IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR SUSSEX COUNTY

CALDERA PROPERTIES - LEWES/ REHOBOTH VII, LLC.,	:	C.A. No. 07C-12-002 (THG)
Plaintiff,	:	
v.	:	
THE RIDINGS DEVELOPMENT, LLC, CENTEX HOMES, and BEAZER HOMES CORP.,	:	
Defendants.	:	

MEMORANDUM OPINION

UPON MOTIONS FOR JUDGMENT ON THE PLEADINGS AND MOTIONS TO DISMISS -

GRANTED IN PART, DENIED IN PART

DATE SUBMITTED: June 3, 2008

DATE DECIDED: June 19, 2008

Jeffrey M. Weiner, Esquire, 1332 King Street, Wilmington, DE 19801, and Barbara Anisko, Esquire, Pamela M. Tobin, Esquire, and Marc B. Kaplin, Esquire, P.O. Box 3037, Blue Bell, PA 19422-0765, attorneys for plaintiff

Daniel F. Wolcott, Jr., Esquire, Gregory A. Inskip, Esquire, and Michael B. Rush, Esquire, P.O. Box 951, Wilmington, DE 19899-0951, attorneys for defendants The Ridings Development, LLC and Beazer Homes Corp.

Gerard M. O'Rourke, Esquire, Suite 1501, 222 Delaware Avenue, Wilmington, DE 19801, and Deborah J. Israel, 1401 Eye Street, NW, Suite 700, Washington, DC 20005-2225, attorneys for defendant Centex Homes

Graves, J

Pending before the Court are motions which defendants The Ridings Development, LLC ("Ridings"), Centex Homes ("Centex"), and Beazer Homes Corp. ("Beazer") have filed in response to plaintiff Caldera Properties-Lewes/Rehoboth VII, LLC's ("Caldera") suit against them resulting from defendants' failure to close on the second and third phases of a land deal. The parties have argued their respective positions both in writing and orally. During a telephone conference in this matter on June 16, 2008, I made several rulings. I ruled on the perpetual easement issue and I ruled none of the defendants should be dismissed as parties at this time. However, with regard to the other issues, I have granted a 60 day period in order for the parties to conduct expedited discovery on damages. This is my decision memorializing and expanding upon my rulings of June 16, 2008.

To make the factual scenario easier to understand, I first sketch an outline of the facts contained in the pleadings and the documents attached thereto; thereafter, I backtrack and fill in the outline with all of the facts.

Caldera and Centex entered into various agreements with the goal of turning two tracts of land into a residential development containing hundreds of single-family lots. Caldera initially did not own the two pieces of land; instead, it had contracts to buy them. Upon purchasing them, Caldera was obligated to obtain approval for developing at least 200 lots on the property. Caldera obtained approval for 225 lots. Centex then was to purchase the properties from Caldera and develop them. The sale/purchase of 225 building lots was set to take place over three phases and by way of three settlements. The first settlement occurred. Ridings was the entity to which the Property was conveyed. Allegedly, Centex assigned the Amended Contract to Ridings. Centex and/or its assignee installed infrastructure and a wastewater treatment facility. The wastewater

treatment facility was installed on land which Centex and/or its assignee did not yet own but had intended to purchase in the second phase. Centex and/or its assignee delayed the second settlement. Ultimately, the second settlement never took place. The contract for sale, as amended, contains a liquidated damages clause which addresses the situation where the purchase of the property does not occur because of Centex and/or its assignee's wrongful refusal or default. It also contains other provisions addressing the situation where Centex and/or its assignee do not purchase all of the property.

Caldera filed suit against Centex, Ridings and Beazer, and the defendants counterclaimed. The parties dispute who breached first. Caldera has not limited itself to recovering the liquidated damages. Instead, it seeks additional damages by way of claims of misrepresentation regarding the delay in the second closing, breach of the implied condition of good faith and fair dealing, and tortious interference with prospective economic advantage. The parties also seek resolution of issues regarding easements which Centex and/or its assignee obtained in order to develop the property it did not own and regarding other matters pertaining to which entity must pay for what improvements.[1]

The factual elaboration follows.

On May 31, 2002, Caldera acquired equitable title to approximately 208.9 acres of land pursuant to an agreement with Howard L. Ritter. On October 21, 2003, Caldera acquired equitable title to approximately 5.73 acres of land pursuant to an agreement with the Estate of

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[1]Recently, Caldera filed an action in the Court of Chancery regarding access to and operation of the wastewater treatment facility. Caldera Properties-Lewes/Rehoboth VII, LLC v. The Ridings Development, LLC, *et al.,* Del. Ch., C.A. No. 3795-CC. The Supreme Court, pursuant to Del. Const. Art. IV, § 13(2), has designated me to sit on the Court of Chancery for the purpose of hearing and determining all issues in this Chancery case.

William N. Wright. The combined properties are "the Property" which is involved in this pending litigation.

Caldera, anticipating that it would be the owner of the Property, entered into an agreement with Centex dated February 19, 2004 ("2/19/04 Contract" or "Contract"), where Centex agreed to buy the Property from Caldera.

In Section 5 of the 2/19/04 Contract, the three phases of closings are set forth. The first closing was to occur 10 days from satisfaction of specified conditions precedent. The second closing was to occur 18 months after the first closing. The third closing was to occur 36 months after the first closing. Phase I was to consist of approximately 77.4 acres and contain 75 single family residential lots; Phase II was to consist of approximately 67.32 acres and contain 75 single family residential lots; and Phase III was to consist of approximately 73.74 acres and contain 75 single family lots. The purchase price was based on the number of approved dwelling lots multiplied by $80,000. There were 225 approved lots; thus, the purchase price was $18 million, or $6 million for each phase.

The "DEPOSIT" provision of the 2/19/04 Contract, which is contained in section 4, provided as follows. Centex was to deliver a $10,000 Earnest Money Deposit upon the signing of the Contract. After the feasibility and approval period passed, Centex was to deliver $2 million. Once the $2 million was delivered, the $10,000 was to be returned to Centex. The contract provided for the deposit to be secured by a second lien deed of trust on another property which Caldera owned ("Deposit Deed of Trust"). The 2/19/04 Contract provided:

> 4.3.2. Security for Deposit. Notwithstanding that Seller shall be in possession of all or any portion of the Deposit, any and all such monies then held by Seller shall remain subject to the terms and conditions of this Contract and **shall be returned**

to Purchaser in the event of Seller's default or termination hereof following a failure of a condition precedent (as provided in Section 10 below) and shall be a credit to the Purchase Price at closing hereunder. *** [Emphasis added.]

