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**FOR PUBLICATION**



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**CNMI SUPERIOR COURT**  
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**IN THE SUPERIOR COURT  
FOR THE  
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS**

<b>SALTY SAIPAN CORPORATION and</b>	)	<b>CIVIL CASE NO. 11-0082</b>
<b>DONICIA METTAO LIFOIFOI,</b>	)	
	)	<b>FINDINGS OF FACT AND</b>
<b>Plaintiffs,</b>	)	<b>CONCLUSIONS OF LAW AND ORDER</b>
	)	<b>IMPOSING CONSTRUCTIVE TRUSTS</b>
<b>v.</b>	)	<b>ON REAL ESTATE AGENT FOR</b>
	)	<b>CONSUMER PROTECTION ACT</b>
<b>MUSTAFA SHAKIR, SHAKIR CNMI</b>	)	<b>VIOLATION AND BREACH OF</b>
<b>INC. and SAMA HOLDINGS, LLC,</b>	)	<b>FIDUCIARY DUTY</b>
	)	
<b>Defendants.</b>	)	

**I. INTRODUCTION**

This matter came before the Court for a bench trial that began on March 4, 2013, and was completed on April 18, 2013, in Courtroom 220A. Plaintiff Salty Saipan Corporation (“Salty Saipan”) was represented by Colin Thompson, Esq. Plaintiff Donicia Mettao Lifoifoi (“Ms. Lifoifoi”) was represented by Robert T. Torres, Esq. The Defendants Mustafa Shakir (“Mr. Shakir”), Shakir CNMI Inc., and SAMA Holdings, LLC were represented by Stephen J. Nutting, Esq. The parties filed proposed findings of fact and conclusions of law on October 7 and 9, 2013.

This action concerns two real estate transactions, transferring leasehold interests in two adjoining parcels of real property, which occurred in the autumn of 2007. Ms. Lifoifoi owned one of the properties, and the estate of her late husband owned a long-term leasehold interest in the other. Salty Saipan was interested in acquiring a long-term leasehold interest in both properties. As

1 will be described more fully below, Mr. Shakir served as real estate agent and facilitated the  
2 creation of a long-term lease between Ms. Lifoifoi and Salty Saipan for the property owned by Ms.  
3 Lifoifoi. Mr. Shakir acquired the lease for the other property for himself from the estate of Ms.  
4 Lifoifoi's late husband. The issues underlying all the claims in this case are whether it was  
5 inequitable and contrary to Commonwealth law for Mr. Shakir, without full disclosure, to receive  
6 payment from both parties to the first transaction, and to obtain the leasehold interest himself in the  
7 second transaction.

8 Plaintiffs brought six claims against Defendants. Ms. Lifoifoi brought two claims: (1)  
9 professional malpractice based on Mr. Shakir's role as a real estate agent; and (2) breach of contract  
10 based on a brokerage agreement entered into by Ms. Lifoifoi and Mr. Shakir on behalf of Shakir  
11 CNMI Inc. Plaintiff Salty Saipan brought three claims against the Defendants: (1) professional  
12 malpractice based on Mr. Shakir's role as a real estate agent; (2) breach of contract based on an oral  
13 agreement concerning Mr. Shakir's role in acquiring an interest in real property for Salty Saipan;  
14 and (3) violation of the Consumer Protection Act, alleging violations of 4 CMC § 5105(l) & (m).  
15 Finally, the Plaintiffs together assert the claim that all profits made by Mr. Shakir from the second  
16 property, and all commissions received by Mr. Shakir in connection with the property transactions,  
17 were obtained by fraud, undue influence or other wrongful acts, and that a constructive trust has  
18 arisen in favor of the Plaintiffs.

19 Having considered the evidence, filings, arguments of the parties, and applicable law, the  
20 Court makes the following findings of fact and conclusions of law.

## 21 **II. FINDINGS OF FACT**

22 Based on the evidence presented at trial and the facts admitted in the pleadings, the Court  
23 finds that the following facts were established by a preponderance of the evidence.

24

1 **A. The Parties, the Properties, and the Real Estate Transactions**

2 The claims in this case involve transfers of interest in two parcels of adjacent real property,  
3 Tract No. 22597-R2 (“the Mettao Property”) and Tract No. 22597-2 (“the Salty Property”), that  
4 took place in November 2007. The Salty Property is owned in fee simple by Ms. Lifoifoi, a person  
5 of Northern Marianas descent. The Mettao Property was leased by Bonifacio and Francisa F.  
6 Mettao to Martin Lifoifoi, Ms. Lifoifoi’s late husband, for a period of fifty-five years, from October  
7 23, 1990 until October 23, 2045. During the autumn of 2007, the Mettao Property lease was held by  
8 the Estate of Martin Lifoifoi (the “Estate”). Ms. Lifoifoi and Juan Santiago Tenorio were co-  
9 executors of the Estate.

10 On November 2, 2007, Ms. Lifoifoi leased the Salty Property to Salty Saipan. Salty Saipan  
11 is a corporation existing and organized under the laws of the CNMI with its principal place of  
12 business on Saipan. Salty Saipan is owned by a Korean family. At the time of the transactions at  
13 issue in this case, Salty Saipan was largely directed by two sisters, Kyung Min Song (“Ms. Song”) and  
14 Kyung Won Song (“Ms. Ann”). In the autumn of 2007, Salty Saipan was seeking to lease a  
15 commercial property on Saipan for an acupuncture clinic for one of the family members. At the  
16 time, Ms. Lifoifoi was in default on a mortgage secured by the Salty Property and needed funds to  
17 avoid foreclosure and other penalties. The November 2, 2007 lease granted Salty Saipan a leasehold  
18 interest in the Salty Property for a term of fifty-five years in exchange for a payment of \$40,000 and  
19 the agreement that Salty Saipan would assume the existing mortgage on the property.

20 On November 16, 2007, the Estate, through the actions of co-executors Ms. Lifoifoi and  
21 Juan Tenorio, assigned the ground lease of the Mettao Property to Mr. Shakir. Mr. Shakir is a  
22 businessman who resides in Saipan and has been involved in the real estate business in the  
23 Commonwealth as an investor and agent since about 1992. Mr. Shakir operates a number of  
24 business entities that are also involved in the real estate business. Two of these entities are also

1 named as defendants in this case: (1) Shakir CNMI Inc. is a corporation organized and existing  
2 under the laws of the CNMI, with its principal place of business in Saipan; and (2) SAMA  
3 Holdings, LLC is a limited liability company organized and existing under the laws of the CNMI  
4 with its principal place of business in Saipan. In the November 16, 2007 assignment of ground  
5 lease, the Estate assigned the leasehold interests in the Mettao Property to Mr. Shakir in exchange  
6 for payment of \$40,000. This assignment was pre-approved by the probate court overseeing the  
7 disposition of the Estate on November 15, 2007. *In re Estate of Lifoifoi*, Civ. No 99-0071 (NMI  
8 Super. Ct. Nov. 15, 2007) (Order Approving Assignment of Lease).

9       There was a dispute concerning whether Mr. Shakir paid the \$40,000 due under the lease  
10 assignment, and that dispute was settled by Mr. Shakir and the executors of the Estate, as is  
11 reflected in the Petition for Final Distribution filed June 5, 2008 in Civil Action 99-0071,<sup>1</sup> and  
12 approved by the probate court on August 11, 2008. *In re Estate of Lifoifoi*, Civ. No. 99-0071 (NMI  
13 Super. Ct. Aug. 11, 2008) (Order of Final Distribution).

#### 14 **B. Mr. Shakir's Introduction to the Plaintiffs**

15       As noted above, in the autumn of 2007, Salty Saipan was looking for a commercial property  
16 to lease and Ms. Lifoifoi was facing foreclosure on a mortgage secured by the Salty Property. In  
17 September 2007, Ms. Ann, her husband, Gil Sang Park ("Mr. Park"), and her brother-in-law, Dr.  
18 Jung San Park ("Dr. Park"), met with Ms. Lifoifoi and discussed the possibility of leasing both the  
19 Salty Property and the Mettao Property. This conversation occurred before either Salty Saipan or  
20 Ms. Lifoifoi had spoken with Mr. Shakir. After the September meeting, Mr. Park had dinner with a  
21 family friend, Mr. Jung Gon Kim ("Mr. Kim"), and asked Mr. Kim if he would ask Mr. Shakir  
22 about the properties. Mr. Kim was well-acquainted with Mr. Shakir and knew Mr. Shakir as a friend

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24 <sup>1</sup> The Estate acknowledged that Mr. Shakir had paid the full consideration for the assignment of the Mettao Property lease by making payments to the Estate, Ms. Lifoifoi, and Commonwealth Health Center.

