

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

JAMES STEELE, et al., <i>Plaintiffs</i>	§	IN THE DISTRICT COURT OF
	§	
VS.	§	TRAVIS COUNTY, TEXAS
	§	
GTECH CORPORATION, <i>Defendant</i>	§	201 ST JUDICIAL DISTRICT
	§	

**DEFENDANT GTECH CORPORATION’S
PLEA TO THE JURISDICTION, SPECIAL EXCEPTIONS,
MOTION TO DISMISS, AND ORIGINAL ANSWER**

Defendant GTECH Corporation (“GTECH”) files this Plea to the Jurisdiction and, subject thereto, Special Exceptions, Motion to Dismiss, and Original Answer pursuant to Rules 85, 91, 91a, 92, and 94 of the TEXAS RULES OF CIVIL PROCEDURE.

I. SUMMARY

This Court should dismiss or abate Plaintiff James Steele *et al.*’s (“Plaintiffs”) First Amended Petition because it suffers from two fatal foundational legal defects.

(A) By statute, the Texas Lottery Commission (“Lottery Commission”) is vested with *exclusive* authority to: (1) prescribe the form of tickets and (2) determine which tickets are winning tickets. Plaintiffs have not sought a determination from the Lottery Commission with respect to their tickets or exhausted their administrative remedies. Thus, this Court lacks subject matter jurisdiction and should dismiss or abate this lawsuit.

(B) Even if this Court had subject matter jurisdiction over this dispute, the allegations in Plaintiffs’ First Amended Petition do not state a claim against GTECH because Plaintiffs’ claims are either not cognizable in Texas, defectively pleaded, precluded by statute, or precluded by the economic loss doctrine. This Court should dismiss Plaintiffs’ lawsuit under Rule 91a of the TEXAS RULES OF CIVIL PROCEDURE.

II. PLEA TO THE JURISDICTION

An agency has *exclusive* jurisdiction when a pervasive regulatory scheme indicates that the legislature intended for the regulatory process to be the exclusive means of remedying a problem. *Subaru of America, Inc. v. David McDavid Nissan, Inc.*, 84 S.W.3d 212, 221 (Tex. 2002). If an agency has exclusive jurisdiction, a party must exhaust all administrative remedies before seeking review of the agency's action. *Id.* Until then, the trial court lacks subject matter jurisdiction and must dismiss all claims within the agency's exclusive jurisdiction. *Id.* Alternatively, if the statutory scheme requires an administrative agency to make certain findings before a trial court may adjudicate a claim, the trial court should abate the proceedings until the findings have been made. *Id.* at 222.

A. THE LOTTERY COMMISSION HAS EXCLUSIVE JURISDICTION OVER ALL LOTTERY RELATED DISPUTES OR, ALTERNATIVELY, IS REQUIRED TO MAKE FINDINGS BEFORE THIS COURT MAY ADJUDICATE PLAINTIFFS' CLAIMS.

The Lottery Commission has broad authority and exercises strict control over all lottery related activities pursuant to a pervasive regulatory scheme. *See* TEX. GOV'T CODE Chs. 466 and 467; TEX. ADMIN. CODE Chs. 401, 402 and 403.

The commission has broad authority and shall exercise strict control and close supervision of all activities authorized and conducted in this state under ... Chapter 466 of this Code.

TEX. GOV'T CODE § 467.101(a). Specifically:

The executive director [of the Lottery Commission] shall prescribe the form of tickets.

TEX. GOV'T CODE § 466.251. Moreover:

(a) By purchasing a ticket ... a player agrees to abide by and be bound by the commission's rules ... The player also acknowledges that the determination of whether the player is a valid winner is subject to: (1) the commission's rules and

claims procedures ...; and (2) any validation tests established by the commission

TEX. GOV'T CODE § 466.252. Furthermore:

If a dispute arises between the commission and a ticket claimant concerning whether the ticket is a winning ticket and if the ticket prize has not been paid, the executive director may, exclusively at his/her determination, reimburse the claimant for the cost of the disputed ticket. This shall be the claimant's exclusive remedy.¹

TEX. ADMIN. CODE § 401.302(i). Finally:

In purchasing an instant game ticket, the lottery player agrees to comply with and abide by Texas law, all rules, procedures, and final decisions of the commission

TEX. ADMIN. CODE § 401.302(k). The statutory text makes it abundantly clear that the Legislature intended that the Lottery Commission, not the courts, resolve disputes relating to the form of tickets and which tickets are winning tickets.

