

<b>Engel v International Bus. Machs. Corp.</b>
2022 NY Slip Op 33582(U)
October 17, 2022
Supreme Court, New York County
Docket Number: Index No. 654556/2020
Judge: Andrea Masley
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 48

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THOMAS ENGEL,

Plaintiff,

- v -

INTERNATIONAL BUSINESS MACHINES  
CORPORATION,

Defendant.

INDEX NO. 654556/2020

MOTION DATE N/A

MOTION SEQ. NO. 003

**DECISION + ORDER ON  
MOTION**

-----X

HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 003) 91, 92, 93, 94, 95, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114

were read on this motion to/for DISMISSAL

In motion sequence number 003, defendant International Business Machines Corporation (IBM) moves to dismiss the first amended class action complaint (FAC) of plaintiff Thomas Engel, individually and on behalf of all persons similarly situated, in its entirety with prejudice pursuant to CPLR 3211(a)(1) and (7). In the FAC, plaintiff alleges six causes of action against defendant: (1) negligent misrepresentation; (2) quantum meruit; (3) unjust enrichment; (4) violation of New York Labor Law §§ 191(1)(c), 198; (5) fraud; and (6) prima facie tort. (NYSCEF Doc. No. [NYSCEF] 51, FAC ¶¶ 90-135.)

**Background**

Unless indicated otherwise, the following facts are taken from the FAC and, for the purposes of this motion, are accepted as true.

Plaintiff worked as a sales representative in defendant's New York offices from January 1, 2010 through February 3, 2020. (*Id.* ¶ 7.) Plaintiff, a software sales representative, joined defendant when defendant acquired the company he previously worked for, Guardiam. (*Id.* ¶¶ 11-12.) While working for defendant, Engel "continued to use and sell the Guardiam software systems, as updated and continued by [defendant]." (*Id.* ¶ 12.) Plaintiff's position here is that his compensation as a sales representative at defendant included a base salary and uncapped commissions. (*Id.* ¶ 16.)

An Incentive Plan Letter sets forth the commission plan for plaintiff and other sales representatives. (*Id.*; NYSCEF 94, Engel Incentive Plan for January 1, 2016 through June 30, 2016 [IPL].) Plaintiff alleges that defendant "does not provide its salespeople with written, signed, enforceable contracts regarding commissions" (NYSCEF 51, FAC ¶ 1) and the IPL "expressly disclaimed constituting an enforceable contract or promise by [defendant] to pay any sales commissions." (*Id.* ¶ 17.) The IPL, which defendant submits on this motion, (NYSCEF 94) contains plaintiff's commission plan for the first half of 2016, from January 1, 2016, through June 30, 2016, setting forth the details of his Plan (including his base pay percentage, target incentive percentage, and total quota of \$1.506 million), and contains the following provisions:

**Right to Modify or Cancel:** The Plan does not constitute an express or implied contract or a promise by IBM to make any distributions under it. IBM reserves the right to adjust the Plan terms, including, but not limited to, changes to sales - performance objectives (including management-assessment objectives), changes to assigned customers, territories, or account opportunities, or changes to applicable incentive payment rates or quotas, target incentives or similar earnings opportunities, or to modify or cancel the Plan, for any individual or group of individuals, at any time during the Plan period up until any related payments have been earned under the Plan terms. Managers below the highest levels of management do not know whether IBM will or will not change or adopt any particular compensation plan; they do not have the ability to change the Plan terms for any employee; nor are they in a position to advise any employee on, or

speculate about, future plans. Employees should make no assumptions about the impact potential Plan changes may have on their personal situations unless and until any such changes are formally announced by IBM.

**Adjustments for Errors:** IBM reserves the right to review and, in its sole discretion, adjust or require repayment of incorrect incentive payments resulting from incomplete incentives processes or other errors in the measurement of achievement or the calculation of payments, including errors in the creation or communication of sales objectives. Depending on when an error is identified, corrections may be made before or after the last day of the full-Plan period, and before or after the affected payment has been released.

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**Significant Transactions:** IBM reserves the right to review and, in its sole discretion, adjust incentive achievement and/or related payments associated with a transaction which (1) is disproportionate when compared with the territory opportunity anticipated during account planning and used for the setting of any sales objectives; or for which (2) the incentive payments are disproportionate when compared with your performance contribution towards the transaction.

