

**APPELLATE COURT CASE NO.: A05-0497  
STATE OF MINNESOTA  
IN COURT OF APPEALS**

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PAULETTE B. LIABO,

Plaintiff - Appellant,

-VS-

WAYZATA NISSAN, LLC,

Defendant - Respondent.

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**RESPONSIVE BRIEF AND SEPARATE APPENDIX OF  
DEFENDANT - RESPONDENT WAYZATA NISSAN, LLC**

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## STATEMENT OF ISSUES

1. WHETHER APPELLANT PAULETTE B. LIABO (“LIABO”) WAS CONTRACTUALLY OBLIGATED TO PURCHASE THE 1998 NISSAN ALTIMA GXE FROM RESPONDENT WAYZATA NISSAN, LLC (“WAYZATA NISSAN”) WHEN THE PURCHASE AGREEMENT (“DELIVERY SHEET”) FOR THE VEHICLE INDICATED THAT LIABO WOULD PURCHASE THE VEHICLE FROM WAYZATA NISSAN FOR A TOTAL OF \$18,207.85 IF SHE QUALIFIED FOR THE SPECIAL 2.9% APR THAT WAS BEING ADVERTISED BY NISSAN MOTOR ACCEPTANCE CORPORATION (“NMAC”) AND NMAC SUBSEQUENTLY OFFERED TO EXTEND CREDIT TO LIABO AT THE 2.9% APR?

The trial court held that Liabo was contractually obligated to purchase the vehicle.

2. WHETHER THE CREDIT APPLICATION THAT WAYZATA NISSAN SUBMITTED TO NMAC REQUESTING THAT NMAC EXTEND THE SPECIAL 2.9% APR TO LIABO FOR THE PURCHASE OF THE 1998 ALTIMA GXE WAS BASED ON A VEHICLE PRICE THAT WAS GREATER THAN THE AMOUNT LIABO HAD AGREED TO PAY UNDER THE DELIVERY SHEET, SUCH THAT NMAC’S SUBSEQUENT OFFER TO EXTEND CREDIT TO LIABO AT THE 2.9% APR DID NOT SATISFY THE CONTINGENCY LIABO HAD PLACED ON HER PURCHASE?

The trial court held that there was no monetary difference between the amount Liabo had agreed to pay under the Delivery Sheet (\$18,207.85) and the amount recorded on the NMAC application (\$18,208) and, thus, Liabo was contractually obligated to purchase the vehicle.

3. WHETHER THE STATEMENT ON THE DELIVERY SHEET THAT IT WAS A “BINDING CONTRACT” WAS MISLEADING AND IN VIOLATION OF THE CONSUMER FRAUD ACT (“CFA”) AND DECEPTIVE TRADE PRACTICES ACT (“DTPA”) WHEN THE AGREEMENT ALSO IDENTIFIED, AT LIABO’S REQUEST, THE 2.9% APR CONTINGENCY AND BOTH PARTIES UNDERSTOOD THE AGREEMENT?

The trial court held that Liabo was not misled and, thus, contractually obligated to purchase the vehicle.

4. WHETHER WAYZATA NISSAN WAS ENTITLED TO RETAIN LIABO'S DEPOSIT WHEN THE DELIVERY SHEET ON THE 1998 ALTIMA GXE STATED THAT LIABO WOULD "LOSE ANY DEPOSIT IF [SHE DID] NOT PERFORM ACCORDING TO TERMS" AND ADVISED WAYZATA NISSAN THAT SHE WOULD NOT PURCHASE THE VEHICLE?

The trial court held that Wayzata Nissan was, as a matter of contract law, entitled to retain the deposit.

5. WHETHER WAYZATA NISSAN VIOLATED THE CFA AND DTPA BY "REPRESENTING THAT IT WAS ENTITLED TO RETAIN [LIABO'S] DEPOSIT" AFTER LIABO HAD ADVISED WAYZATA NISSAN THAT SHE WOULD NOT PURCHASE THE VEHICLE?

The trial court held that Wayzata Nissan was, as a matter of contract law, entitled to retain the deposit and, thus, implicitly rejected Liabo's argument.

6. WHETHER A CREDIT TRANSACTION WAS CONSUMMATED WITHIN THE MEANING OF THE FEDERAL TRUTH IN LENDING ACT ("TILA") AND/OR MINNESOTA MOTOR VEHICLE RETAIL INSTALLMENT SALES ACT ("MMVRISA") WHEN: (A) WAYZATA NISSAN DID NOT OFFER TO LEND FUNDS TO LIABO AND LIABO DID NOT AGREE TO BORROW FUNDS FROM WAYZATA NISSAN; (B) THE DELIVERY SHEET ON THE 1998 ALTIMA GXE DID NOT RECOUNT ANY SPECIFIC CREDIT ARRANGEMENT AND DID NOT OBLIGATE LIABO TO ACCEPT ANY CREDIT THAT WAYZATA NISSAN MAY ARRANGE THROUGH A THIRD-PARTY LENDER; AND (C) AFTER NMAC OFFERED TO EXTEND CREDIT TO LIABO AT THE 2.9% APR BUT BEFORE LIABO HAD REVIEWED A RETAIL INSTALLMENT CONTRACT IDENTIFYING THE SPECIFIC CREDIT ARRANGEMENT AND CONTAINING THE TIL DISCLOSURES, LIABO DECIDED THAT SHE DID NOT WANT TO PURCHASE THE 1998 ALTIMA GXE?

The trial court held that consummation had not occurred and dismissed Liabo's TILA and MMVRISA claims.

## STATEMENT OF FACTS

Wayzata Nissan is an automobile dealership located in Wayzata, Minnesota, and is engaged in the business of selling and leasing new and used automobiles. (Wayzata Nissan Appendix at 28, hereinafter “WN App. at \_\_\_\_”.)

At the time of Liabo’s May 1998 transaction, Wayzata Nissan sold or leased approximately 900 vehicles each year. (WN App. at 28.) In approximately 565 of the annual transactions, the customer purchased the vehicle as opposed to leasing it. (*Id.* at 28-9.) In approximately 455 of the 565 annual purchase transactions (approximately 80%), the customer paid cash by arranging his or her own financing with a lending institution. (*Id.* at 29.) In approximately 110 of the annual purchase transactions (approximately 20%), the dealership arranged financing for the purchase of the vehicle with a lending institution pursuant to a retail installment contract. (*Id.*)

At the time of Liabo’s transaction, Wayzata Nissan arranged financing through sales finance companies such as Nissan Motor Acceptance Corporation (“NMAC”), Community Credit and Arcadia Financial, and banks such as Chase Manhattan, Bank One Milwaukee, Wells Fargo/Norwest and Bank America. (WN App. at 29.) The lenders provide the dealership with retail installment contracts for the dealership’s use when arranging credit. (*Id.*) There is no uniform retail installment contract in Minnesota. However, the retail installment contract forms are uniform to the extent that they each contain, among other things, a segregated “Truth-In-Lending” disclosure box which identifies the Annual Percentage Rate,

Finance Charge, Amount Financed, Total of Payments and Total Sales Price, as well as an itemization of the amount financed. (*Id.*)

Wayzata Nissan does not extend credit to customers – it is not licensed as a sales finance company and, thus, does not hold retail installment contracts such that customers make monthly payments to the dealership. (*Id.* at 28-9, 31.) Rather, if a lender has approved financing and the customer has accepted credit terms by executing a retail installment contract, the installment contract is assigned to the lending institution. (*Id.* at 31.) The customer then receives a coupon booklet and/or monthly statement from the lending institution and makes the monthly payments owed under the contract to the lending institution. (*Id.*)<sup>1</sup>

On Saturday, May 30, 1998, Liabo visited Wayzata Nissan in response to a television advertisement indicating the availability of 2.9% annual percentage rate (“APR”) financing on new Altimas. (WN App. at 62, 112, 115.) The special APR program was offered by NMAC and was only available to customers who qualified under NMAC’s Tier 1 or Tier 2 (“preferred” and “standard”) guidelines. (*Id.* at 32.)

Liabo was interested in trading in her 1987 Nissan Sentra to purchase a new Altima. The Sentra had 100,000 miles on it and Liabo wanted to avoid repair costs by purchasing a new

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<sup>1</sup>Thus, while Wayzata Nissan prepares the retail installment contract for the customer’s review and execution, it is the lending institution who, in fact, “lends” the money to the customer to purchase the vehicle. The dealership serves as a credit arranger. *See, e.g., Riviere v. Banner Chevrolet, Inc.*, 184 F.3d 457 (5<sup>th</sup> Cir. 1999); *Kinzel v. Southview Chevrolet Co.*, 892 F.Supp. 1211 (D. Minn. 1994). A dealership which arranges financing through a third-party lending institution is, however, required to provide the TIL disclosures. *Id.*

vehicle. (WN App. at 110-11.) Liabo had been employed at Norwest Bank since the mid-1980's. (*Id.* at 106.) She understood that she could seek financing through her own bank to purchase a vehicle at Wayzata Nissan. (*Id.* at 107-08.) She recalls, however, that the best APR that may have been available to her through Norwest Bank would have been approximately 8 to 9%. (*Id.* at 109.)

Liabo initially met with salesperson Jamie McGregor and, after test-driving a few Altimas, expressed an interest in trading in her 1987 Sentra to purchase a silver 1998 Nissan Altima GXE. (WN App. at 62.) The selling price of the 1998 Altima GXE was \$19,158. (*Id.* at 33.) Daniel Sinner, the dealership's Sales Manager, became involved in the negotiations. (*Id.*) Liabo indicated that she would purchase the 1998 Altima GXE at a trade difference of \$17,990 (which required the dealership to give her a \$1,168 trade-in allowance on the Sentra), plus tax and fees, provided that she qualified for the 2.9% APR. (*Id.*)<sup>2</sup> After Liabo completed a credit application, Mr. Sinner reviewed Liabo's credit report. (WN App. at 33-34.) Liabo's credit report indicated, among other things: "Serious delinquency, derogatory public record, or collection filed; number of accounts with delinquency." (*Id.* at 33, 45-46.) Liabo's credit report indicated that she had a credit card account with Chase Manhattan Bank and had made seven payments that were over 30 days late, one payment that was 60 days late and two payments that were over 90 days late. (*Id.* at 33.) The credit report further indicated that in

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<sup>2</sup>Prior to visiting Wayzata Nissan, Liabo had researched the value of her 1987 Nissan Sentra and determined that it had a trade-in value of approximately \$1,000. (WN App. at 114.)

