

JAMES STEELE, et al.,
Plaintiffs,

vs.

GTECH CORPORATION,
Defendant.

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IN THE DISTRICT COURT OF

TRAVIS COUNTY, TEXAS

201st JUDICIAL DIISTRIC

PLAINTIFFS’ SECOND AMENDED EXPERT DESIGNATIONS

To: Defendant, GTECH CORPORATION, by and through its attorney of record, Kenneth E. Broughton, Reed Smith, LLP, 811 Main Street, Suite 1700, Houston, Texas 77002.

Plaintiffs make these expert disclosures as required by Texas Rule of Civil Procedure 194.2(f) as follows:

A. Retained Experts

I. Nancy Niedzielski, Ph.D.

- 1) Nancy A. Niedzielski, Ph.D.
Rice University – Dept. of Linguistics
211 Herring Hall
Houston, Texas 77005
(713) 348-6299
E-mail: niedz@rice.edu
- 2) Dr. Niedzielski will draw upon her knowledge of linguistics and the teaching of composition with particular reference to the recognition and avoidance of ambiguity in written documents, syntax, pragmatics, and discourse analysis to testify regarding the reasonable conclusions made by an ordinary reasonable speaker/reader of contemporary American English when examining the language of Game 5 of the Fun 5’s scratch-off ticket.

3) The general substance of and basis for Dr. Niedzielski’s opinions are as follows:

The instructions for the game in question state that there are two possible and separate ways to win a prize. Dr. Niedzielski will further opine that GTECH’s interpretation of the instructions is inconsistent with their structure and syntax. Dr. Niedzielski will also opine that an ordinary and reasonable person reading the instructions on the tickets would reasonably conclude that there are two possible and separate ways to win a prize. Dr.

Niedzielski will also opine that an ordinary and reasonable person purchasing a Fun 5 scratch-off ticket would reasonably rely on the instructions in concluding that there were two possible and separate ways to win Game 5. The general bases for these opinions are as follows:

- a) There are five separate games on this card; in Games 1, 2, and 4, the instructions contain two complete sentences (rather than two clauses, as the Game 3 instructions contain). For all three of these games, there are two separate ways to win. Furthermore, in each of the other games, winning the second way is not dependent on winning the first way. The Game 5 instructions also contain two separate sentences, making them analogous to Games 1, 2 and 4, whereby one way of winning the game is illustrated by the first sentence, and a separate way is illustrated by the second.
- b) The use of the deictic pronoun *that* indicates a referent that is proximally close, clearest and most recently stated. In this case, "PRIZE in PRIZE Box" is the most recently stated potential antecedent, rather than the unstated (and therefore, absolutely unclear) "prize you would have won if you revealed three in a row in the first part."
- c) In addition, the 5X box is spatially close to the PRIZE box, providing further likelihood that the reader interprets that winning 5 times the prize is dependent on the PRIZE box, rather than all of the rows, columns, or diagonals of the tic tac toe game.
- d) Very simple phrases would have made clear that winning the second way was dependent on the first. For example, clauses such as "in addition," or "as a bonus" or "to multiply the prize" would have linked the second sentence to the first. The fact that no such clauses were used reinforces the idea that these are two separate, independent ways of winning.
- e) No articles are used in the first sentence. If the crafters of the card used the definite marker *the* (as in, "*the* PRIZE in *the* PRIZE Box), that would have made the prize a specific prize, and thus, more likely to be interpreted as that definite prize in the second sentence. As is stands, the only determiner used is in the second sentence; there is no reason to assume that it therefore refers to the nondefinite-marked prize in the first sentence.
- f) Documents produced in this case further indicate that the reasonable way to interpret the instructions on the game at issue as providing two ways to win. By way of example only, a Texas Lotto Commission email from Wesley Barnes sent on September 5, 2014 indicates that he interprets the instructions to indicate two separate and independent ways to win Game 5. He asks: "Will there ever be a situation where there are three Dollar Bill symbols in a row, column or diagonal AND a "5" in the 5XBox?," which ironically is the way GTECH is arguing is the only way to win. This document, and others, reveal that the reasonable way to interpret the instructions is NOT that the second sentence is dependent on the first ("Will there ever be a situation..."), but rather that interpretation of these two sentences are independent of each other.

