

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SUMTER COUNTY
Court of Common Pleas

Kristi F. Curtis, Circuit Judge

Case No.: 2018-CP-43-00138

Jamaine Holmes, Victoria Lewis, Melanie Baker, Christopher Shipman, Robert Weaver,
Vonetta Wilson, Francesca Worley, Brittany Johnson, Shirley Pearson, Robert Weaver,
Gostonia Pearson, Rodney Leachman, Cassandra Pugh, and Krystal Bostinto, on behalf
of themselves and all others similarly situated, ...Appellants

vs.

South Carolina Education Lottery Commission d/b/a South Carolina Education Lottery,
and Intralot, Inc., ...Respondents

RECORD ON APPEAL

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SC Court of Appeals

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STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF SUMTER

CIVIL ACTION: 2018CP4300138

Jamaine Holman, Victoria Lewis, Melanie Baker, Christopher Shipman, Robert Weaver, Vonetta Wilson, Francesca Worley, Brittany Johnson, Shirley Pearson, Robert Weaver, Gostonia Pearson, Rodney Leachman, Cassandra Pugh, and Krystal Bostinto, on behalf of themselves and all others similarly situated,

Plaintiffs,

vs.

South Carolina Education Lottery Commission d/b/a South Carolina Education Lottery, and Intralot, Inc.

Defendants.

ORDER GRANTING DEFENDANT SOUTH CAROLINA EDUCATION LOTTERY COMMISSION'S MOTION TO DISMISS

This matter comes before the Court on Defendant South Carolina Education Lottery Commission's ("SCEL" or "the Commission") Motion to Dismiss, which was heard before the undersigned on July 30, 2018. This Court issued an Order on the Motion on January 4, 2019. SCEL subsequently filed a Motion to Alter or Amend. After carefully reviewing the Motion to Alter or Amend, the pleadings, other motions, memoranda, and applicable case law, this Court GRANTS SCEL's Rule 59 Motion to Alter or Amend.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs allege that they are purchasers of "Holiday Add-A-Play" lottery tickets sold by various retailers on Christmas Day of 2017. Plaintiffs allege the game was shut down on the evening of December 25, 2017 after a two-hour system-wide event in which nearly every player appeared to receive a "winning" ticket. Plaintiffs further allege that the lottery players who attempted to cash in their apparently winning tickets received slips stating, "Transaction not allowed." Plaintiffs subsequently filed this lawsuit alleging causes of action against SCEL for

unjust enrichment, breach of contract, breach of implied contract, promissory estoppel, and violations of the Unfair Trade Practices Act.

SCEL moved to dismiss the suit, arguing in part that Plaintiffs had failed to exhaust their administrative remedies prior to filing suit. Plaintiffs' counsel subsequently wrote the Commission on behalf of Plaintiffs to initiate an administrative grievance or review regarding the Add-A-Play incident. A few days later, the Commission's Board received and adopted a report and findings prepared by a forensic consulting firm—Gaming Laboratories International—that SCEL had engaged to investigate the Add-A-Play incident. The report concluded that the tickets issued during the incident were issued or produced in error. As a result, the Commission determined it could not pay those tickets and informed each Plaintiff in writing of that decision. The Commission further advised Plaintiffs they could elect (i) to receive a refund for the ticket price, or (ii) to appeal the Board's decision to the Administrative Law Court as provided by law, or (iii) to submit any evidence not considered by the forensic consulting firm to the Commission for additional review.

ANALYSIS

SCEL argues the suit should be dismissed because Plaintiffs have not alleged they have exhausted their administrative remedies. The Court agrees. Under the regulations promulgated by the SCEL, the Executive Director of the Commission may deny awarding a prize to a claimant if the ticket is "printed or produced in error." S.C. Code of Regs. § 44-70(E). The Executive Director's decisions and judgments with respect to the determination of a winning ticket or any dispute arising from the payment or awarding of prizes are final, subject to an appeal to the Commission. S.C. Code of Regs. § 44-70(F).

Section 59-150-300 of the South Carolina Education Lottery Act sets forth the procedure for review of a decision by the SCEL Board of Commissioners. Section (A) states, a "lottery game ticket holder aggrieved by an action of the board may appeal that decision to the Administrative Law Judge

Division.” The ALJ Division may reverse the decision of the board only if the appellant proves the decision is “in violation of constitutional or statutory provisions, is in excess of the statutory authority of the board, is made upon unlawful procedure, is affected by an error of law, is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record, or is arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.” S.C. Code Ann. § 59-150-300(B).

The Court recognizes that the general rule is that administrative remedies must be exhausted absent circumstances supporting an exception to the general rule. *Hyde v. South Carolina Dept. of Mental Health*, 314 S.C. 207, 209, 442 S.E.2d 582, 583 (1994). Plaintiffs argue that the Education Lottery statute permits, but does not mandate, an exclusive administrative remedy. While Plaintiffs are correct that the statute uses permissive rather than mandatory language, the Supreme Court has previously required exhaustion where there is an adequate administrative remedy, and where the statute did not expressly require it. *Id.* (“We find the trial judge abused his discretion in finding as a matter of law that Hyde did not have to exhaust administrative remedies simply because the Whistleblower Statute does not expressly require it.”).

Plaintiffs further argue in the alternative that they fall within the “futility” exception to the exhaustion requirement. South Carolina recognizes exceptions to the exhaustion of administrative remedies requirement. A recognized exception exists when a party demonstrates that pursuit of administrative remedies would be a vain or futile act. *Brown v. James*, 389 S.C. 41, 697 S.E.2d 604 (2010). “Futility, however, must be demonstrated by a showing comparable to the administrative agency taking a ‘hard and fast position that makes an adverse ruling a certainty.’” *Id.* at 54, 697 S.E.2d at 611. The burden of proving futility is on the party seeking to avoid exhausting his administrative remedies. *See Stanton v. Town of Pawley’s Island*, 309 S.C. 126, 128, 420 S.E.2d 502, 503 (1993) (“*Stanton must show that as a matter of law, he was not required to exhaust administrative remedies.*

...”) (emphasis added); *S.C. Self Storage Ass’n v. City of Forest Acres*, No. 2007-CP-40-00316, 2010 WL 9499364, at *8 (S.C. Ct. Comm. Pl., Hon. J. Michelle Childs, April 13, 2010) (“The Court finds Plaintiffs cannot claim that an exhaustion of administrative remedies would have been in vain or futile because Plaintiffs have not met *their burden* of demonstrating that the procedures set forth in the challenged Ordinances would definitely result in an adverse ruling.”) (emphasis added).

When Plaintiffs initially filed this suit, SCEL had not yet made a ruling as to whether it would honor the tickets. On May 30, 2018, however, SCEL issued a press release indicating the SCEL Board of Commissioners “voted to reimburse the purchase price paid by each Holiday Cash Add-A-Play ticketholder bought on December 25, 2017 on or after 5:51 p.m. because these tickets were produced or issued in error.” The fact that the Commission declined to pay the prizes, however, does not show the exhaustion of the entire administrative process would be futile. This is because the efficacy or futility of a multi-level administrative process must be viewed *as a whole*. Not until a complainant has either completed each level of the review process or has proven that *each level*—including, if available, an appeal to the Administrative Law Court—would be futile had he exhausted his administrative remedies or excused his failure to do so. *See Steele v. Benjamin*, 362 S.C. 66, 606 S.E.2d 499 (Ct. App. 2004) (affirming the trial court’s dismissal of plaintiff’s suit, holding that by failing to appeal the agency’s decision to the ALC, the plaintiff failed to exhaust his administrative remedies); *S.C. Dept. of Health & Env. Control v. Armstrong*, 293 S.C. 209, 359 S.E.2d 302 (Ct. App. 1987) (reversing a trial judge who had “determined that he could pass upon the merits of Armstrong’s entitlement to a permit without requiring Armstrong to *complete* the administrative process”) (emphasis added); *Booker v. S.C. Dept. of Corrections*, No. 2011-CP-10-08774, 2013 WL 10533559 (S.C. Ct. of Comm. Pleas, Hon. R. Markley Dennis, Jr., March 1, 2013) (noting that if an aggrieved party is unsatisfied with the outcome of an internal agency grievance process, “the final administrative remedy available to him is a review by the South Carolina Administrative

Law Court,” and he “has not exhausted all administrative remedies unless and until he has completed Step 1, Step 2, and has received an administrative review and decision by the ALC.”); *cf.* S.C. Code Ann. § 1-23-380 (“A party who has exhausted *all* administrative remedies available within the agency and who is aggrieved by a *final* decision in a contested case is entitled to judicial review . . .”) (emphasis added).¹

Furthermore, the statutory requirement that aggrieved ticket holders exhaust the entirety of the administrative review process applies equally to individual claimants and putative classes of claimants.² The relevant statutes contain no class exception to the exhaustion requirement. *See* S.C. Code Ann. § 59-150-300; *see also id.* at §§ 59-150-60, -70(D), -90(A), -230(A), and -240(C). Where, as here, a “statute’s meaning is clear on its face, . . . this court has no right to impose another meaning.” *Peake v. S.C. Dept. of Motor Vehicles*, 375 S.C. 589, 597–98, 654 S.E.2d 284, 289 (Ct. App. 2007).

In sum, the process by which a ticket holder may challenge the Commission’s actions or decisions is a multi-step administrative process including both intra-agency review *and* an appeal to

¹ Courts of other jurisdictions agree that a person aggrieved by an administrative action must either complete each step of the administrative process or must show that *each step* of the process would be futile. *See Johnpoll v. Thornburgh*, 898 F.2d 849, 850 (2d Cir. 1990) (noting that “animosity by *one* case unit manager is not sufficient to show futility of the *entire* administrative process”) (emphasis added); *Metz v. Veterinary Examining Bd.*, 741 N.W.2d 244, 250–51 (Wis. Ct. App. 2007) (“The exhaustion doctrine is typically applied when a party seeks judicial intervention before completing *all* the steps in the administrative process. [] The general rule in this situation is that a party must complete *all* administrative proceedings before coming into court.”) (citations omitted; emphasis added).

² No South Carolina case law supports the idea that a plaintiff may avoid a statutory exhaustion requirement by simply alleging a putative class action. Other courts have held exhaustion was required before a class of plaintiffs could bring an action for damages. *See e.g. Lopez v. Civil Serv. Comm’n*, 232 Cal. App.3d 307, 312 (Cal. Ct. App.—1st Div. 1991) (“The mere bringing of a class action is not ipso facto an exception to the exhaustion requirement. . . . *Morton v. Superior Court*, 9 Cal. App.3d 977 dispels any notion that class actions are *per se* exempt from the exhaustion requirement.”); *Bautista v. Cnty. of Yolo*, No. C039340, 2003 WL 22969353, at *4 (Cal. Ct. App.—3d Dist. 2003) (affirming dismissal of suit and noting that “*Rose* is of no help to plaintiffs” because “*Rose* arose in the context of a writ challenge to a PERS ruling, not a complaint for damages”).

the Administrative Law Court. Plaintiffs have not presented any argument or information to suggest that the Administrative Law Court cannot or will not analyze the matter impartially and fairly. Plaintiffs have not completed the steps within the administrative process, nor have they supported their burden to prove the entirety of the administrative review process would be futile.

CONCLUSION

Plaintiffs have neither exhausted their administrative remedies nor excused their failure to do so. Accordingly, the Court concludes the lawsuit must be dismissed. Because dismissal of the suit is warranted for the foregoing reason, this Court need not rule on the other bases for dismissal asserted by the Commission. This Court **GRANTS** SCEL's Motion to Alter or Amend the prior Order and **GRANTS** SCEL's Motion to Dismiss.

IT IS SO ORDERED.

Hon. Kristi F. Curtis, Circuit Court Judge

February ____, 2019
Sumter, South Carolina



Sumter Common Pleas

Case Caption: Shardaë Davis , plaintiff, et al VS South Carolina Education Lottery
Commission , defendant, et al
Case Number: 2018CP4300138
Type: Order/Dismissal

So Ordered

s/ Kristi F. Curtis, Circuit Court Judge, No. 2762

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STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF SUMTER

CIVIL ACTION: 2018CP4300138

Jamaine Holman, Victoria Lewis, Melanie Baker, Christopher Shipman, Robert Weaver, Vonetta Wilson, Francesca Worley, Brittany Johnson, Shirley Pearson, Robert Weaver, Gostonia Pearson, Rodney Leachman, Cassandra Pugh, and Krystal Bostinto, on behalf of themselves and all others similarly situated,

Plaintiffs,

vs.

South Carolina Education Lottery
Commission d/b/a South Carolina
Education Lottery, and Intralot, Inc.

Defendants.

ORDER GRANTING DEFENDANT INTRALOT'S MOTION TO DISMISS

This matter comes before the Court on Defendant South Carolina Education Lottery Commission's ("SCEL" or "the Commission") Motion to Dismiss, which was heard before the undersigned on July 30, 2018. This Court issued an Order on the Motion on January 4, 2019. Intralot subsequently filed a Motion to Alter or Amend. After carefully reviewing the Motion to Alter or Amend, the pleadings, other motions, memoranda, and applicable case law, this Court GRANTS Intralot's Rule 59 Motion to Alter or Amend.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs allege that they are purchasers of "Holiday Add-A-Play" lottery tickets sold by various retailers on Christmas Day of 2017. Plaintiffs allege the game was shut down on the evening of December 25, 2017 after a two-hour system-wide event in which nearly every player appeared to receive a "winning" ticket. Plaintiffs further allege that the lottery players who attempted to cash in their apparently winning tickets received slips stating, "Transaction not allowed." Plaintiffs subsequently filed this lawsuit alleging causes of action against Intralot for

unjust enrichment, breach of contract, breach of implied contract, promissory estoppel, and violations of the Unfair Trade Practices Act.

Intralot moved to dismiss the suit, arguing in part that Plaintiffs had failed to exhaust their administrative remedies prior to filing suit. Plaintiffs' counsel subsequently wrote the South Carolina Education Lottery Commission on behalf of Plaintiffs to initiate an administrative grievance or review regarding the Add-A-Play incident. A few days later, the Commission's Board received and adopted a report and findings prepared by a forensic consulting firm—Gaming Laboratories International—that SCEL had engaged to investigate the Add-A-Play incident. The report concluded that the tickets issued during the incident were issued or produced in error. As a result, the Commission determined it could not pay those tickets and informed each Plaintiff in writing of that decision. The Commission further advised Plaintiffs they could elect (i) to receive a refund for the ticket price, or (ii) to appeal the Board's decision to the Administrative Law Court as provided by law, or (iii) to submit any evidence not considered by the forensic consulting firm to the Commission for additional review.

ANALYSIS

Intralot argues the suit should be dismissed because Plaintiffs have not alleged they have exhausted their administrative remedies. The Court agrees. Under the regulations promulgated by the SCEL, the Executive Director of the Commission may deny awarding a prize to a claimant if the ticket is "printed or produced in error." S.C. Code of Regs. § 44-70(E). The Executive Director's decisions and judgments with respect to the determination of a winning ticket or any dispute arising from the payment or awarding of prizes are final, subject to an appeal to the Commission. S.C. Code of Regs. § 44-70(F).

Section 59-150-300 of the South Carolina Education Lottery Act sets forth the procedure for review of a decision by the SCEL Board of Commissioners. Section (A) states, a "lottery game ticket

holder aggrieved by an action of the board may appeal that decision to the Administrative Law Judge Division.” The ALJ Division may reverse the decision of the board only if the appellant proves the decision is “in violation of constitutional or statutory provisions, is in excess of the statutory authority of the board, is made upon unlawful procedure, is affected by an error of law, is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record, or is arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.” S.C. Code Ann. § 59-150-300(B).

The Court recognizes that the general rule is that administrative remedies must be exhausted absent circumstances supporting an exception to the general rule. *Hyde v. South Carolina Dept. of Mental Health*, 314 S.C. 207, 209, 442 S.E.2d 582, 583 (1994). Plaintiffs argue that the Education Lottery statute permits, but does not mandate, an exclusive administrative remedy. While Plaintiffs are correct that the statute uses permissive rather than mandatory language, the Supreme Court has previously required exhaustion where there is an adequate administrative remedy, and where the statute did not expressly require it. *Id.* (“We find the trial judge abused his discretion in finding as a matter of law that Hyde did not have to exhaust administrative remedies simply because the Whistleblower Statute does not expressly require it.”).

Plaintiffs further argue in the alternative that they fall within the “futility” exception to the exhaustion requirement. South Carolina recognizes exceptions to the exhaustion of administrative remedies requirement. A recognized exception exists when a party demonstrates that pursuit of administrative remedies would be a vain or futile act. *Brown v. James*, 389 S.C. 41, 697 S.E.2d 604 (2010). “Futility, however, must be demonstrated by a showing comparable to the administrative agency taking a ‘hard and fast position that makes an adverse ruling a certainty.’” *Id.* at 54, 697 S.E.2d at 611. The burden of proving futility is on the party seeking to avoid exhausting his administrative remedies. See *Stanton v. Town of Pawley’s Island*, 309 S.C. 126, 128, 420 S.E.2d 502, 503 (1993).

(“*Stanton must show* that as a matter of law, he was not required to exhaust administrative remedies . . .”) (emphasis added); *S.C. Self Storage Ass’n v. City of Forest Acres*, No. 2007-CP-40-00316, 2010 WL 9499364, at *8 (S.C. Ct. Comm. Pl., Hon. J. Michelle Childs, April 13, 2010) (“The Court finds Plaintiffs cannot claim that an exhaustion of administrative remedies would have been in vain or futile because Plaintiffs have not met *their burden* of demonstrating that the procedures set forth in the challenged Ordinances would definitely result in an adverse ruling.”) (emphasis added).

When Plaintiffs initially filed this suit, SCEL had not yet made a ruling as to whether it would honor the tickets. On May 30, 2018, however, SCEL issued a press release indicating the SCEL Board of Commissioners “voted to reimburse the purchase price paid by each Holiday Cash Add-A-Play ticketholder bought on December 25, 2017 on or after 5:51 p.m. because these tickets were produced or issued in error.” The fact that the Commission declined to pay the prizes, however, does not show the exhaustion of the entire administrative process would be futile. This is because the efficacy or futility of a multi-level administrative process must be viewed *as a whole*. Not until a complainant has either completed each level of the review process or has proven that *each level*—including, if available, an appeal to the Administrative Law Court—would be futile had he exhausted his administrative remedies or excused his failure to do so. *See Steele v. Benjamin*, 362 S.C. 66, 606 S.E.2d 499 (Ct. App. 2004) (affirming the trial court’s dismissal of plaintiff’s suit, holding that by failing to appeal the agency’s decision to the ALC, the plaintiff failed to exhaust his administrative remedies); *S.C. Dept. of Health & Env. Control v. Armstrong*, 293 S.C. 209, 359 S.E.2d 302 (Ct. App. 1987) (reversing a trial judge who had “determined that he could pass upon the merits of Armstrong’s entitlement to a permit without requiring Armstrong to *complete* the administrative process”) (emphasis added); *Booker v. S.C. Dept. of Corrections*, No. 2011-CP-10-08774, 2013 WL 10533559 (S.C. Ct. of Comm. Pleas, Hon. R. Markley Dennis, Jr., March 1, 2013) (noting that if an aggrieved party is unsatisfied with the outcome of an internal agency grievance process,

“the final administrative remedy available to him is a review by the South Carolina Administrative Law Court,” and he “has not exhausted all administrative remedies unless and until he has completed Step 1, Step 2, and has received an administrative review and decision by the ALC.”); *cf.* S.C. Code Ann. § 1-23-380 (“A party who has exhausted *all* administrative remedies available within the agency and who is aggrieved by a *final* decision in a contested case is entitled to judicial review . . .”) (emphasis added).¹

Furthermore, the statutory requirement that aggrieved ticket holders exhaust the entirety of the administrative review process applies equally to individual claimants and putative classes of claimants.² The relevant statutes contain no class exception to the exhaustion requirement. *See* S.C. Code Ann. § 59-150-300; *see also id.* at §§ 59-150-60, -70(D), -90(A), -230(A), and -240(C). Where, as here, a “statute’s meaning is clear on its face, . . . this court has no right to impose another meaning.” *Peake v. S.C. Dept. of Motor Vehicles*, 375 S.C. 589, 597–98, 654 S.E.2d 284, 289 (Ct. App. 2007).

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² No South Carolina case law supports the idea that a plaintiff may avoid a statutory exhaustion requirement by simply alleging a putative class action. Other courts have held exhaustion was required before a class of plaintiffs could bring an action for damages. *See e.g. Lopez v. Civil Serv. Comm’n*, 232 Cal. App.3d 307, 312 (Cal. Ct. App.—1st Div. 1991) (“The mere bringing of a class action is not ipso facto an exception to the exhaustion requirement. . . . *Morton v. Superior Court*, 9 Cal. App.3d 977 dispels any notion that class actions are *per se* exempt from the exhaustion requirement.”); *Bautista v. Cnty. of Yolo*, No. C039340, 2003 WL 22969353, at *4 (Cal. Ct. App.—3d Dist. 2003) (affirming dismissal of suit and noting that “*Rose* is of no help to plaintiffs” because “*Rose* arose in the context of a writ challenge to a PERS ruling, not a complaint for damages”).

In sum, the process by which a ticket holder may challenge the Commission's actions or decisions is a multi-step administrative process including both intra-agency review *and* an appeal to the Administrative Law Court. Plaintiffs have not presented any argument or information to suggest that the Administrative Law Court cannot or will not analyze the matter impartially and fairly. Plaintiffs have not completed the steps within the administrative process, nor have they supported their burden to prove the entirety of the administrative review process would be futile.

CONCLUSION

Plaintiffs have neither exhausted their administrative remedies nor excused their failure to do so. Accordingly, the Court concludes the lawsuit must be dismissed. Because dismissal of the suit is warranted for the foregoing reason, this Court need not rule on the other bases for dismissal asserted by the Commission. This Court **GRANTS** Intralot's Motion to Alter or Amend the prior Order and **GRANTS** Intralot's Motion to Dismiss.

IT IS SO ORDERED.

Hon. Kristi F. Curtis, Circuit Court Judge

February ____, 2019
Sumter, South Carolina



Sumter Common Pleas

Case Caption: Shardae Davis , plaintiff, et al VS South Carolina Education Lottery
Commission , defendant, et al
Case Number: 2018CP4300138
Type: Order/Dismissal

So Ordered

s/ Kristi F. Curtis, Circuit Court Judge, No. 2762

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STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF SUMTER

CIVIL ACTION: 2018CP4300138

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Plaintiffs,

v.

South Carolina Education Lottery Commission
d/b/a South Carolina Education Lottery and
INTRALOT, Inc.,

Defendants.

ORDER DENYING DEFENDANT SOUTH
CAROLINA LOTTERY COMMISSION'S
MOTION TO DISMISS

This matter comes before the Court on Defendant South Carolina Education Lottery Commission's (SCEL) motion to dismiss, which was heard before the undersigned on July 30, 2018. After hearing the arguments of counsel for both the Plaintiffs and Defendants, and after reviewing the file and applicable law, the Court denies the Defendant's motion to dismiss.

Plaintiffs allege that they are purchasers of "Holiday Add-A-Play" lottery tickets sold by various retailers on Christmas Day of 2017. On the evening of December 25, 2017, Plaintiffs allege the game was shut down and lottery players who attempted to cash in their winning tickets received slips stating, "Transaction not allowed." Plaintiffs allege causes of action against SCEL for unjust enrichment, breach of contract, breach of implied contract, promissory estoppel, and violations of the Unfair Trade Practices Act.

Defendant SCEL subsequently filed a motion to dismiss pursuant to Rules 12(b)(1), 12(b)(3) and 12(b)(6) of the South Carolina Rules of Civil Procedure.

I. FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES

SCEL first argues that the suit should be dismissed because Plaintiffs have not alleged that they have exhausted their administrative remedies. The court disagrees.

Under the regulations promulgated by the South Carolina Education Lottery Commission, the Executive Director of the Commission may deny awarding a prize to a claimant if the ticket is "printed or produced in error." S.C. Code of Regs. § 44-70(E). The Executive Director's decisions and judgments with respect to the determination of a winning ticket or any dispute arising from the payment or awarding of prizes are final, subject to an appeal to the Commission. S.C. Code of Regs. § 44-70(F).

Section 59-150-300 of the South Carolina Education Lottery Act sets forth the procedure for review of a decision by the SCEL Board of Commissioners. Section (A) states, a "lottery game ticket holder aggrieved by an action of the board may appeal that decision to the Administrative Law Judge Division." The ALJ Division may reverse the decision of the board only if the appellant proves the decision is "in violation of constitutional or statutory provisions, is in excess of the statutory authority of the board, is made upon unlawful procedure, is affected by an error of law, is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record, or is arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." S.C. Code Ann. § 59-150-300(B).

The Court first recognizes that the general rule is that administrative remedies must be exhausted absent circumstances supporting an exception to the general rule. Hyde v. South Carolina Dept. of Mental Health. 314 S.C. 207, 209, 442 S.E.2d 582, 583 (1994).

Plaintiffs argue that the Education Lottery statute permits, but does not mandate, an exclusive administrative remedy. While Plaintiffs are correct that the statute uses permissive rather than

mandatory language, the Supreme Court has previously required exhaustion where there is an adequate administrative remedy, and where the statute did not expressly require it. Id. (“We find the trial judge abused his discretion in finding as a matter of law that Hyde did not have to exhaust administrative remedies simply because the Whistleblower Statute does not expressly require it.”).

Plaintiffs further argue in the alternative that they fall within the “futility” exception to the exhaustion requirement.

South Carolina recognizes exceptions to the exhaustion of administrative remedies requirement. A commonly recognized exception exists when a party demonstrates that pursuit of administrative remedies would be a vain or futile act. Brown v. James, 389 SC 41, 697 S.E.2d 604 (2010). “Futility, however, must be demonstrated by a showing comparable to the administrative agency taking a ‘hard and fast position that makes an adverse ruling a certainty.’” Id. At 54, 611.

When Plaintiffs initially filed this suit, SCEL had not yet made a ruling as to whether it would honor the tickets. (See Amended Complaint, 24, “SCEL has asked lottery players with winning tickets to have ‘patience,’ and refused to timely pay winners.”) On May 30, 2018, however, SCEL issued a press release indicating the SCEL Board of Commissioners “voted to reimburse the purchase price paid by each Holiday Cash Add-A-Play ticketholder bought on December 25, 2017 on or after 5:51p.m. because these tickets were produced or issued in error.” The press release further states that before making the decision that the tickets were produced or issued in error, SCEL retained an independent, impartial third party to perform an analysis of the computer software.¹

¹ While this motion is couched as a 12(b)(6) motion to dismiss, both the Plaintiff and Defendant in their respective memoranda make reference to matters outside of the pleadings on this issue. Defendant refers repeatedly to the SCEL website and Plaintiffs to a New York Times article that quotes SCEL’s press release.

The Court finds that SCEL's Board has taken a "hard and fast" position with respect to whether it will honor the lottery tickets, thereby making any administrative appeal futile. Furthermore, the Plaintiffs seek class action status and allege that "at least 100,000 persons have incurred monetary damages as a result of Defendant's misconduct." In the face of SCEL's stated position that it will not pay ticketholders their alleged winnings, the Court finds it would be futile to require thousands of ticketholders to individually exhaust their administrative remedies. See Rose v. City of Hayward, 126 Cal App.3d 926 (1981)("plaintiffs in a class action need not exhaust administrative remedies prior to instituting judicial proceedings where the administrative remedies available to the plaintiffs do not provide for class relief.")

I. RIPENESS

At the time SCEL filed its motion to dismiss, the Board had not yet made a final determination as to whether it would honor the tickets at issue. Because no final determination had been made at the time of filing, Defendant argued that this case was not yet ripe for review. In view of the fact that the Board has now publicly announced that it will not pay any winnings for the disputed tickets, this argument is now moot.

II. SOVEREIGN IMMUNITY

SCEL next argues that the causes of action against it for unjust enrichment and promissory estoppel should be dismissed because the SCEL Commission is immune from such suits under the South Carolina Tort Claims Act.²

² Plaintiffs conceded, both in oral argument and in Plaintiffs' Memorandum in Opposition to Defendant's Motion to Dismiss, that the cause of action for Unfair Trade Practices should be dismissed. Defendant's motion to dismiss the UTPA cause of action is therefore granted.

The South Carolina Tort Claims Act governs all tort claims against governmental entities. It is the exclusive civil remedy available for any tort committed by a governmental entity or its employees or agents. S.C. Code Ann. § 15-78-70(b). The Tort Claims Act provides that the State, its agencies or political subdivision are liable for their torts “in the same manner and to the same extent as a private individual under like circumstances,” subject to the limitations upon liability and exemptions contained in the Act. S.C. Code Ann. § 15-78-40. The governmental entity claiming the Act as an affirmative defense bears the burden of establishing a limitation upon liability or an exception to the waiver of immunity. Hawkins v. City of Greenville, 358 S.C. 280, 292, 594 S.E.2d 557, 563 (Ct. App. 2004).

Section 15-78-60 sets out thirty-seven exceptions to the waiver, significantly limiting the tort liability of government entities. One of those exemptions provides that the State is not liable for any loss resulting from “the exercise of discretion or judgment of the governmental entity or employee or the performance or failure to perform any act or service which is in the discretion or judgment of the governmental entity or employee.” S.C. Code Ann. § 15-78-60(4). A finding of discretionary immunity “is contingent on proof the government entity, faced with alternatives, actually weighed competing considerations and made a conscious choice using accepted professional standards.” Hawkins, 358 S.C. at 293, 594 S.E.2d at 564.

A ruling on a motion to dismiss pursuant to Rule 12(b)(6), SCRCP, must be based solely on the factual allegations set forth in the complaint, and the court must consider all well-pled allegations as true. Fabian v. Lindsay, 410 S.C. 475, 481, 765 S.E.2d 132, 136 (2014). The motion should not be granted if facts alleged and inferences reasonably deducible therefrom would entitle the plaintiff to relief on any theory of the case. Patterson v. Witter, 418 S.C. 66, 75-76, 791 S.E.2d 294, 300 (Ct. App. 2016). The question is whether, in the light most favorable to the plaintiff and with every doubt

resolved in his behalf, the complaint states any valid claim for relief. Id. Additionally, where the allegations of the complaint give rise to competing inferences on a question of material fact, dismissal of the case under Rule 12(b)(6) is not appropriate. Jensen v. Conrad, 297 S.C. 323, 334, 377 S.E.2d 102, 108 (Ct. App. 1989). The complaint should not be dismissed merely because the court doubts the plaintiffs will prevail in the action. McNeil v. South Carolina Dep't of Corrections, 404 S.C. 186, 190, 743 S.E.2d 843 (Ct. App. 2013).

The Court finds that the issue of whether SCEL should be entitled to discretionary immunity raises factual questions which cannot be resolved by reference to the pleadings alone. The motion to dismiss these causes of action under Rule 12(b)(6), SCRCP, is therefore denied.

IT IS SO ORDERED.

Jan. _____, 2019
Sumter, South Carolina

Kristi F. Curtis, Circuit Court Judge



Sumter Common Pleas

Case Caption: Shardaë Davis , plaintiff, et al VS South Carolina Education Lottery
Commission , defendant, et al
Case Number: 2018CP4300138
Type: Order/Other

So Ordered

s/ Kristi F. Curtis, Circuit Court Judge, No. 2762

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ELECTRONICALLY FILED - 2019 Jan 04 8:53 AM - SUMTER - COMMON PLEAS - CASE#2018CP4300138

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF SUMTER

CIVIL ACTION: 2018CP4300138

Jamaine Holman, Victoria Lewis, Melanie Baker, Christopher Shipman, Robert Weaver, Vonetta Wilson, Francesca Worley, Brittany Johnson, Shirley Pearson, Robert Weaver, Gostonia Pearson, Rodney Leachman, Cassandra Pugh, and Krystal Bostinto, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

South Carolina Education Lottery Commission
d/b/a South Carolina Education Lottery and
INTRALOT, Inc.,

Defendants.

ORDER DENYING DEFENDANT
INTRALOT, INC.'S MOTION TO DISMISS

This matter comes before the Court on Defendant Intralot, Inc.'s motion to dismiss, which was heard before the undersigned on July 30, 2018. After hearing the arguments of counsel for both the Plaintiffs and Defendants, and after reviewing the file and applicable law, the Court denies the Defendant's motion to dismiss.

Plaintiffs allege that they are purchasers of "Holiday Add-A-Play" lottery tickets sold by various retailers on Christmas Day of 2017. On the evening of December 25, 2017, Plaintiffs allege the game was shut down and lottery players who attempted to cash in their winning tickets received slips stating, "Transaction not allowed." Plaintiffs further allege that Intralot is responsible for technology and support services for the South Carolina Education Lottery (SCEL), including "provision of equipment, software and maintenance services, day-to-day management of operations, sales network and risk management/odds' setting for the SCEL."

Plaintiffs filed this action alleging causes of action against the South Carolina Education Lottery for unjust enrichment, breach of contract, breach of implied contract, promissory estoppel, and violations of the Unfair Trade Practices Act. Plaintiffs subsequently filed an Amended Complaint adding Intralot as a Defendant and alleging causes of action against Intralot for unjust enrichment, breach of contract and/or breach of implied contract, promissory estoppel, unfair trade practices, negligence, and gross negligence.

Defendant Intralot filed a motion to dismiss pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure.

I. FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES

Intralot first argues that the suit should be dismissed because Plaintiffs have not alleged that they have exhausted their administrative remedies. The court disagrees.

Under the regulations promulgated by the South Carolina Education Lottery Commission, the Executive Director of the Commission may deny awarding a prize to a claimant if the ticket is “printed or produced in error.” S.C. Code of Regs. § 44-70(E). The Executive Director’s decisions and judgments with respect to the determination of a winning ticket or any dispute arising from the payment or awarding of prizes are final, subject to an appeal to the Commission. S.C. Code of Regs. § 44-70(F).

Section 59-150-300 of the South Carolina Education Lottery Act sets forth the procedure for review of a decision by the SCEL Board of Commissioners. Section (A) states, a “lottery game ticket holder aggrieved by an action of the board may appeal that decision to the Administrative Law Judge Division.” The ALJ Division may reverse the decision of the board only if the appellant proves the decision is “in violation of constitutional or statutory provisions, is in excess of the statutory authority of the board, is made upon unlawful procedure, is affected by an error of law, is clearly erroneous in

view of the reliable, probative, and substantial evidence on the whole record, or is arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.” S.C. Code Ann. § 59-150-300(B).

The Court first recognizes that the general rule is that administrative remedies must be exhausted absent circumstances supporting an exception to the general rule. Hyde v. South Carolina Dept. of Mental Health, 314 S.C. 207, 209, 442 S.E.2d 582, 583 (1994).

Plaintiffs argue that the Education Lottery statute permits, but does not mandate, an exclusive administrative remedy. While Plaintiffs are correct that the statute uses permissive rather than mandatory language, the Supreme Court has previously required exhaustion where there was an adequate administrative remedy, and where the statute did not expressly require it. Id. (“We find the trial judge abused his discretion in finding as a matter of law that Hyde did not have to exhaust administrative remedies simply because the Whistleblower Statute does not expressly require it.”).

Plaintiffs further argue in the alternative that they fall within the “futility” exception to the exhaustion requirement.

South Carolina recognizes exceptions to the exhaustion of administrative remedies requirement. A commonly recognized exception exists when a party demonstrates that pursuit of administrative remedies would be a vain or futile act. Brown v. James, 389 SC 41, 697 S.E.2d 604 (2010). “Futility, however, must be demonstrated by a showing comparable to the administrative agency taking a ‘hard and fast position that makes an adverse ruling a certainty.’” Id. At 54, 611.

When Plaintiffs initially filed this suit, SCEL had not yet made a ruling as to whether it would honor the tickets. (See Amended Complaint, 24, “SCEL has asked lottery players with winning tickets to have ‘patience,’ and refused to timely pay winners.”) On May 30, 2018, however, SCEL issued a press release indicating the SCEL Board of Commissioners “voted to reimburse the purchase

price paid by each Holiday Cash Add-A-Play ticketholder bought on December 25, 2017 on or after 5:51p.m. because these tickets were produced or issued in error.” The press release further states that before making the decision that the tickets were produced or issued in error, SCEL retained an independent, impartial third party to perform an analysis of the computer software.¹

The Court finds that SCEL’s Board has taken a “hard and fast” position with respect to whether it will honor the lottery tickets, thereby making any administrative appeal futile. Furthermore, the Plaintiffs seek class action status and allege that “at least 100,000 persons have incurred monetary damages as a result of Defendant’s misconduct.” The Court finds that, in the face of SCEL’s stated position that it will not pay ticketholders their alleged winnings, it would be futile to require thousands of ticketholders to individually exhaust their administrative remedies. See Rose v. City of Hayward, 179 Cal. Rptr. 287 (App. Ct. 1981)(“plaintiffs in a class action need not exhaust administrative remedies prior to instituting judicial proceedings where the administrative remedies available to the plaintiffs do not provide for class relief.”)

