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Case Number 14,2025

IN THE SUPREME COURT OF THE STATE OF DELAWARE

BLUE BEACH BUNGALOWS DE, LLC,	)	
Appellant Below, Appellant/Cross-Appellee,	)	No. 14, 2025
v.	)	Court Below: Superior Court of the State of Delaware
THE DELAWARE DEPARTMENT OF JUSTICE CONSUMER PROTECTION UNIT,	)	C.A. No. S24A-04-001
Appellee Below, Appellee/Cross-Appellee	)	

APPELLANT/CROSS-APPELLEE'S OPENING BRIEF

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Dated: March 3, 2025

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NATURE OF PROCEEDINGS

This is an appeal of the Superior Court's review of a hearing officer's decision in an administrative enforcement proceeding conducted by the Delaware Department of Justice's Division of Consumer Protection (the "DOJ"). The DOJ brought administrative charges under 29 *Del. C.* § 2523 against Blue Beach Bungalows DE, LLC ("Blue Beach") regarding Blue Beach's communications with the residents of the Pine Haven community in Lincoln, Delaware. The DOJ appointed a deputy attorney general as a hearing officer to adjudicate the proceeding (the "Hearing Officer"). In April 2024, after a four-day hearing in September 2023, the Hearing Officer issued a decision (the "Decision") that imposed civil penalties on Blue Beach totaling $831,500. The Superior Court reversed many of the Hearing Officer's rulings and related penalties but left in place $500,000 in penalties. Ex. A.

This appeal presents two legal questions. First, does the Delaware Consumer Fraud Act (the "CFA") apply to communications made by Blue Beach to Pine Haven residents after their residency began and that were intended to end their residency? The answer should be no, the CFA does not apply to those communications. Second, does the DOJ's prosecution of fraud claims seeking civil penalties through an administrative process violate Blue Beach's right to a jury trial under the Delaware Constitution? The answer should be yes, Blue Beach's constitutional right to a jury trial was violated.

SUMMARY OF ARGUMENT

1. This Court should hold that the CFA does not apply to Blue Beach's communications with residents after they began residing in Pine Haven and were intended to end their residency. For a communication to be unlawful under the CFA, it must have been "in connection with the sale, lease, receipt, or advertisement of merchandise." 6 *Del. C.* § 2513(a). Based on that language, Delaware courts have consistently ruled for decades that a business's communication made after the consumer entered into a transaction fall outside the scope of the CFA. Here, almost all the communications on which the Hearing Officer based his CFA violations are outside the scope of the CFA and are not actionable, as they occurred after the lease or license had begun and were intended by Blue Beach to end the parties' relationships.

The Hearing Officer attempted to distinguish, and the Superior Court disagreed with, the line of cases which held that post-transaction conduct was outside the CFA's scope. This was legal error. This Court should hold that the CFA does not apply to communications made to residents after they began living in Pine Haven and were intended to end their residency. Blue Beach's statutory interpretation is based on case law that went unchanged for decades by the General Assembly, even while other amendments were enacted. Blue Beach's position is also supported by the common understanding that fraud is about a relationship

starting under false pretenses, not about policing ongoing relationships which are governed and addressed by contract, warranty, and other common law and statutes. The Court should reverse the Hearing Officer's findings of CFA violations for Blue Beach's communications to residents that were intended to end their residency.

2. This Court should hold that this administrative proceeding, in which the DOJ pursued CFA claims for civil penalties, violated Blue Beach's right to a jury trial under Article 1, Section 4 of the Delaware Constitution. The DOJ's CFA claims are based on fraud, which were common law claims tried to a jury, and the DOJ's requested remedy of civil penalties is only available at law. Accordingly, because the Delaware Constitution guarantees the right to a jury trial as it existed at common law, and fraud claims and civil penalties were historically tried to a jury at common law, adjudicating the DOJ's CFA claims and request for civil penalties administratively before the DOJ's Hearing Officer violated Blue Beach's constitutional jury trial right. The Court should rule that this administrative enforcement proceeding violated Blue Beach's constitutional jury trial right, and thus the Court should vacate the Hearing Officer's Decision.

STATEMENT OF FACTS

A. Pine Haven and Blue Beach.

Pine Haven is a property located in Lincoln, Delaware. A832. Pine Haven had been in Dale Cohee's family for over fifty years. A666. His father first built a wild animal park there and then later started a mobile home park which eventually included recreational vehicle ("RV") camping. *Id.*

According to Mr. Cohee, when he sold Pine Haven to Blue Beach in 2022, "there was a mobile home section, and then the RV section was around it." A666. The mobile homes were year-round, and "the camping part was supposed to be all seasonal," but some people lived there year-round. *Id*. Pine Haven was licensed for 170 RV camping sites, and there were 29 manufactured home sites. A672.

In 2022, Mr. Cohee had almost no documentation about the residents. A673, A676, A848-854. He had no written leases with any of the owners of the manufactured homes, many of whom were his friends. A675. He charged them $350 a month in rent and had no written rules. *Id*. As for the RV owners, Mr. Cohee had no written leases or other agreements with them. *Id.* He charged RV owners living there year-round $500 a month. *Id.* For other RV owners, he charged $2,250 at the beginning of the season, which ran from April 15 to October 15. *Id.*

The utility infrastructure in Pine Haven dates to the 1960s and 1970s. A678. Mr. Cohee closed the bathhouses used by RV owners at the end of the season in

October, and he would reopen them at the start of the season in April. A676. From Blue Beach's perspective, the park was blighted, without year-round utilities, and not an appropriate place to live in the winter. A735, A857-862.

Blue Beach is the Delaware LLC that took title to Pine Haven in September 2022. A735, A920-924. Blue Beach is affiliated with a family of companies based in Maryland, including some that own or operate campgrounds, though none own or operate a manufactured housing asset. A733, A737-738. An affiliated company leases and manages the campground next to Pine Haven known as Jellystone which opens in April and closes in October. A733.

B. From contract to purchase, to ownership, to change of use.

Jellystone's success prompted interest in Pine Haven because it was next door. A733-734. On March 28, 2022, Mr. Cohee's entity Pine Haven Campground, LLC entered into a Commercial Real Estate Purchase Agreement (the "Purchase Agreement") with RIG Acquisitions, LLC, a single purpose entity used for acquisitions. A668, A744, A832-848. The Purchase Agreement described the property as "160 developed, full hookup recreational vehicle ('RV') sites (plus 10 additional licensed but unimproved sites) and 29 separate and private mobile homes ('MH') sites." A832.

Under the Purchase Agreement, as amended, the due diligence period lasted from March to June. A745, A917-919. Emily Demarco was Blue Beach's

representative responsible for due diligence. A745. She met several times with Mr. Cohee, including at his office in Pine Haven. A746-747. Mrs. Demarco asked Mr. Cohee to provide her with any written leases or contracts he had with the residents, and he told her he had none. A748. She described his record keeping as "unorganized" in a "disheveled office" with no electronic records. *Id*. Mr. Cohee provided Mrs. Demarco a 2021 Division of Public Health permit that authorized the operation of a "recreation camp" from April to October. A746, A855. Mr. Cohee had not obtained that permit to operate in 2022, so Mrs. Demarco helped him apply for and obtain that permit. A746, A831, A856.

Blue Beach took title to the property on September 15, 2022. A749, A920-924. One month later, Blue Beach raised the monthly rent being charged to the manufactured home owners from $350 to $450. A764. While there were 29 manufactured homes present at the time, initially only 20 people paid the higher rent, and that decreased to just nine people. *Id.*

When Blue Beach became the owner of Pine Haven, all residents were living there with Mr. Cohee's permission. A675. Mr. Cohee conveyed all leases, licenses, and agreements to Blue Beach as part of the sale. A848-854. There is no evidence that any resident entered into a new lease or license agreement with Blue Beach.

