

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION

## **ORDER**

**On this day the Court considered:**

- (1) Defendants' Renewed Motion for Summary Judgment, filed January 25, 2018; and
- (2) Plaintiff's Response, filed February 9, 2018.

Having considered the foregoing, the Court is of the opinion that the Motion should be

**GRANTED IN PART and DENIED IN PART.**

## I. BACKGROUND

This case is a dispute between Plaintiff, Morris S. Lalezarian, and Marcus & Millichap Real Estate Services, Inc. (M&M) over commissions allegedly owed to Lalezarian. Joshua Jandris and Mark Myers, employees of M&M who previously worked with Lalezarian, are also named as Defendants and sued for their alleged conduct independent of M&M.

Lalezarian went to work with M&M as a real estate agent in Dallas, Texas in 2013. He worked as an independent contractor, compensated on a commission schedule that was set forth by M&M's Independent Contractor Manual (the Manual), as incorporated by the Salesperson

Agreement (Lalezarian's contract). Eventually, Lalezarian teamed up with Jandris and Myers (agents working out of M&M's Chicago, Illinois office) after he saw an opportunity to specialize in transactions for senior housing properties. At the beginning of this relationship, Jandris, Myers, and Lalezarian attempted to negotiate a structure for splitting commissions that would differ from the basic structure provided in the company's Manual and was apparently allowed by the Manual's terms. This proposal was never finalized in a written agreement signed by both parties. However, according to Lalezarian, they did enter into a separate oral agreement (the Oral Agreement) to split commissions a certain way until a new agreement could be reached, and Lalezarian began working with Jandris and Myers allegedly relying on the assurance that he would be compensated according to the Oral Agreement. Defendants dispute that the Oral Agreement or any other oral contract was ever consummated. In September of 2014, Jandris, Myers, and Lalezarian negotiated a new, temporary agreement that was scheduled to run for one year (the Affiliate Agreement); this agreement contained a third commission sharing structure (different from the Manual or the alleged Oral Agreement) and it was successfully reduced to writing and signed by the parties. This agreement did not work out and was terminated by Jandris in March of 2015. Lalezarian then continued to work for M&M for the remainder of that year (presumably under the terms of the original Manual and Salesperson Agreement) until he was terminated on December 7, 2015.

Between 2013 and 2015, Lalezarian worked on multiple transactions with Jandris and Myers for which he now claims that he was either underpaid on his commissions or was not paid any commission at all. He asserts that he was completely cut out of the following deals by Jandris and Myers after performing an initial amount of work entitling him to a commission and

that he was entirely deprived the commissions he was owed for these deals: (1) Regency Post-Acute Healthcare System (the Regency transaction); (2) The Legacy at Preston Hollow (the Legacy transaction); and (3) Abby Development (the Abby transaction). Lalezarian further asserts that he was underpaid for several transactions based on the commission agreement allegedly in place at the time of the deal. These include: (1) Silver Ridge Southlake, Silver Ridge Colleyville, Traditions Senior Living, and Winchime of Chico (the “Listing” transactions); and (2) The Arbor of Nacogdoches (the Arbor transaction).

Lalezarian filed this lawsuit asserting a host of causes of action against M&M, Jandris, and Myers, and seeking the recovery of allegedly unpaid or underpaid commissions for the transactions identified above. He also seeks damages for emotional distress, loss of reputation, loss of income, and exemplary damages, and he pleads alternative calculations for damages based on his alternative theories of recovery. Defendants move for summary judgment on all claims.

## **II. STANDARD**

Summary judgment is appropriate only if “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,” when viewed in the light most favorable to the non-moving party, “show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986) (internal quotes omitted). A dispute about a material fact is “genuine” if the evidence is such that a reasonable jury could return a verdict for the non-moving party. *Id.* at 248. In making its determination, the court must draw all justifiable inferences in favor of the non-moving party. *Id.* at 255. Once the moving party has initially

shown “that there is an absence of evidence to support the non-moving party’s case,” *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986), the non-movant must come forward, after adequate time for discovery, with significant probative evidence showing a triable issue of fact. Fed. R. Civ. P. 56(e); *State Farm Life Ins. Co. v. Guttermann*, 896 F.2d 116, 118 (5th Cir. 1990). Conclusory allegations and denials, speculation, improbable inferences, unsubstantiated assertions, and legalistic argumentation are not adequate substitutes for specific facts showing that there is a genuine issue for trial. *Douglass v. United Servs. Auto. Ass’n*, 79 F.3d 1415, 1429 (5th Cir. 1996) (en banc); *SEC v. Recile*, 10 F.3d 1093, 1097 (5th Cir. 1993). To defeat a properly supported motion for summary judgment, the non-movant must present more than a mere scintilla of evidence. *See Anderson*, 477 U.S. at 251. Rather, the non-movant must present sufficient evidence upon which a jury could reasonably find in the non-movant’s favor. *Id.*

