No. 03-16-00172-CV

IN THE COURT OF APPEALS FOR THE THIRD DISTRICT OF TEXAS AT AUSTIN

GTECH CORPORATION,

Appellant,

v.

JAMES STEELE, *et al.*,

Appellees.

BRIEF OF APPELLEES

W. Mark Lanier
Kevin P. Parker
Chris Gadoury
Natalie Armour
Lanier Law Firm
P.O. Box 691448
Houston, Texas 77269-1448
Phone: (713) 659-5200
Fax: (713) 659-2204
kpp@lanierlawfirm.com

Richard L. LaGarde
LaGarde Law Firm
2455 Dunstan #366
Houston, Texas 77005
Phone: (713) 993-0660
Fax: (713) 993-9007
richard@lagardelaw.com

Manfred Sternberg
Manfred Sternberg & Associates, P.C.
4550 Post Oak Place Dr., Suite 119
Houston, Texas 77027
Phone: (713) 622-4300
Fax: (713) 622-9899
Manfred@msternberg.com

(See signature block for all other counsel of record)

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STATEMENT REGARDING ORAL ARGUMENT

Appellees respectfully request oral argument. The Texas supreme court's holding in *Brown & Gay Eng'g, Inc. v. Olivares*, 461 S.W.3d 117 (Tex. 2015), supports the trial court's order overruling GTECH Corporation's First Amended Plea to the Jurisdiction. Nevertheless, oral argument will be helpful to the Court so that it may question counsel regarding policy considerations involved in determining whether to extend governmental immunity to a private independent contractor under the facts in this case, and whether those facts require a departure from the supreme court's holding in *Brown & Gay*. Oral argument will allow counsel to respond to questions from the Court, and to fully and specifically explain how Appellees' pleadings and the evidence support the trial court's ruling.

ISSUES PRESENTED

1. Has GTECH conclusively established that extending derivative immunity to it based on the facts of this case furthers the rationale and purpose of governmental immunity?

2. If so, then has GTECH conclusively established that it exercised no discretion in the activities giving rise to Appellees' claims?

STATEMENT OF FACTS

I. GTECH'S CONTRACTS WITH THE TLC.

On December 14, 2010, GTECH Corporation ("GTECH") and the Texas Lottery Commission ("TLC") entered into a Contract for Lottery Operations and Services ("Operations Contract"). (CR 516, 565). The Operations Contract gives GTECH the right to operate the Texas Lottery through August 31, 2020. (CR 524). It expressly states that GTECH is "an independent contractor" of the TLC. (CR 519, 521). And GTECH agrees to "comply with all applicable laws, rules and regulations," perform its duties in a "high quality, professional and competent manner," and "[o]ffer goods and services only of the highest quality and standards." (CR 524, 527, 549).

Under the Operations Contract, GTECH's fee for operating the Texas Lottery is 2.21% of sales. (CR 170, 554). The Texas Lottery generates sales in excess of $4.3 billion annually. (CR 171). GTECH thus receives approximately $100,000,000.00 per year from the TLC under the Operations Contract. (*Id.*). The Contract requires that GTECH indemnify and defend the TLC in lawsuits arising from its work, and that it maintain various types of insurance, including general liability and errors and omissions insurance. (CR 172, 534-37).

GTECH and the TLC are also parties to a Contract For Instant Ticket Manufacturing And Services ("Printing Contract") that commenced on September 1,

2012. (CR 279). The Printing Contract specifies that GTECH is an "independent contractor" of the TLC. (CR 280). And it states that GTECH agrees to indemnify the TLC, maintain insurance for its work, and "perform its responsibilities by following and applying at all times the highest professional and technical guidelines and standards." (CR 281-82, 288).

II. GTECH PROPOSED THE "FUN 5S" GAME TO THE TLC.

On March 13, 2013, GTECH presented examples of scratch-off games to the TLC. (CR 175, 413-16). Included in those examples was "Fun 5s"—a game GTECH previously operated in Nebraska, Indiana, Kansas, and Western Australia with much financial success. (*Id.*). The TLC selected the "Fun 5s" game as a game that it intended to offer during the 2014 fiscal year. (CR 175).

III. GTECH DRAFTED THE GAME'S WORKING PAPERS.

As the vendor for the "Fun 5s" game, it was GTECH's responsibility to prepare "draft working papers" for the game. (CR 175, 412, 448, 481). Penelope Whyte, one of GTECH's client services representatives, prepared the initial draft working papers, which included the game's parameters, artwork, rules, and instructions. (CR 175-76, 430-32, 456, 481). The TLC was not involved in preparing the initial draft. (CR 176, 445). After Whyte prepared the draft, GTECH's client services and software departments reviewed it. (CR 175-76, 431-32). The initial draft closely mirrored GTECH's "Fun 5s" game in Nebraska. (CR 176, 258, 414-

16). It proposed five games. (CR 176). For "Game 5," GTECH proposed a tic-tac-toe style game that appeared as follows:

(CR 176, 416-17).

GTECH sent the draft working papers to the TLC on April 16, 2014. (CR 176). Without waiving GTECH's contractual obligation to offer an error-free game that was not misleading, the TLC requested that GTECH modify the instructions by changing the Dollar Bill symbol to a "5" symbol, changing the "5" symbol to a Money Bag symbol, and removing the word "line" after the word "diagonal" in the instructions for "Game 5." (CR 176, 178, 288, 316-17, 417, 421, 482-83, 527, 549). The TLC also requested that GTECH change the game parameters to include the Money Bag symbol in the "5X" box on both winning and some non-winning tickets.

(CR 177, 417-19, 421, 482-83, 527, 549). The TLC requested the Money Bag symbol to appear on some non-winning tickets because it was concerned that the tickets, as originally prepared by GTECH, would be easy targets for micro-scratching, since only the "5X" box would need to be scratched to determine if the ticket was a winner. (CR 177, 417-19).

IV. GTECH INDEPENDENTLY REVIEWED THE TLC'S REQUESTED CHANGES AND DETERMINED THAT NO FURTHER CHANGES NEEDED TO BE MADE.

It is standard practice for lottery commissions to return working papers to their vendors with comments and requested changes. (CR 433, 437-38). Generally, when the TLC returns working papers to GTECH, Whyte "take[s] a look at the change and then decide[s] from there." (CR 433). Laura Thurston, another GTECH client services representative, testified that if changes to the parameters are requested, the process of implementing the changes is "deferred to [GTECH's] software team as they're experts in parameters and game play and ensuring that parameters adhere to the prize structure." (CR 463-64). After the client services and software departments implement any requested changes, they comprehensively review the game, including its parameters and instructions, and determine whether additional changes need to be made. (CR 464, 466, 473, 474-75).

When the TLC returned the working papers for the "Fun 5s" game, Thurston reviewed and implemented the TLC's requested changes. (CR 433-34, 463, 467-68).