On September 22, 2022, the Delaware Manufactured Home Relocation Authority ombudsman emailed Blue Beach's then-outside counsel Nicole Faries,

stating his view that some of the residents were subject to the Manufactured Homes and Manufactured Home Communities Act, 25 *Del. C.* § 7001 *et. seq*. (the "MH Act"). A1040-1042. That was the first time any State representative had communicated with Blue Beach's representatives about the residents' legal status. A792. Soon after, Ms. Faries was contacted by various legal aid attorneys about whether the park was seasonal or year-round, and whether the MH Act applied to certain residents. A793.

In January 2023, Blue Beach received a Notice of Violation from DNREC regarding the surfacing of untreated wastewater from the park's sewage system. A925-931. The corrective action that DNREC wants, and that Blue Beach has proposed to undertake, is a substantial effort that will require disruptive construction. A735, A739, A925-948.

In February 2023, Blue Beach decided to pursue a change of use for the park under the MH Act. This decision was prompted by DNREC's notice, the need to fast-track infrastructure improvements, and a desire to bring clarity to the situation at the park in light of the confusion and concerns raised by many stakeholders. A752, A778-779, A795-796. In February 2023, Blue Beach gave written notice of the change of use to all manufactured home residents, giving them one year to find another location for their manufactured homes before the property would no longer be subject to the MH Act. A949-1039; 25 *Del. C.* § 7024(b).

C. Communications with residents.

The DOJ's claims and the Hearing Officer's Decision focus on certain communications Blue Beach made to Pine Haven residents. The two communications with RV residents that the Hearing Officer found violated the CFA were the July 18, 2022 Dear RV Lessees Letter (A816) and the February 23, 2023 Notice of Revocation of Guest License (A905). Both communications were intended to end the RV residents' licensor-licensee relationship with Blue Beach and request that they vacate the community. *Id.* Similarly, the four communications with manufactured home residents that the Hearing Officer found violated the CFA were the June 30, 2022 Dear Tenant Letter (A830), the February 23, 2023 "One Year Notice of Termination of Your Rental Agreement Letter" (A884-885, A949-950), the March 7, 2023 Move Out Incentive Letter (A914), and the Settlement Agreements and Stipulated Agreements (A907-913), all intended to end the parties' landlord-tenant relationship.[1]

[1] As Blue Beach conceded below, the Three-Year Seasonal Lot License documents (A818-828, A863-882, A895-904) and the September 2022 "Hello!" Letter (A829, A883, A894) to the manufactured home residents were potentially within the CFA's scope, as those communications were intended to encourage the manufactured home owners to enter into a new agreement with Blue Beach regarding their residency. Blue Beach's appeal of violations related to those two communications is limited to its argument that the administrative proceeding was unconstitutional.

D. The administrative enforcement proceeding.

On April 3, 2023, the DOJ filed an administrative complaint against Blue Beach (the "Complaint"). A12-173. The Complaint, which was never amended, is 32 pages long and asserted eight counts against Blue Beach. *Id.* On the same day the Complaint was filed, the DOJ also issued an *ex parte* Summary Cease and Desist Order (the "Order") prohibiting Blue Beach from engaging in certain conduct. A174-175.

The DOJ's lead claims in its Complaint were that Blue Beach's communications with residents willfully violated the CFA by falsely stating: (i) that Pine Haven was a seasonal property; (ii) that if residents did not vacate, the police would become involved, and their property may be confiscated and destroyed; and (iii) residents were required to pay higher rent. A31-35 (¶¶ 69-86). The DOJ also alleged that the same conduct violated the Delaware Deceptive Trade Practices Act, 6 *Del. C.* § 2531 *et seq*. (the "DTPA"). A35-37 (¶¶ 87-101). Finally, the DOJ alleged that Blue Beach violated the MH Act by not giving covered residents a required notice and by charging higher rent. A38-41 (¶¶ 102-119).

The administrative hearing was held remotely on September 11, 13, 14, and 15, 2023. A644-815. The parties submitted post-hearing briefing. A407-553.

E. The Hearing Officer's Decision.

The Hearing Officer issued his Decision on April 4, 2024. A554-643. He ruled against the DOJ on several of its claims and requests for relief. Specifically, the Hearing Officer ruled that the DOJ had not proven its DTPA claims and that he could not order Blue Beach to pay the DOJ's attorneys' fees and investigative costs. A615-620, A592. Additionally, the Hearing Officer declined to award penalties for any violations of the MH Act. A631-622. And, although the DOJ claimed that Blue Beach had violated the Order dozens of times, the Hearing Officer found that the DOJ had not proven most of those claims. A641.

The Hearing Officer also found in favor of the DOJ and against Blue Beach on several issues. In summary, the Hearing Officer ruled that the proceeding was constitutional; that Blue Beach violated the CFA numerous times and was required to pay penalties totaling $737,500; that Blue Beach violated the MH Act and was required to rebate excess rental payments with interest; and that Blue Beach violated the Order and was required to pay penalties of $94,000. A642-643.

Blue Beach appealed the Decision to the Superior Court on April 22, 2024. A1051-1053.

F. The Superior Court's Opinion.

The parties first completed a normal round of briefing. A1054-1180. The Superior Court then requested supplemental briefing on Blue Beach's constitutional

argument. A1181-1182, A1183-A1309. Oral argument was held on November 13, 2024. A1310-1426. On December 3, 2024, the Superior Court issued an opinion reversing in part and affirming in part the Hearing Officer's Decision. The next day, the Superior Court issued a revised opinion to correct an errant heading. *See* Ex. A (the "Opinion").

The Superior Court's Opinion addressed the parties' arguments and made rulings on each, some of which favored Blue Beach.[2] Most relevant to this appeal, the Superior Court rejected Blue Beach's argument that the CFA did not apply to Blue Beach's communications made after residents began residing in Pine Haven and that were intended to end their residency. Opinion 6-11. As a result, the Superior Court affirmed the Hearing Officer's findings of CFA violations related to the February 23, 2023 Change of Use Notice, the March 7, 2023 Letter, and the Settlement Agreements / Stipulated Agreements.[3] Opinion 38. The Superior Court also rejected Blue Beach's argument that the administrative proceeding was

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[2] The Superior Court reversed on other grounds (i.e. not the scope of the CFA) the Hearing Officer's finding of CFA violations related to the June 30, 2022 Letter, the July 18, 2022 Letter, the February 23, 2023 "Dear RV Residents" Letter, and the collection of rent payment. Opinion 38; *see id.* 23-31. The Superior Court also reversed the Hearing Officer's finding that Blue Beach's acceptance of rent payment violated the Order. *Id.* 31-35, 38.

[3] The balance of the penalties relates to the August / September 2022 Lot Licenses, the September 15, 2022 "Hello!" Letter, and five findings that Blue Beach violated the Order. *See* Opinion 38. Blue Beach's appeal of those violations is limited its constitutionality argument.

unconstitutional. Opinion 35-38. The DOJ filed an unopposed motion to alter judgment, A1427-1430, prompting the Superior Court to enter an order revising its calculations to reflect the affirmance of $500,000 in penalties. Ex. B.

On January 9, 2025, Blue Beach appealed the Superior Court's judgment to this Court.

