2012 WL 8319741 (D.C.) (Appellate Brief)
District of Columbia Court of Appeals.

Joyce SAUCIER, et al.,
v.
COUNTRYWIDE HOME LOANS, et al.

No. 11-CV-646.
January 20, 2012.

Appeal from the District of Columbia Superior Court

Reply Brief of Appellant

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***1 BORROWERS' REPLY TO LOAN COMPANIES' RESPONSE TO BORROWERS' BRIEF ON APPEAL [1]**

ARGUMENT

I. The Lower Court Erred in Granting Summary Judgment on Borrowers' Fraud Claims

The Lower Court clearly erred by refusing to submit Borrowers' fraud claims to a jury. There is simply no requirement in District of Columbia law that a plaintiff claiming fraud through failure to disclose must establish that there was a pre-existing duty between the parties, and none of the cases cited by Loan Companies holds otherwise. Indeed, the Lower Court failed to acknowledge District of Columbia case law and could not cite a single District of Columbia case for the central proposition of its holding on the issue. Instead the Lower Court applied Maryland law to suggest that a pre-existing fiduciary relationship was required and that such a relationship was required specifically in a claim by a borrower against a lender. [2] See March 28, 2010 Memorandum Opinion on Countrywide Home Loans, Inc. and Presidential Bank's Motion for Summary Judgment ("3/28/11 Op.") at 55-6, APX02344-5 (citing *Hoffman v. Stamper,* 867 A.2d 276, 292 n.12 (Md. 2005), and *Parker v. Columbia Bank,* 604 A.2d 521, 532 (Md. Ct. Spec. App. 1992)).

Had the Lower Court appropriately considered relevant precedent, it would have had no reason to look to Maryland law. As explained in Borrowers' Opening Brief, this Court has made ***2** clear that the parties to a transaction have a "duty" to disclose the "whole truth," even in the absence of a fiduciary relationship between the parties. *See, e.g., Bogan v. Real Estate Comm'n of the District of Columbia,* 1972 D.C. App. LEXIS 419 at *7-8 (D.C. 1972) (same); *Tucker v. Beazley,* 57 A.2d 191 (D.C. Mun. App. 1948) (same); *Borzillo v. Thompson,* 57 A.2d 195 (D.C. Mun. App. 1948) (same). [3] Thus, the Lower Court erred when it required a fiduciary relationship as a predicate for a fraud claim.

The Lower Court also erred in applying Maryland law regarding the liability of lenders to borrowers. Relying on a Maryland case, Parker, the Lower Court suggested that a lender cannot be liable to a borrower absent a fiduciary duty. See 3/28/11 Op. at 56, APX02345. Again, contrary to Maryland law, the law of the District of Columbia provides for fraud claims against lenders without any requirement of a fiduciary relationship. *See, e.g., High v. McLean **Financial** Corp.,* 659 F. Supp. 1561, 1566 (D.D.C. 1987) (sustaining fraud claim by borrower against lender in absence of any "special relationship"). [4] In light of this clear precedent and the explicit differences between Maryland and District of Columbia law on these issues, the Lower Court's reliance on Maryland law to find that Loan Companies owe no duty to Borrowers was plain ***3** error. [5]

Contrary to Loan Companies' argument, Section 551 of the Restatement of Torts actually supports the position advocated by Borrowers below and reiterated on appeal: that there is no prerequisite of a "pre-existing duty" for a common law fraud claim for failure to disclose. Rather, a fiduciary duty is only one of several bases for such liability. Section 551(2) provides:
One party to a business transaction is under a duty to exercise reasonable care to disclose to the other before the transaction is consummated,

(a) matters known to him that the other is entitled to know because of a fiduciary or other similar relation of trust and confidence between them; and

(b) matters known to him that he knows to be necessary to prevent his partial or ambiguous statement of the facts from being misleading; and

(c) subsequently acquired information that he knows will make untrue or misleading a previous representation that when made was true or believed to be so; and

(d) the falsity of a representation not made with the expectation that it would be acted upon, if he subsequently learns that the other is about to act in reliance upon it in a transaction with him; and

(e) facts basic to the transaction, if he knows that the other is about to enter into it under a mistake as to them, and that the other, because of the relationship between them, the ***4** customs of the trade or other objective circumstances, would reasonably expect a disclosure of those facts. [6]

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Restatement (2d) of Torts (1976), § 551(2). *See also Smith v. Duffey,* 576 F.3d 336, 338 (7th Cir. III. 2009) ("often [the duty to disclose] arises in the absence of any special relationship -arises just because the defendant's silence would mislead the plaintiff because of something else that the defendant had said....") (citing Restatement (2d) of Torts § 551(2)(b); *V.S.H. Realty, Inc. v. Texaco, Inc.,* 757 F.2d 411 (1st Cir. 1985) (reversing dismissal of common law fraud claim despite absence of a fiduciary duty because, under § 551(2)(b)), "partial or incomplete statements []may by their incompleteness be actionable").

