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NO. A12-1555

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State of Minnesota  
**In Supreme Court**

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GRAPHIC COMMUNICATIONS LOCAL 1B HEALTH & WELFARE FUND "A"; and THE TWIN CITIES BAKERY DRIVERS HEALTH AND WELFARE FUND, individually and on behalf of all others similarly situated,

*Plaintiffs/ Respondents/ Cross-Appellants,*

vs.

CVS CAREMARK CORPORATION; CVS PHARMACY, INC.; CAREMARK, LLC; CAREMARK MINNESOTA SPECIALTY PHARMACY, LLC; CAREMARK MINNESOTA SPECIALTY PHARMACY HOLDING, LLC; COBORN'S, INCORPORATED; KMART HOLDING CORPORATION; SEARS, ROEBUCK AND CO.; SEARS HOLDING CORPORATION; SNYDER'S DRUG STORES (2009), INC.; SNYDER'S HOLDINGS (2009), INC.; SNYDER'S HOLDINGS, INC.; TARGET CORPORATION; WALGREEN CO., and WAL-MART STORES, INC.,

*Defendants/ Petitioners/ Cross-Respondents.*

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**PLAINTIFFS/RESPONDENTS/CROSS-APPELLANTS'  
 PRINCIPAL AND RESPONSE BRIEF**

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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).

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## STATEMENT OF ISSUES

1. Where this Court has held that "a plaintiff need only plead that the defendant engaged in conduct prohibited by . . . [the Consumer Fraud Act] and that the plaintiff was damaged thereby," *Group Health Plan Inc. v. Philip Morris Inc.*, 621 N.W.2d 2, 12 (Minn. 2001), did Plaintiffs plead a legally sufficient claim under the Consumer Fraud Act, Minn. Stat. § 325F.69, subd. 1 ("CFA"), and the Private Attorney General Statute, Minn. Stat. § 8.31, subd. 3a ("Private AG Statute"), by alleging that Defendants engaged in deceptive practices in connection with the sale of merchandise by (1) overcharging Plaintiffs for purchases of generic prescription drugs when (2) the information that would have allowed Plaintiffs to determine they were overcharged was kept secret by Defendants, such that (3) Plaintiffs were damaged as a result?

The Court of Appeals held that Plaintiffs "sufficiently pleaded a CFA claim and that the district court erred by dismissing this claim under rule 12." *Graphic Communications, et al. v. CVS Caremark Corp., et al.*, Case No. A12-1555, slip op. at 20 (Minn. App. May 6, 2013), Add. 38.

The most apposite authorities on this issue are:

- *Group Health Plan Inc. v. Phillip Morris Inc.*, 621 N.W.2d 2 (Minn. 2001)
- *Wiegand v. Walser Auto Groups Inc.*, 683 N.W.2d 807 (Minn. 2004)
- *The Connecticut Co. v. Medtronic Inc.*, 672 F. Supp. 2d 933 (D. Minn. 2009)
- Minn. Stat. § 325F.69, subd. 1
- Minn. Stat. § 8.31, subd. 3a.

2. Where this Court reaffirmed that a statute may give rise to a civil action by implication in *Becker v. Mayo Found.*, 737 N.W.2d 200 (Minn. 2007), did the Court of Appeals err when it held that a civil action does not exist under Minn. Stat. § 151.21, subd. 4 because "the legislature expressly creates liability when it intends to do so"?

The Court of Appeals held that there is no civil action for violation of Minn. Stat. § 151.21, subd. 4 because the legislature did not expressly create a civil action. *Graphic Communications*, slip op. at 9, Add. 27.

The most apposite authorities on this issue are:

- *Becker v. Mayo Found.*, 737 N.W.2d 200 (Minn. 2007)
- *Flour Exch. Bldg. Corp. v. State of Minn.*, 524 N.W.2d 496 (Minn. Ct. App. 1994)
- *Counties of Blue Earth v. Minn. Dep't of Labor & Indus.*, 489 N.W.2d 265 (Minn. Ct. App. 1992)
- Minn. Stat. § 151.21, subd. 4.

#### **STATEMENT OF THE CASE**

The legislature was clear. A purchaser of a generic prescription drug has the right to receive any money the pharmacy saves by dispensing a generic prescription drug in lieu of its brand-name equivalent. "Any difference between acquisition cost to the pharmacist of the drug dispensed and the brand name drug prescribed shall be passed on to the purchaser." Minn. Stat. § 151.21, subd. 4 (emphasis added).

Plaintiffs ("Purchasers") are two Minnesota employee health and welfare benefit plans that pay for prescription drugs dispensed to their beneficiaries. The Purchasers allege that the Defendants ("Defendant Pharmacies") routinely failed to pass on all of the

money the Defendant Pharmacies saved when dispensing a generic prescription drug in lieu of its brand-name equivalent. The Purchasers further allege that the Defendant Pharmacies engaged in a deceptive practice in connection with the sale of merchandise by (1) failing to pass on to the Purchasers any difference between the acquisition cost of the generic prescription drug dispensed and its brand-name equivalent as required by Minn. Stat. § 151.21, subd. 4; and (2) keeping confidential the information that would have allowed the Purchasers to determine they were being overcharged. The Purchasers seek damages and injunctive relief, alleging claims under the CFA, Minn. Stat. § 151.21, subd. 4, and for unjust enrichment.

Holding that the complaint sufficiently alleged a CFA claim to survive a Rule 12 motion, the Court of Appeals explained:

[Plaintiffs'] allegations are sufficiently detailed to survive a rule 12 motion to dismiss. [Plaintiffs] allege specific instances in which they were overcharged; they set forth specific pharmacies, dates, quantities, brand-name acquisition costs, generic acquisition costs, brand-name sales prices, generic sales prices, and overcharge amounts. In sum, the complaint alleges that misrepresentations were made and consumers were damaged thereby. Thus, the complaint is sufficiently detailed to allow [Defendants] to respond to the allegations. [Plaintiffs'] complaint, therefore, meets the requirements set forth in *Grp. Health* and *Wiegand* to establish a legally sufficient claim for relief.

\* \* \*

In sum, given the early stage of the proceedings and the requirement that we liberally construe the CFA in favor of protecting consumers, we conclude that [Plaintiffs] sufficiently pleaded a CFA claim and that the district court erred by dismissing this claim under rule 12.

*Graphic Communications*, slip op. at 17, 20, Add. 35, 38 (citation omitted).

The Defendant Pharmacies petitioned this Court to review the Court of Appeals' decision. The Purchasers cross-petitioned for review of the Court of Appeals' dismissal

of the Purchasers' claims for a cause of action under Minn. Stat. § 151.21, subd. 4 and for unjust enrichment. On July 31, 2013, this Court granted both petitions.

### STATEMENT OF FACTS

The Purchasers filed a 38-page, 126-paragraph First Amended Complaint ("Complaint") setting forth the basis for their claims.<sup>1</sup> In 2010 alone, over 50 million retail prescriptions were filled in Minnesota pharmacies, with total sales exceeding \$2.9 billion. Compl. ¶ 32, App. 6. Most of these sales were of generic prescription drugs. *Id.* ¶ 33. Most generic prescription drug purchases involve a "substitution," where the doctor writes the prescription using the brand name, and the pharmacy dispenses the generic equivalent as a "substitute" for the brand-name drug. *Id.* ¶ 34, App. 6–7.

Since July 28, 2003 (the date to which the Purchasers' claims date back), the Purchasers have bought over 200,000 prescription drugs from the Defendant Pharmacies.

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<sup>1</sup> The Defendant Pharmacies' statement that the First Amended Complaint is the Purchasers' fourth attempt to plead their claims is misleading. The Complaint was amended twice while the case was in federal court. The first amendment clarified that the Complaint did not include prescriptions under the federal Medicare program. The second amendment added examples of generic prescription drug purchases by the Purchasers from the Defendant Pharmacies. Upon remand to the state court for lack of jurisdiction, the two federal court amendments were void. Accordingly, the Purchasers filed a First Amended Complaint in state court alleging the same examples of generic prescription drug purchases pled in federal court.

The First Amended Complaint was the first complaint reviewed by the state court on a motion to dismiss. The Purchasers had no opportunity to amend it to address any perceived pleading deficiencies. At the very least, the trial court "should have specified that the dismissal was without prejudice giving [Purchasers] the opportunity before entry of judgment, to amend the complaint." *Butler v. Pung*, No. CX-92-1033, 1992 WL 340517, at \*1 (Minn. Ct. App. Nov. 12, 1992).

*Id.* ¶ 40, App. 9. Over half of the drugs purchased from the Defendant Pharmacies were generic prescription drugs. *Id.* ¶¶ 36–39, App. 8–9.

The Defendant Pharmacies keep secret their acquisition costs for prescription drugs. As such, the Purchasers cannot independently determine whether the Defendant Pharmacies pass on the savings the Defendant Pharmacies realize by dispensing a generic drug in lieu of its brand-name equivalent. *Id.* ¶ 41, App. 9.

However, based in large part on acquisition cost information provided by a whistleblower pharmacist, the Complaint alleges the Defendant Pharmacies' acquisition costs in 2008 for five generic prescription drugs and their brand-name equivalents. The Complaint also alleges the retail prices at which the Defendant Pharmacies sold these drugs to the Purchasers. With this otherwise secret data, the Purchasers allege hundreds of examples of specific purchases of generic prescription drugs for which the Defendant Pharmacies (1) failed to pass on to the Purchasers any difference between the acquisition cost of the generic prescription drug dispensed and its brand-name equivalent as required by Minn. Stat. § 151.21, subd. 4, and (2) kept confidential the information that would have allowed the Purchasers to determine that those savings had not been passed on to them. *Id.* ¶¶ 42–96, App. 9–28.

Consider just one of the hundreds of examples of overcharges by the Defendant Pharmacies alleged in the Complaint. On March 6, 2008, Plaintiff Graphic Communications Local 1B Health & Welfare Fund "A" ("Local 1B") purchased from Defendant Walgreen Co. ("Walgreens") a four-tablet supply of the generic drug Alendronate, a prescription drug used in the treatment of osteoporosis and other bone

diseases. *Id.* ¶¶ 43, 53, App. 10, 12. Defendant Walgreens acquired the generic drug Alendronate for only \$6.24. *Id.* ¶ 47, App. 10. By contrast, Defendant Walgreens acquired the same quantity of the brand-name equivalent drug (Fosamax) for \$70.72. *Id.* ¶ 46. To pass on the savings the pharmacy realized from dispensing the generic Alendronate in lieu of the brand Fosamax, Defendant Walgreens had to sell the generic Alendronate for at least \$64.48 less than it sold the brand Fosamax (\$70.72 brand acquisition cost – \$6.24 generic acquisition cost = \$64.48 savings to pharmacy from dispensing generic to be passed on to the purchaser). *Id.* ¶¶ 48–49.

