

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

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

**PLAINTIFFS' RESPONSE IN OPPOSITION TO GTECH'S TRADITIONAL MOTION  
FOR PARTIAL SUMMARY JUDGMENT ON COMMON LAW FRAUD CLAIMS**

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
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## I. SUMMARY OF ARGUMENT

### A. GTECH FALSELY REPRESENTED THAT PLAYERS WOULD WIN A PRIZE IF THEY REVEALED A MONEY BAG SYMBOL.

GTECH designed and sold to the Texas Lottery Commission (“TLC”) an instant scratch-off game known as the “Fun 5’s.” GTECH composed and printed instructions on the face of the “Fun 5’s” ticket that promised that players would win a prize if their ticket revealed a Money Bag symbol. The instructions state, “Reveal a Money Bag ‘’ symbol in the 5x BOX, win 5 times that PRIZE.”<sup>1</sup>

Initially, the parameters for the game called for the winning Money Bag symbol to appear only on tickets where the player had won the ticket’s tic-tac-toe game. That meant every player who revealed a Money Bag symbol would win a prize as promised by GTECH’s instructions. However, before the tickets were printed, GTECH changed the game parameters and placed the Money Bag symbol on not only the tic-tac-toe winning tickets but also on 25% of the non-tic-tac-toe winning tickets. Therefore, some tickets that revealed a Money Bag symbol would win a prize, and some tickets that revealed a Money Bag symbol would not.

After changing the parameters, but before printing the tickets, GTECH performed three reviews of the ticket to see if the instructions needed to be altered to reflect the parameter changes. GTECH decided to keep the wording of the instructions the same, even though not all tickets that revealed a Money Bag symbol would win a prize as promised. Plaintiffs purchased tickets that revealed a Money Bag symbol, but none of their tickets validated as winners.

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<sup>1</sup> Ex. 1 (Dale Bowersock Deposition Exhibit 98, GTECH-000184-205), at GTECH-000187.

**B. GTECH HAS NOT CONCLUSIVELY NEGATED PLAINTIFFS' JUSTIFIABLE RELIANCE AS A MATTER OF LAW.**

Following its unsuccessful attempt to avoid the merits of this case entirely by claiming sovereign immunity, GTECH now argues it is entitled to summary judgment on Plaintiffs' common-law fraud claims because Plaintiffs could not have justifiably relied on GTECH's representation. As support, Defendant argues that the rules for the "Fun 5's" game that were published in the Texas Register negate Plaintiffs' reliance on the instructions on the ticket. However, the rules cited by Defendant relate to the game's design, rather than the determination of winning tickets. And, contrary to Defendant's assertions, those rules do not say that a tic-tac-toe is required to win the game. In fact, other rules that discuss how to win the game essentially duplicate the ticket's instructions and, therefore, do not provide any additional insight.

Also, the TLC's written determinations, explaining to some Plaintiffs why their tickets are not winning tickets, did not raise red flags. Those explanations that a tic-tac-toe was required to win the game were provided to Plaintiffs only after they purchased their tickets and complained to the TLC that they would not validate as winning tickets despite having a Money Bag symbol.

Finally, Plaintiffs' interpretation of the ticket's instructions reasonably considers both sentences of the instructions. And it is based on proper rules of grammar and sentence construction. Expert testimony supports Plaintiffs' interpretation.

The instructions represent there are two ways to win the game. GTECH—the expert in the field of drafting lottery tickets—could have written the instructions in a way that made clear that the game was intended to be a multiplier game and that revealing a tic-tac-toe was required to win. It did not. This requirement was not disclosed in any way to Plaintiffs before they purchased their

tickets. For these reasons, GTECH has not conclusively negated Plaintiffs' justifiable reliance, and its Motion should be denied.

## II. SUMMARY JUDGMENT EVIDENCE

Plaintiffs rely on the following summary judgment evidence:

- Exhibit 1 Dale Bowersock Deposition Exhibit 98, GTECH-000184-205
- Exhibit 2 Deposition of Joseph Lapinski
- Exhibit 3 Penelope Whyte Deposition Exhibit 26, GTECH-000017-38
- Exhibit 4 Exhibit 28 to Whyte Deposition, GTECH-000095-101
- Exhibit 5 Penelope Whyte Deposition Exhibit 29, GTECH-000154-157
- Exhibit 6 Deposition of Laura Thurston
- Exhibit 7 Deposition of Penelope Whyte
- Exhibit 8 Deposition of Joseph Lapinski as Corporate Representative of GTECH
- Exhibit 9 Plaintiffs' Fourth Amended Petition
- Exhibit 10 Affidavit of Dr. Ronald Butters
- Exhibit 11 Gold Bar Bonanza Ticket, Whyte Deposition Ex. 50

## III. FACTUAL BACKGROUND

### A. GTECH CREATED THE DECEPTIVE "FUN 5'S" TICKET.

GTECH is the U.S. subsidiary of an Italian gaming company that runs lotteries across the world.<sup>2</sup> It operates more than half of the state lotteries in the United States,<sup>3</sup> including the Texas

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<sup>2</sup> Ex. 2 (Lapinski Deposition), at 14:22 - 15:2.

