IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

CORNELL GLASGOW, LLC, *et al.,*	)	
	)	
Plaintiffs,	)	
v.	)	
	)	
	)	C.A. No. N11C-05-016-JRS CCLD
	)	C.A. No. N11C-07-160-JRS CCLD
LA GRANGE PROPERTIES, LLC,	)	
et al.,	)	
Defendants.	)	

Date Submitted: October 26, 2012
Date Decided: December 7, 2012

MEMORANDUM OPINION

Decision After Trial
Verdict for Plaintiffs

Sean J. Bellew, Esquire, David A. Felice, Esquire, and Chad A. Flores, Esquire, BALLARD SPAHR LLP, Wilmington, Delaware. Attorneys for Plaintiffs.

Daniel F. Wolcott, Jr., Esquire and Gregory A. Inskip, Esquire, POTTER ANDERSON & CORROON LLP, Wilmington, Delaware. Attorneys for Defendants.

SLIGHTS, J.

I.

In September of 2009, two parties partnered to develop a residential neighborhood from a largely undeveloped tract of land in Newark, Delaware. At first glance, the pairing appeared to be the perfect matching of talents and resources. The arrangement was simple: one partner, the owner of the land, was to provide improved lots upon which the builder, the other partner, would construct homes and then market and sell them to third parties. To govern this new relationship, the parties drafted and signed a detailed Development Agreement (the "Agreement"). In so doing, they selected the very language that has both fueled and confounded this litigation for nearly two years.

The parties anticipated they would share in the profits the construction project was sure to deliver, but soon found themselves in the same predicament many residential developers have encountered over the past several years as the housing market slowed and the pace of home sales lagged behind projections. The parties then began a series of exchanges in which they expressed their dissatisfaction with each other's performance that escalated from e-mails and meetings to full-blown litigation before the Court of Chancery and the Superior Court. The Court now seeks to address the parties' numerous disputes and provide a final resolution of the legal aspects of the controversy that is in accord with the parties' expectations as expressed

in the project's controlling documents.

The plaintiffs/counterclaim defendants are the builder and affiliated entities, Cornell Glasgow, LLC ("Cornell Glasgow") and Cornell Homes, LLC ("Cornell Homes") (collectively "Cornell"). The defendants/counterclaim plaintiffs are the landowners, La Grange Communities, LLC and La Grange Properties, LLC (collectively, "La Grange"), and the founding members of La Grange, Steven J. Nichols ("Nichols") and Lowell McCoy ("McCoy") (all collectively "defendants"). The parties have asserted claims of breach of contract against each other under the Agreement and seek compensatory damages. In addition, Cornell alleges that the defendants and an additional defendant, Bruce C. Johnson ("Johnson"), wrongfully conveyed a model home built and furnished by Cornell without adequately compensating Cornell.

After a five day bench trial and post-trial submissions by the parties, the Court is satisfied that La Grange breached the Agreement by wrongfully withholding certain payments from Cornell and by ousting Cornell from the project. Cornell was excused from providing La Grange with notice of an opportunity to cure the breach because any such notice would have been futile. For its part, La Grange failed to provide Cornell notice and an opportunity to cure any breach of the Agreement Cornell may have committed and, consequently, La Grange is precluded from prosecuting breach

of contract claims against Cornell as a matter of law. Moreover, even if La Grange was somehow excused from the Agreement's notice and cure provision, it has not proven its breach claims by a preponderance of the evidence. Cornell is entitled to damages for breach of the Agreement in the amount of $1,966,745.00. Cornell has also proven that La Grange is liable for breach of contract and breach of the covenant of good faith and fair dealing arising from the wrongful conveyance of Lot 206 with model house ("Lot 206"), and is entitled to damages on those claims in the amount of $192,281. Finally, Cornell is entitled to costs and prejudgment and post judgment interest.

II.

A. The Parties

Cornell Homes is a Pennsylvania limited liability company. Cornell Glasgow is a Delaware limited liability company formed for the special purpose of partnering with the defendants to develop the La Grange Community (the "Development"). La Grange Communities, LLC is a special purpose entity formed by La Grange Properties, LLC for the same purpose (the venture to develop the Development shall be referred to as the "Project"). Both La Grange entities are Delaware limited liability companies. Nichols and McCoy are founding members of La Grange. McCoy is also a former member of the Board of Directors at NBRS Financial Bank ("NBRS"), a

bank that provided some of the funding for the Project. Johnson, the son-in-law of McCoy, purchased Lot 206 from La Grange and is purportedly the current record owner of the property.

B. The Development Agreement

La Grange Communities, LLC purchased the land on which the Development is situated in 2005 for $14,250,000, financed with a Land Note from Wilmington Trust Company at an initial interest rate of 7.5%.[1] La Grange took out additional loans from institutional lenders, including Wilmington Trust and NBRS, as well as loans from individuals, most backed by personal guarantees from Nichols and McCoy, in order to improve the land and organize the new business endeavor.[2] After acquiring the necessary funds, La Grange began interviewing builders with whom it could partner to develop the land into a residential community.[3]

In March of 2009, Cornell and La Grange began to hammer out an arrangement and eventually documented the salient points in an e-mail from Cornell to La Grange

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[1]The parties submitted joint exhibits at trial which shall be referred to as "JX___." Trial testimony shall be referred to by "Date, Trans., Page: Line." *See* JX 31; 9/28/12 Trans. 49:14-20.

[2]JX 31, 54, 55. 9/27/12 Trans. 9:4-12.

[3]9/26/12 Trans.103:19-23

dated March 31, 2009.[4] In a series of bullet points, Cornell expressed several goals and expectations the parties intended to be memorialized in the contract that would govern the arrangement.[5] Of particular relevance here, the e-mail emphasized that the contract must include a "notice and cure" provision and also that "... Cornell [was expected] to perform on timeliness of construction (not necessarily perform with regard to sales pace because profits are as important to pace in a lot of ways and pace is a wildcard in this economy)."[6] As made evident throughout the trial, the parties were focused on pace and profitability, with profitability being the most critical element of the endeavor.[7]

On September 23, 2009, Cornell and La Grange executed the Agreement pursuant to which La Grange granted Cornell the exclusive right to build, market and sell 185 of 227 residences within the Development.[8] These residences were to take

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[4]JX 3A.

[5]*Id.*

[6]*Id.*

[7]*See e.g.* 9/24/12 Trans. 9:15-16 (asserting that going into the Agreement it was clear to the parties that maximizing profitability was "absolutely critical"); 9/24/12 Trans. 18:14-15 (stating that Exhibit A to the Agreement was never amended because pace was not nearly as important as profitability); 9/24/12 Trans. 54:6-7(referring to maximizing profitability as a mutual goal of the parties).

[8] JX 4, The Development Agreement. There is some confusion in the record as to which entities are party to the agreement. *See e.g.* (1) JX 4 at introductory recital; (2) JX 4 at signature block; (3) JX 6 at ¶ 18, Amendment to Development Agreement. The parties appear to have cleared (continued...)

the form of town homes, duplexes, and single-family homes.[9] The Agreement set forth the responsibilities of each party in connection with the Project,[10] and was signed on behalf of Cornell by Gregory Lingo ("Lingo"), the founder and manager of Cornell, and by Nichols on behalf of La Grange.[11]

Pursuant to the Agreement, La Grange was to complete all necessary site improvements within the Development in order to provide Cornell with lots on which to construct the residences.[12] Cornell would then design, construct, market, and sell the residences to third parties.[13] The compensation and profit sharing structure of the Agreement was relatively straight forward. At closing, Cornell would receive a management fee of $10,000 for the sale each town home, $11,000 for each duplex, and $12,000 for each single-family home.[14] In addition, the parties agreed that they

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[8](...continued)
up this confusion in the Pre-Trial Stipulation where they state: "La Grange Properties, La Grange Communities and Cornell Glasgow are parties to the Development Agreement and Amendment to the Development Agreement." Pretrial Stip., Facts Admitted Without Proof (1).

[9]JX 4.

[10]*Id.*

[11]*Id.*

[12]*Id.* at ¶¶ 3B and 3C

[13]*Id.* at ¶¶ 2B-D.

[14]*Id.* at ¶ 5D.

would share profits but only after the Project reached a threshold of profitability.[15] The parties ultimately agreed that, at such time as profits exceeded $2,237,892, any additional profits would be split between the parties with 20% paid to Cornell and 80% paid to La Grange.[16] La Grange further agreed to reimburse Cornell for costs and expenses related to marketing, sales, architecture, and construction.[17] In this regard, the Agreement called for Cornell to supply an invoice to La Grange on the fifth day of each month thereby prompting La Grange to issue payment within three "working days" of receipt of funding from the financial institution funding the construction.[18]

Cornell was charged with maintaining accurate books of account for the Project such that both Cornell and La Grange would have access to this financial information on a rolling basis by the fifteenth day of each month.[19] The data would reflect monthly profit and loss statements as well as job costing and would be tracked and

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[15] 9/24/12 Trans. 47:15-16.

[16] JX 4 at ¶ 5E.

[17] *Id.* at ¶¶ 5A-C.

[18] *Id.* at ¶ 5G.

[19] *Id.* at ¶ 2H.

organized by the financial software Quickbooks©.[20]

Consistent with the parties' pre-Agreement discussions, the Agreement contained a "time is of the essence" provision[21] and also addressed timing issues within Exhibit A to the Agreement, a so-called "Sales Projection Schedule."[22] This schedule set forth a "projected" time schedule for the sale of the various types of residences within the Development.

The Agreement also identified activities that constituted defaults under the Agreement and outlined the process by which a party could claim an Event of Default.[23] Pursuant to the Agreement, an Event of Default would be recognized only when the aggrieved party provided the defaulting party with written notice identifying the default and demanding that it be remedied within thirty days.[24] At trial, Lingo testified that this notice and cure provision was important to Cornell because Cornell knew that if a problem arose in its performance it likely could cure the problem with adequate notice, by moving personnel and resources from other projects to the

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[20] *Id.*

[21] *Id.* at ¶ 19. ("TIME. Time is of the essence as to all matters to be performed by the parties under this Agreement."). As discussed below, the parties disagree as to the significance and meaning of this provision.

[22] *Id.* at Ex. A.

[23] *Id.* at ¶ 6.

[24] *Id.*

Development.[25]

An additional caveat within the Agreement was that each party was to obtain financing to fund its obligations under the Agreement no later than November 1, 2009.[26] La Grange was to secure $3,000,000 to satisfy an outstanding loan with NBRS for the acquisition of the property, as well as $1,890,000 to fund reimbursement of Cornell's costs.[27] Cornell was to secure $2,000,000 for a revolving line of credit that would fund its construction of the residences.[28]

C. The Amendment to the Development Agreement

As stated, the Agreement set November 1, 2009 as the deadline by which the parties were to meet their respective financing obligations.[29] Cornell obtained financing; La Grange did not.[30] Due to federally-imposed lending limits and La Grange's substantial outstanding debt, NBRS would not loan additional funds to La Grange.[31] Consequently, in December of 2009, Cornell and La Grange negotiated an

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[25] 9/24/12 Trans. 117:20-23 thru 118:1-2.

[26] JX 4 at ¶ 1A.

[27] *Id.*

[28] *Id.*

[29] *Id.*

[30] 9/24/12 Trans. 17:1-4.

[31] *See* 9/26/12 Trans. 107:6-9.

Amendment to the Agreement (the "Amendment") pursuant to which Cornell agreed to pay off some of La Grange's existing debt and thereby free up La Grange to procure additional financing to pay for improvements of the Development's lots as required by the Agreement.[32] In exchange, La Grange granted to Cornell the exclusive right to market, sell and construct all 227 lots in the Development (not just the initial 185 lots) and delivered into escrow the deeds to twenty (20) lots.[33] The deeds were to be released to third party purchasers at closing or to Cornell upon La Grange's default of the Agreement or the Amendment.[34] The purpose of holding these deeds in escrow was to provide Cornell with assurance that lots it improved with its resources would not be sold before it had been reimbursed its costs and paid its management fee.[35] The parties executed an Escrow Agreement to finalize these terms.[36]

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[32] *See* JX 6.

[33] *Id.* at ¶¶ 1, 2, 17, 20, Ex. L.

[34] *Id.* at ¶ 2. At the closing on the sale of a residence, the sale proceeds were used to pay the principal of Cornell's loan, plus any accrued interest and other unreimbursed costs and expenses incurred by Cornell in connection with the residence. *Id.*

[35] 9/24/12 Trans. 24:1-7 (McSorley testified at trial as to the purpose of the Escrow arrangement stating, "we did not want to be in [a] position that [we] improved a lot, but we don't own them. All of a sudden that lot would be able to be sold to someone else.").

[36] JX 6, Ex. L.

