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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JUSTICE SHIRLEY WERNER KORNREICH PART 54

Index Number : 111578/2004

PRG BROKERAGE INC.

vs

ARAMARINE BROKERAGE INC

Sequence Number : 011

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed decision/order.

FILED

APR 02 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 3/30/12

JUSTICE SHIRLEY WERNER KORNREICH

J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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PRG BROKERAGE INC.,

Plaintiff,

Index No. 111578/2004
DECISION and ORDER

-against-

ARAMARINE BROKERAGE INC.

Defendant.

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KORNREICH, SHIRLEY WERNER, J.:

Defendant, Aramarine Brokerage Inc. (Aramarine), moves for an order: (I) directing the entry of summary judgment, dismissing the complaint; and (ii) granting Aramarine summary judgment on its fifth counterclaim, seeking imposition of a constructive trust. Plaintiff , PRG Brokerage Inc. (PRG), cross-moves, *inter alia*, for summary judgment on its claims and for dismissal of defendant's counterclaims. The claims and counterclaims asserted in this action arise out of a co-brokering and commission-sharing arrangement between plaintiff and defendant for the sale of insurance policies to owners and drivers of livery cars and medallion taxis. For the following reasons, both defendant's motion and plaintiff's cross motion are granted in part and denied in part.

I. Factual Background[1]

A. The Relevant Agreements

Silver Car Risk Purchasing Group (Silver Car) was formed in 1998 by Joseph Elmasri for the purpose of obtaining commercial insurance coverage, on a group basis, for its members.

[1] Although required to do so by Rule 8 (a) of this chamber's practices, the parties have failed to submit an undisputed, joint statement of material facts.

Silver Car's members are owners, operators and drivers of commercial for-hire vehicles, including livery automobiles and taxicabs. PRG is an insurance broker that had prior experience serving the livery car industry.

On June 28, 1999, Aramarine, an insurance brokerage owned by Elmasri, and Highlands Insurance Company (Highlands), an insurer, entered into a letter agreement (the June 1999 Agreement), "confer[ring] upon Aramarine exclusive authority to place [insurance] business with Highlands . . . for all classes [of] business produced by [PRG]." Affidavit of Elmasri, sworn to August 12, 2010 (Elmasri aff.), Ex. 2. The policy period for the policies issued by Highlands was to be three years, from March 1, 2000 through March 1, 2003.

Consistent with the agreement between Highlands and Aramarine, PRG and Aramarine entered into a co-brokering agreement, dated August 1, 1999 (the August 1999 Agreement). *Id.*, Ex. 3. Pursuant to its terms, the parties agreed, *inter alia*, to a commission-sharing arrangement with respect to the premiums generated by the sale of insurance policies, agreeing that commissions earned would be shared equally. *Id.* Subsequently, the August 1999 Agreement was terminated, *ab initio*. *Id.*, Ex. 8.[2]

On February 1, 2000, the parties entered into an amended and restated co-brokering agreement (the Amended Agreement). *Id.*, Ex. 4. The Amended Agreement provides that

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[2] The parties originally contemplated that Highlands would merely "front" the requisite licensed insurance for the program, and the risk was to be 100% reinsured by an off-shore Cayman Islands reinsurance cell owned by Larry Blessinger, a principal of PRG. Toward this end, Elmasri and Blessinger entered into several other agreements through entities they owned or controlled, including: (I) a Segregated Portfolio Agreement, (ii) a Management Agreement, and (iii) a Service Agreement. Elmasri aff., Exs. 5-7. For various reasons, the venture never went forward, and, instead, Highlands insured the program as a traditional insurer. These additional agreements were terminated, *ab initio*, at the same time as the August 1999 Agreement. *Id.*, Ex. 8.

Aramarine would be the exclusive wholesale insurance broker with Highlands with regard to placement of livery-car driver's insurance produced by PRG, and that PRG would serve as the exclusive retail broker for that market. With regard to the sharing of commissions, Section 4 of the Amended Agreement provides that:

> The insurance brokerage commission generated on all business subject to this Agreement, including contingencies on all business placed hereunder . . . shall be divided between Aramarine and PRG as follows: Aramarine shall be entitled to fifty percent (50%) of the Commission plus thirty-five dollars ($35) per insured vehicle. PRG shall be entitled to fifty percent (50%) of the Commission minus thirty-five dollars ($35) per insured vehicle. PRG shall bill for and collect all premiums on PRG Business and shall remit such premiums to Aramarine, net of PRG's share of the Commission . . . Each party shall maintain the premiums it receives in a fiduciary capacity in accordance with applicable law.