<sup>3</sup> *Id.* at 14:15-17.



Lottery.<sup>4</sup> GTECH has an exclusive contract with the State of Texas to operate the Texas Lottery.<sup>5</sup> Under its contract with the State of Texas, GTECH receives 2.21% of the sales revenues from tickets sold in Texas.<sup>6</sup> If the TLC chooses to purchase one of GTECH's instant scratch-off games, GTECH receives an additional fee on a "per-thousand-tickets" basis.<sup>7</sup> Under this arrangement, GTECH has a financial incentive to maximize ticket sales in Texas.<sup>8</sup> GTECH provides, at each retail location, a computer terminal which is linked to a central GTECH computer.<sup>9</sup> It is GTECH's computer system that tells a retailer which ticket should be validated as a winner and which ticket should be validated as a non-winner.<sup>10</sup>

In March 2013, GTECH presented to the TLC examples of scratch-off games.<sup>11</sup> One of those examples was "Fun 5's"—a game that GTECH previously operated in Nebraska, Indiana, Kansas, and Western Australia with much financial success.<sup>12</sup> The TLC selected "Fun 5's" as a game that it intended to offer during the 2014 fiscal year.<sup>13</sup> GTECH prepared the initial draft

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<sup>4</sup> *Id.* at 6:19-21.

<sup>5</sup> *Id.* at 19:21-20:1.

<sup>6</sup> *Id.* at 24:24 – 25:15.

<sup>7</sup> *Id.* at 26:10-19.

<sup>8</sup> *Id.* at 28:24-29:1.

<sup>9</sup> *Id.* at 31:4-33:8.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 53:23-54:4.

<sup>12</sup> *Id.* at 54:11-57:11.

<sup>13</sup> *Id.* at 54:24-55:15.

working papers for the game.<sup>14</sup> The initial draft closely mirrored GTECH's "Fun 5's" game in Nebraska.<sup>15</sup> For "Game 5," the fifth of the five games on the ticket, GTECH proposed a game that appeared as follows:



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In April 2014, the TLC requested that GTECH modify the instructions to Game 5 by changing the Dollar Bill symbol to a "5" symbol, and changing the "5" symbol to a Money Bag

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<sup>14</sup> Ex. 3 (Penelope Whyte Deposition Exhibit 26, GTECH-000017-38).

<sup>15</sup> Ex. 2 (Lapinski Deposition), at 57:16-23.

<sup>16</sup> Ex. 3 (Penelope Whyte Deposition Exhibit 26, GTECH-000017-38), at GTECH-000020.

symbol.<sup>17</sup> 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.<sup>18</sup> The reason the TLC requested the Money Bag symbol to appear on some non-winning tickets was because the TLC 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.<sup>19</sup> In May 2014, GTECH confirmed that “[t]he ‘MONEY BAG’ Play Symbol will appear in the 5X Box in approximately 25% of the tickets with non-winning combinations in Game 5.”<sup>20</sup>

After changing the game’s parameters, GTECH performed three reviews of the ticket and determined that no additional changes needed to be made to the instructions to make them not misleading.<sup>21</sup> In all three reviews, GTECH made the unilateral decision to use the same wording it had used when the Money Bag symbol appeared only on winning tickets, even though it knew that a significant percent of non-winning tickets would also contain Money Bag symbols.<sup>22</sup>

The instructions for Game 5 on the ticket, as printed and sold to consumers in Texas, including Plaintiffs, represented that there were two ways to win the game. The first way was to

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<sup>17</sup> Ex. 4 (Exhibit 28 to Whyte Deposition, GTECH-000095-101), at GTECH-000097.

<sup>18</sup> Ex. 5 (Penelope Whyte Deposition Exhibit 29, GTECH-000154-157), at GTECH-000154, 000157.

<sup>19</sup> *Id.*, at GTECH-000154.

<sup>20</sup> Ex. 1 (Dale Bowersock Deposition Exhibit 98, GTECH-000184-205), at GTECH-000202.

<sup>21</sup> GTECH’s Laura Thurston “reviewed” and “examined” the language of the instructions as compared to the change in game parameters and “felt it was clear.” Ex. 6 (Thurston Deposition), at 127:2-128:3. GTECH’s Penelope Whyte 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.” Ex. 7 (Whyte Deposition), at 39:19-40:23, 46:9-17. Derek Batchelor in GTECH’s Software department also reviewed the requested changes. Ex. 6 (Thurston Deposition), at 128:5.

