

**UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF ILLINOIS**

SABRA RENCH, individually and on behalf	)	
of all others similarly situated,	)	
	)	
Plaintiff,	)	Case No. 3:13-cv-00922-SMY-PMF
	)	
v.	)	
	)	
A-1 ALLERGY RELIEF, INC., and	)	
HMI INDUSTRIES, INC.,	)	
	)	
Defendants.	)	

**PLAINTIFF’S MOTION FOR PARTIAL SUMMARY JUDGMENT AGAINST  
DEFENDANT HMI INDUSTRIES, INC. AND MEMORANDUM OF LAW IN SUPPORT**

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Plaintiff Sabra Rench, individually and on behalf of all others similarly situated, moves this Court pursuant to Federal Rule of Civil Procedure 56 to enter Partial Summary Judgment against Defendant HMI Industries, Inc. (“HMI”) under the Illinois Prizes and Gifts Act, 815 ILCS 525/1, *et seq.*, (“IPGA”) and the Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILCS 505/1 *et seq.* (“IFCA”).

### **STATEMENT OF UNCONTROVERTED FACTS**

#### **A. HMI’s Products and Warranty**

1. Defendant HMI is engaged in the manufacture and in-home sale of FilterQueen vacuums and air filters (the “HMI Products”) to consumers throughout the United States. Ex. 1, HMI 30(b)(6) Dep. (the “Foley Dep.”) 22:6-23:7.

2. Each sale of an HMI Product includes an HMI Warranty (the “Warranty”). Ex. 2, Joseph D’Amico Dep., 26:17-23, 162:13-163:12; Ex. 3, Demonstration Outline, p. 40.

3. To maintain the Warranty, consumers must make additional purchases of HMI Products. Ex. 2, D’Amico Dep. 163:11-164:13.

#### **B. HMI’s In-Home Consumer Sales Network**

4. HMI sells HMI Products exclusively through in-home demonstrations conducted by HMI’s network of exclusive Distributors. Ex. 1, Foley Dep. at 23:3-7, 26:16-27:4.

5. During the Class period, fourteen different distributors sold the HMI Products and Warranty in Illinois. Ex. 4, HMI Resp. to Pl. 2d Int. No. 4. The HMI Warranty was serviced by a “separate organizational structure” of HMI. Ex. 1, Foley Dep. 183:12-21, 214:19-215:1.

6. HMI monitors and rewards its distributors’ sales performance by, *inter alia*, analyzing monthly and annual sales data, which is transmitted when sales are generated from end-consumers. Ex. 1, Foley Dep. 111:13-16, 113:5-8; Ex. 2, D’Amico Dep. 26:17-23.

7. HMI's agreements with distributors describe HMI's "fundamental obligations" to distributors as follows:

HMI will endeavor to develop and implement programs and promotional materials intended to generate leads and otherwise help Distributor.

HMI will periodically hold schools and seminars at which Distributor . . . can receive training, help and guidance in how to sell and service the Products and how to run a successful distributorship.

Ex. 5, HMI 242.

8. HMI provides training to its distributors in the promotion, sale and service of HMI products, including: (A) conducting sales rallies, meetings and conventions; (B) sending HMI's Business Managers to visit and train distributors in the promotion, marketing and sale of HMI Products; and (C) maintaining an "exclusive on-line community for training materials, tips, and videos." Ex. 1, Foley Dep. 41:3-14 , 43:6-13, 124:24-125:16.

Ross,

We set up a schedule for Bob Kinney to get into the field to meet *several of our key distributors* in the next couple of weeks. *Bob will go on more demos, service calls, and spend time with the key people in the organizations* to learn what needs to be done from the field's perspective. Here's what we have scheduled so far:

\* \* \* \*

May 20-21 Bob, Eric and Ken meet with Chuck Ellens and *Joe D'Amico*

Ex. 6, May 5, 2009 email from Dave Dugan (HMI 4948) (emphasis added).

9. HMI created a "Sing for Sales Song Book," which HMI requires distributors to sing at sales meetings and conventions. Ex. 7, HMI Song Book, (HMI 18-20, 30, 34-35); Ex. 1, Foley Dep. 125:17-126:10. The songs promote selling to "the rich or the poor," and staying in the consumer's home "until they're licked":

**Sound Off**

We're going out to sell that's right. We're going out to sell that's right. And you can bet your lettuce green, we won't be back 'till we sell a machine. *Sell them 1 – 2. Sell them 3 – 4. We can sell the rich or the poor.*

**Jingle Bells**

Jingle bells, jingle bells, jingle night and day! Front doorbells and back doorbells, we'll push them, and we'll say: Sweep your rugs, air-wash them, sanitize them, too. *You've got to buy a Filter Queen, I won't leave 'till you do!*

**Washington and Lee Swing**

And so we fight, fight, fight for every sale. To pass the order book we never fail. *And if they don't sign quick, we stick and stick, until they're licked. FILTER QUEEN, LET'S GO!*

Ex. 7, HMI 30, 34, 35 (emphasis added); *see also* Ex. 1, Foley Dep. 127:4-16.