Furthermore, in a tort action against a third party, no such exhaustion requirement exists. Thomas Sand Co. v. Colonial Pipeline Co., 349 S.C. 402, 413, 563 S.E.2d 109, 115 (Ct. App. 2002). The causes of action against Intralot are tort and implied contract claims, not a statutory violation for which the legislature has provided an administrative remedy. Id.

¹ While this motion is couched as a 12(b)(6) motion to dismiss, both the Plaintiff and Defendant in their respective memoranda make reference to matters outside of the pleadings on this issue. Defendant refers repeatedly to the SCEL website and Plaintiffs to a New York Times article that quotes SCEL’s press release.

II. UNJUST ENRICHMENT

Intralot next moves for dismissal of Plaintiffs' cause of action for unjust enrichment because Plaintiffs' complaint fails to allege that Intralot received any payments from Plaintiffs.

Unjust enrichment is an equitable doctrine which permits a plaintiff to recover the amount that the defendant has been unjustly enriched at the plaintiff's expense. Dema v. Tenet Physician Servs.-Hilton Head, Inc., 383 S.C. 115, 123, 678 S.E.2d 430, 434 (2009). The elements to recover for unjust enrichment are (1) a benefit conferred by the plaintiff upon the defendant; (2) realization of that benefit by the defendant; and (3) retention of the benefit by the defendant upon circumstances that make it inequitable for him to retain it without paying its value. Myrtle Beach Hosp. Inc. v. City of Myrtle Beach, 341 S.C. 1, 8-9, 532 S.E.2d 868, 872 (2000).

The complaint alleges "Plaintiffs . . . conferred a benefit upon Defendants in the form of payments in exchange for Defendants' promises that if a winning ticket was purchased, the winning prize ticket would be paid to the purchaser." [Complaint para. 35] "Defendants realized that benefit by accepting Plaintiffs and the Class members' payments." [Complaint para. 36]. "Defendants represented . . . that such payments would be utilized to pay winning ticket prizes to lottery customers who purchased winning tickets." [Complaint, Para. 37]. "Defendants have refused payments to winning customers, yet retains possession and ownership of these cash assets paid by Plaintiffs and the Class members." [Complaint, Para. 38]

A ruling on a motion to dismiss pursuant to Rule 12(b)(6), SCRCP, must be based solely on the factual allegations set forth in the complaint, and the court must consider all well-pled allegations as true. Fabian v. Lindsay, 410 S.C. 475, 481, 765 S.E.2d 132, 136 (2014). The motion should not be granted if facts alleged and inferences reasonably deducible therefrom would entitle the plaintiff to relief on any theory of the case. Patterson v. Witter, 418 S.C. 66, 75-76, 791 S.E.2d 294, 300 (Ct.

App. 2016). The question is whether, in the light most favorable to the plaintiff and with every doubt resolved in his behalf, the complaint states any valid claim for relief. Id. Additionally, where the allegations of the complaint give rise to competing inferences on a question of material fact, dismissal of the case under Rule 12(b)(6) is not appropriate. Jensen v. Conrad, 297 S.C. 323, 334, 377 S.E.2d 102, 108 (Ct. App. 1989). The complaint should not be dismissed merely because the court doubts the plaintiffs will prevail in the action. McNeil v. South Carolina Dep't of Corrections, 404 S.C. 186, 190, 743 S.E.2d 843 (Ct. App. 2013).

Taking the facts as alleged in the pleadings as true, and viewing them in the light most favorable to Plaintiffs, Plaintiffs have alleged sufficient facts to support a cause of action for unjust enrichment.

III. BREACH OF CONTRACT/BREACH OF IMPLIED CONTRACT

Intralot next argues that the cause of action for "breach of contract/breach of implied contract" should be dismissed as to Intralot because there is no privity of contract between Plaintiffs and Intralot, and Plaintiffs are not third-party beneficiaries of the contract between the Defendants.

Plaintiffs allege that Intralot and the South Carolina Education Lottery "had a contract between themselves, of which Plaintiffs were direct third-party beneficiaries." [Complaint, para. 42] Intralot argues that Plaintiffs plead no facts establishing that they are actually third-party beneficiaries of the contract between Defendants, and fail to cite any specific language in the contract between defendants demonstrating that Plaintiffs are third-party beneficiaries.

Generally, one not in privity of contract with another cannot maintain an action against him in breach of contract, and any damage resulting from the breach of a contract between the defendant and a third party is not recoverable by the plaintiff. Windsor Green Owners Ass'n v. Allied Signal, 362 S.C. 12, 17, 605 S.E.2d 750, 752 (Ct. App. 2004). However, if a contract is made for the benefit

of a third party, that party may enforce the contract if the contracting parties intended to create a direct benefit for the third party. Maners v. Lexington County Sav. & Loan Ass'n, 275 S.C. 31, 33-34, 267 S.E.2d 422, 423 (1980)

The Court finds that the question of whether Plaintiffs are third-party beneficiaries of the contract between the Defendants cannot be resolved by reference to the pleadings alone, and therefore dismissal under Rule 12(b)(6) is not appropriate.

IV. PROMISSORY ESTOPPEL

Plaintiffs conceded at the motions hearing that there is no basis for the cause of action for promissory estoppel against Defendant Intralot. Defendant's motion to dismiss this cause of action pursuant to Rule 12(b)(6) is therefore granted.

V. UNFAIR TRADE PRACTICES

Plaintiffs conceded at the motions hearing that there is no basis for the cause of action for violations of the U.T.P.A. Defendant's motion to dismiss this cause of action pursuant to Rule 12(b)(6) is therefore granted.

VI. NEGLIGENCE

Intralot next argues that Plaintiffs' cause of action for negligence fails because Defendants did not owe a duty of care to Plaintiffs.

A tort-feasor may be subjected to tort liability for injury to a third party arising out of the tort-feasor's contractual relationship with another, despite the absence of privity between the tort-feasor and the third party. Terlinde v. Neely, 275 S.C. 395, 271 S.E.2d 768 (1980). The tort-feasor's liability exists independently of contract, and rests upon the tort-feasor's duty to exercise due care. Edward's of Byrnes Downs v. Charleston Sheet Metal Co., Inc., 253 S.C. 537, 172 S.E.2d 120 (1970). "The key inquiry is what duty, if any, is owed by the tort-feasor to the third party. It is

essential to liability for negligence that the parties have some relationship recognized by law to support the duty owed by the tort-feasor.” 57 Am.Jur.2d, *Negligence*, Section 36. This duty may be derived from the tort-feasor's contractual relationship with another. Barker v. Sauls, 289 S.C. 121, 122, 345 S.E.2d 244, 244 (1986).

Plaintiffs allege various ways they contend Intralot was negligent in performing its duties under the contract between the Defendants. The Court finds that there are factual questions which cannot be resolved by reference to the pleadings alone, and therefore dismissal under Rule 12(b)(6) is not appropriate.

IT IS SO ORDERED.

Jan. _____, 2019
Sumter, South Carolina

Kristi F. Curtis, Circuit Court Judge



Sumter Common Pleas

Case Caption: Shardaë Davis , plaintiff, et al VS South Carolina Education Lottery
Commission , defendant, et al
Case Number: 2018CP4300138
Type: Order/Other

So Ordered

s/ Kristi F. Curtis, Circuit Court Judge, No. 2762

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ELECTRONICALLY FILED - 2019 Jan 04 8:53 AM - SUMTER - COMMON PLEAS - CASE#2018CP4300138

STATE OF SOUTH CAROLINA

COUNTY OF SUMTER

Shardae Davis, Janesia McFarland, Benjamin Jenkins, Jr., Courtney Brown, Shenequa Wells, Damain Davis, Tamara Boyd, Quinton Boyd, Jamaine Holman, Sarah Robinson, Jamie Dupont, Sharon Bouyagi, and Brian Holman on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

South Carolina Education Lottery Commission
d/b/a South Carolina Education Lottery,

Defendant.

IN THE COURT OF COMMON PLEAS
THIRD JUDICIAL CIRCUIT

SUMMONS

TO THE ABOVE NAMED DEFENDANT:

YOU ARE HEREBY SUMMONED AND REQUIRED to answer the Complaint in this action. A copy of the Complaint is attached to this Summons and is herewith served upon you. Your answer must be in writing and signed by you or by your attorney and must state your address or the address of your attorney if signed by your attorney. Your answer must be served upon the undersigned attorneys for the Plaintiff within thirty (30) days after the service hereof, exclusive of the day of service at 12019 Ocean Highway, P.O. Box 1885, Pawleys Island, South Carolina 29585.

YOU ARE HEREBY GIVEN NOTICE FURTHER that, if you fail to appear and defend and fail to answer the Complaint as required by this Summons within thirty (30) days after the service hereof, judgment by default will be rendered against you for the relief demanded in the Complaint.

[Signature Block on Following Page]

HOPKINS LAW FIRM, LLC

s/ J. Clay Hopkins

J. Clay Hopkins (SC Bar #102053)

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Attorneys for Plaintiffs and the Proposed Class

February 1, 2018

Pawleys Island, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF SUMTER

Shardae Davis, Janesia McFarland, Benjamin Jenkins, Jr., Courtney Brown, Shenequa Wells, Damain Davis, Tamara Boyd, Quinton Boyd, Jamaine Holman, Sarah Robinson, Jamie Dupont, Sharon Bouyagi, and Brian Holman on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

South Carolina Education Lottery Commission
d/b/a South Carolina Education Lottery,

Defendant.

IN THE COURT OF COMMON PLEAS
THIRD JUDICIAL CIRCUIT

CLASS ACTION COMPLAINT
(Jury Trial Demanded)

NOW COMES THE PLAINTIFFS, Shardae Davis, Janesia McFarland, Benjamin Jenkins, Jr., Courtney Brown, Shenequa Wells, Damain Davis, Tamara Boyd, Quinton Boyd, Jamaine Holman, Sarah Robinson, Jamie Dupont, Sharon Bouyagi, and Brian Holman, on behalf of themselves and all others similarly situated (hereinafter collectively referred to as "Plaintiffs"), who complain of the South Carolina Education Lottery Commission d/b/a South Carolina Education Lottery ("Defendant") as follows:

INTRODUCTION

1. This case arises from the Defendant's wrongful refusal to honor winning lottery tickets paid for by Plaintiffs and the proposed Class.

PARTIES

2. Plaintiff Shardae Davis is a citizen and resident of Sumter County, South Carolina.
3. Plaintiff Janesia McFarland is a citizen and resident of Darlington County, South

Carolina.

4. Plaintiff Benjamin Jenkins, Jr. is a citizen and resident of Charleston County, South

Carolina.

5. Plaintiff Courtney Brown is a citizen and resident of Darlington County, South

Carolina.

6. Plaintiff Shenequa Wells is a citizen and resident of Darlington County, South

Carolina.

7. Plaintiff Damain Davis is a citizen and resident of Florence County, South Carolina.

8. Plaintiff Tamara Boyd is a citizen and resident of Dorchester County, South

Carolina.

9. Plaintiff Quinton Boyd is a citizen and resident of Dorchester County, South

Carolina.

10. Plaintiff Jamaine Holman is a citizen and resident of Charleston County, South

Carolina.

11. Plaintiff Jamie Dupont is a citizen and resident of Colleton County, South Carolina.

12. Plaintiff Sarah Robinson is a citizen and resident of Berkeley County, South

Carolina.

13. Plaintiff Sharon Bouyagi is a citizen and resident of Charleston County, South

Carolina.

14. Brian Holman is a citizen and resident of Berkeley County, South Carolina.

15. Defendant South Carolina Education Lottery Commission d/b/a South Carolina Education Lottery ("SCEL") is a body politic existing under the laws of the State of South Carolina, with its principal place of business located in Richland County, South Carolina, and is

responsible for administering lottery games, including the advertising, marketing, sale of tickets, and payment of cash prizes to winning ticket holders, including those in Sumter County. At all times relevant to this complaint, Defendant SCEL agreed to pay cash prizes to lottery players who purchased winning lottery tickets.

VENUE AND JURISDICTION

16. The Court of Common Pleas possesses personal jurisdiction over Defendant as it is a body politic and an instrumentality of the State of South Carolina. The Court of Common Pleas possesses subject matter jurisdiction over this action pursuant to Article V, Section 11 of the South Carolina Constitution.

17. Venue is appropriate in Sumter County because a substantial part of the acts or omissions giving rise to this action occurred in Sumter County.

FACTS

18. Since the South Carolina Education Lottery started in 2002, it has awarded 1.7 million scholarships to students in the state. In fiscal year 2016-17, the lottery paid \$400 million to education in the state, and \$1.09 billion to ticket winners.

19. On Christmas Day 2017, many lottery players in South Carolina purchased a \$1 terminal-generated instant game, Holiday Cash Add-A-Play, created, managed, and advertised by SCEL. The rules of the game were simple: Buy a ticket that contained three Christmas tree symbols in any vertical, horizontal or diagonal line, and the player would win a cash prize.

20. At or around 7:53 p.m. on Christmas Day, after reports of many winners, SCEL suspended the Holiday Cash Add-A-Play game, purportedly because of an error allowing all tickets issued to win. However, many lottery players who purchased Holiday Cash tickets on this day did not win.

21. Lottery players in South Carolina who tried to cash in their Christmas Add-a-Play winnings after the game was shut down received slips, which stated, "Transaction Not Allowed."

22. Through no wrongdoing of Plaintiffs or Class members, SCEL suspended Holiday Cash Add-A-Play game sales and validations. SCEL has asked lottery players with winning tickets to have "patience," and refused to timely pay winners.

23. Plaintiffs and all other lottery players who played the Holiday Cash Add-A-Play game have not received the benefit of their bargain, the winnings promised by Defendant, in exchange for the purchase of the ticket.

CLASS ALLEGATIONS

24. Plaintiffs propose to represent themselves and a class of similarly situated individuals defined as follows:

All citizens of South Carolina at the filing of this Complaint who purchased a winning Holiday Cash Add-A-Play lottery ticket on December 25, 2017.

This class shall exclude (a) all attorneys and their staff representing the putative class; (b) all members of the judiciary presiding over this case; and (c) the Defendant, including all Defendant's agents, employees, officers, and directors.

25. Plaintiffs represent a class of persons so numerous as to make joinder of all individual claims against Defendant impractical. Plaintiff estimates that at least 100,000 persons have incurred monetary damages as a result of Defendant's misconduct.

26. There are questions of law and fact in common to the putative class, including, but not limited to: whether Defendant breached its contract with lottery players; whether Defendant was unjustly enriched; whether Defendant should be estopped from refusing to pay cash prizes to those players who purchased winning tickets; and whether Defendant's actions were deceptive and/or oppressive.

27. The issues of law and fact common to the class predominate over any individual issues such that a class action is a superior method of adjudicating the rights of Defendant and the Class.

28. Plaintiffs' claims are typical of those of the putative class.

29. Plaintiffs and the putative class claims share common determinative issues sufficient to advance the litigation.

30. Plaintiffs will serve as adequate class representatives, have no interests that are antagonistic to those of the class, and have retained attorneys experienced in class action and complex litigation.

31. Each Class member has at least \$100 in damages caused by Defendant's conduct complained of herein.

FOR A FIRST CAUSE OF ACTION
(Unjust Enrichment)

32. Plaintiffs reiterate and reallege each and every allegation as if fully set forth herein.

33. Plaintiffs and the members of the putative class conferred a benefit upon Defendant in the form of payments in exchange for Defendant's promises that if a winning ticket was purchased, the winning prize on that ticket would be paid to the purchaser.

34. Defendant realized that benefit by accepting Plaintiffs and the Class members' payments.

35. Defendant represented throughout these transactions that such payments would be utilized to pay winning ticket prizes to lottery customers who purchased winning tickets.

36. Defendant has refused payments to winning customers, yet retains possession and ownership of these cash assets paid by Plaintiffs and the Class members.

37. Retention of this benefit under these circumstances would be inequitable without payments to Plaintiffs and the Class members of the value of the benefit.

38. As a result, Plaintiffs and the Class members are owed payment by Defendant in the value of their winnings.

FOR A SECOND CAUSE OF ACTION
(Breach of Contract and/or Breach of Implied Contract)

39. Plaintiffs reiterate and reallege each and every allegation as if fully set forth herein.

40. At all times relevant to this Complaint, Plaintiffs and the Class were engaged in a contract for services with Defendant, whereby Plaintiffs made payments to Defendant for tickets in exchange for Defendant's promises that those winning tickets would be honored and cash prizes paid.

41. By and through the contract between Plaintiffs and Defendant, Plaintiffs entrusted Defendant with the responsibility of paying to Plaintiffs the prizes for any winning tickets that Defendant promised to pay.

42. By and through the contract, Defendant took money from each member of the Plaintiff Class for the express purpose of collecting monies to pay winning lottery ticket prizes.

43. On December 25, 2017, Defendant breached its contract with each Plaintiff and each member of the Plaintiff Class by refusing to pay winning tickets.

44. As a direct and proximate result of Defendant's breach, Plaintiffs have suffered appreciable and quantifiable damages, and are owed payment of those damages or, in the alternative, specific performance of the contract.

FOR A THIRD CAUSE OF ACTION
(Promissory Estoppel)

45. Plaintiffs reiterate and reallege each and every allegation as if fully set forth herein.

46. By means of the Defendant's wrongful conduct alleged herein, Defendant made an unambiguous promise to provide Plaintiffs and the Class with payments in connection with winning Holiday Cash Add-A-Play tickets.

47. Plaintiffs and the Class reasonably relied on the promises contained in the parties' agreement. Furthermore, it was foreseeable and expected that Plaintiffs and the Class members would rely on Defendant's misrepresentations.

48. As a direct, foreseeable, and proximate result of Defendant's misconduct alleged herein, Plaintiffs and the Class have been injured, and seek recovery in the form of money damages for the money they are owed as a result of purchasing their winning tickets.

FOR A FOURTH CAUSE OF ACTION
(Violation of S.C. Unfair Trade Practices Act)

49. Plaintiffs reiterate and reallege each and every allegation as if fully set forth herein.

50. Defendant has willfully and knowingly engaged in unfair and deceptive acts and practices as recited above.

51. Plaintiffs and the Class incurred pecuniary loss as a direct result of Defendant's actions and misconduct.

52. Plaintiffs and the Class are informed and believe they are entitled to judgment against Defendant for actual damages, treble damages, reasonable attorneys' fees and costs for the Defendant's violation of the South Carolina Unfair Trade Practices Act, codified at South Carolina Code Ann. §39-5-10 *et seq.*

WHEREFORE, having set forth their Complaint, Plaintiffs, on behalf of themselves and all others similarly situated, would respectfully request judgment against Defendant, to be determined by the trier of fact; for the costs and disbursements of this action; for trial by jury, for actual, compensatory, and consequential damages, treble damages, costs, attorney's fees,

prejudgment interest, and any other relief the Court may deem just and equitable.

Plaintiffs request a jury trial on all counts so triable.

HOPKINS LAW FIRM, LLC

s/ J. Clay Hopkins

J. Clay Hopkins (SC Bar #102053)

William E. Hopkins, Jr. (SC Bar #66474)

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Attorneys for Plaintiffs and the Proposed Class

February 1, 2018

Pawleys Island, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF SUMTER

IN THE COURT OF COMMON PLEAS
FOR THE THIRD JUDICIAL CIRCUIT
CIVIL ACTION NO.: 2018-CP-43-00138

Jamaine Holman, Victoria Lewis, Melanie Baker, Christopher Shipman, Robert Weaver, Vonetta Wilson, Francesca Worley, Brittany Johnson, Shirley Pearson, Robert Weaver, Gastonio Pearson, Rodney Leachman, Cassandra Pugh, and Krystal Bostinto, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

South Carolina Education Lottery
Commission d/b/a South Carolina
Education Lottery and INTRALOT, Inc.,

Defendants.

**AMENDED SUMMONS
(Jury Trial Demanded)**

TO: DEFENDANTS ABOVE NAMED:

YOU ARE HEREBY SUMMONED AND REQUIRED to answer the Amended Complaint in this action. A copy of the Amended Complaint is attached to this Amended Summons and is herewith served upon you. Your answer must be in writing and signed by you or by your attorney and must state your address or the address of your attorney if signed by your attorney. Your answer must be served upon the undersigned attorneys for the Plaintiff within thirty (30) days after the service hereof, exclusive of the day of service at 12019 Ocean Highway, P.O. Box 1885, Pawleys Island, South Carolina 29585.

YOU ARE HEREBY GIVEN NOTICE FURTHER that, if you fail to appear and defend and fail to answer the Amended Complaint as required by this Amended Summons within thirty (30) days after the service hereof, judgment by default will be rendered against you for the relief demanded in the Amended Complaint.

HOPKINS LAW FIRM, LLC

s/ J. Clay Hopkins

J. Clay Hopkins (SC Bar #102053)

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Attorneys for Plaintiffs and the Proposed Class

Pawleys Island, South Carolina
May 29, 2018

STATE OF SOUTH CAROLINA
COUNTY OF SUMTER

IN THE COURT OF COMMON PLEAS
FOR THE THIRD JUDICIAL CIRCUIT
CIVIL ACTION NO.: 2018-CP-43-00138

Jamaine Holman, Victoria Lewis, Melanie Baker, Christopher Shipman, Robert Weaver, Vonetta Wilson, Francesca Worley, Brittany Johnson, Shirley Pearson, Robert Weaver, Gastonio Pearson, Rodney Leachman, Cassandra Pugh, and Krystal Bostinto, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

South Carolina Education Lottery Commission d/b/a South Carolina Education Lottery and INTRALOT, Inc.,

Defendants.

**AMENDED COMPLAINT
(Jury Trial Demanded)**

NOW COMES THE PLAINTIFFS, Sharda Davis, Jamaine Holman, Victoria Lewis, Melanie Baker, Christopher Shipman, Robert Weaver, Vonetta Wilson, Francesca Worley, Brittany Johnson, Shirley Pearson, Robert Weaver, Gastonio Pearson, Rodney Leachman, Cassandra Pugh, and Krystal Bostinto, on behalf of themselves and all others similarly situated (hereinafter collectively referred to as "Plaintiffs"), complaining of the South Carolina Education Lottery Commission d/b/a South Carolina Education Lottery ("SCEL") and INTRALOT, Inc. ("INTRALOT") (hereinafter collectively referred to as "Defendants") as follows:

INTRODUCTION

1. This case arises from the Defendants' wrongful refusal to honor winning lottery tickets paid for by Plaintiffs and the proposed Class.

PARTIES

2. Plaintiff Jamaine Holman is a citizen and resident of Charleston County, South Carolina.
3. Plaintiff Victoria Lewis is a citizen and resident of Sumter County, South Carolina.
4. Plaintiff Melanie Baker is a citizen and resident of Lexington County, South Carolina.
5. Plaintiff Christopher Shipman is a citizen and resident of Pickens County, South Carolina.
6. Plaintiff Robert Weaver is a citizen and resident of Dorchester County, South Carolina.
7. Plaintiff Vonetta Wilson is a citizen and resident of Charleston County, South Carolina.
8. Plaintiff Francesca Worley is a citizen and resident of Dorchester County, South Carolina.
9. Plaintiff Brittany Johnson is a citizen and resident of Charleston County, South Carolina.
10. Plaintiff Shirley Pearson is a citizen and resident of Sumter County, South Carolina.
11. Plaintiff Robert Weaver is a citizen and resident of Berkeley County, South Carolina.
12. Plaintiff Gastonio Pearson is a citizen and resident of Sumter County, South Carolina.

13. Plaintiff Rodney Leachman is a citizen and resident of Charleston County, South Carolina.

14. Plaintiff Cassandra Pugh is a citizen and resident of Sumter County, South Carolina.

15. Plaintiff Krystal Bostinto is a citizen and resident of Florence County, South Carolina.

16. Defendant SCEL is a body politic existing under the laws of the State of South Carolina, with its principal place of business located in Richland County, South Carolina, and is responsible for administering lottery games, including the advertising, marketing, sale of tickets, and payment of cash prizes to winning ticket holders, including those in Sumter County. At all times relevant to this Complaint, Defendant SCEL agreed to pay cash prizes to lottery players who purchased winning lottery tickets.

17. Defendant INTRALOT is, upon information and belief, a corporation organized and existing pursuant to the laws of the State of Georgia and doing business in the State of South Carolina, and is responsible for technology and support services, including provision of equipment, software and maintenance services, day-to-day management of operations, sales network and risk management/odds' setting for the SCEL.

VENUE AND JURISDICTION

18. The Court of Common Pleas possesses personal jurisdiction over Defendant SCEL as it is a body politic and an instrumentality of the State of South Carolina. The Court of Common Pleas possesses personal jurisdiction over Defendant INTRALOT as it is a corporation doing business in the State of South Carolina. The Court

of Common Pleas possesses subject matter jurisdiction over this action pursuant to Article V, Section 11 of the South Carolina Constitution.

19. Venue is appropriate in Sumter County because a substantial part of the acts or omissions giving rise to this action occurred in Sumter County.

FACTS

20. Since the South Carolina Education Lottery started in 2002, it has awarded 1.7 million scholarships to students in the state. In fiscal year 2016-17, the lottery paid \$400 million to education in the state, and \$1.09 billion to ticket winners.

21. On Christmas Day 2017, many lottery players in South Carolina purchased a \$1 terminal-generated instant game, Holiday Cash Add-A-Play, created, managed, and advertised by SCEL. The rules of the game were simple: Buy a ticket that contained three Christmas tree symbols in any vertical, horizontal or diagonal line, and the player would win a cash prize.

22. At or around 7:53 p.m. on Christmas Day, after reports of many winners, SCEL suspended the Holiday Cash Add-A-Play game. However, many lottery players who purchased Holiday Cash tickets on this day did not win.

23. Lottery players in South Carolina who tried to cash in their Christmas Add-a-Play winnings after the game was shut down received slips, which stated, "Transaction Not Allowed."

24. Through no wrongdoing of Plaintiffs or Class members, SCEL suspended Holiday Cash Add-A-Play game sales and validations. SCEL has asked lottery players with winning tickets to have "patience," and refused to timely pay winners.

25. Six (6) months later, Plaintiffs and all other lottery players who played the

Holiday Cash Add-A-Play game have still not received the benefit of their bargain, the winnings promised by Defendant, in exchange for the purchase of the ticket.

CLASS ALLEGATIONS

26. Plaintiffs propose to represent themselves and a class of similarly situated individuals defined as follows:

All citizens of South Carolina at the filing of this Complaint who purchased a winning Holiday Cash Add-A-Play lottery ticket on December 25, 2017.

This class shall exclude (a) all attorneys and their staff representing the putative class; (b) all members of the judiciary presiding over this case; and (c) the Defendant, including all Defendant's agents, employees, officers, and directors.

27. Plaintiffs represent a class of persons so numerous as to make joinder of all individual claims against Defendant impractical. Plaintiff estimates that at least 100,000 persons have incurred monetary damages as a result of Defendant's misconduct.

28. There are questions of law and fact in common to the putative class, including, but not limited to: whether Defendants breached their contract with lottery players; whether Defendants were unjustly enriched; whether Defendants should be estopped from refusing to pay cash prizes to those players who purchased winning tickets; and whether Defendants' actions were deceptive and/or oppressive.

29. The issues of law and fact common to the class predominate over any individual issues such that a class action is a superior method of adjudicating the rights of Defendants and the Class.

30. Plaintiffs' claims are typical of those of the putative class.

31. Plaintiffs and the putative class claims share common determinative issues

sufficient to advance the litigation.

32. Plaintiffs will serve as adequate class representatives, have no interests that are antagonistic to those of the class, and have retained attorneys experienced in class action and complex litigation.

33. Each Class member has at least \$100 in damages caused by Defendant's conduct complained of herein.

FOR A FIRST CAUSE OF ACTION AS TO BOTH DEFENDANTS
(Unjust Enrichment)

34. Plaintiffs reiterate and reallege each and every allegation as if fully set forth herein.

35. Plaintiffs and the members of the putative class conferred a benefit upon Defendants in the form of payments in exchange for Defendants' promises that if a winning ticket was purchased, the winning prize on that ticket would be paid to the purchaser.

36. Defendants realized that benefit by accepting Plaintiffs' and the Class members' payments.

37. Defendants represented throughout these transactions that such payments would be utilized to pay winning ticket prizes to lottery customers who purchased winning tickets.

38. Defendants have refused payments to winning customers, yet retains possession and ownership of these cash assets paid by Plaintiffs and the Class members.

39. Retention of this benefit under these circumstances would be inequitable without payments to Plaintiffs and the Class members of the value of the benefit.

40. As a result, Plaintiffs and the Class members are owed payment by Defendants in the value of their winnings.

FOR A SECOND CAUSE OF ACTION AS TO BOTH DEFENDANTS
(Breach of Contract and/or Breach of Implied Contract)

41. Plaintiffs reiterate and reallege each and every allegation as if fully set forth herein.

42. At all times relevant to this Complaint, Plaintiffs and the Class were engaged in a contract for services with Defendant SCEL, whereby Plaintiffs made payments to Defendant SCEL for tickets in exchange for Defendant SCEL's promises that those winning tickets would be honored and cash prizes paid. At all times relevant to this Complaint, Defendants had a contract between themselves, of which Plaintiffs were direct third party beneficiaries.

43. By and through the contract between Plaintiffs and Defendants, Plaintiffs entrusted Defendants with the responsibility of paying to Plaintiffs the prizes for any winning tickets that Defendants promised to pay.

44. By and through the contract, Defendants took money from each member of the Plaintiff Class for the express purpose of collecting monies to pay winning lottery ticket prizes.

45. On December 25, 2017, Defendants breached its contract with each Plaintiff and each member of the Plaintiff Class by refusing to pay winning tickets.

46. As a direct and proximate result of Defendant's breach, Plaintiffs have suffered appreciable and quantifiable damages, and are owed payment of those damages or, in the alternative, specific performance of the contract.

FOR A THIRD CAUSE OF ACTION AS TO BOTH DEFENDANTS
(Promissory Estoppel)

47. Plaintiffs reiterate and reallege each and every allegation as if fully set forth herein.

48. By means of the Defendants' wrongful conduct alleged herein, Defendants made an unambiguous promise to provide Plaintiffs and the Class with payments in connection with winning Holiday Cash Add-A-Play tickets.

49. Plaintiffs and the Class reasonably relied on the promises contained in the parties' agreement. Furthermore, it was foreseeable and expected that Plaintiffs and the Class members would rely on Defendants' misrepresentations.

50. As a direct, foreseeable, and proximate result of Defendants' misconduct alleged herein, Plaintiffs and the Class have been injured, and seek recovery in the form of money damages for the money they are owed as a result of purchasing their winning tickets.

FOR A FOURTH CAUSE OF ACTION AS TO BOTH DEFENDANTS
(Violation of S.C. Unfair Trade Practices Act)

51. Plaintiffs reiterate and reallege each and every allegation as if fully set forth herein.

52. Defendants have willfully and knowingly engaged in unfair and deceptive acts and practices as recited above.

53. Plaintiffs and the Class incurred pecuniary loss as a direct result of Defendants' actions and misconduct.

54. Plaintiffs and the Class are informed and believe they are entitled to judgment against Defendants for actual damages, treble damages, reasonable attorneys'

fees and costs for the Defendants' violation of the South Carolina Unfair Trade Practices Act, codified at South Carolina Code Ann. §39-5-10 *et seq.*

FOR A FIFTH CAUSE OF ACTION AS TO DEFENDANT INTRALOT, INC.
(Negligence and Gross Negligence)

55. Plaintiffs reiterate and reallege each and every allegation as if fully set forth herein.

56. The actions and conduct of Defendant Intalot, Inc. constitute negligence, gross negligence, willfulness, wantonness and recklessness. Specifically, the actions and conduct of Defendant Intralot, Inc. were negligent in the following particulars:

- a. In failing to properly test or administer lottery games and systems before delivering to Defendant SCEL;
- b. In failing to develop, implement, and/or execute policies and procedures for the testing and administration of lottery games and systems before delivering to Defendant SCEL;
- c. In failing to properly communicate with Defendant SCEL regarding the functionality of lottery games and systems;
- d. In failing to develop, implement, and/or execute policies and procedures for the communication of lottery games and systems;
- e. In failing to properly monitor and/or service lottery games and systems;
- f. In failing to develop, implement, and/or execute policies and procedures for the monitoring and/or servicing of lottery games and systems;
- g. In failing to exercise the reasonable care, skill and prudence exercised by an ordinary, reasonable developer and/or operator of lottery games and systems;

- h. In failing to exercise that degree of care and caution which a reasonably prudent developer and/or operator of lottery games and systems would have exercised under the circumstances then and there prevailing;
- i. If there was a printing error (which is specifically denied), then in negligently producing, manufacturing, and/or developing a lottery game and/or system that was susceptible to such errors and flaws; and
- j. In other ways to be proven through discovery and at trial.

57. That as a direct and proximate result of Defendant's actions and/or inactions, Plaintiffs suffered actual and quantifiable pecuniary losses; have and may in the future cause them to suffer anxiety, annoyance, emotional injury, mental anguish, loss of enjoyment of life, inconvenience, and travel--all to their general damage and detriment.

58. That as a direct and proximate result of Defendant's actions and/or inactions, Plaintiffs are informed and believes that they are entitled to judgment against Defendant in an appropriate amount of actual damages, together with punitive damages in an appropriate amount to be determined by the Court, the costs of this action and such other and further relief as this Court deems just and proper.

WHEREFORE, having set forth their Complaint, Plaintiffs, on behalf of themselves and all others similarly situated, would respectfully request judgment against Defendants, to be determined by the trier of fact; for the costs and disbursements of this action; for trial by jury, for actual, compensatory, and consequential damages, treble damages, costs, attorney's fees, prejudgment interest, and any other relief the Court may deem just and equitable.

Plaintiffs request a jury trial on all counts so triable.

HOPKINS LAW FIRM, LLC

s/ J. Clay Hopkins

J. Clay Hopkins (SC Bar #102053)

William E. Hopkins, Jr. (SC Bar #66474)

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Attorneys for Plaintiffs and the Proposed Class

Pawleys Island, South Carolina
May 29, 2018

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE THIRD JUDICIAL CIRCUIT
COUNTY OF SUMTER	)	CIVIL ACTION NO.: 2018-CP-43-00138
	)	
Jamaine Holman, Victoria Lewis, Melanie	)	
Baker, Christopher Shipman, Robert	)	
Weaver, Vonetta Wilson, Francesca	)	
Worley, Brittany Johnson, Shirley Pearson,	)	
Robert Weaver, Gastonio Pearson, Rodney	)	
Leachman, Cassandra Pugh, and Krystal	)	
Bostinto, on behalf of themselves and all	)	ANSWER OF INTRALOT, INC.
others similarly situated	)	
	)	
Plaintiff	)	
	)	
vs.	)	
	)	
South Carolina Education Lottery	)	
Commission d/b/a South Carolina	)	
Education Lottery and INTRALOT, Inc.	)	
	)	
Defendants	)	

Comes now Defendant Intralot, and, by and through its undersigned counsel, answers Plaintiff's Amended Complaint, demonstrating unto the Court as follows:

FOR A FIRST DEFENSE
(General and Specific Denial)

1. Defendant Intralot denies each and every allegation of the complaint not hereinafter specifically and unconditionally admitted.
2. Defendant Intralot denies the allegations of paragraph 1.
3. Defendant Intralot admits the allegations of paragraphs 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, and 18.
4. Defendant Intralot denies the allegations of paragraph 19, as venue is proper only in Richland County pursuant to S.C. Code Ann. § 59-150-30(A).

5. Defendant Intralot does not have sufficient information to admit or deny the allegations of paragraph 20. Thus, the allegations of paragraph 20 are denied.

6. Defendant Intralot admits only so much of paragraph 21 as sets forth that many lottery players purchased the Holiday Cash Add-A-Play. The remaining allegations of paragraph 21 are denied.

7. Defendant Intralot admits the allegations of paragraph 22 only to the extent that they alleged the SCEL suspended the Holiday Cash Add-A-Play game. Defendant Intralot is without sufficient information to admit or deny the remaining allegations of paragraph 22. As such, the remaining allegations in paragraph 22 are denied.

8. Defendant Intralot denies the allegations of paragraph 24.

9. Defendant Intralot denies the allegations of paragraph 25.

10. Defendant Intralot denies the allegations of paragraph 26 regarding class certification under Rule 23 of the South Carolina Rules of Civil Procedure, and further denies that class certification is appropriate.

11. Defendant Intralot denies the allegations of paragraphs 27, 28, 29, 30, 31, 32, and 33 and further denies the allegations of paragraphs 27, 28, 29, 30, 31, 32 and 33 to the extent they allege class certification under Rule 23 of the South Carolina Rules of Civil Procedure is appropriate.

12. Defendant Intralot notes that paragraph 34 is a restatement of previous allegations to which no response is required. To the extent a response is required, the allegations of paragraph 34 are denied.

