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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 C.A. No. S24A-04-001
THE DELAWARE DEPARTMENT OF JUSTICE CONSUMER PROTECTION UNIT,	)	
Appellee Below, Appellee/Cross-Appellant	)	

APPELLEE/CROSS APPELLANT'S CORRECTED ANSWERING BRIEF AND OPENING BRIEF ON CROSS-APPEAL

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NATURE OF PROCEEDINGS

Pine Haven was a manufactured home and recreational vehicle ("RV") community in Lincoln, DE that was home to people who could not afford to live elsewhere. When the new owner, Blue Beach Bungalows DE, LLC ("Blue Beach"), purchased the community, it had the singular goal of getting rid of residents through any possible avenue. In less than a year, it variously pronounced to a variety of residents that they had three-year seasonal lot licenses, that they possessed revokable guest licenses, that they had month-to-month rental agreements, and threatened many of them that they could become holdover tenants and criminal trespassers. Similarly, Blue Beach barraged the residents with ever-shifting deadlines by which to move out. RV owners were given deadlines of August 31, 2022; October 31, 2022; March 15, 2023; and May 1, 2023. Manufactured home owners were given deadlines of October 31, 2023; February 28, 2024; and November 15, 2025.

On April 3, 2023, the Director of Consumer Protection (the "Director") at the Delaware Department of Justice's Consumer Protection Unit ("CPU") issued a Summary Cease and Desist Order (the "Summary Order") to Blue Beach in response to these various communications. A174-175. Following the Summary Order and the appointment of a hearing officer (the "Hearing Officer"), the parties engaged in briefing, oral argument, a hearing regarding a violation of the Summary Order, and a hearing on the merits, culminating in the Hearing Officer's post-hearing

opinion and order (the "Decision"). In the Decision, the Hearing Officer awarded $737,500 for violations of the Consumer Fraud Act, 6 *Del. C.* § 2511 *et seq*. (the "CFA") and $94,000 for violations of the Summary Order, and ordered Blue Beach to rebate any rent payments made in excess of the amount permitted in the Manufactured Homes and Manufactured Home Communities Act, 25 *Del. C.* § 7001 *et seq*. (the "MH Act"). A554-643.

Blue Beach appealed the Decision to the Superior Court. The Superior Court affirmed on the two major issues of this case—the CFA's application to post-transaction conduct and the constitutionality of the hearing process—as well as $500,000 in civil penalties. Ex. A to Appellant's Op. Br. (the "Opinion") at 11, 37-38; Ex. B to Appellant's Op. Br. It vacated the Decision on certain other issues. Opinion at 22-25, 29-31.

SUMMARY OF ARGUMENT

1. Denied. Neither the Superior Court nor the Hearing Officer erred in finding that communications made after the formation of a lease were within the CFA's scope. For a communication to be within the scope of the CFA, it must be simply "in connection with the sale, lease, receipt, or advertisement of any merchandise." 6 *Del. C* § 2513(a). The plain text of the statute does not mention any time limitation; instead, the communication merely needs to relate to the lease or receipt of the merchandise (which includes real estate and related services). Here, Blue Beach's communications largely concerned the seasonal or year-round status of the property covered by residents' leases as well as the residents' ability to remain on that property. As such, these communications plainly are in connection with the lease and receipt of merchandise.

Additionally, these communications differ from the Superior Court cases cited by Blue Beach, as unlike here, those cases 1) involved sales rather than leases and 2) were decided before the addition of "receipt" to the CFA.

2. Denied. Both the Superior Court and Hearing Officer correctly found that the CPU's administrative process did not violate Blue Beach's right to a jury trial under Article 1, Section 4 of the Delaware Constitution. When deciding whether a cause of action comes with the right to a jury trial, Delaware courts examine whether such right attached to the cause of action at common law. If so, a right to a jury trial exists

for that cause of action. But if no right to a jury trial attached at common law, or if the cause of action did not exist, then no right to a jury trial exists today. Here, the CFA creates a distinct cause of action for the Attorney General that did not exist at common law. As such, the CFA did not come with the right to a jury trial at common law and thus, Blue Beach does not have a right to a jury trial.

CPU's Cross Appeal

3. This Court should find that the letters that Blue Beach sent to residents on June 30, 2022 and July 18, 2022 violated the CFA, both for the reasons articulated by the Hearing Officer and for additional independent reasons. The Hearing Officer's Decision on this issue should be affirmed, since Blue Beach's status as an equitable owner did not give it the right to send these letters, and CPU adequately pleaded that Blue Beach violated the CFA by sending these letters despite not owning the property. Additionally, independent grounds exist to affirm: the June 30 letter threatened residents with penalties under the Landlord-Tenant code despite the Landlord-Tenant Code not applying to them, while Appellant's July 18 letter made false threats and misrepresented the nature of residents' leases.

4. This Court should find that the February 23, 2023 letter to RV owners violated the CFA. The letter made false threats and falsely claimed that Pine Haven was not a year-round facility, despite being sent to year-round RV residents.

5. This Court should find that Blue Beach violated the CFA for collecting rent payments that were prohibited by law. The Superior Court erred in finding that there was not substantial evidence to support this finding, both because evidence in the record demonstrates that Blue Beach employees physically received these payments and because, even absent such evidence, Blue Beach was aware that it was receiving these payments and failed to inform residents that Blue Beach could not legally

charge this amount. Additionally, CPU adequately pleaded that this rent collection violated the CFA.

STATEMENT OF FACTS

I. Pine Haven Background and History

Pine Haven is a community located in Lincoln, Delaware. A832. Prior to Blue Beach's purchase of the community in 2022, the community had been owned by Dale Cohee. A666. At the time of the sale to Blue Beach, Pine Haven contained both manufactured homes and RVs. *Id.* The manufactured home residents lived there year-round, while the RVs contained a mix of year-round and seasonal residents. *Id.* Cohee allowed about 40 RV residents to live there year-round since they could not afford to live elsewhere. A672.

II. Transfer of ownership of Pine Haven

In March 2022, Cohee's entity Pine Haven Campground, LLC and Rig Acquisitions, LLC, a shell company created by Blue Beach, entered into a Commercial Real Estate Purchase Agreement which disclosed that there were 29 manufactured home sites and 160 RV sites. A667-668, A734, A832. The agreement also provided that Blue Beach would allow the manufactured home owners to live in their homes for three years after closing. A844. While closing was initially set for June 1, 2022, it was extended to September 15, 2022. A669, A745.

III. Blue Beach's communications with residents and CPU

Both prior to and after the September 15, 2022 closing date, Blue Beach deluged the residents with false and contradictory communications. On June 30, 2022, Blue Beach caused a "60-day Termination/Non-Renewal Notice" to be sent that threatened residents with double rent under the Landlord-Tenant Code if they remained on the property past August 31, 2022. A830. The letter was drafted by Blue Beach and sent by Cohee's company at Blue Beach's direction. A669-670, A759-759. At least two residents received the letter before Cohee decided it was not right to deliver them. A659, A670.