The Contract further provided:

4.4. Termination. If this transaction is terminated before Closing, the Escrow Agent shall deliver the Deposit to Seller or to Purchaser pursuant to the terms of this Contract, or if Seller and Purchaser dispute the distribution of the Deposit, the Escrow Agent may deliver the Deposit to the appropriate court in Sussex County, Delaware, in an interpleader action and thereafter shall be relieved of any further obligation therefor.

In Section 8, the 2/19/04 Contract also allowed for Caldera to use the deposit to subsidize expenses it incurred in the development approval process:

8. Development Approval Process. Seller agrees to undertake the following actions at Seller's sole risk and expense; provided, however, that Seller may use the Additional Deposit (in accordance with Section 4.3 above) to subsidize any expenses incurred by Seller in connection with the entitlement activities described in this Section 8. *** [Emphasis in original.]

Section 17 is the Default section. Therein, it is provided in pertinent part as follows:

17. DEFAULT.

17.1 Purchaser's Default. In the event that this transaction shall fail to close because of a wrongful refusal or default on the part of Purchaser, the Deposit shall be paid by the Escrow Agent to the Seller as agreed liquidated damages. Thereafter, neither Purchaser nor Seller shall have any further obligation under this Contract. Purchaser and Seller acknowledge that if Purchaser defaults, Seller will suffer damages in an amount that cannot be ascertained with reasonable certainty on the Effective Date and that the amount of the Deposit to be paid to Seller most closely approximates the amount necessary to compensate Seller in the event of such default. Purchaser and Seller agree that this is a bona fide liquidated damages provision and not a penalty or forfeiture provision. Except for the indemnification provision in Section 6.4 above [which provision is inapplicable in this case], seller waives all other remedies including the right to recover damages in excess of the Deposit and the right to enforce specific performance. [Parenthetical added.]

17.2. Seller's Default. In the event that Seller shall fail to fully and timely

perform any of its obligations hereunder, then Purchaser may, at its option (i) declare Seller's default under this Contract by written notice delivered to Seller, in which event the Deposit shall be refunded to Purchaser, or (ii) enforce specific performance of this Contract, or (iii) grant such extensions of time as Purchaser deems proper under the circumstances without waiving any other remedy.

17.3. Notice. Prior to declaring a default and exercising the remedies described herein, the non-defaulting party shall issue written notice of default to the defaulting party describing the event or condition of default in sufficient detail to enable a reasonable person to determine the action necessary to cure the default. The defaulting party shall have 10 days from delivery of the notice in which to cure the default. If the default has not been cured within the 10-day period, the non defaulting party may exercise the remedies described above.

In Section 18, there is a provision regarding Seller's possession of the Property:

18. POSSESSION; ACCESS EASEMENTS; DEVELOPMENT COOPERATION.
At each of the three (3) Closings hereunder, Purchaser shall be granted full possession of that portion of the Property that will, upon recordation of the Record Plat, contain such SFD lots as are the subject of such Closing, as provided in Section 5 above. During the period between the First Closing and the Third Closing hereunder, Purchaser shall have the right to full, and complete access in, on, over, across and through any portions of the Property then still owned by Seller for the purpose of developing, building upon, and marketing the portions of the Property theretofore acquired by Purchaser at the First Closing or the Second Closing, as the case may be, and for the purpose of carrying out all activities ancillary thereto or in furtherance thereof Seller shall (i) grant such easements, rights-of-way, and dedications as may be required by or acceptable to any Governmental Authority or public utility companies for the purpose of acquiring and obtaining public utilities, sanitary and storm sewers, water, gas, electric and/or telephone facilities for the benefit of the Property or any portion thereof; (ii) grant such slope, grading or drainage easements as are necessary or desirable in connection with the development of the Property; (iii) grant all construction easements required by virtue of, or in connection with, Purchaser's development of the Property in phases, including the right of Purchaser to clear and grade land not yet acquired by Purchaser but lying within thirty feet (30') of Purchaser's property line; and (iv) dedicate portions of the Property for public use (including, without limitation, common green areas, park areas, open spaces, roads, rights-of-way, sidewalks and gutters) in the event that any Governmental Authority requires such dedication as a condition to the approval and/or recordation of any site plans or plats with respect to the Property.

The following provisions of the "MISCELLANEOUS" section of the 2/19/04 Contract are pertinent to this litigation.

> 21. MISCELLANEOUS.
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> ***
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> 21.3. Amendment. No modification or amendment of this Contract shall be of any force or effect unless in writing executed by both Seller and Purchaser.
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> 21.4. Attorneys' Fees. If any party obtains a judgment against any other party by reason of breach of this Contract, attorneys' fees and costs shall be included in such judgment.
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> ***
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> 21.7. Time of the Essence. Time is of the essence in the performance of all obligations by Purchaser and Seller under this Contract.
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> ***
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> 21.9. Successors and Assigns. This Contract shall inure to the benefit of and be binding upon the permitted successors and assigns of the parties hereto; provided, however, that prior to any assignment of this Contract, the requesting party must receive the prior written consent of the other party, which consent shall not be unreasonably withheld, conditioned or delayed. Notwithstanding the foregoing, Purchaser shall have the right, in its sole discretion, to assign this Contract to an entity in which Purchaser (i) serves as the manager or (ii) holds a fifty percent (50%) or greater ownership interest.[Emphasis in original.]

On April 5, 2004, Caldera and Centex entered into the First Amendment to Real Estate Sale Contract ("First Amendment"). The First Amendment designated April 9, 2004, as the expiration date for the feasibility and approval period. The parties additionally modified the 2/19/04 Contract to provide for the closing on the Ritter property to take place at the same time as Caldera acquired it so that the deed was delivered directly from Ritter to Centex. The First Amendment also amended the Deposit provision as follows: $800,000 of the Deposit was to be

applied to the portion of the purchase price due and payable at the first closing; $800,000 of the Deposit was to be applied to the portion of the purchase price due and payable at the second closing; and the remaining $400,000 was to be applied to the portion of the purchase price due and payable at the third closing.

Since the Contract had not been terminated during the feasibility period, Centex paid the Deposit to Caldera and Caldera released the Ernest Money Deposit to Centex.

