] 2012; *see also Affordable Power, L.P. v. Buckeye Ventures, Inc.*, 347 S.W.3d 825, 830 (Tex. App.—Dallas 2001, no pet.); *United Residential Properties, L.P. v. Theis*, 378 S.W.3d 552, 564 (Tex. App.-Houston [14th Dist.] 2012, no pet.). Actual authority is created through "written or spoken words or conduct of the principal communicated to the agent." *See* CNOOC Southeast Asia Ltd. v. Paladin Res. (Sunda) Ltd., 222 S.W.3d 889, 889 Tex. App.—Dallas [5th Dist.] 2007).

Texas courts have found that payment to an authorized agent of the obligee constitutes payment to the principal. *See Jarvis*, 390 S.W.3d 631 (Tex. App.—Dallas [5th Dist.] 2012, no writ; *see also Cash v. Lebowitz*, 734 S.W.2d 396, 399 (Tex. App.—Dallas 1987, writ ref'd n.r.e.). This is true even if the agent appropriates the money to his own use. *See MacMichael LLC v. Packaging Corp. of Am.*, No. 05-08-00561-CV, 2009 Tex. App. LEXIS 5244. For example, in *Jarvis*, when the buyers purchased real property, Stewart Title Company wired payoff funds to a third-party business called "NOC" that had acted as a servicer on behalf of the lender (Jarvis) who held the underlying note obligation instead of wiring payoff funds directly to Jarvis, the lender. The buyers sought a declaration that the note had been paid because NOC, the third-party servicer, failed to pay Jarvis the wired funds it had received. Jarvis also filed a third-party petition against Stewart

Title alleging that Stewart Title had been negligent in paying the third-party business, NOC, instead of Jarvis and that they breached the escrow agreement of which Jarvis was a third party-beneficiary. *See Jarvis* at 390 S.W.3d at 641. In its findings of fact and conclusions of law, the trial court found that Jarvis and the third-party business NOC, through their course of conduct had established a usual customary and authorized procedure for such business to receive funds and that NOC had the actual authority to receive such funds. *Id* at 642. The appeals court affirmed the trial court's ruling that a payment to the authorized agent of the oblige constitutes payment to a principal. *Id.* The court determined that there was more than a scintilla of evidence that NOC had implied actual authority to accept the loan payoff for the lender. *Id.* Because Stewart Title Company had wired the funds to NOC as NOC had instructed the title company to do, the court held that the payment that Stewart Title made to NOC amounted to payment directly to the lender. *Id.*

2. Texas Courts have held that an agent is one who is authorized by a person or entity to act on behalf of a principal and have even held that a payment to an agent of the principal is a payment to the principal.

Likewise, in *Metro. Ins. & Annuity Co. v. Peachtree Settlement Funding, LLC*, the Houston Court of Appeals found that a funding company, Peachtree Settlement Funding, LLC ("Peachtree"), was Ms. Swain's authorized agent for purposes of receiving the periodic payment from MetLife the insurer, and as a result, payment of periodic payments to the funding company would constitute payment to Ms. Swain. In *Metro*, Swain had lost her mother and MetLife had agreed to a structured settlement for the benefit of Swain which included MetLife paying Swain $1400.00 for life. Swain later agreed to enter into a transfer agreement with Peachtree such that Peachtree would make an upfront buyout payment to Swain for a portion of the settlement and thereafter Peachtree would be entitled to receive $495.00 per month out of Swain's $1400.00 per

month payment from MetLife. *See Metro Ins. & Annuity Co. v. Peachtree Settlement Funding, LLC,* 500 S.W.3d 5, 17 (Tex. App.—Houston [1st Dist.] 2016, no writ). Peachtree had entered into a transfer agreement with Swain and had filed an application for approval with the court and MetLife filed an opposition to Peachtree's application. MetLife's arguments were that MetLife as the settlement obligor nor its annuity insurer was required to divide any periodic payment between the payee and any transferee or assignee or between two or more transferees or assignees. *Id.* Under such servicing arrangement, MetLife argued that it would be required to send payment to Peachtree, Peachtree would retain its assigned portion and forward the remainder onto Swain. *Id.* Ultimately the court held that under Texas law, MetLife's obligation to Swain, with regard to the remittance of the unassigned payment is fulfilled once MetLife forwards payment to Peachtree, even if Peachtree fails to remit the unassigned payments to Swain. The court's reasoning was that Swain had granted such authority to Peachtree and that once Peachtree, as Swain's authorized payment agent, received payment from MetLife, payment of the unassigned payments had effectively been made to Swain. *Id.*

