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
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, 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.

INITIAL BRIEF OF RESPONDENT SOUTH CAROLINA EDUCATION LOTTERY COMMISSION

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INTRODUCTION AND SUMMARY

During a two-hour period on Christmas Day of 2017, a software glitch in the Holiday Cash Add-A-Play® lottery game caused nearly every player to receive a ticket with nine "winning" symbols. Appellants (the "ticket holders") allege they were among those who received these "winning" tickets. The South Carolina Education Lottery Commission ("SCEL" or "the Commission") subsequently requested retailers not pay the tickets until the Commission completed an investigation. The Commission also issued press releases asking players to be patient while the Commission conducted an investigation and determined whether to pay the tickets.

The ticket holders did not wait for that decision nor did they approach the Commission to request it review, refund, or pay their tickets. Instead, they sued seeking payment. The trial court dismissed the suit, correctly ruling that (i) the ticket holders were statutorily required to exhaust their administrative remedies before filing suit, (ii) they had not done so, and (iii) their failure was not excused by any exception to the exhaustion requirement.

The ticket holders' arguments on appeal present no basis to overturn the trial court's ruling. The ruling was based on arguments and evidence properly before the court, and controlling law requires aggrieved ticket holders to pursue and exhaust their administrative remedies, including intra-agency review *and* an appeal to the Administrative Law Court ("ALC"), before suing the Commission. The ticket holders failed even to begin this process before filing suit, and their subsequent initiation and abandonment of the administrative process does not constitute exhaustion. Further, their arguments that exhaustion was unnecessary because it would have been futile or is not required for class actions are squarely foreclosed by South Carolina precedent.

Finally, there is an additional and independent ground upon which to sustain the trial court's ruling. The Commission's allegedly wrongful conduct (namely declining to pay the tickets) is expressly *required* by statute, and the relief the ticket holders seek (namely paying the tickets) is expressly *prohibited* by statute. Accordingly, their claims do not—and cannot—state a claim upon which relief can be granted, and the trial court did not err by dismissing them.

COUNTER-STATEMENT OF THE ISSUES ON APPEAL

1. Did the trial court correctly dismiss the ticket holders' suit because they were required to exhaust their administrative remedies, failed to do so, and were not excused from their failure to do so?

2. May the trial court's ruling be sustained on the additional ground that the Commission is expressly barred by statute from providing the relief the ticket holders seek?

COUNTER-STATEMENT OF THE CASE AND FACTS

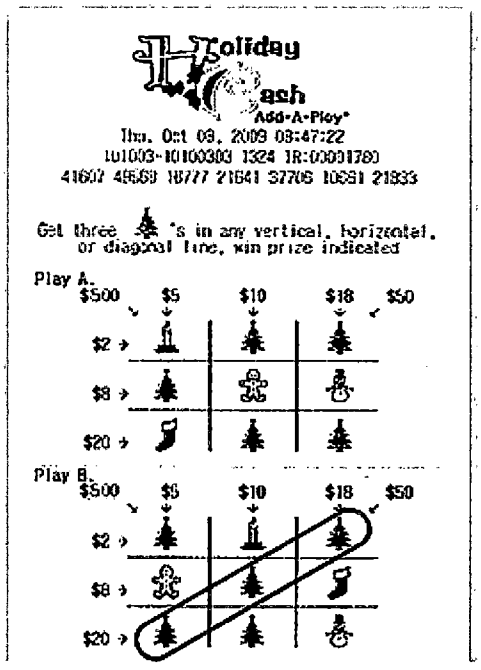
This suit arises from the ticket holders' alleged purchase of Holiday Cash Add-A-Play® lottery tickets on December 25, 2017. *See* Complaint (filed Feb. 1, 2018) (R. ___). A number of the issues before this Court, including whether the trial court properly dismissed the suit for failure to exhaust administrative remedies, turn on the events giving rise to this suit and the trial court's ruling. A full exposition of those events follows.

I. The Holiday Cash Add-A-Play® game.

Add-A-Play® was a lottery game a player could add onto his purchase of another lottery game ticket. *See* SCEL's Mem. in Supp. of Mot. to Dismiss at 5–6 (R. ___). Specifically, when a player purchased a Pick 3, Pick 4, or Palmetto Cash 5 ticket, he had the option to also purchase up to five Add-A-Play® plays for $1 each. *Id.* The lottery terminal would then generate and dispense the Add-A-Play® ticket(s) to the player, who would know instantly whether he won. Each play consisted 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.[1]—appeared in each of the nine spaces on the grid. *Id.* On a properly issued ticket, a player would win if three Christmas tree images appeared in a vertical, horizontal, or

[1] The game was 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 at issue in the instant appeal.

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:



Id. at 6 (R. ___). The odds of winning ranged from 1-in-6 (for a ticket winning $2) to 1-in-4,800 (for a ticket winning $500). *Id.* Those odds were dramatically altered for a two-hour period on Christmas Day 2017. The Commission's news release, issued shortly thereafter, summarized what occurred:

> 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 June 1, 2019).

II. The ticket holders' suit and the Commission's Motion to Dismiss.

The ticket holders sued, alleging they purchased "winning" Add-A-Play® tickets during the Christmas Day incident. *See* Complaint (R. ___, ___). They filed suit against SCEL on February 1, 2018, seeking payment of their tickets. *Id.* The Complaint alleges the ticket holders and other players who attempted to cash in their "winning" tickets after the game was suspended were unable to do so, *id.* ¶ 21 (R. ___), and that the Commission had not yet paid those tickets but instead had asked for players' patience while the Commission determined its response, *id.* ¶ 22 (R. ___). The Complaint does not allege the ticket holders initiated or exhausted their administrative remedies prior to filing suit.

On April 10, 2018, the Commission moved to dismiss the ticket holders' suit pursuant to Rules 12(b)(1), 12(b)(3), and 12(b)(6), SCRCP, because the claims (and those of the putative class) were barred by their failure to exhaust administrative remedies, failure to assert claims upon which relief could be granted, filing suit in the wrong venue, and the doctrines of ripeness and sovereign immunity. *See* SCEL's Mot. to Dismiss (R. __); SCEL's Memo. in Supp. (R. __).