1994, Liabo had been five months late in paying on three student loans. (*Id.*) The credit report indicated that Liabo had refinanced those student loans in late 1994 with Sallie Mae and that at one point in 1997, she was four months behind on each of the loans. (*Id.*)

Based on the credit report, Mr. Sinner advised Liabo that she would not fit within NMAC's guidelines for the special 2.9% financing rate. (WN App. at 33-34.) As noted, the 2.9% rate was only available to Tier 1 or Tier 2 customers under NMAC's guidelines. (*Id.* at 32-34.) Mr. Sinner thought Liabo would probably qualify as a Tier 4 customer with NMAC. (*Id.* at 34.)<sup>3</sup> Liabo indicated that she had resolved the student loan issues. (*Id.*) Mr. Sinner gave Liabo the telephone number to Sallie Mae and advised her on what she would need to do to get her credit report cleaned up. (*Id.*)<sup>4</sup> Mr. Sinner also advised Liabo that even without the student loan issues, she would probably not qualify for the 2.9% rate with NMAC. (*Id.*) Mr. Sinner discussed other possible options with Liabo, including submitting her credit application to another bank, such as Chase Manhattan, where Liabo already had an account. (*Id.*) Mr. Sinner advised Liabo that while the interest rate through a bank would be at a retail rate (and,

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<sup>3</sup>Tier 4 is for customers with a very poor credit history and generally required an APR of at least 16% under NMAC's guidelines. (WN App. at 34.)

<sup>4</sup>Liabo proceeded to make several calls to the United States Department of Education requesting that it advise the credit bureau reporting agencies to delete the adverse student loan references on her credit report. (WN App. at 131.) Liabo requested that the Department of Education "fax a copy to all credit bureaus and I want a copy faxed to myself". (*Id.*) Ultimately, on Wednesday, June 3, 1998, Liabo received, via facsimile, a copy of the June 3<sup>rd</sup> notice that the Department of Education had sent to the credit bureau reporting agencies (i.e., Equifax, Experian and TransUnion) demanding that they "immediately delete" the adverse references to her student loans because they had been rehabilitated. (WN App. at 52.)

thus, higher than 2.9%), she would receive a \$500 cash rebate in lieu of the special 2.9% APR. (*Id.*) In that event, Liabo could apply the \$500 cash rebate to reduce the trade-difference from \$17,990 to \$17,490, such that Liabo would need \$500 less to purchase the vehicle. (*Id.*)<sup>5</sup>

Liabo indicated that she wanted the dealership to submit her application to NMAC for the 2.9% rate and use Chase Manhattan as a back up in the event she did not qualify for the 2.9% rate. (WN App. at 34.) Mr. Sinner advised her that the dealership would do so, but the dealership was not the bank and, therefore, could not make any promises that she would qualify for that rate. (*Id.*) Liabo understood that the 2.9% APR was not guaranteed – that the lending institution would have to approve her for that rate. (WN App. at 110, 120.)

Liabo agreed to purchase the 1998 Altima GXE at a trade difference of \$17,990 (selling price of \$19,158 less \$1,168 trade-in allowance) with \$1,200 down, provided that she qualified for the NMAC special 2.9% advertised APR. (WN App. at 32-33.) The dealership completed a Delivery Sheet setting forth the purchase terms and Liabo gave the dealership a cash deposit in the amount of \$1,200. (*Id.* at 33.) Initially, Liabo was reluctant to sign the Delivery Sheet because it did not indicate that her agreement to purchase the Altima GXE was conditioned upon her qualifying for the special 2.9% APR. (WN App. at 117-19, 128.) The Delivery Sheet stated: ***“I understand that this is a binding contract and I will lose any deposit if I do not***

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<sup>5</sup>Mr. Sinner also discussed the option of leasing the 1998 Altima GXE with Liabo. (WN App. at 34.) Mr. Sinner advised Liabo that under a 42 month lease, her monthly payments would probably be around \$254.00, plus tax. (*Id.*) Liabo indicated that she wanted to purchase the Altima, rather than enter into a lease. (*Id.*)

*perform according to terms.*” (*Id.* at 39.) (Emphasis supplied.)<sup>6</sup> Before signing the Delivery Sheet, Liabo wanted language added to it indicating that her agreement to purchase was contingent upon qualifying for the 2.9% APR. (WN App. at 117-19, 122-23.) Accordingly, the dealership added language, stating: “Special 2.9% O.A.C.” (*Id.* at 33, 39.) After this language was added, Liabo executed the Delivery Sheet. (*Id.* at 122-23.)

Both parties understood that if Liabo did not qualify for the 2.9% APR through NMAC, Liabo would not be obligated to purchase the Altima GXE and the dealership would refund her \$1,200 deposit. (*Id.* at 33, 123.) Both parties also understood that if Liabo was approved for the 2.9% financing, Liabo would be obligated to purchase the Altima GXE (or forfeit the deposit). Liabo would not be able to back out of the agreement to purchase the Altima GXE “[b]ecause they agreed to my terms and I agreed to theirs, at least that was my understanding of the situation”. (*Id.* at 127.) Both parties also understood that Liabo would still need to review and execute a retail installment contract setting forth the terms of a loan. (WN App. at 33, 121, 124-25, 127.) Liabo understood that if she qualified for the 2.9% APR financing, “I would then receive loan papers that I would have to review and sign”. (*Id.* at 124.) “That’s normally how it works when you apply for a loan.” (*Id.* at 125.)<sup>7</sup> The retail installment

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<sup>6</sup>The Delivery Sheet was used in all automobile sale transactions, regardless of whether the customer paid cash, arranged his/her own financing or had the dealership arrange financing with a lender. (WN App. at 29-30.) In the majority of purchase transactions (slightly over 80%), Wayzata Nissan’s customers either paid cash or arranged financing through their own bank to pay for the vehicle described in the Delivery Sheet. (*Id.* at 30.)

<sup>7</sup>According to Liabo, she was “looking to stay as close to around \$350 [per month] as possible”— the amount “I could comfortably afford based on my income . . .”. (WN App. at

contract would identify, among other things, the annual percentage rate, the finance charge, the amount financed, the total of payments, the total sales price, the length of the loan, the amount of the monthly payment, the payment schedule, and an itemization of the amount financed. (*Id.* at 49.)

Wayzata Nissan advised Liabo that it would submit her credit application and would contact her the following week to let her know if she had been approved for the special 2.9% APR financing. (WN App. at 125-26.) Liabo left the dealership that day without meeting with the dealership's Business Manager, Jill White Bryant, in the finance department. (WN App. at 128a.) Later that afternoon, Ms. White Bryant completed the "DEALER" section of the NMAC credit application, indicating that Liabo needed a total of \$18,208 to purchase the 1998 Altima GXE. (*Id.* at 56.) The application was subsequently submitted to NMAC and Chase Manhattan Bank. (*Id.*)<sup>8</sup> At approximately 4:15 p.m. on Saturday, May 30<sup>th</sup>, NMAC sent a notice to Wayzata Nissan indicating (as Mr. Sinner had assumed would be the case) that it would only extend credit to Liabo at a Tier 4 level. (WN App. at 35, 51.) The following week, Ms. White Bryant spoke with Liabo and advised her that NMAC had not approved the 2.9% rate. (*Id.* at 57, 129-30.) Ms. White Bryant and Liabo discussed the derogatory comments on Liabo's credit bureau report regarding her student loans. (*Id.* at 57.) Liabo informed Ms. White Bryant that the information was incorrect and that she had resolved the problem. (*Id.*)

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116.) If the 2.9% APR financing arranged through NMAC would have resulted in a monthly loan payment above \$350, she would have "pursue[d] other options". (*Id.* at 117.)

<sup>8</sup>Chase Manhattan declined to extend any credit to Liabo.

Ms. White Bryant suggested that Liabo bring in documentation that the problem had been corrected so that the dealership could resubmit her application to NMAC for further consideration. (*Id.*)<sup>9</sup>

On Wednesday, June 3, 1998, at approximately 6:00 p.m., Liabo received a notice from the United States Department of Education which directed the credit bureau companies (Equifax, Experian and TransUnion National) to “immediately delete” from their records the derogatory information regarding Liabo’s student loans on the grounds that the loans had been “rehabilitated”. (WN App. at 52.) Liabo returned to Wayzata Nissan that evening and met with Ms. White Bryant. (WN App. at 57, 132-34.) After Liabo provided a copy of the notice from the Department of Education, Ms. White Bryant prepared and sent a “2<sup>nd</sup> Request” to NMAC asking NMAC to reconsider extending the 2.9% APR on the Altima GXE because “Paullette [sic] never defaulted on any of [the three student loans]”. (*Id.* at 57, 59.) Ms. White Bryant sent NMAC a copy of the Department of Education notice and advised NMAC that the notice “instructs the credit bureau’s [sic] to delete these accounts”. (*Id.*) Ms. White Bryant asked the NMAC Regional Manager to contact Mr. Sinner or another management employee because she would not be in the office the following day, Thursday, June 4, 1998. (*Id.*)<sup>10</sup>

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<sup>9</sup>Ms. White Bryant also advised Liabo that she could lease, or consider less expensive vehicles as an option in the event Liabo did not qualify for the 2.9% rate on the 1998 Altima GXE. (*Id.*)

<sup>10</sup>While at the dealership, Liabo looked at used Nissan Maxima vehicles as a potential option, as the dealership’s Business Manager had suggested. (WN App. at 57, 136-37, 54-55.) Liabo recalls some discussion of a 10.99% interest rate on a Maxima, which she thought was extremely high. (*Id.* at 140.)

Mr. Sinner made several calls to NMAC in an effort to persuade NMAC to extend the 2.9% APR so that Liabo could purchase the 1998 Altima GXE. (WN App. at 36.) Between Wednesday, June 3, 1998, and Monday, June 8, 1998 (when NMAC finally agreed to extend the 2.9% APR on the Altima GXE), Mr. Sinner spoke with Liabo regarding the progress on her financing with NMAC. (*Id.*) Mr. Sinner advised Liabo that the dealership was still trying to get her the 2.9% rate and that he had calls into NMAC, and would let her know when a final decision was made. (*Id.*)

After initially being turned down by the NMAC Buyer's Supervisor, Mr. Sinner contacted NMAC's Regional Manager in an attempt to persuade him to extend the special financing rate. (WN App. at 36.) On the morning of Monday, June 8, 1998, after several telephone calls, NMAC's Regional Manager approved Liabo for the 2.9% APR financing on the 1998 Altima GXE and sent the dealership a Tier 2 approval notice. (*Id.* at 36, 53.) The Regional Manager informed Mr. Sinner that its approval was limited to the amount requested. (*Id.* at 36.)

