

THE STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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APPEAL FROM SUMTER COUNTY  
COURT OF COMMON PLEAS

KRISTI F. CURTIS, CIRCUIT COURT JUDGE

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APPELLATE CASE NO.: 2019-000501

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SC Court of Appeals

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.

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**RESPONDENT'S FINAL BRIEF**

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## STATEMENT OF THE ISSUES ON APPEAL

### I. WHETHER THE CIRCUIT COURT PROPERLY DISMISSED PLAINTIFF'S COMPLAINT FOR FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES.

#### STATEMENT OF THE CASE

Plaintiff filed an Amended Complaint on June 20, 2018. This Class Action Complaint will be referred to as the "Complaint." In the Complaint, Plaintiff alleges that he represents the interests of individuals who purchased a MegaMillions ticket with duplicate numbers. (Complaint ¶ 10). Plaintiff purchased a ticket where he believed the automated system would provide him unique numbers for each of his five plays. (R. at 25). Contrary to his alleged expectations, Plaintiff received five plays and four of them were duplicates. (R. at 25). Notwithstanding the allegations that his alleged winning tickets have not been paid, Plaintiff states no facts that he has 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.

In this case, Plaintiff brings five causes of action against Defendant Intralot. First, he makes a claim for Unjust Enrichment. (R. at 27). Second, he makes a claim for Breach of Contract and/or Breach of Implied Contract. (R. at 27-28). Third, he makes a claim for Promissory Estoppel. (R. at 28-29). Fourth, Plaintiff alleges that Defendant Intralot violated the South Carolina Unfair Trade Practices Act.<sup>1</sup> (R. at 29). Fifth and finally, Plaintiff brings a claim for Negligence and Gross Negligence. (R. at 29-30). Plaintiff's complaint should be dismissed because he failed to exhaust administrative remedies and because he failed to state viable claims against Defendant Intralot.

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<sup>1</sup> Plaintiff conceded dismissal of his claim pursuant to the South Carolina Unfair Trade Practices Act.

Both Intralot and the South Carolina Education Lottery brought Motions to Dismiss, contending that Plaintiff 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 Honorable Kristi Curtis, Circuit Court Judge, held oral arguments on the Motions to Dismiss at the same time as *Holman, et al, v. South Carolina Education Lottery Commission and Intralot, Inc.*

With respect to the issue of exhaustion of administrative remedies, Plaintiff's Memorandum in Opposition to the Motion to Dismiss presented only two arguments: that the lottery grievance procedure was inapplicable because Plaintiff does not allege that any error occurred (R. at 68-69) and that the requirement to exhaust administrative remedies is moot because the South Carolina Education Lottery Commission has now denied Plaintiff's claims. (R. at 69-70). 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, Plaintiff orally argued that pursuing administrative remedies was permissive and not mandatory. Further, Plaintiff argued and that even if exhaustion was required, it can be excused under the doctrine of futility.<sup>2</sup> With respect to futility, Plaintiff argued that the South Carolina Education Lottery already rejected his claims for the prizes to be paid. (R. at 89-90).

The Circuit Court concluded that "[t]he process by which a ticket holder may challenge the Commission's actions or decisions is a multi-step administrative process including both intra-agency review *and* an appeal to the Administrative Law Court. Mr. Cox did not even allege that he had followed the procedures and has not represented argument or information that doing so

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<sup>2</sup> Plaintiff does not raise the permissive versus mandatory argument on appeal and thus has waived said argument.

would result in an adverse ruling at all levels. There is nothing to suggest that the Administrative Law Court would not fairly and impartially analyze the case.” (R. at 11) (Emphasis in Original).

This appeal follows.

### STANDARD OF REVIEW

Under Rule 12(b)(6), SCRPC, 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. App. 2002). A trial judge in the 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 a 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 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 PLAINTIFF’S COMPLAINT FOR FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES.**

##### **A. Plaintiff Waived the Argument that Administrative Procedures Do Not Apply to His 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.” *’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 Plaintiff's 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, Plaintiff argued that the grievance procedure was inapplicable because he contends that the tickets were not pled to be issued in error. (R. at 68-69). Further, Plaintiff contended that because the South Carolina Education Lottery decided to deny the Class Member claims, Defendant's exhaustion argument was moot. (R. at 69-70). 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 his Memorandum, Plaintiff orally argued that pursuing administrative remedies was permissive and not mandatory. Further, Plaintiff argued and that even if exhaustion was required, it can be excused under the doctrine of futility.<sup>3</sup> With respect to futility, Plaintiff argued that the South Carolina Education Lottery already rejected his claims for the prizes to be paid. (R. at 89-90).

Moreover, Plaintiff's equitable and tort claims are subject to the exhaustion requirement, as Plaintiff's 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

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<sup>3</sup> Plaintiff does not raise the permissive versus mandatory argument on appeal and thus has waived said argument.