1 and as his tenant. The next morning after having dinner with Mr. Park, Mr. Kim spoke with Mr.  
2 Shakir and explained that Salty Saipan had an interest in leasing the two properties. After receiving  
3 this information, Mr. Shakir asked another one of his acquaintances, Rick Rangamar, if Mr.  
4 Rangamar knew Ms. Lifoifoi and could make contact. Mr. Rangamar did know Ms. Lifoifoi and set  
5 up a meeting between Ms. Lifoifoi and Mr. Shakir.

6 **C. Autumn 2007 Events**

7 Mr. Shakir and Ms. Lifoifoi met several times in September and October 2007. During the  
8 course of these meetings, they entered into several agreements. On September 21, 2007 and  
9 October 24, 2007, Mr. Shakir paid money to Ms. Lifoifoi that was understood by both parties to be  
10 advance payments for the money Ms. Lifoifoi would receive from leasing the Mettao Property to  
11 Mr. Shakir.<sup>2</sup> On October 13, 2007, Ms. Lifoifoi and Mr. Shakir attempted to enter into an  
12 Assignment of Ground Lease for the Mettao Property, under which the remainder of the 1990 lease  
13 would be assigned to Mr. Shakir. However, because Ms. Lifoifoi was not the owner of the 1990  
14 lease, this assignment was ineffective. Also on October 13, 2007, Ms. Lifoifoi and Mr. Shakir, on  
15 behalf of his company, Shakir CNMI Inc., entered into an Exclusive Brokerage Agreement to  
16 facilitate the lease of the Salty Property. Under the brokerage agreement, Mr. Shakir was to receive  
17 half of any amount paid under the lease agreement that exceeded the amount required to pay off the  
18 mortgage underlying the Salty Property. On October 29, 2007, Mr. Shakir loaned Ms. Lifoifoi \$300  
19 to be repaid with the proceeds of the lease of the Salty Property.

20 During this same period of time, September and October 2007, Mr. Shakir met with  
21 representatives of Salty Saipan. Additionally, Mr. Shakir had Mr. Kim communicate with Salty

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23 <sup>2</sup> The Court notes that Ms. Lifoifoi testified that she was unaware that Mr. Shakir would be the assignee of the Mettao  
24 Property lease. However, the Court did not find this testimony credible given the consistent documentation that Mr. Shakir intended to lease the Mettao Property, the assignment agreement listing Mr. Shakir as the assignee, and the multitude of payments from September 21, 2007 to May 9, 2008 from Mr. Shakir to Ms. Lifoifoi for the Mettao Property.

1 Saipan about the properties. In particular, Mr. Shakir asked Mr. Kim to relay the message that the  
2 Salty Property was available for lease; that the Mettao Property had legal problems and was not  
3 currently available; and that the Mettao Property would be available for Salty Saipan to lease later  
4 at a reasonable price. Mr. Shakir did not communicate to Salty Saipan that he sought to obtain the  
5 leasehold interest in the Mettao Property, either temporarily or permanently. Nor did he  
6 communicate that fact to Mr. Kim. Similarly, Mr. Shakir did not communicate to Salty Saipan or  
7 Mr. Kim that he had entered various advance payment or loan repayment agreements with Ms.  
8 Lifoifoi.

9           Upon hearing that the Mettao Property was unavailable due to legal problems, Salty Saipan  
10 agreed to lease just the Salty Property. Based on the Mr. Shakir's representations, communicated  
11 through Mr. Kim, Salty Saipan believed that the Mettao Property transaction would shortly follow  
12 at a minimal price ("pocket change"). Salty Saipan and Ms. Lifoifoi entered the Ground Lease  
13 Agreement on November 2, 2007, and Salty Saipan paid \$40,000 to Ms. Lifoifoi that day. Under  
14 the Ground Lease Agreement, Salty Saipan agreed to "assume payment of a debt on an existing real  
15 property mortgage encumbering the property with the City Trust Bank." Pl.'s Ex. 7 at 3. City Trust  
16 Bank would not agree to allow Salty Saipan to take over the mortgage, so Salty Saipan, in order to  
17 fulfill its responsibility under the Ground Lease Agreement, made payments to City Trust Bank  
18 necessary to avoid foreclosure until Salty Saipan was able to obtain a separate loan in June 2008.

19           Mr. Shakir, directly and through Mr. Kim, provided several services to Salty Saipan in the  
20 course of the Salty Property lease transaction. Mr. Shakir obtained a title report and provided it to  
21 Salty Saipan. Mr. Shakir helped Salty Saipan obtain the financing necessary to pay off Ms.  
22 Lifoifoi's mortgage underlying the Salty Property, which was a material term of the ground lease.  
23 To obtain this loan, Mr. Shakir contacted Mr. Robert DeCourteney, president and chief executive  
24 officer of the Bank of Federated States of Micronesia ("Bank of FSM"). In late 2007, when Mr.

1 Shakir contacted Mr. DeCourteney about a loan for Salty Saipan, Bank of FSM did not have a  
2 Saipan office, so a client introduction was necessary to have a loan application reviewed. The Bank  
3 of FSM first denied Salty Saipan’s loan application. After the loan application was denied, Mr.  
4 Shakir approached Mr. DeCourteney on behalf of Salty Saipan again, with a request for a smaller  
5 loan to be paid back over a longer period of time. That loan application was approved.

6 Mr. Shakir charged Salty Saipan a three-percent commission on the price of the lease  
7 agreement, totaling \$9,350, and a three-percent commission for his assistance with obtaining the  
8 loan from Bank of FSM, totaling \$6,000. Salty Saipan paid Mr. Shakir \$9,350 on November 13,  
9 2007, and \$6,000 on June 10, 2008. These commission payments were in addition to the \$20,000  
10 commission that Ms. Lifoifoi paid to Mr. Shakir under their written brokerage agreement.

11 In addition to the September 21, 2007 and October 24, 2007 advance payments for the  
12 Mettao Property lease assignment, in November and December 2007, Mr. Shakir and Ms. Lifoifoi  
13 entered into five other temporary loan agreements, wherein Mr. Shakir gave Ms. Lifoifoi cash  
14 payments to be repaid when the Mettao Property was cleared from probate.<sup>3</sup> A portion of this  
15 money was used by Ms. Lifoifoi and her family members to cover the expenses of moving out of  
16 the Mettao Property. During the course of Ms. Lifoifoi’s dealings with Mr. Shakir, she was assisted  
17 by her daughter, Teresa Lifoifoi James, and her daughter’s husband.

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21 <sup>3</sup> The wording of these various agreements differs slightly, but all of the agreements indicate that Mr. Shakir is giving  
22 Ms. Lifoifoi cash, and that the cash is an advance that will be repaid through the Mettao Property. See Pl.’s Exs. 18-22  
23 (Ms. Lifoifoi agrees to repay sums of money “borrowed as temporary loan payable upon completion of probate of my  
24 lot TR 2257 R2”); Pl.’s Ex. 17 (Ms. Lifoifoi agrees to pay a sum of money “advanced upon receiving payment for my  
lot leased to him and upon completion of the probate”); Pl.’s Ex. 15 (Ms. Lifoifoi acknowledges the receipt of cash “as  
advance payment for the assignment of Lot TR-22597-R2); and Pl.’s Ex. 11 (Ms. Lifoifoi acknowledges the receipt of  
advance payment for the assignment of “my lot # 22597-R2,” and “agree[s] that Mr. Shakir will deduct the above  
amount from the downpayment to be paid upon signing of the assignment of lease.”).

1 **D. Mettao Property Offered to Salty Saipan**

2 On June 5, 2008, the probate court issued its Order of Final Distribution and in doing so,  
3 recognized that all terms of the lease assignment from the Estate to Mr. Shakir had been performed.  
4 In the late summer or early fall of 2008, after the probate court issued the Order of Final  
5 Distribution, Mr. Shakir offered to assign the lease of the Mettao Property to Salty Saipan. This  
6 offer was orally conveyed by Mr. Kim to Ms. Song. Mr. Shakir recalls that the price he asked was  
7 \$66,000. Both Song sisters recall that the offered price was \$160,000. Mr. Kim, recalls that the  
8 price was something between \$100,000 and \$150,000. The Court finds that the evidence  
9 establishes that the offered price was \$160,000.<sup>4</sup> Salty Saipan, declined that offer.