(NYSCEF 94, IPL.)

Plaintiff alleges that “[a]t or about the same time as sales representatives were provided with IPLs,” defendant presented a PowerPoint presentation to sales representatives, including plaintiff, “describing the terms of the commission plan being offered to them.” (NYSCEF 51, FAC ¶ 18.) Plaintiff also alleges that “[u]pon information and belief” the PowerPoint was presented to him both before and after the IPL was presented to him and was also available for download during and after the relevant sales period. (*Id.*) The PowerPoints stated that “Earnings opportunity remains uncapped,” “Payments uncapped,” and that sales must have “ledger-based and auditable measurements.” (*Id.* ¶ 19.) The “PowerPoints contain more details and specific promises about commissions than the IPLs contain.” (*Id.*)

Engel alleges that “[t]he PowerPoints are presented to commissioned sales representatives to incentivize them to work harder, to close more deals (and bigger

deals), to not seek employment elsewhere, all of which benefits [defendant] at the employee's expense." (*Id.*) Plaintiff further alleges that the representations in the PowerPoints are often repeated in sales meetings that salespeople like plaintiff widely attend, and they were also repeated to plaintiff by plaintiff's direct supervisors, defendant's managers. (*Id.* ¶ 20.) According to plaintiff, defendant's written guidance to its managers states:

"Conditions that may lead to an adjustment include the need to correct errors or the need to balance with employee's contribution to the success of a large sales transaction (which criteria must be clearly provided to Commissions team).

**Adjustments must not be done only as a ceiling or cap on the total earnings allowable to employees."**

(*Id.* ¶ 21.)

One of plaintiff's major deals while working for defendant was selling the Guardiam-based IBM software to Citigroup (the Citigroup Deal), a major banking and financial services entity. (*Id.* ¶ 26.) Plaintiff was assigned to sell software to Citigroup in 2010 before joining defendant and eventually closed a large deal with Citigroup which is at issue here. (*Id.*) From the beginning of 2015 through June 2016, plaintiff was "the only sales representative and person principally responsible for trying to close [the Citigroup Deal]." (*Id.*) Plaintiff "worked diligently to close [the Citigroup Deal], his work was extensive, and he spent countless hours working to close it." (*Id.* ¶ 27.) Defendant provided plaintiff with the IPL while he was working on the Citigroup Deal in January of 2016. (*Id.*) Defendant told his management in "March or April 2016" that "he was moving along with the [Citigroup Deal] and that this major deal – perhaps the second largest Guardiam software sale ever – was likely to close." (*Id.* ¶ 28.)

"[I]n or around April of 2016, [defendant] pulled [the Citigroup Deal] out of [plaintiff's] territory and designated it a Target Account Absolute Plan ('TAAP') account." (*Id.* ¶ 29.) Plaintiff alleges that this move "was designed to cap [plaintiff's] commission on what was going to be a most substantial software and services sale, something that IBM has done with other salespeople in similar circumstances, and all part of IBM's pattern and practice of capping commissions." (*Id.* ¶ 30.) Plaintiff alleges that he had already earned commissions on the Citigroup Deal at that point, (*id.* ¶ 31) and "[d]esignating [the Citigroup Deal] as a TAAP account was done for the sole purpose of limiting [plaintiff's] income when the deal closed" and it was "the only one of [plaintiff's] accounts that was designated a TAAP account in that sales period." (*Id.* ¶ 32.) Defendant did not adjust plaintiff's quota when it moved the Citigroup Deal. (*Id.* ¶ 34.) Plaintiff fails to allege the terms of the TAAP.

Plaintiff closed the Citigroup Deal at the end of June of 2016 at \$21 million in total sale and \$9 million in revenue for the first six months after closing. (*Id.* ¶ 35.) Plaintiff was the only representative of defendant under the deal, and while others worked on ancillary portions of the deal, it was the product of his work and "the heart of the deal" and "his leadership was remarkable." (*Id.* ¶ 35.) A manager of defendant circulated an email after the Citigroup Deal closed, commending plaintiff's work. (*Id.* ¶ 36.) Under "the formula that usually applied to [plaintiff's] sales under his normal commission plan," he earned a commission of \$770,000. (*Id.* ¶ 37.) Defendant initially took the position that plaintiff earned \$181,800 after the deal closed under the TAAP, but after plaintiff "pushed back," defendant paid him \$218,000. (*Id.*) Plaintiff asserts that his commission was "arbitrarily capped to limit his earnings," rather than adjusted

for errors or balanced against the contributions of others on the deal. (*Id.* ¶ 38.)

