

CAUSE NO. DC-14-14838

DAWN NETTLES, <i>Plaintiff,</i>	§	IN THE DISTRICT COURT OF
	§	
	§	
V.	§	
	§	DALLAS COUNTY, TEXAS
GTECH CORPORATION	§	
AND THE TEXAS LOTTERY COMMISSION, <i>Defendants.</i>	§	
	§	
	§	160 TH JUDICIAL DISTRICT

**DAWN NETTLES' RESPONSE TO THE TEXAS LOTTERY COMMISSION'S
PLEA TO THE JURISDICTION**

Plaintiff, Dawn Nettles, asks the Court to overrule the Texas Lottery Commission's ["TLC's"] Plea to the Jurisdiction. A memorandum in support of this response is attached hereto.

Respectfully submitted,

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**PLAINTIFF’S MEMORANDUM IN SUPPORT OF RESPONSE TO THE TEXAS LOTTERY
COMMISSION’S PLEA TO THE JURISDICTION**

TABLE OF CONTENTS

TABLE OF AUTHORITIES	4
I. SUMMARY OF ARGUMENTS	5
A. Sovereign immunity does not apply in this case.	5
B. If sovereign immunity does apply, it was waived by the TLC’s egregious conduct.....	6
C. There were no administrative remedies for Ms. Nettles to exhaust.	6
II.FACTUAL BACKGROUND	7
A. The Dispute.	7
B. GTECH’s plan to add the TLC as a RTP.	11
III.ARGUMENT	11
A. Sovereign immunity does not apply in this case.	11
1. The TLC has failed to meet its burden to show that sovereign immunity applies.....	11
2. Sovereign immunity is defined by the courts, not the Legislature.	12
3. The absence of a Legislative waiver of immunity does not determine whether immunity exists.	13
4. The Supreme Court has supplied the test to be applied in this case.	13
5. The <i>Brown & Gay</i> and <i>Reata</i> decisions mandate that sovereign immunity should not be applied to bar this lawsuit.	14
6. An agreement to “hold harmless” another party is an agreement to assume that party’s liability.....	14
7. GTECH agreed to hold the TLC harmless and to defend the TLC under two separate contracts.	15
8. The claims in Ms. Nettles’ lawsuit are of the type that trigger GTECH’s contractual duties.	18
9. Under the “eight-corners” rule, GTECH is contractually obligated to defend the TLC. 19	
10. Under the “parol evidence” rule, GTECH is, as a matter of law, contractually obligated to hold harmless the TLC.	20
B. If sovereign immunity does apply, it was waived by the TLC’s egregious conduct.....	20
1. In the absence of a fair dispute resolution scheme, the Supreme Court has indicated a willingness to consider waiver-by-conduct for egregious conduct.	20
2. In this case, there was no fair dispute resolution scheme and the TLC’s behavior was egregious.....	22
C. There is no administrative remedy available for Ms. Nettles to exhaust.	24
D. Granting the TLC’s plea to the jurisdiction would violate the open courts provision of the Texas Constitution.	25
IV.CONCLUSION	26
V.PRAYER.....	26

TABLE OF AUTHORITIES

Cases

Alamo Cmty. College Dist. v. Browning Const. Co., 131 S.W.3d 146, 155 (Tex. App.—San Antonio 2004, pet. denied)..... 20

Bland Indep. Sch. Dist. V. Blue, 34 S.W.3d 547, 554 (Tex. 2000) 12

Brinkerhoff-Faris Trust & Sav. Co. v. Hill, 281 U.S. 673, 677-81, 50 S. Ct. 451, 74 L. Ed. 1107 (1930) 25

Brown & Gay Engineering, Inc. v. Olivares, 461, S.W. 3d 117, 122-23 (Tex. 2015) 12

Brown & Gay Engineering, Inc. v. Olivares, 461, S.W. 3d 117, 123 (Tex. 2015) 5

City of McKinney v. Hank's Rest. Group, L.P., 412 S.W.3d 102, 114 (Tex. App. Dallas 2013) 22

Dresser Indus. v. Page Petroleum, 853 S.W.2d 505, 507-508 (Tex. 1993)..... 15

Employees Ret. Sys. of Tex. v. Duenez, 288 S.W.3d 905 (Tex. 2009) 25

Employees Ret. Sys. v. Putnam, LLC, 294 S.W.3d 309, 327 (Tex. App.—Austin 2009, no pet.).... 21

Federal Sign v. Tex. S. Univ., 951 S.W.2d 401, 408 (Tex. 1997) 20

GuideOne Elite Ins. Co. v. Fielder Rd. Baptist Church, 197 S.W.3d 305, 308 (Tex. 2006) 19

Leach v. Texas Tech Univ., 335 S.W.3d 386, 400-01 (Tex. App.—Amarillo 2011, pet. filed) 21

Reata Constr. Corp. v. City of Dallas, 197 S.W.3d 371 (Tex. 2006)..... 13

Reata Constr. Corp. v. City of Dallas, 197 S.W.3d 371, 374 (Tex. 2006)..... 12

Sacks v. Haden, 266 S.W.3d 447, 450 (Tex. 2008) 20

Tex. Dep't of Parks & Wildlife v. Miranda, 133 S.W.3d 217, 227 (Tex. 2004)..... 12

Tex. Natural Res. Conservation Comm'n v. IT-Davy, 74 S.W.3d 849, 857 (Tex. 2002) 21

Texas S. Univ. v. State Street Bank & Trust Co., 212 S.W.3d 893, 908 (Tex. App.—Houston [1st Dist.] 2007, pet. denied) 21

Willis v. Donnelly, 199 S.W.3d 262, 275 (Tex. 2006)..... 20

Statutes

Tex. Civ. Prac. & Rem. Code § 107.001 21

Tex. Gov't Code §§ 2260.001-108..... 21

Texas Government Code Sec. 466.014 (a) 6, 7, 10

Texas Government Code Sec. 467.021 7

Texas Government Code Sec. 467.101 7

I. SUMMARY OF ARGUMENTS

The TLC alleges that this Court has no jurisdiction because the doctrine of sovereign immunity bars Ms. Nettles' suit against the TLC. The TLC also claims that Ms. Nettles failed to exhaust some unspecified administrative remedy.

This case raises the interesting question of whether a state agency can use the common-law doctrine of sovereign immunity to bar a court from reviewing its actions if the agency's defense and liability has been contractually assumed by a private contractor and if the agency has engaged in egregious fraudulent conduct in violation of its Legislative mandate.

A. Sovereign immunity does not apply in this case.

The common-law doctrine of sovereign immunity is not based on legislation or the Constitution. It was developed by the courts. The courts are required to determine if sovereign immunity applies in the first place before considering whether a waiver of immunity by the Legislature is applicable.

The Texas Supreme Court recently held that a threshold question for determining if sovereign immunity applies is whether the lawsuit would cause "unforeseen expenditures" that could "hamper government functions by diverting funds from their allocated purposes".¹

The TLC's co-defendant in this case, GTECH Corporation ["GTECH"], entered into two contracts whereby it agreed to "indemnify, defend, and hold the Texas Lottery...harmless" from claims like those asserted by Ms. Nettles in this case. By so doing, GTECH expressly agreed it would defend the TLC from claims of the type asserted by Ms. Nettles and that it would assume

¹ *Brown & Gay Engineering, Inc. v. Olivares*, 461, S.W. 3d 117, 123 (Tex. 2015).

the TLC's liability for those claims. Accordingly, Ms. Nettles' suit against the TLC would not cause "unforeseen expenditures" that could "hamper government functions by diverting funds from their allocated purposes."

The doctrine of sovereign immunity should not bar Ms. Nettles' claims for two reasons: (1) Only GTECH is at financial risk in this lawsuit because GTECH contractually assumed the TLC's liability and has agreed to defend the TLC for claims of the type presented by Ms. Nettles; and, (2) The taxpayers of Texas are not at financial risk in this lawsuit because Ms. Nettles has expressly pled that she is seeking no recovery from the TLC beyond that which GTECH is contractually obligated to pay on the TLC's behalf.

B. If sovereign immunity does apply, it was waived by the TLC's egregious conduct.

If the doctrine of sovereign immunity does apply to Ms. Nettles' claims, the TLC waived its immunity by engaging in egregious conduct that violated its Legislative mandate to "promote and ensure integrity, security, honesty, and fairness in the operation and administration of the lottery".²

C. There were no administrative remedies for Ms. Nettles to exhaust.

Lastly, the undisputed testimony of the TLC's Executive Director establishes that there were no administrative remedies available for Ms. Nettles once the TLC's computer validated each of her scratch-off tickets as "not a winner". Accordingly, the TLC's plea to the jurisdiction should be overruled.

² Texas Government Code Sec. 466.014 (a).

II. FACTUAL BACKGROUND

A. The Dispute.

The TLC was created by the Legislature and is composed of five political appointees.³ The Legislature has mandated that the TLC must exercise its powers to “promote and ensure integrity, security, honesty, and fairness in the operation and administration of the lottery”.⁴ The TLC is obligated, by statute, to “ensure that games are conducted fairly.”⁵

GTECH, which is also known by its assumed trade name of “IGT”⁶, is the U.S. subsidiary of an Italian gaming company⁷ which operates lotteries, sports betting, and commercial bookmaking throughout the world.⁸

GTECH has the exclusive contract to operate the Texas lottery through the year 2020.⁹ GTECH’s fee is 2.21 % of sales.¹⁰ Accordingly, GTECH is financially benefitted by increased lottery ticket sales. The Texas Lottery generates sales in excess of \$4.3 billion annually. GTECH receives approximately \$100 million per year from the TLC under its contract.¹¹

Dawn Nettles is one of approximately 1,000 Texas consumers who have filed suit against GTECH, the private operator of the Texas lottery.¹² The dispute surrounds the language developed by GTECH and printed by GTECH on 16.5 million tickets it sold to the Texas Lottery.

³ Texas Government Code Sec. 467.021

⁴ Texas Government Code Sec. 466.014 (a).

⁵ Texas Government Code Sec. 467.101

⁶ GTECH recently acquired International Gaming Technology, the largest maker of slot machines. GTECH now operates under the assumed name “IGT”. Lapinski Deposition, Exhibit 2 at p. 6.

⁷ Lapinski Depo. Exhibit 2 at p. 14.

⁸ www.IGT.com;

⁹ Lapinski Depo. Exhibit 2 at p. 19-20.

¹⁰ Lapinski Depo. Exhibit 2 at p. 25.

¹¹ Grief Depo. Exhibit 8 at p. 28.

¹² Similar cases against GTECH are pending in Austin and El Paso. By stipulation of the parties, discovery taken in the Austin case can be used in this case. See, Rule 11 Agreement, Exhibit 9.

Specifically, GTECH developed and printed the following language on the Fun 5's scratch-off tickets:

Reveal three "5" symbols in any one row, column or diagonal, win PRIZE in PRIZE box. Reveal a Money Bag "👛" symbol in the 5X BOX, win 5 times that PRIZE.

GTECH programmed its computers to validate the Fun 5's tickets as winners of five times the PRIZE in the PRIZE box only if the tickets revealed **both** a Money Bag symbol **and also** three "5" symbols in any one row, column, or diagonal. ¹³

Sales of the Fun 5's tickets began on September 2, 2014.¹⁴ On that same day the TLC began to get calls on its consumer hotline from players who believed they had automatically won because their tickets revealed a Money Bag symbol.¹⁵ One of the TLC's consumer hotline employees reported to her boss that the Fun 5's tickets contained "poor wording".¹⁶ The TLC's Instant Ticket Coordinator acknowledged that there was "confusion" and that there might be a better way to word the game.¹⁷

On September 3rd, eighty-three (83) players called the TLC to complain that the wording was "misleading".¹⁸ On the same day, another TLC representative reported to the TLC's Instant Ticket Coordinator that "[t]he way the instructions read in the second sentence gives the impression that matching the 5 symbols is not necessary to win the bonus portion, that you only have to get the money bag symbol".¹⁹ That same day Michael Anger, the head of the TLC's

¹³ Bowersock Depo. Exhibit 11 at pp. 140-141.

¹⁴ Morales Deposition, Exhibit 10 at p. 31.

¹⁵ Bowersock Depo. Exhibit 11 at p. 98.

¹⁶ Bowersock Depo. Exhibit 11 at pp. 105-106.

¹⁷ Bowersock Depo., Exhibit 11 at p. 99.

¹⁸ Bowersock Depo., Exhibit 11 at p. 111.

¹⁹ Bowersock Depo., Exhibit 11 at p. 107.

