PAUL G. CLARK,	**IN THE**
Plaintiff,	**CIRCUIT COURT**
v.	**FOR BALTIMORE CITY**
ZALCO REALTY, INC., *et al.*,	**Case No. C-10-007236**
Defendant.	

MEMORANDUM OPINION

This matter came before the Court for a hearing on February 17, 2012 on the Motion for Summary Judgment filed by Defendants Zalco Realty, Inc. and 100 Harborview Drive Council of Unit Owners and on Plaintiff Paul Clark's Motion to Strike Defendants' Motion for Summary Judgment. Because the case was scheduled for trial soon after the hearing, the Court issued an Order on February 23, 2012 denying Plaintiff's motion to strike Defendants' motion and granting Defendants' motion for summary judgment. This Memorandum Opinion explains the reasons for that Order. The Court has considered the parties' motions, memoranda, factual submissions, and oral arguments.

Plaintiff's Allegations

On October 27, 2009, Plaintiff Paul C. Clark purchased Unit PH-4A in the 100 Harborview Drive Condominium ("Harborview") located at 100 Harborview Drive in Baltimore City. Harborview is a high-rise condominium in downtown Baltimore. Unit PH-4A (the "Unit") is one of the penthouse units. Mr. Clark purchased the Unit at auction from "Erikson Retirement Home" for $1,150,000. On the settlement statement, the seller is listed as "SCL Realty LLC, By Erikson Retirement Communities, LLC, its sole member." Second Am. Compl., Exh. 12.

Defendant 100 Harborview Drive Council of Unit Owners (the "Council") is the council of unit owners for the Harborview condominium. Defendant Zalco Realty, Inc. ("Zalco") is a property management company hired by the Council to manage the property.

After Defendants moved for summary judgment, Plaintiff filed a Second Amended Complaint. The Second Amended Complaint asserts the same three causes of action, but adds factual allegations applicable to all three counts. In their reply memorandum, Defendants have responded to those additional allegations, and Defendants do not object to the Court considering the Second Amended Complaint as the operative pleading in ruling on their motion.

Plaintiff alleges that the Council and Zalco made false or misleading statements or omissions of fact to him directly or through the "Resale Certificate for Harborview" provided by the Council in connection with the sale of the Unit to him. In general terms, Plaintiff alleges that Harborview has had a history of "major physical and financial problems," Second Am. Compl. at p. 5 (heading; capitalization and boldface altered), including being "plagued for years by substantial water infiltration and mold infestation problems caused by leaks in the exterior façade and roof system," *id.* ¶ 17. Plaintiff also alleges that the seller of the Unit had made substantial additions or alterations to the Unit, including a decorative fountain added on or near a balcony, that had caused water leaks into the penthouse unit below the Unit at issue in this case.[1] According to Plaintiff, these

[1] Plaintiff's allegations of water leaks from Unit PH-4A into the unit below are different in kind from his allegations of water leaks into Unit PH-4A. The former are apparently localized leaks allegedly caused by the alterations made by the previous owner of the Unit. The latter are allegedly part of the more general problem of water infiltration in

alterations constitute violations of the Harborview declaration, bylaws, or rules and regulations. Plaintiff alleges that the Council and Zalco had ample knowledge of both the long-standing problems with the condominium as a whole and the more particular problems created by the alterations to the Unit and that Defendants were aware that repairs of the major problems with the condominium would require expenditures by the council exceeding $5 million. Plaintiff claims the Council and Zalco had a duty to disclose these facts to him either in the Resale Certificate or in a separate conversation he had with a Zalco employee and that they failed to do so.

Plaintiff alleges that he and his family initially moved into the Unit, but then discovered water damage and the presence of mold that made the Unit uninhabitable. He and his family moved out of the Unit in March 2010 and have been unable to use it since then.

Plaintiff asserts three claims in his Second Amended Complaint. In Count I, titled "Fraudulent Misrepresentation – Rescission," Plaintiff alleges that he "never would have agreed to be bound by the [Harborview] By-Laws" but for Defendants' misrepresentations. Second Am. Compl. ¶ 51. In that count, he seeks "an Order rescinding the By-Laws" and awarding him a refund of all fees and assessments he has paid as a unit owner. *Id.* at p. 15. In Count II, "Fraudulent Misrepresentation – Money Damages," Plaintiff seeks $2,500,000 in compensatory damages and $2,500,000 in punitive damages based on the cost of the Unit, the costs needed to repair it, and consequential damages related to his purchase of the Unit. Count III is a claim for

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other areas of Harborview. Plaintiff alleges that the specific leak or leaks into the ceiling of Unit PH-4A were caused by defects in the common roof above the Unit.

