

STATE OF INDIANA )  
 ) SS:  
COUNTY OF MARION )

IN THE MARION SUPERIOR COURT  
CIVIL DIVISION 7  
CAUSE NO. 49D07-0701-CT-000730

JEFF KOEHLINGER and JEFF FRAZER, )  
Individually and as representatives of )  
a class of all similarly situated persons, )

Plaintiffs, )

THE STATE LOTTERY COMMISSION )  
OF INDIANA d/b/a THE HOOSIER LOTTERY, )

Defendant. )

**FILED**

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MAR 03 2010

*Elizabeth A. White*  
CLERK OF THE MARION CIRCUIT COURT

**ORDER DENYING THE PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT  
AND GRANTING THE DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

This cause comes before the Court on the parties' Cross Motions for Summary Judgment. For the following reasons, the Court denies Plaintiffs' Motion for Summary Judgment and enters Summary Judgment in favor of Defendant.

**I. STATEMENT OF UNDISPUTED MATERIAL FACTS**

**A. The Hoosier Lottery and Scratch-off Games**

1. The Hoosier Lottery is authorized by the Indiana General Assembly in part to "enable the people of Indiana to benefit from significant additional money for capital improvements." Ind. Code § 4-30-1-1.
2. In its twenty years of existence, the Lottery has generated over \$3.4 billion in revenue for the State of Indiana. (*See* Exhibit 1, Affidavit of Kathryn A. Densborn ("Densborn Affidavit") ¶ 4.)
3. The Lottery offers various "scratch-off games" that run for specified periods of time. (*Id.* ¶ 5.)
4. The Lottery posts certain information about these games on its website, [www.in.gov/hoosierlottery](http://www.in.gov/hoosierlottery), including information about prizes not yet claimed. (*Id.* ¶ 7.)

5. The numbers on the Lottery's website do not necessarily reflect the number of *available* prizes because the Lottery does not know what prize-winning tickets have been *purchased* until the prizes are *claimed*. (*Id.* ¶ 8.) Thus, if a winning ticket has been purchased, but the prize is not yet claimed, that prize will be listed on the website as "unclaimed," even though it may no longer be available. (*Id.*)

B. The Cash Blast Scratch-Off Game

6. The Cash Blast scratch-off game began in December 2004. (*Id.* ¶ 11.)
7. The price of a Cash Blast ticket was \$10. (*Id.* ¶ 12.)
8. There were approximately 5,000,000 tickets available to be purchased. (*Id.* ¶ 18.)
9. This fact was available to the public in the Indiana Administrative Code. 65 IAC 4-353 *et seq.*
10. At no time did players know how many tickets had been sold or were left in inventory to be purchased. This information was not made available. (Densborn Aff. ¶ 18.)
11. As stated on each ticket, the odds of purchasing a winning ticket (of any amount) were one in 3.29 tickets. (*Id.* ¶ 13.)
12. There were 10 "top prizes" in the amount of \$250,000 each. (*Id.* ¶ 13.)
13. During the entire time that Cash Blast tickets were available to be purchased, there was at least one \$250,000 prize available to be won. (Jones Aff. ¶ 34.)
14. Thousands of other prizes were available at levels of \$10,000, \$1,000, \$500, \$200, \$100, \$50, \$20, \$15 and \$10. (*Id.* ¶ 14.)
15. A total of approximately 1,530,322 winning tickets with prizes were available. (See Densborn Aff., Ex. A.)

16. Approximately \$36,688,000 in prizes was available to be won by players of Cash Blast. (*Id.*)

17. In total, approximately \$35,062,170 in prize money was paid out to Cash Blast players. (*See* Exhibit 20, Vince Thomas Report.)

18. When a player purchased a Cash Blast ticket, the player was purchasing a *chance* to win a prize. (*See* Densborn Aff., Ex. B ("Overall Odds 1:3.29").)

**C. Not All Sales of Cash Blast Tickets Were Affected By The Overstatement**

19. Some class members purchased Cash Blast tickets in part based on their review of information relating to the number of prizes remaining. While the odds of the game never changed and players never knew how many tickets had been purchased, these players apparently thought they were more likely to win a top prize because of the overstatement.