ARGUMENT

I. The CFA does not apply to Blue Beach's communications to residents after they began their residency and that were intended to end their residency.

A. Question Presented

Whether the CFA applies to Blue Beach's communications to residents after they began their residency and that were intended to end their residency. A412, A421-425, A534, A539, A541, A543-545, A549, A551 (to Hearing Officer); A1060-1061, A1072-1078, A1154-1159, A1316-1358 (to Superior Court).

B. Scope of Review

This Supreme Court "review[s] issues of statutory construction and interpretation *de novo.*" *Taylor v. Diamond State Port Corp.*, 14 A.3d 536, 538 (Del. 2011). "On an appeal from an administrative agency, [the Supreme] Court's function is limited to determining whether there is substantial evidence in the record to support the agency's decision and whether that decision is free from legal error." *Delaware Dep't of Health & Soc. Servs. v. Jain*, 29 A.3d 207, 211 (Del. 2011).

C. Merits of Argument

The CFA does not apply to every communication made by a business to a consumer. Rather, for a communication to be found unlawful under the CFA, it must have been done "in connection with the sale, lease, receipt, or advertisement of merchandise." 6 *Del. C.* § 2513(a). Based on that language, Delaware courts have

consistently ruled for decades that a business's communications made *after* a consumer entered into a transaction are outside the CFA's scope. Here, almost all the communications on which the Hearing Officer based his CFA violations are outside the CFA's scope because they were made *after* the lease or license had begun and were intended to *end* the landlord-tenant or licensor-licensee relationships. Both the Superior Court and Hearing Officer erred by ruling, for different reasons, that those communications were within the CFA's scope.

i. The CFA's text, along with decades of case law, supports holding that the CFA does not apply to Blue Beach's communications to residents after they began their residency and that were intended to end their residency.

The CFA does not apply to every communication made by a business to a consumer. Section 2513(a) of Title 6 states, with emphasis added:

> The act, use, or employment by any person of any deception, fraud, false pretense, false promise, misrepresentation, unfair practice, or the concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression, or omission, *in connection with the sale, lease, receipt, or advertisement of any merchandise*, whether or not any person has in fact been misled, deceived, or damaged thereby, is an unlawful practice.

The emphasized language of Section 2513(a) makes it clear that, for a communication to be found unlawful under the CFA, it must have been done "in connection with the sale, lease, receipt, or advertisement of merchandise."

The statutory definitions of the key terms in Section 2513(a)—sale, lease, and advertisement—show that the CFA only applies to communications that have a

nexus with the consumer entering into a transaction with the business. "'Sale' means any sale, offer for sale, or attempt to sell…." 6 *Del. C.* § 2511(8). "'Lease' means any lease, offer to lease, or attempt to lease…." *Id.* § 2511(3). And "'Advertisement' means the attempt…to induce, directly or indirectly, any person to enter into any obligation or acquire…any merchandise." *Id.* § 2511(1). The takeaway from these definitions is that the CFA is intended to apply to a business's communications to induce a consumer to pay for merchandise. Those communications occur leading up to and at the time of a transaction, not after the transaction has occurred or is in progress.

Delaware courts have consistently ruled that a business's communications made *after* the consumer entered into a transaction fall outside the CFA's scope. "The misleading statement must be made in connection with a sale, lease or advertisement, such that post-sale representations do not constitute consumer fraud under the Act." *Ayers v. Quillen*, 2004 WL 1965866, at *6 (Del. Super. June 30, 2004). "[T]his Court cannot ignore the clear language of the statute which restricts its application to deceptive practices 'in connection with the sale or advertisement' of the merchandise." *Norman Gershman's Things to Wear, Inc. v. Mercedes-Benz of N. Am.*, 558 A.2d 1066, 1074 (Del. Super. 1989), *aff'd*, 596 A.2d 1358 (Del. 1991). "Given this statutory limitation, it is clear that post-sale representations

which are not connected to the sale or advertisement of the [merchandise] do not constitute consumer fraud under the Act." *Id.*

Delaware courts have carefully applied this rule in various situations, with particular focus on whether the communications at issue were made before or after the transaction began. *See Lee ex rel. B.L. v. Picture People, Inc.*, 2012 WL 1415471, at *9 (Del. Super. Mar. 19, 2012) (finding post-sale communications about promotional use of photographs already taken by photographer not actionable); *Ayers*, 2004 WL 1965866, at *6-7 (finding advertisement on website that was present before a dog was boarded actionable); *Thomas v. Harford Mut. Ins. Co.*, 2003 WL 220511, at *4 (Del. Super. Jan. 31, 2003) (finding post-sale communications by insurance case manager to plaintiff regarding policy rights not actionable), *rearg. denied*, 2003 WL 21742143 (Del. Super. July 25, 2003); *Gershman's*, 558 A.2d at 1074-75 (finding pre-sale communications promising prompt car repairs actionable; finding post-sale communications which plaintiff relied upon in not exercising legal rights not actionable). In sum, communications made leading up to a transaction may be actionable under the CFA, but communications made after a transaction has occurred or begun are not.

Importantly, this decades-long line of case law ruling that post-transaction conduct is outside the CFA's scope has remained unaltered by the General Assembly, even while other amendments were enacted. "A fundamental canon of

statutory construction states that the long time failure of the legislature to alter a statute after it had been judicially construed is persuasive of legislative recognition that the judicial construction is the correct one." *State v. Barnes*, 116 A.3d 883, 892 (Del. 2015) (internal quotation marks and alterations omitted). "Any concerted judicial misconstruction of a statute is subject to corrective tuning by the legislature, and thus prior statute-interpreting rulings gain approving harmony from ensuing legislative silence." *Nationwide Prop. & Cas. Ins. Co. v. Irizarry*, 2020 WL 525667, at *4 (Del. Super. Jan. 31, 2020), *aff'd,* 238 A.3d 191 (Del. 2020).

This statutory interpretation principle compellingly supports Blue Beach's argument. The Superior Court's interpretation that post-transaction conduct was outside the CFA's scope was first stated in 1989. *Gershman's*, 558 A.2d at 1074. The Superior Court restated and followed this interpretation in 2003 and 2004. *Thomas*, 2003 WL 220511, at *4; *Ayers*, 2004 WL 1965866, at *6. And this interpretation was more recently applied in 2012, 2013, 2016, 2020, and 2022. *Lee*, 2012 WL 1415471, at *9; *Price v. State Farm Mut. Auto.*, 2013 WL 1213292, at *11 (Del. Super. Mar. 15, 2013), *aff'd*, 77 A.3d 272 (Del. 2013); *Dunfee v. Newark Shopping Ctr. Owner LLC*, 2016 WL 639556, at *4 (Del. Super. Feb. 16, 2016); *Olga J. Nowak Irrevocable Tr. v. Voya Fin., Inc.*, 2020 WL 7181368, at *9 (Del. Super. Nov. 30, 2020), *aff'd*, 256 A.3d 207 (Del. 2021); *Foraker v. Voshell*, 2022 WL 2452396, at *16-17 (Del. Super. July 1, 2022). During this 30-plus year period,

the General Assembly substantively amended the CFA at least seven times.[4] But none of the amendments addressed or changed the Superior Court's[5] longstanding and repeated interpretation limiting the CFA's scope. This legislative silence indicates the General Assembly's recognition that the Superior Court has properly held that post-transaction conduct is outside the CFA's scope.