$2,500,000 in damages based on an alleged violation of the Maryland Consumer Protection Act.

Facts

The facts stated in this section are either undisputed based on the parties' respective factual submissions or are the facts taken in the light most favorable to Plaintiff.

The basic facts of Mr. Clark's purchase of the Unit and Defendants' statements made just before his purchase are not disputed. Mr. Clark and his family moved in 2005 into a condominium unit in the 23 Pierside Condominium near Harborview (although Mr. Clark also lived part-time in Bethesda, Maryland, where his business is located), and his wife's parents lived in a unit of Harborview. Unit PH-4A was being offered for sale at auction. Mr. Clark learned of the auction and personally visited the Unit at least twice before the auction. On at least one of those occasions, he was accompanied by his wife, Rebecca Delorme. There is no allegation that these tours or any other promotion of the sale of the Unit were offered or conducted by the Council or Zalco.

On the evening before the auction, there was a cocktail party for potential bidders in the Unit. Mr. Clark attended the event and noticed a drip coming from the living room ceiling in the Unit. It was raining, but he could not determine the source of the leak. Before the auction, he went to see Gisele Rivera, the Property Manager employed by Zalco. According to Plaintiff:

> I went down prior to the auction and sat with Rivera, the property manager, and she informed me that she was aware of the drip, and that the roof was scheduled for replacement. I asked her when. She said in the March time frame, and then showed me books showing work plans that showed that it was to be replaced. I asked her what about

> the damage to the interior of the unit. She said that that would be repaired at building expense.

Defs.' Memo., Exh. A at 33. Later in his deposition, when asked if he had requested any materials of Ms. Rivera, Mr. Clark testified:

> She volunteered, actually, when we talked about it, and she quickly pulled off books that had construction plans and schedules and said, look right here, they're going to replace the roof. And so then my next concern was what about the interior of the unit. She said that that would be fixed by the building.

Id. at 43. Mr. Clark described these as "the salient points that I relied upon before making a bid." *Id.* at 33. Ms. Delorme, Mr. Clark's wife, also attended the cocktail party and remembers seeing "[t]wo pinhole drips in the great room" from the ceiling a few feet apart. Defs.' Memo., Exh. B at 49-50. She accompanied Mr. Clark to meet with Ms. Rivera:

> We walked downstairs, asked the property manager if she knew about it or when they were going to be fixed, you know, and she said she knew about it, that there is a thing, a book, held it up to Paul and said, and it's going to be fixed in March.

Id. at 57.

Mr. Clark entered a bid of $1,150,000 at the auction and was the winning bidder. Before settlement, Mr. Clark received the Resale Certificate provided by the Council to the Unit seller for use in connection with the sale. The Resale Certificate was prepared by Zalco and signed by Thomas Willis, a Zalco employee, as "Community Manager." A cover letter gives September 29, 2009 as the "Issue Date" and states that the information is "correct as of" that date. The following statements in the Resale Certificate are relevant to Plaintiff's claims:

3. The following is a list of capital expenditures approved by the Council of Unit Owners or its authorized designee which are not reflected in the current operating budget: **None known**

* * *

5. Attached is a copy of the current operating budget. The budget includes details concerning the Association's reserve fund for repair and replacement and the intended use of the reserve fund: $823,283.34 as of August 31, 2009.

* * *

8. Although there has not been an inspection of the unit to determine the existence of any violations, the Association has no knowledge that any alterations or improvements to the unit or to the limited common elements appurtenant thereto violate any provisions of the Declaration, By-Laws or House Rules, except as follows: **None**

9. The Association has no knowledge of any violation of building or health code with respect to the unit or the common elements assigned thereto except as follows: **N/A**

Further, the Association has no knowledge of an health or building code violations for any other portion of the condominium except as follows: **N/A**

* * *

THE FOREGOING STATEMENTS ARE TRUE AND CORRECT TO THE BEST OF OUR KNOWLEDGE, INFORMATION AND BELIEF.

ZALCO REALTY, INC.
AS MANAGING AGENT ONLY

Second Am. Compl., Exh. 4 (emphasis in original).