10 **E. Driveway Blockage, Easement Offer, and Mettao Property Improvements and Subleases**

11 A year passed with Salty Saipan occupying the Salty Property. For part of that time a church  
12 sub-leased the Mettao Property from Mr. Shakir. Then, in late 2009, with no notice to Salty Saipan  
13 large piles of gravel were placed on the driveway to the parking lot behind the Salty Property. As a  
14 result, the cars parked in the back were blocked in. Mr. Kim called Mr. Shakir on behalf of Salty  
15 Saipan to find out what was going on. During that conversation, Mr. Shakir told Mr. Kim that Mr.  
16 Shakir's friend from India had bought the lease of the Mettao Property; that the driveway used by  
17 Salty Saipan was actually on the Mettao Property; and that the friend was planning to build a  
18 building that went up to the property line, so Salty Saipan could not use the driveway any more. Mr.  
19 Shakir explained that the friend might be willing to grant an easement to Salty Saipan for around  
20 \$20,000. Mr. Shakir later wrote a letter to Dr. Park representing that Mr. Shakir's friend from India  
21 would grant an easement for the driveway for \$25,000.

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23 <sup>4</sup> Mr. Shakir's testimony about the offered price is not credible given that the evidence also demonstrated that Mr.  
24 Shakir offered the Mettao Property lease to Ms. Song individually at a later time for \$120,000. There would be no  
reason for Mr. Shakir to make a second, higher, offer after the first offer was declined. Also, Mr. Kim's recollection of  
the offered price was much closer to the figure testified to by the Song sisters than the figure testified to by Mr. Shakir.



1 Salty Saipan declined all of the easement offers and instead invested in building a new  
2 driveway on the other side of the building on the Salty Property. This cost Salty Saipan at least  
3 \$3,000.

4 At the time that the original driveway was blocked with gravel, Mr. Shakir was the owner of  
5 the Mettao Property lease. The Mettao Property lease was never transferred to his friend from India.  
6 The Mettao Property lease was transferred at some point before September 2010 to SAMA  
7 Holdings, LLC, one of the companies controlled by Mr. Shakir that he uses as a holding company  
8 for some of his property interests. Mr. Shakir spent \$167,000 to construct a new building on the  
9 Mettao Property. On September 2, 2010, Mr. Shakir, on behalf of SAMA Holdings, LLC, subleased  
10 the portion of the Mettao Property with the new building to Union of Professionals, a CNMI  
11 corporation, for a term of thirty-five years in exchange for \$225,000, of which SAMA Holdings had  
12 received about \$125,000 at the time of trial. Mr. Shakir has also subleased the remaining portion of  
13 the property to various sublessors, and had received approximately \$33,500.00 in rent at the time of  
14 trial.

### 15 **III. CONCLUSIONS OF LAW**

#### 16 **A. Salty Saipan’s Professional Malpractice Claim**

17 Salty Saipan brought a claim of “professional malpractice” against Shakir based on the  
18 “professional relationship [that] existed between Shakir, as a professional real estate broker and  
19 agent, and Salty Saipan as client.”<sup>5</sup>

20 Unlike all other U.S jurisdictions, in the CNMI there are no statutes or regulations that  
21 specifically govern the practice of real estate brokerage. Thus, in the CNMI, terms such as “real  
22 estate broker” that are defined by statute and regulated by licensing requirements in other  
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24 <sup>5</sup> First Amended Complaint at 13 (Third Claim for Relief).

1 jurisdictions, have no established legal meaning. Instead, in the CNMI, principles of agency law  
2 govern the relationship between a real estate agent and the client. Because there is no written or  
3 customary law governing the agency relationship, agency law is governed by the American Law  
4 Institute’s Restatements of the Law. 7 CMC § 3401. The CNMI Supreme Court has applied rules  
5 from both the second and third Restatements of Agency. *See Repeki v. MAC Homes (Saipan) Co.*, 2  
6 NMI 33, 49-52 (applying rules from Restatement (Second) of Agency); *and Kabir v. CNMI Public*  
7 *School System*, 2009 MP 19 ¶¶ 45-46 (applying rule from Restatement (Third) of Agency).

8 An agency relationship is a fiduciary relationship where both parties consent that one  
9 person, the agent, will act on behalf and subject to the control of another person, the principal. *See*  
10 *Repeki*, 2 NMI at 49 (quoting Restatement (Second) of Agency § 1 (1958)). Within the scope of the  
11 agency agreement, the agent is a fiduciary and has power to change legal relationships on behalf of  
12 the principal, and the principal has a right to control the agent’s actions. *See id.*, (quoting  
13 Restatement (Second) of Agency §§ 12-14). These characteristics are essential. *Id.* at 49.

14 In this case, Salty Saipan has not established the existence of an agency relationship  
15 between Salty Saipan and Mr. Shakir or his companies. While there was evidence presented  
16 concerning the parties’ expectations, there was no evidence that indicated that there was an  
17 agreement that Mr. Shakir had the authority to act on behalf of Salty Saipan, or that Salty Saipan  
18 exercised control over Mr. Shakir’s actions. The evidence indicates that once Mr. Kim informed  
19 Mr. Shakir that Salty Saipan was interested in acquiring long-term leasehold interests in the Salty  
20 and Mettao Properties, Mr. Shakir took many actions: He determined that the Mettao Property was  
21 not readily available and had that information communicated to Salty Saipan; He provided  
22 preliminary title reports to Salty Saipan; He used his professional network to connect Salty Saipan  
23 with financing sources and assisted with the preparation of financing applications; He, through Mr.

1 Kim, communicated the Salty Property offer from Ms. Lifoifoi to Salty Saipan; And, he connected  
2 Salty Saipan with legal counsel.

3 There was no evidence presented that the parties agreed that Mr. Shakir had the authority to  
4 legally bind Salty Saipan, or that Salty Saipan had the power to control Mr. Shakir's conduct.  
5 Moreover, many of the actions taken by Mr. Shakir could be characterized as actions he took on  
6 behalf of, and under the control of, Ms. Lifoifoi, because their aim was to facilitate the Salty  
7 Property transaction.

8 Nor was there evidence that demonstrated an agreement that Mr. Shakir obtained the Mettao  
9 Property lease on Salty Saipan's behalf. Instead, Mr. Shakir communicated to Salty Saipan that the  
10 Mettao Property lease would be available at a reasonable price at a later time.<sup>6</sup>

11 Salty Saipan paid Mr. Shakir \$9,350 and \$6,000 for his assistance with the Salty Property  
12 transaction including obtaining the financing for the transaction. However, payment by the property  
13 buyer does not establish the existence of an agency relationship. *See Repeki*, 2 NMI at 43, 51.

14 In *Repeki*, the CNMI Supreme Court considered whether an agency relationship existed  
15 between MAC Homes and Anthony Pellegrino. *Repeki*, 2 NMI at 49-52. MAC Homes was a  
16 company principally owned by Kazutoyo Sonobe, and Pellegrino was an acquaintance of Sonobe's.  
17 *Id.* at 38. Pellegrino facilitated MAC Homes' long-term lease of real property in the CNMI. *Id.* at  
18 38-41. Although the trial court's analysis of agency relationships was more in-depth, the only issue  
19 on appeal was whether Pellegrino was MAC Homes' agent for the purpose of investigating the title  
20 of the real property.<sup>7</sup> *Id.* at 49. In *Repeki*, Sonobe approached Pellegrino with information that

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22 <sup>6</sup> The falsity of this representation and unreasonableness of the actual price offered will be addressed below in the  
23 sections concerning Salty Saipan's Consumer Protection Act and constructive trust claims. *See below*, §§ III.C, III.G(1).

24 <sup>7</sup> The plaintiff in the underlying case brought a quiet title action against MAC Homes and was successful. *Id.* at 37-38.  
However, the trial court awarded a \$332,000 lien on the property to MAC Homes because of the buildings MAC  
Homes constructed on the property, enhancing its value, while under the belief that it had a valid 55-year lease. *Id.* The  
appeal in *Repeki*, was brought by the plaintiff, who challenged the trial court's award of the lien. *Id.* The

1 MAC Homes was interested in leasing property; and Pellegrino, with the assistance of two other  
2 individuals, promoted the lease of a particular lot, suggested the terms of the lease, and assured  
3 MAC Homes’ representatives on two separate occasions that the title to the property was sound. *Id.*  
4 at 38-40. Pellegrino and the two other individuals split a “commission” of over \$68,000, which was  
5 the difference between the price agreed to by the seller of the lease, and the price paid by MAC  
6 Homes. Neither the seller nor MAC Homes was aware of the price discrepancy and resultant  
7 “commission.” *Id.* at 38-41.

8         The trial court found that Pellegrino and the two others were not agents of MAC Homes  
9 because there was no agency contract; they were not employed by MAC Homes; and, they had no  
10 authority to legally bind MAC Homes. *Id.* at 42-43. The fact that the “commission” earned was  
11 money paid by MAC Homes was not dispositive. *Id.* at 43. The CNMI Supreme Court also found  
12 that there was no agency relationship between Pellegrino and MAC Homes because Pellegrino  
13 lacked authority to legally bind MAC Homes and because he was acting in his own interest, not  
14 subject to the control of MAC Homes. *Id.* at 51.