Defendant Walgreens did not do so. Local 1B was charged (and paid) \$79.46 for the brand drug Fosamax. *Id.* ¶¶ 51–52, App 10–11. To pass on the \$64.48 in savings that Defendant Walgreens realized from dispensing the generic Alendronate in lieu of the brand Fosamax, the maximum price Local 1B could be charged for the generic Alendronate was \$14.98 (\$79.46 brand sales price – \$64.48 savings in cost from generic = \$14.98 maximum generic price). However, Local 1B was charged and paid \$31.70 for the generic Alendronate, an overcharge of \$16.72 (\$31.70 price paid – \$14.98 maximum

price = \$16.72 overcharge). *Id.* ¶ 53, App. 11. The Complaint alleges hundreds of similar examples. *Id.* ¶¶ 42–96, App 9–28.<sup>2</sup>

There is no reason to believe that the Defendant Pharmacies' deceptive practices with regard to the sale of generic prescription drugs have been limited only to the Purchasers. Rather, the Purchasers believe that every Minnesota business that pays for prescription drug benefits for its employees, every Minnesota governmental unit that pays for prescription drug benefits for its employees (and for beneficiaries of governmental programs such as Medicaid), every health and welfare trust fund that pays for prescription drug benefits for its beneficiaries, and every individual in Minnesota who pays for prescription drugs out of his/her own pocket has been similarly overcharged without their knowledge.

Accordingly, the Purchasers brought their lawsuit both on their own behalf and as a putative class action on behalf of purchasers of generic prescription drugs throughout the state. *Id.* ¶¶ 110–112, App. 31–32. The Purchasers have pleaded three counts for relief: (1) violation of Minn. Stat. § 151.21, subd. 4; (2) violation of the Consumer Fraud

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<sup>2</sup> A result of requiring pharmacies to pass on any savings in cost of generic prescription drugs to purchasers is that the pharmacies' markup for a generic prescription drug cannot be greater than the markup for the brand-name equivalent. Defendant Walgreens' markup on the brand Fosamax was \$8.74 (\$79.46 charged for brand drug – \$70.72 brand acquisition cost = \$8.74 markup). Accordingly, to comply with Minnesota law, Defendant Walgreens' markup on the generic equivalent (Alendronate) could not exceed \$8.74. Since the acquisition cost of Alendronate was \$6.24, Defendant Walgreens could charge no more than \$14.98 (\$8.74 markup + \$6.24 acquisition cost = \$14.98 statutory maximum price) for Alendronate.

Act, Minn. Stat. § 325F.69, actionable under the Private AG Statute, Minn. Stat. § 8.31, subd. 3a; and (3) unjust enrichment. *Id.* ¶¶ 113–125, App. 32–34.

### STANDARD OF REVIEW

"When reviewing a case dismissed pursuant to Minn. R. Civ. P. 12.02(e) for failure to state a claim on which relief can be granted, the question before this court is whether the complaint sets forth a legally sufficient claim for relief." *Hebert v. City of Fifty Lakes*, 744 N.W.2d 226, 229 (Minn. 2008). The facts alleged in the Complaint are taken as true, and Plaintiffs are entitled to the benefit of all reasonable inferences in their favor. *Elzie v. Comm'r Pub. Safety*, 298 N.W.2d 29, 32 (Minn. 1980). A complaint should not be dismissed under Rule 12 "if it is possible on any evidence which might be produced, consistent with the pleader's theory, to grant the relief demanded." *Wiegand*, 683 N.W.2d at 811 (quotation omitted).

When interpreting a statute to determine whether to infer a right to sue under the statute, a court is to give effect to the legislature's intent. *Becker*, 737 N.W.2d at 207, n.4; *Gorman v. Easley*, 257 F.3d 738, 747, n.8 (8th Cir. 2001), *rev'd on other grounds by Barnes v. Gorman*, 536 U.S. 181 (2002) ("When a court 'implies' a cause of action it does not 'create' it, but rather 'discovers' it in an act of statutory construction"). To discern and give effect to the legislature's intent, a court's analysis starts with the language of the statute. *See* Minn. Stat. § 645.16. "Statutes must be construed with reference to the objects sought to be accomplished and that which is implied in a statute is as much a part of it as that which is expressed." *Knopp v. Gutterman*, 102 N.W.2d 689, 695 (Minn. 1960).

## ARGUMENT

### I. INTRODUCTION

The Defendant Pharmacies have systematically overcharged the Purchasers for generic prescription drugs, misrepresenting to the Purchasers the amount that was owed for prescriptions and keeping secret the information that would have allowed the Purchasers to determine they had been overcharged. This is a deceptive practice in connection with the sale of merchandise in violation of the Consumer Fraud Act, for which the Purchasers have an express cause of action pursuant to the Private AG Statute. The Court of Appeals correctly held that the Purchasers sufficiently pled a CFA claim not subject to Rule 12 dismissal, as it is possible that the Purchasers will be able to present evidence at trial, consistent with their theory, by which the trier of fact can conclude the Defendant Pharmacies engaged in conduct that violates the CFA.

The only issue that warrants reversal is the Court of Appeals' effective abrogation of the implied right of action doctrine. Misconstruing this Court's decision in *Becker*, the Court of Appeals held that there is no right of action under Minn. Stat. § 151.21, subd. 4 because "the legislature expressly creates civil liability where it intends to do so" and the legislature did not expressly create a cause of action in Minn. Stat. § 151.21, subd. 4. *Graphic Communications*, slip op. at 9, Add. 27. That has never been the law in Minnesota. That holding should be reversed.

**II. THE COURT OF APPEALS PROPERLY DETERMINED THAT PLAINTIFFS HAVE STATED A CLAIM UNDER RULE 12 FOR VIOLATION OF THE CONSUMER FRAUD ACT.**

**A. PLAINTIFFS HAVE SUFFICIENTLY ALLEGED THAT DEFENDANTS ENGAGED IN DECEPTIVE PRACTICES IN CONNECTION WITH THE SALE OF MERCHANDISE.**

**1. The CFA and Private AG Statute Broadly Define What Conduct Is Actionable.**

The CFA provides, in pertinent part:

**Fraud, misrepresentation, deceptive practices.** The act, use, or employment by any person of any fraud, false pretense, false promise, misrepresentation, misleading statement or deceptive practice, with the intent that others rely thereon in connection with the sale of any merchandise, whether or not any person has in fact been misled, deceived, or damaged thereby, is enjoined.

Minn. Stat. § 325F.69, subd. 1 (underline emphasis added). This Court should honor the broad language used by the legislature in enacting the CFA. *See, e.g., Brua v. Minn. Joint Underwriting Ass'n*, 778 N.W.2d 294, 300 (Minn. 2010)("If the meaning of a statute is unambiguous, we interpret the statute's text according to its plain language").

The language of the Private AG Statute, which provides a cause of action for damages for any person injured by a violation of the CFA, is similarly broad:

In addition to the remedies otherwise provided by law, any person injured by a violation of [the CFA] may bring a civil action and recover damages, together with costs and disbursements, including costs of investigation and reasonable attorney's fees, and receive other equitable relief . . . .

Minn. Stat. § 8.31, subd. 3a (emphasis added).

The plain language of the Private AG Statute unambiguously establishes a direct, express statutory cause of action for violations of the CFA. The express statutory cause

of action under the Private AG Statute is "in addition to" any other remedy otherwise provided by law.<sup>3</sup>

The CFA does not specifically define what constitutes "any fraud, false pretense, false promise, misrepresentation, misleading statement, or deceptive practice." The legislature's decision not to define these terms was deliberate and designed to maximize consumer protection: "[G]iven that the fertility of human invention in devising new schemes of fraud, the CFA could not possibly enumerate all, or even most, of the areas and practices that it covers without severely retarding its broad remedial power to root out fraud in its myriad, nefarious manifestations." *Force v. ITT Hartford Life Ins. & Annuity Ins. Co.*, 4 F. Supp. 2d 843, 859 (D. Minn. 1998)(quotation omitted); *see also St. Paul Fire & Marine Ins. Co. v. Ellis & Ellis*, 262 F.3d 53, 66 (1st Cir. 2001)(standard of conduct under Unfair Trade Practices Act is "notably imprecise" and includes any conduct possessing a "rancid flavor of unfairness"); *Zanakis-Pico v. Cutter Dodge Inc.*, 47 P.23d 1222, 1230 (Haw. 2002)(consumer protection statutes are "constructed in broad language in order to constitute a flexible tool to stop and prevent fraudulent, unfair, or deceptive business practices for the protection of both consumers and honest business men"); *Clement v. St. Charles Nissan Inc.*, 103 S.W.3d 898, 900 (Mo. Ct. App. 2003)(consumer protection statute omitted definition of *deceptive practices* deliberately "in order to prevent evasion by overly meticulous definitions").

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<sup>3</sup> Prior to remand, the Defendant Pharmacies acknowledged before the federal district court that this principle is "unremarkable." *See* Resp. App. 13. ("Plaintiffs make the unremarkable point that they have an independent right to sue for conduct that violates the CFA").

While the legislature deliberately omitted a definition of *deceptive practices* in the CFA to maximize consumer protection, it has provided definitions of *deceptive practices* in other contexts. *See* Minn. Stat. § 72A.20, subd. 18 ("improperly withholding, misappropriating, or converting any money belonging to a policyholder, beneficiary, or other person" is a "deceptive practice or act" in the insurance industry); Minn. Stat. § 80B.05, subd. 1 (failure to disclose a material fact is a "fraudulent, deceptive and manipulative act or practice[ ]" in a corporate takeover); Minn. Stat. § 149A.72, subd. 12 (failure to disclose difference between acquisition cost and price charged for cash advance goods is a "deceptive act or practice" in the funeral industry); Minn. Stat. § 325D.44, subd. 1(13)(a deceptive trade practice is "any [ ] conduct which [ ] creates a likelihood of confusion or misunderstanding"); Minn. Stat. § 325F.63 (unauthorized or excess charges to customers in connection with repairs qualify as a "deceptive practice" and give rise to a CFA claim). The definitions of *deceptive practice* contained in these narrowly-tailored statutes are useful examples of some of the types of conduct the legislature considers deceptive.

The commonly understood meaning of the term *deceptive practice* also supports a broad interpretation of the phrase. *See* Minn. Stat. § 645.08 ("words and phrases are construed according to rules of grammar and according to their common and approved usage"); *see also State v. Heiges*, 806 N.W.2d 1, 15 (Minn. 2011)(resort to dictionary definitions is appropriate to determine the plain and ordinary meaning of words and phrases). The term *deceptive practice* is commonly understood to mean, simply, "conduct that is likely to deceive a consumer acting reasonably under similar

circumstances." Black's Law Dictionary 466 (9th ed. 2009), Resp. App. 23; *see also* <http://www.dictionary.com>, visited 9/29/13 (defining *deceptive* as "apt or tending to deceive; perceptually misleading").