D. The Parties' Business Relationship Deteriorates

Upon entering into the Agreement, La Grange began to develop lots and install infrastructure within the Development while Cornell began to construct, market and sell homes to third parties. In June of 2010, Cornell's sales of town homes and duplexes were ahead of the sales projections the parties had included as Exhibit A to the Agreement.[37] Even Nichols acknowledged Cornell's ability to sell these two products stating, "I think the duplexes were fairly well received. They went – they were probably, I am going to say, eight, nine, ten ahead of that schedule at that time...."[38] Sales of single family homes, however, lagged behind projections. As Lingo conceded, "[o]ur sales of the single family homes were slower in general than the rest of the products."[39] Despite the slower sales pace of single family homes, the Project was $250,000 ahead of projected profitability as of September 2010.[40]

In September 2010, Cornell noted that La Grange had failed to reimburse certain costs as required under the Agreement and expressed its concerns to La

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[37]9/28/12 Trans. 91:14-19.

[38]*Id.*

[39]9/24/12 Trans. 55:2-3.

[40]9/24/12 Trans. 20:16-19.

Grange.[41] In response, La Grange asserted that it required additional accounting information and access to financial records in order to evaluate and process Cornell's invoices.[42] And so began an almost ritualistic exchange of e-mails in which La Grange would request specific details or clarifications regarding costing and other accounting details and Cornell would respond with responsive information and demands for payment.[43] Despite this seemingly open (albeit circular) dialogue, the reimbursement and accounting issues persisted throughout the following months.[44]

By early 2011, the relationship between Cornell and La Grange had soured.[45] On January 5, 2011, Nichols sent an e-mail to Lingo raising five concerns with respect to Cornell's activities at the Development:[46] (1) Cornell's sales of homes for

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[41]9/25/12 Trans. 27:10; 9/28/12 Trans. 69:8-16.

[42]9/24/12 Trans. 135:4-18.

[43]*See e.g.* JX 14 (e-mail from La Grange to Cornell seeking spreadsheets of expenses and requesting that Cornell re-class expense items, followed by a response from Cornell that they have re-classed the expenses and attached the requested spreadsheets to the e-mail); JX 16 (e-mail from La Grange to Cornell requesting invoices related to nine different expense items with a response from Cornell stating they "are willing to pull anything you need."); JX 17 (e-mailed offer from Cornell to sit down with La Grange to go through a few examples on the QuickBooks© software).

[44]JX 10, 19.

[45]JX 19, 20.

[46]JX 19.

prices below the minimum agreed upon price;[47] (2) incentives in relation to Cornell's relationship with Pike Creek Mortgage Services, Inc. ("Pike Creek");[48] (3) the ongoing accounting issues;[49] (4) unapproved soft costs;[50] and (5) a $70,000 architectural issue related to the construction of three homes.[51] Lingo responded by email on January 6, 2011, and indicated that Cornell wanted to address La Grange's concerns and was still interested in maintaining a long term relationship with La Grange.[52]

The parties met later in the day on January 6, 2011, and discussed several solutions to La Grange's concerns.[53] For instance, Cornell suggested that the parties

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[47]Nichols addressed four specific lots allegedly sold below the base price: 49, 55, 62, and 139. *See* JX 18 (Nichols questioned McSorley about a base house on Lot 62 sold for $209,990, to which McSorley responded that the base price for the unit was $227,990 with a final sales price of $240,174).

[48]Nichols alleged incentives were given in excess of $4,000 to buyers who agreed to use Pike Creek due to a relationship between Cornell and Pike Creek Mortgage.

[49]Nichols specifically questioned funds taken from settlement for construction expenses as compared to budgets of the base houses and options of Lots 49, 55, 62, and 139.

[50]The fourth concern deals with $74,898 that La Grange asserts were not approved.

[51]The $70,000 architectural issue dealt with columns constructed on three different residences which ultimately had to be shortened due to an alleged error in Cornell's plans.

[52]JX 19.

[53]*See id.* (La Grange Community Meeting notes dated January 6, 2011).

hire an independent accountant to assess the accounting issues in dispute.[54] E-mail exchanges and meetings between La Grange and Cornell regarding La Grange's concerns continued through mid-January.[55]

On January 15, 2011, Lingo forwarded to Nichols an internal Cornell e-mail in which McSorley relayed his account of a meeting between McSorley and La Grange personnel, including an employee named Michelle Pinder.[56] At the conclusion of this email, McSorley states, "As a company, we can be more profitable focusing our efforts elsewhere.[ ] Michelle stated [La Grange] can be more profitable with another builder, which I believe is the best option at this point."[57]

On February 4, 2011, apparently in response to learning of Cornell's internal discussions about terminating the relationship, Nichols sent an e-mail to Lingo in which Nichols states that he had discussed the matter with McCoy and both agreed that La Grange and Cornell "should go there [sic] separate ways."[58] E-mails between

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[54] *Id.*

[55] *See* JX 20.

[56] *Id.*

[57] *Id.*

[58] JX 23.

the parties continued throughout the day.[59] At 4:26 p.m., Nichols sent an email to Lingo in which he states, "I think at this point it would be best for you to let the Cornell personnel know that after today, they do not need to report to Lagrange [sic]."[60] Also on February 4, 2011, Robert Penza, Esquire, counsel for La Grange, sent a letter to Lingo in which he expressed La Grange's desire "to initiate a dialogue to frame the current outstanding issues so that the parties can attempt to terminate the Development Agreement on mutually acceptable terms."[61] Lingo responded that Cornell was not averse to a mutual termination of the Agreement, but was reluctant to begin the process without further consideration of the consequences.[62]

In the following week, the relationship between the parties broke down completely. Unbeknownst to Cornell, La Grange began to take steps to continue the Project without Cornell. It solicited bids from: C. O'Brien Architects, Inc. for new house plans, Sign-A-Rama for new signage, and Richard Martelo for a new bond and liability insurance.[63] La Grange also sought out and obtained an entirely new business plan for the Project from Mason Run Builders, LLC, a company owned by

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[59]JX 24A (e-mail chain consisting of four e-mails).

[60]*Id.*

[61]JX 24.

[62]*See Id.*

[63]JX 26, 28, 29.

Drew McCoy, the son of Defendant, Lowell McCoy.[64]

At 2:49 p.m. on February 11, 2011, Marc Kaplin, Esquire, an attorney representing Cornell, faxed and e-mailed a Notice of Default to La Grange and its attorney, Mr. Penza.[65] The default notice was predicated on La Grange's refusal to reimburse Cornell for costs and expenses under the Agreement.[66] As discussed below, Mr. Nichols' conduct on the evening of February 11, 2011, suggests he received the notice of default that evening and immediately reacted.[67]

E. La Grange Ousts Cornell From The Development

Cornell's last day on the Project was February 11, 2011. As described by Krista DeVoll ("DeVoll"), a Cornell sales representative, in the early evening of February 11, Nichols entered the Cornell sales office at the Development and, in a business-like tone, informed DeVoll that she and her fellow Cornell employees were

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[64] *See* JX 21.

[65] JX 27.

[66] *Id.*

[67] The testimony was not clear with respect to when La Grange received the notice. Initially, Nichols testified he received the notice some time on February 12. Upon cross-examination, however, Nichols testified that he was unsure when he received the document and may have received it Friday evening (2/11/11). 9/28/12 Trans. 36:23 thru 37:1-10, 79:1-13. The timing is relevant as it relates to the sequence of events on the evening of February 11 leading to Cornell's ouster from the Development.

to leave the Development immediately and not return.[68] She was further informed that if she did return she would be escorted from the premises.[69] She left that evening with the clear understanding that she was no longer welcome on the Project.[70] DeVoll contacted Lingo to relay what had transpired and was directed by Lingo that she and a co-worker were to gather Cornell's property within the office and remove it.[71]

Nichols disagreed with DeVoll's account of the events of February 11. According to Nichols, he observed DeVoll informing prospective customers that there were no available properties for sale at the Development.[72] Only upon hearing this false representation to a prospective home buyer did he inform DeVoll that if Cornell did not intend to sell homes, she and her fellow Cornell sales agents need not return to the Project.[73] Nichols testified that he intended to call Lingo to speak about the matter, but did not do so.[74]

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[68]Deposition Transcript of Krista DeVoll, C.A. 6202-CC, 3/25/11 Trans. 25-28. In lieu of in-person testimony, the Court admitted DeVoll's transcript into the record.

[69]*Id.*

[70]*Id.*

[71]*Id.*

[72]9/28/12 Trans. 37:20-21.

[73]*See* 9/28/12 Trans. 38:3-7.

[74]9/28/12 Trans. 40:20-23.

After hearing the competing versions of the events of February 11, the Court finds DeVoll's account to be most credible. Nichols likely received Cornell's notice of default earlier that evening and reacted precipitously by dismissing Cornell's sales agents from the Project with instructions never to return. This thoughtless reaction, never retracted by La Grange, now serves as the foundation upon which Cornell's breach claims have been constructed.

F. Lot 206

As discussed above, pursuant to the Amendment, La Grange delivered into escrow the deeds to twenty (20) lots to be released to purchasers upon the sale of each lot or to Cornell upon La Grange's default of the Agreement.[75] The deed to Lot 206 was one of the twenty held in escrow.[76] Cornell constructed a model home on Lot 206 to be used to market residences in the Development.[77] At trial, Cornell produced an expert who testified that Cornell had invested more than $457,000 to construct and furnish the Model, with NBRS financing approximately $274,000 of the total amount.[78] Based on the Amendment, La Grange was to pay the monthly interest

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[75] JX 6, Ex. L.

[76] *Id.*

[77] 9/24/12 Trans. 24:21-23.

[78] *See* JX 51.

payments on Cornell's NBRS loan.[79]

In April 2011, Cornell provided a second notice of default to La Grange in which it reiterated the defaults it had identified in February 2011, and added as a default La Grange's ouster of Cornell from the Development.[80] Pursuant to the Escrow Agreement, Cornell directed the Escrow Agent to release the deed to Lot 206 to Cornell as a result of La Grange's default.[81] La Grange contested the release of the deed and the Escrow Agent continued to hold the deed in escrow.[82] Unbeknownst to Cornell, on May 18, 2011, La Grange, through counsel, drafted a new deed by which La Grange Communities, LLC transferred Lot 206 to Bruce C. Johnson for $430,000.[83]

Lot 206, with improvements, had been appraised by Fox Appraisal Services, LLC on April 28, 2011, at $436,000.[84] Johnson acquired the property with a $280,000 loan and a $150,000 second mortgage which was purportedly a "set-off"

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[79] JX 6.

[80] JX 34.

[81] JX 38.

[82] JX 38, 39, 40.

[83] *See* JX 42.

[84] JX 37.

from La Grange for money that Johnson had previously loaned to McCoy.[85] The parties on both sides of the transaction had substantial difficulty explaining its bases and structure, lending credence to Cornell's suspicions regarding the *bona fides* of the deal. Johnson testified that he loaned $500,000 to McCoy as a personal loan, while McCoy testified that Johnson loaned the money to La Grange.[86] And then, there was the mysterious $10,000 check that someone brought to the settlement on Lot 206. No one on either side of the transaction could definitively explain its origin or purpose.[87]

According to McCoy, the sale of Lot 206 occurred because interest payments to NBRS in connection with Lot 206 were three (3) months in arrears and the funds from the sale to Johnson were necessary to bring the loan current.[88] Johnson testified that he purchased Lot 206 as an investment on McCoy's recommendation, but further testified that he never engaged in any negotiations regarding the purchase price of the property.[89] Moreover, he visited the property one time and never secured keys to the

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[85]JX 41; 9/27/12 Trans. 132:7-15.

[86]9/27/12 Trans 68:9-15, 112:12-18.

[87]*See* JX 41; 9/25/12 Trans. 146-147; 9/27/12 Trans. 123:1-10 (unsatisfactorily explaining the origin of the $10,000 check).

[88]9/27/12 Trans. 75:22-23 thru 76:1-2.

[89]*See* 9/27/12 Trans. 120:4-9.

home.[90] Since acquiring the property, Johnson has made several attempts to sell Lot 206 and the premises are currently occupied by prospective purchasers.[91]

G. Procedural History

After Cornell's exclusion from the property on February 11, 2011, Cornell filed a complaint against La Grange in the Delaware Court of Chancery on February 18, 2011, seeking mandatory injunctive relief and specific performance of the Agreement.[92] Cornell sought interim relief in the form of a temporary restraining order and, following briefing and argument, was granted such relief on March 8, 2011.[93] After expedited discovery revealed that the defendants likely did not have the resources to perform the Agreement, Cornell filed a motion to transfer the case to the Complex Commercial Litigation Division of the Superior Court so that it could seek monetary damages against the defendants. The motion was granted by Chancellor William B. Chandler, III on April 4, 2011.[94] Chancellor Chandler wrote, "... the

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[90] 9/27/12 Trans. 121:1-9.