13. Defendant Intralot denies the allegations of paragraphs 35, 36, 37, 38, 39, and 40.

14. Defendant Intralot notes that paragraph 41 is a restatement of previous allegations to which no response is required. To the extent a response is required, the allegations of paragraph 34 are denied.

15. Defendant Intralot admits the allegations of paragraph 42 to the extent that Plaintiffs engaged in a contract with the SCEL and Plaintiffs made payment to the SCEL in exchange for promises that prizes would be paid. Defendant denies the remaining allegations of paragraph 42.

16. Defendant Intralot denies the allegations of paragraphs 43, 44, 45, and 46.

17. Paragraphs 47, 48, 49, 50, 51, 52, 53, and 54 refer to causes of action that have been dismissed by the Court. Thus, no response is necessary. To the extent a response is required, the allegations of paragraphs 47, 48, 49, 50, 51, 52, 53 and 54 are denied.

18. Defendant Intralot denies the allegations of paragraphs 55, 56, 57, and 58.

19. Defendant Intralot denies the allegations of Plaintiffs' paragraph entitled, prayer for relief, and further expressly denies any allegation not admitted in the above paragraphs.

FOR A SECOND DEFENSE
(Failure to Exhaust Administrative Remedies)

20. Defendant Intralot realleges the preceding paragraphs as if repeated verbatim herein.

21. Pursuant to the applicable Regulations, the Executive Director of the South Carolina Education Lottery Commission "may deny awarding a prize to a claimant if the ticket is printed or produced in error." S.C. Code Reg. 44-70(E).

22. Decisions of the Executive Director are final, subject to an appeal to the full commission. S.C. Code Reg. 44-70(F).

23. Pursuant to S.C. Code Ann. § 59-150-300(B), “[t]he Administrative Law Judge Division shall hear appeals from the decisions of the board and, based upon the proceedings before the board.” The Administrative Law Judge Division may reverse the decision of the board if the board action violates a constitutional or statutory provision; is in excess of the statutory authority of the board, is made upon unlawful procedure, or is affected by other error of law; is clearly erroneous in view of reliable, probative, and substantial evidence on the whole record; or is arbitrary or capricious or characterized by an abuse of discretion or clearly unwarranted exercise of discretion. S.C. Code Ann. § 59-150-300(B).

24. Under South Carolina law, Plaintiffs were required to address the allegations of this complaint through the appropriate administrative channels prior to commencing suit.

25. Plaintiffs failed to institute the appropriate requests and/or appeals before the appropriate administrative entity, as contemplated and expressly set forth in S.C. Code Ann. § 59-150-300(B), and S.C. Code of Regs. Ann. 44-70(F).

26. Plaintiffs in the instant matter have failed to exhaust administrative remedies by pursuing appeals to the Administrative Law Judge Division.

27. The failure to exhaust administrative remedies requires dismissal of Plaintiffs’ complaint.

FOR A THIRD DEFENSE
(Failure to State a Claim for which Relief May be Granted)

28. Defendant Intralot realleges the preceding paragraphs as if repeated verbatim herein.

29. Plaintiffs have failed to state facts sufficient to constitute a cause of action against Defendant Intralot. Thus, Plaintiffs have failed to state a claim for which relief may be granted, requiring dismissal pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure.

FOR A FOURTH DEFENSE
(Unclean Hands, Waiver, and Estoppel)

30. Defendant Intralot realleges the preceding paragraphs as if repeated verbatim herein.

31. Upon information and belief, some class members knew that the tickets were produced or issued in error, but commenced to buy tickets despite this knowledge. Class members who were store employees were reported to have locked store doors to keep the public out of the stores while employees bought numerous tickets.

32. The conduct of Plaintiffs, as set in paragraph 31, constitutes unfair and/or deceptive practices engaged in by Plaintiffs.

33. Defendants have been prejudiced as a direct result of Plaintiffs conduct, in that no claim would exist but for Plaintiffs' intentional conduct. Thus, the claims of any of those class members are barred by the doctrines of unclean hands, waiver and estoppel.

FOR A FIFTH DEFENSE
(Lack of Duty to Plaintiffs)

34. Defendant Intralot realleges the preceding paragraphs as if repeated verbatim herein.

35. Plaintiffs have failed to allege that a contractual relationship with Defendants, and have further failed that Defendant owed Plaintiffs any duty of care.

36. Based upon Plaintiffs' failure to establish that Defendant owed a duty of care in either tort or contract to Plaintiffs, no claims against Defendant Intralot exist.

FOR A SIXTH DEFENSE
(Failure to Assert Damages)

37. Defendant Intralot realleges the preceding paragraphs as if repeated verbatim herein.

38. Pursuant to S.C. Code § 59-150-230(C)(3)(a), lottery players are entitled to reimbursement for their ticket when a ticket was produced or issued in error. Upon information and belief, Plaintiffs have been offered return of the ticket price paid. Thus, Plaintiffs have sustained no damages.

FOR A SEVENTH DEFENSE

(Failure to Mitigate Damages)

39. Defendant Intralot realleges the preceding paragraphs as if repeated verbatim herein.

40. Pursuant to applicable statutory law, and principles of contract law, Plaintiffs were required to mitigate any damages they may have had for the alleged conduct, but failed to do so.

41. Plaintiffs failure to mitigate damages requires that their claims be dismissed.

FOR AN EIGHTH DEFENSE

(Class Action Not Proper)

42. Defendant Intralot realleges the preceding paragraphs as if repeated verbatim herein.

43. This action should not proceed as a Class Action pursuant to Rule 23 of the South Carolina Rules of Civil Procedure because the requisite elements are not met.

FOR A SEVENTH DEFENSE

(Other Potential Defenses)

44. Defendant Intralot intends to rely on any and all other defenses as may be developed through discovery and the evidence.

WHEREFORE, having fully answered the Amended Complaint, Defendant Intralot prays the Court dismiss the complaint with prejudice and for such other and further relief as the Court may deem just and proper.

RESPECTFULLY SUBMITTED, this 8th day of February, 2019.

STROM LAW FIRM, LLC

s/J. Preston Strom, Jr.
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STATE OF SOUTH CAROLINA)
COUNTY OF SUMTER)

IN THE COURT OF COMMON PLEAS

THIRD JUDICIAL CIRCUIT

C.A. No.: 2018-CP-43-00138

Shardae Davis, Janesia McFarland,)
Benjamin Jenkins, Jr., Courtney Brown,)
Shenequa Wells, Damain Davis, Tamara)
Boyd, Quinton Boyd, Jamaine Holman,)
Sarah Robinson, Jamie Dupont, Sharon)
Bouyagi, Brian Holman, Marie Davis,)
Jonathan Matthis, Timothy Small,)
Kimberly White, Victoria Lewis, Melanie)
Baker, Leslie Brown, Angela Gleaton,)
John Hatcher, Barbara Holland, Ed)
Robinson, Angela Robinson, Christopher)
Shipman, Robert Weaver, and Vonetta)
Wilson on behalf of themselves and all)
others similarly situated,)

Plaintiffs,)

vs.)

South Carolina Education Lottery)
Commission d/b/a South Carolina)
Education Lottery,)

Defendant.)

**DEFENDANT'S
MOTION TO DISMISS**

COMES NOW Defendant South Carolina Education Lottery Commission ("the Commission"), by and through undersigned counsel, and reserving its rights to plead otherwise and without waiving any argument not expressly made herein, hereby moves to dismiss Plaintiffs' claims pursuant to Rules 12(b)(1), 12(b)(3), and 12(b)(6) of the South Carolina Rules of Civil Procedure ("SCRCP") and the doctrines of ripeness and sovereign immunity. Dismissal of the instant lawsuit is required because Plaintiffs have not exhausted their administrative remedies; the Plaintiffs' claims are not yet ripe for judicial disposition; some or all of Plaintiffs' claims are barred by the doctrine of sovereign immunity; the Complaint fails to assert a single cause of action against the Commission upon which relief could be granted; the alleged actions

do not and cannot constitute a violation of the Unfair Trade Practices Act ("UTPA") and the UTPA expressly forbids class action claims; and Plaintiffs have failed to file their claims in the statutorily required venue.

For the foregoing reasons, as well as those to be asserted and more fully stated in any memorandum of law filed by the Commission in support of this motion and by any arguments made at a hearing on the motion, and without waiving any arguments (including but not limited to arguments that Plaintiffs' class action claims and allegations are inappropriate and impermissible or that the Commission's alleged wrongdoing is, in fact, compelled by State law), the Commission respectfully requests this Court to dismiss the instant Complaint.

NELSON MULLINS RILEY & SCARBOROUGH LLP

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Attorneys for Defendant

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 April 10, 2018

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
)
COUNTY OF SUMTER)

Shardae Davis, Janesia McFarland, Benjamin)
Jenkins, Jr., Courtney Brown, Shenequa Wells,)
Damain Davis, Tamara Boyd, Quinton Boyd,)
Jamaine Holman, Sarah Robinson, Jamie Dupont,)
Sharon Bouyagi, Brian Holman, Marie Davis,)
Jonathan Matthis, Timothy Small, Kimberly)
White, Victoria Lewis, Melanie Baker, Leslie)
Brown, Angela Gleaton, John Hatcher, Barbara)
Holland, Ed Robinson, Angela Robinson,)
Christopher Shipman, Robert Weaver, and)
Vonetta Wilson on behalf of themselves and all)
others similarly situated,)

Plaintiffs,)

vs.)

South Carolina Education Lottery Commission)
d/b/a South Carolina Education Lottery,)

Defendant.)

I, the undersigned counsel of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Defendant, do hereby certify that I have served all counsel in this action with a copy of the pleading specified below by e-filing and by mailing a copy of the same by United States Mail, postage prepaid, to the following address:

Pleading: Defendant's Motion to Dismiss

Counsel Served: William E. Hopkins, Jr.
Joseph Clay Hopkins
Hopkins Law Firm
PO Box 1885
12019 Ocean Highway
Pawleys Island, SC 29585

s/William S. Brown
William S. Brown

April 10, 2018

STATE OF SOUTH CAROLINA)
)
 COUNTY OF SUMTER)

IN THE COURT OF COMMON PLEAS

THIRD JUDICIAL CIRCUIT

C.A. No.: 2018-CP-43-00138

Shardae Davis, Janesia McFarland,)
 Benjamin Jenkins, Jr., Courtney Brown,)
 Shenequa Wells, Damain Davis, Tamara)
 Boyd, Quinton Boyd, Jamaine Holman,)
 Sarah Robinson, Jamie Dupont, Sharon)
 Bouyagi, Brian Holman, Marie Davis,)
 Jonathan Matthis, Timothy Small,)
 Kimberly White, Victoria Lewis, Melanie)
 Baker, Leslie Brown, Angela Gleaton,)
 John Hatcher, Barbara Holland, Ed)
 Robinson, Angela Robinson, Christopher)
 Shipman, Robert Weaver, and Vonetta)
 Wilson on behalf of themselves and all)
 others similarly situated,)

Plaintiffs,)

vs.)

South Carolina Education Lottery)
 Commission d/b/a South Carolina)
 Education Lottery,)

Defendant.)

**MEMORANDUM IN
 SUPPORT OF DEFENDANT'S
 MOTION TO DISMISS**

Defendant South Carolina Education Lottery Commission ("the Commission" or "SCEL"), by and through undersigned counsel, files this memorandum in support of its Motion to Dismiss Plaintiffs' claims pursuant to Rules 12(b)(1), 12(b)(3), and 12(b)(6) of the South Carolina Rules of Civil Procedure ("SCRCP") and the doctrines of ripeness and sovereign immunity. As explained more fully below, dismissal of the suit is warranted because Plaintiffs have not exhausted their administrative remedies as required by law, and, even if they had, Plaintiffs' claims are not yet ripe for judicial review. In addition, several of Plaintiffs' claims are barred by the doctrine of sovereign immunity. Furthermore, even if this Court had jurisdiction to entertain Plaintiffs' claims, the Complaint fails to assert a single cause of action against the

Commission upon which relief could be granted. Finally, even if Plaintiffs' claims were viable (which they are not), Plaintiffs have filed their claims in the wrong venue in violation of state law. For all of these reasons, dismissal is required.

LEGAL BACKGROUND

In 2001, the General Assembly enacted the South Carolina Education Lottery Act (the "Lottery Act") to establish and govern the operation of a state lottery. *See* S.C. Code Ann. §§ 59-150-10 to -410. The Lottery Act governs the operation and administration of lottery games in considerable detail and places significant operational authority and discretion in the hands of the Commission and the Board of Commissioners of the South Carolina Lottery Commission ("the Board"). The Commission and the Board are tasked with promulgating regulations and adopting policies and procedures to organize, operate, and regulate the conduct of lottery games. *Id.* §§ 59-150-50 and -60. The Commission is also given "all the powers necessary or convenient to carry out and effectuate the purposes and provisions of this chapter" including the power to "organize, initiate, supervise, and administer the operation of the lottery as provided by this chapter and regulations promulgated relating to . . . the conduct of the games." *Id.* § 59-150-60; *see also id.* § 59-150-90(A) (stating the Commission's executive director must "supervise and administer the operation of the lottery games" and must "direct and supervise all administrative and technical activities" provided for in the Lottery Act, its implementing regulations, and the Commission's policies and procedures).

The Board and the Commission are expressly required to promulgate regulations specifying the "method to be used in selling lottery game tickets or shares" and the "method and location of selecting or validating winning lottery game tickets or shares." *Id.* § 59-150-70(D). In addition, the Commission "shall promulgate regulations and adopt policies and procedures to establish a system of verifying the validity of lottery games tickets or shares claimed to win prizes and to effect

payment of prizes” and shall “supervise lottery game ticket or share validation and lottery drawings.” *Id.* § 59-150-230(A)(3) and -240(C). Notably, however, the Lottery Act limits the Commission’s prize-paying discretion, by forbidding the Commission from paying unissued tickets or erroneously issued tickets. *Id.* § 59-150-230(C) & (D); *see also* S.C. Code of Regulations § 44-70(E) and (F).

The Lottery Act and the regulations and procedures of the Commission mandate in detail the process by which a person dissatisfied with the Commission’s actions may challenge those acts. *See* S.C. Code Ann. § 59-150-300; S.C. Code of Regulations § 44-70; SCEL Ticket Holder Complaint Procedure, Dec. 29, 2004, *available at* <http://www.sceducationlottery.com/images/pdf/ComplaintProcedures.pdf> (last visited April 5, 2018) (hereafter “SCEL Complaint Procedure”).

Specifically, a ticket holder aggrieved by a decision or action of the Commission or its agents and who was unable to resolve that dispute after discussions with Commission staff must promptly file a formal written complaint with the Commission’s Executive Director. *See* SCEL Complaint Procedure ¶ A. The Executive Director or his designee must then review the complaint to assess its validity and determine whether it contains sufficient information to make an appropriate determination. *Id.* ¶ E. When the Executive Director determines he has sufficient information to make an appropriate determination and resolution of the complaint, he may issue a final decision based on the written submissions or, in his discretion, may schedule a formal hearing before the Executive Director. *See id.* ¶ F. If a hearing is held, it is conducted “in accordance with Rule 47 of the Rules of Procedure of the Administrative Law Judge Division to the extent and fashion deemed appropriate by the Executive Director” and must be recorded by a certified court reporter. *See id.* ¶ K. The player may be represented by counsel at the hearing and may present arguments, evidence, and testimony. *See id.* ¶¶ H, L.

The Executive Director's decision in and disposition of a formal complaint—regardless of whether the decision is made on the paper filings or after a hearing—will be delivered to the player in writing, explaining the basis for the decision and informing the player of his right to appeal to the Board. *See id.* ¶ L; *see also* S.C. Code of Regulations § 44-70(F) (“The Executive Director’s decisions and judgments in respect to the determination of a winning ticket or any dispute arising from the payment or awarding of prizes are final, subject to an appeal to the Commission.”).

A player who wishes to appeal the Executive Director’s decision to the Board must do so within 15 days after receiving the Executive Director’s decision and may request either a hearing before the Board or that the Board decide the appeal based on the written materials. *See* SCEL Complaint Procedure ¶ L(4)–(5). If the player requests a hearing, the Board or a designated Board member must provide one within 60 days. *Id.* ¶¶ L–M.¹ In its review of the matter, the Board shall adopt the record of the proceedings before the Executive Director and, based on that record, supplemented by the arguments presented at a Board hearing (if one was requested), may affirm the Executive Director’s decision, remand the matter to him for further proceedings, or reverse his ruling for certain limited reasons expressly enumerated in the Complaint Procedure. *See id.* ¶¶ N–O. The Board’s decision must be provided to the player in writing, must explain the reasons for the decision, and must inform him of his right to a further appeal to the Administrative Law Court (“ALC”) as provided in Code section 59-150-300. *See id.* ¶ P.

If the player is unhappy with the Board’s final resolution of the matter, he may appeal that decision to the ALC, and, if unhappy with the ALC’s decision, may then—and only then—appeal to the Circuit Courts:

- (A) Any . . . lottery game ticket holder aggrieved by an action of the board may appeal that decision to the Administrative Law Judge Division. The action is subject to review by an administrative law

¹ The Board’s duties include to “hear appeals of hearings required by this chapter.” *Id.* § 59-150-50.

judge on the record of the board, upon petition of the aggrieved person within ten days from receipt of official notice from the board of the action of which review is sought. . . .

- (B) The Administrative Law Judge Division shall hear appeals from decisions of the board and, based upon the record of the proceedings before the board, may reverse the decision of the board only if the appellant proves the decision to be:
 - (1) in violation of constitutional or statutory provisions;
 - (2) in excess of the statutory authority of the board;
 - (3) made upon unlawful procedure;
 - (4) affected by other error of law;
 - (5) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
 - (6) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.
- (C) The Administrative Law Judge Division may remand an appeal to the board to conduct further hearings.
- (D) For judicial review of a final decision of an administrative law judge in a case involving the commission, the petition by an aggrieved party must be filed with the circuit court and served on the opposing party not more than thirty days after the aggrieved party receives the final decision and order of the administrative law judge. Appeal in these matters is by right.

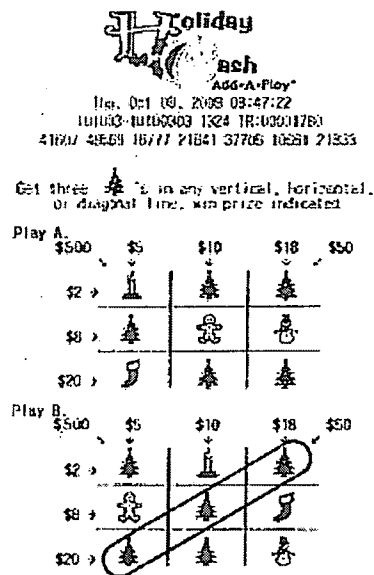
Id. § 59-150-300.

THE HOLIDAY CASH ADD-A-PLAY® GAME²

One of the lottery games offered by the Commission is the Holiday Cash Add-A-Play® game. As the name suggests, Add-A-Play® is a game that may be added onto a player's purchase of another lottery game ticket. Specifically, when a player purchases a Pick 3, Pick 4, or Palmetto Cash 5 ticket, he has the option to also purchase up to five Add-A-Play® plays for \$1 each. The lottery terminal will then generate and dispense the Add-A-Play® ticket(s) to the player, who will

² For a description of the Holiday Cash Add-A-Play® game and instructions for playing the game, *see* http://www.sceducationlottery.com/games2/games_addaplay_holidaycash2017.aspx (last visited April 5, 2018). *See also* South Carolina Education Lottery Official Holiday Cash Add-A-Play® Game Rules, *available at* http://www.sceducationlottery.com/images/pdf/ADD_A_PLAY/Holiday_Cash_AAP_2017.pdf (last visited April 5, 2018).

know instantly whether he won. Each play consists of a three-by-three grid printed on the ticket in which a different holiday-themed symbol—*i.e.*, a candle, Christmas tree, snowman, etc.³—appears in each of the nine spaces on the grid. On a properly issued ticket, a player wins if three Christmas tree images appear in a vertical, horizontal, or diagonal line (similar to the classic children's game of tic-tac-toe), with the prize amount varying depending on the direction in which the line of trees points:



Sample Ticket showing one non-winning play and one play winning \$50, available at http://www.sceducationlottery.com/games2/games_addaplay_holidaycash2017.aspx (last visited April 6, 2018).

The odds of winning range from 1-in-6 (for a ticket winning \$2) to 1-in-4,800 (for a ticket winning \$500). Those odds were dramatically altered for a two-hour period on Christmas Day 2017. The Commission's news release, issued shortly thereafter, and quoted in part below, summarized what occurred:

³ The game is offered in slightly different seasonal variations throughout the year, and the symbols change to match the seasonal theme. The paragraph above describes the 2017 "Holiday" version that is at issue in the instant lawsuit.

The South Carolina Education Lottery's computer system vendor, Intralot, experienced a programming error on Christmas Day that impacted Holiday Cash Add-A-Play tickets, a \$1 terminal-generated instant game. From 5:51 p.m. to 7:53 p.m., the same play symbol was repeated in all nine available play areas on tickets which would result in a top prize of \$500. No more than five identical play symbols should appear for a single play. As soon as the issue was identified, the Add-A-Play game was suspended immediately to conduct a thorough investigation. Instant (scratch) tickets and all other lottery games were not affected by this error.

SCEL, *Programming Error Causes Issue with Holiday Cash Add-A-Play Game*, December 27, 2017, available at <http://www.sceducationlottery.com/winners/NewsDisplayArticle.asp?ID=2776> (last visited April 5, 2018).⁴ A subsequent news release noted the Commission was investigating the Christmas Day occurrence and had not yet decided whether to pay the Add-A-Play® tickets issued during the two-hour incident. See SCEL, *South Carolina Education Lottery Needs More Information*, January 23, 2018, available at <http://www.sceducationlottery.com/winners/NewsDisplayArticle.asp?ID=2788> (last visited April 5, 2018) (noting the Board was awaiting the results of an independent review of the incident). As of the present date, the Commission continues to await the results of that independent investigation before deciding whether to pay tickets issued after 5:51 p.m. on December 25, 2017:

The decision regarding payment of Holiday Cash Add-A-Play tickets purchased on or after 5:51 PM (17:51) on December 25, 2017 will be determined by the SCEL Commission after an independent review has been finalized. Any ticket submitted for a claim purchased on or after 5:51 PM (17:51) on December 25, 2017 will be stored and considered at a later time.

SCEL News Release, available at <http://www.sceducationlottery.com/winners/newspage.asp> (last visited April 5, 2017).

⁴ Pursuant to Rule 201, SCRE, the Court may take judicial notice of the information reported in the news releases cited above because the information disclosed therein is generally known within the territorial jurisdiction of the trial court.

FACTUAL BACKGROUND

The facts alleged in the Complaint are sparse. Plaintiffs allege that on the evening of December 25, 2017, the Commission suspended the Add-A-Play® game after an error in the system resulted in nearly every player “winning” during a two-hour period. *See* Complaint ¶¶ 19–20. The Complaint further alleges that players who attempted to cash in their “winning” tickets after the game was suspended were unable to do so, *id.* ¶ 21, and that the Commission has not yet paid those tickets but instead has asked for players’ patience while the Commission determines its response, *id.* ¶ 22. The Complaint does not allege Plaintiffs exhausted their administrative remedies prior to filing the instant lawsuit.

STANDARD OF REVIEW

A defendant may move to dismiss a plaintiff’s complaint (or any aspect thereof) for lack of subject matter jurisdiction pursuant to Rule 12(b)(1), SCRCP. “A court’s subject matter jurisdiction is determined by whether it has the authority to hear the type of case in question.” *Allison v. W.L. Gore & Assocs.*, 394 S.C. 185, 188, 714 S.E.2d 547, 549 (2011) (citation omitted). ““The question of subject matter jurisdiction is a question of law.”” *Linda Mc Co. v. Shore*, 390 S.C. 543, 551, 703 S.E.2d 499, 503 (2010) (citation omitted).

A defendant may also move to dismiss a complaint pursuant to Rule 12(b)(3), SCRCP when the suit was filed in a venue other than the venue mandated by statute. *See, e.g., City of Irmo v. Burr*, No. 2006-CP-40-06432, 2007 WL 2412991 (Richland Cnty. Ct. of Common Pleas, Hon. Michelle Childs, June 28, 2007) (dismissing suit pursuant to Rule 12(b)(3) because Lexington County, not Richland County, was the proper venue).

In addition, a defendant may move to dismiss the plaintiff’s complaint for “failure to state facts sufficient to constitute a cause of action” pursuant to Rule 12(b)(6), SCRCP. “A ruling on a motion to dismiss pursuant to Rule 12(b)(6) must be based solely on the factual allegations set

forth in the complaint, and the court must consider all well-pled allegations as true.” *Disabato v. S.C. Ass’n of Sch. Adm’rs*, 404 S.C. 433, 441, 746 S.E. 2d 329, 333 (2013).

A lawsuit may be dismissed if it is not “ripe and appropriate for judicial determination,” *i.e.*, where the alleged wrong or harm is still “contingent, hypothetical or abstract.” *Pee Dee Elec. Co-op., Inc. v. Carolina Power & Light Co.*, 279 S.C. 64, 66, 301 S.E.2d 761, 762 (1983) (citing *Orr v. Clyburn*, 277 S.C. 536, 290 S.E.2d 804 (1982)). “The basic rationale of the doctrine of ripeness is to prevent courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by challenging parties.” 2 Am. Jur. 2d Administrative Law Section 485 (citations omitted).

An affirmative defense such as sovereign immunity⁵ can be raised in a Rule 12(b)(6) motion if the allegations of the Complaint demonstrate the existence of the affirmative defense. *See Crocker v. Barr*, 295 S.C. 195, 367 S.E.2d 471 (Ct. App. 1988), *rev’d on other grounds*, 305 S.C. 406, 409 S.E.2d 368 (1991); *see also Spence v. Spence*, 368 S.C. 106, 124, 628 S.E.2d 869, 878 (2006) (“Most courts allow such defenses to be raised in a motion to dismiss under Rule 12(b) ‘when there is no disputed issue of fact raised by an affirmative defense, or the facts are completely disclosed on the face of the pleadings, and realistically nothing further can be developed by pretrial discovery or a trial on the issue raised by the defense.’”) (citation omitted).

⁵ *See Washington v. Whitaker*, 317 S.C. 108, 114–15, 451 S.E.2d 894, 898 (1994) (“We join those jurisdictions which hold that sovereign immunity is an affirmative defense.”)

ARGUMENT

I. This suit is premature and should be dismissed because Plaintiffs have not exhausted their administrative remedies as required by statute.

The instant lawsuit should be dismissed because Plaintiffs have not exhausted their administrative remedies related to the Commission's alleged wrongdoing.⁶ As noted above, the regulations and procedures governing the lottery are clear that a person aggrieved by an action or decision of the Commission must first file a formal written complaint with the Commission's Executive Director. *See* SCEL Complaint Procedure ¶ A;⁷ *see also* S.C. Code of Regulations § 44-70(F).⁸ If the player is dissatisfied with the Executive Director's final, written decision, he must seek a hearing before the Board. *See* SCEL Complaint Procedure ¶¶ L-M; *see also* S.C. Code of Regulations § 44-70(F). If the player disagrees with the Board's final, written decision and finds it unpalatable, his appeal must be taken to the ALC. *See* S.C. Code Ann. § 59-150-300(A) ("Any . . . lottery game ticket holder aggrieved by an action of the board may appeal that decision to the Administrative Law Judge Division. . . . The Administrative Law Judge Division shall hear appeals from decisions of the board").⁹ Only *after* the ALC rules may the matter be

⁶ A lawsuit filed in Circuit Court is properly dismissed pursuant to Rule 12(b)(6) when a plaintiff has not yet exhausted his administrative remedies. *See Unisys Corp. v. S.C. Budget & Control Bd.*, 346 S.C. 158, 176, 551 S.E.2d 263, 273 (2001) ("Since Unisys is required to exhaust its administrative remedies as a matter of law, dismissal under Rule 12(b)(6) for failure to state a claim was proper."); *see also S. Ry. Co. v. Order of Ry. Conductors*, 210 S.C. 121, 41 S.E.2d 774 (1947) (noting the exhaustion of remedies will preclude original resort to courts where statute gives exclusive jurisdiction to administrative agency).

⁷ Available at <http://www.sceducationlottery.com/images/pdf/ComplaintProcedures.pdf>.

⁸ As noted in the "Legal Background" above, the Lottery Act authorizes the Commission to promulgate regulations and establish policies and procedures such as those cited above to regulate game play including the decision whether to pay a ticket. *See* S.C. Code Ann. §§ 59-150-60, -90(A), -230(A)(3), and -240(C).

⁹ Notably, because an appeal from the Board to the ALC is subject to the Rules of Procedure of the Administrative Law Judge Division, *see* S.C. Code Ann. § 59-150-300(A), that appeal may *not* be brought on behalf of a class. *See Allen v. S.C. Pub. Employee Ben. Auth.*, 411 S.C. 611, 769 S.E.2d 666 (2015) (holding class action relief was not available in action before ALC).

taken to the Circuit Court. *Id.* § 59-150-300(D) (“For judicial review of a final decision of an administrative law judge in a case involving the commission, the petition by an aggrieved party must be filed with the circuit court . . .”).

Plaintiffs’ Complaint in the instant lawsuit skips completely over the first three steps of this mandatory exhaustion of administrative remedies. Until Plaintiffs first file written complaints with the Executive Director (which they have neither done nor alleged they have done), receive and appeal the Executive Director’s decisions to the Board (which they have neither done nor alleged they have done), and subsequently seek review of that proceeding by appealing it to the ALC (which they have neither done nor alleged they have done), they cannot assert claims in this Court arising from lottery game play. Accordingly, the instant lawsuit should be dismissed pursuant to Rule 12(b)(6), SCRCP. *See Unisys Corp.*, 346 S.C. at 176, 551 S.E.2d at 273; *see also Triano v. Division of State Lottery*, 703 A.2d 333 (N.J. App. Div. 1997) (analyzing statutory scheme similar to South Carolina’s Lottery Act and holding aggrieved players could not file an action in state trial court against the State Lottery without first exhausting their administrative remedies by seeking a ruling from the Lottery Commission itself and then seeking review of that ruling in the way mandated by law).

II. This suit is not ripe and should be dismissed because the Commission has not yet decided whether to pay the Add-A-Play® tickets from the Christmas day incident.

Even if this Court had original jurisdiction to hear claims arising directly from the Commission’s decisions relating to payment of ticket claims (which, as explained above, it does not), dismissal of this lawsuit would nevertheless be required because the claims are not yet ripe for judicial review and resolution. A lawsuit may be dismissed if it is not “ripe” for judicial determination. *Pee Dee Elec. Co-op., Inc.*, 279 S.C. at 66, 301 S.E.2d at 762; *Colleton Cnty. Taxpayers Ass’n v. Sch. Dist. Of Colleton Cnty.*, 371 S.C. 224, 242, 638 S.E.2d 685, 695 (2006)

(“As our jurisprudence instructs, an issue that is contingent, hypothetical, or abstract is not ripe for judicial review.”) (citation omitted); *see also Williamson Cnty. Regional Planning Comm’n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985) (holding a claim against a governmental commission was not “ripe” until the commission has reached a final decision regarding application of its regulations to the property at issue); *Smith v. S.C. Retirement Sys.*, 336 S.C. 505, 527, 520 S.E.2d 339, 351 (Ct. App. 1999) (“‘Gratuitous interference’ in the administrative process should be avoided.”).

The claims asserted in the instant lawsuit are all premised on an assumption that the Commission will not pay the tickets held by the Plaintiffs. *See* Compl. ¶¶ 1, 23, 36, 38, 43–44, 48, and 50–51. The Commission, however, *has not yet decided whether it will pay the tickets* issued after 5:51 p.m. on December 25, 2017. *See* SCEL News Releases, *available at* <http://www.sceducationlottery.com/winners/newspage.asp> and <http://www.sceducationlottery.com/winners/NewsDisplayArticle.asp?ID=2788> (last visited April 5, 2018).¹⁰ Accordingly, Plaintiffs’ claims are not yet ripe and must be dismissed.¹¹

¹⁰ It is possible that, after receiving the results of the pending independent investigation into the incident, the Commission may conclude that the winning tickets issued after 5:51 p.m. on December 25, 2017 cannot be paid because of a statutory prohibition, such as that found in S.C. Code Ann. § 59-150-230(C)(3). In the event the Commission were to reach such a conclusion, Plaintiffs’ claims would then be ripe, but would still require dismissal from this Court for the reasons explained in this memorandum, as well as for the independent reason that the Commission’s decision was mandated by law (and conversely, that the Plaintiffs’ desired relief is forbidden by state law) and thus the Plaintiffs’ Complaint fails to state causes of action upon which relief can be granted.

¹¹ Alternatively, if this Court does not dismiss the lawsuit on this or another basis, the Commission requests the lawsuit be stayed pending (i) the completion of the independent investigation into the Christmas Day mishap and (ii) the Commission’s decision whether to pay the tickets at issue. “Courts have inherent power to stay proceedings in actions pending before them as part of their power to control their own docket.” *Carolina Water Serv., Inc. v. Lexington Cnty. Joint Mun. Water & Sewer*, 367 S.C. 141, 153 n.2, 625 S.E.2d 227, 233 n.2 (Ct. App. 2006) (citing 1A C.J.S. Actions § 244 (2004), *rev’d on other grounds*, 373 S.C. 96, 644 S.E.2d 681 (2007)).

III. Plaintiffs' claims for Unjust Enrichment, Promissory Estoppel, and violation of the UTPA should be dismissed because the Commission is immune from such claims.

Even if this Court had original jurisdiction to entertain a suit brought by a lottery player against the Commission (which, as explained above, it does not), and even if Plaintiffs' claims were ripe (which they are not), Plaintiffs' causes of action for Unjust Enrichment, Promissory Estoppel, and violation of the South Carolina Unfair Trade Practices Act (the "UTPA") must nevertheless be dismissed because the Commission is sovereignly immune from such claims.

In *McCall v. Batson*, 285 S.C. 243, 329 S.E.2d 741 (1985), the Supreme Court abolished the doctrine of sovereign immunity as it applied to acts of the State and its political subdivisions. In response, the General Assembly reinstated sovereign immunity subject only to the limited waiver specifically provided in the South Carolina Tort Claims Act ("the TCA"). See S.C. Code Ann. § 15-78-20(b); *Murphy v. Richland Mem. Hosp.*, 317 S.C. 560, 563, 455 S.E.2d 688, 690 (1995) ("In response to our decision in *McCall*, the legislature implemented a comprehensive act providing for the logical disposition of governmental liability. [] The Act first completely restores sovereign immunity."). As explained below, sovereign immunity bars three of Plaintiffs' four causes of action and thus mandates the dismissal of those claims.

A. The General Assembly has not waived sovereign immunity for equitable causes of action including unjust enrichment and promissory estoppel.

Unjust enrichment and promissory estoppel are equitable doctrines. See *Dema v. Tenet Physician Servs.-Hilton Head, Inc.*, 383 S.C. 115, 123, 678 S.E.2d 430, 434 (2009) ("Unjust enrichment is an equitable doctrine . . ."); *Rushing v. McKinney*, 370 S.C. 280, 289, 633 S.E.2d 917, 922 (Ct. App. 2006) ("The doctrine of promissory estoppel is equitable in nature.") (quoting *West v. Newberry Elec. Co-op.*, 357 S.C. 537, 541-42, 593 S.E.2d 500, 502 (Ct. App. 2004)). The General Assembly has not waived sovereign immunity for equitable causes of action seeking monetary relief against governmental entities. The TCA does not include a

waiver of sovereign immunity for a non-tort cause of action for unjust enrichment or promissory estoppel, nor has the General Assembly enacted any other legislation that expressly or implicitly waives sovereign immunity for such equitable claims. Court of other jurisdictions agree that claims of *quantum meruit*—which South Carolina’s courts treat as essentially identical to a claim of unjust enrichment—against the State are barred by sovereign immunity:

[D]ismissal of the *quantum meruit* claim was . . . appropriate because such a claim when brought against an arm of the State is barred by sovereign immunity. In North Carolina, the State waives sovereign immunity when it expressly enters into a valid contract. Sovereign immunity bars *quantum meruit* actions against the State, however, because the remedy of *quantum meruit* is based on an implied contract and an implied contract cannot support the inference of an express waiver.

Eastway Wrecker Service, Inc. v. City of Charlotte, 599 S.E.2d 410, 412 (N.C. Ct. App. 2004).

Because Plaintiffs’ first and third claims are barred by the doctrine of sovereign immunity, they are not claims upon which relief can be granted, and they should be dismissed.

B. The General Assembly has not waived sovereign immunity for knowing and willful fraud and deception, which are necessary elements of a UTPA violation.