III. The ticket holders' initiation and abandonment of the administrative process.

At the time the Commission filed its Motion to Dismiss, it had not yet decided whether to pay the tickets. After the motion was filed, the ticket holders' counsel wrote the Commission seeking to initiate administrative grievances or reviews on the ticket holders' behalf and requesting payment of the Add-A-Play® tickets. *See* Hearing Tr. at 5:6–8 and 13:19–14:1 (R. ___ and ___); *see also* SCEL's Mot. for Reconsideration, Ex. A (R. ___). Not long thereafter, the Commission concluded its investigation of the Christmas Day mishap and determined that, because the tickets had been issued

as a result of a system error, the Commission would not pay the ticket amounts. *See* Hearing Tr. at 5:8–15 and 13:24–14:1 (R. ___ and ___).[2]

The Board informed the Plaintiffs of this decision in writing. *See* SCEL's Mot. for Reconsideration, Ex. C (R. ___); *see also* Hearing Tr. at 19:12–20 (R. ___). The letters further advised the Plaintiffs that they could (a) choose to receive a refund for the ticket price, (b) appeal the Board's decision to the Administrative Law Court ("ALC"), or (c) submit any new evidence, arguments, and authority to the Commission's Executive Director with a request for review. *See* SCEL's Mot. for Reconsideration, Ex. C (R. ___); *see also* Hearing Tr. at 19:12–20 (R. ___).

None of the Plaintiffs availed themselves of any of the three options. *See* Hearing Tr. at 19:12–20 (R. ___). After 30 days had passed without any of them 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* SCEL's Mot. for Reconsideration, Ex. D (R. ___); *see also* Hearing Tr. at 5:8–15 and 13:24–14:4 (R. ___ and ___). None of the Plaintiffs filed an appeal with the ALC. *See* Hearing Tr. at 14:4, 14:16–17 (R. ___).

IV. The Amended Complaint, initial denial of the Motions to Dismiss, and subsequent reconsideration and dismissal of the suit.

The Plaintiffs filed an Amended Complaint in this lawsuit on May 29, 2018 adding several new named plaintiffs, adding a new defendant—Intralot, Inc. (the contractor providing equipment and operation of some of SCEL's lottery games)—and adding a new cause of action against Intralot for Negligence and/or Gross Negligence. *See* Amend. Compl. (R. ___). Intralot filed its own Motion

[2] As part of the Commission's investigation, it engaged a forensic consulting firm—Gaming Laboratories International ("GLI")—to investigate the incident. *See* SCEL's Mot. for Reconsideration at 2 and Ex. B (R. ___ and ___). GLI's report reviewed the circumstances and causes of the incident, and concluded the tickets were issued or produced in error. *Id.*

to Dismiss and supporting memorandum on July 17, 2018. *See* Intralot's Motion and Memo (R. ___). The Plaintiffs filed an opposition to SCEL's motion to dismiss, *see* Opposition (R. ___), and the trial court heard arguments on the motions to dismiss on July 30, 2018, *see* Hearing Tr. (R. ___).

On January 4, 2019, the trial court filed orders denying SCEL's and Intralot's motions to dismiss. *See* Order denying SCEL's Mot. to Dismiss (R. ___); Order denying Intralot's Mot. to Dismiss (R. ___). On January 14, 2019, both SCEL and Intralot filed motions to reconsider, alter, or amend the trial court's rulings. *See* SCEL's Motion to Reconsider, Alter, or Amend (R. ___); Intralot's Motion to Alter or Amend (R. ___). On February 25, 2019, the trial court granted SCEL's and Intralot's motions to alter or amend and granting their prior motions to dismiss, ruling the ticket holders had not exhausted their administrative remedies. *See* Order (R. ___); Order (R. ___). The ticket holders appealed these orders. *See* Notice of Appeal (March 25, 2019).[3]

STATEMENT OF THE CONTROLLING AUTHORITIES

Analysis of the issues and arguments before the Court requires an understanding of the statutory framework governing the Commission and lottery games. 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

[3] The ticket holders consented to the dismissal of their UTPA claim, *see* Opposition at 11 (R. ___), and have not challenged the dismissal of that claim on appeal.

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 in one key way, by forbidding the Commission from paying unissued tickets or erroneously issued tickets. *Id.* § 59-150-230(A)(3) ("A prize must not be paid if it [] arises from claimed lottery game tickets that are unissued, produced or issued in error."); *see also* S.C. Code of Regulations § 44-70(E) and (F) ("The Executive Director or Commission may deny awarding a prize to a claimant if the ticket is printed or produced in error. [] 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.").

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.[4] *See* S.C. Code Ann. § 59-150-300; S.C. Code of Regulations § 44-70(E)–(F); SCEL Ticket Holder Complaint Procedure, Dec. 29, 2004, *available at* http://www.sceducationlottery.com/images/pdf/ComplaintProcedures.pdf (last visited May 28, 2019) (hereinafter "SCEL Complaint Procedure").

Specifically, a ticket holder aggrieved by a decision or action by the Commission or its agents and who was unable to resolve that dispute after discussions with Commission staff must formally seek redress from the Commission. *See* SCEL Complaint Procedure ¶ A. The Commission's decision must be delivered to the player in writing, must explain the basis for the decision, and must inform the player of his right to an intra-agency appeal or an appeal to the Administrative Law Court ("ALC"). *See id.* ¶¶ L–P; *see also* S.C. Code of Regulations § 44-70(F).

If the player is unhappy with the Commission'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 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;

[4] The ticket holders have not challenged the trial court's correct conclusion that the administrative procedure described in the trial court's order and in the instant brief are mandatory rather than merely permissive. Accordingly, they have waived that argument and conceded the point.

(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.

