IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

CORNELL GLASGOW, LLC and CORNELL HOMES, LLC,	)	
Plaintiffs,	)	
v.	)	C.A. No. N11C-05-016 JRS CCLD
LA GRANGE PROPERTIES, LLC, LA GRANGE COMMUNITIES, LLC, STEVEN J. NICHOLS, LOWELL MCCOY, MARYANN WASKO-SMITH and LA GRANGE BUILDERS, LLC,	)	
Defendants.	)	

Date Submitted: June 1, 2012
Date Decided: June 6, 2012

MEMORANDUM OPINION

Upon Consideration of Defendants' Motion to Dismiss.
GRANTED in Part and DENIED in Part.
Upon Consideration of Plaintiffs' Motion to Dismiss Defendants' Counterclaim.
GRANTED in Part and DENIED in Part.

Sean J. Bellew, Esquire and David A. Felice, Esquire, BALLARD SPAHR LLP, Wilmington, Delaware. Mark B. Kaplin, Esquire, Barbara Anisko, Esquire and Amee S. Farrell, Esquire, KAPLIN STEWART MELOFF REITER & STEIN, P.C., Blue Bell, Pennsylvania. Attorneys for Plaintiffs.

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

SLIGHTS, J.

I.

A fractured relationship between an owner and builder of a large residential development in Newark, Delaware has spawned multiple claims and counterclaims of breach of contract and various business torts between the businesses involved in the project as well as certain individuals who either worked for or were otherwise related to the owner. The defendants/counterclaim plaintiffs, all entities or individuals affiliated with the owner, have moved to dismiss the tort claims brought by the builder arguing, in essence, that the builder has improperly attempted to transform a straightforward breach of contract case into a much broader fraud, tortious interference with contract, conspiracy and defamation case. In turn, the plaintiffs/counterclaim defendants, both entities affiliated with the builder, have moved to dismiss the owner's defamation counterclaim on similar grounds. In addition, one of the plaintiffs/counterclaim defendants seeks dismissal of the breach of contract counterclaims on the ground that it was not a party to the operative contracts upon which the claims are based.

The motions *sub judice* present themes that are quite common in commercial litigation arising from the breakdown of a contractual relationship. It seems more and more that breach of contract claims will not suffice to ameliorate the sense of betrayal parties feel when they come out on the losing end of a contractual business

relationship. Often parties feel compelled to punctuate their breach claims with claims that the breaching party committed fraud, either by inducing performance without any intention of reciprocating, or by misrepresenting facts or circumstances relating to the performance of the contract in advance of or in connection with the alleged breach. The aggrieved party seeks tort damages, usually including exemplary damages, in addition to breach damages. A claim for extra-contractual attorney's fees will typically be thrown in for good measure.

In some instances, the tort claims are justified when facts and circumstances reveal that something more than failed performance was responsible for the breakdown of the contractual relationship. In other instances, the tort claims amount to nothing more than an effort to "pile on" diaphanous claims of misbehavior on top of contractual breach claims that alone are adequate to redress the "wrong" that allegedly has been committed. Much like the brawler who brings a big stick to a fist fight, these parties seek to escalate the controversy by injecting tort claims into straightforward breach of contract disputes.

In this case, both parties have brought big sticks to a fist fight. They have brought tort claims against each other comprised of feckless allegations of misconduct coupled with strategically placed prayers for exemplary damages and counsel fees. This is (or, at least, should be) a breach of contract claim, plain and

(relatively) simple. As explained below, except for their defamation claims, which survive for now because they are subject to a low pleading threshold, neither party has plead sufficient facts to state *prima facie* tort claims. Moreover, the clear and unambiguous terms of the operative development contracts reveal that one of the counterclaim defendants was not a party to that contract. Accordingly, the motions to dismiss the tort counts of the complaint (except for the defamation count), and the motion to dismiss the breach of contract counts of the counterclaim (as against one of the counterclaim defendants) must be **GRANTED.** The motion to dismiss the defamation count of the Complaint and the motion to dismiss the defamation count of the counterclaim are **DENIED.**

II.

A. The Parties

Plaintiff, Cornell Homes, LLC ("Cornell Homes"), is a Pennsylvania limited liability company that specializes in the design, marketing and construction of residential properties in Pennsylvania, New Jersey and Delaware.[1] Plaintiff, Cornell Glasgow, LLC ("Cornell Glasgow") (collectively with Cornell Homes, "Cornell"), is Delaware limited liability company formed by Cornell Homes for the purpose of building and developing a residential housing project comprised of 227 lots in

[1] Complaint ("Comp."), ¶¶ 10, 24-25.

Newark, Delaware on property owned by defendant, La Grange Communities, LLC, a Delaware limited liability company.[2] La Grange Communities, LLC ("La Grange Communities"), along with defendant La Grange Properties, LLC ("La Grange Properties), also a Delaware limited liability company (collectively "La Grange"), entered into a contract with Cornell to build, market and sell homes in a residential development known as the La Grange development (the "Development").[3] Defendants, Steven J. Nichols ("Nichols") and Lowell McCoy ("McCoy"), are founding members of La Grange and own defendant, La Grange Builders, LLC (a Delaware LLC), as well.[4] Defendant, Maryann Wasko-Smith ("Wasko-Smith"), is a former employee of Cornell and current employee of La Grange.[5]

B. The Development Agreement

According to the Complaint, La Grange sought out Cornell's assistance with the Development in the summer of 2008 because La Grange lacked "the necessary experience in marketing, selling and constructing homes" and because it was "unable to obtain the financing necessary to build out the Development...."[6] La Grange was

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[2] *Id.* at ¶¶ 9, 30, 34.

[3] *I d.* at ¶¶ 1, 28, 36.

[4] *Id.* at ¶¶ 29, 127.

[5] *Id.* at ¶¶ 48-49.

[6] *Id.* at ¶ 30.

on the verge of defaulting on an approximately $14 million acquisition loan with Wilmington Trust Company which had been personally guaranteed by Nichols and McCoy.[7] Nichols approached Greg Lingo ("Lingo"), an owner and manager of Cornell Homes, in hopes that Cornell would utilize its expertise to "salvage the failing Development."[8]

On September 23, 2009, Cornell and La Grange executed a "Development Agreement" pursuant to which La Grange granted Cornell the exclusive right to build, market and sell 185 single-family detached, town homes, and duplex residences (the "Residences") within the Development (the "Project").[9] Pursuant to the Development Agreement: (1) La Grange was to pay certain designated expenses incurred by Cornell in connection with the marketing, sale and construction of the Residences as well as certain overhead and administration expenses;[10] (2) La Grange was to pay Cornell a management fee upon the sale of each Residence;[11] (3) La Grange was to construct and install all site improvements and infrastructure within the Development so that it could provide Cornell finished lots on which to build the

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[7] *Id.* at ¶¶ 30-33.

