

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

JAMES STEELE, et al.,  
*Plaintiffs,*

v.

GTECH CORPORATION,  
*Defendant.*

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IN THE DISTRICT COURT OF  
  
TRAVIS COUNTY, TEXAS  
  
201<sup>st</sup> JUDICIAL DISTRICT

**PLAINTIFFS’ RESPONSE TO DEFENDANT’S PLEA TO THE JURISDICTION  
AND SPECIAL EXCEPTIONS**

Plaintiffs James Steele, et al. oppose Defendant’s Plea to the Jurisdiction and Special Exceptions and respond as follows:



**I. SUMMARY OF ARGUMENT**



The dispute in this case is between nearly 1,000 lottery players and a private independent contractor, GTECH Corporation (“GTECH”). GTECH is the subsidiary of an Italian multi-national company that operates lotteries across the globe. GTECH entered into a contract with the Texas Lottery Commission (“TLC”) in December of 2010 to operate the Texas Lottery through August of 2020. As the operator of the Texas Lottery, GTECH is responsible for, among other things, developing, maintaining, and servicing scratch-off lottery games, and for providing the Texas Lottery with computer terminals that are programmed to validate tickets with certain serial numbers as “winning” tickets. Tickets with other serial numbers are euphemistically referred to as “non-winning” tickets.

The crux of Plaintiffs’ claims is that GTECH was involved in formulating the following misleading language used in Game 5 of the “Fun 5’s” scratch-off lottery tickets:


GAME 5. If a player reveals three “5” Play Symbols in any one row, column or diagonal, the player wins the PRIZE in the PRIZE box. If a player reveals a “MONEY


BAG” Play Symbol in the 5X BOX, the player wins 5 times that PRIZE.

This language was formulated by GTECH at a time when the parameters for the game called for 100% of the tickets with a Money Bag “” symbol to be “winning” tickets. However, GTECH changed the parameters of the game to provide that a significant percentage of tickets with a Money Bag “” symbol would be “non-winning” tickets. Even though the parameters of the game were substantially modified and the above-quoted language had become misleading, GTECH made the decision to nonetheless use the misleading language on the tickets it printed and distributed.

Plaintiffs purchased lottery tickets that revealed a Money Bag “” symbol. Upon seeing that they had a Money Bag “” symbol, Plaintiffs justifiably believed they had winning tickets. Many called friends and relatives with the good news and celebrated their apparent win. Some cried. Others made plans to pay off their mortgages. However, when Plaintiffs submitted their tickets to the TLC to collect their prizes, they learned that the serial numbers for their tickets were not on the list of “winning” tickets GTECH provided to the TLC. Therefore, their tickets were, by definition, “non-winning” tickets and not eligible for the payment of prize money.

Later, Plaintiffs learned that for a ticket to be validated as a winner of Game 5, it had to meet the following additional undisclosed requirements:

Reveal three “5” symbols in any one row, column or diagonal, win PRIZE in PRIZE box. [*And, if you also*]  
Reveal a Money Bag “” symbol in the 5X BOX, win 5 times ~~that~~ [*the*] PRIZE [*already won*].

Even though Plaintiffs' tickets revealed a Money Bag  symbol, their tickets did not meet the added but undisclosed requirement of "also" revealing three "5" symbols in any one row, column or diagonal.

Plaintiffs have asserted fraud and tortious interference causes of action against GTECH for its independent tortious conduct in promulgating and formulating the deceitful wording in Game 5 and in programming its computers so that the Plaintiffs' tickets would not be validated as winners. Plaintiffs do not challenge the decision by the TLC that Plaintiffs' tickets are "non-winners", nor do they assert any claims against the TLC.

Despite this, GTECH seeks to dismiss or abate this case claiming that the TLC has exclusive jurisdiction to adjudicate Plaintiffs' claims against GTECH, relying on statutes which give the TLC authority to prescribe the form of tickets and to decide whether a ticket is a winner. None of these statutes even arguably gives the TLC authority to adjudicate tort claims by third parties against its contractors. Moreover, for similar reasons, there are no administrative remedies for Plaintiffs to pursue or exhaust, and the plea to the jurisdiction should thus be denied. Finally, as to the only special exception which has not been rendered moot due to intervening pleading amendments, Plaintiffs assert that Texas does indeed recognize a cause of action for tortious interference with an expectancy, and this special exception should thus be overruled.

## **II. ARGUMENT**

### **A. This dispute is between lottery players and a private independent contractor.**

GTECH entered into a contract with the TLC in December of 2010 to operate the Texas Lottery through August of 2020. GTECH's contract is, in large part, a matter of public record and can be viewed on the Texas Lottery's website.<sup>1</sup>

In their contract, GTECH and the TLC agree that GTECH will act "as an independent contractor and not as an employee or agent of the TLC."<sup>2</sup>

As operator of the Texas lottery, GTECH is responsible for providing the Texas Lottery with computer terminals that are programmed to validate tickets with certain serial numbers as "winning" tickets. All other tickets are deemed "non-winning" tickets.