The Commission is immune from Plaintiffs’ claim for violation of the UTPA. As a governmental entity,¹² the Commission is liable in tort only to the extent its immunity has been waived by the TCA, and only to the extent permitted by that Act. *See* S.C. Code Ann. § 15-78-40 (“The State, an agency, a political subdivision, and a governmental entity are liable for their torts

¹² The Lottery Act, which established and governs the Commission, expressly notes the Commission “is deemed to be a public commission and an instrumentality of the State.” S.C. Code Ann. § 59-150-30(A). Furthermore, the Commission has many of the characteristics the Supreme Court has held indicate the governmental status that leads to protection under the Tort Claims Act. *See Health Promotion Specialists, LLC v. S.C. Bd. of Dentistry*, 403 S.C. 623, 743 S.E.2d 808 (2013) (holding the Board of Dentistry was a governmental entity entitled to the protections of the TCA because it was created by the legislature, was composed of members appointed by the Governor, and its expenditures and receipts were controlled by statute); *see also* S.C. Code Ann. § 59-150-30(A) (statute creating SCEL); *id.* § 59-150-40(A) (noting SCEL’s members are appointed by Governor, President Pro Tem, and Speaker of the House); *id.* §§ 59-150-170, -190, -230, and -310 (controlling SCEL’s expenditures and revenues).

. . . subject to the limitations upon liability and damages, and exemptions from liability and damages contained herein.”). “The Tort Claims Act governs all tort claims against governmental entities and is the *exclusive* civil remedy available in an action against a governmental entity or its employees.” *Parker v. Spartanburg Sanitary Sewer Dist.*, 362 S.C. 276, 280, 607 S.E.2d 711, 714 (Ct. App. 2005) (citations omitted; emphasis added); *see also* S.C. Code Ann. § 15-78-20 (“The remedy provided by this chapter is the exclusive civil remedy available for any tort committed by a governmental entity”),¹³ *Benton v. Roger C. Peace Hosp.*, 313 S.C. 520, 523, 443 S.E.2d 537, 539 (1994) (“The Act clearly states it provides the exclusive remedy for governmental torts.”).

The TCA, however, preserves the Commission’s immunity for the type of alleged wrongdoing that necessarily forms the basis for a UTPA claim. *Compare* S.C. Code Ann. § 15-78-60(17) (preserving immunity for conduct that constitutes fraud, malice, or and intent to harm) *with* Compl. ¶ 50 (premising Plaintiffs’ UTPA claim on the allegation that “Defendant has willfully and knowingly engaged in unfair and deceptive acts and practices”). Not surprisingly then, the South Carolina Supreme Court has previously concluded that a governmental entity was immune to a UTPA claim. *See Health Promotion Specialists, LLC v. S.C. Bd. of Dentistry*, 403 S.C. 623, 743 S.E.2d 808 (2013) (affirming trial court’s ruling that Board of Dentistry was immune to all the claims asserted against it, including a claim alleging a violation of the UTPA). Because the General Assembly has not waived immunity for knowing and willful fraud and

¹³ Similarly, although no individual officers, directors, agents, or employees of SCEL are named as defendants in the instant lawsuit, the TCA provides the exclusive remedy for torts committed by such persons while acting within the scope of their official duties. *See* S.C. Code Ann. § 15-78-70(a) (“This chapter constitutes the exclusive remedy for any tort committed by an employee of a governmental entity.”); *id.* § 15-78-200 (“Notwithstanding any provision of law, this chapter, ‘the South Carolina Tort Claims Act,’ is the exclusive and sole remedy for any tort committed by an employee of a governmental entity while acting within the scope of the employee’s official duty.”).

deception—wrongdoing that necessarily forms the basis for a violation of the UTPA, and upon which Plaintiffs’ UTPA claim is expressly based—Plaintiffs’ fourth cause of action must be dismissed.

IV. Plaintiffs’ UTPA claim should be dismissed because the Commission is not a “person” nor were its actions “trade or commerce” as defined in the UTPA.

The UTPA prohibits “[u]nfair methods of competition and unfair or deceptive acts or practices *in the conduct of any trade or commerce*” and provides for an action by a private party “who suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment by *another person* of an unfair or deceptive method, act or practice declared unlawful by [the UTPA].” S.C. Code Ann. §§ 39-5-20(a) and -140(a) (emphasis added). As explained below, the Commission cannot be liable under the UTPA because it is not a “person” nor are its actions of administering lottery games the “conduct of any trade or commerce.” Furthermore, even if it were possible to assert a UTPA claim against a governmental entity for the performance of its statutory duties, the private right of action provided by the UTPA expressly prohibits class action claims such as the one asserted here. *See id.* § 39-5-140(a) (stating a person injured by a violation of the UTPA “may bring an action individually, *but not in a representative capacity*, to recover actual damages”) (emphasis added). Accordingly, the claim must be dismissed.

A. The Commission is not a “person” whose acts may give rise to a UTPA violation.

As noted above, the UTPA provides a private right of action for one injured by the deceptive or unfair acts of a “person.” The UTPA defines a “person” as “natural persons, corporations, trusts, partnerships, incorporated or unincorporated associations and any other legal entity.” S.C. Code Ann. § 39-5-10(a). Conspicuously absent from this definition are governmental entities and political subdivisions. When the General Assembly means to include such entities in a statutory definition of

“person,” it does so explicitly.¹⁴ Its failure to do so here is telling. Courts of other jurisdiction analyzing UTPA claims against state lottery commissions have concluded lottery commissions are not “persons” under state UTPAs and thus they cannot be liable for violations of state UTPAs. *See, e.g., Stansell v. N.M. Lottery*, 211 P.3d 214, 215 (N.M. Ct. App. 2009) (“We conclude that the Lottery is not a ‘person’ under the Unfair Practices Act.”); *Bretton v. State Lottery Comm.*, 673 N.E.2d 76, 78 (Mass. Ct. App. 1996) (holding lottery commission could not be liable under state unfair practices act because “it is a widely accepted rule of statutory construction that general words in a statute such as ‘persons’ will not ordinarily be construed to include the State or political subdivisions thereof.”) (citation omitted);¹⁵ *Janis v. Cal. State Lottery Comm.*, 68 Cal. App. 4th 824, 831 (Cal. Ct. App. 1998) (“The Unfair Practices Act applies to specific “persons” Government entities, such as CSL, are not included in this definition of person.”).

B. The Commission’s alleged actions did not occur in the course of “trade or commerce” as necessary to give rise to a UTPA violation.

Even if the Commission were a “person,” its alleged actions cannot form the basis for a UTPA claim because those actions did not occur “in the conduct of any trade or commerce.” *See Health Promotion Specialists, LLC v. S.C. Bd. of Dentistry*, 403 S.C. 623, 638–39, 743 S.E.2d 808, 816 (2013) (holding state Board of Dentistry was not susceptible to a UTPA claim because its actions were not taken in a “business or consumer transaction”); *see also Jackson v. City of Aiken Housing Auth.*, 2017 WL 4324856 (D.S.C. Sept. 26, 2017) (granting governmental entity’s

¹⁴ *See, e.g., S.C. Code Ann. § 13-7-120(I)* (“‘Person’ means any individual, public or private corporation, political subdivision, government agency, ...”); *id. § 27-29-10(3)* (“‘Person’ means an individual, corporation, government, or governmental subdivision or agency”); *id. § 44-55-2320(4)* (same); *id. § 58-33-20(5)* (“The term ‘person’ includes any individual, group, firm, partnership, corporation, cooperative, association, government subdivision, government agency, local government, municipality, any other organization, or any combination of any of the foregoing.”).

¹⁵ The South Carolina Supreme Court cited the *Bretton* case with approval in *Healthy Promotion Specialists, LLC v. S.C. Bd. of Dentistry*, 403 S.C. 623, 743 S.E.2d 808 (2013).

motion for summary judgment on UTPA claim, ruling that “[o]bviously, the administration of a governmental income assistance program by a governmental entity is not an activity in trade or commerce ‘perpetrated in a business context’”). Indeed, the *Health Promotions* Court expressly cited with approval the holding of the Massachusetts Court of Appeals that a state lottery commission could not be liable under a state UTPA because its actions are not business or commercial activities. See *Health Promotions*, 403 S.C. at 639, 743 S.E.2d at 816 (citing *Bretton v. State Lottery Comm’n*, 673 N.E.2d 76, 78–79 (Mass. Ct. App. 1996)). Here too, the Commission’s activities, like those of the state lottery commission in *Bretton*, “are driven by legislative mandate, not business or personal objectives,” *Bretton*, 673 N.E.2d at 79, and thus they cannot form the basis for a viable UTPA claim.

V. Plaintiffs’ suit should be dismissed because it was filed in the wrong venue and transfer is impossible.

Even if Plaintiffs had viable claims upon which relief could be granted, dismissal is nevertheless compelled under Rule 12(b)(3), SCRCPP because Plaintiffs have filed this lawsuit in the wrong venue. The portion of the Lottery Act creating the Commission plainly states: “Venue for the commission is in Richland County.” S.C. Code Ann. § 59-150-30(A). Dismissal of the instant suit is thus warranted because it is filed in an improper venue. See Rule 12(b)(3), SCRCPP; see also *City of Irmo v. Burr*, No. 2006-CP-40-06432, 2007 WL 2412991 (Richland Cnty. Ct. of Common Pleas, Hon. Michelle Childs, June 28, 2007) (dismissing suit pursuant to Rule 12(b)(3) because Lexington County, not Richland County, was the proper venue).¹⁶

¹⁶ Dismissal, rather than transfer under Rule 82(b), SCRCPP, is required because the Richland County Court of Common Pleas is not a court in which the action could have been brought because Plaintiffs have yet to exhaust their administrative remedies. See Section I, above; see also Rule 82(b), SCRCPP (“When an action is brought in the wrong county or in the wrong court, the court shall not dismiss the action but shall transfer it to any proper county or court *in which it could have been brought*.”) (emphasis added).

CONCLUSION

For the foregoing reasons, this Court should dismiss Plaintiffs' suit.

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April 10, 2018

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF SUMTER) THIRD JUDICIAL CIRCUIT

Shardae Davis, Janesia McFarland, Benjamin) C.A. No.: 2018-CP-43-00138
Jenkins, Jr., Courtney Brown, Shenequa Wells,)
Damain Davis, Tamara Boyd, Quinton Boyd,)
Jamaine Holman, Sarah Robinson, Jamie Dupont,)
Sharon Bouyagi, Brian Holman, Marie Davis,)
Jonathan Matthis, Timothy Small, Kimberly)
White, Victoria Lewis, Melanie Baker, Leslie)
Brown, Angela Gleaton, John Hatcher, Barbara)
Holland, Ed Robinson, Angela Robinson,)
Christopher Shipman, Robert Weaver, and)
Vonetta Wilson on behalf of themselves and all)
others similarly situated,)

CERTIFICATE OF SERVICE

Plaintiffs,)

vs.)

South Carolina Education Lottery Commission)
d/b/a South Carolina Education Lottery,)

Defendant.)

I, the undersigned counsel of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Defendant, do hereby certify that I have served all counsel in this action with a copy of the pleading specified below by e-filing and by mailing a copy of the same by United States Mail, postage prepaid, to the following address:

Pleading: Defendant's Memorandum in Support of the Motion to Dismiss

Counsel Served: William E. Hopkins, Jr.
Joseph Clay Hopkins
Hopkins Law Firm
PO Box 1885
12019 Ocean Highway
Pawleys Island, SC 29585

s/William S. Brown
William S. Brown

April 10, 2018

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS
FOR THE THIRD JUDICIAL CIRCUIT

COUNTY OF SUMTER)

Jamaine Holman, Victoria Lewis, Melanie
Baker, Christopher Shipman, Robert
Weaver, Vonetta Wilson, Francesca
Worley, Brittany Johnson, Shirley Pearson,
Robert Weaver, Gastonio Pearson, Rodney
Leachman, Cassandra Pugh, and Krystal
Bostinto, on behalf of themselves and all
others similarly situated,)

CIVIL ACTION NO.: 2018-CP-43-00138

Plaintiffs)

vs.)

**DEFENDANT INTRALOT'S
MOTION TO DISMISS**South Carolina Education Lottery
Commission d/b/a South Carolina
Education Lottery and INTRALOT, Inc.)

Defendants)

Comes now Defendant Intralot, Inc., by and through its undersigned counsel of record, and hereby moves this Honorable Court to dismiss this action on the grounds that Plaintiff's Complaint is premature for having failed to exhaust administrative remedies and for failing to state a claim for which relief may be granted pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure. For these reasons to be more fully explained in a memorandum of law to be filed before any hearing on this motion, Defendant Intralot's Motion to Dismiss should be granted and the Complaint should be dismissed pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure.

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July 17, 2018

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE THIRD JUDICIAL CIRCUIT
COUNTY OF SUMTER	)	
	)	
Jamaine Holman, Victoria Lewis, Melanie	)	CIVIL ACTION NO.: 2018-CP-43-00138
Baker, Christopher Shipman, Robert	)	
Weaver, Vonetta Wilson, Francesca	)	
Worley, Brittany Johnson, Shirley Pearson,	)	
Robert Weaver, Gastonio Pearson, Rodney	)	
Leachman, Cassandra Pugh, and Krystal	)	
Bostinto, on behalf of themselves and all	)	
others similarly situated,	)	
	)	
Plaintiffs,	)	
	)	MEMORANDUM IN SUPPORT OF
vs.	)	INTRALOT'S MOTION TO DISMISS
	)	
South Carolina Education Lottery	)	
Commission d/b/a South Carolina	)	
Education Lottery and INTRALOT, Inc.,	)	
	)	
Defendants.	)	

Before the Court is Defendant Intralot's Motion to Dismiss, on the grounds that Plaintiff's Complaint is premature for having failed to exhaust administrative remedies and that Plaintiffs have failed to state a claim for which relief may be granted pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure. For the reasons set forth herein, Defendant Intralot's Motion to Dismiss should be granted.

FACTUAL ALLEGATIONS

Plaintiffs filed this Amended Complaint on May 29, 2018. Counsel for Intralot accepted service of the Complaint on July 2, 2018. This pleading is essentially a Class Action Complaint and will be referred to as the "Complaint." In the Complaint, Plaintiffs allege that they represent the interests of individuals who purchased a Holiday Cash Add-A-Play lottery tickets in South Carolina on December 25, 2017. (Complaint ¶ 21.) Plaintiffs apparently contend that they

received winning tickets, although those allegations are not clear. Plaintiffs stated that “Six months later, Plaintiffs and all other lottery players who played the Holiday Cash Add-A-Play game have still not received the benefit of their bargain, the winnings promised by Defendant, in exchange for the purchase of the ticket.” (Complaint ¶ 25.) Plaintiffs further state that “[l]ottery players in South Carolina who tried to cash in their Christmas Add-A-Play winnings, after the game was shut down, received slips, which stated, ‘Transaction Not Allowed.’” (Complaint ¶ 23.) Notwithstanding the allegations that their alleged winning tickets have not been paid, Plaintiffs state no facts that they have exhausted administrative remedies pursuant to S.C. Code Ann. § 59-150-230(C), S.C. Reg. 44-70(F), and S.C. Code Ann. § 59-150-300. Further, Plaintiffs fail to acknowledge that based upon South Carolina law, prizes cannot be paid if it “arises from claimed lottery game tickets that are stolen, counterfeit, altered, fraudulent, unissued, *produced or issued in error*, unreadable, not received, or not recorded by the commission within the applicable deadlines.” S.C. Code Ann. § 59-150-230(C)(3)(a)(emphasis added.) For any condition precedent to a valid claim, the ticket cannot be one that was “produced or issued in error.” Here, Plaintiffs never allege that the tickets were not “produced or issued in error” and fail to plead a condition precedent to any of their causes of action.

In this case, Plaintiffs bring five causes of action against Defendant Intralot. First, they make a claim for unjust enrichment. (Complaint ¶¶ 34-40.) Second, they make a claim for Breach of Contract and/or Breach of Implied Contract. (Complaint ¶¶ 41-46.) Third, they make a claim for Promissory Estoppel. (Complaint ¶¶ 47-50.) Fourth, Plaintiffs allege that Defendant Intralot violated the South Carolina Unfair Trade Practices Act. (Complaint ¶¶ 51-54.) Finally, Plaintiffs bring a claim for Negligence and Gross Negligence. (Complaint ¶¶ 55-58.) Plaintiffs’

complaint should be dismissed because they failed to exhaust administrative remedies and because they failed to state viable claims against Defendant Intralot.

STANDARD OF DETERMINATION

Under Rule 12(b)(6) of the South Carolina Rules of Civil Procedure, a party may move to dismiss a complaint against him based on a failure to state facts sufficient to constitute a cause of action. Spence v. Spence, 368 S.C. 106, 116, 628 S.E.2d 869, 874 (2006). In considering a motion to dismiss under Rule 12(b)(6), the circuit court must base its ruling solely on the allegations set forth in the complaint. Doe v. Marion, 373 S.C. 390, 645 S.E.2d 245 (2007). A motion to dismiss for failure to state a claim should be granted if the facts alleged or those inferences reasonably deducible therefrom demonstrate that Plaintiff is not entitled to relief under any theory of his or her case. Patterson v. Witter, 418 S.C. 66, 791 S.E.2d 294 (2016). According to the Supreme Court, “the question is whether, in the light most favorable to the plaintiff and with every doubt resolved in his behalf, the complaint states any valid claim for relief.” Cole Vision Corp. v. Hobbs, 394 S.C. 144, 149, 714 S.E.2d 537, 539 (2011).

ARGUMENT AND CITATION TO AUTHORITY

A. Plaintiffs’ Complaint Should Be Dismissed as Premature for Having Failed to Exhaust Administrative Remedies.

In their Complaint, Plaintiffs have alleged that Defendants refused to pay winning lottery ticket prizes upon presentment. (Complaint ¶ 45.) Plaintiffs implicitly alleged that they complied with the statutory requirements under S.C. Code Ann. § 59-150-10, *et. seq.* to make a valid claim for prizes to a licensed retailer and that the licensed retailer denied their claim. However, Plaintiffs make no allegations that they made appeals to the South Carolina Education Lottery Commission, received an adverse determination from the South Carolina Education Lottery Commission, and appealed same to the Administrative Law Courts.

The rule of exhaustion of administrative remedies is generally considered a rule of policy, convenience, and discretion, rather than one of law, and will not divest the circuit court of subject matter jurisdiction. Capital City Ins. Co. v. BP Staff, Inc., 382 S.C. 92, 674 S.E.2d 524 (Ct.App. 2009). Thus, “the failure to exhaust administrative remedies goes to the prematurity of a case, not subject matter jurisdiction.” Ward v. State, 343 S.C. 14, 17 n. 5, 538 S.E.2d 245, 246 n. 5 (2000). According to the Supreme Court, “[t]he general rule is that administrative remedies must be exhausted absent circumstances supporting an exception to the application of the general rule.” Hyde v. S.C. Dep’t of Mental Health, 314 S.C. 207, 208, 442 S.E.2d 582, 583 (1994). The Court of Appeals has cited 2 Am. Jur. 2d Administrative Law § 595 (1962) approvingly in Brown v. James, which states:

The doctrine of exhaustion of administrative remedies requires that where a remedy before an administrative agency is provided, relief must be sought by exhausting this remedy before the courts will act. This doctrine is well established, is a cardinal principle of practically universal application, and must be borne in mind by the courts in construing a statute providing for review of administrative action.

Brown v. James, 389 S.C. 41, 48, 697 S.E.2d 604, 608 (Ct. App. 2010).

South Carolina courts recognize exceptions to the general rule that administrative remedies must be exhausted. Where a party demonstrates that the pursuit of administrative remedies is in vain or is futile, the party is excused from the exhaustion requirement. Brown v. James, 389 S.C. 41, 54, 697 S.E.2d 604, 611 (Ct. App. 2010). “Futility, however, must be demonstrated by a showing comparable to the administrative agency taking ‘a hard and fast position that makes an adverse ruling a certainty.’” Law v. S.C. Dep’t of Corr., 368 S.C. 424, 438, 629 S.E.2d 642, 650 (2006) (citations omitted). A mere belief that the agency will deny the claim does establish futility. Smith v. South Carolina Retirement System, 336 S.C. 505, 526-27,

520 S.E.2d 339, 350-51 (Ct. App. 1999.) Another exception to the exhaustion requirement is where an agency has acted outside the scope of its authority. Responsible Econ. Dev. V. S.C. Dep't of Health & Envtl. Control, 371 S.C. 547, 553, 641 S.E.2d 425, 428 (2007).

The administrative process requires validation of a lottery game ticket. S.C. Code Ann. § 59-150-230(C). A prize must not be paid if it “arises from claimed lottery game tickets that are stolen, counterfeit, altered, fraudulent, unissued, *produced or issued in error*, unreadable, not received, or not recorded by the commission within the applicable deadlines.” S.C. Code Ann. § 59-150-230(C)(3)(a)(emphasis added.) Under the Regulations promulgated under this section, the Executive Director or the South Carolina Education Lottery Commission “may deny awarding a prize to a claimant if the ticket is printed or produced in error.” S.C. Code Reg. 44-70(E). Decisions of the Executive Director are final, subject to an appeal to the full commission. S.C. Code Reg. 44-70(F). Finally, pursuant to S.C. Code Ann. § 59-150-300(B), “[t]he Administrative Law Judge Division shall hear appeals from the decisions of the board and, based upon the proceedings before the board.” The Administrative Law Judge Division may reverse the decision of the board if the board action violates a constitutional or statutory provision; is in excess of the statutory authority of the board, is made upon unlawful procedure, is affected by other error of law; is clearly erroneous in view of reliable, probative, and substantial evidence on the whole record; or is arbitrary or capricious or characterized by an abuse of discretion or clearly unwarranted exercise of discretion. S.C. Code Ann. § 59-150-300(B).

In this case, there is a requirement to exhaust administrative remedies. Plaintiffs have not alleged that they have exhausted administrative remedies to appeal any decision of the Executive Director to the Commission and then appealing any Commission decision to the Administrative Law Judge Division. The South Carolina Education Lottery Commission should have the

opportunity, after a full hearing, to render a decision on whether lottery tickets purchased by any of the Plaintiffs were “produced or issued in error.” Further, any adverse decision to any of the Plaintiffs is appealable to the Administrative Law Judge Division. Plaintiffs have not pleaded that the administrative process is futile and have made no allegation that the Administrative Law Judge Division cannot provide the relief they are seeking, if aggrieved by any decision of the Commission. Thus, the Complaint is premature and must be dismissed for failure to exhaust administrative remedies.

B. Plaintiffs’ Claim for Unjust Enrichment Fails as to Defendant Intralot, as the Complaint Fails to Allege Facts of Any Receipt of Plaintiffs’ Payment by Defendant Intralot.

Unjust enrichment is an equitable remedy used typically for implied or quasi-contracts. Plaintiffs’ Complaint is not clear on the underlying basis to seek the remedy of unjust enrichment. The elements to recover for unjust enrichment based on quantum meruit, quasi-contract, or implied by law contract, which are equivalent terms for equitable relief, are: “(1) a benefit conferred by the plaintiff upon the defendant; (2) realization of that benefit by the defendant; and (3) retention of the benefit by the defendant under circumstances that make it inequitable for him to retain it without paying its value.” Myrtle Beach Hosp., Inc. v. City of Myrtle Beach, 341 S.C. 1, 8–9, 532 S.E.2d 868, 872 (2000). While Plaintiffs assert the elements for unjust enrichment in their Complaint, their factual recitation makes it clear that the South Carolina Education Lottery received their payment and alleges that the South Carolina Education Lottery failed to pay for alleged winning tickets, asserting that “[t]hrough no wrongdoing of Plaintiffs or Class members, SCEL suspended Holiday Cash Add-A-Play game sales and validations.” (Complaint ¶ 24.) Moreover, Plaintiffs have no contractual relationship with Defendant Intralot, either express or implied, that would provide any contractual rights in equity for the remedy of unjust enrichment. Thus, Plaintiffs’ claim for unjust enrichment fails.

C. The Breach of Contract/Breach of Implied Contract Cause of Action Fails for Lack of Privity Between Plaintiffs and Defendant Intralot.

“Generally, one not in privity of contract with another cannot maintain an action against him in breach of contract, and any damage resulting from the breach of a contract between the defendant and a third-party is not, as such, recoverable by the plaintiff.” Windsor Green Owners Ass’n v. Allied Signal, Inc., 362 S.C. 12, 17, 605 S.E.2d 750, 752 (Ct.App.2004) (citation omitted). “‘Privity’ denotes [a] mutual or successive relationship to the same rights of property.” Thompson v. Hudgens, 161 S.C. 450, 462, 159 S.E. 807, 812 (1931) (citation omitted); see also Black’s Law Dictionary 1394 (10th ed. 2014) (defining “privity” as “[t]he connection or relationship between two parties, each having a legally recognized interest in the same subject matter (such as a transaction, proceeding, or piece of property); mutuality of interests”). South Carolina courts have equated privity with standing. See Maners v. Lexington County. Sav. & Loan Ass’n, 275 S.C. 31, 33–34, 267 S.E.2d 422, 423 (1980) (affirming the trial judge’s determination that “appellant had no standing to allege [her claim] because she was not in privity with respondent”). “However, if a contract is made for the benefit of a third person, that person may enforce the contract if the contracting parties intended to create a direct, rather than an incidental or consequential, benefit to such third person.” Id. (citation omitted). However, the presumption may be overcome if the intent of the parties to the contract was to provide the third-party a direct benefit, rather than an incidental or consequential one. Bob Hammond Constr. Co. v. Banks Constr. Co., 312 S.C. 422, 424, 440 S.E.2d 890, 891 (Ct.App.1994); Cothran v. Rock Hill, 211 S.C. 17, 20, 43 S.E.2d 615, 616–17 (1947).

Plaintiffs specifically alleged that they entered into a contract with the South Carolina Education Lottery. (Complaint ¶ 42.) Defendant Intralot, a private company providing administrative and technical services to the South Carolina Education Lottery Commission, is

not alleged to be involved in the approval of retailers or in the sale of lottery tickets. Moreover, there is no allegation that Plaintiffs actually are in privity with Defendant Intralot.

Plaintiffs attempt to save their breach of contract cause of action by stating that “[a]t all times relevant to this Complaint, Defendants had a contract between themselves, of which Plaintiffs were direct third-party beneficiaries.” (Complaint ¶ 42.) A third-party beneficiary is a party that the contracting parties intend to directly benefit. Touchberry v. City of Florence, 295 S.C. 47, 48–49, 367 S.E.2d 149, 150 (1988). However, Plaintiffs plead no facts establishing that they are actually third-party beneficiaries of the contract between Defendants. Here, Plaintiffs failed to cite to any specific language in the contract between Defendants demonstrating that players are third-party beneficiaries. Thus, any attempt to save this cause of action from the lack of privity with bare allegations that Plaintiffs were third-party beneficiaries fails.

As a result, Plaintiffs do not have standing to bring a breach of contract or breach of implied contract action against Defendant Intralot. Thus, Plaintiffs’ second cause of action should be dismissed as to Defendant Intralot.

D. Plaintiffs’ Claims of Promissory Estoppel Fails for Failing to Identify Any Alleged Misrepresentation Made by Defendant Intralot.

Promissory estoppel is a quasi-contract remedy. Higgins Constr. Co. v. S. Bell Tel. & Tel. Co., 276 S.C. 663, 665, 281 S.E.2d 469, 470 (1981). Courts have used the doctrine where the refusal to apply it ““would be virtually to sanction the perpetration of a fraud or would result in other injustice.”” Satcher v. Satcher, 351 S.C. 477, 484, 570 S.E.2d 535, 538 (Ct. App. 2002) (quoting Citizens Bank v. Gregory's Warehouse, Inc., 297 S.C. 151, 154, 375 S.E.2d 316, 318 (Ct. App. 1988)). The elements of promissory estoppel are (1) an unambiguous promise by the promisor; (2) reasonable reliance on the promise by the promisee; (3) reliance by the promisee was expected by and foreseeable to the promisor; and (4) injury caused to the promisee by his

reasonable reliance. Davis v. Greenwood Sch. Dist. 50, 365 S.C. 629, 634, 620 S.E.2d 65, 67 (2005). Thus, promissory estoppel actually is a remedy for fraud or negligent misrepresentation.

Plaintiffs' allegation is that "Defendants made an unambiguous promise to provide Plaintiff and the Class with payments in connection with winning Holiday Cash Add-A-Play tickets." (Complaint ¶ 48.) However, Plaintiffs never identify any statement made by Defendant Intralot regarding payments for any alleged winning lottery tickets. In this regard, the complaint fails to set forth a specific allegation of what information was negligently misrepresented. Even if Plaintiffs had properly identified information specific false information promulgated by Defendant Intralot, to establish liability for negligent misrepresentation, the plaintiff must show by a preponderance of the evidence: (1) the defendant made a false representation to the plaintiff; (2) the defendant had a pecuniary interest in making the representation; (3) the defendant owed a duty of care to see that he communicated truthful information to the plaintiff; (4) the defendant breached that duty by failing to exercise due care; (5) the plaintiff justifiably relied on the representation; and (6) the plaintiff suffered a pecuniary loss as the proximate result of his reliance on the representation. Quail Hill, LLC v. County of Richland, 387 S.C. 223, 240, 692 S.E.2d 499, 508 (2010); McLaughlin v. Williams, 379 S.C. 451, 456, 665 S.E.2d 667, 670 (Ct.App.2008) (noting the elements of negligent misrepresentation must be established by a preponderance of the evidence). Here, Plaintiffs' failed to set forth specific allegations of what false representation was made by Defendant Intralot that each Plaintiff received and relied upon. Thus, any cause of action for negligent misrepresentation and the remedy of promissory estoppel fails and should be dismissed from this action.

E. Plaintiffs' Cause of Action for Violation of the South Carolina Unfair Trade Practices Act Fails for Failing to Set Forth Each Necessary Element of a Cause of Action.

To be actionable under the South Carolina Unfair Trade Practices Act, the unfair or deceptive act or practice must have an impact upon the public interest. Haley Nursery Co. v. Forrest, 298 S.C. 520, 381 S.E.2d 906 (1989). “An unfair or deceptive act or practice has an impact upon the public interest if the act or practice has the potential for repetition.” Id. at 524, 381 S.E.2d at 908. There are two general ways to demonstrate the potential for repetition: (1) by showing the same kind of actions occurred in the past, thus making it likely the actions will continue absent some deterrence, or (2) by showing the company's procedures create a potential for repetition of the unfair and deceptive acts. Crary v. Djebelli, 329 S.C. 385, 496 S.E.2d 21 (1998). Here, Plaintiffs’ Complaint is devoid of any allegation that the alleged practices have any potential for repetition. Moreover, Plaintiffs have alleged no facts indicating that Defendant Intralot engaged in any deceptive trade practice. In fact, Plaintiffs fifth cause of action negates their claim for violation of the South Carolina Unfair Trade Practices Act in alleging that Defendant Intralot negligently failed to properly test and implement the technological aspect of the Holiday Cash Add-A-Play. (Complaint ¶ 56.) As, there is no allegation of any unfair trade practice by Defendant Intralot and no allegation that any conduct is capable of repetition, this cause of action should be dismissed.

F. Plaintiffs’ Negligence Cause of Action Fails For Lack of a Duty Owed to Plaintiffs.

To prevail in an action founded in negligence, the plaintiff must establish three essential elements: (1) a duty of care owed by the defendant to the plaintiff; (2) a breach of that duty by a negligent act or omission; and (3) damage proximately caused by a breach of duty. Newton v. South Carolina Pub. Rys. Comm’n, 312 S.C. 107, 108-109, 439 S.E.2d 285, 287 (Ct.App.1993), *rev’d on other grounds*, 319 S.C. 430, 462 S.E.2d 266 (1995). Actionable negligence is based upon the breach of duty to do or refrain from doing some particular act. Hodge v. Crafts –

Farrow State Hosp., 286 S.C. 437, 439, 334 S.E.2d 818, 820 (1985). A breach of duty exists when it is foreseeable that one's conduct may likely injure the person to whom the duty is owed. Horne v. Beason, 285 S.C. 518, 521, 331 S.E.2d 342, 344 (1985). The damages allegedly sustained must be shown to have been proximately caused, i.e. causally connected, to the breach of duty in order to warrant a recovery. *Id.* If one neglects a duty which proximately causes injury to another, recovery is warranted. Hodge, 286 S.C. at 439, 334 S.E.2d at 820.

In this case, Plaintiffs' Complaint states that Defendant Intralot failed to exercise reasonable care in the context of the administrative services provided to the South Carolina Education Lottery, including failing to develop, implement, and execute policies and procedures for testing lottery games. (Complaint ¶ 56.) Here, while Intralot may have had a duty to have properly functioning systems and properly testing lottery games, this duty was owed to the South Carolina Education Lottery Commission and not to the general public. In certain circumstances under South Carolina law, a tortfeasor may be liable for injury to a third party arising out of the tortfeasor's contractual relationship with another, despite the absence of privity between the tortfeasor and the third party. Barker v. Sauls, 289 S.C. 121, 122, 345 S.E.2d 244, 244 (1986) (citing Terlinde v. J.F. Neely, Sr., 275 S.C. 395, 399, 271 S.E.2d 768, 770 (1980)). The tortfeasor's liability exists independently of the contract and rests upon the tortfeasor's duty to exercise due care. *Id.* (citing Edward's of Byrnes Downs v. Charleston Sheet Metal Co., 253 S.C. 537, 542, 172 S.E.2d 120, 122 (1970)). This common law duty of due care includes the duty to avoid damage or injury to foreseeable plaintiffs. *See Terlinde*, 275 S.C. at 399, 271 S.E.2d at 770 (stating that the "key inquiry" in determining whether to impose liability is "foreseeability, not privity").

In this case, Plaintiffs have not alleged that their negligence claim is based upon contractual duties Defendant Intralot owed to Defendant South Carolina Education Lottery Commission. Defendant Intralot's contractual obligations to the Defendant South Carolina Education Lottery are governed, in part, by the statutory framework. Pursuant to S.C. Code Ann. § 59-150-230(C)(3)(a), a prize must not be paid if it "arises from claimed lottery game tickets that are stolen, counterfeit, altered, fraudulent, unissued, *produced or issued in error*, unreadable, not received, or not recorded by the commission within the applicable deadlines." S.C. Code Ann. § 59-150-230(C)(3)(a)(emphasis added.) This statute establishes that any duty of Intralot in the production or issuance of lottery tickets is owed directly to the South Carolina Education Lottery Commission and not to Plaintiffs, as tickets issued in error are not to be paid. Therefore, S.C. Code Ann. § 59-150-230(C)(3)(a) establishes that any contractual duty owed to Defendant South Carolina Education Lottery does not provide a duty of care to consumers like Plaintiff. Plaintiffs have no legal right in tort as to Defendant Intralot. Plaintiff's Negligence cause of action should be dismissed.

CONCLUSION

For the above and foregoing reasons, Plaintiffs' Complaint as to Defendant Intralot should be dismissed pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure.

RESPECTFULLY SUBMITTED, this 16th day of July 2018.

STROM LAW FIRM, LLC

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STATE OF SOUTH CAROLINA

COUNTY OF SUMTER

Jamaine Holman, Victoria Lewis, Melanie Baker, Christopher Shipman, Robert Weaver, Vonetta Wilson, Francesca Worley, Brittany Johnson, Shirley Pearson, Robert Weaver, Gastonio Pearson, Rodney Leachman, Cassandra Pugh, and Krystal Bostinto, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

South Carolina Education Lottery Commission d/b/a South Carolina Education Lottery and INTRALOT, Inc.,

Defendants.

IN THE COURT OF COMMON PLEAS
THIRD JUDICIAL CIRCUIT

C.A. No. 2018-CP-43-00138

**PLAINTIFFS' MEMORANDUM IN
OPPOSITION TO DEFENDANT'S
MOTION TO DISMISS**

Plaintiffs, by and through undersigned counsel, submit this memorandum in opposition to Defendant's Motion to Dismiss Plaintiffs' causes of action for unjust enrichment, promissory estoppel, and violation of S.C. Unfair Trade Practices Act.

Defendant South Carolina Education Lottery Commission d/b/a South Carolina Education Lottery moved to dismiss Plaintiffs' Complaint pursuant to Rules 12(b)(1), 12(b)(3), and 12(b)(6) of the South Carolina Rules of Civil Procedure ("SCRCP") and the doctrines of ripeness and sovereign immunity. (See Def.'s Mot. Dismiss).¹

Because the complaint contains short and plain statements of Plaintiffs' claims for unjust enrichment, breach of contract and/or breach of implied contract, and promissory estoppel showing

¹ Defendant's Motion contains an absurdly enormous amount of facts that are not set forth in either Complaint filed by Plaintiffs. As the Court is aware, any factual information not contained in the Complaint should not be considered for purposes of Defendant's Motion.

that Plaintiffs are entitled to relief, Plaintiffs' Complaint is legally sufficient. Defendant's Motion to Dismiss states no adequate basis for this Court to dismiss Plaintiffs' Complaint. Defendant's Motion is premised upon both a mistaken presumption that Plaintiffs' lottery tickets were "erroneously issued," which Plaintiffs have never asserted or believe, and a mistaken analysis of sovereign immunity, neither of which entitles it to dismissal at this stage. Most critically, Defendant ignores the proposition that Plaintiffs are entitled to relief based on Defendant's ministerial and proprietary functions as a governmental entity of the state of South Carolina and its entering into a contract with a private company. As set forth more fully below, for these reasons Defendant's motion should be rejected.