<sup>22</sup> *Id.*

reveal a Tic-Tac-Toe combination.<sup>23</sup> The second way was to reveal a money bag symbol in the 5X box.<sup>24</sup> A copy of the ticket is below:



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**B. GTECH KNEW AND INTENDED THAT CUSTOMERS WOULD RELY ON THE INSTRUCTIONS.**

Joseph Lapinski, GTECH's corporate representative and account development manager for Texas, testified to the importance of the instructions on scratch-off tickets.<sup>26</sup> Lapinski is the person

<sup>23</sup> Ex. 1 (Dale Bowersock Deposition Exhibit 98, GTECH-000184-205), at GTECH-000188.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> Ex. 2 (Lapinski Deposition), at 6:11-24; Ex. 8 (Lapinski Corp. Rep. Deposition), at 7:2-6.

most knowledgeable at GTECH about lottery operations in Texas.<sup>27</sup> According to Lapinski, “the instructions printed on a scratch-off ticket [a]re very important...because they tell the player what symbols he has to get or she has to get on the ticket in order to win a prize.”<sup>28</sup> “The instructions explain to them how to play and how you win.”<sup>29</sup> Lapinski expects customers to rely on the instructions that are printed on scratch-off tickets.<sup>30</sup>

### **C. PROCEDURAL HISTORY**

Plaintiffs are purchasers of “Fun 5s” tickets who revealed a Money Bag symbol in the “5X” box.<sup>31</sup> They were misled by the instruction on Game 5 into believing that they would win five times the amount in the prize box if their tickets revealed a Money Bag symbol.<sup>32</sup> Plaintiffs filed suit against GTECH on December 9, 2014. They allege claims against GTECH for common-law fraud and fraud by nondisclosure.<sup>33</sup> On February 25, 2016, the trial court overruled GTECH’s plea to the jurisdiction. The Court of Appeals for the Third District in Austin, Texas affirmed the trial court’s judgment as to Plaintiffs’ claims for fraud and fraud by non-disclosure on January 11,

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<sup>27</sup> Ex. 2 (Lapinski Deposition), at 6:22-24.

<sup>28</sup> *Id.* at 8:16-18.

<sup>29</sup> *Id.* at 12:8-9.

<sup>30</sup> *Id.* at 10:7-13.

<sup>31</sup> Ex. 9 (Plaintiffs’ Fourth Amended Petition), ¶ 79.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*, ¶¶ 81-108.

2018.<sup>34</sup> The supreme court affirmed the judgment of the court of appeals on June 12, 2020.<sup>35</sup> GTECH filed its Traditional Motion for Partial Summary Judgment on October 29, 2021.

#### IV. ARGUMENT AND AUTHORITIES

##### A. LEGAL STANDARD

To be entitled to traditional summary judgment, the movant must show that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. TEX. R. CIV. P. 166(a)(c); *Provident Life and Acc. Ins. Co. v. Knott*, 128 S.W.3d 211, 215-16 (Tex. 2003); *Southwestern Elec. Power Co. v. Grant*, 73 S.W.3d 211, 215 (Tex. 2002). The movant has the burden of proof. *Grant*, 73 S.W.3d at 215. A defendant is entitled to summary judgment only if the defendant conclusively negates at least one essential element of the plaintiff's cause of action or conclusively establishes all of the elements of an affirmative defense. *See Frost Nat. Bank v. Fernandez*, 315 S.W.3d 494, 508 (Tex. 2010). The burden to raise a fact issue shifts to the non-movant only after the movant has established that it is entitled to summary judgment. *Rhone-Poulenc, Inc. v. Steel*, 997 S.W.2d 217, 222-23 (Tex. 1999). The court takes as true all evidence favorable to the non-movant, indulging in every reasonable inference and resolving any doubts in the non-movant's favor. *Knott*, 128 S.W.3d at 215; *Grant*, 73 S.W.3d at 215.

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<sup>34</sup> *GTECH Corp. v. Steele*, 549 S.W.3d 768, 804 (Tex. App.—Austin 2018), *aff'd sub nom.* The Court of Appeals reversed and rendered judgment with respect to Plaintiffs' claims for aiding and abetting, conspiracy, and tortious interference. *Id.* at 796.

<sup>35</sup> *Nettles v. GTECH Corp.*, 606 S.W.3d 726, 739 (Tex. 2020).

## **B. COMMON LAW FRAUD**

To prevail on a fraud claim, a plaintiff must prove that: (1) the defendant made a material representation that was false; (2) the defendant knew that the representation was false, or made it recklessly as a positive assertion without any knowledge of its truth; (3) the defendant intended to induce the plaintiff to act upon the representation; and (4) the plaintiff actually and justifiably relied upon the representation and suffered injury as a result. *JPMorgan Chase Bank, N.A. v. Orca Assets G.P., L.L.C.*, 546 S.W.3d 648, 653 (Tex. 2018).

## **C. GTECH MADE A FALSE REPRESENTATION.**


The misrepresentation for which Plaintiffs sue is the following instruction on the face of the ticket: “Reveal a Money Bag ‘’ symbol in the 5x BOX, win 5 times that PRIZE.”<sup>36</sup> That statement is false because, under the game parameters, a significant percent of non-winning tickets contained a Money Bag symbol.<sup>37</sup>

## **D. PLAINTIFFS JUSTIFIABLY RELIED ON GTECH’S REPRESENTATION.**

“Justifiable reliance usually presents a question of fact.” *JPMorgan*, 546 S.W.3d at 654; *see Jacked Up, L.L.C. v. Sara Lee Corp.*, 854 F.3d 797, 811 (5th Cir. 2017). “In measuring justifiability, [the court] must inquire whether, given a fraud plaintiff’s individual characteristics,

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<sup>36</sup> Ex. 1 (Dale Bowersock Deposition Exhibit 98, GTECH-000184-205), at GTECH-000187.