STANDARD OF REVIEW

The determination of whether a party must exhaust his administrative remedies or is excused from doing so is entrusted to the trial court's sound discretion and will be reversed only if the trial court abused that discretion. *See Storm M.H. ex rel. McSwain v. Charleston Cnty. Bd. of Trustees*, 400 S.C. 478, 487, 735 S.E.2d 492, 497 (2000) ("'Whether administrative remedies must be exhausted is a matter within the trial judge's sound discretion and his decision will not be disturbed on appeal absent an abuse thereof.'") (quoting *Hyde v. S.C. Dep't of Mental Health*, 314 S.C. 207, 208, 442 S.E.2d 582, 582–83 (1994)); *Ward v. State*, 343 S.C. 14, 17 n.5, 538 S.E.2d 245, 246 n.5 (2000) ("The doctrine of exhaustion of administrative remedies is generally considered a rule of policy, convenience and discretion, rather than one of law . . . .") (citation and quotation marks omitted).

Similarly, as to the question of whether exhaustion would be futile, the party seeking to avoid the exhaustion requirement (here, the ticket holders) bears the burden of proving futility, and the trial court's ruling on this issue is reviewed under the deferential abuse of discretion

standard. *See Stanton v. Town of Pawley's Island*, 309 S.C. 126, 128, 420 S.E.2d 502, 503 (1993). A trial court's interpretation of statutes and regulations is reviewed de novo. *See Town of Summerville v. Cty. of N. Charleston*, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008) ("Determining the proper interpretation of a statute is a question of law, and this Court reviews questions of law de novo.") (citation omitted).

ARGUMENT

The trial court correctly dismissed the ticket holders' claims against the Commission because their claims are subject to the requirement that they exhaust their administrative remedies before filing suit and their failure to do so was not excused. The ticket holders' appellate arguments to the contrary are unavailing.

I. The trial court correctly ruled the ticket holders were required to exhaust their administrative remedies.

The statutes, regulations, and agency procedures governing the lottery provide that a person aggrieved by any action or decision of the Commission relating to the administration or operation of lottery games in this state may file suit only after completing a multi-step intra-agency review process followed by an appeal to the ALC. The first step in this process if for the complainant to file a formal written complaint with the Commission's Executive Director. *See* S.C. Code of Regulations § 44-70;[5] SCEL Complaint Procedure ¶ A.[6] If the player is dissatisfied with the Executive Director's final, written decision, he must seek a hearing before the Commission's Board. *See* S.C. Code of Regulations § 44-70(F); SCEL Complaint Procedure ¶¶ L–M. If the player finds the Board's final, written decision unpalatable, his appeal must be taken to the ALC.

[5] The Lottery Act authorizes the SCEL to promulgate regulations and to establish policies and procedures to regulate and administer game play including the sale of tickets and the decision whether to pay a ticket. *See* S.C. Code Ann. §§ 59-150-60, -90(A), -230(A)(3), and -240(C).

[6] *Available at* http://www.sceducationlottery.com/images/pdf/ComplaintProcedures.pdf.

See S.C. Code Ann. § 59-150-300(A). Only *after* the ALC rules may the matter be taken to the Circuit Court. *Id.* § 59-150-300(D).

The trial court analyzed the foregoing authorities and correctly concluded the ticket holders were required to exhaust (*i.e.*, pursue each step of the administrative process to completion) these remedies. *See* Order at 2–5 (R. ___) (analyzing the controlling statutes, regulations, policies, and interpretive case law and concluding that exhaustion, up to and including an appeal to the ALC, was required here). On appeal, the ticket holders challenge the trial court's conclusion on two bases, each of which is discussed below.

A. The Lottery Act, regulations, and Commission procedures require exhaustion of grievances relating to lottery games.

The ticket holders argue the exhaustion requirement applies only to certain types of claims—and not to the ones they asserted in their suit. *See* App.'s Brief at 6 ("[C]laims for breach of contract, unjust enrichment, promissory estoppel and negligence [are] not subject to the requirement of exhaustion of administrative remedies."). This argument, however, misapprehends the doctrine of exhaustion and its application here.

The statutory language provides that the administrative process (the exhaustion of which is mandatory) applies to "a lottery game ticket holder aggrieved by an action of the Board . . . ." S.C. Code Ann. § 59-150-300. The labels a ticket holder wishes to attach to his claims or the causes of action he wishes to plead do not impact or negate that requirement. Nor is there any *per se* rule exempting equitable claims or other specific types of claims from the requirement. *See Drummond v. State Dept. of Rev.*, 378 S.C. 362, 368–69, 662 S.E.2d 587, 590 (2008) (affirming dismissal of unjust enrichment claim because plaintiff failed to exhaust his administrative remedies).

The ticket holders, however, mistakenly seem to believe a ticket holder is required to exhaust his administrative remedies *only* if he asserts his ticket was issued or produced in error.

See id. at 9 (arguing that "because [they] never alleged their tickets were issued erroneously," "there was no purpose" for them to exhaust the administrative review process).[7] His argument, however, finds no support in the statutes, regulations, or procedures that govern lottery games and disputes arising therefrom. The exhaustion requirements, which were already explained at length in this brief, do not apply only to one narrow variety of grievance; they apply to *any* grievance a ticket holder may have relating to or arising from the administration and operation of lottery games including the issuance and payment (or nonpayment) of tickets.

The ticket holders' misunderstanding seems to arise from their conflation of two separate and independent arguments, one of which was made to the trial court and one of which was not, namely (1) that the ticket holders were required to exhaust their remedies prior to filing suit, *see* SCEL's Mem. in Supp. of the Mot. to Dismiss at 10–11 (R. __), and (2) a separate argument that, even assuming the trial court had jurisdiction to hear their claims, their claims must nevertheless be dismissed because the Commission is prohibited by law from paying tickets that are printed or issued in error.[8] The exhaustion requirement does not apply *only* to erroneously issued tickets. The law does not state that; the Commission never argued that; and the trial court did not conclude that.