As stated in the Resale Certificate, the Council also provided a copy of its then current budget. Defs.' Reply Memo., Exh. E (budget designated as Clark 576-94). The

2009 Adopted Budget, as included in the disclosure documents, consists of a cover letter, four spreadsheet pages, ten pages of notes to the spreadsheets, and a two-page "Reserve Fund Cash Flow Worksheet." *Id.* Page 4 of the spreadsheets includes a section titled "CAPITAL EXPENSES." *Id.* (Clark 582). By far the largest expense item in that section is line 8245, "Building Exterior," with a budgeted amount of $801,709. *Id.* The note corresponding to that line item, on page 9 of the notes, is: "**Building Exterior**[,] Exterior project phase I including engineering and construction management costs." *Id.* (Clark 591).

Additional facts will be included in the discussion below.

Discussion

1. Plaintiff's Motion to Strike Defendants' Motion for Summary Judgment

Plaintiff styles his opposition to summary judgment as an alternative motion to strike Defendants' motion or opposition. As a basis for striking Defendants' motion, Plaintiff argues that the Court should not entertain Defendants' motion because Defendants have not fulfilled their discovery obligations, as indicated by the need for Plaintiff to file a third motion to compel. Plaintiff further suggests that Defendants have revealed the impropriety of their motion in a footnote in which Defendants state that they "accept the following facts as undisputed for the limited purpose of this motion for summary judgment, however Defendants reserve the right to dispute facts in future proceedings if necessary."[2] Defs.' Memo. at 3 n.1.

[2] There is nothing improper about Defendants' footnote. Although there may be circumstances where a party may not take one position on the facts in seeking summary judgment and then later contest those facts at trial, it is not unusual for a party to make a limited concession of facts on summary judgment to test the legal sufficiency of a claim or issue even accepting one version of the facts for purposes of the motion. *See, e.g.*,

The proper procedural mechanism for Plaintiff's discovery argument is Maryland Rule 2-501(d) (which Plaintiff cites once without discussion, Plaintiff's Oppos. at 5), not Maryland Rule 2-322(e). Rule 2-322 deals generally with preliminary motions challenging a complaint, and Rule 2-322(e) specifically permits a party to file a motion to strike "before responding to a *pleading* or, if no responsive pleading is required by these rules, . . . within 15 days after the service of the *pleading*. Md. Rule 2-322(e) (emphasis added). A court may act on such a motion or *sua sponte* to strike certain matter "from any *pleading* or may order any *pleading* that is late or otherwise not in compliance with these rules stricken in its entirety." *Id.* (emphasis added). The Maryland Rules are specific that a "pleading" means "a complaint, counterclaim, a cross-claim, a third-party complaint, an answer, an answer to a counterclaim, cross-claim, or third-party complaint, a reply to an answer, or a charging document as used in Title 4." Md. Rule 1-202(u). The Rules distinguish between "pleadings" and "motions." *Compare* Md. Rule 2-302 *with* Md. Rule 2-311(a). Thus, Rule 2-322(e) does not provide a basis to move to strike a motion for summary judgment or any paper other than a "pleading."

Maryland Rule 2-501(d) permits a party opposing summary judgment to file an affidavit establishing "that the facts essential to justify the opposition cannot be set forth for reasons stated in the affidavit." Md. Rule 2-501(d). On such an opposition, "the court may deny the motion or may order a continuance to permit affidavits to be obtained

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Eisel v. Board of Educ. of Montgomery Cnty., 324 Md. 376, 379-80 (1991) (defendants accepted allegations of amended complaint as true in moving for summary judgment based on failure to state claim upon which relief may be granted); *Simmons v.* Lennon, 139 Md. App. 15, 18 n.1 (2001) ("Solely for the purposes of the summary judgment motion, the parties accepted the facts set forth in Part I, above, as true. It seems likely that, if this matter were to be presented to a jury, Lennon would dispute at least some of these facts.").

or discovery to be conducted or may enter any other order that justice requires." *Id.* Here, Plaintiff argues in part that Defendants' alleged failure to provide full discovery has inhibited his ability to establish factual disputes that would prevent a grant of summary judgment. Under Rule 2-501(d), he could have provided an affidavit – usually the affidavit of one of his attorneys – describing what discovery responses are lacking and why they are essential to the summary judgment opposition. Although Plaintiff has not filed such an affidavit, the same purpose is satisfied by Plaintiff's arguments concerning the status of discovery and his perceived need to file a third motion to compel. Despite Plaintiff's use of the wrong procedural mechanism, the Court has considered Plaintiff's argument and rejects it because Plaintiff has not shown with particularity that anything that might emerge out of further discovery would alter the legal conclusions explained below.