Next, on July 18, 2022, Blue Beach sent a letter that claimed Pine Haven was not a year-round facility and threatened to have residents arrested and their property destroyed if they did not leave by October 31, 2022. A816. This letter went to all RV residents, and to one manufactured home owner. A648-649, A760.

In August and September of 2022, Blue Beach sent seasonal lot licenses that purported to allow the manufactured home owners to live seasonally at Pine Haven for three years and increased their rent from $350 to $450 per month. A818-828, A691-692.

On the day of closing, September 15, 2022, Blue Beach sent another letter to the manufactured home owners, asserting that the community was not year-round, but purporting to allow them to live there year-round for three years. A653, A829.

On February 23, 2023, Blue Beach sent out two letters: one to manufactured home owners (the "Change of Use" letter) and one to RV residents (the "Dear RV Residents" letter). A699, A705, A884, A905. The Change of Use letter provided notice of termination of their rental agreements, effective February 28, 2024, due to the changing of the use of the property, as required by 25 *Del. C.* § 7024. The letter again stated that Pine Haven was a seasonal campground and that the letter was not a change-of-use, but rather "an elimination of an illegal use." A884. The Dear RV Residents letter purported to revoke RV residents' guest licenses and threatened legal action and destruction of property if they did not vacate by March 15. A905.

On March 7, 2023, Blue Beach sent yet another letter to manufactured home owners, offering them incentives to move out. This letter again stated that Pine Haven was a seasonal campground. A919.

Blue Beach executed settlements or stipulated agreements with several residents who agreed to move out before February 28, 2024, in exchange for an incentive payment. A907-A913. Once again, these settlement agreements stated that Pine Haven was a seasonal campground. A909-913.

IV. Procedural Background

On April 3, 2023, the Director issued the Summary Order to Blue Beach, accompanied by a complaint detailing the factual and legal basis for the Summary

Order and the charges that CPU was alleging. A12-175. A hearing officer was appointed and a hearing was scheduled, pursuant to 29 *Del. C.* § 2525(c) and 6 *Del. Admin. C.* § 103-25.1.3. A10-11, A174-175. The parties submitted briefs on May 26 and June 2 and had oral argument on June 6, 2023. A176-284. On July 3, 2023, CPU moved for sanctions in response to Blue Beach's violations of the Summary Order. A285-296. These violations included, among other things, awakening a 19-year-old young man to wrongly evict him from his family's manufactured home, and Blue Beach's then-attorney telling that same family they could not stay at the community until February 2024 despite the Change of Use letter stating otherwise. B30, B92-98. A hearing on the motion for sanctions was held on July 10 and 11 and August 1. B1-B400. On August 29, 2023, the Hearing Officer issued an opinion and order, which covered prehearing issues, in response to the briefing and oral argument held in May and June. A373-A406. A hearing on the merits was held the week of September 11, 2023, followed by briefing. A407-A553, A644-A815.

V. The Hearing Officer's Decision

On April 4, 2024, the Hearing Officer issued the Decision, ruling in favor of CPU on several issues. A642-643. He found that Blue Beach repeatedly violated the CFA, and accordingly awarded $737,500 in penalties. A642. He found a violation of the MH Act and ordered Blue Beach to rebate excess rental payments

to tenants. A643. Finally, he found that Blue Beach violated the Summary Order, and ordered $94,000 in additional penalties. *Id*. The Hearing Officer however, found that CPU had not met its burden to demonstrate Blue Beach willfully violated the Deceptive Trade Practices Act, 6 *Del. C.* § 2531 *et seq* and declined to award attorneys' fees or penalties for a violation of the MH Act. A556, A592, A622.

VI. The Superior Court's Decision

On April 22, 2024, Blue Beach appealed the Decision to the Superior Court. A1051-1052. After routine briefing, the Superior Court ordered supplemental briefing on the constitutionality of the administrative hearing process. A1054-A1309. Oral argument was held on November 13, 2024. A1310-1426. On December 3, 2024, the Superior Court issued its decision. The next day, the Superior Court issued its revised decision. The Superior Court affirmed in part and vacated in part. Specifically, the Superior Court affirmed the Decision by finding 1) that CPU's administrative hearing process did not violate the Delaware Constitution and 2) that several of Blue Beach's miscommunications were "in connection with" the residents' leases, as contemplated by the CFA. Opinion at 11, 37-38. Accordingly, the Superior Court upheld the civil penalties awarded for the Lot Licenses, the letters of September 15, February 23 (Manufactured Home

owners), and March 7, the Settlement Agreements, as well as for several violations of the Summary Order. Opinion at 38.

The Superior Court vacated the Decision with respect to the letters of June 30, July 18, February 23 (RV Residents) and the collection of rent payments, finding that these did not violate the CFA or the Summary Order. Opinion at 38. On December 12, 2024, the Superior Court granted an unopposed Motion to Alter the Judgment filed by CPU. In total, the Superior Court affirmed $500,000 in civil penalties. Ex. B to Appellant's Op. Br.

On January 9, 2025, Blue Beach appealed the Superior Court's order to this Court. On January 22, 2025, CPU cross-appealed the Superior Court's order to this Court.

ARGUMENT

I. Blue Beach's communications made to residents were "in connection with" the "lease" and "receipt" of "merchandise".

A. Question Presented

Whether communications telling residents their property was seasonal and that they must vacate were "in connection with" the lease and receipt of real estate and related services.

B. Scope of Review

The Supreme Court reviews the Hearing Officer's decision directly to determine whether it was supported by substantial evidence and free from legal error. *Gala v. Bullock*, 250 A.3d 52, 64 (Del. 2021). Questions of law are reviewed *de novo*. *Munyan v. Daimler Chrysler Corp*., 909 A.2d 133, 136 (Del. 2006).

The CFA "shall be liberally construed and applied to promote its underlying purposes and policies." 6 *Del. C.* § 2512.

C. Merits of Argument

The Court is asked, as a matter of first impression, whether the CFA covers post-transaction conduct. The Court has to look no further than the statute's text: the communication need only be "*in connection with* the sale, lease, receipt, or advertisement of any merchandise". 6 *Del. C.* § 2513(a) (emphasis added).

Nothing in the statute suggests that the communication must be made at or before the moment the transaction occurs.

However, even if the Court narrowly interprets the "in connection with" phrase, the communications relevant to this case were still made in connection with both the lease and receipt of merchandise for three reasons. First, with the recent addition of "receipt" to 6 *Del. C.* § 2513(a), the CFA now even more clearly applies to post-transaction conduct related to a consumer's ongoing receipt of real estate or other merchandise. Second, the communications were made in connection with a lease, which establishes and governs an ongoing relationship, as opposed to a sale, which happens at a single point in time. Any time restriction that other courts may have read into the CFA analysis when a sale is at issue should not apply here, where a lease is at issue. Finally, because manufactured home leases are renewed on a periodic basis, many of Blue Beach's relevant communications applied not just to current leases, but to the renewal process establishing residents' next leases.

i. The CFA applies to post-transaction conduct.

a. The text of the CFA is unambiguous and makes clear that it is not limited to communications made prior to a transaction.