Caldera had delivered to Centex, in a previous, unrelated transaction between the parties, a Deposit Deed of Trust in the amount of $2 million, the purpose of which was "to secure the return by Mortgagor [Caldera] to Mortgagee [Centex] of the Deposit ... in the amount of $2,000,000, if such return of the Deposit is required under the Contract." Deposit Deed of Trust, attached as Exhibit B to Complaint. On April 15, 2004, the parties entered into the "First Amendment to Deposit Mortgage". Therein, the amount secured was increased from $2 million to $4 million. That increase covered the $2 million Deposit for the transaction at issue and constituted security for its return.

Caldera purchased the Wright property in connection with the agreements. It also obtained approval for the development of 225 single family dwelling lots.

On October 11, 2005, Caldera and Centex entered into the Second Amendment to Real Estate Sale Contract ("Second Amendment").

Section 2. of the Second Amendment contains provisions which address the reimbursement to Caldera of certain expenses it would be advancing which were Centex's responsibility.

This Second Amendment also contains the following provision:

5. Grant of Easements upon Contract Termination. Purchaser hereby acknowledges and agrees that, if the Contract is terminated before the Third Closing has been consummated, Seller will require certain easement rights over the land theretofore acquired by Purchaser (at the First Closing, and/or at the Second Closing) ("Purchaser's Land"), in order to develop the property still owned by Seller (the "Retained Land"). Accordingly, Purchaser hereby covenants and agrees that, upon any such termination, Purchaser shall grant to Seller reasonable access, utility, construction, and drainage easements over portions of Purchaser's Land as necessary for the reasonable development of the Retained Land; provided, that all such easements shall be consistent with, and the use thereof shall not interfere with, the development of Purchaser's Land in accordance with approved plats, plans, and permits. [Emphasis in original.]

This provision, like the liquidated damages clause, establishes the parties contemplated that the deal might not be completed.

On this same date, October 11, 2005, Caldera and Ridings entered into an Easement Agreement ("Easement Agreement"). The agreement granted easements to Ridings (Grantee) over the Property of Caldera (Grantor). There were three easements: a construction easement; a utility easement; and a slope, grading and draining easement. The construction easement addresses what would happen in the event the contract was not fulfilled. It does not contain language that the easement was perpetual while the other two clauses do contain such language. Set forth below is the pertinent language of the Easement Agreement.

RECITALS:

R-1. Grantor and Grantee have entered that certain Real Estate Sale Contract, dated February 19, 2004, as amended from time to time (collectively, the "Contract") in which Grantor shall sell and Grantee shall acquire fee simple title to certain parcels of land located in Sussex County, Delaware, ... (the "Property");

R-2. Grantee **intends** to acquire the Property in three (3) phases. Accordingly, Grantee may require (for construction purposes, for purposes of installing certain utilities and for purposes of maintaining slopes and providing drainage) access and use by way of easements over and across those phases still owned by Grantor [Those phases of the Property, to the extent still owned by Grantor at the time of

reference hereunder, are referred to herein as the "Grantor Parcels". Those phases of the Property, to the extent still owned by Grantee at the time of reference hereunder, are referred to herein as the "Grantee Parcels". In this regard, the Grantor parcels shall be deemed to include, after the first closing under the Contract, the parcels more particularly described in Exhibit B-2 and Exhibit B-3 attached hereto and, after the second closing under the Contract, solely the parcel described in Exhibit B-3 hereto. The Grantee Parcels shall be deemed to include, after the first closing under the Contract, the parcel more particularly described in Exhibit B-1 hereto and, after the second closing under the Contract, the parcels described in Exhibit B-1 and Exhibit B-2 hereto.] [Emphasis added.]

R-3. Grantee has requested that Grantor grant and establish certain easements over and across the Property as described herein.

NOW, THEREFORE, in consideration of the foregoing, the mutual covenants and agreements herein contained, and the sum of Ten and 00/100 Dollars ($10.00), the receipt and sufficiency of which is hereby acknowledged, Grantor and Grantee hereby agree as follows.

1. Incorporation of Recitals. The Recitals set forth above are hereby incorporated herein in the same extent as if fully set forth herein.

2. Grant of Construction Easement. *** **In the event that the Contract is terminated without Grantee having acquired all of the Grantor Parcels, Grantee shall, to the extent reasonably possible, restore any such non-acquired Grantor Parcels to their original condition.** This Construction Easement shall automatically terminate upon the earlier to occur of (a) Grantee's acquisition of the Property in its entirety pursuant to the Contract and (b) Grantee's completion of its development and construction work with respect to the Grantee Parcels. [Emphasis added.]

3. Grant of Utility Easement. Grantor does hereby declare, grant, convey and create in favor of Grantee, its successors and assigns, as owners of the Grantee Parcels, a non-exclusive **perpetual utility easement** over, across and through the Grantor Parcels (the "Utility Easement"), for the purposes of installing, constructing, reconstructing, maintaining, operating, inspecting, repairing, utilizing, relocating and replacing any and all private and public utilities including, without limitation, facilities for water, gas, electric, cable television, telephone, drainage of waste water, waste water collection and treatment, drainage of storm water and storm water management and detention, together with the reasonable right of ingress and egress on, over, across, through and under the Grantor Parcels for any of the foregoing purposes, which right of ingress and

egress shall include the right to construct on the Grantor Parcels roadways and access-ways necessary to construct, service and maintain such facilities. Grantee shall utilize the Utility Easement in a manner that does not materially and unreasonably interfere with the use and enjoyment of the Grantor Parcels; provided that the foregoing shall not be construed so as to limit the breadth of the Utility Easement hereby granted. **The Utility Easement is a perpetual easement and shall not terminate unless and until Grantee has acquired the Property in its entirety.** [Emphasis added.]

4. Grant of Slope, Grading and Drainage Easement. *** The SGD Easement is a perpetual easement and shall not terminate unless and until Grantee has acquired the Property in its entirety. ***

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7. Termination of Easements; Limitations. Notwithstanding any other provision hereof, this Agreement, and the Easements created hereunder, shall automatically terminate upon the Grantee's acquisition of the Property in its entirety. ***

***

9. Provisions Run with the Land. This Agreement is intended to and shall run with, and be appurtenant to, the real property benefitted and burdened hereby and shall bind and inure to the benefit of the respective successors in title to each parcel of land described herein.

The parties went to the first closing on October 11, 2005. Caldera alleges that upon information and belief, Centex assigned the Amended Contract to Ridings, an entity in which Centex holds a 50 percent or greater interest. On or about October 11, 2005, $800,000 of the Deposit was credited against the $6 million, to be paid to Caldera at the closing, leaving the Deposit amount at $1.2 million.