Plaintiff alleges that his commissions on the Citigroup Deal were earned at the time defendant capped them. (*Id.* ¶ 39.)

### Discussion

On a motion to dismiss pursuant to CPLR 3211(a)(7), the court must “accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory.” (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994] [citation omitted].) “[B]are legal conclusions as well as factual claims which are either inherently incredible or flatly contradicted by documentary evidence” cannot survive a motion to dismiss. (*Summit Solomon & Feldesman v Lacher*, 212 AD2d 487 [1st Dept 1995] [citation omitted].)

To prevail on a CPLR 3211(a)(1) motion to dismiss, the movant has the “burden of showing that the relied-upon documentary evidence resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff’s claim.” (*Fortis Fin. Servs. v Filmat Futures USA*, 290 AD2d 383, 383 [1st Dept 2002] [internal quotation marks and citation omitted].) “A cause of action may be dismissed under CPLR 3211(a)(1) only where the documentary evidence utterly refutes [the] plaintiff’s factual allegations, conclusively establishing a defense as a matter of law.” (*Art and Fashion Group Corp. v Cyclops Prod., Inc.*, 120 AD3d 436, 438 [1st Dept 2014] [internal quotation marks and citation omitted].)

### I. Fraud and Negligent Misrepresentation

The elements of a fraud claim are “a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury.” (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 178 [2011] [internal quotation marks and citation omitted].) Similarly, a “claim for negligent misrepresentation requires the plaintiff to demonstrate (1) the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff; (2) that the information was incorrect; and (3) reasonable reliance on the information.” (*Id.* at 180 [internal quotation marks and citations omitted].)

#### *Particularity*

Defendant asserts that plaintiff’s claim for fraud fails because the FAC lacks particularity. While a fraud or negligent misrepresentation claim must be pled with particularity under CPLR 3016(b), the requirements of that section “may be met when the facts are sufficient to permit a reasonable inference of the alleged conduct.” (*Pludeman v N. Leasing Sys., Inc.*, 10 NY3d 486, 492 [2008].) “The purpose of section 3016(b)’s pleading requirement is to inform a defendant with respect to the incidents complained of.” (*Id.* at 491.)

Defendant asserts that plaintiff has failed to specify what was said, when and by whom. However, plaintiff alleges that PowerPoints, with specific statements that earnings opportunities and payments would not be capped, were presented by defendant to sales representatives, including plaintiff, “[a]t or about the same time as

sales representatives were provided with IPLs” and the IPLs were provided every six months. (NYSCEF 51, FAC ¶¶ 16-19.) These allegations are sufficient to put defendant on notice of the alleged misrepresentations.

Moreover, defendant makes much of the fact that plaintiff’s allegation that “[defendant] presented the PowerPoint to [plaintiff] both before and after the IPL was presented to him” is only on “information and belief.” (NYSCEF 51, FAC ¶ 18.) The sentence structure is such that “information and belief” applies to the timing of the presentation, not the fact that it was made, and such allegation does not preclude a claim of fraud where, as here, enough information has been set forth to “apprise defendants of the alleged wrongs.” (*Allenby, LLC v Credit Suisse, AG*, 134 AD3d 577, 580 [1st Dept 2015] [internal quotation marks and citation omitted].) Regardless, the precise timing of the presentation is irrelevant, because plaintiff alleges that the PowerPoint containing the representations about capping was “available for [plaintiff], and other salespeople, to download during the entirety of the relevant sales periods and afterwards.” (NYSCEF 51, FAC ¶ 18.)

This case is distinguishable from *Manda Int’l Corp. v Yager*, which defendant cites, where the third-party plaintiff alleged a plot to defraud him based on a conversation, overheard by an unnamed individual and later conveyed to the third-party plaintiff, and plaintiff failed to allege “the name of the employee, or details of when or where the overheard conversation took place, or when the unnamed former employee conveyed this information to [the third-party plaintiff].” (139 AD3d 594, 594 [1st Dept 2016].) Here, while plaintiff does not allege the names of the specific speakers who gave the presentation, he does allege specific relevant information that was provided to

him by defendant in a PowerPoint, around the time he received the IPL, and that he had access to the PowerPoint throughout the time period of the FAC.

