CAUSE NO. DC-14-14838

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

DAWN NETTLES' RESPONSE TO GTECH'S FIRST AMENDED PLEA TO THE JURISDICTION

Plaintiff, Dawn Nettles, asks the Court to overrule GTECH Corporation's ["GTECH's"] First Amended Plea to the Jurisdiction. A memorandum in support of this response is attached hereto.

Respectfully submitted,

LAGARDE LAW FIRM, P.C.

Richard L. LaGarde
SBN: 11819550
Mary Ellis LaGarde
SBN: 24037645
3000 Weslayan Street, Suite 380
Houston, Texas 77027
Telephone: (713) 993-0660
Facsimile: (713) 993-9007
Email: richard@lagardelaw.com
mary@lagardelaw.com

COUNSEL FOR PLAINTIFF

MANFRED STERNBERG & ASSOCIATES, P.C.

Manfred Sternberg
SBN: 19175775
4550 Post Oak Place Dr. #119
Houston, TX 77027
Telephone: (713) 622-4300
Facsimile: (713)622-9899
Email: manfred@msternberg.com

CO-COUNSEL FOR PLAINTIFF

PLAINTIFF'S MEMORANDUM IN SUPPORT OF HER RESPONSE TO GTECH'S FIRST AMENDED PLEA TO THE JURISDICTION

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

I. Summary of Arguments

GTECH, a private contractor, argues that it is immune from suit under the doctrine of "derivative immunity". For the reasons set forth below, Ms. Nettles asks the court to overrule GTECH's plea to the jurisdiction.

A. GTECH was an independent contractor, not an employee of the TLC.

In both its Lottery Operations Contract and its Instant Ticket Manufacturing Contract with the TLC, GTECH agreed that it would act as an "independent contractor" and not as an "employee" or "agent" of the TLC.

B. GTECH exercised "independent discretion" so it is not entitled to "derivative immunity".

The Texas Supreme Court has made it clear that "private parties exercising independent discretion are not entitled to sovereign immunity." *Brown & Gay Eng'g, Inc. v. Olivares,* 461 S.W.3d 117, 124 (Tex. 2015). Ms. Nettles' allegations make it clear that GTECH exercised independent discretion when it formulated the misleading and deceptive language used in the instructions for the Fun 5's scratch-off tickets. Therefore, GTECH is not immune from suit under the doctrine of "derivative immunity".

C. The fact that GTECH's work was subject to approval by the TLC does not give GTECH immunity from suit.

In the *Brown & Gay* opinion, *supra*, the private contractor's work was subject to approval by the Toll Road Authority. The Supreme Court made it clear that the private

contractor was not entitled to sovereign immunity merely because the contractor's work was subject to approval by the government agency. Similarly, in this case, the fact that GTECH's working papers were subject to approval by the TLC does not extend sovereign immunity to GTECH.

II. The Applicable Legal Burden

A plea to the jurisdiction is a dilatory plea used to defeat a cause of action without regard to whether the claims asserted have merit. *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 554 (Tex. 2000). The plea challenges the trial court's subject matter jurisdiction. *Id*.; *see Tex. Dep't of Transp. v. Jones,* 8 S.W.3d 636, 638 (Tex. 1999).

The plaintiff has the initial burden to plead facts affirmatively showing that the trial court has jurisdiction. *Tex. Ass'n of Bus. v. Tex. Air Control Bd., 852 S.W.2d 440, 446 (Tex. 1993)*; *Univ. of N. Tex. v. Harvey, 124 S.W.3d 216, 220 (Tex. App.--Fort Worth 2003, pet. denied)*. Courts are to construe the pleadings liberally in favor of the pleader, look to the pleader's intent, and accept as true the factual allegations in the pleadings. *See Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 228 (Tex. 2004). If the pleadings do not contain sufficient facts to affirmatively demonstrate the trial court's jurisdiction, but do not affirmatively demonstrate incurable defects in jurisdiction, the plaintiff should be afforded the opportunity to amend its pleadings. *Id*. at 226-27.

Where the plea to the jurisdiction challenges the existence of jurisdictional facts, courts consider relevant evidence submitted by the parties when necessary to resolve the jurisdictional issues raised, even when the evidence implicates the merits of the cause of action.