Loan Companies' contention that "the lender's duty under federal law is to HUD not to the borrowers," Brief of Appellee Countrywide Home Loans, Inc. ("CW Br.") at 19 (citing Op. at 59-60, APX02348-9); *see also Pres.* Br. at 34-36, is but a red herring. Borrowers do not argue that HUD regulations bestow a "duty of disclosure" upon Loan Companies. Nor do they contend that regulations provide them with a private cause of action. Rather, Borrowers argue the simple principle articulated at common law, codified by the Restatement and adopted by the District of Columbia: where a party to a transaction makes a representation, it has an obligation to reveal the whole truth -- regardless of whether there exists a pre-existing duty.[7] The cases cited by ***5** Loan Companies and by the Lower Court do not address, much less reject, this principle.[8]

Here, Loan Companies' actions (advising Borrowers that their loans had been approved)[9] gave rise to a duty to disclose the *whole truth* about the loans (the fact that the loan approvals were subject to several FHA conditions and safeguards that were ignored). *See Pyne v. Jamaica Nutrition Holdings,* Ltd, 497 A.2d 118, 131 (D.C. 1985) and other cases cited in Borrowers' Opening Brief ("Op. Br.") at 22-23;[10] *see also Union Pacific Resources Group, Inc. v. Rhone-* ***6** *Poulenc, Inc.,* 247 F.3d 574, 584-86 (5th Cir. 2001); Okland Oil Co. v. Conoco Inc., 144 F.3d 1308, 1324 (10th Cir. 1998); *V.S.H. Realty, Inc. v. Texaco, Inc.,* 757 F.2d 411, 414-15 (1st Cir. 1985).

According to Loan Companies, their failure to comply with FHA loan conditions and safeguards did not require disclosure because it was not "within the scope of facts" necessary to qualify their statements of loan approval. CW Br. at 25; see also Pres. Br. at 17-19. To the contrary, Loan Companies' decision to ignore mandatory FHA conditions and safeguards constitutes material qualifying information that should have been disclosed to Borrowers.

As Direct Endorsement Lenders, Loan Companies took on a special role generally reserved for the federal government. In turn, they were required to comply with certain conditions and safeguards, each of which constituted a fundamental term of the loan and which were put in place precisely to prevent what occurred here: the issuance of loans for the purchase of incomplete and substandard units at artificially inflated prices. See APX01820-2 (safeguards were "intended to provide protections against the kinds of **abuses** that have historically occurred in the FHA programs").

First, the Loan Companies were required to obtain an independent appraisal that reflected the fair market price of each unit. See Op. Br. at 10-11, 22. As set forth in the FHA Amendatory Clause contained in each of the sales contracts, the FHA explicitly permitted a Borrower to cancel the sale in the event that his or her unit did not appraise for the contract price. See Id. at 22. Had the Borrowers been informed that the appraisals of their units were inflated, they could ***7** have walked away from the sale. Thus, Loan Companies' failure to inform Borrowers that the appraisals were not accurate was not only essential information, but in fact determined whether or not the loan would go through.

These conditions and safeguards also required Loan Companies to have an independent inspector conduct an inspection to determine whether the work set forth in the Public Offering Statement ("POS") had been completed and performed to HUD property standards before approving and issuing the loans. See Op. Br. at 7-8. Independent confirmation that the construction was completed and completed properly was a fundamental condition of the loan. Because this determination of the conditions of the property and quality of construction was a perquisite for loan approval, Loan Companies' failure to conduct these inspections and determine the property conditions constituted material qualifying information. For this reason, the fact that the inspection

had not been done and the property conditions not determined should have been disclosed to the Borrowers as qualifying information when they were advised that their loans had been approved.

Loan Companies failed to comply with two additional FHA conditions: the seasoning requirement and the presale/owner-occupancy requirement. Both of these were designed to prevent the issuance of FHA loans on properties with no real market value. See Id. at 5-6, 17-18. Like the conditions described above, the seasoning and presale/owner-occupancy requirements were prerequisites to and conditions on loan approval that directly affected the price of the units and amount of the loan. Compliance with these conditions was required before the loan could be approved. Thus, when the Loan Companies informed Borrowers that their loans had been approved, the fact that the seasoning and presale/owner-occupancy conditions were being ignored was material qualifying information.