In contrast, though, plaintiff's allegations concerning repetition of these misrepresentations in sales meetings by unnamed IBM managers, (*Id.* ¶ 20), are insufficiently pled. (See *Eastman Kodak Co. v Roopak Enterprises, Ltd.*, 202 AD2d 220, 222 [1st Dept 1994] [finding dismissal of fraud claims was required where "[t]he defendant alleged neither the time nor the place of the purported misrepresentations nor which employee of the plaintiff purportedly made them."]) Plaintiff's allegation that defendant's written guidance to its managers provides that capping is not permitted, cannot resuscitate this fraud claim because this representation was not made to plaintiff, but to managers. Thus, plaintiff's fraud and negligent misrepresentation claims are dismissed to the extent they are based on the misrepresentations alleged in paragraphs 20 and 21 of the FAC.

#### *Misrepresentation and Reliance*

Next, defendant asserts that plaintiff has failed to allege any misrepresentation or reliance to support his fraud or negligent misrepresentation claims. First, defendant argues that plaintiff's misrepresentation claim fails because plaintiff's allegations that the Citigroup Deal was designated as a TAAP account to limit his income are conclusory. The court disagrees. Plaintiff's allegations that his commissions were capped are not conclusory, but rather, at most, create an issue of fact as to why plaintiff received the amount of commissions he did (i.e. were they reduced in accordance with his plan, the TAAP, or arbitrarily capped). Moreover, the FAC contains sufficient allegations to support an inference that defendant capped his income, rather than modified it

according to the IPL, including that the Citigroup Deal was changed to a TAAP account, shortly after he told his managers that he was about to close the deal, (NYSCEF 51, FAC ¶¶ 28-29), and that his “commissions were not adjusted as a result of any errors or to balance his contribution against that of others who worked on the deal” as may be permitted under the IPL. (*Id.* ¶ 38.)

Additionally, even if plaintiff did not “earn” commissions on the Citigroup Deal until after it closed, this would not preclude him from pleading a misrepresentation. While the Citigroup Deal was changed to a TAAP account before plaintiff closed it, it is not clear from the FAC that plaintiff knew this change would mean his commissions would be “capped,” or that changing to a TAAP account necessarily meant he would be “capped.” Indeed, plaintiff alleges that he convinced defendant to increase his commissions after they were initially calculated under this plan. (*Id.* ¶ 37.)

Contrary to defendant's arguments, plaintiff has sufficiently alleged reasonable reliance. “[T]he question of what constitutes reasonable reliance is not generally a question to be resolved as a matter of law on a motion to dismiss.” (*ACA Fin. Guar. Corp. v Goldman, Sachs & Co.*, 25 NY3d 1043, 1045 [2015] [citation omitted].) Defendant incorrectly asserts that plaintiff cannot allege he relied on defendant's representations that it does not cap commissions because he was informed that the Citigroup Deal would be changed to a TAAP account and acquiesced to payment under that plan by continuing to work at IBM. As explained above, plaintiff does not allege that he was aware defendant would cap his commissions when it changed the Citigroup Deal to a TAAP account, but rather that defendant changed the designation for the purpose of capping him. (NYSCEF 51, FAC ¶ 32.) Thus, plaintiff could not have

acquiesced to any new terms because he was not informed of his compensation on the Citigroup Deal until after it closed.

Moreover, while defendant is correct that “representations of future intentions, such as job security or future changes” typically do not support a claim of fraud, (*Meyercord v Curry*, 38 AD3d 315, 316 [1st Dept 2007]), “representations of present intentions [that] constitute statements of material existing fact” may be “sufficient to support a fraud claim.” (*Laduzinski v Alvarez & Marsal Taxand LLC*, 132 AD3d 164, 168 [1st Dept 2015].) Defendant’s representations that earnings opportunities and payments are “uncapped” are statements of defendant’s existing policy, on which plaintiff reasonably relied.