20. Other players bought Cash Blast tickets for reasons unrelated to the overstatement information relating to the remaining number of unclaimed prizes. Some class members purchased Cash Blast tickets as part of a routine over the period of their participation in the game. (Mitchell Deposition 35:18-36:10.) Several players testified that scratch-offs were entertainment. (Kress Deposition 39:3-5 ("It's – it was entertainment. It was entertainment. But, you know, with the – with the shot at winning some money.")); (Mitchell Deposition 44:11-15 (agreeing that scratch-off games are a "form of entertainment" and an "enjoyable thing to do.")); (Pennington Deposition 35:14 ("I guess maybe it is just fun.")). Class representative Jeffrey Frazer described playing scratch-off tickets as an investment and as entertainment:

Q: But with respect to both playing Hoosier Lottery games and horseracing, is the opportunity, the hope that

you're going to make money, the only reason that you play?

A: Certainly it's a form of entertainment, and you would like to have a return on your investments.

(Frazer Deposition 88:6-19.) Other class members were influenced by the general opportunity to get rich or make money, but this was not dependent upon the specific number of remaining top prizes. (Exhibit 6, Deposition transcript of Jeffrey Allen Hawks, dated April 10, 2009 ("Hawks Deposition") 57:7-11 ("To have a chance at being rich for a little amount of money. That's why all people, I think, buy scratch-offs, unless it's an addiction, and that's an issue they need to address.")); (Exhibit 7, Deposition transcript of Jeffrey Koehlinger, dated April 30, 2009 ("Koehlinger Deposition") 43:7 ("The opportunity to win a large prize.")); (Exhibit 10, Deposition transcript of Patricia Ann Pennington, dated April 29, 2009 ("Pennington Deposition") 35:12 ("To see if I can make some money.")); (Exhibit 11, Deposition transcript of Frank Staley, Sr., dated April 23, 2009 ("Staley Deposition") 33:6 ("I played to make money.")); (White Deposition 28:24 ("To win.")).

21. Some class members would have purchased Cash Blast tickets as long as there was at least just one top, \$250,000, prize remaining in the game:

Q: How many 250,000-dollar prizes would have to be available for you to have played Cash Blast?

A: At least one. There had to be one for me to play.

(Exhibit 9, Deposition transcript of Dorothy R. Mitchell, dated April 22, 2009 ("Mitchell Deposition") 23:16-19).

Q: Is there a number of top prizes that would be too low for you?

A: Zero.

(Exhibit 12, Deposition transcript of Fred A. White, dated April 22, 2009 ("White Deposition") 17:21-23.) Judy Anderson testified that she would "probably" still purchase a Cash Blast ticket even if there were no \$250,000 prize still available:

Q: So how many [ top \$250,000 prizes] would have to be available to be won for you to want to buy a Cash Blast ticket?

A: I never considered that.

Q: If there was at least one available, would you have bought a Cash Blast ticket?

A: Yes.

\* \* \* \* \*

Q: Is the same true for the other lower numbers of prizes? For example, there was a – there were 10,000-dollar prizes in Cash Blast. Is the same true with respect to that, that if there was at least a 10,000-dollar prize available, would you buy a Cash Blast ticket, or would there also have to be a top prize of \$250,000 available?

A: Yes.

\* \* \* \* \*

Q: So even if there was no 250,000-dollar prize available but only 10,000-dollar prizes available, would you have bought a Cash Blast ticket?

A: Probably.

(Exhibit 4, Deposition transcript of Judy Anderson, dated April 23, 2009 ("Anderson Deposition") 28:12-29:12.) Plaintiff Jeffrey Frazer testified that he bought several tickets ("less than a hundred") *after* he received notice of the Lottery's overstatement. (Exhibit 5, Deposition transcript of Jeffrey Frazer, dated April 30, 2009 ("Frazer Deposition") 52:17-54:8.)