The ticket holders' confusion of these concepts likewise infects their understanding of the trial court's ruling. Contrary to their assertions, the trial court did not "improperly rel[y] solely on Respondents' hired experts in concluding the winning tickets were printed in 'error.'" *See* App.'s Brief at 9. The trial court made no such finding, ruling, or conclusion. Instead, the trial court

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[7] Whether their tickets were "printed or issued in error" are asserted reasons behind the Commission's action by which the ticket holders claim to be aggrieved. The validity of those reasons could and would be addressed in the administrative process. The ticket holders' disagreement with those reasons is no basis to avoid the administrative process.

[8] This latter argument was not asserted by the Commission in the instant litigation. It was asserted by the Commission in a concurrent proceeding—*Cox v. S.C. Ed. Lottery*—involving a different lottery game and in which the plaintiff was represented by the same counsel as the case at bar.

concluded that the ticket holders' claims arose from the administration and operation of a lottery game, and thus under the controlling statutes, regulations, and agency procedures, the ticket holders were required to exhaust their administrative remedies before seeking judicial redress, but had failed to do so. That ruling was correct and should be affirmed.

B. The ticket holders' grievances are precisely the type of claims the administrative review process is meant to resolve.

In addition to their misapprehension of the relationship between the exhaustion requirement and the question of whether the tickets were issued or printed in error (arguments that, as explained already, are separate and independent from one another), the ticket holders erroneously argues their claims are of a type exempt from the exhaustion requirement because they are of a type "that cannot be ruled upon by the administrative body" or they involve "a matter of statutory construction." *See* App.'s Brief at 6 and 12.[9] They are wrong on both counts.

The ticket holders' dispute with the Commission is precisely the kind of claim the administrative review process can (and must) resolve. Regardless of the labels they attaches to their claims, at bottom their grievance is simple: they want their tickets paid. The administrative process is meant to resolve such disputes and is uniquely capable of doing so. The intra-agency process is entirely capable of determining what happened and why; whether to pay them the winnings (if any) of which they were deprived; whether to refund the ticket price; or whether no compensable conduct occurred. The administrative review process is, in fact, *better* suited for the resolution of the ticket holders' disputes than litigation due to the specific experience and expertise of the decision-makers in the administrative process. *See Video Gaming Consultants, Inc. v. S.C. Dept. of Rev.*, 342 S.C. 34,

[9] The remainder of the ticket holders' argument on pages 6–7 of their brief—namely that under the *Thomas Sand* case, a plaintiff's suit against a non-governmental third party cannot be barred by the requirement—is inapplicable to the Commission, which need not respond to it.

38, 535 S.E.2d 642, 644 (2000) ("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.").

The ticket holders' argument that their claims involve a matter of statutory construction and thus are exempt from exhaustion fares no better. They cite no South Carolina authority in support of this argument—because there is none. To the contrary, South Carolina case law indicates the opposite, namely that even when the merits of a claim or defense involves a disputed matter of statutory interpretation, the plaintiff must first exhaust his administrative remedies before filing suit. *See, e.g., B&A Development, Inc. v. Georgetown Cnty.*, 372 S.C. 261, 641 S.E.2d 888 (2007) (affirming dismissal for failure to exhaust administrative remedies even though the merits of the claims in the suit depended on disputed statutory construction); *Allen v. S.C. Alcoholic Beverage Control Comm'n*, 321 S.C. 188, 467 S.E.2d 450 (Ct. App. 1996) (affirming dismissal of claim brought under the Whistleblower Act, the merits of which was disputed, because the plaintiff had not first exhausted each step of the administrative review process); *Hyde v. S.C. Dep't of Mental Health*, 314 S.C. 207, 442 S.E.2d 582 (1994) (same). If the ticket holders were correct and *any* case involving a question of statutory interpretation (including the question of whether a statute required exhaustion) was exempt from the exhaustion requirement, the exception would swallow the rule, and the doctrine of exhaustion would be rendered a nullity.

In sum, the ticket holders' claims are precisely the type that the administrative process is not only capable of resolving, but which it is especially suited to resolve, and which it is required to resolve prior to a plaintiff filing suit. The trial court correctly ruled exhaustion was required.

II. The trial court correctly ruled the ticket holders failed to exhaust their administrative remedies.

The trial court ruled that because the ticket holders had not pursued their administrative remedies and appeals to their completion, they had not exhausted those remedies. *See, e.g.*, Order at 4–6 (R. ___) (noting the "multi-level administrative process must be viewed *as a whole*," meaning a complainant must "complete each level of the review process," but the ticket holders "have not completed the steps within the administrative process") (emphasis in original). On appeal, however, the ticket holders argue that (i) the absence of a decision by the SCEL Board at the time they filed their Complaint and Amended Complaint meant they *couldn't* exhaust their remedies, *see* App.'s Brief at 10, and (ii) that their tentative foray into and subsequent retreat from the administrative process was sufficient to count as "exhaustion" *id.* at 12–13. Their arguments are incorrect.

A. The absence of a Board decision at the time the Complaint(s) were filed demonstrates, rather than excuses, the prematurity of this suit.

The ticket holders argue that at the time they filed their Complaint and Amended Complaint, it was impossible for them to exhaust their remedies because there had not yet been a decision by the Commission's Board from which they could appeal to the ALC. *See* App.'s Brief at 10. Their argument fails for at least two reasons. First, it cleverly, but erroneously, attempts to transform a problem of the ticket holders' own making into an excuse justifying their error. The fact that the Board had not yet made a decision at the time the suit was filed is precisely the problem necessitating dismissal of the suit. The absence of a Board decision isn't an excuse to skip the administrative process. Rather, it illustrates with perfect clarity the prematurity of this suit.