15         The facts of the instant case are similar to the facts in *Repeki*. In both cases, the purchaser of  
16 a long-term lease interest sought the help of an acquaintance to facilitate the transfer, and such  
17 transfer was facilitated, with a resultant payment to the facilitator. But, both cases lack evidence of  
18 an agency agreement under which the purchaser exercises control over the person facilitating the  
19 transfer and the facilitator has legal authority to bind the purchaser.

20         Accordingly, the Court finds that Salty Saipan did not establish the existence of an agency  
21 relationship, and finds that Defendants are not liable for professional malpractice.

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24 plaintiff/appellant sought to demonstrate an agency relationship between Pellegrino and MAC Homes so that  
Pellegrino’s knowledge that the title was not clear could be imputed to MAC Homes. *Id.* at 42-43, 51.

1 **B. Salty Saipan’s Breach of Contract Claim**

2 Salty Saipan next alleges a breach of contract.<sup>8</sup> To prove a breach of contract claim, Salty  
3 Saipan must establish (1) an enforceable contract; (2) Defendants’ failure to perform; and (3)  
4 resulting damages. *PRC LLC v. Chang Shin Resort Corp.*, Civ. No. 12-0163 (NMI Super. Ct. Mar.  
5 8, 2013) (Order Granting in Part and Denying in Part Plaintiffs’ Motion for Summary Judgment at  
6 4); *and Fujie v. Atalig*, Civ. No. 10-0131 (NMI Super. Ct. Feb. 3, 2011) (Order Denying  
7 Defendants’ Motion to Dismiss at 4). To be enforceable, a contract requires mutual assent and  
8 consideration. *PRC LLC*, Civ. No. 12-0163 at 4.

9 Salty Saipan asserts that there was an enforceable contract between Salty Saipan and Mr.  
10 Shakir. Salty Saipan maintains that Mr. Shakir agreed to provide services that secured the transfer  
11 of leasehold interests to the Salty Property and Mettao Property to Salty Saipan for the lowest  
12 possible price in exchange for the payment of a 3% commission. The evidence presented at trial did  
13 not establish the existence of such a mutually-agreed upon bargain. Instead, the evidence  
14 established that Salty Saipan requested the assistance of Mr. Shakir in late September 2007, but  
15 only agreed to pay the 3% commission in November, after the terms of the underlying property  
16 transactions had already changed to reflect the fact that the Mettao Property interests were not  
17 immediately transferrable. Salty Saipan agreed to the 3% commission as part of the Salty Property  
18 transaction. And Salty Saipan was not bound to purchase the interest in the Mettao Property when it  
19 became available. There was no meeting of the minds between Mr. Shakir and Salty Saipan as to  
20 the terms of the bargain. Instead, the testimony of the Song sisters and Mr. Kim indicated that Mr.  
21 Shakir assisted Salty Saipan as a friend and that the parties never had an explicit agreement.

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<sup>8</sup> First Amended Complaint at 15 (Fourth Claim for Relief).

1 Salty Saipan’s assertion of breach is two-fold: (1) Mr. Shakir breached the contract by  
2 failing to obtain the lowest price for Salty Saipan because he was simultaneously working for Ms.  
3 Lifoifoi without Salty Saipan’s consent; and (2) Mr. Shakir breached the contract by failing to  
4 facilitate the transfer of the Mettao Property to Salty Saipan, but instead obtained the leasehold  
5 interest of the Mettao Property himself, and then offered to sell that interest to Salty Saipan at an  
6 unfairly high price.

7 However, the evidence presented did not support the existence of a mutual agreement that  
8 included those terms. Instead, the evidence demonstrated that representatives of Salty Saipan were  
9 aware that Mr. Shakir was assisting Ms. Lifoifoi. The evidence also demonstrated that Salty Saipan  
10 was in a hurry to obtain property, and that when they found out that the Mettao Property was not  
11 immediately available, Salty Saipan agreed to purchase the leasehold interest in just the Salty  
12 Property. There was evidence that Mr. Shakir promised to offer the Mettao Property to Salty Saipan  
13 when it was available for transfer at a reasonable price. There was no evidence that such a promise  
14 was part of a mutually-bargained-for exchange.

15 Accordingly, the Court finds that Salty Saipan failed to prove a breach of contract by the  
16 Defendants because there was not sufficient proof the existence of a contract that included the terms  
17 allegedly breached by Mr. Shakir. Thus, the Defendants are not liable for a breach of contract.

### 18 **C. Salty Saipan’s Consumer Protection Act Claim**

19 Salty Saipan also alleged violations of the Consumer Protection Act.<sup>9</sup> The Consumer  
20 Protection Act (“CPA”) makes unlawful a variety of “unfair and deceptive acts or practices in the  
21 conduct of any trade or commerce.” 4 CMC § 5105. Salty Saipan alleges violations of subsections  
22 (l) and (m) in this case. Subsection (l) states that “[e]ngaging in any other conduct which similarly

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24 <sup>9</sup> First Amended Complaint at 17 (“Sixth Claim for Relief”).

1 creates a likelihood of confusion of misunderstanding” is unlawful. 4 CMC § 5105(l). This  
2 subsection follows eleven others that describe conduct such as mislabeling and misrepresenting the  
3 quality, price, or availability of goods and services. 4 CMC §§ 5105(a)-(k). Subsection (m) states  
4 that “[e]ngaging in any act or practice which is unfair or deceptive to the consumer” is unlawful.  
5 4 CMC § 5105(m); *Ishimatu v. Royal Crown Ins. Corp.*, 2010 MP 8 ¶ 22. The definition of  
6 “commerce” and “trade” under the CPA includes: “the sale, advertising, offering for sale,  
7 contracting for sale, exchange, distribution for consideration, or solicitation for purchase to the  
8 general public . . . any service[.]” 4 CMC § 5104(b). Under the CPA:

9 Any person aggrieved as a result of a violation of [the CPA] may bring an action in  
10 the Commonwealth Superior Court for such legal or equitable relief as the court may  
11 order. In addition to actual damages, the court shall award liquidated damages in an  
amount equal to the actual damages in cases of willful violations, and shall award  
costs and reasonable attorney’s fees if the plaintiff prevails.

12 4 CMC § 5112(a).

13 Deceit is “the act of intentionally giving a false impression.” BLACK’S LAW DICTIONARY  
14 369 (Abridged 9th ed. 2010). And under state and federal consumer protection laws, a deceptive act  
15 is one that is “likely to deceive a consumer acting reasonably under similar circumstances.” *Id.*  
16 Thus, a practice that is deceptive to a particular consumer is one that was intended to give a false  
17 impression, and would have given such false impression to any consumer in a similar circumstance.

18 The CNMI Supreme Court has considered whether commercial acts were unfair and  
19 deceptive several times. Acts found to be deceptive include a financial company influencing a  
20 daughter to assume her deceased mother’s debt, even though the daughter had no legal obligation to  
21 do so; and, an insurance company repeatedly denying a claim that was covered under an insurance  
22 plan. *Isla Fin. Servs. v. Sablan*, 2001 MP 21 ¶¶ 23-25; and *Ishimatu v. Royal Crown Ins. Corp.*,  
23 2010 MP 8 ¶ 25. In *Agulto v. Northern Marianas Investment Group, Ltd.*, 4 NMI 7, 10 (1993), the  
24 allegations were that the defendant acted deceptively by concealing a poker machine malfunction,

1 misreporting the number of points won on poker machines, and refusing to pay the consumer. In  
2 *Agulto*, there was no finding of unfair or deceptive acts because sufficient evidence was not  
3 presented to establish those allegations, and there were legitimate explanations offered for all of the  
4 alleged acts. *Id.*

5         The Court finds that Mr. Shakir's conduct in the transactions underlying this case was  
6 unfair, deceptive, and confusing to Salty Saipan. As a preliminary matter, Mr. Shakir actions were  
7 commercial in nature, as he provided services to Salty Saipan and was paid \$15,350.00 for those  
8 services. *See* 4 CMC § 5104(b). Mr. Shakir's conduct was unlawfully confusing because he  
9 misrepresented the character and scope of his services. *See* 4 CMC § 5105(l). Mr. Shakir holds  
10 himself out as a real estate broker, but is also aware that there are no requirements for the practice  
11 of real estate brokerage in the CNMI. The evidence established that Mr. Shakir was first approached  
12 by Salty Saipan and that at all times he knew that they sought assistance acquiring the leasehold  
13 interests in both the Salty and Mettao Properties. Salty Saipan approached Mr. Shakir because he  
14 held himself out as a real estate professional, and both his words and actions represented to Salty  
15 Saipan that he was protecting their interests. The evidence established that not only was Salty  
16 Saipan confused about Mr. Shakir's role in the land transaction, but also that Mr. Shakir did not  
17 honestly communicate his role to Salty Saipan. The Court finds that this conduct violates 4 CMC  
18 § 5105(l) and is unlawfully confusing to the consumer.