The CFA prohibits the use of deceptive or unfair conduct "*in connection with* the sale, lease, receipt, or advertisement of any merchandise. . .." 6 *Del. C.* § 2513(a) (emphasis added). The Superior Court found the "in connection with"

language to be broad and not limiting. Opinion at 11. Blue Beach argues that "in connection with" limits the CFA to only apply to communications made prior to the transaction or agreement, thus removing many of the communications at issue in this case from the CFA's scope. Appellant's Op. Br. at p.13-15. As the Court below found, this ignores the unambiguous, plain meaning of the statute and misreads the legislature's intent.

When interpreting statutory language, Delaware courts aim "to ascertain and give effect to the intent of the legislators, as expressed in the statute." *Noranda Aluminum Holding Corp. v. XL Ins. Am., Inc.*, 269 A.3d 974, 977 (Del. 2021) (quoting *Dewey Beach Ent., Inc. v. Bd. of Adjustment of Town of Dewey Beach*, 1 A.3d 305, 307 (Del. 2010). "[I]f statutory text is unambiguous, this Court's role is limited to an application of the literal meaning of the statute's words. *Arnold v. State*, 49 A.3d 1180, 1183 (Del. 2012). "Undefined words in a statute must be given their ordinary, common meaning." *Oceanport Indus., Inc. v. Wilmington Stevedores, Inc.*, 636 A.2d 892, 900 (Del. 1994).

Here, the statute is unambiguous: for a communication to be covered under the CFA, it merely must relate to the "sale, lease, receipt, or advertisement of any merchandise". 6 *Del. C.* § 2513(a). *See* In Connection With, ***Merriam Webster***, https://www.merriam-webster.com/dictionary/in%20connection%20with (last visited April 3, 2025) (defining In Connection With as "in relation to

(something)"). As the Superior Court below found, the phrase, both in common parlance and as it has been interpreted by courts in Delaware, is broad and expansive, rather than limiting as Blue Beach suggests. Opinion at 11; *Exit Strategy, LLC v. Festival Retail Fund BH, L.P.*, 2023 WL 4571932, at *13 (Del. Ch. July 17, 2023), *aff'd*, 326 A.3d 356 (Del. 2024) ("The phrase 'in connection with' is a phrase that 'lawyers use when they wish to capture the broadest possible universe.'") (quoting *DeLucca v. KKAT Mgmt., L.L.C.*, 2006 WL 224058, at *2 (Del. Ch. Jan. 23, 2006)); *Lillis v. AT & T Corp.,* 904 A.2d 325, 332 (Del. Ch. 2006) (stating that the phrase in connection with "constitutes the broadest possible authorization"). The phrase, as colloquially used, only requires that two actions relate to one another; one does not need to occur before the other. The context of this case highlights the dubious nature of Blue Beach's effort to read a time-based limitation into the phrase: a communication that tells a resident that they must leave their property by a certain date and that the property is seasonal would colloquially be considered "in connection to" an agreement that gives them the right to be on that property. Because the CFA's text is unambiguous and leaves no doubt as to the plain meaning of the "in connection with" phrase, the Court need not go further and accordingly should find that Blue Beach's post-transaction communications are covered under the CFA. *Leatherbury v. Greenspun*, 939 A.2d

1284, 1288 (Del. 2007) ("…unambiguous statutes are not subject to judicial interpretation).

Blue Beach argues that the definitions of "sale", "lease", and "advertisement" support its argument that the CFA only applies to communications made before or at the time of the transaction. Appellant's Op. Br. at 14-15. These definitions, however, do not support Blue Beach's argument, but rather help show that post-transaction conduct is covered by the CFA. For example, Blue Beach points to the definition of sale ("any sale, offer for sale, or attempt to sell….") and lease ("any lease, offer to lease, or attempt to lease"), arguing that "[t]hose communications occur leading up to and at the time of a transaction, not after the transaction has occurred or is in progress." Appellant's Op. Br. at 14-15; 6 *Del. C.* § 2511(3), *6 Del. C.* § 2511(8).

As an initial matter, Blue Beach's argument is essentially misdirection, since the interpretive question for the Court is whether conduct is "in connection with" the defined term, and thus does not turn on any time-based restriction in such term itself. To the extent the definitions do provide guidance here, the circular nature of these definitions (e.g. defining a lease as "any lease…") shows that the General Assembly meant for the plain meaning of these words to be used. In fact, the general and expansive nature of the definitions (e.g., "lease" includes not only a lease, but also an offer to lease, and an attempt to lease) demonstrates that the

legislature contemplated that the CFA would cover a broad array of communications. Blue Beach also points to "advertisement", which is defined as "the attempt…to induce, directly or indirectly, any person to enter into any obligation or acquire…any merchandise", to support its argument. Advertisement is the only defined term that is limited to inducing a consumer to engage in a transaction, which makes sense due to the nature of advertisements, since they are meant to induce a consumer to engage in a transaction. But the fact that advertisements are limited to inducing a consumer to take action is telling: it shows that when the legislature wanted to limit the CFA in such a way, it knew how to. Notably, it failed to do so elsewhere.

Given that the statutory definitions neither alter the "in connection with" analysis nor provide alternative meanings to the plain meanings of "sale", "lease", or "advertisement" and the plain meaning of the statute is unambiguous, the Court need not go further in its analysis of the CFA. *Riad v. Brandywine Valley SPCA, Inc.*, 319 A.3d 878, 883 (Del. 2024) (finding if text is unambiguous, the Court is "limited to an application of the literal meaning of the statute's words."). However, even if the Court were to find the statute ambiguous, the General Assembly provided direction in the CFA for how courts should interpret ambiguity in the statute. 6 *Del. C.* § 2512 states that the purpose of the CFA is to "protect consumers and legitimate business enterprises from unfair or deceptive

merchandising practices" and that the statute "shall be liberally construed and applied to promote its underlying purposes and policies." Here, a finding that the CFA applies to post-transaction conduct is the interpretation that best promotes the underlying purpose of protecting consumers. *See In re Brandywine Volkswagen, Ltd.*, 306 A.2d 24, 28 (Del. Super. Ct.), *aff'd sub nom. Brandywine Volkswagen, Ltd. v. State Dep't of Cmty. Affs. & Econ. Dev., Div. of Consumer Affs.*, 312 A.2d 632 (Del. 1973) (using 6 *Del. C.* § 2512 as an "interpretational aid[]" to interpret the CFA). Using the General Assembly's mandate to assist in interpretating the statute is not improper reliance, as Blue Beach suggests, but rather is applying the General Assembly's intent. Appellant's Op. Br. at 22

Despite both the statute's plain language and the legislature's interpretive direction, Blue Beach nonetheless implores the Court to ignore these and instead look towards inapplicable public policy and statutory canons of constructions to reach a different and forced interpretation. For instance, Blue Beach urges the Court to examine a broader perspective beyond the text of the statute, and argues that fraud is about starting a relationship under false pretenses, and accordingly, that must be the case for the CFA. Appellant's Op. Br. at 18-19. This essentializing of the CFA fails.