As noted earlier, Centex and/or its assignee was to construct improvements to serve the entire Property, including, sewage collection. The construction would commence before Centex and/or its assignee owned the entire Property. Thus, the parties included the above-described

provisions; i.e., the "Possession" provision in Section 18 of the 2/19/04 Contract[2] and the above-quoted provisions in the Easement Agreement.

Ridings commenced construction on Phase I. That construction included construction of stormwater management facilities such as retention basins and ponds, drainage facilities, storm sewer pipes, private utility lines, roads, entrances and the sewer collection, transmission, treatment and disposal facilities. On September 2, 2005, the Delaware Department of Natural Resources and Environmental Control ("DNREC") issued to Caldera a permit to construct an on-site wastewater treatment and disposal system to serve the Property. The construction was required to be completed by March 2, 2008. Ridings entered into negotiations with Tidewater Environmental Services, Inc. ("Tidewater") to operate and maintain the sewer collection, transmission, treatment and disposal facilities being constructed. The Public Service Commission granted Tidewater a Certificate of Public Convenience and Necessity ("CPCN") to provide services to the Property.

The second closing, which was supposed to occur in April, 2007, did not occur. By letter dated June 6, 2007, Caldera provided notice that Centex was in default and it had 10 days to consummate the second closing or Caldera would retain the Deposit as liquidated damages.

Ridings responded in a letter dated June 13, 2007. The letterhead stated, "Beazer Homes". The letter was signed on behalf of Ridings by William Hofherr, "Beazer Homes Corp. Authorized Member." In this letter, Ridings argued that Caldera had caused a breach of the contract by encumbering the property.

Caldera responded by letter dated June 20, 2007, that the encumbrances were on parcels

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[2]See page 5, supra, for this provision's text.

of property which Ridings did not yet own, and since Caldera had to convey clear title at the second closing, the fact "there were security instruments on a portion of the Property before you took title has no impact on the Property or on your rights under the Contract."

Thus, Caldera asserts Ridings' contentions of Caldera's breach were "pretextual". In its complaint, it alleges "Defendants sought to engage Caldera in further negotiations in an attempt to induce Caldera not to exercise its contractual rights against Defendants." Complaint, paragraph 86. Caldera then alleges as follows:

> 87. [William] Hofherr and Robert Davis ("Davis") of Centex represented to Caldera that if Caldera agreed not to exercise its rights under the Amended Contract, Defendants would close on the remainder of the Property on October 1, 2007.
> 88. Defendants represented there their "home office" had approved the offer and that they had financing in place for the offer.
> 89. Upon information and belief, Defendants made the representations knowing they were false with the intent that Caldera would rely on them.
> 90. Caldera relied on such false representations to its detriment.
> 91. Relying on Defendants' false representations, Caldera refrained from exercising its rights under the Amended Contract and caused to be prepared a third amendment to the Contract which would have extended the Second Closing date to October 1, 2007 ("Third Amendment"). ***
> 92. Although a Third Amendment was prepared and delivered to Defendants by Caldera, Defendants did not sign the Third Amendment.
> 93. On the evening of September 30, 2007, Defendants informed Caldera that they would not attend the closing scheduled for the next day, October 1, 2007.
> 94. Upon information and belief, Defendants engaged in protracted negotiations with Caldera for the sole purpose of inducing Caldera not to exercise its rights under the Amended Contract while they sought to find a means to get out of their contractual obligation to purchase the remainder of the property.

Caldera has not set forth any damages resulting from the alleged misrepresentations.

By notice dated October 2, 2007, Caldera notified defendants that the 2/19/04 Contract was terminated and it was retaining the Deposit as liquidated damages. It also stated to defendants:

> *** All improvements that you have made to the Caldera property including, without limitation, the sewer treatment and disposal plant, are now the property of Caldera, and you will have no right to use the plant.
>
> **By copy of this letter to Tidewater Environmental Services, Inc.,** we are advising them of your default and that you have no further interest in or rights with respect to the property owned by Caldera and that **therefore, the Wastewater Water Service Agreement that you have been negotiating with Tidewater is no longer appropriate and should not be executed.** [Emphasis added.]

In its letter dated October 7, 2007,[3] Ridings explained the Easement Agreement entitled it to operate the wastewater plant and it warned Caldera about interfering with its relationship with Tidewater.

In an October 25, 2007, letter, Caldera explained its position on why the easement no longer existed.

In a November 5, 2007, letter, Ridings' attorney rejected Caldera's position regarding the easement and explained that it was not required to close because a condition to the closing, that utilities be available, was not met since a final agreement had not been reached with Tidewater.

Caldera asserts in its complaint that the agreement between Tidewater and defendant "was fully negotiated and reduced to writing" and "Ridings intentionally refused to execute the agreement so that it could use the lack of an executed agreement to justify its refusal to close on the remainder of the Property." Complaint, ¶ 101. Thus, "Ridings' rationale for its refusal to close on the remainder of the Property was pretextual and made in bad faith." Complaint, ¶ 102. Caldera makes this assertion without referencing its October 2, 2007, letter notifying Tidewater and defendants that the agreement should not be executed.

On December 4, 2007, Caldera filed the pending lawsuit. Therein, it sets forth as

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[3]Again, the letterhead stated "Beazer Homes".

allegations all of the information recited above. It further alleges:

> 103. Defendants Ridings and /or Centex have breached the Amended Complaint.
> 104. Notwithstanding Ridings' and/or Centex's breach of the Amended Contract, Defendants Ridings and/or Centex are wrongfully refusing to acknowledge Caldera's right to the Deposit.
> 105. Notwithstanding Ridings' and/or Centex's breach of the Amended Contract, Defendant Centex is wrongfully refusing to reduce the Deposit Deed of Trust Mortgage.
> 106. Defendants Ridings and/or Centex have acted in bad faith and have violated the covenant of good faith and fair dealing inherent in the Amended Contract.
> 107. Defendants Ridings and/or Centex, by their refusal to proceed to the Second Closing, have frustrated the very purpose of the Amended Contract.
> 108. Defendants Ridings and/or Centex, by their refusal to proceed to the Second Closing, have frustrated the very purpose of the Easement Agreement which was to provide access to Caldera Land in anticipation of Ridings purchasing the Caldera Land at the Second and Third Closings.

The counts of the complaint are summarized below.

Count I seeks declaratory judgments regarding ownership and easements over the various properties, which entity has the right to contract with Tidewater, and which entity has the right to utilize the wastewater facilities.

Count II seeks a declaratory judgment regarding Caldera's obligation to reimburse Ridings for the value of Buyer Constructed Improvements and Facilities which Ridings constructed on Caldera's land.