[91] *See* JX 43, 44, 45.

[92] *Cornell Glasgow, LLC v. La Grange Properties, LLC,* C.A. No. 6202-CC (filed February 18, 2011).

[93] La Grange was temporarily enjoined from selling or marketing homes in the Development. C.A. No. 6202-CC (Tr. ID 36353314).

[94] *Cornell Glasgow, LLC v. La Grange Properties, LLC, et al.*, 2011 WL 1451840 (Del. Ch. April 4, 2011).

equitable remedy of specific performance is unrealistic in this case. La Grange does not have enough funds on its construction line of credit to satisfy costs associated with discharging its obligations of delivering the fully improved lots to Cornell."[95]

Also in April 2011, the parties exchanged additional notices of default. Both notices listed various defaults but neither addressed the requisite thirty (30) day opportunity to cure.[96] On April 13, 2011, Cornell sent a letter to La Grange entitled, in part, "Further Notice of Continuing Default" in which it reiterated La Grange's failure to reimburse Cornell for costs and expenses and also addressed Cornell's wrongful "eviction" from the Development.[97] La Grange responded on April 15, 2011, with a Notice of Default which listed La Grange's view of Cornell's alleged defaults under the Agreement.[98] Again, no mention was made of an opportunity to cure the alleged defaults.[99]

Cornell filed two separate complaints in this Court. This first addressed its claims arising from the defendants' alleged breaches of the Agreement and Amendment (with related tort claims); the second addressed Cornell's claims arising

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[95] *Id.* at *1.

[96] JX 34, 36.

[97] JX 34.

[98] JX 36.

[99] *Id.*

from the allegedly wrongful conveyance of Lot 206.[100] The cases were consolidated for trial with the agreement of the parties.

As the litigation progressed, both parties pressed certain equitable claims (e.g. rescission and piercing the corporate veil) and, at various times, requested this judge to seek *pro tem* appointment as a Vice Chancellor so that these claims could be litigated along side the law claims. The Court declined. Rather, the Court severed the equity claims and stayed them pending resolution of the law claims.[101]

III.

A. Cornell's Claims and La Grange's Defenses

Cornell contends that La Grange discontinued reimbursement of soft costs as of September 2010 in breach of the Agreement.[102] Cornell further contends that La Grange's removal of Cornell from the project was in breach of La Grange's contractual obligation to provide Cornell with free and unrestricted access to the Development. According to Cornell, La Grange failed to provide Cornell with the

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[100]C.A. No. N11C-05-016 JRS [CCLD]; C.A. No. N11C-07-160 JRS [CCLD].

[101] Tr. ID 48802291. The parties stipulated that Plaintiffs' equitable claims in the Action ending '160 -- (I) fraudulent conveyance (for equitable relief); (II) fraudulent conveyance (for equitable relief); (III) constructive trust; (VIII) ejectment; and (IX) rescission - - would be deferred for future adjudication if necessary. The parties further stipulated that defendants' motion to amend their Answer and Counterclaims to assert claims for (IV) *alter ego*/agency liability and (V) disgorgement would also be deferred for future adjudication if necessary.

[102]Cornell maintains that La Grange has admitted that soft costs remain outstanding dating back to September of 2010. Plaintiffs' Opening Brief ("Pfs. Op. Br.") at 22.

contractually-required notice of default and opportunity to cure prior to the ouster. As a result of this breach of the Agreement, Cornell contends that it has lost its entitlement to management fees. Accordingly, it seeks compensatory damages in the total amount of $1,966,745 for: (1) unreimbursed costs and expenses; and (2) lost management fees.[103]

Cornell's remaining three claims stem from the Lot 206 dispute. Cornell contends that La Grange's sale of Lot 206 to Johnson was not an arm's length transaction nor did it result in a sale that returned a fair market price for the property.[104] Cornell next contends that, despite the parties' dispute over ownership of Lot 206, which should have prevented the deed from leaving escrow, the defendants' conduct in obtaining a replacement deed for Lot 206 and then transferring the property to Johnson violated the implied covenant of good faith and fair dealing with respect to the Agreement and the Amendment.[105] Lastly, Cornell contends that La Grange, Nichols and/or McCoy received proceeds from the sale and Johnson

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[103] *Id.* at 23.

[104] *Id.* at 26.

[105] *Id.*

received the fully furnished model home without suffering any financial detriment and, as a result, all defendants including Johnson were unjustly enriched.[106]

La Grange has responded to Cornell's claims with defenses they contend excuse any alleged wrongdoing on their part. In response to Cornell's claim that La Grange's ouster constituted a breach justifying an award of lost management fees, La Grange argues that it was Cornell who first breached the Agreement.[107] La Grange maintains that Cornell agreed to sell homes on a set schedule and, due to its inability to maintain the pace set for single family homes, Cornell breached a firm obligation under the Agreement.[108] Cornell's sale of homes for less than required by the Agreement, says La Grange, constitutes a further breach. La Grange refers to these breaches as material breaches and, as such, argues it is not liable to Cornell for management fees on sales closing after February 11, 2011.[109] La Grange also addresses Cornell's claim regarding the failure to reimburse soft costs. La Grange asserts that it initially paid the invoices presented by Cornell, but in September of

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[106] *Id.* at 27.

[107] Defendants' Answering Brief ("Dfs. Ans. Br.") at 11.

[108] *Id.*

[109] *Id.*

2010 began questioning certain expenses.[110] La Grange maintains that Cornell was unable satisfactorily to answer La Grange's inquiries making payment unnecessary.[111] Moreover, La Grange alleges that Cornell's accounting failures constituted a breach of the Agreement.

In response to Cornell's Lot 206 claims, La Grange asserts that it had a right to Lot 206 and the corresponding deed held in escrow. La Grange contends that Cornell could take possession of any of the twenty lots held in escrow if La Grange defaulted under the Agreement only if the default occurred for any reason other than Cornell's failure to comply with the terms of the Agreement.[112] According to La Grange, Cornell's claim that La Grange was in default so as to justify release of the Lot 206 deed to Cornell was predicated on La Grange's failure to reimburse Cornell. Because its default was a result of Cornell's antecedent default, La Grange argues that its failure to reimburse does not constitute a default justifying the release of the Lot 206 deed to Cornell.[113]

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[110]Defendants' Opening Brief ("Dfs. Op. Br.") at 4.

[111]*See id.*

[112]Dfs. Ans. Br. at 6.

[113]*Id.* at 7.

B. La Grange's Counterclaims and Cornell's Defenses

La Grange contends that Cornell allowed for excessive, unauthorized sales incentives and sold residences below the base prices called for in the Agreement without La Grange's consent.[114] As a result of these actions, La Grange seeks breach damages in the amount of $827,144.95.[115]

Cornell counters by stating that La Grange cannot assert a breach claim because it did not comply with the clear and unambiguous notice and cure provision set forth in the Agreement.[116] Cornell stresses that even if La Grange's failure to comply with the notice and cure provision was excused, La Grange has not met its burden of proving breach as to its base price and incentive claims.[117] According to Cornell, it never sold homes below the agreed upon base price and La Grange has not proven the contrary by a preponderance of the evidence.[118] As to the unauthorized incentives, Cornell maintains that this allegation is based on a misplaced understanding of the contract terms in that La Grange confuses the value of the

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[114]Dfs. Op. Br. at 19.

[115]*Id.* at 19-20. La Grange arrives at $827,144.95 by adding together $689,144.95 in excessive incentives, $68,000 resulting from houses sold below the base price, and the $70,000 architectural issue addressed above. *See* JX 62.

[116]Plaintiffs' Answering Brief ("Pfs. Ans. Br.") at 9.

[117]*Id.* at 10.

[118]*Id.*

incentive with the actual cost.[119] In response to specific allegations of impropriety concerning Pike Creek, Cornell points to the language of the Agreement in justifying its incentive arrangement with Pike Creek asserting that this relationship was not a deviation from the terms of the Agreement.[120]

IV.

The Court begins with the fundamental observation that Cornell bears the burden of proving its claims and La Grange bears the burden of proving its counterclaims by a preponderance of the evidence. In this regard, the Court must be mindful that if the evidence presented by the parties during trial is inconsistent, and the opposing weight of the evidence is evenly balanced, then "the party seeking to present a preponderance of the evidence has failed to meet its burden."[121] As fact-finder, the Court followed the direction that we regularly give to our juries when assessing the evidence and the credibility of witness testimony:

> I must judge the believability of each witness and determine the weight to be given to all trial testimony. I considered each witness's means of knowledge; strength of memory and opportunity for observation; the reasonableness or unreasonableness of the testimony; the motives actuating the witness; the fact, if it was a fact, the testimony was

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[119] *Id.* at 11.

[120] *Id.* at 19.

[121] *Eskridge v. Voshell,* 593 A.2d 589 (Del.1991) (ORDER), (citing *Guthridge v. Pen-Mod, Inc.,* 239 A.2d 709, 713 (Del.Super.1967)).

> contradicted; any bias, prejudice or interest, manner of demeanor upon the witness stand; and all other facts and circumstances shown by the evidence which affect the believability of the testimony. After finding some testimony conflicting by reason of inconsistencies, I have reconciled the testimony, as reasonably as possible, so as to make one harmonious story of it all. To the extent I could not do this, I gave credit to that portion of testimony which, in my judgment, was most worthy of credit and disregarded any portion of the testimony which, in my judgment, was unworthy of credit.[122]

V.

As the Court listened to the evidence at trial, two major themes emerged to characterize the parties' dispute. These themes now serve as the backdrop for the Court's legal analysis in this case.

First, the Court recognizes that a contract, at its core, is a memorialization of the expectations of the contracting parties. In the present case, the Court is satisfied that the parties entered into the Agreement with the overarching expectation of profitability. This conclusion, apparently undisputed, is supported by the language of the Agreement as well as the testimony elicited at trial from both Cornell's witnesses and La Grange's witnesses. Unfortunately, as the relationship soured, La Grange, in particular, lost sight of this expectation and allowed its frustration with

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[122] *Dionisi v. DeCampli,* 1995 WL 398536, *1 (Del. Ch. June 28, 1995).

discreet aspects of the relationship to cause it to dismantle a productive and profitable business partnership with Cornell.

Second, when parties enter into a commercial relationship with expectations of success, they define their relationship with express contractual terms that are meant to protect their expectations and provide remedies when the expectations are not met. Here, the parties elected to include within the Agreement a detailed notice and cure provision. Now that the parties find themselves embroiled in litigation, they seek to invoke the contractual protections they bargained-for at the outset of their relationship in support of their respective claims of breach. Yet when the relationship began to fail, both parties were quite willing to ignore the notice and cure provision they had bargained-for in happier times.

For its part, Cornell says that La Grange did not reimburse its costs and expenses. According to Cornell, this, along with La Grange's ouster of Cornell from the project, constituted breaches of the Agreement. La Grange points to a laundry list of failures to support its breach claim, including Cornell's flawed accounting practices, Cornell's inability to maintain the projected sales pace for single family homes, Cornell's alleged sales of homes below the base price, and Cornell's offer of unauthorized incentives. Remarkably, however, neither La Grange nor Cornell ever exchanged timely notice of the alleged breaches or provided an opportunity to cure.

As discussed below, what saves Cornell's failure to abide by the Agreement, but not La Grange's, is Cornell's commitment to try to make the relationship work. Cornell stayed engaged in the relationship; La Grange gave up on it prematurely and in material breach of the Agreement, rendering any "notice and cure" futile.

A. Interpretation of the Contractual Provisions at Issue

Before the Court can determine if either or both parties breached the Agreement, it must first interpret the provisions of the contract to determine the parties' respective obligations. In so doing, the Court must be guided by Delaware's parol evidence rule.[123] "When two parties have made a contract and have expressed it in a writing to which they have both assented as to the complete and accurate integration of that contract, evidence ... of antecedent understandings and negotiations will not be admitted for the purpose of varying or contradicting the writing."[124] The Court must be mindful, however, that a disagreement between the parties as to the meaning of the contract's provisions or terms does not render the document ambiguous.[125] "Rather, a contract is ambiguous only when the provisions in

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[123] *See Pellaton v. Bank of NY*, 592 A.2d 473, 478 (Del. 1991) ("if [an] instrument is clear and unambiguous on its face, neither this Court nor the trial court may consider parol evidence 'to interpret it or search for the parties' intent[ions]'") (citing *Hibbert v. Hollywood Park, Inc.*, 457 A.2d 339, 343 (Del. 1983)).

[124] 26 CORBIN ON CONTRACTS § 573 (1960).