In this case, EVA was acting with express authority as set forth in the Listing Agreement on behalf of Turner, such Listing Agreement set forth the rate of the commission and included an escrow authorization under paragraph 5(G) whereby Turner had instructed Independence to pay the commission amount per the Listing Agreement and EVA had so instructed. These fact issues align with *Jarvis* which affirmed the trial court's ruling that a title company is entitled to rely upon the authority of an agent of the parties in order to disburse funds because such payment to the agent is deemed to be authorized by its principal as a result of such authority. Such actions are also supported by *Metro* as the court there held that a servicer, duly appointed, had authority to act on behalf of its principal. Independence should have paid the commission to EVA pursuant to the

instructions that the Seller and EVA, as the Seller's agent, had given them incident to the Listing Agreement. There is no evidence that Turner terminated EVA's authority and alternatively, a fact issue exists as to whether such authority existed upon EVA's instruction. If Independence was concerned over the dispute that the Seller raised, they were entitled to point to *Jarvis* and to rely upon the holding that a title company is authorized to take instructions from and to disburse funds to a party acting as an agent of another. When Independence failed to honor the Listing Agreement, they facilitated the Seller's breach, breached their fiduciary duty to the Seller and EVA and cost themselves a lawsuit. All of this should have been avoided because Independence should have performed its duty to EVA.

C. There is a fact issue as to whether EVA was a third-party beneficiary of the Real Estate Sale Contract which included the Escrow Agreement and whether Independence Title had a duty to pay those entitled to receive money at the closing.

Traditionally, there are two categories of third-party status in a contract: donee status and creditor beneficiary status. *See MCI Telecomms. Corp. v. Tex. Utils. Elec. Co.*, 995 S.W.2d 647, 651 (Tex. 1999). The former is not a third-party beneficiary while the latter is. *Id.* at 651. The distinction between the types of beneficiaries turns on whether the contract establishes a legal duty running to the third party. *Id.* Without that duty the benefit that comes to the third party is a "pure donation" that is incidental to the contract's terms but does not support an intent to give the party rights in the contract. *Id.* "If, on the other hand, that performance will come to him in satisfaction of a legal duty owed to him by the promisee, he is a creditor beneficiary. *Id.; see also Stine v. Stewart, 80 S.W.3d 586, 589 45 Tex. Sup. Ct. J. 966 (Tex. 2002).* "This duty may be an indebtedness, contractual obligation, or other legally enforceable commitment owed to the third-party." *Id.* As the Texas Supreme Court described, the relationship that must be established to confer third-party beneficiary status for an arbitration claim, "The benefit must be more than

incidental, and the contracting parties' intent to 'confer a direct benefit to a third-party must be clearly and fully spelled out or enforcement by the third-party must be denied." *See Gainey v. Minoo, LLC*, 2019 Tex. App. LEXIS 107989; *see also Jody James Farms, JV v. Altman Grp., Inc.*, 547 S.W.3d 624, 631 (Tex. 2018) (quoting *MCI Telecomms. Corp.*, 995 S.W.2d at 651). And though the prerequisites for finding third-party beneficiary status are strict, they are not untampered. For example, a third-party seeking beneficiary status need not present evidence of the phrase 'third-party beneficiary' or other magic words." *Id.*

A third party can enforce such a duty only if the contracting parties' intention to confer a direct benefit on the third party is clearly and fully spelled out in the contract. *Id.* A broker's name is an essential element of a written commission agreement and cannot be supplied by parol evidence. *See Boyert v. Tauber*, 834 S.W.2d 60, 62, 35 Tex. Sup. Ct. J. 1092 (Tex. 1992). The intent to benefit third parties is controlling. *See Corpus Christi Bank & Trust v. Smith*, 525 S.W.2d 501, 503-05, 18 Tex. Sup. Ct. J. 354 (Tex. 1975).