Id.[3]

Other relevant sections of the Amended Agreement, provide that:

> PRG shall be responsible for performing all underwriting activities in connection with the business subject to this Agreement, including review of all applications for insurance, claims history and physical inspection and photographing of all insured vehicles.

id., Section 2 (c);

> the relationship of the parties shall be that of independent contractors and nothing herein shall create the relationship of principal and agent . . . or partners in a partnership . . . between the parties hereto.

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[3] The total commissions earned from premiums paid on insurance policies covered by Highlands were to be calculated as 10% of the premium received from the insureds. Despite their course of dealing under the Amended Agreement, the parties do not agree whether the language in this provision provides for a $35 or $70 differential per vehicle. *Compare* plaintiff's counterstatement of proposed material facts, ¶ 10, *with* defendant's responses and objections to counterstatement, ¶ 10.

id., Section 5.

> This Agreement shall not be assigned by either of the parties, and their respective obligations hereunder shall not be delegated without the prior written consent of all parties hereto ....

id., Section 12 (a); and

> This Agreement may not be varied, modified or amended except by a writing signed by the party against which this Agreement is sought to be enforced.

id., Section 12 (b).

In February of 2000, PRG began binding insureds under the Silver Car program. In February or March of 2000, there was a meeting regarding the Silver Car program between, among others, representatives of Highlands, including its CEO, Willis King, and General Counsel, Stephen Greenberg, as well as Blessinger and Elmasri. The participants at the meeting spoke about the treatment of commissions, the flow of funds, and how the premiums would get to Highlands. Initially, per the Amended Agreement, premiums were to be paid to PRG, sent on to Aramarine, and then to Highlands, with PRG and Aramarine each taking out their commission along the way. *Id.*, Sec. 4. However, because the majority of premiums were being financed through a premium finance company, Highlands wanted premiums to be paid over directly to it. *See id.*, Ex. 19. Further, as a result of language in the August 1999 Agreement providing that "[a]ll commissions on business produced by PRG . . . shall be the *exclusive* property of Aramarine..." (emphasis added), Highlands intended to pay the entire commission amount to Aramarine, including PRG's portion, with Aramarine bearing the responsibility of paying PRG.

As indicated in a letter dated April 3, 2000 from Greenberg to Elmasri, PRG strongly objected to the new method by which commissions would be distributed:

[* 6]

> We do not want to find ourselves in the middle of a dispute between [Aramarine] and [PRG]. At the meeting last week, Larry Blessinger took the position forcefully that you and he agreed that the commission would be split between Aramarine and PRG and that the PRG portion should be sent to PRG directly.

Id., Ex. 20. To remedy the situation, Greenberg proposed that Elmasri and Blessinger jointly send him a letter containing instructions on the distribution of commissions Highlands received from the premium finance companies. *Id.*

Accordingly, on June 22, 2000, PRG and Aramarine sent a joint written agreement to Highlands regarding the payment of commissions (the June 22, 2000 letter). It states, in relevant part, that:

> *PRG hereby releases [Highlands] from any obligations to pay commissions to PRG in excess of the PRG Allocation.* Aramarine hereby releases [Highlands] from any obligation to pay commissions to Aramarine in excess of the Aramarine Allocation.
>
> This agreement shall not be deemed to modify or waive any provision of the [Amended] Agreement or any other agreement between the parties, nor shall this agreement be deemed a waiver of rights or claims PRG or Aramarine may have against each other.

Id., Ex. 22 (emphasis added). Consequently, after June 22, 2000, Highlands paid commissions directly to PRG and Aramarine. *See id.*, Ex. 23.

