THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM LEE COUNTY
COURT OF COMMON PLEAS

KRISTI F. CURTIS, CIRCUIT COURT JUDGE

APPELLATE CASE NO.: 2019-000501

Kevin Cox, on behalf of himself and all others similarly situated,

Appellant,

v.

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

Respondents.

APPELLANT'S FINAL BRIEF

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STATEMENT OF ISSUES ON APPEAL

I. DID THE TRIAL COURT ERR IN GRANTING RESPONDENTS' SEPARATE MOTIONS TO DISMISS?

STATEMENT OF THE CASE

This is a purported class action case. Appellant is a citizen and resident of Lee County, South Carolina who purchased who purchased in Lee County five (5) Mega Millions tickets sold by Respondent South Carolina Education Lottery Commission d/b/a South Carolina Education Lottery ("SCEL") on March 25, 2016. (R. p. 025, ¶7). When Appellant got home later that evening, he discovered that four (4) of the tickets had duplicate numbers printed on each of them. (R. p. 025, ¶8). Thus, despite purchasing and paying for five (5) chances to win, he was only given, in effect, two (2) chances since there were only two unique numbers.

Respondent SCEL is responsible for administering lottery games, including the testing of games, advertising, marketing, sale of tickets, and payment of cash prizes to winning ticket holders. (R. p.024, ¶2). Respondent INTRALOT, Inc. ("Intralot") is responsible for technology and support services, including provision of equipment, software, and maintenance services, day-to-day management of operations, sales network and risk management/odds' setting for Respondent SCEL. (R. pp. 024-025, ¶3). Respondents have not, and did not, provide players with an individual chance to win per lottery ticket purchase, and have provided players with duplicate numbers on tickets, yet retain possession and ownership of these cash assets paid by Appellants. (R. p. 027, ¶22).

On February 2, 2018, Appellant filed his initial complaint against Respondent SCEL seeking reimbursement for the benefit of his bargain – the individual and separate

chances to win a lottery prize in exchange for purchase of a lottery ticket. On March 23, 2018, Respondent SCEL filed its Motion to Dismiss. Appellant, with Respondent SCEL's consent, thereafter filed his Amended Complaint on June 7, 2018, adding Respondent Intralot. On July 25, 2018, Respondent Intralot filed its Motion to Dismiss.

The case came before the Honorable Kristi F. Curtis on July 30, 2018, on Respondents' Motions. The court granted Respondents' Motions in an Order dated February 25, 2019, claiming Appellant had "neither exhausted his administrative remedies nor excused his failure to do so." Appellant served his Notice of Appeal on March 25, 2019.

STANDARD OF REVIEW

"Under Rule 12(b)(6), SCRCP, a defendant may move to dismiss a complaint based on a failure to state facts sufficient to constitute a cause of action. In considering such a motion, the trial court must base its ruling solely on allegations set forth in the complaint." *Spence v. Spence*, 368 S.C. 106, 116, 628 S.E.2d 869, 874 (2006). "On appeal from the dismissal of a case pursuant to Rule 12(b)(6), [SCRCP,] an appellate court applies the same standard of review as the trial court." *Rydde v. Morris*, 381 S.C. 643, 646, 675 S.E.2d 431, 433 (2009). "That standard requires the [c]ourt to construe the complaint in a light most favorable to the nonmovant and determine if the 'facts alleged and the inferences reasonably deducible from the pleadings would entitle the plaintiff to relief on any theory of the case.'" *Id.* (quoting *Williams v. Condon*, 347 S.C. 227, 233, 553 S.E.2d 496, 499 (Ct. App. 2001)). "If the facts and inferences drawn from the facts alleged in the complaint, viewed in the light most favorable to the plaintiff, would entitle the plaintiff to relief on any theory, then the grant of a motion to dismiss for failure to state a claim is

improper." *Spence*, 368 S.C. at 116, 628 S.E.2d at 874.

ARGUMENT

I. THE TRIAL COURT ERRED IN GRANTING RESPONDENTS' MOTIONS TO DISMISS.

A. The Administrative Procedures Do Not Apply to Appellant's Equitable and Tort Claims.

The trial court erred in dismissing Appellant's Amended Complaint pursuant to Rule 12(b)(6), SCRCP, based upon exhaustion principles because the Amended Complaint sets forth sufficient facts to support claims for breach of contract, unjust enrichment, promissory estoppel and negligence – claims not subject to the requirement of exhaustion of administrative remedies.

