THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM SUMTER COUNTY
COURT OF COMMON PLEAS

KRISTI F. CURTIS, CIRCUIT COURT JUDGE

APPELLATE CASE NO.: 2019-000502

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

Appellants,

v.

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

Respondents.

RESPONDENT'S FINAL BRIEF

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STATEMENT OF THE CASE

Plaintiffs filed this Amended Complaint on May 29, 2018. The Class Action Complaint will be referred to as the "Complaint." In the Complaint, Plaintiffs allege that they represent the interests of individuals who purchased Holiday Cash Add-A-Play lottery tickets in South Carolina on December 25, 2017. (R. at 46, ¶ 21). Plaintiffs contend that they received winning tickets, and alleged that "[s]ix 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." (R. at 46-47, ¶ 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.'" (R. at 46, ¶ 23).

Notwithstanding the allegation that their alleged winning tickets have not been paid, Plaintiffs stated 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 failed 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 brought four causes of action against Defendant Intralot.[1] First, they made a claim for Unjust Enrichment. (R. at 48-49, ¶¶ 34-40). Second, they made a claim for Breach of Contract and/or Breach of Implied Contract. (R. at 49, ¶¶ 41-46). Third, they made a claim for Promissory Estoppel. (R. at 50, 47-50). Finally, Plaintiffs made a claim for Negligence and Gross Negligence. (R. at 51-52, 55-58). The claims against Intralot mirrored the claims against the South Carolina Education Lottery.

Both Intralot and the South Carolina Education Lottery brought Motions to Dismiss, contending that Plaintiffs failed to exhaust administrative remedies. Intralot brought its motion pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure, and the South Carolina Education Lottery brought its motion pursuant to both Rules 12(b)(1) and 12(b)(6) of the South Carolina Rules of Civil Procedure. The Court initially denied the motions in a written order dated January 4, 2019. Both Intralot and the South Carolina Education Lottery filed Motions to Alter or Amend pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure. The Circuit Court granted the Motions to Alter or Amend by Intralot and the South Carolina Education Lottery in separate written orders, both dated February 25, 2019. The Circuit Court concluded that Plaintiffs failed to demonstrate that they exhausted administrative remedies and failed to establish that they were excused from this requirement pursuant to any of the exceptions to the exhaustion requirement, including the futility exception. (R. at 3-6, 10-13).

STANDARD OF REVIEW

Under Rule 12(b)(6), SCRCP, a defendant may move to dismiss based on a failure to state facts sufficient to constitute a cause of action. *Baird v. Charleston County,* 333 S.C. 519, 511 S.E.2d 69 (1999); *Bergstrom v. Palmetto Health Alliance,* 352 S.C. 221, 573 S.E.2d 805 (Ct.

[1] Initially, Plaintiffs brought a cause of action for violation of the South Carolina Unfair Trade Practices Act, but they withdrew this claim at the hearing on the Motion to Dismiss.

App. 2002). A trial judge in a civil setting may dismiss a claim when the defendant demonstrates that the plaintiff has failed to state facts sufficient to constitute a cause of action in the pleadings filed with the court. *Williams v. Condon,* 347 S.C. 227, 553 S.E.2d 496 (Ct. App. 2001). Generally, in considering a Motion to Dismiss under Rule 12(b)(6) of the South Carolina Rules of Civil Procedure, the trial court must base its ruling solely upon allegations set forth on the face of the complaint. *Stiles v. Onorato,* 318 S.C. 297, 457 S.E.2d 601 (1995); *Bergstrom,* 352 S.C. at 233, 573 S.E.2d at 811; *see also Brown v. Leverette,* 291 S.C. 364, 353 S.E.2d 697 (1987) (trial court must dispose of motion for failure to state cause of action based solely upon allegations set forth on face of complaint); *Williams,* 347 S.C. at 233, 553 S.E.2d at 499 (trial court's ruling on 12(b)(6) motion must be premised solely upon allegations set forth by plaintiff).