The Court applies the established standard governing summary judgment motions. Summary judgment is appropriate when "the motion and response show that there is no genuine dispute as to any material fact and that the party in whose favor judgment is entered is entitled to judgment as a matter of law." Md. Rule 2-501(f); *see also White v. Friel*, 210 Md. 274, 285 (1956). All facts and inferences must be drawn in the light most favorable to the non-moving party. *Merchants Mortgage Co. v. Lubow,* 275 Md. 208, 217 (1975). Mere allegations and unsubstantiated assertions that do not show material disputes of fact with detail and precision are insufficient to prevent the entry of summary judgment. *Beatty v. Trailmaster Prods., Inc.,* 330 Md. 726, 738 (1993). The purpose of summary judgment is not to try the case or resolve factual disputes, but rather to determine whether a factual controversy exists requiring a trial. *Goodwich v. Sinai*

Hosp., 343 Md. 185, 205-06 (1996). "Summary judgment procedure is not a substitute for trial, but it does play an important role in weeding out cases, claims, or issues that investigation shows have no merit." *Pittman v. Atlantic Realty Co.*, 359 Md. 513, 554 (2000) (Wilner, J., dissenting) (citing shift in federal approach to summary judgment from initial "skepticism" to "look[ing] more favorably on the proper role summary judgments play in that winnowing process").

B. Summary Judgment

This case turns on construction of the resale provisions of the Maryland Condominium Act, Md. Code (2011 Supp.), § 11-135 of the Real Property Article ("RP"), and the Maryland Consumer Protection Act, Md. Code (2005 & 2011 Supp.), Title 13 of the Commercial Law Article ("CL"). These issues are in an unusual posture because the Maryland Court of Appeals very recently addressed some of the precise legal issues presented in this case in *MRA Property Management, Inc. v. Armstrong*, 2011 Md. LEXIS 646 (Md. October 25, 2011). The Court, however, then withdrew its opinion based on motions for reconsideration, *MRA Property Management, Inc. v. Armstrong*, 2011 Md. LEXIS 783 (Md. December 15, 2011), and the case was re-argued on March 1, 2012. The October 25, 2011 opinion thus has no current precedential value.[3] Assuming there is an appeal in this case, there may be a definitive resolution of some of the issues while the appeal is pending.

[3] Moreover, the Court's opinion was written by Judge Murphy, who has since retired from the Court, and three judges did not join in the opinion of the Court. Judges Battaglia and Harrell dissented, and Judge Eldridge joined in the judgment only.

1. The Resale Provision of the Maryland Condominium Act.

The resale section of the Condominium Act requires a condominium unit owner who is reselling his or her unit to provide certain specified information to the purchaser of the unit at least fifteen days before closing on the sale. RP § 11-135(a). That information includes a "certificate" containing twelve enumerated statements or items of information. RP § 11-135(a)(4). Because much or all of the required information for this certificate is within the knowledge of the condominium's council of unit owners, the statute requires the council to provide a certificate containing the required information to any unit owner on written request and payment of a fee by the unit owner. RP § 11-135(c). The certificate that forms part of the required disclosure is commonly referred to as a "resale certificate." A contract for resale of a unit is unenforceable if the unit owner selling the unit fails to provide the required information, RP § 11-135(a), and, once the seller provides the information, the purchaser has seven days to "rescind in writing the contract of sale without stating any reason and without any liability on his part," RP § 11-135(f)(1).

Although the obligation to provide the resale certificate to the unit purchaser is placed on the unit seller, the statute creates a duty to provide information that may support a common law fraudulent misrepresentation action by the unit purchaser directly against the council of unit owners. *Swinson v. Lords Landing Village Condominium*, 360 Md. 462, 478 (2000) (The council "was under a public duty, imposed by statute, to provide that information to a unit owner for the express purpose of allowing that unit owner to transmit the information to a prospective buyer."). It is a "duty to provide accurate and non-misleading information." *Id.* In *Swinson*, the Court examined the

precise scope of the information required by statute and concluded that the council of unit owners in that case was not liable because it had satisfied the requirements of the statute. *Id.* at 478-81. The Court read the statute strictly. The council was not required to include information about an existing *housing* code violation because the statute refers only to *building* or *health* code violations. *Id.* at 478-81 (interpreting RP § 11-135(a)(4)(x)). Nor was the council required to describe the status of pending litigation because the statute only required disclosure of the existence of litigation. *Id.* at 481 (interpreting RP § 11-135(a)(4)(vii)). Thus, RP § 11-135(a)(4) both creates a disclosure obligation and defines the limits of that obligation.

