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03-23-00205-CV
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THIRD COURT OF APPEALS
AUSTIN, TEXAS
4/6/2023 9:50 AM
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CLERK

NO. _____

IN THE COURT OF APPEALS
FOR THE THIRD DISTRICT OF TEXAS
AT AUSTIN

In re:
GTECH CORPORATION,

Relator.

On Petition for Writ of Mandamus
To the 201st District Court, Travis County, Texas
James Steele, et al., v. GTECH Corporation,
No. D-1-GN-14-005114
The Honorable Amy Clark Meachum, Presiding

PETITION FOR WRIT OF MANDAMUS

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STATEMENT OF THE CASE

Nature of the Case:

This is a fraud case arising from the sale of lottery tickets by the Texas Lottery Commission ("TLC") in a game known as Fun 5's. MR.000008-000012. Relator, GTECH, is a contractor of the Texas Lottery and functions on behalf of and at the direction of the TLC. MR.000313. Plaintiffs below allege that they won prize amounts up to $500,000 per ticket in the Fun 5's scratch-off ticket game, despite published game rules that precluded them from winning any prize on the subject tickets because Plaintiffs did not first reveal a tic-tac-toe on their tickets. MR.000407. Fraud and fraud by nondisclosure are Plaintiffs' only remaining claims because this Court previously held that Plaintiffs' claims for aiding and abetting fraud, tortious interference, and conspiracy were barred by sovereign immunity. *See GTECH Corp. v. Steele*, 549 S.W.3d 768, 804 (Tex. App.—Austin 2018), aff'd, 606 S.W.3d 726, 739 (Tex. 2020).

In 2015, Plaintiffs sought discovery from GTECH, to which GTECH responded. MR.000471-000474. After responding, GTECH gave notice that it had inadvertently produced two documents that were covered by the work-product privilege, and requested return of those documents, a request with which Plaintiffs purportedly complied. *Id*. More than seven (7) years later, Plaintiffs filed a motion for *in camera* inspection and to compel production of those two documents. MR.000455-000474. The trial court held a hearing on Plaintiffs' motion and received the two documents for *in camera* review. MR.000554-000628.

On March 6, 2023, the trial court granted in part, and denied in part, Plaintiffs' motion, requiring GTECH to produce the two documents with one minor exception. MR.000553. That order is the subject of this petition for writ of mandamus.

Trial Court (Respondent):	Hon. Amy Clark Meachum, 201st District Court of Travis County, Texas.
Trial Court's Action:	On March 6, 2023, after hearing argument, the trial court entered its Order Granting in Part and Denying in Part Plaintiffs' Motion to Compel Production of Clawed-Back Documents, App. Tab A, MR.000553.

STATEMENT OF JURISDICTION

This Court has the power to grant the writ of mandamus sought in this petition under authority of article V, section 6 of the Texas Constitution, section 22.221(b) of the Texas Government Code (which states that a court of appeals "may issue all writs of mandamus, agreeable to the principles of law regulating those writs, against a . . . judge of a district or county court," and Rule 52 of the Texas Rules of Appellate Procedure.

ISSUES PRESENTED

1. Did the trial court abuse its discretion by ordering production of the clawed-back documents when the documents meet the legal standards for protection as work-product created in anticipation of litigation?
2. Did the trial court abuse its discretion by too narrowly construing the work-product privilege, restricting its analysis to core work-product as opposed to the non-core work-product alleged by GTECH?

INTRODUCTION

This case has a long history in the court below, in this Court, and in the Texas Supreme Court. Filed originally in 2014, Plaintiffs' theories for recovery have shifted over time. This Court, in a previous appeal, ruled that Plaintiffs' claims for aiding and abetting fraud, tortious interference, and conspiracy were barred by sovereign immunity, a ruling affirmed by the Texas Supreme Court. *See GTECH Corp. v. Steele*, 549 S.W.3d 768, 804 (Tex. App.—Austin 2018), *aff'd*, 606 S.W.3d 726, 739 (Tex. 2020). As a result of this ruling, Plaintiffs' only remaining claims are for common-law fraud and fraud-by-nondisclosure.

Not surprisingly, given the case's long history, discovery between the parties began many years ago. This mandamus proceeding relates to a discovery dispute that arose in 2015, but which was not brought before the trial court until December 2022. Just before the underlying lawsuit was filed, articles appeared in certain Texas publications noting potential issues with the Texas Lottery's Fun 5's scratch-off game. One of those articles specifically referenced the primary named plaintiff, noted he had consulted a lawyer, and also noted that the lawyer believed Plaintiffs had a good cause of action. A GTECH executive received that article, forwarded it by email (with comments) to other GTECH executives, and within a matter of weeks, engaged counsel for what was sure to be a massive lawsuit.

When GTECH originally responded to certain of Plaintiffs' discovery requests, it inadvertently produced two email strings between GTECH executives that followed the publication of these articles. After realizing the error in production, GTECH advised opposing counsel, requested return of the two documents, and added the documents to its privilege log. Plaintiffs purportedly returned the documents as required by the applicable rules of civil procedure, and sought no hearing before the trial court until more than seven (7) years later.

In December 2022, Plaintiffs filed their motion for *in camera* inspection and to compel production of the documents. Following responsive briefing, the trial court held a hearing on the motion on February 15, 2023, and received the two documents for *in camera* inspection. At a subsequent hearing on March 3, 2023, the trial court indicated its intention to order production of the two documents, with the exception of one portion of one of the email strings. The trial court entered its order compelling production of the two documents, as redacted, on March 6, 2023.

The trial court abused its discretion in ordering production of these two documents. Both email strings were originated immediately following the publication of news articles identifying the very real threat of litigation. The trial court received evidence from GTECH that its executives on the email strings anticipated litigation as a result of the articles made the subject of these communications. The communications, and GTECH's evidence, satisfied all

required elements for protection of the documents under the Texas Supreme Court's *Brotherton* test. Because these documents constitute GTECH's protected work-product, this Court should issue the requested writ of mandamus to the trial court to correct its abuse of discretion.

STATEMENT OF FACTS

A. GTECH and the Texas Lottery Commission

This case concerns a Texas Lottery scratch-off ticket called "Fun 5's." The Texas Lottery is owned and operated by the Texas Lottery Commission (TLC), a state agency. MR.000061. By statute, the TLC and its executive director "have broad authority and shall exercise strict control and close supervision over all [Texas Lottery] games conducted in this state." TEX. GOV'T CODE § 466.014(a); *see also* TEX. GOV'T CODE § 467.101(a) (similar).