At some point during the first year of the Silver Car program, Highlands expressed concerns that the program was riddled with fraudulent claims (*id.*, Ex. 24) and sought to cancel the program at the end of its first year. On December 19, 2000, Highlands sent a Notice of Termination to PRG and each of the insured drivers under the Silver Car program, stating that Highlands would not renew the policies effective as of February 28, 2001. *Id.*, Ex. 25. On December 21, 2000, Highlands sent PRG and Aramarine a letter stating that it was revoking

PRG's and Aramarine's authority to bind coverage or to issue certificates of insurance. *Id.*, Ex. 26. Because Highlands had issued policies with three-year terms, Silver Car, Aramarine and PRG took the position – and the New York State Insurance Department agreed (*id.*, Ex. 27 [opinion letter]) – that the program could not be canceled more than 120 days prior to the end of the policy term after the insurance had been in effect more than 60 days.

B. The Ensuing Litigation

On December 27, 2000, PRG filed a complaint with the New York State Insurance Department, alleging that the purported non-renewal notices violated the terms of the policies and the Insurance Law. *Id.*, Ex. 28.

On February 15, 2001, Aramarine and Silver Car filed an action in New York State Supreme Court to obtain a temporary restraining order (TRO) enjoining Highlands from terminating the policies and to recognize the authority of Silver Car to continue to enroll its members as Highlands' insureds. *Id.*, Exs. 29 and 30. Aramarine also sought damages from Highlands in excess of $4 million for lost commissions on the two remaining years of the policies, basing that figure on the $2 million in commissions it had earned during the first year of the program. *Id.*, Ex. 29, ¶¶ 34-35. The court granted the TRO. *Id.*, Ex. 31. Thereafter, PRG began to issue certificates of insurance for the second year of the program to both existing and new Silver Car members.

On March 16, 2001, Highlands commenced a suit in the United States District Court for the Southern District of New York against, among others, PRG, Aramarine and Silver Car. *Id.*, Ex. 34. In its complaint, Highlands alleged that Aramarine and PRG engaged in fraud in the manner in which they ran and priced the program. *Id.*

Ultimately, Silver Car, Aramarine and Highlands decided to settle their claims against each other in the state and federal actions. Specifically, in a Confidential Settlement Agreement and Release dated and effective April 15, 2001 (the Settlement Agreement), Silver Car and Aramarine agreed to a settlement which guaranteed that Highlands would not terminate the second year of the program, while agreeing that it could be terminated in the third year. *Id.*, Ex. 36, § B (1) (f). As part of the settlement, Aramarine also received a lump sum payment from Highlands in settlement of all of Aramarine's claims against Highlands. *Id.*, § B (2) (e) (i-iv). PRG did not reach a settlement with Highlands.

In April 2001, counsel for Highlands wrote a letter to counsel for PRG, stating that it was confirming an agreement reached between Highlands, Silver Car, Aramarine and PRG (the Proposed Agreement). *Id.*, Ex. 38. Had it been executed, the Proposed Agreement would have allowed the parties to continue doing business together during litigation. The Proposed Agreement provided that: (i) financed premiums would be forwarded directly to Highlands in the same manner as in the prior year of the program (¶ 5); (ii) Highlands would "place 5% of gross written premium received by Highlands, less $35 per insured vehicle, into an interest bearing escrow account pending resolution of PRG's entitlement to such commissions" (¶ 6); and (iii) no amount of financed premiums forwarded to Highlands by the premium finance company would be paid to Aramarine, "since that issue had been resolved by agreement between Highlands and Aramarine" (¶ 7). On April 25, 2001, counsel for PRG signed the Proposed Agreement received from Highlands and faxed it back to counsel for Highlands, who had already signed it. *Id.* For reasons that are not entirely clear, the Proposed Agreement never became effective.

On June 21, 2001, PRG served counterclaims in the federal action against Highlands,

seeking, among other things, to try to obtain an order enjoining Highlands from canceling the policies until after the full three years had run, and to collect its share of commissions owed plus fees it claimed it was losing because of the cancellation of coverage. *Id.*, Ex. 37, ¶¶ 172, 187. In a decision and order dated January 5, 2004, the district court dismissed the federal complaint in its entirety and dismissed six of the ten counterclaims asserted by PRG. *See Highlands Insurance Co. v PRG Brokerage Inc., et al*, 2004 US Dist Lexis 83. Ultimately, PRG failed to obtain an order compelling Highlands to continue the program into the third year or an award of damages for the third year's fees.