[8] *Id.* at ¶ 32-33.

[9] *Id.* at ¶ 37. *See also* Development Agreement, attached as Ex. C. to the Complaint.

[10] *Id.* at ¶ 36.

[11] *Id.* at ¶¶ 39-42.

Residences;[12] (4) Cornell was then to design, market, build and sell the Residences to home buyers pursuant to a Sales Projection Schedule;[13] (5) La Grange was to obtain financing to fund its improvement of the Development sites;[14] (6) Cornell was to obtain financing to fund the construction of the Residences;[15] and (7) the parties were to share in the profits upon the achievement of designated profit milestones pursuant to a formula set forth in the Development Agreement.[16] In the event of a default, the Development Agreement provided that the non-breaching party was to provide notice of the default and afford the breaching party thirty days to cure.[17]

C. Cornell Engages Wasko-Smith and Obtains Construction Financing

On or about December, 1, 2009, at Nichols' insistence, Cornell hired Wasko-Smith "to assist with the marketing and sales of the Residences and the estimating of contractor payments."[18] In doing so, Cornell relied upon Nichols' assurances that La

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[12] *Id.* at ¶ 37.

[13] *Id.* at ¶ 38; Ex. C at ¶ 1.A; Schedule attached to Development Agreement at Ex. A.

[14] *Id.*

[15] *Id.* at ¶ 51.

[16] *Id.* at ¶ 43.

[17] *Id.* at ¶¶ 46-47.

[18] *Id.* at ¶¶ 48-49.

Grange would reimburse Cornell for Wasko-Smith's salary and expenses.[19] Shortly thereafter, Cornell Glasgow engaged Cornell Homes to market, build and sell the residences.[20]

Pursuant to the Development Agreement, Cornell obtained its financing from NBRS Financial ("NBRS") to fund its construction of the Residences (the "Cornell Loan").[21] La Grange, however, was unable to secure the site improvement financing as required by the Development Agreement because its lender, also NBRS, advised it that "such funding would be in violation of its lending limits."[22] To address La Grange's credit position, NBRS, Nichols, and McCoy (who was a member of the NBRS board of directors) proposed that Cornell use a portion of the Cornell Loan to purchase 20 of the building lots from La Grange so that La Grange, in turn, could use those proceeds to pay down its debt with NBRS, "thereby freeing up La Grange's existing financing with NBRS" to fund the site improvements.[23] In exchange, La Grange, through Nichols, agreed that it would "assume responsibility for the payment of the principal and interest of the Cornell Loan" and also agreed that Cornell would

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[19] *Id.*

[20] *Id.* at ¶ 50.

[21] *Id.* at ¶ 52.

[22] *Id.* at ¶¶ 53-54.

[23] *Id.* at ¶¶ 56-57.

have the exclusive right to build, market and sell all (not just 185) of the 227 lots in the Development.[24]

D. The Amendment to the Development Agreement

On December 11, 2009, La Grange and Cornell executed an amendment to the Development Agreement ("the Amendment") "to, *inter alia*, reflect the modification of the financing provisions in the Development Agreement and to expand the Development Agreement from 185 to 227 Residences."[25] The Amendment reiterated that Cornell had acquired the exclusive right to market, sell and construct all 227 Residences in the Development, and provided that La Grange was to deliver deeds to all lots within the Development to be held in escrow by a designated escrow agent (Saul Ewing, LLP) at the time of the closing of the construction financing.[26] In the event La Grange defaulted upon its obligations under the Amendment "for any reason other than the failure of Cornell to comply with the terms of the Development Agreement," the Amendment provided, *inter alia*, that La Grange was to "assign to Cornell all contracts executed by La Grange with third party purchasers for the

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[24] *Id.* at ¶ 58-59

[25] *Id.* at ¶¶ 60-61.

[26] *Id.* at ¶¶ 61, 64.

acquisition of the lots [within the Development]."[27]

E. The Defendants' Alleged Plot to Breach The Development Agreement And To Take Over The Project For Themselves

Cornell developed and implemented an aggressive marketing plan for the Residences through January, 2011, and sales of the Residences exceeded all projections as incorporated in the Development Agreement.[28] In the meantime, pursuant to the terms of the Development Agreement, Cornell regularly submitted monthly invoices for covered fees and expenses to La Grange and La Grange, in turn, was to pay those invoices within three days of presentment.[29] In September, 2010, La Grange failed to pay Cornell's invoices.[30] When asked, La Grange advised Cornell that payment would be forthcoming.[31] The following month, when invoices remained unpaid, La Grange advised Cornell that it could not process the invoices because it required "additional information."[32] Thereafter, a cycle began where the invoices remained unpaid, Cornell would demand payment, La Grange would request

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[27] *Id.* at ¶ 65.

[28] *Id.* at ¶¶ 73-74, 84-89.

[29] *Id.* at ¶¶ 90-92.

[30] *Id.* at ¶ 93.

[31] *Id.*

[32] *Id.* at ¶¶ 94-95.

"further information," Cornell would supply the information and demand payment, La Grange would request "further documentation or explanation," and so on.[33] Cornell alleges that these delays were "a pretext to cover up the full extent of La Grange's and Nichols' cash shortages and inability to pay Cornell."[34]

As La Grange and Nichols stalled in the payment of Cornell's invoices, Nichols and McCoy initiated a plan to remove Cornell from the Project so that La Grange could avoid its obligations under the Development Agreement and bring on a "cheaper builder" to complete the Project.[35] All the while, Cornell relied upon La Grange's false representations that it would pay Cornell as required by the Development Agreement and continued to perform under the contract.[36] McCoy, knowing that Nichols had falsely stated La Grange's intent to pay Cornell, did nothing to advise Cornell that Nichols and La Grange had no intention of making payment.[37] La Grange also slowed its completion of site improvements which, in turn, slowed Cornell's ability to begin construction of Residences it had already sold

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[33] *Id.* at ¶¶ 95-97.

[34] *Id.* at ¶ 98.

[35] *Id.* at ¶¶ 99, 105, 110-112.

[36] *Id.* at ¶¶ 100-101, 106.