[125] *See Rhone-Poulenac Basic Chem. Co. v. American Motorists Ins. Co.*, 616 A.2d 1192, 1196 (Del. 1992)("A contract is not rendered ambiguous simply because the parties do not agree upon its proper construction.").

controversy are reasonably or fairly susceptible of different interpretations or may have two or more different meanings."[126]

The Court will interpret the contract's terms according to the meaning that would be ascribed to them by a reasonable third party.[127] Where the Court finds that the contract clearly and unambiguously reflects the parties' intent, the Court's interpretation of the contract must be confined to the document's "four corners."[128] Otherwise, if there is ambiguity, the Court may consider extrinsic evidence of the parties' intent.[129]

While the parties have invoked several provisions of the Agreement to make their respective breach of contract claims, two provisions in particular memorialize broad obligations that govern all aspects of the parties' contractual relationship. Specifically, the parties agreed that "time [was] of the essence" in the performance of the Agreement and that each was obliged to provide to the other a "notice of default" and "opportunity to cure" before pursuing remedies for breach in court. The parties have argued that these provisions of the Agreement are clear and unambiguous but, not surprisingly, they have offered different interpretations of the provisions'

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[126] *Id.*

[127] *Comrie v. Enterasys Networks, Inc.*, 837 A.2d 1, 13 (Del. Ch. 2003).

[128] *See O'Brien v. Progressive Northern, Ins. Co.*, 785 A.2d 281, 288-89 (Del. 2001).

[129] *Id.*

meaning. They also both have submitted extrinsic evidence to aid in the interpretation of the provisions should the Court find them to be ambiguous.

1. Time Is of the Essence

The Agreement states in relevant part, "Time is of the essence as to all matters to be performed by the parties under this Agreement."[130] The Court finds this provision to be clear and unambiguous. A time is of the essence provision has distinct legal significance. In his seminal treatise on contracts, Professor Williston explains:

> When it is said that time is of the essence, the proper meaning of the phrase is that the performance by one party at or within the time specified in the contract is essential in order to enable that party to require performance from the other party. It does not simply mean delay will give rise to a right of action against that party, although the breach of any promise in a contract, including one dealing with the time of performance, will have that effect. Nor does that phrase merely mean that performance on time is a material matter, but rather, that it is so material that exact compliance with the terms of the contract in this respect is essential to the right to require counter-performance.[131]

It is, of course, true that, "[a]n express statement in a contract that 'time is of the essence' is not conclusive, and other provisions may be so inconsistent therewith as to lead to the conclusion that time is not essential."[132] Nevertheless, a clear and

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[130] JX 4 at ¶ 19.

[131] 15 WILLISTON ON CONTRACTS §46:2 (4th 2000).

[132] *Rocky Mountain Gold Mines v. Gold, Silver & Tungsten*, 93 P.2d 973, 983 (Colo. 1939).

unambiguous "time is of the essence" provision cannot simply be ignored. The Court must presume that the parties included the provision for a reason.[133] Standing alone, a time is of the essence provision is too broad to be the basis of an actionable breach claim; but the provision coupled with a proven deviation from a firm contractual time deadline will support a breach claim.[134] Unfortunately for La Grange, it has attempted to link the Agreement's time is of the essence provision to a projection, not a deadline.[135]

Exhibit A to the Agreement is a table entitled "Sales Projection Schedule." The table sets forth each of the three original residence styles - - town homes, single family homes, and duplexes - - and sets forth a corresponding projection of how many of that style residence will be sold in each quarter.[136] The parties have offered differing interpretations of the term "projection." Cornell argues that "projection"

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[133]*See Estate of Osborn v. Kemp*, 991 A.2d 1153, 1159 (Del. 2010) ("We will read a contract as a whole and we will give each provision and term effect, so as not to render any part of the contract mere surplusage.")(citation omitted).

[134]Williston, *supra* § 46:2.

[135]In so finding, the Court does not render the Agreement's time is of the essence provision surplusage. *See Estate of Osborn,* 991 A.2d at 1159. There remain deadlines in the Agreement that are modified by this provision. For example, a firm deadline is established at ¶ 1A. of the Agreement, which states "Financing commitments from financial institutions providing for (i) and (ii) of this Section A must be in place by no later than November 1, 2009." In fact, a failure to meet this deadline prompted the parties to amend the entire Agreement by way of the December 2009 Amendment.

[136]JX 4, Ex. A.

connotes an aspiration or target, while La Grange contends that Exhibit A reflects hard sales deadlines. In Delaware, courts routinely refer to dictionaries to discern a contractual term's ordinary meaning.[137] Merriam-Webster's dictionary defines "projection," in relevant part, as "an estimate of future possibilities based on a current trend."[138] Consistent with the term's ordinary meaning, the Court of Chancery has held that "a projection is, at best, a good faith estimate of how a company might perform in the future; it is by no means a warranty that can be blindly relied upon."[139]

The Agreement was negotiated at arm's length and the parties chose to characterize the sales targets in Exhibit A as a "projection" not a "deadline."[140] The Court will not rewrite Exhibit A under the guise of interpreting it.[141] Cornell's

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[137]*See e.g. Lorillard Tobacco Co. v. Am. Legacy Fund*, 903 A.2d 728, 738 (Del. 2006) ("Delaware courts look to dictionaries for assistance in determining the plain meaning of terms which are not defined in a contract."); *Martin Marietta Materials, Inc. v. Vulcan Materials Co.*, 2012 WL 5257252 at *34-35 (Del. Ch. May 4, 2012) (referring to Webster's Dictionary to define several undefined terms within a confidentiality agreement).

[138]http://www.meriam-webster.com/dictionary/projection

[139] *In re Oracle Corp.*, 867 A.2d 904, 940-41 (Del. Ch. 2004), *aff'd sub nom., In re Oracle Corp. Derivative Litig.*, 872 A.2d 960 (Del. 2005).

[140] *Cf. Stroud-Hopler, Inc. v. Farm Harvesting Co., Inc.*, 2005 WL 3693342 at *4-5 (N.J. Super. A.D. January 23, 2006) (interpreting exhibit that indicates specific dates to complete work, to be unambiguous and, when read in conjunction with a time is of the essence provision, to be the equivalent of deadlines where agreement provides that "strict adherence to project scheduling is a must"and "[n]o extension of time beyond date stipulated in proposal will be allowed on account of [] causes which could have been avoided by exercise of reasonable foresight....").

[141]*Union Fire Ins. Co. of Pittsburgh, P.A. v. Pan American Energy, LLC*, 2003 WL 1432419
(continued...)

interpretation of Exhibit A is the more reasonable interpretation and will be applied here.

Even assuming, *arguendo*, the Court found Exhibit A to be ambiguous and, therefore, considered extrinsic evidence to interpret it, the result would be unchanged. Cornell presented persuasive evidence that when, in the past, it has committed to a particular sales pace, it has memorialized that commitment with clear and unambiguous terms in so-called "Lot Purchase Agreements."[142] A standard Lot Purchase Agreement states, in relevant part:

> Purchaser shall purchase a minimum of seventeen (17) Lots contained on one (1) Building Pad (the "Initial Purchase") within ten (10) days after receipt by purchaser of written notice from Seller that the Conditions Precedent to Settlement have been met for fifty one (51) Lots (the "Completion Notice"). After the Initial Purchase, Purchaser shall purchase a minimum of one (1) Building Pad (including all Lots located therein or thereon) per quarter during each of the first three (3) quarters, no Building Pads in the fourth (4th) quarter, and thereafter not less than three (3) Building Pads per every four (4) quarters.[143]

The Lot Purchase Agreement's hard deadlines stand in stark contrast to the "projections" set forth in Exhibit A. Moreover, Lingo persuasively explained why

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[141](...continued)
at *4 (Del. Ch. March 19, 2003)("The courts may not by construction add or excise terms, nor distort the meaning of those used and thereby make a new contract for the parties under the guise of interpreting the writing.").

[142]JX 32 A.

[143]*Id.* at ¶ 3(a).

Cornell would never have committed to hard sales deadlines in the midst of one of the worst housing markets in recent memory.[144] The Court is satisfied that the persuasive extrinsic evidence reveals that the Exhibit A "Sales Projection Schedule," even when read in light of the Agreement's time is of the essence provision, set forth aspirational projections, *not* deadlines the violation of which would constitute a default under the Agreement.

2. The Notice and Cure Provision

The Agreement's "notice and cure" provision provides:

> The occurrence of one or more of the following, along with written notice thereof to the defaulting party identifying such default and demanding its remedy within thirty (30) days of such notice, shall constitute an "Event of Default," unless such occurrence is remedied within any applicable grace or cure period.

As clearly stated, the provision requires the party claiming a default to deliver to the defaulting party a written notice identifying the default and allowing a thirty (30) day opportunity to cure. The provision is clear and unambiguous.

a. Noncompliance With Notice and Cure

Courts in our State and beyond have recognized that contractual notice and cure provisions cannot be ignored no matter how urgently parties may seek to do so

[144] 9/24/12 Trans. 8:22-23.

when prosecuting breach claims in litigation.[145] Of these decisions, *U.S. Bank National Ass'n* provides the most direct admonition to litigants that they may not intentionally overlook or attempt to provide *ex post* explanations for failing to abide by clear and unambiguous contractual notice and cure provisions.[146] As will be discussed in more detail below, neither party *sub judice* saw fit to comply with the Agreement's notice and cure provision after their relationship broke down.

Cornell provided La Grange with two notices of default, both of which failed to comply with the notice and cure provision. Cornell's first notice of default was dated February 11, 2011, and addressed La Grange's failure to reimburse Cornell for soft costs in breach of the Agreement.[147] While the notice clearly identified the alleged default, Cornell failed to offer the requisite opportunity to cure. As noted

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[145] *See e.g.*, *U.S. Bank Nat'l Ass'n v. U.S. Timberlands Klamath Falls, L.L.C.*, 2004 WL 1699057 (Del. Ch. July 29, 2004) (rejecting argument that mere filing of complaint by non-breaching party would satisfy contractual notice and cure provision); *Harper v. Del. Valley Broadcasters*, 743 F. Supp. 1076, 1083-84 (D.Del 1990)(enforcing notice and cure provision to bar certain breach of contract claims), *aff'd*, 932 F.2d 959 (3d Cir. 1991); *Kerns v. United States*, 2012 WL 5877479 (E.D. Va. Nov. 20, 2012)(dismissing claims arising from a Deed of Trust because the plaintiff failed to comply with the notice and cure provision contained within the document); *Point Productions A.G. v. Sony Music Entm't, Inc.,* 2000 WL 1006236 (S.D.N.Y. July 20, 2000) (granting a motion for summary judgment where party did not comply with notice and cure provision of contract and failed to prove excuse by futility); *Argo Corp. v. Greater N.Y. Mut. Ins. Co.*, 827 N.E.2d 762, 764 (N.Y. Ct. App. 2005)(affirming order dismissing breach claims for failure to comply with contract's notice and cure provision).

[146] *See U.S. Bank Nat'l Ass'n*, 2004 WL 1699057 at *6, n. 24 ("Therefore, this court adheres to the well-reasoned decisions [...] holding that a pre-suit notice provision in a contract should be given meaning, as it evidences the clear intent of the parties to require written notice of default before [a party] may pursue litigation.").

[147] JX 27.

above, Cornell filed suit in the Court of Chancery on February 18, 2011, a mere seven days after providing the notice of default. In the absence of justification for noncompliance, Cornell's failure to offer La Grange an opportunity to cure its alleged defaults extinguishes any claim of breach it might later pursue.[148]

La Grange likewise has failed to comply with the notice and cure provision of the Agreement.[149] Indeed, La Grange's purported notice of default, dated April 15, 2011, identifies Cornell's alleged defaults but does not allow for the requisite opportunity to cure as the parties were already well underway in litigation. Accordingly, absent some cognizable justification for its noncompliance, La Grange may not pursue its breach claims against Cornell in litigation.

b. Futility Excuses Cornell's Noncompliance But Not La Grange

The contractual obligation to provide pre-suit notice and opportunity to cure may be excused where such notice would be futile in achieving its intended

[148] *U.S. Bank Nat'l Ass'n*, 2004 WL 1699057 at *3 (Del. Ch. July 29, 2004) ("Very simply, the filing of [the complaint] does not afford the receiving party the opportunity to cure its defaults in a non-litigious manner."). Cornell's second attempt at compliance - - the April 13, 2011 notice of default - - also missed the mark. The parties were engaged in litigation by that time and the subject matter of the second notice was clearly implicated by Cornell's complaint. *See* JX 34.

