Amici Curiae AARP and National Association of Consumer Advocates ("NACA") jointly submit this brief.[1] AARP is a nonprofit, nonpartisan membership organization dedicated to addressing the needs and interests of people aged 50 and older. AARP has over 35 million members, with approximately 645,000 members in Minnesota. NACA is an association of more than 1000 attorneys and consumer advocates organized to help create and strengthen state and federal laws designed to protect consumers from unscrupulous business practices in connection with the extension of credit and the collection of debts. *Amici* are concerned that the decision below will lead to diminished enforcement of consumer laws leading to an increase in deceptive and unfair trade practices in the marketplace, which disproportionately affect older people.

STATEMENT OF FACTS

AARP and NACA adopt and incorporate the factual statement presented in Appellant Wiegand's Brief.

ARGUMENT

A MISREPRESENTATION OR DECEPTIVE ACT CAN CAUSE HARM TO CONSUMERS AS CONTEMPLATED BY THE PRIVATE ATTORNEY GENERAL STATUTE, DESPITE THE PRESENCE OF WRITTEN DISCLAIMERS.

The Court of Appeals erred when strictly construing the Minnesota Prevention of Consumer Fraud Act (MCFA), thereby limiting its scope of applicability. Specifically, the

[1] Pursuant to Minn. R. Civ. App. P. 129.03, AARP and NACA state that counsel for neither party authored this brief, in whole or in part, and that no person or entity, other than *Amici*, made a monetary contribution or promise of contribution to the preparation or submission of the brief.

court incorrectly held that consumers must prove reliance in order to meet their burden of proof under the MCFA and the Private Attorney General Statute, Minn. Stat. § 8.31, subd. 3a (Private AG Statute). Statutory causation of consumer injury does not mean "reliance," as that term was contemplated at common law. This Court has expressly rejected the equation of these terms so that the consumer fraud statutes serve a remedial purpose and are broadly applied to provide a remedy where there is a violation. Even in damages cases, this Court has determined, "[t]o impose a requirement of proof of individual reliance in the guise of causation would reinstate the strict common law reliance standard that we have concluded the legislature meant to lower for these statutory actions." Group Health Plan, Inc., et al. v. Philip Morris Inc., et al., 621 N.W.2d 2, 15 (Minn. 2001). Because the legislature deliberately excluded strict common law standards, including "reliance," from the MCFA and the Private AG Statute, the lower court erred in holding that reliance could not be established as a matter of law.

This Court has repeatedly recognized Minnesota's consumer protection statutes as broad, remedial laws that exist to equalize the imbalance of bargaining power between average consumers and sophisticated sellers. Ly v. Nystrom, 615 N.W.2d 302, 308 (Minn. 2000) (Minnesota legislature adopted MCFA for same purpose as other states had been enacting similar statutes since 1950's: "to prohibit deceptive practices and to address the unequal bargaining power often present in consumer transactions"); State v. Alpine Air Products, Inc., 500 N.W.2d 788, 790 (Minn. 1993) ("In passing consumer fraud statutes, the

legislature clearly intended to make it easier to sue for consumer fraud than it had been to sue for fraud at common law. The legislature's intent is evidenced by the *elimination* of elements of common law fraud, such as proof of damages or reliance on misrepresentations.") (emphasis in original). This Court has specifically held that the remedial aspects of the statutes, and therefore their broad application in consumer transactions, do no fall away when a private citizen sues for damages under the Private AG Statute. Group Health, 621 N.W.2d at 12-13 (in recognizing that Minnesota legislature expanded connection between conduct and injury necessary to permit suit, Court expressly held that elimination of reliance from fraud cause of action applies to both injunctive ***and damages*** cases). By all accounts, the transactions described in the fact statement provided by Appellant's opening brief depict exactly the type of unequal bargaining power and unfair trade practices the MCFA was designed to remedy.

All fifty states and the District of Columbia have enacted consumer protection statutes with broad applicability to most consumer transactions, designed to protect consumers from unfair, deceptive and abusive business practices in the marketplace. National Consumer Law Center, *Unfair and Deceptive Acts and Practices* § 1.1 (2001 5th ed. & Supp. 2003). Most states, including Minnesota, patterned their statutes after the language in Section 5(a)(1) of the Federal Trade Commission (FTC) Act, 15 U.S.C. § 45(a)(1) (2001), which provides in relevant part that "unfair or deceptive acts or practices in or affecting commerce, are hereby

declared unlawful." This Court has recognized Minnesota's adoption of both the spirit and letter of these broad provisions:

> By 1981, every state in the United States had statutes providing for consumer protection enforcement by a state agency – commonly, as in Minnesota, the state attorney general – with broad enforcement authority. Minnesota's Consumer Fraud Act was adopted in 1963 to achieve the same purpose[.]