19         Mr. Shakir's conduct was also unlawfully deceptive and unfair to Salty Saipan. *See* 4 CMC  
20 § 5105(m). Mr. Shakir established through his own testimony that his primary goal in the land  
21 transactions was to protect his interests. As discussed above, Mr. Shakir violated no specific  
22 contractual obligations, nor did he enter into an agency relationship with Salty Saipan. This lack of  
23 formal agreement was deceptive in itself. He gave the impression to Salty Saipan that he was  
24



1 providing a service to the corporation, when in reality, he scooped up the property rights that they  
2 requested assistance with.

3 Mr. Shakir never explained the legal barriers to acquiring the Mettao Properties to Salty  
4 Saipan, and did not disclose to Salty Saipan or Mr. Kim that he personally was obtaining the  
5 leasehold interest to the Mettao Property because he had been advancing money to Ms. Lifoifoi.  
6 Mr. Shakir never offered to obtain the Mettao Property from the Estate for Salty Saipan, even  
7 though he knew Salty Saipan was interested in the property. He communicated to Salty Saipan that  
8 the Mettao Property would be available in the future at a “reasonable price,” yet he acquired the  
9 interests in the Mettao Property for \$40,000, but offered the property to Salty Saipan for \$160,000.  
10 The Court finds that offered price to be unreasonable, given Mr. Shakir’s own testimony that he  
11 told Ms. Lifoifoi \$60,000 was an unfairly high price for the Mettao Property.

12 The evidence presented concerning Mr. Shakir’s communications about the easement also  
13 indicated that the act of concealing his ownership of the Mettao Property lease was deceptive and  
14 intentional. When, at the request of Salty Saipan, Mr. Kim contacted Mr. Shakir about the business’  
15 driveway being blocked, Mr. Shakir represented that his friend from India had acquired the  
16 leasehold interest in the Mettao Property and requested easement payments from Salty Saipan. The  
17 evidence demonstrated that the friend from India never obtained the leasehold interest and Mr.  
18 Shakir never disclosed to Salty Saipan that his company was the owner of the Mettao Property  
19 leasehold interest.

20 Accordingly, the Court finds that Mr. Shakir’s conduct violated 4 CMC § 5105(m) and was  
21 unlawfully deceptive and unfair to Salty Saipan. Salty Saipan has requested the equitable remedy of  
22 constructive trust, which will be discussed further below. The Court finds that Salty Saipan is  
23 entitled to costs and reasonable attorney’s fees pursuant to 4 CMC § 5112(a).

24

1 **D. Ms. Lifoifoi's Claims are Limited to the Salty Property Transaction**

2 Before addressing Ms. Lifoifoi's claims individually, the Court finds that the only  
3 transaction at issue concerning Ms. Lifoifoi's claims is the lease agreement for the Salty Property.  
4 There are multiple, legally sufficient reasons that the transfer of the Mettao Property from the Estate  
5 to Mr. Shakir is not at issue.

6 First, although the Plaintiffs consistently refer to both Properties as one for the purpose of  
7 proving the various claims, it is undisputed that the ownership of the properties was legally distinct.  
8 Ms. Lifoifoi did not own the leasehold interest in the Mettao Property; instead, the Mettao Property  
9 transaction was between the Estate and Mr. Shakir. Although preliminary discussions between all  
10 parties concerned both properties, Ms. Lifoifoi did not own the leasehold interest in the Mettao  
11 Property, thus she could not transfer it, nor could she enlist an agent to do so.

12 Second, the scope of the agency agreement, the October 13, 2007 Exclusive Brokerage  
13 Agreement, between Ms. Lifoifoi and Shakir CNMI Inc. was limited to the Salty Property.

14 Third, the evidence did not establish the existence of any additional agreement between Ms.  
15 Lifoifoi and Mr. Shakir or his companies, that the Mettao Property would eventually be transferred  
16 to Salty Saipan. Although Ms. Lifoifoi testified that this was her understanding, this testimony was  
17 not credible in light of the overwhelming documentary evidence to the contrary. Ms. Lifoifoi signed  
18 multiple loan and advance payment agreements stating that she was receiving money from Mr.  
19 Shakir in exchange for his future leasehold interest in the Mettao Property. Similarly Ms. Lifoifoi  
20 signed several documents in her capacity as executrix of the Estate that specifically listed Mr.  
21 Shakir as the assignee of the Mettao Property leasehold interest.

22 Finally, any claim with its basis in the lease assignment between the Estate and Mr. Shakir  
23 is barred by the doctrine of res judicata. Under the doctrine of res judicata, once final judgment has  
24 been entered on the merits of an action, parties or their privies are precluded from relitigating issues

1 that were or could have been raised in that action. *Santos v. Santos*, 4 NMI 206, 209 (1994)  
2 (internal citations omitted). Whether a prior judgment has a res judicata effect depends upon the  
3 scope of the prior cause of action. *In re Estate of Camacho*, 4 NMI 22, 25 (1993). “[A] valid  
4 judgment extinguishes all rights of a plaintiff to remedies against the defendant with respect to all  
5 or any part of the transaction, or series of connected transactions, out of which the action arose,  
6 including remedies or forms of relief not demanded in the first action.” *Marianas Pub. Land Corp.*  
7 *v. Kan Pac. Saipan, Ltd.*, 1 NMI 431, 437 (1990) (citing Restatement (Second) of Judgments §§ 24,  
8 25). Res judicata applies with heightened force to final judgments of probate courts. *In re Estate of*  
9 *Hillblom*, 2011 MP 5 ¶ 14.

10 Here, the scope of the probate court proceedings included determinations that Mr. Shakir  
11 paid the full consideration for the assignment of the Mettao Property lease by making payments to  
12 the Estate, Ms. Lifoifoi, and Commonwealth Health Center.<sup>10</sup> This was a final decision of the  
13 probate court. And while the lease assignment was between the Estate and Mr. Shakir, the Estate  
14 allowed some of the consideration for the lease assignment to be paid directly to Ms. Lifoifoi. It  
15 was that amount paid directly to Ms. Lifoifoi that was contested and determined in the probate  
16 proceedings. Thus, Ms. Lifoifoi was able to bring her personal claims concerning the Mettao  
17 Property assignment in the probate case.<sup>11</sup> Accordingly, the Court finds that under the doctrine of  
18 res judicata, Ms. Lifoifoi is barred from relitigating the issue of the amount of consideration that  
19 was or should have been paid by Mr. Shakir for the assignment of the Mettao Property.

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22 <sup>10</sup> See *In re Estate of Lifoifoi*, Civ. No. 99-0071 (NMI Super. Ct. Aug. 11, 2008) (Order of Final Distribution); and  
23 Resp’t’s Ex. J (June 3, 2008 Petition for Final Distribution).

24 <sup>11</sup> Arguably, Ms. Lifoifoi did not have the information that the Mettao Property was not transferred to Salty Saipan  
during the course of the probate proceedings. However, as described earlier, the evidence did not establish any  
agreement between Ms. Lifoifoi and Mr. Shakir that the Mettao Property lease would eventually be transferred to Salty  
Saipan.

1 For all of the above-stated reasons, the only transaction the Court will consider in  
2 determining whether Ms. Lifoifoi has proved her claims against Defendants is the Salty Property  
3 lease. Specifically, Ms. Lifoifoi's claims of breach of fiduciary duty that have their basis in Mr.  
4 Shakir's acquisition of the Mettao Property leasehold interest and the amount paid for that leasehold  
5 interest, including the amount paid through advance payments or loans, are barred for all of the  
6 reasons above.

7 **E. Ms. Lifoifoi's Professional Malpractice Claim**

8 Ms. Lifoifoi brought a claim of professional malpractice against Defendants based on the  
9 agency relationship between Ms. Lifoifoi as principal and Mr. Shakir of Shakir CNMI Inc. as the  
10 agent.<sup>12</sup> As described above, the relationship between a real estate agent and client in the CNMI is  
11 governed by agency law as there are no Commonwealth statutes or regulations that control the  
12 practice of real estate brokerage. The elements of a breach of fiduciary duty claim vary depending  
13 upon the particular duty breached. In the most general terms, agents must provide their services in  
14 good faith and have the duties of service, obedience, and loyalty to their principals. *See* Restatement  
15 (Second) of Agency §§ 377-398; *and* Restatement (Third) of Agency §§ 8.01-8.12. The only  
16 allegation of breach of fiduciary duty that concerns the Salty Property transaction is that Mr. Shakir  
17 did not disclose to Ms. Lifoifoi the fact that he was also providing professional services to and  
18 received payments from Salty Saipan.