PROCEDURAL HISTORY

Plaintiffs filed this action in Sumter County's Court of Common Pleas on February 1, 2018, because of Defendant's wrongful refusal to honor winning lottery tickets purchased and paid for by Plaintiffs and the proposed class. Thereafter, Defendants submitted their present Motion on April 10, 2018, arguing that this matter should be dismissed for lack of subject matter jurisdiction, improper venue and because Plaintiffs have both failed to state facts sufficient to constitute a cause of action and have not exhausted their legal remedies through the Commission or Administrative Law Courts.

STATEMENT OF FACTS

Plaintiffs are citizens and residents of South Carolina, where they purchased lottery tickets in several different counties on Christmas Day of 2017. Defendant South Carolina Education Lottery Commission ("SCEL") is a body politic existing and operating under the laws of the state of South Carolina, with its principal place of business located in Richland County, South Carolina, and is responsible for administering lottery games, including the testing of games, advertising,

marketing, sale of tickets, and payment of cash prizes to winning ticket holders, including those in Sumter County where this lawsuit has been filed. SCEL entered in to a contract with Defendant Intralot to create the games and the necessary software and hardware to implement the games. At all times relevant to this complaint, Defendant SCEL agreed to pay cash prizes to lottery players who purchased winning lottery tickets.

On December 25, 2017, Plaintiffs purchased a \$1 terminal-generated instant game, Holiday Cash Add-A-Play, which was created, tested, managed, and advertised by Defendants SCEL and Intralot. After reports of many winners, SCEL suspended the game due to an alleged "error" allowing all tickets issued to win; however, this is patently false because many lottery players, including several Plaintiffs, purchased losing tickets at the same time they purchased winning tickets. Thereafter, lottery players in South Carolina who tried to cash in their winnings after the game was shut down were denied compensation for their winning tickets. Defendant suspended the game sales and validations through no wrongdoing by Plaintiffs, and Plaintiffs were told to have "patience" until the Commission came to a conclusion on whether or not to cash the winning tickets. To this day, Plaintiffs have not received the benefit of their bargain, the winning proceeds promised by Defendant in exchange for the purchase of the ticket. SCEL paid a company to perform an "audit" which, unsurprisingly, determined the tickets were issued "erroneously" and the SCEL has therefore used this as a basis to deny Plaintiffs their rightful winnings for which they paid.

LEGAL STANDARD

In considering a motion to dismiss a complaint based on a failure to state facts sufficient to constitute a cause of action, the trial court must base its ruling solely on allegations set forth in the complaint. Spence v. Spence, 368 S.C. 106, 116, 628 S.E.2d 869, 874 (2006). If the facts

alleged and inferences reasonably deducible therefrom, viewed in the light most favorable to the plaintiff, would entitle the plaintiff to relief on any theory, then dismissal under Rule 12(b)(6) is improper. Baird v. Charleston County, 333 S.C. 519, 511 S.E.2d 69 (1999); Stiles v. Onorato, 318 S.C. 297, 457 S.E.2d 601 (1995). "The question is whether, in the light most favorable to the plaintiff, and with every doubt resolved in his behalf, the complaint states any valid claim for relief." Gentry v. Yonce, 337 S.C. 1, 5, 522 S.E.2d 137, 139 (1999). The complaint should not be dismissed merely because the court doubts the plaintiff will prevail in the action. Toussaint v. Ham, 292 S.C. 415, 357 S.E.2d 8 (1987).

ARGUMENT

I. Plaintiffs do not have to exhaust their administrative remedies as required by the statute because the Lottery Act Provision grievance procedure is inapplicable.

Defendant argues that this suit is being brought based on the notion that the Commission suspended the game after an error in the system resulted in nearly every player "winning" during a two-hour period. Plaintiffs do not allege there was an error in the system and instead contend they are owed the benefit of their bargain, which are the winnings promised by Defendant in exchange for the purchase of the ticket. Because Plaintiffs do not allege, and in fact deny, that there was an "error" in the system, the Lottery Act's limitation on the Commission's prize-paying discretion, by forbidding the Commission from paying unissued tickets or erroneously issued tickets, is inapplicable because the tickets in contention were not erroneously issued. See S.C. Code Ann. § 59-150-230(C)(3)(a) (stating a prize must not be paid if it is issued in error). Thus, there is no purpose for an aggrieved ticket holder to file a complaint with the Commission's Executive Director, schedule the appropriate hearing with the director after review, appeal the respective decision to the Board, or to ultimately appeal to the Administrative Law Court because Plaintiffs never alleged their tickets were issued erroneously. This is a question of act to be

determined during discovery and it would be improper for the Court to dismiss the Complaint based on the Defendant's factual assertions rather than Plaintiffs.

II. Defendant's Administrative Remedy Argument is Moot because Defendant has now decided to deny Class Members' Claims.

First, Defendant argues that this "lawsuit should be dismissed because Plaintiffs have not exhausted their administrative remedies related to the [Defendant's] alleged wrongdoing." (See Def.'s Mem. at 10). "The exhaustion doctrine acts as a prudential rule that provides the courts 'with a method to exercise comity toward administrative agencies and to promote efficient use of judicial resources while protecting the rights of parties who have come before the court seeking relief.'" McDonald v. Centra, Inc., 946 F.2d 1059, 1063 (4th Cir. 1991) (citing Morrison-Knudsen Co., Inc. v. CHG Int'l, Inc., 811 F.2d 1209, 1223 (9th Cir. 1987)).

However, there are exceptions to the requirement that parties exhaust administrative remedies before seeking judicial review. Exceptions to the doctrine exist where "(1) the dispute is a matter of statutory construction; (2) the utilization of administrative procedures would cause irreparable injury; and (3) the resort to administrative procedures would be futile." Id. "Absent a clear showing that an administrative agency has taken a *hard and fast position* that makes an adverse ruling a certainty, a litigant's prognostication that he is likely to fail before an agency is not a sufficient reason to excuse the lack of exhaustion." Thetford Properties IV Ltd. Partnership v. U.S. Dep't of Housing & Urban Dev., 907 F.2d 445, 450 (4th Cir. 1990).

This argument is not moot, however, for two reasons. First, the named plaintiffs did initiate administrative reviews or grievances, each of which has been denied or rejected in writing by the Defendant. Second, the Defendant has now determined it will limit relief to the issuance of a refund for the purchase price of tickets to Class Members. Fortin, J., *Sorry, Lottery Winners. South Carolina Won't Pay, but Here's Your \$1.*, New York Times, accessed at

<https://www.nytimes.com/2018/05/31/us/south-carolina-lottery-glitch.html> (last visited June 1, 2018). Defendant has issued a decision, which it is required to according to Defendant's administrative remedy argument – a position which the Class Members disagree with, and are unwilling to accept. For that reason, Defendant's administrative remedy argument is now moot and Plaintiffs and the Class Members should be allowed to proceed with this lawsuit, which they would be entitled to file the same day Defendant made the above-referenced determination.

III. Sovereign immunity does not prohibit Plaintiff's equitable claims.

Defendant argues that "Plaintiffs' causes of action for Unjust Enrichment, Promissory Estoppel, and violation of the South Carolina Unfair Trade Practices Act (the "UTPA") must nevertheless be dismissed because the Commission is sovereignly immune from such claims." However, Defendant fails to point the Court to any South Carolina law specifically on point. In Quail Hill, LLC v. County of Richland, the South Carolina Court of Appeals came to the opposite inference Defendant wishes the Court to make. 665 S.E.2d 194, 379 S.C. 314 (Ct. App. 2008).

In that case, the plaintiff filed a complaint in circuit court requesting an injunction and alleging causes of action against the defendant – a governmental entity – for equitable estoppel, negligence, negligent misrepresentation, and inverse condemnation. Id. The government defendant moved for summary judgment, which the circuit court granted. Id. In reversing the Circuit Court, the Court of appeals noted that "[t]he acts of a government agent that are within the proper scope of his authority may give rise to estoppel against a municipality." Id. (citing Charleston County v. Nat'l Adver. Co., 292 S.C. 416, 418, 357 S.E.2d 9, 10 (1987)); see also Landing Dev. Corp. v. City of Myrtle Beach, 285 S.C. 216, 221, 329 S.E.2d 423, 426 (1985) ("To allow the city to repudiate its former interpretation of permissible rentals and the statements of its zoning director, based upon

a re-assessment of the meaning of an undefined term in the ordinance[,] would be unconscionable.").

The South Carolina Tort Claims Act states that state, political subdivisions, and employees while acting within the scope of official duty are immune from liability for any tort except waived by this chapter. See S.C. Code Ann. § 15-78-20(b). Under the exceptions to waiver of immunity, § 15-78-60(5) states that the exercise of discretion or judgment of the governmental entity or employee or the performance or failure to perform any act or service which is in the discretion or judgment if the governmental entity or employee are not valid claims accepted under the act. SCEL is not acting or serving a discretionary function by running the lottery. Moreover, by claiming discretionary immunity or even sovereign immunity as a whole, the burden of proof is on the entity claiming the immunity.

"To establish 'discretionary immunity,' the governmental entity must prove that the governmental employees, faced with alternatives, actually weighed competing considerations and made a conscious choice; furthermore, the governmental entity must show that in weighing the competing considerations and alternatives, it utilized accepted professional standards appropriate to resolve the issue before them." Stephens v. CSX Transp., Inc., 415 S.C. 182, 200, 781 S.E.2d 534, 543-44 (2015) (citing Pike v. S.C. Dep't of Transp., 343 S.C. 224, 230, 540 S.E.2d 87, 90 (2000)).

Not only does Defendant **not** meet the first prong by not making an internal consideration and by instead contracting a private entity to review the matter, there was no conscious choice involved based on the fact that there were no two "competing considerations." Because the first prong is not met that is established in Stephens, there is no evidentiary basis that Defendant could not only weigh a competing consideration (because there was no consideration given or weighed

by Defendant itself and only by the private entity), but there was also no professional standard involved because the private entity was arguably the sole decision maker in the matter to resolve the issue that was of no fault of Plaintiffs. This argument is further supported by a standard test to weigh if an action is discretionary or ministerial.

To determine whether a given action qualifies for immunity, there is a two-step analysis. Greenbelt Ventures, LLC v. Washington Metro. Area Transit Auth., 481 F. App'x 833, 839 (4th Cir. 2012) (citing James v. WMATA, 649 F. Supp. 2d 424, 430 (D. Md. 2009)). First, if the entity is engaged in a quintessential governmental function, its activities fall within the scope of its immunity. Greenbelt at 481 F. App'x at 839. However, if the entity is not engaged in such a governmental function, a court "must determine whether the challenged activity is discretionary or ministerial." Id. A duty is discretionary if it involves judgment, planning, or policy decisions; it is not discretionary and thereby ministerial if it involves enforcement or administration of a mandatory duty at the operational level, even if professional expert evaluation is required. Id. (citing Monument Realty LLC v. WMATA, 535 F. Supp. 2d 60, 76 (D.D.C. 2008) (citation omitted)). Where the activity is discretionary, the entity is immune from claims effecting governmental functions. Id. In deciding whether the case at bar involves a discretionary activity, the court must first look to whether a statute, regulation, or policy specifically proscribes a course of action. Id. Here there is a statute, regulation, and policy for Defendant established by the Act; therefore, Defendant is a ministerial function of government.

Ordinarily, sovereign immunity bars claims of negligence and affords an entity protection when it is engaged in governmental functions, not when it is involved in commercial ventures. The selling of lottery tickets is a proprietary and hereby ministerial venture, and when done in a negligent manner as this case, the doctrine of sovereign immunity should not protect the

commercial wrongdoer, which is Defendant. Because Defendant is a political subdivision and/or entity of the State, it may not avoid its obligation to perform its commercial services in a non-negligent manner by invoking the doctrine of sovereign immunity. It is a general concept that if a governmental body such as Defendant is negligent in performing a proprietary function, it will be liable for its negligence, while, if the activity is classified as governmental, the defense of sovereign immunity will apply. Here, Defendant most certainly by any legal standard was engaged in a commercial venture not only by running the commission, but also by pocketing losing tickets' monetary value; therefore, sovereign immunity should not bar this cause of action.

This proprietary function standard is further evidenced by other case law holding that the test for whether action is governmental or proprietary action should be whether contract itself deprives governing body, or its successors, of discretion which public policy demands should be left unimpaired. See City of Beaufort v. Beaufort-Jasper Cty. Water & Sewer Auth., 325 S.C. 174, 179-80, 480 S.E.2d 728, 731 (1997); see also AGI Assocs., LLC v. City of Hickory, N.C., 773 F.3d 576 (4th Cir. 2014) (holding that, under NC law, governmental immunity from equitable claims is waived when a county or municipality acts in a proprietary, rather than governmental capacity). The notion that a government entity is protected from equitable claims should be waived pursuant to a proprietary function theory is articulated by the South Carolina Supreme Court and North Carolina Supreme Court.

Under South Carolina law and the Act, immunity is waived by entering into a valid contract and by purchasing liability insurance. See S.C. Code Ann. §§ 15-78-20(a); 59-150-60(A)(1). AGI affirms this same standard and states that, like the Act, when an entity enters into a valid contract, it has implicitly consented to be sued for damages on the contract in the event it breaches the contract. AGI at 773 F.3d at 579 (citing Smith v. State, 289 N.C. 303, 222 S.E.2d 412, 423-24

(1976) (addressing the State's immunity from suit); see also Data Gen. Corp. v. Cnty. of Durham, 143 N.C. App. 97, 545 S.E.2d 243, 247 (2001) (citing to Smith v. State for the proposition that when a governmental entity such as a county “enters into a valid contract, the entity ‘implicitly consents to be sued for damages’ ” if there is a breach)).

Plaintiffs submit Defendant is liable for contract per the statute itself. Furthermore, Defendant has no argument to be made under a proprietary function theory of immunity. AGI holds “when a municipality acts in its governmental capacity, it shares the immunity traditionally accorded the sovereign. However, when it acts as a corporation, it is held to the same standards of liability as any private corporation. AGI at 773 F.3d at 579 (citing Estate of Williams ex rel. Overton v. Pasquotank Cnty. Parks and Recreation Dep't, 366 N.C. 195, 732 S.E.2d 137, 141 (2012)). Defendant is not an entity engaging in an activity that could even be remotely considered to be a governmental function. It is, by definition, a proprietary function by operating a lottery gaming system, coupled with the fact that it has profited off losing tickets because it refused to pay for the losing or winning tickets’ allotted values. Therefore, just as any private corporation would be subject to liability of equitable claims and disgorgement of profits, so too should Defendant because it is acting proprietarily.

Defendant has failed to articulate in any way why it should be cloaked with the protection of sovereign immunity for the matter at hand or why it needs protection from equitable claims such as unjust enrichment when it chose to deliberately act beyond its claimed governmental function and duties. There is no argument to be had as to why imposing liability for equitable claims against Defendant as a government entity would disrupt essential public services. If Defendant is or was concerned about exposure to this litigation, it has the same protection available as any private corporation by not engaging in this distinct proprietary function of selling and profiting from

lottery ticket sales. This court should not afford Defendant the veil of governmental immunity and protections that are not afforded to other private corporations engaged in similar proprietary and ministerial ventures.

IV. Plaintiffs concede the UTPA claim should be dismissed.

V. Plaintiffs will consent to transferring venue to Richland County.

CONCLUSION

For the reasons stated above, Plaintiff respectfully requests the Court deny Defendant's Motion to Dismiss in its entirety, except as to the UTPA claim.

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Attorneys for the Plaintiffs and the Proposed Class

Pawleys Island, South Carolina

July 27, 2018

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SUMTER	)	THIRD JUDICIAL CIRCUIT
Jamaine Holman, Victoria Lewis, Melanie	)	C.A. No.: 2018-CP-43-00138
Baker, Christopher Shipman, Robert	)	
Weaver, Vonetta Wilson, Francesca	)	
Worley, Brittany Johnson, Shirley Pearson,	)	
Robert Weaver, Gostonia Pearson, Rodney	)	
Leachman, Cassandra Pugh, and Krystal	)	
Bostinto, on behalf of themselves and all	)	
others similarly situated,	)	
	)	
Plaintiffs,	)	SOUTH CAROLINA
	)	EDUCATION LOTTERY
vs.	)	COMMISSION'S MOTION TO
	)	RECONSIDER, ALTER, OR AMEND
South Carolina Education Lottery	)	
Commission d/b/a South Carolina	)	
Education Lottery, and Intralot, Inc.	)	
	)	
Defendants.	)	

Pursuant to Rule 59(e), SCRC, Defendant South Carolina Education Lottery Commission ("the Commission" or "SCEL") files this motion requesting the Court reconsider, alter, or amend its ruling dated January 4, 2019, denying SCEL's Motion to Dismiss. As explained more fully below, reconsideration of that ruling is warranted (1) because the Court did not rule on SCEL's argument that dismissal is warranted because this suit was filed in the wrong venue, (2) because a plaintiff may not avoid the requirement that he exhaust his administrative remedies merely by bringing a putative class action, and (3) because Plaintiffs have not met their burden of presenting evidence to show that, when the administrative process is viewed as a whole, exhaustion of the process and its administrative remedies would be futile.

BACKGROUND AND RELEVANT RECENT EVENTS

The General Assembly has statutorily vested the Commission with the authority to operate and administer lottery games. See SCEL's Memorandum at 2-3 (filed April 10, 2018). Pursuant to that authority, the Commission has promulgated regulations and procedures governing lottery play.

See id. at 3–5. Those procedures, as well as the statutes enacted by the General Assembly, establish a process by which a person who wishes to challenge the Commission’s actions or determinations must do so. Specifically, a ticket holder who disputes an act or decision of the Commission:

- (1) Must first file a formal written complaint with the Commission’s Executive Director;
- (2) Then, if dissatisfied with his decision, must appeal his decision to the SCEL’s Board of Commissioners (the “Board”);
- (3) Then, if dissatisfied with the Board’s decision, must appeal the Board’s decision to the Administrative Law Court (“ALC”); and
- (4) If dissatisfied with the ALC’s decision, he may then—and only then—challenge the Commission’s acts and decisions in the Circuit Courts by appealing from the ALC’s ruling.

See id. In the instant proceeding, Plaintiffs skipped past the first three steps of this mandatory process and proceeded directly to the fourth and final step—filing suit in this Court—without pursuing, much less exhausting, their administrative remedies. *See* SCEL’s Memorandum at 10–11.

Several events occurring after the Commission filed its Motion to Dismiss are relevant to the Commission’s arguments regarding the Plaintiffs’ failures to exhaust their administrative remedies. First, on or around May 25, 2018, Plaintiffs’ counsel wrote the Commission seeking to initiate an administrative grievance or review regarding the Holiday Cash Add-A-Play incident. *See, e.g.*, Letter from Clay Hopkins to Tim Madden, dated May 25, 2018 (attached hereto as **Exhibit A**).

Second, on May 30, 2018, the Commission’s Board adopted a report and findings prepared by Gaming Laboratories International (“GLI”), a forensic consulting firm engaged to investigate the Holiday Cash Add-A-Play incident at issue. That report—a copy of which is attached hereto as **Exhibit B**—thoroughly reviewed the circumstances and causes of the incident, and concluded the ostensibly “winning” tickets issued during the malfunction were issued or produced in error. Accordingly, the Commission determined it would not pay those erroneous tickets.

Third, on or around June 14 and 15, 2018, the Commission informed each Plaintiff (via letters sent from the Commission's counsel to Plaintiffs' counsel) of the Board's decision and advised them of three options available to them:

- (a) Any player holding an erroneously issued ticket from the Add-A-Play incident may return that ticket to the Commission by January 7, 2019 and receive a refund for the ticket price and the postage expenses;
- (b) Any player who disagrees with the Board's decision and wished to challenge it may seek review of the Board's decision by pursuing an appeal to the Administrative Law Court in the manner specified in S.C. Code Ann. § 59-150-300; and
- (c) Any player who disagrees with the Board's decision and who possesses any evidence not considered by GLI could request that SCEL's Executive Director review that evidence by sending him, within 30 days, a copy of the player's ticket(s), the additional evidence, a statement outlining the reason for the complaint, and any law or authority upon which the player relies.

See, e.g., Letter from William Brown to Sharda Davis, dated June 14, 2018 (attached hereto as **Exhibit C**).¹ None of the Plaintiffs in the instant proceeding availed themselves of any of the three options. After 30 days had passed without any of the Plaintiffs submitting additional evidence, authorities, or arguments to the Commission, the Executive Director informed each of them in writing of the Board's decision and reminded them that further review of this decision was by to appeal to the ALC pursuant to S.C. Code Ann. § 59-150-300. *See, e.g.*, Letter from Hogan Brown to Sharda Davis, dated July 25, 2018 (attached hereto as **Exhibit D**).²

LEGAL STANDARD

"A motion under Rule 59(e) long has been viewed as 'motion for reconsideration' despite the absence of those words from the rule." *Elam v. S.C. Dept. of Transp.*, 361 S.C. 9, 21, 602 S.E.2d 772, 778 (2004). A party may file a motion such a motion "when she believes the court has

¹ The letters sent to other Plaintiffs were identical to this one save for the name of the recipients.

² The letters sent to other Plaintiffs were identical to this one save for the name of the recipients.

misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it.” *Id.* at 24, 602 S.E.2d at 780. “A party *must* file such a motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review.” *Id.* (emphasis in original).

Much of this Court’s recent ruling hinged on the Court’s analysis of Plaintiffs’ argument that exhaustion of their administrative remedies would be futile, and thus the legal standard for that analysis is particularly important. Notably, the burden of proving futility rests *on the party asserting futility, i.e.,* on the party seeking to excuse his failure to exhaust his administrative remedies. *See Stanton v. Town of Pawley’s Island*, 309 S.C. 126, 128, 420 S.E.2d 502, 503 (1993) (“*Stanton must show* that as a matter of law, he was not required to exhaust administrative remedies or that the trial judge’s ruling was based upon facts for which there is no evidentiary support. Stanton has failed to establish either. Therefore, we affirm the trial judge’s dismissal of the action for failure to exhaust administrative remedies.”) (emphasis added); *S.C. Self Storage Ass’n v. City of Forest Acres*, No. 2007-CP-40-00316, 2010 WL 9499364, at *8 (S.C. Ct. Comm. Pl., Hon. J. Michelle Childs, April 13, 2010) (“The Court finds Plaintiffs cannot claim that an exhaustion of administrative remedies would have been in vain or futile because Plaintiffs have not met *their burden* of demonstrating that the procedures set forth in the challenged Ordinances would definitely result in an adverse ruling.”) (emphasis added).

ARGUMENT

I. Reconsideration is warranted to rule on SCEL’s venue argument.

As asserted in SCEL’s Motion to Dismiss and as explained in SCEL’s memorandum in support of its motion, dismissal of the instant lawsuit is required because Plaintiffs have filed it in the wrong venue. *See* SCEL’s Memorandum at 18 (April 10, 2018); S.C. Code Ann. § 59-150-30(A) (“Venue for the commission is in Richland County.”); *City of Irmo v. Burr*, No. 2006-CP-40-

06432, 2007 WL 2412991 (S.C. Ct. of Common Pleas, Hon. J. Michelle Childs, June 28, 2007) (dismissing suit pursuant to Rule 12(b)(3) because Lexington County, not Richland County, was the proper venue).

This Court's ruling on January 4, 2019 did not address or rule on this basis for dismissal. SCEL respectfully requests reconsideration of the Court's order to allow the Court to alter or amend its ruling, and SCEL respectfully suggests the venue argument provides an adequate basis on which this suit should be dismissed.

II. Reconsideration is warranted because a plaintiff may not circumvent a legislatively required administrative remedy merely by alleging a putative class action.

As explained at length in SCEL's prior memorandum in support of its Motion to Dismiss, the General Assembly has expressly established an administrative process by which aggrieved ticket holders may challenge the Commission's actions or determinations. *See* SCEL's Memorandum at 2–5 and 10–11 (April 10, 2018). This requirement represents the deliberate and express legislative judgment of the General Assembly. This Court's recent ruling recognized that exhaustion of this administrative process and its remedies is mandatory. *See* Order at 2–3 (January 4, 2019). Nevertheless, this Court concluded exhaustion of Plaintiffs' administrative remedies was *not* required in this instance because Plaintiffs have alleged a putative class action, and it would (in the Court's view) be futile to require each of the putative class members to exhaust his or her administrative remedies. *See* Order at 4 (January 4, 2019) (citing *Rose v. City of Hayward*, 126 Cal. App.3d 926 (Cal. Ct. App.—1st Dist. 1981) in support of the proposition that “plaintiffs in a class action need not exhaust administrative remedies prior to instituting judicial proceedings”).

SCEL respectfully argues that both this Court's conclusion and its reliance on *Rose* are mistaken. First, the language of the South Carolina statutes at issue is plain that exhaustion is required by those who dispute the Commission's decisions. The statute provides no exception to

this rule merely because multiple people dispute a decision, and this Court lacks the freedom to infer a meaning different from that expressed by the legislature or to imply exceptions where the General Assembly provided none:

The primary rule of statutory construction is to ascertain and give effect to the intent of legislature. [] The first inquiry is whether the statute's meaning is clear on its face. [] With any question regarding statutory construction and application, the court must always look to legislative intent as determined from the plain language of the statute.

When a statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed, and *this court has no right to impose another meaning*. . . .

The legislature's intent should be derived primarily from the plain language of the statute. . . . "Once the legislature has made [a] choice, *there is no room for the courts to impose a different judgment based upon their own notions of public policy.*"

Peake v. S.C. Dept. of Motor Vehicles, 375 S.C. 589, 597–98, 654 S.E.2d 284, 289 (Ct. App. 2007)

(emphasis added; citations omitted; final alteration in original).

In the instant proceeding, the legislature's intent is plainly and unequivocally expressed in the statutes. Only *after* an aggrieved ticket holder exhausts the entirety of the administrative process—up to and including an appeal to the Administrative Law Court—may he or she file suit in this court. *See* S.C. Code Ann. § 59-150-300; *see also id.* at §§ 59-150-60, -70(D), -90(A), -230(A), and -240(C). Allowing a plaintiff to circumvent this mandatory process simply by asserting a class claim would ignore the legislature's judgment, flout the legislature's intent, and create an exception where the statute provides none.

Further, this Court's reliance on an intermediate appellate court case from California—*Rose v. City of Hayward*—is misplaced. First, there is no South Carolina case law in support of the idea that a plaintiff may make an end run around a statutory exhaustion requirement by simply alleging a putative class action. To the contrary, South Carolina law states that where the language of a statute

is plain and express (as it is here), the court has no right to impose another meaning. Second, not even California's courts apply *Rose* in actions that, like this one, are claims seeking damages. Rather, subsequent California appellate court decisions have limited *Rose* to its specific facts and held exhaustion *was* required before a class of plaintiffs could bring an action for damages. See *Lopez v. Civil Serv. Comm'n*, 232 Cal. App.3d 307, 312 (Cal. Ct. App.—1st Div. 1991) (“The mere bringing of a class action is not ipso facto an exception to the exhaustion requirement. . . . *Morton v. Superior Court*, 9 Cal. App.3d 977 dispels any notion that class actions are *per se* exempt from the exhaustion requirement.”); *Bautista v. Cnty. of Yolo*, No. C039340, 2003 WL 22969353, at *4 (Cal. Ct. App.—3d Dist. 2003) (affirming dismissal of suit and noting that “*Rose* is of no help to plaintiffs” because “*Rose* arose in the context of a writ challenge to a PERS ruling, not a complaint for damages”).

Because the General Assembly's intent is plain and explicit, and because the California case upon which this Court relied is not controlling—even in California—in cases like the instant proceeding, SCEL respectfully requests this Court reconsider its ruling that a plaintiff may avoid the statutory exhaustion requirement merely by asserting a class claim.

III. Reconsideration is warranted because Plaintiffs have not met their burden of presenting evidence that the administrative process and remedies, viewed as a whole, are futile.

As SCEL has explained previously, the administrative process by which an aggrieved ticket holder may challenge the Commission's actions or determinations is a multi-step process including both intra-agency review *and* an appeal to the Administrative Law Court. See SCEL's Memorandum at 2–5 (April 10, 2018). Each of those levels of review or appeal provides a chance for a new decision-maker to reconsider and reverse the initial decision made below. Accordingly, a party's failure to complete *each* level of review, including an appeal to the ALC, constitutes a failure to exhaust his administrative remedies. See *Steele v. Benjamin*, 362 S.C. 66,

606 S.E.2d 499 (Ct. App. 2004) (affirming the trial court's dismissal of plaintiff's suit, holding that by failing to appeal the agency's decision to the ALC, the plaintiff failed to exhaust his administrative remedies); *see also Booker v. S.C. Dept. of Corrections*, No. 2011-CP-10-08774, 2013 WL 10533559 (S.C. Ct. of Comm. Pleas, Hon. R. Markley Dennis, Jr., March 1, 2013) (noting that if an aggrieved party is unsatisfied with the outcome of an internal agency grievance process, "the final administrative remedy available to him is a review by the South Carolina Administrative Law Court," and he "has not exhausted all administrative remedies unless and until he has completed Step 1, Step 2, and has received an administrative review and decision by the ALC.").

In the instant proceeding, this Court found that exhaustion of the administrative process would be "futile" because the SCEL Board had already made a determination that it could not pay the tickets at issue. *See* Order at 3–4 (January 4, 2019). But the fact that *one level* of the administrative process did not award Plaintiffs the relief they seek does not mean that the *entire* process is futile. The futility exception applies only when exhaustion of *the whole* of the administrative process and remedies would be futile. *See, e.g., S.C. Dept. of Health & Env. Control v. Armstrong*, 293 S.C. 209, 359 S.E.2d 302 (Ct. App. 1987) (reversing a trial judge who had "determined that he could pass upon the merits of Armstrong's entitlement to a permit without requiring Armstrong to *complete* the administrative process") (emphasis added); *see also Johnpoll v. Thornburgh*, 898 F.2d 849, 850 (2d Cir. 1990) (noting that "animosity by *one* case unit manager is not sufficient to show futility of the *entire* administrative process") (emphasis added); *cf. S.C. Code Ann. § 1-23-380* ("A party who has exhausted *all* administrative remedies available within the agency and who is aggrieved by a *final* decision in a contested case is entitled to judicial review . . .") (emphasis added). Indeed, the very term "exhaustion" requires a party seeking administrative redress to *exhaust* the process, *i.e.*, to see the process through to its completion.

In the instant proceeding, Plaintiffs have not completed the multiple levels of review that comprise the administrative process, nor have they borne their burden to present *any* evidence that exhaustion of the *entire* process would be futile. Rather, the evidence is quite to the contrary. The letters sent to each of the Plaintiffs on June 14 or 15, 2018 expressly invited them to submit any additional evidence, factual information, law, authorities, and a statement outlining the reasons for their complaints to the SCEL's Executive Director for review. *See, e.g.*, Letter from William Brown to Shardae Davis, dated June 14, 2018 (attached hereto as **Exhibit C**). This invitation stands in stark contrast to this Court's conclusion that the Commission "has taken a 'hard and fast' position with respect to whether it will honor the lottery tickets." *See* Order at 4 (January 4, 2019). Where, as here, the evidence indicates that the administrative process includes additional and meaningful levels of review that are receptive to additional evidence, arguments, and authorities, the outcome of the administrative process is not yet a certainty, the agency's position is not yet final, and completion of the administrative process is not futile.

Furthermore, the letters sent to each Plaintiff expressly notified the Plaintiffs of the availability of an appeal to the ALC. *See, e.g.*, Letter from William Brown to Shardae Davis, dated June 14, 2018 (attached hereto as **Exhibit C**); Letter from Hogan Brown to Shardae Davis, dated July 25, 2018 (attached hereto as **Exhibit D**). An appeal to the ALC provides an independent, objective, judicial review and correction (if needed) of the Commission's initial decision, and Plaintiffs have presented no evidence whatsoever to show that appeal to the ALC would be futile. Plaintiffs' half-hearted efforts of initiating, then abandoning, the administrative process does not constitute exhaustion. *See, e.g., Metz v. Veterinary Examining Bd.*, 741 N.W.2d 244, 250–51 (Wis. Ct. App. 2007) ("The exhaustion doctrine is typically applied when a party seeks judicial intervention before completing *all* the steps in the administrative process. [] The general rule in this situation is that a party must complete *all* administrative proceedings before

coming into court.”) (citations omitted; emphasis added); *Muellenaux v. State, By and Through Oregon Dept. of Revenue*, 651 P.2d 724 (Ore. 1982) (“A party does not exhaust his administrative remedies simply by stepping through the motions of the administrative process without affording the agency an opportunity to rule on the substance of the dispute. Exhaustion of administrative remedies is not accomplished through the expedience of default.”) (citations omitted); *Jackson v. Dept. of Rev.*, 695 P.2d 923 (Ore. 1985) (“[J]udicial review is unavailable where a party has ‘foreclosed through his own inaction completion of the administrative process’”) (citation omitted).

Plaintiffs have not taken advantage of the administrative opportunities to present arguments and evidence and seek review of the Commission’s initial decision—either by presenting such material and arguments to the Executive Director or by appealing to the ALC—and thus they have not exhausted their administrative remedies. Accordingly, the instant lawsuit should be dismissed pursuant to Rule 12(b)(6), SCRCP. See *Unisys Corp. v. S.C. Budget & Control Bd.* 346 S.C. 158, 176, 551 S.E.2d 263, 273 (2001) (dismissing suit pursuant to Rule 12(b)(6) due to plaintiff’s failure to exhaust its administrative remedies); *Capital City Ins. Co. v. BP Staff, Inc.*, 382 S.C. 92, 101, 674 S.E.2d 524, 529 (Ct. App. 2009) (“The South Carolina Supreme Court has indicated that dismissal may be proper under Rule 12(b)(6), SCRCP, for failure to state a claim where the opposing party is required to exhaust its administrative remedies as a matter of law, but failed to do so.”); see also *Triano v. Division of State Lottery*, 703 A.2d 333 (N.J. App. Div. 1997) (analyzing statutory scheme similar to South Carolina’s Lottery Act and holding aggrieved players could not file an action in state trial court against the State Lottery without first exhausting their administrative remedies by seeking a ruling from the Lottery Commission itself and then seeking review of that ruling in the way mandated by law).

Plaintiffs began the administrative review process when, after litigation had begun, their counsel requested the Commission initiate an administrative grievance process. But once the process was started, they declined to see it to its completion. Having abandoned the administrative review process, they should not be rewarded for their knowing failure to exhaust.

CONCLUSION

For the foregoing reasons, the Commission respectfully requests this Court reconsider, alter, and amend its ruling and dismiss Plaintiffs' suit.

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 (864) 250-2300

Attorneys for Defendant

Greenville, South Carolina
 January 14, 2019

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SUMTER	)	THIRD JUDICIAL CIRCUIT
	)	
Jamaine Holman, Victoria Lewis, Melanie	)	C.A. No.: 2018-CP-43-00138
Baker, Christopher Shipman, Robert Weaver,	)	
Vonetta Wilson, Francesca Worley, Brittany	)	
Johnson, Shirley Pearson, Robert Weaver,	)	
Gostonia Pearson, Rodney Leachman, Cassandra	)	
Pugh, and Krystal Bostinto, on behalf of	)	
themselves and all others similarly situated,	)	
	)	
Plaintiffs,	)	CERTIFICATE OF SERVICE
	)	
vs.	)	
	)	
South Carolina Education Lottery Commission	)	
d/b/a South Carolina Education Lottery, and	)	
Intralot, Inc.	)	
	)	
Defendants.	)	

I, the undersigned counsel of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Defendant, do hereby certify that I have served all counsel in this action with a copy of the pleading specified below by e-filing to the following recipients:

Pleading: Defendant South Carolina Education Lottery Commission's Motion to Reconsider, Alter, or Amend

Counsel Served: William E. Hopkins, Jr.
Joseph Clay Hopkins
Hopkins Law Firm
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Pawleys Island, SC 29585

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2110 N. Beltline Blvd.
Columbia, SC 29204

Mario Anthony Pacella
PO Box 1635
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s/William S. Brown
William S. Brown

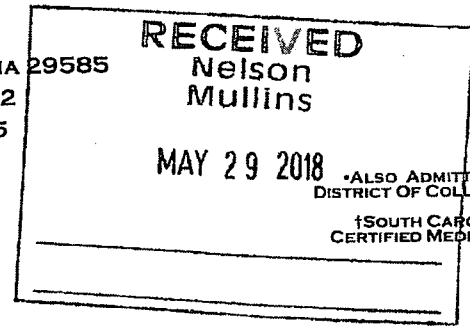
January 14, 2019

EXHIBIT A

HOPKINS LAW FIRM, LLC

12019 OCEAN HIGHWAY
POST OFFICE BOX 1885
PAWLEYS ISLAND, SOUTH CAROLINA 29585
TELEPHONE: 843-314-4202
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WWW.HOPKINSFIRM.COM

WILLIAM E. HOPKINS JR. *†
J. CLAY HOPKINS
IAN TAYLOR



May 25, 2018

VIA ELECTRONIC AND FIRST-CLASS U.S. MAIL

Timothy E. Madden, Esq.
Nelson Mullins Riley & Scarborough LLP
104 South Main Street, Ninth Floor
Greenville, SC 29601

Email: tim.madden@nelsonmullins.com

RE: Shardae Davis, et al. v. South Carolina Education Lottery Commission
d/b/a South Carolina Education Lottery
Civil Action No.: 2018-CP-43-00138

Kevin Cox, et al. V. South Carolina Education Lottery Commission d/b/a
South Carolina Education Lottery
Civil Action No.: 2018-CP-31-00047

Dear Tim:

I hope this letter finds you well. I am reaching out to you regarding the above-referenced matters and your client's position.