Ly v. Nystrom, 615 N.W.2d at 308 (citation and footnote omitted). By incorporating the FTC Act's broad and expansive prohibition against unfair or deceptive practices affecting commerce, Minnesota and other states enacted laws with potent private and state remedies providing wide-spread redress for marketplace abuses.

Amici urge this Court to ensure that Minnesota continue to remain in step with other jurisdictions that have steadfastly upheld broad construction of their respective state consumer protection laws in order to effectuate the laws' remedial purposes by protecting consumers from the kind of unfair and deceptive conduct exhibited in this present case. For example, many other jurisdictions have rejected attempts to apply common law fraud standards of reliance to statutory consumer cases, including **Arizona** (Babbit v. Green Acres Trust, 618 P.2d 1086, 1094 (Ariz. Ct. App. 1980)), **California** (Committee on Children's Television, Inc. v. General Foods Corp., 673 P.2d 660, 668-69 (Cal. 1983)), **Connecticut** (Aurigemma v. Arco Petroleum Prod. Co., 734 F. Supp. 1025, 1028-29 (D. Conn. 1990)), **Delaware** (Stephenson v. Capano Development, Inc., 462 A.2d 1069, 1074 (Del. 1983)),

Idaho (Kidwell v. Master Distributors, Inc., 615 P.2d 116, 123-24 (Idaho 1980)), **Illinois** (Connick v. Suzuki Motor Co., 675 N.E.2d 584, 593 (Ill. 1996)), **Iowa** (Miller v. Hydro Mag, Ltd., 436 N.W.2d 617, 621 (Iowa 1989)), **Maryland** (Maryland v. Andrews, 533 A.2d 282, 285-56 (Md. App. 1987)), **Massachusetts** (Heller Fin. v. Insurance Co. of North America, 573 N.W.2d 8, 13 (Mass. 1991)), **Michigan** (Dix v. American Bankers Life Assurance Co., 415 N.W.2d 206, 209 (Mich. 1987)), **Missouri** (Webster v. Areaco Inv. Co., 756 S.W.2d 633, 635-36 (Mo. Ct. App. 1988)), **New Jersey** (Gennari v. Weichert Co. Realtors, 691 A.2d 350, 366 (N.J. 1997)), **New York** (Stutman v. Chemical Bank, 731 N.E.2d 608, 612 (N.Y. 2000)), **Tennessee** (Harvey v. Ford Motor Credit Co., 1999 WL 486894, *1-2 (Tenn. Ct. App. July 13, 1999)), **Texas** (Celtic Life Ins. Co. v. Coats, 885 S.W.2d 96, 99 (Tex. 1994)), and **West Virginia** (McGraw v. Imperial Mktg., 472 S.E.2d 792, 803-04 (W. Va. 1996)).

Indeed, this Court, applying New Jersey's consumer fraud laws, recently upheld a jury finding of causation of consumer injury in the absence of direct evidence of reliance. With New Jersey statutory language materially identical to Minnesota's consumer statutes and, most importantly, Minnesota's Private AG Statute, this Court held that the fact that the plaintiffs had "seen" misleading advertisements was sufficient to establish causation of consumer injury because the jury could infer that the misleading advertisements harmed class members. Peterson v. BASF Corp., ___ N.W.2d ___, 2004 WL 307317, *13 (Minn. 2004) (Appendix p. 1). This Court specifically reiterated New Jersey courts' view that New Jersey's private consumer statute "requires only a causal relationship, not reliance." Id. at

*12. Because the language of New Jersey's statute is materially identical to Minnesota's Private AG Statute, this Court should hold that proof of only a causal relationship, not reliance, is required in Minnesota.

The lower court's opinion in this case is inconsistent with the causal connection standard announced by this Court. If left intact, the lower court's holding will foster brazen misrepresentation and deceptive conduct in the market of consumer goods and services. Companies will be, in essence, licensed to present overtly misleading sales techniques to consumers about their rights and the terms of a transaction as long as contradicting information is buried in an adhesion contract. While the written disclosure may be relevant, it remains a jury question. See In re Lutheran Brotherhood Variable Ins. Prods. Co. Sales Practices Litig., 2003 WL 21737528, *4-5 (D. Minn. July 22, 2003) (Appendix p. 20) (holding that evidence of defendant's recognition that its conduct was resulting in more sales was sufficient to establish causal nexus between its behavior and consumers' injuries under Minnesota consumer statutes, and existence of ***disclaimers in written materials*** was not sufficient evidence of "unreasonable" reliance for purposes of summary judgment).

The lower court's summary view that plaintiff Wiegand's reliance upon Walser's admittedly deceptive statement was "unjustifiable," therefore, invades the province of the jury to determine whether certain conduct violates the MCFA. In doing so, the lower court wholly ignored the important role the consumer statutes play in preventing and deterring deceptive practices in the marketplace in Minnesota and improperly read into the statute a

common law, reasonable reliance standard, despite clear holdings from this Court that common law reliance is not an element of proof under the Private AG Statute.