Lottery Operations Division was made aware of the controversy as was the TLC's legal department.²⁰

On September 4th, the TLC received one hundred thirty-four (134) complaint calls from Fun 5's players.²¹

On September 5th, a TLC employee sent an e-mail to Robert Tirloni, the TLC's Products & Drawings Manager, in which she reported that the operators in the call center were getting "pushback" from players who called the game "misleading". Some players indicated they were going to call the news media. Others indicated they were going to call lawyers.²² A copy of that e-mail was forwarded to the TLC's Executive Director Gary Grief.²³

On that same day, the staff of the TLC put together the paperwork necessary to "call" the game.²⁴ If the paperwork they prepared had been approved by Gary Grief on September 5th, a message would have been sent to retailers on their computer terminals instructing them to immediately stop selling the Fun 5's game.²⁵

However, Mr. Grief did not call the game on September 5th. In fact, Mr. Grief has testified that he had no interest in shutting down the game that day.²⁶ Mr. Grief noted that Fun 5's was the TLC's best-selling game earning \$3 million per week in sales.²⁷

Mr. Grief was scheduled to attend the Public Gaming Research Institute's (PGRI's) Lottery Expo 2015 at the Eden Rock Hotel in Miami Beach later that week or early the next

²⁰ Bowersock Depo., Exhibit 11 at p. 115.

²¹ Bowersock Depo., Exhibit 11 at p. 123.

²² Bowersock Depo., Exhibit 11 at p. 124.

²³ Grief Depo. Exhibit 8 at p. 34.

²⁴ Bowersock Depo., Exhibit 11 at pp. 129-131.

²⁵ Id.

²⁶ Grief Depo. Exhibit 8 at p. 41.

²⁷ Grief Depo. Exhibit 8 at p. 35.

week.²⁸ Mr. Grief was scheduled to be inducted into PGRI's Lottery Industry Hall of Fame. Mr. Grief was asked in his deposition how it might have looked to the folks at the PGRI if just days before he received that honor he was forced to shut a game down because it was misleading and deceptive. Mr. Grief refused to answer the question on advice of counsel.²⁹

In a speech to the PGRI, Mr. Grief stated that his goal is to generate increased revenues and that "we have to peddle faster and faster to eke out better revenues year after year".³⁰

Calls from angry consumers continued to pour into the TLC's consumer hotline at the rate of seventy-five (75) to one hundred (100) calls per day.³¹ The TLC continued selling the misleading and deceptive Fun 5's tickets until October 21, 2014, when Mr. Grief finally ordered that the game be shut down after receiving pressure from Legislators who were getting calls from their constituents.³²

During the six and one-half weeks between the date his staff prepared the paperwork to shut down the Fun 5's game and the date Mr. Grief finally agreed to shut it down, the TLC gained approximately \$19.5 million in additional revenues from knowingly selling the deceptive and misleading Fun 5's tickets. However, by doing so the TLC violated its Legislative mandate to "promote and ensure integrity, security, honesty, and fairness in the operation and administration of the lottery".³³

²⁸ Grief Depo. Exhibit 8 at p. 42-44.

²⁹ *Id.*

³⁰ Grief Depo. Exhibit 8 at p. 36-37.

³¹ Bowersock Depo. Exhibit 11 at p. 160.

³² Grief Depo. Exhibit 8 at p. 44-45.

³³ Texas Government Code Sec. 466.014 (a).

B. GTECH's plan to add the TLC as a RTP.

Ms. Nettles originally sued only GTECH, the private company that (1) developed and printed the deceptive language used on the tickets, (2) sold 16.5 million of the deceptive tickets to the TLC, (3) continued to distribute the deceptive tickets for sale long after it became aware that the language was misleading; and, (4) withheld important information from the TLC regarding the demand by retailers that they not be sent more of the misleading tickets.

GTECH responded to a request for disclosures in this case by announcing that it may designate the TLC as a responsible third party.³⁴ To avoid an "empty chair" defense by GTECH, Ms. Nettles added the TLC as a party defendant and made it clear that she was not seeking a recovery from the TLC beyond that which GTECH is contractually obligated to pay on behalf of the TLC.³⁵

III. ARGUMENT

A. Sovereign immunity does not apply in this case.

Sovereign immunity does not apply for the reasons set forth below.

1. The TLC has failed to meet its burden to show that sovereign immunity applies.

To prevail on its plea to the jurisdiction, the TLC "must show that even if all the allegations in the plaintiff's pleadings are taken as true, there is an incurable jurisdictional defect apparent from the face of the pleadings, rendering it impossible for the plaintiff's

³⁴ See relevant portion of GTECH's Response to Request for Disclosures attached hereto as Exhibit 1.

³⁵ At paragraph 82 of her Second Amended Petition, Ms. Nettles states "Plaintiff does not seek to recover money from the Texas Lottery Commission beyond what this court declares must be paid on behalf of the TLC by GTECH.

petition to confer jurisdiction on the court." *Bland Indep. Sch. Dist. V. Blue*, 34 S.W.3d 547, 554 (Tex. 2000). Ms. Nettles' allegations in her pleadings, if taken as true, establish that sovereign immunity is not applicable to this case.

A court may consider evidence in addressing the jurisdictional issues raised in a plea to the jurisdiction. *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 227 (Tex. 2004). If the evidence reveals a question of fact on the jurisdictional issue, the trial court cannot grant the plea, and the issue must be resolved by a fact finder. *Id.* at 227-28. However, if the relevant evidence is undisputed or fails to raise a fact question on the jurisdictional issue, the trial court rules on the plea to the jurisdiction as a matter of law. *Id.* at 228.

In this case, the undisputed jurisdictional facts establish that GTECH is responsible for paying the costs of the TLC's defense in this case and has assumed the liability for paying any judgment Ms. Nettles might obtain against the TLC. Accordingly, this Court should rule, as a matter of law, that sovereign immunity does not bar Ms. Nettles' claims.

2. Sovereign immunity is defined by the courts, not the Legislature.

Sovereign immunity is a common-law doctrine that was developed by the courts without any legislative or constitutional enactment. *Reata Constr. Corp. v. City of Dallas*, 197 S.W.3d 371, 374 (Tex. 2006). It remains the judiciary's responsibility to define the boundaries of the sovereign immunity doctrine and to determine under what circumstances sovereign immunity exists in the first instance. *Brown & Gay Engineering, Inc. v. Olivares*, 461, S.W. 3d 117, 122-23 (Tex. 2015).

3. The absence of a Legislative waiver of immunity does not determine whether immunity exists.

By contrast, the Legislature determines when and to what extent to waive sovereign immunity if the courts find that immunity exists. *Id.* at 122. Accordingly, the absence of a statutory grant of immunity is irrelevant to whether, as a matter of common law, the boundaries of sovereign immunity apply. *Id.*

4. The Supreme Court has supplied the test to be applied in this case.

The Supreme Court recently outlined the factors to be considered by courts in deciding whether sovereign immunity exists. The Court observed that sovereign immunity “was designed to guard against the ‘unforeseen expenditures’ associated with the government’s defending lawsuits and paying judgments ‘that could hamper government functions’ by diverting funds from their allocated purposes.” *Id.* at 123.

Because the lawsuit brought in the *Brown & Gay* case would not cause “unforeseen expenditures” that could “hamper government functions by diverting funds from their allocated purposes”, the Court ruled that sovereign immunity would not be applied to bar that suit.

The Supreme Court earlier applied the same standard to determine that sovereign immunity did not exist to bar suit against the City of Dallas in *Reata Constr. Corp. v. City of Dallas*, 197 S.W.3d 371 (Tex. 2006). In the *Reata* case, the City of Dallas filed suit against a construction company. The construction company filed a counterclaim against the City. The Court held that sovereign immunity would not apply to bar Reata’s counterclaim against the City to the extent that any recovery by Reata on its counterclaim would offset any recovery by

the City against Reata. However, the Court found that the City continues to have immunity from affirmative damage claims against it for monetary relief exceeding amounts necessary to offset the City's claims against Reata. *Id.* at 377.

5. The *Brown & Gay* and *Reata* decisions mandate that sovereign immunity should not be applied to bar this lawsuit.

Under the holdings of the *Brown & Gay* and *Reata* opinions, the threshold question for this Court is whether Ms. Nettles' claims will cause "unforeseen expenditures" for the TLC that could "hamper government functions by diverting funds from their allocated purposes". Because GTECH owes a contractual duty to "indemnify, defend, and hold the Lottery Commission...harmless" for Ms. Nettles' claims, this lawsuit will not result in "unforeseen expenditures" that could "hamper government functions by diverting funds from their allocated purposes". Therefore, the common-law doctrine of sovereign immunity should not be applied to bar Ms. Nettles' lawsuit.

In addition, to the extent that Ms. Nettles has expressly pled that she is not seeking a recovery from the TLC beyond that which GTECH is contractually obligated to pay³⁶, the holding of the *Reata* case mandates that the TLC is not entitled to sovereign immunity.

6. An agreement to "hold harmless" another party is an agreement to assume that party's liability.

The Supreme Court has defined a "hold harmless" agreement as "[a] contractual arrangement whereby one party assumes the liability inherent in a situation, thereby relieving

³⁶ At paragraph 82 of her Second Amended Petition, Ms. Nettles states "Plaintiff does not seek to recover money from the Texas Lottery Commission beyond what this court declares must be paid on behalf of the TLC by GTECH.

the other party of responsibility. . . . [An] agreement or contract in which one party agrees to hold the other without responsibility for damage or other liability arising out of the transaction involved. *Dresser Indus. v. Page Petroleum*, 853 S.W.2d 505, 507-508 (Tex. 1993).

7. GTECH agreed to hold the TLC harmless and to defend the TLC under two separate contracts.

The undisputed evidence shows that GTECH entered into two contracts with the TLC, both of which require GTECH to “indemnify, defend, and hold the Texas Lottery...harmless” from claims of the type alleged by Ms. Nettles.³⁷ GTECH was aware, before it signed the contracts, that it was agreeing to assume the TLC’s liability for any claims that might arise, in whole or in part, because of something GTECH did or failed to do.³⁸

GTECH had two lawyers review the contracts before they were executed and GTECH’s account development manager for Texas testified that GTECH stands by its contractual obligation.³⁹

a. The Contract for Lottery Operations and Services obligates GTECH to defend the TLC and to assume the TLC’s liability for claims of the type raised in this lawsuit.

On December 10, 2014, GTECH and the TLC executed a “Contract for Lottery Operations and Services” (“Operations Contract”).⁴⁰ GTECH receives approximately \$100 million per year

³⁷ Lapinski Depo. Exhibit 2, pp. 23-24 & 44-45.

³⁸ Lapinski Depo. Exhibit 2 at p. 23.

³⁹ Id.

⁴⁰ A copy of the relevant portions of the Operations Contract is attached hereto as Exhibit 3.

from this Operations Contract.⁴¹ The Operations Contract is a matter of public record, and can be accessed on the TLC's website.⁴²

Section 3.33 of the Operations Contract provides, in relevant part, as follows:

“3.33.1 GTECH shall indemnify, defend and hold the Texas Lottery...harmless from and against any and all claims, demands, causes of action, liabilities, lawsuits, losses, damages, costs, expenses or attorneys' fees (collectively, "Claim"), and including any liability of any nature or kind arising out of a Claim for or on account of the Works...which may be incurred suffered, or required in whole or in part by an actual or alleged act or omission of GTECH...whether the Claim is based on negligence, strict liability, intellectual property infringement or any other culpable conduct, whether frivolous or not...”

The term “Works” is defined in the “Request for Proposals for Lottery Operations and Services” (“Request for Proposals”)⁴³ which was issued by the Texas Lottery Commission on January 4, 2010, and which is a matter of public record and can be accessed at the Texas Lottery Commission's website.⁴⁴ The Request for Proposals was incorporated into and made a part of the Operations Contract as Exhibit A to that agreement. At page VI of the Request for Proposals, the term “Works” was defined as follows:

“Any tangible or intangible items or things that have been or will be prepared, created, maintained, serviced or developed by a Successful Proposer... at any time following the effective date of the Contract, for or on behalf of TLC under the Contract, including but not limited to... lottery games....”

⁴¹ Grief Depo. Exhibit 8 at p. 28.

⁴²

<http://txlottery.org/export/sites/lottery/Documents/procurement/RFP2011/Lottery%20Operations%20and%20Services%20Contract.pdf>.

⁴³ A copy of the relevant portions of the Request for Proposals is attached hereto as Exhibit 4.

⁴⁴

http://www.txlottery.org/export/sites/lottery/Documents/procurement/RFP2011/Lottery_Operations_RFP.pdf.

b. The Contract for Instant Ticket Manufacturing and Services also obligates GTECH to defend the TLC and to assume the TLC's liability for claims of the type raised in this lawsuit.

In addition, GTECH Corporation is the successor in interest to the rights and obligations of GTECH Printing Corporation⁴⁵ which entered into a "Contract for Instant Ticket Manufacturing and Services" ("Instant Ticket Contract")⁴⁶ with the Texas Lottery Commission. The Instant Ticket Contract is a matter of public record and can be accessed at the Texas Lottery Commission's website.⁴⁷

The "Instant Ticket Contract" incorporates, by reference, the provisions of the "Request for Proposals for Instant Ticket Manufacturing and Services" ("Instant Ticket RFP")⁴⁸ issued by the Texas Lottery Commission on November 7, 2011, and which can be accessed on the Texas Lottery Commission's website.⁴⁹ The Instant Ticket RFP provides, in relevant part, as follows:

"3.32.1 The Successful Proposer shall indemnify, defend and hold the Texas Lottery...harmless from and against any and all claims, demands, causes of action, liabilities, lawsuits, losses, damages, costs, expenses or attorneys' fees (collectively, —Claim), and including any liability of any nature or kind arising out of a Claim for or on account of the Works...which may be incurred, suffered, or required in whole or in part by an actual or alleged act or omission of the Successful Proposer..., whether the Claim is based on negligence, strict liability, intellectual property infringement or any other culpable conduct, whether frivolous or not."