Id. at 227; *Blue, 34 S.W.3d at 555*; *see City of Waco v. Kirwan, 298 S.W.3d 618, 622 (Tex. 2009)*. A review of a plea to the jurisdiction challenging the existence of jurisdictional facts mirrors that of a traditional motion for summary judgment. *Miranda,* 133 S.W.3d at 228. The defendant is required to meet the summary judgment standard of proof for its assertion that the trial court lacks jurisdiction. *Id.* Once the defendant meets its burden, the plaintiff is then required to show that there is a disputed material fact regarding the jurisdictional issue. *Id.* If the evidence creates a fact question regarding jurisdiction, the trial court must deny the plea to the jurisdiction and leave its resolution to the fact finder. *Id.* at 227-28. But, if the 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 considering this evidence, courts "take as true all evidence favorable to the non-movant" and "indulge every reasonable inference and resolve any doubts in the non-movant's favor." *Id.*

III. The Applicable Substantive Law

Contractors and agents acting within the scope of their "employment" for the government generally have derivative sovereign immunity. *Butters v. Vance Int'l, Inc.,* 225 F.3d 462, 466 (4th Cir. 2000); *see Yearsley v. W. A. Ross Constr. Co*., 309 U.S. 18, 20-21, 60 S. Ct. 413, 84 L. Ed. 554 (1940) (noting that "there is no liability on the part of the contractor for executing [the] will [of Congress]").

However, the Texas Supreme Court has held that a government contractor "is not entitled to sovereign immunity protection unless it can demonstrate its actions were actions of the [governmental entity], executed subject to the control of the [governmental entity]." *K.D.F.*

v. Rex, 878 S.W.2d 589, 597 (Tex. 1994). In other words, "private parties exercising independent discretion are not entitled to sovereign immunity." *Brown & Gay Eng'g, Inc. v. Olivares*, 461 S.W.3d 117, 124 (Tex. 2015) (citing *K.D.F.,* 878 S.W.2d at 597).

The Texas Supreme Court, in *Brown & Gay*, recently considered the scope of derivative immunity for government contractors. *See id.* There, the plaintiff claimed that Brown & Gay, a government contractor, negligently designed and constructed a roadway, thereby causing a fatal accident. *Id.* at 121. Brown & Gay argued that it was entitled to derivative immunity as an "employee" of the Fort Bend County Toll Road Authority (the "Authority"), the governmental entity that issued the contract. *Id.* at 120 (citing *Tex. Adjutant General's Office v. Ngakoue,* 408 S.W.3d 350, 356 (Tex. 2013) (explaining that a suit against a government official acting in an official capacity is "merely another way of pleading an action against the entity of which the official is an agent")). The trial court agreed with Brown & Gay and dismissed the case, but the Fourteenth Court of Appeals reversed, holding that Brown & Gay was not entitled to immunity because it was an independent contractor, rather than an employee, of the Authority. *Id.* The Texas Supreme Court affirmed the court of appeals' decision. *Id.*

The Supreme Court first reviewed federal case law establishing that derivate immunity is extended to private contractors "only in limited circumstances". The Court noted that, in each of the cases examined by the Court, "the complained-of conduct for which the contractor was immune was effectively attributed to the government. That is, the alleged cause of the injury was not the independent action of the contractor, but the action taken by the government through the contractor." *Id.* at 125. In *Brown & Gay*, on the other hand, the plaintiffs did not complain of harm caused by Brown & Gay's "implementing the Authority's specifications or

following any specific government directions or orders," nor did they complain about the decision to build the roadway at issue or "the mere fact of its existence." *Id.* Instead, the plaintiffs argued that Brown & Gay was "independently negligent in designing the signs and traffic layouts" for the roadway. *Id.* Thus, the Texas Supreme Court rejected Brown & Gay's "contention that it is entitled to share in the Authority's sovereign immunity solely because the Authority was statutorily authorized to engage Brown & Gay's services and would have been immune had it performed those services itself." *Id.* at 127.

The *Brown & Gay* Court also noted that the policy rationales underlying the doctrine of sovereign immunity would not be advanced by affording immunity to private contractors. The Court explained that sovereign immunity is "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," but "[i]mmunizing a private contractor in no way furthers this rationale." *Brown & Gay Eng'g, Inc. v. Olivares,* 461 S.W.3d 117, 123 (Tex. 2015). The Court explained:

> [e]ven if holding a private party liable for its own improvident actions in performing a government contract indirectly leads to higher overall costs to government entities in engaging private contractors, those costs will be reflected in the negotiated contract price. This allows the government to plan spending on the project with reasonable accuracy.