"A party is not required to exhaust administrative remedies if the issue is one that cannot be ruled upon by the administrative body." *Charleston Trident Home Builders, Inc. v. Town Council of Town of Summerville*, 369 S.C. 498, 502, 632 S.E.2d 864, 867 (2006) (citing *Ward v. State*, 343 S.C. 14, 538 S.E.2d 245 (2000)). For example, in *Thomas Sand Co. v. Colonial Pipeline Co.*, 349 S.C. 402, 563 S.E.2d 109 (Ct. App. 2002), the respondent argued that the appellant's failure to exhaust administrative remedies precluded a tort action against third parties. *Id.* at 412, 563 S.E.2d at 114-15. The South Carolina Supreme Court disagreed and held the following:

> If this were an appeal from the denial of the permit through the administrative process in which [the agency] was the appropriate fact finder, Thomas Sand would clearly be required to exhaust its administrative remedies prior to bringing suit. . . . However, in a tort action against a third party, no such exhaustion requirement exists. The question is not whether the permit would have been granted but whether Thomas Sand was damaged. . . . [The agency] is not the appropriate fact finder to answer this question. The jury is.
>
> The basic purpose of the exhaustion requirement, to allow the agency to render a final decision and set forth its reasons for the permit denial, would

> not assist the court in this instance. The alleged wrong is not one which the administrative process was designed to redress. "The doctrine of exhaustion of administrative remedies only comes into play when a litigant attempts to invoke the original jurisdiction of a circuit court to adjudicate a claim based on a statutory violation for which the legislature has provided an administrative remedy." A litigant need not exhaust administrative remedies where "there are no administrative remedies for the wrongs it assertedly suffered."

Thomas Sand, 349 S.C. at 413, 563 S.E.2d at 115 (*quoting Med. Mut. Liab. Ins. Soc. of Md. v. B. Dixon Evander & Assocs.*, 92 Md. App. 551, 609 A.2d 353 (Md. App. 1992)).

Here, like the *Thomas Sand* case, Appellants' claims against Respondent Intralot are clearly against a third-party, for which there is no administrative exhaustion requirement. Furthermore, like this Court's decision in *Capital City Ins. Co. v. Bp Staff, Inc.*, Appellants' claims are not based on a statutory violation for which the legislature mandates the pursuit of an administrative remedy. 674 S.E.2d 524, 382 S.C. 92 (Ct. App. 2009).

In short, the Lottery Act, S.C. Code Ann. §59-150-300, sets forth a statutory scheme for grieving a Board decision. Here, there is no indication that Appellant was given any Board decision.[1]

Quite simply, Appellant was not provided with tickets containing distinct game numbers in exchange for the purchase of an individual ticket. There was no "Board" – as defined by statute – decision prior to the filing of Appellants' Complaint and/or Amended Complaint. Accordingly, as in *Thomas Sand* and *Capital City*, Appellant was not required, as a matter of law, to exhaust the administrative process regarding his equitable and tort claims before filing the current action in circuit court.

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[1] "Board" means the Board of Commissioners of the South Carolina Lottery Commission. S.C. Code Ann. §59-150-20(2).

B. Even If Required, The Trial Court Erred in Concluding That Appellant Failed to Exhaust His Administrative Remedies, or Excused His Failure to Do So.

The trial court rejected Appellant's argument that the statutory language in the Lottery Act concerning administrative remedies is permissive ("may") rather than mandatory. The trial court determined that Appellant failed to exhaust his administrative remedies and did not present evidence that this failure was excused. As set forth below, however, the trial court's reasoning was erroneous.

i. The Lottery Act Provision Grievance Procedure Is Inapplicable.

Appellant did not allege there was any "error" in his Complaint, Amended Complaint, or memoranda filed with the trial court. Since Appellant did not allege and, in fact, vehemently denied there was an "error" in the system, the Lottery Act's limitation on Respondent SCEL's prize-paying discretion, by forbidding Respondent SCEL from paying unissued tickets or erroneously issued tickets, was inapplicable because the tickets in contention were not erroneously issued. *See* S.C. Code Ann. § 59-150-230(C)(3)(a) (stating a prize must not be paid if it is issued in error). At the very least, there is serious factual dispute warranting reversal of the trial court's decision.