Dr. Niedzielski bases her opinions on the general principles of the science of Linguistics, and specifically those from syntax, pragmatics and discourse analysis. In addition, she will draw from her experience practicing and teaching in the field of forensic linguistics for over fifteen years.

Dr. Niedzielski is likely to develop additional mental impressions and opinions as additional discovery materials become available for her review, including but not limited to, reviews of the parties' depositions, interviews with the plaintiffs, or corpus searches regarding the usage of the terms implicated by the Fun 5's Ticket.

Dr. Niedzielski may also opine on the demographics of Texas lotto scratch off players, including but not limited to the meaning of the instructions in question to the typical, reasonable reader of modern American English scratch off ticket instructions. Dr. Niedzielski may also develop additional mental impressions and opinions after reviewing the reports or testimony of Defendant's experts. Dr. Niedzielski will be made available for deposition if Defendant wishes to explore these additional mental impressions and opinions. Opinions set forth in Dr. Niedzielski's deposition are incorporated by reference into this disclosure.

4) A). Dr. Niedzielski has been provided with and has reviewed the following documents:

File no.	Exhibit no.	Bates range
001	13	GTECH 390-391
002	--	GTECH 918-923
003	26	GTECH 17-38
004	27	TLC 8374-8375
005	28	GTECH 95-101
006	96	GTECH 154-157
007	97	GTECH 183
008	98	GTECH 184-205
009	40	GTECH 854-878
010	101	TLC 5860
011	14-18	GTECH 599-603
012	19-21	GTECH 604-607
013	102	TLC 6506
014	103	TLC 6507
015	104	TLC 6532
016	105	TLC 8372-8373
017	108	TLC 6540-6541
018	106	TLC 7390-7392
019	114	TLC 6582-6583
020	115	TLC 6592
021	116	TLC 5750-5752
022	117	TLC 8376-8377
023	106	TLC 7392
024	118	TLC 7397-7398
025	--	TLC 6620-6621
026	--	TLC 6105
027	2	TLC 8356-8360

028	122	TLC 8361
029	--	TLC 6149
030	--	TLC 8378-8379
031	--	TLC 8390-8391
032	--	TLC 6210
033	125	TLC 7436
034	126	TLC 7435
035	--	TLC 6359
036	130	TLC 5753-5755
037	--	TLC 8380-8382
038	--	Fun 5's Ticket
039	82-91	Multiplier tickets
040	--	12/09/2015 affidavit of Dr. Ronald Butters
041	--	Plaintiffs' First Amended Expert Designations
042	--	Defendants' First Amended Expert Designations

B). A copy of Dr. Niedzielski's current *curriculum vitae* is included as Exhibit "1". This includes a listing of all of her publications over the past 10 years.

C) Dr. Niedzielski is an Associate Professor of Linguistics at Rice University in Houston, Texas. She has taught classes in acoustic phonetics, sociolinguistics, speech technology, general linguistics, and forensic linguistics and language and the law. She has been a member of the Linguistics Society of America (LSA), the International Forensic Linguistics Association, and the American Dialect Society. She served for three years on the LSA Executive Council for the Committee on Social and Political Concerns. A more comprehensive listing of her qualifications can be found in her *curriculum vitae*, which is attached as "Exhibit 1."

D) Dr. Niedzielski has not provided deposition or trial testimony as a retained expert in any other cases over the past four years.

E) Dr. Niedzielski is being compensated at the rate of \$150 per hour for review, analysis and consultation, and \$200 per hour for testimony.

II. Jacqueline Henkel, Ph.D.

- 1) Jacqueline Henkel, Ph.D.
The University of Texas at Austin
208 West 21st St., Stop B5500
Tel: 512-471-4942
E-mail: henkelj@austin.utexas.edu
- 2) Dr. Henkel will apply principles of English grammar and rhetoric and testify regarding the meaning of the instructions printed on the Fun 5's scratch-off ticket at issue, and a reader's reasonable interpretation of those instructions. In doing so, she will rely upon her expertise

regarding (and apply the principles of) the English language, including: English writing, writing instruction, and grammar; rhetorical analysis; English language linguistics; narrative theory; and discourse theory.