[37] *Id.* at ¶¶ 102-105, 110-112.

to home buyers.[38]

Because La Grange had failed to reimburse Cornell for Ms. Wasko-Smith's salary, Cornell was forced to terminate her employment in early 2011.[39] Thereafter, La Grange, through one of its affiliated entities, hired Wasko-Smith to assist in its plan to terminate Cornell from the Project.[40] Specifically, Wasko-Smith, taking advantage of her knowledge of Cornell's marketing and sales strategies and its relationships with lenders and subcontractors, began to advise La Grange regarding strategies to market, sell and build Residences after Cornell was off the Project.[41]

On February 4, 2011, Nichols, acting on behalf of La Grange, advised Lingo that La Grange and Cornell should "go their separate ways."[42] Cornell refused.[43] While Cornell remained on the Project, Nichols, McCoy, Wasko-Smith and Drew McCoy (McCoy's son) prepared a business plan for potential lenders that called for Drew McCoy's company, Mason Run Homes, LLC ("Mason Run"), to market, sell

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[38] *Id.* at ¶ 109.

[39] *Id.* at ¶ 113.

[40] *Id.* at ¶ 114.

[41] *Id.* at ¶ 115.

[42] *Id.* at ¶ 117.

[43] *Id.* at ¶ 118.

and build the Residences.[44] The business plan called for Wasko-Smith to be the general manager of La Grange and touted her experience with Cornell.[45] Thereafter, La Grange and Mason Run entered into an agreement pursuant to which Mason Run would replace Cornell on the project.[46] Also, on February 9, 2011, Nichols and McCoy formed La Grange Builders, apparently for the purpose of replacing Cornell in the event that Mason Run was unable to do so, and then promptly hired Wasko-Smith to work for La Grange Builders.[47] Unbeknownst to Cornell, La Grange Builders then "surreptitiously" took various steps to position itself to take over all Project responsibilities from Cornell.[48] All the while Cornell continued to perform under the Development Agreement.[49]

On February 11, 2011, Cornell provided written notice to La Grange that it was in default of the Development Agreement for failing to meet its reimbursement obligations.[50] In response, on that same day, Nichols and Wasko-Smith arrived at the

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[44] *Id.* at ¶¶ 120-121.

[45] *Id.* at ¶ 123.

[46] *Id.* at ¶ 124.

[47] *Id.* at ¶¶ 126-129.

[48] *Id.* at ¶¶ 130-137.

[49] *Id.* at ¶ 138.

[50] *Id.* at ¶ 139.

Cornell sales office at the Development and, without prior notice to Cornell, advised all present that La Grange had "fired" Cornell and that they were to leave the Development immediately.[51] La Grange then began to notify buyers, potential buyers, realtors, and others that a La Grange-related entity had taken over the project.[52] Wasko-Smith "falsely" advised Cornell's subcontractors "that Cornell had left the job" and then "sought the subcontractors' agreement to work for La Grange directly."[53] She followed that notice with a similar notice to home buyers that Cornell had "left the development."[54] On April 7, 2011, Nichols and Wasko-Smith introduced Atlantic Building Associates to subcontractors as the new developer on the Project.[55]

F. The Court of Chancery Litigation

Cornell initiated this litigation in the Court of Chancery when, on February 18, 2011, it filed its complaint seeking, *inter alia*, injunctive relief and specific

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[51] *Id.* at ¶¶ 140-142.

[52] *Id.* at ¶ 143.

[53] *Id.* at ¶ 144.

[54] *Id.* at ¶¶ 184-185.

[55] *Id.* at ¶¶ 145-146.

performance of the Development Agreement.[56] Expedited discovery followed.[57] On April 2, 2011, Cornell moved to transfer this litigation to this Court upon discovering, from its perspective, that La Grange lacked the financial resources to fund its obligations under the Development Agreement on a going-forward bases. The Court of Chancery granted the motion on April 4, 2011.[58]

G. The Complaint

Cornell's complaint is comprised of eight counts: Count I - breach of contract against LaGrange; Count II - fraud against La Grange, Wasko-Smith, Nichols and McCoy; Count III - tortious interference with existing contractual relationship against Wasko-Smith; Count IV - tortious interference with existing and prospective contractual relationships against all defendants; Count V - defamation against La Grange, Nichols and Wasko-Smith; Count VI - negligent misrepresentation and omissions against La Grange, Wasko-Smith, McCoy and Nichols; Count VII - conspiracy against all defendants; and Count VIII - aiding and abetting against Nichols, McCoy, Wasko-Smith and La Grange Builders. With regard to the various tort claims, Cornell seeks compensatory and punitive damages, pre and post judgment

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[56] *Id*. at ¶ 5.

[57] *Id*. at ¶ 6.

[58] *Id*. at ¶ 5.

interest, counsel fees and costs, and other "proper and just" relief.

H. The Counterclaims

La Grange alleges in its counterclaim at Count I that "Cornell breached the Development Agreement by: entering into sales contracts with purchasers for less than the agreed sales price set forth [in] the Development Agreement[;][59] and entering into sales contracts with purchasers containing incentives which were more dollars than those permitted by the Development Agreement."[60] In Count III, La Grange contends that "Cornell overcharged La Grange by at least Seventy-Four Thousand Dollars" under the monthly reimbursement provisions of the Development Agreement. As stated, La Grange has asserted the claims in Counts I and III against "Cornell," defined in the pleading as Cornell Homes, LLC and Cornell Glasgow, LLC.[61] According to plaintiffs, Cornell Homes, LLC is not a party to the Development Agreement. On this basis, they have moved to dismiss Counts I and III of the counterclaim as to Cornell Homes, LLC.

In Count II of the couterclaim, La Grange contends that, on April 14, 2011, Cornell sent a letter "to contractors that Cornell believed were working for La Grange

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[59] Defendants' Answer, Affirmative Defenses, and Counterclaims ("Counterclaim") at ¶ 32.

[60] *Id.* at ¶ 33.

[61] *Id.* at ¶ 2.

at the Development" to which was attached the Court of Chancery letter opinion dismissing the litigation initiated by Cornell against La Grange in that court (and transferring the litigation to this Court). The Court of Chancery letter opinion, in turn, summarized inaccurate representations made by Cornell to the effect that La Grange lacked the "financial ability to complete its contractual site work at the development."[62] According to La Grange, the April 14, 2011 letter, and related conversations between Cornell and "various contractors," constitute "defamation, libel, and slander" in that they contained false statements concerning the business of La Grange that have caused damage to La Grange and injury to its business reputation.[63]

III.

Defendants have moved to dismiss Counts II through V, VII and VIII of the Complaint for failure to state claims upon which relief can be granted.[64] They seek dismissal of Count VI for lack of subject matter jurisdiction.[65] As to Count II (fraud), defendants contend that the Complaint fails to allege that: (a) defendants, McCoy or

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[62] *Id.* at ¶¶ 26-28.

[63] *Id.* at ¶¶ 38-42.

[64] *See* Del. Super. Ct. Civ. R. 12(b)(6).