### **B. The official game rules describe all tickets with MONEY BAG symbols as winners.**

The official rules for Game 5 of the Fun 5's Instant Game provide as follows:

GAME 5. If a player reveals three "5" Play Symbols in any one row, column or diagonal, the player wins the PRIZE in the PRIZE box. If a player reveals a "MONEY BAG" Play Symbol in the 5X BOX, the player wins 5 times that PRIZE.<sup>3</sup>

Plaintiffs are lottery players who purchased tickets that revealed a "MONEY BAG" Play Symbol and justifiably believed they had purchased winning tickets.

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<sup>1</sup> Contract for Lottery Operations and Services Between the Texas Lottery Commission and GTECH Corporation, accessed on March 5, 2015 at: <http://txlottery.org/export/sites/lottery/Documents/procurement/RFP2011/Lottery%20Operations%20and%20Services%20Contract.pdf>

<sup>2</sup> Id. at Part 2; See also Par. 3.8 which provides that "nothing contained in the Contract will be construed to create or imply a joint venture, partnership, employer/employee relationship, principal-agent relationship or any other relationship between the parties."

<sup>3</sup> 39 Texas Register p. 4801, par. 1(L) (June 20, 2014).

**C. GTECH added a requirement that did not conform to the language on the tickets or the official game rules.**

GTECH prepared a computer validation program that did not conform to the language on the tickets or the official game rules for the Fun 5's game. Specifically, GTECH programmed its computer validation program to treat the instructions for Game 5 as if the following language had been added:

Reveal three "5" symbols in any one row, column or diagonal, win PRIZE in PRIZE box. [*And, if you also*]  
Reveal a Money Bag "👛" symbol in the 5X BOX, win 5 times ~~that~~ [*the*] PRIZE [*already won*].

Plaintiffs' tickets revealed a Money Bag "👛" symbol but did not meet GTECH's added undisclosed requirement of "also" revealing three "5" symbols in any one row, column or diagonal. Accordingly, GTECH's non-conforming computer program failed to validate Plaintiffs' tickets as "winning" tickets.

**D. The dispute in this case is not with the TLC.**

It is undisputed that GTECH's computer validation program failed to validate Plaintiffs tickets as "winning" tickets. When Plaintiffs presented their tickets to the TLC, the TLC determined that the serial numbers on their tickets did not appear on the computerized list of "winning" tickets provided by GTECH to the TLC.

Plaintiffs do not dispute the determination by the TLC that their tickets are "non-winning" tickets because that decision was mandated by both the official game rules for the Fun 5's game and the Texas Administrative Code.

Paragraph 1.2(L) of the official game procedures for the Fun 5's game, defines a "Non-Winning Ticket" as "[a] Ticket which is not programmed to be a winning Ticket...."<sup>4</sup> In other words, because GTECH did not program Plaintiffs' tickets to be "winning" tickets, they are, by definition "non-winning tickets" under the official game rules for the Fun 5's game.

Moreover, the Texas Administrative Code, which governs the payout of prizes by the TLC, provides that, prior to payment of a prize, "[t]he validation number of an apparent winning ticket shall appear on the commission's official list of validation numbers of winning tickets for the particular game and pack....."<sup>5</sup>

The TLC followed both the official game rules and the Texas Administrative Code when it determined that Plaintiffs' tickets were "non-winners". Plaintiffs do not dispute the TLC's determination.

Plaintiffs do dispute GTECH's actions. GTECH was the company that helped to develop the misleading language used on the tickets, printed the misleading language on the tickets, distributed the misleading tickets for sale, and programmed its computers in such a way as to leave a significant percentage of the tickets with a Money Bag symbol off from the list of "winning" tickets.

**E. There is a legal presumption that district courts have exclusive jurisdiction.**

There is a legal "presumption" that this court is authorized to resolve this dispute.<sup>6</sup> The Texas Constitution provides that district courts have "exclusive, appellate, and original

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<sup>4</sup> 39 Texas Register p. 4801, par. 1(L) (June 20, 2014).

<sup>5</sup> 16 Tex. Admin. Code §401.302 (d).