Thurston testified that she "reviewed" and "examined" the changes to the language of the instructions as compared to the change in game parameters and "felt it was clear." (CR 467-68). Whyte testified that she reviewed the instructions, the requested changes, and the executed working papers after the requested changes had been implemented, and she determined "that they didn't need to be changed." (CR 434-36). The software department also reviewed the requested changes. (CR 468).

V. GTECH HAD A DUTY TO ENSURE THE FINAL INSTRUCTIONS WERE FREE OF ERRORS, CLEAR, AND NOT MISLEADING.

According to Whyte, as client services representatives, she and Thurston had a "duty" to make sure there was no need for additional changes to the instructions. (CR 438). She testified that it is "part of [their] job" to determine whether additional changes need to be made, and to "let [the TLC] know if there should be a change." (CR 438-39). If a change requested by the TLC would make the existing instructions misleading or deceptive, it is "part of [their] job" to inform the TLC that additional changes need to be made. (CR 438). This is because the TLC is relying on GTECH and its expertise in having worked with these types of games for many years. (*Id.*). And it would be "reasonable for the [TLC] to rely upon [GTECH] to notify them if a change in the instructions would be needed." (CR 439).

Joseph Lapinski, an account development manager for GTECH, testified that he is the person most knowledgeable at GTECH about the lottery operations in Texas. (CR 411). According to Lapinski, GTECH has a contractual obligation to

provide executable working papers that are error free. (CR 425). "[I]f [GTECH] folks saw a change come through from the Lottery [and] anticipated or believed that . . . it would harm the game or the Lottery, . . . they would either say something to the Lottery or bring it to someone's attention." (CR 424).

Likewise, TLC personnel testified that GTECH has a duty to ensure that the instructions on the final working papers are clear and unambiguous. Dale Bowersock, the TLC's Product Coordinator, testified that the instructions on the game are important, and they should be clear and not misleading. (CR 444, 447-48). The TLC expects GTECH to report to it any concerns with the game, including any concerns that the instructions are misleading, after GTECH implements requested changes. (CR 446-48). It also expects that GTECH will provide final working papers that are free of errors. (CR 449).

Robert Tirloni, the TLC's Products and Drawing's Manager, testified that he expects GTECH to exercise reasonable care to make sure that the instructions are clear and unambiguous. (CR 480-82). He "wouldn't expect them to deliver games that are misleading." (CR 482-83). And the TLC "expect[s] [GTECH] to deliver a game that is clear and that makes sense." (CR 482). GTECH is under a contractual obligation to review the final working papers and provide the TLC with final working papers that are error free. (CR 483-84).

Gary Grief, the TLC's executive director, testified that the TLC "rel[ies]" on GTECH based on its "experience in the industry," and because it is a "private company[y] that do[es] this" type of work. (CR 454, 456). GTECH "has an important role to play" in reviewing the language and making sure that it is not misleading. (CR 456). And Grief expects GTECH to exercise reasonable care to propose language that is not misleading. (CR 457).

GTECH had a responsibility to conduct an independent review of the game's parameters, and to compare the parameters with the instructions to ensure that the instructions were not misleading or deceptive. (CR 178-79). It also had a responsibility to ensure that the final working papers were error-free. (CR 178). Based on GTECH's experience and expertise in developing scratch-off games, the TLC was relying on it to provide final working papers that were error-free and not misleading. (CR 180). GTECH reviewed the final working papers after the TLC's requested changes were implemented, and it exercised independent discretion in deciding to refrain from making additional changes to the game's instructions. (*Id.*).

On May 15, 2014, Grief signed an order confirmation form approving the final working papers for the "Fun 5s" ticket. (CR 336, 356, 488).[1] GTECH printed

[1] GTECH asserts that "On June 20, 2014, the Commission prepared the official rules and specifications for the 'Fun 5's' ticket and published them in the Texas Register" and that "[t]he Commission did not send the official rules and specifications to GTECH for its review before it published them in the Texas Register." (Appellant's Brief at 11-12). As support, it cites the Affidavit of Walter Gaddy. (*See id.*). Appellees objected to Gaddy's affidavit based on the fact that his statements are not based on personal knowledge. (CR 401). Further, the fact the TLC

approximately 16.5 million tickets, and charged the TLC approximately $390,000 for the use of its game. (CR 181). The TLC began selling the tickets on September 2, 2014. (CR 183). An example of the tickets that were sold is shown below:

(CR 182).

GTECH and the TLC began receiving complaints about the misleading wording on the tickets from the very first day that the tickets were sold. (CR 183-84). Nevertheless, the tickets continued to be sold through October 21, 2014, during

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did not send the "official rules and specifications" to GTECH before it published them is immaterial because GTECH does not allege that they differed from the final working papers. (*See* Appellant's Brief at 12).

which time they generated approximately $21 million in revenue, a percentage of which was paid to GTECH for operating the game. (CR 186).

VI. PROCEDURAL HISTORY.

Appellees are purchasers of "Fun 5s" tickets with a Money Bag symbol in the "5X" box. (CR 190). They were misled by the instructions on the tickets into believing that they would win five times the amount in the prize box if their tickets revealed a Money Bag symbol in "Game 5." (*Id.*). Appellees filed suit against GTECH on December 9, 2014. (CR 3). They allege claims against GTECH for common-law fraud, fraud by nondisclosure, tortious interference with an existing contract, and conspiracy. (CR 3, 169-201). On February 2, 2016, GTECH filed its First Amended Plea to the Jurisdiction, which the trial court overruled on February 25, 2016. (CR 231, 695).[2] For the reasons below, this Court should affirm the trial court's order.

SUMMARY OF THE ARGUMENT

In *Brown & Gay Eng'g, Inc. v. Olivares*, 461 S.W.3d 117 (Tex. 2015), the Supreme Court of Texas considered, for the first time, whether governmental immunity may be extended to private government contractors. 461 S.W.3d at 164. The Court reasoned that governmental immunity may be extended where (1) doing so furthers the doctrine's rationale and purpose, and (2) the private contractor exercised

[2] On March 28, 2016, the trial court issued an Amended Order Overruling GTECH Corporation's First Amended Plea to the Jurisdiction, certifying the issue for interlocutory review. (SCR 3).

no discretion in activities giving rise to the plaintiff's claims. *Id.* at 125-29. Here, GTECH has not conclusively established that the extension of immunity will further the doctrine's rationale and purpose. Additionally, the evidence raises a fact issue as to whether GTECH exercised discretion in activities giving rise to Appellees' claims. Therefore, the Court should affirm the trial court's order overruling GTECH's First Amended Plea to the Jurisdiction.