First, while the word "fraud" appears in the name of the Consumer Fraud Act (and once more as part of a laundry list in its operative provision), it is far

more than a statute prohibiting only fraud. Indeed, as Delaware's version of a so-called UDAP ("unfair and deceptive acts and practices") statute, it is similar to statutes in every other state that prohibit conduct going well beyond mere "fraud." Also known as "Little-FTC Acts" due to their federal analogue in Section 5 of the FTC Act, these statutes do not codify common law fraud, but rather reach a broad range of conduct not captured by the common law. *State ex rel. Brady v. Publishers Clearing House*, 787 A.2d 111, 116 (Del. Ch. 2001) ("Both the CFA and the UDTPA stem from the 1914 Federal Trade Commission Act and its later amendment in 1938. They are consumer protection laws and remedies for unfair competition, not simply codified versions of common law fraud."); 15 *U.S.C.* § 45.

Further, Blue Beach argues that because common law fraud is the only legal protection available prior to a transaction, and because several other remedies exist after a transaction, the CFA cannot apply to post-transaction conduct. Appellant's Op. Br. at 18-19. It is unclear how this is relevant. Nothing requires an equilibrium of available remedies before and after a contract is entered into. The availability of other post-transaction protections for consumers is irrelevant to the CFA's scope, especially given that the CFA was meant "to raise the standards which the public has a right to expect from all business enterprises". *Brandywine Volkswagen, Ltd. v. State Dep't of Cmty. Affs. & Econ. Dev., Div. of Consumer Affs.*, 312 A.2d 632, 634 (Del. 1973).

Additionally, Blue Beach's argument that the General Assembly acquiesced to the Superior Court's misinterpretation of the CFA's scope is unconvincing. *See* Appellant's Op. Br. at 16-17. This reasoning has been severely downplayed by courts. *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 186, (1994) ("It is 'impossible to assert with any degree of assurance that congressional failure to act represents' affirmative congressional approval of the [courts'] statutory interpretation...Congressional inaction cannot amend a duly enacted statute.") (quoting *Patterson v. McLean Credit Union*, 491 U.S. 164, 175, n. 1 (1989)); *see also United States v. Cooper*, 396 F.3d 308, 314, n. 7 (3d Cir. 2005) ("…we are reluctant to divine Congress' intent from a statute's subsequent history because it is an untrustworthy barometer.").

For several reasons, discerning the actual intent of the legislature from legislative silence requires significant speculation. *Helvering v. Hallock*, 309 U.S. 106, 119–20 (1940) ("To explain the cause of non-action by Congress when Congress itself sheds no light is to venture into speculative unrealities."). For instance, the legislature simply may not be aware of the judicial decisions. *Id.* at 120. Additionally, the structural bias that makes inaction far more likely than action in the legislature, in addition to legislative strategy, may be further reason for this legislative silence. *Id; see also* William N. Eskridge Jr, *Interpreting Legislative Inaction*, 87 Mich. L. Rev. 67, 88-89 (1988).

The history of the CFA that Blue Beach describes highlights the unreliability of the legislative acquiescence approach. Blue Beach states that the first Superior Court case that did not extend the CFA to post-transaction conduct was in *Gershman's* in 1989, followed by *Thomas* in 2003. Appellant's Op. Br. at 17; *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); *Thomas v. Harford Mut. Ins. Co.*, 2003 WL 220511, at *4 (Del. Super. Jan. 31, 2003). However, in 1993, the District Court of Delaware found that post-transaction conduct *does* fall under the scope of the CFA, thus creating an inconsistency between the Superior Court and District of Delaware. *Lony v. E.I. du Pont de Nemours & Co.*, 821 F. Supp. 956, 962 (D. Del. 1993). Despite no further adjudication of the issue until 2003, the Delaware legislature remained silent on the inconsistency for 10 years. Under the legislative acquiescence approach, a vigilant legislature should have taken action to fix any judicial interpretation at odds with the legislature's intent. But the General Assembly never fixed this inconsistency, despite multiple amendments to the CFA during that period.[1]

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[1] 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)

There are several potential reasons why the General Assembly may not have intervened during this period: lack of awareness, indifference to how the courts interpreted the statute, contentment with a difference in interpretation, or, as the logic of legislative acquiescence would suggest, the General Assembly preferred the interpretation from *Gershman's* from 1989-1993, then preferred the *Lony* interpretation from 1993-2003, then preferred the *Thomas/Gershman's* interpretation from 2003-2024, and now perhaps prefers the interpretation from the Superior Court in this case. All of this suggests that the legislative acquiescence theory is an unreliable approach for a court to rest its statutory interpretation on, especially in this case where it is a matter of first impression for *this* Court. *Helvering,* 309 U.S. at 121 ("...we walk on quicksand when we try to find in the absence of corrective legislation a controlling legal principle.")

b. The legislative addition of "receipt" further clarifies that post-transaction conduct is covered by the CFA.

Notwithstanding Blue Beach's suggestion that the General Assembly has remained silent, the fact is that the General Assembly *did* alter the CFA to overrule the Superior Court's case law and further clarify that post-transaction conduct is within the scope of the CFA. As amended in 2021 and applicable here, the CFA now contains the word "receipt" following the phrase "in connection with" in

Section 2513(a).[2] With that addition, the legislature removed any doubt as to whether the CFA applies to post transaction conduct.[3] Thus, the statute, read plainly, now unambiguously encompasses conduct that occurs after the original sale or lease where the consumer has an ongoing relationship with the seller and continues to receive the benefit of the original bargain, whether it be a subscription-based product, the provision of contracted-for services, or, as here, access to the real property owned by the seller. Each communication for which the Hearing Officer penalized Blue Beach was made in connection with the relevant resident's ongoing receipt of real estate and associated services.

Blue Beach's citation to the synopsis of the bill that added "receipt" into the CFA is inapposite. Appellant's Op. Br. at 23. The General Assembly included the following example in the synopsis: "…persons who provide goods or services at no charge to consumers—such as social media companies funded by advertising

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[2] 83 *Del. Laws*, c. 85, § 2

[3] The intent to clarify that the CFA applies to post-transaction conduct was made clear in contemporaneous press releases issued jointly by the Attorney General and sponsors of the 2021 amendment contemporaneously with both the introduction and passage of that bill. *See* https://news.delaware.gov/2021/01/28/lawmakers-doj-announce-legislation-to-stop-unfair-business-practices/ and https://news.delaware.gov/2021/06/15/unfair-business-practices-bill-passes-senate-ready-for-governors-signature/.