A motion to dismiss under Rule 12(b)(6) should not be granted if facts alleged and inferences reasonably deducible therefrom would entitle the plaintiff to relief on any theory of the case. *See Gentry v. Yonce,* 337 S.C. 1, 522 S.E.2d 137 (1999); *Stiles,* 318 S.C. at 300, 457 S.E.2d at 602–03; *see also Baird,* 333 S.C. at 527, 511 S.E.2d at 73 (if the facts and inferences drawn from the facts alleged in the complaint would entitle the plaintiff to relief on any theory, then granting a motion to dismiss for failure to state a claim is improper); *McCormick v. England,* 328 S.C. 627, 494 S.E.2d 431 (Ct. App. 1997) (motion to dismiss cannot be sustained if facts alleged in complaint and inferences reasonably deducible therefrom would entitle plaintiff to relief on any theory of the case). In deciding whether the trial court properly granted the motion to dismiss, the appellate court must consider whether the complaint, viewed in the light most favorable to the plaintiff, states any valid claim for relief. *See Gentry,* 337 S.C. at 5, 522 S.E.2d at 139; *see also Cowart v. Poore,* 337 S.C. 359, 523 S.E.2d 182 (Ct. App. 1999) (looking

at facts in light most favorable to plaintiff, and with all doubts resolved in his behalf, the court must consider whether the pleadings articulate any valid claim for relief).

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 Unisys Corp. v. S.C. Budget & Control Bd.*, 346 S.C. 158, 176, 551 S.E.2d 263, 273 (2001) (stating that exhaustion of remedies precludes original resort to courts where an administrative agency is granted exclusive jurisdiction by the express terms of a statute). Thus, this Court must determine whether exhaustion of administrative remedies was required as a matter of law; if not, this Court must next determine whether the Circuit abused its discretion in dismissing the case until exhaustion of the administrative process is complete in order to assist in the disposition of the circuit court proceeding. *See Stanton v. Town of Pawley's Island*, 309 S.C. 126, 128, 420 S.E.2d 502, 503 (1992) ("[T]he question of whether to require the plaintiff to exhaust administrative remedies was a matter within the sound discretion of the trial judge," which will not be disturbed absent an abuse of discretion). *See also Coleman v. Dunlap,* 306 S.C. 491, 495, 413 S.E.2d 15, 17 (1992); *Andrews Bearing Corp. v. Brady,* 261 S.C. 533, 536, 201 S.E.2d 241, 243 (1973) (exhaustion of administrative remedies is within sound discretion of the trial court subject to abuse of discretion review). "An abuse of discretion occurs where the trial judge was controlled by an error of law or where his order is based on factual conclusions that are without evidentiary support." *Coleman*, 306 S.C. at 495, 413 S.E.2d at 17 (quoting *Tri County Ice and Fuel Co. v. Palmetto Ice Co.*, 303 S.C. 237, 242, 399 S.E.2d 779, 782 (1990)). Thus, Plaintiffs are incorrect that the appellate courts apply a *de novo* standard of review and that the appropriate standard of

review is abuse of discretion as to whether the Circuit Court properly found that Plaintiffs failed to exhaust administrative remedies.

ARGUMENT

I. THE CIRCUIT COURT PROPERLY DISMISSED PLAINTIFFS' COMPLAINT FOR FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES.

A. The Trial Court Did Not Improperly Rely on Facts Not Contained in the Pleadings and Plaintiffs Chose Not to Rebut Those Facts.

Plaintiffs contend that the South Carolina Education Lottery's attachment of documentary evidence in its Motion to Alter or Amend improperly converted the Rule 12(b)(6) motion to a Motion for Summary Judgment pursuant to Rule 56 of the South Carolina Rules of Civil Procedure. This argument does not entitle Plaintiffs to relief for a number of reasons. First, Plaintiffs neglect to acknowledge that the South Carolina Education Lottery's Motion to Dismiss for failing to exhaust administrative remedies was filed pursuant to both Rules 12(b)(1) and 12(b)(6) of the South Carolina Rules of Civil Procedure, and Rule 12(b)(1) allows for the consideration of affidavits and other evidence. *Chew v. Newsome Chevrolet, Inc.*, 315 S.C. 102, 104, 431 S.E.2d 631, 632 (Ct. App. 1993). Second, the Court merely referred to the report of Gaming Laboratories International to establish context and did not rely on such evidence in concluding that Plaintiffs failed to exhaust administrative remedies. Third, Defendants filed their Motion to Alter or Amend on January 14, 2019. The Court did not rule on said motion until February 25, 2019. During the interim, Plaintiffs failed to file any response and did not contest any of the documentary evidence submitted by the South Carolina Education Lottery.