While we disagree that our clients were required, by statute or otherwise, to file a grievance in reference to their purchase of lottery tickets, please allow this letter to serve as the following individuals' formal complaint to the South Carolina Education Lottery for (1) their unpaid winning tickets; and (2) the Lottery's issuance of duplicate tickets for which our clients paid for a unique and individual ticket:

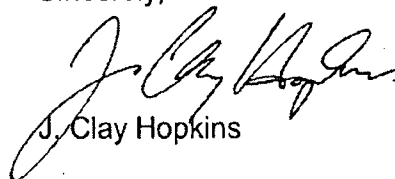
Kevin Cox, Shardae Davis, Janesia McFarland, Benjamin Jenkins, Jr., Courtney Brown, Shenequa Wells, Damain Davis, Tamara Boyd, Quinton Boyd, Jamaine Holman, Sarah Robinson, Jamie Dupont, Sharon Bouyagi, Brian Holman, Marie Davis, Jonathan Matthis, Timothy Small, Kimberly White, Victoria Lewis, Melanie Baker, Leslie Brown, Angela Gleaton, John Hatcher, Barbara Holland, Ed Robinson, Angela Robinson, Christopher Shipman, Robert Weaver, Vonetta Wilson, Stephen Morris, LaTerrance Hopkins, Tiffany Hopkins, Mike Patel, Deborah Pressley, Francesca Worley, Edward Mitchum, Kathy Mitchum, Deleasera Rogers, Diron Stephens, Ladedra Carson, Thomas Bishop, Pamela Hodge, Shanta

Timothy E. Madden, Esq.
May 25, 2018
Page 2

Mallette, Xaval Patel, Jessica Brown, Lasandra Briggs, Felicia Briggs, Brittany Johnson, Omar Johnson, Carlos Boyd, Shirley Pearson, Robert Weaver, Gastonio Pearson, Rodney Leachman, Cassandra Pugh, Angela White, Vanessa Robinson, Krystal Bostinto and Javun Haynes

If you so require, we can provide contact information for each of these individuals. As always, please feel free to contact me if you have any questions or concerns.

Sincerely,



J. Clay Hopkins

JCH/ebf

Cc: Miles E. Coleman, Esq. (Miles.coleman@nelsonmullins.com)
William S. Brown, Esq. (William.brown@nelsonmullins.com)
William E. Hopkins, Jr., Esq.

EXHIBIT B

FORENSIC REPORT



Gaming Laboratories International, LLC
World Headquarters
600 Airport Road
Lakewood, NJ 08701
Phone: 732.942.3999
Fax: 732.942.0043

Final Report

Document Reference:

PS-224-ITL-18-001

Date:

May 17, 2018

GLI®

WWW.GAMINGLABS.COM

Record on Appeal 125

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1. Overview of Holiday Add-A-Play Incident

1.1 Description of Holiday *Add-A-Play* Game

The *Holiday Cash Add-A-Play* game is an instant game that is available for purchase as an addition to a traditional lottery ticket sold at a retailer sales terminal. The outcome of the *Holiday Cash Add-A-Play* game is made available to the patron instantly when the lottery ticket is printed. The winning outcome is presented in the form of a 3 by 3 grid with each of the available 9 spaces containing a symbol, where the alignment of such symbols may form a combination that represents a prize; see [Figure 1](#). The available symbols are: "Tree", "Stocking", "Gingerbread", "Snowman", "Candle", "Wreath", "Reindeer", "Snowflake", and "Drum".

The documented game rules indicate that in the event the grid contains three "Tree" symbols in any vertical, horizontal, or diagonal line, the player wins a prize. The prize is represented by a currency value printed on the ticket, one for each of the available 8 lines where a 3 "Tree" symbol combination can be achieved (3 horizontal, 3 Vertical, and 2 Diagonal).

The available prizes described in the design specifications range from \$2.00 to \$500.00, per *Add-A-Play* game. The player may add up to 5 *Add-A-Play* games per purchased lottery ticket, and thus the maximum amount that can be awarded for *Add-A-Play* games per lottery ticket purchased is \$2,500. There is a singular barcode on the front of the ticket that facilitates the redemption of any winnings for all of the *Add-A-Play* games on a ticket to be processed by a retailer. On the back of the printed ticket is a 9 digit serial number, one for each of the purchased *Add-A-Play* games; see [Figure 1](#).



REC'D. NOV 7, 2017 09:45:35
100925-10002501 0006 TH:00001240.
000000 000000 000000 000000 000000 000000 000000 000000 000000 000000

Get three 's in any vertical, horizontal, or diagonal line, win prize indicated.

Play A	\$100	\$5	\$10	\$10	\$50
\$2					
\$8					
\$20					

Play B	\$100	\$5	\$10	\$10	\$50
\$2					
\$8					
\$20					

Play C	\$100	\$5	\$10	\$10	\$50
\$2					
\$8					
\$20					

Play D	\$100	\$5	\$10	\$10	\$50
\$2					
\$8					
\$20					

Play E	\$100	\$5	\$10	\$10	\$50
\$2					
\$8					
\$20					

PLEASE TURN REVERSE SIDE OF THIS LABEL
IMMEDIATELY AFTER PURCHASE.

66110F571A1581B105891B017BA0D157050C4A
09390 74090 01/24 15237 17700 05410 14010

PROCEEDS SUPPORT EDUCATION

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1. **Introduction**

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1. *Staphylococcus aureus*



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598944386

SOUTH CALIFORNIA EDUCATION LOTTERY 1986-1
Sam Leong, Chairman **Ingan Hwang, Interim Executive Director**
CLMBS CENTER ADDRESS: SCEL, P.O. BOX 11037, GLENDALE, CA 90239-1037
 Clmbs is a section of SCEL which is a clear lotto where a majority of all lottery
 tickets, the SCEL Clmbs ticket, are an American in history sale. For more and
 past winning numbers, call (800) 794-1103 (NCA 11036).

[illegible]

06-	Phone Used to Transmit				
	Transmit	Transmit	Transmit	Transmit	Transmit

598944387

SOUTH CAROLINA EDUCATION LOTTERY 1991

Sam L. Hight, Chairman Hagan Street, Intention Executive Director
CLARK CENTER SQUARE, DEPT. 90, BOX 1000, COLUMBIA, SC 29201-1000

Check in excess of \$500 or the value of a prize over \$500 is taxable at the time it is received. The SCEL Clark Center is a non-profit educational institution. For current and past winning numbers, call 800-241-1000 or 803-799-1000.

[illegible]

06-	06-1	06-2	06-3	06-4	06-5	06-6	06-7	06-8	06-9	06-10	06-11	06-12	06-13	06-14	06-15	06-16	06-17	06-18	06-19	06-20	06-21	06-22	06-23	06-24	06-25	06-26	06-27	06-28	06-29	06-30	06-31	06-32	06-33	06-34	06-35	06-36	06-37	06-38	06-39	06-40	06-41	06-42	06-43	06-44	06-45	06-46	06-47	06-48	06-49	06-50	06-51	06-52	06-53	06-54	06-55	06-56	06-57	06-58	06-59	06-60	06-61	06-62	06-63	06-64	06-65	06-66	06-67	06-68	06-69	06-70	06-71	06-72	06-73	06-74	06-75	06-76	06-77	06-78	06-79	06-80	06-81	06-82	06-83	06-84	06-85	06-86	06-87	06-88	06-89	06-90	06-91	06-92	06-93	06-94	06-95	06-96	06-97	06-98	06-99	06-100
-----	------	------	------	------	------	------	------	------	------	-------	-------	-------	-------	-------	-------	-------	-------	-------	-------	-------	-------	-------	-------	-------	-------	-------	-------	-------	-------	-------	-------	-------	-------	-------	-------	-------	-------	-------	-------	-------	-------	-------	-------	-------	-------	-------	-------	-------	-------	-------	-------	-------	-------	-------	-------	-------	-------	-------	-------	-------	-------	-------	-------	-------	-------	-------	-------	-------	-------	-------	-------	-------	-------	-------	-------	-------	-------	-------	-------	-------	-------	-------	-------	-------	-------	-------	-------	-------	-------	-------	-------	-------	-------	-------	-------	-------	-------	-------	-------	--------

598944388

SOUTH CAROLINA EDUCATION LOTTERY (SCEL)
Sam Littlejohn, Chairman Roger Bowers, Incoming Executive Director
CLUBS CENTER ADDRESS: SCEL, P.O. BOX 1078, COLUMBIA, SC 29211-1078
Members are eligible to play lottery games which are usually at the same time
under the SCEL Clubs General Fund as indicated on the SCL. For current de-
tails on the lottery, call 1-800-793-4266.

[illegible]

Figure 1. Ticket Front and Back View

1.2 Summary of Design Specifications for Holiday *Add-A-Play* Game

As documented within the *Holiday Cash Add-A-Play* specifications, there are a fixed number of games that are available to be sold. The overall set is comprised of 6,000,000 games at a \$1.00 purchase price, thus representing \$6,000,000 in available *Add-A-Play* ticket sales. These 6,000,000 games are broken down into 25 pools each containing 240,000 games. Within each pool, the following quantities of winning games are present:

COUNT	GAME PRIZE AMOUNT
40,000	\$2
7,200	\$5
720	\$8
720	\$10
320	\$18
200	\$20
125	\$50
50	\$500

Table 1. Quantity of Winning Games

Thus, within each pool of 240,000 games, there are 49,335 winning games, as itemized above, and 190,665 losing games. The pool is distributed into a randomized set of winning and losing games at the system server. As tickets are purchased, the pool begins to deplete and game purchase transactions are processed. The 50 top award tickets (\$500) are distributed throughout the pools by the pool generation routines so that there will not be a concentration of top-award winning tickets in close proximity within the pool. Section 3.2 of this document will explain how the source code handles this distribution.

The system specifications further describe that at all times there will be exactly two prize pools that are available and active. When a prize pool reaches a particular threshold of depletion, the system will then sell from the next pool at a 10:1 ratio. The specifications indicate that the game will provide 10 from the new pool and 1 from the previous pool; however, the actual function of the system, which is inconsistent with the specifications, is for every 9 tickets from the new pool there will be 1 ticket from the previous pool. The *Add-A-Play* ticket can contain between 1 and 5 *Add-A-Play* games each, all games being from the same pool.

The following is an outline of the documented specifications and game functionality of *Holiday Cash Add-A-Play* prior to the modification that caused the incident:

- There are 6,000,000 games divided into 25 pools of 240,000 games each.
- Games begin to be sold out of Pool 1 with Pool 2 being active for future use.
- Pool 1 eventually sells 228,000 games (95%), leaving 12,000 games remaining.
- The next 10 games sell out of Pool 2, and the 11th game sells out of Pool 1 (using the ratio included within the specifications).
- The above step repeats until there are no more games remaining in Pool 1.
- Pool 2 becomes the primary pool and Pool 3 becomes active as the secondary pool.
- Games are sold out of Pool 2 until 228,000 games (95%) have been sold.
- The next 10 games sell out of Pool 3, and the 11th game sells out of Pool 2.
- This repeats until there are no more games remaining Pool 2.
- The above steps repeat while advancing through each of 25 pools until all 6,000,000 tickets are sold.

1.3 Description of Game Modification

On November 6, 2017, a system update went live on the production server modifying the depletion threshold from 95% to the new threshold of 80%. The change modified a hard coded value within source code file `cdua_6108.h`, replacing the old value of 95 with the new value of 80. There was no independent review of this modification.

1.4 Summary of Reported Incident

On December 25th, 2017, there were tens of thousands of *Holiday Cash Add-A-Play* games including Tree symbols in all 9 positions on the 3x3 grid, which far exceeded the number that should have been awarded according to the game specifications. These games were validated via the redemption system for a value of \$500.00.

1.5 Summary Root Cause

The impact of the game modification described in Section 1.3 is that Pool 2 is utilized earlier than in the previous implementation (i.e. after 192,000 games instead of after 228,000 games), resulting in an increased number of games remaining in Pool 1, and thus an increase in the number of games required in Pool 2 to maintain the designated ratio until Pool 1 is completely used.

The consequence of this change is that Pool 2 will run out of games before Pool 1, resulting in the behavior reported in the field on December 25th.

The game is designed such that only 2 pools can be active at a time. Since the rules regarding when new pools are needed are based upon the position in the primary pool, all of the logic to handle threshold detection and pool transitions is implemented solely for that pool.

With the modified implementation, the secondary pool becomes depleted before it has a chance to become the primary pool, and thus is never checked against the designed thresholds, or pool transition criteria.

As a result, games continue to be processed with requests from Pool 2 even though there are no valid games remaining. When those requests are made, invalid games are created based on blank game assets which translate to zeros (0) in areas that are typically populated with values that represent important information, such as symbol assignment and prize value. The '0' values within the *Holiday Cash Add-A-Play* game are assigned to the symbol "Tree" and the highest prize value of \$500.00. Valid games from Pool 1 continue to be issued according to the implemented 9:1 ratio, and so for every 9 invalid games, there will be 1 valid game.

A detailed description of the game source code and logic is included in Section 3.2.

2. Executive Summary of Forensic Analysis

2.1 Scope of Forensic Analysis

Gaming Laboratories International, LLC (GLI) was engaged by the South Carolina Education Lottery (SCEL) to perform an independent, impartial analysis of the occurrence on December 25, 2017 where the *Holiday Cash Add-A-Play* game produced a large amount of \$500 top award wins.

GLI performed the following steps in analyzing the technical details that caused the incident:

1. A forensic source code analysis of the game software to identify the root cause of the issue and compare the game design against the documented game specifications
2. A forensic evaluation at the SCEL User Acceptance Testing (UAT) facility to recreate the condition that caused the incident
3. A review of Intralot's product life cycle development processes, testing practices, and software change procedures used for the *Holiday Cash Add-A-Play* game.
4. A source code security analysis to check for malicious code and assess the coding practices from a security standpoint.

2.2 Summary of Testing Performed and Conclusions

As part of the forensic source code analysis, an in-depth review of all changes for the provided software archives was performed. Source code files were analyzed via a manual review process by an experienced programmer, validated using GLI-developed simulation programs, and confirmed during a debugging session within the development environment at the Intralot facility in Duluth, Georgia.

As a result, the root cause of the issue has been identified:

The change to the draw threshold from 95% to 80% created a condition where the secondary pool was utilized earlier in the game cycle, resulting in additional draws being required from that pool. The number of draws contained in the secondary pool was less than the amount required to complete the primary pool at both the ratio defined in the game specifications, and that actually implemented. After the last record of the secondary pool was used and the pool was exhausted, additional requests from that pool resulted in failed reads of that game data file. These failed reads were treated as successes by the program logic, resulting in tickets being generated with blank game data. These blank records, when interpreted by the system and terminal, resulted in tickets displaying 9 "Tree" symbols which are validated by the system as \$500.00 winners.

Forensic Analysis Testing was performed by the GLI test team at the SCEL UAT Lab at the SCEL office in Columbia, South Carolina during the week of February 12 to 16, 2018. During testing, a total of 1,142,689 tickets were generated for the *Holiday Cash Add-A-Play* game. The testers used a combination of a simulation program and manual ticket creation methods in order to target the condition necessary to experience the issue. The testers were able to incrementally process tickets as the condition threshold approached so that the specific transaction that initiated the event could be isolated and analyzed.

A full replication of the incident that occurred on December 25, 2017 was successfully achieved during testing. This functional testing and recreation of the behavior within a controlled forensic environment confirms the conclusion described above relative to the source code analysis.

Additionally, a cursory review of Intralot's life cycle development and testing operations was conducted. This review spanned best practices for program development from a security standpoint as well as assessment of the processes implemented by the organization for managing ongoing development, modifications to code, and testing processes. Intralot has shown evidence of having processes in place for program development, testing and change management; however, the methodologies outlined were not sufficiently executed. Using testing procedures meeting industry standard best practices for the full depletion of Pool 2 would have greatly enhanced the likelihood of identifying and correcting the issue by replicating it within the testing environment prior to deployment.

This report contains a thorough description of the *Holiday Cash Add-A-Play* game, the underlying logical structure of the game, a detailed description of the source code modifications relative to the November update prior to the incident, the impact of those changes, and an assessment of the development methodologies of the technology provider. The application level technical conclusions have been confirmed both theoretically and functionally within a laboratory. The remainder of this report includes details of the specific tests conducted.

3. Source Code Analysis – Holiday Cash Add-A-Play

3.1 Purpose

A source code analysis of the game software was performed to identify logic flaws or manipulations within the *Holiday Add-A-Play* game program. Each source code module related to the game outcome generation was examined, [REDACTED]

3.2 Evaluation of Holiday Cash Programming

Ticket Pool Creation – [REDACTED]

[REDACTED]

[REDACTED] For the *Holiday Cash Add-A-Play* game, this process is run prior to the initialization of the program, thus providing a randomized set of outcomes from which games are then sold in series as tickets are purchased.

[REDACTED]

For example, category 0 represents the top award category and is classified by 3 "Tree" symbols appearing on the game grid diagonally starting from the top left corner and ending in the bottom right corner of the 3x3 grid. To build this outcome, the program places the "Tree" symbols in positions 0, 4, and 8 of the symbol array and 1 or 2 additional "Trees" are placed such that there are no other winning lines.

TREE	TREE	
	TREE	
TREE		TREE

After placement of the "Tree" positions, a call to the C random function is used to choose a symbol for the first available blank position.

TREE	TREE	CANDLE
	TREE	
TREE		TREE

The next symbol is then chosen from the 7 random non-"Tree" symbols. If it is the same as the first one drawn, that result is discarded and a new random symbol is drawn. This process repeats until the final ticket contains 4 or 5 "Trees", and at most 1 instance of any other symbol.

TREE	TREE	CANDLE
DRUM	TREE	SNOW
TREE	DEER	TREE

The software then utilizes the generated game results data file to populate the final pool that will be used by the live system, with a built in calculation to ensure that top awards are randomly distributed throughout the pool. Based on the current position in the final pool, and the desired top award distribution, a record is randomly drawn from either the entire data file, or from the first 50 records in the data file, which contains the top award results. The chosen record is then verified to be unused, inserted into the final pool at the next available spot, and marked as used in the ordered pool. This process is repeated until the final pool contains 240,000 distinct, randomly distributed game outcome records.

Each pool includes 50 top award records, and 49,285 non-top award winning records.

GLI Simulation Results:

Sample pools were generated and each was verified to contain 240,000 records distributed as per the design specifications of the game.

The files containing both the ordered and randomized data objects were analyzed and it was verified that each record met the designated criteria from the game specification document:

1. Each game outcome record contains 4 or 5 "Tree" symbols.
2. Each game outcome record contains at most 1 of any other symbol.
3. Each game outcome record contains at most 1 winning combination.

Ticket Pull - [REDACTED]

The [REDACTED] file contains the functionality responsible for handling transaction requests for game outcome sets from the pool data files. The current game implementation for *Holiday Cash Add-A-Play* allows for the purchase of 1 to 5 plays per purchase of a *Pick 3*, *Pick 4*, or *Palmetto Cash 5* ticket. The *Holiday Cash Add-A-Play* game functions are independent of the initiating game, and thus the evaluation will not include reference to the initiating game.

For the *Holiday Cash Add-A-Play* game, the function that handles the drawing of the game outcome information is [REDACTED] contains the program logic responsible for the following functions critical to the investigation in progress:

1. Handling the selection of the primary pool, secondary pool, and tracking the counts necessary to manage the pool transitions and draws.
2. Determining the pool from which to obtain game play(s) both before the 80% threshold is reached, and after.
3. Maintaining the ratio of pulls from the primary pool and secondary pool.
4. Handling pool transitions when the primary pool is depleted.

When a request for 1 or more games is made, the software checks the game's current position in the primary pool against the threshold value to determine which pool to use. If the threshold has not been reached, and the current pool contains enough unused records to fulfill the request, the primary pool will be used for all plays for this request. If the threshold has been reached, or the current pool does not have enough unused records left to fulfill the pull request, the secondary pool will be used.

When the primary pool reaches a point where the number of tickets remaining can no longer fulfill the request for multiple plays (for example, the primary pool is at 239,997 sold and a request is made to play 4 games), a flag is set so that further pulls will be made from that pool when it is able to produce all of the requested game plays.

All games for the same ticket purchase request will be provided from the same pool (up to 5 game plays can be purchased per ticket). Game sets will be provided from the primary and secondary pools at a ratio of 1 to 9. For example, if requests are made for 4 plays, 5 plays, 3 plays, 2 plays, and 4 plays, the first request of 4 plays will be entirely pulled from the primary pool, and the sets of 5, 3, 2, and 4 game records will be provided from the secondary pool. The ratio that governs the source pool functions is based on the numbers of tickets sold, independent of the actual number of game plays pulled.

[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]
[REDACTED] function performs the following operations:

1. It validates that the pool that is being used is an existing pool and makes sure that it is available and open for use.
2. It determines the size of each element stored within the data file being accessed based on the Game ID and Draw Id.
3. It reads a record from the data file using the record size determined in #2 and the index of the record provided by the calling function.

Throughout the program architecture, a set of statically defined values is used to indicate the status of program functions. [REDACTED]
[REDACTED]

When the secondary pool is depleted, the call to [REDACTED]
[REDACTED] This results in a record with all fields equal to 0 being returned. When the [REDACTED] function receives the [REDACTED] it produces a log entry reading [REDACTED] where the [REDACTED] values are replaced with the actual pool, game, draw, and record numbers at the time of the message. This response also results in a flag being set in the outgoing transmission structure in the shared memory to be set to [REDACTED] and the [REDACTED] function to be exited with a code of 1.

The process that called the [REDACTED] function receives that result of 1, and interprets it as [REDACTED] which indicates that all processing occurred successfully. The program treats this as a successful pull.

The transaction is processed with the game results record containing all 0's which corresponds to a game outcome with a win of category 0 and symbol grid containing nine 0's. Win category 0 is defined as the top award (\$500.00) and symbol index 0 corresponds to the "Tree" symbol.

The completed transaction data is written to the data file on the server and the associated draw data is updated. Additionally, the previous outgoing transmission status flag of [REDACTED] is overwritten with a "Success" result since the routine completes with no error. The transaction data containing the invalid game results is then transmitted to the terminal where the ticket showing 9 "Tree" symbols is printed.

When a game record is requested after the secondary pool has been depleted and the sequence is such that the primary pool will be used, a normal valid record is pulled from that pool and printed. However, if the secondary pool is chosen, the pick of the actual game data will fail as detailed above and a top award winner showing 9 "Tree" symbols will be printed. After the secondary pool is depleted, 9 invalid game sets are pulled for every valid primary pool set.

Additionally, a complete review of the [REDACTED] function indicated that all returns from the function are 1, which is interpreted as a success. Therefore, the error handling that has been put in place to handle a failure of this function will never be reached, and any failure within the [REDACTED] function is treated as a success by the game system, resulting in an invalid game result.

GLI Simulation Results:

The source code logic that utilized the [REDACTED] function was used to create a program to simulate the pulling of game results from 15 set pools of 240,000 records each. This simulation was used to analyze the logic in place for each of the following functions:

1. The logic utilized to pull games from a pool prior to reaching the 80% threshold.
2. The logic utilized to pull games from a pool after reaching the 80% threshold.
3. The logic utilized to maintain the desired draw ratio when pulling from 2 pools after the 80% ratio.
4. The logic utilized to detect when a pool is depleted, and the movement to the next pool.

The simulation utilized the logic of the [REDACTED] function to draw results in sets of N and determine the point at which the secondary pool is depleted. It also calculated the number of invalid games that would result from the subsequent attempts to access the secondary pool until the first pool is depleted. This simulation was run 10 times for each value of N indicated below. Listed are the average results.

Requested Plays per Pull(N)	Primary Pool Index Where the First Invalid Game Will Occur	Number of Invalid Games Produced until Pool 1 is completed
1	218666	192009
2	218667	96000
3	218665	64000
4	218665	48000
5	218666	38400
Random between 1 and 5	218727.9	63769.6

Table 2. Secondary Pool Depletion and Number of Invalid Games

As shown, each simulation resulted in depletion of the secondary pool prior to the completion of the primary pool, causing the program to generate invalid game results. The number of invalid games is inversely proportional to the number of plays requested per transaction.

System Log Analysis:

The log files were retrieved from the Forensic environment for analysis. Examination of the logs shows numerous instances of the entry:

[REDACTED]

Below is an excerpt from the logs obtained from the Forensic environment, showing the game request successes and errors at the ratio of 1 valid game result to 9 invalid game results (Comments are indicated in **<BOLD>**):

03/04/2018 20:20:13.498: [REDACTED]
[REDACTED] **<GOOD>**
03/04/2018 20:20:13.501: [REDACTED]
[REDACTED] **<FAIL>**
03/04/2018 20:20:13.504: [REDACTED]
[REDACTED] **<FAIL>**
03/04/2018 20:20:13.507: [REDACTED]
[REDACTED] **<FAIL>**
03/04/2018 20:20:13.510: [REDACTED]
[REDACTED] **<FAIL>**
03/04/2018 20:20:13.514: [REDACTED]
[REDACTED] **<FAIL>**
03/04/2018 20:20:13.516: [REDACTED]
[REDACTED] **<FAIL>**
03/04/2018 20:20:13.519: [REDACTED]
[REDACTED] **<FAIL>**
03/04/2018 20:20:13.522: [REDACTED]
[REDACTED] **<FAIL>**
03/04/2018 20:20:13.524: [REDACTED]
[REDACTED] **<FAIL>**

The log files from the actual live system were requested from Intralot, but were not provided. Intralot reported that, although the log files are supposed to be archived every 50 days, when the archives were accessed, the logs from the time of the incident were not present.

Game Specification Document vs Implementation:

As a part of the review, GLI analyzed the game specifications for the *Holiday Cash Add-A-Play* game theme defined in the Customer Change Request document "ADD-A-PLAY R1 2017 CCRF.PDF" and compared that specification against the game implementation in the [REDACTED] software. The document includes the following functionality definitions:

1. At all times, two pools with the defined prize structure will be available and active on the system.
2. When a pool sells down to 80% of the total pool, the system will sell from the next pool at a 10:1 ratio (10 from the new pool and 1 from the previous pool).
3. The top prizes of \$500 will be leveled throughout the pool of 240,000 transactions. Within *Holiday Cash Add-A-Play*, there are 50 top prizes per pool of 240,000. One fifth of the top prizes will be available for one fifth of the total transactions. For example, 10 top prizes will be available for 48,000 transactions, after 48,000 transactions, the next 10 will be available until the pool is completely sold out.
4. The convention that is used to randomly select the ticket printed from the game file shall be designed to ensure that the length of time it takes to produce an *Add-A-Play* ticket remains consistent from the first ticket in a pool to the last ticket in a pool.
5. Whenever the *Add-A-Play* game is loaded and configured for sale on the System, it must be rebuilt to randomly "reshuffle" the transactions within each pool.

The GLI Source review produced no evidence of deviation from the design specifications for items #1, #3, #4, and #5 above.

For Item #2 above, the implementation deviates from the specifications outlined in the customer change request. First, the ratio that has been implemented between the primary and secondary pools is 9 to 1 instead of the defined 10 to 1. The unit that is maintained at this ratio is also different from the change request document. When the terminal requests game result information, that information can be for up to 5 plays per request. As implemented, the game software processes each set of game requests as a single entity for maintaining the desired ratio. When the 80% threshold has been reached, the game will process 9 sets of game results from the next pool, and then 1 set of results from the primary pool.

3.3 Version Update - Change Analysis

After a review of the system architecture, it was determined that the focus of the change analysis would be on the source code provided in the [REDACTED] [REDACTED] archives and the files specific to the *Holiday Cash Add-A-Play* game. These files are [REDACTED]

[REDACTED]

This file contains numerous changes in versions created from the May to November related to TT2318 and TT2323.

The ticket construction source code for the game was modified to utilize the new odds detailed in the "SC Education Lottery Release Specification for *Holiday Cash Add-A-Play* Version 1.3 8/8/2013".

The game record sorting source code for the game was modified to ensure that the top award results are evenly distributed throughout the generated pool data file.

[REDACTED]

This file contained a single change (TT2324) between the May and November escrow versions. The value of the [REDACTED] constant was changed from 95 to 80. This definition sets the value of the constant used to determine the threshold at which the game should begin utilizing a secondary pool. This change was made in order to implement the new threshold as requested by the SCEL in the "ADD-A-PLAY R1 2017 CCRF.PDF" customer change request document.

Change Impact:

When originally designed and implemented, the threshold value for pool selection was 95%. When this threshold was reached, there were 12,000 records remaining in the primary pool. At the designed ratio of 10 to 1, the remaining 12,000 picks from the primary pool utilized 120,000 records from the secondary pool. When the threshold was updated from 95% to 80%, the number of records remaining in the primary pool at the time of transition rose to 48,000 records. With 48,000 primary records to go, the number of records required in the secondary pool to maintain the desired ratio rose to 480,000, twice the size of the pools currently created by the [REDACTED]

Since no changes were made to the game to accommodate for the increased number of required records, the secondary pool becomes depleted prior to the primary pool reaching its end. As they are currently designed and implemented, the game outcome generation routines do not account for the depletion of the secondary pool, and thus produce invalid game results after that pool has been depleted.

In the actual game implementation, the ratio that is used is 9 game sets from the secondary pool to 1 game set from the primary pool. Thus, the actual number of records required in the secondary pool to accommodate the 48,000 remaining primary records is 432,000.

With a threshold of 80%, any pool structure where the same size pools are utilized will not function with the current program logic. At the desired ratio of 10 to 1, the remaining 20% of any size pool will require more games than any 1 pool contains.

Pool Size	80%	20%	Tickets needed at 1:10 ratio
240,000	192,000	48,000	480,000
480,000	384,000	96,000	960,000
960,000	768,000	192,000	1,920,000
1,920,000	1,536,000	384,000	3,840,000

Table 3. Pool Threshold

3.4 Conclusion

An in-depth review of all changes for the provided software archives was performed and the relevant source files were identified. These files were analyzed via a manual review process, and later validated using both GLI developed simulation programs and a debugging session at the Intralot Facility in Duluth, Georgia.

The software responsible for generation of the *Holiday Cash Add-A-Play* pools was examined against the game specifications and math model. The number of top awards, win structure, and distribution schema were verified to match that defined in the specification documentation.

The game program responsible for the production of *Holiday Cash Add-A-Play* game results was analyzed and the root cause of the invalid top award winning tickets was identified. Failed reads of the game data files were treated as successes by the program logic, resulting in tickets being generated with blank game data. These blank records, when interpreted by the system and terminal, resulted in tickets displaying 9 "Tree" symbols which are validated by the system as \$500.00 winners.

3.5 Analysis Tools

The following tools were used by the GLI test team during the analysis of the source code.

- o [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]

3.6 Source Code Origin and Compilation

GLI was provided with the escrow archives for two versions of the Software. The first version was archived on May 1st, and contains the archived code for the 3 components of the Intralot system for the version of software prior to the issue under investigation. The second set of archives, from Nov 14th, contains the version of the product deployed at the time of the incident.

Each ESCROW archive contained the following components:

- o Game Server - the source code for the game server. This includes the code for the actual game code responsible for drawing game results. [REDACTED]
- o Terminal - the source code for the terminal software. This includes the code for the software used by an operator to purchase and generate lottery tickets. This archive was corrupt and could not be accessed. [REDACTED] and [REDACTED]
- o BOS - the source code for the back end system, reports, etc... [REDACTED]

In both ESCROW versions, the encrypted archive for the Terminal source code was corrupted and unable to be opened for review. Intralot provided replacement archive files for each of the versions:

- o [REDACTED]
- [REDACTED]

Please note that the ESCROW items directly above were not received from the Escrow service, and were received directly from Intralot. There is no guarantee that they accurately represent the code versions of the terminal software, however, they do not impact this review. As such, these archives were used for informational purposes only.

Each archive contained the source code for one of the components of the Intralot system. For the scope of this investigation, the pertinent archive was those containing the game server components; [REDACTED] The other archives provided, which contained the Terminal and BOS code, were used for informational purposes only.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Therefore, GLI was able to verify that the source code provided from the Intralot Escrow repository will compile to generate an executable that is functionally equivalent to the programs that were deployed into the UAT environment where the forensic testing was performed and to the live system where the incident occurred.

4. Forensic Testing – Holiday Cash Add-A-Play

4.1 Background

Forensic testing was performed onsite at the SCEL facility during the week of February 12 to 16, 2018. Testing was performed using the Intralot simulator and the Microlot terminals in the Lottery's UAT lab, all of which were connected to the Forensic system.

4.2 Forensic Environment

The Forensic environment at the SCEL lab consisted of the following components:

- Retailer Terminal (Intralot) – Retailer ID: 20225901, v.2.18 software installed
- Retailer Terminal (Intralot) – Retailer ID: 20206601, v.2.18 software installed
- Retailer Terminal (Intralot) – Retailer ID: 20249401, v.2.15 software installed (Previous version)
- Retailer Terminal (Intralot) – Retailer ID: 10138101, v.2.18 software installed
- Claims Terminal (Intralot) – ID: 20407301, v.2.18 software installed
- Claims Terminal (Intralot) – ID: 20409101, v.2.18 software installed
- Back Office System (BOS): SC-1.0.7.0
- Central System: Product Versioning could not be determined from BOS or Admin access was required to access more features in BOS. The Central System was controlled by Intralot offsite. This was stated to GLI by SCEL Forensic staff.
- Intralot Game Simulator: LOTOS Rel: 5.0 Ver. 001.002.000.001.00022

4.3 Functional Testing - Recreation of Incident

This section includes a description of the test results and findings of the test team during the SCEL onsite Forensic testing of the *Holiday Cash Add-A-Play* game program. Game tickets were generated manually at the Microlot terminals and [REDACTED] using the Intralot Game Simulator. [REDACTED]

[REDACTED] The simulator acted as a terminal connected to the central system and allowed large batches of tickets to be created in a short time. [REDACTED]

The GLI Forensic test team arrived onsite at the SCEL lab in Columbia, SC on February 12, 2018. [REDACTED]

[REDACTED] This application permits the user to review ticket data for all tickets produced on the system. The application discerns winning from non-winning tickets produced, and provides the operator with the ticket information and win amount. (Refer to Appendix B)

When a valid ticket is scanned, the [REDACTED] displays full ticket information, including a text based array of symbol names for the winning ticket. For the incident tickets, the symbol array is missing from the application display, as the ticket data that identifies what symbol set to use for the display is missing.

[REDACTED]
[REDACTED]
[REDACTED] After this test, neither Pool 1 nor Pool 2 was exhausted and all tickets generated were valid and followed the expected ticket distribution defined in the game specifications.

After the testing on Feb 14th was complete, and before the start of testing on the 15th, the *Holiday Cash Add-A-Play* game instance #45, for which the previous day's tickets were generated, was closed by Intralot.

The closure of instance #45 and initiation of a new instance of the game had little impact on the results of GLI's forensic analysis other than a time delay. The ticket results generated on day 1 were archived, and collection was started from the beginning.

GLI restarted testing on the new instance (#47) of *Holiday Cash Add-A-Play* game. The Intralot simulator was utilized to perform transactions [REDACTED]

[REDACTED] At the conclusion of this set, 40 valid \$500 tickets had been generated which was consistent with the expected operation based on the game specifications.

Functionality testing of the *Holiday Cash Add-A-Play* game was completed on Friday, February 16, 2018. Using the simulator, transactions #192,001 to #458,665 were performed. The resulting data set included 55 valid winning \$500 tickets, and resulted in the depletion of Pool 2. The number of valid winning top award tickets was again consistent with the game design specifications.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Win Amt	0 – 48K	48K – 96K	96K – 144K	144K – 192K	192K – 458,665
\$500.00	10	9	11	10	55
\$50.00	26	24	33	21	136
\$20.00	45	44	34	32	225
\$18.00	64	62	74	60	353
\$10.00	131	154	127	174	794
\$8.00	147	144	169	128	788
\$5.00	1,389	1,437	1,505	1,425	7,978
\$2.00	8,042	8,026	7,848	8,028	44,444
\$0.00	38,146	38,100	38,199	38,122	211,892
Totals:	48,000	48,000	48,000	48,000	266,665

Table 4. Pool 1 and 2 Ticket Amounts by Win Category up to Pool 2 Completion

Pool 3 and 4

The simulator was used to create an additional set of tickets containing [REDACTED] drawn from *Holiday Cash Add-A-Play* [REDACTED]. This ticket set contained 96 valid \$500 winning tickets. This number of top award tickets was consistent with the game's design and reflects the expected number of top award tickets when utilizing a single pool until the threshold and then drawing from both primary and secondary pools at the implemented ratio of 1 to 9.

