

TURNQUIST PARTNERS REALTORS,
INC. d/b/a ENGEL & VÖLKERS
AUSTIN,

Plaintiff,

vs.

ROBERT TURNER AND ITCOA, L.L.C.
d/b/a INDEPENDENCE TITLE
COMPANY

Defendants.

IN THE DISTRICT COURT

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 THIRD AMENDED PETITION

TO THE HONORABLE JUDGE OF SAID COURT:

Plaintiff Turnquist Partners Realtors, Inc., a Texas corporation d/b/a Engel & Völkers Austin, files this Third Amended Petition against: Defendant Robert Turner, individually; Defendant ITCOA, LLC, a Texas limited liability company d/b/a Independence Title Company; and Defendant Secured Land Transfers, LLC, a Delaware limited liability company d/b/a Independence Title, as successor-in-interest by merger to Texas American Title Company, a merged Texas corporation, formerly d/b/a Independence Title. Plaintiff alleges the following:

I. DISCOVERY-CONTROL PLAN

1. Plaintiff intends to conduct discovery under Level 3 of Texas Rule of Civil Procedure 190.3 and affirmatively pleads that this suit is not governed by the expedited-actions process in Texas Rule of Civil Procedure 169 because Plaintiff seeks monetary relief over \$100,000.00.

II. CLAIM FOR RELIEF

2. Plaintiff seeks monetary relief over \$200,000.00 but not more than \$1,000,000.00.

III. PARTIES

3. Plaintiff Turnquist Partners Realtors, Inc. d/b/a Engel & Völkers Austin (“EVA”) is a Texas corporation with its principal place of business located at 3700 Bee Caves Road, Suite 102, Austin, Texas 78746.

4. Defendant Robert Turner (“Turner”) is an individual and a Texas resident with his principal residence located at 202 Billings Lane, Austin, Texas 78733. Turner has appeared in this matter.

5. Defendant ITCOA, LLC is a Texas limited liability company d/b/a Independence Title Company (“ITCOA”) with its principal office located at 5900 Shepherd Mountain Cove, Building II, Suite 200, Austin, Texas 78730. Defendant ITCOA has appeared in this matter.

6. Defendant Secured Land Transfers, LLC d/b/a Independence Title (“SLT”) is a foreign limited liability company organized and existing under the laws of the State of Delaware with its principal office located at 3001 Leadenhall Road, Madison, New Jersey 07940. SLT is authorized to do business in Texas and is the successor-in-interest by merger to Texas American Title Company, a merged Texas corporation formerly d/b/a Independence Title. Defendant SLT has appeared in this matter and.

7. ITCOA and SLT may be referred to hereinafter, collectively as “**Independence Title**” and/or the “**Independence Title Defendants**”

IV. JURISDICTION AND VENUE

8. The Court has subject-matter jurisdiction over this lawsuit because the amount in controversy exceeds the minimum jurisdictional limits of this Court.

9. The Court has personal jurisdiction over Defendant STL, a nonresident, because STL is duly registered to do in Texas and is the successor-in-interest by merger to Texas American Title Company, a merged Texas corporation, which at all times relevant to this suit was the entity engaged in the business transactions complained of by Plaintiff.

10. Venue is permissive in Travis County because this is a suit for breach of a written contract and this county was identified as the place for payment on the Listing Agreements, an obligation under the contract to be performed. TEX. CIV. PRAC. & REM. CODE §15.035(a). Further, venue is proper in Travis County, Texas because all or a substantial part of the acts or omissions giving rise to the claims occurred in Travis County, Texas. TEX. CIV. PRAC. & REM. CODE §15.002(a)(1).

V. FACTUAL BACKGROUND

11. EVA is a top real estate brokerage firm in Austin, Texas. EVA’s broker is Steve Turnquist and Michele Turnquist (Steve Turnquist’s wife, is a licensed real estate sales person). Both Steve and Michele Turnquist have been some of the City of Austin’s top leading real estate agents in dollar volume since 1995. Kathryn Scarborough, is Steve and Michelle Turnquist’s daughter and she is also one of the top premiere Elite 25 real estate agents in the City of Austin. In fact, in recent years, EVA has closed approximately in excess of 700 real estate transactions per year.

