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SUPREME COURT OF TEXAS
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NO. 18-0159

In the Supreme Court of Texas

GTECH CORPORATION,

Petitioner,

V.

JAMES STEELE, et al.,

Respondents.

PETITIONER'S REPLY BRIEF ON THE MERITS

On Petition for Review from the
Court of Appeals for the Third District of Texas

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ABBREVIATIONS

"Commission" means the Texas Lottery Commission.

"GTECH" means Petitioner GTECH Corporation.[1]

"Plaintiffs" means the 1,238 plaintiffs and intervenors in this case.

RECORD REFERENCES

GTECH's Brief on the Merits is cited as "BOM at [pg.#]."

GTECH's Response Brief on the Merits in the related case *Nettles v. GTECH Corp.*, No. 17-1010, is cited as "GTECH Resp. BOM at [pg.#]."

Plaintiffs' Response Brief on the Merits is cited as "Resp. BOM at [pg.#]."

The Brief on the Merits of the plaintiff in the related case *Nettles v. GTECH Corp.*, No. 17-1010, is cited as "Nettles BOM at [pg.#]."

The Clerk's Record is cited as "CR[pg.#]."

The Supplemental Clerk's Record is cited as "Supp. CR[pg.#]."

The Second Supplemental Clerk's Record is cited as "2d Supp. CR[pg.#]."

The Texas Lottery Commission's Request for Proposals for Instant Ticket Manufacturing and Services is cited as "RFP at [pg.#]."

[1] GTECH and a former affiliate, GTECH Printing Corporation, were involved in the underlying events, but GTECH later succeeded to the interests of the affiliate. *GTECH Corp. v. Steele*, 549 S.W.3d 768, 772 n.2 (Tex. App.—Austin 2018, pet. filed). GTECH is now known as "IGT Global Solutions Corporation," but the parties and the courts below have continued to use "GTECH" to identify the defendant in this litigation.

INTRODUCTION

Plaintiffs do not contest the need for review in this case. Indeed, they acknowledge courts of appeals' differing views of the contours of derivative immunity—an observation recently echoed by this Court:

> The circumstances under which derivative immunity might exist are ill-defined in our jurisprudence, except to the extent we have held that the absence of any governmental control over a private contractor's work affirmatively precludes it.

Rosenberg Dev. Corp. v. Imperial Performing Arts, Inc., ___ S.W.3d ___, 2018 WL 7572497, at *10 (Tex. Mar. 8, 2019).

Brown & Gay Engineering, Inc. v. Olivares is the case in which the Court clarified that the *absence* of any governmental control means *no* immunity. *See* 461 S.W.3d 117 (Tex. 2015). But the Court has yet to clarify the "degree of control" required to *establish* immunity. This case provides the Court with that opportunity, and Plaintiffs do not argue otherwise.

Plaintiffs also concede, as they must, that this is not a case of no governmental control. They argue instead that the government's control was insufficient because GTECH, they claim, had discretion to override government-issued directions and "injury occur[red] through the combination of both parties' actions." (Resp. BOM at 13.) Based on this false premise, Plaintiffs argue that immunity here would create a "broad rule" enabling all government contractors to claim immunity. Not so.

This case involves a distinctive, comprehensive statutory scheme vesting complete control in the Texas Lottery Commission—extending immunity here opens no floodgates. The Commission is statutorily mandated to "exercise strict control and close supervision over all lottery games," which includes the requirement that the Commission "prescribe the form of tickets." TEX. GOV'T CODE §§ 466.014(a), 466.251(a). And under the contracts between GTECH and the Commission, the Commission retained "sole discretion" over all "[f]inal decisions," while GTECH was obligated to "accept and support the decision of the [Commission]." (RFP at 4.) Thus, in the words of *Brown & Gay*, the claimed fraud in the final Fun 5's ticket "was not the independent action of [GTECH], but the action taken by the [Commission] *through* [GTECH]." *See* 461 S.W.3d at 125.

Based on this rationale, the court of appeals correctly recognized that derivative immunity bars three of Plaintiffs' four claims—for aiding and abetting the Commission's fraud, conspiring with the Commission, and tortiously interfering with Plaintiffs' alleged contracts with the Commission (i.e., the lottery tickets). *Steele*, 549 S.W.3d at 796. Plaintiffs do not contest this holding. (Resp. BOM at 27 n.13.) Yet the same reasoning that led to the unchallenged dismissal of three claims should defeat Plaintiffs' remaining claim for fraud because it, like Plaintiffs' other claims, attacks decisions made by the Commission pursuant to its exclusive statutory authority over the form and content of lottery tickets.