<sup>37</sup> *Id.* at GTECH-000202. GTECH asserts that Plaintiffs’ fraud claims presuppose that GTECH made a representation to Plaintiffs. Motion at 11 fn. 9. *See Plaintiffs’ Special Exceptions, Infra, V.* (pp.22-23) GTECH has an exclusive contract with the State of Texas to operate the Texas Lottery. Ex. 2 (Lapinski Deposition), at 19:21-20:1. Under the contract, GTECH receives a percent of the sales revenues from tickets sold in Texas. *Id.* at 24:24 – 25:15. GTECH drafted and sold to the TLC the “Fun 5’s” game, including, specifically, drafting the false representation that is the basis of this lawsuit: “Reveal a Money Bag ‘’ symbol in the 5x BOX, win 5 times that PRIZE.” *Id.* at 53:23-54:4; 54:11-57:11; Ex. 3 (Penelope Whyte Deposition Exhibit 26, GTECH-000017-38), at GTECH-000020; Ex. 1 (Dale Bowersock Deposition Exhibit 98, GTECH-000184-205), at GTECH-000188.

abilities, and appreciation of facts and circumstances at or before the time of the alleged fraud[,] it is extremely unlikely that there is actual reliance on the plaintiff's part." *Grant Thornton LLP v. Prospect High Income Fund*, 314 S.W.3d 913, 923 (Tex. 2010) (internal quotes omitted); see *Bank of Texas, N.A. v. Glenny*, 405 S.W.3d 310, 318 (Tex. App.—Dallas 2013, no pet.). "[A] person may not justifiably rely on a misrepresentation if there are 'red flags' indicating such reliance is unwarranted." *Grant Thornton*, 314 S.W.3d at 923 (internal quotes omitted).

However, "'justifiable reliance' is not the same as 'reasonable reliance,' and the Texas Supreme Court has specifically held that a victim of fraud is generally under no duty to discover the truth by exercising proper care." *Ginn v. NCI Bldg. Sys. Inc.*, 472 S.W.3d 802, 830 (Tex. App.—Houston [1st Dist.] 2015, no pet.) (citing *Koral Indus. v. Sec-Conn. Life Ins. Co.*, 802 S.W.2d 650, 651 (Tex. 1990)); see also *Trenholm v. Ratcliff*, 646 S.W.2d 927, 933 (Tex. 1983) ("Where one has been induced to enter into a contract by fraudulent representations, the person committing the fraud cannot defeat a claim for damages based upon a plea that the party defrauded might have discovered the truth by the exercise of proper care."). In purchasing their "Fun 5s" tickets, Plaintiffs justifiably relied on the instructions on the face of the ticket that told them that they would win five times the amount in the prize box if their tickets revealed a Money Bag symbol.<sup>38</sup> As GTECH's corporate representative acknowledged, the instructions on the ticket are "very important ...because they tell a player what symbols he has to get or she has to get on the ticket in order to win a prize."<sup>39</sup>

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<sup>38</sup> Ex. 9 (Plaintiffs' Fourth Amended Petition), ¶ 79.

<sup>39</sup> Ex. 2 (Lapinski Deposition) at 8:16-18.



**E. THE RULES IN THE TEXAS REGISTER DO NOT CONCLUSIVELY NEGATE PLAINTIFFS' JUSTIFIABLE RELIANCE ON THE TICKET'S INSTRUCTIONS.**

**1. *The Cited Rule Relates to the Game's Design, Not the Determination of Winning Tickets***

GTECH asserts that Section 2.2(V) of the rules in the Texas Register for the Fun 5's game conclusively negates Plaintiffs' justifiable reliance. GTECH claims that Section 2.2 explains how to win the game. However, Section 2.2 is entitled "Programmed Game Parameters." See Defense Ex. A-4, at TLC006910. It discusses how the game is to be designed. See *id.* But how a game is designed is different than how the game is won. Section 2.2(V) does not explain how a player wins Game 5.

**2. *The Rules for Determining Prize Winners Use the Same Language as the Instructions on the Ticket.***

A different section of the rules in the Texas Register discusses how a player wins the game. Section 2.0, entitled "Determination of Prize Winners," explains that "[i]f a player reveals a 'MONEY BAG Play Symbol in the 5X BOX, the player wins 5 times that PRIZE.'" Defense Ex. A-4, at TLC006909. Importantly, this language is nearly identical to the instructions on the ticket, which state, "Reveal a Money Bag '💰' symbol in the 5x BOX, win 5 times that PRIZE."<sup>40</sup>

Therefore, even if Plaintiffs had read the rules in the Texas Register before they purchased their tickets, they would not have learned anything more than what was stated in the instructions on the ticket about how to play and win the game. "Programmed Game Parameters" are not "rules" for playing the game. And players should not have to read and understand them, and then determine

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<sup>40</sup> Ex. 1 (Dale Bowersock Deposition Exhibit 98, GTECH-000184-205), at GTECH-000187.

if they are inconsistent with the ticket's instructions and the rules listed in the "Determination of Prize Winners" section of the Texas Register.