Pursuant to its statutory mandate, the TLC entered into services contracts with GTECH and two other contractors. MR.000063. GTECH's contracts call for it to submit "draft working papers" to the TLC containing specifications for proposed scratch-off tickets, including the design, artwork, prize structures, and rules of the game. MR.000063; MR.000071. GTECH's role in the process is limited to submitting proposed specifications; it has no authority to select the final specifications. GTECH's role is limited by its contracts with the TLC, which require GTECH to ensure that all scratch-off tickets "shall in all respects conform to, and

function in accordance with, Texas Lottery-approved specifications and designs." MR.000313. GTECH's role is further limited by the Government Code, which mandates that the executive director of the TLC, rather than a contractor like GTECH, "shall prescribe the form of tickets." TEX. GOV'T CODE § 466.251(a).

B. The "Fun 5's" ticket

On March 13, 2013, GTECH proposed to the TLC a prototype of what became the "Fun 5's" scratch-off ticket. MR.000036. Similar tickets had been sold by other state lotteries without consumer complaints, and GTECH's proposal was based on a "Fun 5's" scratch-off ticket that the Nebraska Lottery had sold. *Id*. The TLC expressed interest in the "Fun 5's" concept and GTECH sent an initial set of draft working papers to the TLC. *Id*. The proposed Texas Lottery ticket contained five games, including a tic-tac-toe game. The tic-tac-toe game contained a 3-by-3 grid of symbols, a "PRIZE" box, and a box labeled "5X BOX," which is known as a "multiplier." MR.000036-000037; MR.000083. If the player scratched off the grid and revealed three Dollar Bill symbols in any one row, column, or diagonal line, the player would win the prize revealed by scratching off the "PRIZE" box. MR.000036; MR.000083-000085. Then, if the player who won that prize scratched off the multiplier "5X BOX" and revealed a "5" symbol, the player would win five times that prize won via tic-tac-toe. MR.000036-000037; MR.000083-000085.

As initially proposed by GTECH to the TLC, the "Fun 5's" ticket looked like this:

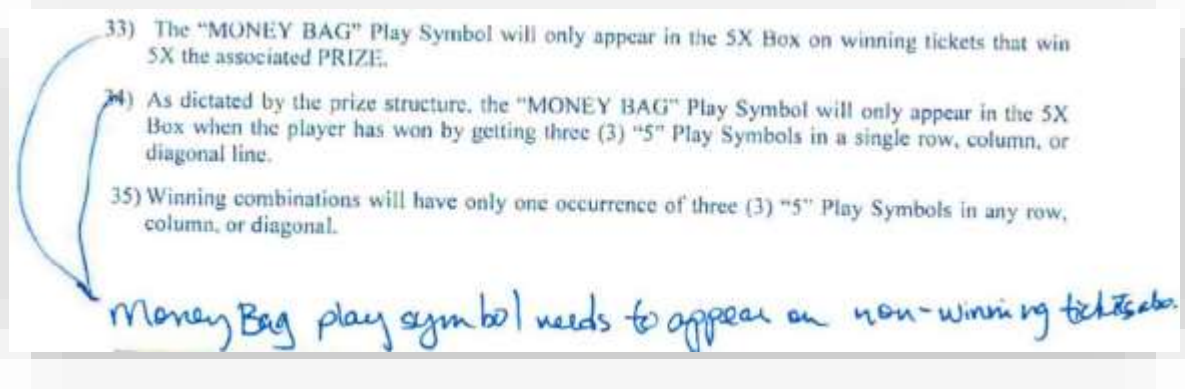
MR.000084.

Of particular significance, GTECH's draft working papers initially specified that "[t]he '5' Play Symbol will only appear in the [multiplier "5X BOX"] when the player has won by getting three (3) "BILL" Play Symbols in a single row, column, or diagonal." MR.000037; MR.000098. In other words, some of the tickets in which

players won the tic-tac-toe game would contain a symbol in the multiplier "5X Box," while none of the tickets in which players did not win the tic-tac-toe game would contain a symbol in the multiplier "5X Box." MR.000098.

The TLC decided to include a tic-tac-toe game on its "Fun 5's" tickets, but decided that the game would differ from GTECH's proposal in several ways. MR.000064; MR.000102-000122. First, the TLC directed GTECH to change the "5" symbol to a "money bag" symbol and change the "dollar bill" symbol to a "5" symbol. MR.000037; MR.000113. The TLC also revised the rules of the tic-tac-toe game. MR.000104.

Critically, the TLC further modified GTECH's proposal by directing GTECH to include a "money bag" symbol in the multiplier "5X BOX" on tickets in which players did not win the tic-tac-toe game, as well as tickets in which they did. MR.000037; MR.000122. Specifically, the TLC instructed GTECH that the "Money Bag play symbol needs to appear on non-winning tickets also":


33) The "MONEY BAG" Play Symbol will only appear in the 5X Box on winning tickets that win 5X the associated PRIZE.

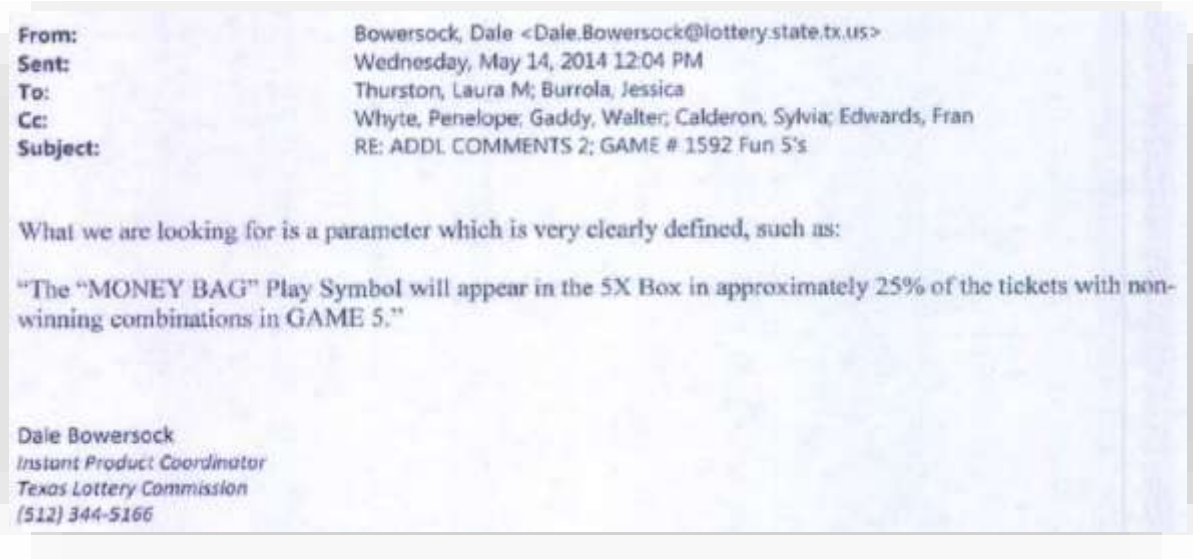
34) As dictated by the prize structure, the "MONEY BAG" Play Symbol will only appear in the 5X Box when the player has won by getting three (3) "5" Play Symbols in a single row, column, or diagonal line.