10. To avoid rescissions, HMI trained distributors to offer “perceived discounts” by offering a “trade-in” by which the consumer surrenders her current vacuum:

- Q. And as I read it, HMI is incentivizing the distribution network to take the people's vacuums and authorizing them to sell them for their own profit, correct?
- A. Yes. Just like when a car dealership takes a used car as a trade-in, they can do what they want with that used car. We did the same thing with the vacuums. The issue was the fact that you wanted to get them out of the house so that people, if they experience buyer's remorse – this is the reason that *all the Health-Mor trainers told me when I was trained and throughout the other years I was in the business and at events and everything else, it's: Get the damn vacuum out of the house. Get the trade-ins out. Do not forget the trade-in.* It was like the number one thing because they get buyer's remorse, or there's something on the floor that, you know, they just grab the little Dirt Devil to pick it up, and then they go: Oh, it picked it up. Why did I spend, you know, two, three grand on this system?

Ex. 8, Joseph Herrick Dep., 90:20-91:18; *see also id.* at 88:23-90:9 (“We can't sell it for more than twenty-eight ninety-eight, but they make us go through all this stuff to make it look like they're getting a discount, which was not very honest.”).

**C. HMI's “Scratch Card Promotion”**

11. HMI developed the “Scratch Card Promotion” (the “Promotion”) and required HMI distributors to execute Scratch Card Promotion Agreements providing, *inter alia*, that: (A) the scratch cards “will identify the Distributor as the sponsor of the Promotion”; (B) “HMI will

directly pay for and provide the Grand Prize, all First Prizes, all Second Prizes, and all Third Prizes won by recipients;” and (C) “HMI reserves the right to terminate the Promotion at any time, at its sole discretion.” Ex. 9, Scratch Card Agmt, ¶¶ 1, 2, 4, 6, 15; *see also* Ex. 10, Agreement (“***The Cards will not identify HMI***”); Ex. 11, Scratch Card PowerPoint (HMI 6983).

12. The purpose of the Scratch Cards is to get into consumers’ homes:

Q. That’s the key; get your foot in the door?

A. ***Entry approval.***

\* \* \* \*

Q. So entry approval is the -- getting in the house, in the home, is the ultimate goal of in-home sales; correct?

A. Uh-huh, can’t --  
[Objection]

Q. Is that right?

A. ***Yes; yes. You can’t make a sale if you’re not there.***

Ex. 1, Foley Dep. at 77:11-13, 79:14-21 (emphasis added); *see also id.* at 77:6-10, 157:18 (consumers get their prize “if you allow us in your home”).

13. HMI worked with its distributors to develop the Scratch Cards, which “are the main source of leads” for HMI’s distributors. Ex. 12, HMI Project Approval (Joe Reising), p. 1.

14. One distributor testified that, as a very conservative estimate, 70% of his sales in Illinois were generated from the Scratch Card Promotion:

Q. And you said about 70 percent of sales came from scratch cards, the information; is that correct?

A. That was my estimate for Illinois and Missouri, but it's probably more. It was a very conservative estimate.

Ex. 8, Herrick Dep. 101:23–102:3.

15. HMI maintained the right to control the content and use of its distributors’ scratch cards, including the right to terminate distributors. Ex. 1, Foley Dep. 49:13-50:11.



16. HMI trained its distributors on the Scratch Card Promotion at schools and seminars. Ex. 8, Herrick Dep. 73:25-74:22.

17. HMI purchased insurance for the Scratch Card Promotion, stating, “We have been doing scratch off promotions since 2006.” Ex. 13, Indemnity Application (HMI 7208), p. 1.

18. On October 9, 2007, A-1 Allergy Relief, Inc. (“A-1”), an exclusive HMI distributor, executed HMI’s Scratch Card Promotion Agreement. Ex. 14 (HMI 7220); Ex. 9.

19. A-1 was operated by Joe D’Amico, who had been an exclusive HMI distributor from 1998 to 2007 through JD & Associates, Inc. and, thereafter, through A-1. Ex. 2, D’Amico Dep. 62:18-63:25. A-1’s territory included Illinois. *Id.* at 60:25-61:11.

20. A-1 and other HMI distributors were subject to sales quotas:

Q. And, did HMI continue to require you to meet certain sales standards, quotas throughout your distributor, experience as distributor?

A. There was always quotas set.

*Id.* at 67:2-5.

**D. The HMI Poker Scratch Card**

21. In 2008 and 2009, HMI’s “Poker Scratch Card” was “by far the most popular one” among HMI distributors Ex. 15, May 27, 2008 email from J. Reising (HMI 6803).