**3. *The Rules Do Not Say that a Tic-Tac-Toe is Required to Win the Game.***

Even if Section 2.2(V) could be construed as explaining how a player wins the game, it does not conclusively negate Plaintiffs' justifiable reliance. GTECH repeatedly informs this Court that Section 2.2(V) states that a tic-tac-toe combination is required to win Game 5.<sup>41</sup> But that is not true. Section 2.2(V) simply states that "[w]inning combinations will have only one occurrence of three (3) '5' Play Symbols in any row, column, or diagonal." Defense Ex. A-4, at TLC006910. In other words, no winning ticket will have more than one Tic-Tac-Toe combination. Contrary to GTECH's assertions, Section 2.2(V) *does not state* that revealing a tic-tac-toe combination is the only way to win. And it *does not state* that some tickets with the Money Bag symbol are non-winning tickets.

Moreover, Section 2.2(V) speaks only to the first sentence of the instructions, which represents the first way to win the game. It does not discuss the second sentence of the instructions, which represents that the game can also be won by revealing a Money Bag symbol.

Therefore, even if Plaintiffs could have been reasonably expected to have found and studied the rules in the Texas Register prior to purchasing their tickets, they reasonably could have interpreted the instructions the way they did. This is especially true since the instructions in the "Determination of the Prize Winner" section are essentially identical to those on the game ticket. GTECH has not demonstrated as a matter of law that "it is extremely unlikely that there is actual

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<sup>41</sup> Motion at 8 ("The Rules state no player can win a prize without a Tic-Tac-Toe.") ("The Rules Require a Tic-Tac-Toe to Win."); Motion at 9 ("The Rules state there are no winning tickets that do not include a Tic-Tac-Toe."); Motion at 12 ("[T]he binding Rules state the only way to win is to get Tic-Tac-Toe."); Motion at 14 ("The TLC's Fun 5's Rules state the only way a player can win is to get a Tic-Tac-Toe.").

reliance on [Plaintiffs'] part.” See *Grant Thornton*, 314 S.W.3d at 923; *Glenny*, 405 S.W.3d at 318.<sup>42</sup>

#### **4. GTECH’s Case Law Does Not Support its Argument.**

GTECH cites *Stewart v. Texas Lottery Com’n*, 975 S.W.2d 732, 735-36 (Tex. App.—Corpus Christi 1998, no pet.), as support for its position that Plaintiffs are charged with knowledge of the rules for the game in the Texas Register. Motion at 7. However, that case is not binding, and its holding that “all persons are presumed to know the law” does not mean that Plaintiffs were required to interpret the rules the way that GTECH does.

Additionally, *Stewart* is factually distinguishable. The appeal in that case concerned the trial court’s grant of summary judgment on the plaintiff’s breach of contract claim. *Id.* at 735, 737. The plaintiff had sued the TLC and a ticket vendor for the vendor’s failure to issue a ticket with her requested numbers. *Id.* at 734. The court of appeals held that the vendor had no duty to review and verify the lottery ticket before selling it to the plaintiff, and no duty to inform the plaintiff that she needed to check the ticket before purchasing it. *Id.* at 736-37. Unlike the plaintiff in *Stewart*,

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<sup>42</sup> See also *O’Brien v. Daboval*, 388 S.W.3d 826, 843 (Tex. App.—Houston [1st Dist.] 2012, no pet.) (plaintiff justifiably relied on defendant’s false representations about defendant’s finances, and financial statement provided by defendant that referenced the existence of other documents did not raise a red flag negating reliance); *Estate of Stegall*, 02-17-00410-CV, 2019 WL 6205244, at \*16 (Tex. App.—Fort Worth Nov. 21, 2019, no pet.) (when selling law firm to defendants, the fact the sale documents did not contain a continued employment agreement of plaintiff, coupled with plaintiff’s knowledge that the parties had not contemplated an oral employment agreement, did not raise red flags negating reliance on defendant’s representations of continued employment); *Jacked Up*, 854 F. 3d at 797 (addition of a change-of-control termination provision to the licensing agreement between plaintiff and defendant did not raise a red flag negating plaintiff’s reliance on defendant’s representations that it was not actively planning to sell its beverage department, and would not sell the department without including items subject to the licensing agreement).

Plaintiffs allege claims based on their review of the tickets and their reliance on the ticket's instructions.<sup>43</sup>

Justifiable reliance is a question of fact. *JPMorgan*, 546 S.W.3d at 654; *Jacked Up*, 854 F.3d at 811. The rules in the Texas Register do not conclusively negate Plaintiffs' reliance on the ticket's instructions that state that players would win five times the amount in the prize box if their tickets revealed a Money Bag symbol.