For example, in *Gainey*, the Fort Worth Court of Appeals held that the trial court had abused its discretion by denying the real estate agents' motion to compel arbitration. *Gainey*, 2019 Tex. App. LEXIS 107989. In this case the buyer to a real estate purchase agreement was bound by the arbitration clause and the Fort Worth Court of Appeals held that the real estate agents could enforce the arbitration clause as third-party beneficiaries even though they were non-signatories. *Id.* The terms of the purchase agreement contained clauses that specifically referenced the real estate agents and established legal duties that ran to them from the signatories. *Id.* The claims made by the buyer against the real estate agents fell within the scope of the arbitration clause. *Gainey*, 2019 Tex. App. LEXIS 107989. The court confirmed that "in determining whether the parties intended to benefit a third-party, courts look to the entire agreement, giving effect to all of

its provisions." *See ConocoPhillips Co. v. Graham*, No. 01-11-00503-CV, 2012 Tex. App. LEXIS 2461, 2012 WL 1059084, at *6 (Tex. App.—Houston [1st Dist.] March 29, 2012, no pet.).

In this case, EVA was a third-party creditor beneficiary of the Escrow Agreement and such 'Escrow Agreement' which Independence argues is set forth in the Real Estate Contracts, included the collateral listing agreement and as a whole, it established a legal duty that was owed to EVA (i.e. to pay its commission). Specifically, the duty of Turner to close and fund the sale of the Property included that EVA would receive its commission and EVA was specifically named in the Escrow Agreement as the broker representing Turner and entitled to receive the commission. The duty of Turner to pay the commission to EVA constituted an indebtedness, a contractual obligation, and a legally enforceable commitment owed to EVA by Turner. The payment of the commissions to EVA was not merely incidental.

In analyzing whether the parties to the Escrow Agreement intended that EVA be a third-party beneficiary, it is clear that they did. Not only is EVA listed on page 9 and 8 of the Contracts, as being the party representing the Seller entitled to receive the commissions, but the Listing Agreements themselves were collateral to and made part of the Escrow Agreements and as such they conferred a direct benefit that EVA was to receive upon fulfillment of the Contract. *See* argument section IV. A. 2 and 3.

D. Substantial evidence exists to support EVA's claim for Promissory Estoppel as Independence Title has made numerous specific and definite promises to EVA in word and conduct, including, without limitation, that it would 'take care of EVA' and its agents. EVA has relied upon such specific promises and conduct by delivering a significant portion of its business to Independence Title totaling over 70 million in real estate closings in 2018 and EVA relied upon Independence Title's promises to pay its commission as set forth in the Listing Agreement.

The underlying function of the theory of promissory estoppel is to promote equity. The Texas Supreme Court has stated that the vital principle is that he who by his language or conduct

leads another to do what he would not otherwise have done, shall not subject such person to loss or injury by disappointing the expectations upon which he acted. This remedy is always so applied to promote the ends of justice. *See Koelzer v. Pizzirani*, 718 S.W.2d 420, 423 (Tex. App.—Fort Worth 1986, no writ). *See also Wheeler v. White*, 398 S.W.2d 93, 96 (Tex. 1965) The binding thread that runs through the cases applying promissory estoppel is the existence of promises designedly made to influence the conduct of the promisee, tacitly encouraging the conduct, which conduct, although not necessarily constituting any actual performance of the contract itself, is something that must be done by the promisee before he could begin to perform and was a fact known to the promisor. *Id.* Where one party has by his words or conduct made to the other a promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it., the party who gave the promise cannot afterward be allowed to aver to the previous relationship as if no such promise has been made. *Id.* This does not create aa contract where none existed before, but only prevents a party from insisting upon his strict legal rights when it would be unjust to allow him to enforce them. *Id.*