Finally, a broader perspective supports Blue Beach's position that post-transaction communications are outside the CFA's scope. In the context of a consumer and business, fraud is a misrepresentation intended to induce the consumer to buy what the business is selling. *See* Consumer Fraud, BLACK'S LAW DICTIONARY (12th ed. 2024). The CFA protects consumers from a business's fraudulent conduct before a transaction begins. Absent the CFA, before a contract begins, the only other legal protection available is an action for common law fraud, which is more difficult to prove. And limiting the CFA's scope to pre-transaction conduct follows the general principle of Delaware law that fraud is no longer actionable once a contractual relationship begins. *See Hiller & Arban v. Reserves Mgmt.*, 2016 WL 3678544, at *4 (Del. Super. July 1, 2016) ("Courts generally focus on when the

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[4] 69 *Del. Laws*, c. 203, §§ 13, 17-21, 23 (1994); 71 *Del. Laws*, c. 420, §§ 1-3 (1998); 71 *Del. Laws*, c. 470, §§ 3-14 (1998); 74 *Del. Laws*, c. 113, §§ 1, 2 (2003); 80 *Del. Laws*, c. 79, § 114(a) (2015); 83 *Del. Laws*, c. 85, §§ 1-2 (2021); 83 *Del. Laws*, c. 178, § 5 (2021).

[5] This Court affirmed the Superior Court's judgments in *Olga*, *Price*, and *Gershman's*, but none of this Court's decisions discussed the CFA scope issue.

fraudulent conduct is alleged to have occurred. Allegations related to the inducement to contract have been recognized as separate and distinct conduct, while those focused on inducement of continued performance are generally impermissible."). In sum, fraud is about a relationship starting under false pretenses, and there is no reason to view consumer fraud differently.

Once a transaction begins, consumers gain legal protections through contract, tort, warranty, state statutes (like the MH Act), federal statutes, and so on. Indeed, in several of the cited Superior Court cases, CFA claims based on post-transaction conduct were dismissed, but plaintiffs were allowed to pursue claims for that same conduct under other legal theories. *See Lee*, 2012 WL 1415471, at *3, *9 (dismissing CFA claim but allowing appropriation tort claim to proceed); *Thomas*, 2003 WL 220511, at * 3-6 (dismissing CFA claim but allowing bad faith breach of contract and tortious interference claims to proceed); *Gershman's*, 558 A.2d at 1078 (dismissing CFA claim but allowing other claims to proceed including breach of warranty, deceptive trade practices, and negligence). So, affirming the Superior Court's longstanding interpretation limiting the CFA's scope to pre-transaction conduct does not leave consumers without protection and remedies for post-transaction conduct.

Applying this proper understanding of the CFA's limited scope to this case, this Court should reverse most of the Hearing Officer's findings of CFA violations.

There is no dispute that all the communications for which the Hearing Officer found CFA violations were made by Blue Beach after the residents started living in Pine Haven. *See* A1347-1348. Furthermore, there is no evidence that any resident entered into a new lease or license agreement with Blue Beach. Thus, the Hearing Officer committed legal error by rejecting Blue Beach's argument and finding that communications seeking to end current leases or licenses were within the scope of, and violated, the CFA. This legal error on the CFA's scope renders all but two of the Hearing Officer's findings legally untenable.[6] This Court should reverse all of the legally erroneous findings.

ii. The Hearing Officer's reasons for rejecting Blue Beach's argument are without merit.

The Hearing Officer rejected Blue Beach's argument for four reasons, all of which are without merit.[7] First, the Hearing Officer errantly concluded that the CFA applied to Blue Beach's communications with residents because the manufactured home owners' unwritten leases would automatically renew under 25 *Del. C.* § 7009. A599. The Hearing Officer seemed to reason that, since the leases would renew, Blue Beach's communications were made before residents entered into a new (or

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[6] The only CFA violations not affected by this legal error are those related to the Three-Year Seasonal Lot License documents and the September 2022 "Hello!" Letter. *See* Opinion 38 (summarizing violations). Those two violations are, however, subject to Blue Beach's constitutional argument.

[7] The Superior Court disagreed with the Hearing Officer's reasoning, *see* Opinion 6-9, but affirmed the Hearing Officer's ruling on a different basis, *see* Opinion 9-11.

renewed) lease, so the communications were made "in connection" with a new lease. *Id.* However, this reasoning ignores the substance of the communications, all of which were intended to *end* the *existing* leases or licenses and were not "in connection with" renegotiating or entering into new or renewed leases or licenses.

Second, the Hearing Officer "rejected [Blue Beach's] interpretation that post-sale communications are not actionable in the context of an ongoing lease," finding that the residents detrimentally relied on misleading communications about their rights. A600. The Hearing Officer appeared to distinguish the case law on the basis that the leases or licenses were ongoing as opposed to one-off sales. *Id.* This misreads the case law. In several cases where courts found post-transaction communications outside the CFA's scope, the parties had ongoing relationships which involved the consumer's legal rights:

- *Gershman's*, 558 A.2d at 1074 (ruling claims regarding processing warranty claims after purchasing a car were outside the CFA's scope, even though customer "relied upon [the representations] in not exercising its rights under the law").
- *Thomas*, 2003 WL 220511, at *4 (ruling claims regarding insurance benefits and representations made by case manager to customer after insurance contract was entered into were outside the CFA's scope).
- *Olga J. Nowak*, 2020 WL 7181368, at *9 (ruling that "the claim relates to illustrations and communications occurring after the sale of the Policy, and thus, is not actionable under the DCFA").
- *Foraker*, 2022 WL 2452396, at *17 (ruling that misrepresentations which occurred during construction over a year after the parties signed the contract "do not fall into the parameters as set forth by the CFA").

The fact that the residents' leases and licenses were ongoing does not distinguish this case from the cited decisions where courts ruled that communications made after the transaction began were outside the CFA's scope.

Third, the Hearing Officer relied on the CFA's liberal construction section to reject Blue Beach's argument. A600 (citing 6 *Del. C.* § 2512). However, courts have rejected this reasoning, ruling that the temporal limitation inherent in the text of Section 2513(a) is not overwritten by the liberal construction section. *Thomas*, 2003 WL 220511, at *4; *Gershman's*, 558 A.2d at 1074.

Fourth, the Hearing Officer embraced the DOJ's argument that the 2021 addition of "receipt" to Section 2513(a) amended the statute to apply to post-transaction conduct. A600-601. This conclusion misreads the amendment's effect and purpose. Adding "receipt" to Section 2513(a) did not unambiguously extend the CFA to post-transaction conduct. Instead, the amendment inserted "receipt" among other types of interactions—sale, lease, advertisement—that a business has with consumers. The amendment did not distinguish "receipt" from sale, lease, or advertisement; rather, "words grouped in a list should be given related meaning." *Delaware Bd. of Nursing v. Gillespie*, 41 A.3d 423, 427 (Del. 2012). Indeed, the bill's synopsis clearly explains the meaning of the new and ambiguous term "receipt." *Carper v. New Castle Cnty. Bd. of Ed.*, 432 A.2d 1202, 1205 (Del. 1981)

(stating that a bill's synopsis explains legislative intent). At the bottom of the long synopsis, the drafters included just one sentence about the addition of "receipt":

> The act also amends §2513(a) to add the term 'receipt,' to clarify that persons who provide goods or services at no charge to consumers—such as social media companies funded by advertising revenue—are not precluded from being held liable for engaging in consumer fraud simply because they may not directly sell or lease their goods or services to consumers.

Del. H.B. 91 syn., 151st Gen. Assem., 83 Del. Laws. ch. 85, §2 (emphasis added). The synopsis explains that "receipt" was added to specifically address the provision of goods or services at no charge, not to undo decades of case law holding that communications after the transaction began are outside the CFA's scope.