Plaintiffs do not challenge the Commission's comprehensive statutory authority—because they cannot. They instead offer deflection. Plaintiffs first refer to GTECH's discretion at an irrelevant, preliminary stage when GTECH provided *initial* ticket designs to the Commission. As a fallback, Plaintiffs argue that GTECH had discretion "to alert" the Commission that some might misinterpret the Fun 5's ticket and claim fraud. But these arguments dodge the dispositive question under *Brown & Gay*, which is whether the state directed the "complained-of conduct," not whether the contractor exercised discretion at some other point in time or over conduct unrelated to the cause of action. This Court's conduct-specific inquiry places the focus here on decisions that were, by statute, decisions of the sovereign and protected by immunity.

This should resolve the immunity inquiry in GTECH's favor. The court of appeals properly held that no additional, independent showing as to immunity's fiscal justifications is required when a claim substantively attacks governmental decisions. Plaintiffs do not challenge this holding. To the contrary, they acknowledge that "[i]mmunity serves a proper function when a public contractor performs its work strictly in accordance with government plans, specifications, or orders." (Resp. BOM at 13.) Thus, if Plaintiffs' discretion argument is rejected—as it should be—then there is no disagreement under either the court of appeals' opinion or Plaintiffs' briefing that GTECH is entitled to immunity.

If the Court determines that more is required—either because it concludes that GTECH exercised discretion, or because (as urged by the petitioner in *Nettles*) GTECH must make an independent showing of lost expenditures—immunity is still proper given the statutory framework. The Legislature controls the Texas Lottery and directs billions of dollars in lottery funds to schools and veterans. *See* TEX. GOV'T CODE § 466.355. Disgruntled lottery ticket purchasers are, on the other hand, statutorily limited to recover no more than $5 per disputed ticket. *See* 16 TEX. ADMIN. CODE § 401.302(i). The Legislature never envisioned an exception permitting "mass action" tort suits to disrupt Texas's lottery system.

This Court's most recent cases provide guidance. In *Rosenberg*, the Court explained that "modern justifications for sovereign immunity are political, pecuniary, and pragmatic" and, [a]mong other benefits, sovereign immunity maintains equilibrium among the branches of government by honoring 'the allocation of responsibility' for resolving disputes with the state." *Rosenberg Dev. Corp.*, 2018 WL 7572497, at *1. Given these justifications, the Court in *Hays Street Bridge Restoration Group v. City of San Antonio* made clear that "immunity is implicated by any suit that seeks to control governmental action." *See* ___ S.W.3d ____, 2019 WL 1212578, at *4 (Tex. March 15, 2019).

The question presented here is whether immunity is proper when a contractor is sued for fraud merely because it accepted and implemented a decision made by

the government, in accordance with a statutory mandate. This should be a model case for derivative immunity. The court of appeals' contrary holding—permitting a multi-million-dollar fraud claim to proceed—wrongly exposes the Commission's sovereign decisions to collateral attack.

ARGUMENT IN REPLY

I. Review is needed because the contours of derivative immunity are "ill-defined" under existing jurisprudence.[2]

This Court in *Brown & Gay* set forth two considerations for derivative immunity: (1) whether the complained-of conduct was directed or controlled by the government, and (2) whether immunity is supported by public-fisc justifications. 461 S.W.3d at 123-27. As Plaintiffs concede, Texas courts have "differed" on the fundamental question of "whether a private contractor claiming sovereign immunity has to satisfy one or both." (Resp. BOM at 12; *see* BOM at 22-26.)

While the petitioner in *Nettles* takes the position that both considerations must be independently satisfied, Plaintiffs purport to sidestep this issue on the theory that "GTECH has satisfied neither." (*Compare* Nettles BOM at 5-7, 15, *with* Resp. BOM at 12.) But Plaintiffs agree with the Austin Court of Appeals' holding that, if an act of the sovereign is attacked (i.e., where no independent discretion by the contractor is shown over the subject act), then the fiscal justification for immunity is necessarily

[2] *Rosenberg Dev. Corp.*, 2018 WL 7572497 at *10.

present. (*See* Resp. BOM at 13, 17, 47; *Steele*, 549 S.W.3d at 786-87.) Under this construct, any further showing of fiscal justification (e.g., unanticipated expenditures) need only be shown as an alternative basis for immunity. The *Nettles* petitioner, on the other hand, insists that this further showing is always required.

This case presents the Court with the opportunity to provide clarity as to the interplay of the considerations discussed in *Brown & Gay*.