***8** Had either Loan Company complied with these loan conditions and safeguards, it could not have approved these loans. Had the appraisals not been artificially inflated, the loans would not have gone through. Likewise, had the Loan Companies conducted the required fee inspections, they would have uncovered the plethora of problems at the Property and in the individual units, and the loans could not have been approved. Had the Loan Companies complied with the seasoning and presale/owner-occupancy requirements, the loans could not have been issued at all. For this reason, Loan Companies' failure to comply with FHA conditions and safeguards was material to the statements that the loans were approved, and required disclosure regardless of whether Loan Companies expressly advised Borrowers that their loans "were all right with the FHA." Op. at 50, APX02339. *See, e.g., Martinez v. Freedom Mortgage Team,* 527 F. Supp. 2d 827, 838 (N.D.I11. 2007) (approving loan constituted representations that appraisal reflected market value and that borrower was creditworthy); *M&T Mortgage Corp. V. Miller,* 323 F. Supp. 2d 405, 410 (E.D.N.Y. 2004) (defendants "used FHA's issuance of mortgage insurance to further deceive [borrowers] into believing that the purchase price was fair and that that the entire transaction was legitimate").[11]

As made clear in Borrower's Opening Brief and in Amicus Consumer Law Center's Brief in Support of Appellants, even if pre-existing duty were required in the District of Columbia, ***9** there is ample evidence of "special circumstances" that would support such a finding. Countrywide was involved in the King's Court conversion from the time of the conversion in March 2001, when it became the "preferred lender" for the Project. See 3/28/11 Op. at 5, APX02294. Countrywide agents "were in frequent contact as the approval process went forward," *see Id.,* and agents for both Loan Companies worked closely with the Developer. Countrywide and Presidential loan officers maintained offices at the King's Court building, see Id. at 29, APX02318; see also APX02131 and APX01324, where they spent time gathering documents, soliciting loans and/or meeting with or calling Borrowers. See 3/28/11 Op. at 7-8, APX02296-7.

As Direct Endorsement Lenders, Presidential and Countrywide agreed to perform many of the roles traditionally left to the federal government. In turn, the Loan Companies (1) gained "special knowledge" of the facts attendant to Borrowers' purchases that were unknown to Borrowers, and (2) accepted responsibility for complying with FHA conditions and requirements, including reviewing the POS, ensuring that the appraisals were accurate and obtaining a fee inspection. As a result of these "special circumstances," Loan Companies assumed a role of trust that obligated them to disclose the defects with the loans, the appraisals and the units even in the event that a "fiduciary relationship" was required. *See, e.g., High,* 659 F. Supp. 1561, 1568 (D.D.C. 1987) (noting that "[t]he District of Columbia has deliberately left the definition of 'fiduciary relationship' flexible so that the relationship may change to fit new circumstances in which a special relationship of trust may properly be implied."). The Lower Court's decision, which deprived Borrowers of the ability to present these circumstances to a jury, was clear error.

The concerns raised by the Lower Court and reiterated by Loan Companies on appeal ***10** regarding the purported "expansion of liability" urged by Borrowers is unavailing. Borrowers do not suggest that "a merchant is under a legal duty to speak in every instance where the defendant is in possession of material information that the counter-party may not have." CW Br. at 15; *see also Id.* at 17 (misconstruing Borrowers' argument as transforming "any failure to volunteer information" into fraud). Rather, Borrowers correctly assert that, where a party to a transaction makes a representation, it is obligated to disclose the whole truth, regardless of the prior relationship between the parties. Likewise, Presidential's suggestion that "allowing liability based on silence and without reference to duty would have the effect of significantly broadening the scope of potential liability"

by "eliminating the knowledge and scienter requirements of common law fraud" is simply wrong. Borrowers do not seek to eliminate any of the elements of common law fraud; they merely urge the Court to reject the Lower Court's imposition of an additional element never before required by this Court. [12] As set forth in the Restatement, a preexisting duty is but one of several bases for liability for misrepresentation; it is not a prerequisite to any liability.

II. The Lower Court Erred in Granting Summary Judgment on Borrowers' CPPA Claims

Loan Companies' attempts to justify the erroneous dismissal of Borrowers' CPPA claims are likewise unavailing. The Loan Companies contend (as they did in connection with Borrowers' fraud claims) that they cannot be held liable under Subsection (e) because their statements of loan approval were supposedly technically correct. *See* Pres. Br. at 27-28; *see also* ***11** CW Br. at 41. This argument is based on a fundamental misunderstanding of Borrowers' claims. Borrowers do not suggest that Loan Companies' statements of loan approval were not, in some sense, literally true. Rather, they contend that the statements were true because they were incomplete. Specifically, Loan Companies did not reveal that the loans had been approved only because they had ignored and failed to comply with the FHA conditions and safeguards that were required for that approval.