19 The existence of an agency relationship between Shakir CNMI Inc. and Ms. Lifoifoi is  
20 uncontested in this case, and was memorialized in the October 13, 2007 Exclusive Brokerage  
21 Agreement. Under that agreement, Shakir CNMI Inc., through Mr. Shakir, agreed to sell the Salty  
22 Property "for the amount due to the mortgage loan encumbered." Pl.'s Ex. 10 at 5. In exchange,  
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24 <sup>12</sup> First Amended Complaint at 9 ("First Claim for Relief").

1 “[a]ny amount over the mortgage settlement shall be equally divided between [Shakir CNMI Inc.]  
2 and [Ms. Lifoifoi].” Pl.’s Ex. 10 at 1.

3 As detailed above, although Mr. Shakir provided services to Salty Saipan and received  
4 payment, an agency relationship did not exist between them because Mr. Shakir did not have the  
5 authority to act on Salty Saipan’s behalf, and Salty Saipan did not have the ability to control Mr.  
6 Shakir. There was no agency relationship between Salty Saipan and Mr. Shakir or any of his  
7 companies. Thus, Mr. Shakir was not practicing dual agency. *See* Restatement (Second) of Agency  
8 § 392; *and* Restatement (Third) of Agency § 8.03. However, an agent’s duty to disclose material  
9 information to the principal is not limited to situations of dual agency.

10 Both the Second and Third Restatements of Agency impose on an agent the duty to refrain  
11 from acquiring a benefit from a third party in connection with transactions covered by the agency  
12 agreement, and to give any profit made by the agent on the transaction to the principal. Because the  
13 agent owes a duty of loyalty to a principal, “[u]nless otherwise agreed, an agent is subject to a duty  
14 to his principal not to act on behalf of an adverse party in a transaction connected with his agency  
15 without the principal’s knowledge.” Restatement (Second) of Agency § 391. Evidence of “the  
16 receipt of anything of substantial nature” from the adverse party is sufficient to support a judgment  
17 against an agent. *Id.* at cmt. e. Likewise, “[u]nless otherwise agreed, an agent who makes a profit in  
18 connection with the transactions conducted by him on behalf of the principal is under a duty to give  
19 such profit to the principal.” Restatement (Second) of Agency § 388.

20 The Restatement (Third) of Agency sets forth a similar rule: “An agent has a duty not to  
21 acquire a material benefit from a third party in connection with transactions conducted or other  
22 actions taken on behalf of the principal or otherwise through the agent’s use of the agent’s  
23 position.” Restatement (Third) Agency § 8.02. Harm to the principal is not required to establish  
24 liability of the agent. *Id.* at cmt. b (notes following illustrations 1 and 2). Under section 8.06 of the

1 Restatement (Third) of Agency, conduct that would ordinarily violate section 8.02 is not a breach if  
2 the principal consents, so long as:

3 (a) in obtaining the principal's consent the agent (i) acts in good faith; (ii) discloses  
4 all material facts that the agent knows, has reason to know, or should know would  
5 reasonably affect the principal's judgment unless the principal has manifested that  
6 such facts are already known by the principal or that the principal does not wish to  
7 know them, and (iii) otherwise deals fairly with the principal; and

8 (b) the principal's consent concerns either a specific act or transaction, or acts or  
9 transactions of a specified type that could reasonably be expected to occur in the  
10 ordinary course of the agency relationship.

11 § 8.06(1).

12 The Court directed supplemental briefing on the issue of which Restatement rules to apply.  
13 Salty Saipan and Mr. Shakir submitted the directed briefing. Ms. Lifofoi did not. The CNMI  
14 Supreme Court has not explicitly addressed the question of which version of the Restatement to  
15 apply when the Restatement is the controlling law under 7 CMC § 3401. As noted above, the CNMI  
16 Supreme Court has applied rules from both the Second and Third Restatements of Agency. *See*  
17 *Repeki v. MAC Homes (Saipan) Co.*, 2 NMI 33, 49-52 (applying rules from Restatement (Second)  
18 of Agency); *and Kabir v. CNMI Public School System*, 2009 MP 19 ¶¶ 45-46 (applying rule from  
19 Restatement (Third) of Agency).

20 The issue of which version of the Restatement to apply has been addressed once before by  
21 the CNMI Superior Court, and has also been addressed by the Superior Court of the Virgin Islands,  
22 which has a statute substantively the same as 7 CMC § 3401. *See Cabrera v. Micronesian Resort,*  
23 *Inc.*, Civ. No. 11-0085 (NMI Super. Ct. Nov. 6, 2013, pub. Mar. 20, 2014) (Order at 5-7); *and In re*  
24 *Manbodh Asbestos Litigation*, 47 V.I. 215, 224-243 (V.I. Super. Ct. Nov. 23, 2005).

25 In *Cabrera*, the CNMI Superior Court adopted certain provisions of the Restatement Third  
26 of Torts. In doing so, the Court found that (1) prior CNMI Superior Court orders applying the  
27 Restatement Second of Torts were not binding authority, (2) that the CNMI Superior Court is not

1 required to adopt the Restatement Third, and (3) that sections of the Restatement Third may be  
2 adopted by the CNMI Superior Court if those sections express the common law as generally  
3 understood in the United States, and doing so would be in the best interests of the Commonwealth.  
4 *Cabrera*, Civ. No. 11-0085 at 5-7. The Superior Court of the Virgin Islands expressed a slightly  
5 different rule and found the court must apply the version of the Restatement that was in effect at the  
6 time of the adoption of the statute establishing the Restatement as the controlling common law,  
7 unless a later version of the Restatement reflects a change in the majority rule. *Manbodh Asbestos*,  
8 41 V.I. at 237.

9 This Court is persuaded by the reasoning of both the *Cabrera* Court and the Superior Court  
10 of the Virgin Islands that adopting a newer version of the Restatement is appropriate where that  
11 new version represents the current majority common law rule. And, the CNMI Supreme Court has  
12 implicitly sanctioned the adoption of newer versions of the Restatements, as evidenced by its prior  
13 application of sections from the Restatement Third of Agency. *See Kabir v. CNMI Public School*  
14 *System*, 2009 MP 19 ¶¶ 45-46 (applying rule from Restatement (Third) of Agency).

15 In this particular case, the applicable sections of the Restatements Second and Third of  
16 Agency are substantively similar, but the Restatement Third is more comprehensive and more  
17 specific. The Reporter's Notes to section 8.06 of the Restatement Third of Agency explain that the  
18 Restatement Second of Agency does not have a direct counterpart to this rule. Instead, the  
19 Restatement Second sections are prefaced with the clause "unless otherwise agreed." *See, e.g.*,  
20 Restatement (Second) of Agency §§ 388, 391. The Reporter's Notes include a review of case law  
21 from a variety of agency contexts that have explored the requirements of valid consent by the  
22 principal. Restatement (Third) of Agency, § 8.06.

23 Accordingly, the Court finds that the newer Restatement is a reflection of the common law  
24 as currently generally understood in the United States, and that it is appropriate to adopt the

1 Restatement Third of Agency to determine whether Mr. Shakir violated his fiduciary duties in this  
2 case.

3 Under sections 8.02 and 8.06 of the Restatement Third of Agency, Mr. Shakir's conduct was  
4 a breach of his fiduciary duty of loyalty. Mr. Shakir received payments of \$6,000 and \$9,350.00  
5 from Salty Saipan for services provided in connection with the Salty Property transaction, which  
6 was the same transaction covered by the agency agreement with Ms. Lifoifoi. *See* Restatement  
7 (Third) of Agency § 8.02. Ms. Lifoifoi agreed to pay a commission to Mr. Shakir that was one half  
8 of the amount of the sale of the interest in the Salty Property that exceeded the amount required to  
9 satisfy the underlying mortgage. The payments made by Salty Saipan to Mr. Shakir were never  
10 reported to Ms. Lifoifoi and were not included in the calculation of the \$20,000 commission that  
11 Ms. Lifoifoi paid to Mr. Shakir. Ms. Lifoifoi was not aware that Mr. Shakir received any payments  
12 from Salty Saipan, thus she did not consent to it. *See* Restatement (Third) of Agency  
13 § 8.06(1)(a)(ii). No harm to Ms. Lifoifoi is required for a finding of breach of fiduciary duty and  
14 resultant liability. Restatement (Third) of Agency § 802 at cmt. b (notes following illustrations 1  
15 and 2).