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

Money Bag play symbol needs to appear on non-winning tickets also.

Id. (handwritten notations made by the TLC).

The TLC directed this change as a security measure to prevent "microscratching," which occurs when an individual (often an employee of a retail ticket outlet) uses a pin to reveal a microscopic portion of the play area of a scratch-off ticket. MR.000030; MR.000037. This technique reveals whether the ticket is a winner before it is sold. *Id*. The TLC explained to GTECH that if the "money bag" symbol appeared only on tickets in which players won the tic-tac-toe game, that might make the game an easy target for microscratching, as only the multiplier "5X BOX" would need to be microscratched to determine whether the ticket was a winning ticket. MR.000048. Two days later, the TLC followed up and directed GTECH to print a "money bag" symbol on approximately 25% of the non-winning tickets:



From: Bowersock, Dale <Dale.Bowersock@lottery.state.tx.us>
Sent: Wednesday, May 14, 2014 12:04 PM
To: Thurston, Laura M; Burrola, Jessica
Cc: Whyte, Penelope; Gaddy, Walter; Calderon, Sylvia; Edwards, Fran
Subject: RE: ADDL COMMENTS 2; GAME # 1592 Fun 5's

What we are looking for is a parameter which is very clearly defined, such as:

"The "MONEY BAG" Play Symbol will appear in the 5X Box in approximately 25% of the tickets with non-winning combinations in GAME 5."

Dale Bowersock
Instant Product Coordinator
Texas Lottery Commission
(512) 344-5166

MR.000048-000051; MR.000059.

GTECH followed the TLC's directions and prepared a set of final working papers for the TLC's approval. As illustrated in the final working papers, the "Fun 5's" ticket and tic-tac-toe game looked like this:

MR.000128. In accordance with the changes made by the TLC, a "money bag" symbol appeared on approximately 25% of the non-winning tickets, and the rules of the tic-tac-toe game read: "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." *Id*. On May 15, 2014, the TLC approved the final working papers for the "Fun 5's" ticket. MR.000124.

On June 20, 2014, the TLC prepared the official rules and specifications for the "Fun 5's" ticket and published them in the Texas Register. *See* Texas Lottery Comm'n, Instant Game Number 1592 "Fun 5's," 39 TEX. REG. 4799 (2014).

C. The lead up to the litigation

On September 2, 2014, the TLC, through its retailers, began selling "Fun 5's" tickets to the public. MR.000062. On September 17, 2014, at 1:30 a.m., the most senior GTECH official in Texas, Joseph Lapinski, received notice of an online article from the Dallas Morning News stating that Plaintiff James Steele and others had retained counsel to pursue a lawsuit related to the Fun 5's scratch-off game. MR.000502. Upon reading the article and its multiple express references to potential litigation, Mr. Lapinski advised other GTECH executives of this litigation threat by email on September 17, the same day he received the article. MR.000503. This communication string ("Communication 1") represents the first of the two clawed-back documents improperly ordered produced by the trial court.[1]

[1] Both Communications were tendered to the trial court *in camera*, and the trial court retained the Communications, marking them as Court Exhibit 1. Relator has made arrangements with the court reporter to have these *in camera* documents delivered to this Court upon the filing of this petition for writ of mandamus. These Communications will be cited to herein as the *in camera* documents.

Likewise, on or about September 23, 2014, the Houston Chronicle ran a story entitled "Angry scratch-off players want $10 million from Texas Lottery." MR.000503. That same day, Mr. Lapinski again forwarded the press article to other GTECH executives, with commentary. *Id.* This communication string ("Communication 2") (collectively, the "Communications") represents the second of the two clawed-back documents improperly ordered produced by the trial court.

Subsequently, many other individuals who bought "Fun 5's" tickets complained that the tickets were misleading and sued. A lawsuit was filed in Dallas,[2] and, on December 9, 2014, less than three months after the first press article, the underlying litigation was filed in Austin. MR.000001-000018. The crux of Plaintiffs' complaint is that ticket purchasers were misled to believe that the presence of a "money bag" symbol in the multiplier "5X Box" meant that purchasers were entitled to five times the amount of money in the "PRIZE" box, even though the purchasers did not have a tic-tac-toe. *Id.*

D. Plaintiffs' discovery requests and GTECH's claw-back of produced documents

On September 2, 2015, in response to certain of Plaintiffs' discovery requests, GTECH produced numerous documents. MR.000471-000474. Subsequently, on September 18, 2015, counsel for GTECH snapped-back Communication 2, advising

[2] *Dawn Nettles v. GTECH Corp*., No. DC-14-14838 (160th Judicial District Court, Dallas County, Tex.).

Plaintiffs' counsel that the document was privileged and had been inadvertently produced. MR.000471-000472. On September 21, 2015, counsel for GTECH similarly snapped-back Communication 1. MR.000473-000474. Plaintiffs' counsel purportedly complied with the requests and returned both Communications.

E. The trial court considers Plaintiffs' long-delayed motion to compel production

On December 29, 2022, more than seven (7) years after GTECH clawed-back the Communications, Plaintiffs first sought a hearing on these issues before the trial court by filing their Motion to Compel *In Camera* Review of Clawed-Back Documents. MR.000455-000474. Notably, despite GTECH's clear identification of "anticipation of litigation" (a/k/a work-product privilege) as the basis for withholding the Communications, Plaintiffs' argument focused on the absence of any attorney on the Communications as well as the lack of any indication that preparation for litigation was the primary motivating factor for the Communications. *Id*. As will be discussed *infra*, neither element is required for protection of work-product created in anticipation of litigation.