The Lower Court's dismissal of Borrowers' Subsection (f) claims was likewise clear error. There is simply no basis -- in the text, policy or history of the CPPA -- for imposing the requirement of a pre-existing duty between the parties. In fact, the CPPA is unambiguous that no pre-existing duty is required. The "duty" that gives rise to liability under the Act arises from the relationship between the merchant and the consumer. *See* D.C. Code. § 28-3904(f) (omission must be by a "merchant" that injures a "consumer"); D.C. Code. § 28-3901(a)(3) (defining "merchant". *See also, e.g., Byrd v. Jackson,* 902 A.2d 778, 281-82 (D.C. 2006) (contractual relationship not required to create consumer-merchant relationship under CPPA). By its terms, no other relationship is required under the CPPA. [13]

The Lower Court's reliance on *Chiarella* was misplaced. The Court relied on this case for the proposition that "[s]ilence, absent a duty to disclose, is not misleading...". 3/28/11. at 68-69, APX02357-8. But in contrast to the federal securities law at issue in these cases, the CPPA unambiguously imposes a duty of disclosure upon merchants who possess material ***12** information where non-disclosure would have a "tendency to mislead." [14] There was therefore no reason for the Lower Court to look for guidance beyond the language of the statute itself. [15]

Moreover, there is a world of difference between federal criminal securities regulations, which were enacted to punish "corporate insiders" for **abusing** their positions of trust in the **financial** markets, and state consumer protection statutes, which are designed to protect consumers from unsavory trade practices in their transactions with merchants. *See Solomon v. Falcone,* 791 F. Supp. 2d 184, 190 (D.D.C. 2011) ("The purpose of the [CPPA] is to protect consumers from a broad spectrum of unscrupulous practices by merchants, therefore the statute should be read broadly to assure that the purposes are carried out.") (citing *Modern Mgmt. Co. v. Wilson,* 997 A.2d 37, 62 (D.C. 2010)). As stated in Borrowers' Opening Brief and in the Brief of Amicus Curiae, the more appropriate place for the Court to look for guidance would have been the FTC Act and case law interpreting that Act. Loan Companies' argument that the federal securities laws are more "analogous" than the FTC Act is unavailing in light of the legislative history of the CPPA, which specifically contemplates that the courts will look to the FTC Act for guidance in interpreting the CPPA. See Committee Report on Bill 1-253 (attached as Ex. 1 to ***13** Brief of Amicus Curiae) at 1, 7.

Loan Companies contend that, without a pre-existing duty requirement, "the potential for liability under the statute is virtually limitless." Pres. Br. at 29; see also CW Br. at 39-40. This concern is without merit. The CPPA imposes its own limits on liability by requiring a merchant-consumer relationship and by requiring proof that the matter on which the consumer was misled is "material" to the transaction. *See, e.g., Busby v. Capital One, N.A.,* 772 F. Supp. 2d 268, 279 (D.D.C. 2011) ("Despite its broad reach, the CPPA applies only to consumer-merchant relationships."); *Athridge v. Aetna Cas. & Sur Co.,* 351 F.3d 1166, 1176 (D.C. Cir. 2003) (finding that misrepresentations at issue could not, as a matter of law, have a tendency to mislead). See also Brief of Amicus Curiae at 5-9. There was, therefore, no reason to impose a fiduciary duty requirement upon the statute.

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Moreover, the imposition of this additional common-law requirement runs counter to the express purpose of the CPPA: to broaden the remedies available at common law. *See* D.C. Code § 28-3905(k)(2) (the remedies available under the statute are "cumulative and in addition to other remedies or penalties provided by law"). To this end, the CPPA protects against "all improper trade practices," not just those existing at common law. See Id. at § 3901(b)(1) (emphasis added). *See also Williams v. Central Money Co.,* 974 F. Supp. 22, 27 (D.D.C. 1997) ("The purposes of the CPPA are to 'assure that a just mechanism exists to remedy all improper trade practices....'") (citing D.C. Code § 28-3901(b)).