Although the Court has made it clear that common law reliance is not the same thing as causation, Group Health, 621 N.W.2d at 14-15, much has been made of the idea that they are indistinguishable. However, causation may appear where direct reliance does not. One scholar, using a misleading advertisement as an example of a deceptive statement, succinctly observes that a deceptive practice can harm any consumer purchasing the subject product or service even in the absence of reliance:

> If the advertisements constituted a material inducement to convince an individual who saw them to purchase the product, the individual would be able to show reliance and could likely recover the entire sales price. In contrast, a second consumer who did not see the ads could not establish reliance, but might nonetheless establish "causation." If the consumer could show that the increased demand resulting from the advertisements increased the product's price, that individual could establish that the false advertisements increased the costs of the product and could recover damages equal to that increase. Thus, requiring reliance would bar the second plaintiff from recovering, while requiring only causation may permit both of the plaintiffs to recover.

Seth W. Goren, A Pothole on the Road to Recovery: Reliance and Private Class Actions under Pennsylvania's Unfair Trade Practices and Consumer Protection Law, 107 Dick. L. Rev. 1, 11-

12 (2002). In the present case, when faced with the prospect of losing financing for an automobile, Plaintiff Wiegand was coerced to purchase unrelated goods and services, and thereby was harmed by Walser's false statement that such purchases were required. Even if Mr. Wiegand read the disclaimer and fully understood it, the imbalance in bargaining power forced him to make the additional purchases. Plaintiff must be afforded the opportunity to prove that the contract provision did not override defendant's practice of deceptively forcing borrowers to purchase unwanted items in connection with providing necessary car financing, especially when the plaintiff, as in the instant case, alleges that the salesperson ***conditioned*** the availability of car financing upon such purchases. Thus, even if Mr. Wiegand understood that the contract he signed contradicted the salesperson's oral misrepresentations, the plaintiff was harmed by defendant's deceptive conduct. In addition, when a business is in the practice of making oral representations to its customers that materially contradict the contract it requires consumers to sign, it undoubtedly is engaging in conduct that violates the MCFA and Private AG Statute.

Furthermore, despite the lower court's finding that the existence of contrary contract language makes "reliance" somehow "unjustifiable," nowhere has the legislature stated or implied that a plaintiff must establish direct proof of "reliance," or that such reliance be "justifiable." In fact, such inquiry into whether there was "justifiable reliance" invades the jury's province to determine whether the statements or omissions involved in a consumer fraud case are misleading or deceptive. That is, the question of whether purported reliance

was justified or reasonable goes to the heart of whether the defendant's activities were deceptive in the first place.

But even under the lower court's strict "reasonableness" analysis, it is clear that, despite the existence of contrary contract language, Mr. Wiegand's reliance on Walser's oral conditions was wholly reasonable because, without fulfillment of Walser's oral conditions, Mr. Wiegand would be without a car. There is a huge gap, into which most consumers fall, between believing a seller has the ***authority*** to establish a purchasing condition and believing that a seller has the ***power*** to establish a purchasing condition. In this case, even if Mr. Wiegand understood the contract and believed Walser Automotive did not have the contractual authority to condition financing on an expensive service contract and credit insurance, he certainly may have believed that Walser Automotive had the power and was willing to withhold car financing from him. Such a belief would go unchecked by the contract's statements that Walser had no legal authority to do so.

As Appellant's brief deftly demonstrates, consumers often lack two things: intimate knowledge of the products and services being purchased and the legal education to understand whether the contract language they are reading actually applies to them or is susceptible to a legal loophole which, as many consumers expect, does not actually protect them. Although parties to a contract cannot go beyond the four corners of the document in showing the contract terms in a breach of contract claim, in a statutory fraud action, they can present evidence outside the written agreement to show fraud. See Sutton v. Viking

Oldsmobile Nissan, Inc., No. C2-99-1843, 2001 WL 856250 at *2-3 (Minn. Ct. App. 2001), rev. denied (Minn. Oct. 24, 2001) (Appendix p. 32) (despite failure to state breach of contract claim, plaintiff stated cause of action for consumer fraud based on language in contract that contradicted the actions of defendant auto dealer). Minnesota's consumer statutes have never sought to determine whether the parties got the benefit of a presumed arms' length bargain, which is the venerable object of contract law. Rather, state consumer protection statutes, such as Minnesota's, seek to outlaw overreaching and protect consumers from deceptive conduct that, absent deceptive conduct, would not likely lead to such sales.

CONCLUSION

Amici Curiae AARP and NACA respectfully and unequivocally join in Mr. Wiegand's request that this Court reverse the decision of the Court of Appeals and hold that Mr. Wiegand has stated a claim upon which relief can be granted.

Dated:_____ _____

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