[149] In response to Cornell's motion for summary judgment, La Grange argued that it substantially complied with the notice and cure provision. The Court, relying on *Gildor v. Optical Solutions, Inc.*, 2006 WL 4782348 (Del. Ch. May 11, 2006), held that where literal compliance was possible substantial compliance was not a substitute. (Tr. ID 46520066).

purpose.[150] Our Courts generally have recognized that "[t]he law does not require a futile act."[151] That said, the parties have not informed the Court, nor is the Court otherwise aware, of any Delaware precedent that clarifies the standard for futility against which noncompliance with a contractual notice and cure provision should be measured. Accordingly, the Court has looked elsewhere and has found the holding in *In re Best Payphones, Inc*. to be instructive.[152] There, the court held that a court may find compliance with a notice and cure provision is futile only when the defaulting party expressly and unequivocally repudiates the contract or where the actions of the defaulting party have rendered future performance of the contract by the non-defaulting party impractical or impossible.[153] A repudiation must be positive

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[150] *Reserves Dev., LLC v. R.T. Properties, LLC,* 2011 WL 4639817 (Del. Super. Sept. 22, 2011).

[151] *Id.* at *7.

[152] *Best Payphones, Inc. v. Manhattan Telec. Corp.* (*In re Best Payphones, Inc.*), 432 B.R. 46 (S.D.N.Y. 2010). The Court has already relied upon *Best Payphones, Inc.* in connection with pre-trial rulings with regard to the notice and cure provision. (Tr. ID 46556734).

[153] *Id.* at *54 (citing *Bausch & Lomb Inc. v. Bressler*, 977 F.2d 720, 728 (2d Cir.1992) (recognizing that a failure to provide notice and an opportunity to cure may be excused where "the repudiating party expressly disavowed any further duties under the contract at issue, in effect declaring the contract at an end."); *About.com, Inc. v. TargetFirst, Inc.*, 2003 WL 942134 at *4 (S.D.N.Y. March 10, 2003) (noting that to excuse performance of the obligation to provide notice and opportunity to cure "[t]he announcement of intention not to perform by the repudiating party must be 'positive and unequivocal.'")(internal citations omitted)).

and unequivocal.[154] This guidance jibes well with similar analytical themes found within Delaware's ample repudiation jurisprudence.[155]

It would be difficult to illustrate the concept of repudiation with more colorful detail than Nichols provided the evening of February 11, 2011, when he ousted Cornell from the project. Nichols told Cornell sales agents to leave the project and not come back. If any Cornell representative tried to return, Nichols made it clear that La Grange would have them escorted from the property.[156] Nichols' rash decision to kick Cornell off the project rendered Cornell's future performance - - in the form of construction, marketing and sales of new homes - - not merely impractical but impossible. Denying access to the Development and threatening physical removal was a clear and unequivocal assertion that La Grange would neither allow Cornell to continue to perform nor itself continue to perform under the Agreement. Cornell's obligation to comply with the Agreement's notice and cure provision is excused by futility.

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[154] *Id.*

[155] *See e.g. Frontier Oil Corp. v. Holly Corp.,* 2005 WL 1039027, at *27 (Del. Ch. Apr. 29, 2005) ("An '*unequivocal* statement by a promisor that he will not perform his promise' is the essential underpinning for a repudiation claim.") (quoting *Carteret Bancorp, Inc. v. The Home Group, Inc.*, 1988 WL 3010 at *5 (Del. Ch. June 13, 1988)(emphasis supplied)).

[156] DeVoll, 3/25/11 Trans. 25-28.

For its part, La Grange urges the Court to rely on *Reserves* to excuse its failure to provide notice and an opportunity to cure.[157] In *Reserves*, the court noted that "the parties and/or their representatives met on more than one occasion to discuss the status of the infrastructure" and further found that the record in that case showed "that written notice of a default on the infrastructure would not have led to agreement or compromise."[158] Unfortunately, it is not clear from this discussion the nature and extent to which the parties in *Reserves* attempted to resolve their issues.[159] Further, in the present case, the record does not support a finding that the parties were so fundamentally at odds as to render a compromise on at least some if not all of La Grange's issues impossible.[160]

Cornell specifically requested that the notice and cure provision be included in the Agreement because it wanted an opportunity to fix its defaults before the

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[157] *Reserves,* 2011 WL 4639817 at *7 (Del. Super. Sept. 22, 2011).

[158] *Id.*

[159] The phrase "more than one occasion" could signify two meetings or two hundred meetings. *Id.*

[160] As McSorley explained, Cornell was attempting to address La Grange's concerns regarding the accounting issues by providing increased and more meaningful access to Cornell's costing data and better explanations of the breakdown of home sales prices prior to closing. 9/24/12 Trans. 135:4-22 (testifying that each of Cornell's requests for reimbursement were met with question from La Grange that were then answered by Cornell); 9/25/12 Trans. 78, 84 (addressing e-mail requests from La Grange for accounting information and Cornell's willingness and ability to provide the requested information). In addition, Lingo persuasively explained that Cornell could have stepped up the sales pace, if needed to respond to a notice of default from La Grange, by dedicating resources and directing customers from other Cornell projects to the Project. 9/24/12 Trans. 118:1-11 (testifying that at three other communities Cornell had been able to sell houses at a rapid rate when pressured to meet an objective by increasing staff and advertising).

parties walked away from their partnership and pursued litigation.[161] La Grange deprived Cornell of this opportunity. To read *Reserves,* as La Grange does, to sanction a claim of futility whenever a notice and cure provision does not fit within a party's strategic business plan would be tantamount to endorsing an exception that swallows the rule.[162] And it would frustrate the legitimate expectations of contracting parties. Nothing Cornell did in the course of the parties' relationship evidenced a repudiation of the Agreement. Nor did Cornell's alleged failure in performance render La Grange's performance impractical or impossible. Accordingly, the Court finds that La Grange's failure to provide Cornell with notice and the opportunity to cure was not justified by futility.

B. Cornell's Claims for Relief

1. The Breach of Contract Claims

Cornell's claim for breach of the Agreement and Amendment is comprised of two parts, each constituting a separate breach: (1) La Grange's failure to reimburse Cornell's soft costs dating back to September of 2010; and (2) Cornell's inability to obtain the benefit of the bargain due to La Grange's actions on February 11, 2011.

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[161] 9/24/12 Trans.117:20-23 thru 118:1-2.

[162] *See Purnell v. State*, 979 A.2d 1102, 1107 (Del. 2009) (noting that exceptions - - in this case to the hearsay rule - - should not be construed to allow the "exception to swallow the [] rule."); *Henry v. Nanticoke Surg. Assoc., P.A.*, 931 A.2d 460, 464 (Del. Super. 2007) (same).

Under Delaware law, the elements of a breach of contract claim are: (1) a contractual obligation; (2) a breach of that obligation; and (3) resulting damages.[163]

a. Failure To Reimburse Costs and Expenses

With respect to Cornell's first breach claim involving La Grange's alleged failure to reimburse costs and expenses, there appears to be little dispute that La Grange failed to meet its contractual obligations. Pursuant to the Agreement, La Grange was obligated to reimburse Cornell for such soft costs relating to marketing, architecture and construction.[164] Yet La Grange failed to reimburse Cornell for soft costs dating back to September of 2010.[165]

At trial, Nichols testified that La Grange stopped reimbursing Cornell for soft costs because Cornell failed to provide the requisite accounting to justify reimbursement.[166] The explanation is not persuasive. The evidence reveals that Cornell gave La Grange unfettered access to its costing data in the form of complete

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[163] *H-M Wexford, LLC v. Encorp, Inc.,* 832 A.2d 129, 144 (Del. Ch. 2003).

[164] JX 4 at ¶¶ 5A-C.

[165] *See* 9/24/12 Trans. 134:17-23- 135:1-22. McSorley testified that for the first nine months of the business relationship, Cornell submitted invoices related to incurred soft costs and received reimbursement from La Grange without issue. Beginning in September of 2010, Cornell's invoices were consistently met with a series of questions as to expenses and requests for financial information instead of payment. The requested information was provided by Cornell but La Grange did not remit payment. *Id.*

[166] 9/28/12 Trans. 69:12-21.

Quickbooks© files.[167] As McSorley explained, this data provided all that La Grange needed to know about job costing.[168] Moreover, as noted, La Grange never provided Cornell with a notice of default relating to these accounting issues, thus raising serious doubt as to whether these issues were the actual reason La Grange was withholding reimbursement. Cornell's purported failure to meet La Grange's accounting standards did not constitute a breach that would excuse La Grange's failure to reimburse Cornell. Cornell has proven breach and is entitled to damages.

b. The Ouster and Resulting Breach

Pursuant to the Agreement, La Grange was required to provide Cornell with unrestricted access to the Development.[169] On February 11, 2011, La Grange ousted Cornell from the Project. This breach of the Agreement, in turn, rendered Cornell unable to perform services that would have yielded management fees from the future sales of homes. As a result of La Grange's breach, therefore, Cornell was damaged.

La Grange argues that Cornell is not entitled to management fees on houses that it never built or sold. In this regard, La Grange contends that its ouster of Cornell

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[167] JX 11, 16.

[168] 9/25/12 Trans. 72:16-21. When questioned by opposing counsel as to trial exhibits which reflected production of requested accounting information, McSorley noted JX 11 and JX 16 addressed La Grange's ability to access the information generated by Quickbooks©.

[169] JX 4 at ¶3A.

from the project was justified because Cornell had materially breached the contract by failing to maintain the sales pace for single family homes set forth in the projections contained in Exhibit A to the Agreement. Relying upon *Hifn, Inc.*,[170] La Grange maintains that, in light of the Agreement's time is of the essence provision, Cornell's failure to adhere to the "Sales Projection Schedule" constituted a material breach which excused La Grange's continued performance and justified the ouster. The Court already has rejected this argument as contrary to the Agreement's clear and unambiguous terms. As discussed below, it is also contrary to the evidence adduced at trial.

La Grange maintains that it bargained for the time is of the essence provision in relation to the sales projection schedule for the purposes of timely satisfying repayment demands from its lenders[171] and also to ensure that La Grange would be

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[170] *Hifn, Inc. v. Intel Corp.*, 2007 WL 2801393 at *9 (Del. Ch. May 2, 2007), ("When time is of the essence in a contract, a failure to perform by the time stated is a material breach of the contract that will discharge the non-breaching party's obligation to perform its side of the agreement.")

[171] 9/26/12 Trans 112-114. La Grange asserts that it was expected to make periodic loan repayments on its loans and that the lending institutions needed assurances as to where this money would come from. La Grange maintains that Exhibit A to the Agreement, along with the time is of the essence provision, would be the type of documentation its lenders would want to see to ensure La Grange would have the funds to make timely payments on its loans. Nichols testified that its lenders would not have allowed La Grange to enter into an arrangement without a firm obligation as to time of performance because otherwise such an arrangement could last indefinitely without any performance generating profits. *Id.*

able to recoup the funds it had invested in infrastructure for the Development.[172] This explanation makes perfect sense. What does not make sense, however, is La Grange's implicit suggestion that either of these interests was ever in jeopardy during the course of the parties' relationship. La Grange presented no evidence that it was in default of its loan obligations prior to the ouster. Indeed, Cornell was servicing portions of La Grange's debt.[173] Nor did La Grange present evidence that it was not able to improve lots or install infrastructure in the Development as a consequence of Cornell's inability to sell single family homes at the pace projected in Exhibit A.

While perhaps not fully mindful of its mandates, the Court is satisfied that Cornell complied with the Agreement's time is of the essence provision and its Exhibit A. In this regard, the Court reiterates its finding that Exhibit A did not impose sales deadlines upon Cornell. Nevertheless, Cornell was obliged to perform its work - - construction, marketing and sales of new homes - - with dispatch. Although it is clear that the sales of single family homes in the Development lagged behind the projections,[174] it is also clear that Cornell's performance under the

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[172]*See* 9/26/12 Trans. 117:17-20, 119:2-9.

[173]9/24/12 Trans. 20:16-17.

[174]9/24/12 Trans. 52: 11-18; 54:22-23 thru 55:1-3 (addressing the slower pace of single family homes with some dispute as to whether the slow sales were the result of a depressed housing market or Cornell's efforts).

Agreement was yielding profits to the parties in excess of those projected at the outset of their relationship.[175] The profitability of the project reflects Cornell's hard work and dedication to the project, is consistent with the overarching goal of the project as reflected in the Agreement, and is in keeping with the Agreement's time is of the essence requirement. There was no breach of this provision that would excuse La Grange's ouster of Cornell from the project. Cornell is entitled to damages.

2. The Lot 206 Claims

a. Breach of Contract

Cornell asserts that La Grange breached the Agreement, Amendment, and the Escrow Agreement by: (a) selling Lot 206 with the fully furnished Model Home to Johnson when the deed to the property should have been held in escrow; and (b) failing to use the proceeds from the sale to pay amounts owed Cornell.[176] As mentioned above, under Delaware law, the elements of a breach of contract claim are: (1) a contractual obligation; (2) a breach of that obligation; and (3) resulting damages.[177]

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[175] 9/24/12 Trans. 20:16-19 (asserting that the project was $250,000 more profitable than anticipated in September of 2010).