22. Consistent with the Scratch Card Promotion Agreement, HMI’s Poker Scratch Cards did not identify HMI as a Sponsor. Below is a sample copy of the HMI Poker Scratch Card (front and back), which offers a “**\$10,000 GRAND PRIZE.**” Foley and Kimberly Wallace, HMI’s Sales Service Manager for over 15 years, testified that, in fact, HMI *never* awarded a “\$10,000 Grand Prize” for this or any other scratch card. Ex. 16, Kimberly Wallace Dep., 157:9-13; *see also* Ex. 1, Foley Dep. 147:13-20:



Here Are The WINNING HANDS

Three-Of-A-Kind (3 Aces)

Three-Of-A-Kind (3 Kings)

Three-Of-A-Kind (3 Queens)

Four-Of-A-Kind (4 Aces)

Four-Of-A-Kind (4 Kings)

Full-Of-A-Kind (4 Kings)

NOTE: Order of winning hands does not match order of prizes. Prizes available to be won and odds of winning are: (1) - 21 out of 1,000,000 cards; (2) - 399,835 out of 1,000,000 cards; (3) - 599,834 out of 1,000,000 cards; (4) - 186 out of 1,000,000 cards; (5) - 123 out of 1,000,000 cards; (6) - 1 out of 1,000,000 cards. You may be asked to view FILTERQUEEN Indoor Air Quality System. No obligation required. No purchase necessary. Available prizes decrease as prizes are awarded. Sponsor not affiliated with prize mfrs. Co-sponsored by FILTERQUEEN Merchants throughout the U.S. Retail Value is the verifiable value at the start of promotion.

To Learn The Prize You Have Won, CALL IMMEDIATELY

Winning hand must be verified with master key chart to determine prize.

360/438-0800 or 877/773-0800

Store Hours: Monday - Friday 10:00am - 8:00pm  
Saturday 10:00am - 2:00pm

(1) Bose 3-in-1 Stereo  
21:1,000,000 (Retail Value: \$1000)

(2) Chefmaster BBQ Set -18 pc  
399,835:1,000,000 (Retail Value: \$79)

(3) Siltzer Knife Set -17 pc  
599,834:1,000,000 (Retail Value: \$69)

(4) Canon Sure Shot Camera  
186:1,000,000 (Retail Value: \$79)

(5) Bulova His/Her Watch  
123:1,000,000 (Retail Value: \$189)

(6) \$10,000 Grand Prize  
1:1,000,000

602926  
Olympic Air Technologies  
719 Saker Kinney Road SE  
Suite #120  
Lacey, WA 98590

Ex. 17, HMI Poker Scratch Card (Doc 131-28).

23. From 2007 to 2009, A-1 ordered hundreds of thousands of the Poker Scratch Cards. Ex. 18, (HMI 6803, 6713, 6711).

24. In March 2008, HMI's Poker Scratch Card was the subject of an Illinois Attorney General Consumer Complaint alleging that the card was "deceptive." Ex. 19 (HMI 10171-74).<sup>1</sup>

25. In August 2009, Joe Reising, HMI's Lead Program Specialist, advised HMI management of the need to redesign the Poker Scratch Card:

The Cards are printed a million at a time and usually last about 3 months before we have to reorder. *For over a year, the network has been asking for something new to offer, or at least a redesign of the popular Poker card because response rates are declining. The scratch cards are the main source of revenue for a couple of our biggest organizations.*

Ex. 12 (HMI 7020).

<sup>1</sup> In November 2008, A-1 received another Attorney General Complaint, which A-1 forwarded to HMI for assistance. HMI responded to A-1, "First, you do not need to involve attorneys, either privately or through HMI. *An Attorney General Complaint has nothing to do with our legal system.*" Ex. 20, (HMI 6616) (underlining in original; emphasis added).

26. HMI has not identified a scratch card utilized in Illinois that discloses HMI as a sponsor. Ex. 21, Def. Resp. to Pl. 1st RFP No. 32. Exhibit 22, attached hereto shows examples of various HMI Scratch Cards used in Illinois. Ex. 8, Herrick Dep. 152:7-22.

**E. The A-1 Poker Scratch Card**

27. In 2009, with HMI's knowledge and consent, A-1 began printing its own Poker Scratch Cards to create leads for HMI Products, using HMI's Poker Scratch Card as a template:

Q. Okay. And, they didn't cut you off for doing that did they?

A. No.

[Objection]

A. ***In fact, they, the people that saw it loved it and took it back to HMI.***

\* \* \* \*

Q. Is Exhibit 153, the poker card depicted on Exhibit 153 the model for, Exhibit 153 depicts a poker card from HMI, is that correct?

A. Yes.

Q. And, did that provide the format, the model for Exhibit 27 the poker scratch card that you generated?

[Objection]

A. The template, yes.

Q. Okay. And, you testified earlier that HMI divisionals and other people were in and out of your office all the time?

A. Yeah, when they would come to, when they would come to visit, yeah.

Q. ***And, they saw your scratch cards and they used your scratch cards?***

A. ***They took some with them.***

Q. ***Alright. And, they knew you were generating your own scratch cards?***

A. ***Yes.***

Ex. 2, D'Amico Dep. at 140:8-13, 157:1-23 (emphasis added); *see also id.* at 22:5-18, 140:1-7;

Ex. 23, October 13, 2010 email from HMI Distributor to HMI's Reising and Jensen (HMI 6858)

“I recommend that you look at Joe D’Amico’s Blackjack scratch card. . . . It is a good card, and at least it would give your design people some basis and ideas they may not think of.”)