Sometime in November 2003, Highlands became insolvent and was placed into receivership. On December 3, 2004, PRG and Highlands entered into a Settlement Agreement and Release whereby each side issued the other releases of their remaining claims. *Id.*, Ex. 40.

C. The Instant Action

Plaintiff commenced this action on August 11, 2004, by filing a summons and complaint. Affirmation of Peter J. Biging, dated January 17, 2011 (Biging aff.), Ex. 1. Plaintiff filed an amended complaint on September 21, 2004. Elmasri aff., Ex. 41. In the amended complaint, plaintiff asserts four causes of action against Aramarine: breach of the Amended Agreement (1st COA); breach of fiduciary duty (2d COA); unjust enrichment (3d COA); and conversion (4th COA). Plaintiff contended that, under the commission-sharing provision of the Amended Agreement, it is entitled to half of the $2 million Aramarine ultimately received in its settlement with Highlands.

Defendant served its amended answer with counterclaims on March 23, 2007. *Id.*, Ex. 42. The counterclaims allege: breach of contract (1st CC); an accounting (2d CC); theft of joint

venture opportunity (3d CC); breach of fiduciary duty (4th CC); constructive trust (5th CC), and; breach of the duty of good faith and fair dealing (6th CC). The counterclaims are largely based on Aramarine's assertion that, without its knowledge or consent, PRG charged the insureds certain fees and membership dues that should have been shared equally with Aramarine, pursuant to the Amended Agreement.[1]

Plaintiff served its reply to counterclaims on April 6, 2007. Biging aff., Ex. 6.

II. Discussion

To prevail on a motion for summary judgment, the proponent must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering evidentiary proof in admissible form. *See Zuckerman v City of New York*, 49 NY2d 557, 560 (1980). Once this showing has been made, the burden shifts to the party opposing the motion to rebut the *prima facie* showing by producing evidentiary proof in admissible form sufficient to require a trial of material issues of fact. *See Kaufman v Silver*, 90 NY2d 204, 208 (1997). Additionally, in deciding the motion, the court must view the evidence in a light most favorable to the party opposing the motion and must give that party the benefit of every favorable inference. *Negri v Stop & Shop*, 65 NY2d 625, 626 (1985).

A. Defendant's Motion to Dismiss the Amended Complaint

Applying these principles, the court finds that defendant has established a *prima facie* case for the first branch of its motion, *i.e.*, dismissal of the complaint. First, Highlands was expressly authorized by the June 22, 2000 letter to pay defendant and plaintiff their respective commission

[1] The counterclaims for an accounting and breach of fiduciary duty do not purport to assert a right to share fees.

shares separately and directly -- at PRG's insistence. Second, uncontradicted deposition testimony from those directly involved with negotiating the terms of the Settlement Agreement, confirms that: (i) the $2 million paid by Highlands to Aramarine was in settlement solely of Aramarine's separate share of commissions that would have been due it but for Highlands' efforts to cancel the policies prematurely; and (ii) the payment was in keeping with the method for transmitting commissions agreed to in the June 22, 2000 letter. Significantly, that testimony establishes that no portion of the settlement amount paid to Aramarine was intended or paid in satisfaction of any portion of PRG's commission allocation. Terence Cummings, counsel for Elmasri, gave the following testimony:

> **Q**: In connection with Aramarine's settlement of its claim against Highlands, did Aramarine obtain a monetary payment from Highlands?
>
> **A**: Yes.
>
> **Q**: Did any portion of that monetary payment constitute the share of commissions that was due to PRG or might be due to PRG?
>
> **A**: Well, the short answer to your question is no . . . And the purpose of the settlement was to make Aramarine, and only Aramarine, whole for its lost revenues as a result of Highlands' desire to withdraw.

Biging aff., Ex. 26, p 71-72; *see also id.*, p 149-150, 152-153. Cummings' testimony is consistent with that of Highlands' CEO, King, the party on the other side of the Settlement Agreement:

> **Q**: Do you recall the basic terms of the settlement agreement?
>
> **A**: I negotiated the settlement agreement with Mr. Elmasri because we didn't want to continue on this program. That simple.
>
> **Q**: Okay. And do you recall the settlement agreement providing that Mr. Elmasri's company, Aramarine, would receive a monetary payment?
>
> **A**: Yes. I negotiated that monetary payment directly with Mr. Elmasri.