Finally, the court finds that, contrary to defendant’s assertion, the IPL itself does not utterly refute plaintiff’s claims by precluding reliance as a matter of law. As an initial matter, the court declines to determine at this stage whether the IPL constitutes a valid enforceable contract, as plaintiff alleges it does not and defendant is equivocal as to whether it is. Regardless of whether the IPL is enforceable, the court cannot decide as a matter of law that its terms would preclude plaintiff from relying on defendant’s representation of uncapped commissions. While the IPL does provide that defendant reserves the right to modify or cancel the terms of the plan at any time before they are earned, this is not inconsistent with defendant’s representation that earnings opportunity remains “uncapped”, which is different from a change to the plan. (*Cf. Stone v Schulz*, 231 AD2d 707, 707–08 [2d Dept 1996] [“Where, as here, there is a meaningful conflict between an express provision in a written contract and a prior alleged oral representation, the conflict negates a claim of a reasonable reliance upon the oral

representation.”] [internal quotation marks omitted and citation].) Moreover, there is no clear disclaimer of reliance in the IPL, other than to disclaim reliance on representations of defendant’s managers. Rather, plaintiff alleges that the PowerPoint was given to him by defendant, IBM. Thus, it is not clear at this stage, that plaintiff did not reasonably rely on defendant’s representation that his commissions would not be capped.

The cases defendant cites in support on this point are also distinguishable. In *MultiJuice, S.A. v Snapple Beverage Corp.*, the court analyzed reliance for a promissory estoppel claim on a summary judgment motion and found that because of a settlement agreement in which the plaintiffs “disclaim[ed] any prior ‘agreement’ or ‘understanding’” and terms of draft distribution agreements that were inconsistent with promises allegedly made before, “no reasonable jury” could find that plaintiff “reasonably and foreseeably” relied on any “clear and unambiguous promises.” (2006 WL 2548475, at \*3 [SD NY Sept. 1, 2006].) However, this is a motion to dismiss. The second case defendant cites, *De Madariaga v Union Bancaire Privee*, is also distinguishable, because the defendant’s policy that “payment of bonuses was entirely discretionary was clearly expressed” in several documents given to plaintiff. (103 AD3d 591, 591 [1st Dept 2013].) The IPL here does not provide that commissions are entirely discretionary, but rather that they may be cancelled or changed. *Lobosco v N.Y. Tel. Co./NYNEX*, which defendant cites in its reply is also distinguishable in that it involved a breach of contract action, not a fraud action, based on two provisions of an employee manual. (96 NY2d 312, 317 [2001] [finding employee could not enforce provision in manual that he would be protected against reprisal for reporting violations where the same manual

provided that “[t]his code of conduct is not a contract of employment and does not create any contractual rights of any kind between NYNEX and its employees.”])

Finally, the court rejects defendant’s assertion that plaintiff has not pled he relied on defendant’s misrepresentations. To the contrary, plaintiff alleges that he continued to work on the Citigroup Deal after receiving PowerPoints from IBM that his earnings would not be capped, that “[p]laintiff and the members of the Subclass relied upon IBM’s misrepresentations regarding commissions in selling IBM’s product and services” (NYSCEF 51, FAC ¶ 98), and that “commission terms are a highly material factor that a sales representative employee considers when selecting and remaining with an employer.” (*Id.*) These are plaintiff’s allegations that he relied on defendant’s representations that his commissions would not be capped. Thus, the court denies the motion to dismiss as to plaintiff’s fraud claims.

Plaintiff’s negligent misrepresentation claim, however, fails because the FAC contains no allegations supporting a special or privity-like relationship between plaintiff and defendant. The existence of an employer-employee relationship alone is not sufficient to state a claim for negligent misrepresentation. (*Rivas v Amerimed USA, Inc.*, 34 AD3d 250, 250 [1st Dept 2006] [“negligent misrepresentation [claim], was properly dismissed on the ground that the employer-employee relationship alleged was not one of special confidence and trust.”].) Plaintiff’s allegations that commissioned employees directly benefit defendant in closing deals and promises of uncapped commissions encourage them to work harder, (NYSCEF 51, FAC ¶ 24), do not “raise the possibility of a special relationship” beyond commissioned employee and employer. (*Cf. Antipodean Domestic Partners, LP v Clovis Oncology, Inc.*, 2018 NY Slip Op

30809[U] [Sup Ct, NY County Apr. 30, 2018] [finding plaintiff raised the possibility of a special relationship by alleging “that the Underwriter Defendants had access to trial data which plaintiff did not have and were able to evaluate the data in a way that plaintiff could not.”])