On February 8, 2023, in anticipation of a scheduled hearing on February 15, 2023, GTECH filed its Response to Plaintiffs' Motion to Compel. MR.000486-000522. In its Response, GTECH carefully outlined the chain of events leading up to the Communications, and attached affidavit testimony from Mr. Lapinski, the author of the Communications, detailing why the articles he was forwarding in the

Communications caused him to anticipate litigation against GTECH. *Id*. GTECH also detailed the actually applicable *Brotherton* legal standard for assessing work-product privilege and how the Communications met that privilege. *Id*. On February 15, 2023, less than two hours before the scheduled hearing, Plaintiffs' filed their reply.[3] MR.000532-000552.

F. The trial court grants Plaintiffs' Motion to Compel the Communications (with limited redaction)

Following a lengthy hearing on February 15 (MR.000554-000628), the trial court, at a separate hearing on March 3, 2023, announced its intention to grant in part, and deny in part, Plaintiffs' Motion to Compel. MR.000633. Without explanation of her analysis of the applicability of work-product privilege to the Communications, Judge Meachum directed that she would order redacted one portion of Communication 2 (which appears five emails up in the email chain) (apparently because it appeared to reference legal advice), but would otherwise order the remainder of the Communications produced. *Id*. She entered the Order to that effect on March 6, 2023, (MR.000553), and this petition for writ of mandamus followed.

[3] The version of Plaintiffs' Reply included in the sworn mandamus record includes certain redactions resulting from the trial court's sealing order to which it is attached, intended to protect the substance of the Communications from release to the public during the pendency of this mandamus action.

STANDARD OF REVIEW

Mandamus will issue "to correct a clear abuse of discretion or a violation of a duty imposed by law when there is no adequate remedy by appeal." *Cantu v. Longoria*, 878 S.W.2d 131, 132 (Tex. 1994) (per curiam) (citing *Walker v. Packer*, 827 S.W.2d 833, 839–40 (Tex. 1992)). Work-product that is created in anticipation of litigation but that does not reflect an attorney's thought processes is generally exempt from discovery unless the party seeking the discovery proves a need-hardship exception. *In re National Lloyds*, 532 S.W.3d 794, 803-04 (Tex. 2017); Tex. R. Civ. P. 192.5(b)(2). Mandamus is the appropriate remedy when a trial court orders production of privileged documents, because the disclosing party has no adequate remedy by appeal if privileged documents are disclosed. *In re Christus Santa Rosa Health Sys.*, 492 S.W.3d 276, 286-87 (Tex. 2016).

SUMMARY OF THE ARGUMENT

Protection of privileged information from discovery is an essential tenet of Texas law. Courts regularly restrict discovery of information protected by the attorney-client and work-product privileges, amongst others. So important are these protections that they are in many instances, including this one, built into the rules of civil procedure under which Texas cases are litigated.

Here, GTECH, after inadvertent production, snapped-back the Communications at issue, adding them to its privilege log as being protected work-

product made in anticipation of litigation. After Plaintiffs challenged the applicability of the work-product privilege, GTECH came forward with evidence satisfying the Texas Supreme Court standard for applying the work-product privilege and supporting the conclusion that the two Communications, each instigated immediately following press articles referencing the possibility of litigation, are in fact GTECH's work-product. In reply, Plaintiffs failed to make any showing of substantial need or undue hardship that would justify disclosure of the privileged Communications.

Despite GTECH's proof of privilege, the trial court entered an Order requiring disclosure of the majority of the Communications. In doing so, the trial court abused its discretion by misapplying established Texas law governing the work-product privilege and by too narrowly construing the applicability of the privilege. This Court should grant the requested petition and issue a writ of mandamus to the trial court to correct this abuse of discretion.

ARGUMENT

The trial court abused its discretion by ordering the production of the two clawed-back documents (Communications 1 and 2) that were protected by the work-product privilege. The trial court's abuse of its discretion appears to have occurred, in part, because the trial court too narrowly construed the work-product privilege so as to apply it only to communications reflecting the attorney thought process.

Because GTECH has no adequate remedy by appeal from these abuses of discretion, mandamus is warranted.

I. The trial court abused its discretion by ordering the production of Communications protected by the work-product privilege.

On September 17, 2014, at 1:30 a.m., the most senior GTECH official in Texas, Joseph Lapinski, received notice of an online article from the Dallas Morning News stating that Plaintiff James Steele and others had retained counsel to pursue a lawsuit related to the Fun 5's scratch-off game. MR.000502; MR.000505-000508. Upon reading the article and its multiple express references to potential litigation, Mr. Lapinski advised other GTECH executives of this litigation threat by email on the same day, September 17. MR.000503.

Likewise, on or about September 23, 2014, the Houston Chronicle ran a story entitled "Angry scratch-off players want $10 million from Texas Lottery." MR.000503; MR.000510-000522. That same day, Mr. Lapinski again forwarded the press article to other GTECH executives, with commentary. MR.000503.

These emails amongst GTECH executives are protected by the work-product doctrine under Texas Rule of Civil Procedure 192.5 and the authorities interpreting it. In fact, Rule 192.5(a)(2) expressly defines protected work-product to include communications "made in anticipation of litigation . . . among a party's representatives, including the party's . . . employees." Tex. R. Civ. P. 195.2(a)(2). Rule 192.5 also expressly protects "material prepared or mental impressions

developed in anticipation of litigation . . . by . . . a party's representatives, including the party's . . . employees." Tex. R. Civ. P. 195.2(a)(1). The Communications satisfy these standards because they are GTECH employees' communications (reflecting their mental impressions) made in anticipation of litigation, and thus, are protected work-product.

A. The documents ordered produced by the trial court are protected by the work-product privilege.

1. The Communications are work-product under Rule 192.5.

Rule 192.5(a) defines "[w]ork product" to include:

> (1) material prepared or mental impressions developed in anticipation of litigation . . . by . . . a party's representatives, ***including the party's . . . employees*** . . .; or (2) a communication made in anticipation of litigation . . . among a party's representatives, ***including the party's . . . employees***.

Tex. R. Civ. P. 192.5(a) (emphasis added). Rule 192.5(b) broadly protects work-product from discovery. *See* Tex. R. Civ. P. 192.5(b)(1)-(2). The Communications ordered produced by the trial court fall precisely within Rule 192.5's protection.

First, sub-part (a)(2) of Rule 192.5 specifically encompasses the individuals involved in the Communications, which occurred only among GTECH executives. *See* Tex. R. Civ. P. 192.5(a)(2); *see also in camera* documents. Thus, Rule 192.5(a)(2) unquestionably applies and supports protection.