* * *

Q: Was it your intent to provide Mr. Elmasri with a payment of any portion of any commissions that would be due PRG for the second year of the program?

A: We . . . had already gotten a written agreement with him that we weren't going to do that, that Mr. Blessinger, forcefully and vociferously wanted his commission to be paid directly to him.

Q: In making this settlement with Mr. Elmasri for his share of the commissions or for negotiated resolution of his share of the commissions that would be due for the second year of the program, you were relying on the June 22, 2000, letter agreement we referred to earlier?

A: Yes.

Id., Ex. 31, p 41-44.

Evidence that even PRG understood that the settlement Aramarine entered into with Highlands was for Aramarine's share of the commissions can be gleaned from the Proposed Agreement that, though never effective, was signed by PRG's counsel. According to its proposed terms, while Highlands could reserve its rights with regard to PRG's entitlement to commissions, "Highlands shall place 5% of gross written premium received by Highlands, less $35 per insured vehicle, into an interest bearing escrow account pending resolution of PRG's entitlement to such commissions." Elmasri aff., Ex. 36. Importantly, as to Aramarine's share of commissions, the proposed agreement notes that "[w]ith respect to gross written premium forwarded to Highlands by [the premium financing company], it is agreed that no amounts shall be payable to Aramarine *since that issue has been resolved by agreement between Highlands and Aramarine*." *Id.* (emphasis added).

In opposition to the motion (and in support of its cross motion for judgment on its claims), PRG's principal argument is that nothing in the June 22, 2000 letter relieved it of its right to

receive commissions per the formula set forth in the Amended Agreement, stipulating that brokerage commissions "shall be divided [and] . . . Each party shall maintain the premiums it receives in a fiduciary capacity ...." Ergo, Aramarine's failure to share the $2 million settlement it received was a breach of the Amended Agreement. This argument misses the point.

The issue before the court is not, as PRG would have it, whether it had a *right* to commissions. Rather, once Highlands was given the authority to pay each broker its commission share directly, the question on this motion is whether the settlement amount paid to Aramarine was solely for its commission share (as authorized by the June 22, 2000 letter) or included some portion of PRG's commission allocation. Here, the undisputed evidence before the court is that Highlands had negotiated and settled with Aramarine for a discounted value on *its* share of the commissions that would have been due had the program continued through the remainder of the policy term. Indeed, that settlement ended litigation with Aramarine, but litigation continued with PRG. Giving plaintiff every favorable inference, the proof submitted in opposition to the first branch of Aramarine's motion is inadequate to raise a triable issue of fact with respect to any legitimate right to share the $2 million settlement amount.[5] As all of PRG's claims rest upon defendant's refusal to share the settlement amount, plaintiff cannot maintain them. Therefore, judgment in favor of defendant on the first branch of its motion, is granted, and the amended complaint is dismissed. As a corollary, that branch of plaintiff's cross motion seeking judgment on its claims, is denied.

However, as discussed more fully in the next section of this decision, addressing plaintiff's

[5] For this reason, Aramarine's misconceived argument, abandoned in reply, that the June 22, 2000 letter constituted an assignment of rights, is of no relevance to the court's determination.

cross motion to dismiss counterclaims. Aramarine has failed to carry its burden with respect to the second branch of its motion, *i.e.*, judgment on its fifth counterclaim for imposition of a constructive trust on fees and membership dues collected by PRG. Consequently, the second branch of Aramarine's motion is denied.

B. Plaintiff's Cross- Motion to Dismiss Counterclaims

Simply stated, Aramarine's counterclaims for breach of contract (first), theft of joint venture opportunity (third), breach of fiduciary duty (fourth), constructive trust (fifth), and breach of the duty of good faith and fair dealing (sixth) are grounded on allegations that certain fees PRG charged the insureds without Aramarine's knowledge or consent, including membership dues, risk-management fees and administration fees, should have been shared equally with Aramarine. Aramarine argues that: (I) these fees are subject to language in the Amended Agreement stating that commissions, "including *contingencies* on all business placed hereunder," (emphasis added) would be split 50% between PRG and Aramarine; and (ii) as joint venturers, PRG had a fiduciary duty to Aramarine to keep the overall cost of insurance as competitive as possible, and PRG's charging of fees "created the potential" (Counterel. ¶ 26) that there was less interest in the program and fewer purchasers. Aramarine's counterclaim for an accounting (second), is based on its contention that PRG collected premiums during the second year of the program and failed to account for those premiums and the amount of commissions due Aramarine.