Together with *Nettles*, this case also illustrates confusion over the degree of governmental control required to show lack of discretion. The Dallas Court of Appeals in *Nettles* held that the requisite governmental control was present. 2017 WL 3097627, at *8-9. Here, the Austin Court of Appeals agreed with the Dallas Court of Appeals as to three of Plaintiffs' four claims, but it held otherwise as to Plaintiffs' fourth claim for fraud—even though all of Plaintiffs' claims are variations on the same theme and complain of the same conduct. *See Steele*, 549 S.W.3d at 796, 800-802.

GTECH disagrees with the Austin Court of Appeals' refusal to find immunity from the fraud claim, but agrees with the legal standard the court articulated. The court of appeals resolved the "tension" between the government-control and public-fisc portions of *Brown & Gay* by distilling various sovereign immunity cases down to the following principle: derivative immunity applies when claims "substantively attack underlying governmental decisions and directives made within delegated

powers rather than the contractor's own independent discretionary acts." *Id.* at 786-87 & n.97. Thus, "to the extent GTECH can show that the Steele Plaintiffs are substantively attacking actions and underlying decisions or directives of [the Commission] and not GTECH's independent discretionary actions, the claims would implicate [the Commission's] immunity, and no additional showing regarding immunity's underlying fiscal rationales is required." *Id.* at 787. Applying this standard, the court of appeals should have concluded that immunity bars all of Plaintiffs' claims.

II. Plaintiffs' fraud claim should be barred because it substantively attacks the Texas Lottery Commission's decisions.

Plaintiffs argue that GTECH is not entitled to immunity because it "could have avoided the conduct now alleged to be fraud" in two ways: "either [1] by drafting correct game instructions in the first place or [2] by advising [the Commission] of the deception that [the Commission's] parameter changes would reveal." (Resp. BOM at 38.) Those arguments fail for three reasons.

First, Plaintiffs ignore the statutory and contractual terms that vest the Commission with plenary authority over the form and content of lottery tickets. *Second*, GTECH's role in preparing an initial, never-published draft of the Fun 5's ticket is irrelevant to Plaintiffs' fraud claim, which is based on a later, different form of the ticket. *Third*, GTECH's alleged "discretion to alert" the Commission is not—and cannot be—the basis for Plaintiffs' fraud claim. Plaintiffs complain of what the

Commission represented to them, not what GTECH may or may not have suggested to the Commission.

A. Plaintiffs disregard the statutory scheme and misread the contractual provisions giving the Commission total control over the Fun 5's ticket.

By statute, the Commission must "exercise strict control and close supervision over all lottery games conducted in this state to promote and ensure integrity, security, honesty, and fairness in the operation and administration of the lottery." TEX. GOV'T CODE § 466.014(a). This control extends "over all activities authorized and conducted in this state under . . . Chapter 466," including all lottery tickets and the Commission's contractual relationship with GTECH. *See id.* § 467.101(a); *see also id.* § 466.251(a) (the Commission "shall prescribe the form of tickets").

The Commission's contracts with GTECH reflect this mandated division of authority. "Final decisions" about the Fun 5's ticket were "always the prerogative of the [Commission] in its sole discretion." 549 S.W.3d at 795. The Fun 5's ticket Plaintiffs complain about was required to "in all respects conform to, and function in accordance with, [Commission]-approved specifications and designs." (RFP at 23.) To the extent that GTECH could provide any "guidance," the Commission could "reject [GTECH's] guidance for any reason," while GTECH was bound to "accept and support the decision of the [Commission]." (*Id.* at 4.) And although GTECH is an "independent contractor" according to the contracts, "[i]ts operations [are

nevertheless] subject to the same scrutiny and oversight that would apply if all operations were performed by [the Commission's] employees." (*Id.*)

Plaintiffs are thus wrong to assert that GTECH had "considerable discretion" and that "[the Commission] looked to GTECH for its expert 'guidance'" as to "all matters related to" lottery games and tickets. (Resp. BOM at 20-22.) Plaintiffs' argument mischaracterizes the terms of GTECH's contracts and ignores the Texas Lottery Act, under which the Commission has plenary, nondelegable control over lottery tickets like the Fun 5's. It is also divorced from the complained-of conduct in this case: a representation on the final Fun 5's ticket that the Commission directed in its contractual "sole discretion" (RFP at 4) and within its statutory nondelegable authority, TEX. GOV'T CODE §§ 466.014(a), 466.251(a). Whatever "discretion" GTECH had in the abstract, it had no choice but to implement the Commission's decisions as to the form and content of the Fun 5's. (*E.g.*, RFP at 4.)

