At an IAS Term, Part 21 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 2nd day of May, 2008.

P R E S E N T:

HON. LAURA LEE JACOBSON,

Justice.

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PRINCE SEATING CORP., Index No. 36150/06

Plaintiff,

- against -

QBE INSURANCE COMPANY, ET AL.,

Defendants.

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PRINCE SEATING CORP., Index No. 41688/07

Plaintiff,

- against -

CENTURY COVERAGE CORP.,

Defendant.

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The following papers numbered 1 to 10 read on this motion:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-2 3-4 7-9
Opposing Affidavits (Affirmations)	5 10
Reply Affidavits (Affirmations)	6
Affidavit (Affirmation)	
Other Papers	

Upon the foregoing papers, in this action for a declaratory judgment and alleging breach of an insurance contract (*Prince Seating Corp. v QBE Ins. Co.*, Sup Ct, Kings County, index No. 36150/06), plaintiff Prince Seating Corp. (plaintiff) moves for an order, pursuant to CPLR 3025 (b), for leave to amend its amended complaint, and pursuant to CPLR 602 (a), consolidating this action with another action (*Prince Seating Corp. v Century Coverage Corp.*, Sup Ct, Kings County, index No. 41688/07) (action #2). Defendant Century Coverage Corp. (Century) cross-moves for an order: (1) pursuant to CPLR 2221 (e), granting it leave to renew a prior motion by it to dismiss plaintiff's amended complaint in this action in its entirety based upon the ground that plaintiff's action is time-barred by the applicable Statute of Limitations, (2) pursuant to CPLR 3211 (a) (7), dismissing plaintiff's amended complaint in this action for failure to state a cause of action, (3) pursuant to CPLR 3211 (a) (4), dismissing plaintiff's complaint in action #2 in its entirety based upon the ground that there is another action pending between the parties, (4) pursuant to CPLR 3211 (a) (7), dismissing plaintiff's complaint in action #2 for failure to state a cause of action, and (5) pursuant to CPLR 3211 (a) (5), dismissing plaintiff's complaint in action #2 on the ground that it is time-barred by the applicable Statute of Limitations. Defendant First Capital Risk Services (First Capital) cross-moves for an order, pursuant to CPLR 3211 (a) (1) and (7), dismissing plaintiff's amended complaint as against it, as a matter of law, for failure to state a cause of action or any basis upon which recovery can be granted against it.

Plaintiff was insured by defendant QBE Insurance Company (QBE) under a commercial liability insurance policy (the QBE policy), effective from June 25, 2000 to June 25, 2001. Century was plaintiff's insurance broker. An insurance claim arose when an accident involving Edward J.

Rabideau, Jr. (Rabideau) occurred on April 28, 2001 (during the effective period of the QBE policy) at Logan's Roadhouse in Fairfax, Virginia. Rabideau claimed to have sustained personal injuries when a barstool, which had been manufactured by plaintiff, allegedly collapsed. Plaintiff asserts that Century had instructed it to report all potential claims to it, and that Century would then forward the claims to QBE. Plaintiff states that it followed this practice and reported claims to Century, and never reported a claim directly to QBE.

According to plaintiff, it was first notified of Rabideau's personal injury claim against it by a letter dated July 31, 2001 from Risk Enterprise Management (REM), the entity that investigated claims for Logan's Roadhouse. Plaintiff allegedly then notified Century of Rabideau's claim by a fax dated August 21, 2001. By letter dated November 11, 2001 from REM, plaintiff was informed that REM had not heard from plaintiff's insurance representative regarding Rabideau's claim. Plaintiff then allegedly contacted Century and forwarded a copy of REM's November 11, 2001 letter to Century. Plaintiff asserts that it, again, contacted Century in mid-December in order to follow-up on the claim, and that it was instructed by Century to re-fax to it the claim letters from REM, which it then did on December 18, 2001. According to plaintiff, when it contacted Century a few weeks later, it was asked to re-fax the claim letters from REM to Century, yet again, and it did so on January 22, 2002. On February 21, 2002, Century first faxed notice of the claim to Tri-City Insurance Brokers (Tri-City), a wholesale insurance broker. Tri-City then forwarded the notice of this claim to QBE by a fax dated February 22, 2002.

By letter dated March 11, 2002, First Capital, a third-party administrator for QBE, on behalf of QBE, denied plaintiff's claim under the QBE policy based upon late notice pursuant to a provision

(section IV [2]) in the QBE policy, which required notification of an occurrence as soon as practicable. By letter dated March 13, 2002, Century then advised plaintiff that QBE had denied coverage and would not be defending plaintiff due to late notification.