Id.

IV. Argument

A. GTECH was an independent contractor, not an employee of the TLC.

In the *Brown & Gay* case, the appellate court found that the private contractor was not entitled to "derivative immunity" because it was an "independent contractor", not an "employee" or "agent" of the governmental entity.

Similarly, in this case GTECH's contracts with the TLC expressly provide that GTECH is to act as an "independent contractor" and not as an "employee" or "agent" of the TLC.

On December 10, 2014, GTECH and the TLC executed a "Contract for Lottery Operations and Services" ("Operations Contract").[1] The Operations Contract gives GTECH the exclusive right to operate the Texas Lottery through the year 2020.[2] The Operations Contract is a matter of public record and can be accessed on the TLC's website.[3]

Paragraph 3.8 of GTECH's Operations Contract describes the relationship of the parties as follows:

> GTECH and the Texas Lottery agree and understand that GTECH shall render the goods, services and requirements under this Contract as an independent contractor, and 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.[4]

[1] Plaintiff's Third Amended Petition at ¶ 12.

[2] *Id*.

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

[4] Plaintiff's Third Amended Petition at ¶ 14.

The TLC also gave three private companies the responsibility for developing and manufacturing instant scratch-off tickets.[5] One of those companies, GTECH Printing Corporation, entered into a "Contract for Instant Ticket Manufacturing and Services" ("Instant Ticket Contract") with the TLC in August of 2012.[6] The Instant Ticket Contract is a matter of public record and can be accessed at the Texas Lottery Commission's website.[7] Subsequent to entering into the Instant Ticket Contract, GTECH Printing Corporation was merged into GTECH Corporation which is now the successor in interest to the rights and obligations of GTECH Printing Corporation under the Instant Ticket Contract.[8]

At page 2 of the Instant Ticket Contract, GTECH and the TLC agreed that GTECH would provide its services under the contract "as an independent contractor and not as an employee or agent of the TLC…."[9]

In summary, GTECH is not an employee or agent of the TLC. It is an independent contractor. Therefore, it is not entitled to assert "derivative immunity" as an "employee" or "agent" of the TLC.

B. Because GTECH exercised "independent discretion", it is not entitled to "derivative immunity".

The Supreme Court has made it clear that "private parties exercising independent discretion are not entitled to sovereign immunity." *Brown & Gay Eng'g, Inc. v. Olivares*, 461 S.W.3d 117, 124 (Tex. 2015). The allegations in Ms. Nettles' Third Amended Petition as well as

[5] The three private companies are GTECH Printing Corporation, Scientific Games International, Inc., and Pollard Banknote Ltd. See Plaintiff's Third Amended Petition at ¶ 19.

[6] Plaintiff's Third Amended Petition at ¶ 19.

[7] http://www.txlottery.org/export/sites/lottery/Documents/procurement/instant_contract/GPC_Executed_Contract.pdf.

[8] Plaintiff's Third Amended Petition at ¶ 19.

[9] Plaintiff's Third Amended Petition at ¶ 23.

the jurisdictional evidence make it clear that GTECH exercised "independent discretion" when it formulated the language printed on the Fun 5's tickets.

In March of 2013, GTECH made a presentation to the TLC and provided examples of GTECH scratch-off games available for sale to the TLC.[10] One of those games was known as the "Fun 5's" game. GTECH had previously operated the Fun 5's game in Nebraska, Indiana, Kansas, and Western Australia with much financial success.[11]

The TLC selected GTECH's Fun 5's game as one of the scratch-off games it intended to purchase from GTECH for use during fiscal year 2014.[12]

It was GTECH's responsibility to prepare the first draft of the working papers for the Fun 5's game.[13] GTECH's customer service representative, Penny Whyte, prepared the initial draft of the working papers for the Fun 5's game.[14] The TLC had no involvement in putting together the initial draft working papers.[15] The initial draft working papers were sent to the TLC only after GTECH had done an internal review of the artwork, instructions, and parameters for the game.[16]

On April 16, 2014, GTECH sent the draft "working papers" for approval by the TLC.[17] The draft working papers closely mirrored the game parameters, artwork, and instructions used by GTECH for its Fun 5's game in Nebraska.[18] The game instructions found in GTECH's initial draft