Courts faced with factual allegations similar to those in the Complaint have come to the common sense conclusion that secret overcharges to consumers concerning the price owed for a product are deceptive. *Michigan ex rel. Gurganus v. CVS Caremark Corp.*, No. 299997, 2013 WL 238552 (Mich. Ct. App. Jan. 22, 2013), Resp. App. 24–41, is particularly on point. In *Gurganus*, the Michigan Court of Appeals considered whether the defendant pharmacies' failure to pass on to purchasers the savings the pharmacies realized from dispensing generic prescription drugs, as required by Michigan's analogous generic drug pricing statute, coupled with the defendants keeping confidential the information that would have allowed the plaintiffs to determine they were overcharged, was deceptive or fraudulent conduct under Michigan anti-fraud statutes. The court concluded that such overcharges were actionable:

Material to a pharmacist's entitlement to payment for generic drugs that are dispensed is that the amount charged complies with § 17755(2). Here, defendants' presentation of claims for payment impliedly represents to purchasers and payees that defendants are passing on the savings in cost, if any, when generic drugs are dispensed. However, if plaintiffs' allegations are true, defendants are not actually passing on the savings in cost by concealing material facts regarding the profits that they are realizing from the sale. We conclude that this alleged mechanism for violating § 17755(2) meets the definition of "deceptive" under the plain language of both statutes. More specifically, because the alleged violation of § 17755(2) entails omission of a material fact leading purchasers and payees to believe

the state of affairs is something other than it actually is, defendants are engaging in deceptive, and therefore false, conduct.

*Id.*, at \*14, Resp. App. 40.<sup>4</sup>

Similarly, in *Illinois ex rel. Hartigan v. Stianos*, 574 N.E.2d 1024 (Ill. 1985), the court was faced with the question of whether secret overcharges to consumers constituted actionable "unfair or deceptive acts or practices" under Illinois' Consumer Fraud Act.<sup>5</sup> *See id.* at 576. The defendant merchants were selling various non-prescription drugs to consumers and charging sales tax in excess of the tax authorized by Illinois law. *Id.* The defendants forwarded the required tax to the state, but retained the remaining "tax" collected from consumers, generating additional, unlawful profits for the defendants. *See id.* The court noted that "deceptive acts or practices" is a term "not capable of precise definition" and further observed that "whether a given practice is unfair or deceptive must be determined on a case-by-case basis." *Id.* The court held that the defendants' secret overcharges were deceptive and unfair under the act because they "could aggregate very substantial losses and injury to the consuming public." *Id.* The court further remarked,

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<sup>4</sup> The court in *Gurganus* held that the plaintiffs stated claims under two Michigan anti-fraud statutes but could not maintain a claim under Michigan's Consumer Protection Act because Michigan's Consumer Protection Act has statutory language that exempts regulated industries from Consumer Protection Act claims. *See Gurganus*, 2013 WL 238552, at \*1 fn.1, Resp. App. 25. *Gurganus* is currently on appeal before the Michigan Supreme Court.

<sup>5</sup> Like the CFA, Illinois' Consumer Fraud Act prohibits the use of "unfair or deceptive acts or practices" in connection with "any trade or commerce." 815 Ill. Comp. Stat. 502/2 (2013). The statute also provides specific examples of deceptive practices, but expressly states that the deceptive practices prohibited are not limited to those enumerated in the statute. *Id.*

"[i]t is [ ] unfair to permit the extraction from the consumer of excessive sums under the guise it is a lawful tax." *Id.*

## 2. **The Defendant Pharmacies Engaged In Deceptive Conduct.**

The Defendant Pharmacies' and related *amicus curiae* argue that the Purchasers are "bootstrapping" alleged violations of Minn. Stat. § 151.21, subd. 4 onto the CFA, turning the CFA into a strict liability statute for any failure by a business to comply with any statute or regulation that might relate in any way to a consumer transaction. Defs' Br. at 13. The Defendant Pharmacies fundamentally misconstrue why their conduct is deceptive and actionable under the CFA and Private AG Statute.

The Purchasers do not claim that the Defendant Pharmacies' practice of failing to pass on the money they save by dispensing a generic prescription drug in lieu of its brand-name equivalent is, in and of itself, a deceptive practice and a *per se* violation of the CFA. Rather, the Purchasers assert that the Defendant Pharmacies' failure to pass on this money to the Purchasers, combined with the fact that the information needed to determine whether the savings have been passed on is known only by the Defendant Pharmacies, is a deceptive practice in connection with the sale of merchandise.

Put another way, if the Defendant Pharmacies had wanted to charge prices in excess of those allowed under Minn. Stat. § 151.21, subd. 4 without engaging in a deceptive sales transaction, they could have done so. One way the Defendant Pharmacies could have done so is by disclosing their acquisition costs to the Purchasers. This would have allowed the Purchasers to determine whether they were receiving the money they are entitled to. The Purchasers submit that such conduct should be directly actionable as

a direct violation of Minn. Stat. § 151.21, subd. 4. However, it would not be a deceptive practice actionable under the CFA.

Another way the Defendant Pharmacies could have avoided engaging in deceptive conduct is if they had told the Purchasers "we do not pass on to you the difference between the acquisition cost of the generic drug dispensed compared to its brand-name equivalent." This also would have allowed the Purchasers to know they were not receiving their money from the Defendants, such that the Defendants' failure to pass on that money, while directly actionable as a violation of Minn. Stat. § 151.21, subd. 4, would not have been a deceptive practice.

It is the fact that the Purchasers had no way of knowing they were being overcharged that renders the Defendant Pharmacies' overcharges deceptive. The combination of the Defendant Pharmacies' failure to pass on the money they saved from dispensing the generic version of the drug and the Defendant Pharmacies keeping secret the information that would allow the Purchasers to determine they had not received their money makes these sales deceptive.

The Purchasers are not claiming that the Defendant Pharmacies are under a blanket obligation to disclose their acquisition costs or that merchants in other industries must disclose their acquisition costs in every sales transaction. The Defendant Pharmacies, since they are subject to a unique pricing statute, have a choice. If the Defendant Pharmacies wish to avoid engaging in a deceptive transaction under the CFA, they can do one of three things: (1) pass on to the Purchasers the money the Defendant Pharmacies save from dispensing a generic prescription drug; (2) not keep confidential

the information that would allow the Purchasers to determine that their money had not been passed on to them; or (3) tell the Purchasers that the money the pharmacy saved from dispensing a generic drug had not been passed on to them.

In short, the Purchasers seek to recover countless, secret overcharges by the Defendant Pharmacies over the course of untold numbers of consumer transactions. This is precisely the type of harm that the legislature had in mind when it enacted the CFA and Private AG Statute. *See, e.g., Khoday v. Symantec Corp.*, 858 F. Supp. 2d 1004, 1017 (D. Minn. 2012)("the Private AG Statute is intended to stop those who rip off a large number of citizens"). As the Court of Appeals held:

[Plaintiffs'] allegations are sufficiently detailed to survive a rule 12 motion to dismiss. [Plaintiffs] allege specific instances in which they were overcharged; they set forth specific pharmacies, dates, quantities, brand-name acquisition costs, generic acquisition costs, brand-name sales prices, generic sales prices, and overcharge amounts. In sum, the complaint alleges that misrepresentations were made and consumers were damaged thereby. Thus, the complaint is sufficiently detailed to allow [Defendants] to respond to the allegations. *See, e.g., E-Shops Corp. v. U.S. Bank Nat'l Ass'n*, 678 F.3d 659, 663 (8th Cir. 2012)(stating that the complaint must plead the details of the fraudulent acts). [Plaintiffs'] complaint, therefore, meets the requirements set forth in *Grp. Health* and *Wiegand* to establish a legally sufficient claim for relief.

*Graphic Communications*, slip op. at 17, Add. 35. The trier of fact could reasonably conclude, after the completion of discovery and presentation of evidence at trial, that the Defendant Pharmacies' conduct was deceptive. Accordingly, the Purchasers' CFA claim under the Private AG Statute should be allowed to go forward.

**B. THE CONSUMER FRAUD ACT IS BROADER THAN COMMON LAW FRAUD.**

"[C]onsumer protection laws were not intended to codify the common law; rather, they were intended to broaden the cause of action to counteract the disproportionate bargaining power present in consumer transactions." *State by Humphrey v. Alpine Air Prods.*, 490 N.W.2d 888, 892 (Minn. Ct. App. 1992), *aff'd* 500 N.W.2d 788 (Minn. 1993); *accord Wiegand*, 683 N.W.2d at 812. "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." *Group Health Plan*, 621 N.W.2d at 13 (emphasis in original). This Court has recognized that the CFA "reflect[s] a clear legislative policy encouraging aggressive prosecution of statutory violations." *State by Humphrey v. Philip Morris Inc.*, 551 N.W.2d 490, 495 (Minn. 1996)(emphasis added).

In light of the policies underlying the CFA and the legislature's conscious decision to expand access to the courts in consumer cases, this Court has consistently interpreted the CFA broadly and in favor of protecting consumers. *See Group Health Plan*, 621 N.W.2d at 10 (noting the CFA is "generally very broadly construed to enhance consumer protection" (emphasis added)); *see also Ly v. Nystrom*, 615 N.W.2d 302, 308 (Minn. 2000)(same); *Philip Morris Inc.*, 551 N.W.2d at 496 (same). The Court's decisions have properly favored an application of the CFA that is "broad and flexible." *See Ly*, 615 N.W.2d at 308.

This Court has specifically cautioned against the judiciary limiting the scope and reach of the CFA where the legislature has clearly expressed an intent to maximize consumer protection. *See Group Health Plan*, 621 N.W.2d at 11 ("neither is it our role to narrow the reach [of the CFA] where the legislature has spoken in unequivocally broad terms"); *see also Alpine Air Prods.*, 500 N.W.2d at 790 ("We will not impute to the legislature the strange goal of making it easier to sue for consumer fraud by eliminating elements required at common law, while at the same time insisting on a higher standard of proof.").

The Court of Appeals' decision was entirely consistent with this well-established precedent, the plain language of the CFA, and the long-recognized policies underlying the CFA. As the Court of Appeals held:

Consumer-protection statutes, including the CFA, "are to be liberally construed in favor of protecting consumers." . . . *Nystrom*, 615 N.W.2d at 308 ("We recently observed that the [CFA] 'reflect[s] a clear legislative policy encouraging aggressive prosecution of statutory violations' and thus should be 'generally very broadly construed to enhance consumer protection.'" (quoting *State by Humphrey v. Philip Morris Inc.*, 551 N.W.2d 490, 495–96 (Minn. 1996))). "Consumer protection laws were not intended to codify the common law; rather they were intended to broaden the cause of action to counteract the disproportionate bargaining power present in the consumer transactions." *Alpine Air Prods., Inc.*, 490 N.W.2d at 892.

*Graphic Communications*, slip op. at 11–12, Add. 29–30.

Nevertheless, the Defendant Pharmacies attempt to minimize these principles, and the numerous precedents embodying those principles, as "general observations." Rather than applying the CFA broadly to enhance consumer protection, the Defendant Pharmacies urge this Court to adopt—for the first time—a narrow interpretation of the

CFA with no support in this state's jurisprudence. The Defendant Pharmacies' approach would inject common law requirements into the CFA with no basis in the statutory text. Coupled with the Private AG Statute's "public benefit" requirement,<sup>6</sup> the Defendant Pharmacies' suggested approach would actually make it harder to pursue a claim under the CFA than to sue for fraud at common law.