Accordingly, the submission of documentary evidence was not improper. The Court's reference to the evidence for context in its factual background was not erroneous and not considered in the context of the issue surrounding exhaustion. Finally, the Plaintiffs cannot

somehow argue that their due process rights to challenge the evidence submitted were violated because they failed to take any opportunity to rebut by neglecting to respond to the parties' Motions to Alter or Amend.

B. Plaintiffs Waived the Argument that Administrative Procedures Do Not Apply to Their Equitable and Tort Claims.

It is well-settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved for appellate review. *Creech v. South Carolina Wildlife and Marine Resources Dep't,* 328 S.C. 24, 491 S.E.2d 571 (1997). Error preservation requirements are intended "to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments." *I'On v. Town of Mt. Pleasant,* 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000); *see also State v. Nelson,* 331 S.C. 1, 5 n. 6, 501 S.E.2d 716, 718 n. 6 (1998) ("the ultimate goal behind preservation of error rules is to insure that an issue raised on appeal has first been addressed to and ruled on by the trial court."); 4 C.J.S. *Appeal and Error* § 213 (1993) ("At the very least, the matter must have definitely been called to the attention of the trial court sufficiently to obtain a ruling thereon."). Without an initial ruling by the trial court, a reviewing court simply would not be able to evaluate whether the trial court committed error. *Staubes v. City of Folly Beach*, 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000).

A review of Plaintiffs' Memorandum in Opposition to Defendant's Motion to Dismiss dated July 27, 2018, shows no argument regarding exhaustion of administrative remedies related to equitable claims or tort claims. Instead, Plaintiffs argued that the grievance procedure was inapplicable because they contend that the tickets were not pled to be issued in error. (R. at 101). Further, Plaintiffs contended that because the South Carolina Education Lottery decided to deny the Class Member claims, Defendants exhaustion argument was moot. (R. at 102). Third, Plaintiffs argued that sovereign immunity does not prohibit Plaintiffs' equitable claims. (R. at

103). Thus, Plaintiffs never raised this argument in their memorandum. Further, arguments made to the trial court at the hearing on the Motion to Dismiss also failed to address this claim. In fact, in addition to the arguments in their Memorandum, Plaintiffs orally argued that pursuing administrative remedies was permissive and not mandatory. Further, Plaintiffs argued and that even if exhaustion was required, it can be excused under the doctrine of futility.[2] With respect to futility, Plaintiffs argued that the South Carolina Education Lottery already rejected their claims for the prizes to be paid. (R. at 202-203).

Moreover, Plaintiffs' equitable and tort claims are subject to the exhaustion requirement, as Plaintiffs' causes of action stem solely from the purchase of a lottery ticket and whether a prize should be paid. This claim, whether in contract or in tort, is subject to a determination by the South Carolina Education Lottery Commission or its designee and review by the Administrative Law Judge Division. In this regard, the administrative process requires validation of a lottery game ticket. S.C. Code Ann. § 59-150-230(C). Under the statutory scheme, 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,

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[2] Plaintiffs do not raise the permissive versus mandatory argument on appeal and thus have waived said argument.

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). Thus, the core determination of whether Plaintiffs' tickets are winners and should receive prizes is subject to administrative review, regardless of whether the claim is equitable or legal, or sounds in tort or contract.

The Plaintiffs further argue that their claims against Intralot are against a third party for which there is no administrative exhaustion requirement, citing *Thomas Sand v. Colonial Pipeline Co.*, 349 S.C. 402, 563 S.E.2d 109 (Ct. App. 2002). First, this argument has been waived for failing to raise it to the Circuit Court. Second, in *Thomas Sand*, the South Carolina Court of Appeals noted that "[i]f this were an appeal from the denial of the permit through the administrative process which DHEC was the appropriate fact finder, Thomas Sand would clearly be required to exhaust its administrative remedies prior to bringing suit." *Thomas Sand*, 349 S.C. at 413, 563 S.E.2d at 115. The Court of Appeals found that the tort action brought by Thomas Sand was not subject to exhaustion because "[t]he question is not whether the permit would have been granted but whether Thomas Sand was damaged, either by delay or expense in the permit process or by the eventual denial of the permit, based on Colonial's negligence." *Id.* In contrast with *Thomas Sand*, the issue here, whether sounded in tort or contract, is whether a prize should be paid. In this case, the agency, subject to administrative review by the Administrative Law Judge Division, is the appropriate fact finder.