For those reasons, there was no purpose for an aggrieved ticket holder to file a complaint with Respondent SCEL's Executive Director, schedule the appropriate hearing with the director after review, appeal the respective decision to the Board, or to ultimately appeal to the Administrative Law Court because Appellant never alleged his tickets were issued erroneously. This was a question of fact to be determined during discovery. Quite simply, it was improper for the trial court to dismiss Appellant's Complaint based solely on its acceptance of Respondents' factual assertions that the ticket was printed in error.

The question of whether the Lottery Act, and its corresponding administrative

remedies provisions, applies in this case has been improperly determined by the trial court, which made its own factual findings. These findings were erroneous. Appellant should be given the opportunity to conduct discovery to determine the issue of whether the allegations in his pleadings – that no error occurred in printing the ticket with duplicative numbers – are true; thus, eliminating the statutory administrative (permissive) requirements, and allowing Appellant to proceed on his claims.

ii. There Was No Board "Decision."

The Lottery Act states that an individual may grieve the board's "decision" within ten days from receipt of official notice from the board of the action of which review is sought. S.C. Code Ann. §59-150-300(A). Here, there was no allegation, nor evidence presented that any decision was made by the Board concerning Appellant's lottery tickets. Also, there was no "decision" to grieve when Appellant's Complaint and Amended Complaint were filed. Therefore, because there was no Board "decision" existing at any time prior to the filing of Appellant's claims, he was not required to exhaust his administrative remedies under a plain reading of the Lottery Act.

iii. Any Administrative Review Would be Futile Given Respondent SCEL's "Decision" to Deny Payment to Appellant.

"The general rule is that administrative remedies must be exhausted absent circumstances supporting an exception to 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). "A commonly recognized exception to the requirement of exhaustion of administrative remedies exists when a party demonstrates that pursuit of administrative remedies would be a vain or futile act." *Moore v. Sumter County Council*, 300 S.C. 270, 273-74, 387 S.E.2d 455, 458 (1990) (citing 82 Am. Jur. 2d *Zoning and Planning* § 332 at 903 (1976)). Futility is an

exception when the administrative body cannot provide the relief requested or when circumstances guarantee a negative result of appeal. *See Ward*, 343 S.C. at 18–19 ("Allowing ALJs to rule on the constitutionality of the statute would violate the separation of powers doctrine.... Requiring a party to go before an agency or ALJ who cannot rule on the constitutionality of a statute would be a futile act."); *Law v. South Carolina Dept. of Corrections*, 368 S.C. 424, 438, 629 S.E.2d 642, 650 (2006) ("Futility, however, must be demonstrated by a showing comparable to the administrative agency taking a hard and fast position that makes an adverse ruling a certainty.") (internal quotation marks and citation omitted).

Here, after the SCEL refused to offer any relief to Appellant, it would have been futile for Appellant to exhaust his administrative remedies as the Board's decision was certain to be unfavorable. *Storm M.H. v. Charleston Cnty. Bd. of Trs.*, 400 S.C. 478, 735 S.E.2d 492 (2012). Further, the administrative remedies would have been inadequate given the pendency of Appellant's action and the potential delay of an administrative appeal. *Id.*

iv. Even if the Lottery Act's Exhaustion Requirement Applies, Respondents' Administrative Remedy Argument is Moot Because Respondent SCEL Has Denied Appellant's Claims for Payment.

"The exhaustion doctrine acts as a prudential rule that provides the courts 'with a method to exercise comity toward administrative agencies and to promote efficient use of judicial resources while protecting the rights of parties who have come before the court seeking relief.'" *McDonald v. Centra, Inc.*, 946 F.2d 1059, 1063 (4th Cir. 1991) (citing *Morrison-Knudsen Co., Inc. v. CHG Int'l, Inc.*, 811 F.2d 1209, 1223 (9th Cir. 1987)).

However, as the trial court recognized initially, there are exceptions to the requirement that parties exhaust administrative remedies before seeking judicial review.

Exceptions to the doctrine exist where "(1) the dispute is a matter of statutory construction; (2) the utilization of administrative procedures would cause irreparable injury; and (3) the resort to administrative procedures would be futile." *Id.*

This argument is still moot, however, for three reasons. First, this is a matter of statutory construction, as stated *supra*, and as argued by Respondents at length in their memoranda. Because the determination of whether Appellant is entitled to any damages depends on a determination as to whether the tickets with duplicative numbers were printed or issued in "error," Appellant is not required to submit his claims to administrative review.