a. Approved Capital Expenditures

Plaintiff relies on three subparts of RP § 11-135(a)(4). The Court will first consider the provisions relating to a council's budget for capital expenditures. A resale certificate must include:

> (iv) A statement of any capital expenditures approved by the council of unit owners planned at the time of the conveyance which are not reflected in the current operating budget disclosed under subparagraph (vi) of this paragraph; [and]
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> * * *
>
> (vi) The current operating budget of the condominium including details concerning the reserve fund for repair and replacement and its intended use, or a statement that there is no reserve fund . . . .

RP § 11-135(a)(4)(iv) and (vi). In 1982, the General Assembly amended subparagraph (iv) from a requirement that a council disclose "capital expenditures *proposed* by the council" to "capital expenditures *approved* by the council." 1982 Md. Laws ch. 836 (emphasis added). That specific change indicates the General Assembly's intention to

restrict a council's disclosure obligation to only those capital expenditures formally approved by a council at the time of the transaction.

It is undisputed that the Council and Zalco provided Harborview's 2009 budget as part of the Resale Certificate packet. As stated above, that budget included a section on capital expenditures, including a specific line item for $801,709 designated as "Exterior project phase I including engineering and construction management costs." In the Resale Certificate itself, the Council and Zalco stated "$823,283.34 as of August 31, 2009" for "the Association's reserve fund for repair and replacement and the intended use of the reserve fund." The Council and Zalco further indicated "**None known**" for "capital expenditures approved by the Council of Unit Owners or its authorized designee which are not reflected in the current operating budget."

Plaintiff does not dispute these statements of the financial information provided, but he argues that there are genuine disputes of fact concerning what capital expenses the Council had actually approved. Plaintiff points in particular to the minutes of a September 9, 2009 meeting of the Council's Board of Directors which noted a "CSG Façade Project Report" given by representatives of Construction Systems Group to the Council board. Defs.' Memo., Exh. C at 1. The minutes note that "CSG is a consulting engineer firm hired by the condominium to design and administer the Façade Project, which involves multiple categories of work on the exterior surfaces of the building . . . ." *Id.* Among other things, the minutes note:

1. "CSG would charge 10% of the construction cost to manage the project," which "would bring their total estimate of the cost of the project to $6.2m," although the 10% fee is described as "negotiable" and alternative cost estimates of "$1m off the above cost" and "$5.6m" are also described. *Id.*

2. As proposed by CSG, the project is described as occurring "in four phases, one phase per year over the next four years," "[a]lthough the Board could choose to stretch out this project longer." *Id.* Using CSG's proposed schedule, "the majority of the units experiencing leaks would be 'corrected' in Phase I." *Id.* at 2.

3. "[The Board] included about $270,000 in the 2010 budget for debt service of a $2m loan. Using CSG's current estimates, the Phase I cost ($1.1m) in 2010 is the lowest of all four phases and, given the timing of the construction (beginning in March/April 2010) and the likelihood of lower bids than CSG estimates, it's likely that we will have to expend far less than $2m in 2010. . . . However, since there is a large increase in costs in Phase II (2011--$1.6m) and Phase III (2012--$1.67m), Mike suggested that we budget more in debt service in 2010 than we needed and bank it to lessen the impact of the added debt service in 2011 and 2012. The Board agreed." *Id.*

4. "The Board members present agreed that CSG should manage the project given the Board and Maintenance Committee's intense selection process when we hired them. CSG suggested that they begin designing the project immediately so that the administrative process can be completed and construction can begin in March or April (weather permitting). The Board agreed and Tom says that each phase of CSG's work will be covered as a work change under section 1.3.3.1 of their contract. Tom doesn't need any Board action yet but the board members present gave him approval to have CSG prepare the document to authorize façade engineering design service for Board approval. Their design services will cost $50,000, most of which will be paid in 2009 and the remainder in 2010 (Tom says our capital reserve fund can handle this expense." *Id.*