In support of its cross- motion, PRG argues that the express terms of the only operative agreement between the parties – the Amended Agreement – provides only for a sharing of commissions, not fees and dues collected by PRG (purportedly for the various services it provided in administering the Silver Car program, pursuant to Section 2 [c] of the Amended Agreement).

Therefore, according to PRG, those counterclaims under which Aramarine seeks a share of the fees, must be dismissed.

In opposition to plaintiff's cross- motion and in support of its motion for judgment on its fifth counterclaim (constructive trust), Aramarine asserts a new theory to justify its entitlement to a share of the fees, never alluded to in its pleadings. Specifically, Aramarine relies on the Cayman Islands transaction – a deal that never went forward:

> Aramarine's position is that while at one point PRG had been given a right to charge and collect membership dues from Silver Car's members, that right - - granted in the Management Agreement - - was terminated when the agreement was terminated and voided *ab initio* . . . PRG's decision to charge and collect such dues without authority was highly improper. Further, PRG purported to charge those dues for the exact same services it claimed it was providing for which the insured drivers were being charged substantial 'administration fees'. . . *Aramarine bases its claim* to a constructive trust over the fees collected *upon the fact that PRG had no legal right to collect same, and then fail to remit the fees to Silver Car.*

Defendant's responses and objections to counterstatement, ¶ 28 (emphasis added).

By contrast, the theory initially advanced by Aramarine relied wholly on the Amended Agreement:

> The monies collected from the insured members of the Silver Car Program as fees and dues were collected by PRG in breach of PRG's fiduciary duties to ARAMARINE, and concealed from Aramarine in breach of PRG's contractual obligations under the terms of the [Amended Agreement].
>
> As the intent of the [Amended Agreement] was to have ARAMARINE and PRG share equally in the receipt of brokerage revenue (including contingencies) generated by the placement of business into the Purchasing Group Programs (with the exception of the $35 per vehicle payment to be paid to Aramarine from PRG's commission share), a constructive trust should be placed

over 50% of all such fees collected by PRG.

Counterel. ¶¶ 29, 30. As pleaded, the counterclaims that assert a right to a share in the fees and dues PRG collected, *i.e.*, breach of contract, theft of joint venture opportunity, constructive trust and breach of the duty of good faith and fair dealing, are anchored on the contention that the fees and dues constitute "contingencies" that are required to be shared pursuant to Section 4 of the Amended Agreement. *See* Counterel. ¶¶ 5, 6, 22, 30, 32, 33.

Although Aramarine does not trouble to explain why it abandoned its "contingencies" theory in favor of the Cayman Islands argument, the court is persuaded by PRG that it did so because the term "contingencies" as used in the Amended Agreement does not include the fees or dues paid to PRG, a fact apparently overlooked by Aramarine when it crafted its counterclaims. *See* affidavit of Blessinger, sworn to November 17, 2010 (Blessinger aff.), Ex. O, p 102-03 (testimony of Cummings to the effect that "contingencies" has a special meaning in the insurance industry and refers to profit-sharing commissions).

Nevertheless, there is nothing in Aramarine's new theory that establishes its *legal* entitlement to a share of the fees. To the contrary, having abandoned its "contingencies" theory, Aramarine has left itself in the position of claiming a share in fees and dues it now describes as improperly charged in the first place. Aramarine's new allegations, at most, simply raise questions about the probity of PRG's business practices. In sum, to the extent that Aramarine alleges an entitlement to a share of dues and fees collected by PRG, it cannot maintain its counterclaims for breach of contract, theft of joint venture opportunity, constructive trust and breach of the duty of good faith and fair dealing. These causes of action are dismissed.