16 Accordingly, the Court finds Mr. Shakir breached his fiduciary duties to Ms. Lifoifoi by  
17 secretly accepting payments of \$6,000 and \$9,350 from Salty Saipan. Ms. Lifoifoi has requested  
18 that the Court find these payments are held in constructive trust for Ms. Lifoifoi, a matter which  
19 will be further discussed below.

20 **F. Ms. Lifoifoi's Breach of Contract Claim**

21 Next, Ms. Lifoifoi alleged a breach of contract claim.<sup>13</sup> To prove a breach of contract claim,  
22 Ms. Lifoifoi must establish (1) an enforceable contract; (2) Defendants' failure to perform; and (3)

23 \_\_\_\_\_  
24 <sup>13</sup> First Amended Complaint at 12 ("Second Claim for Relief").



1 resulting damages. *PRC LLC v. Chang Shin Resort Corp.*, Civ. No. 12-0163 (NMI Super. Ct. Mar.  
2 8, 2013) (Order Granting in Part and Denying in Part Plaintiffs' Motion for Summary Judgment at  
3 4); and *Fujie v. Atalig*, Civ. No. 10-0131 (NMI Super. Ct. Feb. 3, 2011) (Order Denying  
4 Defendants' Motion to Dismiss at 4).

5 The parties agree that there is an enforceable contract between Ms. Lifoifoi and Shakir  
6 CNMI Inc., as set forth in the October 13, 2007 Exclusive Brokerage Agreement. The only breach  
7 that Ms. Lifoifoi alleges that concerns the Salty Property transaction is substantively the same as the  
8 allegations supporting the breach of loyalty claim described above: Mr. Shakir did not disclose that  
9 he was providing services for Salty Saipan and being paid separately by Salty Saipan. The written  
10 contract does include a warranty that "Unless specified below, Broker has no other known agency  
11 relationships with other parties that would conflict with any interests of Owner." Pl.'s Ex. 10, p. 3,  
12 § 8.D. As discussed at length above, the Plaintiffs did not establish that Mr. Shakir had an agency  
13 relationship with Salty Saipan.

14 However, Mr. Shakir's undisclosed receipt of payment from Salty Saipan did violate  
15 Section 5 of the written contract, which states: "Commission. Broker shall seek to be paid a  
16 commission from the owner upon sale of the property. Any amount over the mortgage settlement  
17 shall be divided equally between Broker and Owner." Mr. Shakir took more than half of the amount  
18 paid by Salty Saipan over the assumption of the mortgage. Salty Saipan paid \$40,000 to Ms.  
19 Lifoifoi, and a total of \$15,350 to Mr. Shakir, making the total amount over the mortgage settlement  
20 \$55,350. Mr. Shakir took \$35,350 as a commission, which constitutes well over half. Thus, the  
21 Court finds that Ms. Lifoifoi suffered damages of \$7,675.<sup>14</sup>

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24 <sup>14</sup> Half of the total amount over the mortgage settlement is \$27,675 (\$55,350/2). Ms. Lifoifoi only kept \$20,000 of the \$40,000 that Salty Saipan paid directly to her, and paid the remaining \$20,000 to Mr. Shakir, which was \$7,675 more than she owed under the contract.

1           Accordingly, the Court finds Mr. Shakir breached the contract with Ms. Lifoifoi. The  
2 appropriate remedy will be discussed below.

3 **G. Constructive Trust**

4           The Plaintiffs’ made a joint claim requesting the declaration that (1) Mr. Shakir’s profits  
5 from the Mettao Property are being held in constructive trust for Ms. Lifoifoi and Salty Saipan; and  
6 (2) All profits and commissions paid to Mr. Shakir in connection with the property transactions are  
7 being held in constructive trust for Ms. Lifoifoi and Salty Saipan.<sup>15</sup>

8           1. Mettao Property Profits

9           Because Ms. Lifoifoi’s claims are limited to those arising out of the Salty Property  
10 transaction, the Court dismisses Ms. Lifoifoi’s claim requesting declaration of a constructive trust  
11 comprised of the profits from the Mettao Property. *See supra*, § III.D.

12           Salty Saipan’s claim requesting a constructive trust declaration is related to its Consumer  
13 Protection Act claim, because a Consumer Protection Act claim can seek equitable relief. 4 CMC  
14 § 5112(a). A constructive trust is an equitable remedy that is imposed “[w]here a person holding  
15 title to property is subject to an equitable duty to convey it to another on the ground that he would  
16 be unjustly enriched if he were permitted to retain it.” Restatement (First) of Restitution, § 160.  
17 Although a constructive trust is often used to restore property to the original transferor, a  
18 constructive trust may also arise “where the defendant wrongfully prevents the plaintiff from  
19 acquiring property and acquires the property for himself.” *Id.* at § 160, cmt. d. Such situations are  
20 governed by Section 169 of the Restatement (First) of Restitution: “Where a person acquires  
21 property from another by fraud, duress or undue influence under such circumstances that a third  
22  
23

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24 <sup>15</sup> First Amended Complaint at 16 (“Fifth Claim for Relief”).

1 person is entitled to restitution from the transferee, the transferee holds the property upon a  
2 constructive trust for the third person.”

3 Thus, the Court next considers whether Mr. Shakir acquired the Mettao Property from the  
4 Estate by fraud, duress or undue influence. As discussed above, res judicata bars Ms. Lifoifoi from  
5 relitigating the issue of the amount of consideration paid by Mr. Shakir for the Mettao Property. *See*  
6 *supra*, § III.D. However, the Court did consider the evidence presented about the advance payments  
7 and temporary loans in the analysis of whether the Mettao Property is being held in constructive  
8 trust for Salty Saipan, because Salty Saipan was not a party to the probate proceedings. *See*  
9 *Commonwealth v. Cabrera*, 1999 MP 22 ¶ 9 (“Under the doctrine of res judicata, previous litigation  
10 of either a claim or issue may preclude subsequent litigation of the same claim or issue by the same  
11 parties or their privies.”).

12 Fraud involves an intentional misrepresentation for the purpose of inducing reliance on that  
13 misrepresentation. *See Syed v. Mobil Oil Mariana Islands, Inc.*, 2012 MP 20 ¶ 44. However, as the  
14 Court found above, the evidence demonstrated that Ms. Lifoifoi, the administrator of the Estate,  
15 knew that the Mettao Property was being transferred to Mr. Shakir and not Salty Saipan.

16 Nor was undue influence proved in this case. “The essence of undue influence is the  
17 subversion of another person’s free will in order to obtain assent to an agreement.” *Mesa v.*  
18 *Manglona*, 3 CR 914, 921-22 (Super. Ct. 1989). While the evidence in this case raised questions  
19 about the fairness of Mr. Shakir’s advance lending practices, it fell short of proving that Mr. Shakir  
20 dominated Ms. Lifoifoi or subverted her free will. *See Restatement (Second) Contracts*, § 177  
21 (showing of domination of the persuading party over the influenced party is required). Instead, the  
22 evidence demonstrated that Ms. Lifoifoi requested advance payments from Mr. Shakir, and that Ms.  
23 Lifoifoi was assisted by her daughter and her daughter’s husband during that process.

24

1           Finally, there was no showing of duress. Under the Restatement, duress involves an act of  
2 assent, brought on by either physical compulsion or a threat. *See* Restatement (Second) of Contracts  
3 §§ 174-75. There was no evidence that Mr. Shakir made any threats to Ms. Lifoifoi or that he  
4 physically compelled her to assent to the Mettao Property assignment in her role as administrator of  
5 the Estate.

6           The Court next considers whether Mr. Shakir’s conduct constituted fraud, undue influence,  
7 or duress, when he maintained his interests in the Mettao Property by offering it to Salty Saipan at  
8 an unreasonable price. The Court’s inquiry here centers on the allegation of fraud.

9           The general rule in the Commonwealth is that “[o]ne who fraudulently makes a  
10 misrepresentation of fact, opinion, intention, or law for the purpose of inducing another to act or  
11 refrain from acting in reliance thereupon is liable for loss caused by justifiable reliance on the  
12 misrepresentation.” *Fusco v. Matsumoto*, 2011 MP 17 ¶ 47 (quoting *Del Rosario v. Camacho*, 2001  
13 MP 3 ¶ 79). Fraudulent misrepresentation requires proof of the following elements: (1) a material  
14 false misrepresentation by the defendant; (2) the defendant’s knowledge of its falsity; (3) the  
15 defendant’s intent that the plaintiff act reasonably upon it; and (4) the plaintiff’s justifiable and  
16 detrimental reliance upon the misrepresentation. *Syed v. Mobil Oil Mariana Islands, Inc.*, 2012 MP  
17 20 ¶ 44.