28. In 2012, Plaintiff Sabra Rench received A-1’s Poker Scratch Card (front and back depicted below) in the mail. (Doc 69-1, Rench Decl. ¶ 4).



Ex. 24, A-1 Poker Scratch Card.

29. A-1’s Poker Scratch Card contains the same language as HMI’s Poker Scratch Card and, consistent with the Scratch Card Agreements, does *not* identify HMI as a Sponsor.

D’Amico testified that he and other distributors printed their own scratch cards to save money:

Q. *The [HMI] poker card looks similar to Sabra’s card, the card that you sent out that Sabra received, does it not?*

A. *Yeah.*

[Objection]

A. *Objectively, it was about trying to save a little money. Everything else was the same.*

\* \* \* \*

Q. Alright. And, this scratch card marked as Exhibit 27 *as with the, all the scratch cards generated by HMI while you were a distributor did not identify HMI as a sponsor, correct?*

[Objection]

A. Yes.

\* \* \* \*

Q. What was the, the purpose of Exhibit 27 you're holding in your hand?

A. To generate leads to create sales.

Q. And, sales of HMI products?

A. Sales of HMI products, yes.

Q. You weren't selling anything else at the time, right?

A. Correct.

Q. Okay. And did HMI as of September, 2012 express to you disapproval of your use of your creation of your own scratch cards?

A. No.

Ex. 2, D'Amico Dep. at 112:25-113:12, 157:25-159:1 (emphasis added).

30. In September 2012, when Plaintiff received the scratch card in the mail, she scratched the card and called the telephone number to see what prize she had won. Doc. 69-1, Rench Decl. ¶ 5. Plaintiff was told that someone would come to her home to deliver the prize and conduct a product demonstration. Plaintiff was not told what the product was or that the demonstration would consist of multiple 3-hour demonstrations. *Id.* at ¶ 6.

31. At Plaintiff's house, A-1 utilized HMI's training and offered Plaintiff "perceived discounts," including a trade-in discount if she surrendered her current vacuum. After the second 3-hour demonstration, A-1 sold an HMI vacuum, air filter, and warranty to Plaintiff for \$2,798.00 (at an undisclosed 28.99% interest rate). *Id.* at ¶¶ 7-15.

32. After the purchase, Plaintiff tried to reach A-1 by phone to rescind her purchase. *Id.* at ¶¶ 16-18. Plaintiff then wrote to A-1 to rescind the transaction. *Id.* at ¶ 21.

33. In October 2012, Plaintiff called TD Bank to rescind the sale. *Id.* at ¶¶ 19-20, 22.

34. From October 2012 through March 2013, Plaintiff wrote numerous letters to the Illinois Attorney General seeking to rescind the sale. *Id.* at ¶ 24.

35. Plaintiff would not have purchased the HMI products or warranty had she not received the illegal scratch card. Doc. 69-1, Rench Decl. ¶ 27

36. In 2014, HMI considered adding a disclosure to the scratch cards that stated, “You may be asked to view a FilterQueen Indoor Air Quality System demonstration (90 minute)”); however, Ross Jensen, HMI’s Director of Sales, emailed Kimberly Wallace:

I’m not at all thrilled about the 90 minute disclaimer on the card. Any way to avoid that? We might as well put a 3,000 vacuum demo on it too.

Ex. 25, HMI 8751-52, 8749 (Doc. 131-27); *see also* Herrick Dep. 148:16-149:3 (“The point of keeping [pricing] to the end [of the presentation] is to not scare people off by sticker shock because if you said I have a \$2,800.00 vacuum and air filter, people would not really want to let you in the door as often, and, therefore, you would do less shows and make less sales and earn less of an income.”).

#### **THE LEGAL STANDARD**

“The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). Summary judgment is appropriate when “the pleadings, depositions, answers to interrogatories, admissions, and affidavits, if any, demonstrate that there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law.” *Spath v. Hayes Wheels Int’l-Ind., Inc.*, 211 F.3d 392, 396 (7th Cir. 2000). A genuine issue of material fact exists “if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 258 (1986). Finally, the nonmoving party may not rest on mere allegations or denials in its pleadings, but rather “must set forth specific facts

showing that there is a genuine issue for trial.” *Serednyj v. Beverly Healthcare, LLC*, 656 F.3d 540, 547 (7th Cir. 2011) (quoting *Anderson*, 477 U.S. at 250).