C. The Circuit Court Properly Concluded Plaintiffs Failed to Exhaust Administrative Remedies.

The Circuit Court concluded that Plaintiffs failed to exhaust their administrative remedies by failing to pursue remedies through the Administrative Law Judge Division. (R. at 6, 13). 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).

As noted by the Circuit Court, exhaustion is a multi-step process, requiring both "intra-agency review *and* an appeal to the Administrative Law Court." (R. at 6, 13) (Emphasis in Original). The process is set forth in section I(B) of this brief. The Circuit Court further concluded that "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." (R. at 6, 13). In challenging this finding on appeal, Plaintiffs make a number of arguments. First, Plaintiffs argue that the administrative process is inapplicable because Plaintiffs have not alleged that any error occurred. Second, Plaintiffs argue that they were excused from the requirement because there was no board decision prior to the filing of Plaintiffs' claims in the Circuit Court. Third, Plaintiffs argue that they are excused from exhausting administrative remedies because administrative review would be futile given the board's decision. Fourth, Plaintiffs contend that even if they were required to exhaust administrative remedies, such requirement is moot because the South Carolina Education Lottery denied Class Members' claims for payment. Fifth and finally, Plaintiffs contend that they should be excused from pursuing administrative remedies because this is a putative class action and that the administrative process cannot provide class-wide relief. Defendant Intralot addresses each of these arguments below.

1. Plaintiffs' Argument that They Did Not Plead that the Tickets Were Issued in Error Is Misplaced.

Plaintiffs contend that they are excused from the exhaustion requirement because Plaintiffs pled that their tickets were winning tickets and never stated in their pleading that the tickets were produced or issued in error. Plaintiffs contend that their pleading states that they received winning tickets that were not paid, giving rise to their causes of action and that only tickets issued in error are subject to the administrative process. This wholly misconstrues the role of the administrative process, which is to determine if the lottery tickets issued to Plaintiffs are to be paid a prize. "Exhaustion is generally required as a matter of preventing premature interference with agency processes, so that the agency may function efficiently and so that it may have an opportunity to correct its own errors, to afford the parties and the courts the benefit of its experience and expertise, and to compile a record which is adequate for judicial review." *Video*

Gaming Consultants, Inc. v. S.C. Dep't of Revenue, 342 S.C. 34, 38, 535 S.E.2d 642, 644–45 (2000).

The factual determination as to whether a prize should be paid is for the South Carolina Education Lottery Commission or its designee, subject to review by an Administrative Law Judge. S.C. Code Ann. § 59-150-230(C); S.C. Code Reg. 44-70(E). Merely pleading that the tickets are winning tickets and are to be paid does not then excuse the exhaustion requirement. If so, artful pleading would allow Plaintiffs to avoid administrative development of the factual issues involved in every case. Thus, Plaintiffs' claim in this regard has no merit.

2. Plaintiffs' Contention that There Was No Board Decision Prior to the Filing of the Complaint Does Not Excuse the Exhaustion Requirement.

Plaintiffs correctly note that at the time of the filing of their Complaint, the South Carolina Education Lottery Commission had not issued a determination regarding the validity of the tickets until May 30, 2018. Yet, Plaintiffs never explain in their brief or in any arguments made to the Circuit Court why they can prematurely file a lawsuit while the South Carolina Education Lottery is considering their claims during the administrative process. In fact, the argument that Plaintiffs failed to exhaust administrative remedies goes to the prematurity of Plaintiffs' claims. *Video Gaming Consultants*, 342 S.C. at 38, 535 S.E.2d at 644–45. Thus, the Circuit Court properly rejected this argument.