Loan Companies suggest that the Lower Court imposed the requirement that there be an additional "duty" beyond that set forth in the statute to effectuate the materiality element of the ***14** statute. But there is nothing about materiality that requires a pre-existing "duty."[16] *See, e.g., Basic Inc. v. Levinson,* 485 U.S. 224, 241 (U.S. 1988) (refusing to "collapse the materiality requirement into the analysis of defendant's disclosure duties" in the context of federal securities regulations). That the two are separate questions is made clear by the common law of fraud (codified in § 551 of the Restatement of Torts), which holds that there is a duty to disclose where not stating something would be misleading. Accordingly, even if the Lower Court had been correct in looking to the common law when considering Borrowers' CPPA claims, its analysis, which required proof of a pre-existing duty, was in error.

The Loan Companies reiterate their argument (made in connection with Borrowers' fraud claims) that, "Appellants as a matter of law can assert no private cause of action based on alleged violation of FHA regulations." Pres. Br. at 32; *see also* CW Br. at 19-20. As explained above, however, Borrowers are not attempting to assert a private right of action based on FHA requirements. Rather, they seek to recover for the fact that, in failing to disclose their non-compliance with FHA conditions and requirements, the Loan Companies omitted material information that tended to mislead the Borrowers. Accordingly, both *United States v. Neastadt,* 366 U.S. 696 (1961), and *Wells Fargo Home Mortg., Inc. v. Neal,* 398 Md. 705 (Md. 2007), are inapplicable.[17]

***15** Presidential further contends that, because the CPPA specifically enumerates only two federal statutes and District of Columbia law, liability cannot be predicated on a violation of any other law. Presidential's attempt to read this limitation into the statute is simply misguided. By its terms the CPPA protects against "all improper trade practices," D.C. Code § 28-3901(b)(1), not just those enumerated in Subsections (w) and (x). See D.C. Code § 28-3905(b)(1)(B) (authorizing Director to investigate whether "the trade practice which occurred violated any statute, regulation, rule of common law, or other law of the District of Columbia") (emphasis added). Among the plethora of deceptive acts prohibited by the Act is the failure to state a material fact that tends to mislead, as proscribed by Subsection (f). There is simply nothing in that section of the Act (or elsewhere) that prohibits recovery where the failure to disclose also violates an unenumerated federal law. See, e.g., Hughes v. Abell, 794 F. Supp. 2d 1 (D.D.C. 2010) (upholding claims for fraudulent misrepresentations under both Subsection (e) and Home Ownership and Equity Protection Act (HOEPA)). Presidential's attempt to justify the Lower Court's error by suggesting this limitation therefore fails.

III. The Lower Court Erred in Granting Summary Judgment on Borrowers' Conspiracy Claims

The Lower Court's dismissal of Borrowers' conspiracy claims was also in error. As set forth in their Opening Brief, Borrowers were not required to present direct evidence of an agreement between the Loan Companies and the appraisers in order to establish liability, but ***16** were permitted to rely on circumstantial proof. *See Monsanto v. Spray-Rite Serv. Corp.,* 465 U.S. 752, 764 (1984); *Halberstam v. Welch,* 705 F.2d 472, 486 (D.C. 1983). To this end, Borrowers set forth sufficient evidence that Loan Companies worked with the Developers and Sales agents to sell overpriced and un-renovated properties to Borrowers to withstand summary judgment. In fact, the loans at issue only went through because Loan Companies, working with the Developers and Sales Agents to sell the substandard units, failed to do what they were required to do. Borrowers' evidence was not, as Countrywide suggests, limited to "four facts" demonstrating a legitimate attempt to make money by sharing in an innocent commercial endeavor. Rather, it includes the totality of evidence set forth in Borrowers' Opening Brief and summarily rejected by the Lower Court. This evidence must be viewed and considered not in isolation but in its totality -- something which the Lower Court failed to do in summarily rejecting Borrowers' claims.[18]

IV. The Lower Court Erred in Granting Summary Judgment on the Association's CPPA Claims

The Lower Court clearly erred in finding that the Association could not recover on behalf of its members under the CPPA. [19] The Lower Court's conclusion that the Association could not recover for the injuries sustained by the Borrowers was based on its finding that the Borrowers' CPPA claims failed. As set forth in Borrowers' Opening Brief and above, the Lower Court's ***17** dismissal of Borrowers' CPPA claims was in error. Accordingly, its decision dismissing the Association's claims was also in error.