<sup>6</sup> *In re Entergy Corp.*, 142 S.W.3d 316, 322 (Tex. 2004).

jurisdiction of all actions, proceedings, and remedies, except in cases [in which jurisdiction is] conferred . . . on some other court, tribunal, or administrative body."<sup>7</sup>

**F. The TLC would have “exclusive jurisdiction” only if the Legislature granted it sole authority to adjudicate this dispute.**

An administrative agency has exclusive jurisdiction when the Legislature grants it the “sole authority” to make an initial determination in a dispute.<sup>8</sup> In order for the TLC to have exclusive jurisdiction in this case, the TLC must have authority to determine the controversy at issue.<sup>9</sup> GTECH has failed to show this court that the Legislature gave the TLC any authority, much less “sole authority”, to make an initial determination in a dispute between lottery players and a private independent contractor. Therefore, this court is not deprived of jurisdiction over this dispute by the “exclusive jurisdiction” doctrine.

**G. A grant of broad authority to an agency is not a grant of “exclusive jurisdiction.”**

In *Subaru of America, Inc. v. David McDavid Nissan, Inc.*, 84 S.W.3d 212, 221 (Tex. 2002), the court dealt with the issue of whether the Texas Motor Vehicle Board had exclusive jurisdiction to adjudicate a dispute between a car manufacturer and a car dealer. The court examined the broad statutory authority given to the Motor Vehicle Board in § 3.01(a) of the Texas Motor Vehicle Commission Code which, at the time, provided as follows:

(a) The board has the general and original power and jurisdiction to regulate all aspects of the distribution, sale, and leasing of motor vehicles and to do all things, whether specifically designated in this Act or implied herein, or necessary or convenient to the exercise of this power and jurisdiction, including the original jurisdiction to determine questions of its own jurisdiction. In addition to the other duties placed on the

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<sup>7</sup> Tex. Const. art. V, § 8.

<sup>8</sup> Id. at 321-322 (emphasis added).

<sup>9</sup> *Juliff Gardens, L.L.C. v. Tex. Comm'n on Env'tl. Quality*, 131 S.W.3d 271, 278-279 (Tex. App. Austin 2004).

board by this Act, the board shall enforce and administer the terms of Chapter 503, Transportation Code.<sup>10</sup>

The Supreme Court initially concluded that this grant of broad statutory authority was not an express grant of “exclusive jurisdiction” to adjudicate the dispute.<sup>11</sup>

However, the Legislature amended § 3.01(a) to read as follows:

(a) The board has the *exclusive, original jurisdiction* to regulate those aspects of the distribution, sale, and leasing of motor vehicles as governed by this Act and to do all things, whether specifically designated in this Act or implied herein, or necessary or convenient to the exercise of this power and jurisdiction, including the original jurisdiction to determine questions of its own jurisdiction.<sup>12</sup>

The Supreme Court concluded that the statutory authority found in the newly amended §3.01(a) “clearly expresses the Legislature’s intent for the Board to have exclusive jurisdiction over matters the Code governs.”<sup>13</sup>

In this case, the Legislature granted the following broad authority to the TLC:

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.<sup>14</sup>

This grant of broad authority to the TLC more closely matches the grant of broad authority initially given to the Motor Vehicle Board in the *Subaru* case. The Supreme Court rejected the

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<sup>10</sup> *Id.* at 218.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 219 (emphasis added).

<sup>13</sup> *Id.* at 223.

<sup>14</sup> TEX. GOV’T CODE § 467.101(a).



notion that a mere grant of broad authority expresses an “intent” on the part of the Legislature to give an agency “exclusive jurisdiction”. A similar conclusion must be reached in this case.

**H. Even a legislative grant of exclusive jurisdiction in one area cannot be expanded by the agency itself to grant exclusive jurisdiction in other areas.**

In *Employees Ret. Sys. of Tex. v. Duenez*, 288 S.W.3d 905 (Tex. 2009), the Texas Supreme Court made it clear that “exclusive jurisdiction must be granted by the Legislature; an agency cannot grant exclusive jurisdiction to itself.”<sup>15</sup> In the *Duenez* opinion, the Employees Retirement System of Texas (“ERS”) claimed that it had exclusive jurisdiction to adjudicate a subrogation claim it filed against a former member of the system. The Supreme Court looked at the agency’s authorizing legislation for an express grant of exclusive jurisdiction or for a pervasive regulatory scheme indicating that was the Legislature’s intention.<sup>16</sup> The grant of legislative authority provided as follows:

The executive director has *exclusive authority* to determine all questions relating to enrollment in or *payment of a claim* arising from group coverages or benefits provided under this chapter other than questions relating to payment of a claim by a health maintenance organization.<sup>17</sup>

The court noted that the Legislature may have granted ERS exclusive jurisdiction of disputes relating to the *payment of a claim*.<sup>18</sup> However, the legislature did not grant the agency exclusive jurisdiction of disputes related to *reimbursement of benefits* already paid.<sup>19</sup>

In this case, the Legislature granted the TLC broad authority to control the lottery. However, it did not expressly grant the TLC “exclusive” authority to do so. Even if the authorizing legislation could be interpreted to give the lottery commissioner “exclusive

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<sup>15</sup> *Id* at 910.