ARGUMENT

I. STANDARD OF REVIEW.

An appellate court reviews *de novo* the trial court's ruling on a challenge to subject matter jurisdiction. *Tex. Dept. of Parks and Wildlife v. Miranda*, 133 S.W.3d 217, 228 (Tex. 2004). The court accepts as true the factual allegations in the pleadings, construes the pleadings liberally in favor of the plaintiff, and looks to the plaintiff's intent. *Id.* at 226, 228. If the pleadings do not contain sufficient facts to demonstrate jurisdiction, but do not demonstrate incurable defects in jurisdiction, the plaintiff should be afforded the opportunity to amend the 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 in resolving the jurisdictional issues raised. *Id.* at 227. ***The defendant has the burden of establishing its entitlement to immunity.*** *Lubbock County Water Control and Imp. Dist. v. Church & Akin, L.L.C.*, 442 S.W.3d 297, 305 (Tex. 2014). If the relevant

evidence is conclusive, or if it fails to raise a fact question on the jurisdictional issue, the plea to the jurisdiction may be resolved as a matter of law. *Miranda*, 133 S.W.3d at 228. If, instead, the evidence raises a fact question regarding the jurisdictional issue, the movant has failed to establish its right to dismissal. *Id.* at 227-28. Only after the defendant establishes its entitlement to immunity does the burden shift to the plaintiff to raise a fact issue. *Church & Akin*, 442 S.W.3d at 305. In reviewing a plea to the jurisdiction, the court takes as true all evidence in favor of the plaintiff, and it indulges in every reasonable inference and resolves any doubts in the plaintiff's favor. *Miranda*, 133 S.W.3d at 228.

II. EXTENDING IMMUNITY TO GTECH DOES NOT FURTHER THE DOCTRINE'S RATIONALE AND PURPOSE.

In *Brown & Gay*, Pedro Olivares, Jr. was struck and killed by a drunk driver who entered an exit ramp on the Westpark Tollway and proceeded to drive the wrong way. 461 S.W.3d at 119. His mother brought suit against Brown & Gay, a private engineering firm that contracted with the Toll Road Authority to design, build, and operate the Tollway. *Id.* at 119-20. Under the contract, the Authority delegated the responsibility of designing road signs and layouts to Brown & Gay, subject to the authority's approval, and Brown & Gay agreed to maintain insurance for the project. *Id.* Brown & Gay filed a plea to the jurisdiction in response to the suit brought by Ms. Olivares, arguing it was entitled to derivative governmental immunity. *Id.* at 120.

In considering Brown & Gay's plea, the Court began with an analysis of the origin and purpose of governmental immunity. *Id.* at 121-22. It recognized that immunity protects the state, its political subdivisions, and the public as a whole by preventing the disruption of key government services and tax resources from being shifted away from their intended purposes. *Id.* at 121. It stated that "[g]uiding [the Court's] analysis of whether to extend sovereign immunity to private contractors like Brown & Gay is whether doing so comports with and furthers the legitimate purposes that justify th[e] otherwise harsh doctrine." *Id.* at 123.

Brown & Gay argued that immunity would save the government money in the long term. *Id.* But the Court held that the general purpose of protecting the public fisc is not advanced where private companies can and do manage their risk exposure by obtaining insurance. *Id.* Further, the Court stated that the doctrine is not a cost-saving measure, but a measure designed to guard against "unforeseen expenditures." *Id.* It stated:

> [E]ven assuming that holding private entities liable for their own negligence in fact makes contracting with those entities more expensive for the government, this argument supports extending sovereign immunity to these contractors only if the doctrine ***is strictly a cost-saving measure. It is not.***
>
> Sovereign immunity has never been defended as a mechanism to avoid any and all increases in public expenditures. Rather, it 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. [cite and quotation marks omitted]. ***Immunizing a private***

> ***contractor in no way furthers this rationale.*** Even 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.
>
> By contrast, immunizing the government—both the State and its political subdivisions—from suit directly serves the doctrine's purposes because the costs associated with a potential lawsuit cannot be anticipated at the project's outset. Litigation against the government therefore disrupts the government's allocation of funds on the back end, when the only option may be to divert money previously earmarked for another purpose. It is this diversion—and the associated risk of disrupting government services—that sovereign immunity addresses. Accordingly, the rationale underlying the doctrine of sovereign immunity does not support extending that immunity to Brown & Gay.

Id. at 123-24 (emphasis added). After addressing the second element of derivative governmental immunity, the Court circled back to the doctrine's rationale and purpose in its conclusion:

> In sum, we cannot adopt 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. That is, ***we decline to extend to private entities the same immunity the government enjoys for reasons unrelated to the rationale that justifies such immunity in the first place*** . . . .

Id. at 127 (emphasis added). It thus "decline[d] to extend sovereign immunity to private contractors based solely on the nature of the contractors' work when the very rationale for the doctrine provides no support for doing so." *Id.* at 129.

For the same reasons that the supreme court declined to extend immunity in *Brown & Gay*, this Court should decline to extend immunity to GTECH here. GTECH is a for-profit corporation that receives 2.21% of Texas Lottery sales under the Operations Contract as its fee to operate the Texas Lottery. (CR 170, 554). The TLC generates sales in excess of $4.3 billion annually, and it thus pays GTECH approximately $100,000,000.00 per year in fees. (CR 170-71). GTECH agreed under the Operations Contract and the Printing Contract to indemnify and defend the TLC in lawsuits arising out of its work, and to maintain insurance, including general liability and errors and omission insurance. (CR 172, 281-82, 288, 534-37). Thus, GTECH can, and has, managed its risk. *See* 461 S.W.3d at 123.

Additionally, GTECH has not established that extending immunity would guard against unforeseen expenditures associated with the government's defending lawsuits and paying judgments. GTECH argues that there may be "unforeseen losses" because "the resulting loss of future lost ticket sales would cause an unforeseen detriment to the [TLC] and the State." (Appellant's Brief 19, n.4). But focus of the doctrine is ***not*** on unforeseen ***losses***, but on unforeseen ***expenditures***. 461 S.W.32 at 123-24. Further, GTECH cites no evidence to support its speculation about "unforeseen losses," nor does it explain how holding GTECH liable would result in unforeseen losses or expenditures. The deceptive tickets have already been pulled from the market. (CR 186). During the time they were sold, they generated

approximately $21 million in revenue. (*Id.*). That revenue and the alleged losses are unaffected by the grant or denial of immunity to GTECH. And GTECH's contractual obligations to maintain insurance, and indemnify and defend the TLC for lawsuits arising out of its work demonstrate that this type of claim was foreseeable, and that GTECH and the TLC contemplated it and arranged a plan to guard against unforeseen expenditures. (CR 534-37).