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." 83 Del. Laws, c. 85, § 2. Contrary to Blue Beach's suggestion, this synopsis language is entirely consistent with the Hearing Officer's interpretation of "receipt". First, this Court need not reach for the synopsis or any other indicia of legislative intent when the statutory language unambiguously includes post-transaction conduct. *Bd. of Adjustment of Sussex Cnty. v. Verleysen*, 36 A.3d 326, 332 (Del. 2012) ("…the Court may only look to the synopsis if the Court finds that the statutory language is ambiguous and requires interpretation"). Even if the Court were to look at legislative intent, the synopsis fully supports the conclusion that "receipt" brings post-transaction conduct within the CFA's coverage. Both a social media user and a manufactured home resident are in receipt of merchandise. It would be an inconsistent result to treat a social media user who has never paid for merchandise as a proper victim under the CFA, while excluding a manufactured home resident who has paid and continues to make ongoing payments under a lease from being a victim under the CFA. The General Assembly's inclusion of one explanatory example in its synopsis cannot be read to exclude other factual scenarios that are clearly within the plain meaning of the statute.

ii. The CFA directly applies to communications "in connection with...[a] lease."

As determined by the Hearing Officer, the fact that a lease establishes an ongoing relationship is yet another reason that the CFA applies to the post-transaction conduct at issue in this case. Blue Beach's arguments to the contrary ignore this fundamental distinction between a sale and a lease. Leases establish ongoing relationships between lessor and lessee. *See* Black's Law Dictionary 889 (6th ed. 1990) (defining lease as "Any agreement which gives rise to a relationship of landlord and tenant… or lessor and lessee…"). They do not exist only at the point in time of their formation, but rather exist for the duration of the lessor-lessee relationship established by the term of months or years set forth in the lease agreement. The CFA applies to communications that are made "in connection with" the "lease" of "merchandise", including "real estate". 6 *Del. C.* § 2511, 2513(a). Despite Blue Beach's attempt to read terms in the CFA, the statute does not say that it applies to communications made in connection with the *start* or the *formation* of a lease. The plain reading of the statute accounts for the ongoing nature of a lease, and thus applies to all communications made in connection with a lease throughout its term.

Blue Beach points to several cases in which courts found that conduct after an initial *sale* was not actionable under the CFA, despite the existence of an ongoing relationship after the sale (insurance or a warranty, for instance). Even if

these cases correctly interpreted the "in connection with" language with respect to sales (which, as set forth above, they do not), they are limited to cases involving sales; none of them involve leases. *See Gershman's*, 558 A.2d at 1069; *Thomas*, 2003 WL 220511, at *3; *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). A sale is a transaction that happens at a point in time, but a lease is a relationship that occurs over a period of time rather than in the instant of its formation. The Superior Court found this to be a "distinction without a difference". Opinion at 8. But to write off such a distinction is to ignore the text of the statute, overlooking the foundational principle of statutory interpretation. *Leatherbury*, 939 A.2d at 1288 (Noting the first step in interpreting a statute is examining the text to determine if it is ambiguous). Thus, conduct that occurs during the duration of the lease and meets the other elements of the statute is actionable under the CFA.

iii. Several of Blue Beach's communications were in connection with future leases.

Unless stated otherwise in writing, the duration of a rental agreement for manufactured homes is one year. 25 *Del. C.* § 7009. At all relevant times, Pine Haven's residents did not have written leases. A675. Accordingly, each lease lasted one year. The February 23, 2023 Change of Use letter gave manufactured home owners notice that their lease would be terminated on February 28, 2024. A884-885. Given that the rental agreements were one-year leases and that Blue

Beach was terminating their leases on February 28, 2024 (more than a year later), all communications made to the manufactured home owners on or before February 28, 2023 were necessarily made in connection with future leases, not just the current lease.[4]

[4] Of the communications challenged by Blue Beach, this includes the June 30 letter, the July 18 letter, the Change of Use letter, and the Dear RV Residents letter. A816, A830, A884, A905.

II. The CPU's administrative enforcement process is constitutional

A. Question Presented

Whether the Consumer Protection Unit's administrative proceeding violates Blue Beach's right to a jury trial.

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). "[A] legislative enactment is cloaked with a presumption of constitutionality and should not be declared invalid unless its invalidity is beyond doubt." *Justice v. Gatchell*, 325 A.2d 97, 102 (Del. 1974). "There is a strong presumption of constitutionality attending a legislative enactment which, unless the evidence of unconstitutionality is clear and convincing, the court will be reluctant to ignore." *Id.* The party seeking to overthrow the statute has the burden of rebutting this presumption of constitutionality. *Wilmington Med. Ctr., Inc. v. Bradford*, 382 A.2d 1338, 1342 (Del. 1978).

C. Merits of Argument

The Delaware Constitution states that "[t]rial by jury shall be as heretofore". Del. Const. art. I, § 4. Delaware courts have interpreted this to mean that whether a cause of action comes with the right to a jury trial depends on whether that cause of action existed and was accompanied by a jury trial at common law.

As both the Hearing Officer and the Superior Court found, the CFA creates a cause of action distinct from common law fraud, and therefore there is no right to a jury trial for CFA enforcement actions. The General Assembly did not pass the CFA to merely codify common law fraud; it sought to further protect consumers from unfair and deceptive practices and to raise the standards of what consumers can expect from businesses. Out of the five elements of common law fraud, only one – a false representation – is potentially required to prove a violation of the CFA, and even then, it is not a required element for claims such as those related to unfairness.

Federal jurisprudence discussing the right to a jury under the Seventh Amendment to the United States Constitution, including the Supreme Court's recent decision in *SEC v. Jarkesy*, 603 U.S. 109 (2024) ("*Jarkesy*"), differs significantly from Delaware law. Federal law does not follow the nuanced framework established by Delaware, instead simply looks to whether the cause of action is legal in nature or equitable in nature. As such, the federal jurisprudence on which Blue Beach so heavily relies does not bear on this case.

i. To determine whether the right to a jury trial exists, Delaware Courts examine whether a cause of action came with the right to a jury at common law.

The right to trial by jury in civil causes of action under Delaware law is governed exclusively by Article I, Section 4 of the Delaware Constitution. The

Seventh Amendment to the United States Constitution has not been applied to states through the incorporation doctrine. *Gasperini v. Ctr. for Humans., Inc.*, 518 U.S. 415, 432 (1996). Additionally, this Court has ruled that Article I, Section 4 differs from the Seventh Amendment. *Claudio v. State*, 585 A.2d 1278, 1298 (Del. 1991). Therefore, the right to a jury trial in civil matters in Delaware is controlled by Article I, Section 4 and the Delaware caselaw interpreting it.