The same day, the dealership contacted Liabo and advised her that NMAC had approved the 2.9% rate and that she should stop by the dealership to complete the paperwork and take delivery of the vehicle. (WN App. at 36.) Liabo returned to the dealership on June 8<sup>th</sup>. At that time, however, Liabo sought to purchase a more expensive Altima vehicle (a GLE model) at

the 2.9% APR.<sup>11</sup> She initially spoke with Mr. McGregor, the salesperson, and asked if he could show her a 1998 Altima GLE, which listed for approximately \$3,000 more than the 1998 Altima GXE. (WN App. at 138-39, 36.) The GLE had, among other things, leather seats, a power driver's seat, remote keyless entry, a sunroof, ABS brakes and alloy wheels. (*Id.* at 36.) The 1998 Altima GLE retailed for approximately \$22,225, as opposed to the 1998 Altima GXE, which retailed for \$19,158. (*Id.*) Mr. McGregor advised Mr. Sinner, the Sales Manager, that Liabo no longer wanted to purchase the GXE, but wanted to purchase the more expensive GLE instead. (*Id.*) Mr. Sinner spoke with Liabo and advised her that the approval for the 2.9% rate was based on the amount she had agreed to pay for the 1998 Altima GXE; it was not a blanket approval for any vehicle. (*Id.* at 37.) Mr. Sinner advised Liabo that NMAC was not going to extend additional monies to her to purchase a more expensive vehicle and explained to her that he had to pull strings just to get her qualified for that rate on the GXE. (*Id.*) Nevertheless, Mr. Sinner called NMAC again and inquired as to whether they would be willing to extend additional credit to Liabo under the 2.9% program. (*Id.*) Mr. Sinner was told that

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<sup>11</sup>It was not until after Liabo had been advised that Wayzata Nissan had arranged the 2.9% APR financing on the GXE that she expressed her desire to cancel the purchase of the GXE and purchase a more expensive GLE. (WN App. at 64.) (“[O]n or about June 8, 1998, Defendant informed Plaintiff that she was now approved for credit under the 2.9% interest financing program” and “[b]ased upon this new information about her approval for credit Plaintiff sought to purchase a different 1998 Nissan Altima”). At no time prior to being advised of NMAC’s approval of the 2.9% APR on the Altima GXE did Liabo express any intention of cancelling the agreement to purchase the 1998 Altima GXE, much less cancelling the same in order to finance the purchase of a more expensive vehicle. (*Id.* at 37.) Indeed, Liabo testified that she would not have been interested in purchasing a more expensive vehicle if she did not qualify for the 2.9% APR. (*Id.* at 135.)

the 2.9% approval was based on the 1998 Altima GXE and NMAC would not extend additional monies. (*Id.*) Mr. Sinner advised Liabo of his conversation with NMAC. (*Id.*) At that point, Liabo “attempted to renegotiate the purchase”. (*Id.*) Liabo advised Mr. Sinner that another local dealership, Feldmann’s Nissan, was selling 1998 Altima GXE’s for less than Wayzata Nissan. (*Id.*) Mr. Sinner declined to renegotiate the parties’ agreement and Liabo indicated that she would have to think about whether she wanted to purchase the Altima GXE. (*Id.*) Mr. Sinner advised Liabo that while she did not have to purchase the vehicle, she could lose her \$1,200 deposit if she chose not to do so. (*Id.*)

Liabo left the dealership. She did not return to the dealership to purchase the Altima GXE and, thus, did not accept the credit NMAC was willing to offer.

Had Liabo accepted the 2.9% financing that Wayzata Nissan had arranged through NMAC, Wayzata Nissan would have prepared a retail installment contract for Liabo’s review. (WN App. at 49.) The retail installment contract would have identified the credit terms<sup>12</sup> and contained the disclosures required by the TILA and MMVRISA. (*Id.*) The retail installment contract would have been assigned to NMAC and Liabo would have paid the monthly

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<sup>12</sup>Had Liabo executed the retail installment contract she would have borrowed a total of \$18,207.85 (trade difference of \$17,990 plus sales tax of \$1,169.35, license fees of \$207.00, registration fees of \$7.00, certificate of title fees of \$9.50, a documentary fee of \$25.00, less the \$1,200 downpayment). (WN App. at 49.) At a 2.9% APR, over a 60 month loan, the finance charge would be \$ 1,373.75, the total of payments would be \$19,581.60, the total sales price would be \$21,949.60 and Liabo’s monthly payments would have been \$326.36 with the first monthly payment due on June 29, 1998. (*Id.*)

payments directly to NMAC.<sup>13</sup>

### **PROCEDURAL POSTURE**

In her Amended Complaint, Liabo alleged individual and class action claims under the Minnesota Motor Vehicle Retail Installment Sales Act (“MMVRISA”), Minn. Stat. §168.66, *et seq.* (Count I), Minnesota’s Deceptive Trade Practices Act (“DTPA”), Minn. Stat. §325D.44, and Minnesota’s Consumer Fraud Act (“CFA”), Minn. Stat. §325F.68, *et seq.* (Count II), and the federal Truth-in-Lending Act (“TILA”), 15 U.S.C. §1601, *et seq.* (Count III). (WN App. at 60-71.)

In the Spring of 2000, Liabo brought a motion for summary judgment on the TILA and MMVRISA claims. Although Liabo was not bound to accept credit at the 2.9% APR if it was, in fact, offered by NMAC (and Liabo did not, in fact, accept the 2.9% APR financing when it was offered), Liabo claimed that the Delivery Sheet constituted a binding credit agreement and that Wayzata Nissan violated the TILA and MMVRISA by not providing her with the written disclosures required by those statutes prior to consummation of the alleged credit transaction. Wayzata Nissan brought a cross-motion for summary judgment, contending that it had no liability under the TILA or the MMVRISA and that Liabo was not, in any event,

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<sup>13</sup>In her Initial Brief, Liabo suggests that Wayzata Nissan was attempting to find a financial institution “willing to . . . accept an assignment of the [Delivery Sheet] . . .”. (*See* Liabo’s Initial Brief at pp. 10, 14.) There is no evidence to support this assertion. Had Liabo proceeded with the purchase and accepted the 2.9% APR financing by executing the NMAC retail installment contract, that installment contract – not the Delivery Sheet -- would have been assigned to NMAC.

entitled to statutory damages and had no actual damages to support a cause of action

By Order dated May 22, 2000, the trial court granted Wayzata Nissan's motion and denied Liabo's motion. The trial court first found that the Delivery Sheet constituted a binding agreement to purchase because the 2.9% APR financing contingency had been satisfied. (WN App. at 10-11.) The Delivery Sheet stated that Liabo would "lose any deposit if [she did] not perform according to terms". (*Id.* at 39.) Accordingly, the trial court held that while Liabo was free to back out of the agreement, she did so at the risk of losing the deposit. (*Id.* at 14.) The trial court further held that the Delivery Sheet did not constitute a binding credit agreement because nothing in the Delivery sheet compelled Liabo to accept the 2.9% APR financing if it was offered.

The trial court stated:

[Liabo argues that in] making a non-refundable deposit that she became obligated to accept the special 2.9% APR financing offered by Wayzata Nissan. This Court disagrees. While the threatened loss of her \$1,200 down-payment may have been a highly compelling reason to accept the special 2.9% APR, it in no way obligated Liabo to accept the special 2.9% APR. \* \* \* The fact that the agreement between Liabo and Wayzata Nissan recorded in the Delivery Sheet was conditional upon Liabo obtaining a certain financing rate does not by itself obligate Liabo to accept that rate. \* \* \* Up until the time Liabo executed [a retail installment contract] she would have been free to decline the credit offered . . . The Court finds that the Delivery Sheet was not a binding credit agreement.

(WN App. at 12-14.)<sup>14</sup>

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<sup>14</sup>Liabo also brought a motion for class certification pursuant to Minn.R.Civ.P. 23.02(b) and 23.02(c) contending that Wayzata Nissan's alleged violations of the TILA, MMVRISA, CFA and DTPA presented common issues of fact and law, that her claims were typical of those she sought to represent, and that a class action was a superior method of

In light of its holding, the trial court did not rule on Wayzata Nissan's position that Liabo was not entitled to statutory damages and had no actual damages to support a cause of action.<sup>15</sup>

The case was dormant for several years. Over 4½ years later, in the fall of 2004, Liabo filed a motion for summary judgment on her alleged claims under the Consumer Fraud Act ("CFA"), Minn. Stat. §325F.69, subd. 1, and the Deceptive Trade Practices Act ("DTPA"), Minn. Stat. §325D.44, subd. 13. Wayzata Nissan filed a cross-motion for summary judgment. In her motion, Liabo contended that the Delivery Sheet did not constitute a binding agreement. Liabo claimed that she was not contractually obligated to purchase the Altima GXE because NMAC had declined (initially) to extend the 2.9% APR financing to her on the Altima GXE. Alternatively, she contended that the credit application Wayzata Nissan submitted to NMAC was based on a vehicle price that was greater than the amount she had agreed to pay under the Delivery Sheet and, as a result, NMAC's subsequent credit offer did not actually satisfy the

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adjudication. By Order dated May 22, 2000, the trial court denied Liabo's motion for class certification. (WN App. at 1.) Liabo did not appeal the trial court's certification ruling.

<sup>15</sup>*See, e.g., Peter v. Village Imports Co.*, 2001 WL 1640130 at \*3 (D. Minn. Oct. 9, 2001) (WN App. at 85) (failure to "provide timely disclosures is a purported violation of 15 U.S.C. 1638(b) for which only actual damages are available"). In order to recover actual damages under the TILA, a plaintiff must "show that damages were sustained as a result of the failure to properly disclose, i.e., that he or she would have gotten credit on more favorable terms but for the violation . . ." *McCoy v. Salem Mortgage Co.*, 74 F.R.D. 8, 12 (E.D. Mich. 1976). *See also Peters v. Jim Lupient Oldsmobile Co.*, 220 F.3d 915 (8<sup>th</sup> Cir. 2000) (plaintiff must prove that had proper disclosure been given he would have been able to obtain a lower price). Here, Liabo could not establish any actual damages proximately related to the fact that she did not receive written TIL disclosures, even if a credit transaction had been "consummated".

contingency she had placed on her purchase.

By Order dated January 12, 2005, the trial court granted Wayzata Nissan's motion and denied Liabo's motion. (WN App. at 16.) The trial court stated in relevant part:

Liabo argues that the terms of the Delivery Sheet differed significantly from the terms of the credit approval and therefore were not a fulfillment of the condition precedent. This Court finds Liabo's arguments unpersuasive. In its brief, Defendant specifically outlines the prices associated with the purchase of the Altima, and explains in detail why so many different prices appear on the various purchasing forms. The purchase price of the vehicle was \$19,158.00. There was also a trade-in deduction [of] \$1,168.00, and a cash deposit of \$1,200.00. The final calculation also needs to take into consideration sales tax at \$1,169.35 and the required fee of \$248.50 for a final total of \$18,207.85, which Liabo would have to come up with to purchase the vehicle. \* \* \*

[D]ue to the fact that NMAC agreed to extend 2.9% APR financing to Plaintiff for the amount that Plaintiff agreed to pay for the vehicle under the delivery sheet (\$18,208), the condition precedent to the agreement became fulfilled and the terms of the Delivery Sheet became binding on Liabo. In short, Plaintiff agreed to purchase the 1998 Altima GXE if she qualified for the special 2.9% APR financing. Plaintiff, after much effort on the part of Wayzata Nissan, was approved for that financing, but elected not to purchase the vehicle.