GTECH argues that Appellees may not assert, for the first time on appeal, that extending immunity to GTECH does not further the rationale and purpose of governmental immunity. (Appellant's Brief at 19 (citing Tex. R. App. P. 33.1)). But it is the ***defendant*** that has the burden of establishing its entitlement to immunity, including establishing that the doctrine's rationale and purpose are met. *See Brown & Gay*, 461 S.W.3d at 123 ("we note that Brown & Gay cites no evidence to support its proposed justification"); *Church & Akin*, 442 S.W.3d at 305 (defendant has the burden of establishing entitlement to immunity). GTECH did not argue below that extending immunity to it in this case furthers the doctrine's rationale and purpose. (*See, generally,* 231-56, 683-94). It now seeks to cover that failure by contending that Appellees are not entitled to address this argument. In this respect, GTECH's invocation of Texas Rule of Appellate Procedure 33.1 is especially ironic. Rule 33.1 establishes the steps required at the trial court level to preserve a complaint for appellate review. *See* Tex. R. App. P. 33.1. It should not be used by an appellant to

preclude an appellee from responding to arguments which the appellant failed to raise in the trial court. *See also Alford v. State*, 400 S.W.3d 924, (Tex. Crim. App. 2013) ("Ordinary notions of procedural default do not apply equally to appellants and appellees; in general, appellants are subject to procedural default rules and appellees are not."). GTECH should not be heard to complain of its own failure to address issues relating to the rationale and purpose of immunity in the trial court.

GTECH also claims that Texas courts have interpreted *Brown & Gay* as turning on only the second prong of the derivative immunity doctrine: whether the party exercised discretion. (*See* Appellant's Brief at 19, n.4 (citing *Lenoir v. U.T. Physicians*, 491 S.W.3d 68 (Tex. App.—Houston [1st Dist.] 2016, pet. filed); *Freeman v. American K-9 Detection Servs., L.L.C.*, --- S.W.3d ---, No. 13-14-00726-CV, 2015 WL 6652372, *7 (Tex. App.—Corpus Christi Oct. 29, 2015, pet. filed); *Kuwait Pearls Catering Co., WLL v. Kellogg Brown & Root Services, Inc.*, No. Civ. A. H-15-0754, 2016 WL 1259518 (S.D.T.X. Mar. 31, 2016)). But in *Kuwait Pearls*, the federal district court explicitly stated that Texas law did not control the case, and it did not perform an analysis of *Brown & Gay*. *See Kuwait Pearls*, 2016 WL 1259518 at *10, n. 12, 22. And, contrary to GTECH's assertion, both *Lenoir* and *Freeman* did address the rationale underlying the doctrine of governmental immunity. *See Lenoir*, 491 S.W.3d at 84-85, 87; *Freeman*, 2015 WL 6652372 n.3.

In fact, the *Lenoir* court thoroughly discussed and quoted the supreme court's explanation of the doctrine's rationale:

> The Court also noted the fiscal rationale for extending immunity to contractors and concluded that it loses force the more that litigation expenses are removed from real-time government budget allocation considerations. *Id.* at 123-24. When a private entity contracts with the government to perform services and the private entity maintains insurance to cover litigation and judgment costs, there is a diminished threat that litigation-driven "costs and consequences" will be borne by the government because the government is not facing unplanned and unforeseen costs that might force budgetary reallocations. *See id.* at 121, 124.
>
> . . .
>
> Based on the Brown & Gay contractor's discretion, the allegations of independent negligence in the exercise of that discretion, and the contractor's procurement of insurance (to avoid making the government subject to unforeseen litigation costs), the Court held that the contractor was not entitled to sovereign immunity:
>
> > In sum, we cannot adopt Brown & Gay's contention . . . . [T]his suit does not threaten allocated government funds and does not seek to hold Brown & Gay liable merely for following the government's directions. Brown & Gay is responsible for its own negligence as a cost of doing business and may (and did) insure against that risk, just as it would had it contracted with a private owner.

491 S.W.3d at 84-85 (quoting *Brown & Gay*, 461 S.W.3d at 127). The *Lenoir* court, in denying immunity, noted that the defendant was required to maintain liability insurance like Brown & Gay, which "minimize[d] any impact litigation . . . might have on the state budget." *Id.* at 87. It thus held that "the underlying rationale for extending immunity is absent here, just as it was in *Brown & Gay*." *Id.* Like the

agreements in *Lenoir* and *Brown & Gay*, the Operations Contract and the Printing Contract also require that GTECH maintain insurance, and thus counsel against the extension of immunity. (CR 172, 281-82, 288, 534-37).

In short, *Lenoir* and *Freeman* do not support GTECH's position that the rationale behind governmental immunity should play no role in determining whether a private contractor should be immune. To the contrary, those cases are consistent with the supreme court's proclamation in *Brown & Gay*: that "***[g]uiding [the court's] analysis*** of whether to extend sovereign immunity to private contractors like Brown & Gay ***is whether doing so comports with and furthers the legitimate purposes that justify this otherwise harsh doctrine***." *Brown & Gay*, 461 S.W.3d at 123 (emphasis added). Based on the fact that extending immunity to Brown & Gay would not further the rationale and purpose of governmental immunity, the supreme court affirmed the court of appeals' reversal of the trial court's order granting the plea: ***"We hold that extending sovereign immunity to the engineering firm does not serve the purposes underlying the doctrine, and we therefore decline to do so. Accordingly, we affirm the court of appeals' judgment."*** *Id.* at 119 (emphasis added). Because the doctrine's rationale and purpose do not justify the extension of immunity to GTECH here, this Court should affirm the trial court's order overruling GTECH's First Amended Plea to the Jurisdiction.

III. GTECH EXERCISED INDEPENDENT DISCRETION IN PERFORMING THE ACTIVITIES GIVING RISE TO APPELLEES' CLAIMS.

The Court should decline to extend immunity to GTECH because it also exercised independent discretion in performing the activities giving rise to Appellees' claims.

A. GTECH Must Show It Exercised No Discretion In The Activities Giving Rise To Appellees' Claims.

GTECH asserts that it is entitled to immunity because it merely followed the TLC's directions as to what GTECH believes to be the three "components" of Appellees' claims:

1. placing a "money bag" symbol in the multiplier "5X Box" on tickets that did not have three symbols in any one row, column, or diagonal;

2. programming the computer system so that it would not validate winning tickets that did not have three symbols in any one row, column, or diagonal; and

3. preparing rules that misled customers into believing they had won.

(Appellant's Brief at 20). GTECH argues that it is entitled to immunity unless Appellees can show that it acted with discretion in carrying out each component. (*Id.* at 20, 21-26). That argument is wrong for two reasons.