B. PLAINTIFFS' CLAIMS AGAINST GTECH ARE WITHIN THE SCOPE OF THE LOTTERY COMMISSION'S EXCLUSIVE JURISDICTION.

Plaintiffs' claims against GTECH all derive from two allegations, both of which GTECH denies: (1) that an instruction in certain tickets was supposedly ambiguous; and (2) that under Plaintiffs' preferred, ungrammatical interpretation of the supposedly ambiguous instruction, certain tickets that they allegedly purchased should have been validated as winning tickets by a computer program that GTECH operated pursuant to a contract with the Texas Lottery. *See* Pls.' First Am. Pet. ¶¶ 12-22.

¹ Additionally, the tickets that Plaintiffs purportedly purchased specifically provide that "claims are subject to applicable laws, rules, procedures, and final decisions of Executive Director [of the Lottery Commission]."

This Court lacks subject matter jurisdiction because the Lottery Commission has exclusive jurisdiction to determine both: (1) whether instructions in tickets are ambiguous; and (2) whether tickets should be validated as winning tickets.

Disputes relating to supposedly ambiguous instructions clearly relate to the form of tickets—which the Lottery Commission is statutorily empowered to determine. TEX. GOV'T CODE § 466.251. The Lottery Commission's statutory power necessarily includes the power to resolve claims of ambiguity in those tickets. To hold otherwise would be to make the Lottery Commission's statutorily recognized "broad authority" and "strict control" over lottery-related matters subject to judicial second guessing—a circumstance that is clearly at odds with the regulatory scheme that the Legislature enacted.

Disputes relating to whether tickets are winning tickets or should have been validated as winning tickets are unambiguously within the exclusive jurisdiction of the Lottery Commission. *See* TEX. GOV'T CODE §§ 467.201(a) (Lottery Commission has broad authority and shall exercise strict control over all lottery related activities) and 466.252 (player is bound by Lottery Commission's rules and determination of whether ticket is a winning ticket); TEX. ADMIN. CODE §§ 401.302(i) (player's *sole remedy* in dispute over whether ticket is winning ticket is to seek determination from Executive Director of Lottery Commission who may, at his discretion, reimburse player for cost of ticket) (emphasis supplied) and 401.302(k) (player agrees to comply with Texas law and all rules, procedures, and final decision of Lottery Commission).

Plaintiffs must obtain a final determination from the Lottery Commission with respect to their tickets and exhaust their administrative remedies. *See Subaru of America, Inc.*, 84 S.W.3d at 221-222. Until that time, this Court lacks subject matter jurisdiction over Plaintiffs' claims and should dismiss or abate them. *Id.*

III. SPECIAL EXCEPTIONS

A. PLAINTIFFS' CLAIM FOR "TORTIOUS INTERFERENCE WITH EXPECTANCY" IS NOT A COGNIZABLE CLAIM IN TEXAS.

There is no claim for tortious interference with an expectation of winning a pure game of chance in Texas. A claim for tortious interference with prospective business relations, while recognized, requires Plaintiffs to prove that there was a reasonable probability that they would have entered into a business relationship with another. *See Texas Disposal Sys. Landfill, Inc. v. Waster Mgmt. Holdings, Inc.*, 219 S.W.3d 563, 590 (Tex. App.—Austin 2007, pet. denied). Plaintiffs' "expectancy" that they "would have received their prize but for the interference of [GTECH]" does not constitute reasonable probability that Plaintiffs would have entered into a business relationship with a third person. *See* Pls.' First Am. Pet. ¶ 27.