In conclusion, the Hearing Officer committed legal error by rejecting Blue Beach's argument and finding that communications to residents seeking to end their leases or licenses were within the scope of, and violated, the CFA.

iii. The Superior Court's reliance on a District Court case to reject Blue Beach's argument was legal error.

The Superior Court rejected Blue Beach's "position that the CFA has no application to post-closing conduct." Opinion 11. In so holding, the Superior Court did not follow the Hearing Officer's reasoning, which it found unpersuasive. Opinion 6-9. Instead, the Superior Court disagreed with the line of case law which held that post-transaction communications are outside the CFA's scope. The Superior Court opted to follow a contrary decision from the Delaware District Court

which held that "a misrepresentation made after the sale may be found by a trier of fact to be 'in connection with the sale.'" *Lony v. E.I. du Pont de Nemours & Co.*, 821 F. Supp. 956, 982 (D. Del. 1993) ("*Lony*"). Opinion 9-11. This was legal error for two reasons.

First, the Superior Court declined to follow the long line of Superior Court decisions because those opinions contained, in the court's view, "little analysis" on the CFA scope issue. Opinion 9. Accepting this criticism, the same can be said of the *Lony* opinion. In *Lony*, the primary legal issue was whether the plaintiff, a German citizen, had standing to rely on the CFA. 821 F. Supp. at 961-962. After ruling that the plaintiff had standing, the District Court devoted only three sentences to its ruling that a communication made after the sale may be within the CFA's scope. *Id.* at 962. The District Court did not cite any case law supporting its ruling, nor did it address, much less distinguish, the contrary *Gershman's* decision issued three years prior. *Lony* did not include a more robust analysis of the CFA scope issue, so jettisoning the line of Superior Court cases on that basis is not justified.

Second, *Lony* has little precedential value. No court has cited *Lony* to support holding that post-transaction communications are within the CFA's scope.[8] In fact,

[8] Then-President Judge Ridgely cited *Lony* as authority contrary to *Gershman's*, but he followed *Gershman's* and held that "post-sale representations …do not fall within the constructs of the Consumer Fraud Act." *Thomas*, 2003 WL 220511 at *4, n. 22; *see id.*, 2003 WL 21742143, at *1 (denying reargument and reaffirming *Gershman's* as the "on point" authority).

this brief cites seven Superior Court cases decided after *Lony* in which post-transaction communications were held to be outside the CFA's scope. And, in 2015, the District Court did not cite *Lony* and instead followed the Superior Court decisions, ruling that "[p]ost-sale representations not connected with the sale or advertisement of merchandise do not fall within the purview of the DCFA." *Christiana Care Health Servs., Inc. v. PMSLIC Ins. Co.*, 2015 WL 6675537, at *7 (D. Del. Nov. 2, 2015) (citing *Thomas* and *Price*). Therefore, the outdated *Lony* decision stands alone in the face of at least a half-dozen state and federal court decisions that support Blue Beach's argument. The Superior Court's reliance on *Lony* was legal error.

II. This administrative proceeding violated Blue Beach's right to a jury trial under the Delaware Constitution.

A. Question Presented.

Whether this administrative proceeding, in which the DOJ prosecuted CFA claims against Blue Beach seeking civil monetary penalties, violated Blue Beach's right under the Delaware Constitution to a jury trial. A444-447, A514, A552 (to Hearing Officer); A1098-1101, A1176-1180, A1183-1231, A1267-1293, A1401-1424 (to Superior Court).

B. Scope of Review.

"Questions of law and constitutional claims are decided *de novo*." *Doe v. Wilmington Hous. Auth.*, 88 A.3d 654, 661 (Del. 2014). "On an appeal from an administrative agency, [the Supreme] Court's function is limited to determining whether there is substantial evidence in the record to support the agency's decision and whether that decision is free from legal error." *Jain*, 29 A.3d at 211.

C. Merits of Argument

Delaware's Constitutions, from the State's founding era to the present, have guaranteed the right to trial by jury as it existed at common law. Delaware courts have preserved the constitutional right to a jury trial in actions at law, including declaring statutory schemes that infringe on that right unconstitutional. Historically, fraud cases were tried by jury in law courts in both England and Delaware, and monetary penalties were only available at law. The United States Supreme Court's

recent decision in *SEC v. Jarkesy*, 144 S.Ct. 2117 (2024) ("*Jarkesy*"), which held that a defendant had the right under the federal constitution to a jury trial in a remarkably similar case, supports Blue Beach's argument. In the administrative proceeding on appeal here, the DOJ pursued CFA claims against Blue Beach and was awarded substantial civil penalties. Because the DOJ pursued its case administratively and not in court, a specially appointed deputy attorney general decided the case, not a jury. That violated Blue Beach's right to a jury trial under the Delaware Constitution.

The Hearing Officer and Superior Court ruled the administrative process did not implicate the constitutional jury trial right because, in their view, the DOJ's CFA claims were "plainly" (A595) and "significantly" different (Opinion 37) from common law fraud claims. This distinction, however, is overstated and immaterial. The substance and nature of the DOJ's CFA claims remained centered on proving that Blue Beach made false statements to residents, with the DOJ seeking civil monetary penalties—a legal claim and remedy. As such, the jury trial right applies to the DOJ's CFA claims and requested remedies.

i. The history and interpretation of Delaware's constitutional right to a jury trial.

Delaware's constitutional guarantee of the right to a jury trial has its roots in the State's founding in the late 18th century. "Following the signing of the Declaration of Independence on July 4, 1776, several states adopted their own

constitutions, which included their own bills of rights." *Claudio v. State*, 585 A.2d 1278, 1290 (Del. 1991) (quotation and citation omitted). In Delaware, a convention met on August 27, 1776 to draft a constitution for the State. *Id.* The convention adopted the Declaration of Rights and Fundamental Rules of the State of Delaware on September 11, 1776. *Id.* Section 13 of that declaration provided that, "trial by jury of facts where they arise is one of the greatest securities of the lives, liberties and estates of the people." *Id.* (quoting the Declaration). "The original 1776 Delaware Constitution incorporated the thirteenth section of the Declaration" and its jury trial guarantee. *Storey v. Camper,* 401 A.2d 458, 463, n.4 (Del. 1979); *McCool v. Gehret*, 657 A.2d 269, 282 (Del. 1995) (quoting Del. Const. of 1776, art. 25).

Each subsequent Delaware Constitution memorialized and secured the jury trial right in Article I, Section 4, which provides that "[t]rial by jury shall be as heretofore." "This language has appeared in Article I, Section 4 of three successive Delaware constitutions—1792, 1831 and 1897." *Claudio*, 585 A.2d at 1297. The 1897 Constitution, as amended, is the operative constitution today. *See In re Request of Governor for Advisory Opinion*, 950 A.2d 651, 653 (Del. 2008).

Delaware courts have consistently interpreted this provision as guaranteeing the right to a jury trial as it existed at common law. As explained in *Claudio*, "the proper focus of any analysis of the right to trial by jury, as it is guaranteed in the Delaware Constitution, requires an examination of the common law." 585 A.2d at

1297-1298. This examination involves reviewing the legal history to determine whether the nature of the action or remedy sought were tried by jury in a law court when the constitutional guaranty was reaffirmed in 1897. *Ellery v. State ex rel. Sec'y of Dep't of Transp.*, 633 A.2d 369 (Del. 1993); *Hopkins v. J.P. Court No. 1*, 342 A.2d 243, 244 (Del. Super. 1975).

ii. Delaware courts have ruled that there is a constitutional right to a jury trial in actions at law.