3. The Circuit Court Correctly Concluded that the Administrative Process Was Not Futile.

The Circuit Court correctly concluded that exhausting administrative remedies is not futile because Plaintiffs have the opportunity to present their claims to the Administrative Law Judge Division of the South Carolina Courts. Plaintiffs' sole argument in this regard is that because the South Carolina Education Lottery Commission's decision was certain to be

unfavorable, engaging in the administrative process would be futile, and that administrative remedies would be inadequate. However, Plaintiffs never challenge the impartiality of the Administrative Law Judge Division and do not expressly challenge the authority of an Administrative Law Judge to reverse the Commission's finding that the tickets were produced or issued in error, and order that the prizes be paid. Because the Administrative Law Judge Division can provide the relief requested in this case, requiring Plaintiffs to complete the administrative process is not futile. The Circuit Court was correct in this regard.

4. The South Carolina Education Lottery Commission's Administrative Finding that Tickets Were Issued in Error Does Not Moot the Requirement for Exhaustion of Administrative Remedies.

In many ways, Plaintiffs' argument of mootness is a repackaging of the first and fourth arguments noted above. Fundamentally, this argument fails for failing to appeal to the Administrative Law Judge Division the adverse determinations that prizes were not to be paid because the tickets were produced or issued in error. The failure to complete the administrative process renders Plaintiffs' action premature.

5. Merely Pleading an Action as a Class Action Under Rule 23 of the South Carolina Rules of Civil Procedure Does Not Excuse the Exhaustion of Administrative Remedies.

The Circuit Court held that the administrative process applies equally to individual claimants and putative class members. (R. at 5, 12). The court further stated that "[t]he relevant statutes contain no class action exception to the exhaustion requirement." (Orders at 5). Plaintiffs' argument that the class action device permits it to avoid administrative remedies is based primarily on California cases and one Alabama case. *Rose v. City of Hayward*, 179 Cal. Rptr. 287 (Ct. App. 1981) and *Thorn v. Jefferson County*, 375 So.2d 780 (Ala. 1979). 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).

In terms of statutory construction under South Carolina law, where a "statute's meaning is clear on its face," a court cannot impose another meaning. The statutes at issue here provide no ability to pursue the administrative process collectively. Further, the case support set forth by Plaintiffs does not support the concept that pleading a class action avoids exhaustion of administrative remedies. With respect to *Rose*, as noted by the Circuit Court, another California court held that "[t]he mere bringing of a class action is not ipso facto an exception to the warrant requirement." *Lopez v. Civil Serv. Comm'n*, 232 Cal. App. 3d 307, 312 (Cal. Ct. App.—1st Div. 1991). Moreover, in *Bautista v. County of Yolo*, the California appellate court affirmed the dismissal of a class action suit 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." *Bautista v. County of Yolo*, No. C039340, 2003 WL 22969353, at *4 (Cal. Ct. App. 3d Dist. December 18, 2003). Additionally, *Thorn* does not support Plaintiffs' argument, as that court excused plaintiffs from pursing statutory remedies not because it was pled as a class action but because its suit contested the validity of the tax in question. In *Thorn*, the Alabama court stated, "We hold that a class action was a proper remedy for the recovery of any taxes which were paid illegally, but we limit that recovery to the two taxable years next preceding the filing of the complaint. This limitation on recovery would correspond to the statutory scheme which requires that a taxpayer

seek a refund within two years." Thus, the reason for excusing compliance with the statutory scheme was because plaintiffs in *Thorn* contended the taxes were collected illegally. There is no such illegality alleged here.

The Circuit Court correctly concluded that merely pleading this action as a putative class action pursuant to Rule 23 of the South Carolina Rules of Civil Procedure does not excuse Plaintiffs from the requirement they exhaust administrative remedies. Thus, the Circuit Court neither abused its discretion nor committed legal error. The decision of the Circuit Court should be affirmed.

CONCLUSION

For the above and foregoing reasons, this Court should affirm the Circuit Court's dismissal of this action, as the Circuit Court correctly concluded that Plaintiffs failed to exhaust their administrative remedies and that Plaintiffs failed to satisfy any of the exceptions to the exhaustion requirement.

August 12, 2019

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