The cases cited by plaintiff do not hold differently. Two of the cases plaintiff cites sustaining negligent misrepresentation claims by an employee against an employer did not address the issue of a special relationship. (*Schlansky v United Merchants & Mfrs., Inc.*, 443 F Supp 1054 [SD NY 1977]; *Leonelli v Pennwalt Corp.*, 740 F Supp 122 [ND NY 1990].) The third case found that even though there was no support in the complaint for a special relationship, more facts and further briefing might support a special relationship, because “at least some of the Plaintiffs here are subject to one or more collective bargaining agreements.” (*Gordon v Kaleida Health*, No. 08-CV-951S, 2012 WL 171577, at \*10 [WD NY Jan. 17, 2012].) That is not the case here.

Moreover, *North Star Contr. Corp. v MTA Capital Constr. Co.*, which plaintiff cites, does not change this result. (120 AD3d 1066, 1069 [1st Dept.2014].) While that case found a special duty may arise where a relationship “so close as to approach that of privity” exists, (*id.*), it does not change the rule that, generally, “an arm’s-length business relationship between sophisticated parties will not give rise to a confidential or fiduciary relationship that would support a cause of action for negligent misrepresentation.” (*J.P. Morgan Sec. Inc. v Ader*, 127 AD3d 506, 507, [1<sup>st</sup> Dept 2015] [citation omitted]; see also *Marzouk v Cit Group, Inc.*, 2017 NY Slip Op 30117[U] [Sup Ct, NY County 2017] [applying, after *North Star*, the rule that “an employer-employee relationship alone is not of a fiduciary nature and, thus, does not qualify as a special

relationship.”)] Moreover, the court declines plaintiff’s invitation to read an implied rule into Article 6 of the Labor Law that creates a special relationship between a commissioned employee and an employer for purposes of a negligent misrepresentation claim. Thus, plaintiff’s negligent misrepresentation claim is dismissed

II. Violation of New York Labor Law §§ 191(1)(c), 198<sup>1</sup>

Plaintiff has alleged a claim under New York Labor Law Section 191(1)(c), which provides:

c. Commission salespersons.--A commission salesperson shall be paid the wages, salary, drawing account, commissions and all other monies earned or payable in accordance with the agreed terms of employment [ . . . ] The employer shall furnish a commission salesperson, upon written request, a statement of earnings paid or due and unpaid. The agreed terms of employment shall be reduced to writing, signed by both the employer and the commission salesperson, kept on file by the employer for a period not less than three years and made available to the commissioner upon request. Such writing shall include a description of how wages, salary, drawing account, commissions and all other monies earned and payable shall be calculated. Where the writing provides for a recoverable draw, the frequency of reconciliation shall be included. Such writing shall also provide details pertinent to payment of wages, salary, drawing account, commissions and all other monies earned and payable in the case of termination of employment by either party. The failure of an employer to produce such written terms of employment, upon request of the commissioner, shall give rise to a presumption that the terms of employment that the commissioned salesperson has presented are the agreed terms of employment.

(Labor Law § 191[1][c].)

Defendant argues that plaintiff has not alleged violation of Section 191(1)(c) because plaintiff was paid pursuant to the TAAP plan, and an employer can adjust an

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<sup>1</sup> While plaintiff fails to address defendant’s argument that his claim for liquidated damages under Section 198 of the Labor Law should be dismissed because he has brought this action as a class action, the Court finds this argument premature at the motion to dismiss stage, as class certification has not yet been addressed.

at-will employee's compensation unilaterally. As explained above, plaintiff does not allege that he knew his compensation would be capped when the Citigroup Deal was changed to a TAAP account, and thus, he could not have agreed to it. (*Cf. Leeds v. Best Styles, Inc.*, 2016 N.Y. Slip Op 31783[U] [Sup Ct, NY County Sep. 27, 2016] ["The employer of an at-will employee is entitled to change the terms of the employment agreement . . . prospectively, subject to [the employee's] right to leave the employment if the new terms [are] unacceptable."] [quotations and citation omitted].) Moreover, defendant's assertion that plaintiff was actually paid more upon his request only further supports an inference that he would not necessarily be capped under the TAAP plan.