Plaintiff contends that the Council had an obligation to tell him that the Council was considering the need to spend more than $5 million to repair the extensive water infiltration problems. The minutes certainly show that the Board was deep into planning of the project and that it likely would cost more than $5 million, but the minutes also show that the ultimate cost was still the subject of negotiations and bidding and that the Board did not need or authorize any expenditure in 2009 or 2010 beyond what was already budgeted. Defendants have demonstrated by affidavits and documents that no

capital expenditures other than those disclosed had been approved as of the effective date of the Resale Certificate. Apart from the meeting minutes, Plaintiff has not submitted any factual material supporting or suggesting "approved" expenses that were not included in the Council's disclosures. Because RP § 11-135(a)(4)(iv) specifically limits the Council's obligation to "approved" expenses, Plaintiff has not identified a genuine dispute of material fact on this issue. Moreover, the Resale Certificate and budget disclosed by the Council informed Mr. Clark that the Council was preparing to pay more than $800,000 for "engineering and construction management costs" for "phase I" of a project involving the exterior of the building.[4] The magnitude of that expense for a limited purpose in only the first phase of a project should have alerted him to the fact that a major project, likely with additional phases, was under way.

b. Health or Building Code Violations

A resale certificate also must include:

> (x) A statement as to whether the council of unit owners has knowledge of any violation of the health or building codes with respect to the unit, the limited common elements assigned to the unit, or any other portion of the condominium . . . .

RP § 11-135(a)(4)(x). The Council stated in item 9 of the Resale Certificate:

> 9. The Association has no knowledge of any violation of building or health code with respect to the unit or the common elements assigned thereto except as follows: **N/A**

[4] Defendants have not sought to square the disclosed expense of over $800,000 for Phase I work with the $1.1 million Phase I estimate included in the September 9, 2009 minutes, but any discrepancy is immaterial because the higher estimate, even according to the minutes, did not result in or require a higher "approved" amount. Given the other context, it is quite possible that the two "Phase I" references are to two different or only partially overlapping aspects of the project.

> Further, the Association has no knowledge of an health or building code violations for any other portion of the condominium except as follows: **N/A**

Plaintiff does not contest the Council's and Zalco's factual showing that they were not aware of any pending building code or health code violations on the effective date of the Resale Certificate: "Clark agrees with Defendants that he has no evidence of building or health code citations or violation notices – but that is where his agreement ends." Pl.'s Memo. at 27. Instead, Plaintiff argues that the statute must be interpreted to include knowledge of conditions that might constitute building or health code violations and that there are factual disputes concerning whether such conditions existed at Harborview in September and October 2009. Defendants argue that the statute should be interpreted to be limited to building code or health code citations or notices pending at the time.

The Court concludes that the statute should be read to limit a council's disclosure obligation to building or health code violations that are the subject of pending enforcement proceedings. *Swinson* does not answer this exact question, but it does support the need to interpret the resale provision narrowly so that a council's disclosure duties may be readily understood and discharged. The building and health codes are necessarily broad. Baltimore City has adopted the International Building Code (2009) with certain additions and amendments. Building, Fire and Related Codes of Baltimore City Code § 2-101(a). The 2009 International Building Code spans 35 chapters and eleven appendices. *See* http://publicecodes.citation.com/icod/ibc/2009/index.htm (last viewed February 24, 2012). The Health Code of Baltimore City has at least sixteen titles. Enforcement of both codes involves considerable discretion vested in City code

enforcement officials. It is likely that almost any property deficiency could conceivably be characterized as a violation of one of these codes. Requiring councils of unit owners to interpret these complex codes and to predict possible enforcement actions, all at risk of being charged with fraud by unit purchasers, would be untenable. This Court concludes that, if the General Assembly had intended that councils have such a broad disclosure duty, it would have used language such as "possible violation" or "potential violation." In the absence of such language, a council's obligation is satisfied by disclosure of any cited or noticed code violation that has not been resolved when the resale certificate is issued. Because it is undisputed that Harborview had no such pending building or health code violations in September 2009, the Council and Zalco met their obligations on this point with the Resale Certificate.

c. Condominium Declaration or Bylaw Violations

Plaintiff's third claim, first made in his Second Amended Complaint, arises from the requirement that a resale certificate include:

> (ix) A statement as to whether the council of unit owners has knowledge that any alternation or improvement to the unit or to the limited common elements assigned to the unit violates any provision of the declarations, bylaws, or rules or regulations . . . .