Delaware courts have addressed how the right to a jury trial under the Delaware Constitution applies in civil cases. Emerging from this body of case law is a straightforward framework—there is a constitutional right to a jury trial in actions at law, but not in actions that are historically equitable. *See* A1266, Hon. Randy J. Holland, *The Delaware State Constitution: A Reference Guide* 47 (2d ed. 2017) ("The common law right to trial by jury exists for actions at law but not for actions brought in equity.").

Actions at Law. Several cases stand for the general proposition that a party has the right under the Delaware Constitution to a jury trial in an action at law. *E.g. McCool*, 657 A.2d at 282 ("A sine qua non of that common law jurisprudence is the principle that either party shall have the right to demand a jury trial upon an issue of fact in an action at law."); *Graham v. State Farm Mut. Auto. Ins. Co.*, 565 A.2d 908, 912 (Del. 1989) (noting that a contract action is an action at law, so either party is entitled to request a jury trial); *Park Oil, Inc. v. Getty Ref. & Mktg. Co.*, 407 A.2d

533, 535 (Del. 1979) ("The right to a jury trial, however, applies to an action at law; it does not apply in an equity suit.").

In two cases that deserve particularly close attention here, the Superior Court ruled that new statutory schemes which reframed historical common law actions were unconstitutional because the statutes deprived litigants of their constitutional right to a jury trial.

In *Hopkins*, tenants petitioned the Superior Court to prevent the J.P. Court from proceeding with summary possession actions against them without affording them their constitutional right to a jury trial. 342 A.2d 243, 244 (Del. Super. 1975). Three years earlier, the Delaware Landlord Tenant Code (the "Code") was enacted, which included a summary possession process that started with a trial before a single justice and could then be appealed *de novo* to a three-justice panel. Under the new Code, the tenants had no right to a jury trial. *Id.* at 245.

The tenants successfully argued that, at common law, eviction proceedings were tried to a jury. *Id.* at 244. "At common law, and in Delaware prior to 1793, a landlord seeking to recover leased premises relied upon an action of ejectment" and "[e]jectment actions were historically triable to a jury." *Id.* at 244. "[A]t the time of the adoption of the present State Constitution (1897) such proceedings were triable before a jury of three persons and remained so until the 1972 statute here under attack." *Id.* at 245. In response, the DOJ (defending the Code and the J.P.

Court) argued that the court should "be reluctant to strike down a statute of obvious good purpose" and that the summary possession process in the Code was "a new and distinct remedy which, unlike the common law ejectment action, did not exist 'heretofore' and thus imparts no jury requirement." *Id.* at 245, 246.

The Superior Court agreed with the tenants and held that the Code was unconstitutional because it denied a litigant in a summary possession proceeding a jury trial in the form that existed when the 1897 Constitution was adopted. *Id.* at 247. In so holding, the Superior Court analyzed the history of the common law cause of action of "ejectment," which was the foundation of the modernized eviction proceeding. *See id.* at 245 ("It is clear from the history of the repossession statute that its origin lies in the common law action of ejectment."). And the Superior Court rejected the contention that the Code and its possession remedy were new and therefore did not exist "heretofore." *Id.* The Superior Court instead "look[ed] at the substance and not the mere form" of the Code's intent to address the repossession of rented property. Viewed through that prism, the Superior Court found that the Code "embraces litigation traditionally triable before a jury[,] and it is the nature of the proceeding rather than its designation which determines whether it is traditionally triable by jury." *Id.* at 246. Therefore, the Superior Court ruled that the Code's summary possession process was unconstitutional.

In *Allstate*, a car owner and her insurer filed a replevin action against a repair shop that was asserting a garagemen's lien and refusing to release a vehicle. 787 A.2d 742 (Del. Super. 2001). The repair shop moved to dismiss for lack of jurisdiction, arguing that a statute granted the J.P. Court exclusive jurisdiction over replevin actions in garagemen lien cases. The plaintiffs countered that the J.P. Court did not provide for a jury trial in replevin cases, which deprived them of their constitutional right to a jury trial. *Id.* at 743. The Superior Court sided with the plaintiffs and held that "granting the Justices of the Peace exclusive jurisdiction over replevin actions in garagemen lien cases where there is no right to a jury trial violates plaintiffs' right to a jury trial as protected by the Delaware Constitution." *Id.*

To reach this holding, the Superior Court began with a historical analysis of replevin actions which showed that, before the 1897 Constitution was adopted, such cases were exclusively in the Superior Court's jurisdiction and involved jury trials. *Id.* at 743-47. Next, the Superior Court reviewed statutory enactments after 1897 that granted concurrent jurisdiction to the J.P. Court and, most importantly, changed the court that heard appeals from J.P. Court decisions. *Id.* at 748. Before 1995, such appeals were heard *de novo* in the Superior Court where a jury trial could be held. *Id*. Since 1995, however, such appeals were heard by the Court of Common Pleas where there are no civil jury trials, and appeals from that court to the Superior Court were on the record. *Id.*

The change of forum for appeals of J.P. Court decisions in replevin actions eliminated the opportunity for a jury trial, which the Superior Court ruled was unconstitutional. "The effect of the law redirecting appeals to the Court of Common Pleas where they involve garagemen's liens is to extinguish altogether the historic right to a jury trial." *Id.* at 749. "Therefore, since 1995, a litigant wishing to file a replevin action in a garagemen's lien case would never have the opportunity to have a jury trial. This violates Article 1, Section 4 of the Delaware Constitution." *Id.* at 749. In closing, the Superior Court noted the "laudable purpose" of the recent jurisdictional changes, but ruled that policy justifications could not "overcome the more fundamental right to a jury trial for a litigant who seeks it in a replevin action arising out of a garagemen's lien." *Id.* 750.

In summary, many Delaware cases demonstrate that the Delaware Constitution preserved the right to a jury trial in actions at law, and *Hopkins* and *Allstate* prove that efforts to statutorily modernize common law legal actions cannot eliminate the constitutional right to a jury trial for those legal claims and remedies.

Actions in Equity. By contrast, several cases show that there is no right to a jury trial under the Delaware Constitution for actions that are historically equitable. In *Money Store/Delaware, Inc. v. Kamara*, the court held that there is no right to a jury trial in a mortgage foreclosure action because "mortgage foreclosure proceedings trace their roots to the power of the High Court of Chancery of Great

Britain which had the power to foreclose a mortgage by a bill in equity." 704 A.2d 282, 283 (Del. Super. 1997). In *Moore v. Graybeal*, the court upheld the Superior Court's dismissal of a collateral attack on a will, ruling there was no right to a jury trial because the claim was exclusively in the jurisdiction of the Court of Chancery. 550 A.2d 35 (Del. 1988). And in *State v. Cahill*, the court held that the Delaware Constitution did not grant a putative father the right to a jury trial on the issue of paternity, as that was a new cause of action that had its roots in equitable actions for child support. 443 A.2d 497, 499 (Del. 1982).

iii. The legal history of fraud claims and monetary penalties show that the DOJ's case is an action at law that must be tried by a jury.

In this case, the DOJ pursued CFA claims and sought civil penalties. A review of the English and Delaware common law shows that fraud claims and requests for monetary penalties were tried by juries in law courts. As a result, both the DOJ's cause of action and the requested punitive legal remedy mean this case may only be decided by a jury in a court of law.