The term "Works" is defined at Page V of the Instant Ticket RFP as follows:

⁴⁵ GTECH Printing Corporation was subsequently merged into GTECH Corporation and GTECH Corporation is the successor in interest to the rights and obligations of GTECH Printing Corporation. See GTECH's Response to Request for Admissions No. 17 & 18 attached hereto as Exhibit 5.

⁴⁶ A copy of relevant portions of the Instant Ticket Contract is attached hereto as Exhibit 6.

⁴⁷http://www.txlottery.org/export/sites/lottery/Documents/procurement/instant_contract/GPC_Executed_Contract.pdf.

⁴⁸ A copy of the relevant portions of the Instant Ticket RFP is attached hereto as Exhibit 7.

⁴⁹ http://www.txlottery.org/export/sites/lottery/Documents/procurement/Book_1_ITM_RFP_FINAL_110711.pdf.

Any tangible or intangible items or things that have been or will be prepared, created, maintained, serviced or developed by a Successful Proposer...at any time following the effective date of the Contract, for or on behalf of TLC under the Contract, including but not limited to... lottery games,...game designs, ... instructions....”

8. The claims in Ms. Nettles’ lawsuit are of the type that trigger GTECH’s contractual duties.

Ms. Nettles’ Second Amended Petition⁵⁰ clearly alleges that her damages were caused in whole or in part by an actual or alleged act or omission of GTECH. Her allegations clearly fall within the scope of the contractual language that triggers GTECH’s obligation to defend and hold harmless the TLC.

At paragraph 24 of her Second Amended Petition, Ms. Nettles alleges that GTECH proposed the misleading and deceptive language that appeared in the final working papers submitted by GTECH to the TLC.

At paragraphs 27 and 28, Ms. Nettles alleges that GTECH printed the misleading and deceptive language on 16.5 million Fun 5’s tickets.

Paragraph 30 alleges that GTECH began to receive complaint calls about the deceptive nature of the language it printed on the tickets on the day after ticket sales began.

Paragraph 42 alleges that GTECH also learned that the language it proposed and printed on the tickets was misleading and deceptive from one or more of 7 different sources.

Paragraph 43 alleges that despite GTECH’s knowledge that the wording it proposed and printed on the tickets was misleading players, GTECH nonetheless continued to take orders

⁵⁰ Ms. Nettles’ Second Amended Petition is on file with the Court and is incorporated herein by reference for all purposes.

from retailers for replacement packs of Fun 5's tickets, continued to deliver Fun 5's tickets to retailers, continued to activate packs of Fun 5's tickets so they could be sold to consumers, and continued to validate tickets with a Money Bag symbol as "non-winning" tickets even though the wording on the tickets misled consumers and retailers into believing that the tickets should be "winning" tickets.

9. Under the "eight-corners" rule, GTECH is contractually obligated to defend the TLC.

Texas follows the "eight-corners" rule to determine whether a party owes a duty to defend. *See, GuideOne Elite Ins. Co. v. Fielder Rd. Baptist Church*, 197 S.W.3d 305, 308 (Tex. 2006). The rule takes its name from the fact that only two documents are ordinarily relevant to the determination of the contractual duty to defend: the contract itself and the pleadings of the third-party claimant. *GuideOne*, 197 S.W.3d at 308. The duty to defend is not affected by facts ascertained before suit, developed in the course of litigation, or by the ultimate outcome of the suit. *Zurich American Ins. Co. v. Nokia Inc.*, 268 S.W.3d 487, 491 (Tex. 2008). The Supreme Court has directed courts applying Texas law to "resolve all doubts regarding the duty to defend in favor of the duty and... construe the pleadings liberally. *Id.* (citation omitted).

Here, the allegations made within the four corners of Ms. Nettles' Second Amended Petition clearly trigger GTECH's contractual duty to defend the TLC based on the obligation assumed by GTECH within the four corners of both its Operations Contract and its Instant Ticket Contract. Accordingly, the Court should find, as a jurisdictional fact, that GTECH owes a duty to defend the TLC in this case as a matter of law.

10. Under the “parol evidence” rule, GTECH is, as a matter of law, contractually obligated to hold harmless the TLC.

Courts will enforce an unambiguous contract as written and will not receive parol evidence for the purpose of creating an ambiguity to give the contract meaning different from that which its language imports. *Sacks v. Haden*, 266 S.W.3d 447, 450 (Tex. 2008) (per curiam). The interpretation or construction of an unambiguous contract is a question of law for the court. *Willis v. Donnelly*, 199 S.W.3d 262, 275 (Tex. 2006); *Alamo Cmty. College Dist. v. Browning Const. Co.*, 131 S.W.3d 146, 155 (Tex. App.—San Antonio 2004, pet. denied).

The defense and hold harmless provisions of both the Operations Contract and the Instant Ticket Contract are unambiguous. GTECH owes the TLC a duty to hold harmless and defend the TLC from Ms. Nettles’ claims under the clear and unambiguous language of both of the contracts.

B. If sovereign immunity does apply, it was waived by the TLC’s egregious conduct.

1. In the absence of a fair dispute resolution scheme, the Supreme Court has indicated a willingness to consider waiver-by-conduct for egregious conduct.

In 1997, the Supreme Court held that a governmental entity does not waive its immunity from a breach-of-contract suit by merely entering into a contract. *Federal Sign v. Tex. S. Univ.*, 951 S.W.2d 401, 408 (Tex. 1997).

In a footnote in *Federal Sign*, the Supreme Court held open the possibility that “[t]here may be other circumstances where the State may waive its immunity by conduct other than

simply executing a contract so that it is not always immune from suit when it contracts.” 951 S.W.2d at 408 n.1.

Perhaps in response to the *Federal Sign* case, the Legislature enacted a comprehensive scheme that allows contracting parties to resolve breach-of-contract claims against the State. See Tex. Civ. Prac. & Rem. Code § 107.001; Tex. Gov’t Code §§ 2260.001-108.

Five years later, in a plurality opinion joined by three other justices, Justice Baker cited the newly enacted Legislative scheme that was available to resolve breach-of-contract claims and rejected the argument that the Court should fashion a waiver-by-conduct exception in a breach-of-contract suit against the State. *Tex. Natural Res. Conservation Comm’n v. IT-Davy*, 74 S.W.3d 849, 857 (Tex. 2002). But in a concurring opinion, also joined by three other justices, Justice Hecht stated: “I cannot absolutely foreclose the possibility that the State may waive immunity in some circumstances other than by statute.” *Id.* at 862.

One reported case acted on the *Federal Sign* footnote and found a waiver-by inequitable-conduct. See *Texas S. Univ. v. State Street Bank & Trust Co.*, 212 S.W.3d 893, 908 (Tex. App.—Houston [1st Dist.] 2007, pet. denied) (university waived its immunity when it “lured” the other party into the contract “with false promises that the contract would be valid and enforceable,” then took position contract was not valid). *Id.* at 908.

By contrast, relying on the plurality opinion in *IT-Davy*, several other courts of appeal have declined to find a waiver-by-conduct exception to immunity until the Supreme Court identifies the kind of conduct that would give rise to such a waiver. See, e.g., *Leach v. Texas Tech Univ.*, 335 S.W.3d 386, 400-01 (Tex. App.—Amarillo 2011, pet. filed); *Employees Ret. Sys. v. Putnam, LLC*, 294 S.W.3d 309, 327 (Tex. App.—Austin 2009, no pet.); *City of McKinney v.*

Hank's Rest. Group, L.P., 412 S.W.3d 102, 114 (Tex. App. Dallas 2013) (“Any judicial abrogation of governmental immunity should be undertaken by the supreme court.”).

2. In this case, there was no fair dispute resolution scheme and the TLC’s behavior was egregious.

Ms. Nettles urges this Court to find that when it comes to state-operated gambling, the government must be above reproach. For that reason, she is asking the Court to recognize a narrowly drawn waiver-by-conduct doctrine when it comes to fraud on the public in state-operated gambling. The TLC’s conduct, in knowingly and intentionally selling misleading and deceptive lottery tickets to Texas consumers, is just the type of “egregious conduct” contemplated by Justice Hecht and the three concurring justices in their *IT-Davy* footnote. The State is engaged in a high profile and controversial gambling business designed to raise over one billion dollars⁵¹ annually for the State’s budget. Recognizing that the lottery is a controversial undertaking, the Legislature expressly ordered the Lottery Commission and its Executive Director to use the powers vested in them to “promote and ensure integrity, security, honesty, and fairness in the operation and administration of the lottery”.⁵² The Executive Director of the TLC admitted that fairness and integrity are essential for this billion dollar revenue stream. As he put it, “obviously, fairness and integrity is [sic] foremost because there will be no revenue without the fairness and integrity.”⁵³

Just as Justice Hecht and a plurality of the Supreme Court saw a need for some sort of waiver-by-conduct doctrine before the Legislature took action to bring fairness to resolution of

⁵¹ Lapinski Depo., Exhibit 2 at p. 8.

⁵² Texas Government Code Sec. 466.014 (a).

⁵³ Grief Depo. Exhibit 8 at p. 38.

breach-of-contract cases against the State, the courts of Texas should not sidestep their responsibility to protect the citizens of Texas from fraud when it comes to state-operated gambling. The Governor can't be expected to act against the TLC. He appoints the five members of the TLC. The Legislature can't be expected to act against the TLC. It relies upon the TLC to provide over \$1 billion in annual revenues for the State's budget, thereby relieving the Legislature of the duty of raising that money in taxes. The TLC can't be relied upon to police itself. The agency has an ombudsman to look after the interests of its own employees but has no such ombudsman to protect the interests of Texas consumers.⁵⁴ Its own Executive Director admitted that his goal is to increase annual revenues transferred to the State and that "we have to peddle faster and faster to eke out better revenues year after year".⁵⁵

The courts of Texas should heed the words of the Reverend Mark H. Creech, Executive Director of the Christian Action League, who observed the following:

The business of government is to suppress evil, not to supervise it. Yet the argument often made in favor of state-operated lotteries is that the vice of gambling can be managed and made into something virtuous for the public. Hogwash!!!

There are few matters in life with a greater sleaze factor than the unholy alliance between the gaming industry and government. In fact, state-operated lotteries corrupt government.

Just since the year 2000, Colorado's lottery director resigned under pressure. Minnesota's lottery director committed suicide after scrutiny and tough questions from auditors. Nebraska's lottery head chief was placed on leave during a probe. Oregon's lottery director resigned after an audit showed hundreds of millions of dollars in administrative waste. Florida lottery officials were fired following an investigation revealing

⁵⁴ Tirloni Depo. Exhibit 12 at pp. 48-49.

⁵⁵ Grief Depo. Exhibit 8 at p. 36-37.

they accepted meals and gifts from vendors doing business with the lottery.

The Atlanta Journal-Constitution quotes Russ Davidson, the former chief financial officer of the Kentucky lottery, saying, "You're dealing with the dirtiest industry I've ever seen in my 30 years of doing business

Not only do state-operated lotteries cause government to prey on its own people; not only do they often use deceptive advertising; not only do they put government in competition with legitimate business — but they are riddled with scandal after scandal...."⁵⁶

The Lottery Commission and its Executive Director violated their Legislative mandate in this case by placing profits over integrity, thereby putting a major State revenue stream in jeopardy. If any “egregious conduct” can constitute a waiver of sovereign immunity, their conduct should so qualify.

C. There is no administrative remedy available for Ms. Nettles to exhaust.

In its Plea to the Jurisdiction, the TLC stated that this Court lacks jurisdiction “[t]o the extent Plaintiff has not exhausted its [sic] administrative remedies....” The TLC did not specify what administrative remedies it alleges were available to Ms. Nettles in this case. However, the undisputed testimony of Gary Grief, the Executive Director of the TLC makes it clear that no administrative remedy was available to Ms. Nettles. Ms. Nettles’ petition alleges that she validated each of her tickets that revealed a Money Bag symbol by scanning them and that the computer validated each of her tickets as non-winning tickets.⁵⁷ Dale Bowersock, the TLC’s Instant Ticket Product Coordinator testified that unless the computer validates a ticket as a

⁵⁶ <http://www.renewamerica.com/columns/creech/050327>

⁵⁷ Nettles Second Amended Petition at ¶150.