None of the contract terms cited by Plaintiffs show otherwise. (*See id.* at 21.) Most deal with GTECH's provision of potential game concepts or initial drafts. (*Id.*) But the Commission alone selects the game concepts to be developed for lottery games in Texas and, for reasons below, the initial drafts are immaterial to whether GTECH has immunity for alleged fraud in the final ticket. (CR275; *see* Part II.B, *infra*.) Nor do the other provisions cited by Plaintiffs alter the Commission's total authority over the form and content of the Fun 5's ticket. They simply deal with

GTECH's role in incorporating the Commission's changes and its obligation to deliver working papers that are "complete and free of any errors."

Plaintiffs contend that the "complete and free of any errors" obligation meant that GTECH had to second-guess or override the Commission's directions if GTECH considered them ill-advised. (Resp. BOM at 22-23.) But that phrase means just the opposite—GTECH had to deliver to the Commission tickets that *precisely conformed to* the Commission's directions.

Contractual context confirms this understanding. The phrase "complete and free of any errors" is surrounded by terms emphasizing that working papers must be "in a format designated by the Texas Lottery" and that any changes "must be approved . . . by the [Commission]." (RFP at 63.) Elsewhere, the contract is even more explicit: "Final decisions regarding the direction and control of the Lottery are always the prerogative of the [Commission] in its sole discretion." (*Id.* at 4.) This accords with the governing statutes giving the Commission absolute control over all aspects of the lottery, including "the form of tickets." TEX. GOV'T CODE §§ 466.014(a), 466.251(a).

The "complete and free of any errors" phrase thus shows that GTECH *lacked* discretion to stray from the Commission's decisions, not the other way around. *See J.M. Davidson, Inc. v. Webster*, 128 S.W.3d 223, 229 (Tex. 2003) (contract language is "considered with reference to the whole instrument"); *see also TGS-NOPEC*

Geophysical Co. v. Combs, 340 S.W.3d 432, 441 (Tex. 2011) ("Language cannot be interpreted apart from context."). And here, as in *Nettles*, there is no "evidence that GTECH's working papers erred in incorporating the [Commission's] decisions." 2017 WL 3097627, at *8.

Plaintiffs also argue that GTECH's role was "advisory," like that of the non-immune financial advisor in *K.D.F. v. Rex*, 878 S.W.2d 589 (Tex. 1994), but the comparison fails. (Resp. BOM at 25.) The Court's opinion in *K.D.F.* does not detail the financial advisor's role, except to say that "[i]ts activities necessarily involve[d] considerable discretion" because its "role [was] more in the nature of advising [the government] how to proceed, rather than being subject to the direction and control of [the government]." 878 S.W.2d at 597. Not so here. GTECH was unquestionably subject to the Commission's total control. Under both statute and contract, the content and form of the Fun 5's ticket was within the Commission's sole discretion, no matter what advice GTECH might offer.[3] (RFP at 4, 23, 63; CR527; TEX. GOV'T CODE §§ 466.014(a), 466.251(a), 467.101(a).)

[3] *Bixby v. KBR, Inc.* similarly does not support Plaintiffs' position. (*See* Resp. BOM at 25 (discussing 748 F. Supp. 2d 1224 (D. Or. 2010)).) The court there simply held that when a contractor is "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." 748 F. Supp. 2d at 1242. Here, Plaintiffs complain that GTECH implemented the Commission's directions as to the form and content of the Fun 5's lottery ticket. Under *Bixby*'s reasoning, GTECH "is entitled to the same immunity the [Commission] would enjoy." *See id.*

Plaintiffs nevertheless suggest that GTECH cannot show that it was acting "as" the Commission because GTECH did not interact with the public. (Resp. BOM at 26.) But this fact points to the opposite conclusion—that GTECH was merely a conduit for the Commission's action, and that any representation made by the Fun 5's ticket was attributable to the Commission alone.

Plaintiffs also suggest that proportionate responsibility is enough protection for GTECH. (Resp. BOM at 30.) This is a red herring. Plaintiffs' fraud claim does not implicate multiple responsible parties—it is based on the content of the Fun 5's ticket, which was statutorily controlled solely by the Commission.

B. Any discretion GTECH had over the *initial* draft Fun 5's ticket is immaterial to the fraud alleged in the final ticket.

In an effort to circumvent the Commission's statutory authority over the form and content of the Fun 5's ticket, Plaintiffs refer to GTECH's supposed discretion over *initial, never-published* drafts of the ticket. (Resp. BOM at 20, 24, 31-33.) This argument was not Plaintiffs' "primary focus" in the court of appeals—and for good reason. *Steele*, 549 S.W.3d at 800. The court below correctly held that any discretion GTECH had "in originating the Fun 5's game and Game 5 instructions is ultimately immaterial to its claim of derivative sovereign immunity against the fraud" claim Plaintiffs assert. *Id.* That is because Plaintiffs never saw the originally proposed Fun 5's ticket, and they cannot assert a fraud claim based on a ticket they never saw or purchased. Plaintiffs' fraud claim is necessarily based on the content of the final

ticket they purchased, and the Commission had complete control over the form and content of that ticket.