Fraud Claims. Under the English common law, fraud claims were heard exclusively in law courts, which used juries. *See*, A1216-1224, *Pasley v. Freeman*, 100 Eng. Rep. 450, 456 (KB 1789) (overruling post-trial motion and deferring to

jury's finding that defendant committed fraud);[9] A1226-1228, *Sowerby v. Warder*, 30 Eng. Rep. 124, 126 (Ex. 1791) (Chancellor stating, "the Court leaves the question of fraud to be tried by a jury….").

Likewise, under Delaware's common law up through 1897, fraud or "deceit" cases were tried only by juries in law courts. *See Grier v. Dehan*, 1877 WL 2278, at *3 (Del. Super. Oct. 1877) (charging a jury in a deceit case); *Herring v. Draper*, 1859 WL 1343, at *3 (Del. Super. Oct. 1859) ("The action was for an alleged deceit practiced on the plaintiff by the defendant…. the jury had heard the evidence on both sides, and it would be for them alone to determine the facts to which that evidence related."); *see also Mears v. Waples*, 1868 WL 1010, at *20 (Del. Super. Apr. 1868) (charging a jury: "But again, [was the defendant] in fact, guilty of fraud? This is a question to be determined by the jury in view of all the evidence before them.").

Monetary Penalties. Actions for civil penalties were also tried by jury in English law courts. "A civil penalty was a type of remedy at common law that could only be enforced in courts of law. Remedies intended to punish culpable individuals, as opposed to those intended simply to extract compensation or restore the status quo, were issued by courts of law, not courts of equity." *Tull v. U.S.*, 481 U.S. 412, 422 (1987); *see id.* at 418 ("English courts had held that a civil penalty suit was a particular

[9] Justice Gorsuch in his concurrence in *Jarkesy* cited *Pasley* as authority showing that fraud claims were tried by juries in English law courts. *Jarkesy*, 144 S. Ct. at 2145.

species of an action in debt that was within the jurisdiction of the courts of law." (collecting English authority)); *see also*, A1230-1231, *Calcraft v. Gibbs*, 101 Eng. Rep. 11, 11-12 (K.B. 1792) (granting new jury trial in a debt action for civil penalties).

Similarly, under Delaware common law, civil monetary penalties can only be pursued in law courts; the Court of Chancery does not enforce penalties. *Beals v. Wash. Int'l*, 386 A.2d 1156, 1159 (Del. Ch. 1978) ("Chancery historically and traditionally did not enforce forfeitures or penalties and that this was the rule of law in the high court of chancery in England in 1776 and is therefore the rule in this Court today."); *see Cape Henlopen Taxpayers for Fair Elections v. Cape Henlopen Sch. Dist.*, 2007 WL 98486, at *1 (Del. Ch. Jan. 3, 2007) (describing the "imposition of penalties" as "a classic matter for the law courts.").

This Court's decision in *American Appliance, Inc. v. State ex rel. Brady* answers the historical inquiry and confirms that the monetary penalties sought here are common law remedies heard in a court of law and tried to a jury. 712 A.2d 1001 (Del. 1998).[10] In *American Appliance*, the DOJ brought an action in Superior Court against an appliance store for CFA violations and sought civil monetary penalties. The Supreme Court held that the Superior Court had subject matter jurisdiction because the Delaware Constitution grants the Superior Court jurisdiction over "*all*

[10] In both *American Appliance* and this case, the DOJ was proceeding under Chapter 25 of Title 29.

causes of a civil nature, real, personal and mixed, *at common law*....” *Id.* at 1003 (quoting Del. Const. Art. IV, § 7 (emphasis added)). The Court further reasoned that the DOJ’s “action to recover a civil penalty is an action ‘of a civil nature’ and is akin to a common law action to recover a debt.” *Id*. As support, the Court summarized the United States Supreme Court’s holding in *Tull v. U.S.* in a parenthetical: “where, in considering the right to a jury trial in an action for a civil penalty, the Supreme Court noted that ‘[a] civil penalty was a type of remedy at common law that could only be enforced in courts of law.’” *American Appliance*, 712 A.2d at 1003, n.10 (quoting *Tull*, 481 U.S. at 422). Thus, this Court has confirmed that a party has the right to a jury trial in actions for civil penalties under the same Delaware Code chapter that the DOJ is proceeding under here.

iv. This administrative enforcement proceeding violated Blue Beach’s right under the Delaware Constitution to have fraud claims and requests for monetary penalties tried by a jury.

This Court should hold that this administrative proceeding violated Blue Beach’s jury trial right under the Delaware Constitution. The DOJ’s CFA claims and its request for monetary penalties make this case, at its core, an action at law. Therefore, Blue Beach has the constitutional right to have a jury decide the case.

First, the DOJ’s CFA claims are fraud claims, rooted in concepts of common law fraud, which were historically tried by a jury. The DOJ alleged that Blue Beach violated the CFA by willfully making false and misleading representations to

residents about the nature of the park and their rights to reside there. *See* A32-34 (¶¶ 71, 77, 83). To prove a CFA violation, the DOJ must show that Blue Beach made false or misleading representations to, or intentionally omitted or concealed material facts from, the residents. 6 *Del. C.* § 2513(a). The requirement to prove a false or misleading representation is also the foundation of a common law fraud claim. *See In re Brandywine Volkswagen*, 306 A.2d 24, 27 (Del. Super. 1973) (stating "the common thread which runs through" common law fraud, equitable fraud, and CFA claims is the "creati[on] of a condition of falseness."); *Nye Odorless Incinerator Corp. v. Felton*, 162 A. 504, 509 (Del. Super. 1931) (describing elements of common law fraud and deceit: "This is what is commonly known as an action of deceit. The gist or foundation of the action is fraud. Without fraud the action does not exist."). While the CFA does not require proof of reliance, damages, or, in some circumstances, intent, "[i]n all other respects [] the statute must be interpreted in light of established common law definitions and concepts of fraud and deceit." *Stephenson v. Capano Dev., Inc.*, 462 A.2d 1069, 1074 (Del. 1983). A CFA claim is fundamentally a fraud claim, and fraud claims were tried by jury at common law.

Second, the DOJ sought, and the Hearing Officer awarded, substantial monetary penalties—a remedy only available at common law. The Hearing Officer imposed administrative penalties totaling $737,500 for CFA violations. A642. Historically, civil penalties were only available at law, not equity. *Beals*, 386 A.2d

at 1159. And this Court in *American Appliance* ruled that the DOJ's claim seeking civil penalties for CFA violations was a civil action at common law, quoting with approval the United States Supreme Court's ruling that a litigant has a right to a jury trial for civil penalties. *Id.*, 712 A.2d at 1003, n.10 (quoting *Tull*, 481 U.S. at 422). Because the DOJ sought and was awarded civil penalties here, Blue Beach had the right to a jury trial under the Delaware Constitution.

v. The United States Supreme Court's interpretation of the Seventh Amendment supports ruling that this proceeding violated Blue Beach's Delaware constitutional right to a jury trial.