18           The following findings are supported by clear and convincing evidence. Mr. Shakir,  
19 conveyed the false message to Salty Saipan that it would be able to later acquire the Mettao  
20 Property at a reasonable price. Mr. Shakir made this representation to induce Salty Saipan’s  
21 agreement to the Salty Property transaction at the price that had originally been discussed for both  
22 the Salty Property and the Mettao Property, knowing that he would get half of the amount paid over  
23 the mortgage price. At the time Mr. Shakir conveyed the “reasonable price” message to Salty  
24 Saipan, he had no intention of offering Salty Saipan the Mettao Property at a reasonable price. This

1 finding is supported by circumstantial evidence that Mr. Shakir's other representations concerning  
2 the Mettao Property were deceptive: He did not inform Salty Saipan that he planned to personally  
3 acquire the Mettao Property lease before re-assigning it to Salty Saipan, nor did he inform Salty  
4 Saipan that he was making a series of loans to Ms. Lifoifoi secured by the Mettao Property. And  
5 Salty Saipan agreed to the Salty Property transaction at the higher price believing that it was the  
6 first of two transactions, which together, would form a fair deal.

7         Accordingly, the Court finds that by fraudulently representing to Salty Saipan that the  
8 Mettao Property would be available later at a reasonable price, while secretly acquiring the Mettao  
9 Property himself and then offering it to Salty Saipan at an unreasonable price, Mr. Shakir acquired  
10 the Mettao Property in a fraudulent manner. As such, he would be unjustly enriched absent the  
11 imposition of a constructive trust. The Court also finds that Salty Saipan has demonstrated there is  
12 no adequate remedy at law, as its breach of contract claim failed.

13         Thus, the Court finds that the Mettao Property leasehold interest is being held in  
14 constructive trust for Salty Saipan. Salty Saipan does not request as a remedy that SAMA Holdings,  
15 LLC transfer the lease to Salty Saipan. Instead, Salty Saipan requests that the Court declare the  
16 profits derived from the Mettao Property to be held in constructive trust.

17         Mr. Shakir paid \$40,000 for the Mettao Property lease and spent approximately \$167,000  
18 constructing a new commercial building on the Mettao Property. He has subleased the Mettao  
19 Property for \$258,500, although he has not yet received all payments under those sub-lease  
20 agreements (\$225,000 from Union of Professionals, \$33,500 from various other rentals). Thus, Mr.  
21 Shakir, both as an individual and through his company SAMA Holdings, LLC, has secured profits  
22 of \$51,500 from the Mettao Property. These profits must be paid to Salty Saipan within 30 days.

1 As trustee of the Mettao Property lease interest, Mr. Shakir and his companies, must yearly  
2 account for and pay to Salty Saipan all profits derived from the Mettao Property, outside of those  
3 already accounted for in this judgment.

4 The calculation of profits offered by Salty Saipan in its proposed Findings of Fact and  
5 Conclusions of Law were far greater, but they did not include an offset for the amount Mr. Shakir  
6 paid to construct the commercial building on the Mettao Property. Salty Saipan also requested that  
7 Mr. Shakir be held liable for the amount that Salty Saipan paid in excess of \$300,000 for the Salty  
8 Property lease. The Court declines to make that award because the terms of the Salty Property lease  
9 do not state a particular sum, nor did the testimony at trial establish that Mr. Shakir ever  
10 communicated an offer of a fixed sum.

11 Salty Saipan also requests prejudgment and post judgment interest. Post judgment interest  
12 on money judgments is set by statute as nine percent a year. 7 CMC § 4101. “Prejudgment interest  
13 serves to compensate for the deprivation of the money due from the time the claim accrues until  
14 judgment is entered, ‘thereby achieving full compensation for the injury that damages are intended  
15 to redress.’” *Manglona v. Commonwealth*, 2005 MP 15 ¶ 43 (quoting *West Virginia v. United*  
16 *States*, 479 U.S. 305, 310 n. 2 (1987)). Prejudgment interest is awarded as a matter of discretion and  
17 governed by interests of fairness. *Hemlani v. Villagomez*, 1 CR 203, 208 (NMI Dist. Ct. App. Div.  
18 Oct. 19, 1981).

19 The Court finds that an award of prejudgment interest would not be equitable in this case.  
20 The remedy here is based on the amount of unjust profits earned by Mr. Shakir. Thus, full  
21 compensation is satisfied through the imposition of a constructive trust and prejudgment interest is  
22 not necessary.

1           2. Commissions

2           Plaintiffs also request a declaration that all commissions paid to Shakir are being held in  
3 constructive trust. This request is based in principles of agency law. *See* Restatement (Third) of  
4 Agency § 8.01 cmt. d(1) (“A court may construct a remedy when an agent profits through a breach  
5 of fiduciary duty by imposing a constructive trust on the agent’s profits.”) Thus, the Court  
6 dismisses the claim as to Salty Saipan because Plaintiffs only established the existence of an agency  
7 relationship between Ms. Lifoifoi and Shakir CNMI Inc.

8           As described above, Mr. Shakir breached his fiduciary duties to Ms. Lifoifoi because he  
9 acquired a material benefit from a third party, Salty Saipan. Mr. Shakir received commission  
10 payments of \$15,350 from Salty Saipan arising from the Salty Property transaction. These  
11 payments were not disclosed to Ms. Lifoifoi. The Court finds that these commission payments are  
12 being held in constructive trust for Ms. Lifoifoi. Defendants must pay \$15,350 to Ms. Lifoifoi  
13 within 30 days. The Court finds that Ms. Lifoifoi established that an equitable remedy is necessary  
14 because the amount of damages available under the breach of contract claim is not sufficient to  
15 disgorge the material benefit Mr. Shakir obtained in violation of his fiduciary duties. *See*  
16 Restatement (Third) of Agency, § 8.02 cmt. b (notes following illustrations 1 and 2).

17           Ms. Lifoifoi also requests an award of attorney’s fees and costs. This request goes against  
18 the general rule in the Commonwealth that, in the absence of a statutory award for attorney’s fees,  
19 each party bears its own litigation costs. *Reyes v. Reyes*, 2004 MP 1 ¶ 79; *Deleon Guerrero v. Dep’t*  
20 *of Public Safety*, 2013 MP 17 ¶ 21. There are equitable exceptions to this general rule, such as bad  
21 faith conduct during litigation; however, claims based on allegations of bad faith do not  
22 automatically qualify for deviation from the general rule. *Ishimatu v. Royal Crown Ins. Corp.*, 2010  
23 MP 8 ¶ 71. The Court does not find that an equitable award of attorney’s fees is appropriate here  
24 because there was no bad faith conduct on the part of the Mr. Shakir during the litigation, and

1 because many of the claims asserted by Ms. Lifoifoi were barred by res judicata. *See id.* ¶ 71 n. 27  
2 (citing various cases where the losing party’s bad faith opposition to the enforcement of clear  
3 constitutional or statutory rights entitled the prevailing party to attorney’s fees).

4 **V. CONCLUSION**

- 5 1. Defendants are not liable to Salty Saipan for professional malpractice based on an agency  
6 relationship.
- 7 2. Defendants are not liable to Salty Saipan for breach of agency contract.
- 8 3. Defendants are liable to Salty Saipan for violations of the Consumer Protection Act,  
9 4 CMC § 5105(l) & (m). The Court imposes a constructive trust on the profits earned  
10 from the Mettao Property lease with Mr. Shakir acting as trustee, and Salty Saipan as the  
11 beneficiary. Defendants must pay \$51,500 to Salty Saipan within 30 days. And Mr.  
12 Shakir must yearly account for and pay all profits derived from the Mettao Property lease  
13 to Salty Saipan.
- 14 4. The Court awards costs and reasonable attorney’s fees to Salty Saipan pursuant to  
15 4 CMC § 5112(a). Within fourteen days after entry of this judgment, Salty Saipan must  
16 file a motion stating the amount sought, and disclosing the terms of any agreement with  
17 respect to fees to be paid. *See* NMI R. Civ. P. 54(d)(2)(B). If requested by Defendants,  
18 the Court shall offer an opportunity for Defendants to submit an opposition to the  
19 requested amount. NMI R. Civ. P. 54(d)(2)(C).
- 20 5. Mr. Shakir and his companies are liable to Ms. Lifoifoi for breach of fiduciary duty and  
21 breach of contract. The Court imposes a constructive trust on the \$15,350 commissions  
22 received by Mr. Shakir from Salty Saipan. Defendants must pay \$15,350 to Ms. Lifoifoi  
23 within 30 days. Upon such payment, all trustee duties will be deemed satisfied.



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**IT IS SO ORDERED** this 22<sup>nd</sup> day of December, 2014.

/s/  
JOSEPH N. CAMACHO  
Associate Judge