22. The Plaintiffs' two marketing experts testified that people play scratch-off games, including Cash Blast, for different reasons. Dr. Zielinski stated that all

scratch-off players play scratch-off games for myriad reasons, many of which are completely unrelated to the number of unclaimed prizes (Zielinski Deposition 125:25-128:11), and that the Lottery's statements about Cash Blast's unclaimed prizes was not the reason some players bought Cash Blast tickets (Zielinski Deposition 135:10-22.). Similarly, Dr. Robert Miller admitted that players buy scratch-off tickets for myriad reasons and using different strategies, many of which have nothing to do with "unclaimed prize" data (Miller Deposition 56:21-23; 60:18-62:6).

23. Plaintiffs' experts also agree that some players purchased Cash Blast tickets with *no knowledge of or reliance on* the overstatement. Dr. Joan Zielinski admitted during her deposition that some Cash Blast players were completely unaffected by the Lottery's representations regarding unclaimed Cash Blast prizes:

Q: How was a person who purchased a Cash Blast ticket without knowledge of the statements regarding unclaimed prizes or without relying upon that information affected by the Lottery's representations?

A: I think that would be a minority of Cash Blast buyers.

...

Q: How was a consumer who purchased a Cash Blast ticket without knowledge of the statements regarding unclaimed prizes or without relying upon those statements affected by the Lottery's statements regarding unclaimed prizes?

A That minority of consumers was not affected.

(Exhibit 24, Deposition of Dr. Joan Zielinski (Zielinski Deposition) at 145:16-146:17) (emphasis added). Plaintiffs' second marketing expert, Dr. Robert Miller, admitted that it was only "logical" that a number of Cash Blast players purchased Cash Blast tickets without knowledge of or reliance on the Lottery's unclaimed prize data. (Exhibit 23, Deposition of Dr. Robert Miller (Miller Deposition) 30:18-25.) Dr. Miller stated that Cash Blast players who

purchased tickets without knowledge of or reliance upon unclaimed prize data were unaffected (Miller Deposition 137:9-15, 153:15-154:8; 167:23-168:4) and that there were Cash Blast players who "didn't know and didn't use the [ unclaimed prize] information" (*Id.* 151:7-9). Dr. Miller's report also acknowledged that a certain population of Cash Blast players bought Cash Blast tickets without awareness of the Lottery's representations:

Q: In the eighth paragraph [ of your report] you say, "There is a significant secondary emotional gain for gamblers in discovering ways not only to utilize an advantage to obtain prizes, but also to be more competitive than similarly situated players who are purchasing tickets without the benefit of a closely held strategy." In this context, similarly situated players means other 10-dollar scratch-off players?

A: Yes, sir.

Q: And without the benefit of a closely held strategy, meaning those who aren't aware of the unclaimed prize data?

A: *Right.* Or I guess it could be explained also not just similarly situated players, but also -- as I think about this, it's obvious that it -- it could be the whole range of people that are buying scratch-off games or people that are gambling in general. You know, people want to have a sense of control.

Q: But using your written opinion here, it is that people who are aware of the unclaimed prize data for Cash Blast felt they were more competitive than people who did not know?

A: *Yes.*

(Miller Deposition 169:19-170:18) (emphasis added).

24. Plaintiffs' econometrics analysis by Dr. Robert Sandy showed that millions of dollars of Cash Blast tickets were sold without any influence from the Lottery's representation. Dr. Sandy concluded that the Lottery's overstatement resulted in additional Cash Blast sales of "about" \$12,581,430—but not all Cash Blast sales. (Exhibit 25, Sandy Report at 6; Sandy Deposition at 52:14-21.) In his deposition, Dr. Sandy admitted that not

all tickets purchased during the overstatement period were purchased because of the overstatement. (Sandy Deposition at 52:6-9; 96:9-97:9.).