The court also rejects defendant's argument that, even if the IPL is not an enforceable contract, it still satisfies the requirement of Section 191(1)(c) that "[t]he agreed terms of employment shall be reduced to writing, signed by both the employer and the commission salesperson . . ." (*Id.*) The Court disagrees. Even if the IPL is signed by both parties, plaintiff alleges—and defendant is equivocal on this issue—that it does not contain an enforceable agreement as to plaintiff's commissions. Thus, plaintiff's allegations are sufficient to state a claim for violation of the statute here.

### III. Quantum Meruit and Unjust Enrichment

Defendant argues that plaintiff's quantum meruit and unjust enrichment claims fail because, accepting plaintiff's allegation that the IPL is not an enforceable contract, then Section (a)(10) of the Statute of Frauds precludes these claims. As an initial matter, the court notes that defendant has failed to properly move pursuant to CPLR

3211 (a)(5) for dismissal under the Statute of Frauds. Nevertheless, the court analyzes the application of the statute here.

Section (a)(10) of the General Obligations Law § 5-701, provides:

a. Every agreement, promise or undertaking is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by his lawful agent, if such agreement, promise or undertaking:

10. Is a contract to pay compensation for services rendered in negotiating a loan, or in negotiating the purchase, sale, exchange, renting or leasing of any real estate or interest therein, or of a business opportunity, business, its good will, inventory, fixtures or an interest therein, including a majority of the voting stock interest in a corporation and including the creating of a partnership interest. "Negotiating" includes procuring an introduction to a party to the transaction or assisting in the negotiation or consummation of the transaction. This provision shall apply to a contract implied in fact or in law to pay reasonable compensation but shall not apply to a contract to pay compensation to an auctioneer, an attorney at law, or a duly licensed real estate broker or real estate salesman.

Where there is no enforceable written agreement and Section 5-701 applies, quantum meruit and unjust enrichment claims may be barred by the statute of frauds. (*Snyder v Bronfman*, 13 NY3d 504, 506 [2009].) Contrary to defendant's arguments, Section 5-701(a)(10) is inapplicable on its face. This section concerns the procuring of various real estate transactions or of "a business opportunity." (e.g. *Freedman v. Chem. Const. Corp.*, 43 NY2d 260, 262 [1977] [alleged oral agreement for fee for obtaining construction contract fell within Section 5-701(a)(10)]; *Ghaffari v. Rima Invs. Corp.*, 266 AD2d 111, 111 [1st Dept 1999] [alleged oral agreement to pay a commission on sales to customers that plaintiff referred to defendant fell within Section 5-701(a)(10)].) Plaintiff alleges that he sold products and services for defendant. (NYSCEF 51, FAC ¶ 98.) Thus, Section 5-701(a)(10) is not applicable here.

Defendant also asserts, in a footnote, that had plaintiff pled a contract claim, the existence of a contract would preclude plaintiff's claims for quantum meruit and unjust enrichment. As noted above, the court cannot determine at this stage that the IPL constitutes a valid enforceable contract. Moreover, courts generally hold that where there is a dispute as to whether an enforceable contract exists, plaintiffs should be permitted to proceed upon multiple theories of recovery. (*Kramer v Greene*, 142 AD3d 438, 441–42 [1st Dept 2016] [“[W]here there is a bona fide dispute as to the existence of a contract or the application of a contract in the dispute in issue, a plaintiff may proceed upon a theory of quasi contract as well as breach of contract, and will not be required to elect his or her remedies.”] [internal quotation marks and citation omitted].) Thus, plaintiff's claims for unjust enrichment and quantum meruit may proceed.

Defendant further argues that plaintiff fails to allege reliance or a reasonable expectation of compensation to support his unjust enrichment and quantum meruit claims. As set forth above, plaintiff has adequately alleged that he relied on defendant's representations that his commissions would not be capped. Moreover, the case defendant cites regarding unjust enrichment does not suggest that a plaintiff must meet the same heightened pleading standard for reliance on an unjust enrichment claim as for a fraud claim, but rather that there must be a sufficient connection between the plaintiff and defendant. See *Santander Consumer USA, Inc. v Kobi Auto Collision & Paint Ctr., Inc.*, 183 AD3d 984, 988 [3d Dept 2020] [“[A] cause of action for unjust enrichment requires a showing of reliance which, given the absence of a prior relationship between respondent and petitioner, was manifestly absent here.”].) That is

not an issue here. Thus, plaintiff's claims for unjust enrichment and quantum meruit may proceed.