Second, the argument incorrectly implies that the ticket holders (for reasons unstated) *had* to immediately file suit without waiting for the Board's decision. But this unsupported implication is implausible. There was no statute of limitations bearing down or any other reason the ticket holders could not await the Board decision they knew was coming, and then (if disappointed with

in) appeal to the ALC to exhaust their remedies. The doctrine of exhaustion requires an aggrieved party to pursue the administrative process to completion, including both seeking and awaiting a multi-step, intra-agency review and appealing the agency's decision to the ALC. *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); *Allen v. S.C. Alcoholic Beverage Control Comm'n*, 321 S.C. 188, 467 S.E.2d 450 (Ct. App. 1996) (affirming dismissal for failure to exhaust because plaintiff had initiated the administrative review process but had not appealed the initial decision and thus had not exhausted the intra-agency review process); *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.").[10]

In the context of an aggrieved ticket holder, the first step is for the ticket holder to file a formal written complaint with the Commission's Executive Director and then, if dissatisfied with the

[10] Other jurisdictions agree. *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).

Executive Director's decision, to appeal that decision to the Board, and if dissatisfied with the Board's ruling to appeal that ruling to the ALC. *See* S.C. Code Ann. § 59-150-300; S.C. Code of Regulations § 44-70(F); SCEL Complaint Procedure ¶¶ A and L. Once that process is underway, a ticket holder (and especially one not faced with a statute of limitations problem) may not unilaterally decide the Board is taking *too long* to reach a decision and thus decide he is excused from exhausting his remedies. Stated differently, the ticket holders cannot argue the absence of a Board decision inhibited or prevented them from pursuing and exhausting the administrative process, when the absence of a Board decision *was the* ***result*** *of their prematurely filed suit and their refusal to exhaust their administrative remedies.* Had the ticket holders wished to exhaust their administrative remedies, they could simply have awaited the Board decision and then appealed it to the ALC. Their failure to do so does not allow them to simply skip the exhaustion requirement.

B. The ticket holders' belated initiation and abandonment of the administrative process did not satisfy the exhaustion requirement.

The ticket holders argue their tentative post-filing foray into, and subsequent retreat from, the administrative process was sufficient to count as "exhaustion." *See* App.'s Brief at 12–13 (arguing the exhaustion requirement is "moot" because, according to the ticket holders, they "did initiate administrative reviews or grievances, each of which was rejected in writing by Respondent SCEL"). But as already explained, exhaustion of administrative remedies requires more than just the initiation and subsequent abandonment of the process. It requires an aggrieved party to pursue his remedies—including both intra-agency review and the appeal of the agency's decision to the ALC—*to their completion.* A party's failure to complete that entire process constitutes a failure to exhaust his administrative remedies. *See Steele*, 362 S.C. 66, 606 S.E.2d 499; *Allen*, 321 S.C. 188, 467 S.E.2d 450; *Booker v. S.C. Dept. of Corrections*, No. 2011-CP-10-08774, 2013 WL 10533559.

In the instant proceeding, after the ticket holders filed suit and after the Commission filed its Motion to Dismiss for failure to exhaust, the ticket holders took the opening step in the administrative process by submitting a request for payment to the Commission's Executive Director. *See* Hearing Tr. at 5:6–8 and 13:19–24 (R. ___ and ___); see also SCEL's Mot. for Reconsideration, Ex. A (R. ___). However, they promptly abandoned that process by failing to submit the information and materials the Executive Director requested to enable the administrative review, *see* Hearing Tr. at 19:12–20 (R. ___); by electing not to appeal the Executive Director's decision to the Board (despite being expressly advised how and why to do so), *id.* at 5:11–15, 14:2–4, 14:16–17, and 22:15–25 (R. ___, ___, ___, and ___); and by making no attempt to appeal to the ALC.

Accordingly, the ticket holders have not exhausted their administrative remedies, and the trial court properly dismissed their lawsuit. *See generally Unisys Corp. v. S.C. Budget & Control Bd.*, 346 S.C. 158, 176, 551 S.E.2d 263, 273 (2001) (dismissing suit due to plaintiff's failure to exhaust its administrative remedies); *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).

III. The trial court correctly ruled the ticket holders were not excused from the requirement to exhaust their administrative remedies.

The trial court concluded the ticket holders' failure to exhaust their administrative remedies was not excused by the "futility" exception to the exhaustion requirement or by the fact that their suit asserted putative class claims. *See* Order at 3–5 (R. ___). Their arguments to the contrary are rebutted below.

A. Exhaustion of the ticket holders' administrative remedies was not futile.

The ticket holders argue they were excused from the requirement to exhaust their administrative remedies because doing so would have been futile, arguing that appealing to the Board would have been futile "as the Board's decision was certain to be unfavorable." *See* App.'s Brief at 11. Their argument fails for at least three reasons.

First, the ticket holders' assertion that an appeal to the Board would have been futile because the Board's ruling was a foregone conclusion is mere speculation. This is an insufficient basis upon which to conclude that exhaustion would be futile. *See, e.g., Smith v. S.C. Retirement Sys.*, 336 S.C. 505, 527, 520 S.E.2d 339, 351 (Ct. App. 1999) (rejecting plaintiff's futility argument and noting that the agency "has not had an opportunity to rule on" the dispute and thus "[i]t would be speculative for this Court to try to determine the outcome of an administrative hearing"); *Stanton v. Town of Pawley's Island*, 309 S.C. 126, 128, 420 S.E.2d 502, 503 (1992) (rejecting futility claim by a plaintiff asserted the town had already denied another owner's identical claim, holding "Stanton could not be sure what the Board would rule"); *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). Here, just as in *Smith*, allowing the ticket holders "to avoid the administrative process on their unsupported allegation of futility would allow the futility exception to swallow the exhaustion rule." *Smith*, 336 S.C. at 527, 520 S.E.2d at 351.

Second, the ticket holders incorrectly imply the ALC would be incapable of conducting a meaningful review of the Board's decision or of awarding the relief sought. *See* App.'s Brief at 11

(stating thus and citing cases standing for the proposition that the ALC cannot rule on the constitutionality of a statute). The argument is incorrect. The ALC is perfectly capable of reviewing and, if necessary, correcting a decision by the Commission's Board to deny payment of a ticket. The instant proceeding does not challenge the constitutionality of a statute, and there is no reason the ALC could not review the Board's decision and, if it concluded that decision was wrong, render the relief requested.