D. The Lottery's Discovery of Manufacturing Defects Associated with Cash Blast

25. In early 2005, some purchasers of the Cash Blast game were unable to scratch off the latex covering the game numbers on their tickets. (Jones Affidavit ¶ 11.)
26. The problem was a manufacturing defect. (*Id.*)
27. Scientific Games, Inc., with whom the Lottery had contracted to print the tickets, reprinted and replaced approximately 2.5 million Cash Blast tickets in May 2005. (*Id.* ¶ 12.)
28. When the Lottery starts a new game like Cash Blast, it places electronic information about the game into its computer system. (*Id.* ¶ 3.) The electronic information includes a "record" for each paper ticket. (*Id.* ¶¶ 3-4, 20.) The Lottery uses these records to "validate" winning tickets, i.e., to confirm that a paper ticket which is presented to the Lottery for a prize is authentic and entitles the individual to the indicated prize. (*Id.* ¶ 3.) The Lottery's computer also uses these records to keep track of the number of prizes which remain unclaimed. (*Id.* ¶¶ 3, 26-28.)
29. The Lottery has procedures in place to confirm that the electronic information loaded into its computer is correct and matches the specifications for the game. (*Id.* ¶¶ 5-8.) The Lottery followed these procedures for Cash Blast when it started the game in December 2004. (*Id.* ¶¶ 5-9.) The Lottery followed the procedures again in May 2005 after it loaded the electronic files for the replacement tickets provided by Scientific Games. (*Id.* ¶¶ 16-18, 23-24.) The Lottery's standard verification procedures, in fact, discovered an

error in the first batch of electronic files delivered by SGI. (*Id.* ¶ 17.) Before adding the information for the new tickets, the Lottery manually designated as "void" the computer records for the old tickets which had been destroyed. (*Id.* ¶ ¶ 20-22.) After these actions, the Lottery's procedures confirmed that information about Cash Blast, including data about unclaimed prizes remaining in the game, was correct. (*Id.* ¶ ¶ 20-24.)

#### E. What The Lottery Did Not Know

30. What the Lottery did not know was that the automated process in the computer which compiled data about unclaimed prizes for the Lottery's website continued to count the unclaimed prizes in the electronic files for the voided tickets. (*Id.* ¶ ¶ 26-29.) When the Lottery went into the computer and manually gave the defective tickets a "void" designation, it removed them from the ticket count for purposes of the procedures used to check the accuracy of data for the game. (*Id.* ¶ ¶ 20-24.) However, the automated computer process that compiled data about unclaimed prizes for the website did not recognize the tickets as void. (*Id.* ¶ ¶ 27, 29.)

31. Having run hundreds of scratch-off games over its fifteen years of operations, the Lottery had not replaced a large number of defective tickets in this manner before Cash Blast. (*Id.* ¶ 25.) The error did not show up in the procedures the Lottery used to compare the electronic information about the new tickets loaded into the computer with the written specifications for the game. (*Id.* ¶ 24.) The Lottery's ability to detect the error was also impaired because for security reasons, Lottery personnel do not have access to the prize information in the electronic files for the tickets in the game. (*Id.* ¶

28.) Accordingly, the Lottery did not know that its computer would continue to count prizes for tickets notwithstanding their "void" status. (*Id.* ¶ 26.)

#### F. Effect Of The Error

32.The error resulted in an overstatement of unclaimed prizes for the Cash Blast game on the Lottery's website and in materials distributed to retailers. (*Id.* ¶ 29.)

33.At the time of the error, eight prizes of \$250,000 were in fact not yet claimed. (*Id.* ¶ 33.)

34.As a result of the error, the website reported that thirteen such prizes were unclaimed. (*Id.*)

35.At all times during the period that the unclaimed prizes were misreported, at least one top prize remained unclaimed. (*Id.* ¶ ¶ 34-35.) Similarly, multiple prizes in all other prize categories – from \$10,000 to \$10 – remained unclaimed at all times. (*Id.*)

36.And, at all times, the original odds of winning a prize (1 in 3.29 tickets), remained the same. (*Id.* ¶ 30.)

#### G. Discovery Of The Error

37.The Lottery discovered the error in the summer of 2006. (*Id.* ¶ 37.) A lottery player contacted the Lottery wanting to know where he might purchase Cash Blast tickets. (*Id.* ¶ 38.)

38.The Lottery checked its inventory and discovered that over 98% of the Game 743 tickets had been sold as of late June. (*Id.* ¶ 39.)

39.However, according to the electronic files in the computer, only 65% of the tickets had been sold. (*Id.*)

40. The Lottery investigated further. (*Id.* ¶ 40.) This led to the discovery that there was a discrepancy between the number of unclaimed prizes listed on the Lottery's website and the actual number of unclaimed prizes in the Cash Blast game. (*Id.*)

#### H. The Coupon Program

41. When the Lottery learned of the error, it immediately posted a message to Cash Blast participants on its website explaining the error and apologizing. (*Id.* ¶¶ 41-42.)