The Delaware Constitution, which was ratified in 1897, states that "[t]rial by jury shall be as heretofore". Del. Const. art. I, § 4. Delaware courts have interpreted this to mean that the right to trial by jury shall be as it was before 1897. *Ellery v. State ex rel. Sec'y of Dep't of Transp.*, 633 A.2d 369 (Del. 1993). In order to maintain the right to a jury trial as it was at common law, courts examine whether the cause of action in question was accompanied by the right to a jury trial at common law. If the cause of action did come with the right to a jury trial at common law, then it will have the right to a jury trial today. However, if the cause of action did not come with the right to a jury trial, or did not exist at common law, then the cause of action has no right to a jury trial today. *Ellery v. State ex rel. Sec'y of Dep't of Transp.*, 633 A.2d 369 (Del. 1993*); Bon Ayre Land LLC v. Bon Ayre Cmty. Ass'n*, 2015 WL 893256, at *4 (Del. Super. Ct. Feb. 26, 2015), *rev'd on other grounds*, 133 A.3d 559 (Del. 2016).

For example, in *Ellery*, this Court found no right to a jury trial in condemnation cases after examining the common law to determine that, prior to 1897, parties in condemnation cases did not have the right to a jury trial. *Ellery*, 633 A.2d 369. Similarly, in *Bon Ayre*, the court found there was no right to a jury trial under the MH Act, holding "absent a newly created statutory right to trial by jury, if the right for a particular cause of action did not exist at common law, then it does not exist today." 2015 WL 893256, at *4. In both of these cases, the courts' analysis was focused on whether the specific cause of action existed and came with the right to a jury trial at common law, and because the actions did not, they do not have one in the present.

ii. Delaware Courts do not use the legal vs. equitable framework to determine whether there is a right to a jury trial.

Blue Beach advocates for a different framework, arguing that in Delaware, courts follow a simple framework: there is a right to jury trial for actions that are legal in nature, but no right to a jury trial for equitable actions. Appellant's Op. Br. at 29. The caselaw does not support such a framework. Going back to *Ellery*, this Court did not focus at all on whether the condemnation action was legal or equitable in nature; instead it asked whether condemnation actions had a right to a jury trial at common law. *Ellery*, 633 A.2d 369.

This is not limited to instances in which courts found that there was no right to a jury trial. Indeed, cases cited by Blue Beach, which find that there was a right

to a jury trial, do not even follow Blue Beach's proposed framework. In *Allstate Ins. Co. v. Rossi Auto Body, Inc.*, for example, the plaintiff brought a replevin action under a statutory scheme that did not allow for a jury trial. 787 A.2d 742 (Del. Super. Ct. 2001). The court found that the statute violated Article I, Section 4 of the Delaware Constitution, because replevin actions prior to 1897 involved jury trials. *Id.* at 747. The court's decision in *Allstate* did not hinge on the legal nature of replevin; rather, the right to a jury trial existed because it existed at common law for replevin actions. *Id.* at 747-749. Similarly, Blue Beach highlighted *Hopkins v. Justice of Peace Court No. 1*. 342 A.2d 243 (Del. Super. Ct. 1975); Appellant's Op. Br. at p. 30-31. The court in *Hopkins* found that the right to a jury trial attached to summary possession proceedings due to their similarity to ejectment actions, which at common law entitled parties to a jury trial. *Hopkins*, 342 A.2d at 245. Missing from the court's analysis was any discussion of the whether the cause of action was legal or equitable.

iii. The United States Supreme Court's Jarkesy decision does not affect the right to a jury trial in Delaware.

Blue Beach leans heavily on the United States Supreme Court's recent decision in *Jarkesy* to argue that the administrative hearing below violated its right to a jury trial. However, *Jarkesy* does not bear on this case due to the vast differences between the Seventh Amendment to the United States Constitution and Article 1, Section 4 of the Delaware Constitution. For one, under the Seventh

Amendment, a legal cause of action automatically entitles a party to a jury trial, a framework that Delaware courts do not follow. *Jarkesy*, 603 U.S. at 122 ("The Seventh Amendment extends to a particular statutory claim if the claim is 'legal in nature.'") (quoting *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 53 (1989)). Indeed, except for the federal "public rights" exception, which is not at issue in this case, essentially the entire *Jarkesy* decision is spent deciding whether the cause of action is legal or equitable. *Jarkesy*, 603 U.S. at 121-126. On that question, the *Jarkesy* court found that the remedy "is all but dispositive". *Id.* at 123. But in Delaware, the remedy is not even relevant, let alone dispositive.

Similar to *Jarkesy*, Blue Beach argues that civil penalties are a legal remedy, and thus entitle it to a jury trial. But we are not in federal court. The remedy-dispositive framework followed in *Jarkesy* and advocated for here by Blue Beach is at odds with the framework courts in Delaware follow. Regardless of the nature of the cause of action *or* the remedy, what drives the right to a jury trial in Delaware is whether that cause of action existed and came with the right to a jury trial prior to 1897. If anything, the civil penalty remedy supports the Hearing Officer and Superior Court's finding that Blue Beach did not have a right to a jury trial, since the difference in remedies is another difference between the CFA and common law fraud.

On the subject of remedies, Blue Beach's argument that *American Appliance, Inc. v. State ex rel. Brady* supports its claim for a jury trial is unavailing. 712 A.2d 1001 (Del. 1998). Appellant's Op. Br. at 36-37. For one, in *American Appliance*, the right to a jury trial was not in question; instead, the court was assessing subject matter jurisdiction. 712 A.2d at 1001. In cases where the right to a jury trial is actually in question, Delaware courts have repeatedly focused not on the remedy, but instead on whether the cause of action was accompanied by the right to a jury trial at common law. *Ellery,* 633 A.2d 369; *Bon Ayre*, 2015 WL 893256, at *4. For the same reason, the citation to *Tull v. U.S* in *American Appliance* is unconvincing: *Tull* focused on the remedy and "whether it is legal or equitable in nature." *Tull v. U.S*, 481 U.S. 412, 418 (1987). Second, *American Appliance* is also unavailing because the Court found that the Court of Chancery can hear a CFA civil penalty claim under the clean up doctrine, suggesting that CFA claims for civil penalties do not require a jury trial. 712 A.2d at 1004.

Another difference between the Seventh Amendment and Article 1, Section 4 is demonstrated by Delaware's use of the "clean-up" doctrine. The clean-up doctrine gives the Court of Chancery jurisdiction over "purely legal causes of action that are before it as part of the same controversy over which the Court originally had subject matter jurisdiction," despite the Court of Chancery's status as a court of equity. *Kraft v. WisdomTree Invs., Inc.*, 145 A.3d 969, 974 (Del. Ch.

2016). In cases in which the Court of Chancery exercises jurisdiction via the clean-up doctrine, legal causes of action are decided upon without the use of a jury. By contrast, the Seventh Amendment requires jury trials for legal issues, even when they are intertwined with equitable issues. *FirstString Rsch., Inc. v. JSS Med. Rsch. Inc*., 2021 WL 2182829, at *10 (Del. Ch. May 28, 2021). This is noteworthy, because this case itself is an intertwined case: in addition to civil penalties, CPU requested equitable remedies in the form of a cease-and-desist order and restitution. A041-042. If this case had been brought in the Court of Chancery, it would not have received a jury trial, illustrating that in Delaware, the right to a jury trial is not absolute for this sort of matter, unlike under federal law.

