

CAUSE NO. DC-14-14838

DAWN NETTLES, § IN THE DISTRICT COURT OF
Plaintiff §
§
VS. § DALLAS COUNTY, TEXAS
§
GTECH CORPORATION, §
Defendant § 160TH JUDICIAL DISTRICT

**GTECH CORPORATION'S
FIRST AMENDED PLEA TO THE JURISDICTION**

Defendant GTECH Corporation (“GTECH”) files this First Amended Plea to the Jurisdiction pursuant to Rule 85 of the TEXAS RULES OF CIVIL PROCEDURE.¹

**I
SUMMARY**

The Texas Lottery Commission (“TLC”), pursuant to statute, designs, owns and sells a large variety of scratch-off tickets through its 17,000 retailers across the state. Plaintiff Nettles has sued GTECH asserting claims based on her personal interpretation of the instructions in several Fun 5’s scratch-off tickets (the “Instruction”) that she purchased from the TLC.

Plaintiff admits that the TLC, *not* GTECH, chose the wording of the Instruction. It is undisputed (and a matter of statutory law) that the TLC, *not* GTECH, controlled the content, distribution, and sale of all Fun 5’s tickets. Pursuant to a contract between the TLC and GTECH, GTECH is the operator of the Texas Lottery on behalf of and at the direction of the TLC.

Plaintiff’s lawsuit should be dismissed because Plaintiff’s claims are based solely on alleged conduct attributable to the TLC – *not* GTECH – so they are barred by derivative governmental immunity. Based upon GTECH’s adherence to the directions given to it by the

¹ In response to Plaintiff’s Original Petition, GTECH filed its Plea to the Jurisdiction, Special Exceptions, Motion to Dismiss and Answer on February 2, 2015. Given that Plaintiff’s Second Amended Petition differs substantially from her Original Petition and her First Amended Petition, GTECH files this First Amended Plea to the Jurisdiction and, separately, its Special Exceptions and Answer.

TLC, Plaintiff has sued GTECH and the TLC for fraud, fraud by non-disclosure and has sued GTECH for aiding and abetting the fraud alleged to have been committed by the TLC. Plaintiff also seeks Declaratory Relief which will be the subject of a separate Plea to the Jurisdiction.

II ARGUMENT AND AUTHORITIES

1. Plaintiff's lawsuit is premised on alleged conduct – the publishing of the Instruction – that was directed and controlled by an entity with governmental immunity, *i.e.* the TLC. Indeed, Plaintiff Nettles has judicially admitted that the TLC instructed GTECH to include the specific wording and money bag symbol that she claims was misleading and fraudulent. Plaintiff's lawsuit is thus precluded by derivative governmental immunity.

A. Plaintiff's lawsuit should be dismissed because her claims are based on alleged conduct attributable to an entity with governmental immunity.

2. Private companies are shielded by governmental immunity to the extent their actions were directed by a governmental entity enjoying such immunity. *See K.D.F. v. Rex*, 878 S.W.2d 589, 597 (Tex. 1994); *see also Brown & Gay Engineering, Inc. v. Olivares*, 461 S.W.3d 117, 124-127 (Tex. 2015). *Yearsley v. W.A. Ross Construction Co.*, 309 U.S. 18 (1940) (contractor directed by federal government to construct several dikes was immune from claims resulting from damage caused by dikes and not their manner of construction).

3. Plaintiff's live petition leaves no room for doubt that the challenged conduct in this case was directed *by the TLC*. It was not GTECH's discretionary conduct. Specifically, Plaintiff judicially admits that:

On May 12, 2014, *the TLC*, requested that GTECH change the parameters of Game 5 to provide that the winning Money Bag "\$" symbol in the 5X Box would be printed on both winning tickets and non-winning tickets.²

² Pl's 2nd Am. Pet. at ¶ 20 (emphasis supplied).

Under the parameters for the game originally proposed by GTECH to the TLC, one hundred percent of the tickets that revealed a Money Bag “\$” symbol would be programmed into GTECH’s computers as “winning” tickets.”³

At the request of the TLC, GTECH changed the game’s parameters and programmed its computers so that a significant percentage of the tickets that had not won the tic-tac-toe game would nonetheless reveal a Money Bag “\$” symbol in the 5X Box.⁴

Plaintiff Nettles’ theory is that GTECH should be held responsible for adhering to its contract with the TLC and following that government agency’s instructions. Yet, this is precisely what derivative governmental immunity is intended to prevent.

4. Plaintiff has not alleged that GTECH deviated from what the TLC required of it in any way, or did anything other than carry out the TLC’s express instructions. Her lawsuit is, therefore, barred.

5. Plaintiff is attempting to challenge the TLC’s decisions by suing a contractor that merely carried them out. If Plaintiff Nettles were to prevail on this theory, governmental contractors would be placed between the Scylla of breaching their contract with the governmental entity that hired them and the Charybdis of potentially unlimited liability from disgruntled third parties.⁵ The losers would ultimately be the citizens of Texas, who would have to pay more for governmental services.

6. Given Plaintiff’s judicial admission that the challenged conduct at the center of this case was directed by the TLC, this Court should rule that Plaintiff’s lawsuit is barred by derivative governmental immunity and should be dismissed.

³ Pl’s 2nd Am. Pet. at ¶ 21.

⁴ Pl’s 2nd Am. Pet. at ¶ 22 (emphasis supplied).

⁵ Scylla and Charybdis is an idiom from Greek mythology which means being between two dangers, choosing either of which brings harm.

III
PRAYER

GTECH Corporation respectfully requests that the Court dismiss Plaintiff's claims, that Plaintiff take nothing by reason of this suit, as well as such further and other relief, at law or in equity, to which GTECH may be justly entitled.

Respectfully submitted,

REED SMITH LLP

/s/ Kenneth E. Broughton

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing document was served on the following counsel of record on this 16th day of October, 2015:

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