[65] *See* Del. Super. Ct. Civ. R. 12(b)(1).

Wasko-Smith made any false statements or misrepresentations; (b) defendants La Grange or Nichols knowingly made any false statements; and (c) Cornell reasonably relied upon "the supposed misrepresentations."[66] As to Count III (tortious interference with existing contractual relationship against Wasko-Smith), defendants argue that Wasko-Smith, an agent or employee of La Grange, could not, as a matter of law, tortiously interfere with a contract (the Development Agreement) to which La Grange was a party. As to Count IV (tortious interference with existing and prospective contractual relations against all defendants), defendants argue that the complaint contains no specific allegations of wrongdoing against McCoy and, as to the remaining defendants, fails as a matter of law because none of the defendants were "strangers" to the contracts with which they allegedly tortiously interfered.[67] As to Count V (defamation against La Grange, Nichols and Wasko-Smith), defendants argue that the alleged defamatory statements are not defamatory as a matter of law and, in any event, Cornell has failed to allege any damages caused by the defamation. As to Count VI (negligent misrepresentation and omissions), defendants argue that the Court lacks subject matter jurisdiction to adjudicate this claim because it sounds in equity. Finally, as to Counts VII (conspiracy against all defendants) and VIII

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[66] Defendants' Opening Brief In Support of Motion to Dismiss ("DOB") at 6.

[67] *Id.*

(aiding and abetting against Nichols, McCoy, Wasko-Smith and La Grange Builders), defendants argue that the claims fail because the defendants, as a matter law, must be deemed to be a single actor which could neither conspire with nor aid and abet itself.

In response, Cornell argues as to Count II (fraud) that defendants have misconstrued their fraud allegations by casting them as claims only for fraudulent misrepresentations as opposed to fraudulent concealment. According to Cornell, it has adequately plead that McCoy, Nichols, Wasko-Smith and La Grange each fraudulently concealed La Grange's intent to breach the Development Agreement in order to induce Cornell to continue to perform. Cornell also alleges it has adequately plead that Nichols, Wasko-Smith and La Grange engaged in fraudulent misrepresentations and that Cornell reasonably relied upon these misrepresentations to its detriment. As to Count III (tortious interference), Cornell argues that its claim is viable because Wasko-Smith was not employed by either Cornell or La Grange at the time she allegedly interfered with the Development Agreement. As to Count IV (tortious interference), Cornell notes that the Defendants were not parties to Cornell's contracts with home buyers and subcontractors and, therefore, Defendants' argument that they could not, as a matter of law, interfere with those contracts is misplaced. Cornell contends that its defamation claim (Count V) is legally sound because the statements identified in the Complaint were statements of fact (not opinion) that

maligned Cornell "in a trade, business or profession."[68] As to Count VI (negligent misrepresentation), Cornell appears to acknowledge that this Court lacks subject matter jurisdiction to adjudicate the claim but urges this judge to seek "temporary assignment to the Court of Chancery in accordance with Article IV § 13(2) of the Delaware Constitution."[69] As to the conspiracy and aiding and abetting counts (Counts VII and VIII), Cornell argues that it has plead that defendants conspired (and aided and abetted) not only among themselves, as defendants have argued, but also "with multiple unnamed, but identified, coconspirators...."[70]

Cornell's Motion to Dismiss Counterclaim challenges defendants' defamation and libel counterclaim (Count II) on grounds that the alleged defamatory statements: (a) are true; (b) were not made by Cornell but rather were made by the Court of Chancery in a written judicial opinion; (c) were a matter of public record in the Court of Chancery's docket; and (d) have not been alleged to have caused any injury to La Grange's business. As to the slander counterclaim, Cornell argues that the allegations, qualified by "upon information and belief," are too vague and conclusory to state a viable claim. As to the breach of contract counterclaims (Counts I and III),

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[68] Plaintiffs' Opening (sic) Brief In Response to Defendants' Motion to Dismiss ("PAB") at 12.

[69] *Id.* at 13.

[70] *Id.*

Cornell Homes alleges that it was not a party to the Development Agreement and could not, therefore, have breached it.

In response, defendants argue that they adequately plead their claims for defamation, liable and slander in that they specifically identified the defamatory statements and the means by which La Grange was damaged by the statements. Moreover, they argue, the statement is not protected by the absolute privilege applicable to statements in court because the statement in the Court of Chancery decision is merely a restatement of Cornell's false and defamatory statement, not an independent finding of the court. As to the breach of contract claim, defendants argue that Cornell Homes is estopped from denying obligations under the Development Agreement since it sought to enforce rights under the same agreement in Cornell's Complaint. In addition, they argue that Cornell Glasgow is merely the agent or alter ego of Cornell Homes such that Cornell Homes should be liable for any breach by Cornell Glasgow.

IV.

When considering a Motion to Dismiss under Superior Court Rule 12(b)(6), the Court must assume that all well pled facts in the complaint are true.[71] A complaint will not be dismissed unless the plaintiff would not be entitled to recover under any

[71] *Ramunno v. Cawley*, 705 A.2d 1029, 1034 (Del. 1998).

reasonable set of circumstances susceptible of proof.[72] Stated differently, a complaint may not be dismissed unless it is clearly not viable, which may be determined as a matter of law or fact.[73] "Allegations that are merely conclusory and lacking factual basis, however, will not survive a motion to dismiss."[74]

V.

Cornell has brought tort claims along side of breach of contract claims. Accordingly, it is appropriate first to determine if the claims can coexist given the prevailing law in Delaware that "a plaintiff bringing a claim based entirely upon a breach of the terms of a contract generally must sue in contract, and not in tort."[75] To the extent any of the tort claims survive this general rule, the Court will then analyze whether the plead facts are sufficient to state a claim under Rule 12(b)(6) and whether the Court may exercise subject matter jurisdiction over negligent misrepresentation claim under Rule 12(b)(1).

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[72] *Nix v. Sawyer*, 466 A.2d 407, 410 (Del. Super. 1983).

[73] *Diamond State Tel. Co. v. Univ. of Del.*, 269 A.2d 52, 58 (Del. 1970).

[74] *Criden v. Steinberg*, 2000 WL 354390, at *2 (Del. Ch. Mar. 23, 2000) (citation omitted).

[75] *Data Mgt. Internationale, Inc. v. Saraga*, 2007 WL 2142848, at *3 (Del. Super. Ct. July 25, 2007) (citations omitted).