[176] Pfs. Op. Br. at 25-26.

[177] *H-M Wexford, LLC*, 832 A.2d at 144.

Cornell has premised this claim, specifically, and its entire complaint, generally, upon the factual predicate that La Grange Properties, LLC and La Grange Communities, LLC violated an obligation that the parties were not to disturb the deed to Lot 206 held in escrow. Cornell has not identified a contractual provision that expressly imposes this obligation, and the Court has found no such obligation in the operative agreements.[178] Having said this, the Court has found no provision of the operative agreements that would permit this conduct either. To the extent La Grange's conduct in drawing a new deed for Lot 206 and then transferring that property to Johnson is actionable, therefore, the cause of action lies outside of the contracts entered into by and between Cornell and La Grange. Cornell has failed to prove this aspect of its breach of contract claim.

Cornell has, however, proven that La Grange breached the operative agreements by failing to reimburse Cornell its costs in connection with the improvements it constructed on Lot 206. Specifically, the Agreement required La Grange "to reimburse Cornell for all expenses paid by Cornell for the construction

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[178] Within the factual allegations of the Complaint in N11C-07-160, which Cornell incorporates by reference into the subject breach of contract count, Cornell refers to ¶ 17 of the Amendment, which provides that La Grange will, *inter alia*, "deliver into escrow with the [escrow agent]" the deed to Lot 206. *See* Complaint, ¶ 24. Cornell has not alleged that La Grange failed to do so. *See* Complaint, ¶ 25.

[of homes within the Development]."[179] In addition, the Amendment required La Grange to make "interest and/or principal payments" on a loan from NBRS related to Lot 206.[180] It did not do so in breach of the Amendment.[181] Accordingly, Cornell is entitled to breach damages on these claims.

b. Breach of the Covenant of Good Faith and Fair Dealing

Cornell alleges that La Grange's conduct in drawing a new deed and then transferring Lot 206 to Johnson in the midst of its dispute with Cornell over the title to the property constituted a breach of the covenant of good faith and fair dealing. "The covenant [of good faith and fair dealing] is 'best understood as a way of implying terms in the agreement,' whether employed to analyze unanticipated developments or to fill gaps in the contract's provisions."[182] Stated differently, the covenant provides "a way of 'honoring the reasonable expectations created by the

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[179] JX 4 at ¶5C.

[180] JX 6 at ¶2.

[181] 9/27/12 Trans. 57:10-15.

[182] *Dunlap v. State Farm Fire & Cas. Co.*, 878 A.2d 434, 441 (Del. 2005) (citation omitted).

autonomous expressions of the contracting parties."[183] Under Delaware law, the covenant "attaches to every contract."[184]

After carefully reviewing the evidence, the Court is satisfied that the parties expected that deeds to designated properties within the Development, including Lot 206, would be held in escrow by an escrow agent. Upon noting La Grange's defaults under the Agreement, and pursuant to the Amendment, Cornell demanded that the escrow agent release to it the deed to Lot 206. La Grange disagreed. Rather than facilitate or, at least, await a resolution of that dispute, La Grange secretly had a new deed drawn and sold Lot 206 out from under escrow, in violation of the parties' expectations as expressed in the operative agreements.[185] This conduct was "arbitrary and unreasonable" and it had "the effect of preventing [Cornell] from receiving the 'fruits' of the bargain."[186] La Grange is liable, therefore, for violating the covenant of good faith and fair dealing.

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[183] *E. I. DuPunt de Nemours & Co. v. Pressman*, 679 A.2d 436, 443 (Del. 1996) (citation omitted).

[184] *Dunlap,* 878 A.2d at 442.

[185] JX 6 at ¶17, Ex. L at ¶3.

[186] *Dunlap*, 878 A.2d at 447.

c. Fraudulent Conveyance (6 *Del. C.* § 1301, *et seq.*)

The Court turns to Cornell's statutory claim for fraudulent conveyance. Our fraudulent conveyance statute provides a framework, including defined terms, which a claimant must satisfy to obtain relief. It is telling to the Court that, with a significant record at its disposal, Cornell has given only cursory attention to this claim in its post-trial submission.[187] Despite a record spanning five (5) days of trial testimony and approximately sixty (60) trial exhibits, Cornell does not attempt to satisfy any definition or identify any statutory pathway upon which the Court could ground relief on this claim. For its part, La Grange takes pains to assert that Cornell has not met its burden of proving that the sale of Lot 206 rises to the level of fraud.[188]

Under these circumstances, the Court will not attempt to construct the pathway to relief on Cornell's behalf. Accordingly, as the statutory requirements for fraudulent conveyance have not been established by a preponderance of the evidence

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[187] Indeed, Cornell refers to this claim but once in a single footnote. Pfs. Op. Br. at 27, n. 12.

[188] La Grange argues that Cornell has failed to show that La Grange received something other than "a reasonably equivalent value" for the property. (*See* Dfs. Op. Br. at 17-18) (styled under argument that Cornell's claims were not proven against Johnson). This argument is in addition to La Grange's statutory "good faith" defense. Dfs. Op. Br. at 18.

against any of the defendants, the Court finds in favor of all defendants on this claim.[189]

d. Unjust Enrichment

The Court next considers Cornell's claim of unjust enrichment. "The elements of a claim of unjust enrichment are '(1) an enrichment, (2) an impoverishment, (3) a relation between the enrichment and the impoverishment, (4) the absence of justification, and (5) the absence of a remedy provided by law.'"[190] To the extent the claim is directed to La Grange, it fails as a matter of law. "It is a well-settled principal of Delaware law that a party cannot recover under a theory of unjust enrichment if a contract governs the relationship between the contesting parties that gives rise to the unjust enrichment claim."[191] As determined above, several contracts govern the relationship between Cornell and La Grange with respect to Lot 206. No claim for unjust enrichment against La Grange lies here.

Cornell also seeks recovery from Johnson on a theory of unjust enrichment on the ground that he "received a fully furnished model home ... without spending a

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[189] The scope of review of this claim, in accordance with the parties' stipulation (Tr. ID 46802291), is limited to consideration of available legal remedies under 6 *Del. C.* § 1307(b).

[190] *Seibold v. Camulos Partners LP*, 2012 WL 4076182 at *1 n.106 (Del. Ch. Sept. 17, 2012) (citing *Nemec v. Shrader*, 991 A.2d 1120, 1130 (Del. 2010)).

[191] *Vichi v. Koninklijke Philips Electronics N.V.*, 2012 WL 5949204 at *22 (Del. Ch. Nov. 28, 2012) (citations omitted).

dime."[192] It is not at all clear that this contention is supported by the record evidence, particularly given that closing documents for the Lot 206 transaction reveal that Johnson did, in fact, "spend a dime" (several in fact) for the property.[193] Even assuming *arguendo* that Cornell's claim was factually accurate, it is, nevertheless, legally flawed. As our Court of Chancery recently held:

> As an extension of that principle [no unjust enrichment when a valid contract] exists, this Court also has held that 'unjust enrichment cannot be used to circumvent basic contract principles [recognizing] that a person *not a party to [a] contract* cannot be held liable to it.' Delaware courts consistently have held that 'where a contract exists no person can be sued for breach of contract who has not contracted either in person or by an agent, and ... that the doctrine of unjust enrichment cannot be used to circumvent this principle merely by substituting one person or debtor for another.' 'The rationale for this rule is that the inability of a party to a contract to fulfill an obligation thereunder cannot serve as basis to conclude that other entities, *who are not party to the contract,* are liable for that obligation.'[194]

Cornell has alleged that La Grange's conduct with respect to Lot 206 constituted a breach of the parties' contracts. The Court has found that allegation to be supported by the preponderance of the evidence and has found La Grange in breach. Cornell cannot now seek to circumvent the operative agreements by invoking

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[192]Pfs. Op. Br. at 27.

[193]JX 41.

[194] *Vichi*, 2012 WL 5949204 at *21 (Del. Ch. Nov. 28, 2012) (citing *WSFS v. Chillibilly's, Inc.*, 2005 WL 730060 (Del. Super. March 30, 2005) (citations and internal quotation marks omitted) (emphasis in original)).

the equitable doctrine of unjust enrichment against Johnson simply because Johnson was not a party to its contracts with La Grange. Cornell has its remedy at law and that must suffice.[195]

To the extent Cornell is still pressing an unjust enrichment claim against Nichols and McCoy in their individual capacities (not argued in its post trial brief), the claim fails because the contract with La Grange governs the controversy.[196] If Cornell seeks to reach Nichols and McCoy through the La Grange entities, that claim would effectively require the Court to pierce the corporate veil(s), a remedy this Court lacks the subject matter jurisdiction to provide.[197]

The Court finds in favor of all defendants on Cornell's unjust enrichment claim.

C. La Grange's Counterclaims

1. Sales Incentives and Pike Creek Mortgage Incentives

The Court already has determined that La Grange did not comply with the notice and cure provision of the Agreement and that this noncompliance was not

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[195] *Seibold*, 2012 WL 4076182 at *1 (Del. Ch. Sept. 17, 2012) (dismissing plaintiff's unjust enrichment claim upon noting that plaintiff had an available legal remedy on its tort claim, observing that "[u]njust enrichment is in essence a gap-filling remedy, which can be sought in the absence of a remedy provided by law.")(citation and internal quotation marks omitted).

[196] *Vichi*, 2012 WL 5949204 at *21 (Del. Ch. Nov. 28, 2012).

[197] *See Sonne v. Sacks*, 314 A.2d 194, 197 (Del. 1973).

excused by futility. While this determination is fatal to La Grange's breach of contract counterclaims, the Court will entertain them on the merits in any event for the sake of completeness. As discussed below, the Court is satisfied that La Grange has failed to meet its burden of proving its counterclaims by a preponderance of the evidence.

La Grange contends that Cornell was required by the Agreement to seek La Grange's written approval when deviating from the agreed upon sales incentives and base prices for the various types of residences sold in the Development.[198] According to La Grange, Cornell did not comply with this provision when it offered unauthorized sales incentives to home buyers. The evidence says otherwise.

As McSorley explained at length, the incentives Cornell offered to buyers never exceeded those permitted by the Agreement.[199] In this regard, it is important to focus on the actual cost of the incentives to the seller, not the value of the incentives to the buyer. Lingo reconciled the value versus cost confusion by using

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[198]JX 4 at ¶2C. The Agreement states in relevant part, "To enable Cornell to enter into the Contracts on behalf of La Grange, Cornell and La Grange shall agree, in advance, to the minimum sales prices and terms reasonably acceptable to La Grange (the "Default Terms") as set forth in Exhibit "E." Any Contract that incorporates a sales price and terms no less favorable to La Grange than the Default Terms and is executed by Cornell shall be deemed acceptable to La Grange. If the terms of any Contract differ from the Default Terms, Cornell shall request the consent of La Grange." *Id.*

[199]9/25/12 Trans. 41-43.

the example of an incentive for a finished basement. Lingo explained that a finished basement cost $3,000 to build, but when the sale was documented the finished basement was reflected as a $10,000 to $12,000 charge to the customer.[200] Mr. Lingo further stated, "[w]e were consistently under but we were being told you gave the customer $12,000, which was never the -- agreement was the cost of the incentive, not how much we mark it up so the customer saw value."[201] The Court agrees with this interpretation of Cornell's obligation. Cornell did not short change La Grange on sales incentives.

La Grange took umbrage with Cornell offering incentives to home buyers who secured mortgage financing through Pike Creek, Cornell's preferred lender.[202] In this regard, the evidence revealed that Cornell displayed Pike Creek's marketing information in its sales office and Cornell's sales representatives would recommend Pike Creek as a credible mortgage company.[203] If a purchaser selected Pike Creek as its lender, then they would receive as an "incentive" a "discount against the purchase

[200] 9/24/12 Trans. 87:4-11.

[201] 9/24/12 Trans. 87:11-16.

[202] Dfs. Op. Br. at 8.

[203] 9/25/12 Trans. 30:5-13.

price [of the home]" or cash back at settlement.[204] In exchange, Cornell received a quarterly marketing fee from Pike Creek in the amount of $60,000.[205]

Cornell, through McSorley, was adamant that the relationship between Cornell and Pike Creek Mortgage was well-known to La Grange from the inception of the Agreement and throughout the Project.[206] McSorley testified that Pike Creek's preferred lender status was clearly set forth in Cornell's Purchase Agreement (Exhibit C to the Agreement).[207] Moreover, a La Grange employee, Mary Ann Wasko-Smith,[208] who worked directly with Cornell from the outset of the Project, was well aware of Pike Creek's involvement with the Project.[209] McSorley testified

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[204]JX 4, Ex. C at ¶ 10(b).