42. Further, in January of 2007, the Executive Director of the Lottery announced a program to provide coupons to people who had purchased Cash Blast tickets during the time when the information about unclaimed prizes was incorrect. (Densborn Affidavit ¶¶ 19-25.)

43. The Lottery published notice of the program on its website beginning January 10, 2007. (*Id.* ¶¶ 22-23.) The notice stated:

To continue our high level of customer service, as authorized by 65 Ind. Admin. Code § 4-2-6, ticket holders may submit a claim for any Game 743 tickets purchases between May 18, 2005 and July 6, 2006. Upon review of each claim form by Hoosier Lottery personnel, all eligible tickets will receive a \$10.00 coupon for a scratch-off ticket(s) of the claimant's choice.

(*Id.* ¶ 25.)

44. The Lottery also mailed a letter to its retailers with information about the coupon program for consumers. (*Id.* ¶ 24.)

45. On March 29, 2007, the Lottery informed the public via another notice posted on its website that "[a]ll Game 743 Claim Forms and eligible tickets must be postmarked no later than April 30, 2007, in order to be considered by the Hoosier Lottery." (*Id.* ¶ 31.)

46. The Lottery communicated the same information about the deadline for submission of claim forms in a letter to each of its retailers. (*Id.* ¶ 32.)

47. Upon review of the tickets submitted, the Lottery issued coupons worth \$350,430 to the individuals participating in the coupon program. (*Id.* ¶¶ 34-35.)

48. The coupons could be redeemed at any Hoosier Lottery retailer. (*Id.* ¶ 35.)

## II. CONCLUSIONS OF LAW

### A. Summary Judgment Standard

1. Summary judgment is appropriate when the designated evidence demonstrates that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Ind. Trial Rule 56(C); *Ruff v. Charter Behavioral Health Sys.*, 699 N.E.2d 1171, 1173 (Ind. Ct. App. 1998).
2. The moving party bears the burden of designating evidence showing that no genuine issues of material fact exist and that the moving party is entitled to judgment as a matter of law. *Estate of Pflanz v. Davis*, 678 N.E.2d 1148, 1150 (Ind. Ct. App. 1997).
3. Once met, the burden shifts to the non-movant to specifically designate facts showing that there is a genuine issue for trial. *Id.*
4. No genuine issue of material fact exists where facts concerning an issue that would dispose of the litigation are undisputed. *See Scott v. Bodor, Inc.*, 571 N.E.2d 313, 318 (Ind. Ct. App. 1991).

### B. The Hoosier Lottery Is Entitled To Summary Judgment On Plaintiffs' Claims for Negligent Misrepresentation and Negligence

5. This Court denied the Hoosier Lottery's Motion to Dismiss the Plaintiffs' negligent misrepresentation claim on the premise that the Indiana Supreme

Court had shown a limited inclination toward expanding the applicability of the tort. (Order Denying Lottery's Motion to Dismiss at ¶¶ 60-66.)

However, to date, the Supreme Court has not expanded the applicability of the tort of negligent misrepresentation beyond the employer-employee relationship. Therefore Summary Judgment on this claim is appropriate.

6. The last case in which our Supreme Court considered a cause of action for negligent misrepresentation was *Passmore v. Multi-Mgmt. Servs., Inc.*, 810 N.E.2d 1022 (Ind. 2004). In that case, the Court adopted the Restatement (Second) of Torts' formulation of the tort of *conscious* misrepresentation for situations where *physical* injury resulted from a person knowingly supplying false information in response to an employment inquiry. *Id.* at 1025. But for a *negligent* misrepresentation that causes physical injury, the Court *declined* to recognize a cause of action or to adopt the Restatement. And because there is no physical injury in this case, even *Passmore's* narrow holding about *conscious* misrepresentation is inapplicable here.
7. In *Passmore*, the Supreme Court noted that Indiana courts have recognized the tort of negligent misrepresentation only in limited circumstances. 810 N.E.2d at 1025. In one case, *Eby v. York-Division, Borg-Warner*, 455 N.E.2d 623 (Ind. Ct. App. 1983), the Court of Appeals permitted an employee to pursue a claim for negligent misrepresentation where the employee relied on his employer's representation that there was a job for him in Florida, and moved to Florida, only to find there was no job. However, the court stressed that it was not adopting the whole of the Restatement on negligent misrepresentation. *Id.* at 630.