If the Court must look to other jurisdictions for guidance, Pennsylvania offers a far more relevant choice than Blue Beach's proffered federal jurisprudence. Pennsylvania decisions are of particular relevance because Delaware's constitutional right to jury trial derived from Pennsylvania's Constitution. Hon. Randy J. Holland, *The Delaware State Constitution: A Reference Guide* 41 (2d ed. 2017). Pennsylvania follows a similar framework to Delaware, not basing the right to a jury trial on whether the action is legal or equitable. *Fazio v. Guardian Life Ins. Co. of Am.*, 62 A.3d 396, 402 (2012) ("It has long been recognized that the Pennsylvania Constitution Article 1, § 6 only preserves the right to trial by jury in those cases where it existed at the time the

Constitution was adopted.") (citation and internal quotation marks omitted). In *Fazio*, Pennsylvania found that its consumer fraud statute "did not merely codify common law claims of fraud", but rather "created a distinct cause of action for consumer protection." *Id.* at 411. As such, the Pennsylvania court found that no right to a jury trial attached. *Id.* at 412.

iv. The CFA created a distinct cause of action that did not exist at common law and thus does not require a jury trial.

A historical analysis, like those undertaken in *Ellery* and *Bon Ayre,* demonstrates that CPU's cause of action under the CFA did not exist at common law nor is it "in substance so similar to" to common law fraud "that the constitutional right to a jury trial attaches." *State v. Cahill*, 443 A.2d 497, 500 (Del. 1982). Common law fraud has five elements: 1) a false representation 2) scienter 3) intent to induce action 4) justifiable reliance and 5) damages. *State ex rel. Brady v. Publishers Clearing House*, 787 A.2d 111, 116 (Del. Ch. 2001). Of these, the only element that may be required for a CFA violation is a false representation. *Id.* And even a false representation is not always required, as a CFA violation may be based on an unfair practice, which is foreign to common law fraud and does not require misrepresentation. 6 *Del. C.* § 2511(9) (listing the elements of an unfair practice). Indeed, the Court of Chancery recognized this in *Publishers Clearing House* when it ruled that all these differences show that "[c]ommon law fraud differs remarkably from 'statutory fraud' under the CFA,"

and then on the basis of that dissimilarity refused to extend Chancery Rule 9(b)'s heightened pleading standard for fraud to claims under the CFA. 787 A.2d at 116-117.

Enforcement by the Attorney General is another area in which the CFA differs meaningfully from common law fraud. At common law, the typical fraud plaintiff was the aggrieved individual. Under the CFA, the Attorney General is given enforcement powers that go beyond those available to private litigants. The Attorney General need not wait until an offending practice has occurred, as one would need to do at common law, but may bring an action "whenever it appears...that a person...is *about to* engage in" a CFA violation. 6 *Del. C.* § 2522(a) (emphasis added). Further, the statute of limitations for enforcement actions under the CFA is five years, whereas the statute of limitations for the CFA and common law fraud brought by private litigants is three years. *State ex rel. Brady v. Pettinaro Enterprises*, 870 A.2d 513, 526 (Del. Ch. 2005). *See also Fazio* 62 A.3d at 411 (finding a different statute of limitations between common law fraud and Pennsylvania's consumer protection statute to be a relevant factor in finding no right to a jury trial).

The General Assembly passed the CFA to provide causes of action and enforcement avenues that were *in addition to*, rather than *replacements for*, common law fraud. It did this to "swiftly stop[]" unfair and deceptive practices

that were not then being adequately addressed through common law avenues. 6 *Del. C.* § 2512; *Brandywine Volkswagen, Ltd. v. State Dep't of Cmty. Affs. & Econ. Dev., Div. of Consumer Affs.*, 312 A.2d 632, 634 (Del. 1973) ("An obvious objective of the law is to raise the standards which the public has a right to expect from all business enterprises"). Blue Beach highlights *Hopkins* and *Allstate,* arguing that "efforts to statutorily modernize common law legal actions cannot eliminate the constitutional right to a jury trial for those legal claims and remedies." Appellant's Op. Br. at 33. This reliance is misplaced, as in both cases, the common law actions at issue were "extinguished" or "express[ly] repeal[ed]". *Allstate*, 787 A.2d at 749 ("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."); *Hopkins*, 342 A.2d at 244 ("Included in the array of statutory changes, was the express repeal of the [statute] which had governed tenant eviction proceedings with minor modification since 1852."). That's not the case here. Common law fraud claims – and the right to a jury trial that attends

them – still exist. The CFA was not intended to, nor does it result in, the repeal or extinguishment of common law fraud.[5]

To the extent that a CFA action is akin to something at common law, it resembles equitable fraud rather than common law fraud. The Superior Court in *In Re Brandywine Volkswagen* made this very determination when deciding whether to use legal or equitable fraud as a guide to interpret the CFA. 306 A.2d at 28. That court used 6 *Del. C.* § 2512 as an interpretational aid, reasoning that because the CFA's objective is "to protect consumers and legitimate business enterprises from unfair or deceptive merchandising practices" and because the General Assembly required the statute to be "liberally construed and applied to promote its underlying purposes and policies", that the more lenient cause of action – equitable fraud – was more similar to the CFA. Using this reasoning, the court found that, like equitable fraud and unlike common law fraud, the CFA does not require intent to misrepresent. 306 A.2d at 29. Connecting this analysis to the jury trial issue in

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[5] Blue Beach, in a footnote, argues that cases requiring juries despite the statutory creation of medical negligence panels support its position that new statutory frameworks do not eliminate the right to a jury. Appellant's Op. Br. at 43; *Robinson v. Mroz*, 433 A.2d 1051, 1056 (Del. Super. 1981). This is not relevant here, as those statutes created no new cause of action but simply added a procedure to existing cases in Superior Court.

this matter, it is apparent that, because equitable fraud did not generally come with the right to a jury trial at common law, then even if the Court were to find the CFA akin to equitable fraud, there would be no right to a jury trial under the CFA.

Finally, Blue Beach asserts that CPU overstates the difference between CFA claims and common law fraud, arguing that CPU was still required to prove scienter and intent to induce. Appellant's Op. Br. at 42-43. This misstates what CPU must prove. Under common law fraud, a plaintiff must prove "knowledge or belief that the representation was false, or was made with reckless indifference to the truth", whereas CPU, in order to obtain civil penalties, need prove only that Blue Beach willfully violated the statute, meaning it "knew or should have known that the conduct was of the nature prohibited by this subchapter." 6 *Del. C.* § 2522(b); *Publishers Clearing House*, 787 A.2d at 116. Proving that a party "should have known" is a substantially lower bar than "reckless indifference to the truth". Additionally, proving a willful violation is not required for all of the relief that CPU requested. For example, a cease-and-desist violation does not require proof of a willful violation. 6 *Del. C.* § 2524(a). As for intent to induce, that is only required for "the concealment, suppression, or omission of any material fact", but most of the violations found by the Hearing Officer were for affirmative misleading statements.