<sup>16</sup> *Id.* at 909.

<sup>17</sup> Texas Insurance code §1551.352 (emphasis added).

<sup>18</sup> *Duenez*, *supra* at 909.

<sup>19</sup> *Id.*

jurisdiction” to adjudicate disputes between lottery players and the TLC, the Legislature did not extend that authority to disputes between lottery players and third-party independent contractors.

As the *Duenez* court noted, exclusive jurisdiction must be granted by the Legislature; an agency cannot grant exclusive jurisdiction to itself.<sup>20</sup>

**I. There is no “pervasive regulatory scheme” indicating an intent for the TLC to have “exclusive jurisdiction” over this type of dispute.**

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 the problem to which the regulation is addressed.<sup>21</sup>

In *Duenez*, the Supreme Court found that the authorizing legislation did not include a detailed regulatory scheme to resolve the dispute before the court.<sup>22</sup> Absent such a detailed regulatory scheme, the court refused to find that the agency had exclusive jurisdiction.<sup>23</sup>

Defendant has not presented this court with a pervasive regulatory scheme showing that the Legislature intended to grant the TLC exclusive jurisdiction to adjudicate disputes between lottery players and third party independent contractors. To the contrary, a review of the authorizing legislation shows that the Legislature did not provide any administrative or regulatory process for Plaintiffs to resolve their complaints or to recover damages caused by third party independent contractors.

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<sup>20</sup> *Duenez* at 910.

<sup>21</sup> *Subaru of America, Inc. v. David McDavid Nissan, Inc.*, 84 S.W.3d 212, 221 (Tex. 2002).

<sup>22</sup> *Duenez* at 909.

<sup>23</sup> *Id.*

**J. The “open courts” provision of the Texas Constitution would be violated if GTECH’s Plea to the Jurisdiction is granted.**

The *Duenez* court warned that 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.<sup>24</sup>

This court should not apply an expansive construction to the TLC’s authorizing legislation thereby relegating Plaintiffs’ common-law claims to administrative remedies in violation of the open-courts provision of the Texas Constitution.

**K. Tortious Interference with an Expectancy is a recognized cause of action in Texas.**

Defendant filed special exceptions alleging that Tortious Interference with an Expectancy is not a recognized cause of action in Texas. To the contrary, a number of Texas courts have recognized the validity of the cause of action.<sup>25</sup> The elements of the cause of action were set forth in *In re Marshall*, 253 B.R. 550, 559 (Bankr. C.D. Cal. 2000) as follows: (1) the existence of an expectancy; (2) a reasonable certainty that the expectancy would have been realized, but for the interference; (3) intentional interference with that expectancy; (4) tortious conduct involved with the interference; and (5) damages. Each of those elements have been alleged in Plaintiff’s Second Amended Petition. Defendant’s special exception as to this claim should be denied.

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<sup>24</sup> Id. at 910; Texas Constitution, art. I, § 13.

<sup>25</sup> See, *King v. Acker*, 725 S.W.2d 750, 754 (Tex. App.--Houston [1st Dist.] 1987, no writ); see also *Brandes v. Rice Trust, Inc.*, 966 S.W.2d 144, 146-47 (Tex. App.--Houston [14th Dist.] 1998, pet. denied).

**L. Defendant's special exception as to Tortious Interference with Existing Contract has been rendered moot.**

Defendant complained that Plaintiff failed to allege that Defendant had actual or constructive knowledge of existing contracts in which Plaintiffs had an interest. Plaintiffs have filed their Second Amended Petition and have alleged, in relevant part, the following:

GTECH knew or had reason to know that a class of lottery players, of which Plaintiffs were members, had entered into such contracts with the Texas Lottery. Moreover, Defendant knew or had reason to know of the interest that a class of lottery players, of which Plaintiffs were members, had in said contracts.

Defendant's special exception on this point is now moot.

**III. CONCLUSION**

Defendant has failed to show that the legislature granted the TLC any jurisdiction to adjudicate this dispute, much less the "exclusive jurisdiction" necessary to support Defendant's Plea to the Jurisdiction. Defendant has also failed to show that its only remaining special exception that was not rendered moot has any merit. Accordingly, both Defendant's Plea to the Jurisdiction and its Special Exceptions should be denied.

Respectfully submitted,

**LAGARDE LAW FIRM, P.C.**



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**CERTIFICATE OF SERVICE**

The undersigned certifies that a true and correct copy of the foregoing instrument was served upon the attorneys of record of all parties to the above cause in accordance with Texas Rules of Civil Procedure on the 7<sup>th</sup> day of April, 2015.

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A handwritten signature in black ink, appearing to read "R L Lagarde", written in a cursive style.

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RICHARD L. LAGARDE