8. In the other case cited by the Supreme Court in *Passmore, Darst v. Illinois Farmers Insurance Co.*, 716 N.E.2d 579, 584 (Ind. Ct. App. 1999), the Court of Appeals wrote that "since *Eby*, we have stated that, despite the limited recognition of the tort in the context of an employer-employee relationship, Indiana does *not* recognize the tort of negligent misrepresentation," and held that "without direction from our Supreme Court, we *decline* to extend the tort's application beyond the specific facts of *Eby*" (emphasis added). Other courts have acknowledged the unavailability of this claim in Indiana. *See, e.g., Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672, 674 (7th Cir. 2001).
9. More recently, the Indiana Court of Appeals again has recognized the limited nature of negligent misrepresentation in Indiana:

But it is clear that to date Indiana has not recognized that a duty exists to support the tort outside the limited context of an employment relationship. Instead, we have held that a professional owes no duty to one with whom he has no contractual relationship unless the professional has actual knowledge that such third person will rely on his professional opinion.

*Thomas v. Lewis Eng'g, Inc.*, 848 N.E.2d 758, 760 (Ind. Ct. App. 2006)

(internal citations omitted).

10. The Plaintiffs' claims do not arise out of an employer-employee or other professional services relationship. Therefore, Indiana's limited tort of negligent misrepresentation may not be applied here. Summary Judgment is granted to the Lottery as to the Plaintiffs' claim of negligent misrepresentation.
11. The Plaintiffs may not reconfigure a disallowed negligent misrepresentation claim as one for simple negligence. The only wrongful conduct alleged by Plaintiffs is the publication of incorrect information about unclaimed prizes for

the Cash Blast game. Assuming that this is the "negligence" upon which Plaintiffs' claim for negligence is based, then the claim is one for negligent misrepresentation, which, as set forth above, is not actionable in Indiana.

12. A similar situation arose in *Darst*, where the plaintiff also attempted to assert claims for both negligent misrepresentation and "breach of an assumed duty to provide accurate information." The Court of Appeals noted that the plaintiff would prove both theories in exactly the same way, i.e., "a person, under a duty to supply accurate information, fails to exercise reasonable care in doing so and as a result the plaintiff, who justifiably relied on the information, was damaged." 716 N.E.2d at 584-85. The court affirmed summary judgment for the defendant:

Because we have determined that the tort of negligent misrepresentation, to the extent that it exists, should not be expanded beyond the holding of *Eby*, . . . and because *we find no practical difference between negligent misrepresentation and the breach of an assumed duty to provide accurate information*, we conclude that Trustee has not fulfilled his burden of demonstrating that the trial court erred.

*Id.* at 585 (emphasis added).

13. This case presents the same situation as *Darst*: the Plaintiffs cannot distinguish their negligent misrepresentation claim from their negligence claim. Therefore, Summary Judgment is granted to the Lottery on both claims.

C. The Hoosier Lottery Is Entitled To Summary Judgment On Plaintiffs' Claim for Breach Of Contract

14. Indiana courts have indicated that a lottery ticket is a contract or a "quasi-contract." In *Smith v. State Lottery Commission of Ind.*, 701 N.E.2d 926, 930 (Ind. Ct. App. 1998) ("*Smith I*"), the court wrote that "[a]t best, the sale of

instant game tickets might establish a quasi-contract between the Lottery and the player." In a subsequent decision in the same case, *Smith v. State Lottery Commission of Indiana*, 812 N.E.2d 1066, 1072 (Ind. Ct. App. 2004) ("*Smith II*"), *trans. denied*, the parties stipulated to the existence of a contract, and the court cited with apparent approval two Washington State cases in support of the parties' stipulation that a lottery ticket formed a contract. *Id.*

15. The contract between players and the Lottery is simple. Players purchase a ticket for a chance to win a prize; if a ticket entitles a player to a prize, the Lottery agrees to pay. The plaintiffs do not contend that the Lottery failed to uphold its end of this bargain.