[REDACTED] This is consistent with the results obtained in the prior tests and is consistent with the game design.

[REDACTED] was the first 9 "Tree" \$500 ticket generated from Pool 3 with a depleted Pool 4:

- o Tickets 1,130,676 and 1,130,677 were also 9 "Tree" \$500 winning tickets.
- o Ticket 1,130,678 was a valid non-winning ticket.
- o The next 9 tickets (1,130,679 to 1,130,687) were all 9 "Tree" \$500 win tickets.
- o Ticket 1,130,688 was a valid non-winning ticket.
- o Ticket 1,130,689 was a 9 "Tree" \$500 winning ticket.

The resulting ticket set contained 10,800 incident tickets showing 9 "Tree" symbols and 1,200 non-incident tickets.

This behavior is consistent with that demonstrated in pools 1 and 2, and shows that the behavior is independent of the pools themselves.

Win Amt	672009 – 720008	720009 – 768008	768009 – 816008	816009 – 864008	864009 – 1130674
\$500.00	10	10	10	9	57
\$50.00	25	28	24	23	141
\$20.00	41	42	37	48	219
\$18.00	58	53	82	58	354
\$10.00	132	137	151	144	803
\$8.00	141	123	155	146	794
\$5.00	1,416	1,443	1,487	1,439	8,037
\$2.00	8,014	8,063	8,076	7,954	44,355
\$0.00	38,163	38,101	37,978	38,179	211,906
Totals:	48,000	48,000	48,000	48,000	266,666

Table 5. Pool 3 and 4 Ticket Amounts by Win Category up to Pool 4 Completion

4.4 Conclusion

Utilizing the UAT servers at the SCEL facilities, GLI personnel were able to examine the Terminal, Game Server, and BOS software in action. The environment was configured with the version of the system that was deployed at the time of the incident. Using both the Terminal software and Intralot's simulator software, GLI personnel were able to generate tickets with both valid game results and those with the erroneous 9 "Tree" symbol grid.

Review of the sequence of erroneous tickets and analysis of the number of items produced demonstrated behavior consistent with the program logic as detailed in Section 3.

5. Intralot Testing and Software Change Practices

A software development lifecycle is made up of a series of steps, or phases, that provide a framework for developing software and managing it through its entire lifecycle. Some of these phases include strategies which must be in place for the planning, creation, testing, and deployment of said software. With this in mind, a review was performed by GLI to compare the Intralot software testing practices and software change practices against industry best practices. This review covered [REDACTED]

5.1 Software Testing - Industry Best Practices

As identified in the International Software Testing Qualifications Board (ISTQB) Foundation Level Syllabus 2011, Test Analysis and Design section 1.4.2, the test analysis and design activity has the following major tasks:

- Reviewing the test basis (such as requirements, software integrity level (risk level), risk analysis reports, architecture, design interface specifications).
- Evaluating testability of the test basis and test objects.
- Identifying and prioritizing test conditions based on analysis of test items, the specification, behavior and structure of the software.
- Designing and prioritizing high level test cases.
- Identifying necessary test data to support the test conditions and test cases.
- Designing the test environment setup and identifying any required infrastructure and tools.
- Creating bi-directional traceability between test basis and test cases.

In addition to the items above which focus mainly on the creation of test conditions and test cases, a review was also performed over the development lifecycle processes, software change controls and methodologies in which issues are reported.

5.2 Product Development Lifecycle Practices

[REDACTED]

When a new project or modification to an existing project is received, the project is assigned to one or more developers based on its complexity. These developers program or modify the project according to the defined scope, and once it has been completed

and all development issues addressed, it is assigned to the internal Quality Assurance (QA) department.

The QA department evaluates the software using a set of test cases authored for the product according to the product specifications and reports any issues back to the development team. The development team then addresses any issues found, and the corrected version is returned back to QA for another round of testing. This process repeats until both QA and Development personnel have determined that there are no additional issues to address.

Once the QA process has been completed, the software enters the UAT phase where it is tested by the customer and Intralot teams in the UAT environment. Should any issues be found within this phase, the software is returned back to the development team to correct the reported error and the development and QA processes are then repeated.

After User Acceptance Testing is successfully completed, the software is deployed to the field by the customer, and is observed on the live system to detect any escaped defects that might exist due to server load that is not able to be replicated in a testing environment.

This development process is standard for the software development industry.

5.3 Software Change Controls

During the source code development phase it is common practice to utilize a software change management system to ensure all changes made from one version of code to the next are documented, the contents are shared with others, and each build version is controlled.

Based on documentation provided to GLI for review, it was determined that Intralot is using GIT for change management of their Central System source code. GIT is a widely used and respected source management tool that provides secure code storage and change tracking capabilities. Each developer is assigned a unique ID which allows for the tracking of changes by user.

[REDACTED]

cdun_6108.h [REDACTED]

```

32 12
34 14 /* Mandatory single inclusion */
36 16 #ifndef _CDUN_6108_H
38 18 #define _CDUN_6108_H
40 20
42 22 #include "b.h"
44 24
46 26 /* Definitions */
48 28 #define G1_ID 6108
50 30 #define MAX_TICKETS 1000000
52 32 #define FL_PCS 95
54 34 #define FL_PCG 80
56 36 #define MAX_POOL_SIZE 15 /* Max number of pools per game */
58 38
60 40 #if (L5_PRODUCED_NEW)
62 42 #define SRY_5_SH "SRV5"
64 44 #define
66 46 #define GAME_W100_SH "Game5"
68 48 #define FILE "log_5"
70 50
72 52 /* Global variables */

```

Utilizing an industry recognized change management system and having the ability to readily reference modifications made between different versions of source code would be in line with the expectations of the software development industry.

5.4 Intralot Software Testing

Per request of GLI, Intralot provided an export of applicable test cases [REDACTED]

Upon review of the document, there were multiple test cases which were found to be general in nature and did not contain specific information necessary to fully evaluate the changes made in source code. A specific example of this can be seen below where the tester was instructed to verify the game plays as expected with the delivery of tickets from two separate pools once the first pool is depleted by 80% of its available tickets.

Test Step	Test Data	Expected Result
1 Perform play transactions of APP Holiday Cash via simulator		Play transactions performed successfully.
2 Verify that all times, two pools of tickets with the defined price structure will be available and active on the system. Subsequently, when a pool of tickets sells down to 80% of the total pool, the system will then sell from the next pool at a 10:1 ratio (10 from the new pool and 1 from the previous)		Data match correctly on CS/POS according to CCRF

Figure 3. Example Test Case

What is not defined within the test case is the number of games that would need to be played in order to fully cover the impact of this software change.

There are no actual results recorded in the document provided but judging by the game behavior and analysis of the source code, these tests should have failed if a sufficient number of plays occurred. The game produces invalid results after Pool 1 reaches roughly 218,665 tickets.

Additional information provided by Intralot would later indicate that the test consisted of 194,424 tickets from Pool 1, and 30,860 from Pool 2 which were not enough plays to recreate the concern.

While test cases did exist to evaluate the transition from Pool 1 to Pool 2, they could have been written in greater detail to account for all possible situations which could have occurred based on the change(s) made in source code to the game. Specifically, the test case approach should have considered the impact that the new game design would have on the math model regarding pool usage, and included an assessment of behavior when Pool 2 became depleted.

5.5 Software Defects

[REDACTED] The supplied document included four defects, one for the Microlot Terminal, and the other three for the LOTOS Central System. The four defects were raised and resolved in September of 2017. An abbreviated synopsis of the issues reported is included below:

Key	Summary	Component	Resolution
USSC17R1-316	Report (rpt_1) for 6108 is not correct	LOTOS CS	Fixed with SW change
USSC17R1-319	Top winner, incorrect prize amount displayed	LOTOS CS	Fixed with SW change
USSC17R1-308	Holiday Cash Layout issue	Microlot Terminal	Works as designed
USSC17R1-315	The top winners are not the expected	LOTOS CS	Works as designed

Table 6. SC17R1 ADD-A-PLAY Defects.pdf

Based on the information provided within the export of JIRA, which is an industry recognized program in the tracking of software defects, the software defect tracking process is viewed as being in line with the expectations of the software development industry.

5.6 Conclusion

After reviewing Intralot's software development lifecycle processes including development, change tracking, testing, and issue reporting, it can be concluded that sufficient processes are in place that are aligned with industry best practices; however, the execution of creating appropriate test cases to evaluate the modification made to this version of software, and the testing of all logic branches of the game determination code were not handled appropriately.

6. Source Code Security Analysis Overview

6.1 Summary

In addition to the focused review provided in the source code analysis section of this document, [REDACTED]

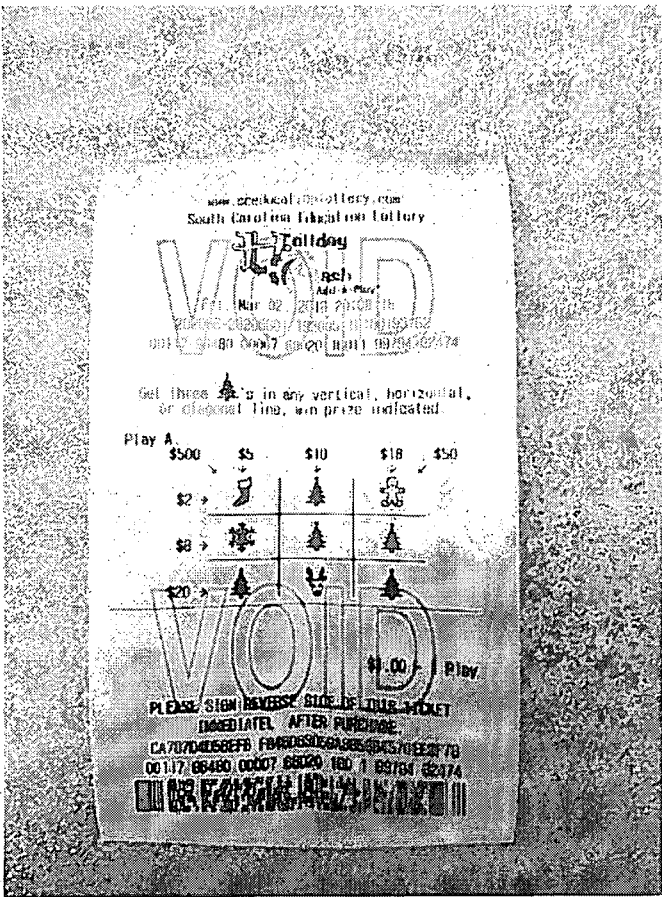
[REDACTED]

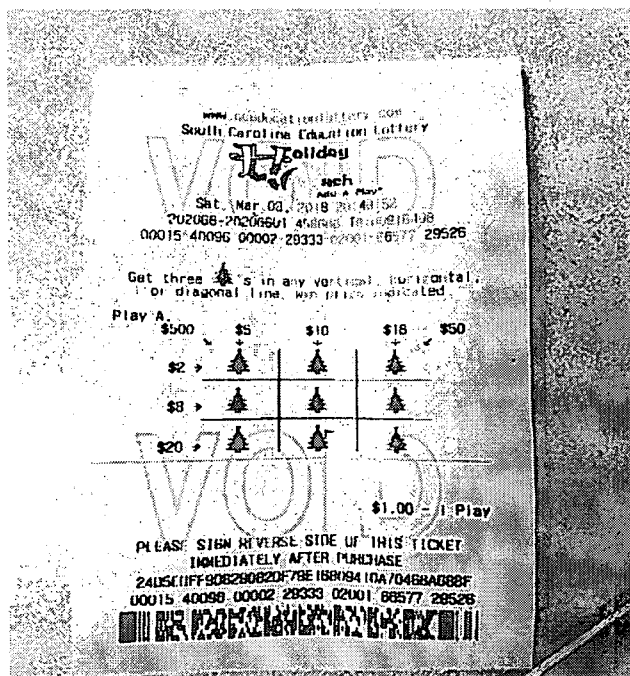
[REDACTED]

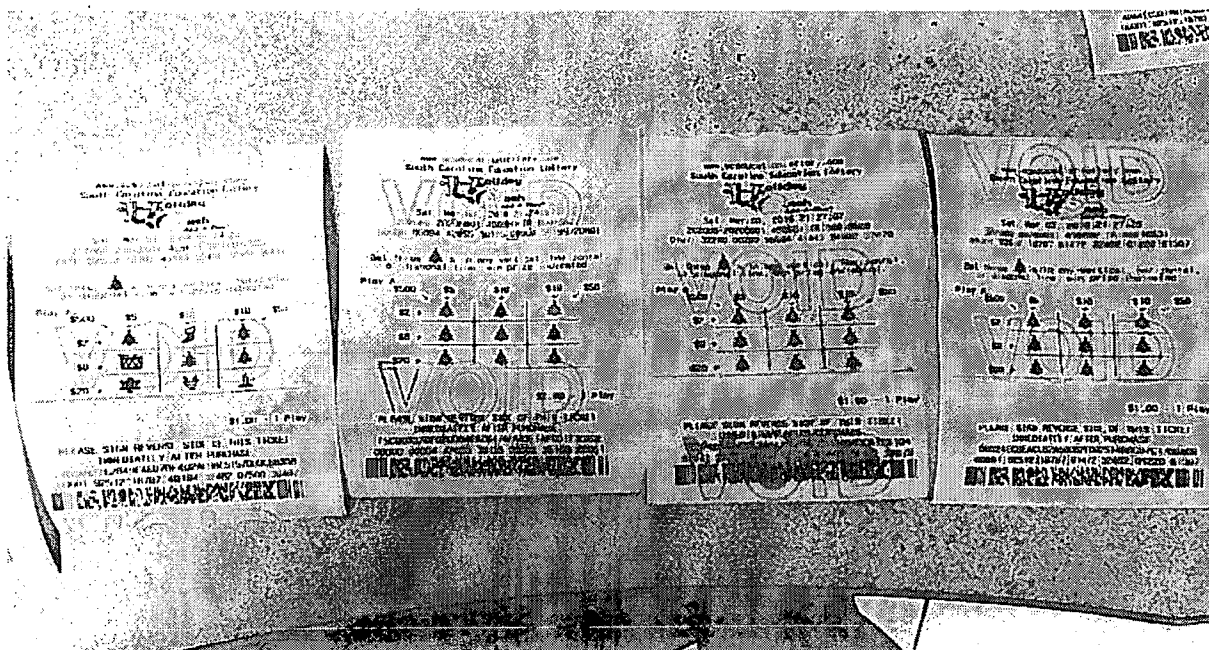
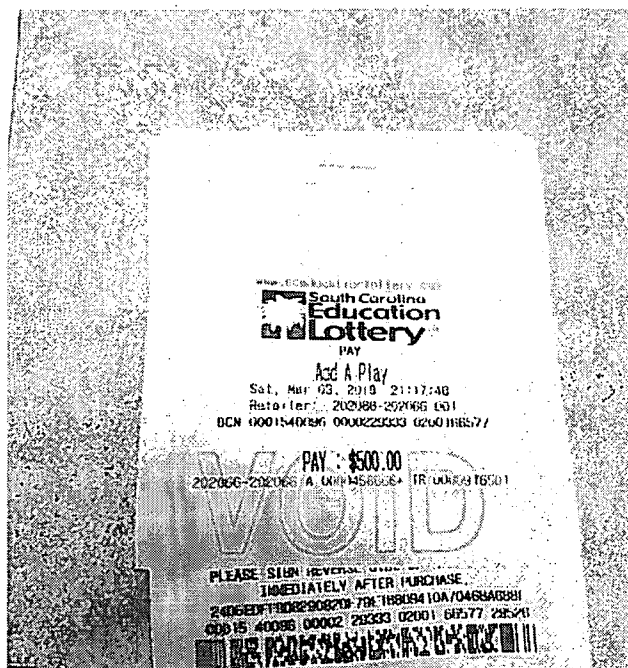
[REDACTED] The reports produced by these tools show the presence of a number of suboptimal coding practices within the overall implementation. These suboptimal practices are related to buffer manipulation functions, system shell functions, potential race conditions, unchecked buffer indexing, and the use of a hard coded password within the program logic. Regarding the hard coded password, on the BOS system, a custom encryption class was created in order to mask private information when saving data in readable files. This class includes a default, hard coded password that is used as part of the encryption. This class is currently only utilized to encrypt a claimant's social security number value when writing their information to a database file.

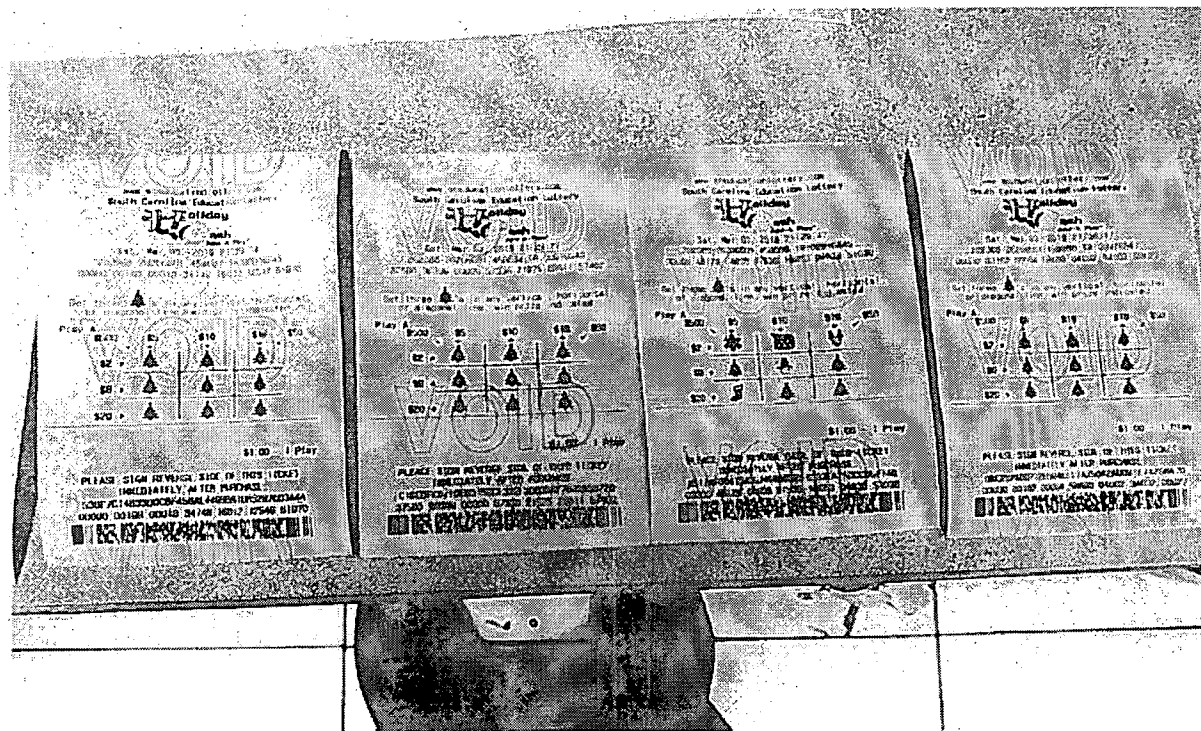
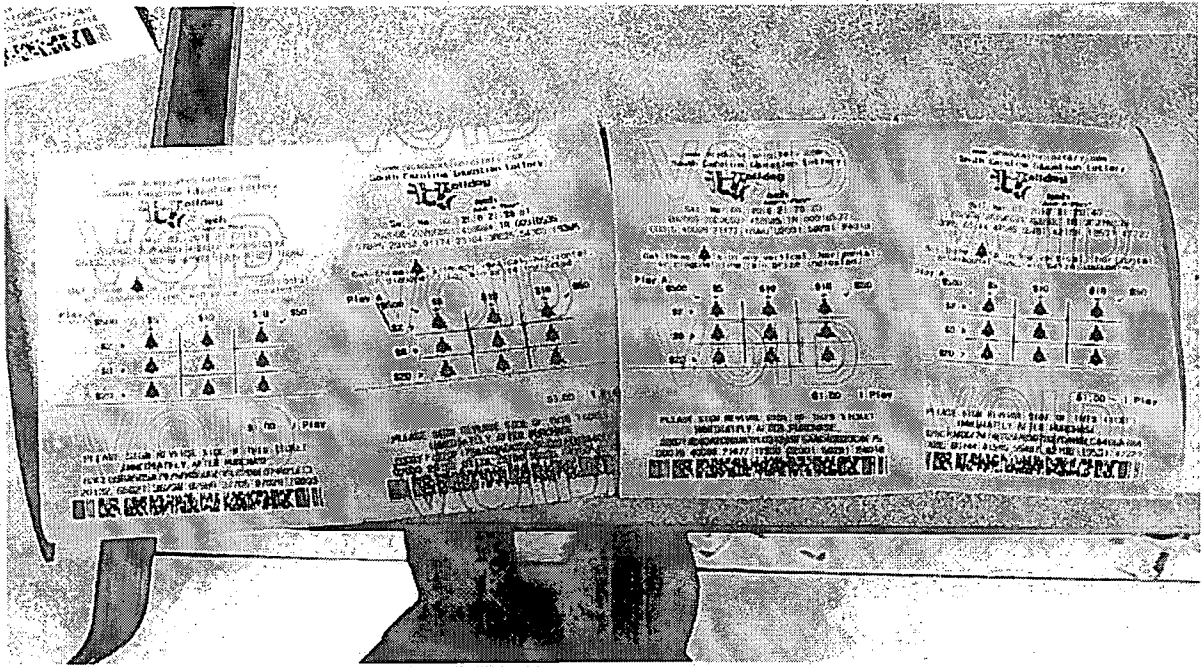
Analysis of the flagged items in connection with the source analysis in section 3 of this document show no connection between the suboptimal practices detected and the issue that occurred on December 25th 2017. No malicious code or tampering of the software was identified during the analysis. Full details for this analysis can be provided upon request.

APPENDIX A: FORENSIC TICKETS

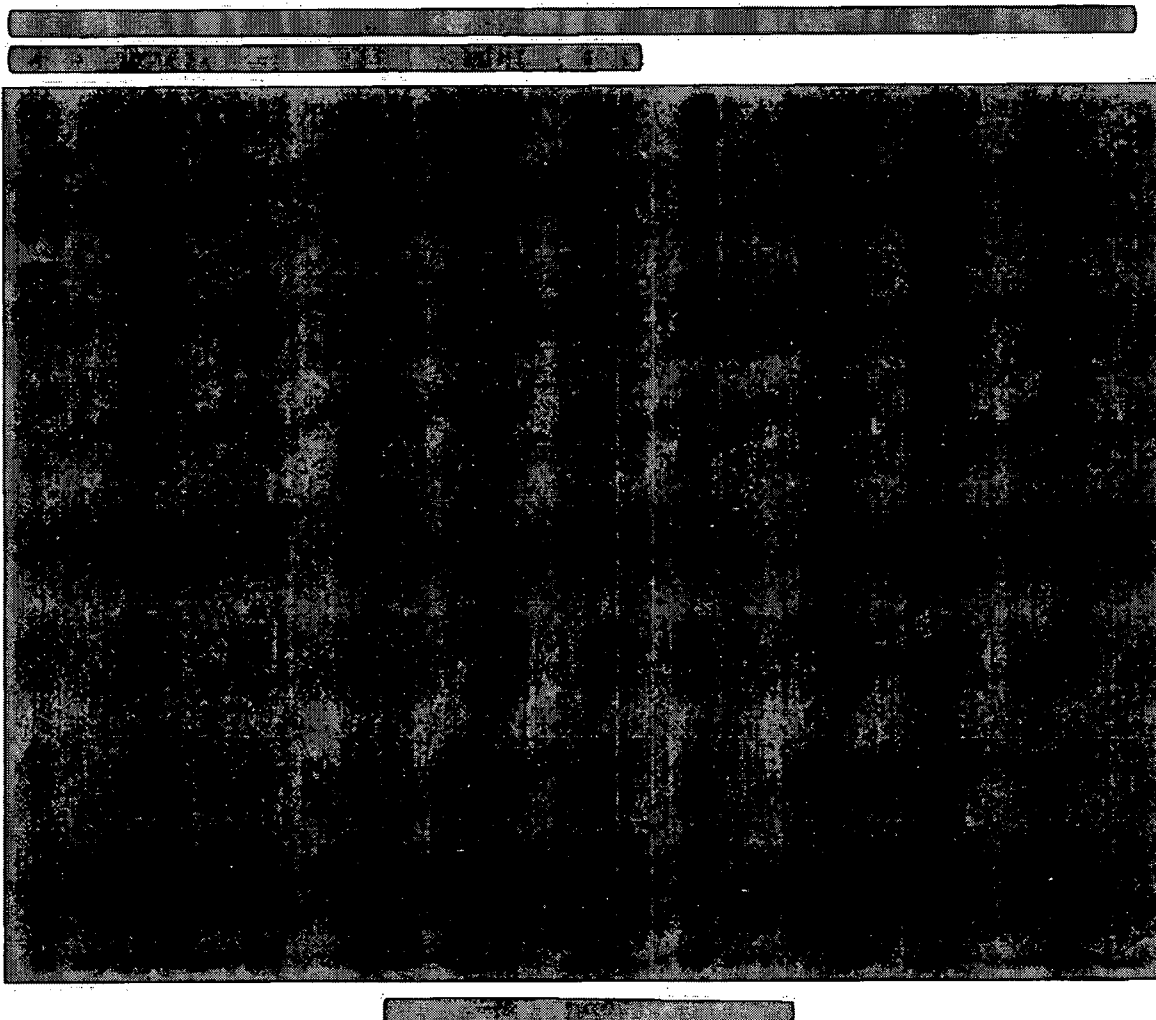








APPENDIX B: BOS REPORTING OF FORENSIC TICKET



[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

APPENDIX D: INTRALOT POOL TESTING

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

APPENDIX E: INTRALOT TEST CASES

[REDACTED]
[REDACTED]

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[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]

APPENDIX F: REFERENCE DOCUMENTATION

[REDACTED]

- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
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Record on Appeal 178

EXHIBIT C



NELSON MULLINS

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nelsonmullins.com

June 14, 2018

Via Electronic Mail and US Mail

Shardae Davis
c/o Bill Hopkins
Hopkins Law Firm, LLC
12019 Ocean Highway
Post Office Box 1885
Pawley's Island, SC 29585
Email: bill@hopkinsfirm.com

RE: Administrative Review of Lottery Ticket Issue

Dear Shardae Davis,

As counsel for the South Carolina Education Lottery ("SCEL"), we are in receipt of the letter from your counsel dated May 25, 2018 seeking to initiate an administrative grievance or review regarding Holliday Cash Add-A Play tickets.

On May 30, 2018, the Board of the South Carolina Education Lottery adopted a report and findings prepared by Gaming Laboratories International ("GLI") regarding Holiday Cash Add-A Play tickets which depict nine tree symbols which were generated on December 25, 2017, between the hours of 5:51 P.M. and 7:53 P.M. (the "Erroneous Tickets"). This letter outlines details regarding the implementation of the Board's decision and administrative procedures regarding the decision.

Players Who Seek Reimbursement for Erroneous Tickets

Any player who holds an Erroneous Ticket who desires to return the original ticket and receive a refund will be reimbursed for the price of the ticket and first-class postage expenses associated with mailing the original ticket. Players who desire reimbursement should do the following:

June 14, 2018
Page 2

Mail the **original** Holiday Cash Add-A-Play tickets (no copies or other reproductions will be processed for reimbursement) purchased on or after 5:51(17:51) P.M. on December 25, 2017 to this address:

S.C. Education Lottery
P.O. Box 11039
Columbia, SC 29211-1039

Include your name and return address. Since these reimbursements will require manual processing, we ask that players mail in all tickets to avoid wait time at the Claim Center.

Requests for Holiday Cash Add-A-Play refunds must be received by SCEL no later than January 7, 2019.

Players Who Disagree with the Board's Report and Findings with no additional evidence

Any player who disagrees with the Board's report and findings but does not have additional evidence to present on the issue must seek review of the May 30, 2018 Board's decision and pursue the remedies through the Administrative Law Court in the manner specified in S.C. Code Ann. § 59-150-300.

Players Who Disagree with Board's Report and Findings, and Have Evidence Not Considered by GLI

In the report and findings, the Board said:

"Due to the finding that payment of the tickets would be a clear violation of law, the Board's previously adopted Ticket Complaint Procedures (adopted December 29, 2004) are suspended for and shall not apply to any Holiday Cash Add-A-Play tickets depicting nine tree symbols sold between the hours of 5:51 pm and 7:53 pm on December 25, 2017. If any player possesses evidence which was not considered by or available to GLI regarding the reason the Holiday Cash Add-A-Play ticket depicting nine tree symbols held by the player was issued, produced or printed, the player may submit such evidence to the Executive Director.

Therefore, no prize shall be paid for any Holiday Cash Add-A-Play tickets depicting nine tree symbols sold between the hours of 5:51 pm and 7:53 pm on December 25, 2017. Any holder of one of these tickets is entitled to a refund upon submission of the original ticket to the Executive Director. Any further review sought by a player must be sought in accordance with §59-150-300(A).

June 14, 2018

Page 3

Any player who holds an Erroneous Ticket, seeks to challenge the determination of the Board, and possesses evidence which was not considered by GLI, may seek review of this evidence by the Executive Director. To seek review of this evidence, the player must, **within 30 days**, do as follows:

- (1) Submit a legible copy of both the front and back of the ticket(s) at issue and the SCEL must have the right to inspection of the original ticket(s), if requested.
- (2) Submit all of the evidence or factual information that the player believes was not considered by GLI and which the player wants considered.
- (3) Submit any law or authority that the player believes supports his or her position.
- (4) Submit a statement outlining the reason(s) for the complaint.

If you have evidence to be reviewed, please submit these items to me at the address at the top of the letterhead and I will forward on to the SCEL Executive Director for review. After the SCEL Executive Director's review, a written response will be provided to you.

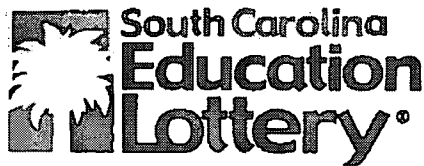
Very truly yours,



William S. Brown

WSB:sz

EXHIBIT D



July 25, 2018

SOUTH CAROLINA EDUCATION LOTTERY
Office of Executive Director

ADMINISTRATIVE REVIEW DETERMINATION

Case of: **Shardae Davis**

Dear Ms. Davis,

You initiated an administrative grievance or review by the South Carolina Education Lottery ("SCEL") through the May 25, 2018 letter submitted on your behalf by your attorney.

Based upon information provided by your counsel, it is the understanding of the SCEL that you claim to be in possession of a ticket or tickets for the Holiday Cash Add-A-Play game depicting nine tree symbols sold between the hours of 5:51 pm and 7:53 pm on December 25, 2017.

By letter dated June 14, 2018 directed to your attorney, counsel for the SCEL informed you of the procedures to follow to pursue the Administrative Review.

The procedures for the Administrative Review included that if you had information, evidence, or argument that you wanted considered by the SCEL, you were required to submit to the SCEL, within 30 days of the June 14, 2018 letter, (1) a legible copy of both the front and back of the ticket(s) at issue, (2) all of the evidence or factual information that you believe was not considered by GLI and which you want considered, (3) any law or authority that you believe supports your position, and (4) a statement outlining the reason(s) for the complaint.

You have failed to submit any of the material or information. Since you have not submitted any additional information, evidence, facts, or legal arguments, the SCEL, by and through its Executive Director, makes the following findings and conclusions:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

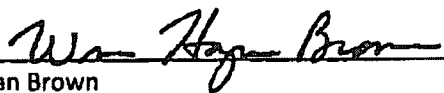
- (1) The SCEL Commission previously engaged Gaming Laboratories International LLC ("GLI"), an established industry expert to independently review and analyze the incident which occurred on December 25, 2017, regarding the Holiday Cash Add-A-Play game.
- (2) GLI conducted the independent, impartial analysis as requested in accordance with industry standards.

1333 Main Street 4th Floor Columbia, SC 29201
P.O. Box 11949, Columbia, SC 29211 - 1949
Ph. 803-737-2002 FAX 803-737-2005 sceducationlottery.com

- (3) GLI reported the facts learned in its investigation in a thorough, unbiased written report.
- (4) All Holiday Cash Add-A-Play tickets issued, produced and/or printed on December 25, 2017, which depict nine tree symbols were issued, produced and/or printed in error for the reasons stated in the written report produced by GLI.
- (5) The errors in issuing, producing, and/or printing the tickets which depict nine tree symbols include, but are not limited to flawed software and source code which, when implemented, caused the game to operate outside the parameters of the game specifications, including the creation of:
 - tickets outside of the fixed number of games plays available to be sold (six million); and
 - invalid tickets; and
 - invalid tickets having the appearance of winning tickets; and
 - an excessive number of top-award tickets; and
 - an excessive concentration of top-award tickets.
- (6) Additional errors occurred due to inadequate and incomplete testing by SCEL's vendor, who was required to but failed to implement best industry practices.
- (7) South Carolina statutory law and the regulations previously adopted, all of which govern the payment of prizes, are clear and unambiguous that no prize shall be paid for any ticket which is issued, produced or printed in error.
- (8) To pay any of the Holiday Cash Add-A-Play tickets depicting nine tree symbols sold between the hours of 5:51 pm and 7:53 pm on December 25, 2017, would be to violate South Carolina law.
- (9) Therefore, and pursuant to the action of the SCEL Board, no prize shall be paid for any Holiday Cash Add-A-Play tickets depicting nine tree symbols sold between the hours of 5:51 pm and 7:53 pm on December 25, 2017. Any holder of one of these tickets is entitled to a refund upon submission of the original ticket to the Executive Director.
- (10) You claim to possess a ticket or tickets sold in the Holiday Cash Add-A-Play game between the hours of 5:51 pm and 7:53 pm on December 25, 2017, which depicts nine tree symbols. The SCEL's previously adopted Ticket Complaint Procedures were suspended by the SCEL Board of Commissioners regarding tickets sold in the Holiday Cash Add-A-Play game which were sold between the hours of 5:51 pm and 7:53 pm on December 25, 2017, and which, when printed, depict nine tree symbols. You initiated an administrative grievance or review by the SCEL through the May 25, 2018 letter submitted on your behalf by your attorney. You failed to present a copy of any ticket you claim is in your possession or any additional evidence regarding the ticket(s) you claim to hold for consideration by the SCEL.
- (11) Therefore, in accordance with the action of the SCEL Board, your complaint seeking payment of a prize is hereby dismissed, without prejudice to your right to seek a refund as stated in paragraph 9 above. Any further review sought by you of this matter must be

sought from the South Carolina Administrative Law Division in accordance with §59-150-300(A).

Sincerely,


Hogan Brown
SCEL Executive Director

STATE OF SOUTH CAROLINA)

COUNTY OF SUMTER)

Jamaine Holman, Victoria Lewis, Melanie
Baker, Christopher Shipman, Robert
Weaver, Vonetta Wilson, Francesca
Worley, Brittany Johnson, Shirley Pearson,
Robert Weaver, Gastonio Pearson, Rodney
Leachman, Cassandra Pugh, and Krystal
Bostinto, on behalf of themselves and all
others similarly situated)

Plaintiff)

vs.)

South Carolina Education Lottery
Commission d/b/a South Carolina
Education Lottery and INTRALOT, Inc.)

Defendants)

IN THE COURT OF COMMON PLEAS
FOR THE THIRD JUDICIAL CIRCUIT
CIVIL ACTION NO.: 2018-CP-43-00138

**MOTION TO ALTER OR AMEND ORDER
DENYING MOTION TO DISMISS**

On January 4, 2019, this Court issued an Order denying Defendant Intralot's Motion to Dismiss, concluding that Plaintiffs' sufficiently stated claims for breach of implied contract, unjust enrichment, and negligence. The Court further concluded that Plaintiffs are excused from their obligation to exhaust administrative remedies to the Administrative Law Court merely because Plaintiffs pleaded this as a putative class action. For the reasons that follow, this Court should reconsider each of its rulings that were adverse to Defendant Intralot.

