

**Cause No. D-1-GN-14-005114**

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

**GTECH’S NO-EVIDENCE MOTION FOR SUMMARY JUDGMENT ON PLAINTIFFS/INTERVENORS’ FRAUD BY NON-DISCLOSURE CLAIMS**

Defendant GTECH Corporation (“GTECH”) files this No-Evidence Motion for Summary Judgment on Plaintiffs’/Intervenors’ Fraud by Non-disclosure Claims pursuant to TEX.R.CIV.P. 166a(i), and respectfully shows:

**I. Fraud by Non-disclosure Claims**

1. Plaintiffs/Intervenors allege the Texas Lottery Commission (“TLC”) and GTECH defrauded them by “jointly” developing the Fun 5’s scratch off tickets supposedly containing a “false representation” that “if the ticket revealed a Money Bag . . . symbol in Game 5, the player would receive 5 times the amount in the PRIZE box.”

2. After an adequate time for discovery, the party without the burden of proof may, without presenting evidence, move for summary judgment on the ground that there is no evidence to support an essential element of the nonmovant’s claims or defenses. Tex. R. Civ. P. 166a(i).

3. Once a movant specifies the essential element or elements of a claim or defense to which there is no evidence, the burden shifts to the nonmovant to bring forth some evidence of the essential elements challenged. *See Lampasas v. Spring Center, Inc.*, 988 S.W.2d 428, 432 (Houston [14th Dist.] 1999, no pet.). If the nonmovant does not, the Court must grant a no-evidence motion for summary judgment on each claim or defense so challenged. *See id.*

4. Plaintiffs/Intervenors allege “GTECH had a duty to disclose that a significant percentage of the tickets with a Money Bag symbol would not be on the list of “winning” tickets. GTECH disclosed limited information in the language it chose to print on the tickets, which created a substantially false impression”. (See Plaintiffs’ 4<sup>th</sup> Am. Pet. ¶ 100 at p. 24 and in several Petitions in Intervention filed by various Intervenors).

5. Plaintiffs/Intervenors allege “GTECH had a duty to inform purchasers of Fun 5’s tickets that they would not automatically “win” if they revealed a Money Bag  symbol,” that GTECH “remained silent and did not disclose the truth to Plaintiff.” (Plaintiffs’ 4<sup>th</sup> Am. Pet. ¶ 103 at p. 25 and in various Petitions in Intervention).

6. However, Plaintiffs/Intervenors cannot provide any evidence of the existence of a “**legal duty**” owed to them by GTECH which is an essential element of their Fraud by Non-disclosure claims. Consequently, summary judgment must be granted under Texas law.

**A. GTECH Entitled to Summary Judgment on Plaintiffs’/Intervenors’ Fraud-by-Non-disclosure Claims Because No Legal Duty Existed.**

7. To prove fraud by non-disclosure, Plaintiffs/Intervenors must establish:
- (1) GTECH concealed from or failed to disclose certain facts to Plaintiffs/Intervenors;
  - (2) **GTECH had a duty to disclose** the complained of facts to Plaintiffs/Intervenors;
  - (3) The facts were material;
  - (4) GTECH knew Plaintiffs/Intervenors were ignorant of the facts, and they did not have an equal opportunity to discover the facts;
  - (5) GTECH was deliberately silent when it had a **duty** to speak;
  - (6) By failing to disclose the facts, GTECH intended to induce Plaintiffs/Intervenors to take some action or refrain from acting;

- (7) Plaintiffs/Intervenors relied on GTECH's non-disclosure; and
- (8) Plaintiffs/Intervenors were injured as a result of acting without the knowledge of the undisclosed facts. See *Blankinship v. Brown*, 399 S.W.3d 303, 308 (Tex. App.—Dallas 2013, pet. denied).

8. Plaintiffs'/Intervenors' claims for fraud by non-disclosure fail as a matter of law because they cannot produce any evidence giving rise to the existence of a **legal duty** requiring GTECH to disclose as alleged in Plaintiffs' and Intervenors' most recent petitions.

9. The existence of a duty to disclose is a question of law to be decided by the court. *In re Inter'l Profit Assocs.*, 274 S.W.3d 672, 678 (Tex. 2009).

**B. Party lacking a fiduciary duty, confidential relationship, or special informal relationship has no duty to disclose information and is not liable for non-disclosure.**

10. In *Bombardier Aero. Corp. v. SPEP Aircraft Holdings, LLC*, the Texas Supreme Court held fraud by non-disclosure, a subcategory of fraud, occurs when a party has a duty to disclose certain information and fails to disclose it. 572 S.W.3d 213 (recognizing duty to disclose existed based on a fiduciary duty created by limited power of attorney) (citing *Schlumberger Tech. Corp v. Swanson*, 959 S.W.2d 171, 181 (Tex. 1997)). To establish fraud by non-disclosure, plaintiff must show: (1) defendant deliberately failed to disclose material facts; (2) defendant had a duty to disclose such facts to plaintiff; (3) plaintiff was ignorant of the facts and did not have an equal opportunity to discover them; (4) defendant intended plaintiff to act or refrain from acting based on the non-disclosure; and (5) plaintiff relied on the non-disclosure, which resulted in injury. See *Bradford v. Vento*, 48 S.W.3d 749, 754-55 (Tex. 2001) (explaining there must be a duty to disclose); *Wise v. SR Dall., LLC*, 436 S.W.3d 402, 409 (Tex. App.—Dallas 2014, no pet.) (listing elements for fraud by non-disclosure (citing *7979 Airport Garage*,