12. As a result of EVA's, the Turnquists', and Scarborough's reputation and volume of real estate transactions that they have closed each year, Independence Title Company has long-solicited EVA and its agents as EVA has very strong and noteworthy relationships with many sellers, buyers, developers, and builders in the Austin market and EVA is able to drive business to any title company that it forms relationships with. EVA and its agents have been long-standing friends of Independence Title and Michele Turnquist, and Independence Title's President and Founder Jay Southworth have had a very longstanding relationship in the real estate professional arena as Independence Title has worked hard to cultivate business relationships with EVA in order to obtain closings from EVA.

13. For example, approximately 2 years ago, Independence Title recruited one of EVA's agents to work in marketing for Independence Title so that they could better position themselves to market Independence Title to EVA and its agents. Once that occurred, EVA continued to direct significant business and closings to Independence Title closing an estimated \$70 million in real estate dollar volume with Independence Title in the last year or so. In fact, as part of their marketing efforts, Independence Title even sponsored EVA's television show where they were highlighted and did so so that EVA would understand that Independence Title valued their relationship, assuring EVA that EVA, and their clients, could rely upon Independence Title to close real estate transactions effectively, efficiently carefully and fairly.

14. In October 2017, EVA entered into two agreements (the "Listing Agreements") with Turner to serve as his sole and exclusive real estate broker for properties located at 5201 and 5203 Tortuga Trail, Austin, Travis County, Texas (the "Properties"). In 2015 and 2016 EVA had marketed the Properties prior to their completion before they even went on the market and under prior listing agreements executed in 2015. EVA had worked tirelessly marketing the

Properties even before the 2017 Listing Agreements were signed.

15. In July 2018, following several weeks of negotiations and discussions facilitated by EVA, Turner, as seller, entered into two separate real estate contracts (the “Contracts”) with Lauree Z. Moffett, as buyer, for the Properties’ sale. Prior to executing the Contracts with the buyer and desperate to have the Properties sold, Turner told agents for EVA to do what they needed to do to get the deal done. EVA relied on Turner’s statements in securing and finalizing the Contracts for Turner.

16. The Contracts designated Independence Title Company as escrow agent for the sales transaction and incorporated EVA into the transaction as the listing broker firm, representing “Seller only as Seller’s agent.”

17. As the only broker designated in the Contracts for either Turner or the buyer, and as agreed to in the Listing Agreements between EVA and Turner, EVA was entitled to a commission of five-percent (5%) of the Contracts’ collective sales price of \$11,200,000.00, for a total commission of \$560,000.00 payable at the closing of the transaction.

18. During the pendency of the Contracts and while EVA continued to facilitate multiple details of the sales transaction with the buyer for the benefit of Turner, Turner discussed the commission to be paid EVA with an EVA representative. Turner stated that he would pay EVA what he owed pursuant to the Contracts, but that he also wanted to take care of his attorney, Terry Irion. Terry Irion, Turner’s counsel, had performed entitlement work on the Properties for Turner and negotiated the final sales Contracts with the buyer on Turner’s behalf. In fact, the buyer was not represented by a broker, which Turner acknowledged, and Irion negotiated the sales Contracts and their terms directly with the buyer’s counsel. Believing that Turner’s payment of his attorney for legal services should have no bearing on the real estate brokerage

commission owed to EVA pursuant to the Listing Agreements, EVA continued in good faith to work on behalf of Turner and relied on his promises to pay what he owed as the transaction progressed to the closing date. At no time did Irion or Turner ask EVA to amend or modify its Listing Agreement by executing a written amendment.

19. However, in the immediate days prior to the closing of the transaction, instead of authorizing payment to EVA pursuant to the clear terms of the Listing Agreements and the Contracts, Turner, through his attorney, instructed Independence Title to reduce Plaintiffs' compensation to an arbitrary amount equal to two and one-half percent (2.5%) of the total transaction, for a proposed fee of only \$280,000.00. This reduction was arbitrary because it was not based on the clear and unambiguous language contained in the Listing Agreement nor on any other agreement or understating that would allow for reducing the compensation earned and payable under the Listing Agreements. Further, the reduction in commission was contrary to the direct representations Turner made to EVA, and on which EVA relied prior to entering into the Listing Agreements and, later, while it continued to facilitate the transaction with the buyer through to the date of closing—specifically, the representation that Turner would pay EVA the commission he owed under the parties' agreements.