On April 25, 2003, Rabideau commenced an action against plaintiff in Virginia (the Virginia action) to recover damages for the personal injuries allegedly sustained by him on April 28, 2001. On August 20, 2004, a motion by Rabideau was granted for a default judgment against plaintiff in the Virginia action. An inquest was held in the Virginia action on March 17, 2005, and, on August 1, 2005, a judgment in the amount of $1,400,000 was entered against plaintiff in the Virginia action.

On November 27, 2006, plaintiff filed this action against QBE, Century, and First Capital. Century interposed an answer dated January 10, 2007, alleging, as an affirmative defense, the Statute of Limitations. On January 11, 2007, QBE moved to dismiss plaintiff's second cause of action, which alleged fraud in the inducement against it, based upon the ground that it failed to state a claim. On January 19, 2007, Century moved to dismiss plaintiff's complaint as against it based upon the ground that the applicable Statute of Limitations had expired. On March 27, 2007, Century's motion was fully submitted, but its motion was adjourned because plaintiff had still not opposed QBE's motion. On April 20, 2007, plaintiff served its opposition papers to QBE's motion, attaching an amended complaint, which added a new fourth cause of action against Century for breach of contract. On May 7, 2007, Century filed a reply to plaintiff's opposition to QBE's motion. In its reply, Century objected to plaintiff's amendment of its complaint without leave of court, but it also addressed the merits of the amended complaint. Specifically, Century argued that plaintiff's

breach of contract cause of action sounded in negligence, and not contract, and was, therefore, time-barred.

By decision and order dated September 26, 2007 and entered on October 4, 2007, this court granted QBE's motion to dismiss plaintiff's second cause of action for fraud. With respect to Century's motion, the court found that plaintiff's claim against Century, in its original complaint, sounded in negligence, and it dismissed that claim as time-barred. However, the court found that plaintiff's amended complaint sufficiently pleaded a cause of action for breach of contract, and it sustained that claim. On October 30, 2007, Century filed a notice of appeal from the court's September 26, 2007 decision and order. On November 13, 2007, plaintiff filed action #2 against Century, alleging that Century breached its contract with it.

In addressing plaintiff's motion, insofar as it seeks leave to amend its amended complaint, the court notes that, pursuant to CPLR 3025 (b), leave to amend a pleading should be freely granted, upon such terms as may be just, in the absence of prejudice or surprise resulting from the delay, unless the proposed amendment is wholly devoid of merit as a matter of law (*see RCLA, LLC v 50-09 Realty, LLC*, 48 AD3d 538, 538 [2008]; *Melendez v Bernstein,* 29 AD3d 872, 872 [2006]; *Acker v Garson*, 306 AD2d 609, 610 [2003]). Century, however, argues that plaintiff's motion for leave to file a second amended complaint in this action should be denied because plaintiff's proposed second amended complaint is identical to plaintiff's present amended complaint and it fails to set forth any additional or subsequent transactions or occurrences that warrant an amendment.

Upon a comparison of plaintiff's present amended complaint with its proposed second amended complaint, the court is unable to discern any difference between these two complaints. Rather, it appears that the allegations in these two complaints are identical. It further appears that

plaintiff seeks the requested amendment in order to remedy any technical procedural irregularity which may exist due to plaintiff's prior amendment of the complaint, without leave of court, during the pendency of Century's earlier motion to dismiss. Thus, the court, in order to cure any possible perceived irregularity, grants plaintiff such leave to amend its pleading (*see* CPLR 2001, 3025 [b]).

No prejudice will result to Century by the granting of this amendment since Century has been afforded the opportunity to, and has addressed the merits of plaintiff's amended complaint and this is, essentially, the relief sought by it in its instant cross motion to renew. Therefore, Century's cross motion, insofar as it seeks leave to renew, is rendered moot, and Century's arguments shall be addressed as against plaintiff's second amended complaint (which is identical to plaintiff's first amended complaint).

Similarly, while plaintiff seeks to consolidate this action with action #2, the complaint in action #2 is identical to the first amended complaint and the second amended complaint (hereinafter referred to as the amended complaint) as it pertains to Century in this action. Thus, since action #2 is entirely duplicative of this action with respect to Century, Century's cross motion, insofar as it seeks dismissal of action #2 on the basis of another action pending on the same claim (i.e., this action), must be granted (*see* CPLR 3211 [a] [4]), and the balance of Century's cross motion, which seeks dismissal of action #2 on the same grounds as it seeks dismissal of the claim against it in action #1, is rendered moot. Plaintiff's motion, insofar as it seeks consolidation of action #2 with this action, is also rendered moot.