A. Count II (Fraud against all defendants), Count IV (Tortious Interference With Existing Contractual Relationship Against Wasko-Smith) and Count VI (Negligent Misrepresentation and Omissions against La Grange, Wasko-Smith, McCoy and Nichols)

Cornell's fraud, negligent misrepresentation and one of its tortious interference with contract claims all arise from or are related to the Development Agreement. Cornell also seeks damages for La Grange's alleged breach of the Development Agreement. Delaware courts will not permit a plaintiff to "bootstrap" a breach of contract claim into a tort claim merely by intoning the *prima facie* elements of the tort while telling the story of the defendant's failure to perform under the contract.[76] To be viable, the tort claim must "involve violation of a duty which arises 'by operation of law and not by the mere agreement of the parties.'"[77] The question whether *vel non* a tort claim can survive along side a breach of contract claim arising from the same operative facts can, in many instances, be decided on a motion testing the viability of a plaintiff's complaint accepting all of the allegations therein as true.[78] This is such

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[76] *See Kuroda v. SPJS Holdings LLC*, 971 A.2d 872, 889 (Del. Ch. 2009); *Data Mgt. Internationale, Inc.*, 2007 WL 2142848, at *3; *Iotex Comm., Inc. v. Defries*, 1998 WL 914265, at *5 (Del. Ch. Dec. 21, 1998); *Pinkert v. Olivieri, PA*, 2001 WL 641737, at *5 (D. Del. May 24, 2001).

[77] *Data Mgt. Internationale, Inc.*, 2007 WL 2142848, at *3 (citing *Garber v. Whittaker*, 174 A. 34, 36 (Del. Super. Ct. 1934)). *See also Segovia v. Equities First Holdings, LLC*, 2008 WL 2251218, at *19 (Del. Super. Ct. May 30, 2008) (same); *Kuroda*, 971 A.2d at 889 ("Thus, in order to assert a tort claim along with a contract claim, the plaintiff must generally allege that the defendant violated an independent legal duty, apart from the duty imposed by contract.").

[78] *See e.g. Nacco Indus., Inc. v. Applica Inc.*, 997 A.2d 1, 35-36 (Del. Ch. 2009); *Iotex Comm., Inc.,* 1998 WL 914265, at *5.

a case.

1. Fraud (Count II) and Negligent Misrepresentation (Count VI)

"Delaware upholds the freedom of contract and enforces as a matter of fundamental public policy the voluntary agreements of sophisticated parties."[79] Our jurisprudence is reflected in Oliver Wendell Holmes' famous line: "The only universal consequence of a legally binding promise is that the law makes the promisor pay damages if the promised event does not come to pass."[80] Thus, Delaware courts historically have endorsed the concept of the "efficient breach" of contract - a "theory of contract law which urges expectation damages as a remedy in order to encourage a promisor's breach where resulting profits to the promisor exceed the loss to the promisee."[81] This "elevat[ion] [of] contract law over tort law [] allow[s] parties to order their affairs and bargain for specific results," particularly in the event of a

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[79] *Nacco Indust., Inc.*, 997 A.2d at 35 (citing *Abry Partners V, LP v. F & W Acq. LLC*, 891 A.2d 1032, 1061 (Del. Ch. 2006)).

[80] Oliver Wendell Holmes, Jr., THE COMMON LAW 301 (1881). *See also* Holmes, *The Path of the Law,* 10 Harv. L. Rev. 457, 462 (1897) ("The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it - nothing else."); Farnsworth, *Legal Remedies for Breach of Contract*, 70 Colum. L. Rev. 1145, 1147 (1970) ("Our system [] is not directed at compulsion of promisors to prevent breach; rather, it is aimed at relief to promisees to redress breach.").

[81] *Morabito v. Harris*, 2002 WL 550117, at *3 (Del. Ch. March, 26, 2002). *See also E.I. duPont de Nemours & Co. v. Pressman*, 679 A.2d 436, 445 (Del. 1996) (noting that Delaware recognizes the doctrine of "efficient breach" and that it "'accords remarkably with the traditional assumptions of the law of contract remedies.'") (citation omitted); *Nacco Indus., Inc.*, 997 A.2d at 35 ("Delaware [] recognizes the concept of efficient breach.").

breach.[82]

Cornell's allegations relating to the fraud and negligent misrepresentation[83] allegedly perpetrated by the defendants all relate to the defendants' failed performance under the Development Agreement. Cornell alleges that defendants delayed payment of Cornell's invoices, an obligation imposed by the Development Agreement, and then induced Cornell's continued performance by promising payment upon receipt of additional information from Cornell.[84] This conduct, also alleged to constitute a breach of the Development Agreement,[85] allegedly was at the core of the defendant's fraudulent scheme to keep Cornell on the Project while defendants searched for a more profitable means by which to complete the Project.[86] Clearly, the alleged misrepresentations and/or omissions upon which Cornell relies to make its

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[82] *Nacco Indust., Inc.*, 997 A.2d at 35.

[83] The Court is mindful that defendants have argued that this Court lacks subject matter jurisdiction to adjudicate Count VI (negligent misrepresentation) because the claim sounds in equity and must, therefore, be litigated in Chancery. *See Radius Servs., LLC v. Jack Corrozi Const., Inc.*, 2009 WL 3273509, at *2 (Del. Super. Ct. Sept. 30, 2009). Cornell has offered only token resistance to this argument, but urges this judge to seek appointment as a Vice Chancellor pursuant to Del. Const. art IV, §13(2) so that the claim can be adjudicated with the others raised in the Complaint. Because the Court has determined that a plain reading of the Complaint reveals that the negligent misrepresentation claim fails as a matter of law, the Court will not invoke the Delaware Constitution to seek *pro temp* appointment of this judge to another court just so the claim can be dismissed there.

[84] Compl. at ¶¶ 90-109, 235-237.

[85] *Id.* at ¶¶ 111-114.

[86] *Id.* at ¶¶ 103, 105.

fraud claim "were not collateral to the [Development Agreement], but rather memorialized [] some of [La Grange's] principal obligations under [the] agreement with [Cornell]."[87] As such, even if the defendants never intended to perform, their alleged scheme to breach the Development Agreement simply cannot give rise to an actionable claim for fraud or negligent misrepresentation.[88] At best, Cornell has plead that defendants (La Grange in particular) engaged in an "efficient breach" of the contract for which it can be held liable for compensatory and expectancy damages.[89]

Cornell's fraud count fails for another reason tied again to the breach claim it has also asserted - - it has failed to plead damages caused by the fraud separate and apart from the alleged breach damages. "In Delaware, the elements of fraud are: '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.'"[90] Pursuant

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[87] *Pinkert*, 2001 WL 641737, at *5.

[88] *See Id.* (citing *Iotex Commun., Inc.*, 1998 WL 914265, at *5).

[89] *See Pressman*, 679 A.2d at 445-46.