“winning” ticket, the TLC will not pay on that ticket no matter what the player does.⁵⁸ Gary Grief testified that once a ticket is scanned and validated as “not a winner” there is nothing more a player can do to appeal that validation.⁵⁹ In fact, Mr. Grief testified that he does not have authority to pay a ticket that is scanned and validated by the computer as “not a winner.”⁶⁰

It would be a violation of Ms. Nettles’ constitutional right to due process of law if the Court were to deny her the right to seek a common-law remedy based on the TLC’s argument that she failed to exhaust administrative remedies when no such remedy actually exists. See, *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673, 677-81, 50 S. Ct. 451, 74 L. Ed. 1107 (1930) (State supreme court denied taxpayer due process of law when it held that taxpayer may not obtain relief from discriminatory assessment because he failed to exhaust administrative remedies, where no administrative remedy was available).

D. Granting the TLC’s plea to the jurisdiction would violate the open courts provision of the Texas Constitution.

In *Employees Ret. Sys. of Tex. v. Duenez*, 288 S.W.3d 905 (Tex. 2009), the Texas Supreme Court made it clear that in ruling on a plea to the jurisdiction, courts must avoid “constitutionally suspect” constructions of legislation that would relegate common-law claims to administrative remedies in violation of the Texas Constitution’s open-courts provision.⁶¹ It would be a violation of the open courts provision to abrogate Ms. Nettles’ common-law remedies just because she failed to perform some, as of yet, unidentified administrative

⁵⁸ Bowersock Depo. Exhibit 11 at p. 141.

⁵⁹ Grief Depo. Exhibit 8 at pp. 48-49.

⁶⁰ Id.

⁶¹ *Duenez* at 910; Texas Constitution, art. I, § 13.

remedy that the TLC admits would be a futile or useless act. It would likewise be a violation of the open courts provision to deny Ms. Nettles a common-law remedy by applying the doctrine of sovereign immunity when her claim does not put the TLC at financial risk.

IV. CONCLUSION

Under the holdings of both the *Brown & Gay* and the *Reata* opinions, *supra*, the doctrine of sovereign immunity does not apply to bar Ms. Nettles' lawsuit against the TLC for two reasons: (1) The unambiguous contracts between GTECH and the TLC establish, as a matter of law, that GTECH is obligated to defend the TLC from, and has assumed the TLC's liability for the claims raised by Ms. Nettles; and, (2) Ms. Nettles has expressly pled that she is seeking no recovery from the TLC beyond that which GTECH is contractually obligated to pay on the TLC's behalf. As such, only GTECH is at financial risk, not the taxpayers of Texas.

If the Court finds that sovereign immunity is applicable, Ms. Nettles urges the Court to find that the egregious and *ultra vires* conduct of the TLC, in violation of its Legislative mandate, constitutes a waiver of the TLC's sovereign immunity.

Lastly, the undisputed testimony of the TLC's Executive Director establishes that there were no administrative remedies available to Ms. Nettles once she scanned her tickets and the computer terminals validated each of her tickets as "not a winner".

V. PRAYER

For these reasons, Ms. Nettles asks the Court to overrule the TLC's Plea to the Jurisdiction.

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing instrument was served in accordance with the Texas Rules of Civil Procedure, on this the 11th day of November, 2015, to the following counsel of record:

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COUNSEL FOR TEXAS LOTTERY COMMISSION



RICHARD L. LAGARDE

CAUSE NO. DC-14-14838

DAWN NETTLES, § IN THE DISTRICT COURT OF
Plaintiff §
VS. § DALLAS COUNTY, TEXAS
GTECH CORPORATION, §
Defendant § 160TH JUDICIAL DISTRICT

**DEFENDANT GTECH CORPORATION'S
RESPONSES TO PLAINTIFF'S REQUEST FOR DISCLOSURE**

Subject to GTECH's Plea to the Jurisdiction, Defendant GTECH Corporation ("GTECH") makes the following responses to Plaintiff Dawn Nettles' Request for Disclosure pursuant to TEXAS RULE OF CIVIL PROCEDURE 194.

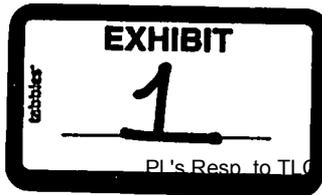
Respectfully submitted,

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ATTORNEYS FOR DEFENDANT
GTECH CORPORATION



(i) any witness statements described in Rule 192.3(g).

RESPONSE: GTECH has none but specifically reserves the right to supplement or amend its response.

(j) in a suit alleging physical or mental injury and damages from the occurrence that is the subject of the case, all medical records and bills that are reasonably related to the injuries or damages asserted or, in lieu thereof, an authorization permitting the disclosure of such medical records and bills;

RESPONSE: Not applicable.

(k) in a suit alleging physical or mental injury and damages from the occurrence that is the subject of the case, all medical records and bills obtained by the responding party by virtue of an authorization furnished by the requesting party; and

RESPONSE: Not applicable.

(l) the name, address, and telephone number of any person who may be designated as a responsible third party.

RESPONSE: TEXAS LOTTERY COMMISSION
By and through its attorneys
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Joshua Godbey
Assistant Attorney General
Tort Litigation Division
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Austin, Texas 78701
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FAX# 512.463.2224 1.877.673.6839

1 the State of Texas, doesn't it?

2 A. It generates over a billion dollars a year.

3 Q. Okay. And that's a billion dollars a year that
4 we as taxpayers would have to make up for if the lottery
5 loses the trust of lottery players, correct?

6 A. That I don't have the answer to. You'd have to
7 check with your legislature.

8 Q. All right. The money has got to come from
9 somewhere, right?

10 A. Or they've got to do without, yes.

11 Q. Okay. So -- so you and I as taxpayers have an
12 interest in seeing to it that the lottery is fair and that
13 the tickets are accurate and not misleading, correct, sir?

14 A. I think we have an interest and an expectation as
15 taxpayers that it be fair, yes.

16 Q. All right. Now, the instructions printed on a
17 scratch-off ticket, they're very important, aren't they?

18 A. Yes.

19 Q. All right. And they're important because they
20 tell the player what symbols he has to get or she has to
21 get on the ticket in order to win a prize?

22 A. That's correct, yes.

23 Q. And the player, the consumer, is bound by those
24 instructions, aren't they?

25 A. I'm not sure what you mean by bound.

1 companies. It could be online, it could be a physical
2 location or some combination thereof.

3 Q. Are there research companies you're familiar with
4 that your company has used in the past to help you develop
5 games?

6 A. Off the top of my head I'm not familiar with the
7 names.

8 Q. Who at your company would be familiar with that?

9 A. I think Walter Gaddy and I think you may be
10 talking with him next week.

11 Q. I am, yes. Fair enough. Do you ever use a
12 research company called Ipsos-Reid?

13 A. We do. I don't know that we've ever used them
14 explicitly for the purpose of developing games.

15 Q. All right. What kind of research do they do for
16 you that you're aware of?

17 A. You know, I know we've used -- we haven't used
18 them in Texas recently but I know we've used them in other
19 jurisdictions. I wouldn't -- I'm not familiar with the
20 specific purpose of their work.

21 Q. Now, your company has operated the Texas Lottery
22 for many years, correct?

23 A. Yes.

24 Q. You have an exclusive contract with the State of
25 Texas to operate the lottery?

1 A. We do.

2 Q. And -- and the latest contract was entered into
3 in 2010?

4 A. Yes.

5 Q. And that contract runs through the year 2020?

6 A. That's correct.

7 Q. All right. I want to show you a document and --
8 and ask if you can identify it for us. We're going to
9 mark this as Exhibit 8 to your deposition.

10 (Exhibit No. 8 marked.)

11 Q. (BY MR. LAGARDE) Here you go, sir. Is -- is
12 that a copy of the contract between your company and the
13 Texas Lottery Commission for the operations and services
14 of the lottery?

15 A. Yes, it is.

16 Q. Now, if -- this contract since it's a public
17 document is located on the -- the Texas Lottery
18 Commission's Website, correct?

19 A. That's correct.

20 Q. And this contract incorporates into it something
21 called a request for proposal, correct?

22 A. Yes.

23 Q. And as I understand it, the Lottery Commission
24 back before this document was signed in 2010, before you
25 were awarded the contract, they posted something called a

1 request for proposal where they offered -- where they said
2 to your company and other companies out there here's what
3 we require if you want to get the contract with us,
4 correct?

5 A. That's correct.

6 Q. And then you-all had to respond to that with a
7 formal document?

8 A. Yes, we did.

9 Q. What was that called?

10 A. Proposal.

11 Q. And then after your proposal was sent in and
12 other companies sent their proposals in you were awarded
13 the contract?

14 A. That's correct.

15 Q. So we have this contract, Exhibit 8, and this
16 contract Exhibit 8 also incorporated within itself,
17 incorporates as part of it, the request for proposal?

18 A. Yes.

19 Q. And -- and your proposal?

20 A. That's correct.

21 Q. So if we want to know what the rights and duties
22 and obligations are of GTECH we look at Exhibit 8 plus the
23 request for proposal which we can find on the Texas
24 Lottery Website, correct?

25 A. Yes. I would -- I don't know if the word duty is

1 appropriate but the services that we -- that we're
2 obligated to perform for the -- for the State are -- are
3 detailed in the contract which includes the proposal and
4 the RFP.

5 Q. Okay. So the RFP, the request for proposal, your
6 proposal and the -- the actual contract itself are all
7 combined as one document by reference, correct?

8 A. That's correct.

9 Q. And we can find each of those documents on the
10 Texas Lottery Commission Website?

11 A. Yes.

12 Q. And in -- in looking at the request for proposal
13 before you bid on it you had a good idea of what the Texas
14 Lottery Commission was requiring of your company, correct?

15 A. To the extent that we were familiar with what
16 oper -- what the operation included at the time as the
17 incumbent, yes, we had some familiarity with -- with what
18 it took to operate. But, you know, in the RFP, you know,
19 they had some ideas for the future that we were less
20 familiar with or didn't -- wouldn't -- you know, wouldn't
21 be familiar with.

22 Q. All right. But when you got the RFP, the request
23 for proposal, you had a pretty good idea of what the Texas
24 Lottery Commission expected from you if you wanted to bid
25 on the contract?

1 A. If we failed to meet the requirements of the
2 contract and that results from a claim, then yes, we're
3 liable.

4 Q. (BY MR. LAGARDE) Okay. Fair enough. Now that
5 contract and the request for proposal and your proposal on
6 the Website that is public that we've been given a copy
7 of, that's not the complete contract, is it? Aren't there
8 parts of the contract that have not been made public?

9 A. There are sections of the proposal document that
10 have been redacted, yes.

11 Q. All right. And -- and you have not made that
12 available to us, correct?

13 A. That's correct.

14 Q. And if I or the judge or the jury wanted to look
15 at that you would not show that to us, correct?

16 MR. BROUGHTON: Objection; form.

17 A. If -- I would tell you it would depend on the
18 circumstance. So all of that information is -- is
19 confidential for proprietary or security reasons. I'm not
20 a lawyer. I don't know what the mechanisms are to be able
21 to protect that information. But if it was relevant to
22 this case I'm sure we would do whatever was possible to
23 make that information available.

24 Q. (BY MR. LAGARDE) Fair enough. Now, let me ask
25 you this. How does your company get paid to operate the

1 Texas Lottery?

2 A. We're paid a commission based on the sales of
3 lottery tickets.

4 Q. All right. So whenever you sell a lottery ticket
5 at a convenience store or whenever the Lottery Commission
6 sells a ticket at the convenience store, a percentage of
7 those revenues goes to the Lottery Commission, correct?

8 A. Correct.

9 Q. And a percentage goes to your company?

10 A. Yes.

11 Q. All right. Is that percentage public knowledge?

12 A. Yes, it is.

13 Q. Public information? What percentage is that?

14 A. The percentage that -- that we derive from
15 lottery sales is 2.21 percent of sales.

16 Q. And is there any other income to your company
17 other than the 2.21 percent of lottery sales?

18 A. In the operator contract?

19 Q. Let's start with that, operator contract.

20 A. For the operator contract there isn't -- our --
21 our sale -- our revenues start with that number. There
22 are a couple mechanisms where we would have our revenues
23 reduced.

24 Q. All right. And there are things called --

25 A. Liquidated damages. Sorry. Go ahead.

1 GTECH Printing Corporation for instant games?

2 A. Yes, it is.

3 Q. And again, this -- this contract would be
4 publicly available on the TLC's Website, correct?

5 A. That's correct.

6 Q. And -- and there would have been a request for
7 proposal just like in the other contract for this,
8 correct?

9 A. Yes.

10 Q. And there would be a proposal made by GTECH
11 Printing Corporation to get that -- that contract,
12 correct?

13 A. Yes.

14 Q. And all three of those documents are merged into
15 one contract with the TLC, correct?

16 A. That's correct.

17 Q. They're all incorporated by reference?

18 A. Yes.

19 Q. And same question there. Is it your
20 understanding that GTECH Printing Corporation promised the
21 Texas Lottery Commission that if -- if GTECH Printing
22 Corporation did anything or failed to do anything under
23 this contract that it would hold the TLC and the State of
24 Texas harmless from having to expend any penny on a claim?

25 MR. BROUGHTON: Objection; form.

1 A. The assurance is if we -- if -- if we failed to
2 meet the requirements of the contract then we would hold
3 the Lottery harmless.

