

**GTECH'S TRADITIONAL MOTION FOR
SUMMARY JUDGMENT ON COMMON LAW FRAUD**

GTECH Corporation ("GTECH") moves for traditional summary judgment on Plaintiffs/Intervenors' claims for common law fraud and shows the following:

I. OVERVIEW OF LEGISLATIVE SCHEME FOR THE TEXAS LOTTERY

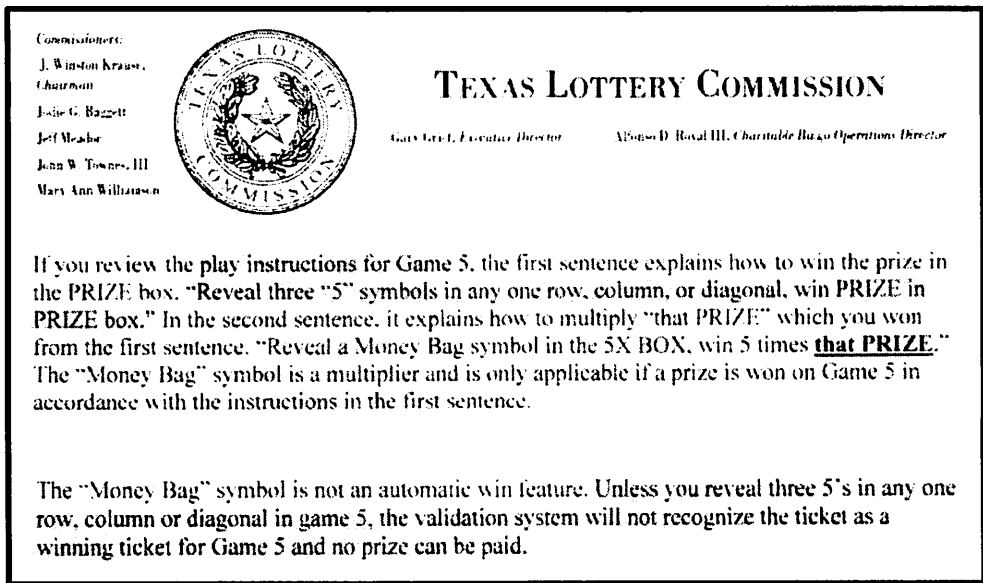
1. GTECH is entitled to summary judgment on Plaintiffs/Intervenors' ("Plaintiffs") common law fraud claims because Plaintiffs, as a matter of law, cannot establish a false representation or justifiable reliance because they are presumed to have known the Rules governing the tickets they bought. Plaintiffs claim they believed they had winning lottery tickets even though they did *not* have Tic-Tac-Toe. However, the Texas Lottery Commission's ("TLC") mandatory *requirement* of getting a Tic-Tac-Toe as a condition precedent to have a winning Fun 5's ticket was fully disclosed to Plaintiffs *as a matter of law* before they ever bought a ticket.

2. Plaintiffs' *only* defense to the Lottery Statute and TLC Rules: it is "**not reasonable**" to expect a scratch-off ticket player to read the TLC's Rules governing Fun 5's. In other words, Plaintiffs are asking this Court to give them a pass on their ignorance of the law. More strikingly, Plaintiffs essentially ask this Court to nullify an integral part of the Texas Lottery Statute. This Court should decline Plaintiffs' invitation to rewrite the Lottery Statute and overturn the legislative scheme for the Texas Lottery.

3. The TLC, which by statute is exclusively charged with all aspects of Texas Lottery tickets, published the binding Rules for the Fun 5's Tic-Tac-Toe game months before those tickets went on sale. Those binding Rules require a player to achieve a Tic-Tac-Toe to have a winning ticket. In other words, no Tic-Tac-Toe means no prize. Because the Tic-Tac-Toe requirement was fully disclosed to Plaintiffs as a matter of law before they bought a ticket, the essential elements of falsity and justifiable reliance do not exist.