In addition, the Defendant Pharmacies advocate for *de facto* immunity from CFA claims for any merchant involved in an industry subject to regulation. As discussed further below, this type of "regulatory immunity" is contrary to the plain language of both the CFA and the Private AG Statute. There is no support in Minnesota jurisprudence for the proposition that the plain language of statutes duly enacted by the legislature can be ignored because an industry is regulated by an administrative body.

The Defendant Pharmacies' approach, if adopted, would represent a sea change in this state's jurisprudence. Contrary to prior precedent, the Court would dramatically narrow the scope and effectiveness of the CFA, despite the legislature's unequivocally broad language. This Court has rejected similar invitations in the past. *See, e.g., Group Health Plan*, 621 N.W.2d at 11 (deferring to the legislature's broad choice of words and rejecting defendant's efforts to narrow the scope of who may sue under the CFA). The

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<sup>6</sup> *See, e.g., Ly*, 615 N.W.2d at 314 ("the Private AG Statute applies only to those claimants who demonstrate that their cause of action benefits the public"). The Defendant Pharmacies argued throughout the proceedings below that the Purchasers' claims, despite the duration and magnitude of the Defendant Pharmacies' deceptive pricing practices, would not benefit the public. They have now abandoned the issue, as it is obvious that this action would benefit millions of Minnesotans who have been "ripped off" by the Defendant Pharmacies. *Graphic Communications*, slip op. at 18–20, Add. 36–38.

Court should do so again here and preserve the integrity of the CFA, as enacted by the legislature, by affirming the Court of Appeals' decision.

C. DEFENDANTS' DECEPTIVE CONDUCT IS ACTIONABLE UNDER THE CFA REGARDLESS OF WHETHER PLAINTIFFS HAVE A DIRECT CAUSE OF ACTION UNDER MINN. STAT. § 151.21, SUBD. 4.

The Defendant Pharmacies argue that the Purchasers are precluded from pursuing an express cause of action under the plain language of the CFA and Private AG Statute because the Purchasers supposedly do not have an implied cause of action under Minn. Stat. § 151.21, subd. 4. Defs' Br. at 15–19. Their argument should be rejected.

In enacting the CFA, the legislature used deliberately broad language, prohibiting "[t]he act, use, or employment by any person of any . . . deceptive practice . . . in connection with the sale of any merchandise." Minn. Stat. § 325F.69, subd. 1 (emphasis added). The legislature used similarly broad language when it defined the term *sale* as used in the CFA: "'Sale' means any sale, offer for sale, or attempt to sell any merchandise for any consideration." Minn. Stat. § 325F.68, subd. 4 (emphasis added). By definition, the sale of a generic prescription drug is a "sale of any merchandise" under the CFA. The CFA does not exclude the sale of generic prescription drugs from its scope. Thus, by its plain language, any deceptive practice in connection with the sale of generic prescription drugs is actionable under the CFA. *See* Minn. Stat. § 325F.69, subd. 1.

Had the legislature intended to exclude sales of generic prescription drugs from the CFA, it certainly knew how to do so. The legislature has expressly exempted numerous other industries and products from consumer protection statutes. *See* Minn. Stat. § 325F.53, subd. 2 (exempting certain retail products); *see also* Minn. Stat.

§ 325F.64 (exempting certain home and auto repairs); Minn. Stat. § 325F.662, subd. 3 (exempting certain auto sales); Minn. Stat. § 325F.6644 (exempting commercial vehicles); Minn. Stat. § 325F.755, subd. 5 (exempting sales regulated by the Federal Trade Commission); Minn. Stat. § 325F.755, subd. 6 (exempting certain regulated activities); Minn. Stat. § 325F.80, subd. 4 (exempting certain consumer transactions); Minn. Stat. § 325F.96 (exempting certain rental transactions); Minn. Stat. § 325F.988 (exempting certain goods). Indeed, the legislature has even exempted certain price discounts related to prescription drugs from consumer protection statutes. *See* Minn. Stat. § 325F.784, subd. 4.

The legislature clearly knew how to exempt transactions regulated by the Pharmacy Code from the CFA, but chose not to do so. Instead, the legislature provided a cause of action for any deceptive practice in connection with any sale of any merchandise, which necessarily includes deceptive practices in connection with the sale of generic prescription drugs. *See* Minn. Stat. § 325F.69, subd. 1.

Had the legislature intended to preclude from the Private AG Statute claims involving the sale of generic prescription drugs, it also could have done so. *See, e.g.,* Minn. Stat. § 216H.03, subd. 8 ("the remedies provided by section 8.31, subdivision 3a, do not apply to a violation of this section"). However, the legislature did not preclude transactions involving the sales of generic prescription drugs from the scope of the Private AG Statute.

Similarly, if the legislature had intended to bar lawsuits under the CFA or Private AG Statute in circumstances where the industry or product at issue is subject to

regulation, or where an administrative remedy is available to the plaintiff, the legislature could have done so. Instead, the legislature did precisely the opposite, expressly providing that the right to sue under the Private AG Statute was "in addition to the remedies otherwise provided by law" (such as purported administrative remedies before the Board of Pharmacy). Minn. Stat. § 8.31, subd. 3a (emphasis added).

The Defendant Pharmacies attempt to artificially narrow the scope of the CFA, arguing, "[w]here the legislature wants a violation of another statute to constitute a 'deceptive practice' under the MCFA, it has said so." Defs' Br. at 23. The Defendant Pharmacies then point to a few discrete statutory provisions that expressly state that a violation of their provisions constitutes a *per se* violation of the CFA. Determining certain conduct *per se* unlawful does not make all other conduct lawful. Such an interpretation would ignore the legislature's deliberate use of expansive language in the CFA. *See* Minn. Stat. § 325F.69, subd. 1 (prohibiting "any . . . deceptive practice" in connection with the sale of goods); *see also Force*, 4 F. Supp. 2d at 859 ("the CFA could not possibly enumerate all, or even most, of the areas and practices it covers without severely retarding its broad remedial power").

In any event, the Purchasers are not alleging that a violation of Minn. Stat. § 151.21, subd. 4 constitutes a *per se* violation of the CFA. Rather, it is the Defendant Pharmacies' practice of overcharging the Purchasers in violation of Minn. Stat. § 151.21, subd. 4, given the fact that the Defendant Pharmacies keep secret the facts from which those overcharges can be determined, that renders the Defendant Pharmacies' conduct deceptive.

Numerous courts—including courts applying the CFA—have recognized that conduct that violates consumer protection statutes can be actionable even if a related underlying statute does not itself provide a cause of action. See *Parkhill v. Minn. Mut. Life Ins. Co.*, 995 F. Supp. 983, 988–99 (D. Minn. 1998)(acknowledging the CFA's broad language and allowing a CFA claim to proceed despite the related underlying statute not providing a cause of action); *Laysar Inc. v. State Farm Mut. Auto. Ins. Co.*, No. Civ. 04-4584, 2005 WL 2063929, at \*1–\*2 (D. Minn. Aug. 25, 2005)(rejecting argument that CFA claim based on misleading auto insurance policies was barred because the Minnesota Unfair Claims Practices Act did not provide a private cause of action); *Blackwood v. Wells Fargo Bank N.A.*, No. 10-10483, 2011 WL 1561024, at \*4 (D. Mass. April 22, 2011)("Even where a statute does not provide for a private remedy, [the Massachusetts consumer protection statute] is the appropriate avenue through which the plaintiff may seek a remedy for the violation thereof"); *Perez v. Rent-A-Center Inc.*, 892 A.2d 1255, 1275 (N.J. 2006)(permitting claim under New Jersey consumer protection statute despite a detailed administrative scheme governing the rent-to-buy industry because the consumer protection statute provisions were "in addition to and cumulative of any other right, remedy"); *Kasky v. Nike Inc.*, 45 P.3d 243, 249 (Cal. 2002)("a private plaintiff may bring a UCL action even when the conduct alleged to constitute unfair competition violates a statute for the direct enforcement of which there is no private right of action"); *State ex rel Gurganus*, No. 299997, 2013 WL 238552, at \*14, Resp. App. 37 (Mich. App. Jan. 22, 2013)(lawsuit alleging deceptive practices in connection with

generic prescription drug sales could proceed under Michigan anti-fraud statutes despite the lack of a direct cause of action under Michigan's generic drug pricing statute).

The Defendant Pharmacies fail to identify a single case limiting the CFA or the Private AG Statute in the manner they propose. Nevertheless, they argue that "the Court of Appeals has previously and repeatedly held that a plaintiff may not bootstrap an alleged violation of a regulatory statute that lacks a private right of action into a common law claim or to a CFA claim, because doing so circumvents legislative intent to provide remedies other than a private right of action." Defs' Br. at 17 (emphasis added). As purported support for this assertion, the Defendant Pharmacies cite *Schermer v. State Farm & Cas. Ins. Co.*, 702 N.W.2d 898 (Minn. Ct. App. 2005), *aff'd on other grounds*, 721 N.W.2d 307 (Minn. 2006); *Olson v. Moorhead Country Club*, 568 N.W.2d 871 (Minn. Ct. App. 1997); and *Palmer v. Ill. Farmers Ins. Co.*, 666 F.3d 1081 (8th Cir. 2012). They are wrong.

Each of those cases considered whether a common law claim (and only a common law claim) can be based on the violation of an underlying statute providing no cause of action.<sup>7</sup> They did not consider the question at issue in this case: namely, whether an express cause of action under the CFA and Private AG Statute can somehow be abrogated by the purported lack of an implied cause of action under another statute.

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<sup>7</sup> See *Schermer*, 702 N.W.2d at 905 ("a litigant cannot directly sue under Minn. Stat. § 72A.20, subd. 13, or use an alleged violation of this statute to prove elements of a common law claim"); *Olson*, 568 N.W.2d at 875 (common law conversion claim could not be based on violation of the Minnesota Fair Labor Standards Act); *Palmer*, 666 F.3d at 1086 (breach of contract claim barred where it was based on a violation of Minnesota's insurance statutes, which did not provide a cause of action).

Those cases have no application here, where the CFA and Private AG Statute unequivocally provide the Purchasers with an express cause of action in addition to any other remedies the Purchasers may have.

This Court should not ignore the plain language of the CFA and Private AG Statute. The Purchasers have the right to sue under the CFA and Private AG Statute in addition to any other remedies they otherwise have.

**D. THE BOARD OF PHARMACY'S ROLE IN REGULATING THE PRACTICE OF PHARMACY DOES NOT PRECLUDE PLAINTIFFS' CFA CLAIM.**

The Defendant Pharmacies' and related *amicus* briefs also argue that the Board of Pharmacy ("BOP") has "primary jurisdiction" to address the allegations in the Purchasers' Complaint and that the Purchasers' Complaint should be dismissed because it would somehow interfere with the BOP's regulatory authority. Specifically, the Defendant Pharmacies point to (1) the practice of pharmacy as a "highly regulated industry"; (2) the ability of the BOP to discipline pharmacists that fail to comply with Minnesota pharmacy laws; and (3) the attorney general's ability to seek an injunction on behalf of the BOP, as somehow evidencing legislative intent that the Purchasers not be allowed to maintain their lawsuit. Defs' Br. at 17–19.