**F. PLAINTIFFS DO NOT READ THE SECOND SENTENCE OF THE INSTRUCTIONS IN ISOLATION, AND PLAINTIFFS' INTERPRETATION OF "THAT PRIZE" DOES NOT CONTRADICT THE RULES IN THE TEXAS REGISTER.**

GTECH contends that Plaintiffs cherry-pick the second sentence of the instruction and ignore the first sentence. Motion at 12. Not so. The instructions represent there are two ways to win the game. GTECH—the expert in the field of drafting lottery tickets—could have written the instructions in a way that made clear that the game was intended to be a multiplier game and that revealing a Tic-Tac-Toe was required to win. The instructions could have stated, “reveal a Tic-Tac-Toe to win a prize *and* reveal a Money Bag symbol to win five times that prize.” They did not.

Indeed, the Supreme Court recognized GTECH's discretion in creating the language of the instructions:

GTECH was contractually obligated to design the tickets, and it submitted working papers to the Commission that included game specifications and instructions. The Commission did not tell GTECH how to write the instructions. The Commission did instruct GTECH to include the multiplier money-bag symbol on some non-winning tickets, and *GTECH changed the final working papers accordingly*. The Commission then approved those final working papers. *Both before and after making the changes requested by the Commission, GTECH had discretion regarding the conduct at issue: choosing the wording of the game instructions.*

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<sup>43</sup> See Ex. 9 (Plaintiffs' Fourth Amended Petition).

The Commission did not specify the manner in which that task was to be performed; it only approved GTECH's proposed instructions. *GTECH points to nothing in the contract, the statute, or the evidence that left GTECH without discretion to propose complete and non-misleading instructions.*

*Nettles v. GTECH Corp.*, 606 S.W.3d 726, 736-37 (Tex. 2020) (emphasis added).

Other scratch off games offered by the Texas Lottery that are intended to be multiplier games clearly identify themselves as such.<sup>44</sup> For instance, the instructions for the Texas Lottery Game “Gold Bar Bonanza” explain how to multiply the prize that was already won by playing the game on the ticket.<sup>45</sup> An example of that ticket is below.



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The multiplier instructions for that game state, “Reveal a 2X, 5X, or 10X symbol in the BONUS AREA *and multiply your total winnings* by that amount.”<sup>47</sup> The word “BONUS” indicates a way to increase the amount of a prize that was already won.<sup>48</sup> And the words “multiply” and “total

<sup>44</sup> See, e.g., Ex. 11, (Gold Bar Bonanza Ticket, Whyte Deposition Ex. 50).

<sup>45</sup> See, e.g., Ex. 11, (Gold Bar Bonanza Ticket, Whyte Deposition Ex. 50).

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> See *id.*

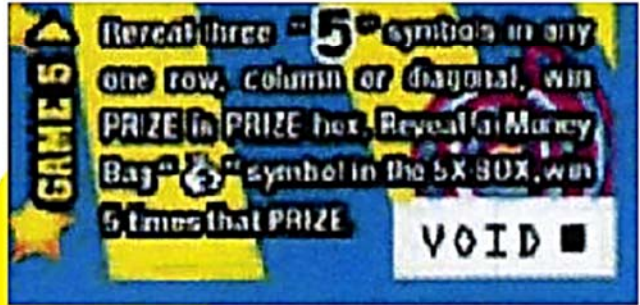
winnings” explain that the prize already won is multiplied by the number in the Bonus Area.<sup>49</sup> Unlike these instructions, the instructions for Game 5 do not contain any similar language indicating it was intended to be a multiplier game.

GTECH contends that Plaintiffs’ interpretation of the words “that prize,” as used in the instructions, contradicts the rules in the Texas Register. Motion at 10, 12. It misrepresents to this Court that the “Rules state a player’s eligibility to win ‘5 times that PRIZE’ was conditional on having won ‘that PRIZE’ by revealing three ‘5’ symbols...(i.e., tic-tac-toe).” Motion at 10. But as demonstrated *supra IV.E.* (pp. 12-15), the rules say nothing of the sort.

The relevant question is, “what is meant by the phrase, ‘that PRIZE’”? The answer is simple, and it comes from the first sentence of the instructions. Using the grammar rule of the last antecedent, the phrase, “that PRIZE” may reasonably be construed as meaning “the prize in the prize box.”

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<sup>49</sup> *See id.*




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Testimony by Plaintiffs' linguistics expert, Dr. Ronald Butters,<sup>51</sup> supports Plaintiffs' interpretation:

Ordinary reasonable speakers of contemporary American English would conclude from examining GAME 5 of the Texas Lottery Commission (TLC)'s 2014 "Fun 5's" scratch-to-play game card that the purchasers had won a prize that the undisclosed parameters of the game may not have been designed to award. If a game player scratches off the box labeled "5X BOX" and finds a Money Bag "\$" symbol and then scratches off the "PRIZE" box, this will cause the game player to understand that he or she has won a prize that is five times the amount exposed by

<sup>50</sup> *Id.*

<sup>51</sup> Dr. Butters is a linguistics professor in the English Department and the Linguistic Program at Duke University, who served as Chairman, the Director of Undergraduate Studies, and Director of First-Year Writing. Ex. 10 (Affidavit of Dr. Ronald Butters,) at 1-2.

scratching off the “PRIZE” box. The relevant language of the GAME 5 card is the independent sentence, “Reveal a Money Bag “” symbol in the 5X BOX, win 5 times that PRIZE.”

...