The Lower Court also erred in concluding that the Association could not demonstrate an injury-in-fact. As was properly decided by Judge Hedge, [20] the individual unit owners' ownership interest in the common areas provides the Association with the injury-in-fact necessary to recover on behalf of its members. [21] *See also Fort Lincoln Civic Ass'n., Inc. v. Fort Lincoln New Town Corp.,* 944 A.2d 1055, 1073 (D.C. 2008) ("We now hold that a condominium owner or condominium owner's association need not allege or prove intentional misrepresentation or failure to disclose" to prevail under the CPPA)(emphasis added); *Twin Towers Plaza Tenants Ass'n v. Capitol Park Asso'n, L.P.,* 894 A.2d 1113, 1118 (D.C. 2008) (finding that Association "fit within the statutory definition of a 'person" entitled to bring claims under CPPA). The Lower Court's decision dismissing the Association's claims was therefore in error. [22]

***18 CONCLUSION**

For the foregoing reasons, the Lower Court's March 28, 2011 Order should be reversed.

Footnotes

1 For the Court's convenience, Borrowers have filed a single brief to jointly respond to Loan Companies' arguments.

2 Presidential attempts to justify this error by asserting that, "when the Superior Court surveyed District of Columbia authorities, it did not locate a case stating the precise duty requirement as articulated in *Chiarella* and in section 551 of the Restatement. The Court therefore looked to Maryland precedent." Pres. Br. at 21-22. This argument is circular, as it presupposes that there is a duty requirement in the District of Columbia, yet claims that, because there is no clear law, the Court was forced to look outside this jurisdiction to find support for this duty.

3 Presidential's assertion that "Appellants cite no cases holding that the District of Columbia differs from the common law as stated buy the Superior Court in its Opinion," Brief of Appellee Presidential Bank ("Pres. Br.") at 22, is puzzling, given the plethora of cases cited in Borrowers Opening Brief and noted above. Indeed, one of the very cases cited by Loan Companies in support of their position that there must be a pre-existing duty of disclosure before one may be held liable for fraud in the District of Columbia, not only stands for the opposite proposition but actually cites two of the very cases cited by Borrowers in their opening brief. *See Kapiloff v. Abington Plaza Corp.,* 59 A.2d 516, 517 (D.C. 1948), citing Tucker and Borzillo for the proposition that one who undertakes to make an assertion in a transaction has an obligation to state "the full truth."

4 Presidential misreads *High* as requiring the existence of "special circumstances" in order to sustain a claim for fraud made by a borrower against a lender. The *High* Court, however, imposes no such requirement in sustaining the plaintiffs' *fraud* claim; it does so only in the context of their Breach of a Fiduciary Duty claim. *Id.* at 1568.

5 Presidential cites two cases, not cited by the Lower Court, in support of its contention that this Court requires proof of a pre-existing duty as an element of common law fraud. In *Elemary v. Holzmann A.G.,* 33 F. Supp. 2d 116 (D.D.C. 2008), the court merely notes that "[n]ondisclosure of material information may constitute fraud, especially where there is a duty to disclose." (citing *Pyne v. Jamaica Nutrition Holdings,* 497 A.2d 118, 131 (D.C. 1985) (emphasis added). It did not impose a duty requirement as a predicate to fraud. In *Kapiloff v. Abington Plaza Corp.,* 59 A.2d 516, 517 (D.C. 1948), the court noted that "[t]here is ... no question that mere silence does not constitute fraud unless there is a duty to speak." This case is inapposite where, as here, Borrowers do not rely on Loan Companies' silence as a basis for liability; rather they contend that the statements made by Loan Companies (that the loans were approved) were fraudulent in that they failed to included material qualifying information. Indeed, the *Kapiloff* court specifically notes that an "affirmative duty of disclosure" arises where, "under the familiar principle that when one undertakes to speak, either

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voluntarily or in response to inquiry, he must 'not only to [sic] state truly what he tells' but also must not 'suppress or conceal any facts within his knowledge which materially qualify those stated. If he speaks at all he must make a full and fair disclosure.'" *Id.* at 518 (citing *Borzillo,* 57 A.2d at 198).

6 Presidential suggests that, under Section 551, a duty to disclose arises only "when one party has information 'that the other [party] is entitled to know because of a fiduciary or other similar relation of trust and confidence between them." Pres. Br. at 20 (citing Restatement (2d) of Torts (1976), § 551(1)). Presidential fails to disclose the entirety of that section, under which duty to disclose does not depend on a "special relationship" but can arise in a number of different situations, as set forth in § 551(2).

7 The fact that "the loan approvals were in fact loan approvals," Pres. Br. at 18; see also CW Br. at 14, does not insulate the Loan Companies from liability for fraud. Indeed, the very nature of a fraudulent misrepresentation is that, although the statement may technically be correct, the failure to disclose material qualifying information renders the statement fraudulent. In asking the Court to find that there can be no liability for fraud where the specific words uttered are, on their face, correct, Loan Companies essentially urge this Court to re-write the common law of fraud. This Court has never held that a fraud claim may not lie where the precise words used are "technically correct" and it should not do so now.