Count III alleges breach of contract against Centex and Ridings. It asks for liquidated damages, partial release of the Deposit Deed of Trust to reduce it to its original amount of $2 million, and various declarations, including that the Easement Agreement is null and void.

Count IV claims a breach of the covenant of good faith and fair dealing against Centex and Ridings regarding the Contract.

Count V alleges misrepresentation against all defendants. Caldera asserts defendants "made the misrepresentations to induce Caldera to refrain from exercising its rights under the Amended Contract" and "delayed exercising its contractual rights in justifiable reliance upon Defendants' misrepresentations" and Caldera "suffered damages." Complaint, ¶¶ 134-36.

Count VI alleges tortious interference with prospective economic advantage against all defendants. Caldera asserts as follows:

> 139. By refusing to consummate further closings while continuing to claim rights to the Caldera Land and the sewer collection, treatment and disposal facilities, Defendants have, without justification or privilege, intentionally interfered with Caldera's efforts to sell the Property to prospective third party purchasers.
>
> 140. As a result, Caldera has suffered, and will continue to suffer, damages in the form of interest payments on the mortgages for the Caldera Land and the depreciating value of the Caldera Land.
>
> 141. Defendants' conduct was intentional, reckless, willful, malicious and wanton and/or in willful or conscious disregard of Caldera's rights.

Ridings filed an answer and counterclaim. In its counterclaim, it advances the following counts. Count I is a declaratory judgment concerning rights pursuant to the Easement Agreement. Count II states a claim of unjust enrichment as to infrastructure constructed by Ridings on Phases II and III. Count III is a claim of unjust enrichment as to the wastewater treatment plant and related facilities. Count IV alleges tortious interference with prospective business advantage. Specifically, with regard to this claim, Ridings asserts the following. Caldera, by its October 2, 2007 letter, inaccurately informed Tidewater that Ridings no longer had any rights to the wastewater treatment plant and to stop negotiating with Ridings. Tidewater refuses to execute an agreement until the dispute is resolved. Ridings will suffer damages by virtue of delay in providing wastewater treatment to the lots being developed. Count V of the counterclaim alleges

tortious disparagement of property rights (slander of title). This claim is based on Caldera's statements to Tidewater that Ridings had no rights to the easement when it knew Ridings has a perpetual easement, which statement wrongfully questions Ridings' title.

Caldera disputes the material matters in the counterclaim. In particular, it argues the Easement Agreement was mutually dependent upon the fulfillment of the Contract to purchase the Property and when defendants breached that contract, the Easement Agreement became null and void. It further asserts that "Ridings in bad faith refused to execute a sewer service agreement in [sic] negotiated with a [sic] Tidewater ... to prevent sewer service to Phases II and III." Plaintiff's Answer and Affirmative Defenses to Defendant The Ridings Development, LLC's Counterclaims, ¶ 163.

As noted earlier, defendants have filed various motions. Defendants' motions are, with regard to some claims, to dismiss for failure to state a claim pursuant to Superior Court Civil Rule 12(b)(6) and, with regard to other claims, for judgment on the pleadings pursuant to Superior Court Civil Rule 12(c).[4]

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[4]In Superior Court Civil Rule 12, it is provided in pertinent part as follows:

> *(b) How presented.* Every defense, in law or fact, to a claim for relief in any pleading ... shall be asserted in the responsive pleading thereto..., except that the following defenses may at the option of the pleader be made by motion: *** (6) failure to state a claim upon which relief can be granted, ...
>
> *(c) Motion for judgment on the pleadings.* After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the Court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

The standard of review for a motion to dismiss for failure to state a claim is set forth in Spence v. Funk, 396 A.2d 967, 968 (Del. 1978):

> For the purpose of judging a motion to dismiss a complaint for failure to state a claim, made pursuant to Superior Court Civil Rule 12(b)(6), all well-pleaded allegations must be accepted as true. The test for sufficiency is a broad one, that is, whether a plaintiff may recover under any reasonably conceivable set of circumstances susceptible of proof under the complaint. If he may recover, the motion must be denied. [Citations omitted.]

The standard is further expounded upon in Wilmington Trust Company v. Politzer & Haney, Inc., Del. Super., C.A. No. 02C-05-138, Silverman, J. (April 25, 2003) at 7-8:

> Dismissal will not be granted if the complaint "gives general notice as to the nature of the claim asserted against the defendant." Further, a complaint will not be dismissed "unless it is clearly without merit, which may be either a matter of law or fact." "Vagueness or lack of detail," by itself, is insufficient to dismiss a claim. If there is a basis upon which the plaintiff may recover, the motion is denied. [Footnotes and citations omitted.]

The Chancery Court has noted that since "the proper interpretation of language in a contract is a question of law", then "a motion to dismiss is a proper framework for determining the meaning of contract language." Allied Capital Corporation v. GC-Sun Holdings, L.P., 910 A.2d 1020, 1030 (Del. Ch. 2006).

The standard of review for a motion for judgment on the pleadings appears in Gonzalez v. Apartment Communities Corp., Del. Super., C.A. No. 04C-12-175, Cooch, R.J. (Oct. 4, 2006) at 2-3:

> When deciding a Rule 12(c) motion, the nonmoving party is entitled to the benefit of any inferences that may fairly be drawn from its pleading. The motion should be granted when no material issues of fact exist and the movant is entitled to judgment as a matter of law. [Footnotes and citations omitted.]

I. Motion Regarding the Perpetual Easement

Ridings/Centex/Beazer, collectively referred to as "defendants", have filed a motion for a partial judgment regarding the utility easement. Defendants seek a ruling that the "perpetual utility easement" granted in the Easement Agreement is valid.[5] Defendants argue as follows. The motion involves Count I of Caldera's complaint as it relates to the Easement Agreement and seeks a determination of the parties' respective rights regarding the Easement Agreement. The Easement Agreement is clear on its face. A perpetual utility easement has been granted defendants. The easement is perpetual until defendants acquire the Property. Parol evidence is not admissible.