Section 90 of the RESTATEMENT (SECOND OF CONTRACTS states the principle of promissory estoppel as follows: "A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promise or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise." Accordingly, the requirements of promissory estoppel are: "(1) a promise, (2) foreseeability of reliance thereon by the promisor, and (3) substantial reliance by the promisee to his detriment." *See English v. Fischer*, 660 S.W.2d 521, 524 (Tex. 1983), citing *Aubrey v. Workman*, 384 S.W.2d 389, 393 (Tex. Civ. App.—Fort Worth 1964, writ ref'd n.r.e.).

Furthermore, a promise has been defined as "a declaration which binds the person who makes it, either in honor, conscience, or law, to do or forbear a certain specific act, and which gives the person to whom made a right to expect or claim the performance of some particular thing. *Id.*

The elements of an action for promissory estoppel are the following: 1) the defendant made a promise to the plaintiff; 2) the plaintiff reasonably and substantially relied on the promise to its detriment; 3). The plaintiff's reliance was foreseeable by defendant; and 4) Injustice can be avoided only by enforcing the defendant's promise. *See Henry Schein, Inc. v. Stromboe*, 102 S.W,3d 675, 686 n.25 (Tex.2002); *see also English v. Fischer*, 660 S.W.2d 521, 524 (Tex. 1983). **A promise is a declaration that binds the person who makes it to act or refrain from acting in a specified way; it gives the person to whom the promise is made the right to expect its performance. *Traco, Inc. v. Arrow Glass*, 814 S.W.2d 186, 190 (Tex. App.—San Antonio 1991, writ denied). A promise may be made orally or in writing or can be inferred from conduct. *See Fretz Const. Co. v. Southern Nat'l Bank*, 626 S.W.2d 478, 483—84 (Tex. 1981).**

In this case substantial evidence exists that demonstrates that Independence verbally and through its continued conduct made promises to EVA related to its promise to protect EVA by paying its real estate commissions per its listing agreements, to protect and take care of its agents, and to act with trust and care in respect of EVA. Specifically, EVA and Independence have a long-standing relationship in the real estate community.[30] One of EVA's principals, Michele Turnquist has known the past President of Independence, Jay Southworth for over 20 years.[31] Independence Title, through Southworth individually along with a marketing team that he hired, targeted the business development of key residential brokers in Austin, Texas including Michele Turnquist and

[30] *See* Exhibit A.
[31] *See* Exhibit A, ¶ 6.

her daughter Kathryn Scarborough who is also a top 25 Elite agent with EVA.[32] On numerous occasions, Independence called upon EVA's agents, including Michele Turnquist and Kathryn Scarborough, promoting its serv ices and making specific offers and promises to them in the community, including that Independence Title would provide superior service and "take care" of EVA agents.

In this case, a fact issue exists as to the extent of the promises made independence Title to EVA including the following promises which EVA can show were made them, including without limitation: 1) the offer to 'take care of them and pay their commissions; 2) the offer to 'take care of their clients and customers; 3) the offer to assist them with marketing in exchange for some of EVA's business; and 4) the sponsorship and payment of a real estate television show representing that they cared about brokers and would make sure their commissions get paid. As demonstrated by the Affidavit of Michele Turnquist, it is the customary practice for title companies to ensure agents are paid their commissions at closing. If there is a dispute the Title Company will refuse to close or escrow the funds.[33]

EVA reasonably and substantially relied upon such of the promises made to them as Independence Title delivered over 70 million in closings in 2018 alone, and EVA could have recommended and direct its clients to any other title company in Austin because the premiums for such title polies are the same no matter which title company issues a policy to a lender or a buyer.[34]

EVA's reliance was completely foreseeable by Independence. Independence is an expert in the very competitive title industry. It also is keenly aware that the ONLY thing it has to offer