20. After EVA became aware of Turner's attempt to reduce the five percent (5%) commission owed EVA and a day prior to the date the closing of the transaction was to occur, EVA objected to the reduced commission and placed all parties concerned on notice of a dispute with Turner.

21. EVA's notice objecting to the reduced commission was specifically directed to Independence Title. Along with informing Independence Title of the dispute, EVA requested that Independence Title—as an impartial agent for the parties—placed the disputed commission

funds in escrow pending resolution of the competing claims. Rather than honor its fiduciary duty of neutrality to all parties to the transaction, or at a minimum rather than acting with reasonable care as a qualified title company would, Independence Title refused to conserve the funds as requested and paid commission funds that EVA was otherwise entitled to receive to other parties. Moreover, prior to closing, Independence Title was presented with a copy of the Listing Agreements and chose not to pay the commissions to EVA as set forth in the Listing Agreements and essentially assisted Turner in repudiating them.

22. Moreover, on August 15th, 2018—the very day of the closing—at the instruction of Turner’s attorney, Terry Irion, EVA’s commission was further and finally reduced from the previously notified two and one-half percent (2.5%) to two percent (2.0%). Accordingly, EVA was paid only \$224,000.00 of the \$560,000.00 payable upon the closing of the transaction. Curiously, Mr. Irion and/or his firm was paid \$101,800.00 out of closing.

23. Because of the actions of both Turner and one or both of the Independence Title Defendants, as described herein, EVA suffered economic harm and loss in an amount of at least \$336,000.00.

VI. CAUSES OF ACTION

A. Breach of Contract by Defendant Robert Turner

24. Plaintiff incorporates the factual background in Paragraphs 11-23, above, as if restated in full and alleges the following:

25. EVA and Turner entered into valid and enforceable Listing Agreements whereby EVA as Turner’s exclusive agent, would be paid five percent (5%) of the total sales price of the Properties. EVA performed its obligations under the Listing Agreements and the Properties were sold for \$11,200,000.00, which entitled EVA to a \$560,000.00 commission. Turner breached the

Listing Agreements by failing and refusing to pay EVA its five percent (5%) commission and instead directing that EVA be paid only two percent (2%), or \$224,000.00.

26. As a result of Turner's breach of the parties' written agreements, EVA suffered economic damages in an amount of at least \$336,000.00—the difference in the actual amount EVA was paid and the amount EVA expected to be paid if the breach had not occurred. EVA is entitled to recover its actual, economic damages from Turner as well as costs and fees as allowed by law and the parties' written agreements.

B. Common Law Fraud by Defendant Robert Turner

27. Plaintiff incorporates the factual background in Paragraphs 11-26, above, as if restated in full and alleges the following:

28. Turner made representations to EVA regarding the amount of commission he would pay to it. These statements were made for the purpose of inducing EVA to enter the 2015 and 2017 Listing Agreements, to secure the Contracts with the buyer, and to complete the transaction under the Contracts through to closing. These representations were material and false. On information and belief, Turner never intended to pay EVA the full amount of commission owed to it. Instead, Turner intended to keep for himself the sums owed to EVA and to also pay his lawyer a portion of the commission that was owed to EVA. EVA relied on Turner's statements in entering the Listing Agreements, securing the Contracts, and completing the transaction under the Contracts and has been damaged as a result of this reliance.

29. As a result of Turner's fraudulent actions, EVA suffered economic injury in an amount of at least \$336,000.00—the actual extent to which it did not receive the full benefit-of-the-bargain of its enforceable contract with Turner. EVA is entitled to recover its actual, economic damages from Turner, along with costs allowed by law. EVA is also entitled to

recover additional, exemplary damages if the jury finds clear and convincing evidence of Turner's fraud.

C. Statutory Fraud / Fraud in a Real Estate Transaction by Defendant Robert Turner

30. Plaintiff incorporate the factual background in Paragraphs 11-29, above, as if restated in full and alleges the following:

31. The Contracts and Listing Agreements are agreements relating to a real estate transaction. During the course of the transaction, Turner made false representations and promises to EVA that he would pay it the percentage commission identified in the Listing Agreements. This statement was made for the purpose of inducing EVA to enter the Listing Agreements, securing the Contracts with the buyer, and completing the transaction under the Contracts through to the closing. EVA relied on Turner's statements in entering the Listing Agreements and completing the transaction under the Contracts and has been damaged as a result.