[10] Plaintiff's Third Amended Petition at ¶ 24.
[11] Plaintiff's Third Amended Petition at ¶ 24; Lapinski Deposition, Exhibit 1 at pp. 54-56.
[12] Plaintiff's Third Amended Petition at ¶ 25.
[13] Plaintiff's Third Amended Petition at ¶ 26; Lapinski Deposition, Exhibit 1 at p. 47.
[14] Plaintiff's Third Amended Petition at ¶ 26; Whyte Deposition, Exhibit 2 at pp. 24-25.
[15] Plaintiff's Third Amended Petition at ¶ 26; Bowersock Deposition, Exhibit 3 at p. 32.
[16] Plaintiff's Third Amended Petition at ¶ 26; Whyte Deposition, Exhibit 2 at pp. 24-25.
[17] Plaintiff's Third Amended Petition at ¶ 26.
[18] Plaintiff's Third Amended Petition at ¶ 26; Lapinski Deposition, Exhibit 1 at p. 57.

working papers were identical to those chosen by GTECH when it first submitted the artwork for the Fun 5's game to the TLC except GTECH changed the word "get" to "reveal".[19]

GTECH's draft working papers proposed a Fun 5's game ticket consisting of five games. For Game 5, GTECH proposed a tic-tac-toe style of game with the following printed instructions[20]:

According to the testimony of Gary Grief, Executive Director of the TLC, the TLC relies on GTECH for the language that goes on the tickets because GTECH has the experience in the industry and GTECH runs games in states other than Texas.[21] Mr. Grief expected GTECH to exercise reasonable care to propose language for the Fun 5's tickets that was not misleading.[22]

[19] Plaintiff's Third Amended Petition at ¶ 26; Bowersock Deposition, Exhibit 3 at pp. 41-43.
[20] Plaintiff's Third Amended Petition at ¶ 26. See Lapinski Deposition, Exhibit 1 at p. 57.
[21] Plaintiff's Third Amended Petition at ¶ 28; Grief Deposition, Exhibit 4 at p. 16.
[22] Plaintiff's Third Amended Petition at ¶ 28. Grief Deposition, Exhibit 4 at p. 19.

On April 30, 2014, the TLC requested that GTECH change the "Dollar Bill" symbol to a "5" symbol and change the "5" symbol to a Money Bag "  " symbol.[23]

On May 12, 2014, the TLC requested that GTECH change the parameters of Game 5 to provide that the winning Money Bag "  " symbol in the 5X Box would be printed on both winning tickets and non-winning tickets. The stated reason for the requested change was a fear that the 5X Box would be an easy target for "micro-scratching" since only the 5X box would need to be scratched to tell if a ticket was a "winning" ticket.[24]

GTECH changed the game's parameters and programmed its computers so that a significant percentage of the tickets that had not won the tic-tac-toe game would nonetheless reveal a Money Bag "  " symbol in the 5X Box.[25]

It is not unusual for the TLC to ask GTECH to make a change in a game's parameters. However, if a change in the parameters is requested, it is GTECH's duty to review the instructions to ensure there is no need for a change in the instructions to make them clear and unambiguous.[26]

According to the testimony of GTECH's client services representative, Penny Whyte, if the TLC requests that a change be made to the working papers, GTECH's client service representative will look at the requested change and will decide from there whether to make the requested change. It was the responsibility of employees of GTECH's printing division to check the parameters of the game in the working papers, to compare the language on the

[23] Plaintiff's Third Amended Petition at ¶ 34. See Lapinski Deposition, Exhibit 1 at p. 58.
[24] Plaintiff's Third Amended Petition at ¶ 35. See Lapinski Deposition, Exhibit 1 at pp. 59-60.
[25] Plaintiff's Third Amended Petition at ¶ 37. See Lapinski Deposition, Exhibit 1 at p. 62.
[26] Plaintiff's Third Amended Petition at ¶ 42; Whyte Deposition, Exhibit 2 at pp. 52-53.

tickets to make sure it was not misleading or deceptive, and to make sure the final executed working papers were free of errors.[27] It is GTECH's expectation that when it sends proposed working papers to the lottery, the instructions for the game will be clear and not misleading.[28]

It was the responsibility of GTECH's client services representative and its software department to conduct a comprehensive review of the game's instructions to make sure that the change in parameters requested by the TLC did not require a change in the language of the game's instructions.[29] GTECH's customer service representative and its software department had the knowledge and expertise necessary to ensure that the language was clear, unambiguous, and not misleading.[30]