First, GTECH has the burden of establishing its entitlement to immunity. *See Church & Akin*, 442 S.W.3d at 305 ("The Water District had the burden, in its plea to the jurisdiction, to establish that it is a governmental entity entitled to governmental immunity."); *Freeman*, 2015 WL 6652372 at *2 ("A review of a plea to the

jurisdiction challenging the existence of jurisdictional facts mirrors that of a traditional motion for summary judgment. The defendant is required to meet the summary judgment standard of proof for its assertion that the trial court lacks jurisdiction."). Only after GTECH conclusively establishes its entitlement to immunity does the burden shift to Appellees to raise a fact question. *See Church & Akin*, 442 S.W.3d at 305 ("Once it satisfied that burden, the burden shifted to Church & Akin to establish, or at least raise a fact issue on, a waiver of immunity."); *Freeman*, 2015 WL 6652372 at *2 ("Once the defendant meets its burden, the plaintiff is then required to show that there is a disputed material fact regarding the jurisdictional issue."); *Lenoir*, 491 S.W.3d at 76 ("If, instead, the evidence raises a fact question regarding the jurisdictional issue, the movant has failed to establish its right to dismissal.").

Second, the question before the Court is not whether GTECH exercised absolute discretion in each of component, but whether GTECH exercised some discretion in an activity that gave rise to Appellees' claims. Stated another way, "a private entity contracting with the government may benefit from sovereign immunity [only] if 'it can demonstrate its actions were actions of the . . . government' and that '***it exercise[d] no discretion*** in its activities.'" *Lenoir*, 491 S.W.3d at 82 (emphasis added) (quoting *Brown & Gay*, 461 S.W.3d at 124-25 (quoting *K.D.F. v. Rex*, 878 S.W.2d 589, 597 (Tex. 1994)). Thus, GTECH must conclusively establish that it

exercised no discretion in activities giving rise to Appellees' claims. Because the evidence raises a fact issue on this ground, the Court should affirm the trial court's order.

B. Appellees Did Not Judicially Admit That Components Of Their Claim Arise From Decisions Made By The Commission.

GTECH asserts that Appellees "judicially admit that the first two components of their claim arise from decisions made by the [TLC]." (Appellant's Brief at 20 (citing CR 177, 179-80); *see also* Appellant's Brief at 21-26). But a judicial admission must be "clear, deliberate, and unequivocal." *Lenoir*, 491 S.W.3d at 73-74. Appellees' statements—that changes were made and computers were programmed at the ***request*** of the TLC—are not clear, deliberate, and unequivocal admissions that their claims arise from decisions made by the TLC, or much less that GTECH exercised no discretion in the activities giving rise to their claims. Such statements must be read in context with the rest of Appellees' pleadings, which allege that GTECH exercised discretion in implementing the requested changes, and in determining that no further changes needed to be made. In this regard, Appellees' Third Amended Petition states:

> According to the testimony of GTECH's client services representative, Laura Thurston, 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 decide from there whether to make the requested change. This is an act of independent discretion on the part of GTECH's client services representatives.

. . .

> It was the responsibility of employees of GTECH's printing division to exercise their independent discretion by checking the parameters of the game in the working papers and by comparing the language on the tickets to ensure that the language was not misleading or deceptive.
>
> . . .
>
> It was also GTECH's contractual responsibility to make sure the final executed working papers were 'free of errors.'
>
> . . .
>
> It is part of GTECH's job to point out concerns about the game to the TLC.
>
> . . .
>
> In the exercise of reasonable care and independent discretion, GTECH's personnel should have notified the TLC if a requested change in the parameters of the game would cause problems with the game.

(CR 178-79).

Further, a judicial admission is an assertion of fact that "relieves the opposing party of proving the admitted fact." *Lenoir*, 491 S.W.3d at 74. GTECH is not charged with proving what the TLC did, but rather with what GTECH did not do—that it exercised no discretion in the activities giving rise to Appellees' claims. *Brown & Gay,* 461 S.W.3d 124. Even though the changes requested by the TLC were ultimately implemented, GTECH exercised discretion in accepting, implementing, and reviewing those changes, and also determining that no additional changes needed to be made. (CR 177-81).

Finally, even if Appellees' statements could be construed as judicial admissions, GTECH is still not entitled to immunity because, as demonstrated below, it had discretion to make changes to the instructions on the final working papers, and it exercised that discretion in declining to do so. In purchasing their tickets, Appellees were not focused on the symbols chosen for the tickets or the parameters of the game, but rather on the game ticket instructions that led them to believe that their tickets were winners.[3]

C. Governmental Immunity May Not Be Extended To Private Contractors Exercising Independent Discretion.

In determining whether governmental immunity may be extended to private contractors, the supreme court in *Brown & Gay*, began with an analysis of *K.D.F. v. Rex*, 878 S.W.2d 589 (Tex. 1994), and a distinction recognized in that case between the typical private company that contracts with the government, and a company that acts solely under the direction of the government and exercises no discretion. *Brown & Gay*, 461 S.W.3d at 124. With respect to the typical government contractor, the court quoted *K.D.F.*, stating:

> While sovereign immunity protects the activities of government entities, no sovereign is entitled to extend that protection *ad infinitum* through

[3] In support of its assertion that Appellees' pleadings entitle GTECH to immunity, GTECH relies upon *City of Austin v. Silverman*, No. 03-06-00676-CV, 2009 WL 1423956, *3 (Tex. App.—Austin May 21, 2009, pet. denied). But the plaintiff in that case sued the City of Austin, Texas, which is undoubtedly a governmental unit. 2009 WL 1423956 at *1. And the case involved whether immunity had been waived, rather than whether the entity was entitled to immunity in the first place. *See id.* at *1-2.

> nothing more than private contracts. [The private entity] is not entitled to sovereign immunity protection unless it can demonstrate its actions were actions of the Kansas government, executed subject to the control of the system.

Id. (quoting *K.D.F.*, 878 S.W.2d at 597). With respect to the second category of company, the supreme court held that immunity could apply to a company that "operate[d] solely upon the direction of [the system]," and "exercised no discretion in its activities . . . , such that a lawsuit against one [wa]s a lawsuit against the other." *Id.* Thus, under the dichotomy recognized in *K.D.F.*, immunity applies only when the contractor is exercising no discretion.

Turning to the facts in *Brown & Gay*, the supreme court noted that the evidence showed that Brown & Gay was an independent contractor with discretion to design signage and road layouts for the Tollway. *Id.* at 126. In analyzing the discretion element, the supreme court found instructive the following language from a federal district court summarizing the extension of derivative immunity to federal contractors:

> Where the government hires a contractor . . . and specifies the manner in which the task is to be performed, and the contractor is later haled into court to answer for a harm that was caused by the contractor's compliance with the government's specifications, the contractor is entitled to the same immunity the government would enjoy, because the contractor is, under those circumstances, effectively acting as an organ of government, without independent discretion. ***Where, however, the contractor . . . is allowed to exercise discretion in determining how the task should be accomplished***, if the manner of performing the task ultimately causes actionable harm to a third party the contractor is not entitled to derivative sovereign immunity . . . .