[90] *Outdoor Tech., Inc. v. Allfirst Fin., Inc.*, 2001 WL 541472, at *3 (Del. Super. Ct. Apr. 1, 2001) (citations omitted).

to Superior Court Civil Rule 9(b), allegations of fraud must be plead with particularity.[91] This includes the fifth element of the claim - causal damages.[92] "Delaware courts have consistently held that to successfully plead a fraud claim, the allegedly defrauded plaintiff must have sustained damages as a result of a defendant's actions."[93] And the damages allegations may not simply "rehash" the damages allegedly caused by the breach of contract.[94]

Cornell's damages allegation in Count II states simply "Plaintiffs have suffered and continue to suffer damages as a result of La Grange's fraudulent representations and conduct."[95] Earlier in the complaint, Cornell alleges that it continued to incur costs as it marketed and sold homes while defendants intended that La Grange would

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[91] Del. Super. Ct. Civ. R. 9(b). *See also Nacco Indust.,Inc.*, 997 A.2d at 27 ("[Rule 9(b)] requires that the plaintiff alleges 'the circumstances of the fraud with detail sufficient to apprise the defendant of the basis for the claim.'").

[92] *See Brevet Capital Spec. Opp. Fund, LP v. Fourth Third, LLC*, 2011 WL 345821, at *7 (Del. Super. Ct. Aug. 5, 2011).

[93] *Dalton v. Ford Motor Co.*, 2002 WL 338081, at *6 (Del. Super. Ct. Feb. 28, 2002). *See also Lazard Debt Recov. GP, LLC v. Weistock*, 864 A.2d 955, 972 (Del. Ch. 2004) (holding that Rule 9(b) requires so-called "loss causation" to be plead with particularity); *Manzo v. Rite Aid Corp.*, 2002 WL 31926606, at *5 (Del. Ch. Dec. 19, 2002), *aff'd,* 825 A.2d 239 (Del. 2003) (TABLE) (dismissing fraud claim for failing specifically to allege "cognizable damages suffered as a result" of the fraud).

[94] *See Albert v. Alex Brown Mgt. Serv., Inc.*, 2005 WL 2130607, at *7 (Del. Ch. Aug. 26, 2005).

[95] Compl. at ¶ 208.

breach the Development Agreement.[96] It also alleges the loss of "the benefit of the [Development] Agreement."[97] These are nothing more than a "rehash" of Cornell's damages allegations relating to its breach claims.[98] Cornell has failed to plead fraud damages separate and apart from its breach damages. The fraud claim, therefore, must be dismissed for this reason as well.[99]

2. Tortious Interference With Contract (Count III)

Count III (tortious interference with contractual relationship against Wasko-Smith) likewise fails when plead along side Cornell's breach of contract claim. Cornell alleges that Wasko-Smith interfered with the contractual relationship between La Grange and Cornell, as memorialized in the Development Agreement, by supplying information she had learned while working with Cornell to her co-defendants in order to assist them in their scheme to breach the Development Agreement.[100] The claim fails for two reasons. First, because Wasko-Smith was a representative of La Grange,[101] she could not, as a matter of law, tortiously interfere

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[96] *Id.* at ¶¶ 100-101, 106.

[97] *Id*. at ¶ 164.

[98] *See*, *e.g.*, *id.* at ¶¶ 154-164.

[99] *Albert*, 2005 WL 2130607, at *7.

[100] *Id*. at ¶¶ 113-115, 210-214.

[101] *Id.* at ¶¶ 114, 229.

with a contract to which La Grange was a party and to which she was not a "stranger."[102] Second, and flowing from the first, the Complaint "fails to make factual allegations that support a reasonable inference that [Wasko-Smith] acted outside the scope of [her] authority" with La Grange during the time in which she is alleged to have interfered with La Grange's contract with Cornell.[103] Any conclusory allegations to the contrary in the Complaint will not suffice to state a claim for tortious interference against Wasko-Smith.[104]

B. Count IV (Tortious Interference with Existing and Prospective Contractual Relationships Against All Defendants)

In this count, Cornell alleges that all defendants interfered with Cornell's current and prospective contracts with subcontractors and home buyers.[105] While this claim does not relate directly to the alleged breach of the Development Agreement, it does arise from the Development Agreement. Specifically, the Development Agreement makes clear that Cornell would enter into contracts with homeowners "on

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[102] *See Kent County Equip., Inc. v. Jones Motor, Inc.*, 2009 WL 737782, at *3 (Del. Super. Ct. Mar. 20, 2009).

[103] *Kuroda*, 971 A.2d at 884. *See also Smith v. Biomet, Inc.*, 384 F.Supp.2d 1241, 1252 (N.D. Ind. 2005) ("[A]llowing a breach of contract to be characterized as a tortious interference with business relations would make the tort a sort of 'wild card' that would lead to the award of punitive damages for simple breaches of contract.").

[104] *Id. See*, *e.g.*, Compl. at ¶ 213 ("Defendant Wasko-Smith's interference was improper and without justification and not privileged.").

[105] Compl. at ¶¶ 144, 184, 220-222.

behalf of La Grange and "in the name of La Grange as seller."[106] La Grange was never a "stranger" to the contracts with home buyers and could not, therefore, through its agents, representatives, or otherwise, interfere with those contracts.[107] Nor were the defendants "strangers" to the relationships between Cornell and its subcontractors. The Development Agreement required La Grange to reimburse Cornell for "all expenses incurred by Cornell for the construction of homes,"[108] and for "all marketing and sales expenses [Cornell] incurred."[109] As defendants were not "strangers" to either the sales contracts for new homes or Cornell's contracts with its subcontractors, they could not tortiously interfere with these contracts as a matter of law.[110]

C. Count V (Defamation Against La Grange, Nichols and Wasko-Smith)

Cornell's defamation claim arises in part from statements allegedly made by

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[106] *Id.* at Exhibit C (attaching Development Agreement) at §2C.

[107] *See Tenneco Auto., Inc. v. El Paso Corp.*, 2007 WL 92621, at *5 (Del. Ch. Jan. 8, 2007) ("Imposition of liability for tortious interference with contractual relationship requires that the defendant be a stranger to both the contract and the business relationship giving rise and underpinning the contract.") (internal quotations omitted).

[108] Compl. at ¶ 41.

[109] *Id.* at ¶ 39.

[110] *See Kent County Equip., Inc.*, 2009 WL 737782, at *3; *Tenneco Auto., Inc.*, 2007 WL 92621, at *5. Even if the contracts with home buyers were "automatically assigned" to Cornell by virtue of La Grange's breach of the Development Agreement (Complaint at ¶ 22), this did not render La Grange, as owner of the property upon which the Residences were built, or its employees or agents, strangers to those contracts such that a tortious interference claim would then become viable.