#### IV. Prima Facie Tort

Plaintiff has failed to state a claim for prima facie tort. To state a cause of action for prima facie tort, the plaintiff must allege "(1) the intentional infliction of harm, (2) which results in special damages, (3) without any excuse or justification, (4) by an act or series of acts which would otherwise be lawful." (*Kickertz v New York Univ.*, 110 AD3d 268, 277 [1st Dept 2013].) "[T]here is no recovery in prima facie tort unless malevolence is the sole motive for defendant's otherwise lawful act or . . . unless defendant acts from 'disinterested malevolence.'" (*Burns Jackson Miller Summit & Spitzer v Lindner*, 59 NY2d 314, 333 [1983].)

Defendant correctly asserts that plaintiff has failed to allege that the sole motive for defendant's actions was malevolence towards plaintiff or other salespersons. Plaintiff alleges that "[d]esignating [the Citigroup Deal] as a TAAP account was done for the sole purpose of limiting [his] income when the deal closed." (NYSCEF 51, ¶ 32.) This allegation does not suggest that the sole motive was malevolence towards plaintiff, but rather, at most, for defendant to keep \$500,000. Such an economic motive cannot constitute malice sufficient for a claim of prima facie tort. (*Meridian Cap. Partners, Inc. v Fifth Ave. 58/59 Acquisition Co. LP*, 60 AD3d 434, 434 [1st Dept 2009]).

#### V. Class Action Definition

Plaintiff asserts a class in the FAC called the "Declaratory/Injunctive Relief Class" which is defined as "[a]ll persons residing or who resided in the State of New York while working for IBM on a commission incentive plan during the Relevant Time Period"

(NYSCEF 51, FAC ¶ 82) and a Subclass called the “Damages Class” consisting of “[a]ll persons residing or who resided in the State of New York while working for IBM on a commission incentive plan during the Relevant Time Period and that were not paid the amount of commissions reflected in the individual’s commissions formula.” (*Id.*)

Defendant asserts that the Class definition should be dismissed because the definition of the Class is fatally overbroad in that it includes plaintiffs who have not been harmed.

The Court finds it is premature to consider the merits of plaintiff’s class definition at this stage. (*Griffin v Gregory’s Coffee Mgmt. LLC*, 191 A.D.3d 600 [2021], quoting *Downing v First Lenox Terrace Assoc.*, 107 AD3d 86, 91 [1st Dept. 2013] “[I]t will generally be ‘premature to dismiss class action allegations before an answer is served or pre-certification discovery has been taken.’”) While in some cases, class claims may be dismissed at the pre-certifications stage, (see, e.g. *Baytree Cap. Assocs., LLC v. AT&T Corp.*, 10 Misc. 3d 1053[A], 2005 NY Slip Op 51927[U], \*4 [Sup Ct, NY County 2005]), defendant has not conclusively demonstrated that there is no basis, as a matter of law, for a class action here. (*Downing v First Lenox Terrace Assoc.*, 107 A.D.3d at 91 “[A] motion to dismiss may be made before a motion to determine the propriety of the class and a hearing under CPLR 902 where it appears conclusively from the complaint and from the affidavits that there was as a matter of law no basis for class action relief.”) [quotations and citation omitted].) Thus, it is not appropriate for the court to analyze the class definition at this stage.

Accordingly, it is

ORDERED that defendant's motion to dismiss is granted in part to the extent that plaintiff's claims for negligent misrepresentation and prima facie tort are dismissed without prejudice and otherwise denied; and it is further

ORDERED that defendant shall answer in 20 days after the date of this decision; and it is further

ORDERED that the parties shall submit a proposed PC order by November 14, 2022. If the parties cannot agree, they may submit competing proposed PC orders.

Motion Seq. No. :

10/17/2022  
DATE

  
ANDREA MASLEY, J.S.C.

CHECK ONE:  CASE DISPOSED  DENIED  NON-FINAL DISPOSITION  OTHER

APPLICATION:  GRANTED  SETTLE ORDER  GRANTED IN PART  SUBMIT ORDER

CHECK IF APPROPRIATE:  INCLUDES TRANSFER/REASSIGN  FIDUCIARY APPOINTMENT  REFERENC F