Second, as required by Rule 192.5, the Communications were made in anticipation of litigation. The Communications occurred in September 2014, after

the release of two news articles (collectively, the "Articles") referencing (1) public concerns related to the Fun 5's game, (2) Fun 5's players considering "legal action" and (3) Plaintiff James Steele contacting a lawyer. MR.000505-000522. GTECH anticipated litigation on the morning of September 17, 2014—at the latest—from the moment Mr. Lapinski received notice of the first Article dated September 16, 2014. MR.000503. The Communications discuss the Fun 5's game in light of the positions raised in the Articles, less than three months before James Steele filed this lawsuit in December 2014. *See in camera* documents. From the date and time GTECH received notice of the first Article, September 17, 2014 at 1:30 a.m., GTECH validly anticipated litigation. MR.000503. Therefore, applying the plain language of Rule 195.2, the Communications—both of which were made after GTECH's receipt of the September 16, 2014 Article—were prepared in anticipation of litigation, constitute protected work-product, and were improperly ordered produced by the trial court.

2. The Communications are work-product under the *Brotherton* two-part test.

In addition to falling within the express language of Rule 192.5, the Communications also satisfy the Texas Supreme Court's *Brotherton* two-part test for determining whether documents were prepared in anticipation of litigation. As will be discussed *infra*, *National Tank Co. v. Brotherton*, 851 S.W.2d 193, 195 (Tex. 1993) provides the governing standard for determining whether communications

were made in anticipation of litigation. The first part of the test is objective: whether "a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue[.]" *Brotherton*, 851 S.W.2d at 195. A "substantial chance of litigation . . . means that litigation is more than merely an abstract possibility or unwarranted fear." *Id*. at 204 (internal citation omitted). The second part of the test is subjective: "the party resisting discovery [must have] believed in good faith that there was a substantial chance that litigation would ensue and conducted the investigation for the purpose of preparing for such litigation." *Id*. at 195. The Communications meet both parts of the *Brotherton* standard.

(a) GTECH satisfies the *Brotherton* objective standard.

Regarding the objective standard, and as explained *supra*, both Communications discuss the Fun 5's game in light of positions raised in the Articles. *See in camera* documents. Both Articles reference lawyer contact by a lottery player, Plaintiff James Steele. MR.000505-000522. One of the Articles even mentions a specific Houston litigation attorney representing a group of lottery players. MR.000511-000512. Also, as detailed in the Affidavit of Joseph Lapinski (presented as evidence to the trial court), as a result of these Articles, GTECH retained counsel shortly thereafter—which further shows the reasonableness of GTECH's expectation of litigation. MR.000503.

All that is required to meet *Brotherton*'s objective standard is that a reasonable person would have concluded under all the circumstances that more than an abstract possibility or unwarranted fear of litigation existed. *See Brotherton*, 851 S.W.2d at 195, 204. Taken together, the above facts more than satisfy this standard. The Articles explicitly reference attorney representation of lottery players, with one of the Articles stating the Steeles' attorney's belief that the Steeles "have a good case." MR.000505-000522. The ensuing Communications served no purpose other than to discuss the likely claim against GTECH. *See in camera* documents; MR.000503. They were not generated in the normal course of business. MR.000503. Mr. Lapinski did not initiate the Communications to comply with any reporting or disclosure requirement. *Id.* The Communications were not a regular part of Mr. Lapinski's job duties. *Id.* The Communications were generated solely to discuss the likely claim against GTECH. *Id.*

Thus, considering the totality of the circumstances at the time of the Communications, a reasonable person would have concluded that there was a substantial probability of litigation. GTECH satisfied *Brotherton*'s objective test for establishing work-product privilege over the Communications.

(b) GTECH satisfies the *Brotherton* subjective standard.

Regarding the subjective part of the *Brotherton* test, there can be no doubt that GTECH believed there was a substantial chance of litigation related to Fun 5's when

Mr. Lapinski read the Dallas Morning News article on the morning of September 17, 2014. As detailed in his affidavit, Mr. Lapinski found the article alarming because it reported that "dozens of angry and disappointed" Fun 5's lottery players had contacted Dawn Nettles (known as the self-proclaimed "Texas Lottery Watchdog"), who stated the players "have a strong case . . . ." MR.000502. Ms. Nettles operates a blog called The Lotto Report that reports exclusively on Texas Lottery games. *Id.* Ms. Nettles told the Dallas Morning News that "[p]eople everywhere are very upset." *Id.*; MR.00505-00508. The September 16, 2014 Article also referenced that Ms. Nettles "sent a complaint letter to the Travis County District Attorney complaining of deceptive business practices." *Id.*

Mr. Lapinski believed the September 16th article, received by him on September 17 at 1:30 a.m., "contained multiple statements suggesting a substantial probability of litigation against GTECH." MR.000502. In addition to describing Ms. Nettles' opinion that the Fun 5's players "have a strong case" and reporting that she had filed a complaint with the Travis County District Attorney, the September 16th Article specifically referenced that "[two plaintiffs in this lawsuit,] James and Geraldine Steele had 'contacted a lawyer who thinks they have a good case.'" *Id.* According to Mr. Lapinski, "[f]rom the moment I read the September 16th article on September 17, 2014, I anticipated that litigation against GTECH related to the Fun 5's scratch-off game was probable." MR.000503. Therefore, he forwarded the

September 16, 2014 Article to three other senior GTECH executives via email on September 17, 2014. *Id*. Mr. Lapinski forwarded the September 16th Article because he "believed that there was a substantial chance of litigation against GTECH. The news article made clear that litigation against GTECH was more than an abstract possibility." *Id*.

Likewise, Communication 2 also satisfies *Brotherton*'s subjective standard. As Mr. Lapinski explained, the second Article "also referenced a specific Houston litigation attorney who represented multiple lottery players, and who represents plaintiffs in this litigation." MR.000503. Mr. Lapinski also confirmed that the second Article "confirmed what I already believed in light of the article I read on September 17, 2014: there was a substantial chance of litigation against GTECH related to the Fun 5's scratch-off game." *Id*.

Thus, at the time of the Communications, GTECH believed there was a substantial chance of litigation, and the Communications reflect GTECH's initial communications to prepare for that litigation. In similar factual situations, multiple other courts have found similar communications to be protected by the work-product privilege. *In re Energy XXI, Gulf Coast, Inc.*, No. 01-10-00371-CV, 2010 Tex. App. LEXIS 10117, at *16-21 (Tex. App.—Houston [1st Dist.] Dec. 23, 2010, no pet.) (internal communications—without lawyers—were protected work product); *In re Mid-Century Ins. Co.*, 549 S.W.3d 730, 735 (Tex. App.—Waco 2017, no pet.) (citing

Rule 192.5) (communications were protected work product). This Court should reach the same conclusion, protect GTECH's communications made in anticipation of litigation, and issue the requested writ of mandamus to correct the trial court's abuse of discretion.