### **III. DISCUSSION**

Lalezarian’s First Amended Complaint asserts ten causes of action against the Defendants: (1) breach of contract (based on M&M’s alleged failure to pay commissions pursuant to the Salesperson Agreement and Manual); (2) breach of contract (based on M&M’s, Myers’s, and Jandris’s alleged failure to pay commissions and divide commissions pursuant to the Oral Agreement); (3) breach of contract (based on M&M’s alleged failure to pay commissions pursuant to the Affiliate Agreement); (4) “recovery of commissions after termination without cause;” (5) promissory estoppel; (6) quantum meruit/unjust enrichment; (7) fraud; (8) breach of fiduciary duty; (9) fraudulent nondisclosure; and (10) libel and/or slander and libel and/or slander per se. Some of these causes of action, while inconsistent theories of recovery, are asserted in the alternative. Defendants move for summary judgment on all claims,

and the Court therefore addresses each cause of action in turn. For the sake of convenience, the Court groups several of these causes of action into broader categories.

#### **A. Breach of Contract**

Lalezarian's first three causes of action are for breach of contract. More specifically, he asserts several alternative theories that some or all of the Defendants have failed to honor the terms of three different written or oral contracts. Defendants assert that there are only two enforceable agreements and that Lalezarian has been paid all that he is owed under the terms of those agreements. Defs.' Br. Regarding Renewed Mot. for Summ. J. (Defs.' Mot.) 14–19. Defendants further argue that Lalezarian either waived or ratified the commission payments he has already received and that he cannot bring a claim for underpayment of those commissions. Defs.' Mot. 19. Finally, Defendants argue that Lalezarian cannot establish a breach of contract arising from the Regency, Windchime, Legacy, or Abby transactions because he was not entitled to any commissions for these properties under the terms of his contract(s) with Defendants. Defs.' Mot. 20–22. Of course, this final argument is entirely dependent on the Defendants' theory that the only enforceable contracts are the two they have identified.

While it is a well-settled principle of Texas law that the interpretation of unambiguous terms in a contract is a question of law for the court, the parties in this case engaged in multiple negotiations and made agreements at different times to be bound by various terms regarding Lalezarian's compensation. Lalezarian initially went to work with M&M under one agreement, allegedly negotiated a separate oral agreement with Jandris and Myers, and ultimately signed a third agreement at a later date. Now there is a factual dispute concerning what terms were accepted by each party, when these various contracts were in effect, and what is owed under the

terms of each relevant contract. This is not a simple case concerning a legal interpretation of unambiguous terms.

Having carefully considered the arguments and evidence presented by the parties, the Court is of the opinion that Lalezarian has demonstrated sufficient evidence to create genuine issues of material fact as to (1) whether Jandris and Myers agreed to an oral contract with Lalezarian that modified the terms of the original Salesperson Agreement and M&M Manual; (2) which agreement was in place at the time of each of the transactions for which Lalezarian alleges he was deprived commissions; (3) whether Lalezarian was entitled to compensation for the Regency, Windchime, Legacy, or Abby transactions based on the contract that was in place at the time of those transactions; and (4) whether Lalezarian was underpaid commissions on the Listing and Arbor transactions based on the contract that was in place at the time of those transactions. Pl.’s Br. in Supp. (Pl.’s Resp.) 25–45. For the reasons thoroughly and persuasively argued by Lalezarian in his Response, the Court is not persuaded by any of Defendants’ arguments that the breach of contract claims are defeated by the parol evidence rule, the statute of frauds, waiver, or ratification. The questions of fact regarding contract formation and compliance in this case preclude summary judgment on any of Lalezarian’s three breach of contract claims, and Defendants’ Renewed Motion for Summary Judgment must be denied as to those causes of action.