[32] *See* Exhibit A, ¶¶ 4, 9-10.
[33] *See* Exhibit G, Affidavit of Stacey Goodnight Dunn, ¶ 5; *see also* Exhibit A, ¶¶ 8, 10; Exhibit C, p. 94, l. 18 – p. 97, l. 9.
[34] *See* Exhibit A, ¶ 11.

that sets it apart from other title companies is its service and the relationships that it cultivates with brokers and real estate agents in the community.[35] It knows that the representations and promises it makes will set it apart from other companies and thus that EVA would have relied upon those promises and conduct in order to distinguish the selection of Independence Title company over another.

E. EVA has raised a fact issue on its claim for negligence.

In addition to Independence Title's breach of its fiduciary duty to EVA for failing to pay its commission, Independence Title's actions were negligent and such actions raise significant fact issues on whether they breached their duty to EVA. A title company may be liable for its negligence in closing a real estate transaction. *See Dixon v. Shirley*, 558 S.W.2d 112 (Tex. Civ. App—Corpus Christi 1977, writ ref'd n.r.e.); *see also Zimmerman v. First Am. Title Ins. Co.,* 790 S.W.2d 690, 694 (Tex. App.—Tyler 19909, writ denied). The title insurance agent may not intentionally or recklessly deceive the parties to a real estate transaction. *See Stone v. Lawyers Title Insurance Corp.*, 537 S.W.2d 55 (Tex. Civ. App.—Corpus Christi 1976). In *Zimmerman,* appellant real estate agent arranged a sale of 48 lots between a seller and buyer. *Zimmerman,* 790 S.W.2d 690, 694 (Tex. App.—Tyler 19909, writ denied). The parties agreed in the sale contract that in lieu of a cash commission, Zimmerman would receive one of the lots free and clear. As part of the closing which the title company handled, lot #80 was conveyed to Zimmerman, yet it was not transferred 'free and clear' as it was encumbered by the mortgage that was secured by the other lots that the buyer had purchased. *Id.* When buyer defaulted in payments, the mortgagee foreclosed its lien. *Id.* During this time, the agent conveyed his lot to his son. When appellants learned of the foreclosure, they filed an action against appellee title company for negligence. *Id.* The trial court

[35] *See* Exhibit A, ¶ 4.

directed verdict in favor of the title company. On appeal, the court found that appellee did owe a duty to the agent in its obligation of transferring agent's title and that appellee did not carry out the terms of the parties' agreement. *Id.* The court stated that the record raised the issue that appellee failed to conform to the agreement and failed to disclose the existence of an outstanding lien. *Id.* The court found no merit in the title company's contention that appellants made an election of remedies by seeking other inconsistent forms of relief. Judgment was reversed and remanded. *Id.*

As in *Zimmerman*, where the court held that the title company was negligent in failing to close the sale so that Zimmerman received lot #80 'free and clear', in this case Independence failed to close the transaction in accordance with the written escrow instructions from the Seller and EVA which directed Independence to pay the commission per the Listing Agreements to EVA. Independence had a duty to all parties to the transaction to close the transaction correctly and in accordance with written instructions that were contractual in nature and that had been agreed upon by the Seller and EVA in advance per the Listing Agreements, including its duties to pay all parties who were entitled to be paid. Such actions were negligent and reckless and as such Independence Title's Motion for Summary Judgment should be denied.

VII. CONCLUSION AND PRAYER

Based upon the foregoing, Plaintiff, Turnquist Partners Realtors, Inc. d/b/a Engel & Völkers Austin respectfully requests that the Court deny Defendants ITCOA, LLC's and Secured Land Transfers, LLC's Amended Motion for Summary Judgment and enter an order denying such Motion and awarding Plaintiff any further relief to which it is entitled in law or in equity.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I CERTIFY that a true and correct copy of the above document was served on the following counsel(s) of record and/or individual(s) in accordance with TEX. R. CIV. P. 21a via the method indicated for each on the 14th day of January, 2020.

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