3. *In re Energy XXI* is on-point and protects the Communications as work-product.

In *In re Energy XXI*, Justice Terry Jennings, writing for the Houston First Court of Appeals, held that internal communications between a company's executives (and without lawyers) after the company anticipated litigation were protected work-product. *In re Energy XXI*, 2010 Tex. App. LEXIS 10117, at *16-21. The reasoning of that case dictates the same result in the present matter.

In *Energy XXI*, Lockton Companies, LLC ("Lockton") served as Energy XXI's insurance broker. Energy XXI, an energy exploration company, obtained from Lockton well-control insurance, which included coverage for well blowout costs. *Id*. at *2. On January 20, 2007, Energy XXI representatives met with Lockton to discuss whether Energy XXI's well-control insurance limits should be increased from $25 million to cover a Louisiana well. *Id*. at *2-3. The parties disagreed whether, at that meeting, Energy XXI requested that Lockton increase coverage to $50 million on the Louisiana well. *Id*. at *3. Energy XXI claimed it did. Lockton alleged that Energy XXI said it would provide its answer at a later date, but never did. *Id*. Months later, the Louisiana well experienced a blowout, which triggered

Energy XXI's well-control insurance, which led to a lawsuit between Energy XXI and Lockton. *Id*.

Energy XXI sued Lockton claiming Energy XXI instructed Lockton to increase the well-control insurance to $50 million and Lockton failed to secure such coverage. *Id*. During the lawsuit, Lockton moved to compel Energy XXI to produce certain internal communications Energy XXI contended were privileged work-product. *Id*. at *3-4. Energy XXI contended that its internal communications after 3:13 pm on October 11, 2007, constituted protected work-product because, at that time, Energy XXI received an email from Lockton denying Energy XXI's claim that it has requested an increase in well-control insurance to $50 million, and thus, Energy XXI anticipated litigation at that time. *Id*. at *6-7. Energy XXI argued that after 3:13 pm, "there was more than an abstract possibility that there would be litigation" between Lockton and Energy XXI from that point forward. *Id*. at *7. While the trial court disagreed with Energy XXI and ordered production of the internal communications, the appellate court granted Energy XXI's petition for writ of mandamus finding the trial court abused its discretion by ordering production of the internal communications. *See id*. at *19, *23.

After reviewing, among other things, the affidavit evidence submitted, Rule 192.5, and the *Brotherton* two-part test, the appellate court held that as of 3:13 pm on October 11, 2007, Energy XXI and Lockton had taken clear, adverse positions as

to whether Lockton had been instructed to secure the additional coverage, and thus, Energy XXI both objectively and subjectively believed there was a substantial chance that litigation would ensue between Lockton and Energy XXI. *Id*. at *18-19. The court specifically noted that exclusion of lawyers from the internal communications did not overweigh the internal communications themselves, which established that the communications were made in anticipation of litigation. *Id*. at *20, n.6.

In re Energy XXI is on point and should guide resolution of this mandamus proceeding. Just as Energy XXI's executives were put on notice of potential litigation upon reading Lockton's 3:13 pm email, here, Mr. Lapinski, a GTECH executive, was put on notice of potential litigation concerning the Fun 5's game upon reading the September 16, 2014 Article. The subsequent Article only heightened that anticipation of litigation. Just as Energy XXI's subsequent communications constituted protected work-product, so must GTECH's internal communications amongst GTECH executives following receipt of the Articles.

B. Rule 192.5 and the *Brotherton* two-part test are the correct—and only—governing standards for determining protection under the work-product privilege.

1. The correct standard for applying work-product protection is the Texas Supreme Court's *Brotherton* test.

Plaintiffs correctly cited Rule 192.5 for the definition of the work-product privilege in their Motion to Compel. MR.00457. However, Plaintiffs then relied on

Flores v. Fourth Court of Appeals, 777 S.W.2d 38, 41 (Tex. 1989) for an outdated two-part test to determine whether documents are prepared in anticipation of litigation, including an obsolete requirement that "the outward manifestations indicate litigation is imminent." *Id.* But *Flores* was directly modified by the Texas Supreme Court's opinion in *Brotherton*. 851 S.W.2d at 195 ("We accordingly modify *Flores* to the extent that it accords protection only to investigations conducted when litigation is imminent."). Thus, *Brotherton* vitiated any requirement of "imminent" litigation for material to be protected because it was prepared in anticipation of litigation. Plaintiffs' originally articulated standard has not been the law for over 29 years. Plaintiffs' initial failure to cite—and willingness to ignore—such important precedent is telling.

The *Brotherton* Court explained the correct standard:

> [I]nvestigative documents are prepared in "anticipation of litigation" for purposes of Tex. R. Civ. P. 166b(3) if a) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue; and b) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and conducted the investigation for the purpose of preparing for such litigation.

Id. Notably, though *Brotherton* construed former Texas Rule of Civil Procedure 166b, Texas courts have continued citing *Brotherton* for the test to determine whether materials are developed in "anticipation of litigation," and thus, are protected "work product" under the newer Rule 192.5. *E.g., In re Energy XXI*, 2010

Tex. App. LEXIS 10117, at *7-8. *Brotherton*, in conjunction with Rule 192.5, is the controlling standard and protects GTECH's Communications as work-product. *See supra*.

And even when Plaintiffs finally acknowledged the proper standard in their Reply, their arguments fared no better. Indeed, Plaintiffs wove throughout their argument the incorrect premise that the Communications were not made to an attorney, and did not mention litigation. MR.000532-000552. Plaintiffs also tried attacking Mr. Lapinski's affidavit testimony by saying he could not remember the dates of the subject Articles at the time of his deposition, and by pointing out the alleged deficiencies in the words actually used by Mr. Lapinski in his Communications. MR.00536-00538. But once again, Plaintiffs' arguments miss the mark. Inclusion of an attorney is expressly *not* required for work-product protection, and the *Brotherton* test does not dictate specific words that must be used for the privilege to apply. Rather, *Brotherton* requires GTECH to meet both the objective and subjective elements of the test, hurdles GTECH easily cleared. And Plaintiffs did not even attempt to make any showing of a need-hardship exception that might overcome GTECH's work-product privilege. *In re National Lloyds*, 532 S.W.3d 794, 803-04 (Tex. 2017); Tex. R. Civ. P. 192.5(b)(2). The Communications are protected work-product, and mandamus should issue to correct the trial court's abuse of discretion in ordering the production of privileged documents.