4 Q. (BY MR. LAGARDE) Okay.

5 A. If it resulted in a claim, yes.

6 Q. Fair enough. And you stand by that obligation?

7 A. Yes, we do.

8 Q. Okay. Now, this contract along with the request
9 for the proposal and along with the proposal itself set
10 forth what it is you're promising the Lottery Commission
11 you would do on instant games and -- and what your
12 obligations and duties are to the Lottery Commission,
13 correct?

14 A. You use the word obligations and duties. I think
15 it lays out -- you know, the RFP laid out what they
16 required of us as a print vendor.

17 Q. Right.

18 A. On the contract it says these are the services we
19 will provide.

20 Q. Okay. And -- and as I understand it, there's a
21 contract just like this or probably similar to this that
22 was entered into by the TLC with Pollard Banknotes?

23 A. Yes.

24 Q. And with Scientific Games?

25 A. Yes.

1 Page V to see what it means, correct?

2 A. Yes.

3 Q. All right. And that kind of lays out what
4 you-all as a company are selling in terms of instant
5 tickets and the game process?

6 A. Yes.

7 Q. And Page 28 of the game, Part 3.32 has that
8 indemnification provision we talked about earlier,
9 correct?

10 A. Yes.

11 Q. And -- and I -- I'm still looking for it, but do
12 you recall part of the agreement with the Lottery
13 Commission requiring you to provide working papers to the
14 Texas Lottery Commission for these instant games?

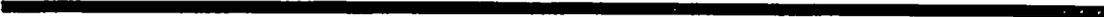
15 A. I don't.

16 Q. All right.

17 A. It's part of our process, but I don't -- I
18 don't -- I'm not familiar -- I don't recall where in the
19 agreement that that's described.

20 Q. I'm -- since I don't have it with me I'm going to
21 ask you to trust me and I'm going to read what I've got
22 that it says with the understanding that we don't have it
23 in front of us and we'll go back and verify it. All
24 right, sir?

25 A. Okay.



CONTRACT

FOR

***LOTTERY OPERATIONS AND SERVICES
BETWEEN THE
TEXAS LOTTERY COMMISSION
AND
GTECH CORPORATION***



withhold all indemnification costs and related expenses and fees (incurred or sustained by the Indemnified Parties) from payments to GTECH under this Contract, or if no contract payments are to be made, the Texas Lottery will make demand of payment from GTECH or seek recovery against GTECH's Performance Bond. The Indemnified Parties, upon giving notice to GTECH, shall have the right in good faith to pay, settle or compromise, or litigate any Claim under the belief that the Claim is well founded, whether it is or not, without the consent or approval of GTECH. The Texas Lottery has sole discretion as to the choice and selection of any attorney who may represent the Texas Lottery. To the extent that GTECH makes any payments to or on behalf of the Indemnified Parties under the Contract, and to the extent permissible by law, GTECH shall be fully subrogated to all rights and claims of the Indemnified Parties in connection therewith. In any event, the Indemnified Parties shall provide reasonable notice to GTECH of any Claim known to the Indemnified Parties to arise out of the Contract.

3.34 BONDS AND INSURANCE

All required bonds and insurance must be issued by companies or financial institutions which are financially rated Excellent or better as rated by A.M. Best Company and duly licensed, admitted, and authorized to do business in the State of Texas. The Texas Lottery shall be named as the obligee in each required bond. Each insurance policy, except those for workers' compensation, employer's liability and professional liability, must name the Texas Lottery (and its officers, agents and employees) as an additional insured on the original policy and all renewals or replacements. Insurance coverage must include a waiver of subrogation in favor of the Texas Lottery, its officers, and employees for bodily injury (including death), property damage or any other loss. The insurance shall be evidenced by delivery to the Texas Lottery of certificates of insurance executed by the insurer or its authorized agency stating coverage, limits, expiration dates, and compliance with all applicable required provisions. Upon request, the Texas Lottery shall be entitled to receive, without expense, certified copies of the policies and all endorsements. Except as otherwise expressly provided herein, required coverage must remain in full force and effect throughout the term of the Contract and any extensions thereof, and provide adequate coverage for incidents discovered after termination of the Contract. Insurance coverage shall not be canceled, non-renewed or materially changed except after thirty (30) Days' notice by certified mail to the Texas Lottery. GTECH must submit original certificates of insurance for each required insurance contract, and any renewals thereof, within fifteen (15) Days after contract execution. Renewal certificates shall be submitted prior to or within fifteen (15) Days after expiration of the existing policy. GTECH must submit required bonds when and as provided in sections of this Contract outlining bond requirements.

3.35 SELF INSURANCE

GTECH may not elect to provide entirely or in part for the insurance/bond protections described in this Contract through self-insurance. A deductible provision contained in an insurance policy that meets the requirements of this Contract is not considered as self-insurance unless the deductible amount exceeds ten percent (10%) of the face amount of the insurance policy.



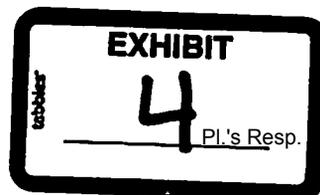
TEXAS LOTTERY COMMISSION

REQUEST FOR PROPOSALS

FOR

LOTTERY OPERATIONS AND SERVICES

ISSUED January 4, 2010, 4:00 P.M. Central Time
Request for Proposal No. 362-10-0001





Term	Definition
Works	<p>Any tangible or intangible items or things that have been or will be prepared, created, maintained, serviced or developed by a Successful Proposer (or such third parties as the Successful Proposer may be permitted to engage) at any time following the effective date of the Contract, for or on behalf of TLC under the Contract, including but not limited to any (i) works of authorship (such as literary works, musical works, dramatic works, choreographic works, pictorial, graphic and sculptural works, motion pictures and other audiovisual works, sound recordings and architectural works, which includes but is not limited to lottery games, game names, game designs, ticket format and layout, manuals, instructions, printed material, graphics, artwork, images, illustrations, photographs, computer software, scripts, object code, source code or other programming code, HTML code, data, information, multimedia files, text web pages or web sites, other written or machine readable expression of such works fixed in any tangible media, and all other copyrightable works), (ii) trademarks, service marks, trade dress, trade names, logos, or other indicia of source or origin, (iii) ideas, designs, concepts, personality rights, methods, processes, techniques, apparatuses, inventions, formulas, discoveries, or improvements, including any patents, trade secrets and know-how, (iv) domain names, (v) any copies, and similar or derivative works to any of the foregoing, (vi) all documentation and materials related to any of the foregoing, (vii) all other goods, services or deliverables to be provided to TLC under the Contract, and (viii) all Intellectual Property Rights in any of the foregoing.</p>



representatives and assigns (the "Indemnified Parties") harmless from and against any and all claims, demands, causes of action, liabilities, lawsuits, losses, damages, costs, expenses or attorneys' fees (collectively, "Claim"), and including any liability of any nature or kind arising out of a Claim for or on account of the Works, or other goods, services or deliverables provided as the result of any Contract resulting from this RFP, which may be incurred, suffered, or required in whole or in part by an actual or alleged act or omission of the Successful Proposer, or a subcontractor of the Successful Proposer, or any person directly or indirectly employed by the Successful Proposer or a subcontractor of the Successful Proposer, whether the Claim is based on negligence, strict liability, intellectual property infringement or any other culpable conduct, whether frivolous or not. The foregoing indemnity obligations of the Successful Proposer shall not apply to Claims arising out of or related to the exceptions (y) and (z) set forth in Section 3.26.1 above.

- 3.33.2 The Successful Proposer's liability shall extend to and include all reasonable costs, expenses and attorneys' fees incurred or sustained by the Indemnified Parties in: (a) making any investigation and in prosecuting or defending any Claim arising out of or in connection with the Works, or other goods, services or deliverables provided under any Contract resulting from this RFP (including but not limited to any claim that all or any portion of the Works infringes the patent, copyright, trade secret, trademark, confidential information, or other Intellectual Property Rights of any third party); (b) obtaining or seeking to obtain a release therefrom; or (c) enforcing any of the provisions contained in this RFP or the Contract. The Texas Lottery will withhold all indemnification costs and related expenses and fees (incurred or sustained by the Indemnified Parties) from payments to the Successful Proposer under any Contract resulting from this RFP, or if no contract payments are to be made, the Texas Lottery will make demand of payment from the Successful Proposer or seek recovery against the Successful Proposer's Performance Bond. The Indemnified Parties, upon giving notice to the Successful Proposer, shall have the right in good faith to pay, settle or compromise, or litigate any Claim under the belief that the Claim is well founded, whether it is or not, without the consent or approval of the Successful Proposer. The Texas Lottery has sole discretion as to the choice and selection of any attorney who may represent the Texas Lottery. To the extent that the Successful Proposer makes any payments to or on behalf of the Indemnified Parties under the Contract, and to the extent permissible by law, the Successful Proposer shall be fully subrogated to all rights and claims of the Indemnified Parties in connection therewith. In any event, the Indemnified Parties shall provide reasonable notice to the Successful Proposer of any Claim known to the Indemnified Parties to arise out of the Contract.

3.34 BONDS AND INSURANCE

All required bonds and insurance must be issued by companies or financial institutions which are financially rated Excellent or better as rated by A.M. Best Company and duly licensed, admitted, and authorized to do business in the State of Texas. The Texas Lottery shall be named as the obligee in each required bond. Each insurance policy, except those for workers' compensation, employer's liability and professional liability,

CAUSE NO. D-1-GN-14-005114

JAMES STEELE, et al.,
Plaintiffs

§
§
§
§
§
§
§

IN THE DISTRICT COURT OF

VS.

TRAVIS COUNTY, TEXAS

GTECH CORPORATION,
Defendant

201st JUDICIAL DISTRICT

**SUBJECT TO GTECH'S PLEA TO THE JURISDICTION,
DEFENDANT GTECH CORPORATION'S OBJECTIONS AND RESPONSES
TO PLAINTIFFS' SIXTH SET OF DISCOVERY**

Subject to GTECH's Plea to the Jurisdiction and pursuant to TEXAS RULE OF CIVIL PROCEDURE 197, Defendant GTECH Corporation ("GTECH") serves the following Objections and Responses to Plaintiffs' Sixth Set of Discovery.

Respectfully submitted,

REED SMITH LLP

/s/ Kenneth E. Broughton

Kenneth E. Broughton
State Bar No. 03087250
Francisco Rivero
State Bar No. 24046725
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amunoz@reedsmith.com

ATTORNEYS FOR DEFENDANT
GTECH CORPORATION



US_ACTIVE-123812565 1-KSWRIGHT

RESPONSE TO RFP NO. 16: Defendant objects to this request as vague, undefined, overbroad, unduly burdensome and not tailored to the Fun 5's scratch-off game. Defendant further objects to this request as it represents a "fishing expedition" not allowed under Texas Rule of Civil Procedure 196. Defendant further objects that this requests irrelevant documents and documents not calculated to lead to the discovery of admissible evidence. Defendant further objects to the extent this calls for the production of proprietary and/or confidential information belonging to Defendant.

REQUEST FOR PRODUCTION NO. (SIC)

Produce all Documents that relate to or refer to the Fun 5's scratch off game and one or more of the following: segmentation studies; custom panels; concept testing; product/volumetric predictions; market and opinion tracking; media habits and shopping behavior assessments; retailer interviews; and/or qualitative research.

RESPONSE TO RFP NO. (SIC): Defendant objects that this request is vague and uses undefined terms which could be confusing and misleading. Defendant objects to this request as it represents a "fishing expedition" not allowed under Texas Rule of Civil Procedure 196. Defendant further objects that this requests irrelevant documents and documents not calculated to lead to the discovery of admissible evidence. Defendant further objects to the extent this calls for the production of proprietary and/or confidential information belonging to Defendant. Without waiving the foregoing objections, none.

REQUEST FOR ADMISSION NO. 17:

Admit that GTECH Printing Corporation was merged into and became an unincorporated division of GTECH Corporation prior to January 1, 2014.

RESPONSE TO RFA NO. 17: Admitted.

REQUEST FOR ADMISSION NO. 18:

Admit that prior to January 1, 2014 GTECH Corporation became the successor in interest to the rights and obligations of GTECH Printing Corporation under its Instant Ticket Manufacturing and Services Contract with the Texas Lottery Commission.

RESPONSE TO RFA NO. 18: Admitted.



**CONTRACT FOR
INSTANT TICKET MANUFACTURING AND SERVICES
BETWEEN
THE TEXAS LOTTERY COMMISSION
AND
GTECH PRINTING CORPORATION**

RECITAL

This Contract is entered into by and between the Texas Lottery Commission, hereinafter referred to as "the Commission, TLC or the Texas Lottery," and GTECH Printing Corporation, 10 Memorial Boulevard, Providence, Rhode Island 02903, hereinafter referred to as "Contractor."