Further, the instructions in the initial draft of the Fun 5's ticket were not fraudulent because they were accurate. (*See* Resp. BOM at 31-33.) Plaintiffs' fraud claim alleges that the Fun 5's ticket misrepresented that, "if the ticket revealed a Money Bag symbol in Game 5, the player would 'win'." (CR191.) But the Fun 5's ticket originally proposed in the draft working papers *accurately* represented that a ticket was a winner if it revealed a money bag symbol in Game 5. This is because only tickets with tic-tac-toe (i.e., only winning tickets) could reveal a money bag symbol in Game 5. (CR265, 276, 310.) Any discrepancy between revealing a money bag symbol and winning a prize existed only because of a change the Commission specifically directed. (CR190, 241, 271, 276, 334.)[4]

The facts here are completely unlike those in *Brown & Gay*, so Plaintiffs' analogies to that case miss the mark. (*See* Resp. BOM at 22, 24-25, 38-39.) In *Brown & Gay*, the plaintiffs complained of negligence "in designing the signs and traffic layouts for the Tollway." 461 S.W.3d at 126. Because the private contractor

[4] To be clear, while Plaintiffs claim fraud based on this Commission-directed change, there are serious questions regarding the merits of any fraud claim. As noted by the panel at oral argument in the court of appeals, Plaintiffs did not see the disputed instructions until after they had bought their tickets, negating any claimed reliance. In addition, Plaintiffs' fraud claim requires one to read the instructions in a way that entitles them to recover five times the prize money in a tic-tac-toe game even though they did not have a winning tic-tac-toe combination. These impediments, among others, cast serious doubt on any fraud claim.

exercised independent discretion over the complained-of signs and layout in the final design, immunity for the state's decisions was not implicated. *Id.* at 126. Here, in contrast, GTECH exercised no discretion over the ticket's final form or content; the Commission's statutory control was total.

Plaintiffs next try to bootstrap GTECH's role in preparing initial drafts to the complained-of conduct (i.e., the final ticket they purchased) by suggesting that their fraud claim attacks GTECH's initial actions "in combination with" the Commission's later mandatory directions. (*See* Resp. BOM at 33-34.) But this reasoning is flawed, and one of the cases Plaintiffs emphasize shows why.

Plaintiffs posit a hypothetical based on *Butters v. Vance International, Inc.*, in which the Fourth Circuit held that a private contractor had immunity from a sexual-discrimination claim where the complained-of conduct resulted from an order of the Saudi Arabian military. (Resp. BOM at 46-47 (referencing 225 F.3d 462, 466 (4th Cir. 2000)).) Plaintiffs ask the Court to "suppose the contractor had recommended an adverse employment decision based on sexual discrimination and the Saudi military had implemented that recommendation." (*Id.* at 47.) "Immunity," they contend, "should not protect the private contractor in that instance." (*Id*.)

Plaintiffs' hypothetical flips the facts of this case on their head. GTECH did not recommend any change in the Fun 5's ticket. Rather, like the private contractor in *Butters*, GTECH was directed by the government to take the complained-of action

and simply followed the government's directives. 225 F.3d at 464-66. (*See* CR241, 260-63, 271, 276, 334.)

In this way, *Butters* counters Plaintiffs' "in combination with" theory. (*See* Resp. BOM at 13, 30.) The contractor in *Butters* exercised "initial" (and continuing) discretion over its hiring and staffing decisions. 225 F.3d at 464. It hired the plaintiff and made the decision to assign her as part of a security detail for a Saudi Arabian princess—no doubt an exercise of discretion "in the first place." *See id.* Only after the contractor exercised discretion over the plaintiff's employment for four years did the Saudi government direct the contractor not to promote her because doing so would offend Saudi norms. *Id.* at 464-65. The contractor followed that directive, which led the plaintiff to sue. Under Plaintiffs' argument here—which supposes that immunity-defeating discretion exists even when the complained-of conduct is government-directed—the contractor in *Butters* would not have shared in the Saudi government's immunity. But it did. Indeed, the Fourth Circuit's decision turned on whether the Saudi government or the contractor "was responsible for the decision not to promote [the plaintiff]," not whether the private company exercised any discretion over her employment generally. *Id.* at 467.

Any initial discretion GTECH had, even "in combination with" later government directives, does not defeat immunity from Plaintiffs' complaint about the Commission's decisions.