In any event, the counterclaims for theft of joint venture opportunity and constructive trust

cannot survive, because the Amended Agreement provides that "the relationship of the parties shall be that of independent contractors and nothing herein shall create the relationship of principal and agent . . . or partners in a partnership . . . between the parties hereto." Elmasri aff., Ex. 4, Section 5. Thus, Aramarine's assertion that this document evidences a joint venture between Aramarine and PRG, with its attendant fiduciary duties (*see* Counterel. ¶¶ 1, 4, 21, 25), is flatly contradicted by its very terms. Further, because a necessary element of a constructive trust claim is the existence of a fiduciary relationship (*see Abacus Fed. Sav. Bank v Lim*, 75 AD3d 472, 473 [1st Dept 2010]), Aramarine cannot maintain that claim.

It follows that Aramarine's breach of fiduciary duty counterclaim, based on the "potential" adverse affect PRG's charging of fees may have had on the competitiveness of Silver Car's insurance product, cannot survive. As alleged, leaving aside its clearly speculative nature, this counterclaim is predicated on the existence of a joint-venture relationship between the parties that the Amended Agreement expressly disavows. Counterel. ¶ 25 ("As a joint venturer with Aramarine . . . PRG had a fiduciary obligation ...."). [6] However, Aramarine's second counterclaim seeking an accounting of premiums allegedly received by PRG during the second year of the Silver Car program survives. [7]

Turning to the remainder of the relief sought by PRG on its cross-motion, that branch seeking an order striking Aramarine's Appendixes 1 and 2 containing complete deposition

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[6] Aramarine's other arguments in opposition to the cross motion have been considered and are rejected as having no merit.

[7] Although not an issue reached by the court in its decision, the parties seek to establish, by offers of proof, Aramarine's knowledge, or lack thereof, of the fees charged by PRG. The court notes that its review of the record does not reveal any evidence that it feels conclusively establishes this fact one way or the other.

transcripts, is denied. Rule 16 (a) of the Rules of the Commercial Division provides that: "If a document to be annexed to an affidavit or affirmation is voluminous and only discrete portions are relevant to the motion, counsel shall attach excerpts and submit the full exhibit separately."

Finally, in light of the long-settled prohibition against the admissibility of evidence derived from settlement discussions, that branch of PRG's cross-motion seeking an order to strike the mediation memorandum, described in bold on the first page as "Confidential Submission for Mediator Only Prepared for Purposes of Mediation" and relied on by Aramarine to establish its damages on its counterclaims, is granted. *See Gutkind v George Lueders &Co.*, 267 NY 320, 329 (1935); *White v The Old Dominion Steamship Company*, 102 NY 660, 662 (1886); *Jones Lang Wootton USA v LeBoeuf, Lamb, Greene & MacRae*, 243 AD2d 168, 182 (1st Dept 1998); *Bigelow-Sanford, Inc. v Specialized Commercial Floors*, 77 AD2d 464, 465-67 (4th Dept 1980) (a party may, with impunity, attempt to buy his peace). Therefore, the mediation memorandum annexed as Ex. 20 to the Biging affirmation and as Ex. 39 to the Elmasri affidavit, as well as the excerpt that is annexed as Ex. 18 thereto, is stricken. Accordingly, it is

ORDERED that Aramarine Brokerage Inc.'s motion for summary judgment dismissing the Amended Complaint, is granted and PRG Brokerage Inc.'s cross-motion for summary judgment on its complaint, is denied; and it is further

ORDERED that Aramarine Brokerage Inc.'s motion for summary judgment on its Fifth Counterclaim, is denied; and it is further

ORDERED that PRG Brokerage Inc.'s cross-motion for summary judgment dismissing the counterclaims is granted to the extent of dismissing the First and Third through Sixth Counterclaims and is otherwise denied; and it is further

ORDERED that PRG Brokerage Inc.'s cross-motion for an order striking Aramarine Brokerage Inc.'s Appendixes 1 and 2 to this motion. is denied; and it further

ORDERED that PRG Brokerage Inc.'s cross-motion for an order striking the mediation memorandum that is annexed as Ex. 20 to the Biging affirmation and as Ex. 39 to the Elmasri affidavit, as well as the excerpt that is annexed as Ex. 18 thereto, is granted; and it is further

ORDERED that the parties shall appear for a pre-trial conference in Part 54 on April 17. 2012, at 12:00 p.m..

Dated: March 30, 2012

ENTER:

J.S.C.