WHEREAS, the TLC previously issued a Request for Proposals (RFP) for Instant Ticket Manufacturing and Services (RFP No. 362-12-0001); and

WHEREAS, GTECH Printing Corporation submitted a proposal in response to the RFP; and

WHEREAS, following review of proposals submitted in response to the RFP, the TLC has selected Contractor to provide Instant Ticket Manufacturing and Services for the TLC for the Contract term and any renewal periods.

NOW, THEREFORE, in consideration of the mutual covenants herein contained, the parties agree as follows:

I. TERM

This Contract shall commence on September 1, 2012, and continue through August 31, 2018, subject to the termination provisions in the RFP and subject to the TLC being continued and funded by the Texas Legislature.

The Texas Lottery reserves the right to extend this Contract, at its sole discretion, for up to two (2) additional three (3) year periods, at the Contract rate or rates as modified during the term of the Contract.



1. RFP Glossary of Terms, definition of “Works”

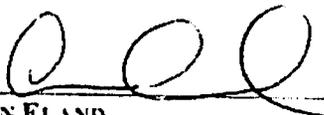
Any tangible or intangible items or things that have been or will be prepared, created, maintained, serviced, developed, incorporated, provided or obtained by a Successful Proposer (or such third parties as the Successful Proposer may be permitted to engage) at any time following the effective date of the Contract, for or on behalf of TLC under the Contract, including but not limited to any (i) works of authorship (such as literary works, musical works, dramatic works, choreographic works, pictorial, graphic and sculptural works, motion pictures and other audiovisual works, sound recordings and architectural works, which includes but is not limited to lottery games, game names, game designs, ticket format and layout, manuals, instructions, printed material, graphics, artwork, images, illustrations, photographs, computer software, scripts, object code, source code or other programming code, HTML code, data, information, multimedia files, text web pages or web sites, other written or machine readable expression of such works fixed in any tangible media, and all other copyrightable works), (ii) trademarks, service marks, trade dress, trade names, logos, or other indicia of source or origin, (iii) ideas, designs, concepts, personality rights, methods, processes, techniques, apparatuses, inventions, formulas, discoveries, or improvements, including any patents, trade secrets and know-how, (iv) domain names, (v) any copies, and similar or derivative works to any of the foregoing, (vi) all documentation and materials related to any of the foregoing, and (vii) all other goods, services or deliverables to be provided to TLC under the Contract.

2. RFP Section 3.27 (Pre-Existing and Third Party Rights)

3.27.1 To the extent that any pre-existing rights and/or third party rights or limitations are embodied, contained, reserved or reflected in the Works, the Successful Proposer shall either (a) grant to the Texas Lottery the irrevocable, perpetual, non-exclusive, worldwide, royalty-free right and license to (i) use, execute, reproduce, display, perform, distribute copies of, and prepare derivative works based upon such pre-existing rights and any derivative works thereof in connection with the sale, offering for sale, marketing, advertising, and promotion of the Texas Lottery's goods and services, and in all forms of media, media channels and/or publicity that may now exist or hereafter be created or developed, including but not limited to television, radio, print, Internet, and social media (e.g., Facebook, Twitter, YouTube, etc.) and (ii) authorize others to do any or all of the foregoing, or (b) where the obtaining of the aforementioned rights is not reasonably practical or feasible, provide written notice to the Texas Lottery of such pre-existing or third party rights or limitations, request the Texas Lottery's approval of such pre-existing or third party rights, obtain a limited right and license to use such pre-existing or third party rights on such terms as may be reasonably negotiated, and obtain the Texas Lottery's written approval of such pre-existing or third party rights and the limited use of same. The Successful Proposer shall provide the Texas Lottery with documentation indicating a third party's written approval for the Successful Proposer to use any pre-existing or third party rights that may be embodied, contained, reserved or reflected in the Works. The Successful Proposer shall indemnify, defend and hold the Texas Lottery harmless from and against any and all claims, demands, regulatory proceedings and/or causes of

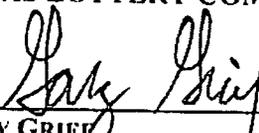
EXECUTED on this 3rd day of August 2012, by a person having the authority to contractually bind GTECH Printing Corporation.

GTECH PRINTING CORPORATION

By: 
ALAN ELAND
PRESIDENT

EXECUTED on this 7th day of Aug 2012, by a person having the authority to contractually bind the Texas Lottery Commission.

TEXAS LOTTERY COMMISSION

By: 
GARY GRIER
EXECUTIVE DIRECTOR



TEXAS LOTTERY COMMISSION

REQUEST FOR PROPOSALS

FOR

INSTANT TICKET MANUFACTURING AND SERVICES

ISSUED November 7, 2011, 4:00 P.M. Central Time
Request for Proposal No. 362-12-0001





Term	Definition
Works	Any tangible or intangible items or things that have been or will be prepared, created, maintained, serviced or developed by a Successful Proposer (or such third parties as the Successful Proposer may be permitted to engage) at any time following the effective date of the Contract, for or on behalf of TLC under the Contract, including but not limited to any (i) works of authorship (such as literary works, musical works, dramatic works, choreographic works, pictorial, graphic and sculptural works, motion pictures and other audiovisual works, sound recordings and architectural works, which includes but is not limited to lottery games, game names, game designs, ticket format and layout, manuals, instructions, printed material, graphics, artwork, images, illustrations, photographs, computer software, scripts, object code, source code or other programming code, HTML code, data, information, multimedia files, text web pages or web sites, other written or machine readable expression of such works fixed in any tangible media, and all other copyrightable works), (ii) trademarks, service marks, trade dress, trade names, logos, or other indicia of source or origin, (iii) ideas, designs, concepts, personality rights, methods, processes, techniques, apparatuses, inventions, formulas, discoveries, or improvements, including any patents, trade secrets and know-how, (iv) domain names, (v) any copies, and similar or derivative works to any of the foregoing, (vi) all documentation and materials related to any of the foregoing, (vii) all other goods, services or deliverables to be provided to TLC under the Contract, and (viii) all Intellectual Property Rights in any of the foregoing.



Operations Instant Product Coordinator. The Successful Proposer, at its expense, shall, upon request of TLC, timely register the Works (*e.g.*, federal copyright or federal and/or state trademark or service mark registration) in the name of TLC. TLC retains the right and option to obtain or secure registration of the Works in its own name, and on its own behalf, without the substantive involvement of the Successful Proposer.

3.30 ACCOUNTING RECORDS

The Successful Proposer and its Subcontractors are required to maintain their books, records, information and other materials pertaining to any Contract awarded pursuant to this RFP in accordance with generally accepted accounting principles. These records shall be available to the Texas Lottery, its internal auditor or external auditors (and other designees) and the Texas State Auditor at all times during the Contract period and for a period of four (4) full years after (i) the expiration date of any Contract awarded pursuant to this RFP, or (ii) final payment under any Contract awarded pursuant to this RFP, whichever is later.

3.31 RIGHT TO AUDIT

The Successful Proposer understands that acceptance of state funds under this Contract acts as acceptance of the authority of the State Auditor's Office, or its designee, to conduct an audit, other assurance services or investigation in connection with those funds. The Successful Proposer further agrees to cooperate fully with the State Auditor's Office in the conduct of the audit, other assurance services or investigation, including providing all records requested. The Successful Proposer shall ensure that this provision concerning the State Auditor's Office's authority to audit state funds and the requirement to cooperate fully with the State Auditor's Office is included in any subcontracts it awards. Additionally, the State Auditor's Office shall at any time have access to and the rights to examine, audit, excerpt, and transcribe any pertinent books, documents, working papers, and records of the Successful Proposer relating to this Contract.

3.32 INDEMNIFICATION

- 3.32.1 The Successful Proposer shall indemnify, defend and hold the Texas Lottery, its commission members, the State of Texas, and its agents, attorneys, employees, representatives and assigns (the "Indemnified Parties") harmless from and against any and all claims, demands, causes of action, liabilities, lawsuits, losses, damages, costs, expenses or attorneys' fees (collectively, "Claim"), and including any liability of any nature or kind arising out of a Claim for or on account of the Works, or other goods, services or deliverables provided as the result of any Contract resulting from this RFP, which may be incurred, suffered, or required in whole or in part by an actual or alleged act or omission of the Successful Proposer, or a Subcontractor of the Successful Proposer, or any person directly or indirectly employed by the Successful Proposer or a Subcontractor of the Successful Proposer, whether the Claim is based on negligence, strict liability, intellectual property infringement or any other culpable conduct, whether frivolous or not. The foregoing indemnity obligations of the Successful Proposer shall



not apply to Claims arising out of or related to the exceptions (y) and (z) set forth in Section 3.27.1 above.

- 3.32.2 The Successful Proposer's liability shall extend to and include all reasonable costs, expenses and attorneys' fees incurred or sustained by the Indemnified Parties in: (a) making any investigation and in prosecuting or defending any Claim arising out of or in connection with the Works, or other goods, services or deliverables provided under any Contract resulting from this RFP (including but not limited to any claim that all or any portion of the Works infringes the patent, copyright, trade secret, trademark, confidential information, or other Intellectual Property Rights of any third party); (b) obtaining or seeking to obtain a release therefrom; or (c) enforcing any of the provisions contained in this RFP or the Contract. The Texas Lottery will withhold all indemnification costs and related expenses and fees (incurred or sustained by the Indemnified Parties) from payments to the Successful Proposer under any Contract resulting from this RFP, or if no contract payments are to be made, the Texas Lottery will make demand of payment from the Successful Proposer or seek recovery against the Successful Proposer's Performance Bond. The Indemnified Parties, upon giving notice to the Successful Proposer, shall have the right in good faith to pay, settle or compromise, or litigate any Claim under the belief that the Claim is well founded, whether it is or not, without the consent or approval of the Successful Proposer. The Texas Lottery has sole discretion as to the choice and selection of any attorney who may represent the Texas Lottery. To the extent that the Successful Proposer makes any payments to or on behalf of the Indemnified Parties under the Contract, and to the extent permissible by law, the Successful Proposer shall be fully subrogated to all rights and claims of the Indemnified Parties in connection therewith. In any event, the Indemnified Parties shall provide reasonable notice to the Successful Proposer of any Claim known to the Indemnified Parties to arise out of the Contract.

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Transcript of the Testimony of
Gary Grief

Date:

September 25, 2015

Case:

JAMES STEELE et al VS. GTECH

Kim Tindall and Associates, LLC.

Phone: (210) 697-3400

Fax: (210) 697-3408

Email: ktindall@ktanda.com

Internet: www.KimTindallandAssociates.com

EXHIBIT

8

tabbler

Pl.'s Res. R. 1. Res. Plea T.C. Plea to the Jurisdiction Page 28

1 Q. (BY MR. LAGARDE) All right. So it might be an
2 error, it might not be; you just don't know?

3 A. I'd have to look at it.

4 Q. Okay. Now, if -- if a company like GTECH
5 proposes language in a ticket that, because of some
6 change in the parameters of the ticket, is now
7 misleading or deceptive, would you expect them to stand
8 behind that? In other words, if you said to them, I'm
9 obligated to protect the integrity and honesty and
10 fairness of this system, and you propose language to me
11 that's deceptive and misleading, I've got people
12 complaining all over the place, did you have the power
13 to say to GTECH, I want you to re-print that ticket at
14 your expense?

15 MR. MINDELL: Objection, form.

16 MR. BROUGHTON: Objection, form.

17 A. My expectation is purely based on the contract.
18 GTECH not only prints tickets for us. They're our
19 lottery operator.

20 Q. (BY MR. LAGARDE) Correct.

21 A. The value of that contract is about
22 \$100 million a year.

23 Q. Yes, sir.

24 A. This contract is one-tenth or less of that
25 size, as is Pollard's and as is Scientific Game's. My

1 poorly written and I will talk to an attorney. And then
2 she says, The calls are still coming in today.

3 And then I notice that Mr. Tirloni
4 forwarded this e-mail to you and Ms. Kelly Cripe, is
5 that correct, on September the 5th?

6 A. Yes.

7 Q. All right. So if -- if you were waiting for
8 someone to ring the bell, would this e-mail be an
9 idea of -- give us an idea of when the bell was rung for
10 you?

11 MR. BROUGHTON: Objection, form.

12 A. No.

13 Q. (BY MR. LAGARDE) All right. And why not?

14 A. When I say letting me know that issues are
15 coming up, that's day-to-day business. Ringing the bell
16 would be more something like, Gary, we need to stop this
17 game.

18 Q. Okay. So you didn't -- you weren't looking for
19 subtleties. You wanted someone to come in and say, This
20 game needs to be stopped?

21 A. I deal very directly.

22 Q. All right.

23 A. And that's my expectation for staff.

24 Q. And if your staff didn't say, We need to stop
25 this game, it didn't rise to the level of interest that

1 would cause your attention?

2 MR. MINDELL: Objection, form.

3 A. I don't know that I'd say it that way. I -- I
4 like to know what's going on. I like to try to keep a
5 feel on all the different games that we have out there.
6 I wouldn't say that.