C. GTECH's "discretion to alert" the Commission to the Commission's alleged fraud does not defeat immunity.

Plaintiffs next seek an exemption from immunity because GTECH had "discretion to advise [the Commission] of the problems created by [the Commission's] parameter change." (Resp. BOM at 33-44.) This argument targets the wrong conduct. The derivative-immunity analysis focuses on the conduct that forms the basis of the claim, and here that conduct is the Commission's conduct—i.e., the representation in the final Fun 5's ticket, over which the Commission had total statutory and contractual control. Regardless of GTECH's "discretion" to advise the Commission, GTECH had no authority to require a change to the ticket's content. Moreover, GTECH's alleged failure to suggest *to the Commission* that it should consider changing the ticket's content is not a misrepresentation—much less a misrepresentation *to Plaintiffs*—that could form the basis of any alleged fraud.

Plaintiffs try to overcome these hurdles by referencing selected testimony of certain GTECH and Commission employees that GTECH would, as a matter of professionalism, tell the Commission if it were making an error. Such testimony is unavailing for two reasons. *First*, it cannot and does not override the statutory and contractual control vested in the Commission. *Second*, there is no evidence that anyone—either at GTECH or the Commission—thought the Commission's instructions were misleading. (CR435, 468.) There was thus nothing to "alert" the Commission to.

1. Professional expectations do not defeat derivative immunity.

Plaintiffs point to testimony from some employees that "GTECH and [Commission] personnel . . . expected GTECH to conduct a review of the game after [the Commission] suggested parameter changes and to advise [the Commission] if additional modifications were needed." (Resp. BOM at 8, 23.) These employees' expectations do not defeat GTECH's immunity.

Individual employees' opinions are neither competent nor material to the analysis because, as the court of appeals correctly concluded, "the scope of [GTECH's] discretion or duties relevant to the immunity inquiry are controlled by the two contracts." 549 S.W.3d at 802 n.153.

Plaintiffs contend that GTECH's reliance on this holding is "incorrect" because, they say, "the court relied on [employee] testimony to conclude that GTECH had discretion to suggest modifications to game instructions in light of [Commission]-directed parameter changes." (Resp. BOM at 35.) But the court of appeals simply cited this testimony when laying out Plaintiffs' arguments. Footnote 153 was a proper recognition by the court that the statutory and contractual context—not the subjective testimony of some employees—controlled its inquiry.

Even if the testimony were relevant to the immunity analysis, it is clear that these employees understood the division of responsibility between the two entities. One of the GTECH employees on whom Plaintiffs rely, for example, confirmed that

"the buck stop[s]" with "the lottery," not GTECH, "when it comes to making sure that the instructions are clear and unambiguous." (CR466.) Commission employees likewise testified that they "go through a complete review process" and "everyone in the review process *at the Lottery Commission* ha[s] the responsibility to check the instructions to make sure they're not misleading." (CR446, 482 (emphasis added).)

2. Under the court of appeals' reasoning, every plaintiff will be able to assert immunity-defeating discretion to alert, eviscerating the doctrine.

Plaintiffs contend that the discretion-to-alert loophole will not permit artful pleading because "a defendant can challenge 'talismanic allegations' of jurisdictional facts by submitting evidence contravening the existence of those facts." (Resp. BOM at 42.) This is no answer to the sweeping effect of the court of appeals' holding.

Plaintiffs did not—because they cannot—identify what evidence a contractor could possibly submit to show that it lacked any ability (or "discretion") to alert the government that the government's decisions might be mistaken. (*See* BOM at 38-40.) This shows that no matter the factual circumstances, Plaintiffs' discretion-to-alert argument would allow any plaintiff to overcome immunity simply by reframing a complaint about a government decision as a complaint about a contractor's failure to question the government's decision—even when, as here, such a failure is not

relevant because, by statute, the claimed misrepresentation is that of the Commission.

Ultimately, Plaintiffs' "failure to alert" theory is nothing more than a claim that GTECH aided and abetted or conspired with the Commission to commit fraud[5]—claims that the court of appeals rejected based on immunity. *Steele*, 549 S.W.3d at 796. Just as Plaintiffs do not challenge that ruling (Resp. BOM at 27 n.13), they should not dispute immunity as to the only non-dismissed fraud claim, which is necessarily based on the Commission's statutorily directed conduct.

III. The fiscal justifications for immunity are satisfied.

Plaintiffs contend that granting immunity to GTECH does not comport with fiscal justifications for immunity. (Resp. BOM at 47-55.) Plaintiffs are wrong for two independent reasons.