The third flaw in the ticket holders' argument is that they gloss over the fact that the administrative review process does not end with the Board. The administrative process is a multi-step process including both intra-agency review *and* an appeal to the Administrative Law Court. *See generally* pp. 6–9, *supra.* 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* Argument II.B, *supra*, and cases cited therein.

The fact that *one level* of the administrative process did not award the ticket holders the relief they sought 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, the ticket holders did 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 the ticket holders invited them to submit additional evidence, factual information, law, authorities, and a statement outlining the reasons for his complaint to the SCEL's Executive Director for review. *See* Hearing Tr. at 19:12–20 (R. ___). This invitation stands in stark contrast to the ticket holders' argument that the Commission has taken a "hard and fast" position regarding their claim. *See* App.'s Brief at 13. 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 Executive Director's written determination sent to the ticket holders expressly notified them of the availability of an appeal to the ALC. *See* Hearing Tr. at 5:11–15, 14:2–4, and 22:15–25 (R. ___, ___, and ___). An appeal to the ALC provides an independent, objective, judicial review and correction (if needed) of the Commission's initial decision, and the ticket holders have presented no evidence or arguments whatsoever to show that appeal to the ALC would be futile. In the absence of a showing that the entire administrative process would be futile, the ticket holders are not excused from their failure to exhaust their administrative remedies.

B. The ticket holders were not relieved of the exhaustion requirement merely because they asserted putative class action claims.

The ticket holders argue they should be excused from exhausting their administrative remedies because there is supposedly no exhaustion requirement in class action cases. *See* App.'s Brief at 13–15. They are wrong for at least three reasons. First, and most fatally, their argument is contrary to binding precedent from the South Carolina Supreme Court. In *Brackenbrook N. Charleston, LP v. Cnty. of Charleston*, 360 S.C. 390, 602 S.E.2d 39 (2004), a group of taxpayers brought a putative class action seeking certain relief against the County. The trial court certified a class and held the members were not required to exhaust their administrative remedies. The Supreme Court reversed, holding the taxpayers—despite having asserted class claims—were nevertheless required to exhaust their administrative remedies. *See id.* at 401, 602 S.E.2d at 45 ("The circuit court orders are reversed . . . . County shall, within thirty days of this opinion, give written notice to all taxpayers within the class certified by the circuit court, other than those who have already initiated administrative refund requests, of their right to seek an administrative refund, and of the date by which the refund request must be initiated.").

Second, the ticket holders' policy argument—that requiring potentially "tens of thousands" of individuals to exhaust their remedies would be unduly burdensome—is speculative. Even assuming each of those hypothetical individuals initiated and exhausted his administrative remedies, the ticket holders have provided no reason to think that their individual exhaustion of their remedies would overwhelm the process. And even if there were, that is an insufficient basis upon which to ignore or rewrite what the law requires. The statutes and regulations at issue are 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 should not

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).

The legislature's intent is plainly and unequivocally expressed. Only *after* an aggrieved ticket holder exhausts the entirety of the administrative process—up to and including an appeal to the ALC—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.

Third, even the out-of-state cases on which the ticket holders rely do not, in fact, support their argument. For example, they relies on *Rose v. City of Hayward*, 126 Cal. App. 3d 926 (Cal. App. 1981) for the proposition that plaintiffs in a class action need not exhaust their administrative remedies when those remedies do not provide for class relief. *See* App.'s Brief at 14. But not even California's courts apply *Rose* in actions that, like this one, seek 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").

The ticket holders' reliance on *Thorn v. Jefferson County*, 375 So.2d 780 (Ala. 1979) fares no better.[11] The ruling in *Thorn* that the taxpayers could sue without first going through the process of requesting a tax refund was not based on the fact that the taxpayers filed a putative class action. Rather, the ruling in *Thorn* was based on the nature of the taxpayers claim, namely that the county's collection of ad valorem taxes "was void and illegal." *See Thorn*, 375 So.2d at 788 ("[T]axpayers contend they did not have to pursue that statutory remedy because they claimed that the assessment was void and illegal. We agree with the taxpayers. . . . [T]he statutory procedure for refund of taxes does not apply where the assessment complained of is void and illegal."). Accordingly, even if *Thorn* were controlling South Carolina (and it is not), it addresses an entirely different question than the one before this Court. The ticket holders have not alleged that the sale of Holiday Cash Add-A-Play® tickets is "void and illegal," and thus the sole factor supporting the *Thorn* court's ruling is not present here.

South Carolina law rejects the ticket holders' argument that they should be excused from the requirement that they exhaust their administrative remedies, and none of the out-of-jurisdiction cases

[11] The ticket holders inadvertently provides the wrong citation for the *Thorn* case. The citation supplied above is correct.

he cites compel or permit a different result. The trial court correctly ruled his failure to exhaust was not excused and thus warranted dismissal.

IV. The trial court's orders dismissing this suit rested exclusively on facts and arguments properly and timely presented to the court.

The ticket holders incorrectly argue the trial court erred by supposedly considering "new" evidence and arguments allegedly raised for the first time in the Commission's Motion to Reconsider, Alter, or Amend, which the ticket holders claim they never had a chance to rebut. *See* App.'s Brief at 3–6. The ticket holders' argument is wrong for at least three reasons.

First, contrary to the ticket holders' assertion, the supposedly "new" evidence and arguments were not, in fact, first raised in the Motion to Reconsider. Rather, the items the ticket holders now complain of—namely, the GLI report and the letters between the ticket holders and the Commission seeking and declining payment of the tickets[12]—had previously been discussed, described, and argued to the trial court at the hearing on the Motions to Dismiss. *See* Hearing Tr. at 5:6–15, 7:21–24, 11:17–22, 13:19 to 14:1, 19:12–20 (R. ___, ___, ___, ___ to ___, and ___). Because the arguments and facts in the Commission's Motion to Reconsider had previously been raised to the trial court without objection and had been acknowledged and discussed by Plaintiff's counsel at that hearing, there was no procedural impropriety to the Commission reiterating them, along with demonstrative support, in the Motion to Reconsider.