7 Q. (BY MR. LAGARDE) Okay. Earlier in -- in this
8 line of e-mails that got forwarded to you, Ms. Tagle
9 said, We received 134 calls on Thursday, September
10 the 4th. Did it cause you concern that 134 consumers
11 were calling in to say they thought the game was
12 misleading, that they were disappointed, that they were
13 going to call a lawyer? Did -- did it cause you any
14 concern?

15 A. Not particularly. If I remember right, I
16 believe this was our best-selling \$5 game. So you're
17 talking about a game that's selling \$3 million a week or
18 so when it first started. 134 calls, 3 million a week,
19 you know, one could look at that different ways.

20 Q. Sure. One could look at it in the way that you
21 were interested in net revenues generated for the state
22 or one can look at it from the point of view of someone
23 who's been given the statutory duty to make sure that
24 the game was honest and fair and that there was
25 integrity in the system. Are you telling the jury that

1 goal as executive director of the Texas Lottery is to
2 generate increased revenues?

3 MR. MINDELL: Objection, form.

4 A. That is one of my goals.

5 Q. (BY MR. LAGARDE) And have you, in fact, given
6 a speech where you said, We have to paddle faster and
7 faster to eke out better revenues year after year?

8 MR. MINDELL: Objection, form.

9 A. I believe I did make that comment.

10 Q. (BY MR. LAGARDE) And in pedaling faster and
11 faster each year to reach your personal goal of
12 generating more revenues from the lottery, did you think
13 that personal goal was more important than the integrity
14 and honesty of the system?

15 MR. BROUGHTON: Objection, form.

16 MR. MINDELL: Objection, form.

17 A. No. But now you're going to make me explain to
18 you the context of that comment. I've made that comment
19 several times to conferences.

20 Q. (BY MR. LAGARDE) Yes, sir.

21 A. And the fact of the matter is, lotteries, not
22 just in Texas but all over the United States and the
23 world, have to keep coming out with more games, various
24 price points, different play styles; not just scratch
25 games, draw games as well.

1 I think back to 1992 when I actually
2 started at the lottery, we had one scratch game, sold
3 for \$1, and we had Lotto Texas, sold for \$1. And now I
4 look at our portfolio, we have 100 scratch games, we've
5 got nine or ten draw games out there in the market.
6 That's what I mean by having to paddle faster and
7 faster. The revenue hasn't grown from one to 100. The
8 revenue has grown at a more scaled pace. That's what
9 that comment's about.

10 Q. All right. But my question was: Which is more
11 important to you as the executive director, the
12 fairness, the integrity and the honesty of the game or
13 increasing revenues year after year? Which is more
14 important?

15 MR. MINDELL: Objection, form.

16 A. You can't have the revenue without the fairness
17 and integrity. So, obviously, fairness and integrity is
18 foremost because there will be no revenue without the
19 fairness and integrity.

20 Q. (BY MR. LAGARDE) Fair enough. You mentioned a
21 while ago this was one of your best-selling games, the
22 Fun 5's. Should that play a role in your decision
23 whether or not to shut the game down?

24 A. I think in any situation where you've got a
25 game out there, you need to try to -- it's -- it's --

1 A. Yes.

2 Q. Was there anyone else at the Lottery Commission
3 who had the power to say, I'm shutting this game down?

4 A. No.

5 Q. And had you reached out to your staff after you
6 got this e-mail on September the 5th to find out what
7 was going on, whether you need to be concerned about
8 this?

9 A. Via phone call, e-mail, meeting?

10 Q. Anything. Anything.

11 A. I can't recall.

12 Q. Were -- were you in town on September the 5th,
13 to your knowledge?

14 A. You'd probably know better than I do. I don't
15 recall.

16 Q. Just wondering, sir. You -- you were scheduled
17 to give a speech later that week or early the next week
18 in Miami Beach, Florida, right?

19 A. Probably.

20 Q. And you were receiving a great honor. You were
21 being inducted into the Hall of Fame of the -- the PGRI,
22 correct, sir?

23 A. That did occur.

24 Q. And that's the Public Gaming Research
25 Institute?

1 A. Correct.

2 Q. And that's a great honor, isn't it?

3 MR. MINDELL: Objection, form.

4 A. I'd like to think so.

5 Q. (BY MR. LAGARDE) How would it look to the
6 folks at PGRI if -- if just days before you receive that
7 honor if you had to shut a game down because it was
8 misleading and deceptive?

9 MR. BROUGHTON: Objection, form.

10 MR. MINDELL: Objection. I'm going to
11 instruct my witness not to answer. I don't think that
12 is really the type of topics we're talking about here
13 today.

14 Q. (BY MR. LAGARDE) Are you able to answer that,
15 sir?

16 MR. MINDELL: I'm instructing him not to
17 answer.

18 MR. BROUGHTON: Objection, form.

19 MR. LAGARDE: Okay.

20 Q. (BY MR. LAGARDE) Are you refusing to answer?

21 MR. MINDELL: I'm instructing him not to
22 answer.

23 MR. LAGARDE: That's fine. I'm --

24 Q. (BY MR. LAGARDE) Are you going to follow your
25 counsel's advice and not answer that question?

1 A. Yes.

2 Q. Fair enough. When, if ever, did you consider
3 shutting this game down?

4 A. I couldn't begin to tell you the date.

5 Q. Let's assume the record shows that -- that the
6 actual paperwork that had been prepared on September 5th
7 was sent out on October 21st of last year. Does that
8 sound familiar to you?

9 A. Fair enough.

10 Q. What prompted you to give the decision? As I
11 understand, you're the decider on -- on shutting games
12 down. What prompted you on October 21 to shut the game
13 down as opposed to doing so on September the 5th?

14 A. I don't think there was any one factor that led
15 to that. It was a culmination of events leading up to
16 that.

17 Q. What sort of events were those?

18 A. Discussions with legislators, discussions with
19 my staff. Those would probably be the two biggest
20 factors.

21 Q. And when you say discussions with the
22 legislators, who -- who was it in the legislature that
23 had discussions with you?

24 A. I recall we had a meeting with Representative
25 Anderson, a couple of others. I -- I can't remember,

1 quite frankly. But similar to us, they get phone calls
2 from constituents. And they don't have the advantage of
3 our experience in dealing with the public on lottery
4 matters. And all they get are complaints. And I go
5 back to what I said earlier, it's hard for them to gauge
6 whether it's coming from players who are truly just
7 confused about how to play a game and need some help or
8 whether those players are being led by some type of
9 instigator trying to get an ill-gotten gain of some kind
10 from the State of Texas.

11 Q. Tell me about these meetings with the
12 legislators. What did -- what did they express to you,
13 Representative Anderson and -- and the others you spoke
14 to?

15 MR. MINDELL: Objection, form.

16 A. Phone calls coming in.

17 Q. (BY MR. LAGARDE) Okay. You said the two most
18 important things in your decision to shut the game down
19 was your meetings with legislators and meetings with
20 your staff. Tell us about the staff meetings. What is
21 it about the staff meetings that prompted you to shut
22 the game down on October 21st?

23 MR. MINDELL: Objection, form.

24 A. There isn't any one thing. It was just the
25 culmination of events. And -- and, again, this is why

1 prizes in this game that weren't meant to be prizes that
2 weren't paid, period.

3 Q. All right. And if I'm understanding you
4 correctly, you never intended to pay five times the
5 amount in the prize box if a person got a money bag
6 symbol if they didn't already have won the tic tac toe
7 game, correct?

8 MR. MINDELL: Objection, form.

9 A. Now I'm really going off memory, but I believe
10 you've stated that correctly.

11 Q. (BY MR. LAGARDE) All right. And is there
12 anything the players could have done to convince you
13 otherwise? In other words, is there any appeal they
14 could have made to you to convince you to pay on those
15 tickets if they had not won the tic tac toe game
16 already?

17 MR. MINDELL: Objection, form.

18 A. No. Our rules are very clear. It has to --
19 any ticket has to pass all the validation requirements.

20 Q. (BY MR. LAGARDE) All right. And if the --
21 could you --

22 A. And, in fact, I don't even have the authority
23 to go beyond that.

24 Q. Right. And -- and so the question is whether
25 or not the players should have appealed that decision,

1 appealed that validation. There was no appeal to be
2 made, was there?

3 MR. MINDELL: Objection, form.

4 A. No.

5 Q. (BY MR. LAGARDE) In fact, if they scanned
6 their ticket and the scanner said "Not a winner," under
7 your validation rules, they couldn't collect on that
8 ticket, no matter what appeal they made to you, correct?

9 MR. MINDELL: Objection, form.

10 A. That's correct.

11 Q. (BY MR. LAGARDE) All right. Fair enough.
12 Now, at any rate, after talking to legislators, talking
13 to your staff, on October 21st you said, Shut the game
14 down, correct?

15 MR. MINDELL: Objection, form.

16 A. If that's the date, yes.

17 Q. (BY MR. LAGARDE) And -- and is there
18 anything -- any reason that could not have been done on
19 September the 5th?

20 MR. MINDELL: Objection, form.

21 A. Can you restate your question?

22 Q. (BY MR. LAGARDE) Sure. Is there any reason
23 why what you did on the 21st of October could not have
24 been done by you on September the 5th?

25 A. Mechanically, a game can be closed at any time.

Transcript of the Testimony of
Dan Morales

Date:

September 24, 2015

Case:

JAMES STEELE VS. GTECH

Kim Tindall and Associates, LLC.

Phone: (210) 697-3400

Fax: (210) 697-3408

Email: ktindall@ktanda.com

Internet: www.KimTindallandAssociates.com

EXHIBIT

tabbiter
10

1 A. Yes.

2 Q. And because you're testifying under oath, it's
3 very important that we make sure that you understand my
4 questions before you attempt to answer them. Okay?

5 A. Uh-huh. Yes.

6 Q. If, for some reason, you don't understand a
7 question, feel free to make me repeat or rephrase my
8 question. Okay?

9 A. Okay.

10 Q. It's very important that you give verbal
11 answers, like yes and no as opposed to nodding your head
12 or saying uh-huh or nuh-uh. Okay?

13 A. Yes.

14 Q. Very good. Mr. Morales, what do you do for a
15 living?

16 A. I am the senior scratch product manager for
17 GTECH Corporation --

18 Q. All right.

19 A. -- for GTECH Texas.

20 Q. And as a senior scratch product manager here in
21 Texas, tell us what -- what your duties are.

22 A. My primary responsibility is develop --
23 developing the game launch schedule for the Texas
24 Lottery and maintaining it throughout their fiscal year.

25 Q. And when you say developing the game launch

CAUSE NO. D-1-GN-14-005114

JAMES STEELE, et al.,) IN THE DISTRICT COURT
))
 Plaintiffs,))
))
 vs.) TRAVIS COUNTY, TEXAS
))
 GTECH CORPORATION,))
))
 Defendant.) 201ST JUDICIAL DISTRICT

ORAL AND VIDEOTAPED DEPOSITION OF

DALE BOWERSOCK

JULY 30, 2015

ORAL AND VIDEOTAPED DEPOSITION OF DALE BOWERSOCK,
 produced as a witness at the instance of the PLAINTIFFS
 and duly sworn, was taken in the above-styled and
 numbered cause on the 30th day of July, 2015, from
 9:32 a.m. to 3:24 p.m. before TEENA L. HARMON-DAVIS, a
 Certified Shorthand Reporter in and for the State of
 Texas, reported by machine shorthand at the Office of the
 Attorney General, 300 West 15th Street, 11th Floor,
 Austin, Texas, pursuant to the Texas Rules of Civil
 Procedure and/or the provisions stated on the record or
 attached hereto.



1 but I don't remember what day that was on that e-mail.

2 MR. BROUGHTON: Okay. Let's -- let's take
3 a quick break because I understand we only have five
4 minutes left on the tape.

5 THE VIDEOGRAPHER: We're off the record,
6 11:42.

7 (Recess from 11:42 a.m. to 11:58 a.m.)

8 THE VIDEOGRAPHER: This is tape number 3.
9 We're back on the record, 11:58.

10 (Exhibit No. 103 marked)

11 Q. (By Mr. LaGarde) Let me show you what we've
12 marked as Exhibit 103. And is this an e-mail from
13 Angelica Tagle at the Lottery Commission to you at the
14 top of the page?

15 A. Yes, sir.

16 Q. And is she -- she informing you about the calls
17 that they're getting on September 2 about the Fun 5's
18 game?

19 A. Yes.

20 Q. And her report to you is: Players think that
21 the money bag symbol on Game 5 is an automatic win.
22 Something we will need to carefully review if we reprint
23 this game.

24 What did you interpret her to mean when
25 she said, something we will need to carefully review if

1 we reprint this game?

2 A. That we would -- we would look at the -- the
3 game and see if there's a way to better clarify.

4 Q. Did you agree with her at that point in time,
5 on September 2, that that was something you might want to
6 carefully review before reprinting the game?

7 MR. MINDELL: Objection, form.

8 A. Yes.

9 Q. Okay.

10 A. I mean --

11 Q. You thought it -- did you think that if players
12 were calling and were confused and thought that a money
13 bag symbol was an automatic win that there might be a
14 better way to word the game?