(WN App. at 22-23.)

Liabo then filed this appeal.

#### **STANDARD OF REVIEW**

Summary judgment is appropriate when there are no genuine issues of material fact and either party is entitled to judgment as a matter of law. Minn.R.Civ.P. 56.03; *Scott v. Forest Lake Chrysler-Plymouth-Dodge*, 611 N.W.2d 346, 350 (Minn. 2000); *Betlach v. Wayzata Condominium*, 281 N.W.2d 328, 330 (Minn. 1979). A "genuine issue" will only exist where the evidence before a court is of such a nature that a reasonable jury could return a verdict in

favor of the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-52 (1986).

Evidence which is “implausible” is not sufficient to defeat a motion for summary judgment.

*Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

## LEGAL ANALYSIS

### **A. The Trial Court Properly Dismissed Liabo’s TILA Claim.**

The TILA requires that “creditors” (which can include entities which arrange credit, such as automobile dealerships), 15 U.S.C. 1602(f), provide written disclosures to consumers in credit transactions, including, the “amount financed”, “finance charge”, “annual percentage rate”, “total of payments”, “total sale price”, and number of payments. *See* 15 U.S.C. §1638(a). The TILA requires that the written disclosures be provided to the consumer “before the credit is extended”. 15 U.S.C. §1638(b)(i). The Federal Reserve Board regulations which implement the TILA, 12 C.F.R. §226.01, *et seq.* (hereinafter “Regulation Z”), expand on this requirement by mandating that the TIL disclosures be made “before consummation”. 12 C.F.R. §226.17(b). “Consummation” is, in turn, defined under Regulation Z as “the time that a consumer becomes contractually obligated on a credit transaction”. 12 C.F.R. §226.2(a)(13).

The Official Staff Commentary to Regulation Z provides:

1. State law governs. When a contractual obligation on the consumer’s part is created is a matter to be determined under applicable law; Regulation Z does not make this determination. A contractual commitment agreement, for example, that under applicable law binds the consumer to the credit terms would be consummation. Consummation, however, does not occur merely because the consumer has made some financial investment in the transaction (for example, by paying a nonrefundable fee) unless, of course, applicable law holds otherwise.

2. Credit v. sale. Consummation does not occur when the consumer becomes contractually committed to a sale transaction, unless the consumer also becomes legally obligated to accept a particular credit arrangement. For example, when a consumer pays a nonrefundable deposit to purchase an automobile, a purchase contract may be created, but consummation for purposes of the regulation does not occur unless the consumer also contracts for financing at that time.

See 12 C.F.R. Pt. 226, Supp. 1 (Official Staff Interpretations), Commentary 2(a)(13).

The trial court properly framed the issues in this case. The first issue is whether the terms of the Delivery Sheet contractually obligated Liabo to purchase the Altima GXE (or not purchase it, but forfeit the deposit). If the trial court erred in determining that it did, as Liabo contends, then no agreement whatsoever would have existed under Minnesota law binding Liabo to anything, much less an agreement obligating her to purchase the vehicle under a particular credit arrangement. In that event, Liabo would, as a matter of general contract law, be entitled to a refund of the deposit and her TILA claim (indeed, all of her claims) would necessarily fail. If, on the other hand, the Delivery Sheet constituted a binding agreement to purchase, as the trial court held, the issue would become whether the terms of the Delivery Sheet *also* obligated Liabo to a specific credit arrangement. These two issues are distinct because under the TILA: “[c]onsummation does not occur when the consumer becomes contractually committed to a sale transaction, *unless the consumer also becomes legally obligated to accept a particular credit arrangement*”. See 12 C.F.R. Pt. 226, Supp. 1 (Official Staff Interpretations), Commentary 2(a)(13) (emphasis supplied). See also American Bank of Connecticut v. Mango, 1998 WL 928434 at \*2 (Conn. Super. 1998) (WN App. at 73)

("[b]ecause the disclosure requirements of the TILA do not come into play until the parties are bound on the *credit terms* for the purchase transaction, it is not inconsistent . . . for him to be bound on the Use and Occupancy Agreement but for the disclosure obligation not to have matured") (emphasis in original).<sup>16</sup>

**1. The trial court properly determined that Liabo was contractually obligated to purchase the 1998 Altima GXE.**

Obviously, on Saturday, May 30, 1998, the date that Liabo executed the Delivery Sheet, Liabo was not obligated to purchase the Altima GXE. Her agreement to purchase the vehicle was subject to the condition that she qualify for the special 2.9% APR.<sup>17</sup> Both parties understood that if that condition was not satisfied, Liabo would not be obligated to purchase

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<sup>16</sup>Throughout her Initial Brief, Liabo fails to appreciate the significant distinction between a binding purchase agreement and a binding credit agreement. For example, she asserts that if "the Delivery Sheet . . . was . . . a binding contract . . . then Wayzata [was obligated] to make those disclosures required by . . . TILA and . . . MVRISA". (*See* Liabo's Initial Brief at p. 13.) However, TIL disclosures are not required unless the consumer has become legally obligated to a particular credit arrangement to pay for the item that has been purchased.

<sup>17</sup>Under Minnesota law, a "condition precedent" is "any fact or event, subsequent to the making of a contract, which must exist or occur before a duty of immediate performance arises under the contract". *National City Bank of Minneapolis v. St. Paul Fire & Marine Ins. Co.*, 447 N.W.2d 171, 176 (Minn. 1989); *451 Corp. v. Pension Sys. for Policemen and Firemen of City of Detroit*, 310 N.W.2d 922, 923 (Minn. 1981); *Carl Bolander Sons Co., Inc. v. United Stockyards Corp.*, 298 Minn. 428, 433, 215 N.W.2d 473, 476 (1974); *Lake Co. v. Molan*, 131 N.W.2d 734, 740 (1964). Thus, if the condition does not occur and is not excused, no contract exists, and no party can be held liable for breach of that contract. *See, e.g., National Union Fire Ins. v. Schwing Am., Inc.*, 446 N.W.2d 410, 412 (Minn. Ct. App. 1989) ("[w]hen a contract contains a condition precedent, a party to the contract does not acquire any rights under the contract unless the condition occurs").

the vehicle and Wayzata Nissan would be obliged to refund the deposit.<sup>18</sup> The trial court held that “[w]hen Wayzata Nissan secured the special 2.9% APR for Liabo, it fulfilled the condition precedent to the agreement and the terms of the Delivery Sheet became binding upon Liabo”. (WN App. at 11.) “In short, [Liabo] agreed to purchase the 1998 Altima GXE if she qualified for the special 2.9% APR financing. [Liabo], after much effort on the part of Wayzata Nissan, was approved for that financing, but elected not to purchase the vehicle.” (WN App. at 23.)

Liabo claims that the trial court erred in reaching this conclusion. However, both arguments raised by Liabo were properly rejected by the trial court.

First, Liabo contends that the Delivery Sheet did not constitute a binding agreement to purchase “because financing was approved only at a cash price of \$20,576.00, a figure nowhere mentioned in the Delivery Sheet . . .”. (*See* Liabo’s Initial Brief at p. 31.) Throughout her Brief, Liabo contends that “Wayzata inserted a cash price on her credit application which exceeded that disclosed in the Delivery Sheet . . .” and, thus, Wayzata Nissan “obtained approval of credit for Liabo which was conditioned on a higher purchase

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<sup>18</sup>If the condition was not satisfied, Liabo would, as a matter of general contract law, be entitled to a refund of the deposit. *See, e.g., Aslakson v. Home Sav. Ass’n*, 416 N.W.2d 786, 789 (Minn. Ct. App. 1987) (purchase agreement which is subject to financing is not enforceable where condition is not satisfied). *See also Walker Mobile Home Sales, Inc. v. Walker*, 965 S.W.2d 271 (Mo. Ct. App. 1998), *reh’g and/or transfer denied*, (Mo. 1998), *transfer denied*, (Mo. 1998) (where purchase agreement is contingent upon financing and condition is not satisfied, buyer is generally entitled to the return of deposit); *Shepard v. Calloway*, 441 So.2d 488 (La. Ct. App.1983) (same); *Housley v. Mericle*, 57 S.W.3d 360 (Mo. Ct. App. 2001) (seller entitled to retain deposit if financing is arranged and buyer does not perform). In the event the condition was not satisfied, Liabo’s claim for a refund of the deposit would sound in contract, not in fraud.

price than stated in the Delivery Sheet . . .”. (*See* Liabo’s Initial Brief at pp. 30-32.) This assertion is groundless. Liabo agreed to purchase the Altima GXE for \$19,158.00 – the “price” that was “disclosed” on the Delivery Sheet Liabo signed. (WN App. at 39.) After deducting the trade-in allowance (\$1,168.00) and cash deposit (\$1,200.00) from the vehicle price and adding the applicable sales tax (\$1,169.35) and fees (\$248.50), Liabo needed to come up with a total of \$18,207.85 to purchase the vehicle. (*Id.*) The \$20,576 figure that Wayzata Nissan’s Business Manager recorded in the “DEALER” section of the NMAC credit application under the heading entitled “PROPOSED FINANCING TERMS” included the selling price of the vehicle (\$19,158) *and* the sales tax (\$1,169.35) and fees (\$248.50) that were identified on the Delivery Sheet, rounded to the nearest dollar. (WN App. at 56.)<sup>19</sup> The NMAC application indicated that Liabo needed a total of \$18,208 to purchase the Altima GXE – the *exact same*

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<sup>19</sup>In her Initial Brief, Liabo contends that under the MMVRISA a retail installment contract must separately itemize the “cash sales price” of the motor vehicle and itemize the applicable sales tax. (*See* Liabo’s Initial Brief at pp. 30-31) (“MMVRISA prohibits burying the sales tax in the cash price”). This argument, while entirely irrelevant to any issue in this case, is meritless. First, the NMAC credit application is obviously not a “retail installment contract” as defined by the MMVRISA. *See* Minn. Stat. §168.66, subd. 4 (1998). Second, the MMVRISA specifically provides that the “cash sales price” of a motor vehicle “may include any taxes . . . , and any other charges agreed upon between the parties”. *See* Minn. Stat. §168.66, subd. 9 (1998). Sales tax may either be included in the “cash sales price” under Minn. Stat. §168.71(b)(1) or “if not included in [the “cash sales price]” separately itemized. *See* Minn. Stat. §168.71(b)(4) (1998). Third, had Liabo proceeded with the transaction and elected to accept the 2.9% APR financing, the NMAC “retail installment contract” would have itemized both the “cash sales price” of the 1998 Altima GXE and the applicable sales tax. (WN App. at 49.)