Second—and most importantly—the trial court's ruling dismissing the suit did not depend on or adopt the supposedly "new" evidence and arguments. The ticket holders incorrectly argue "the trial court improperly accepted [the GLI report] as fact." *See* App.'s Brief at 4. This is

[12] Notably, each of these "new" items post-dated the Commission's motion to dismiss. Accordingly, these items *could not* have been attached to that motion. *Cf.* App.'s Brief at 4 (complaining that "these items were never provided or presented in [the Commission's] motion to dismiss").

demonstrably incorrect. The Order's only reference to GLI's report is in the "Factual and Procedural Background" to note *the Commission's* reason for its decision not to pay the tickets. *See* Order at 2 (R. ___). But the trial court did not accept the truth of GLI's conclusion or make any finding that the tickets were issued or printed in error. At most, the trial court noted that the *Commission* had made such a determination, *see* Order at 2, 4 (R. ___, ___), but the trial court did not make such a finding itself, nor was its ruling based on that fact. Rather, the ruling rested on (i) the trial court's conclusion that a ticket holder seeking payment of his ticket must exhaust his administrative remedies (including an appeal to the ALC) before seeking judicial relief, (ii) the undisputed fact that the ticket holders had not done so, and (iii) the conclusion that their failure was not excused. The trial court's ruling and reasoning are separate from and independent of the question of whether the tickets were issued or printed in error. The justification the Commission gives for denying payment of a ticket (and the question of whether that justification was a good one) has no effect on whether exhaustion is required. The trial court's ruling rested on the exhaustion requirement, not on the "new" evidence.

Third, the ticket holders cannot now bemoan the fact that they had no opportunity to dispute the supposedly "new" evidence on which the trial court's order of dismissal supposedly rested. *See* App.'s Brief at 5 (complaining the ticket holders were not given "any reasonable opportunity . . . to challenge Respondent's determinations"). They had a chance to do so at the hearing on the motions to dismiss, during which counsel for the Commission, Intralot, and the ticket holders discussed the GLI report, the Commission's belief that an error had occurred, and the communications between the parties. *See* Hearing Tr. at 5:6–15, 7:21–24, 11:17–22, 13:19 to 14:1, 19:12–20 (R. ___, ___, ___, ___ to ___, and ___). The ticket holders had another chance when the Commission filed its motion for reconsideration, at which point (if they objected to the material

contained therein) they could and should have filed a Response objecting to it. The ticket holders held their peace, and they cannot now complain they had no chance to dispute the Commission's arguments.

In sum, the "new" evidence and arguments were previously, properly, and timely presented to the trial court; the trial court's ruling did not rest on any of the supposedly "new" matters; and the ticket holders had multiple opportunities, but failed to take them, to respond or object to the materials about which they now complain. There was no procedural impropriety in the Commission's motion or the trial court's ruling. The ruling should be affirmed.

V. The trial court's dismissal may be affirmed on the additional sustaining ground that the relief the ticket holders seek is forbidden by law.

As the prevailing party below, the Commission may assert additional grounds to sustain the ruling below, even if (as here) those grounds were not raised to or relied on by the court below. *See* Rule 220(c), SCACR ("The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal."); *I'on, LLC v. Town of Mt. Pleasant*, 338 S.C. 406, 419, 526 S.E.2d 716, 723 (2000) ("Under the present rules, a respondent—the "winner" in the lower court—may raise on appeal any additional reasons the appellate court should affirm the lower court's ruling, *regardless of whether those reasons have been presented to or ruled on by the lower court.*") (emphasis added); *see also* J. Toal, *et al.*, *Appellate Practice in South Carolina* 62 (2d ed. 2002) (same).

Such an additional sustaining ground is present in the instant appeal.[13] Specifically, although the Commission did not argue and the trial court did not find that the disputed Add-A-

[13] This argument is separate from and independent of the Commission's argument regarding exhaustion of administrative remedies. Neither one is dependent on the other, and this argument provides an independent, additional, and alternative basis to dismiss the ticket holders' claims.

Play® tickets were printed or issued in error and were thus unpayable, *see* Arguments I.A and IV, *supra*, there is sufficient Record evidence and judicially noticeable facts to conclude as a matter of law that some error occurred on December 25, 2017 and the Commission is thus expressly forbidden by statute from doing what the ticket holders' request. *See* S.C. Code Ann. § 59-150-230(C)(3) ("A prize must not be paid if it . . . arises from claimed lottery game tickets that are unissued, produced or issued in error.").

This Court need not resolve any disputed issues of fact to arrive at this additional sustaining ground. Record evidence and judicially noticeable facts[14] establish beyond dispute that *something* happened on Christmas Day 2017 that drastically altered odds of winning and caused thousands of aberrant "winning" tickets to be printed and issued. *See generally* SCEL's Mot. to Reconsider, Ex. B (R. ___) (detailing the circumstances and causes of the Christmas Day incident); Jacey Fortin, *Sorry, Lottery Winners. South Carolina Won't Pay, but Here's Your $1*, NEW YORK TIMES, May 31, 2018, *available at* https://www.nytimes.com/2018/05/31/us/south-carolina-lottery-glitch.html (last visited June 3, 2019) ("Starting at 5:51 p.m. last Dec. 25, gas stations and convenience stores across the state dispensed a steady stream of what appeared to be winning tickets. . . . For those two hours on Christmas Day, many players were surprised to find all of their grids filled entirely with star-topped evergreens."); Fox 46, *SC lottery players promised 'winning' tickets would be honored after Christmas glitch*, Feb. 22, 2018, *available at* http://www.fox46charlotte.com/news/local-news/exclusive-sc-lottery-players-promised-winning-