RP § 11-135(a)(4)(ix). The Council stated in item 8 of the Resale Certificate:

> 8. Although there has not been an inspection of the unit to determine the existence of any violations, the Association has no knowledge that any alterations or improvements to the unit or to the limited common elements appurtenant thereto violate any provisions of the Declaration, By-Laws or House Rules, except as follows: **None**

Plaintiff asserts that the alterations made by the previous owner of the Unit had caused water leaks into the unit below the Unit, that those alterations violated the condominium bylaws, and that the Council was aware of and did not disclose those alleged violations. Defendants argue that the statute must be read to be limited to violations actually alleged through the enforcement mechanisms of the condominium and that there were no pending proceedings before the Council alleging any violation of the bylaws pertaining to the Unit.

The Court agrees with Defendants that RP § 11-135(a)(4)(ix) must be interpreted to be restricted to alleged declaration or bylaw violations that are the subject of current enforcement proceedings. As with RP § 11-135(a)(4)(x), that restriction is necessary to make the Council's disclosure obligations readily understandable and manageable. Requiring the Council to investigate and to anticipate what conditions might amount to potential violations or might become the subject of a complaint would impose a duty of inquiry beyond that contemplated by the statute. Consistent with the narrow reading applied in *Swinson*, the Council's disclosure duty should be restricted to readily ascertainable information within its knowledge. Because Plaintiff does not contend that there were pending bylaw violation proceedings involving the Unit, it is undisputed that the Council satisfied this limited disclosure obligation.

The Court thus concludes on the undisputed facts and as a matter of law that the Council's Resale Certificate and the accompanying disclosure documents did not violate RP § 11-135(a)(4) in any of the ways alleged by Plaintiff.

2. Ms. Rivera's Alleged Misrepresentations

Plaintiff also identifies one allegedly false or misleading statement made by Defendants outside the scope of the Resale Certificate. Plaintiff complains that Ms. Rivera, a Zalco employee acting on behalf of the Council, misrepresented that the water leak in the Unit was a minor roofing issue that the Council would repair within a matter of months.

The simple answer to this allegation is that Defendants have demonstrated that what Ms. Rivera told Mr. Clark was true when she said it and Plaintiff has produced nothing to create an issue concerning the factual accuracy of Ms. Rivera's statements. According to Mr. Clark's and Ms. Delorme's own testimony about the brief meeting with Ms. Rivera, Ms. Rivera readily acknowledged the existence of the leak in the Unit, acknowledged that it was caused by the common roof, and was even eager to point out to them the written plans to have the roof repaired. She said the repair was planned for March or April 2010, which is perfectly consistent with the minutes of the September 9, 2009 Council board meeting. The fact that the work schedule was later delayed does not create an issue of fact concerning the accuracy of the statement when Ms. Rivera made it. Ms. Rivera also stated that the Council would repair any consequential damage in the Unit itself. Although a dispute has now developed between the parties concerning the extent of that damage and the necessary repairs, even on this point Plaintiff does not suggest the Council has disavowed all responsibility.[5]

[5] The Court does not know the status of any separate claim Mr. Clark may have made for repair of the Unit. In this action, his claims are limited to the theory that he would not have purchased the Unit had he known of certain information. The Court does not decide the extent of Mr. Clark's potential recovery against the Council or any other party on a

The undisputed facts here are that Mr. Clark had several opportunities to inspect the Unit and that he had actual knowledge of a water leak in the ceiling before bidding on the Unit. Presumably, Mr. Clark either did or could have made inquiries of the seller of the Unit concerning the leaks or any history of leaks in the Unit. He also presumably could have arranged for a professional inspection of the Unit. Plaintiff has failed to establish the factual basis for any claim of fraud or misrepresentation against the Council or Zalco based on Ms. Rivera's limited statements.

3. The Maryland Consumer Protection Act

The final issue is whether the Maryland Consumer Protection Act ("CPA") applies in this situation to create a cause of action against the Council. As potentially applicable here, the CPA broadly prohibits any person from "engag[ing] in any unfair or deceptive trade practice . . . in: (1) [t]he sale . . . of any . . . consumer realty . . .; [or] (2) [t]he offer for sale . . . of . . . consumer realty . . . ." CL § 13-303. The statutory definition of "[u]nfair or deceptive trade practices" includes:

> (1) False, falsely disparaging, or misleading oral or written statement, visual description, or other representation of any kind which has the capacity, tendency, or effect of deceiving or misleading consumers;
>
> (2) Representation that:
>
> (i) . . . consumer realty . . . ha[s] a sponsorship, approval, accessory, characteristic, ingredient, use, benefit, or quantity which [it] do[es] not have;
>
> (iv) . . . consumer realty . . . [is] of a particular standard, quality, grade, style, or model which {it is] not;

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different theory than is asserted in this case, not does the Court decide the effect, if any, of resolution of this action without the assertion of such a claim in this action.