Under the legal standard articulated by the court of appeals—which Plaintiffs do not contest—"no additional showing regarding immunity's underlying fiscal rationales is required" because GTECH has shown that Plaintiffs' claim substantively attacks the Commission's decisions. *See Steele*, 549 S.W.3d at 787. If the Court agrees, then it need go no further. If, however, the Court disagrees and

[5] *See Immobiliere Jeuness Establissement v. Amegy Bank Nat'l Ass'n*, 525 S.W.3d 875, 882 (Tex. App.—Houston [14th Dist.] 2017, no pet.) (aiding and abetting is providing "assistance or encouragement" to an allegedly tortious act). (*See also* Resp. BOM at 28-29 (explaining the basis of Plaintiffs' fraud claim.)

concludes that a further showing is required, GTECH is still entitled to immunity because of the fiscal implications of this case under the lottery-statute scheme.

A. Because Plaintiffs' claim attacks the Commission's decisions, the fiscal justifications for immunity are implicated.

The court of appeals reasoned that a suit attacking "the government's actions within delegated powers" necessarily implicates "immunity's underlying fiscal justifications." *Id.* at 786-87 & n.97. Here, GTECH has shown that Plaintiffs' claim attacks the Commission's decisions about the form and content of the Fun 5's ticket—decisions made by the Commission within its delegated powers—and "in this way [Plaintiffs' claim] would inherently cause the unanticipated diversion of appropriated funds from their intended purposes." *See id.* at 786.

Plaintiffs do not contest the inherent link between governmental control and immunity's fiscal justifications—and rightly so. (*See* Resp. BOM at 13, 17, 47.) This Court's jurisprudence shows that sovereign immunity protects the sovereign will, no matter who is tasked with turning the sovereign will into action. (*See* BOM at 41-43.) Municipalities, for example, have no independent immunity, but the Court has consistently held that they are immune for governmental acts. *E.g.*, *Wasson Interests, Ltd. v. City of Jacksonville*, 489 S.W.3d 427, 436, 439 (Tex. 2016).[6] And in *Brown*

[6] *See also, e.g.*, *Hays Street*, 2019 WL 1212578, at *4-6 (concluding that city was immune from suit in the first instance because the plaintiff's "suit [sought] to control governmental action" by attacking the city's governmental acts, even though no money damages were sought).

& Gay, the Court recognized that private contractors have been granted immunity when "the complained-of conduct" was "effectively attributed to the government." 461 S.W.3d at 125. Conversely, when government officials—who also lack independent immunity—act "without legal authority or fail[] to perform a purely ministerial act" they are *not* entitled to immunity's full protections. *City of El Paso v. Heinrich*, 284 S.W.3d 366, 372 (Tex. 2009).

It is telling that Plaintiffs cite only a dissenting opinion (written in a different context) to suggest that derivative immunity is never appropriate "to limit the liability of a private party." (Resp. BOM at 54 (quoting *Fort Worth Transp. Auth. v. Rodriguez*, 547 S.W.3d 830, 856 (Tex. 2018) (Johnson, J., dissenting)).) This suggestion was rejected by the majority in that case, which recognized that "[t]his is not the first time we have . . . treated an employee of a private entity as an employee of the government . . . ." 547 S.W.3d at 847. The Court's derivative-immunity caselaw likewise holds that "an agent of [the state]" is entitled to sovereign immunity when acting "under the control and direction" of the state. *K.D.F.*, 878 S.W.2d at 597-98; *see also Brown & Gay*, 461 S.W.3d at 124-27.

Plaintiffs miss the mark in arguing that granting immunity to GTECH would create an "across-the-board liability shield" that would "diminish the public's trust in the Texas Lottery . . . ." (Resp. BOM at 50.) GTECH does not urge such a shield, but instead seeks immunity only for Commission-directed acts. Immunizing

GTECH when it acts *as* the Commission should not diminish the public's trust. *See Brown & Gay*, 461 S.W.3d at 125-27.

Plaintiffs also veer off course in arguing that GTECH asks for a "novel expansion" of immunity to protect contractors "even when the actionable conduct is a result of the private contractor's discretion." (Resp. BOM at 52-53.) GTECH does not seek immunity for an exercise of independent discretion, but for following the government's directions—consistent with this Court's jurisprudence. *See Brown & Gay*, 461 S.W.3d at 125-27; *K.D.F.*, 878 S.W.2d at 597-98.

Finally, derivative immunity is not improper merely because GTECH's contracts include an indemnity provision. (*See* Resp. BOM at 48, 50 & n.19.) The indemnity provision does not indemnify the Commission for its own acts or omissions—and that is what is at issue here.[7] (*See* Part II, *supra*.)