2. Texas law after *Brotherton* makes clear that *Brotherton*'s "primary motivating purpose" suggestion no longer applies

Plaintiffs also originally claimed that "for the [work-product] privilege to apply, preparation for litigation must be the primary motivating purpose underlying the creation of the document." MR.000457-000458. However, when examined in context, it is clear that "primary motivating purpose" is inapplicable here because it only applies when examining ordinary business practices involving post-accident investigations.

The phrase "primary motivating purpose" originates in *Brotherton*'s consideration of whether accident reports and witness statements prepared by the operator of a manufacturing facility and the operator's insurer in connection with a post-accident investigation were privileged work product because they were prepared in anticipation of litigation. *Id*. at 195, 200-07. In a discussion of the subjective part of the test for determining whether documents are prepared in anticipation of litigation, the Court gave guidance on how courts should judge whether the subjective standard is satisfied:

> With regard to the subjective prong, the circumstances must indicate that the investigation was in fact conducted to prepare for potential litigation. The court therefore must consider the reasons that gave rise to the company's ordinary business practice. If a party routinely investigates accidents because of litigation and nonlitigation reasons, the court should determine the primary motivating purpose underlying the ordinary business practice.

Id. at 206. The Court went on to summarize the "anticipation of litigation" test without mentioning the "primary motivating purpose" phrase. *Id*. at 207. Thus, a close review of *Brotherton* itself reveals that the suggestion to "determine the primary motivating purpose" is limited to a court's analysis of ordinary business practices involving post-accident investigations.

This fact is further elucidated when considering Texas case law after *Brotherton* in conjunction with Rule 192.5, a post-*Brotherton* rule. GTECH has been unable to locate any Texas Supreme Court case (or Austin Court of Appeals case) decided after *Brotherton* that cites the phrase "primary motivating purpose." However, multiple courts have cited the *Brotherton* two-part test for assessing anticipation of litigation, and have noted that "the language of Rule 192.5 does not require that the sole or primary purpose of the material or communication be for preparing for litigation." *In re Mid-Century Ins. Co.*, 549 S.W.3d at 734 (citing Rule 192.5); *see also In re Fairway Methanol LLC*, 515 S.W.3d 480, 490 (Tex. App.—Houston [14th Dist.] 2017, no pet.) (same). Thus, case law after *Brotherton* construing Rule 192.5 makes clear that *Brotherton*'s language regarding "primary motivating purpose" is limited in actual application.

No case law cited by Plaintiffs below changes that fact. Plaintiffs relied below on *In re Maher*, 143 S.W.3d 907, 912 (Tex. App.—Fort Worth 2004, no pet.), which in turn relies on *Flores* and *Henry P. Roberts Invs. v. Kelton*, 881 S.W.2d 952, 955

(Tex. App.—Corpus Christi 1994, no writ). In *Maher*, the party seeking discovery sought mandamus after the trial court denied the party's motion to compel. *Maher*, 143 S.W.3d at 910. The appellate court held that the party resisting discovery had failed to meet its burden of proof, and therefore, the trial court abused its discretion in finding the documents privileged. *Id*. at 915. But in its analysis, the appellate court never reached the second (subjective) part of the two-step *Brotherton* test. *Id*. at 914. Thus, *Maher* cannot possibly be considered authoritative regarding the second (subjective) part of the *Brotherton* test—the only part of the *Brotherton* test that references the "purpose" of the challenged material.

Kelton is similarly inapposite. The Corpus Christi court in *Kelton* applied the *Brotherton* test in the context of whether an expert's post-accident report for an insurer was prepared in anticipation of litigation, and thus privileged work-product under former Rule 166b. *Kelton*, 881 S.W.2d at 954-55. The circumstances in *Kelton* are more similar to the specific situation envisioned by the *Brotherton* court for when a court should determine the "primary motivating purpose" in applying the *Brotherton* test. *See Brotherton*, 851 S.W.2d at 206 (discussing "primary motivating purpose" in the context of post-accident investigation). *Kelton* also construes the "anticipation of litigation" standard under the former Rule 166b, which has been at least partially replaced by Rule 192. Tex. R. Civ. P. 192, cmt. 8 ("Work product is defined for the first time, and its exceptions stated. Work product replaces [certain

specific] discovery exemptions from former Rule 166b."). Thus, *Kelton* is unpersuasive not only because it is outdated, but also due to being factually and legally distinguishable.

The result of the above analysis is straightforward: *Brotherton*'s suggestion for courts to "determine the primary motivating purpose underlying the ordinary business practice[,]" *Brotherton*, 851 S.W.2d at 206, does not apply to the facts here. This case does not involve examination of post-incident investigations or reports. The only applicable standards for determining that the Communications are protected work-product are Rule 192.5's definition of "work product," and *Brotherton*'s two-step objective and subjective test for determining whether material was prepared in anticipation of litigation. Under these standards, GTECH's Communications are protected work-product, and the trial court's Order to produce the Communications is an abuse of discretion.

II. The trial court abused its discretion by too narrowly construing the work-product privilege to apply only to communications reflecting attorney thought processes

In addition to abusing its discretion by failing to properly apply the *Brotherton* standard, the trial court also abused its discretion by too narrowly construing the work-product privilege to apply only to communications reflecting legal advice and/or attorney thought processes.

The Texas Supreme Court has specifically addressed the proper method by which courts should analyze claims of work-product under Rule 192:

> Core work product—work product that contains "the mental impressions, opinions, conclusions, or legal theories" of an attorney or an attorney's representative—is not discoverable. A trial court may order disclosure of noncore work product—defined as "[a]ny other work product" that is not core work product—only if the requesting party shows substantial need and undue hardship. In such a case, the trial court may order disclosure even if doing so "incidentally discloses by inference attorney mental processes otherwise protected [as core work product]," but "the court must—insofar as possible—protect against disclosure of the mental impressions, opinions, conclusions, or legal theories not otherwise discoverable."

In re Nat'l Lloyds Ins. Co., 532 S.W.3d 794, 803-04 (Tex. 2017) (orig. proceeding) (citations omitted) (analyzing prior version of Rule 192).

In other words, there is work-product that directly involves the thought processes of an attorney, but also work-product that does not involve an attorney's thought processes, a reality reflected by Rule 192's recognition that communications between a party and its representatives can also be protected work-product. For the latter to be discoverable, the party seeking the discovery bears the burden of establishing substantial need and undue hardship. *Id*.