*amount* (rounded to the nearest dollar), that was identified on the Delivery Sheet.<sup>20</sup> The trial court properly rejected Liabo's argument.

Second, Liabo suggests that the Delivery Sheet did not constitute a binding agreement because she was initially advised that NMAC was not willing to extend credit to her at the 2.9% APR and she "demonstrated to Wayzata that she no longer wished to purchase the vehicle . . .". (*See* Liabo's Initial Brief at pp. 29-30.) The trial court properly rejected this argument. It is undisputed that at no time between June 3, 1998 and June 8, 1998 (when NMAC ultimately agreed to extend the 2.9% APR) did Liabo verbally express any intention of cancelling the agreement to purchase the Altima GXE. (WN App. at 37.)<sup>21</sup> Indeed, on June 3<sup>rd</sup>, Liabo brought in the June 3<sup>rd</sup> notice she had received via facsimile from the United States Department of Education which addressed the student loan issues, as had been specifically requested by the dealership's Business Manager. Liabo was aware of the fact that Wayzata

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<sup>20</sup>In her Initial Brief, Liabo cites several cases from other jurisdictions which purportedly stand for the proposition that "altering the terms of a credit application constitutes consumer fraud" and "secretly increasing the cash price of a product being sold is deceptive". (*See* Liabo's Initial Brief at pp. 31-32.) Neither situation took place here. The figures recorded in the "DEALER" section of the NMAC application were for the exact same amounts (rounded to the nearest dollar) as those referenced on the Delivery Sheet that Liabo executed. Liabo's claim that Wayzata Nissan violated the CFA and DTPA fails.

<sup>21</sup>When NMAC initially denied 2.9% APR financing on the Altima GXE, Liabo and Ms. White Bryant, Wayzata Nissan's Business Manager, "discussed the derogatory comments on [Liabo's] credit bureau report regarding her student loans". (WN App. at 57.) "[Liabo] informed [Ms. White Bryant] that this information was incorrect or that she had resolved the problem." (*Id.*) Ms. White Bryant then "suggested that [Liabo] bring in documentation to verify that the problem had been resolved so that the dealership could re-submit her application to NMAC for further consideration". (*Id.*)

Nissan resubmitted her application and was continuing to make efforts to secure the 2.9% APR financing.<sup>22</sup> The fact that a Wayzata Nissan salesperson assisted Liabo in looking at other less expensive used vehicles as an option in the event the 2.9% APR financing was not secured (something Wayzata Nissan's Business Manager had suggested Liabo consider doing), is not evidence that the parties intended to abandon the purchase agreement on the 1998 Altima GXE.<sup>23</sup>

It was not until after Liabo had been advised of NMAC's approval of the 2.9% APR on June 8<sup>th</sup>, that Liabo expressed a desire to cancel the purchase agreement on the 1998 Altima GXE and purchase a more expensive 1998 Altima GLE. (WN App. at 64.) (“[O]n or about June 8, 1998, Defendant informed Plaintiff that she was now approved for credit under the 2.9% interest financing program” and “[b]ased upon this new information about her approval for credit Plaintiff sought to purchase a different 1998 Nissan Altima”.)

The trial court correctly ruled, on two occasions, that the Delivery Sheet was binding because Wayzata Nissan convinced NMAC to extend the 2.9% APR financing to Liabo: When

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<sup>22</sup>Mr. Sinner advised Liabo that the dealership was still trying to get her the 2.9% rate, that he had calls in to NMAC, and that he would let her know when a final decision was made. (WN App. at 36.)

<sup>23</sup>“[A]bandonment . . . must be clearly expressed, and acts and conduct of the parties to be sufficient must be positive, unequivocal, and inconsistent with the existence of the contract.” *Desnick v. Mast*, 311 Minn. 356, 365, 249 N.W.2d 878, 884 (1976). Assisting Liabo look at less expensive used Nissan Maxima vehicles as an option in the event that NMAC was unwilling to extend the 2.9% APR on the Altima GXE is not inconsistent with the existence of the contract on the Altima GXE. The special 2.9% APR program that was advertised only applied to new Altima vehicles, not used Maxima vehicles. (WN App. at 109, 113.)

Wayzata Nissan secured the special 2.9% APR for Liabo, it fulfilled the condition precedent to the agreement and the terms of the Delivery Sheet became binding upon Liabo.” (WN App. at 11.)

**2. The trial court properly determined that Liabo was not contractually obligated to a particular credit arrangement.**

Assuming Liabo was contractually obligated to purchase the Altima GXE, the next issue would be whether Liabo was ever contractually obligated on a credit transaction. In addressing this issue, it is important to bear in mind the significant changes that were made to Regulation Z following the passage of the Truth in Lending Simplification Reform Act (“TILSRA”) in 1980. *See* Pub. L. 96-221, Title VI, Mar. 31, 1980. The TILSRA became fully effective on October 1, 1982. *See* Pub. L. 96-221, Title VI, §625, Mar. 31, 1980.<sup>24</sup> Prior to 1982, Regulation Z provided that “consummation” would occur when “*a contractual relationship was created between a creditor and a customer ... irrespective of the time of performance of either party*”. *See* 12 C.F.R. § 226.2(k) (1980) (emphasis supplied). In determining whether “consummation” had occurred in a transaction, the Official Staff Interpretations of the Federal Reserve Board (“FRB”) required courts to look at the point in time in which the consumer first

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<sup>24</sup>The legislation had several purposes: “First, to eliminate unnecessary disclosures which detract from key credit information; second, to limit a creditor’s liability so that damages attach only to violations of a meaningful nature; third, to make compliance easier for creditors, and more understandable to consumers by requiring the Federal Reserve Board to issue simple, easily understood model forms and clauses . . . ; fourth, to provide increased information to consumer’s through ‘shopper’s guides to credit’; and, finally, to strengthen administrative enforcement of the act . . .”. *See* S. Rep. No. 1312, 95<sup>th</sup> Cong., 123 Cong. Rec. 11332-33 (Apr. 20, 1977).

suffered economic coercion to obtain financing, such as by the payment of a non-refundable fee. However, the FRB's "interpretation produced a substantial amount of confusion" and "[c]ase law was inconclusive and created further confusion on the point". *See* Rohner and Miller, *Truth in Lending*, §508 at p. 258.

In 1982, the FRB revised the definition of "consummation" to provide that it would only occur at "*the time that a consumer becomes contractually obligated on a credit transaction*". 12 C.F.R. § 226.2(a)(13) (1982) (emphasis supplied). As noted by the FRB, this change represented "a significant departure from longstanding staff interpretations . . . that had added the concept of 'economic coercion' to the test of when consummation occurs". *See* 46 C.F.R. 20848, 20851 (April 7, 1981). "Under the revised definition, consummation occurs only when the consumer becomes contractually obligated on a credit transaction." *Id.* The new definition "now focuses only on the time the consumer becomes contractually obligated, rather than the time the consumer pays the non-refundable fee or suffers an economic penalty for failing to go forward with the credit transaction". *Clark v. Troy and Nichols, Inc.*, 864 F.2d 1261, 1264 (5<sup>th</sup> Cir. 1989), *reh'g denied*, 874 F.2d 812 (5<sup>th</sup> Cir. 1989) (quoting 12 C.F.R. Chapter 2, art. 226.2 Supp. 1 at p. 676 (1987)). The definitional change was "designed to insure that consummation would occur only when contractual obligations bound the parties to the credit terms, not when there had merely been some investment in the transaction, such as the making of a non-refundable deposit". *Murphy v. Empire of Am., FSA*, 746 F.2d 931, 933, n. 1 (2<sup>nd</sup> Cir. 1984).

As explained by one commentator:

[Under the new rule], both the Regulation and the Commentary make clear that consummation is the point at which the customer becomes contractually obligated on a credit obligation. This significant change means that the purchase order situation described previously, as long as the purchase order itself is not a binding credit obligation, the proper disclosure point would be the (later) execution of the installment sale agreement. This is the case even though there may be a non-refundable deposit or fee associated with the first agreement. Thus, the concept of “economic coercion” devised by the Board staff no longer exists in TIL. This revision seems to have been made to increase creditors’ certainty about the proper timing of disclosures; it also appears to be consistent with a more general emphasis in the new Regulation on the legally binding aspects of the credit obligation itself rather than surrounding circumstances.

See Rohner and Miller, *Truth in Lending*, §508 at p. 259.<sup>25</sup>

“Under the new, revised definition, [the] coercion element is omitted, and courts should only look at the point in time that the consumer becomes contractually obligated on a credit transaction.” *Zoumayai v. Jack Haggerty Olds, Inc.*, 1985 WL 1453 at \*2 (N.D. Ill. 1985) (WN App. at 104) (“[t]he new definition makes clear that under TILA the relevant contractual obligation pertains only to the credit transaction, and the specific example of a car purchase

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<sup>25</sup>Applying the “economic coercion” theory, some courts held that a dealership which was arranging financing was obligated to provide TIL disclosures to a customer *before* the customer executed a purchase agreement where the purchase agreement (or the dealership’s operating procedures) required the customer to purchase the vehicle regardless of whether a lender extended credit. *See, e.g., Tirado v. “Z” Frank, Inc.*, 522 F.Supp. 405 (N.D. Ill. 1981); *Gonzalez v. Schmerler Ford*, 397 F.Supp. 323 (N.D. Ill. 1975). While the purchase agreements did not obligate the customer to any credit arrangement, the fact that the customer was obligated to purchase the vehicle (or forfeit a deposit) if financing fell through constituted an economic incentive to accept financing and, thus, “consummation” had occurred.

is cited to emphasize this separateness”). The duty to make the TIL disclosures does not arise at the time of the underlying purchase; rather, the creditor must provide the disclosures only if the consumer is “legally obligated to accept a particular credit arrangement”. 12 C.F.R. §226, Supp. 1, Official Staff Interpretations, §226.2(a)(13).<sup>26</sup> Thus, the “court must look exclusively to the legal contractual obligations, not the consumer’s belief of when a binding contract exists”. *Beckett v. H&R Block, Inc.*, 1994 WL 698505 (N.D. Ill. 1994) (WN App. at 75). Obviously, if the consumer was not legally bound to a particular credit arrangement, no TIL disclosures were ever due and no cause of action exists for failing to supply them.