Id. n. 9 (quoting *Bixby v. KBR, Inc.*, 748 F. Supp. 2d 1224, 1242 (D. Or. 2010)). Because Brown & Gay exercised independent discretion in performing activities giving rise to the plaintiff's claim, the supreme court concluded that it was not entitled to immunity. *Id.* at 126.

D. Governmental Immunity Should Not Be Extended To GTECH Because It Exercised Independent Discretion.

1. GTECH Exercised Independent Discretion In Preparing And Proposing The "Fun 5s" Game And Its Working Papers.

GTECH contracted with the TLC to operate the Texas Lottery. (CR 524). Under the Operations Contract, GTECH agreed to perform its duties in a "high quality, professional and competent manner" and to "[o]ffer goods and services only of the highest quality and standards." (CR 527, 549). GTECH had discretion in deciding which games it would propose to the TLC and in designing those games. (*See* CR 175, 413-16). The TLC did not dictate the type or design of the game to be offered. (*See* CR 176, 445). Rather, GTECH exercised its independent discretion in designing the "Fun 5s" game and in deciding to present it to the TLC for purchase. (*Id.*).

After the TLC selected "Fun 5s" as a game it intended to offer, GTECH exercised its independent discretion in preparing the initial draft working papers. (CR 175-76, 412, 430-32, 412, 481). GTECH drafted the game's artwork, instructions, rules, and parameters. (*Id.*) And its customer service and software

departments reviewed the initial draft before it was sent to the TLC. (CR 175-76, 431-32).

2. GTECH Exercised Independent Discretion In Implementing Requested Changes.

Without waiving GTECH's contractual obligation to offer an error-free game that was not misleading, the TLC requested that GTECH modify the instructions by changing the Dollar Bill symbol to a "5" symbol, changing the "5" symbol to a Money Bag symbol, and removing the word "line" after the word "diagonal" for "Game 5." (CR 176, 288, 316-17, 417, 421, 482-83, 527, 549). It also requested that GTECH change the game parameters to include the Money Bag symbol in the "5X" box on both winning and some non-winning tickets. (CR 177, 417-19, 421, 482-83, 527, 549). The TLC requested that the Money Bag symbol appear on non-winning tickets because it was concerned that the ticket, as drafted, would be an easy target for micro-scratching. (CR 177, 417-19).

The TLC did not make these changes itself. Rather, it sent its requests back to GTECH for GTECH to review and implement, and so that GTECH could make any necessary and additional changes. (CR 177-81, 433, 437-38, 463-68). GTECH is an expert in preparing scratch-off games. (CR 179-80, 464). The TLC relied on GTECH to prepare a final draft that was not misleading or deceptive based on its experience and expertise. (CR 179-80, 464). The TLC's reliance on GTECH

demonstrates the TLC's deference to GTECH in the preparation of the final working papers.

It is standard practice for lottery commissions to return working papers to their vendors with requested changes. (CR 433, 437-38). When the TLC returns working papers to GTECH, GTECH's client services and software departments review any requested changes and decide whether to implement them. (CR 433, 463-64, 467-68). Specifically, Whyte testified that she "take[s] a look at the changes and then decide[s] from there." (CR 433). Thurston testified that requested changes to the parameters are "deferred to [GTECH's] software team" because "they're the experts in parameters and game play and ensuring that parameters adhere to the prize structure." (CR 463-64). After requested changes are implemented, GTECH's client services and software departments comprehensively review the rules, instructions, and parameters, and they determine whether further changes need to be made. (CR 438-39, 464, 466, 473, 474-75). According to Whyte, it is "part of [the] job" of the client services department to review the instructions and assure that they are clear and unambiguous. (CR 438-39).

After the TLC returned the "Fun 5s" draft working papers to GTECH, Thurston "reviewed" the TLC's requested changes, felt the language was "clear," and implemented the changes. (CR 433-34, 463, 467-68). Whyte and the software department also reviewed the changes. (CR 434-36, 468). Thus, the evidence shows

that GTECH exercised independent discretion in implementing the TLC's requested changes.[4]

3. GTECH Exercised Independent Discretion In Reviewing The Final Working Papers And Determining No Additional Changes Should Be Made.

GTECH's own personnel testified that they had a duty to review the final working papers and determine whether additional changes needed to be made. Whyte testified that the TLC could reasonably expect GTECH to notify it if further changes to the instructions needed to be made. (CR 439). In fact, her job required that she determine whether additional changes needed to be made to make the existing instructions not misleading or deceptive, and that she inform the TLC if additional changes were needed. (CR 438-39). Lapinski testified that GTECH has a contractual obligation to provide error-free working papers, and that GTECH would inform the TLC if one of its requested changes was anticipated to cause harm. (CR 424-25).

TLC personnel likewise testified to their reliance on GTECH's expertise to ensure that the instructions on the final working papers were not misleading or

[4] GTECH argues that the fact it "did not depart from or second-guess the Commission's directions" shows that it "followed the Commission's directions to the letter." (Appellant's Brief at 28). But GTECH ignores that it created the game and selected the language to be used in the initial draft of the working papers. (CR 175, 412-16, 430-32, 445, 456, 481). The TLC, in requesting changes, did not waive GTECH's obligation to offer an error-free game that was not misleading. (CR 178, 417-19, 421, 482-83, 527, 549). And the TLC expected GTECH to inform it if additional changes needed to be made, given that this was GTECH's game and it had experience in the industry. (CR 446-49, 480-84, 454-57).

deceptive. The Product Coordinator testified that the game's instructions are important, that they should not be misleading, and that the TLC expects GTECH to provide error-free final working papers and report to it any concerns with the game, including concerns that the instructions are misleading. (CR 446-49). The Products and Drawing's Manager testified that GTECH is under a contractual obligation to review the final working papers and provide final working papers that are error-free. (CR 482-84). He also testified that GTECH has a duty to exercise reasonable care in ensuring the instructions are not misleading. (*See id.*). Finally, the Executive Director testified that he relies on GTECH, based on its experience in the industry, to review the language of the instructions and make sure that it is not misleading. (CR 454-57).