32. As a result of Turner's fraudulent actions committed in the course of a real estate transaction, EVA suffered economic injury in an amount of at least \$336,000.00—the actual extent to which it did not receive the full benefit-of-the-bargain of its enforceable contract with Turner. EVA is entitled to recover its actual, economic damages from Turner, along with exemplary damages, and cost and fees as allowed by law.

D. Breach of Fiduciary Duty by Independence Title

33. Plaintiff incorporates the factual background in Paragraphs 11-32, above, as if restated in full and alleges the following:

34. One or both of the Independence Title Defendants were the escrow agent(s) under the Contracts. As such, Independence Title owed duties to all parties to the transaction,

including but not limited to, the duty of neutrality and the duty to conserve the escrow fund and to pay it only to those persons entitled to receive it. Independence Title breached its fiduciary duties to EVA by failing to pay it the fee entitled to it, and paying other parties. Further, upon notice, it refused to place disputed funds at issue in escrow until the parties resolved their disputes over fees and misapplied funds that EVA was entitled to receive, thus causing EVA to suffer damages.

35. As a result of Independence Title's breach of its fiduciary duties, EVA suffered economic damages of at least \$336,000.00. EVA is entitled to recover its actual, economic damages from Independence Title as well costs allowed by law.

E. Negligence by Independence Title

36. Plaintiff incorporates the factual background in Paragraph 11-35, above, as if restated in full and alleges the following:

37. Independence Title readily markets its escrow services to real estate agents who bring them transactions and refer them business, and requests copies of listing agreements as part of the file, particularly if there are commission disputes involved in a closing, and repeatedly assures real estate agents that they will take care of their needs and their clients' needs to ensure a smooth closing. In fact, Independence Title, like most title companies, relies upon referrals of real estate brokers, who recommend certain title companies to their clients thus allowing Independence Title to close more transactions. In fact, the very core of Independence Title Company's business comes from real estate brokers.

38. In addition, rates that are charged to a Seller or Buyer for title insurance are regulated by the Texas Department of Insurance meaning that the cost of an owner's or lender's policy of title insurance and each endorsement associated therewith, are the same no matter

which title company a party uses. As such, the **only thing** that sets Independence Title apart from other title companies is their services which they promote and market heavily to the real estate brokerage community as being superior to those of other title companies and promising to take care of the realtors and their deals. As such they assure the brokers that they will close all transactions with superior service, act expeditiously, be responsive and act fairly.

39. Independence Title owed EVA a duty to use ordinary care in the provision of escrow services and in the closing of the real estate transaction that is the subject of this lawsuit. Independence Title failed to use ordinary care in the provision of escrow and closing services, by failing to pay the correct real estate commission as set forth in the Listing Agreements, and paying other parties. Further, upon notice of the dispute, it failed to request that the parties enter into an escrow agreement to escrow the disputed commission funds, and it refused to place the disputed commission funds at issue in escrow until the parties resolved their disputes over fees. In fact, Independence Title misapplied commission funds that EVA was entitled to receive, thus causing EVA to suffer damages. and proximately caused damages to EVA as a result.

40. As a result, EVA suffered damages in an amount of at least \$336,000.00 and has been forced to bring this suit and incur further attorney's fees. EVA is entitled to recover its actual, economic damages from Independence Title as well costs allowed by law.

F. Promissory Estoppel

41. Plaintiff incorporates the factual background in Paragraph 11-40, above, as if restated in full and alleges the following:

42. Independence Title actively markets its escrow and closing services to real estate agents who bring them transactions and refer them business, and requests copies of listings agreements as part of the file. Independence Title repeatedly assures agents and repeatedly

assured EVA's principals that they will take care of both their needs and their clients' needs to ensure a smooth closing. Additionally, Independence Title is known to allow various parties (sellers, buyers, brokers, developers, builders, etc.) to enter into escrow agreements whereby Independence Title would escrow disputed commissions and place disputed commissions in escrow. Independence Title repeatedly promised EVA that it would "take care of them" but then failed to do so, when it followed Turner's attorney's instruction, contrary to the Listing Agreements, and to arbitrarily reduce EVA's commission that was set forth in the Listing Agreements. Such promises are enforceable under the doctrine of promissory estoppel. Independence Title breached its promises to EVA by failing to pay it the real estate commission that it was entitled to, and paying other parties. Further, upon notice, Independence Title refused to place disputed funds at issue in escrow until the parties resolved their disputes over fees and misapplied commission funds that EVA was entitled to receive, thus causing EVA to suffer damages.