> (3) Failure to state a material fact if the failure deceives or tends to deceive; [or]
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> * * *
>
> (9) Deception, fraud, false pretense, false premise, misrepresentation, or knowing concealment, suppression, or omission of any material fact with the intent that a consumer rely on the same in connection with:
>
> (i) The promotion or sale of any . . . consumer realty . . . .

CL § 13-301.

Plaintiff correctly points out that the direct seller of real property is not the only person who might violate the CPA "in" the sale of consumer realty: "It is quite possible that a deceptive trade practice committed by someone who is not the seller would so infect the sale or offer for sale to a consumer that the law would deem the practice to have been committed 'in' the sale or offer of sale." *Morris v. Osmose Wood Preserving*, 340 Md. 519, 541 (1995) (but holding that manufacturer of allegedly defective plywood sold to builders was not participating in the sale of consumer realty). Relying on this language, the Court later concluded that an appraiser who provided grossly inflated appraisals to facilitate a property "flipping" scheme could be held liable under the CPA. *Hoffman v. Stamper*, 385 Md. 1, 32 (2005). The "erroneous and misleading appraisals directly 'infected' the sales at issue," and the appraiser "was an integral part of the entire scheme of deceptive trade practices committed in the sale of consumer realty." *Id.* (quoting *Morris*, 340 Md. at 541).

Here, Defendants' role in the resale of the Unit was nothing like the "integral" conspiratorial role of the appraiser in *Hoffman*. The Council fulfilled a statutory duty it was bound to perform in connection with the resale of any unit, and Zalco, as the

property manager serving the Council, simply served its role as the Council's agent. The Court concludes nevertheless that Defendants were acting "in" the sale of the Unit. Their actions were taken because of the sale and with the expectation that the Resale Certificate would be provided to the buyer as part of the transaction. Nothing in *Hoffman* suggests that the participation in the sale must be conspiratorially dishonest to come within the scope of the CPA. The degree of dishonest participation in *Hoffman* only made resolution of the issue clearer in that case.

The simple fact of inclusion under the umbrella of the CPA, however, does not end the inquiry. Where a council of unit owners participates in a transaction specifically because of the statutory duty to provide a resale certificate, that statute also controls the scope of the duty for purposes of both common law fraud and the CPA. It would be absurd to suggest, for example, that a council of unit owners that is required to provide information only because of its obligation to provide a resale certificate and that provides exactly the information required by the statute would then be subjected to potential CPA liability on the ground that the statutory limitation with which it complied made the information misleading or incomplete. In the specific context of this case, for example, RP § 11-135(a)(4)(iv), as discussed above, required the Council to provide information only concerning certain "approved" capital expenditures not included in the Council current budget. Applying the CPA to negate that explicit statutory restriction on the Council's obligation and to impose a far broader obligation to disclose all capital expenses under consideration would eviscerate the carefully and intentionally drawn limitations of RP § 11-135(a)(4)(iv).

Thus, if a council of unit owners participates in the resale of a unit solely to discharge its responsibility to supply a resale certificate and it satisfies its obligations as required by RP § 11-135(a)(4), the council does not violate the CPA just because it does not disclose additional information not required by RP § 11-135(a)(4). In another case, a council of unit owners might choose to participate in the transaction in ways that go beyond its obligations under RP § 11-135(a)(4). In such a case, it might violate the CPA depending on the way in which it acted in the transaction and whether its actions or statements could be deemed to be unfair or deceptive.

In this case, as already discussed, Defendants fulfilled their obligations under RP § 11-135. They therefore cannot be liable under the CPA for the contents of the Resale Certificate. The only statements by any Defendant beyond the Resale Certificate were the statements made by Ms. Rivera. For the reasons discussed above, those statements were neither false nor misleading. Defendants are therefore entitled to judgment as a matter of law on Plaintiff's CPA claim.

Conclusion

For these reasons, there are no genuine issues of material fact and Defendants are entitled to judgment as a matter of law. Defendants' motion for summary judgment has been granted by prior order.

Judge Lawrence Fletcher-Hill
Judge's signature appears
On the original document

March 19, 2012

Judge Lawrence P. Fletcher-Hill

TRUE COPY TEST

FRANK M. CONAWAY, CLERK

CIRCUIT COURT FOR BALTIMORE CITY

cc: Steven D. Silverman, Esq.
Richard J. Magid, Esq.