16. The tickets for the Cash Blast game state that "All winners, tickets and transactions are subject to Lottery regulations, rules and state law. Liability if any, is limited to refund of retail sales price. Not responsible for lost or stolen tickets." (Densborn Affidavit ¶ 13.) The tickets also refer the purchaser to Hoosier Lottery Retailer postings or instruct the player to "contact the Lottery at [www.hoosierlottery.com](http://www.hoosierlottery.com) or 1-800-955-6886" "[f]or specific end dates and game information." (*Id.*)

17. The Plaintiffs argue that the information published by the Lottery about unclaimed prizes is a term of the contract between the Lottery and a ticket purchaser. However, the Plaintiffs themselves describe that information as "advertising." (Complaint, ¶¶ 8, 9, 17) The general rule is that advertising is not an offer to enter into a contract. *See McCormick Piano & Organ Co. v. Geiger*, 412 N.E.2d 842, 846-47 (Ind. Ct. App. 1980) ("[U]nder general

contract theory there is a presumption that general advertising aimed at the public is not an offer to enter a contract.").

18. Moreover, the statement on the Cash Blast ticket advising purchasers about how they can learn more information about the game does not evidence an intent to make all such information a term of the contract between the parties. "[W]here a written contract refers to another instrument and makes the terms and conditions of such other instrument a part of it, the two will be construed together as the agreement of the parties. However, if in a written contract, a reference is made to another writing for a particularly designated purpose, the other writing becomes a part of the contract only for the purpose specified, and is foreign to the contract for all purposes other than the one specified." *MPACT Constr. Group, LLC v. Superior Concrete Constructors, Inc.*, 785 N.E.2d 632, 639 (Ind. Ct. App. 2003). Case law indicates that mere reference to an extraneous document is not enough to incorporate it by reference; rather, the contract must make specific reference to the document it intends to incorporate and the parties' intent to be bound by the extraneous document or terms. *See Payday Today v. Defreeuw*, 903 N.E.2d 1057, 1062 (Ind. Ct. App. 2009); *I.C.C. Protective Coatings, Inc. v. A.E. Stanley Mfg. Co.*, 695 N.E.2d 1030, 1036 (Ind. Ct App. 1998).

19. Nothing in the contract between the parties, the Cash Blast ticket, incorporates by reference the Hoosier Lottery's website into any contract that arises when an individual purchases a ticket. The reference to the postings by retailers, the Lottery's website, and the Lottery's toll-free phone number does not state that the parties' contract is or was intended to incorporate or be subject to all information accessible through those means. In contrast, the

next statement printed on the ticket clearly states an intent to incorporate other terms into the contract: "All winners, tickets and transactions are *subject to* Lottery regulations, rules and state law." (Densborn Affidavit ¶ 13 (emphasis added).) This shows that the Lottery knew how to incorporate terms into the contract with a ticket purchaser when it intended to do so.

20. Finally, Plaintiffs argue that the scratch-off ticket contract incorporates the Lottery's website. But the Lottery's website is subject to following which also appeared on the website:

Although the Lottery endeavors to ensure the accuracy of the information that appears on this website (including winning numbers), it makes no warranty as to the quality, correctness, completeness or validity with respect to said information and does not warrant that the functions contained on the website will be uninterrupted or error-free, or that defects will be rectified.

(Jones Affidavit ¶ 36.) In other words, even assuming that the Lottery's website was incorporated into the contract, the disclaimer makes clear that there was no mutual intent – shared by both the Lottery and a ticket purchaser – that the contract between the parties include a representation or warranty by the Lottery that all information on its website was correct.

21. Advertising on the Lottery website was not incorporated into the contract between the Lottery and Cash Blast players, and the Lottery did not breach the contract between it and Cash Blast players. Summary Judgment is granted to the Lottery on the Plaintiffs' breach of contract claim.