[14] This Court may take judicial notice of subjects and facts of general knowledge. *See Gignilliat v. Gignilliat, Savitz & Bettis, L.L.P.*, 385 S.C. 452, 464 n.6 684 S.E.2d 756, 762 n.6 (2009) (taking judicial notice on appeal of indisputable fact); *Palmetto Homes, Inc. v. Bradley*, 357 S.C. 485, 483 n.3, 593 S.E.2d 480, 491 n.3 (Ct. App. 2004) (same); *Cox v. Fleetwood Homes of Georgia, Inc.*, 329 S.C. 157, 160 n.2, 494 S.E.2d 462, 463 n.2 (Ct. App. 1997), rev'd on other grounds, 334 S.C. 55, 512 S.E.2d 498 (1999); *State v. Little*, 227 S.C. 60, 69, 86 S.E.2d 875, 879 (1955); *see also* Rule 201(b), SCRE.

tickets-would-be-honored-after-christmas-glitch (last visited June 3, 2019) ("Two dozen phone calls released as part of a public records request reveals store clerks were worried when more than 42,000 winning tickets were printed over two hours. In some cases, the clerks said when customers saw what was happening, they took advantage.").

These well-known facts—*e.g.*, that tens of thousands of tickets containing nine tree symbols were printed during the two-hour span—undoubtedly indicate that something was amiss, since under the game rules the odds of winning a $500 ticket should have been 1-in-4,800 and no more than five of the same play symbols should ever appear on a single play. *See* SCEL's Mem. in Supp. of Mot. to Dismiss at 6–7 (R. ___); *see also* SCEL Official Holiday Cash Add-A-Play® Game Rules at 3, *available at* https://web.archive.org/web/20171230064423/http://www.sceducation lottery.com/images/pdf/ADD_A_PLAY/Holiday_Cash_AAP_2017.pdf.

The entirety of the ticket holders' Complaint stems from this incident. Accordingly, under the terms of the Lottery Act, the Commission *cannot* pay them anything arising from the tickets they received during the incident, and thus the Commission cannot be liable for failing to do so.[15]

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[15] Courts of other jurisdictions have likewise concluded that similar statutes bars claims (regardless of the label or cause of action asserted) seeking payment of aberrant tickets. *See, e.g., Plourde v. Conn. Lottery Corp.*, 2000 WL 1918014 (Conn. Super. Ct. Dec. 18, 2000) (granting summary judgment in favor of state lottery agency on breach of contract claim because state law prohibited payment on tickets printed in error and the ticket at issue contained misprinted game symbols); *Ruggiero v. State Lottery Comm'n*, 489 N.E.2d 1022 (Mass. Ct. App. 1986) (reversing decision in favor of plaintiff who claimed to have a winning ticket because the evidence showed that the ticket had been misprinted and could not be validated as a winner as required by the applicable statutes and rules); *Ga. Lottery Corp. v. Sumner*, 529 S.E.2d 925 (Ga. Ct. App. 2000) (holding state lottery agency did not breach contract in determining that lottery ticket was not a winner because the mark on the ticket resulted from a printing error); *Consola v. New York*, 84 A.D.3d 1557 (N.Y. App. Div. 2011) (affirming summary judgment in favor of state lottery agency that refused to pay a $5 million prize because the disputed ticket contained a play symbol resulting from a misprint); *Haynes v. Dept. of Lottery*, 630 So.2d 1177 (Fla. Ct. App. 1994) (affirming dismissal of complaint alleging state lottery agency had breached a contract with the player where player had received several tickets with duplicate numbers rather than the numbers he had selected); *Curcio v. State Dept. of Lottery*, 164 So.3d 750, 755 (Fla. Ct. App. 2015) (holding a lottery player could not assert

In sum, because the Commission's alleged "wrongdoing" is compelled by South Carolina law, and because the ticket holders' desired outcome is prohibited by South Carolina law, their claims do not—and cannot—state a claim upon which relief can be granted. The trial court did not err by dismissing them.

CONCLUSION

For the foregoing reasons Respondent South Carolina Education Lottery Commission respectfully requests this Court affirm the trial court's dismissal of the ticket holders' claims against it.

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a meritorious claim for breach of contract arising from a misprinted lottery ticket, and noting "this analysis is consistent with the decisions from other states rejecting breach of contract claims under nearly identical circumstances"); *Valente v. Rhode Island Lottery Comm'n*, 544 A.2d 586 (R.I. 1988) (reversing decision in favor of plaintiff who claimed to have won a $10,000 prize on a scratch-off lottery ticket because the winning number on the ticket was blurred and ambiguous and the ticket failed all of the lottery's validation tests).

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
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, 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.

PROOF OF SERVICE

I hereby certify that I have caused a copy of Respondent South Carolina Education Lottery Commission's Initial Response Brief and Designation of Matter to be served upon all counsel of record, by mailing copies of same, postage prepaid to the following addresses:

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June 3, 2019

HAND DELIVERED
The Honorable Jenny Abbott Kitchings
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RE: *Holman et al. v. S.C. Ed. Lottery Comm'n*
Appellate Case No. 2019-000502
Our File No. 055431/01501

Dear Ms. Kitchings:

In connection with the above captioned matter, enclosed please find an original and one copy of the Initial Response Brief of Respondent the South Carolina Education Lottery Commission. Also enclosed is an original and one copy of the Commission's Designation of Matter. We ask that you file the originals and return clocked-in copies to us via our courier.

By copy of this letter and by the Proof of Service enclosed, I am serving a copy of the Commission's Initial Response Brief and Designation on the other parties' counsel of record.

Very truly yours,

Miles Coleman

Miles E. Coleman

Enclosures
CC: William E. Hopkins, Esquire
J. Clay Hopkins, Esquire
J. Preston Strom, Jr., Esquire
Mario A. Pacella, Esquire
Bakari T. Sellers, Esquire