#### **B. Recovery of Commissions**

Another cause of action brought by Lalezarian appears to be a proposed alternative theory to breach of contract. Lalezarian titles this claim “Recovery of Commissions After Termination Without Cause,” and cites a 1974 case from the Supreme Court of Texas as its source. *Miller v.*

*Riata Cadillac Co.*, 517 S.W.2d 773 (Tex. 1974). In *Riata*, the Supreme Court of Texas held that “an employee who is discharged without good cause prior to the time specified for payment of a bonus is entitled to recover a pro rata part of such bonus for the period he actually worked.” *Id.* at 775. Lalezarian argues that “Texas courts would apply a similar rule in the context of an independent contractor like [himself].” Pl.’s First Am. Compl. ¶125. Defendants move for summary judgment on this cause of action by asserting that the theory only applies in the employment law context to *employees* who are owed bonuses by their employers; Defendants contend that the “cause of action” is inapplicable to an independent contractor like Lalezarian who is allegedly owed commissions. Further, Defendants argue that—unlike the oral agreement at issue in *Riata*—their agreement with Lalezarian expressly sets out each parties’ right to terminate the agreement and contains express provisions governing Lalezarian’s right to any commissions following termination. Defs.’ Mot. 23.

The Court is not persuaded that the rule announced by *Riata* authorized any specific *cause of action* as the parties appear to assume. Instead, *Riata* involved a claim for breach of an oral contract and its rule concerning prorated bonuses merely clarified what the plaintiff was entitled to recover for his breach-of-contract claim. This Court’s research reveals that both Texas and federal courts discussing the rule of *Riata* have done so in the context of breach-of-contract claims, but the Court has located no cases (and Lalezarian has cited none) in which an independent cause of action for “recovery of commissions” has been successfully brought by a Plaintiff in any court. Cf., *Wilson v. Noble Drilling Servs., Inc.*, 405 F. App’x 909, 915 (5th Cir. Dec. 23, 2010); *Lewis v. Vitol, S.A.*, No. 01-05-00367-CV, 2006 WL 1767138, at \*3 (Tex. App.—Houston [1st Dist.] June 29, 2006, no pet.); *Authier v. Automated Logic Consulting*

*Servs., Inc.*, No. 5:14-CV-993-DAE, 2016 WL 4069886, at \*7 (W.D. Tex. Jul. 28, 2016).

Lalezarian has not satisfied the Court that there is any recognized cause of action under Texas law for “recovery of commissions after termination without cause.” Accordingly, summary judgment is granted on this cause of action.

**C. Promissory Estoppel and Quantum Meruit (Unjust Enrichment)**

As further alternative theories to his breach of contract claims, Lalezarian pleads that he is entitled to recover for claims of promissory estoppel or unjust enrichment. Defendants plead that they are entitled to summary judgment on these claims because all of Lalezarian’s disputed commissions are covered by valid and enforceable contracts.

A plaintiff may plead relief under various theories, even though they are only entitled to recover under one; thus, Lalezarian may plead that he is entitled to relief under a valid contract or a promissory estoppel or unjust enrichment theory, even if he cannot ultimately collect damages for each of these. *See Burlington N. R.R. Co. v. Southwestern Elec. Power Co.*, 925 S.W.2d 92, 97 (Tex. App.—Texarkana 1996), *aff’d*, 966 S.W.2d 467, 474 (Tex. 1998); *Truly v. Austin*, 744 S.W.2d 934, 936 (Tex. 1988); Fed. R. Civ. P. 8(a). If a court determines that a valid contract exists to govern the relationship between the parties, then recovery under an unjust enrichment theory is precluded and summary judgment is proper on that claim. *See Infowise Sols., Inc. v. Microstrategy, Inc.*, No. Civ. A. 3:04-CV-0553-N, 2005 WL 2445436, at \*7 n.12 (N.D. Tex. Sept. 29, 2005). But the Court has not conclusively determined the existence or terms of a specific contract governing this case and has instead found that the breach-of-contract claims must be presented to a jury for the reasons stated above; Lalezarian’s alternative claims for promissory estoppel and unjust enrichment are therefore properly maintained and not subject to

summary judgment at this time. *Cf. id.* at \*7 (dismissing an unjust enrichment claim *after* the court determined that a valid contract governed the subject matter in dispute).