8 Indeed, in *Brown v. Countrywide Home Loans, Inc.,* 319 B.R. 278 (B.R.D.C. 2004), cited by both the Lower Court and by Countrywide, the court's discussion of the purpose of HUD guidelines was in the context of a negligence claim, which necessarily requires proof of a pre-existing duty. *See Id.* at 282-287. When considering the plaintiff's *fraud* claim, the court specifically noted this distinction, noting that *"it is well established that a plaintiff need not establish the existence of privity of contract or any specific duty of care to recover on a claim for fraud." Id.* at 288 (emphasis added). *Emmons v. Brown,* 600 N.E.2d 133, 134 (Ind. Ct. App. 1992) and *Clark v. Grover,* 132 Mich. App. 476, 482 (Mich. Ct. App. 1984), are inapposite for the same reason.

9 Both Loan Companies contend that "Borrowers offered no evidence that [Loan Companies] expressly told any Borrower that his or her loan was approved." CW Br. at 22; see also Pres. Br. at 12. It is axiomatic that a "representation" need not be an actual "statement." Rather, a communication may constitute a "statement" on the part of the actor. *See, e.g., Cooper v. First Gov't Mortg. & Investors Corp.,* 238 F. Supp. 2d 50, 65 (D.D.C. 2002) (mortgage companies, through their actions, made material misrepresentations).

10 Loan Companies' attempt to distinguish these cases is unavailing. In *Pyne,* the court merely noted that "nondisclosure of material information may constitute fraud, especially where there is a duty to disclose." 497 A.2d at 131 (emphasis added). While Countrywide urges that the use of the word "especially" was mere "dicta," CW. Br. at 16, the fact that the court cites a case that lays out the elements of a claim for *breach of fiduciary duty* (versus a claim for fraud), indicates the contrary. *See Id.* (citing, *inter alia, United States v. Kearns,* 595 F.2d 729 (D.C. Cir. 1978)). *See also Sage v. Broadcasting Publications, Inc.,* 997 F. Supp. 49 (D.D.C. 1998) (noting that, where a party has a duty to disclose, "there is any even greater likelihood that non-disclosure will constitute fraud"); *Elemary,* 33 F. Supp. 2d at 137 ("[n]ondisclosure of material information may constitute fraud, especially where there is a duty to disclose") (citing *Pyne,* 497 A.2d at 131 (emphasis added)). Such statements do not, as Loan Companies suggest, require a pre-existing duty as an element of common law fraud. Rather, they merely suggest that a party will be more likely to be held liable for failing to disclose pertinent information where such a duty may be found. Loan Companies' attempt to distinguish *Bennett v. Kiggins,* 377 A.2d 57 (D.C. 1977), is similarly ineffective. The *Bennett* court did not discuss, much less require, a pre-existing duty as an element of common law fraud.

11 *Neither Jatras v. Bank of Am. Corp.,* 2010 U.S. Dist. LEXIS 135815 (D.N.J. Dec. 23, 2010), nor *In re Fordham,* 130 B.R. 632, 649 (Bankr. D. Mass. 1991), support Loan Companies' position. Neither case addresses District of Columbia law and their facts and circumstances differ dramatically from those at issue here. The loan companies named as defendants were not Direct Endorsement Lenders and the loans did not contain the FHA Amendatory Clause. Indeed, the plaintiff-borrowers in both cases had as much or more information about their **financial** situations than did the lender-defendants. *Jatras* at *19 (noting that buyers "had a more thorough understanding of their own **financial** situation than Defendants"); In re Fordham, 130 B.R. at 652 (debtors "were successful businessmen versed in developing real estate" who were represented by an attorney, a **financial** advisor and a mortgage broker at the time they acquired their loans).

12 Presidential's arguments that Borrowers have not established reliance, damages or intent to deceive were not addressed by the Court below. Accordingly, this Court should not consider them here but should remand the case to the Lower Court for consideration of these issues at the trial level. *See, e.g., Flippo Constr. Co. v. Mike Parks Diving Corp.,* 531 A.2d 263, 271 (D.C. 1987) ("Because the trial court did not address this issue, a remand is also required for that reason.").