[T]he fact that the instructions are framed as two separate sentences indicates to readers that the two parts of the game are independent; that is, the player has two chances to win. Readers will not infer that an if-then relationship exists between them merely because two sentences are in collocation one after another.

Moreover, the understanding that GAME 5 of the “Fun 5’s” is a two-ways-to-win game is reinforced for players because three of the other four games are two-ways-to-win games...[B]y adding clarifying language to the second sentence, e.g., the words “bonus,” “multiplier,” or “the PRIZE won” (instead of the allegedly ambiguous “that PRIZE”), the language of GAME 5 could easily have been written to accurately reflect the parameters of the game. With respect to this latter point, speakers will not understand “that PRIZE” to refer to ‘a prize that has been won in the tic-tac-toe first part of the game’, but rather ‘the prize that is revealed under the “PRIZE” box’. The word *that* is a deictic pronoun; the default referent for a deictic pronoun in ordinary speaker understanding is the nearest and least complicated antecedent. In this case, the nearest and most uncomplicated antecedent is “PRIZE in the PRIZE box.” The idea ‘prize that you would have won if you had won the tic-tac-toe portion of the game’ is not the nearest antecedent, and it is far too complicated and cognitively obscure to act as a reasonable antecedent.<sup>52</sup>

Thus, the phrase, “that PRIZE,” could reasonably be construed by a player using due diligence to mean “the Prize in the Prize Box.”

**G. THE COMMISSION’S EXPLANATION OF THE INSTRUCTIONS AFTER PLAINTIFFS COMPLAINED IS IRRELEVANT TO THEIR JUSTIFIABLE RELIANCE.**

GTECH argues that Plaintiffs’ reliance is negated by the TLC’s letters to several Plaintiffs explaining why those Plaintiffs’ tickets are not winning tickets. Motion at 2, 8, 14 (citing Defense Ex. C). Not so. Although the letters explain that a tic-tac-toe is required to win the game, that disclosure came after Plaintiffs purchased their tickets and played the game in reliance on the game’s instructions.

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<sup>52</sup> *Id.* at 1-2.



The TLC's letters state, "Unless you reveal three 5's in any one row, column, or diagonal in game 5, the validation system will not recognize the ticket as a winning ticket."<sup>53</sup> These letters mark the first disclosure to Plaintiffs that they needed to reveal a tic-tac-toe to win the game. However, this disclosure was not made to Plaintiffs before they purchased their tickets. Neither the instructions nor the rules explain that revealing a tic-tac-toe is required to win Game 5. And there is no evidence that any Plaintiff saw any of these letters prior to purchasing their tickets. Instead, the evidence reveals that the letters originated only after Plaintiffs complained to the TLC that their tickets would not validate.<sup>54</sup> Thus, the letters do not conclusively negate Plaintiffs' justifiable reliance on the instructions.

#### **H. GTECH'S REMAINING ARGUMENTS LACK MERIT.**

##### ***1. Plaintiffs' Description of the Game in Pleadings is Immaterial.***

GTECH asserts that Plaintiffs' justifiable reliance is belied by their description of Game 5 in previous pleadings as "a tic-tac-toe style game." Motion at 8-9. Not so. Only after purchasing their tickets and attempting to validate them as winning tickets did Plaintiffs learn of GTECH's intention to require a tic-tac-toe to win the game. *E.g., Defense Exhibit C.* Plaintiffs do not allege breach-of-contract claims, and their claims are not based on whether or not the ticket is a tic-tac-toe or multiplier game. Rather, their claims arise from GTECH's representation that there were two ways to win the game when there were not. GTECH falsely represented that players would win five times the amount in the prize box if their tickets revealed a Money Bag symbol. Plaintiffs justifiably relied on this representation, and suffered damages as a result.

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<sup>53</sup> *E.g.,* Defense Ex. C, at 6 (TLC006041).

<sup>54</sup> *See generally* Defense Ex. C.

**2. Plaintiffs do Not Dispute that they are Bound by the Rules.**

GTECH argues that Plaintiffs' interpretation of the instructions renders TEX. GOV'T CODE §466.252 meaningless.<sup>55</sup> Motion at 13-14. But Plaintiffs do not dispute that they are bound by the commission's rules. As demonstrated *supra IV.H.1.* (p. 20), Plaintiffs are not arguing that their tickets are winning tickets.<sup>56</sup> Rather, Plaintiffs claim that the ticket's instructions falsely represented that they could win Game 5 by revealing a money bag symbol. And as demonstrated *supra IV.E.3.* (p. 13), the Rules do not state that revealing a tic-tac-toe is required to win Game 5.

**3. The Rules of Contractual Interpretation are Not Applicable.**

Citing *Seagull Energy E & P, Inc. v. Eland Energy, Inc.*, 207 S.W.3d 342, 345 (Tex. 2006), GTECH argues that the Court should invoke rules of contractual interpretation and "harmonize" the two sentences that form Game 5's instructions with each other, and also with the Rules in the Texas Register. Motion at 14-15. However, Plaintiffs allege fraud-based claims, not contractual claims. And the issue before this Court is one of fact—Plaintiffs' justifiable reliance on the ticket's instructions.