## ARGUMENT

### **I. HMI VIOLATED THE ILLINOIS PRIZES AND GIFTS ACT BY FAILING TO DISCLOSE HMI AS A “SPONSOR” OF THE SCRATCH CARD PROMOTION.**

The Illinois General Assembly enacted the Illinois Prizes and Gifts Act (“IPGA”), 815 ILCS 525/1, et seq., because it found that “deceptive promotional advertising of prizes is a matter vitally affecting the public interest in this State.” 815 ILCS 525/2. The IPGA applies to any written promotional offer that is: (1) made to a person in Illinois; (2) used to induce a person to meet a salesperson or agent in Illinois; or (3) used to induce or invite a person to contact by any means a salesperson or agent in Illinois. 815 ILCS 525/15(1). Here, the scratch cards at issue were: (1) made to persons in Illinois; (2) used to induce a person to meet a salesperson or agent in their home in Illinois; and (3) used to induce or invite a person to contact by telephone a salesperson or agent in Illinois. Statement of Facts (“SOF”) ¶¶ 12-14, 22, 25, 26, 28-30.

The IPGA requires that a written promotional prize offer contain certain disclosures made “in a clear and conspicuous statement at the onset of the offer.” 815 ILCS 525/25. The first disclosure that must be made on a written promotional prize offer is “the true name or names of the sponsor and the address of the sponsor’s actual principal place of business.” 815 ILCS 525/25(1). Violations of the IPGA may be enforced by “a consumer who suffers loss by reason of any intentional violation of any provision of [the] Act.” 815 ILCS 525/40(b). A consumer who is successful in her action “shall recover the greater of \$500 or twice the amount of the pecuniary loss, reasonable attorney’s fees, and court costs incurred by bringing such action.” *Id.*

#### **A. HMI is a “Sponsor” of the Scratch Card Promotion under the IPGA.**

The IPGA defines a “sponsor” as “a person on whose behalf a promotion is conducted to

promote or advertise goods, services, or property of that person,” and “includes a person who conducts a promotion on behalf of another sponsor.” 815 ILCS 525/10. Here, as Foley explains, the purpose of the scratch card promotion is to gain “entry approval” into consumers’ homes to promote and sell the HMI Products and Warranty. SOF ¶¶ 1-5, 12-14. Under the plain language of the statute, HMI is therefore, a “sponsor” of the scratch card promotion.

Furthermore, although not required under the IPGA’s definition of “sponsor,” here, **HMI actually developed and directly participated in the scratch card promotion in Illinois**. HMI’s Scratch Card Agreements with its distributors stated that HMI developed the promotion, that HMI would supply the \$10,000 Grand Prize, and all First, Second and Third Prizes<sup>2</sup>, and that HMI retained the right to control the content of the scratch cards, including requiring that: (A) “[t]he Cards will not identify HMI”; or (B) the Cards “will identify the Distributor as **the** sponsor of the Promotion.” SOF ¶¶ 7-8, 11-26. When, in 2014, there was discussion of adding a disclosure that, “You may be asked to view a FilterQueen Indoor Air Quality System demonstration (90 minute),” Ross Jensen, HMI’s Director of Sales, responded as follows:

I’m not at all thrilled about the 90 minute disclaimer on the card. Any way to avoid that? We might as well put a [\$]3,000 vacuum demo on it too.

SOF ¶ 36. Foley further testified that HMI held the power to terminate any distributor for using deceptive or misleading scratch cards. SOF ¶ 15.

HMI identified the scratch cards as the “main source of leads” for its distributors, with the Poker Scratch Card being “by far the most popular one” among distributors. SOF ¶¶ 13, 21. HMI trained distributors “incessantly” on the scratch card promotion with power point presentations. SOF ¶ 16. According to one Illinois distributor, Joe Herrick, scratch cards

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<sup>2</sup> HMI purchased insurance for the \$10,000 Grand Prize, explaining in its application: “We have been doing scratch off promotions since 2006. SOF ¶ 17.



generated at least 70% of his sales of HMI products and warranties in Illinois during his time as a distributor. SOF ¶ 14. HMI's direct participation in the scratch card promotion provides further support that HMI is a "sponsor" of the scratch card promotion under the IPGA.

HMI argues that, "HMI was not originally involved in the scratch cards Ms. Rench received. That was an A-1 Allergy scratch card. That was not part of HMI's scratch card program." Doc. 107, Tr. 74:16-20. The undisputed facts, however, lead to a different conclusion. On October 9, 2007, A-1 executed HMI's Scratch Card Promotion Agreement and, thereafter, ordered nearly one million of HMI's Poker Scratch Cards. SOF ¶¶ 18, 23. One of HMI's scratch cards used by A-1 was the subject of an Illinois Attorney General Complaint. SOF ¶ 24. In August 2009, HMI referred to A-1 as a "key customer" of HMI's Scratch Cards. SOF ¶ 13 (Ex. 12). In 2009, as HMI began considering new designs for scratch cards "because the response rates are declining," A-1, with HMI's knowledge and consent, began printing its own Poker Scratch Card using the HMI Poker Scratch Card as a template and including virtually identical content. SOF ¶¶ 25, 27-29. HMI's response was not to terminate A-1 or A-1's Scratch Card Agreement; rather, HMI's executives visiting A-1 took copies of A-1's scratch cards back to HMI to borrow A-1's design ideas. SOF ¶¶ 27-29.