4. Ignoring the published Rules, Plaintiffs argue they believed no Tic-Tac-Toe was required. Plaintiffs contend the second sentence of the two sentence Instruction on the tickets in isolation from the first sentence, led them to believe they would win a prize despite not having Tic-Tac-Toe.¹ However, the Rules require the opposite: Tic-Tac-Toe is mandatory to win.

5. The TLC, as the ultimate authority with respect to lottery tickets in Texas, already considered and, in September 2014, October 2014, November 2014, and March 2015, issued numerous written determinations to several Plaintiffs rejecting their contrary interpretation of the two sentence Instruction printed on the tickets bought from the TLC:



**TIC-TAC-TOE
Required to Win
Prize**

See Texas Lottery Commission Affidavit attached as Ex. C , STEELE 50451-000005-6; TLC006040-6041, TLC006061-6062, TLC006066-6067, TLC006073-6074, TLC006088-6089, TLC006112-6113, TLC006136-6137, TLC006143-6144, TLC006239-6240, TLC006247-6248, TLC006448-6449, TLC006758-6759, TLC006767-6769, TLC007003-7004, TLC007198-7200, TLC007203-7205, TLC007206-7207, TLC007577-7578, TLC007704-7705, TLC007836-7837, TLC008099-8100, TLC008104-8105, TLC008109-8110, TLC008114-8115, TLC008157-8158, TLC008197-8198, TLC008285-8286.; also see Index of Plaintiff Recipients of TLC Rejection Letters, Ex. A-5.

¹ See Plfs.' 4th Am. Pet. at ¶¶ 81 - 98.

6. Texas law is clear. The TLC's Rules governing the Fun 5's game are binding on Plaintiffs as a matter of law. That means Plaintiffs had to get Tic-Tac-Toe to win and they didn't.

II. THE TEXAS LOTTERY STATUTE AND LOTTERY COMMISSION RULES NECESSITATE SUMMARY JUDGMENT

7. Summary judgment on Plaintiffs' common law fraud claims is merited for at least three reasons:

8. *First*, under the State Lottery Act, **“by purchasing a ticket in a particular lottery game, a player agrees to abide by and be bound by the commission's rules, including the rules applicable to the particular lottery game involved.”** See TEX. GOV'T CODE §466.252. As the TLC explained, Plaintiffs' personal interpretations of one sentence from the two sentence Instruction printed on the tickets is incorrect and not allowed by the TLC's Rules. In short, Plaintiffs' contention that no Tic-Tac-Toe is required is wrong. See Ex. C.

9. *Second*, as required by the State Lottery Act and the applicable regulations, Plaintiffs must **“comply with, and abide by, the[] Game Procedures, [...] the State Lottery Act, [and] the applicable rules adopted by the Texas Lottery [...].”** 39 Tex. Reg. 4799-4804 attached as Exhibit A-4, p. 4804 at § 6.0. Plaintiffs' fraud claims ignore these regulations and asks this Court to ignore the specific lottery laws and regulations applicable to all lottery games.

10. *Third*, a court's review of an agency's interpretation of matters in its purview is strictly “limited to determining whether the administrative interpretation ‘is plainly erroneous or inconsistent with the regulation.’” See *Public Utility Com'n v. Gulf States Utilities Co.*, 809 S.W.2d 201, 208 (Tex. 1991); *SWEPI LP v. Railroad Com'n of Texas*, 314 S.W.3d 253, 260 (Tex. App.—Austin 2010, pet. denied). The TLC's interpretation of its own Fun 5's game was not “plainly erroneous” or inconsistent with the regulation published in the Texas Register prior

to the tickets going on sale. Rather, Plaintiffs’ suggested interpretation of the second sentence—which is plainly contrary to the published Rules—is *foreclosed* as a matter of law by the Rules drafted and published by the TLC in the Texas Register disclosing Tic-Tac-Toe was required for a ticket to be a winner.

11. By purchasing a Fun 5’s ticket, Plaintiffs agreed to be bound by and abide by the TLC’s Rules and the TLC’s decisions. The TLC Rules required Tic-Tac-Toe to win. The TLC has rejected Plaintiffs’ interpretation that they could win without getting Tic-Tac-Toe. No Plaintiff challenged the TLC’s determination through an administrative proceeding or judicial review. Plaintiffs’ contrary interpretation must be rejected because Plaintiffs cannot, as a matter of law, establish there was a “false representation” or justifiable reliance thereon.