Under the Court's existing, sound jurisprudence, GTECH is entitled to share in the Commission's immunity from Plaintiffs' fraud claim because that claim attacks the Commission's decisions and, in doing so, necessarily seeks to control the

[7] Further, the indemnity provision does not apply because it excludes from the indemnity obligation those claims that arise when the Commission provides "information or materials to GTECH for inclusion in the Works, and such information or materials [are] included by GTECH, in an unaltered and unmodified fashion, in the Works." (CR532 (§ 3.26.1(z)); CR534 (§ 3.33.1).) Here, the Commission directed GTECH to include certain information on the Fun 5's ticket—namely, a "money bag" symbol in the 5X BOX on some tickets without tic-tac-toe—and GTECH included that information in an unaltered and unmodified fashion. (*E.g.*, CR276, 334.) There is thus no relevant indemnity obligation here.

state's choices about the use of public funds. *See Steele*, 549 S.W.3d at 786-87. No further showing is needed to support immunity here.

B. Plaintiffs' claim, if permitted to proceed, threatens to disrupt previously allocated and protected public funds.

If the Court concludes that a further showing as to fiscal justifications is necessary, immunity is still proper based on the unique statutory overlay for this case. By regulation, a disgruntled lottery ticket purchaser is limited to recovering no more than the cost of the disputed ticket. *See* 16 TEX. ADMIN. CODE § 401.302(i).[8] By statute, the substantial revenue generated by the Texas Lottery is directed to fund schools and veterans' programs.[9] *See* TEX. GOV'T CODE § 466.355. Permitting a multi-million-dollar tort suit based on an allegedly misleading lottery ticket flouts the fiscal framework the Legislature established. *Cf. Wasson*, 489 S.W.3d at 439 (considering "democratic enactments" in determining the boundaries of immunity).

The formidable threat Plaintiffs' lawsuit poses to important state-funded programs is not "illogical," as Plaintiffs argue. (Resp. BOM at 48-50.) Initially, Plaintiffs' position disregards the fact that the state has already had to expend funds to defend against the *Nettles* suit and respond to discovery. Further, fraud litigation,

[8] Plaintiffs complain that immunity is a "harsh doctrine" that causes "those injured . . . to lose their rights to compensation." (Resp. BOM at 12, 15.) That is hardly a concern here, where plaintiffs are only out the cost of their $5 lottery tickets.

[9] *See* Tex. Lottery Comm'n, Summary Financial Info., https://www.txlottery.org/export/sites/lottery/Documents/financial/Monthly-Transfer-Document.pdf (last visited March 13, 2019).

if allowed, will inevitably force the state "to divert money previously earmarked" for other purposes to make up for lost lottery revenue. *Brown & Gay*, 461 S.W.3d at 124. This risk of a forced "diversion" of public funds is an additional reason why granting GTECH immunity comports with the fiscal justifications for sovereign immunity. Even if the Commission-controlled content of the Fun 5's is misleading (and it is not), immunity "shield[s] the public from the costs and consequences of the improvident actions of their governments." *Wasson*, 489 S.W.3d at 432 (quoting *Tooke*, 197 S.W.3d at 332) (alteration omitted). Immunity should apply here.

CONCLUSION AND PRAYER

Derivative sovereign immunity turns on whether the "complained-of conduct" was directed by the state, such that the conduct is effectively "taken by the government *through* the contractor." *Brown & Gay*, 461 S.W.3d at 125. Here, the complained-of conduct is the alleged misrepresentation in the Fun 5's ticket Plaintiffs purchased. Under the Texas Lottery Act, the Commission controlled the ticket's content, and the misrepresentation Plaintiffs allege would not exist but for the changes the Commission directed to the ticket. So, under *Brown & Gay*, GTECH shares in the Commission's immunity.

Nothing in Plaintiffs' brief on the merits impugns GTECH's request that the Court grant review, reverse the court of appeals' judgment insofar as it denies GTECH's plea to the jurisdiction, and render judgment dismissing this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

In accordance with the Texas Rules of Appellate Procedure, I certify that a true and correct copy of this Petition for Review was served via e-service and/or e-mail on the counsel of record listed in Tab A on March 20, 2019.

/s/ Kent Rutter
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CERTIFICATE OF COMPLIANCE WITH RULE 9.4(e), (i)

1. This petition complies with the type-volume limitation of Texas Rule of Appellate Procedure 9.4(i)(2)(D) because, according to the Microsoft Word 2016 word-count function, it contains **5,830** words excluding the parts of the brief exempted by Texas Rule of Appellate Procedure 9.4(e)(i)(1).

2. This petition complies with the typeface requirements of Texas Rule of Appellate Procedure 9.4(e) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 software in Times New Roman 14-point font in text and Times New Roman 12-point font in footnotes.

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Tab A

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