In addressing Liabo’s claim, it is also important to bear in mind the distinction between a written agreement whereby a consumer is contractually obligated to purchase a motor vehicle and an agreement whereby a consumer has become contractually obligated to accept a specific credit arrangement. The Delivery Sheet at issue in this case, for example, is a purchase agreement which “sets forth the terms of the actual purchase, including trade-in allowances and identifies the amount to be financed, if any.” *Scott v. Forest Lake Chrysler-Plymouth-Dodge*, 611 N.W.2d 346, 352 (Minn. 2000). A retail installment contract (a/k/a “retail installment sales contract” “RIC” or “RISC”), on the other hand, sets forth all of the credit terms and is an

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<sup>26</sup>It is well established that “absent some obvious repugnance to the statute, the ... regulation [of the Federal Reserve Board implementing the TILA] should be accepted by the courts, as should the Board’s interpretation of its own regulation”. *Anderson Bros. Ford v. Valencia*, 452 U.S. 205, 219 (1981). Indeed, “[u]nless demonstrably irrational, Federal Reserve Board staff opinions construing the Act or Regulation should be dispositive . . .”. *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 565 (1980).

agreement “which sets forth the details of how the financing is to work – the interest rate, the finance charge, amount financed, total payment and total sales price . . .”. *Id.* See also Minn. Stat. §168.66, subd. 4 (1998) (defining a “retail installment contract”); *Philbeck v. Timmers Chevrolet, Inc.*, 361 F.Supp. 1255, 1257 n. 1 (N.D. Ga. 1973), *rev’d on other grounds*, 499 F.2d 971 (5<sup>th</sup> Cir. 1974), *reh’g denied*, 502 F.2d 1167 (5<sup>th</sup> Cir. 1974) (noting that a retail buyer’s order on the sale of a vehicle “naturally made no pretense of complying with the [TILA] since the credit arrangements of plaintiff’s purchase had yet to be completed” while the installment sales contract “is an agreement to extend credit to which the disclosure requirements of the Act apply”).

Additionally, it is important to note that a consumer’s execution of a retail installment contract constitutes “consummation” under the TILA and that a “creditor” complies with the TILA when it presents a retail installment contract (containing the TIL disclosures) to the consumer for review and execution.<sup>27</sup> Providing the TIL disclosures in a retail installment

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<sup>27</sup>See S. Rep. No. 392, 90<sup>th</sup> Cong., 1<sup>st</sup> Sess. 7 (1967) (noting that compliance would be achieved by “providing the required information on the installment contract or other evidence of indebtedness which the consumer would sign in order to complete the transaction”); *Spearman v. Tom Wood Pontiac-GMC, Inc.*, 312 F.3d 848, 851-52 (7<sup>th</sup> Cir. 2002) (dealership complied with timing provisions of TILA by presenting customer with retail installment contract containing TIL disclosures “moments before she signed”); *Nigh v. Koons Buick Pontiac GMC Inc.*, 143 F.Supp.2d 535, 548-49 (E.D. Va. 2001); *Vang v. Morrie’s Minnetonka Ford*, 2001 WL 1589614 (D. Minn. Dec. 11, 2001) (WN App. at 99) (dealership complies with TILA when it presents the retail installment contract with the requisite TIL disclosures to the customer); *Peter v. Village Imports Co.*, 2001 WL 1640130 (D. Minn. Oct. 9, 2001) (WN App. at 85) (same); *Stravides v. Mellon Nat’l Bank & Trust Co.*, 353 F.Supp. 1072, 1078-79 (W.D. Pa. 1973), *aff’d*, 487 F.2d 953 (3d Cir. 1973) (“Congress apparently provided the terms of the loan could be revealed before the credit was extended (just before

contract complies with the TILA because “[i]n most consumer loans, the [consumer] does not become liable in any way until the note is signed, and disclosure in the note would thus be sufficient”. *Postow v. OBA Fed. Sav. and Loan Ass’n*, 627 F.2d 1370, 1375-76 (D.C. Cir. 1980).<sup>28</sup>

In support of her TILA claim, Liabo cites a line of foreign cases which stand for the proposition that “consummation” under the TILA can occur when a consumer executes a written agreement identifying the agreed upon credit terms (such as a retail installment contract), regardless of whether the retail seller (or lender) signs it or whether the retail seller (or lender) actually extends financing to the consumer on those credit terms.<sup>29</sup> The holdings

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the buyer signed the papers in the dealer’s office) and could be disclosed in the loan papers themselves”).

<sup>28</sup>A dealership is also required under the TILA (and MMVRISA) to provide the consumer with a copy of the retail installment contract that has been executed by the consumer. *See Lozada v. Dale Baker Oldsmobile, Inc.*, 197 F.R.D. 321, 326 (W.D. Mich. 2000) (dealership failed to provide copies of the executed retail installment contract to the purchasers “until some days or weeks after” the purchasers signed the contracts); Minn. Stat. §168.71(a)(1) (1998).

<sup>29</sup>*See, e.g., Nigh v. Koons Buick Pontiac GMC, Inc.*, 319 F.3d 119 (4<sup>th</sup> Cir. 2003), *rev’d on other grounds*, 125 S. Ct. 460 (U.S. 2004) (customer’s execution of retail installment contract was sufficient to constitute consummation because that was when he “made the choice and committed himself to the purchase of credit”); *Cannon v. Metro Ford, Inc.*, 242 F.Supp.2d 1322, 1330 (S.D. Fla. 2002) (“execution [of a retail installment contract] by the buyer constitutes ‘consummation’ of the contract for TILA purposes”); *Madewell v. Marietta Dodge, Inc.*, 506 F.Supp. 286 (N.D. Ga. 1980) (although retail installment contract was not signed by dealership, it was “signed by plaintiffs is in fact a writing enforceable against them . . . and plaintiffs can be considered to have obligated themselves to accept specified credit terms upon signing the contract”); *Copley v. Rona Enterprises, Inc.*, 423 F.Supp. 979 (S.D. Ohio 1976) (written agreement was “by its terms a contract for the extension of credit” and “contractually bound [plaintiffs] not only to purchase the mobile

in these cases do not support Liabo's position. The consumers in those cases (unlike Liabo) executed a retail installment contract (or other written credit agreement) which unconditionally obligated the consumer to borrow funds under a specific credit arrangement. The argument that was raised by the retail seller (or lender) in these cases was that "consummation" could not occur if the *retail seller* had not signed the retail installment contract (or other written credit agreement) or the *lender* declined to extend financing to the consumer on the terms the consumer had agreed to in the retail installment contract (or other written credit agreement). The courts held that the *consumer's* execution of the written agreement constituted "consummation" regardless of whether the retail seller signed it or whether the lender extended financing because when the consumer signed he became "contractually bound to the terms of the lending contract at the option of the lender." Bryson v. Bank of New York, 584 F.Supp. 1306, 1317 (S.D. N.Y.1984). Thus, the cases stand for the rather unremarkable proposition, that "[t]he customer's signature on [a retail installment contract] . . . constitute[s] consummation for purposes of TILA disclosures." Bragg v. Bill Heard Chevrolet, Inc., 374 F.3d 1060, 1068 (11<sup>th</sup> Cir. 2004), *cert. denied*, 125 S. Ct. 963 (U.S. Jan. 18, 2005).

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home, but also to purchase it on the credit terms set out on the face of the . . . agreement"); Rowland v. Magna Millikin Bank of Decatur, N.A., 812 F.Supp. 875 (C.D. Ill. 1992) (court held that consummation occurred on the date that plaintiffs executed retail installment contract "because that was the date [they] contracted for financing and became bound to the credit terms"); Graves v. Tru-Link Fence Co., 905 F.Supp. 515 (N.D. Ill. 1995) (written agreement which obligated the plaintiff to pay the unpaid balance of \$4,000 to Tru-Link over a 36 month period at \$142.61 per month, a total of \$5,133.96, constituted a contract for the extension of credit regardless of whether Tru-Link's credit department approved financing).

Wayzata Nissan does not take issue with the holdings of the courts Nigh, Cannon, Madewall, Copley, Rowland, Tru-Link, Bryson and Bragg. Here, unlike consumers in those cases, Liabo never executed a retail installment contract or other written credit agreement. The Delivery Sheet did not contractually obligate Liabo to borrow funds under a particular credit arrangement (as would have been the case had she executed the NMAC retail installment contract).<sup>30</sup>

The condition that Liabo placed on her *agreement to purchase* the Altima GXE was simply that – a condition that needed to be satisfied before Liabo’s *agreement to purchase* the vehicle became binding. The fact that Wayzata Nissan satisfied that condition by convincing NMAC to approve Liabo for the special 2.9% APR did not, however, legally obligate Liabo to accept the 2.9% APR or any other financing that may have been arranged by Wayzata Nissan because Liabo always had the ability and legal right to waive the condition she had

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<sup>30</sup>Liabo fails to recognize the distinction between a “condition” and a promise. She is operating under the assumption that the condition she insisted on (i.e., that she qualify for the 2.9% APR) was a “promise” and, as such, she was legally obligated to accept that rate if it was, in fact, offered. (*See* Liabo’s Initial Brief at pp. 13, 15, 19-20) (repeatedly stating that “Liabo was bound to purchase on credit”). Liabo’s assumption is, however, erroneous. A condition is distinguished from promise in that condition creates no right or duty in and of itself but is merely limiting or modifying factor. *See Tolzman v. Town of Wyoming*, 1999 WL 109604 (Minn. Ct. App. 1999) (WN App. at 95) (citing 5 Samuel Williston & Walter H.E. Jaeger, *A Treatise on the Law of Contracts* §663 (3d ed. 1961)). *See also* 3A Corbin on Contracts §633 (“[a] promise in a contract creates a legal duty in the promisor and a right in the promisee; the fact or event constituting a condition creates no right or duty and is merely a limiting or modifying factor”). Liabo’s qualification for the 2.9% APR was a “condition” on her agreement to purchase the vehicle – it was not contractual term or promise of that agreement.

originally insisted upon.<sup>29</sup> It is well settled Minnesota law that one party to a contract may waive a condition which exists for that party's own benefit. *See, e.g., Dolder v. Griffin*, 323 N.W.2d 773, 778 (Minn. 1982); *Miracle Const. Co. v. Miller*, 251 Minn. 320, 87 N.W.2d 665 (1958); *Steinhilber v. Prairie Pine Mut. Ins. Co.*, 533 N.W.2d 92 (Minn. Ct. App. 1995); *Hanson v. Moeller*, 376 N.W.2d 220 (Minn. Ct. App. 1985); *Appollo v. Reynolds*, 364 N.W.2d 422, 424, (Minn. Ct. App. 1985). “[I]t is hornbook law that a condition precedent in favor of one of the parties may be waived by that party.” *Walter E. Heller & Co., Inc. v. American Flyers Airline Corp.*, 459 F.2d 896 (2d Cir. 1972). As the trial court noted in its May 22, 2000 Order: “Obtaining the special 2.9% APR financing was a condition set by [Liabo] for her own benefit and she was therefore able to waive it if she chose to do so.” (WN App. at 12.) Thus, “[i]f Liabo did not wish to accept the special 2.9% APR, she was free to reject it and arrange some alternative method of paying the \$18,207.85 balance due on the Altima. If Liabo wanted out of the entire deal, she also had that option, although at the risk of losing her deposit”. (*Id.* at 11-12.)