B. PLAINTIFFS' CLAIM FOR TORTIOUS INTERFERENCE WITH EXISTING CONTRACT IS DEFECTIVELY PLEADED.

In order to recover for tortious interference with an existing contract, Plaintiffs must, among other things, plead and prove that: (1) GTECH had actual knowledge of each of their alleged contracts with the Texas Lottery and of their respective interest in these contracts; or (2) GTECH had knowledge of facts and circumstances that would lead a reasonable person to believe that there was a contract in which each of them had an interest. *See Exxon Corp. v. Allsup*, 808 S.W.2d 648, 656 (Tex. App.—Corpus Christi 1991, writ denied). Plaintiffs have alleged that "[GTECH] knew or had reason to know that purchasers of Fun 5's tickets, such as Plaintiffs, would enter into contracts with the Texas Lottery. Moreover, [GTECH] knew or had reason to know of the interest that the purchasers of the Fun 5's tickets would have in said contracts." Pls.' First Am. Pet. ¶ 33. Plaintiffs' First Amended Petition does not properly plead tortious interference with an existing contract.

Plaintiffs' allegation that "[GTECH] knew or had reason to know that purchasers of Fun 5's tickets, such as Plaintiffs, would enter into contracts with the Texas Lottery" does not plead an element of tortious interference with existing contract. Plaintiffs errantly allege that GTECH had knowledge that "purchasers of Fun 5's tickets, such as Plaintiffs, would enter into contracts." Plaintiffs were required to allege that GTECH had knowledge that each individual plaintiff was a party to a then existing contract with the Lottery Commission.

Plaintiffs' allegation that "[GTECH] knew or had reason to know of the interest that the purchasers of the Fun 5's tickets would have in said contracts" similarly does not plead an element of tortious interference with existing contract. Plaintiffs errantly allege that GTECH had knowledge of "the interest that purchasers of Fun 5's tickets would have" in certain contracts. Plaintiffs were required to allege that GTECH had knowledge of the interest that each individual plaintiff had in a then existing contract with the Lottery Commission.

To the extent this Court finds that it has subject matter jurisdiction over this lawsuit and determines that Plaintiffs' claims should not be dismissed due to foundational legal deficiencies, it should order Plaintiffs to properly plead tortious interference with existing contract or, if Plaintiffs are unable to do so, dismiss this claim with prejudice.

IV. MOTION TO DISMISS

A. THIS COURT SHOULD DISMISS ALL OF PLAINTIFFS' CLAIMS BECAUSE THEY ARE SPECIFICALLY PRECLUDED BY STATUTE.

Plaintiffs' claims all derive from an as of yet unresolved dispute between Plaintiffs and the Lottery Commission relating to the form of certain tickets and the determination of whether certain tickets were winning tickets. Plaintiffs' *exclusive* remedy is to petition the Executive Director of the Lottery Commission who may, at his or her discretion, reimburse Plaintiffs for the cost of the tickets that they purportedly purchased. TEX. ADMIN. CODE § 401.302(i) ("[I]f

a dispute arises between the commission and a ticket claimant concerning whether the ticket is a winning ticket and if the ticket prize has not been paid, the executive director may, exclusively at his/her determination, reimburse the claimant for the cost of the disputed ticket. This shall be the claimant's exclusive remedy.")² By clear and unambiguous statute, Plaintiffs have no claim against GTECH with respect to their tickets.

B. PLAINTIFFS' CLAIM FOR BREACH OF FIDUCIARY DUTY SHOULD BE DISMISSED BECAUSE GTECH DID NOT OWE A FIDUCIARY DUTY.

Plaintiffs allege that GTECH owed them a fiduciary duty "because the validation of winning scratch-off tickets was an act uniquely within the power and control of [GTECH]" and, as such, "players of the Texas Lottery, including these Plaintiffs, placed a high degree of trust and confidence in [GTECH] and were dependent on [GTECH] to act in the best interest of the citizens who purchased scratch-off lottery tickets." Pls.' First Am. Pet. ¶ 37. Plaintiffs' claim for breach of fiduciary duty has no basis in fact or law. Under these facts, the allegation that a fiduciary relationship existed between total strangers is ludicrous.