While the Seventh Amendment to the United States Constitution has not been incorporated to apply to the States,[11] the related jurisprudence is important persuasive authority[12] which supports holding this administrative proceeding is unconstitutional per the Delaware Constitution's jury trial guarantee.[13]

In the United States Supreme Court's 2024 *Jarkesy* case, the SEC had initiated an administrative enforcement action for violations of anti-fraud provisions of federal securities laws and sought civil penalties. *Id.*, 144 S.Ct. at 2126. The SEC

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[11] *McDonald v. City of Chicago, Ill.*, 561 U.S. 742, 765, n.13 (2010).
[12] *See Baird v. Owczarek*, 93 A.3d 1222, 1226-1233 (Del. 2014) (relying on federal authority about investigating juror misconduct and its prejudicial effect on jury trial rights under the Delaware Constitution).
[13] *See Claudio*, 585 A.2d at 1291-1298 (Holland, J.) (explaining how Delaware has taken a comprehensive approach to preserve all features of its constitutional jury trial right, whereas the United States Supreme Court has taken a narrower, selective approach to the federal constitutional jury trial rights).

brought the claims in-house before an administrative law judge, with the SEC levying a $300,000 civil penalty among other remedies. *Id.* at 2127. The defendants appealed, and the Fifth Circuit vacated the SEC's order, holding that "the agency's decision to adjudicate the matter in-house violated [the defendants'] Seventh Amendment right to a jury trial." *Id.* The United States Supreme Court granted certiorari and affirmed. *Id.*

The Court held that the defendants were entitled to a jury trial, stating that a "defendant facing a fraud suit has the right to be tried by a jury of his peers before a neutral adjudicator." *Id*. at 2139. The Court identified two factors to determine if the jury trial right was implicated: (1) whether the action was akin to a common law cause of action; and (2) whether the remedy was the type that could only be obtained in a court of law. *Id.* at 2129.

On the first factor, the Court found that the "close relationship between the causes of action in this case and common law fraud" implicated the jury trial right. *Id.* at 2130. "Both target the same basic conduct: misrepresenting or concealing material facts." *Id.* And the Court reasoned that there was an "enduring link" between statutory fraud and the common law "ancestor" because common law fraud principles are used to interpret federal securities law. *Id.* at 2130-2131.

On the second factor, the Court found that the civil penalties sought by the SEC were a "prototypical common law remedy" that were designed to punish the

defendants, not compensate victims. *Id.* at 2129-2130. Therefore, the penalties were a "type of remedy at common law that could only be enforced in courts of law." *Id.* As such, the Court ruled that the defendants were entitled to a jury trial. *Id.* at 2127.

Jarkesy's holding that an administrative enforcement proceeding seeking civil penalties for statutory fraud violated the defendant's constitutional right to a jury trial persuasively supports this Court reaching the same conclusion for three reasons. First, the facts and procedural posture of the cases are strikingly similar, with both involving the government using an administrative enforcement proceeding under a statutory scheme to seek civil penalties for fraud. Second, *Jarkesy* raised the same questions about the Seventh Amendment right to a jury trial that Delaware courts consider when interpreting Delaware's constitutional jury trial right: are the claim and remedy legal in nature under the common law? *Id.* at 2129; *see, e.g., Hopkins*, 342 A.2d at 246. Third, *Jarkesy* compellingly rebuts the DOJ's arguments in this case. It holds that the jury trial right applies to a statutory claim as long as the claim is "legal in nature,"[14] it is irrelevant whether the plaintiff is the government or a private litigant,[15] and the statutory fraud claim need not be identical to common law fraud to trigger the jury trial right—only a "close relationship" is necessary to

[14] *Jarkesy*, 144 S. Ct. at 2128 (quoting *Granfinanciera, S. A. v. Nordberg*, 492 U.S. 33, 53 (1989)); *see also id.* at 2136.
[15] *Id.* at 2128.

confirm that the action is "legal in nature."[16] *Jarkesy* convincingly supports ruling that this administrative proceeding violated Blue Beach's right to a jury trial under the Delaware Constitution.

vi. The Hearing Officer and Superior Court erred by ruling that the jury trial right did not apply because of differences between the DOJ's CFA claims and common law fraud.

Both the Hearing Officer and the Superior Court found that this administrative proceeding did not violate Blue Beach's jury trial right because the DOJ's CFA claims are "plainly" (A595) and "significantly" different (Opinion 37) from common law fraud. This was legal error for two reasons.

First, the differences between the DOJ's CFA claims and common law fraud are overstated, especially regarding the elements focused on Blue Beach's conduct. It is correct that the DOJ was not required to prove reliance or damages to prevail on its CFA claims. 6 *Del. C.* § 2513(a); *Stephenson*, 462 A.2d at 1074. But the DOJ's CFA claims, as pled in the Complaint, required the DOJ to prove that Blue Beach willfully made affirmative misrepresentations, or concealed materials facts with the intent that residents would rely on the concealed facts. A32-34 (¶¶ 71-74, 77-80, 83-86); 6 *Del. C.* § 2513(a); 29 *Del. C.* § 2524(b). This means the DOJ was still required to prove the first three elements of a common law fraud claim: a false representation, knowing falsity or reckless indifference to the truth, and an intent to

[16] *Id.* at 2131; *see id.* at 2136.

induce. *See Stephenson*, 462 A.2d at 1074 (listing common law fraud elements). While the DOJ was not required to prove the last two elements of a common law fraud claim (reliance and damages), those elements focus on the prosecuting party. Critically, the elements shared by the two claims focus on Blue Beach's conduct, and Blue Beach is the party requesting that a jury decide if its conduct met those elements. For Blue Beach, there is no real difference between the DOJ's CFA claims and a common law fraud claim—the inquiry into Blue Beach's conduct is the same.[17]

Second, the differences between the DOJ's CFA claims and common law fraud are not significant enough to eliminate Blue Beach's jury trial right. While the codification of a common law claim will inevitably lead to some differences, these differences should not nullify the jury trial right attached to the claim.[18] To determine whether a statutory claim triggers the constitutional right to a jury trial, the court "looks at the substance not the mere form" of the statute and asks whether

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[17] Likewise, the Superior Court noted that the CFA and the Consumer Protection subchapter of Title 29 give the state standing, a longer statute of limitations, and greater remedies which are different from a common law fraud claim. Opinion 37. Again, those differences favor the prosecuting party; they do not change the core elements shared with common law fraud that focus on the conduct of the defending party, Blue Beach, which is seeking a jury trial.

[18] For example, a medical negligence action was a common law claim until it was codified in 1976. *Peters v. Gelb*, 314 A.2d 901 (Del. 1973); 60 Del. Laws, c. 373, § 1. There is now a detailed statutory framework for medical negligence claims. 18 *Del. C.* § 6801 *et seq*. Despite the new statutory features and limitations, it is settled law that parties in a medical negligence action have a constitutional right to a jury trial. *See Robinson v. Mroz*, 433 A.2d 1051, 1056 (Del. Super. 1981).

it "embraces litigation traditionally triable before a jury." *Hopkins*, 342 A.2d at 246. "It is the nature of the proceeding rather than its designation which determines whether it is traditionally triable by jury." *Id.*

Here, the substance and nature of the DOJ's CFA claims embrace litigation—fraud claims and penalties—which are traditionally triable to a jury. While the DOJ's CFA claims are less onerous to prove than common law fraud, they still require proof of false or misleading representations by Blue Beach and are based on established common law fraud concepts. *Stephenson*, 462 A.2d at 1074; *In re Brandywine Volkswagen*, 306 A.2d at 27. Allowing the DOJ to proceed administratively on its CFA claims, which are rooted in common law fraud and seek a punitive legal remedy, both of which are "traditionally triable by jury," violates Blue Beach's right to a jury trial under the Delaware Constitution.

CONCLUSION

For the reasons above, this Court should reverse the rulings of the Superior Court and Hearing Officer and hold that: 1) the CFA does not apply to Blue Beach's communications to a resident after they began their lease or license and that were intended to end their residency; and, 2) this administrative proceeding in which the DOJ pursued CFA claims for civil penalties violated Blue Beach's right to a jury trial under the Delaware Constitution.

Dated: March 3, 2025

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