Defendants also argue, in the alternative, that the promissory estoppel claim should fail as a matter of law because Lalezarian cannot demonstrate reasonable reliance on any promise. Specifically, Defendants argue that reliance on any alleged oral agreement was per se unreasonable because such an agreement was directly contradicted by the express, unambiguous terms of the parties' written agreement(s). Defs.' Mot. 24 n.6. This argument is not compelling because, as noted above, the evidence gives rise to genuine issues of fact concerning exactly what oral or written agreements the parties made and the exact terms of those agreements. Lalezarian has sufficiently demonstrated a fact issue as to the existence of an oral agreement that was separate from each of the parties' written agreements, and Lalezarian's alleged reliance on that oral agreement is therefore not clearly unreasonable as a matter of law.

#### **D. Fraud and Fraudulent Nondisclosure**

Next, Lalezarian asserts claims for fraud and fraudulent nondisclosure. The elements of fraud in Texas are: "(1) that a material representation was made; (2) the representation was false; (3) when the representation was made, the speaker knew it was false or made it recklessly without any knowledge of the truth and as a positive assertion; (4) the speaker made the representation with the intent that the other party should act upon it; (5) the party acted in reliance on the representation; and (6) the party thereby suffered injury." *In re FirstMerit Bank, N.A.*, 52 S.W.3d 749, 758 (Tex. 2001).

Fraud by nondisclosure is a "subcategory of fraud" that requires a duty to disclose in order to be actionable. *Hamilton v. Segue Software, Inc.*, 232 F.3d 473, 481 (5th Cir. 2000)

(citing Texas cases). “Texas courts have found that a duty to disclose may arise in four situations: (1) when there is a fiduciary relationship; (2) when one voluntarily discloses information, the whole truth must be disclosed; (3) when one makes a representation, new information must be disclosed when that new information makes the earlier representation misleading or untrue; (4) when one makes a partial disclosure and conveys a false impression.”

*Id.* Aside from a duty to disclose information, the other elements of fraud by nondisclosure are that “(1) a party conceals or fails to disclose a material fact within the knowledge of that party; (2) the party knows that the other party is ignorant of the fact and does not have an equal opportunity to discover the truth; (3) the party intends to induce the other party to take some action by concealing or failing to disclose the fact; and (4) the other party suffers injury as a result of acting without knowledge of the undisclosed fact.” *Bradford v. Vento*, 48 S.W.3d 749, 754–55 (Tex. 2001).

Defendants argue that Lalezarian’s claims all sound in contract and that he cannot “re-package” breach-of-contract claims as tort claims because he has identified no legal duty owed by Defendants other than a contractual duty. Defendants also argue that Lalezarian has failed to identify any independent fraud-based injury. Defs.’ Mot. 26–27. Lalezarian counters that he may recover for Defendants’ alleged fraudulent inducement, even though he later entered into a contract with the Defendants based on that alleged fraud. *See Formosa Plastics Corp. USA v. Presidio Eng’rs & Contractors, Inc.*, 960 S.W.2d 41, 46 (Tex. 1998) (“[T]ort damages are recoverable for a fraudulent inducement claim irrespective of whether the fraudulent representations are later subsumed in a contract or whether the plaintiff only suffers an economic

loss related to the subject matter of the contract.”). The Court agrees and finds that Lalezarian has presented sufficient evidence to create a genuine issue of material fact as to his fraud claim.

As explained below, the Court rejects Lalezarian’s contention that a fiduciary duty exists in this case. The Court therefore agrees with Defendants’ argument that such a duty cannot support any duty of disclosure for purposes of Lalezarian’s fraudulent nondisclosure claim. However, Lalezarian also asserts that a duty of disclosure existed in this case based on previous communications from M&M to Lalezarian that the Regency transaction would not close without his knowledge and communications from Myers and Jandris to Lalezarian regarding the status of the Regency transaction. Pl.’s First Am. Compl. ¶¶177. The Court notes that, aside from a fiduciary duty, a duty to disclose may arise where a party voluntarily discloses information (giving rise to a duty to disclose the whole truth) or where a party makes a partial disclosure and conveys a false impression. *Hamilton*, 232 F.3d at 481. Defendants have not contested these alternative theories of their duty to disclose presented by the First Amended Complaint and they have offered no other arguments disputing the elements of fraudulent nondisclosure (other than the duty and damages arguments made with respect to the fraud claim). The Court is not satisfied that Defendants have sufficiently met their summary judgment burden on this claim. Accordingly, Lalezarian’s causes of action for fraud and fraudulent nondisclosure will both survive summary judgment.