In turning to Century's cross motion, insofar as it seeks to dismiss plaintiff's amended complaint, it is noted that "[a]n insurance policy provision requiring the insured to notify the

insurance company of a covered occurrence is a condition precedent to the company's duty to defend or indemnify claims against the insured" (*Jeffrey v Allcity Ins. Co.*, 26 AD3d 355, 356 [2006]; *see also Empire City Subway Co. v Greater N.Y. Mut. Ins. Co.*, 35 NY2d 8, 11-12 [1974]; *Centrone v State Farm Fire & Cas.*, 275 AD2d 728, 729 [2000]). "Absent a valid excuse, a failure to satisfy the notice requirement vitiates the policy" (*Security Mut. Ins. Co. of N.Y. v Acker -Fitzsimons Corp.*, 31 NY2d 436, 440 [1972]).

Notice provisions have been held to be ambiguous where, as here (section IV [2] of the QBE policy), it uses the pronouns "we" and "us" to describe who should be notified without clearly identifying the insurer as the party to whom these terms apply (*see Jeffrey*, 26 AD3d at 356). Indeed, such terms have been interpreted to allow notice to the broker (*see id.)*. Here, plaintiff claims that it fulfilled the notice requirement under the QBE policy by notifying Century, pursuant to its agreement with it, as its broker, and that Century breached this agreement.

In seeking dismissal of plaintiff's fourth cause of action as against it based upon the ground that it is time-barred by the Statute of Limitations, Century does not dispute that if the six-year Statute of Limitations applicable to breach of contract claims were applied from the date of the accrual of plaintiff's alleged claim against it, plaintiff's claim would be timely (*see* CPLR 213 [2]; *Chase Scientific Research v NIA Group*, 96 NY2d 20, 30 [2001]). Instead, Century argues that the gravamen of plaintiff's sole cause of action against it is actually a claim of negligence, rather than a claim for breach of contract. Century contends that this cause of action is, therefore, time-barred by the three-year Statute of Limitations applicable to negligence claims (*see* CPLR 214 [4]).

In support of its argument, Century, relying upon *Sommer v Federal Signal Corp.* (79 NY2d 540, 552 [1992]), asserts that plaintiff is seeking more than the "benefit of its contractual bargain," and is seeking damages which were not within "the contemplation of [plaintiff and it] as the probable result of a breach at the time of or prior to contracting." Specifically, Century contends that plaintiff is seeking consequential damages, rather than the cost of replacing its services, which, it asserts, would be the measure of damages for breach of contract. Century asserts that the damages of a judgment for $1,400,000 in the Virginia action due to its failure to carry out an alleged agreement to inform QBE of the claim at issue could not have been contemplated by the parties at the time of their entry into such alleged agreement.

Plaintiff, however, alleges that the nature of its agreement with Century was not for the discrete service of procuring insurance, but that Century agreed to receive notification of a claim from it and to timely relay this information to QBE. Thus, contrary to Century's argument, the cost of the replacement of this service could not be a proper measure of contractual damages, and could not be the damages contemplated by the parties at the time of their entry into the alleged agreement. Instead, the recovery of the loss sustained by plaintiff in the Virginia action, as a direct result of an alleged breach of Century's contractual obligation, is the proper measure of damages. These damages, which are the damages sought by plaintiff herein, were foreseeable and the natural and probable result of Century's alleged breach and directly flow from such breach (*see Bi-Economy Mkt., Inc. v Harleysville Ins. Co. of N.Y.*, 10 NY3d 187, 192-193 [2008]; *Ashland Mgt. v Janien*, 82 NY2d 395, 403 [1993]; *Kenford Co. v County of Erie*, 73 NY2d 312, 319 [1989]). That is, Century could

reasonably contemplate that a lack of a defense and indemnification due to a disclaimer caused by a failure to notify QBE would result in a potential judgment against plaintiff.

Century further argues that plaintiff's cause of action for breach of contract fails to state a legally cognizable cause of action, and should, therefore, be dismissed on this basis. In support of this argument, Century asserts that in order to plead a breach of contract claim against an insurance broker, a plaintiff has to plead that it made a specific promise to achieve the result desired by the plaintiff. i.e., that plaintiff would obtain a defense and indemnity in the Virginia action. Century contends that it could not have promised this to plaintiff because QBE could have disclaimed for any number of reasons, other than lack of timely notice, which Century could not anticipate.