43. As a result, EVA suffered damages in an amount of at least \$336,000.00 and EVA has been forced to bring this lawsuit and to incur further attorney's fees. EVA is entitled to recover its actual, economic damages from Independence Title as well costs allowed by law.

VII. ATTORNEYS' FEES / INTEREST / COSTS

44. Pursuant to both Chapter 38 of the Texas Civil Practice and Remedies Code and the specific written agreements of the parties contained in the Listing Agreements, EVA is entitled to recover its attorneys' fees incurred by the prosecution of its breach of contract claim against Turner, plus conditional awards in the event of appeal. EVA is also entitled to recover attorney's fees incurred by the prosecution of its statutory fraud claim against Turner. EVA has employed the undersigned attorney to represent it in this proceeding and, therefore, requests the

award of reasonable attorney fees for those services.

45. Additionally, upon a favorable ruling at the trial of this matter, EVA is entitled to be awarded both pre- and post-judgment interest, on the amount of its awarded damages, as well as court and other taxable costs.

VIII. JURY DEMAND

46. Plaintiff demands a jury trial and previously tendered the appropriate fee at the time it filed Plaintiff's Original Petition.

IX. CONDITIONS PRECEDENT

47. All conditions precedent to Plaintiff's right to recover herein and to the Defendants' liability have been performed or have occurred.

X. PRAYER / REQUEST FOR RELIEF

45. WHEREFORE, premises considered, Plaintiff prays that the Defendants be cited to appear and answer herein, and upon consideration of all the evidence and applicable law at the trial or hearing of the matter, Plaintiff be awarded judgment against Defendants, as requested above, and specifically as follows:

- a. Judgment in favor of EVA against both Turner and one or both of the Independence Title Defendants, each jointly and severally, for the full amount of EVA's actual economic damages and injury;
- b. Judgment in favor of EVA against Turner for exemplary damages, as allowed by law and as found by the jury;
- c. Judgment in favor of EVA against both Turner and one or both of the Independence Title Defendants, each jointly and severally, for the amounts of all prejudgment and post-judgment interest at the highest rate provided by law until paid;
- d. Judgment in favor of EVA against both Turner and one or both of the Independence Title Defendants, each jointly and severally, for of all of EVA's costs of suit as allowed by law;

- e. Judgment in favor of EVA against Turner for all of EVA's reasonable and necessary attorneys' fees as allowed by law;
- f. Such other and further relief to which Plaintiff may be justly entitled.

Respectfully submitted,

COATS | ROSE, P.C.

By: _____



Racy L. Haddad

State Bar No. 24041033

rhaddad@coatsrose.com

Rex J. Zgarba

State Bar No. 24028253

rzgarba@coatsrose.com

Terrace 2

2700 Via Fortuna, Suite 350

Austin, Texas 78746

(512) 469-7987 Telephone

(512) 469-9408 Telecopier

**ATTORNEYS FOR PLAINTIFF/COUNTER-
DEFENDANT**

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 28th day of February, 2020.

Counsel for Defendant/Counter-Plaintiff
Robert Turner:

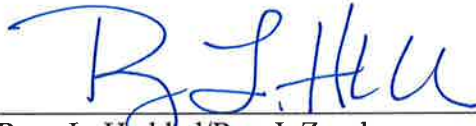
Jeffrey G. Henry
Sprouse Shrader Smith PLLC
Las Cimas III
805 Las Cimas Parkway, Suite 350
Austin, Texas 78746
Email: jeff.henry@sprouselaw.com

- Facsimile Transfer
- Certified Mail, Return Receipt Requested
- U.S. First Class Mail
- Email

Counsel for ITCOA, L.L.C. and Secured
Land Transfer, LLC:

Jeffrey J. Hobbs
ARMBRUST & BROWN, PLLC
100 Congress Ave., Suite 1300
Austin, Texas 78701
Email: jhobbs@abaustin.com

- Facsimile Transfer
- Certified Mail, Return Receipt Requested
- U.S. First Class Mail
- Email



Racy L. Haddad/Rex J. Zgarba