III. SUMMARY JUDGMENT STANDARD

12. Traditional summary judgment is proper when there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law. *See* Tex. R. Civ. P. 166; *Haase v. Glazner*, 62 S.W.3d 795, 797 (Tex. 2001).

13. Applied to this case, summary judgment is proper because, as a matter of law, Plaintiffs cannot establish at least two essential elements of their common law fraud claim – a false representation and justifiable reliance. *Int’l Bus. Machs. Corp. v. Lufkin Indus.*, 573 S.W.3d 224, 228 (Tex. 2019) (stating a false representation and justifiable reliance are essential elements of common-law fraud). Summary judgment is proper on a fraud claim when a defendant conclusively disproves an alleged representation was false. *Limon v. J.T.B. Servs.*, No. 03-07-00453-CV, 2009 Tex. App. LEXIS 3019, at *29 (Tex. App.—Austin Apr. 30, 2009, pet. denied).

14. To prevail on fraud, Plaintiffs must establish they justifiably relied on the allegedly false representation. Under Texas law, “a person may not justifiably rely on a

representation if ‘there are ‘red flags’ indicating such reliance is unwarranted.’ *Grant Thornton LLP v. Prospect High Income Fund*, 314 S.W.3d 913, 923 (Tex. 2010). Justifiable reliance can also be negated as a matter of law when “red flags” indicate reliance is unwarranted. *Barrow-Shaver Res. Co. v. Carrizo Oil & Gas, Inc.*, 590 S.W.3d 471, 501 (Tex. 2019) (citing *Grant Thornton LLP*, 314 S.W.3d at 923). Here, there was much more than “red flags” indicating Plaintiffs could not win without getting Tic-Tac-Toe: there were the TLC’s published Rules, binding on them by statute and referenced on each ticket, stating a Tic-Tac-Toe was required to win. That disclosure directly contradicts Plaintiffs’ suggested interpretation.²

IV. SUMMARY JUDGMENT EVIDENCE

15. Undisputed Material Facts:
 - a. GTECH never sold any Fun 5’s tickets. (Ex. B at ¶ 7)
 - b. GTECH had no ownership interest in the Fun 5’s game. (Ex. B at ¶ 10)
 - c. By statute, the TLC owns the Fun 5’s scratch-off game. (Ex. B at ¶ 3)
 - d. The TLC sold the Fun 5’s tickets through its system of 17,000 retailers. (Ex. B at ¶ 7)
 - e. The TLC developed and published the Rules governing Fun 5’s months *before* the tickets went on sale. Those Rules included what was required to have a winning ticket. (Ex. A-4, June 20, 2014 Texas Register; Ex. B at ¶¶ 11 and 13)
 - f. GTECH had no involvement in developing or publishing the Fun 5’s Rules published in the Texas Register by the TLC. (Ex. B at ¶ 11)
 - g. GTECH was not provided with and did not see the Fun 5’s Rules prior to their publication by the TLC in the Texas Register. (Ex. B at ¶ 11)

² Direct contradiction negates justifiable reliance as a matter of law. *See Barrow-Shaver Res. Co.*, 590 S.W.3d at 498 (express contractual terms negated any justifiable reliance on alleged oral representation).

- h. The TLC Rules state the *only* way for a player to win a Fun 5's prize is that the player must achieve a Tic-Tac-Toe. (Ex. A-4, Fun 5's Rules, June 20, 2014 Texas Register; Ex. C, TLC Rejection Letters)
 - i. Each Fun 5's ticket purchased by Plaintiffs stated the tickets were subject to the applicable law and rules. (Ex. A-1 and A-2, GTECH-000189, 192)
 - j. No Plaintiff achieved a Tic-Tac-Toe on their Fun 5's tickets sued upon. (Copies of tickets sued upon produced by Plaintiffs; Plaintiffs' Resp. in Opp. to No Evidence Motion for Summary Judgment at p. 10)
16. GTECH also relies on the attached summary judgment evidence:
- Exhibit A: Affidavit of Kenneth E. Broughton;
 - Exhibit B: Affidavit of Walter Gaddy;
 - Exhibit C: Affidavit of Custodian of Records for the TLC.