Caldera does not concede this point. It argues as follows. Paragraph 3 of the Easement Agreement is not an exclusive or independent promise. Instead, the Easement Agreement "was dependent on the exchange of mutually dependent covenants and agreements". Plaintiff's Response in Opposition to Defendant The Ridings Development, LLC's Motion for Partial Judgment on the Pleadings, ¶ 2. In support thereof, Caldera cites to the language of the Easement Agreement stating, "NOW, THEREFORE, in consideration of the foregoing, the mutual covenants and agreements herein contained...." Caldera's agreement to grant Ridings a perpetual easement was dependent upon the promises in the Easement Agreement, which included Ridings' promise to acquire fee simple title to the entire property. The Recitals in the Easement Agreement refer to the Contract, which provides for the purchase of the entire Property. "Furthermore, the recitals are incorporated and made a part of the mutual covenant and agreements of the parties `to the same extent as if fully set forth herein.'" Id. Since the promise

[5]For text of the applicable portion of the Easement Agreement, see pages 9-10, supra.

to grant a perpetual easement was mutually dependent on Ridings' promise to purchase the entire Property, Ridings' failure to perform voided Caldera's promise to grant a perpetual easement over the property. Ridings cannot breach the contract and then claim a right to the easement.

Caldera then advances the "fairness argument". It argues that if Ridings did not perform its agreement, the Easement Agreement would fail for lack of consideration. "It would be inequitable and unjust to allow Ridings to retain an easement in perpetuity over Plaintiff's property when Ridings has defaulted on its promise to Plaintiff and therefore, in effect, would be getting a free easement." Id. at ¶ 6. The cases Caldera cites to support the fairness arguments are inapplicable; they pertain to situations where a party is seeking specific performance or an injunction in Chancery Court.

Caldera's alternative argument seeks a ruling of ambiguity. It argues as follows. There is an ambiguity in Ridings' reliance on the provision of the Easement Agreement permitting the easement to terminate when Ridings acquired the property. Thus, the Court should consider parole evidence to determine the parties' intentions. The parties never intended that Ridings could not close and yet retain the easement in perpetuity. Since a material issue of fact exists, there is no basis for awarding judgment.

I quote from a recent decision of Vice Chandler Noble because the language therein is appropriate to my decision in this case. In West Willow-Bay Court, LLC v. Robino-Bay Court Plaza, LLC, Del. Ch., C.A. No. 2742-VCN, Noble, V.C. (Nov. 2, 2007) at 1, interloc. app. den., Del. Supr., No 649, 2007, Holland, J. (Dec. 21, 2007), the Chancery Court stated as follows:

> Judges are frequently called upon to read and apply contracts. Their goal is to find the common, shared intent of the contracting parties. They are instructed, however, not to consider extrinsic evidence unless the contract is ambiguous --

reasonably susceptible of two (or more) plausible interpretations. In addition, extrinsic evidence may not be used in determining whether the contract is ambiguous.

The Chancery Court later states at pages 32-4:

> *** The proper interpretation of a contract, although analytically a question of fact, is considered a question of law.
>
> The goal of contract interpretation is to ascertain the shared intention of the parties. Contracts must be construed as a whole. Where contract language is "clear and unambiguous," the ordinary and usual meaning of the chosen words will generally establish the parties' intent. Fn 81. The presumption that the parties are bound by the language of the agreement they negotiated applies with even greater force when the parties are sophisticated entities that have engaged in arms-length negotiations. Only where contract language is ambiguous will a court consider extrinsic evidence in interpreting an agreement, and a court will not disturb a bargain because, in retrospect, it appears to have been a poor one. [All other footnotes and citations omitted.]
>
> > Fn. 81 Delaware adheres to the objective theory of contracts, under which it is presumed that contract language governs in the absence of ambiguity. Progressive Int'l Corp. v. E.I. du Pont de Nemours & Co., 2002 Del. Ch. LEXIS 91, 2002 WL 1558382, at *7 (Del. Ch. July 9, 2002). Under the objective theory of contact, "`intent does not invite a tour through [a party's] cranium, with [the party] as the guide.'" Id. (quoting E. ALLAN FARNSWORTH, CONTRACTS § 3.6 (2d ed. 2000)).

In addressing a party's argument that the construction of the contract would result in an absurd result, the Chancery Court commented at pages 52-3:

> *** A wide gulf exists between construing an ambiguous contract as commanding an absurd result and simply enforcing the language of a revised contract that appears to be a poor bargain based upon a close and careful reading of its terms.
>
> "[T]here is ... a strong American tradition of freedom of contract, and that tradition is especially strong in our State, which prides itself on having commercial laws that are efficient." Freedom of contract enables parties to enter into all sorts of agreements, advantageous and disadvantageous. Where, as here, the parties have voluntarily ordered their relationship through a binding contract, "Delaware law is strongly inclined to respect their agreement...." [Footnotes and citations omitted.]

In this case, there is no ambiguity regarding the easement. It is a perpetual easement. "Perpetual" means: "continuing or enduring forever; everlasting"; "lasting an indefinitely long time"; "continuing or continued without intermission or interruption". http://dictionary.reference.com/browse/perpetual (last visited June 17, 2008).

Caldera's argument is contrary to the plain language of the contract. The parties, in developing the contract, clearly contemplated that the land deal might not go through and sought to address that situation. This consideration is evidenced by the liquidated damages clause and the Grant of Easements provision in the Second Amendment. The language in the Easement Agreement further evidences the parties' recognition of such a possibility and an attempt to deal with it. The construction easement provision specifically details what steps defendants must take if the deal is not completed. The utility easement specifically states the easement is perpetual and shall not terminate until defendants acquire the land. The parties, in making the utility easement perpetual, clearly were providing defendants with protection for their investments in the utility infrastructure and wastewater plant as well as access thereto should the deal not be completed. This was a wise business decision on defendants' part. Whether Caldera considers it wise on its part is irrelevant. The contract is what it is and Caldera is bound by it.

Thus, I rule that the Easement Agreement is valid and defendants possess a perpetual easement with regard to the utility easement.

This decision does not resolve all parts of Count I of the complaint. There are declarations regarding other aspects of the land deal which Caldera seeks and which are not subject to judgment at this time. Thus, the litigation shall proceed with regard to those claims.

II. Centex's Motion

Centex has filed a motion to dismiss all counts of Caldera's complaint.

Centex argues that the claims in Counts I, II and III should be dismissed against it because it was not a party to the contract. Caldera argues that it has pled sufficient facts demonstrating that Centex is a party to the contract and a party with an interest in the contract. I agree with Caldera's position. At this stage of the proceedings, it is not possible to rule that Centex should not be a party. If, after discovery, it becomes clear that Centex should not be a party to the litigation, then Centex may obtain a ruling on that issue after filing a motion for summary judgment. For now, Centex remains a party to this litigation.