Further, contractual interpretation is a question of law only where the contract is unambiguous. *See Seagull Energy*, 207 S.W.3d at 345. Here, the contract is ambiguous.<sup>57</sup> A player using due diligence could reasonably construe Game 5's instructions as offering two different ways to win the game.

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<sup>55</sup> "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." §466.252(a).

<sup>56</sup> "The player also acknowledges that the determination of whether the player is a valid winner is subject to: (1) the commission's rules and claims procedures, including those developed for the particular lottery game involved..." §466.252(a)(1).

<sup>57</sup> In *Seagull Energy*, the Contract was unambiguous. *Seagull Energy*, 207 S.W.3d at 345 ("Neither the parties nor the lower courts have found this operating agreement ambiguous, and we likewise agree that it is not.").

Finally, Plaintiffs' interpretation of the instructions is based upon a consideration of both sentences, as well as traditional rules of grammar and sentence construction in the English language. *See supra IV.F.* (pp. 15-19). Expert testimony supports Plaintiffs' construction of the phrase "that PRIZE" as meaning "the prize in the prize box." *See id.*

With the intent that players rely on lottery ticket instructions,<sup>58</sup> and the discretion in creating those instructions,<sup>59</sup> GTECH represented that players would win a prize if their Fun 5's ticket revealed a Money Bag symbol in Game 5. GTECH has not identified any red flag that conclusively negates Plaintiffs' reliance on its representation. The rules in the Texas Register do not say that revealing a tic-tac-toe is required to win. And the TLC's letters explaining the requirement occurred only after Plaintiffs purchased their tickets, played Game 5, and complained that their tickets with Money Bag symbols would not validate. Therefore, there is a genuine issue of material fact as to Plaintiffs' justifiable reliance. *See JPMorgan*, 546 S.W.3d at 654; *Jacked Up*, 854 F.3d at 811. For these reasons, the Court should deny GTECH's Traditional Motion for Partial Summary Judgment on Common Law Fraud Claims.

## V. PLAINTIFFS' OBJECTIONS AND SPECIAL EXCEPTIONS

Pursuant to TEX. R. CIV. P. 166(a)(c), Plaintiffs object and move to strike the following summary judgment arguments and evidence:


1. In footnote 9, p.11 of its Motion, GTECH asserts that Plaintiffs' fraud claims presuppose that GTECH made a representation to Plaintiffs. Motion at 11 fn. 9. To the extent that

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<sup>58</sup> Ex. 2 (Lapinski Deposition), at 6:11-24; Ex. 8 (Lapinski Corp. Rep. Deposition), at 7:2-6.

<sup>59</sup> *Nettles*, 606 S.W.3d at 736-37.

GTECH intends to seek summary judgment on this ground, they must do so with argument and authorities by a motion, as opposed to a mere footnote. TEX. R. CIV. P. 166(a)(c).

GTECH did in fact make a representation to Plaintiffs. GTECH has an exclusive contract with the State of Texas to operate the Texas Lottery. Ex. 2 (Lapinski Deposition), at 19:21-20:1. Under the contract, GTECH receives a percent of the sales revenues from tickets sold in Texas. *Id.* at 24:24 – 25:15. GTECH drafted and sold to the TLC the “Fun 5’s” game, including, specifically, drafting the false representation that is the basis of this lawsuit: “Reveal a Money Bag ‘’ symbol in the 5x BOX, win 5 times that PRIZE.” *Id.* at 53:23-54:4; 54:11-57:11; Ex. 3 (Penelope Whyte Deposition Exhibit 26, GTECH-000017-38), at GTECH-000020; Ex. 1 (Dale Bowersock Deposition Exhibit 98, GTECH-000184-205), at GTECH-000188.

2. In Paragraph 13, p. 4 of its Motion, GTECH asserts that “Plaintiffs cannot establish at least two essential elements of their common law fraud claim – a false representation and justifiable reliance.” Motion at 4. GTECH has not moved for a no-evidence summary judgment. It filed a traditional motion for summary judgment, and under that standard, it is GTECH’s burden to conclusively negate those elements, which they have not done. *See Fernandez*, 315 S.W.3d at 508. The burden to raise a fact issue shifts to the non-movant only after the movant has established that it is entitled to summary judgment. *Steel*, 997 S.W.2d at 222-23. Plaintiffs refer the Court to their arguments *supra*, IV.D.-E. (pp. 10-15)

3. GTECH refers to an Exhibit A-5 on p. 2 of its Motion. But does not attach an Exhibit A-5. TEX. R. CIV. P. 166(a)(c) (“[A]ny supporting affidavits shall be filed and served at least twenty-one days before the time specified for the hearing.”).

4. GTECH does not cite any evidence for the pictures “Winner” and “Not Winner” on p. 10 of its Motion, and those pictures are not found in the summary judgment evidence.

## VI. PRAYER

For the foregoing reasons, Plaintiffs pray that this Court deny GTECH's Traditional Motion for Partial Summary Judgment on Common Law Fraud Claims.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument has been forwarded to all counsel in accordance with the Texas Rules of Civil Procedure on this the 30th day of December, 2021.

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