V. THE TLC'S PUBLISHED RULES NEGATE FRAUD CLAIM

Plaintiffs' Are Bound By TLC Rules Which They Are Presumed To Know, Negating Any "False" Representation" or "Justifiable Reliance".

A. Plaintiffs are bound by and presumed to know the Rules governing Fun 5's.

17. Under the State Lottery Act, the TLC and its Executive Director "have broad authority and shall exercise strict control and close supervision over all lottery games [...]." TEX. GOV'T CODE § 466.014(a).

18. By legislative design, the TLC "owns" and has ultimate authority and discretion over the entire lottery space in Texas³ and has exclusive authority to implement and interpret rules applicable to lottery tickets. TEX. GOV'T CODE § 466.015.

19. Under the State Lottery Act, Plaintiffs are legally bound and must abide by the

³ TEX. GOV'T CODE § 467.101(a)(2) ("The [TLC] has broad authority and shall exercise strict control and close supervision over all activities authorized and conducted in this state under . . . (2) Chapter 466 of this code").

Rules promulgated by the TLC. See TEX. GOV'T CODE § 466.252.

20. Significantly, lottery players are presumed to know the laws related to the lottery. *Stewart v. Texas Lottery Com'n*, 975 S.W.2d 732, 735-36 (Tex. App.—Corpus Christi 1998, no pet.).

21. In *Stewart*, the plaintiff asserted she had a winning Texas Lottery ticket. The court denied her claim citing to the State Lottery Act. The court held Stewart was bound by the TLC's rules and that a reference to the rules may appear on the tickets. The court further held parties are "**charged with a duty to read what they agree to**" and that "**all persons are presumed to know the law. Thus, Stewart is presumed to know the laws related to the lottery.**" 975 S.W.2d at 735-36 (emphasis added). The same applies to these Plaintiffs. Each bought tickets referencing the TLC's published Rules. Ex. A-2 at GTECH-000192; Ex. A-4.

B. Plaintiffs Claim They Are Not Bound by the Lottery Statute or the TLC Rules

22. Not only do Plaintiffs claim they don't have to play by the Rules, they insist they are not bound by the Texas Lottery Statute or the TLC's Rules. In Plaintiffs' own words:

Further, lottery tickets are designed to be purchased on a whim. The Rules are not included on the Fun 5's ticket, and it is not reasonable to expect a consumer to locate the Rules, read them, and understand them and then arrive at GTECH's interpretation of them before purchasing a ticket.

See Pls' Response to GTECH's Sur-Reply at p. 4 (Jun. 15, 2021).

23. Plaintiffs' truly remarkable assertion that "*it is not reasonable*" to expect them to locate, read, and understand the Rules governing their scratch-off tickets flies in the face of the Lottery Statute and bedrock Texas law. Plaintiffs' renegade rejection of a portion of the Texas Lottery Act is astounding and would turn Texas statutory and administrative law on its head.

24. The Fun 5's Rules, published months before the TLC's release of Fun 5's tickets, were available to Plaintiffs, and are binding on Plaintiffs by statute, regulation, and the notice of the Rules printed on each ticket. Texas law is clear, Plaintiffs are legally presumed to know the Rules of the Texas Lottery. *Stewart*, 975 S.W.2d at 735-36.