GTECH's duty to review the final working papers, including the instructions, its duty to determine whether further changes were necessary, and its duty to bring any additional changes to the attention of the TLC, who is relying on GTECH's experience and expertise, demonstrates that GTECH had discretion in the final preparation of the "Fun 5s" ticket. GTECH's review of the final working papers, and its determination that no additional changes needed to be made, demonstrates that it exercised discretion in activities that resulted in Appellees being misled into believing that they would win five times the amount in the prize box if their tickets

revealed a Money Bag symbol in "Game 5."[5]

GTECH argues that immunity should be extended to it because the federal government contractor defense extends immunity where the government has approved the design of the product at issue, and also because declining to do so would penalize and deter contractor participation. (*See* Appellant's Brief at 29-30 (citing *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988)). *Boyle* involved a

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[5] GTECH argues that its duty to exercise "reasonable care" in its dealings with the TLC is "at odds" with Appellees' fraud claims. (Appellant's Brief at 28). But the question for determining jurisdiction is not whether GTECH acted negligently or fraudulently. It is whether GTECH had discretion. *Brown & Gay*, 461 S.W.3d at 124. The fact that GTECH had a duty to review the final working papers, inform the TLC of concerns, and provide instructions that were not misleading or deceptive demonstrates that it did have discretion regarding the final language of the instructions. It exercised that discretion when it determined that no additional changes needed to be made, and that discretion resulted in Appellees believing that their tickets were winning tickets. Discretion may be exercised negligently or fraudulently, and GTECH's exercise of discretion in reviewing the final working papers and determining that no additional changes should be made does not preclude Appellees' fraud claims.

GTECH argues that it did not owe the TLC a general duty of "reasonable care" because the duties between GTECH and the TLC are set forth in the Operations Contract. (Appellant's Brief at 31 (citing *LAN/STV v. Martin K. Eby Constr. Co.*, 435 S.W.3d 234 (Tex. 2014) (analyzing whether a general duty to avoid the unintentional infliction of economic loss existed in the context of the negligent performance of services)). But GTECH's argument ignores that it contractually agreed to perform its duties in a "high quality, professional and competent manner," and "[o]ffer goods and services only of the highest quality and standards." (CR 527, 549). The TLC and GTECH's own personnel interpreted the Operations Contract as requiring executed working papers that do not produce misleading games. (CR 421, 482-83).

GTECH asserts that "[t]he existence of a duty is a question of law, and 'testimony is insufficient to create a duty where none exists at law.'" (Appellant's Brief at 31 (citing *Boren v. Texoma Med. Ctr., Inc.*, 258 S.W.3d 224, 228, n.3 (Tex. App.—Dallas 2008, no pet.)). But the plaintiffs in *Boren* were relying upon an affidavit by their ***expert*** that "include[d] ***conclusory statements*** that Texoma owed a duty." *Boren*, 258 S.W.3d n.3 (emphasis added). The court stated that "[b]ecause the question of duty is a question of law for the court, ***an expert cannot opine*** regarding the existence of a duty" and that "***[e]xpert*** testimony is insufficient to create a duty where none exists at law." *Id.* (emphasis added). Here, the testimony of fact witnesses with personal knowledge of their job responsibilities is relevant to the interpretation of duties arising under the Operations Contract and whether these duties required GTECH to use its discretion.

wrongful death action against an independent contractor who supplied the military with a helicopter that was involved in a crash. 487 U.S. at 502-03. The focus of the case concerned whether the federal government contractor defense displaced state law that would otherwise impose liability on the contractor. *Id.* at 510-13. In considering whether federal interests would be affected by state law, the Supreme Court reasoned that "[t]he imposition of liability on Government contractors will [cause] . . . the contractor [to] decline to manufacture the design specified by the Government, or [to] raise its price." *Id.* at 507. *Boyle* is inapposite because this case does not require the balancing of federal law and state law concerns, and because the federal government contractor defense is not at issue here. Moreover, in *Brown & Gay* the Texas supreme court considered and rejected the very rationale in *Boyle* that GTECH asks this Court to consider:

> Even 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.
>
> . . .
>
> Brown & Gay also argues that declining to extend sovereign immunity to contractors like Brown & Gay will make it difficult for the government to engage talented private parties fearful of personal liability. As noted above, such speculation fails to take into account a private party's ability to manage that liability exposure through insurance. It also ignores the countervailing considerations that make contracting with the government attractive, not the least of which is lack of concern about the government's ability to pay.

Brown & Gay, 461 S.W.3d at 123, 129.[6]

Notably, the United States Supreme Court in *Campbell-Ewald Co. v. Gomez*, 136 S.Ct. 663 (2016), held that status as a government contractor does not entitle the contractor to "'derivative sovereign immunity,' *i.e.*, the blanket immunity enjoyed by the sovereign." 136 S.Ct. at 666. There, it stated:

> Do federal contractors share the Government's unqualified immunity from liability and litigation? We hold they do not.
>
> Government contractors obtain certain immunity in connection with the work which they do pursuant to their contractual undertakings with the United States. ***That immunity, however, unlike the sovereign's, is not absolute.*** Campbell asserts derivative sovereign immunity, but can offer no authority for the notion that private persons performing Government work acquire the Government's embracive immunity. ***When a contractor violates both federal law and the Government's explicit***

[6] GTECH also cites four cases citing *Boyle* or applying the same rationale. (*See* Appellant's Brief at 29-31 (citing *Yeroshefsky v. Unisys Corp.*, 962 F. Supp. 710, 718-19 (D. Md. 1997) (action against United States Post Service contractor that built postal letter sorting machine); *Tozer v. LTV Corp.*, 792 F.2d 403 (4th Cir. 1986) (action against U.S. Navy contractor that designed and modified Navy plane); *Maguire v. Hughes Aircraft Corp.*, 725 F. Supp. 821 (D. N.J. 1989) *aff'd*, 912 F.2d 67 (3rd Cir. 1990) (action against U.S. Army contractor that manufactured engine in helicopter used by the national guard); *Wilson v. Boeing Co.*, 655 F.Supp. 766, 773 (E.D. Pa. 1987) (action against U.S. Navy contractor that manufactured engine in Navy plane)). In addition to the fact those cases involved the federal government contractor defense, an entirely different defense than derivative governmental immunity under state law, they also employed the same rationale that the supreme court rejected in *Brown & Gay*. *See Yeroshefsky*, 962 F. Supp. at 716 (honing in on the court's rationale in *Boyle*); *Tozer*, 792 F.2d at 405 (the doctrine's "application to military contractors . . . safeguards the process of military procurement"); *Macguire*, 725 F.Supp. at 823 ("The policies which supported the *Boyle* decision also support the government contractor defense in the instant action. If liability were imposed on [defendants], then future defense contractors would build the cost of potential liability into the price of products supplied to the government."); *Wilson*, 655 F. Supp. at 772 (noting the policy justification for the doctrine of "hold[ing] military contractors liable . . . could pass the cost of accidents along to the government."). They therefore do not support GTECH's attempt to invoke governmental immunity.

instructions, as here alleged, no "derivative immunity" shields the contractor from suit by persons adversely affected by the violation.

Id. at 672 (emphasis added, internal citations and quotation marks omitted). Here, GTECH violated its contractual duties to the TLC to provide executable working papers that were error-free and not misleading. Because GTECH exercised discretion in doing so, it should not be protected by immunity.