If anything, *Nigh*, *Cannon*, *Madewall*, *Copley*, *Rowland*, *Tru-Link*, *Bryson* and *Bragg* support Wayzata Nissan's position. In those cases, the courts concluded that consummation occurred at the moment the consumer signed a retail installment contract because at that time, the consumer was “*contractually bound to the terms of the lending contract at the option of the lender*”. *Bryson v. Bank of New York*, 584 F.Supp. 1306, 1317 (S.D. N.Y.1984) (emphasis

supplied). Here, however, the exact opposite is true: *Liabo had the option of becoming contractually bound to the terms of a lending contract* – she had the option of accepting or rejecting NMAC’s 2.9% APR financing, if it was offered. Liabo understood that she could seek her own financing and pay cash for the vehicle. Indeed, in her Brief, Liabo acknowledges that: “[a]t her sole option, [she] could have, had she so chosen, purchased the vehicle for cash . . .”. (See Liabo’s Initial Brief at pp. 15-16) (emphasis supplied). And, Liabo declined to accept NMAC’s credit offer when it was, in fact, offered.

Regulation Z’s definition of “consummation” makes clear that under the TILA, the only relevant contractual obligation is one which pertains to a credit transaction. Because the disclosure requirements of the TILA do not come into play until the consumer is bound on credit terms for the purchase transaction, it is not inconsistent, as Liabo argues, for her to be bound to purchase the vehicle (at the risk of losing the deposit), but for a TIL disclosure obligation not to have arisen.<sup>30</sup>

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<sup>30</sup>See, e.g., *Jackson v. Grant*, 890 F.2d 118 (9<sup>th</sup> Cir. 1988) (plaintiff was not “contractually obligated” under California law where the agreements indicated that the plaintiff was not guaranteed a loan and the lender was unknown and, thus, loan was not “consummated” on that date); *Evans v. Graves Pontiac-Buick-GMC Truck, Inc.*, 576 So.2d 1025, 1028 (La. Ct. App. 1991), writ denied, 581 So.2d 687 (La. 1991) (evidence “indicates that further action was necessary to consummate the extension of credit”); *American Bank of Connecticut v. Mango*, 1998 WL 928434 at \*2 (Conn. Super. 1998) (WN App. at 72-73) (“[b]ecause the disclosure requirements of the TILA do not come into play until the parties are bound on the *credit terms* for the purchase transaction, it is not inconsistent . . . for him to be bound on the Use and Occupancy Agreement but for the disclosure obligation not to have matured”) (emphasis in original); *Zoumayai v. Jack Haggerty Olds, Inc.*, 1985 WL 1453 at \*2 (N.D. Ill. 1985) (WN App. at 103-04) (“[E]ven if a contract somehow was created on March 28 and plaintiff’s deposit was not refundable, the March 28 contract was a contract

The parties in the immediate case contemplated an extension of credit. However, Liabo never executed an agreement which contractually obligated her to a particular credit arrangement. The Delivery Sheet at issue in this case is a purchase agreement which “sets forth the terms of the actual purchase, including trade-in allowances and identifies the amount to be financed, if any”. *Scott v. Forest Lake Chrysler-Plymouth-Dodge*, 611 N.W.2d 346, 352 (Minn. 2000). The reference to “Special 2.9% O.A.C.” on the Delivery Sheet was not a *promise*, or *term* of an agreement between Liabo and Wayzata Nissan, it was a *condition* to her agreement to purchase. Liabo always had the right to arrange her own financing such that she could pay cash for the vehicle. (*See* Liabo’s Initial Brief at pp. 15-16) (“[a]t her sole option, [she] could have, had she so chosen, purchased the vehicle for cash . . .”). Alternatively, Liabo always had the right to accept the 2.9% APR financing if it was offered by NMAC or not purchase the vehicle at all. The only right she relinquished upon execution of the Delivery Sheet was to insist upon the return of the deposit if the condition was satisfied. While the possibility of losing the deposit may have provided an economic incentive for Liabo to purchase the vehicle, the concept of “economic coercion” no longer exists and “consummation” no longer occurs “merely because the consumer has made some financial investment in the transaction . . .” 12 C.F.R. §226, Supp. 1 (Official Staff Interpretations), Commentary 2(a)(13).

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to purchase, not to obtain credit. The new definition makes clear that under TILA the relevant contractual obligation pertains only to the credit transaction, and the specific example of a car purchase is cited to emphasize this separateness”).

The duty to make TIL disclosures only arises if the consumer has become “legally obligated to accept a particular credit arrangement”. 12 C.F.R. §226, Supp. 1, Official Staff Interpretations, §226.2(a)(13)). As noted above, providing TIL disclosures to a consumer in a retail installment contract satisfies the TILA because the retail buyer does “not become obligated on the credit transaction until he signed the RISC”. Nigh v. Koons Buick Pontiac GMC Inc., 143 F.Supp.2d 535, 548 (E.D. Va. 2001). See also Postow v. OBA Fed. Sav. and Loan Ass’n, 627 F.2d 1370, 1375-76 (D.C. Cir. 1980) (“[i]n most consumer loans, the [consumer] does not become liable in any way until the note is signed, and disclosure in the note would thus be sufficient”). Thus, the trial court was correct in noting: “*[u]p until the time Liabo executed the Installment Contract she would have been free to decline the credit . . .*”. (WN App. at 14.)

While there was contemplation of a potential extension of credit in this case, there was not “consummation” of a credit transaction. Liabo was never contractually obligated to accept a particular credit arrangement – she never signed an agreement legally binding her to borrow funds from anyone. Indeed, Liabo subsequently declined to accept credit from NMAC after it was offered to her.

The trial court properly ruled that there was no binding credit agreement and dismissed Liabo’s TILA claims. The trial court’s ruling must be affirmed.

**B. The Trial Court Properly Dismissed Liabo’s MMVRISA Claims.**

Like the TILA claim, Liabo’s claims under the MMVRISA fail because there was not

consummation of a “retail installment sale” as defined by the MMVRISA. *See* Minn. Stat. §168.66, subd. 3 (1998).<sup>31</sup> A retail installment sale is defined as a “sale evidenced by a retail installment contract wherein retail buyer agrees to buy and retail seller agrees to sell a motor vehicle at a sale price payable in one or more installments with the payment of a finance charge”. *Id.*

The Delivery Sheet does not constitute a “retail installment contract”. Minn. Stat. §168.66, subd. 4 (1998).<sup>32</sup> The Delivery Sheet “sets forth the terms of the actual purchase, including trade-in allowances and identifies the amount to be financed, if any”. *Scott v. Forest Lake Chrysler-Plymouth-Dodge*, 611 N.W.2d 346, 352 (Minn. 2000). A retail installment contract, on the other hand, “sets forth the details of how the financing is to work – the interest rate, the finance charge, amount financed, total payment and total sales price . . .”. *Id.* As Liabo notes in her Brief, the Delivery Sheet does not identify the amount of any finance

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<sup>31</sup>Additionally, under the MMVRISA, compliance with the disclosure provisions of the TILA constitutes compliance with the MMVRISA. *See* Minn. Stat. §168.71(b)(7) (1998) (“in lieu of the above clauses, the retail seller may give the retail buyer disclosures which satisfy the requirements of the Federal-Truth-In-Lending Act in effect as of the time of the contract . . .”). *See also Kinzel v. Southview Chevrolet Co.*, 892 F.Supp. 1211 (D. Minn. 1994) (after concluding that the dealership had satisfied the requirements of the TILA, the court noted that “the very words of the MMVRISA compel the conclusion that [the dealership] has satisfied its requirements”). While Wayzata Nissan did not provide TIL “disclosures” to Liabo, the intent of the statute is clear: to insulate retail sellers from liability if their actions comply with the more specific regulatory requirements of the federal TILA and Regulation Z.

<sup>32</sup>A “retail installment contract is defined as an “agreement . . . evidencing a retail installment sale of a motor vehicle . . . pursuant to which title to, or a lien upon the motor vehicle is retained by the retail seller as security for the retail buyer’s obligation”. *Id.*

charge, the total amount of the installment payments, the amount of each installment payment, or the date of each payment necessary to pay the total of payments. See Minn. Stat. §168.71(b) (1998). Nor does it contain any provisions regarding charges for insurance or other benefits, maintenance of physical damage insurance on the vehicle or provisions regarding pre-payment, late fees, acceleration or the parties' rights and obligations upon default. Id.; see also Minn. Stat. §168.71(a)(3) (delinquency and collection charges); Minn. Stat. §168.73 (1998) (prepayment and acquisition fees). Nor does it indicate that Wayzata Nissan would retain a security interest in the Altima GXE. Minn. Stat. §168.66, subd. 4 (1998) (security interest). Here, there was no "sale evidenced by a retail installment contract . . .". Minn. Stat. §168.66, subd. 3 (1998).

Moreover, the MMVRISA only applies if there has been an actual extension of credit. The purpose of MMVRISA's disclosures "is to inform the installment buyer of the cost of the credit extended to him". O'Brien v. Phillips Motors Excelsior, Inc., 288 Minn. 183, 185, 179 N.W.2d 158, 160 (1970). See also Scott, 611 N.W.2d at 351 (citing O'Brien and acknowledging the "legislative objective of informing the automobile buyer of the cost of the credit extended"). And, the statutory penalties that are available in the event of a violation of the MMVRISA are based on amounts that are "due and owing" and/or the amount of the "finance charge" under an enforceable retail installment contract. See Minn. Stat. §168.75(b)-(c)(1998). The penalties "are imposed in terms of enforcing the retail installment contract as modified by statutory penalties". Scott, 611 N.W.2d at 352. Here, there was no actual

extension of credit – Liabo declined to accept credit from NMAC – and there is no enforceable retail installment contract that could be modified by statutory penalties.<sup>33</sup>

While there was contemplation of a potential “retail installment sale” between the parties, no such sale was consummated by the parties. Before reviewing a NMAC retail installment contract and consummating the transaction by executing the same, Liabo decided to not purchase the vehicle and abandon the transaction. The trial court properly ruled that there was no binding credit agreement and dismissed Liabo’s MMVRISA claims. The trial court’s ruling must be affirmed.