*L.L.C. v. Dollar Rent A Car Sys., Inc.*, 245 S.W.3d 588, 507 n.27 (Tex. App.—Houston [14th Dist.] 2007, pet denied.)).

11. In general, there is no duty to disclose without evidence of a confidential or fiduciary relationship. *Ins. of N. Am. v. Morris*, 981 S.W.2d 667, 674 (Tex. 1998). A fiduciary duty arises “as a matter of law in certain formal relationships, including attorney-client, partnership, and trustee relationships.” *Id.* A confidential relationship is one in which the “parties have dealt with each other in such a manner for a long period of time that one party is justified in expecting the other to act in its best interest.” *Id.*; *see also Meyer v. Cathey*, 167 S.W.3d 327, 331 (Tex. 2005) (per curiam) (recognizing an informal relationship giving rise to a duty may also be created by a “special relationship of trust and confidence [which] exist[s] *prior to*, and *apart from*, the agreement.”) emphasis supplied. An informal relationship giving rise to a duty may also be formed from a “moral, social, domestic or purely personal relationship of trust and confidence.” *Meyer*, 167 S.W.3d at 331.

12. Texas appellate courts recognize three other situations in which a duty to disclose may arise: where a party (1) discovered new information that made its earlier representation untrue or misleading; (2) made a partial disclosure that created a false impression; or (3) voluntarily disclosed some information, creating a duty to disclose the whole truth. *See, e.g., BP Am. Prod. Cp. v. Marshall*, 288 S.W.3d 430, 444-46 (Tex. App.—San Antonio 2008); *rev'd on other grounds*, 342 S.W.3d 59 (Tex. 2011); *Solutioneers Consulting, Ltd. v. Gulf Greyhound Partners*, 237 S.W.3d 379, 385-87 (Tex. App.—Houston [14th Dist.] 2007, no pet.); *Lesikar v. Rappeport*, 33 S.W.3d 282, 299 (Tex. App.—Texarkana 2000, pet. denied.). There is no evidence in this case to support any of those three limited factual situations giving rise to a legal duty.

13. Here, there is no evidence GTECH had a general duty to disclose the complained of information to Plaintiffs/Intervenors because there is no evidence GTECH owed a fiduciary duty or had a confidential relationship with any of the Plaintiffs/Intervenors.

14. There is also no evidence that GTECH was in a formal relationship with Plaintiffs/Intervenors similar to an attorney-client, partnership, or trustee role.

15. Additionally, there is no evidence GTECH had a confidential relationship with Plaintiffs/Intervenors because there is no evidence that GTECH had an informal relationship with any of the Plaintiffs/Intervenors.

16. In fact, there is simply no evidence that GTECH conducted any business at all with any of the Plaintiffs/Intervenors or had any relationship of any sort with any of the Plaintiffs/Intervenors.

## **II. CONCLUSION**

17. There is no evidence GTECH owed Plaintiffs/Intervenors a duty to disclose the information complained about in Plaintiffs'/Intervenors' most recent petitions.

18. When a plaintiff has no evidence of his causes of action after a reasonable time for discovery has elapsed, then a trial court must grant the motion for summary judgment against that plaintiff. *See* Tex. R. Civ. P. 166a(i).

19. From the date of the Plaintiffs' Original Petition **more than six (6) years** have elapsed during which time Plaintiffs/Intervenors have propounded and received responses to numerous discovery requests, examined multiple witnesses by deposition, and exchanged a large number of documents. As such, a reasonable time for discovery has elapsed, yet Plaintiffs/Intervenors failed to gather or produce any evidence on their claims that GTECH owed any legal duty to disclose as alleged by Plaintiffs/Intervenors.

20. Because the existence of a legal duty to disclose is an essential element of their claims of fraud by non-disclosure, Plaintiffs'/Intervenors' claims against Defendant GTECH for fraud by non-disclosure fail as a matter of law and summary judgment must be granted.

#### V. Prayer

Defendant GTECH Corporation respectfully requests the Court grant summary judgment on Plaintiffs'/Intervenors' claims of fraud by non-disclosure, enter an order that they take nothing on those claims, and grant GTECH such further and other relief to which it may, in law or equity, be entitled.

Respectfully submitted,

REED SMITH LLP

*/s/ Kenneth E. Broughton*

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## CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing instrument has been served via the Court's ECF system on the following counsel of record on this the 26th day of March, 2021:

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