25. The Rules state no player can win a prize without a Tic-Tac-Toe. Thus, there was no representation a player could win without Tic-Tac-Toe and Plaintiffs could not have justifiably relied on their (incorrect) reading of the second sentence of the two sentence Instruction on their tickets. The Rules are far more than a "red flag" defeating justifiable reliance; they are legally binding terms and conditions *directly* contradicting the proffered interpretation on which Plaintiffs sue.⁴

C. Plaintiffs' Claimed Ignorance of Texas Law Affords No Excuse.

26. Plaintiffs' judicial pronouncement quoted above rejecting the Texas Lottery Statute and the TLC Rules as "not reasonable" rejects one of the basic tenets of our jurisprudence: "**ignorance of the law is no excuse.**" *Goss v. Bobby D. Associates*, 94 S.W.3d 65, 69 (Tex. App.—Tyler 2002, no pet.) (citing *Cherokee Water Co. v. Forderhause*, 727 S.W.2d 605, 615 (Tex. App.—Texarkana 1987), *rev'd on other grounds*, 741 S.W.2d 377 (Tex. 1987)).

VI. THE BASIS OF PLAINTIFFS' COMMON LAW FRAUD CLAIM SUBVERTS APPLICABLE TEXAS LAW

A. The Rules Require a Tic-Tac-Toe to Win.

27. Even Plaintiffs recognized Fun 5's was a Tic-Tac-Toe game when they judicially admitted: "GTECH proposed a tic-tac-toe style game" that was incorporated into the Fun 5's

⁴ Plaintiffs have incorrectly referred to the Tic-Tac-Toe requirement as "GTECH's interpretation." As stated in the published Rules and the TLC's own letters to several Plaintiffs, the Tic-Tac-Toe requirement to win is actually the Texas Lottery Commission's Rule and the Texas Lottery Commission's interpretation of those Rules. (Ex. C)

scratch-off ticket.⁵ Unsurprisingly, given that it was a Tic-Tac-Toe game, the Rules required a player get a three in a row to win. As shown below, the Rules requiring a Tic-Tac-Toe to win were fully disclosed to Plaintiffs as a matter of law when published in the Texas Register. Plus, each scratch-off ticket Plaintiffs purchased from the TLC specifically referenced those Rules.

28. In June 2014, the TLC published the Rules and Procedures for Game 1592 (“Fun 5’s”) in the Texas Register. *See* 39 Tex. Reg. 4799-4804 (2014) at Ex. A-4.⁶ The Rules state there are *no* winning tickets that do not include a Tic-Tac-Toe (“three (3) “5” Play Symbols in any row, column or diagonal.”). Absent a Tic-Tac-Toe, there is no other way to win:



2.2 Programmed Game Parameters.
GENERAL:

V. Winning combinations will have only one occurrence of three (3) "5" Play Symbols in any row, column, or diagonal.

(i.e., tic-tac-toe)

29. Under Section 2.2(V) of the Fun 5’s Rules, “**winning combinations** will have only **one occurrence** of three (3) “5” Play Symbols in any row, column or diagonal.”⁷ Said

⁵ Plfs.’ 4th Am. Pet. ¶ 29.

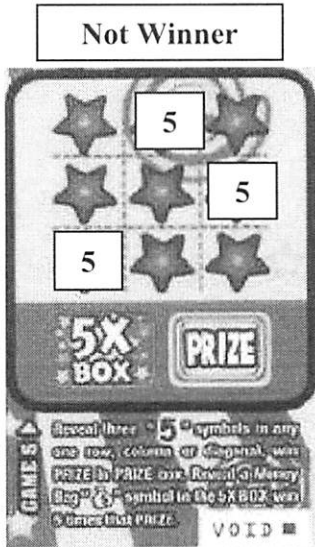
⁶ GTECH moves under Tex. R. Evid. 204 for the Court to take judicial notice of the Texas Register. Sections 2002.022(a) and 2002.054(1) of the Texas Government Code require courts to take judicial notice of the Texas Register. *Eckmann v. Des Rosiers*, 940 S.W.2d 394, 399 (Tex. App.—Austin 1997, no pet.).

⁷ Ex. A-4, 39 Tex. Reg. 4802 (Jun. 20, 2014) (emphasis added).

differently, to win, a player *must* reveal **one** occurrence of Tic-Tac-Toe. Ignoring that Rule, Plaintiffs claim they nevertheless believed they could win by revealing **zero** occurrences of Tic-Tac-Toe. Plaintiffs' interpretation contradicts the Rules. The TLC's official and binding Rules state a player's eligibility to win "5 times that PRIZE" was *conditional* on having won "**that PRIZE**" by revealing three "5" symbols in any one, row, column, or diagonal (*i.e.* tic-tac-toe).