GTECH argues that "Plaintiffs' argument misapprehends the contractual relationship between GTECH and the [TLC]." (Appellant's Brief at 31). It asserts that "[a]nother contract" that discusses the TLC's review process contains "no corresponding provision allowing GTECH to review or change the directions it receives from the Commission." (Appellant's Brief at 30-31). But the contract also does not prohibit further review by GTECH, and both the TLC and GTECH expected another GTECH review after the TLC submitted its changes. (CR 438-39, 424-25, 446-49, 483-84).

GTECH asserts that it is the TLC's role to approve GTECH's work, and that GTECH agreed under the Operations Contract to function in accordance with specifications and designs approved by the TLC. (Appellant's Brief at 30). But this is not a case where the TLC set out specific parameters dictating the type of game it wanted and the language, artwork, and design to be selected for the game. Instead, GTECH presented to the TLC a game that GTECH had created, and the TLC merely tweaked that game. *See Lenoir*, 491 S.W.3d at 86 (declining to extend immunity to

the clinic even though the University of Texas had the right to approve, request, remove, and replace nurses at the clinic, because the clinic had discretion under the contract). Even though the TLC requested changes to the initial draft, GTECH continued to have a duty to provide executable working papers that were error-free and not misleading. (CR 178-79, 420-21, 482-83, 527, 549). In reviewing the TLC's suggested changes and determining that no additional changes needed to be made, GTECH exercised discretion that gave rise to Appellees' claims in this lawsuit. Since GTECH exercised discretion it should be denied governmental immunity.

PRAYER

GTECH has not conclusively established that the extension of immunity to it would further the rationale and purpose of governmental immunity, and a fact issue exists as to GTECH's exercise of discretion in the activities giving rise to Appellees' claims. For these reasons, Appellees pray that the Court affirm the trial court's order overruling GTECH's First Amended Plea to the Jurisdiction.

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Respectfully submitted,

THE LANIER LAW FIRM, P.C.

By: */s/ Kevin P. Parker*

W. Mark Lanier
SBN: 11934600
Kevin P. Parker
SBN: 15494020
Chris Gadoury
SBN: 24034448
Natalie Armour
SBN: 24070785
P.O. Box 691448
Houston, Texas 77269-1448
Telephone: (713) 659-5200
Fax: (713) 659-2204
kpp@lanierlawfirm.com

Richard L. LaGarde
LaGarde Law Firm, P.C.
2455 Dunstan #366
Houston, Texas 77005
richard@lagardelaw.com

Manfred Strenberg
Manfred Sternberg & Associates, P.C.
4550 Post Oak Place Dr. Suite 119
Houston, Texas 77027
Manfred@msternberg.com

Leroy B. Scott
Scott Esq.
3131 McKinney Ave., Suite 600
Dallas, Texas 75204
lscott@scottesq.com

Clinton E. Wells, Jr.
McDowell Wells, L.L.P.
603 Avondale
Houston, Texas 77006
cew@houstontrialattorneys.com

Andrew G. Khoury
Khoury Law Firm
2002 Judson Road, Suite 204
Longview, Texas 75606-1151
Andy@khourylawfirm.com

James D. Hurst
James D. Hurst, P.C.
1202 Sam Houston Avenue
Huntsville, Texas 77340
jdhurst@sbcglobal.net

Daniel H. Byrne
Fritz, Byrne, Head & Fitzpatrick, PLLC
221 West 6th Street, Suite 960
Austin, Texas 78701
dbyrne@fbhf.com

Leonard E. Cox
P.O. Box 1127
Seabrook, Texas 77586
LawyerCox@LawyerCox.com

Wes Dauphinot
Dauphinot Law Firm
900 West Abram
Arlington, Texas 76013
wes@dauphinotlawfirm.com

William M. Pratt
Law Office of William Pratt
3265 Lackland Road
Fort Worth, Texas 76010
lawofficeoffice@yahoo.com

Jerry B. Register
Jerry B. Register, P.C.
1202 Sam Houston Avenue
P.O. Box 1402
Huntsville, Texas 77342
jbreg@sbcglobal.net

William S. Webb
Kraft & Associates, P.C.
2777 Stemmons Freeway, Suite 1300
Dallas, Texas 75207
swebb@kraftlaw.com

John H. Read, II
Attorney at Law
1230 N. Riverfront Blvd.
Dallas, Texas 75207-4013
john@readlawoffices.com

Paul T. Morin
Paul T. Morin, P.C.
503 W. 14th Street
Austin, Texas 78701
PMorin@austin.rr.com

Christopher S. Hamilton
Standly and Hamilton, LLP
325 N. St. Paul Street, Suite 300
Dallas, Texas 75201
chamilton@standlyhamilton.com

Eugene W. Brees
Whitehurst, Harkness, Brees, Cheng,
Alsaffar & Higginbotham, PLLC
7500 Rialto Blvd, Bldg. Two,
Suite 250
Austin, Texas 78735
cbrees@nationaltriallaw.com

Richard Warren Mithoff
Mithoff Law Firm
Penthouse, One Allen Center
500 Dallas, Suite 3450
Houston, Texas 77002
rmithoff@mithofflaw.com

Blake C. Erskine
Erskine & McMahon, L.L.P.
P.O. Box 3485
Longview, Texas 75606
blakee@erksine-mcmahon.com

Henderson L. Buford, III
8240 N. Mopac Expressway,
Suite 130
Austin, Texas 78759
hlb@bufordlaw.com

Raymond L. Thomas
Olegario Garcia
Ricardo Pumarejo, Jr.
Kittleman Thomas, PLLC
4900-B N. 10th Street
McAllen, Texas 78504
rthomas@ktattorneys.com

ATTORNEYS FOR APPELLEES

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the Brief of Appellees has been served on the following counsel in accordance with the Texas Rules of Appellate Procedure on August 25, 2016.

Nina Cortell
Haynes and Boone, LLP
2323 Victory Avenue, Suite 700
Dallas, Texas 75219
Nina.cortell@haynesboone.com

Kent Rutter
Haynes and Boone, LLP
1221 McKinney Street, Suite 2100
Houston, Texas 77010
Kent.rutter@haynesboone.com

Kenneth E. Broughton
Michael H. Bernick
Arturo Munoz
Reed Smith LLP
811 Main Street, Suite 1700
Houston, Texas 77002
kbroughton@reedsmith.com
mbernick@reedsmith.com
amunoz@reedsmith.com

/s/ Kevin P. Parker
Kevin P. Parker

CERTIFICATE OF COMPLIANCE WITH RULE 9.4

This brief complies with the type-volume limitations of Tex. R. App. P. 9.4(i)(2)(B) because this brief contains 8,701 words, excluding the parts of the brief exempted by Tex. R. App. P. 9.4(i)(1).

/s/ Kevin P. Parker
Kevin P. Parker
Attorney for Appellees

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