#### **E. Breach of Fiduciary Duty**

Lalezarian also contends that Jandris and Myers breached a fiduciary duty. In Texas, the elements of a breach-of-fiduciary-duty claim are “(1) the existence of a fiduciary relationship between the plaintiff and defendant; (2) the defendant’s breach of the fiduciary duties arising

from that relationship; and (3) injury to the plaintiff, or benefit to the defendant, resulting from that breach.” *Plotkin v. Joekel*, 304 S.W.3d 455, 479 (Tex. App.—Houston [1st Dist.] 2009, pet. denied). Lalezarian identifies no formal fiduciary duty between himself and Jandris or Myers, but instead argues that they had an “informal fiduciary relationship.” *See Power Reps, Inc. v. Cates*, No. 01-13-00856-CV, 2015 WL 4747215, at \*11 (Tex. App.—Houston [1st Dist.] Aug. 11, 2015, no pet.).

“An informal relationship may give rise to a fiduciary duty where one person trusts in and relies on another, whether the relation is a moral, social, domestic, or purely personal one.” *Schlumberger Tech. Corp. v. Swanson*, 959 S.W.2d 171, 176 (Tex. 1997). “But not every relationship involving a high degree of trust and confidence rises to the stature of a fiduciary relationship.” *Id* at 176–77. Such a relationship is not created lightly and will only be imposed in a the context of a business transaction if the relationship existed prior to, and apart from, the agreement forming the basis of the lawsuit. *Id.* at 177.

This is fundamentally a breach-of-contract case in which the Defendants’ alleged breach of fiduciary duty arises solely from the same acts and omissions that are alleged to be a breach of Lalezarian’s contract(s) with the Defendants. Recognizing this, Lalezarian attempts to argue that he had a special relationship with Jandris and Myers before at least *some* of the events giving rise to his lawsuit. He then contends that, if his first breach-of-contract theory is ultimately unsuccessful, then his relationship with these Defendants would pre-date his *second* contract with them and would be legally maintainable. This argument attempts to split hairs over the timing of specific agreements while ignoring the broader issue that Lalezarian had no special

relationship with any of the Defendants prior to the business (contractual) relationship that forms the basis of the claims in this lawsuit; the Court finds the argument entirely unpersuasive.

Having carefully considered the arguments of the parties, the Court is not convinced that Lalezarian has sufficiently established the existence of an informal fiduciary relationship between himself and any of the Defendants. *See Swanson*, 959 S.W.3d at 176–77; Defs.’ Mot. 27–29. Lalezarian cannot satisfy the first element of his breach-of-fiduciary-duty claim and summary judgment for Defendants is granted as to this claim.

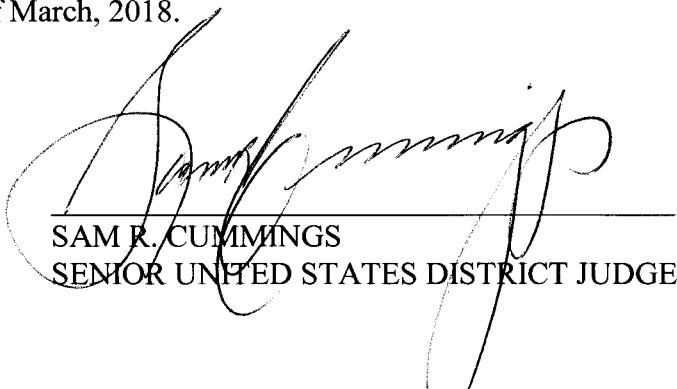
#### **F. Defamation**

Finally, Lalezarian asserts that the Defendants made several statements about him that are actionable as libel, slander, libel per se, and/or slander per se. The Court finds it unnecessary to engage in a lengthy discourse on First Amendment law here. For the reasons stated in Plaintiff’s Response, summary judgment is denied on the defamation causes of action. Pl.’s Resp. 53–55.

#### **IV. CONCLUSION**

For the foregoing reasons, Defendants’ Renewed Motion for Summary Judgment is **GRANTED IN PART** and **DENIED IN PART**. Specifically, the Motion is **GRANTED** with respect to Plaintiff’s causes of action for “recovery of commissions” and breach of fiduciary duty and **DENIED** in all other respects.

SO ORDERED this 9<sup>th</sup> day of March, 2018.



SAM R. CUMMINGS  
SENIOR UNITED STATES DISTRICT JUDGE