15 MR. MINDELL: Objection, form.

16 MR. BROUGHTON: Objection, form.

17 A. Yes. I -- I still read it fine, but obviously
18 there was confusion.

19 Q. Let me -- let me rephrase my question given --

20 A. Yeah.

21 Q. -- the two objections.

22 At the point in time you received this
23 e-mail what was your opinion about the wording of the
24 game?

25 A. When I received it I -- I pulled the game so I

1 Ms. Briones was referring to this wording as being poor
2 wording?

3 A. No.

4 Q. And the response Ms. Tagle made to Ms. Briones'
5 question, are they going to change this, the poor
6 wording, was: Good morning Angela, I have notified
7 Products about the number of calls we've received. If
8 they don't make changes to the instructions on the next
9 reprint we need to make sure we send our feedback when we
10 review the draft working papers.

11 She -- so she's also making a comment
12 about changing the instructions on the next reprint.

13 A. Uh-huh.

14 Q. When do you-all reprint tickets?

15 A. We won't be reprinting Fun 5's.

16 Q. I didn't think you would.

17 A. No. No. If a game is successful, as in
18 outperforming sales, high performing sales, we'll --
19 we'll reprint it sometimes immediately after we know it's
20 going to be selling through, but sometimes we'll let it
21 go black in the market for a while and wait and put it
22 back out, so -- and there are sometimes we just don't
23 reprint them.

24 Q. At any rate, by September the 2nd Ms. Briones
25 in your call center at the Lottery Commission is

1 referring to the wording of Game 5 as poor wording,
2 correct?

3 A. Correct.

4 Q. And Ms. Tagle is saying, if instruction -- if
5 changes to those instructions aren't made in the next
6 reprint, then we need to send our feedback when we review
7 the draft working papers. Is that the review we talked
8 about earlier? When the initial working papers go out it
9 gets sent out to a bunch of different people. Is that
10 when she's saying, we need to give our feedback?

11 A. Yes, sir.

12 Q. Okay. Fair enough.

13 (Exhibit No. 105 marked)

14 Q. Let me show you what we've marked as
15 Exhibit No. 105 to your deposition.

16 A. Thank you.

17 Q. This is TLC8372 to 8373.

18 A. Uh-huh.

19 Q. And at the bottom of the page is this an e-mail
20 from Mr. Wesley Barnes to you?

21 A. It is.

22 Q. Dated September the 3rd of 2014?

23 A. Yes, sir.

24 Q. Is this the same Wesley Barnes who raised the
25 concern early on that it looked like two different games

1 to him?

2 A. It is.

3 Q. And in this September 3 e-mail he says: Dale,
4 we've had an issue with the new game Fun 5's, Game #1592.
5 We've had three claimants today come in believing they've
6 won on Game 5 when in fact they haven't. The issue comes
7 when they don't match a line with the 5 symbols, but the
8 money bag symbol is still presented in the bonus area, 5X
9 Box. The way the instructions read in the second
10 sentence gives the impression that matching the 5 symbols
11 is not necessary to win the bonus portion, that you only
12 have to get the money bag symbol. Then he says -- he
13 repeats what the instructions say: Reveal a money bag
14 symbol in the 5X Box, win five times that prize.

15 Mr. Barnes goes on to say: I think we're
16 going to see more problems like this from this game. I'm
17 not sure what we can do with this game now, but we would
18 definitely like to request for this to be changed for any
19 future runs of this game if there are any. Maybe we can
20 do something similar to what we did for the Bingo
21 Multi-Prize, Game #1546, where we have a change so that
22 the symbol will not appear if the Game 5 is not a winner.

23 When you -- when you got this e-mail, this
24 is now not just a player saying the wording seems to mean
25 you win a prize if you get a money bag symbol; it's

1 so it's all relative, and so if they start doing a count,
2 then I can gauge, you know, what's really going on.

3 Q. Whether it's widespread confusion or just
4 someone in the call center making --

5 A. Exactly.

6 Q. -- a mountain out of a molehill?

7 A. Yes.

8 Q. Okay. And on September 4, the next day, does
9 Ms. Tagle respond to you and say: As of yesterday we
10 received about 83 calls in reference to Game 5 on
11 Fun 5's. As we discussed, players feel that the wording
12 is misleading?

13 A. Yes. That's the e-mail I was remembering
14 earlier.

15 Q. Okay. So as of September 4 she was reporting
16 83 calls from players, right?

17 A. Correct.

18 Q. And then Mr. Tirloni sends an e-mail out to
19 Ms. Tagle and you saying: Here are the talking points.
20 Legal has reviewed.

21 And are there talking points attached to
22 this e-mail?

23 A. The third page are talking points.

24 Q. What was your understanding of the reason for
25 the talking points?

1 she understands the game rules now, but she believes that
2 the instructions are misleading the way they're currently
3 written.

4 So based on this e-mail would it be your
5 assumption that as of September the 3rd Mr. Grief was
6 aware of a concern at least expressed by Ms. Jones that
7 the wording was misleading?

8 MR. MINDELL: Objection, form.

9 A. I can say that it appears that Gary was
10 notified by e-mail. Whether he read it that day I don't
11 know.

12 Q. I've got you.

13 A. He's a busy man.

14 Q. Got you. Mr. Tirloni, on the same day, says:
15 Michael and I have talked. I am going to loop Legal in
16 on this as well. Angelica, when you write talking points
17 I'd like to let Legal see them.

18 So Mr. Tirloni's saying that he and
19 Michael have talked. Who is -- who is the Michael he's
20 referring to?

21 A. Michael Anger.

22 Q. Okay. So based on this e-mail from
23 Mr. Tirloni, as of September 3 Mr. Anger -- Anger, who's
24 in charge of the lottery operations division, is aware of
25 the concern.

1 Q. The third day the game was being played they
2 received 134 calls on it. And then Mr. Tirloni in his
3 e-mail, does he write back to Ms. Tagle and say: When
4 you walk the players through the talking points and
5 explain that it is a multiplier and they have to win the
6 tic-tac-toe game first, are they pretty accepting of that
7 information or are you getting a lot of pushback,
8 correct?

9 A. Correct.

10 Q. And does Ms. Tagle, on September the 5th,
11 respond to Mr. Tirloni's question and say: We're getting
12 pushback from the players. The staff are having to go
13 over and over the game and explain that it is not an
14 instant win. We've received the following comments:
15 This is misleading, disappointed, not clear enough; the
16 other games have two ways to win and why would Game 5 be
17 any different; I will be writing in; I'm calling a
18 lawyer; I hope someone challenges this legally and I'm
19 holding on to my ticket; I'm calling a news station; you
20 should honor the game, there's nothing that states you
21 have to win the tic-tac-toe to use the multiplier; I'm
22 not satisfied, this game is poorly written and I will
23 speak with an attorney, I will use 500 Million Frenzy,
24 Game No. 1354, Game 1 as an example, it sets a precedent.
25 For your information, this call was transferred to me and

1 put this together?

2 A. With the multiple comments, I never knew what
3 management was going to decide to do, so I just got
4 proactive, just to get information ready for if
5 management asked for it.

6 Q. Did you believe that management might ask that
7 the game be called on that day, on September 5th?

8 A. Oh, I didn't know. But, you know, with that
9 much activity I just figured I'd be ready in case they
10 asked.

11 Q. Did anyone request that you do that?

12 A. No.

13 Q. And let's talk about that. Did you have
14 discussions with management? When you say management are
15 you talking about Mr. Tirloni, Mr. Anger, and Mr. Grief?

16 A. It would be Mr. Grief would -- is the only one
17 who's authorized to close a game.

18 Q. Okay. So if -- if someone's going to decide to
19 call a game or close a game, it has to be Mr. Grief?

20 A. For this type of reason, for a business reason.
21 If it's a mature game it doesn't have to go all the way
22 up to Mr. Grief.

23 Q. Got ya. So to call a game early for reasons
24 other than we --

25 A. Typical --

1 Q. And I think you answered my question. At the
2 Lottery Commission you only pay if the validation file
3 prepared by GTECH says this is a winning ticket.

4 A. That's correct.

5 MR. MINDELL: Objection, form.

6 A. That's correct.

7 Q. And if the GTECH validation file, their
8 computer file, says this is not a winning ticket, you
9 don't pay it no matter what, correct?

10 MR. MINDELL: Objection, form.

11 A. Correct.

12 Q. It doesn't matter if the player gets his ticket
13 scanned, it doesn't matter if he turns it into a claim
14 center. If the GTECH validation file says this is not a
15 winning ticket, you don't pay it, correct?

16 MR. MINDELL: Objection, form.

17 A. That's correct.

18 (Exhibit No. 119 marked)

19 Q. Let me show you what we've marked as
20 Exhibit 119, and it is TLC7401. Does this appear to be
21 an e-mail from Mr. Gary Grief to Michael Anger at the
22 Lottery Commission and to Kelly Cripe?

23 A. The second one down does.

24 Q. Yes, sir.

25 A. Yes, sir.

1 Q. Let me show you what we've marked as
2 Exhibit 125. Is -- is the e-mail at the bottom from
3 Mr. Michael Anger to Mr. Grief?

4 A. Yes.

5 Q. And in that e-mail he said: David Veselka
6 reported to me yesterday that the call volume has
7 remained between 75 and 100 calls a day through the week
8 last week. This is consistent with the volume for the
9 last several weeks.

10 A. That's correct.

11 Q. Did you have the understanding that the
12 commission was getting about 75 to 100 calls a day?

13 A. I knew the numbers were significant. I didn't
14 know what they were.

15 Q. And this is as of October the 7th, correct?

16 A. Correct, it's dated October 7th.

17 Q. And then Mr. Grief says in response: When did
18 the game go on sale and what was the print run quantity
19 and prize payout percentage?

20 We know the game went on sale September 1,
21 correct?

22 A. Correct.

23 Q. And we know the print run quantity. Is that
24 the number of tickets printed?

25 A. That's the number of tickets ordered, 16.5. I

CAUSE NO. D-1-GN-14-005114

JAMES STEELE, et al.,) IN THE DISTRICT COURT
))
 Plaintiffs,))
))
 vs.) TRAVIS COUNTY, TEXAS
))
 GTECH CORPORATION,))
))
 Defendant.) 201ST JUDICIAL DISTRICT

ORAL AND VIDEOTAPED DEPOSITION OF

ROBERT TIRLONI

JULY 30, 2015

ORAL AND VIDEOTAPED DEPOSITION OF ROBERT TIRLONI,
 produced as a witness at the instance of the PLAINTIFFS
 and duly sworn, was taken in the above-styled and
 numbered cause on the 30th day of July, 2015, from
 3:40 p.m. to 5:15 p.m. before TEENA L. HARMON-DAVIS,
 a Certified Shorthand Reporter in and for the State of
 Texas, reported by machine shorthand at the Office of
 the Attorney General, 300 West 15th Street, 11th Floor,
 Austin, Texas, pursuant to the Texas Rules of Civil
 Procedure and/or the provisions stated on the record or
 attached hereto.



1 THE VIDEOGRAPHER: This is the videotaped
2 oral deposition of Robert Tirloni. Today's date,
3 July 30, 2015; the approximate time, 3:41 p.m. We're
4 recording and on the record.

5 ROBERT TIRLONI,
6 having been first duly sworn, testified as follows:

7 EXAMINATION

8 BY MR. LAGARDE:

9 Q. State your name for the ladies and gentlemen of
10 the jury, please.

11 A. Robert Tirloni.

12 Q. Mr. Tirloni, by whom are you employed?

13 A. The Texas Lottery Commission.

14 Q. And what is your position at that commission?

15 A. My title is products and drawings manager.

16 Q. And what does a products and drawings manager
17 do for the Lottery Commission?

18 A. The -- on the products side I'm responsible for
19 all new product development. On the draw game side and
20 the scratch off side, the marketing of those products,
21 working with the GTECH sales team. I also oversee
22 retailer development function on the products side. I
23 have a marketing -- a lot of marketing functions. On the
24 drawings side, I oversee the entire drawings program.

25 Q. And drawings program, is that the online game,

1 account?

2 A. I believe that's the -- I believe that's the
3 goal, yes.

4 Q. Is there a similar ombudsman at the Lottery
5 Commission for lottery players, consumers?

6 A. I don't believe so, no.

7 Q. Is there anyone at the commission whose job it
8 is to look after the interests of consumers to the
9 exclusion of making money or bringing in revenues?

10 MR. MINDELL: Objection, form.

11 A. There's not an ombudsman role for the players
12 as you've just described, but there's a whole team of
13 people that -- by looking at these working papers,
14 looking at these games our goal is to ensure we produce
15 the -- the best games we possibly can.

16 Q. Your primary goal is revenues, right?

17 MR. MINDELL: Objection, form.

18 A. Our primary goal is to return revenue to the
19 state of Texas, yes.

20 Q. And my question is, do you have anyone at the
21 commission whose job is not to return revenues to the
22 state, but to look after the interests of players to make
23 sure that nothing is done that might mislead them or
24 cheat them or treat them poorly?

25 MR. MINDELL: Objection, form.