I now examine Centex's motion to dismiss Count VI of the complaint, which is the claim of tortious interference with prospective economic advantage against all defendants. That claim is tied to the perpetual easement provision. Centex argues that Caldera has failed to allege facts that, if true, would establish the elements of a tortious interference with prospective economic advantage. Caldera, in response thereto, argues that its

> Complaint adequately alleges that by refusing to consummate further closings, while continuing to claim rights to the Caldera Land and the sewer collection, treatment and disposal facilities, Defendants have, without justification or privilege, intentionally interfered with Caldera's efforts to sell the Property to prospective third party purchases. ... Defendants know that Plaintiff cannot market or sell the Property so long as Defendants continue to claim an equitable interest and are thereby deliberately interfering with Plaintiff's prospective business relations.

Plaintiff's Response in Opposition to Defendant Centex Homes' Motion to Dismiss Plaintiff's Complaint, page 3.

Caldera bases that claim upon defendants' claiming the easements with regard to the

property. This claim fails because, as explained above, the easements are clear and unequivocal. Defendants have every right to assert their easement rights. Defendants have done nothing wrongful or tortious regarding the easements. Thus, the Court grants judgment on the pleadings on this claim.

Centex's motion also addresses Count V (misrepresentation or fraud against all defendants) and Count IV (breach of the covenant of good faith and fair dealing) against Centex and Ridings. The motion with regard to these two counts needs to be placed in the context of the liquidated damages clause provision of the 2/19/04 Contract.[6]

If it is determined that defendants breached the contract (and that is a factual issue which defendants are disputing), then the contract provides that damages are limited to the Deposit. The law regarding a liquidated damages clause is set forth below.

> Where the damages are uncertain and the amount agreed upon is reasonable, such an agreement will not be disturbed. The injury caused by breach of a contract for the conveyance of land is usually not capable of such reasonably exact measurement as to prevent enforcement of an agreement that is not unconscionable.

Lee Builders, Inc. v. Wells, 103 A.2d 918, 919 (Del. Ch. 1954). Where, as here, the contract expressly provides no other damages are available, then no others are available, period. See Delaware Limousine Services, Inc. v. Royal Limousine Service, Inc., Del. Super., C.A. No. 87C-FE-104, Goldstein, J. (April 5, 1991), reargu. den. (May 2, 1991). The clause is enforceable unless the agreed upon amount is unreasonable. Lee Builders, Inc. v. Wells, supra. In this case, neither party has attacked the reasonableness of the liquidated damages clause. The following

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[6]The pertinent provision of the default clause, which is 17.1 of the 2/19/04 Contract, is set forth at page 4, supra.

percentages of the purchase price have been deemed reasonable: 5%, Lee Builders, Inc. v. Wells, supra; 3.8%, Baldwin v. Starrett, Del. Super., C.A. No. 98A-11-016, Goldstein, J. (July 16, 1999), aff'd, 755 A.2d 386 (Del. 2000); 2%, Boothhurst Ventures, Inc. v. Lacsamana, Del. CCP, C.A. No. 1999-07-071, Welch, J. (Nov. 21, 2000); less than 1%, Williamson v. Bronold, Del. CCP, C.A. No. 241-02-1986, DiSabatino, J. (April 29, 1988).

In the case at hand, the current amount of the Deposit is 10% of the purchase price. Thus, based on the foregoing, the Court rules as a matter of law that the10% figure is a reasonable amount.[7]

If defendants are deemed to have wrongfully refused to close on this contract, Caldera's damages are limited to $1.2 million. I note that Caldera, by way of contractual provision, will be able to recover attorney fees and costs incurred in obtaining such a judgment in addition to the liquidated damages.[8]

With the above damages limitation in mind and the understanding that the parties contemplated that final settlement might not go through, I turn to Caldera's claim of fraud contained in Count V. An element of fraud is that the plaintiff incurred damages. Stephenson v. Capano Development, Inc., 462 A.2d 1069, 1074 (Del. 1983).[9] Caldera argues that the

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[7]Again, neither party has attacked the reasonableness of the liquidated damages clause. Thus, it is appropriate to rule on the clause's reasonableness as a matter of law.

[8]It is provided as follows in the 2/19/04 contract: "21.4. Attorneys' Fees. If any party obtains a judgment against any other party by reason of breach of this Contract, attorneys' fees and costs shall be included in such judgment."

[9]The elements of fraud, as set forth in Stephenson v. Capano Development, Inc., 462 A.2d 1069, 1074 (Del. 1983) are:

> At common law, fraud (or deceit) consists of:

misrepresentation resulted in it extending the contract closing date and that as a result, it "suffered damages". It does not specify what damages it suffered. I explained during the teleconference on June 16, 2008, that I do not see what damages Caldera might have incurred other than those which are encompassed within the liquidated damages clause. Consequently, I have granted the parties 60 days to conduct expedited discovery on the issue of damages which Caldera allegedly incurred as a result of Centex's alleged misrepresentations regarding the settlement and how any conduct of defendants is outside of that contemplated in the "wrongful refusal" language of the contract.

Centex argues it is entitled to dismissal of Count IV of the complaint, which asserts a breach of the covenant of good faith and fair dealing. Caldera's claim is three-fold. It argues the covenant of good faith and fair dealing was breached with regard to Centex's refusal to proceed to the second closing, with regard to its to refusal to reduce the Deposit Deed of Trust Mortgage, and with regard to its claims to the other property.[10]

> 1) a false representation, usually one of fact, made by the defendant;
> 2) the defendant's knowledge or belief that the representation was false, or was made with reckless indifference to the truth;
> 3) an intent to induce the plaintiff to act or to refrain from acting;
> 4) the plaintiff's action or inaction taken in justifiable reliance upon the representation; and
> 5) **damage to the plaintiff as a result of such reliance.**
> [Emphasis added.]

[10]Caldera argues as follows at page 4 of Plaintiff's Response in Opposition to Defendant Centex Homes' Motion to Dismiss Plaintiff's Complaint:

> Plaintiff alleges that Centex's reasons for refusing to close on the remainder of the Property were pretextual and made in bad faith. Centex's refusal to proceed to the second closing frustrated the Contract's very purpose of conveying the Property one phase at a time. Centex is also wrongfully refusing to reduce the

In addressing Caldera's claim the covenant was breached when Centex refused to proceed to the second closing, Centex argues that a party cannot breach the covenant of good faith and fair dealing where the terms of the agreement authorizes the behavior. In other words, not buying all the property was contemplated by the parties and failure to complete the deal does not result in a breach of this covenant. A ruling on this issue needs to await the discovery I have ordered. I will revisit the motion on this claim later.