Minnesota courts have properly refused to recognize the doctrine of "primary jurisdiction" as a judicially created exception to the express statutory provisions in the CFA and Private AG Statute. Had the legislature been concerned about CFA claims under the Private AG Statute interfering with the role of the BOP in regulating the practice of pharmacy, it could have exempted sales transactions governed by the

Pharmacy Code, and its associated regulations, from the CFA and Private AG Statute. The legislature chose not to carve out an exception in the CFA or Private AG Statute for sales of prescription drugs. It would be an improper usurpation of the legislature's function for this Court to create exceptions to the CFA and Private AG Statute where the legislature has chosen not to.

Several courts have expressly rejected the precise arguments presented by the Defendant Pharmacies and *amicus curiae* on this issue. In *Force* the court considered whether the plaintiffs' CFA claim was precluded by virtue of the fact that the related statute underlying the plaintiffs' claims, the Insurance Trade Practices Act ("Insurance Act"), did not provide for a private cause of action. *See Force*, 4 F. Supp. 2d at 856. Like the Defendant Pharmacies, the defendant in *Force* cited *Morris v. Am. Family Mutual Ins. Co.*, 386 N.W.2d 233 (Minn. 1986), and argued that the plaintiffs' CFA claim should have been barred because the legislature supposedly intended to comprehensively regulate the insurance industry by way of enacting the Insurance Act. *See id.*

The *Force* court rejected this argument and correctly observed that *Morris* is not on point because *Morris* did not involve the doctrine of primary jurisdiction and did not involve the CFA: "*Morris*, however, is not as broad as [defendant] asserts, and holds only that no private cause of action exists against an insurer under the Minnesota Unfair Claims Practices Act." *Id.* (italics in original, underlined emphasis added); *accord Parkhill*, 995 F. Supp. at 998–99 (allowing CFA claim to proceed, despite the fact that the related underlying statute, the Unfair Claims Practices Act, regulated the insurance industry and did not provide a private cause of action). As *Force* and *Parkhill* concluded,

the Defendant Pharmacies' "primary jurisdiction" arguments are baseless and directly contrary to the plain language of the CFA and Private AG Statute.

Moreover, the Complaint does not interfere with any BOP regulation. Despite the generic drug pricing statute being passed over thirty years ago, not a single BOP regulation relates in any way to the generic drug pricing provision in Minn. Stat. § 151.21, subd. 4. *See* Minn. R. 6800.0100–9954. This is because the generic drug pricing statute is a consumer protection statute—not a regulatory statute governing technical issues concerning the practice of pharmacy within the specialized understanding of the BOP. The statute was proposed in 1975 by the Subcommittee on Consumer Protection of the Commerce and Economic Development Committee. *Resp. App.* 42–48. The statute was not proposed by the Committee on Health and Welfare that conducts hearings and proposes bills governing the regulation of pharmacies.

The Defendant Pharmacies are inviting the judiciary to usurp the role of the legislature and create a new "preliminary jurisdiction" exception to the plain language of the CFA and Private AG Statute. The Court should decline to do so.

**E. DEFENDANTS' DECEPTIVE PRACTICES IN CONNECTION WITH THE SALE OF MERCHANDISE ARE ACTIONABLE UNDER THE CFA, EVEN IF CONSIDERED "OMISSIONS."**

The Defendant Pharmacies argue that they did not make affirmative misrepresentations and that any omissions they made are not actionable under the CFA because there was no duty for them to disclose acquisition cost information to the Purchasers. *Defs' Br.* at 28–41. This argument by the Defendant Pharmacies both

misstates the applicable standard under the CFA and mischaracterizes the Defendant Pharmacies' actions alleged in the Complaint.

As a threshold matter, the CFA, by its plain language, prohibits many other practices than just affirmative misrepresentations. The CFA prohibits "the act, use, or employment by any person of any fraud, false pretense, false promise, misrepresentation, misleading statement or deceptive practice" in connection with the sale of goods. Minn. Stat. § 325F.69, subd. 1 (emphasis added). The plain language of the CFA does not say there must have been an affirmative statement by the Defendant Pharmacies for their conduct to be actionable. The Defendant Pharmacies' proposed interpretation is too narrow. It would read out of the CFA actions for any (1) fraud; (2) false pretense; (3) false promise; (4) misleading statement; or (5) deceptive practice in connection with the sale of goods that does not meet their restrictive definition.

Second, the Defendant Pharmacies are incorrect in asserting they made no affirmative misrepresentation to the Purchasers. The Defendant Pharmacies affirmatively represented the price owed to them by the Purchasers for the generic prescription drugs dispensed. This was a misrepresentation of the amount actually owed to the Defendant Pharmacies, as the price represented as due and owing failed to pass back to the Purchasers the money the Defendant Pharmacies saved from dispensing the generic drug in lieu of the brand-name equivalent as required by Minn. Stat. § 151.21, subd. 4. *See Downey v. Frey*, 130 N.W.2d 349, 352 (Minn. 1964)(a person may assume that another will obey the law and perform his duty); *see also Unbank Co. v. Wittaker-Gomez*, 438 N.W.2d 382, 385 (Minn. Ct. App. 1989)(same).

Undoubtedly, the price presented by the Defendant Pharmacies for payment by the Purchasers was part of a deceptive practice in connection with the sale of generic prescription drugs. The trier of fact (after the completion of discovery) could reasonably conclude that the Defendant Pharmacies' generic prescription drug pricing practices were deceptive. Defendants acknowledge that the law has long held that "one who speaks must say enough to prevent his words from misleading the other party." Defs' Br. at 37. The Defendant Pharmacies failed to do so.

Even if this Court labels the Defendant Pharmacies' misrepresentations as "omissions," they are still actionable under the CFA. The Court of Appeals properly concluded that the Defendant Pharmacies' practices in connection with the sale of generic prescription drugs to the Purchasers were deceptive under a "material omission" theory:

A CFA claim may be based on a material omission that renders the sales transaction deceptive or misleading. *See Khoday v. Symantec Corp.*, 858 F. Supp. 2d 1004, 1018 (D. Minn. 2012) (stating that the CFA is "broader than common law fraud and support[s] omissions as violations when they are material and naturally affect consumers' conduct). In *Minn. ex rel. Hatch v. Fleet Mortg. Corp.*, the defendants argued that an omission can only give rise to a claim of misrepresentation where there is a duty to disclose the allegedly omitted information. 158 F. Supp. 2d 962, 966-67 (D. Minn. 2001). The court rejected this argument, stating the following:

The cases relied upon for this proposition concern common law fraud and not state consumer protection statutes. The [CFA is] broader than common law fraud and support[s] omissions as violations. While there is no Minnesota case authority directly on point, other courts hold that while a duty to disclose may be required by common law fraud/misrepresentation, it is not required for liability under more broadly drafted consumer protection statutes. *See V.S.H. Realty v. Texaco, Inc.*, 757 F.2d 411, 417 (1st Cir. 1985); *Connick v. Suzuki Motor Co.*, 675 N.E.2d 584, 595 (Ill.

1996). In such situations, the omission must be material, see 757 F.2d at 417, 675 N.E.2d at 595, meaning it must naturally affect the person's decision or conduct, *Yost v. Millhouse*, 373 N.W.2d 826, 830 (Minn. App. 1985).

*Id.* at 967 (citations omitted).

\* \* \*

Because this is a consumer-fraud action, we conclude that, at this stage of the litigation, [Plaintiffs'] complaint need only allege that [Defendants'] failure to disclose acquisition costs and subsequent overcharges were material omissions.

*Graphic Communications*, slip op. at 13–14, Add. 31–32.

Other courts have also concluded that the broad language of the CFA plainly prohibits material omissions. "While a duty to disclose may be required by common law fraud/misrepresentation, it is not required for liability under more broadly drafted consumer protection statutes." *Minn. ex rel. Hatch v. Fleet Mortg. Corp.*, 158 F. Supp. 2d 962, 967 (D. Minn. 2001). Rather, under the CFA "the actionable misrepresentation or omission may occur through silence 'if there is . . . an unequal access to information.'" *In re Prof'l Fin. Mgmt. Ltd.*, 703 F. Supp. 1388, 1397 (D. Minn. 1989)(emphasis added)(quotation omitted); *see also Khoday*, 858 F. Supp. 2d at 1018 (a CFA claim may be based on failure to disclose "'special knowledge' of material facts to which [a consumer does] not have access").

The information the Purchasers need to know to assess whether the Defendant Pharmacies have passed on the money the Defendant Pharmacies saved by dispensing a generic prescription drug is solely in the possession of the Defendant Pharmacies. Compl. ¶ 41, App. 9. This gives rise to a CFA claim. *See Fleet Mortg.*, 158 F. Supp. 2d at 967; *see also In re Prof'l Fin. Mgmt.*, 703 F. Supp. at 1397; *The Kinetic Co. v.*

*Medtronic Inc.*, 672 F. Supp. 2d 933, 945 (D. Minn. 2009)(allowing CFA complaint to proceed where defendant allegedly concealed facts relating to defective medical devices, causing self-insured employers to incur increased costs); *Khoday*, 858 F. Supp. 2d at 1018 (allegations that defendant failed to disclose material facts and had "special knowledge of material facts to which Plaintiffs did not have access" sufficient to state claim under CFA).

The cases cited by the Defendant Pharmacies on this issue are easily distinguishable. The Defendant Pharmacies cite numerous cases involving arm's length transactions between parties with relatively equal access to information. *See, e.g.*, Defs' Br. at 38–39. The Purchasers do not dispute that parties to an arm's length transaction with relatively equal access to information generally do not have an obligation to disclose additional information concerning the sales transaction to one another. That is because the failure to disclose additional information in these situations does not render the sales transaction deceptive or misleading.

Of course, the facts at issue in the Complaint are completely different. Here the Defendant Pharmacies' practice of overcharging the Purchasers for generic prescription drugs and keeping secret from the Purchasers the facts from which the Purchasers could discover they were being overcharged renders the Defendant Pharmacies' conduct deceptive. The Defendant Pharmacies have sole access to the acquisition cost information that would allow the Purchasers to evaluate whether the Defendant Pharmacies passed on the savings from the generic prescription drug dispensed, the Defendant Pharmacies know they are violating the law, and the Defendant Pharmacies

know that the Purchasers have no way of knowing that fact. This is a classic situation of the Defendant Pharmacies having "special knowledge of material facts to which the other party has access" that places an obligation on the Defendant Pharmacies to disclose this information (if they wish to overcharge the Purchasers and not have those overcharges be deceptive). *Boubelik v. Liberty State Bank*, 553 N.W.2d 393, 400 (Min. 1996)("a duty to disclose exists if one party has special knowledge of material facts to which the other party does not have access"). Even the Defendant Pharmacies acknowledge this established legal principle. Defs' Br. at 37.