FACTUAL ALLEGATIONS

In making its factual recitation, the Court omits reference to South Carolina law which explains that prizes cannot be paid if it "arises from claimed lottery game tickets that are stolen, counterfeit, altered, fraudulent, unissued, *produced or issued in error*, unreadable, not received, or not recorded by the commission within the applicable deadlines." S.C. Code Ann. § 59-150-

230(C)(3)(a)(emphasis added.) For any condition precedent to a valid claim either in contract, tort, or equity, the ticket cannot be one that was “produced or issued in error.” Here, Plaintiffs never allege that the tickets were not “produced or issued in error” and fail to plead a condition precedent to any of their causes of action.

STANDARD OF DETERMINATION

Pursuant to Rule 59(a) of the South Carolina rules of Civil Procedure:

A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the State; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in the courts of the State. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

ARGUMENT AND CITATION TO AUTHORITY

A. Plaintiffs’ Complaint Should Be Dismissed as Premature for Having Failed to Exhaust Administrative Remedies.

This Court found that Plaintiffs are excused from the exhaustion of administrative remedies because doing so would be futile in light of the Agency’s decision to only reimburse the purchase price of tickets. However, this should not excuse exhaustion of administrative remedies to an impartial court, the Administrative Law Judge Division of the South Carolina Court system. In this regard, the Court failing to address whether appeal to the Administrative Law Judge Division is futile is in error.

The rule of exhaustion of administrative remedies is generally considered a rule of policy, convenience, and discretion, rather than one of law, and will not divest the circuit court of subject

matter jurisdiction. Capital City Ins. Co. v. BP Staff, Inc., 382 S.C. 92, 674 S.E.2d 524 (Ct.App. 2009). Thus, “the failure to exhaust administrative remedies goes to the prematurity of a case, not subject matter jurisdiction.” Ward v. State, 343 S.C. 14, 17 n. 5, 538 S.E.2d 245, 246 n. 5 (2000). According to the Supreme Court, “[t]he general rule is that administrative remedies must be exhausted absent circumstances supporting an exception to the application of the general rule.” Hyde v. S.C. Dep’t of Mental Health, 314 S.C. 207, 208, 442 S.E.2d 582, 583 (1994). The Court of Appeals has cited 2 Am. Jur. 2d Administrative Law § 595 (1962) approvingly in Brown v. James, which states:

The doctrine of exhaustion of administrative remedies requires that where a remedy before an administrative agency is provided, relief must be sought by exhausting this remedy before the courts will act. This doctrine is well established, is a cardinal principle of practically universal application, and must be borne in mind by the courts in construing a statute providing for review of administrative action.

Brown v. James, 389 S.C. 41, 48, 697 S.E.2d 604, 608 (Ct. App. 2010).

South Carolina courts recognize exceptions to the general rule that administrative remedies must be exhausted. Where a party demonstrates that the pursuit of administrative remedies is in vain or is futile, the party is excused from the exhaustion requirement. Brown v. James, 389 S.C. 41, 54, 697 S.E.2d 604, 611 (Ct. App. 2010). “Futility, however, must be demonstrated by a showing comparable to the administrative agency taking ‘a hard and fast position that makes an adverse ruling a certainty.’” Law v. S.C. Dep’t of Corr., 368 S.C. 424, 438, 629 S.E.2d 642, 650 (2006) (citations omitted). A mere belief that the agency will deny the claim does establish futility. Smith v. South Carolina Retirement System, 336 S.C. 505, 526-27, 520 S.E.2d 339, 350-51 (Ct. App. 1999.) Another exception to the exhaustion requirement is where an agency has acted outside the scope of its authority. Responsible Econ. Dev. V. S.C. Dep’t of Health & Envtl. Control, 371 S.C. 547, 553, 641 S.E.2d 425, 428 (2007).

The administrative process requires validation of a lottery game ticket. S.C. Code Ann. § 59-150-230(C). A prize must not be paid if it “arises from claimed lottery game tickets that are stolen, counterfeit, altered, fraudulent, unissued, *produced or issued in error*, unreadable, not received, or not recorded by the commission within the applicable deadlines.” S.C. Code Ann. § 59-150-230(C)(3)(a)(emphasis added.) Under the Regulations promulgated under this section, the Executive Director or the South Carolina Education Lottery Commission “may deny awarding a prize to a claimant if the ticket is printed or produced in error.” S.C. Code Reg. 44-70(E). Decisions of the Executive Director are final, subject to an appeal to the full commission. S.C. Code Reg. 44-70(F). Finally, pursuant to S.C. Code Ann. § 59-150-300(B), “[t]he Administrative Law Judge Division shall hear appeals from the decisions of the board and, based upon the proceedings before the board.” The Administrative Law Judge Division may reverse the decision of the board if the board action violates a constitutional or statutory provision; is in excess of the statutory authority of the board, is made upon unlawful procedure, or is affected by other error of law; is clearly erroneous in view of reliable, probative, and substantial evidence on the whole record; or is arbitrary or capricious or characterized by an abuse of discretion or clearly unwarranted exercise of discretion. S.C. Code Ann. § 59-150-300(B).

The Court further noted that Plaintiffs are excused from the exhaustion requirement because they are pursuing a class action, citing Rose v. City of Hayward, 179 Cal. Rptr 287 (App. Ct. 1981). However, other courts have held that at least the named Plaintiff must exhaust his or her administrative remedies prior to filing an action in court. See I.M.A.G.E. v. Equal Employment Opportunity Comm’n., 469 F. Supp. 1034, 1041 (D. Colo. 1979) (requiring exhaustion of administrative remedies by at least one member of class is prerequisite to suit); League of United Latin American Citizens v. Hampton, 501 F.2d 843, 846-847 (D.C. Cir. 1974)(same). But see

Stephens v U.S. Airways Group, Inc., No. 07-cv-1264, 2012 WL 13054263, *3 (D.D.C. July 18, 2012) (requiring exhaustion of administrative remedies for all class members).

At minimum, this Court should reconsider its finding of futility in light of the fact that an administrative remedy is available and required statutorily through the Administrative Law Judge Division, as Plaintiffs have not challenged that court's impartiality or that any conclusion affirming the Agency's decision has been made.

B. Plaintiffs Plead No Facts to Establish They Are Third Party Beneficiaries of a Contract Between Them and the South Carolina Education Lottery.

Plaintiffs attempt to save their breach of contract cause of action by stating that “[a]t all times relevant to this Complaint, Defendants had a contract between themselves, of which Plaintiffs were direct third-party beneficiaries.” (Complaint ¶ 42.) A third-party beneficiary is a party that the contracting parties intend to directly benefit. Touchberry v. City of Florence, 295 S.C. 47, 48–49, 367 S.E.2d 149, 150 (1988). However, Plaintiffs plead no facts establishing that they are actually third-party beneficiaries of the contract between Defendants. Here, Plaintiffs failed to cite to any specific language in the contract between Defendants demonstrating that players are third-party beneficiaries. Thus, any attempt to save this cause of action from the lack of privity with bare allegations that Plaintiffs were third-party beneficiaries fails. Notice pleading still requires the pleading of facts and not merely legal conclusions.

Moreover, the Court misses the point with respect to third-party beneficiaries. First, Plaintiffs must be actual or intended beneficiaries of the contract. Further, the Plaintiffs must allege facts that Defendant Intralot breached its contract with the South Carolina Education Lottery. Thus, Plaintiffs must sue under the contract between Intralot and the South Carolina Education Lottery and not based on the ticket alleged to be a contract here. Thus, the Court should

amend its order with respect to the Breach of Implied Contract cause of action, concluding the pleadings are insufficient, and grant Defendant Intralot's Motion to Dismiss.

C. Plaintiffs' Negligence Cause of Action Fails For Lack of a Duty Owed to Plaintiffs.

With respect to the negligence cause of action, the Court stated that "Plaintiffs allege various ways they contend Intralot was negligent in performing under the contract with Defendants." (Order at 8.) Plaintiffs, however, fail to allege what duty Defendant Intralot owed to them, rather than to the South Carolina Education Lottery. To prevail in an action founded in negligence, the plaintiff must establish three essential elements: (1) a duty of care owed by the defendant to the plaintiff; (2) a breach of that duty by a negligent act or omission; and (3) damage proximately caused by a breach of duty. Newton v. South Carolina Pub. Rys. Comm'n, 312 S.C. 107, 108-109, 439 S.E.2d 285, 287 (Ct.App.1993), *rev'd on other grounds*, 319 S.C. 430, 462 S.E.2d 266 (1995). Actionable negligence is based upon the breach of duty to do or refrain from doing some particular act. Hodge v. Crafts -Farrow State Hosp., 286 S.C. 437, 439, 334 S.E.2d 818, 820 (1985). A breach of duty exists when it is foreseeable that one's conduct may likely injure the person to whom the duty is owed. Horne v. Beason, 285 S.C. 518, 521, 331 S.E.2d 342, 344 (1985). The damages allegedly sustained must be shown to have been proximately caused, i.e. causally connected, to the breach of duty in order to warrant a recovery. *Id.* If one neglects a duty which proximately causes injury to another, recovery is warranted. Hodge, 286 S.C. at 439, 334 S.E.2d at 820.

In this case, Plaintiffs' Complaint states that Defendant Intralot failed to exercise reasonable care in the context of the administrative services provided to the South Carolina Education Lottery, including failing to develop, implement, and execute policies and procedures for testing lottery games. (Complaint ¶ 56.) Here, while Defendant Intralot may have had a duty

to have properly functioning systems and to properly test lottery games, this duty was owed to the South Carolina Education Lottery Commission and not to the general public.

Moreover, Defendant Intralot's contractual obligations to the Defendant South Carolina Education Lottery are governed, in part, by the statutory framework. Pursuant to S.C. Code Ann. § 59-150-230(C)(3)(a), a prize must not be paid if it "arises from claimed lottery game tickets that are stolen, counterfeit, altered, fraudulent, unissued, *produced or issued in error*, unreadable, not received, or not recorded by the commission within the applicable deadlines." S.C. Code Ann. § 59-150-230(C)(3)(a) (emphasis added.) This statute establishes that any duty of Defendant Intralot in the production or issuance of lottery tickets is owed directly to the South Carolina Education Lottery Commission and not to Plaintiffs, as tickets issued in error are not to be paid. Therefore, S.C. Code Ann. § 59-150-230(C)(3)(a) establishes that any contractual duty owed to Defendant South Carolina Education Lottery does not provide a duty of care to consumers like Plaintiffs. Plaintiffs have no legal right in tort as to Defendant Intralot. In this regard, the Court should amend its order and dismiss Plaintiffs' negligence cause of action.

D. Plaintiffs' Unjust Enrichment Cause of Action Should Be Dismissed.

Unjust enrichment is an equitable remedy used typically for implied or quasi-contracts. Plaintiffs' Complaint is not clear on the underlying basis to seek the remedy of unjust enrichment. The elements to recover for unjust enrichment based on quantum meruit, quasi-contract, or implied by law contract, which are equivalent terms for equitable relief, are: "(1) a benefit conferred by the plaintiff upon the defendant; (2) realization of that benefit by the defendant; and (3) retention of the benefit by the defendant under circumstances that make it inequitable for him to retain it without paying its value." Myrtle Beach Hosp., Inc. v. City of Myrtle Beach, 341 S.C. 1, 8-9, 532 S.E.2d 868, 872 (2000). The Court concluded Plaintiffs sufficiently pleaded an unjust enrichment

cause of action. However, the Court identified no specific language in the Complaint that money from their lottery tickets were received by Defendant Intralot. Thus, Defendant Intralot possesses no funds of Plaintiffs that should be returned in any action in equity. Thus, the Court should reconsider its Order and dismiss this cause of action.

CONCLUSION

For the above and foregoing reasons, the Court should reconsider its Order denying Defendant Intralot's Motion to Dismiss and amend said Order under Rule 59(e) to grant Defendant Intralot's Motion to Dismiss as set forth herein. In this regard, Plaintiffs' Complaint as to Defendant Intralot should be dismissed pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure.

RESPECTFULLY SUBMITTED, this 14th day of January 2019.

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1 STATE OF SOUTH CAROLINA

2 COURT OF COMMON PLEAS

3 COUNTY OF SUMTER

4 -----x

5 SHARDAE DAVIS, et al.,

6 Plaintiffs,

7 vs.

Transcript of Record
2018-CP-43-00138

8 SOUTH CAROLINA EDUCATION

9 LOTTERY COMMISSION, et al.,

10 Defendants.

11 -----x

12 KEVIN COX, et al.,

13 Plaintiffs,

14 vs.

2018-CP-31-00047

15 SOUTH CAROLINA EDUCATION

16 LOTTERY COMMISSION, et al.,

17 Defendants.

18 -----x

19 July 30, 2018
Sumter, South Carolina

20 B E F O R E:

21 The Honorable Kristi F. Curtis, Judge.

23 DEFENDANTS' MOTION TO DISMISS

24 Bobbi J. Fisher, RPR

25 Official Court Reporter

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P R O C E E D I N G S

(Whereupon, the following proceedings started at 9:59 a.m.)

THE COURT: Shardea Davis, South Carolina Education Lottery Commission. Give me just a minute to get to your paperwork here.

Okay. I'm showing that this is the defendants' motion to dismiss.

MR. BROWN: Yes, Your Honor. William Brown here on behalf of the South Carolina Education Lottery. With me is my law partner, Tim Madden, and back here on the front row is Mr. Hogan Brown, the executive director of The Lottery.

THE COURT: Thank you.

And you are?

MR. HOPKINS: Your Honor, Bill Hopkins here on behalf of the plaintiffs, the putative class, Your Honor.

MR. PACELLA: Your Honor, there's another defendant, INTRALOT. My name is Mario Pacella. I'm here with Mr. Strom and general counsel for INTRALOT, Jay Lapine is also here.

THE COURT: Okay. Mr. Brown?

ARGUMENT ON BEHALF OF DEFENDANT SC EDUCATION LOTTERY

MR. BROWN: Yes, Your Honor. Our principal argument is that this matter is premature, that the plaintiff has failed to exhaust their administrative remedies. The South Carolina Education Lottery was created by The Lottery Act. The Lottery Act, in Section 59-150-300, specifically provides that anyone,

1 including the lottery game ticketholder, which would be the
2 plaintiffs in this case, aggrieved by an action of The Lottery
3 shall proceed through the administrative procedures and appeal
4 any decision by The Lottery to the Administrative Law Judge
5 Division. That has not occurred.

6 I will say, since we filed the motion to dismiss, the
7 plaintiffs or a group of the plaintiffs have submitted
8 administrative complaints to The Lottery. The Lottery, as to
9 most of those, has made an initial determination, and that has
10 been sent to Mr. Hopkins on behalf of those individuals
11 recently, within the last week or ten days or so. And,
12 therefore, the administrative determination has been made, and
13 they are pursuant to the statute authorized to appeal to the
14 administrative law judge if they continue to disagree with the
15 determination of The Lottery. So that process is underway.

16 We contend that, until it is complete, this Court -- that
17 any proceeding in this court is premature and should not
18 proceed and that the legislative directive for an
19 administrative review should occur. And in fact, in Section
20 59-150-300, subpart D, it specifically provides that judicial
21 review should only occur after the ALJ's determination. And
22 we would contend that that is -- that requires a dismissal.

23 We cite in our briefing the Unisys case which says that,
24 under that circumstance when there is not a proper exhaustion
25 of the administrative remedies, a dismissal pursuant to

1 12(b)(6) is the appropriate remedy, and we believe that is
2 appropriate here as well.

3 We also raised issues as to a couple of the particular
4 causes of action as well, Your Honor. The plaintiffs raised
5 equitable claims of promissory estoppel and unjust enrichment.
6 We could take the position and have taken the position that
7 those claims are barred by the doctrine of sovereign immunity.
8 The state legislature has exempted or has preempted the
9 doctrine of sovereign immunity for tort claims but it has not
10 done so for equitable claims. The tort claims act
11 specifically only addresses tort claims; it does not address
12 claims in equity, therefore, sovereign immunity will still
13 remain in effect.

14 We also raised issues regarding the unfair trade
15 practices, which, from the submissions that we received Friday
16 from the plaintiffs, we understand that they agree to
17 dismissal of the Unfair Trade Practices Act, and we also
18 raised the issue that, in The Lottery Act, venue as to the
19 lottery is exclusively in Richland County, and we understand
20 that, in their submission, they agree with that.

21 So we would contend that, principally, because of the
22 administrative procedures, failure to exhaust -- that this
23 case would need to be dismissed in its whole but raise the
24 others as well.

25 THE COURT: And do you want to be heard?

1 ARGUMENT ON BEHALF OF DEFENDANT INTRALOT

2 MR. PACELLA: Yes, Your Honor.

3 First, I think we had communicated last week about
4 consolidating the argument for the Cox case, which is in Lee
5 County for Wednesday as well. There's just one little nuance
6 in Cox that's a little different in my argument here, and I
7 think I wanted to point that out -- when I get there, I will
8 point that out as well.

9 THE COURT: Sure. And just for the record, the Cox case
10 is 2018-CP-31-47?

11 MR. PACELLA: That is what I have, Your Honor.

12 THE COURT: And both parties have agreed for me to hear
13 that here today; is that correct?

14 MR. HOPKINS: That's correct, Your Honor.

15 MR. BROWN: Yes, Your Honor.

16 MR. PACELLA: Thank you, Your Honor. Just a little bit
17 of factual background in this case. The first case, the Davis
18 case -- I think now it's captioned Hallman (phonetic) -- has
19 to do with buying an add-on to a lottery ticket and a number
20 of -- for about a two-hour period, a number of people had
21 received tickets that were purported to be winning, and it was
22 determination, after an investigation and audit, that those
23 tickets were produced or issued in error. So that's the crux
24 of the Hallman case.

25 With respect to the Cox case, this has to do with an

1 allegation that a person bought a Mega Million ticket with --
2 getting five numbers -- five independent numbers, and four of
3 them were duplicative, and that's the context of the Cox case.

4 INTRALOT joins in the motion and files its own motion for
5 the failure to exhaust the administrative remedies. Mr. Brown
6 has already argued that. I don't intend to restate that
7 argument. But INTRALOT has different arguments. It doesn't
8 have a sovereign immunity argument with respect to the
9 remaining causes of action but does have different arguments.

10 There are now four causes of action against INTRALOT:
11 One for unjust enrichment, breach of contract or breach of
12 implied contract, promissory estoppel, and negligence. And
13 I'm going to treat the unjust enrichment and breach of
14 contract/breach of implied contract somewhat similarly. And
15 when the consumer goes to buy a lottery ticket, they go to an
16 authorized retailer and they purchase the ticket from the
17 retailer and The Lottery. INTRALOT is not involved in that
18 transaction. There's no privity of contract between INTRALOT
19 and the consumer purchasing a ticket. And that would be the
20 reason why there is no breach of contract or breach of implied
21 contract cause of action against INTRALOT.

22 With respect to unjust enrichment, again, in that
23 transaction, INTRALOT received no money in that transaction.
24 Money goes to the retailer, ostensibly to The Lottery but not
25 to INTRALOT. INTRALOT provides administrative services and

1 technological services to The Lottery in the context of a
2 contract between The Lottery and INTRALOT, but the consumer is
3 not involved in that contract.

4 So the unjust enrichment cause of action fails because
5 there's no contractual relationship, and then INTRALOT
6 received no payment from the plaintiff. So under the elements
7 of unjust enrichment, there has to be a benefit conferred by
8 the plaintiff on the defendant, realization of that benefit by
9 the defendant, and retention of the benefit by the defendant
10 that makes it equitable for him not to return it. None of the
11 elements for unjust enrichment fits with respect to INTRALOT.

12 The claim for promissory estoppel is basically a claim
13 for negligent misrepresentation. The promissory estoppel, you
14 have to have an unambiguous promise by the promisor,
15 reasonable reliance by the promisee, reliance is expected and
16 foreseeable by the promisor, and there has to be injury to the
17 promisee.

18 There's no allegations in the complaint of any
19 representations made by INTRALOT to the consumers, and because
20 there's no allegation of any negligent misrepresentation or
21 any promise, there's no claim for promissory estoppel.

22 Finally, the plaintiffs make a number of allegations with
23 respect to negligence. In fact, the negligence claim is the
24 only -- only applies to INTRALOT, and it basically boils down
25 to allegations that they negligently implemented this Holiday

1 Cash Add-A-Play with respect to the first case, the Davis
2 case.

3 And all of their allegations of duty apply to INTRALOT's
4 duty to The Lottery, not INTRALOT's duty to the consumer, and
5 because the duty doesn't flow to the consumer, it flows to The
6 Lottery, that claim should be dismissed.

7 In the Cox case, we believe that the problem has to do
8 with retailer error and not with respect to the computer
9 programming. And -- but, likewise, the duty still flows not
10 to the consumer. The duty flows to The Lottery. And there's
11 no negligent cause of action for that reason.

12 THE COURT: And let me just make sure I have this right.
13 In the Cox case, five tickets were purchased, four had the
14 same number?

15 MR. PACELLA: That's what the complaint says.

16 THE COURT: And then, in the Davis case, the allegation
17 is that someone purchased a ticket that had a winning number.

18 MR. PACELLA: They weren't numbers. It was sort of a
19 tic-tac-toe board, and they have a match --

20 THE COURT: I've never played it. I'm too cheap to buy a
21 ticket.

22 MR. BROWN: Your Honor, just to give you some background.
23 On the Holiday Add-A-Play, in order to play that game, a
24 player has to first purchase a ticket for a base game -- Pick
25 3-, Pick 4-, Pick 5-type game -- and then for an extra dollar,

1 you can play the Add-A-Play game. The Add-A-Play game is like
2 a tic-tac-toe board. And if you get three trees in a row, you
3 win a prize. The particular placement of where those trees
4 are determines the prize. So if it's across the top of the
5 tic-tac-toe board, that's a particular dollar value. If it's
6 across the bottom, that's a different one. If it's
7 diagonally, that's another value. So the placement of that
8 determines it.

9 And when you buy a base ticket, it gives you the right to
10 buy up to five Add-A-Plays on top of that base ticket. And
11 the tickets that are at issue in this case are tickets which
12 involve nine tree figures. All nine spots have trees in them,
13 to give you the background of it.

14 THE COURT: Thank you.

15 MR. PACELLA: Which means it appears to be winning in
16 every one of the plays. That's the appearance.

17 And there was an audit that was conducted, and it was
18 determined that the tickets were produced or issued in error.

19 And with respect to the negligence claim, there's not
20 been an allegation in the complaint that -- there's a statute
21 that says you cannot pay a lottery ticket that was produced or
22 issued in error. The Lottery cannot pay that. And that makes
23 it is a precondition to having a successful ticket, is that it
24 was not produced or issued in error, and that allegation is
25 not made by the plaintiffs. They say that they

1 dispute whether there was a printing error, but they have not
2 used that -- they have not alleged that the tickets were
3 issued correctly or properly under the particular statute,
4 which is Subsection 230 -- 59-150-230, Subsection C-3. Thank
5 you.

6 THE COURT: Okay. Thank you.

7 ARGUMENT ON BEHALF OF PLAINTIFFS

8 MR. HOPKINS: Thank you, Your Honor. May it please the
9 Court. Your Honor, I'm Bill Hopkins. We represent -- I
10 haven't counted in a couple of weeks, Your Honor, but I would
11 estimate, at last count, over 50 or 60 plaintiffs who have
12 several million dollars in winnings from the Holiday
13 Add-A-Play game which was -- this happened on Christmas day of
14 2017. I believe from the reports we have read, there are
15 about \$30 million in winning tickets which have been rejected
16 by The Lottery.

17 And so, Your Honor, first of all, I'll say, Mr. Pacella
18 is correct: We have not -- another putative class action suit
19 has been filed where they specifically allege that these were
20 printed in error. We do not allege that these were printed in
21 error. We don't think they were erroneous. We think the
22 software designed by the defendants may have had some
23 particular element this day that allowed it, but we said in
24 our complaint, Your Honor, we have many, many clients who
25 received losing tickets at the same time they received winning

1 tickets. So we don't think there was any error at all;
2 they're simply unhappy that the software allowed winning
3 tickets to be printed. But there were a lot of losers, so we
4 don't think there was an error.

5 That takes us to the first point, Your Honor. The
6 primary argument of both defense is the administrative
7 procedures. We don't believe it applies for a number of
8 reasons. First and foremost, if Your Honor will read the
9 language in the statute, it is all permissive. The words
10 "must" and "shall" are not used. The word "may" is used. So
11 I'm not sure we have -- I don't believe the statute provides
12 we have to follow administrative procedures.

13 Second of all, the statute implies, as they have pointed
14 out, when there's an error, when a complainant makes the
15 complaint that there's been something done in error, a ticket
16 presented in error, we can file a grievance through The
17 Lottery Commission. We don't think there was an error. We
18 have no interest in going before them.

19 Third of all, Your Honor, when they first filed the
20 motion to dismiss, The Lottery Commission said you're
21 premature; we haven't made a decision whether we're going to
22 pay these or not. So out of an abundance of caution, we
23 filed -- for all of our clients, we submitted complaints to
24 The Lottery Commission. As Mr. Brown said, I believe, we have
25 now received formal responses on all of those stating they

1 reject or deny our claim for payment, so that has been done.

2 As Mr. Brown just read, the statute that they cite says
3 an appeal may be taken to The Lottery Commission or to the
4 administrative law court. We have no interest in doing so,
5 Your Honor. We don't believe, frankly, we had a duty to even
6 file these because of futility. As it's put in our brief in
7 opposition, futility allows a party to forego administrative
8 procedures where the conclusion is already foregone. It's
9 already been known that The Lottery has rejected and INTRALOT,
10 they have rejected these claims since Christmas day when they
11 stopped paying, so it would have been futile but we did it
12 anyway. So we think that we have complied in large part.

13 For all of those reasons, Your Honor, the Administrative
14 Procedures Act doesn't apply, it's not required, it's
15 permissive, it's not mandatory, and we have, in fact,
16 complied. They have rejected it. An appeal is strictly
17 permissive; we have elected not to do it.

18 And, finally, Your Honor, we don't believe there was an
19 error. We have no allegation in our complaint that there was
20 an error. This is their software. They designed it. It
21 happened to produce winning tickets on Christmas day for a
22 period of time, as well as losing tickets. Our folks think
23 they're entitled to be paid.

24 The next argument of The Lottery, Your Honor: The
25 equitable claims. Your Honor, we have outlined this

1 extensively in our brief. I won't reread it, but generally,
2 I'll say that the case law supports that an entity can be sued
3 for equitable claims in addition to tort -- under the tort
4 claims act.

5 First of all, Your Honor, we cited a case, the Quail Hill
6 case in our brief which talks about the fact that a claim had
7 been brought against a governmental entity for promissory
8 estoppel or equitable estoppel. The circuit court granted
9 summary judgment on that claim, and the Court of Appeals
10 reserved and said that an entity can be sued for an equitable
11 claim such as promissory estoppel.

12 Your Honor, although there really aren't any cases --
13 that many cases on point in South Carolina, North Carolina,
14 which has a similar, if not identical, tort claims act, there
15 are a number of cases. And what it says is that governmental
16 entities are entitled to immunity when they're performing what
17 are call quintessential government functions, government
18 functions we can't do without that we rely on. We don't need
19 lottery games in South Carolina. A lottery is not a
20 quintessential government function. It is strictly a
21 ministerial function.

22 The North Carolina courts have also held that, when a
23 state undertakes a commercial venture, that they can be
24 liable, they lose their immunity. This is 100 percent
25 strictly a commercial venture. It is a money-making thing for

1 the State of South Carolina.

2 Also, Your Honor, the North Carolina courts talk about
3 when you enter into a contract. If you enter into a contract
4 for a commercial gain and carry out a proprietary function,
5 which is not a quintessential function, you lose your
6 immunity.

7 All those cases are set forth in our brief, Your Honor.
8 For all of those reasons, we definitely believe they have lost
9 their immunity on the equitable claims, unjust enrichment,
10 promissory estoppel. And they have cited no cases, Your Honor
11 -- they haven't cited a single case that would say we can't
12 bring these claims against The Lottery when they're performing
13 a proprietary commercial function and not a quintessential
14 government function.

15 As Mr. Brown said, we have agreed to dismiss our UTPA
16 claims. On the venue, Your Honor, we believe their legal
17 arguments to keep venue in Sumter County, but from a practical
18 standpoint, we don't really care. We're happy to be in
19 Richland or Sumter or any other county where The Lottery does
20 business, so we'll consent to that.

21 On the INTRALOT motion, Your Honor, one of the main
22 arguments that INTRALOT makes is based on privity; saying that
23 our purchasers had no privity. And, Your Honor, if I could
24 approach the bench; there was one case we did not cite in our
25 brief, which I'd like to hand up, if I may.

1 THE COURT: Sure.

2 MR. HOPKINS: Your Honor, the case I have handed up is
3 *Fabian versus Lindsay*, 765 S.E. 2nd 132. It's a 2014 Supreme
4 Court case. The issue there was whether or not a beneficiary
5 of a decedent who had effectively been written out of their
6 inheritance because of a drafting error in a trust. It was a
7 legal malpractice case. Although the facts are legal issue --
8 the facts are different, the legal issue is identical. The
9 Supreme Court really gives a primer on privity while in South
10 Carolina, and they state privity is just mutuality of
11 interest. And they talk about the various theories under
12 which this decedent may have the claim against the lawyers.
13 And the one they rely on, which they note has already existed
14 in South Carolina for years, is third-party beneficiary of a
15 contract.

16 Your Honor, The Lottery and the INTRALOT are not entering
17 into a contract to do business with each other. The sole
18 purpose is for third parties, my clients, to buy these tickets
19 with a chance of winning. My clients are the third-party
20 beneficiary of that contract between INTRALOT and The Lottery.
21 So as third-party beneficiaries, there are duties, and under
22 the law of South Carolina, we believe privity exists, and we
23 can pursue these claims.

24 So, finally, the INTRALOT has moved to dismiss the two
25 equitable claims: Promissory estoppel and unjust enrichment.

1 The promissory estoppel, Your Honor, I would agree, we really
2 can't point to a promise by INTRALOT to our folks other than
3 an implied promise, but on the unjust enrichment, I would
4 submit to the Court that it's premature at this time. What we
5 don't know is the payment. We don't know yet if INTRALOT gets
6 incentives or bonuses based on the amount of play of game they
7 design and implement.

8 I would tend to agree with Mr. Pacella; if it's strictly
9 a contract rate, we get one contract payment for every game we
10 design, it's going to be a tough road to hoe for the unjust
11 enrichment, but we have reason to believe they may have
12 incentives or other things in their contract based on the
13 amount of play on certain games. This was a one-time holiday,
14 Christmas day game where the play was significant, and we'd
15 like to look to see -- during discovery, Your Honor, we'd like
16 an opportunity to see if they got incentives based on the
17 amount of play on Christmas day.

18 So, hopefully, I have answered all your questions or
19 addressed their points, Your Honor. Again, we have set out
20 most of these in our brief, but thank you for your time.

21 THE COURT: Yes, sir.

22 RESPONSE ON BEHALF OF DEFENDANT SC EDUCATION LOTTERY

23 MR. BROWN: Your Honor, very briefly. Initially, the
24 foundation of Mr. Hopkins' argument with regard to the
25 administrative process or one offer of them was that he

1 doesn't allege an error. That is irrelevant as to the
2 administrative exhaustion requirement.

3 The exhaustion requirement applies when a ticketholder is
4 aggrieved by an action of The Lottery. Why The Lottery took
5 that action doesn't matter for the purposes of whether that
6 determination of the dispute should go to the administrative
7 process. And in this situation, undisputedly his clients
8 contend they were aggrieved by the determination of The
9 Lottery. So the reason why The Lottery made its determination
10 doesn't matter in terms of enforcing administrative
11 proceedings.

12 On the -- I would also -- with regard to the
13 administrative proceedings, again, most, if not all, of his
14 clients did submit a request for administrative review. The
15 Lottery sent back a request to him saying send us anything you
16 want us to evaluate in that process pursuant to the
17 administrative -- the APA. The plaintiffs could have pursued
18 discovery in the administrative process; they did not. They
19 did not submit any information, so the determination was made
20 based upon a record where they did not submit anything at all.

21 I haven't addressed the Cox case at all, Your Honor,
22 because I wasn't sure how you wanted to handle that argument.
23 But, in essence, the legal argument is the same, even though
24 the factual issues are different.

25 On the equitable claims, the plaintiff relies on the

1 Quail Hill case, which is a Court of Appeals case from 2008;
2 however, our South Carolina Supreme Court reversed that
3 decision. In 2010, in 387 S.C. 223, 2010, the Supreme Court
4 said you cannot pursue that promissory estoppel claim --
5 equitable estoppel claim against the governmental entity. And
6 the cases that were relied upon principally by the plaintiff
7 from North Carolina relate to exceptions within their tort
8 claims act. Again, those relate to tort claims and how the
9 North Carolina courts interpret their statute. South Carolina
10 has not interpreted it the same way, and the Unisys case,
11 which we cite in the footnote in our brief, which is cited at
12 344 S.C. 158, specifically notes that our tort claims act in
13 South Carolina is strictly construed, and since nothing in it
14 provides an abrogation of sovereign immunity for equitable
15 claims, there is no basis to allow for equitable claims.

16 THE COURT: Yes, sir.

17 RESPONSE ON BEHALF OF DEFENDANT INTRALOT

18 MR. PACELLA: Your Honor, on the two brief points: First
19 has to do with the administrative remedies. The statute in
20 question is 59-50-300. Subsection A refers to an aggrieved
21 party may appeal, but Subsection B says the Administrative Law
22 Judge's Division shall hear appeals. So that "shall" makes
23 that process mandatory.

24 Then with respect to the third-party beneficiary
25 argument, I'm well aware that there could be a third-party

1 beneficiary claim if it was alleged and if facts were alleged
2 that would establish that the consumer is a third-party
3 beneficiary, but that's not what the complaint says. The
4 complaint refers broadly to a contract between Plaintiff and
5 Defendants, plural, meaning contract with The Lottery and a
6 contract with INTRALOT rather than making a claim for a
7 third-party beneficiary. That's not been made.

8 And they're not pointing at any language between the
9 relationship of the contract between INTRALOT and The Lottery
10 to establish that there is some sort of third-party --
11 intended third-party beneficiary.

12 And when you have a third-party beneficiary claim, it has
13 to be an actual and intended beneficiary, not just someone who
14 may just reap the benefits of the contract. Thank you.

15 THE COURT: Thank you.

16 Okay. Thank you very much.

17 RESPONSE BY CLASS ACTION PLAINTIFFS

18 MR. ALGER: Your Honor, I'm sorry to interject. I'm Neil
19 Alger; I actually represent the other class action that's
20 currently pending in front of Judge Lee. I don't want to
21 interject or intervene here, but I do want to bring to the
22 Court's attention that, at least in terms of the
23 administrative remedies issue, that matter is currently under
24 advisement with Judge Lee in almost an identical motion
25 brought by both of those defendants in our case. So to the

1 extent that's relevant to you, I wanted to bring that to your
2 attention.

3 THE COURT: Thank you.

4 FURTHER RESPONSE ON BEHALF OF DEFENDANT SC EDUCATION LOTTERY

5 MR. BROWN: Your Honor, the one distinction that would be
6 is that, in the Richland County case before Judge Lee, none of
7 the parties have begun the administrative process, whereas, in
8 this case, essentially all of them have begun the
9 administrative process.

10 THE COURT: Yes, sir.

11 MR. HOPKINS: And, briefly, if I may, Your Honor, we
12 understand there's this other case. We would respectfully
13 request this Court go ahead and rule on these issues in light
14 of the fact that they're ripe for adjudication. If I could
15 just address one issue. We agree that, if there is an appeal,
16 it must be heard by the ALJ, but if there is no appeal, the
17 appeal isn't mandatory, and we don't intend to appeal it.

18 THE COURT: So what I guess I understood the argument to
19 be is there's no requirement that you appeal it. If you go to
20 the administrative -- if you follow the administrative
21 procedures and you are heard by the commission and they deny
22 your claim, you may appeal it; you certainly don't have to
23 appeal it. But if you want, then, a judicial review of it,
24 you have to appeal it and go through that process, I believe
25 is what their argument is.

1 MR. HOPKINS: And we think if Your Honor reads the
2 statute, you'll find no such requirement whatsoever. There is
3 nowhere in that act is there a prohibition on a judicial
4 action in a court. It talks about permissive. You have this
5 procedure you can undertake, and if you want an appeal, it
6 will be heard by a law judge, then the appeal from the law
7 judge will be to the circuit court. But I think, Your Honor,
8 you'll find nothing prohibiting anyone from bringing a direct
9 action in circuit court and circumventing the administrative
10 procedure claim for The Lottery Act. I welcome Your Honor to
11 read it and also read the Quail Hill case, Your Honor.

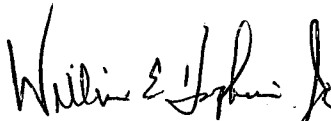
12 THE COURT: All right. Thank you so much. I will review
13 everything carefully and take it under advisement. Thank you.

14 MR. BROWN: Thank you, Your Honor.

15 (At 10:28 a.m., the above hearing concluded.)
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CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Record on Appeal contains all materials proposed to be included by any of the parties and not any other material.



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