Respondent SCEL has issued its final decision – a "hard and fast" position with which Appellant disagrees and is unwilling to accept. For that reason, Respondents' administrative remedy argument is moot, and Appellant should be allowed to proceed with his lawsuit.

v. Class Relief and Remedies are Not Available Under the Administrative Remedies and Should Therefore Be Excused.

In its memorandum in support of its motion to dismiss, Respondent SCEL admitted that the Mega Millions lottery game is a multi-state game with drawings held twice a week. Logistically, there are thousands of South Carolinians who play the Mega Millions game. Thousands of individual appeals would not be an efficient use of valuable Court time and resources and would we wasteful, duplicative, impractical, and taxing on already thinly stretched resources. Such thousands of individual appeals would be necessary, however, as the South Carolina Supreme Court has held that class actions under SCRCP 23 are not permissible, as a matter of law, in administrative appeals in the Administrative Law Courts. *Allen v. S. C. Pub. Emp. Benefit Auth.*, 411 S.C. 61, 769 S.E.2d 666, 671-72

(2015). Thus, by law, hundreds of thousands of individual appeals would necessarily have to be filed if such is required to be pursued through the ALC rather than as a more practical class action under Rule 23, SCRCP. "[T]he class action device saves the resources of both the courts and the parties by permitting an issue potentially affecting every [class member] to be litigated in an economical fashion under Rule 23." *Anthony v. South Carolina State Plastering, LLC*, 390 S.C. 562, 703 S.E.2d 197, 204 (2011).

Furthermore, the entire thrust and intent of Rule 23 would be seriously undermined and effectively gutted because there is no class action vehicle or remedy available in the ALC. Plaintiffs "in a class action need not exhaust administrative remedies prior to instituting judicial proceedings where the administrative remedies available to the plaintiffs do not provide class relief[.]" *Rose v. City of Hayward*, 126 Cal.App.3d 926 (Cal. App. 1981) (citing *Ramos v. County of Madera*, 4 Cal.3d 685, 690-91, 484 P.2d 93 (Cal. App. 1971).

The *Rose* court was not the only court to make such a finding, however. In *Thorn v. Jefferson County*, 373 So.2d 780 (Ala. 1979), the Supreme Court of Alabama held that a class action lawsuit was a "permissible vehicle" and a "proper remedy" for taxpayers to pursue claims even though they had failed to first exhaust available statutory remedies. *Id.* at 788.

This is the quintessential class action scenario, with thousands of potential plaintiffs, each of whom only suffered nominal damages, all under identical circumstances involving the same defendants and same conduct. Very few, if any, of the individual cases would allow for the client to retain counsel and pursue litigation on an individual basis. The individual cases are simply not economically viable. To require an exhaustion of

administrative remedies on an individual basis is, in effect, barring the class action mechanism and therefore depriving the winning ticketholders any recourse or relief while giving Respondents a "get out of jail free" card." This is precisely the scenario envisioned by Rule 23 and to prevent its use here would be manifestly unjust and unfair.

Moreover, the South Carolina Supreme Court has expressed the viewpoint that class actions are favored in this State:

> Our state class action rule differs significantly from its federal counterpart. The drafters of Rule 23, South Carolina Rules of Civil Procedure (SCRCP), intentionally omitted from our state rule the additional requirements found in Federal Rule 23(b), Federal Rules of Civil Procedure (FRCP). By omitting the additional requirements, Rule 23, SCRCP, endorses a more expansive view of class action availability than its federal counterpart.

Anthony, 390 S.C. at 562 (citing *Littlefield v. South Carolina Forestry Comm'n*, 337 S.C. 348, 523 S.E.2d 781, 784 (1999).

CONCLUSION

Based upon the foregoing, Appellant respectfully requests the trial court's ruling granting Respondents' Motions to Dismiss, and dismissing Appellant's case, be reversed. Additionally, Appellant would ask that the judgment be reversed for any other reason appearing in the record of the case.

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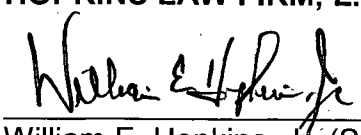

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