Nichols, with the consent of McCoy and La Grange, to Cornell's lender, Wilmington Trust Company, to the effect that Cornell's charges for construction, marketing and selling the Residences were excessive.[111] Cornell also alleges that Nichols and Wasko-Smith, with the consent of McCoy, advised Cornell's sales staff that Cornell had been "fired" from the Project implying that Cornell had not performed adequately under the Development Agreement.[112] Finally, Cornell alleges that Wasko-Smith, with the consent of Nichols and McCoy, advised home buyers and subcontractors that Cornell had voluntarily left the Project and thereby falsely gave them the impression that Cornell was abandoning its contractual responsibilities to them.[113]

Defendants argue that the defamation claim should be dismissed for the simple reason that "Cornell has failed to allege any defamatory statements by Defendants."[114] Specifically, they argue that Cornell has not identified any statements by any of the defendants that would "lower [Cornell] in the estimation of the community or [] deter third persons from associating or dealing with [it]."[115] The Court disagrees. First, it

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[111] Compl. at ¶¶ 134-135, 175.

[112] *Id.* at ¶¶ 140, 178.

[113] *Id.* at ¶¶ 143-144, 173, 176, 182-187, 190.

[114] DOB at 17.

[115] *Id.* (citing *Henry v. Delaware Law School of Widener Univ., Inc.*, 1998 WL 15897, at *10 (Del. Ch. Jan. 12, 1998)).

should be noted that the decision upon which Defendants rely for this argument, *Henry v. Delaware Law School,* was decided on a motion for summary judgment, not a motion to dismiss for failure to state a claim as is pending here.[116] This is significant because, as our Supreme Court has recognized, "even silly or trivial libel claims can easily survive a motion to dismiss where the plaintiff pleads facts that put the defendant on notice of his claim, however vague or lacking in detail these allegations may be."[117] "[T]he threshold for the showing a plaintiff must make to survive a motion to dismiss is low."[118]

Here, Cornell has alleged that: (a) Nichols, on behalf of La Grange, made statements to Wilmington Trust, the lender on the project, that falsely suggested that Cornell was knowingly overcharging La Grange for its expenses on the project; (b) Nichols and Wasko-Smith falsely advised Cornell employees that Cornell had failed to meet its obligations under the Development Agreement; (c) Wasko-Smith falsely advised Cornell's subcontractors that Cornell had voluntarily left the Project and would not, therefore, be meeting its contractual obligations to them; and (d) Wasko-Smith falsely advised home buyers that Cornell had voluntarily left the Project and

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[116] *Id.*

[117] *Doe v. Cahill*, 884 A.2d 451, 459 (Del. 2005) (citing *Ramunno v. Cawley*, 705 A.2d 1029 (Del. 1998)).

[118] *Id.*

would not, therefore, be meeting its contractual obligations to them. Each of these statements, it is alleged, damaged or maligned Cornell in its "trade, business or profession."[119] These plead facts are sufficient to state a claim for defamation under the "low" pleading threshold applicable here, even in the absence of plead special damages.[120] Whether additional facts developed in discovery will reveal that the alleged defamatory statements were true, mere expressions of opinion or, perhaps, protected by an applicable privilege cannot be determined on this motion and remains to be seen.

D. Count VII (Civil Conspiracy Against All Defendants) and Count VIII (Aiding and Abetting Against Nichols, McCoy, Wasko-Smith, and La Grange Builders)

1. Civil Conspiracy

Cornell alleges that all of the defendants conspired with one another to commit the various torts alleged in the Complaint. As the Court will dismiss all but the defamation claim, the focus must be on Cornell's allegations that the defendants conspired to defame Cornell as set forth in the Complaint.[121] Defendants argue that

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[119] *Spence v. Funk*, 396 A.2d 967, 970 (Del. 1978).

[120] *Id.* *See also*, *Doe*, 884 A.2d at 459. As discussed below, because the Court finds that Cornell's civil conspiracy claim fails as a matter of law, only the defendant who is alleged to have made a defamatory statement as an agent of La Grange, and La Grange as the principal, can be held liable for defamation with respect to that statement.

[121] *See Kuroda*, 971 A.2d at 892 ("Civil conspiracy is not an independent cause of action; it must be predicated on an underlying wrong.").

they cannot be held liable for conspiracy because each of them collectively should be considered "one entity" which cannot, as a matter of law, conspire with itself.[122] The Court agrees. "[A] corporation generally cannot be deemed to have conspired with its wholly owned subsidiary, or its officers and agents."[123] Each of the individual defendants named in the Complaint was either an officer or agent of La Grange.[124] They could not, therefore, engage in a legally cognizable civil conspiracy with one another or with La Grange to defame Cornell.

2. Aiding and Abetting

Like civil conspiracy, aiding and abetting is a derivative tort, there must be an actionable underlying wrong to which the claim of aiding and abetting can attach.[125] And, like civil conspiracy, officers and agents cannot aid and abet their principal or each other in the commission of a tort.[126] Here again, the underlying tort is

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[122] DOB at 19.

[123] *In re Transamerica Airlines, Inc.*, 2006 WL 587846, at *6 (Del. Ch. Feb. 28, 2006). *But see, Allied Capital v. GC-Sun Holdings, LP*, 910 A.2d 1020, 1037 n. 37 (Del. Ch. 2006) (declining to adopt a *per se* rule that parent corporations cannot conspire with wholly-owned subsidiaries, but not addressing *Transamerica*'s holding that officers and agents of a corporation cannot conspire with each other on behalf of the corporation or with the corporation itself).

[124] Compl. at ¶¶ 11-12, 28, 29, 36, 114-115, 229.

[125] *See Anderson v. Airco, Inc.*, 2004 WL 2827887, at *4 (Del. Super. Ct. Nov. 30, 2004).

[126] *See Gilbert v. El Paso Co.*, 490 A.2d 1050, 1057 (Del. Ch. 1984) (noting the doctrinal and analytical similarities of the torts of civil conspiracy and aiding and abetting); *Allied Capital*, 910 A.2d at 1038 n.41 (same).

defamation, the only tort claim to survive this motion to dismiss. And, here again, the Complaint fails to plead facts that would provide a legal basis to find that Nichols, McCoy, Wasko-Smith and La Grange Builders aided and abetted each other in the defamation of Cornell.