Century's contention is without merit. The specific promise alleged was that Century would fulfill its contractual obligation to it to notify QBE of Rabideau's claim against plaintiff so as to obtain the specific result of insurance coverage, which is relevant to plaintiff's damages. While Century claims that it could not guarantee coverage by QBE, the reason for the disclaimer of coverage by QBE was the lack of timely notice, not a different reason. Thus, Century could reasonably anticipate that its own failure to give timely notice would result in the disclaimer of coverage by QBE (*see generally Kenford Co.*, 73 NY3d at 319).

Century also argues that plaintiff fails to specifically plead the provisions of the contract or the specific contractual provision that Century violated. This argument is belied by the allegations set forth in plaintiff's fourth cause of action. Plaintiff's fourth cause of action specifically alleges that Century was the insurance broker for the QBE policy; that there was an agreement between it and Century, whereby Century instructed it to forward all information regarding any and all claims to

Century; and that Century agreed that it would forward all such information to QBE. Plaintiff, in its fourth cause of action, further specifically sets forth that Century breached the agreement with it by failing to notify QBE of claims which it had presented to Century, including the Virginia claim. Thus, plaintiff adequately sets forth the provisions of the contract upon which it predicates its cause of action against Century (*see generally Maldonado v Olympia Mech. Piping & Heating Corp.*, 8 AD3d 348, 350 [2004]; *Rattenni v Cerreta,* 285 AD2d 636, 637 [2001]; *Matter of Sud v Sud*, 211 AD2d 423, 424 [1995]; *Atkinson v Mobil Oil Corp.*, 205 AD2d 719, 720 [1994]).

Century additionally contends that plaintiff's fourth cause of action against it is deficient because it fails to plead contractual damages which were contemplated at the time the contract was executed. Specifically, Century asserts that plaintiff fails to plead that the alleged breach by it would cause a future claim by a man named Rabideau.

This argument by Century must fail. Plaintiff seeks damages, which it alleges, were a direct and foreseeable result of Century's breach of the agreement, namely, that if QBE is found not to have a duty to defend and indemnify it for the judgment in the Virginia action under the QBE policy, Century is liable to it and obligated to indemnify it for all damages arising out of the Virginia action. While Century asserts that it did not contemplate the default judgment rendered, this judgment was the natural consequence of the lack of a defense from QBE, which was allegedly caused by Century's failure to notify QBE of the claim, resulting in QBE's disclaimer (*see generally Bi-Economy Mkt., Inc.*, 10 NY3d at 192; *Ashland Mgt.*, 82 NY2d at 403; *Kenford Co.*, 73 NY2d at 319).

Century further contends that an insurance broker may be held liable under a theory of breach of contract only for a failure to procure insurance, and not for a failure to perform the service of

notifying the insurer of a claim. This contention is devoid of merit. It is well established that an insurance broker may be held liable under a breach of contract theory for the failure to forward a timely notice of claim to the insured's insurance carrier (*see Mega Contr., Inc. v Insurance Corp. of N.Y.*, 37 AD3d 669, 669 [2007]; *Lavandier v Landmark Ins. Co.*, 26 AD3d 264, 264 [2006]; *National Life Ins. Co. v Hall & Co. of N.Y.*, 111 AD2d 681, 682 [1985], *affd* 67 NY2d 1021 [1986]; *Heller, Inc. v St. Paul Fire & Mar. Ins. Co.*, 107 Misc. 2d 687, 687-688 [1981]). Thus, inasmuch as the court finds that plaintiff has pleaded a viable breach of contract claim as against Century, Century's cross motion, insofar as it seeks dismissal of this claim based upon the grounds that it is time-barred by the applicable Statute of Limitations and fails to state a cognizable cause of action, must be denied.

The court now turns to First Capital's cross motion to dismiss plaintiff's amended complaint as against it. Plaintiff's third cause of action, in its amended complaint, is asserted as against First Capital. Plaintiff asserts that First Capital was the third-party administrator for QBE, which investigated the Virginia claim that plaintiff presented to Century. Plaintiff alleges that First Capital improperly advised QBE to deny its claim despite its timely notification to Century. It claims that as a result of First Capital's alleged breach of the QBE policy, QBE has refused to defend and indemnify it in connection with the Virginia action, exposing it to the substantial damages which were awarded against it in the Virginia action. Plaintiff seeks recovery from First Capital for the award arising from the Virginia action, plus attorney's fees.