**F. THERE IS AN OBVIOUS CAUSAL NEXUS BETWEEN THE DEFENDANTS' DECEPTIVE CONDUCT AND THE PLAINTIFFS' DAMAGES.**

The Court of Appeals correctly concluded that the Complaint alleges sufficient facts to demonstrate, at the pleadings stage, a plausible causal connection between the Defendant Pharmacies' misleading conduct—secretly failing to pass on to Purchasers the money the Defendant Pharmacies saved from dispensing generic prescription drugs—and the Purchasers' damages—overpayment for those drugs:

We conclude that the alleged chain of causation here is similarly uncomplicated and that *Kinetic* is analogous. [Plaintiffs] allege that [Defendants] kept secret from the public their acquisition costs for generic prescription drugs and that, since 2003, [Defendants] overcharged for generic prescription drugs by not passing on the difference between the acquisition cost of the brand-name drug prescribed and the generic drug dispensed, as required by statute. And because [Defendants] neither disclosed their acquisition costs, nor ceased selling the generic prescription drugs at inflated prices, [Plaintiffs] continued to pay inflated prices for generic prescription drugs without knowing they were being overcharged in violation of Minnesota law. [Plaintiffs] allege that "[Defendants] intended that [Plaintiffs] would rely on such fraudulent, misleading, or deceptive practices in connection with the sale of merchandise: namely, generic prescription drugs."

\* \* \*

We also reject [Defendants'] argument that the complaint fails because it does not allege how [Plaintiffs] would have acted differently. As the Minnesota Supreme Court stated in *Grp. Health* and later reaffirmed in *Wiegand*, in the context of a rule 12 motion to dismiss, [Plaintiffs] are not required to show direct evidence of reliance by individual consumers. 683 N.W.2d 811, 621 N.W.2d at 13. It is enough to allege that [Defendants] violated the CFA and that [Plaintiffs] were damaged—in this case, overcharged—as a result.

*Graphic Communications*, slip op. at 17–18, Add. 35–36.

This Court has repeatedly recognized the legislature's intent to make it easier to assert claims under the CFA than at common law. Consistent with this intent, the Court has stated that a plaintiff asserting a CFA claim "need only plead that the defendant engaged in conduct prohibited by the [consumer protection] statutes and that the plaintiff was damaged thereby." *Group Health Plan*, 621 N.W.2d at 12; *see also Wiegand*, 683 N.W.2d at 811 (reversing order dismissing CFA claim where it remained possible for plaintiff to present evidence demonstrating a causal nexus).<sup>8</sup> "Allegations that the plaintiff relied on the defendant's conduct are not required to plead a violation [of the CFA]." *Group Health Plan*, 621 N.W.2d at 12.

The CFA does not require strict proof of direct causation or any particular manner of proof. *See, e.g., id.* at 14. It certainly does not require detailed pleading with respect

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<sup>8</sup> In an effort to impose additional, artificial burdens on a plaintiff asserting a CFA claim, the Defendant Pharmacies argue that "[a] plaintiff must be able to allege that someone relied upon an alleged misstatement or omission in some way to the detriment of the plaintiff in order to state a causal nexus." Defs' Br. at 44. As support for this proposition—which is directly contradicted by this Court's CFA jurisprudence—the Defendant Pharmacies cite *Royal Realty Co. v. Levin*, 69 N.W. 2d 667, 670–71 (Minn. 1955). *Royal Realty* predates the CFA by nearly ten years and applied more burdensome and inapplicable standards governing common law fraud claims.

to causation. *See id.* at 12 (noting that a plaintiff need only allege conduct violating the CFA and that plaintiff was damaged as a result). "Nor is 'injury' limited to those who have purchased a defendant's goods; the [Private AG Statute] authorizes a private cause of action for 'any party injured directly or indirectly by violations of the consumer protection statutes." *Medtronic Inc.*, 672 F. Supp. 2d at 945 (quoting statutory language)(emphasis added).

The Complaint alleges the Defendant Pharmacies (1) failed to pass on to Purchasers all of the money the Defendant Pharmacies saved from dispensing generic prescription drugs and (2) kept confidential the information that would have allowed the Purchasers to determine that the Defendant Pharmacies had kept the Purchasers' money. Since the Purchasers paid for these generic prescription drugs on behalf of their plan participants, there is an obvious "causal nexus" between the Defendant Pharmacies' deceptive trade practices (failure to disclose generic prescription drug overcharges) and the Purchasers' damages (overpayment for those generic prescription drugs).

If the Purchasers had been provided with information allowing them to determine that they were being overcharged by the Defendant Pharmacies, they obviously would have either (1) demanded a lower price that passed their money back to them; or (2) required that plan participants have their prescriptions filled at a different pharmacy that passed on that money. At a minimum, the Purchasers would have had the opportunity to avoid paying the systematic overcharges imposed by the Defendant Pharmacies. "[T]here is nothing remote, speculative, or hypothetical about it." *Medtronic*, 672 F. Supp. 2d at 940–42, 946 (finding self-insured employer demonstrated a causal nexus

under the CFA where it incurred increased expenses related to employee healthcare benefits resulting from defendant's misleading omissions). To conclude otherwise would deny the Purchasers the benefit of all reasonable inferences, as required at this early stage in the case, and would ignore "real financial injuries occurring in the real world." *See Elzie*, 298 N.W.2d at 32 (a plaintiff is entitled to the benefit of all reasonable inferences on a motion to dismiss); *Medtronic*, 672 F. Supp. 2d. at 940.

**G. ALLOWING PLAINTIFFS' CONSUMER FRAUD ACT CLAIM TO PROCEED WILL NOT "OPEN THE FLOODGATES" TO ADDITIONAL CLAIMS.**

The Court of Appeals also properly rejected the argument that allowing Plaintiffs' CFA claim to proceed would somehow "open the floodgates" to a host of claims against Minnesota businesses:

The district court concluded that finding an actionable claim based on undisclosed acquisition costs "would open the floodgates to [CFA] claims based on a merchant's failure to disclose acquisition costs in connection with any consumer transaction." In reaching this conclusion, the district court cited *In re Mex. Money Transfer Litig.*, 267 F.3d 743, 749 (7th Cir. 2001), which states, "since when is failure to disclose the precise difference between wholesale and retail prices for any commodity 'fraud'? . . . Neiman Marcus does not tell customers what it paid for the clothes they buy, nor need an auto dealer reveal rebates and incentives it receives to sell cars." But *In re Mex. Money Transfer Litig.* did not involve an underlying statute that requires merchants to pass on its cost savings to consumers. 267 F.3d at 747-48. Nor is Neiman Marcus required by statute to pass on to customers the savings it realizes when purchasing clothes from cheaper suppliers. We thus conclude that the district court's "floodgates" analysis is unpersuasive.

*Graphic Communications*, slip op. at 15, Add. 33.

In other words, in evaluating whether conduct is actionable under the CFA, context matters. Here, the Defendant Pharmacies' conduct of failing to pass on to the

Purchasers all of the money the Defendant Pharmacies saved by dispensing generic prescription drugs, while keeping secret the information that would allow the Purchasers to determine they had been overcharged, is deceptive. In other industries, businesses are not required to pass on to consumers the savings the business recognizes from acquiring one version of a product in lieu of another.

As the Court of Appeals recognized, the allegations in the Complaint relate to the core of the sales transaction—the price paid by the Purchasers for the goods being sold by the Defendant Pharmacies. The deceptive practices alleged in this case do not relate to a technical or tangential issue concerning the nature of the goods sold, but rather to the very essence of the sales transaction—the price.

Moreover, there must be some fraud, false pretense, false promise, misrepresentation, misstatement, or deception in connection with the sale of merchandise before that conduct is actionable under the CFA. The bare-bones, incomplete hypotheticals provided by the Defendant Pharmacies and related *amici* are devoid of the context that is needed to know whether the described conduct would be deceptive.

This case must be decided, not on speculative hypotheticals, but on the facts before this Court in this case. Here, the Purchasers have no information by which they can independently assess whether they are receiving the money the Defendant Pharmacies saved by dispensing a generic prescription drug in lieu of its brand-name equivalent. Here, the Purchasers are at the sole whim of the Defendant Pharmacies to pass on those savings, and the Defendant Pharmacies know it. Here, the Defendant Pharmacies use their undeniable informational disparity to take advantage of their

unwitting customers. When evaluating the facts and context of this case, the Defendant Pharmacies' deceptive conduct clearly falls within the core of that prohibited by the CFA.

Finally, the "public benefit" requirement for CFA actions under the Private AG Statute limits the possibility of Minnesota businesses being subject to CFA liability for isolated situations involving an individual consumer. As one United States District Court judge for the District of Minnesota aptly put it, "the Private AG Statute is intended to stop those who rip off a large number of citizens." *Khoday*, 858 F. Supp. at 1017 (D. Minn. 2012). This is exactly what the Purchasers allege has taken place here.

**H. THE EXCUSES OFFERED BY DEFENDANTS AND *AMICUS CURIAE* FOR DECEIVING PURCHASERS OF GENERIC PRESCRIPTION DRUGS SHOULD NOT BE COUNTENANCED BY THE COURT.**

The Defendant Pharmacies suggest that they should be excused from the obligation to pass on to Purchasers any savings the pharmacy recognizes from dispensing a generic prescription drug in lieu of its brand-name equivalent because "the situation has changed dramatically" since the statute was enacted. Defs' Br. at 6. One of the *amici* similarly suggests that the Defendant Pharmacies should be excused from passing on these savings to the Purchasers because doing so is "impractical and unreasonable because consumer and third-party-payer prices are determined by contract . . . ." Nat'l Ass'n Chain Drug Stores *amicus* Br. at 13. The underlying suggestion is that the generic drug pricing statute is archaic and that passing on the savings in cost from generic prescription drugs would be either impossible or economically devastating to pharmacies.

First, there is absolutely no basis for the argument that the Defendant Pharmacies are excused from passing on these savings to Purchasers because the statute is allegedly

outdated or has not been the subject of litigation in the past. "It would be a novel rule indeed which justified misconduct on the part of the defender against state laws . . . on the ground that such statute . . . had fallen into what Grover Cleveland would call 'innocuous desuetude.' . . . There can be no vested right in disrespect for the law." *Moskovitz v. City of St. Paul*, 16 N.W.2d 745, 750 (Minn. 1944).

Second, the suggestion that it would be economically devastating to the Defendant Pharmacies to pass on these savings is nonsensical. The statute allows pharmacies to make the exact same gross profit on a generic prescription drug as on the branded version of the drug—it simply prohibits pharmacies from making a greater profit when a generic prescription drug is dispensed. Indeed, the statute allows pharmacies to make a much greater percentage profit on a generic prescription drug than on the branded version of the drug. For example, for a brand-name drug that the pharmacy acquires for \$40 and sells for \$50 (a \$10 profit), if the generic drug only costs \$2 for the pharmacy to acquire, it can sell the generic for up to \$12—the same \$10 profit, but 20 times the return on investment compared to sales of the brand-name drug.

Moreover, pharmacies do not necessarily have to lower their retail prices for generic prescription drugs to pass on the savings required by the statute. The statute simply requires that any savings the pharmacy receives from dispensing a generic prescription drug has to be passed on to the purchaser. A pharmacy could potentially comply with the statute by increasing its retail price for brand-name drugs and "rebalancing" its profit margins so that the pharmacy makes an identical profit regardless of whether the prescription drug is dispensed in its brand or generic format.