During the hearing at which it announced its ruling, the trial court made the following statements:

- ". . . a decision by the defendants to claw back some documents that they are claiming to be **attorney-client privilege**." MR.000633.

(emphasis added) (note: GTECH never asserted attorney-client privilege over these documents);

- "I am granting plaintiffs their motion with regard to the majority of what they are seeking, which is two emails, but the Court has chosen to redact a portion of one of the emails that the Court has found to be **attorney-client work product**." (emphasis added). MR.000633.

In addition, as noted *supra*, when the trial court ordered production of the Communications, it also ordered that one portion of Communication 2, a 5:39 p.m. email from Tom Stanek to Stefano Monterosso and Joseph Lapinski, be redacted. *Id*. A review of the redacted portion of Communication 2 reveals that it likely reflects receipt of legal advice and potentially an attorney's thought processes. *See in camera* documents.

The trial court statements, combined with the ordered redaction, supports the conclusion that the trial court incorrectly viewed GTECH's work-product privilege claim only as an assertion of core work-product that might reveal attorney thought processes. But this view reflects a reading and application of the work-product privilege that is too narrow under applicable Texas law. As established *supra*, communications protected by the work-product privilege need not reflect an attorney's thought processes. Rather, protection flows to communications solely amongst a party and its representatives. *See* Tex. R. Civ. P. 192.5. While it would

be possible for Plaintiffs to have obtained access to such documents, they would have had to make a showing of substantial need and undue hardship to be so entitled. Here, the record is devoid of even an attempt by Plaintiffs to make such a showing. As a result, Plaintiffs are not entitled to production of the non-core work-product represented by the Communications. The trial court too narrowly construed and applied Texas law governing the work-product privilege. In doing so, the trial court abused its discretion in ordering production of the Communications. For this reason as well, this Court should issue a writ of mandamus to correct the trial court's abuse of discretion and protect GTECH's privileged Communications.

III. GTECH has no adequate remedy on appeal.

Mandamus relief is appropriate because GTECH lacks an adequate remedy by appeal from the trial court's Order. *See In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 135–36 (Tex. 2004) (orig. proceeding). There is no adequate remedy by appeal, for example, where the trial court's ruling will permanently impair or destroy a party's substantive and procedural rights. *See Perry v. Del Rio*, 66 S.W.3d 239, 257 (Tex. 2001) (orig. proceeding). Thus, "[m]andamus relief is available when the trial court compels production beyond the permissible bounds of discovery." *In re Weekley Homes, L.P.*, 295 S.W.3d 309, 322 (Tex. 2009) (orig. proceeding). "Appeal is not an adequate remedy when the appellate court would not

be able to cure the trial court's discovery error." *In re Houstonian Campus, L.L.C.*, 312 S.W.3d 178, 183 (Tex. App.—Houston [14th Dist.] 2010, orig. proceeding).

When the trial court orders the disclosure of privileged information, mandamus is appropriate. *See Walker v. Packer*, 827 S.W.2d 833, 843 (Tex. 1992). Specifically, mandamus is the appropriate remedy when a trial court orders production of privileged documents, because the disclosing party has no adequate remedy by appeal if privileged documents are disclosed. *In re Christus Santa Rosa Health Sys.*, 492 S.W.3d 276, 286-87 (Tex. 2016). Because the trial court's Order requires GTECH to produce documents protected by the work-product privilege, mandamus is warranted here.

PRAYER

For these reasons, Relator, GTECH Corporation, prays that the Court issue a writ of mandamus vacating the trial court's March 6, 2023 Order Granting in Part and Denying in Part Plaintiffs' Motion to Compel. Relator prays for any other relief to which it may be entitled.

Respectfully submitted,

REED SMITH LLP

By: */s/ R. Alan York*

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GTECH Corporation

VERIFICATION

THE STATE OF TEXAS §
§
COUNTY OF HARRIS §

Before me, the undersigned authority, on this day personally appeared R. Alan York, one of the counsel for GTECH Corporation in the above cause, known to me to be the person whose name is subscribed to the foregoing instrument, and stated that the factual statements in this petition for a writ of mandamus are supported by competent evidence included in the Relator's Record in Support of Petition for Writ of Mandamus.

R. Alan York

SWORN TO AND SUBSCRIBED before me this 3rd day of April 2023.

NOTARY PUBLIC, STATE OF TEXAS

My Commission Expires

REGINA L SHEFFIELD
Notary ID #2299140
My Commission Expires
November 25, 2023

CERTIFICATE OF COMPLIANCE

This petition for writ of mandamus complies with the type-volume limitations of Rule 9.4 as it contains 7,250 words, excluding the parts of the brief exempted by Rule 9.4(i)(l).

/s/ R. Alan York
R. Alan York

CERTIFICATE OF SERVICE

I certify that a true and correct copy of this Petition for Writ of Mandamus and the Relator's Record were served on all parties by means listed below on April 6, 2023, through the Court's e-file system as well as indicated below:

The Honorable Amy Clark Meachum
Travis County Courthouse
1700 Guadalupe, 9th Floor
Austin, Texas 78701
(*by EFile*)

Respondent

/s/ R. Alan York
R. Alan York

APPENDIX

TAB A

CAUSE NO. D-1-GN-14-005114

JAMES STEELE, et al., *Plaintiffs,*	§	**IN THE DISTRICT COURT OF**
vs.	§	**TRAVIS COUNTY, TEXAS**
GTECH CORPORATION, *Defendant.*	§	**201st JUDICIAL DISTRICT**

ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS' MOTION TO COMPEL PRODUCTION OF CLAWED-BACK DOCUMENTS

Before the Court is Plaintiffs' motion for *in camera* inspection of clawed-back documents GTECH-0000972 and GTECH-0000981, and motion to compel production of the same. Upon consideration of the motion, the response, any reply, the evidence on file with the Court, an *in camera* inspection of the documents in question, and the arguments of counsel, the Court finds that the motion should be GRANTED IN PART and DENIED IN PART.

It is therefore ORDERED that GTECH's assertions of privilege over GTECH-0000972 and GTECH-0000981 are OVERRULED, with exception of a redacted email on GTECH-0000981, which the Court does find to be privileged work product.

It is further ORDERED that GTECH must immediately produce copies of GTECH-0000972 and GTECH-0000981 to Plaintiffs and Intervenors for production with the redaction identified. The Court orders this production to be "Attorney's Eyes Only," subject to further order of the Court.

IT IS SO ORDERED.

Signed: March 6, 2023

AMY CLARK MEACHUM
Judge Presiding

Filed on 3/6/2023 1:58:33 PM Travis County District Clerk, Velva L. Price