In support of its cross motion, First Capital has submitted the sworn affidavit of George Marr, who was the vice-president of First Capital during the relevant time period. George Marr, in his affidavit, attests that First Capital is not an insurance company, but, instead, is a third-party claims

administrator, licensed by the New York State Insurance Department, to investigate, adjust, and defend claims on behalf of insurance companies and self-insureds. George Marr asserts that in this capacity, First Capital was called upon to investigate and determine coverage for QBE in connection with the claim reported by plaintiff. He explains that the liability loss notice, which QBE received from Tri-City, was forwarded to First Capital for investigation of coverage, and, if coverage was owed to plaintiff, for managing the defense of the claim on QBE's behalf. According to George Marr, since notice was not provided to QBE for more than seven months after plaintiff's admitted receipt of the claim letter from REM, First Capital determined that the policy condition with regard to the insured's obligation, under section IV (2) of the QBE policy, to provide prompt notice of the occurrence, claim, or suit, had been breached. First Capital, therefore, issued the March 11, 2002 disclaimer letter.

First Capital argues that, as a third-party claims administrator, it merely acted as the agent for QBE, who was its disclosed principal. It is well established the "when an agent acts on behalf of a disclosed principal on a contract, the agent will not be personally bound unless there is clear and explicit evidence of the agent's intention to be so bound" (*Spain v Howard Holmes, Inc.*, 108 AD2d 741, 742-743 [1985]; *see also Goldstar Smoked Fish v Greenfield Partners*, 206 AD2d 457, 457 [1994]), or "to substitute [its] personal liability for that of [its] principal or to add [its] personal liability to that of [its] principal" (*Levy v Gold & Co., Real Estate*, 141 AD2d 511, 511 [1988]). "This is so even if the agent, in the course of [its] agency, induces the principal to breach the contract" (*Spain*, 108 AD2d at 743). First Capital contends that its actions do not evidence any intention by it to be personally bound, or to add its personal liability to that of QBE under the QBE policy.

Plaintiff, in opposition to First Capital's cross motion, argues that First Capital can nevertheless be held liable as an independent contractor whose independent acts resulted in the non-coverage by QBE. Plaintiff's argument is unavailing. First Capital's March 11, 2002 disclaimer letter explicitly refers to the fact that First Capital was acting solely in an agency capacity for QBE by providing:

> "Please be advised that First Capital. . . is the designated Third Party Administrator. . . for QBE. . . and [is] handling this matter on their behalf."

There is no allegation by plaintiff that First Capital acted, other than on QBE's behalf, in denying coverage to plaintiff, or that it committed an independent tortious act or stood to benefit in some way from the denial of coverage to plaintiff (*see BIB Constr. Co. v Poughkeepsie,* 204 AD2d 947, 948 [1974]).

Plaintiff further argues, however, that the name, First Capital Group, is listed, as the producer, on the Declarations page of the QBE policy. Such argument, however, is of no moment. The name of the defendant herein, while similar, is not First Capital Group, who was QBE's underwriting agent. Moreover, plaintiff does not allege, in its third cause of action, that First Capital entered into any contract with it, that First Capital was a party to the QBE policy, or that First Capital was the insurer under the QBE policy or was involved in a joint venture with QBE. Plaintiff also does not allege that First Capital issued the QBE policy, billed or collected premiums, received any commissions from collected premiums, shared in QBE's profits, shared the risk of loss of claims with QBE, or directly paid claims.

Plaintiff additionally argues that First Capital shared be held liable for making an independent determination, in its March 11, 2002 disclaimer letter, denying it coverage. This argument must be rejected. The insurer's performance of its contract, even when non-performance results from the delegated decision-making authority of a third-party administrator, remains the insurer's responsibility and obligation (*see Berkowitz v Neuman,* 283 AD2d 179, 181 [2001]; *Rice v Cayuga-Onondaga Healthcare Plan*, 190 AD2d 330, 333 [1993]). Thus, even if First Capital was solely responsible for determining whether plaintiff was entitled to coverage under the QBE policy and made a wrongful determination in this regard, payment of the claim would still be QBE's responsibility (*see Berkowitz*, 283 AD2d at 181-182). Therefore, inasmuch as First Capital was a third-party claims administrator, it is entitled to dismissal of plaintiff's amended complaint as against it *(see* CPLR 3211 [a] [1], [7]; *Berkowitz*, 283 AD2d at 181; *Rice*, 190 AD2d at 333).

Accordingly, plaintiff's motion is granted insofar as it seeks an order, pursuant to CPLR 3025 (b), for leave to amend its amended complaint, and is rendered moot insofar as it seeks an order, pursuant to CPLR 602 (a), consolidating this action with action # 2. Century's cross motion is denied insofar as it seeks an order dismissing plaintiff's amended complaint as against it, and it is rendered moot in all other respects. First Capital's cross motion for an order dismissing plaintiff's amended complaint as against it, is granted.

This constitutes the decision and order of this court.

ENTER,

J.S.C.

HON. LAURA JACOBSON