[205]JX 9.

[206]9/25/12 Trans. 30-31.

[207]JX 4, Ex. C at ¶ 10(b). "Purchaser Discount. Purchaser has been notified that Seller has a business relationship with Pike Creek Mortgage Services, Inc. (PMC a/k/a "Preferred Lender"). Purchaser has also been notified that Purchaser is under no obligation to utilize PMC and that Purchaser has the right to obtain mortgage financing from any lender that Purchaser so chooses. As an incentive to encourage Purchaser to utilize PMC for mortgage financing, and to the extent permitted under applicable law, Seller is willing to provide Purchaser with either a discount against the purchase price set forth in Paragraph 3 hereof ("Non-Cash Discount") or provide Purchaser with a discount against cash due at Settlement, including financing and other Closing Costs (Cash-Discount), or some combination thereof (collectively, the "Incentives").

[208]9/24/12 Trans. 19:5-6, 29:7-10. Nichols asked Cornell to hire Mrs. Wasko-Smith to oversee the project and she functioned as a liaison on the Project who was instructed from the beginning to share Cornell information directly with La Grange. 9/25/12 Trans. 44: 22-23, 45: 1-7.

[209]9/25/12 Trans. 30-31.

convincingly that the arrangement between Cornell and Pike Creek was not detrimental to La Grange, but rather had a "net positive effect."[210] And, as Lingo explained, the average sales price for homes sold with the Pike Creek incentive was $16,000 higher than homes sold without the incentive.[211] Based on the foregoing, the Court is satisfied that the Pike Creek incentive not only did not breach the Agreement, it was entirely consistent with the Agreement.

2. Lagging Sales Pace for Single Family Homes

The Court has addressed this claim in the context of La Grange's argument that it was excused from performance by virtue of Cornell's failure to meet sales projections. For the same reasons that argument fails, La Grange cannot mount a counterclaim against Cornell for a breach that never occurred.

3. The Alleged Accounting Failures

La Grange has failed to prove a breach of the Agreement based upon Cornell's alleged failure to provide the requisite level of accounting under the Agreement. As discussed above, Cornell made clear that La Grange's requests for information were met with commitments to provide complete access to Cornell's internal accounting

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[210] 9/25/12 Trans. 31:2-7.

[211] 9/24/12 Trans. 107:19-23, 108:1-4. *See also* 9/24/12 Trans. 79: 22-23 thru 80: 1 (Lingo testifies that "part of [Cornell's] development responsibilities in section 2E [of the Agreement] was that we were responsible for helping customers get mortgages. That was really one of the critical components to this project that made it successful.").

system.[212] Cornell not only agreed to meet with La Grange to discuss these issues, but at times reformatted previously accessible information at La Grange's request.[213] There was no breach here.

D. Cornell's Damages

Having determined that Cornell has proven its claims for breach of the Agreement, and certain claims regarding the wrongful conveyance of Lot 206, the Court must now turn to a determination of Cornell's damages. Cornell seeks recovery of its unreimbursed costs relating to the Project, the present value of lost future management services fees under the Agreement,[214] damages relating to the improper sale of Lot 206 and interest and court costs. In support of its damages claims, Cornell presented the expert testimony of David A. Anderson (Certified Public Accountant, Certified Fraud Examiner) ("Anderson").[215] LaGrange raised an eleventh-hour

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[212] *See* JX 11; 9/24/12 Trans. 45:13-15, 45:21-23 thru 46:1-2.

[213] 9/24/12 Trans. 135:5-23 thru 136:1-7.

[214] *Duncan v. Theratx, Inc.*, 775 A.2d 1019, 1022 (Del. 2001) ("The 'standard remedy' in Delaware, as elsewhere, 'for breach of contract is based upon the reasonable expectations of the parties *ex ante*.'") (citing Restatement (Second) of Contracts § 347 cmt. a).

[215] At trial, La Grange did not object nor otherwise contest through *voir dire* the qualifications or competency of Anderson in his proffered field of expertise.

challenge to the admissibility of Anderson's testimony as unreliable and seeks its exclusion from the record.[216]

1. The *Daubert* Challenge

Delaware Rule of Evidence 702 provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.[217]

In interpreting D.R.E. 702, our Supreme Court has adopted the United States Supreme Court's holding in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, where the court held that an expert's opinion must be based upon proper factual foundation and sound methodology meaningfully applied to the facts at issue in order to be admissible at trial.[218] In keeping with *Daubert*, the trial judge must act as the "gatekeeper" to determine whether a proffered expert's testimony meets the requisites for

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[216] As La Grange raised its *Daubert* challenge in a letter to the Court three days before the start of trial, the Court allowed Anderson to testify and reserved decision on La Grange's application to exclude his testimony.

[217] D.R.E. 702.

[218] *See Perry v. Berkley*, 996 A.2d 1262, 1267 (Del. 2010)(citing *Daubert v. Merrell Dow Pharmaceuticals,* Inc., 509 U.S. 579 (1993); *M.G. Bancorporation v. Le Beau*, 737 A.2d 513, 521 (Del. 1999)).

admissibility.[219] The trial judge has "broad latitude" while performing this function to decide whether the proffered expert testimony is sufficiently reliable and relevant.[220] The party offering the testimony bears the burden of establishing both prongs of this analysis, *i.e.*, relevancy and reliability, by a preponderance of the evidence.[221]

"If an expert bases an opinion on an erroneous factual foundation, the inaccurate premises invalidate the conclusion even if the expert's methods are generally valid."[222] Stated differently, "where an expert opinion is 'fundamentally unsupported by the facts of the case,' it should be excluded on 'the ground that it will be of no assistance to the fact finder in deciding the case.'"[223]

In this instance, Anderson projected the amount of management fees associated with each housing segment that Cornell was to build at the Development.[224] Not

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[219] *Perry,* 996 A.2d at 1267 (citations omitted).

[220] *Id.* (citations omitted)

[221] *Jones v. Astrazeneca, LP*, 2010 WL 1267114 at *6 (Del. Super. March 31, 2010) (citing *Minner v. Am. Mortgage & Guar. Co.*, 791 A.2d 826, 843 (Del. Ch. 2000)).

[222] *Perry*, 996 A.2d at 1268-9 (citing David H. Kaye, David E. Bernstein and Jennifer L. Mnookin, *The New Wigmore: Expert Evidence* § 3.1 (2004)).

[223] *Id.* at 1269 (citing 2 James W. Moore et al., *Moore's Federal Rules Pamphlet* § 702.6 at 565 (2010) (citations omitted)).

[224] JX 51.

surprisingly, in order to calculate expectancy damages which, by their nature, relate to as yet unrealized benefits of the bargain, Anderson necessarily made assumptions regarding the future conduct of the parties as if La Grange had not breached their agreement.[225] Anderson assumes, *inter alia*, that the parties would amend Exhibit A (which does not, on its face, contemplate the additional "weak link homes" that Cornell subsequently gained the rights to build, market and sell) and projected time frames for building, marketing and selling the town homes (including the additional weak link variety) and duplexes based upon their actual, historical pace.[226] La Grange does not take issue with this assumption, and for good reason. Nichols agreed at trial that Exhibit A did not accurately reflect the parties' arrangement after they entered into the Amendment.[227]

Anderson then makes the two assumptions that have garnered protest from La Grange: (1) that the parties would have amended Exhibit A to allow for an extension

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[225]On multiple instances during his testimony, as well as in his report, Anderson explained that he based his assumptions upon the parties' shared desire to maximize profits. *See e.g.* 9/26/12 Trans. 13:9-15, 16:6-13, 17:6-12, 22:9-13**.** *See* Restatement (Second) of Contracts, § 347 cmt. a (1981) (noting the future and conditional nature of expectation damages when "awarding [the injured party] a sum of money that will, to the extent possible, put [that party] in as good a position as [the injured party] *would* have been in *had the contract been performed*.")(emphasis supplied).

[226] 9/26/12 Trans. 21-23, 34-37 (applying Least Squares Trend Analysis). JX 51 (same). Of note, La Grange does not object to the projected sales paces of town homes and duplexes. Dfs. Ans. Br. at 13-15.

[227] 9/28/12 Trans. 148:15-23 thru 149:1.

of time to sell the single family homes; and (2) that the parties would have agreed to alter the price and/or design of the single family homes to increase their sales pace.[228] Anderson calculated the amounts of projected management fees of each housing segment and reduced that amount to present value to opine that Cornell sustained expectancy damages in the amount of $2,159,000.[229]

La Grange cites *Perry* in support of its contention that Anderson's testimony is inadmissible.[230] There, the Supreme Court affirmed the Superior Court's finding that the testimony of the plaintiff's medical expert was inadmissible upon concluding that he demonstrated a "complete lack of knowledge of the most fundamental relevant facts."[231] Specifically, the court determined that the expert was unaware of the plaintiff's prior medical history of injuries that were similar if not identical to those the expert had opined were proximately caused by the accident at issue.[232] Accordingly, the court concluded that the expert's opinion as to causation was

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[228] *See* Dfs. Ans. Br. at 13-15. 9/26/12 Trans. 14-15, 39-40. JX 51.

[229] 9/26/12 Trans. 51:8-13. JX 51 (using rounded figures for ease of explanation).

[230] *See Perry*, 996 A.2d at 1268. La Grange challenges Anderson's assumptions as being "entirely counterfactual and extra-contractual." La Grange does not dispute the reliability of. Anderson's principles and methods nor the reliability of his application, rather it is the content of Anderson's assumptions that prompts La Grange's objection. Dfs. Ans. Br. at 13-15.

[231] *Perry*, 996 A.2d at 1271.

[232] *Id.*

"without an accurate factual predicate" and, therefore, inadmissible under *Daubert* and D.R.E. 702.[233]

Unlike the medical expert in *Perry*, Anderson did not demonstrate a fundamental misunderstanding of the facts upon which his opinions were based. To the contrary, Anderson knew full well of the parties' disagreement regarding whether Exhibit A reflected projections or deadlines.[234] He also knew that sales of single family homes had lagged behind projections.[235] He was asked to assume that Exhibit A did not reflect contractual deadlines and, therefore, that Cornell had not breached the Agreement by not keeping pace with the projected sales of single family homes. These assumptions, as it turns out, comport with the Court's findings after trial. Moreover, they do not reflect ignorance of key facts that undermine the reliability of the conclusions.[236] Rather, they reflect a reasonable assumption that the parties would have worked together, but for La Grange's breach, to continue on a path towards profitability for the Project. La Grange, through counsel, was able to test Anderson's

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[233] *Id.*

[234] JX 51.

[235] 9/26/12 Trans. 80:18-21. JX 51.

[236] *See Util. Trailer Sales of Kansas City, Inc. v. MAC Trailer Mfg., Inc.*, 267 F.R.D. 368, 372 (D. Kan. 2010) (rejecting Daubert challenge to damages expert's opinion on grounds that assumptions were flawed upon concluding "whether ultimately correct or not, Mr. Hill's assumptions are reasoned and based on facts, not pure speculation.").

assumptions through "vigorous cross examination."[237] *Daubert* is concerned with the reliability of the expert's methodology, not the accuracy of his ultimate conclusions.[238] Anderson's testimony is admissible because his methodology was reliable. La Grange's challenge will be considered when assessing the weight to be given to Anderson's testimony.[239]

2. Cornell Has Proven Its Damages

Having determined that Anderson's testimony is admissible, the Court next considers whether Cornell has satisfied its burden of proving damages by a preponderance of the evidence.[240] A proper damages award for breach of contract is

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[237] *Daubert*, 509 U.S. at 595-96 (holding that "[v]igorous cross examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence."). *See also Beard Research, Inc. v. Kates*, 8 A.3d 573, 593 (Del. Ch. 2010) (noting that "there is less of a basis to use *Daubert* to exclude testimony entirely in a bench trial because the judge can consider any shortcomings in the expert's testimony that are drawn out through cross-examination.")(citation omitted).

[238] *See State v. McMullen*, 900 A.2d 103, 114 (Del. Super. 2006) ("Proponents do not need to demonstrate to the judge by a preponderance of the evidence that the assessments of their experts are correct, they only have to demonstrate by a preponderance of the evidence that their opinions are reliable.")(citations omitted).

[239] *Perry,* 996 A.2d at 1269 (citing *Minn. Supply Co. v. Raymond Corp.*, 472 F.3d 524, 544 (8th Cir. 2006) ("[a]s a general rule, the factual basis of an expert opinion goes to the credibility of the testimony, not the admissibility, and it is up to the opposing party to examine the factual basis of the opinion upon cross-examination."); *Margolies v. McCleary, Inc.*, 447 F.3d 1115, 1120-1121 (8th Cir. 2006) (finding expert's opinion on estimated damages was both reliable and relevant and thus admissible in breach of contract case; defendant's challenges to factual basis of that opinion properly went to weight of evidence, not its admissibility)).