13 Citing *Grayson v. AT&T Corp.,* 15 A3d 219 (D.C. 2011) and *Osbourne v. Capital City Mortg. Corp.,* 727 A.2d 322, 325 (D.C. 1999), Countrywide suggests that "[t]here are multiple instances where this Court has turned explicitly to the common law and adopted its elements and rules in construing the CPPA." CW Br. at 37-38. Yet, in neither case did the Court import an element of a common law tort into the statute.

14 Countrywide accuses Borrowers of failing to address the "tendency to mislead" element of the CPPA. Yet, this issue was discussed by the Court below only in passing, while noting that "silence, absent a duty to disclose is not misleading." 3/28/11 Op. at 69, APX02358

(internal citation omitted); 72, APX2361. In so doing, the Lower Court confuses the concept of duty with the issue of whether or not something is misleading. The two are different things. In any event, the question of whether a material omission had a tendency to mislead is a question for the jury. *See, e.g. In re Newbridge Networks Sec. Litig.,* 926 F. Supp. 1163, 1170 (D.D.C. 1996) ("plaintiffs argue that the statements were so incomplete as to be misleading. That argument raises questions for the finder of fact that may not be resolved by a motion to dismiss.").

15 Countrywide points out that, like the CPPA, Rule 10b-5(b) makes it unlawful to omit to state a material fact where the failure to disclose would be misleading. The *Chiarella* Court specifically noted, however, that it was not addressing this prong of the federal securities regulations because the defendant in that case made no statements in connection with the sale of the stock at issue therein. 445 U.S. at 226 n.5. The Lower Court's reliance on this case when considering Borrowers' Subsection (f) claims was therefore in error.

16 Presidential's reliance on *Grayson* is inapposite. In *Grayson,* this Court addressed the constitutional standing requirement of the CPPA; it did not impose any "duty" requirement onto the Act. To the extent Presidential cites *Grayson* for the materiality standard imposed by the Act, the Loan Companies' failure to disclose either (1) the existence of FHA conditions or (2) their failure to comply with these conditions was material information that should have been disclosed.

17 Countrywide's contention that, by not citing these cases previously Borrowers waived any challenge to this aspect of the Lower Court's ruling, is disingenuous. Borrowers are not required to challenge every aspect of the Lower Court's reasoning or to distinguish every case cited below on appeal. Rather, they must only set forth a statement of the issues presented on appeal. In any event, both cases are factually distinguishable. In *Neastadt,* the Supreme Court determined that "there is no legal relationship between the FHA and the individual mortgagor" that would limit or suspend application of the "misrepresentation" exception to the Federal Tort Claims Act, which prevents recovery from the United States for alleged misrepresentations. In *Wells Fargo.,* the plaintiff was not seeking to recover for alleged misrepresentations but for breach of contract. The Wells Fargo court found that a paragraph in an FHA-approved form deed of trust referring to HUD regulations was not "a bargained-for term between the mortgagor and mortgagee" such that a violation of the regulations gave rise to a breach of contract claim under Maryland law.

18 Countrywide suggests that "the trial court's grant of summary judgment as to the inflated appraisal theory should also be affirmed on the additional grounds that there is no possible injury resulting from the inflated appraisals." CW Br. at 48 n.32. The FHA Amendatory Clause, which permits the borrower to abandon the transaction if the appraisal does not match the purchase price belies that argument. Also, as set forth at note 12, supra, this argument was not addressed by the Court below and should not be considered here.

19 Loan Companies' argument that the Association had no direct dealing with Loan Companies is irrelevant; the Association does not seek to recover on behalf of itself but on behalf of its members.

20 Loan Companies contend that, in seeking reversal of the Lower Court's ruling, the Borrowers rely solely on the law of the case doctrine. In so doing, Loan Companies not only mischaracterize Borrowers' argument but fail to address the argument made by the Borrowers on appeal. See Op. Br. at 49-50.

21 Citing D.C. Code. § 42-1902 and *Gage v. D.C. Bd. Of Zoning Adjustment,* 738 A.2d 1219, 222 (D.C. 1999), Countrywide contends that claims for injuries to common areas can only be brought by the Association on behalf of itself. As an initial matter, Countrywide waived this argument by not filing a cross-appeal. In any event, this argument is simply incorrect. The fact that an Owners Group may file a lawsuit on its own behalf does not mean that individual owners may not also do so. D.C. law is clear that individual unit owners own an undivided interest in the common areas. D.C. Code. § 42-1902.11. To deny them the ability to recover for damages to that interest would be to ignore this statute.

22 Presidential raises the additional argument that two of the Borrowers' claims are time-barred - an issue not raised by Borrowers on appeal. See Pres. Br. at 41-47. Presidential waived this argument by not filing a cross-appeal.

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