There can be no breach of the covenant of good faith and fair dealing regarding Centex's claims to the other property since, as I have ruled, it is entitled to make those claims. Thus, I grant partial judgment in Centex's favor on this portion of the claim.

I now turn to the portion of claim that the implied covenant of good faith and fair dealing was breached when defendant Centex failed to reduce the Deposit Deed of Trust Mortgage.

The implied covenant of good faith and fair dealing is explained in Chamison v. Healthtrust, Inc., 735 A.2d 912, 920-21 (Del. Ch. 1999), aff'd, 748 A.2d 407 (Del. 2000):

> Under Delaware law, an implied covenant of good faith and fair dealing inheres in every contract. As such, a party to a contract has made an implied covenant to interpret and act reasonably upon contractual language that is on its face reasonable. This implied covenant is a judicial convention designed to protect the spirit of an agreement, when, without violating an express term of the agreement, one side uses oppressive or underhanded tactics to deny the other side the fruits of the parties' bargain. It requires the Court to extrapolate the spirit of the agreement from its express terms and based on that "spirit", determine the terms that the parties would have bargained for to govern the dispute had they foreseen the circumstances under which their dispute arose. The Court then implies the

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> Deposit Deed of Trust Mortgage or to relinquish claims to the remainder of the Property. Centex's course of conduct violates the duty of good faith and fair dealing it owes under the Contract. Clearly, Centex cannot breach the Contract on one hand and then seek to enjoy its benefits on the other. That, the law will not permit. [Footnote and citation omitted.]

> extrapolated term into the express agreement as an implied covenant and treats its breach as a breach of the contract. **The implied covenant cannot contravene the parties' express agreement and cannot be used to forge a new agreement beyond the scope of the written contract.** [Emphasis added. Footnotes and citations omitted.]

Caldera argues that Centex wrongfully refused to release the Deposit Deed of Trust Mortgage and it claims that action constitutes a breach of the implied covenant of good faith and fair dealing. Caldera is entitled to the Deposit and a release on the mortgage only in the situation where Centex's refusal to close was wrongful. Centex disputes its refusal to close was wrongful, contending that all the preconditions to the closing were not met. The wrongfulness of the breach and the entitlement to the release of the Deposit Deed of Trust Mortgage is the basis of the breach of contract. Caldera cannot take the basis of the breach of contract claim and say it constitutes a breach of the implied covenant of good faith and fair dealing. Id. To hold that Centex's actions breached the implied covenant of good faith and fair dealing would improperly allow the implied covenant to contravene the parties' express agreement and to forge a new agreement beyond the scope of the written contract. Id. Defendants are entitled to judgment on this issue.

III. Ridings' Motion Regarding Counts IV, V and VI of the Complaint

Ridings has filed a motion with regard to Counts IV, V and VI which advances the same arguments as Centex advanced above. The rulings set forth above apply to Ridings' motion.

IV. Beazer's Motion

The final motion is that of Beazer. It argues that there are no claims against it. In the alternative, it argues that the complaint should be dismissed for the same reasons which Centex advances.

Caldera's response is as follows. Beazer is the authorizing managing agent for Centex. Beazer and Centex own 100% of Ridings. Counts I and II seek declarations of rights arising from contracts and agreements entered into between Caldera, Centex, Beazer, and Ridings, Centex's purported partial assignee. The complaint incorporates communications between Caldera and William Hofherr, an officer of Beazer, and these communications are contained on Beazer letterhead. "Plaintiff has properly sought a declaration as to Beazer's rights, status or interest in the contracts as well as the improvements and facilities constructed on Plaintiff's land in light of Beazer's ownership interest in Ridings and status as Ridings' authorized managing agent." Plaintiff's Response in Opposition to Defendant Beazer Homes Corp.'s Motion to Dismiss Plaintiff's Complaint, ¶ 1.

Caldera notes that Counts III and IV do not assert claims against Beazer, so no need exists to dismiss them.

As to Counts V and VI, Caldera argues it has stated claims against Beazer, also.

The Court rules that at this point, Beazer will remain a party and the issue of which party(ies) should remain may be addressed later. It rules as follows regarding the other claims against Beazer. Partial judgment is entered as to Count I for the reasons discussed above. Count II shall proceed. There are no claims against Beazer as to Counts III and IV. The Court will not make a ruling regarding Count V until after the expedited discovery period has passed. Count VI fails against Beazer for the same reasons as it failed against Ridings and Centex.

V. Conclusions

In conclusion, I rule as follows regarding the pending motions.

1) All defendants shall remain as parties.

2) No motions have been filed as to Count II, which seeks a declaratory judgment regarding Caldera's obligation to reimburse Ridings for the value of the Buyer Constructed Improvements and Facilities which Ridings constructed on Caldera's land, and Count III, which alleges breach of contract against Centex and Ridings. Thus, the claims contained therein shall proceed.

3) Beazer is not a defendant with regard to Counts III and IV.

4) I declare that the utility easement granted defendants is a perpetual easement. No further declarations are made as to the balance of Count I, wherein Caldera seeks declaratory judgments regarding ownership and easements over the various properties, which entity has the right to contract with Tidewater, and which entity has the right to utilize the wastewater facilities.

5) I grant judgment in defendants' favor on Count VI. This count, which alleges tortious interference with prospective economic advantage against all defendants, is tied to the perpetual easement provision. Caldera alleges defendants interfered with its prospective economic advantage by asserting their rights to the perpetual easement provision. Because I rule that defendants possess a perpetual utility easement, I also rule that defendants' assertion of their easement rights are valid. Consequently, Count VI fails.

6) I grant partial judgment in defendants Centex and Ridings' favor on two portions of Count IV, which asserts a breach of the implied covenant of good faith and fair dealing. The portions on which judgment is granted are the claims based on defendants Centex and Ridings' claims to other property and their refusal to reduce the Deposit Deed of Trust Mortgage.

7) As to the balance of Count IV (alleging breach of good faith and fair dealing regarding defendants' alleged wrongful refusal to close) and all of Count V (alleging fraud), I order the

parties to undertake expedited discovery within the next 60 days. This discovery shall focus upon Caldera's alleged damages in connection with the claims asserted therein and how any conduct of defendants is outside of that contemplated in the "wrongful refusal" language of the contract. Within 30 days thereafter, Caldera is to file a written submission describing the conduct of defendants which would give rise to damages beyond the liquidated damages and also describing its damages and explaining how they are not encompassed within the liquidated damages clause. Defendants have 30 days thereafter to file a written response.

IT IS SO ORDERED.