According to the testimony of the TLC's Products and Drawings Manager, Robert Tirloni, it should be the goal of the folks at GTECH to review the working papers and to make sure the instructions are clear.[31]

The TLC's Instant Product Coordinator, Dale Bowersock, testified that it is important for instructions on scratch-off games to be clear and not misleading.[32] It is part of GTECH's job to point out concerns about the game to the TLC.[33] The TLC expects GTECH to have the responsibility to make sure the instructions in their games are not misleading.[34] The TLC

[27] Plaintiff's Third Amended Petition at ¶ 29; Lapinski Deposition, Exhibit 1 at pp. 85-86.
[28] Plaintiff's Third Amended Petition at ¶ 29; Thurston Deposition, Exhibit 5 at p. 52.
[29] Plaintiff's Third Amended Petition at ¶ 40; Thurston Deposition, Exhibit 5 at p. 92.
[30] Plaintiff's Third Amended Petition at ¶ 40; Gaddy Deposition, Exhibit 6 at pp. 83-84.
[31] Plaintiff's Third Amended Petition at ¶ 30; Tirloni Deposition, Exhibit 7 at p. 12.
[32] Plaintiff's Third Amended Petition at ¶ 31; Bowersock Deposition, Exhibit 3 at p.78.
[33] *Id*.
[34] Plaintiff's Third Amended Petition at ¶ 31; Bowersock Deposition, Exhibit 3 at p.76.

expects GTECH to propose wording that is clear and does not misrepresent the chances to win a game.[35]

The TLC expected GTECH to exercise reasonable care to make sure that the instructions on the Fun 5's game were clear and unambiguous.[36] The TLC does not expect GTECH to deliver games that are misleading.[37]

Because the Money Bag "  " symbol would be appearing on both winning and non-winning tickets, it was incumbent upon GTECH's client service representative and its software department to change the wording of the instructions to make it clear to consumers that they would win 5 times the amount in the PRIZE Box only if the ticket revealed ***both*** a Money Bag "  " symbol in the 5X Box ***and also*** revealed three five symbols in any one row, column, or diagonal in the tic-tac-toe game.[38]

GTECH's client service representatives, Laura Thurston and Penelope Whyte, both reviewed the language of the instructions after the change in parameters was requested by the TLC.[39] Both of the GTECH employees made the decision that GTECH would not change the wording of the instructions to make them less misleading or deceptive.[40]

Although the TLC was required to sign off on the final working papers, the TLC was relying on GTECH and its expertise in having worked on scratch-off games for many years.[41] Moreover, GTECH's client services representative, Laura Thurston, admits that it would have

[35] Plaintiff's Third Amended Petition at ¶ 31; Bowersock Deposition, Exhibit 3 at pp. 79-80.
[36] Plaintiff's Third Amended Petition at ¶ 39; Tirloni Deposition, Exhibit 7 at pp. 9-10.
[37] Plaintiff's Third Amended Petition at ¶ 39; Tirloni Deposition, Exhibit 7 at pp. 10-11.
[38] Plaintiff's Third Amended Petition at ¶ 38; Gaddy Deposition, Exhibit 6 at pp. 83-84.
[39] Plaintiff's Third Amended Petition at ¶ 41; Thurston Deposition, Exhibit 5 at pp. 127-128; Whyte Deposition, Exhibit 2 at pp. 39-40 & 46.
[40] *Id*.
[41] Plaintiff's Third Amended Petition at ¶ 42; Whyte Deposition, Exhibit 2 at pp. 52-53.

been reasonable for the TLC to have relied upon GTECH to notify the TLC if a change in the instructions was needed.[42]

GTECH had a contractual duty to ensure that the final executed working papers it submitted to the TLC were complete and free of any errors.[43] In the final executed working papers GTECH presented to the TLC, GTECH decided to use substantially the same language it had proposed in the original draft working papers.[44] The wording GTECH proposed for the final executed working papers stated as follows:

> 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.[45]

The wording selected by GTECH was misleading and deceptive given the change in the games parameters.[46]

In summary, it is undisputed that once the TLC requested a change in the game's parameters, it was the responsibility of GTECH's customer service representatives and its software department to examine the wording of the game's instructions to ensure that the requested change in parameters did not make the existing instructions misleading and deceptive.[47] In the exercise of reasonable care, GTECH's personnel should have notified the

[42] Plaintiff's Third Amended Petition at ¶ 42; Whyte Deposition, Exhibit 2 at p. 54.
[43] Plaintiff's Third Amended Petition at ¶ 43; Lapinski Deposition, Exhibit 1 at p. 83.
[44] Plaintiff's Third Amended Petition at ¶ 43.
[45] *Id*.
[46] Plaintiff's Third Amended Petition at ¶ 44.
[47] Plaintiff's Third Amended Petition at ¶ 44; Lapinski Deposition, Exhibit 1 at pp. 85-86; and, Thurston Deposition, Exhibit 5 at p. 44.