It is well established that not every relationship involving a high degree of trust and confidence rises to the stature of a fiduciary relationship. *Meyer v. Cathey*, 167 S.W.3d 327, 330 (Tex. 2005). For there to be an informal fiduciary relationship, plaintiff must establish that the dealings between plaintiff and the fiduciary were of nature and duration sufficient to justify plaintiff's reliance on the fiduciary to act in the plaintiff's best interest. *Carr v. Weiss*, 984 S.W.2d 753, 765 (Tex. App.—Amarillo 1999, no pet.) When the fiduciary relationship relates to a transaction, the fiduciary relationship must exist before and apart from the transaction that is the basis of the suit. *Meyer*, 167 S.W.3d at 331.

² Alternatively, Plaintiffs' claims are precluded by contract stating that "claims are subject to applicable laws, rules, procedures, and final decisions of Executive Director [of the Lottery Commission]."

Plaintiffs have not alleged that they had personal dealings with GTECH of a nature and duration sufficient to justify their reliance on GTECH to act in their best interest. In fact, Plaintiffs have not alleged that they had *any* dealings with GTECH whatsoever. Instead, Plaintiffs suggest that subjective trust based on their errant perception that the validation of tickets was within the power and control of GTECH³ establishes a fiduciary duty. Plaintiffs' position is drastically inconsistent with Texas law. *See Trostle v. Trostle*, 77 S.W.3d 908, 914 (Tex. App.—Amarillo 2002, no pet.) (subjective trust alone does not create fiduciary relationship). The Court should dismiss Plaintiffs' claim for breach of fiduciary duty.

C. PLAINTIFFS' CLAIMS ARE PRECLUDED BY THE ECONOMIC LOSS DOCTRINE.

The economic loss doctrine precludes plaintiffs from recovering purely economic losses arising out of a defendant's performance of a contract. *See LAN/STV v. Martin Eby Construction Co., Inc.*, 435 S.W.3d 234, 243 (Tex. 2014) (recognizing that Texas courts of appeal have uniformly denied recovery of purely economic losses for negligent performance of contract); *Hou-Tex, Inc. v. Landmark Graphics*, 26 S.W.3d 103, 107 (Tex. App.—Houston [14th Dist.] 2000, no pet.) (denying tort recovery to plaintiff who suffered economic losses due to third party's use of defendant's allegedly defective software supplied to third party under license). Here, Plaintiffs allege that they suffered purely economic losses due to GTECH's preparation of a computer validation program that the Texas Lottery used to determine which tickets were winning tickets. Pls.' First Am. Pet. ¶¶ 10, 19. Under the economic loss doctrine, these allegations cannot be the basis for a tort claim against GTECH. *See Hou-Tex, Inc.*, 26 S.W.3d at 107 (defendant owner of software program licensed to third party with whom plaintiff

³ *See* TEX. GOV'T CODE §§ 467.201(a) and 466.252; TEX. ADMIN. CODE §§ 401.302(i) and (k) (establishing that Lottery Commission, not GTECH, validates tickets).

contracted did not owe plaintiff a tort duty to inform plaintiff of “bug” in computer program or ensure that computer program worked correctly).

V. ORIGINAL ANSWER

A. GENERAL DENIAL

Subject to its Plea to the Jurisdiction, Special Exceptions, and Motion to Dismiss, GTECH denies each and every of the allegations contained in Plaintiffs’ First Amended Petition and demands strict proof thereof by a preponderance of the evidence. GTECH reserves the right to amend or supplement this answer pursuant to the TEXAS RULES OF CIVIL PROCEDURE.