Reveal three "5" symbols in any one row, column, or diagonal, win PRIZE in PRIZE box. Reveal a Money Bag "&" symbol in the 5X BOX, win 5 times that PRIZE.



30. Contrary to the published Fun 5's Rules, Plaintiffs argue they believed they could win despite *not* "getting three (3) "5" Play Symbols in a single row, column, or diagonal line." However, Plaintiffs' interpretation plainly violates the Rules. A player simply cannot win without getting a Tic-Tac-Toe.

31. In September 2014, **three months** after publishing its binding Rules in the Texas Register, the TLC began selling Fun 5's tickets.⁸ While Plaintiffs are presumed to know those published Rules as a matter of law, each Fun 5's tickets also contained a reference stating players are "**subject to**" the laws, "**rules**" and procedures of the TLC:

when all top prizes have been claimed. During closing, games may be sold even after all top prizes have been claimed. Claims are subject to applicable laws, rules, procedures and final decisions of Executive Director.

See Excerpt from Fun 5's ticket, Ex. A-2, at GTECH-000192 (emphasis added). This language is consistent with the underlying statute. TEX. GOV'T CODE § 466.252 ("By purchasing a ticket in a particular lottery game, a player agrees to abide by and be bound by the commission's rules, including the rules applicable to the particular lottery game involved").


B. There Was No "false representation" that Plaintiffs Could Win Without a Tic-Tac-Toe; Plaintiffs' Contrary Interpretation is Foreclosed by the Rules.

32. Plaintiffs' lawsuit is based upon the claim that *no* Tic-Tac-Toe was required to win. Plaintiffs allege that the second sentence of the two sentence instruction printed on Game 5 of the Fun 5's tickets (reproduced immediately below) was misleading to them.⁹

⁸ Ex. B, Gaddy Affidavit at ¶ 13.

⁹ Plaintiffs' fraud claims presuppose GTECH actually made a representation to Plaintiffs despite it being the TLC (not GTECH) that owned and sold the Fun 5's tickets. GTECH did not sell any tickets. There is no evidence of any transaction or communication between GTECH and Plaintiffs because there were none. (Ex. B) Regardless, assuming *arguendo* that tickets sold by the TLC to Plaintiffs are somehow a representation by GTECH, Plaintiffs still cannot prevail as a matter of law because of the full and accurate disclosure requiring a tic-tac-toe to win made to Plaintiffs by the Rules *before* they ever bought a ticket. These undisputed facts defeat Plaintiffs' fraud claims. *Stewart*, 975 S.W.2d at 735-36.



Reveal three “5” symbols in any one row, column, or diagonal, win **PRIZE** in PRIZE box. Reveal a Money Bag “” symbol in the 5X BOX, win 5 times **that PRIZE**.

See Ex. A-1, GTECH-000189. (emphasis added)

33. The referenced “5X BOX” is known as a “multiplier” box. See Ex. C.

34. The referenced “that PRIZE” in the **second sentence** refers back to that “PRIZE” won in the immediately preceding **first sentence** by getting a Tic-Tac-Toe. The second sentence builds upon and refers back to the first sentence.

35. Plaintiffs’ fraud claim is built on cherry picking the second sentence out of the one paragraph Instruction and reading that second sentence in total isolation from the immediately preceding first sentence. They compound that fundamental contract construction folly with also disregarding the TLC’s governing Rules requiring a Tic-Tac-Toe to win. Plaintiffs’ contrary interpretation would render portions of the Fun 5’s Rules without effect, would require the rewriting of other portions, and is inconsistent with the whole of the “Rules” applicable to Fun 5’s tickets. Therefore, even if the Commission’s previously quoted interpretation of its own ticket was entitled to no deference, Plaintiffs cannot prevail.

36. The insurmountable legal obstacle Plaintiffs face is that the binding Rules state the **only** way to win is to get Tic-Tac-Toe and none of the Plaintiffs got Tic-Tac-Toe. Plaintiffs’