TLC if a requested change in the parameters of the game would cause problems with the game.[48]

Both of GTECH's customer service representatives testified that they did examine the existing wording of the instructions and that it was they who decided to keep the old wording despite the change in the game's parameters.[49]

It is likewise undisputed that the TLC was relying upon GTECH to use its experience and expertise to choose wording that would not be misleading and deceptive. This faulty exercise of "independent discretion" on the part of GTECH is the reason misleading and deceptive language was printed on the Fun 5's tickets. Because GTECH exercised "independent discretion", it is not entitled to immunity.

C. The fact that GTECH's working papers were subject to approval by the TLC does not give GTECH immunity from suit.

In the *Brown & Gay* opinion, *supra*, the Fort Bend Toll Road Authority delegated the responsibility for designing road signs and traffic layouts to Brown & Gay, "subject to approval by the Authority's Board of Directors". 461 S.W.3d at 119.

The Supreme Court made it clear that even though the contractor's work was subject to approval by the governmental agency, the private contractor was not entitled to sovereign immunity. *Id*. at 129.

[48] Plaintiff's Third Amended Petition at ¶ 44; Lapinski Deposition, Exhibit 1 at pp. 120-121.

[49] Plaintiff's Third Amended Petition at ¶ 41; Thurston Deposition, Exhibit 5 at pp. 127-128; Whyte Deposition, Exhibit 2 at pp. 39-40 & 46.

In their concurring opinion in *Brown & Gay*, Justice Hecht joined by Justices Willett and Guzman, agreed that the private contractor was not entitled to sovereign immunity and noted as follows:

> The Fort Bend County Road Authority tasked Brown & Gay with selecting and designing road signs and supervised the firm's work. But the Authority did not tell Brown & Gay *how* to do the work. The discretion Brown & Gay retained separated it from the Authority and thus from the Authority's immunity.

Id. at 130-131.

Similarly, in this case, the TLC delegated the responsibility for preparing the working papers for the Fun 5's game to GTECH, subject to approval of the final executed working papers by the TLC. Plaintiff's allegations and the deposition testimony in this case make it clear that the TLC was relying upon GTECH to use its experience and its expertise to choose wording for the instructions that was clear and not misleading or deceptive. GTECH's two customer service representatives admitted that they exercised their discretion to review the wording after the TLC requested a change in the game's parameters. The two GTECH employees decided not to change the wording to make the instructions less confusing or misleading. This exercise of discretion separates GTECH from the TLC and from the TLC's sovereign immunity.

V. Conclusion

GTECH was a private independent contractor and not an employee or agent of the TLC. Furthermore, GTECH exercised "independent discretion" in choosing language for the instructions it printed on the Fun 5's tickets. Although the TLC approved the final executed working papers, the TLC was relying upon GTECH's experience and expertise to choose

language that was not misleading or deceptive. Under the clear mandate of the *Brown & Gay* opinion, *supra*, GTECH is not entitled to derivative immunity.

VI. Prayer

For these reasons, Ms. Nettles asks the Court to overrule GTECH'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 27th day of November, 2015, to the following counsel of record:

Kenneth E. Broughton
Francisco Rivero
Arturo Munoz
REED SMITH, LLP
811 Main Street, Suite 1700
Houston, TX 77002
Telephone: (713) 469-3819
Facsimile: (713) 469-3899
Email: kbroughton@reedsmith.com
frivero@reedsmith.com
amunoz@reedsmith.com

COUNSEL FOR DEFENDANT GTECH CORPORATION

Ryan S. Mindell
Assistant Attorney General
Financial Litigation, Tax and Charitable Trusts Division
P.O. Box 12548
Austin, Texas 78711-2548
Tel. 512-475-4075
Fax 512-478-4013
Email:ryan.mindell@texasattorneygeneral.gov

COUNSEL FOR TEXAS LOTTERY COMMISSION

RICHARD L. LAGARDE