**C. The Trial Court Properly Dismissed Liabo’s CFA and DTPA Claims.**

Liabo alleges that Wayzata Nissan violated the Consumer Fraud Act (“CFA”), Minn. Stat. §325F.68, *et seq.*, and the Deceptive Trade Practices Act (“DTPA”), Minn. Stat. §325D.44, *et seq.*<sup>34</sup>

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<sup>33</sup>In her Brief, Liabo alleges that Wayzata Nissan violated Minn. Stat. §168.66, subd. 9 (1998), because the MMVRISA precludes the imposition of a document administration fee in excess of \$25.00 and the Delivery Sheet identified a charge of \$44.50 next to the word “document fee”. The \$44.50 that was reflected on the Delivery Sheet included the \$25.00 documentary fee as well as the \$7.00 registration charge and \$9.50 certificate of title fees charge. These amounts were simply lumped together on the Delivery Sheet. The NMAC retail installment contract that would have been prepared had Liabo proceeded with the transaction would have itemized the amounts that were included within the \$44.50 figure that appeared on the Delivery Sheet. (WN App. at 49.)

<sup>34</sup>Liabo has no claim under the DTPA. First, the DTPA is intended to “prohibit people from passing off the goods and services of another as their own and creating confusion as to the origin of goods”. *Krueger v. State Farm Fire and Cas. Co.*, 510 N.W.2d 204 (Minn. Ct. App. 1993). Second, Wayzata Nissan did not engage in any “deceptive trade practice” in violation of the statute. Third, the only remedy available under the DTPA is injunctive relief

Under the Private Attorney General Statute, Minn. Stat. §8.31, subd. 3a, a private cause of action can only be brought by someone who was “injured by a violation” of the CFA. Group Health Plan, Inc. v. Philip Morris Inc., 621 N.W.2d 2, 13 (Minn. 2001) (emphasis in original). “A claim under Minn. Stat. §8.31, subd. 3a, alleging a violation of Minn. Stat. §325F.69, subd. 1, has two elements: (1) an intentional misrepresentation relating to the sale of merchandise, and (2) damages to the plaintiff caused by the misrepresentation.” Reinke v. Harold Chevrolet-Geo, Inc., 2004 WL 1152700 (Minn. Ct. App. 2004), *rev. denied*, (Minn. Aug. 17, 2004) (WN App. at 88) (citing Group Health Plan, Inc. v. Philip Morris, Inc., 621 N.W.2d 2, 12-13 (Minn. 2001)).

First, Liabo contends that Wayzata Nissan violated the CFA because the Delivery Sheet she executed on June 3, 1998 stated: “I understand that this is a binding contract and I will lose any deposit if I do not perform according to terms”, while her agreement to purchase the 1998 Nissan Altima GXE vehicle was conditional. Liabo contends that: “[t]o state on May 30, 1998

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and in order to obtain injunctive relief, a plaintiff must establish facts which indicate that he or she is likely to be damaged in the future. See Minn. Stat. §325D.45, subd. 1 (“[a] person likely to be damaged by a deceptive trade practice of another” may sue for injunctive relief); Lofquist v. Whitaker Buick-Jeep-Eagle, Inc., 2001 WL 1530907 (Minn. Ct. App. 2001), *rev. denied*, (Minn. Feb. 28, 2002) (WN App. at 82) (“Because obtaining relief under the UDTPA requires a person to be ‘likely to be damaged’ by the conduct at issue and because Lofquist already signed an installment contract, she is no longer ‘likely’ to be damaged by a misrepresentation in her contract”); Gardner v. First American Title Ins. Co., 296 F.Supp.2d 1011 (D. Minn. 2003) (“Because the MDPTA provides injunctive relief for a ‘person likely to be damaged,’ it provides relief from future damage, not past damage”) (citing Lofquist). Here, the conduct Liabo complains of took place in May of 1998, over seven years ago. She cannot establish that she is likely to be damaged in the future.

that the Delivery Sheet was a “binding contract”, without qualification, was misleading . . . [because] the effect is to blur the conditional nature of the agreement”. (See Liabo’s Initial Brief at pp. 28-29.) This claim is baseless. The Delivery Sheet does not contain any false representation relating to the sale of merchandise, much less an intentionally false representation. See Reinke, supra. The “qualification” that Liabo contends is lacking from the Delivery Sheet is found *on the face* of that very document. The Delivery Sheet specifically stated, at Liabo’s specific request: “Special 2.9% O.A.C.” (WN App. at 33, 39.) Both parties understood the meaning of this language; that if Liabo did not qualify for the special 2.9% APR – the condition Liabo insisted upon – she would not be obligated to purchase the vehicle and the deposit would be returned. (Id. at 123, 33.) Moreover, it is well established that representations regarding the legal effect of an instrument cannot give rise to an action in fraud. See, e.g., Northernair Prods., Inc. v. Crow Wing County, 309 Minn. 386, 244 N.W.2d 279, 281-82 (1976); Pieh v. Flitton, 170 Minn. 29, 30, 211 N.W.2d 964 (1927) (stating that a representation as to the legal effect of an instrument is a representation of law); Mohler v. City of St. Louis Park, 643 N.W.2d 623 (Minn. Ct. App. 2002) (interpretation of zoning ordinance was a representation of law, which was not actionable); Brinkman’s, Inc. v. Floe Int’l, Inc., 2002 WL 452996 (Minn. Ct. App. 2002) (WN App. at 78) (representation that a certificate was a contract is a representation of law, not fact).

Second, Liabo contends that Wayzata Nissan’s alleged violations of the TILA and MMVRISA automatically constitute a violation of the CFA. (See Liabo’s Initial Brief at pp.

26-27.) This claim fails. A violation of the TILA or the MMVRISA does not automatically establish a cause of action under the CFA. The TILA and the MMVRISA are credit disclosure statutes, not prohibitions against fraud.<sup>35</sup> Unlike the TILA and the MMVRISA, the CFA does not mandate any particular form or subject of disclosure, but rather is a general prohibition of fraud and misrepresentation. *See Masepohl v. American Tobacco, Inc.*, 974 F.Supp. 1245, 1254 (D. Minn. 1997) (noting that the CFA does not place an affirmative obligation on parties to disclose information). Additional proof is needed in order to establish a CFA claim. *See, e.g., Reinke, supra* (describing elements of cause of action under the CFA).

Moreover, and more importantly, Wayzata Nissan did not violate either the TILA or the MMVRISA. Wayzata Nissan's conduct was in compliance with the more specific provisions of the TILA and the MMVRISA and cannot, therefore, constitute a violation of the CFA. Consequently, Liabo's argument fails as a matter of law.

Third, Liabo contends that if the Delivery Sheet did not constitute a binding agreement to purchase, then Liabo was entitled to the refund of her deposit and Wayzata Nissan violated the CFA by "*falsely represent[ing] it was entitled to retain her deposit*". (*See* Liabo's Initial

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<sup>35</sup>*See, e.g., Gibson v. Bob Watson Chevrolet-Geo, Inc.*, 112 F.3d 283 (7<sup>th</sup> Cir. 1997) ("[t]he defendants emphasize quite properly that the [TILA] is not a general prohibition of fraud in consumer transactions or even in consumer credit transactions. Its limited office is to protect consumers from being misled about the cost of credit"); *O'Brien v. Phillips Motors Excelsior, Inc.*, 288 Minn. 183, 185, 179 N.W.2d 158, 160 (1970) (purpose of MMVRISA's disclosures "is to inform the installment buyer of the cost of the credit extended to him").

Brief at p. 33.)<sup>36</sup> This claim fails. The CFA prohibits false representations that are made “in connection with the sale of merchandise”. Minn. Stat. §325F.69. The CFA is intended to prevent sellers from fraudulently *inducing* customers into purchasing merchandise that has characteristics, qualities or uses that are different from what the seller represented the merchandise to possess, and allows the aggrieved consumer to recover damages based on the difference between the amount paid and the value received.<sup>37</sup> The statement which Liabo contends supports a claim under the CFA is not a statement that induced the purchase of merchandise. It did not induce anything. Rather, it was Wayzata Nissan’s interpretation of the legal effect of the agreement between the parties. As noted, representations of law are not actionable.

Liabo’s claims under the CFA and DTPA fail. The trial court’s rulings must be affirmed.

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<sup>36</sup>If the Delivery Sheet did not contractually bind Liabo to purchase the vehicle (or not purchase it, but lose the deposit), Liabo would be entitled to a refund of the deposit under contract law. Liabo did not, however, allege a breach of contract claim.

<sup>37</sup>*See, e.g., Ly v. Nystrom*, 615 N.W.2d 302 (Minn 2000) (seller of restaurant allegedly made misrepresentations regarding the condition and profitability of the restaurant during negotiations); *Church of the Nativity of Our Lord v. WatPro, Inc.*, 491 N.W.2d 1 (Minn. 1992) (plaintiff alleged that the defendant manufacturer had misrepresented the quality of roofing materials that the plaintiff purchased); *Peterson v. BASF Corp.*, 618 N.W.2d 821 (Minn. Ct. App. 2000), *rev. denied*, (Minn. Jan. 26, 2001) (defendant allegedly made false statements to farmers and regulatory authorities to conceal fact that a less expensive herbicide had the same quality as identical, but more expensive, herbicide); *Yost v. Millhouse*, 373 N.W.2d 826 (Minn. Ct. App. 1985) (defendant misrepresented that horse plaintiff purchased was registered).

## CONCLUSION

The trial court properly summed up the case: “In short, [Liabo] agreed to purchase the 1998 Altima GXE if she qualified for the special 2.9% APR financing. [Liabo], after much effort on the part of Wayzata Nissan, was approved for that financing, but elected not to purchase the vehicle.” (WN App. at 23.) The trial court also properly granted summary judgment in favor of Wayzata Nissan. Because no credit transaction was consummated – because Liabo abandoned the purchase transaction and thereby declined to accept NMAC’s offer to extend credit – Wayzata Nissan was not obligated to provide written TIL disclosures to her.

As the trial court noted, had Liabo proceeded with her agreement to purchase the Altima GXE and desired to accept the 2.9% APR financing that Wayzata Nissan had arranged through NMAC, she would have been presented with a NMAC retail installment contract – an agreement for the extension of credit to which the disclosure provisions of the TILA and MMVRISA would apply. That financing document would have contained all of the TIL disclosures required by law.

It is ironic that Liabo even sued out claims under the TILA and MMVRISA. The case does not, in reality, involve “credit” at all. Liabo did not seek to abandon the transaction because she thought she could obtain a lower APR elsewhere or because she was disappointed with the credit terms proposed in a retail installment contract. Liabo refused to proceed forward with the transaction because she wanted to purchase a different, more expensive,

vehicle.

Wayzata Nissan respectfully requests that the Court of Appeals affirm the trial court's rulings in all respects.

Respectfully submitted,

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2) (with amendments effective July 1, 2007).