Third, the argument that it is impossible to comply with the statute because exact acquisition costs are impossible to calculate is belied by the facts. The whistleblower who provided the acquisition cost data that forms part of the basis for the lawsuit had access to her pharmacy's acquisition cost information through her pharmacy's point-of-sale computer system. *See* Resp. App. 59, 101–102. It is ridiculous to suggest that the Defendant Pharmacies, many of whom are among the largest companies in the United States, do not understand how much they paid to acquire the prescription drugs they are selling.

Fourth, that the Defendant Pharmacies may have contracts governing prices for generic prescription drug pricing does not relieve them of their statutory obligation to pass on any savings they realize when dispensing a generic prescription drug in lieu of its brand-name equivalent. First, there is no support for the proposition that a pharmacy can contract out of its statutory obligation to pass on these savings to purchasers. Moreover, the Defendant Pharmacies can easily sell generic prescription drugs for the lower of the contractually negotiated price or the statutory maximum price.

Finally, none of the so-called "facts" outside the record referenced by the Defendant Pharmacies and *amici* are properly considered by the Court on a Rule 12 motion to dismiss. They go far beyond information of public record of which the Court can take judicial notice under Minn. R. Evid. 201. Discovery will determine exactly what the Defendant Pharmacies' acquisition costs were and the exact amounts by which the Purchasers have been overcharged. For purposes of the Rule 12 motion to dismiss that is

at issue in this appeal, the Purchasers' factual allegations in the Complaint must be accepted as true.

"It is possible on any evidence which might be produced, consistent with the pleader's theory," for the trier of fact to conclude that the Defendant Pharmacies engaged in deceptive practices in connection with the sale of generic prescription drugs. *Wiegand*, 683 N.W.2d at 811. Accordingly, the Court of Appeals' holding that the Purchasers have stated a claim under the CFA, actionable under the Private AG Statute, should be affirmed.

**III. PLAINTIFFS SHOULD BE ALLOWED TO BRING A DIRECT ACTION FOR VIOLATION OF MINN. STAT. § 151.21, SUBD. 4.**

"Any difference between acquisition cost to the pharmacist of the drug dispensed and the brand name drug prescribed shall be passed on to the purchaser." Minn. Stat. § 151.21, subd. 4. Systematically violating this statute, the Defendant Pharmacies overcharge purchasers of generic prescription drugs, misappropriating for themselves the money that the legislature intended the Purchasers to receive.

Minn. Stat. § 151.21, subd. 4 does not include an express cause of action. However, that is not dispositive of whether the Purchasers may sue under Minn. Stat. § 151.21, subd. 4, as this Court has recognized that a plaintiff may have an implied right of action if this is what the legislature intended.<sup>9</sup> *See Becker*, 737 N.W.2d at 207 n.4

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<sup>9</sup> As explained above, the Purchasers have an independent express action under the CFA for the Defendant Pharmacies' practice of overcharging the Purchasers for generic prescription drugs and keeping secret those overcharges.

(recognizing that legislative intent as to whether a cause of action should be implied is dispositive).

To determine whether inferring a right of action is consistent with legislative intent, courts in this state (and throughout the country) evaluate the following three factors: "(1) whether the plaintiff belongs to the class for whose benefit the statute was enacted; (2) whether the legislature indicated an intent to create or deny a remedy; (3) whether implying a remedy would be consistent with the underlying purposes of the legislative enactment." *Flour Exch. Bldg.*, 524 N.W.2d at 499; *Counties of Blue Earth*, 489 N.W.2d at 268.<sup>10</sup>

Few statutes will meet these factors. This statute does. There is no legitimate dispute that the legislature, by mandating that the savings in cost of generic prescription drugs be passed to purchasers, enacted Minn. Stat. § 151.21, subd. 4 for the specific benefit of generic prescription drug purchasers. Nor is there any legitimate dispute that allowing purchasers to sue is consistent with and effectuates the underlying purposes of the statute: that generic prescription drug purchasers receive any money that pharmacies save from dispensing a generic prescription drug in lieu of its brand-name equivalent.

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<sup>10</sup> In *Becker* this Court did not apply these three factors because, in reviewing the particular statute before it, the legislature's intent to deny a civil action was clear. However, *Becker* did not abandon the three factors as guides to discerning the legislature's intent. Since *Becker* was decided, the Court of Appeals has continued to apply these factors. See, e.g., *Dukowitz v. Hannon Sec. Serv.*, 815 N.W.2d 848 (Minn. Ct. App. 2012); *Minnwest Bank v. Molenaar*, 2009 WL 3172164 (Minn Ct. App. Oct. 6, 2009).

Whether a civil action should be inferred comes down to this question: Despite having granted purchasers of generic prescription drugs the right to specific monetary savings, did the legislature nonetheless intend to deny purchasers the ability to sue in court to recover those savings by creating a Board of Pharmacy with no power to secure those savings for purchasers? The answer is clearly no. Resolving legal disputes over property rights is a core judicial function that takes place in courts. The legislature knows that. Absent the creation of an alternative mechanism for purchasers to recover the savings to which they are legally entitled, it is unreasonable to infer that the legislature intended to deny purchasers the right to sue in court to recover those savings.

No Minnesota court has had to decide whether a right of action should be inferred from a statute like Minn. Stat. § 151.21, subd. 4. This is not a case where the statute directs a government agent to perform some duty of which the plaintiff was, at most, an incidental beneficiary. *See, e.g., Flour Exch. Bldg.*, 524 N.W.2d at 498–99 (statute directed agency to perform act, from which plaintiff derived only "an incidental benefit"). Nor is this a case where a statute regulates certain conduct, but confers no direct, beneficial right on the plaintiff. *See, e.g., Haage v. Steies*, 555 N.W.2d 7, 8 (Minn. Ct. App. 1996)(no right of action for violation of regulatory statute providing that "[n]o person shall engage in . . . occupation of an entertainment agency without procuring a license"). In contrast, Minn. Stat. § 151.21, subd. 4 creates a direct beneficial right for purchasers of generic prescription drugs to receive certain specific monies from the Defendant Pharmacies, but provides no administrative mechanism for the Purchasers to recover their money.

Where the legislature creates a direct, beneficial right in a defined class of people, it would be unreasonable to conclude that the legislature does not want a member of that class to have a means to secure the right conferred. Denying purchasers of generic prescription drugs an implied action to sue to recover the monies owed to them would fail to effectuate, and indeed undermine, the legislature's intent in enacting Minn. Stat. § 151.21, subd. 4.

A. **THE COURT OF APPEALS ERRED IN HOLDING THAT A CIVIL ACTION EXISTS ONLY IF IT IS EXPRESSLY CREATED BY THE LEGISLATURE.**

Selectively quoting language from *Becker* out of context, the Court of Appeals held the legislature "expressly creates civil liability when it intends to do so," effectively abrogating the implied right of action doctrine. *Graphic Communications*, slip. op. at 9, Add. 27. The Court of Appeals' decision is a significant departure from this state's established jurisprudence. It must be reversed.

In *Becker*, this Court reaffirmed that a statute may give rise to a civil action by implication. *See Becker*, 737 N.W.2d at 207. This Court also reaffirmed that whether a right of action should be implied is determined by the legislature's intent. *Id.* at 207 n.4. Applying these principles, this Court did not infer a civil action in *Becker*, not because a civil action must be expressed, but because the legislature's intent to preclude an implied

civil action for violation of the specific statute at issue in *Becker* was clear. *Id.* at 207–08.<sup>11</sup>

Nonetheless, the Defendant Pharmacies request that this Court abandon the implied right action of doctrine, arguing that there must be an expressed indication of the legislature's intent to provide a remedy. Such an approach disregards and fails to give effect to the legislature's intent, for "that which is implied in a statute is as much a part of it as that which is expressed." *Knopp*, 102 N.W.2d at 695. This Court should reaffirm that a civil action may exist by implication, consistent with legislative intent. When that legislative intent is ascertained and effectuated here, it is clear that a civil action should be inferred for violation of the generic prescription drug statute. Minn. Stat. § 645.16 ("The object of all interpretation and construction of laws is to ascertain and effectuate the intention of the legislature").

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<sup>11</sup> Contrary to the Court of Appeals' suggestion, this Court did not hold in *Becker* that the "legislature expressly creates civil liability when it intends to do so." *Graphic Communications*, slip. op. at 9, Add. 27. Rather, this Court stated in *Becker* that, "Other language in CARA demonstrates that the legislature expressly creates civil liability when it intends to do so." *Becker*, 737 N.W.2d at 207 (emphasis added). In *Becker* the legislature provided an express cause of action for violation of an immediately adjacent subdivision of the same statute (the Child Abuse Reporting Act) from which the plaintiffs sought to infer an action. Moreover, this Court noted that there was also an express action for violation of an immediate adjacent statute (the Vulnerable Adults Reporting Act) concerning the same subject matter as the statute from which the plaintiffs sought to infer an action. In light of that context, this Court concluded that the provision of the express claims implied the exclusion of others. As discussed more fully below, there is no such indication that the legislature intended to foreclose a right of action under Minn. Stat. § 151.21, subd. 4.

**B. ALLOWING PURCHASERS OF GENERIC PRESCRIPTION DRUGS TO SUE TO RECOVER THEIR SAVINGS EFFECTUATES THE LEGISLATURE'S INTENT.**

**1. Purchasers of Generic Prescription Drugs Fall Within the Class for Whose Benefit the Statute Was Enacted.**

"[W]hether the plaintiff belongs to the class for whose benefit the statute was enacted" must be decided first by looking to the language of the statute. *Flour Exch. Bldg.*, 524 N.W.2d at 499–500.

Minn. Stat. § 151.21, subd. 4 provides that "[a]ny difference between acquisition cost to the pharmacist of the drug dispensed and the brand name drug prescribed shall be passed on to the purchaser" (emphasis added). The legislature plainly enacted Minn. Stat. § 151.21, subd. 4 for the specific benefit of a special class of persons: purchasers of generic prescription drugs.

Since the Purchasers fall directly within the class for whose benefit the statute was enacted, this factor is easily met. *See Travelers Ins. Co. v. Iron Ranges Natural Gas Co.*, 183 N.W.2d 784, 787–88 (Minn. 1971)("a statute is intended to protect those who may normally be expected to suffer particular injury from its violation. To ascertain this protected group the court looks to the statutory language in light of the evils to be remedied or the harm to be prevented"); *Starko Inc. v. Presbyterian Health Plan*, 276 P.3d 252, 267 (N.M. Ct. App. 2011)(first factor is met where statute contained language that "gives Plaintiffs a protected property right in the reasonable dispensing fee"); *Wilder v. Va. Hosp. Ass'n*, 496 U.S. 498, 510 (1990)("There can be little doubt that health care providers are the intended beneficiaries of the Boren Amendment . . . [where the]

provision establishes a system for reimbursement of providers and is phrased in terms benefiting health care providers").