[240] *See Frontier Oil Corp. v. Holly Corp.*, 2005 WL 1039027 (Del. Ch. Apr. 29, 2005)
(continued...)

an amount sufficient to restore Cornell to the position it would have enjoyed but for the breach.[241]

In summary, Anderson rendered the following opinions as to the amounts of Cornell's damages should La Grange be found liable in this litigation:

- Construction and loan costs for Lot 206 owed in an amount of $192,281;[242]
- Sales, marketing, administrative and related Project costs owed in an amount of $250,631;[243] and
- Present value of lost management services fees owed in an amount of $1,716,114.[244]

La Grange elected to challenge Cornell's damages presentation by cross-examination, which focused upon the assumptions made by Anderson relating to his projected loss of management services fees derived from future sales, rather than by

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[240](...continued)
judgment entered sub nom. Frontier Oil Corp. v. Holly Corp., 2005 WL 5794558 (Del. Ch. May 23, 2005); *Pharmathene, Inc. v. SIGA Technologies, Inc.*, 2011 WL 4390726 at *31 (Del. Ch. Sep. 22, 2011).

[241] *Titan Investment Fund II, LP v. Freedom Mort. Corp.*, 2012 WL 1415461 at *10 (Del. Super. March 27, 2012) (citing *Genecor Int'l, Inc. v. Novo Nordisk A/S*, 766 A.2d 8, 11 (Del. 2000)).

[242]JX 51, Ex. 1B.

[243]JX 51, Ex. 2.

[244]JX 51, Ex. 8.

presenting a competing damages expert. Despite its efforts, however, the Court has found Mr. Anderson's testimony to be both credible and persuasive.

a. Construction and loan costs for Lot 206

In reaching his opinion, Anderson received and reviewed a summary of construction lots and expenses relating to Lot 206 provided by Cornell. He then verified the legitimacy of that information by reconciling each line item and its corresponding numbers with underlying vendor invoices, checks, bank statements and other evidence to ensure that the amounts were expenditures actually incurred by Cornell in connection with Lot 206 or the model home.[245] Anderson found that $457,878.64 was supported by documentation.[246] Anderson included within his calculations a charge by NBRS to Cornell ($8,402.72) relating to the loan Cornell secured in connection with the Amendment and escrowing of the Lot 206 deed.[247] Anderson totaled these amounts ($466,281.36) and then subtracted construction draws from NBRS ($274,000) that resulted in an amount of $192,000.[248] With due consideration given to cross-examination by La Grange, the Court is persuaded that

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[245] *See* 9/25/12 Trans. 172:4-22. This investigation is memorialized in JX 51, Ex. 1A.

[246] 9/25/12 Trans. 173:3-6.

[247] 9/25/12 Trans.173:19-23 thru 174:1-4.

[248] JX 51, Ex. 1B.

Anderson's approach and opinion as to Lot 206 damages is reasonable and supported by the preponderance of the evidence.

b. Sales, marketing, administrative and other costs

Anderson undertook a similar approach in determining the amount of sales, marketing and other costs that Cornell sought to be reimbursed by La Grange. Specifically, Anderson evaluated expenses that included salaries and costs of sales personnel, advertising, collateral materials, promotion and other expenses related to the objective of selling homes within the Development.[249] Although Cornell initially sought more in reimbursements, Anderson was able to verify, by way of reconciliation with supporting documentation, an amount of $300,340.[250] Anderson next adjusted this figure to account for $49,709 that Cornell owed to Nichols Nursery, which resulted in the amount of $250,631.[251] Notwithstanding cross-examination, the Court is persuaded that Anderson's approach and opinion as to this component of Cornell's damages presentation is also reasonable and, again, supported by the preponderance of the evidence.

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[249] 9/26/12 Trans. 175:17-20.

[250] 9/26/12 Trans. 176:9-23 thru 177:1-4.

[251] JX 51, Ex. 2.

c. Lost management services fees (present value)

In determining the lost management services fees, Anderson made assumptions about the parties anticipated co-operation in furthering the goal of profitability for the Project.[252] In reaching his conclusion, Anderson determined a gross figure for each housing segment, then discounted the total of those numbers to present value. With respect to town homes, specifically, Anderson determined that lost management fees totaled $960,000.[253] He reached that number by using a conservative time frame in which to close the sale (approximately 210 days) and projecting a future sales pace based upon actual sales history prior to February 11, 2011.[254] Anderson implemented the Least Squares approach in analyzing the statistical trend of actual sales within his calculations.[255] To ensure the reliability of his projections, and reduce reliance upon the potentially subjective input of Cornell, he contrasted his projected sales pace with other Cornell residential developments with comparable unit types and prices in a

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[252] These assumptions include that La Grange would continue to provide Cornell with developed land (9/26/12 Trans. 11:2-21) and La Grange would not have ousted Cornell from the property (9/26/12 Trans. 12:2-19). Additionally, Anderson made assumptions that the parties would extend the time frame in which to sell the entirety of the residences. *See generally* 9/26/12 Trans.12-17. La Grange focused its cross-examination efforts, however, upon the assumptions which were the subject of its *Daubert* objection discussed above.

[253] 9/26/12 Trans. at 18:1-6.

[254] 9/26/12 Trans.19:11-23 thru 20:1-18. *See generally* 9/26/12 Trans. 26-27 and JX 51, Ex. 4 (indicating actual sales through February 11, 2011 exceeding Exhibit A to Agreement).

[255] 9/26/12 Trans. at 27:3-9. The results of that analysis are reflected in JX 51, Ex. 4.

nearby locale.[256] Anderson then multiplied 96 (the number of town homes that had not closed as of February 11, 2011) by $10,000 (the management services fee prescribed by the Agreement) to reach $960,000. Anderson employed a similar method to derive $330,000 in management fees for duplexes,[257] as well as $600,000 in management fees for the expected sales of single family homes.[258] Lastly, Anderson discounted each of these amounts by a rate of 5.5%[259] to achieve present value for each segment,[260] which he totaled to be $1,716,000 (rounded).[261]

Despite significant cross-examination regarding Anderson's assumptions, and La Grange's position at trial that it would not have agreed to extend the timeframe for future sales (especially for single family homes),[262] the Court is persuaded that Anderson's testimony and opinion as to the present value of lost management

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[256] 9/26/12 Trans. 28-29, 43-44. JX 51, Ex. 5A.

[257] 9/26/12 Trans. 33:7-12. 30 (duplexes to be sold) multiplied by $11,000 (fees per Agreement).

[258] 9/26/12 Trans. 40:1-12. 12 (single-family homes to be sold) multiplied by $12,000 (fees per Agreement).

[259] This is a more conservative (higher) rate than the five-year U.S. treasury bond rate as of February 11, 2011 (2.38%). 9/26/12 Trans. 47:5-23 thru 48:1-18. The result of a higher rate in calculating present value is, of course, a lesser present value. 9/26/12 Trans. 48:13-21.

[260] Present value of town homes ($849,458), duplexes ($308,789) and single-family homes ($536,656). JX 51, Ex. 8.

[261] 9/26/12 Trans. 51:3-4. JX 51, Ex. 8.

[262] *See* 9/26/12 Trans. 108-121.

services fees is reasonable. The assumptions are consistent with the parties' expectations of profitability for the Project, as reflected by the preponderance of the evidence, and the methodology was conservative and reliable.

d. Costs and interest

In addition to the damages supported by Anderson's testimony, Cornell has requested costs, as well as prejudgment and postjudgment interest.[263] Without citing any authority, La Grange contends that Cornell is not entitled to recover costs relating to the filing of the Complaints in the Court of Chancery because they were dismissed. La Grange further contends that the costs of Ms. DeVoll's deposition transcript are not "within the meaning of [Superior Court] Rule 54(g)" because La Grange accommodated Cornell's request that Ms. DeVoll not testify in person to alleviate her inconvenience.[264] Finally, La Grange contends that Cornell is not entitled to prejudgment interest because La Grange had "no means available to determine that amount which [it] had to tender in order to prevent interest from accruing."[265]

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[263] Cornell seeks costs associated with the following: (a) filing of four complaints against the defendants, including two complaints filed in the Court of Chancery "that directly led to the two pending cases"; (b) DeVoll's deposition transcript; and (c) Anderson's expert witness trial testimony. Pfs. Op. Br. at 28, Ex. B (affidavit in support of costs by David A. Felice, Esquire). In the absence of another rate identified in the contract, says Cornell, it also seeks pre-judgment and post-judgment interest at the default legal rate prescribed by 6 *Del. C.* § 2301(a). Pfs. Op. Br. at 28.

[264] Dfs. Ans. Br. at 19.

[265] Dfs. Ans. Br. at 19-20 (citing *Coca-Cola Bottling Co. of Elizabethtown, Inc. v. The Coca-*

(continued...)

As a general rule, "costs shall be allowed as of course to the prevailing party upon application to the Court within ten (10) days of the entry of final judgment, unless the Court otherwise directs."[266] "Under case law ... our courts have defined costs as those 'expenses necessarily incurred in the assertion of [a] right in court,' such as court filing fees, fees associated with service of process or costs covered by statute."[267] Fees paid to court reporters for depositions, however,"shall not be taxable costs unless introduced into evidence."[268]

Courts in our state have found that "[c]osts are allowances in the nature of incidental damages awarded by law to reimburse the prevailing party for expenses *necessarily* incurred in the assertion of [] rights in court."[269] The complaints that Cornell filed in the Court of Chancery were not necessarily incurred in the assertion of the rights that Cornell asserts before this Court. Accordingly, that aspect of Cornell's request for costs is denied. With respect to the deposition costs of DeVoll,

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[265](...continued)
Cola Co., 769 F. Supp. 599, 633 (D. Del. 1991), *aff'd in part and rev'd in part on other grounds*, 988 F.2d 385 (3d Cir.), *cert. denied*, 510 U.S. 908 (1993)).

[266] Super. Ct. Civ. R. 54(d).

[267] *FGC Holdings Ltd. v. Teltronics, Inc.*, 2007 WL 241384 (Del. Ch. Jan. 22, 2007)(citations omitted)(interpreting Court of Chancery analogue, Ct. Ch. Rule 54(d)).

[268] Super. Ct. Civ. Rule 54(f).

[269] *Donovan v. Delaware Water and Air Res. Comm'n*, 358 A.2d 717, 723 (Del. 1976) (citing *Peyton v. William C. Peyton Corp.*, 8 A.2d 89 (Del. 1939)(emphasis added)).

La Grange could have conditioned its assent to its admission into the record upon Cornell's foregoing of associated costs. It did not. Cornell incurred the costs associated with ordering a copy of the deposition transcript despite DeVoll being called to deposition by La Grange. Accordingly, as Cornell admitted DeVoll's deposition into the record *sub judice*, Cornell is allowed to recover these costs.

Prejudgment interest is routinely awarded to successful litigants.[270] The Court is not persuaded that *Coca-cola Bottling Co. of Elizabethtown, Inc.* stands for the proposition proffered by La Grange, that is, that Cornell was obliged to specify the amount which La Grange needed to pay so that La Grange could avoid an assessment of prejudgment interest.[271] La Grange was fully capable of calculating Cornell's likely expectancy damages (lost management fees clearly defined in the Agreement) at the time it kicked Cornell off the Project. Accordingly, the Court awards Cornell prejudgment interest, as well as post judgment interest, at the legal rate.[272]

VII.

For the foregoing reasons, the Court has found in favor of Cornell and awards damages in the amount of $1,966,745 in Civil Action No. N11C-05-016-JRS [CCLD]

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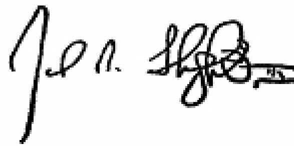
[270] *See Citadel Hldg. Corp. v. Roven*, 603 A.2d 818, 826 (Del. 1992)("In Delaware, prejudgment interest is awarded as a matter of right.")

[271] *See Coca-Cola Bottling Co. of Elizabethtown, Inc.*, 769 F.Supp. at 633.

[272] 6 *Del. C.*§ 2301(a).

against La Grange Communities, LLC and La Grange Properties, LLC and $192,281 in Civil Action No. N11C-07-160-JRS [CCLD] against La Grange Communities, LLC and La Grange Properties, LLC. Further, costs are awarded in the amount of $8,309 and prejudgment and post judgment interest are awarded at the legal rate.

IT IS SO ORDERED.



Joseph R. Slights, III, Judge

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