Regardless of who printed the scratch cards, it is undisputed that A-1 was an exclusive distributor of HMI and that A-1's Poker Scratch Card was used to promote HMI Products and Warranty, making HMI a "sponsor".

Finally, the HMI Warranty included with each sale is serviced by a separate organization within HMI. SOF ¶ 5. Moreover, the only way to maintain that warranty is for consumers to make additional purchases of HMI Products. SOF ¶ 3. This cycle of sales generated by the scratch card promotion supports that HMI is a "sponsor" of the promotion under the IPGA.

**B. HMI Intentionally Violated the IPGA by Requiring that it not be Identified as a “Sponsor” of the Scratch Card Program.**

As set forth above, both versions of HMI’s Scratch Card Agreement express HMI’s intent to avoid disclosure of HMI as a sponsor *of its own scratch card promotion*. Consistent with its Agreements with distributors, although HMI has produced several examples of scratch cards that it created, including those utilized by distributors in Illinois during the Class Period, HMI has not identified any scratch card utilized in Illinois that discloses HMI as a sponsor. SOF ¶ 26. Notwithstanding that HMI’s scratch card promotion clearly was designed and implemented to promote HMI goods and services, HMI intentionally violated the IPGA by requiring that it not be identified on any of the scratch cards used in Illinois as a sponsor of its own promotion.

**C. Plaintiff and the Class have Suffered Loss as a Result of HMI’s Illegal Scratch Card.**

As explained by Kirk Foley, the purpose of HMI’s illegal scratch card promotion was to gain “entry approval” into consumers’ homes to sell HMI Products because “you can’t make a sale if you’re not there.” SOF ¶ 12. HMI’s promotion was effective at producing sales, with HMI referring to the promotion as the “main source of leads” and one distributor providing a “conservative estimate” that 70% of his Illinois sales were to scratch card recipients. SOF ¶¶ 13-14. Once in the home, HMI distributors utilized HMI’s training to “sell to the rich or poor” and stay “until they’re licked.” SOF ¶ 9. Distributors engaged in hours-long sales presentations tactics including “trade-ins” and “perceived discounts,” resulting in the distributor taking the consumer’s old vacuum to make returns more difficult. SOF ¶ 10.

The purpose of the IPGA’s disclosure requirements is to allow consumers to know exactly who and what is behind a promotion involving gifts or prizes, so that consumers are not victimized by high pressure and deceptive sales tactics such as those embodied in this case.

HMI's requirement that it not be identified as a sponsor of its own promotion was clearly intended to subvert this statutory purpose.

The practices described above, beginning with Ms. Rench's receipt of an illegal and deceptive scratch card, caused Ms. Rench, an elderly woman living almost entirely on Social Security, to be subject to over 6 hours of high-pressure, in-home sales tactics, ultimately resulting in her purchase of a \$2,800 vacuum cleaner at 29 % interest.

Prior to receiving the scratch card, Ms. Rench had no intention of purchasing a new vacuum or air filter from anyone. SOF ¶ 35. When Plaintiff received the scratch card in the mail, she scratched the card, saw that she had won a prize, and called the telephone number to see what she had won. SOF ¶ 30. Rench was told that someone would come to her home to deliver the prize and conduct a product demonstration. *Id.* She was not told what product would be demonstrated or that the demonstration would consist of multiple three-hour demonstrations. *Id.*

During the demonstrations, the distributor utilized HMI's training to offer Ms. Rench numerous "perceived discounts," including a trade-in discount if she surrendered possession of her current vacuum. Ms. Rench ultimately signed the documents presented to her, purchasing a HMI vacuum, air filter, and warranty for \$2,798, at an undisclosed 29% interest rate. SOF ¶ 31. After the purchase, Ms. Rench attempted to reach anyone at A-1 by phone to try to rescind the sale. SOF ¶ 32. She then wrote to A-1, who responded by refusing to rescind the transaction. SOF ¶ 32. After receiving a statement from TD Bank in October 2012, Ms. Rench called TD Bank to try to rescind the transaction. SOF ¶ 33. Ms. Rench then tried to rescind the sale by writing numerous letters to the Illinois Attorney General. SOF ¶ 34. Finally, Ms. Rench sought legal relief on behalf of herself and all similarly situated Illinois consumers, first from the Land of Lincoln Legal Assistance, who referred Ms. Rench to the undersigned attorneys.