- 3) The general substance of and basis for Dr. Henkel's opinions are as follows:
- a. The two sentences in the instructions of game 5 of the Fun 5's ticket present an either/or choice—as separate routes to a winning ticket—as opposed to winning the second part being dependent upon winning the first part.
 - b. Writers can shape readers' interpretive responses through repeated syntactic and semantic patterns. In this case, since ticket-holders are most likely to read the ticket like any other text—from left to right and from top to bottom—they will have read four sets of game instructions before encountering the fifth game. Like the fifth game, three of those sets of instructions take the form of two imperatives. In each case those two sentences represent two paths to a win—an either/or choice. Game 4 exemplifies the pattern: gamers can win by revealing three symbol 5's in a row *or* by finding two 5's and a star in one row. There is no suggestion that one need do both to win—that is, succeed in two rows. It thus makes sense that gamers would reasonably interpret similarly the instructions for Game 5. The language supports such an interpretation, and the instructions similarly outline different tasks in different parts of the game box (in two rows in Game 4, in a diagonal, column, or row and a lower row in Game 5).
 - c. If readers' expectations are shaped in one direction, then it is incumbent on the writer to clearly mark a change or break in another direction. For example, in this case, a break in the pattern might have been marked with a suggestive title ("The Texas Two-Step 5") and an instructive heading marked with clarifying adverbs ("If you win in step one, you may then try your luck in step two! First . . ."). The creators might have additionally underscored the point through "visual rhetoric," by marking through the artwork that Game 5 was a distinctive or culminating game.
 - d. Deictics are words that refer either to the external speech context or to particular elements within or in a prior sentence (adverbs of place or pronouns are familiar examples). Deictic analysis reveals that it is unlikely that someone would construe the demonstrative determiner in the phrase "that prize" of the second sentence of Game 5 to refer to the "prize" revealed by winning tic-tac-toe according to the instruction of the first sentence. Readers/hearers are disposed to construe as relevant the (syntactically) nearest possible referent for a deictic element. In this case the nearest referent for "that prize" is in the same sentence, namely the "moneybag" prize revealed in the 5x box (and the prize box connected to it), a prize revealed within the scope of the second instruction alone. Beginning writers are often told to clarify pronouns or other devices with potentially uncertain

or multiple antecedents; this is called "vague reference," a term found in any grammar handbook. Once again, the two instructions make sense as independent paths to a win.

- e. If it were intended that a player had to win the first part of Game 5 (the tic-tac-toe) in order to be eligible to win 5X the prize in the second part of Game 5, there are various alternative ways in which the instructions could have been written to convey this intent.
- f. An ordinary and reasonable person purchasing a Fun 5 scratch-off ticket would reasonably rely on the instructions in concluding that there were two possible and separate ways to win Game 5.

Dr. Henkel is likely to develop additional mental impressions and opinions as additional discovery materials become available for her review, including but not limited to, reviews of the parties' depositions, interviews with the plaintiffs, or corpus searches regarding the usage of the terms implicated by the Fun 5's Ticket. Dr. Henkel may also develop additional mental impressions and opinions after reviewing the reports or testimony of Defendant's experts. Dr. Henkel will be made available for deposition if Defendant wishes to explore these additional mental impressions and opinions. Opinions set forth in Dr. Henkel's deposition are incorporated by reference into this disclosure.

4) A) Dr. Henkel has been provided with and has reviewed the following:

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036	130	TLC 5753-5755
037	--	TLC 8380-8382
038	--	Fun 5's Ticket
039	82-91	Multiplier tickets
041	--	Defendants' First Amended Expert Designations

B) A copy of Dr. Henkel's current *curriculum vitae* is included as Exhibit "2". This includes a listing of her publications over the past 10 years.