2. **The Legislature Indicated an Intent to Permit Purchasers of Generic Drugs to Sue to Recover the Property that the Legislature Mandated They Receive.**

The second factor is "whether the legislature indicated an intent to create or deny a remedy." *Flour Exch. Bldg.*, 524 N.W.2d at 499. That indication of legislative intent is discerned from the language of the statute, and also from the object sought to be achieved by the legislature. *See State ex rel Forslund v. Bronson*, 305 N.W.2d 748, 751 (Minn. 1981)("[i]n the interpretation of statutes, the courts are required to discover and effectuate legislative intent, to consider objects which the legislature seeks to accomplish by the statute and the mischief sought to be remedied, and to avoid the result which would be absurd or would do violence to the language of the statute").

a. **By Mandating that the Savings in Cost of Generic Prescription Drugs Be Passed to Purchasers, It Is Implicit in the Language of the Statute Itself that Purchasers May Sue to Secure This Property Right.**

Minn. Stat. § 151.21, subd. 4 expressly provides the Purchasers the right that they claim: the right to receive specific monetary savings from the Defendant Pharmacies when a generic prescription drug is dispensed. The generic drug pricing statute "contains rights-creating language that gives Plaintiffs a protected property right." *Starko*, 276 P.3d at 267 ("[the statute] specifies the particular right attributable to Plaintiffs, an amount of money that is clearly defined within the statute and a direction from the Legislature that it be paid").

The statute is not a mere wishful hope of the legislature. It is a legislative command—any money the pharmacy saves by dispensing a generic prescription drug in lieu of its brand-name equivalent shall be passed on to purchasers, such that purchasers shall receive all of those monetary savings. Given this legislative command, it would be unreasonable to conclude that the legislature did not intend generic prescription drug purchasers to be able to sue in court to recover their money. It is implicit in the language of the statute itself that this right be enforceable through a cause of action. *See id.* (since the statute "guarantee[s] a property right in the dispensing fee . . . there is implicit legislative intent to create an enforceable right for . . . Plaintiffs").

Applying the same test as in Minnesota, courts in other jurisdictions consistently infer a right of action where a statute creates a direct, beneficial right for a specific group of persons. *See, e.g., Maimonides Med'l Ctr. v. 1st United Am. Life Ins. Co.*, 941 N.Y.S.2d 447, 450 (N.Y. Sup. 2012)(inferring a right of action from statute providing that an insurer that fails to promptly pay a health care claim "shall be obligated to pay the health care provider or person submitting the claim the full amount of the claim plus interest at the statutorily authorized rate"); *Starko*, 276 P.3d at 265 (providing that reimbursement by Medicaid to a dispensing pharmacist "shall be limited to the wholesale

cost of the lesser expensive therapeutic equivalent drug generally available . . . plus a reasonable dispensing fee of at least three dollars sixty-five cents (\$3.65)".<sup>12</sup>

The New Mexico Court of Appeals' recent decision in *Starko* is particularly instructive. In *Starko* a class of pharmacists sued the defendants for failing to reimburse them as required by a statute, which provides, "reimbursement by the [M]edicaid program [for dispensing prescription drugs] shall be limited to the wholesale cost of the lesser expensive therapeutic equivalent drug . . . plus a reasonable dispensing fee of at least . . . \$3.65." *Starko*, 276 P.3d at 265. Applying the same three-factor test as Minnesota, the court inferred a right of action for pharmacists to sue to recover the monies wrongfully withheld from them in violation of the statute, recognizing that "reimbursement . . . in accordance with the statute is a mandatory legislative 'command'" and the statute "contains rights-creating language that gives Plaintiffs a protected property right":

[The statute] specifies the particular right attributable to Plaintiffs, an amount of money that is clearly defined within the statute and a direction from the Legislature that it be paid. This legislative command is not just an institutional policy and practice. . . . [T]he purpose of . . . [the statute] is directed to the reimbursement of individual providers, and the wrong to be remedied by the statute is insufficient reimbursement of individual Medicaid providers. The provisions speak not only to the expenditure of funds but, more specifically, guarantee a property right in the dispensing

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<sup>12</sup> Like Minnesota courts, these courts recognized legislative intent to be dispositive in determining whether to infer a private right of action. *See Maimonides*, 941 N.Y.S.D.2d at 45 ("the best evidence of the Legislature's intent is the text of the statute, which is generally dispositive"); *Starko*, 276 P.3d at 267 ("we hold that the Legislature intended to provide an implied cause of action under the statute").

fee and cost of the drug to dispensing pharmacists. Therefore, there is implicit legislative intent to create an enforceable right for . . . Plaintiffs.

*Id.* at 267 (emphasis added).

Likewise here, there is an implicit legislative intent to create an enforceable right. By providing that "any difference between acquisition cost to the pharmacist of the drug dispensed and the brand name drug prescribed shall be passed on to the purchaser," Minn. Stat. § 151.21, subd. 4 creates a measurable property right—calculable in dollars and cents—that pharmacists must pay to purchasers of generic prescription drugs. To effectuate the legislature's intent, a right of action must be inferred.

**b. The Legislature Has Not Indicated an Intent to Deny Purchasers of Prescription Drugs the Right to Sue to Recover Their Property.**

The Court of Appeals believed that the existence of an administrative enforcement mechanism to punish pharmacists that violate the pharmacy code evidenced a legislative intent to prohibit generic prescription drug purchasers from suing pharmacies to recover the money wrongfully withheld from them. The Court of Appeals was wrong.

The Purchasers acknowledge that, where the legislature creates an administrative scheme that is tailored to secure a statutory right, it is reasonable to infer that the legislature did not intend a separate civil action. An example of this is the area of unemployment benefits. The Minnesota legislature created a beneficial right for certain persons whose employment was terminated to receive financial compensation for a specified period of time. *See, e.g.*, Minn Stat. § 268.30, et seq. The Minnesota legislature also created an administrative procedure for how an unemployed person may

secure this benefit. Under these circumstances, it is reasonable to infer that the legislature did not intend there to be a separate civil action to obtain unemployment benefits.

Conversely, where the legislature creates an enforcement scheme of general applicability, not tailored to secure the right it created, it cannot reasonably be inferred that the legislature intended to preclude a civil action. The existence of a general administrative enforcement scheme, not tailored to secure a statutorily guaranteed property right, does not reveal a legislative intent to preclude a cause of action. *See, e.g., Maimonides Med. Ctr.*, 941 N.Y.S.2d at 453 (rejecting argument that an administrator's "investigatory powers and . . . ability to levy fines . . . [was] evidence that the Legislature contemplated purely administrative enforcement").

Here, the legislature provided no administrative procedure for the Purchasers to recover their monetary savings from the Defendant Pharmacies. While the Purchasers may file an informal "complaint" with the Board, they have no right to an administrative hearing to seek the monetary savings that the Defendant Pharmacies have wrongfully retained. The Board has the complete discretion to do with the Complaint as it pleases, from dismissing the Complaint to initiating a contested case hearing (at which the complainant has no right to participate). The complainant's only right is to be informed of what the Board's ultimate decision is. *See Minn. Stat. § 214.104, subd. 9.*

Moreover, even if the Board chooses to investigate an administrative complaint, it can only punish pharmacists through suspension or revocation of licenses or imposing punitive fines. The Board has no ability to secure for the Purchasers the money to which

they are legally entitled. In fact, the Board, explaining its "complaint review process" through a question-and-answer format on its Web site, candidly admits it cannot recover money for a complainant from a pharmacist or pharmacy:

- Q. What are the things that the Board can't help me with?  
A. *The Board can only take action against a pharmacist's or pharmacy license. It can't help you recover money from a pharmacist or pharmacy.*

Minnesota Board of Pharmacy Web site, <http://www.phcybrd.state.mn.us/Complain.htm> (visited 9/27/13), Resp. App. 109–110 (emphasis added).

The legislature has mandated that purchasers of generic prescription drugs are entitled to receive certain specific money from pharmacies. By creating this property right, it is implicit in the language of the statute that there be a civil action to secure that right. Since the legislature did not create an administrative mechanism providing purchasers the ability to recover their money, there is no indication of a legislative intent to foreclose a civil action. To give effect to the legislature's intent, a civil action must be recognized.

3. **Allowing the Purchasers to Sue the Defendant Pharmacies Is Consistent with the Purpose of the Statute.**

The final factor is "whether implying a remedy would be consistent with the underlying purposes of the legislative enactment." *Flour Exch. Bldg.*, 524 N.W.2d at 499; *see State v. Young*, 268 N.W.2d 428, 430 (Minn. 1978)("Statutes are to be so construed as to suppress the mischief and advance the remedy, to promote rather than defeat the purpose of the legislature"). There is no question that allowing purchasers of generic prescription drugs to sue pharmacies to recover the money that the pharmacies

unlawfully withheld from the Purchasers is consistent with the purpose of the statute: to ensure that the money that pharmacies save by dispensing generic prescription drugs in lieu of their brand-name equivalents is passed to purchasers, not retained by pharmacies.

Allowing the Purchasers to sue would not interfere with the BOP's ability to regulate "the identity, labeling, purity, and quality of all drugs and medicines dispensed in . . . [the] state." Minn. Stat. § 151.06, subd. 1(a)(3). It would not interfere with the BOP's power to "examine and license as pharmacists all applicants whom it . . . deem[s] qualified." *See* Minn. Stat. § 151.06, subd. 1(a)(5). It would not interfere with the BOP's ability to deny or revoke a pharmacist's license or otherwise punish a pharmacist for a violation of the Pharmacy Code. *See* Minn. Stat. § 151.06, subd. 1(a)(7), subd. 5. It would not interfere with any regulation passed by the Board of Pharmacy. Inferring a right of action would not interfere with the administrative scheme regulating pharmacies in any way.

Each of the factors for implying a right of action is met here. Minn. Stat. § 151.21, subd. 4 was enacted for the specific benefit of purchasers of generic prescription drugs. It is implicit in both the language and very nature of the statute that there must be a remedy to secure this right, and there is no indication that the legislature intended to foreclose a right of action. Inferring a right of action is essential to effectuate the underlying purpose of the statute and intent of the legislature, as there is no administrative mechanism for the Purchasers to recover the money wrongfully withheld from them by the Defendant Pharmacies. The Court of Appeals' decision refusing to

recognize the Purchasers' right to sue to recover their money wrongfully withheld from them by the Defendant Pharmacies must be reversed.

**IV. CONCLUSION**

The Court of Appeals' decision should be affirmed as to Plaintiffs' Consumer Fraud Act claim and reversed with respect to Plaintiffs' claims for a direct action under Minn. Stat. § 151.21, subd. 4 and for unjust enrichment. The case should be remanded to the District Court for further proceedings consistent with such a ruling.

Date: September 30, 2013

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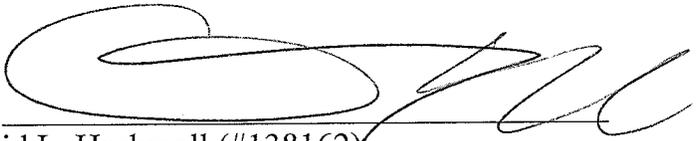
**CERTIFICATE OF COMPLIANCE**

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subds. 1 and 3, for a brief produced with a proportional font. The length of this brief is 15,150 words. This brief was prepared using Microsoft Word 2010 software.

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