B. SPECIFIC DENIALS

- (1) GTECH had no contractual, licensing, or other relationship sufficient to give rise to any legal duty with any Lottery retailer or any of the Plaintiffs;
- (2) GTECH had no communication, contact, or other relationship sufficient to give rise to any legal duty, with any of the Plaintiffs prior to the filing of this lawsuit;
- (3) GTECH made no sale, promise, warranty, guarantee, or representation to any of the Plaintiffs regarding the tickets at issue in this lawsuit;
- (4) GTECH made no sale, promise, warranty, guarantee, or representation to any of the Plaintiffs regarding any computer validation program or any rule, regulation, procedure, or operation related to the validation of any ticket;
- (5) GTECH made no sale, promise, warranty, guarantee, representation and was not a party to any relationship, contractual or otherwise, that may have existed between the Texas Lottery Commission or the Texas Lottery and Plaintiffs;
- (6) All determinations, rules, regulations, procedures, and operations regarding tickets and cash awards were promulgated and implemented by the Texas Lottery Commission without input from GTECH; and
- (7) GTECH had no interest or right to control, direct, or manage the lottery games, tickets, rules, regulations, procedures, and operations determined, promulgated, and implemented by the Texas Lottery Commission.

C. AFFIRMATIVE AND OTHER DEFENSES

GTECH pleads the following affirmative and other defenses:

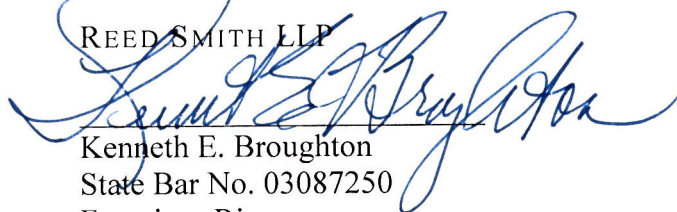
- (1) This Court lacks subject matter jurisdiction over Plaintiffs' claims;
- (2) Plaintiffs lack standing to assert claims against GTECH;
- (3) Plaintiff's claims against GTECH are barred by contract and statute;
- (4) Plaintiffs' claims against GTECH are barred due to waiver and/or estoppel;
- (5) Plaintiffs' claims against GTECH are barred by the economic loss doctrine; and
- (6) Privilege and/or legal justification.

V. PRAYER

GTECH Corporation respectfully requests that the Court dismiss or abate Plaintiffs James Steel *et al.*'s First Amended Petition, that Plaintiffs take nothing by reason of this suit, as well as such further and other relief, at law or in equity, to which GTECH may be justly entitled.

Respectfully submitted,

REED SMITH LLP



Kenneth E. Broughton
State Bar No. 03087250
Francisco Rivero
State Bar No. 24046725
Arturo Muñoz
State Bar No. 24088103
811 Main Street, Suite 1700
Houston, Texas 77002-6110
Telephone: 713.469.3819
Telecopier: 713.469.3899

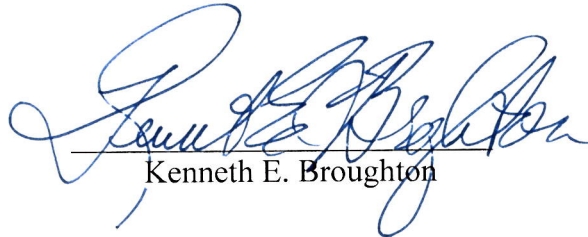
ATTORNEYS FOR DEFENDANT
GTECH CORPORATION

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing document was served on the following counsel of record on this 25th day of January, 2015:

Richard L. LaGarde
Mary Ellis LaGarde
LAGARDE LAW FIRM, P.C.
3000 Wesleyan Street, Suite 380
Houston, Texas 77027
Telephone: 713.993.0660
Telecopier: 713.993.9007
richard@lagardelaw.com
mary@lagardelaw.com

Manfred Sternberg
MANFRED STERNBERG & ASSOCIATES, P.C.
4550 Post Oak Place Dr. #119
Houston, Texas 77027
Telephone: 713.622.4300
Telecopier: 713.622.9899
manfred@msternberg.com



Kenneth E. Broughton