HMI's illegal scratch card promotion was the critical link in the chain of Plaintiff's loss. Without the illegal promotion, HMI distributors would not have been able to enter Plaintiff and Class members' homes. This fact is conceded not only by Foley, but also by HMI's Director of Sales, Ross Jensen, who balked at disclosing the length of in-home demonstrations, stating, "We might as well put a [\$]3,000 vacuum demo on [the scratch card] too." SOF ¶ 36. HMI knew and understood that its disclosure as a sponsor on the scratch card would bar the "entry approval" critical to the promotion and resulting loss to Plaintiff and the Class.

Plaintiff and the Class request damages pursuant to 815 ILCS 525/40(b), including statutory damages of the *greater of* \$500.00 or two times actual damages. Plaintiff requests partial summary judgment as to liability under the IPGA. With respect to damages, Plaintiff requests a summary finding that, based on HMI's liability, Plaintiff and each Class Member is entitled to recover at least the statutory minimum of \$500.00, plus pre- and post-judgment interest, plus the costs of suit, including reasonable attorneys' fees, subject to amendment based on the jury's assessment of actual damages.<sup>3</sup>

**II. HMI VIOLATED THE ILLINOIS CONSUMER FRAUD AND DECEPTIVE BUSINESS PRACTICES ACT BY ITS MISREPRESENTATION, CONCEALMENT, SUPPRESSION, OR OMISSION FROM THE SCRATCH CARDS OF DISCLOSURES REQUIRED BY ILLINOIS LAW.**

ICFA "protects consumers against 'unfair or deceptive acts or practices,' including 'fraud,' 'false promise,' and the 'misrepresentation or the concealment, suppression or omission of any material fact.'" *Wigod v. Wells Fargo Bank, N.A.*, 673 F.3d 547, 574 (7th Cir. 2012) (quoting 815 ILCS 505/2). ICFA "is liberally construed to effectuate its purpose." *Id.* (citation omitted). "The elements of a claim under the ICFA are: (1) a deceptive or unfair act or practice

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<sup>3</sup> Because IPGA provides for the *greater of* \$500.00 or two times actual damages, if two times the actual damages assessed by the jury is greater than \$500.00 per person, then the judgment should be amended to reflect this amount.

by the defendant; (2) the defendant's intent that the plaintiff rely on the deceptive or unfair practice; and (3) the unfair or deceptive practice occurred during a course of conduct involving trade or commerce." *Id.* (citations omitted). "Plaintiff's reliance is not an element of statutory consumer fraud, but a valid claim must show that the consumer fraud proximately caused plaintiff's injury." *Connick v. Suzuki Motor Co.*, 675 N.E.2d 584, 593 (Ill. 1996).

**A. HMI has Committed Multiple Unlawful Practices Under ICFA.**

**1. HMI's violation of the IPGA is an unlawful practice under ICFA.**

According to the Illinois Prizes and Gifts Act, "[v]iolation of any of the provisions of this Act [IPGA] is an unlawful practice under the Consumer Fraud and Deceptive Business Practices Act." As set forth above, the omission of HMI as a sponsor of the scratch cards violated Section 25 of IPGA. Thus, the first element of Plaintiff and the Class' ICFA claim is satisfied because HMI committed an unlawful practice under ICFA.<sup>4</sup>

**2. HMI's violation of section 2P of ICFA is an unlawful practice.**

Section 2P of ICFA provides: "It is an unlawful practice for any person to promote or advertise any business [or] product . . . by means of offering free prizes, gifts, or gratuities to any consumer, unless all material terms and conditions relating to the offer are clearly and conspicuously disclosed *at the outset of the offer* so as to leave no reasonable probability that the offering might be misunderstood." 815 ILCS 505/2P (emphasis added).

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<sup>4</sup> An unlawful practice under ICFA can only arise from omission or misrepresentation of material facts. *See Heastie v. Community Bank of Greater Peoria*, 690 F. Supp. 716, 718 (N.D. Ill. 1988). By classifying specific information that must be disclosed on the scratch cards, and indicating that their non-disclosure constitutes an unlawful practice, the Illinois Legislature has deemed their omissions as material to all Illinois consumers. *See* 815 ILCS 505/2 ("[D]eceptive acts or practices, including but not limited to the use or employment of any . . . misrepresentation or the concealment, suppression or omission of any material fact, with intent that others rely upon the concealment, suppression or omission of such material fact . . . are hereby declared unlawful . . ."). Accordingly, the omission of statutorily required information on the scratch cards constitutes *per se* unlawful practices under ICFA.

Here, the scratch cards do not clearly and conspicuously disclose all material terms at the outset of the offer, including that HMI is a sponsor or that HMI products and services may be offered for sale during an hours-long in-home presentation. As discussed above, when HMI considered adding a disclosure to the scratch cards regarding the in-home demonstration, HMI's Director of Sales sarcastically responded, "We might as well put a 3,000 vacuum demo on it too." SOF ¶ 36. These omissions and misrepresentations violate Section 2P of ICFA and constitute unlawful practices by HMI.