Executive Director or the South Carolina Education Lottery Commission “may deny awarding a prize to a claimant if the ticket is printed or produced in error.” S.C. Code Reg. 44-70(E). Decisions of the Executive Director are final, subject to an appeal to the full commission. S.C. Code Reg. 44-70(F). Finally, pursuant to S.C. Code Ann. § 59-150-300(B), “[t]he Administrative Law Judge Division shall hear appeals from the decisions of the board” and, based upon the proceedings before the board, the Administrative Law Judge Division may reverse the decision of the board if the board action violates a constitutional or statutory provision; is in excess of the statutory authority of the board; is made upon unlawful procedure; is affected by other error of law; is clearly erroneous in view of reliable, probative, and substantial evidence on the whole record; or is arbitrary or capricious or characterized by an abuse of discretion or clearly unwarranted exercise of discretion. S.C. Code Ann. § 59-150-300(B). Thus, the core determination of whether Plaintiff’s 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 Plaintiff further argues that his 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.

**B. The Circuit Court Properly Concluded Plaintiff Failed to Exhaust Administrative Remedies.**

The Circuit Court concluded that Plaintiff failed to exhaust his administrative remedies by failing to pursue remedies through the Administrative Law Judge Division. (R. at 5, 11). 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 5, 11) (Emphasis in Original). This process is set forth in section I(a) of this brief. Plaintiff makes five arguments as to why he believes the Circuit Court erred in concluding he failed to exhaust said remedies without legal excuse. First, Plaintiff argues that the administrative process is inapplicable because Plaintiff has not alleged that any error occurred. Second, Plaintiff argues that he was excused from the requirement because there was no board decision prior to the filing of Plaintiff’s claims in the Circuit Court. Third, Plaintiff argues that he is excused from exhausting administrative remedies because administrative review would be futile given the board’s decision. Fourth, Plaintiff contends that even if he was required to exhaust administrative remedies, such requirement is moot because the South Carolina Education Lottery denied Class Members’ claims for payment. Fifth and finally, Plaintiff contends that he 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. Plaintiff’s Argument that He Did Not Plead that the Tickets Were Issued in Error Is Misplaced.**

Plaintiff contends that he is excused from the exhaustion requirement because he pled that his tickets were winning tickets and never stated in his pleading that the tickets were produced or issued in error. Plaintiff contends that his pleading states that he received winning tickets that were not paid, giving rise to his 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 or whether a ticket has been properly issued 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 were issued properly 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, Plaintiff's claim in this regard has no merit.

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

Plaintiff correctly notes that at the time of the filing of his Complaint, the South Carolina Education Lottery Commission had not issued a determination regarding his duplicative tickets. This is partly because Plaintiff never initiated the administrative process. Yet, Plaintiff never explained in his brief or in any arguments made to the Circuit Court why he prematurely filed a lawsuit when an administrative process can provide Plaintiff the relief requested. In fact, the argument that Plaintiff failed to exhaust administrative remedies goes to the prematurity of Plaintiff's 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 Plaintiff has the opportunity to present his claims to the Administrative Law Judge Division of the South Carolina Courts. Plaintiff's 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, Plaintiff never challenges the impartiality of the Administrative Law Judge Division and does 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 Plaintiff 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, Plaintiff's 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 Plaintiff's 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 did not address the issue of whether the class action device constitutes an exception to the exhaustion requirement. Moreover, Plaintiff never made this argument to the

Circuit Court in this case. Thus, the argument has been waived. Even though this argument was waived, Intralot will address the argument.

Plaintiff's argument that the class action device permits him 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 Plaintiff 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, that 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.—1<sup>st</sup> Div. 1991.) Moreover, in *Bautista v. County of Yolo*, No. C039340, 2003 WL 22969353, at \*4 (Cal. Ct. App.—3d Dist. December 18, 2003), 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."

Additionally, *Thorn* does not support Plaintiff's argument, as the court excused plaintiffs from pursuing 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 the plaintiffs in *Thorn* contended the taxes were collected illegally. There is no such illegality alleged here.

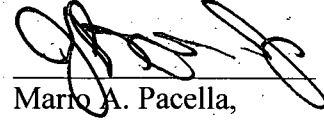
Plaintiff has waived this argument by failing to argue and secure a ruling from the Circuit Court. However, on the merits, Plaintiff's argument also fails. Merely pleading a case as a class action does not render the administrative process futile. Pleading as a class action does not excuse Plaintiff from exhausting his administrative remedies. Plaintiff must exhaust all remedies through the agency and on appeal to the Administrative Law Judge Division. Thus, the Court properly dismissed Plaintiff's Complaint.

### **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 Plaintiff failed to exhaust his administrative remedies and that Plaintiff failed to satisfy any of the exceptions to the exhaustion requirement.

August 12, 2019

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