#### **D. The Hoosier Lottery Is Entitled To Summary Judgment On Plaintiffs' Quasi-Contract Claims**

22. Quasi-contract remedies are not available where there is an express contract in place. The plaintiffs' complaint alleges several quasi-contract claims – for unjust enrichment, restitution and money had and received. (Complaint,

¶ 40.) However, "[t]he existence of a valid express contract for services, . . . precludes implication of a contract covering the same subject matter."

*Kincaid v. Lazar*, 405 N.E.2d 615, 619 (Ind. Ct. App. 1980).

23. Indiana courts have acknowledged that a lottery ticket is a contract between the Lottery and the purchaser of the ticket. Accordingly, equitable claims for money had and received, restitution, and unjust enrichment are not available to the plaintiffs in this case. *DiMizio v. Romo*, 765 N.E.2d 1018, 1025 (Ind. Ct. App. 2001); *Shelby Eng'g Co. v. Action Steel Supply, Inc.*, 707 N.E.2d 1026, 1028 (Ind. Ct. App. 1999) ("There is no question that the existence of an express contract precludes recovery on the equitable theory of money had and received" (citation omitted).). See *Wenning v. Calhoun*, 827 N.E.2d 627, 630 (Ind. Ct. App. 2005) (restitution available as remedy only if no contract exists).

24. Summary Judgment is granted to the Lottery on all claims for money had and received, restitution, and unjust enrichment.

**E. The Hoosier Lottery Is Entitled To Summary Judgment on Plaintiffs' Claims Under The Indiana Deceptive Consumer Sales Act**

25. The Plaintiffs' last claim against the Lottery is for "deceptive sales practices actionable pursuant to Indiana's Deceptive Consumer Sales Act [ "IDCSA"]." (Complaint, ¶ 40). The Plaintiffs allege that the Lottery's "promotional materials" were in violation of the Act because they "represented" that the Cash Blast game (1) "had characteristics or benefits it did not have and which the Lottery reasonably should have know [ sic] that it did not," and (2) "was of a particular standard or quality which it was not and which the Lottery reasonably should have know [ sic] it was not." (*Id.*, ¶ ¶ 29, 30).

26. The IDCSA "does not apply to an act or practice that is . . . required or expressly permitted by state law, rule, regulation, or local ordinance." I.C. § 24-5-0.5-6(2).

27. The "promotional materials" challenged by the plaintiffs were both required and permitted by state law. According to statute, the Lottery commission "may promote and advertise the lottery." I.C. § 4-30-3-8(a). Another statute explains that it is the intent of the legislature that the Lottery Commission adhere to the following policy: "lottery game advertising and promotion shall be consistent with the dignity and integrity of the State." I.C. § 4-30-1-2(6). State law also requires the Lottery to keep an accounting of prizes and prize money distributed: "The commission shall maintain weekly or more frequent records of lottery transactions, including the distribution of tickets to retailers, revenue received, claims for prizes, prizes paid, and other financial transactions of the commission." I.C. § 4-30-3-4. Underscoring the importance of the exclusionary provisions of the IDCSA and the inapplicability of that Act to advertising by the Lottery, the Lottery statute forbids restrictions on advertising of Lottery products:

An Indiana or local law providing a . . . restriction, or prohibition against the . . . advertising, or sale of a lottery ticket *does not apply* to the sale of lottery tickets under this Article . . .

I.C. § 4-30-18-4 (emphasis added).

28. The exclusions in the IDCSA (I.C. § 24-5-0.5-6) are applicable to actions required or permitted by state law, whether or not such actions are imperfectly performed, i.e., whether or not the Lottery made a mistake in calculating unclaimed prizes for the promotional material published for one of its games. Because state law expressly permits the Lottery to advertise and

exempts the Lottery from all state and local laws restricting advertising, the IDCSA does not apply as a matter of law. Summary Judgment is granted to the Lottery with respect to all claims of the Class under the IDCSA.

29. To the extent that any of the foregoing statement of undisputed material facts is determined to be a conclusion of law, the Court incorporates, adopts, and enters it as a conclusion of law.

### III. JUDGMENT

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Plaintiffs' Motion for Summary Judgment is denied and Defendant's Motion for Summary Judgment is granted.

SO ORDERED THIS 3<sup>rd</sup> DAY OF MARCH, 2010.

  
JUDGE, MARION SUPERIOR COURT

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