**3. HMI's violation of Section 2PP of ICFA is an unlawful practice.**

Section 2PP of ICFA provides that it is an unlawful practice to mail or cause to be mailed a postcard or letter if the postcard or letter: (1) contains a request that the recipient call a telephone number; and (2) is mailed or sent to induce the recipient to call the telephone number so that goods, services, or other merchandise may be offered for sale to the recipient; and (3) does not disclose that goods, services, or other merchandise may be offered for sale if the recipient calls the telephone number. 815 ILCS 505/2PP.

Here, the Class includes people in Illinois who were mailed a postcard or letter that (1) contained a request that the recipient call a telephone number; (2) to induce the recipient to call the telephone number so that goods (HMI Products), services (HMI Warranty), or other merchandise could be offered for sale. SOF ¶¶ 12-14, 22, 25, 26, 28-30. The scratch cards, however, did not disclose that HMI goods, services, or other merchandise, may be offered for sale if the recipient called the telephone number. Rather, the scratch cards simply provide: "You may be asked to view a Health and/or Safety Product" or "You may be asked to view FILTERQUEEN Indoor Air Quality System" or "You may be asked to view a FilterQueen Indoor Air Quality System demonstration." SOF ¶¶ 22, 26, 28. None of these disclosures rises

to the level of identifying that HMI goods or services may be offered for sale (much less at a price of nearly \$3,000 after an hours-long presentation) if the recipient calls the telephone number. Accordingly, the scratch cards violate Section 2PP of ICFA, which constitutes an unlawful practice under ICFA.

**B. HMI Intended that the Plaintiff and Illinois Class Rely on the Unlawful Practices.**

As set forth in Section I.B above, HMI's omission as a sponsor was intentional. *See, e.g.*, Ex. 10, HMI Scratch Card Agreement, ¶ 4 ("The Cards will not identify HMI."). Additionally, HMI sought to avoid adding information about the sales presentation or pricing of the HMI Products and Warranty to the scratch cards. SOF ¶ 36. Such non-disclosure was consistent with HMI's training that the price of the Products should not be disclosed until the end of the in-home presentation. SOF ¶ 36. Accordingly, HMI intended that Plaintiff and the Illinois Class rely on the omissions described above so that they could acquire more "entry approval" and, thus, more sales from the scratch card program.

**C. The Unlawful Practices Occurred During a Course of Conduct Involving Trade or Commerce.**

Under ICFA, "[t]he terms 'trade' and 'commerce' mean the advertising, offering for sale, sale, or distribution of any services and any property, tangible or intangible, real, personal or mixed, and any other article, commodity, or thing of value wherever situated, and shall include any trade or commerce directly or indirectly affecting the people of this State." 815 ILCS 505/1(f). "The term 'sale' includes any sale, offer for sale, or attempt to sell any merchandise for cash or on credit." *Id.* § 505/1(d). HMI's unlawful practices related to the scratch cards occurred during a course of conduct involving trade or commerce.

**D. The Unlawful Practices Proximately Caused Plaintiff and the Class' Damage.**

For the reasons set forth in Section I.C above, HMI's unlawful practices proximately caused Plaintiff and the Class damage in the form of pecuniary loss from the purchase of the HMI Products and Warranty. Without the "entry approval" provided by the scratch card, there would be no sale. SOF ¶ 12. Moreover, HMI knew that adding truthful disclosures on the scratch cards would decrease the numbers of "entry approval," and thus, decrease the number of sales. *Id.* Accordingly, the illegal scratch cards are the first link in the chain of Plaintiff and the Class members' pecuniary loss from purchasing the HMI Products and Warranty. *See Connick*, 675 N.E.2d at 595 (finding Plaintiff adequately alleged proximate cause under ICFA by "alleg[ing] that their purchases occurred after the allegedly fraudulent statements"). Finally, although "Plaintiff's reliance is not an element of statutory consumer fraud," here, it is undisputed that Plaintiff would not have purchased the HMI Products or Warranty had she not received the illegal scratch card. SOF ¶ 35.

Accordingly, Plaintiff seeks partial summary judgment as to liability under ICFA because the undisputed facts demonstrate: (1) an unlawful practice by HMI; (2) HMI's intent that Plaintiff rely on the unlawful practice; (3) the unlawful practice occurred in a course of conduct involving trade or commerce; that (4) proximately caused Plaintiff and the Class damages.<sup>5</sup>

**CONCLUSION**

For these reasons, this Court should enter partial summary judgment in favor of Plaintiff and against HMI as to liability under the Illinois Prizes and Gifts Act and the Illinois Consumer Fraud and Deceptive Business Practices Act.

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<sup>5</sup> Because the parties dispute the amount of damages, Plaintiff only seeks judgment as to liability, which leaves the issue of damages for trial.



Respectfully submitted,

**GOLDENBERG HELLER  
& ANTOGNOLI, P.C.**

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of the foregoing was electronically filed with the United States District Court, Southern District of Illinois, and that copies were sent electronically on this 15th day of May, 2018, to all attorneys of record.

/s/ Kevin P. Green