E. The Counterclaims

1. The Breach of Contract Counterclaims

Counts I and III of the counterclaim raise breach of contract claims relating to alleged breaches of the Development Agreement. Both Cornell Glasgow and Cornell Homes are named as counterclaim defendants. Cornell Homes moves to dismiss these claims on the ground that it was not a party to the Development Agreement and cannot, therefore, be sued for breaching the Development Agreement.[127] La Grange Communities, the counterclaim plaintiff, argues in response that Cornell Homes has brought a claim for breach of the Development Agreement against La Grange (collectively) and, therefore, it cannot be heard to defend a claim of breach of the same contract on the ground that it is not a party thereto.[128] In reply, Cornell Homes asserts that it did not, and did not intend to, assert a breach of contract claim based

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[127] *See Summit Inv. II, LP v. Sechrist Indus., Inc.*, 2002 WL 31260989, at *5 (Del. Ch. Sept. 20, 2002) (holding that a defendant not party to a contract can not be sued for breach of that contract).

[128] Defendant La Grange's Answering Brief In Opposition to Plaintiffs' Motion to Dismiss Counterclaims ("DAB"), at 7-8 (citing the doctrine of "judicial estoppel" and supporting cases).

on the Development Agreement or otherwise and that any reading of the Complaint to the contrary is the product of "inartful pleading."[129] Upon carefully reading the Complaint, the Court is satisfied that it does not allege a breach of contract claim on behalf of Cornell Homes. Judicial estoppel does not apply here.

Next, counterclaim plaintiff argues that Cornell Glasgow was the mere agent of Cornell Homes and, accordingly. that Cornell Homes should stand to answer for Cornell Glasgow's breach of the Development Agreement. There may well be a scenario whereby the Court could conclude that Cornell Glasgow was acting merely as Cornell Homes' agent with respect to the Development Agreement, but the counterclaim plaintiff has not plead that scenario in its counterclaim.[130] The closest the counterclaim comes to alleging agency is to define Cornell Homes and Cornell Glasgow together as "Cornell,"[131] and then to allege broadly that "Cornell" entered into the Development Agreement with La Grange and breached that agreement.[132] These allegations are far from adequate to establish an agency relationship between

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[129] Plaintiffs' Reply Brief to Defendants' Response to Plaintiffs' Motion to Dismiss Counterclaims, at 2.

[130] *See generally*, *Sprint Nextel Corp. v. iPCS, Inc.*, 2008 WL 2737409, at *11 (Del. Super. Ct. May 31, 2008) (discussing agency theory for holding principal corporation liable for acts of subsidiary).

[131] Counterclaims of La Grange Communities, LLC, at ¶ 2.

[132] *Id.* at ¶¶ 3, 32-33, 47-48.

Cornell Homes and Cornell Glasgow that would place Cornell Homes in Cornell Glasgow's shoes for purposes of the Development Agreement.[133] Accordingly, counts I and III must be dismissed as against Cornell Homes. The dismissal will be without prejudice, however, so that the counterclaim plaintiff may amend its pleading to allege facts that would justify a finding of agency or "alter ego" if such facts exist.[134] The amended pleading should be filed within twenty (20) days.[135]

2. The Defamation Counterclaim

The counterclaim plaintiff alleges that Cornell (collectively) made certain statements, both oral and written, to potential La Grange contractors to the effect that La Grange was not financially fit and lacked the means to pay them for work they might perform on the Project. It is alleged that these statements constitute

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[133] Nor do the allegations establish a basis to "pierce the corporate veil" of Cornell Glasgow to get to Cornell Homes - - La Grange's final basis for resisting the motion to dismiss the breach of contract counterclaims. *See* DAB at 11-12.

[134] *See Chen v. Imperial Buffet & Rest., Inc.*, 2007 WL 3125229, at *3 (D.N.J. Oct. 23, 2007) (*sua sponte* granting plaintiff leave to amend dismissed complaint to allege alter ego); *Adams Offshore Ltd. v. OSA Int'l, LLC*, 2011 WL 4625371, at *10 (S.D. Tex. Sept. 30, 2011) (same). It should be noted that the Court has declined to extend leave to Cornell to amend its dismissed tort claims because the Court is satisfied that any such amendments would be futile. *See Price v. E.I. duPont de Nemours & Co.*, 26 A.3d 162, 166 (Del. 2011) (noting that leave to amend may denied when amendment would be "futile," i.e., "where the amended complaint would be subject to dismissal under Rule 12(b)(6) for failure to state a claim.").

[135] The Court has not yet considered whether it could exercise subject matter jurisdiction over the amended claim against Cornell Homes based on an agency or alter ego theory.

defamation, libel, and slander.[136]

The first allegedly defamatory statement was contained in a letter to contractors who might perform work on the Project, dated April 14, 2011, in which Cornell referred to a April 2, 2011, decision of the Court of Chancery where the court dismissed Cornell's claims and transferred the claims to this Court. According to the counterclaim, the Court of Chancery, relying solely upon representations from Cornell, stated in its decision that "La Grange does not have enough funds on its construction line of credit to satisfy the cost associated with discharging its obligations of delivering the fully improved lots to Cornell."[137] Cornell's April 14 letter characterized this statement as a "holding" of the court, and it is this characterization with which the counterclaim plaintiff takes issue.[138] Cornell argues in response that its letter was not defamatory because it simply recited the findings of the Chancellor as stated in a publically filed decision of the court.

The counterclaim alleges that Cornell incorporated the Chancellor's statement and made its own representations to contractors regarding La Grange's perilous financial condition and inability to pay contractors knowing that the statements were

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[136] Counterclaim at ¶¶ 37-42.

[137] *Id.* at Ex. B.

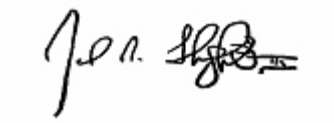
[138] It is alleged that the Chancellor's statement reflects misinformation he received from Cornell without a full hearing during the course of expedited litigation. *Id.* at ¶¶ 26-27.

not factual.[139] The counterclaim further alleges that these statements damaged La Grange's "business" and its "reputation in the [] community."[140] These allegations adequately state a claim under the "low" pleading threshold applicable to defamation claims.[141]

VI.

Based on the foregoing, defendants' motion to dismiss Counts II, III, IV, VI, VII and VIII of the Complaint is **GRANTED.** The motion to dismiss Count V of the Complaint is **DENIED.** The motion to dismiss Counts I and III of the counterclaim as to Cornell Homes is **GRANTED** without prejudice and with leave to amend to allege facts supporting an agency or alter ego theory of liability against Cornell Homes. The motion to dismiss Count II of the counterclaim is **DENIED.**

IT IS SO ORDERED.



Judge Joseph R. Slights, III

Original to Prothonotary

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[139] Counterclaim at ¶¶ 26-28, 40.

[140] *Id.* at ¶¶ 40-42.

[141] *Doe*, 884 A.2d at 459.