C) Dr. Henkel is a Professor Emeritus in the Department of Rhetoric and Writing at the University of Texas at Austin and has researched, studied, lectured on, and published on principles of English rhetoric, writing, and grammar for over 30 years. During her years at UT, she regularly taught courses on English grammar and syntax; on sociolinguistics (including courses on dialects and teaching, language and gender, and dialect variation in American English); on literary criticism; on advanced writing and writing style; and on various topics in American literature. She is often asked to review grammar textbooks; she frequently lectures on grammatical issues at the University Writing Center; and she has published the main entry on language and linguistics in a widely used literature handbook. Her book on linguistics and literary theory was published at Cornell University Press, and she has article publications in *PMLA* (her field's first-ranked journal), *College English*, *Poetics*, and the *New England Quarterly*. A full listing of her qualifications is provided in her *curriculum vitae*.

D) Dr. Henkel has not provided deposition or trial testimony as a retained expert in any other cases over the past four years.

E) Dr. Henkel is being compensated at a rate of \$200 per hour. In-person testimony is counted as an 8-hour day.

B. Mixed Fact and Expert Witnesses

Witnesses identified by both Defendant and Plaintiffs as having knowledge of relevant facts may also express expert opinions based on their education, training, and experience. To the extent that any of them have opinions that are supportive of Plaintiffs' case, Plaintiffs hereby designate them as experts for purposes of those limited opinions. These potential mixed fact and

expert witnesses include Joe Lapinski, Laura Thurston, Penny Whyte, Walter Gaddy, Dale Bowersock, Robert Tirloni, Gary Grief, and Dawn Nettles as well as the witnesses identified by Defendant in its Response to Plaintiffs' Request for Disclosure. The Plaintiffs and Intervenors may also offer opinions regarding their understanding and reliance on the wording of the game instructions.

C. Additional Experts

Plaintiffs do not endorse the qualifications, if any, of Defendant's designated experts to render expert opinions at trial. Plaintiffs do not waive the right to challenge any and all opinions, offered by experts retained by the Defendant that are designated as expert witnesses or adverse expert witnesses, and who are not also specially retained by the Plaintiffs in this case.

Plaintiffs reserve the right to supplement this designation with additional designations of experts within the time limits imposed by the Court or any alterations of same by subsequent Court Order or agreement of the parties, or pursuant to the Texas Rules of Civil Procedure and/or the Texas Rules of Civil Evidence.

Plaintiffs reserve the right to elicit, by way of cross-examination, opinion testimony from experts designated and called by the other parties to the suit. Plaintiffs express their intention possibly to call, as witnesses associated with adverse parties, any of Defendant's experts.

Plaintiffs reserve the right to call un-designated rebuttal expert witnesses whose testimony cannot reasonably be foreseen until the presentation of the evidence against Plaintiffs.

Plaintiffs reserve the right to withdraw the designation of any expert and to aver positively that such previously designated expert will not be called as a witness at trial, and to re-designate same as a consulting expert, who cannot be called by opposing counsel.

Plaintiffs reserve the right to elicit any expert opinion or lay opinion testimony at the time of trial which would be truthful, which would be of benefit to the jury to determine material issues of fact, and which would not violate any existing Court Order or the Texas Rules of Civil Procedure.

Plaintiffs hereby designate, as adverse parties, potentially adverse parties, and/or as witnesses associated with adverse parties, all parties to this suit and all experts designated by any party to this suit, even if the designating party is not a party to the suit at the time of trial. In the event a present or future party designates an expert but then is dismissed for any reason from the suit or fails to call any designated expert, Plaintiffs reserve the right to designate and/or call any such party or any such experts previously designated by any party.

Plaintiffs reserve whatever additional rights they may have with regards to experts, pursuant to the Texas Rules of Civil Procedure, the Texas Rules of Civil Evidence, the case law construing same, and the rulings of the Trial Court.

Respectfully submitted,

THE LANIER LAW FIRM, P.C.

/s/ Christopher L. Gadoury

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CERTIFICATE OF SERVICE

I hereby certify that on December 22, 2021, a true and correct copy of the foregoing was served on all counsel of record in accordance with the Texas Rules of Civil Procedure.

/s/ Christopher L. Gadoury
Christopher L. Gadoury

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