For the other two elements of common law fraud – reliance and damages – Blue Beach discounts their relevance, claiming that those elements do not relate to Blue Beach's conduct. Appellant's Op. Br. at 43. Not only is this irrelevant to the analysis that Delaware courts use to determine whether there is a right to a jury trial, it is also untrue to suggest that the nature of a party's communications do not affect whether another party relies on them or is damaged by them.

v. The General Assembly has the authority to alter Delaware's right to a jury trial under the Delaware Constitution.

Even if the CFA was a modification of the common law, Blue Beach still would not have a right to a jury trial in this matter, since the General Assembly has the ability to modify the right to a jury trial. Before 1897, the right to a jury trial came from the 1831 Constitution, which also said that "[t]rial by jury shall be as heretofore", as did the 1792 Constitution. *Claudio v. State*, 585 A.2d at 1297. As such, the three most recent Delaware Constitutions point back to Delaware's first Constitution, ratified in 1776. Del. Const. of 1776; *Christopher v. Sussex Cnty.*, 77 A.3d 951, 954 (Del. 2013). Importantly, the right to a jury trial under the 1776 Constitution was dictated by Article XXV thereof: "[t]he common law of England, as well as so much of the statute law as have been heretofore adopted in practice in this state, shall remain in force, *unless they shall be altered by a future law of the Legislature*..." Del. Const. of 1776, art. XXV (emphasis added); *Claudio* 585 A.2d at 1291 (Del. 1991) (explaining that Article XXV governed the right to a jury trial

under the 1776 Constitution). Thus, while the right to jury under Delaware law is typically thought to refer back to the right as it existed at common law "heretofore," the original distillation of that concept in 1776 explicitly contemplated that the availability of such a right could be changed by statute. Here, by passing the CFA and explicitly providing for enforcement through an administrative proceeding, the General Assembly made clear that the right to a jury trial does not attach to enforcement actions under the CFA.

III. The Hearing Officer correctly found that the June 30 and July 18 letters violated the Consumer Fraud Act

A. Question Presented

Did the June 30 and July 18 letters violate the Consumer Fraud Act? A236-237, A239-240, A449-451, A453-454 (to Hearing Officer); A1124-1132 (to Superior Court).

B. Scope of Review

The Supreme Court reviews the Hearing Officer's decision directly to determine whether it was supported by substantial evidence and free from legal error. *Gala v. Bullock*, 250 A.3d 52, 64 (Del. 2021). Substantial evidence means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Squire v. Bd. of Educ. of Red Clay Consol. Sch. Dist.*, 911 A.2d 804 (Del. 2006) (internal quotation marks omitted). "Findings of [a hearing officer] after a public hearing should not be set aside unless the record clearly contains no substantial evidence supporting [a hearing officer's] findings." *Id.* (internal quotation marks omitted). Substantial evidence is "more than a scintilla but less than a preponderance of the evidence". *Noel-Liszkiewicz v. La-Z-Boy*, 68 A.3d 188, 191 (Del. 2013). The record must be reviewed "in the light most favorable to the prevailing party below." *Sekyi v. Delaware Bd. of Pharmacy,* 2018 WL 4177544, at *3 (Del. Super. Ct. Aug. 29, 2018). Questions of law are reviewed *de novo*. *Munyan v. Daimler Chrysler Corp.*, 909 A.2d 133, 136 (Del. 2006).

The CFA "shall be liberally construed and applied to promote its underlying purposes and policies." 6 *Del. C.* § 2512.

C. Merits of Argument

i. The June 30 and July 18 letters violated the CFA, both for the reasons found by the Hearing Officer and on independent grounds.

The Hearing Officer found that Blue Beach violated the CFA by sending the June 30 and July 18 letters to residents despite not yet owning the property. This finding – in and of itself – is legally correct and supported by substantial evidence. Additionally, the letters violated the CFA for separate reasons, any of which are independent grounds to uphold the finding. The June 30 letter threatened residents with penalties from the Landlord-Tenant Code, despite its inapplicability to these residents. The July 18 letter violated the CFA for two additional reasons: 1) Blue Beach told residents they had a license running from April 15 to October 31, when they lived there year-round and 2) Blue Beach made false threats to the residents about the police removing them from their property.

a. The Hearing Officer's finding that the June 30 and July 18 letters violated the CFA was supported by substantial evidence and was not legal error.

On June 30, 2022, Blue Beach sent a letter to at least two residents giving them 60-days' notice of their lease termination and threatening them with double rent as holdover tenants under the Landlord Tenant Code. A830. On July 18, Blue

Beach sent a letter revoking residents' guest license, which stated that Pine Haven is not a year-round facility and that if residents did not vacate, the police would be called to remove them. A816.

The Hearing Officer found that the June 30 and July 18 letters violated the CFA because Blue Beach, as a non-owner, did not yet have the right to terminate a lease agreement or revoke a guest license. A606-607. By purporting to exercise these rights without authority, Blue Beach deceived residents in violation of the CFA. However, on appeal, Blue Beach argued for the first time, and the Superior Court agreed, that Blue Beach's status as equitable owner of the property gave it the right to send the June 30 and July 18 letters. Appellant's Op. Br. at p. 24-25; Opinion at 22-23. That was incorrect for two reasons. First, Blue Beach waived this defense by not raising it at the administrative level. *In re Philadelphia Stock Exch., Inc.*, 945 A.2d 1123, 1135 (Del. 2008). In fact, at the administrative level, Blue Beach tried a different tact, initially deflecting blame for the letters on the grounds that it was Cohee's decision to send the letters. A259. Additionally, the Superior Court overstated the rights of an equitable owner. An equitable owner does not have the right to exclude individuals from property. *Burris v. Wilmington Tr. Co.*, 301 A.2d 277, 279 (Del. 1972) (*rev'd on other grounds*). In *Burris*, this Court found that "mere equitable title will not support an action for ejectment." *Id*. An ejectment is closely analogous to Blue Beach's communications in the June 30

and July 18 letters, because the letters sought to remove people from property. Thus, Blue Beach's equitable ownership did not make its communications lawful. The Superior Court sought to distinguish *Burris*, holding that Blue Beach's equitable ownership entitled it to announce its *future* intentions. Opinion at 22-23. However, this misstates the nature of the Blue Beach's communications. Blue Beach did not merely announce its future intentions; it took official actions that only a legal owner can take.

For example, the June 30 letter was a 60-days' notice of lease-termination. Rather than being a forward-looking statement of future intent, this letter served the then-effective legal purpose of conveying the statutorily required 60-day notice under the Landlord-Tenant Code. 25 *Del. C.* § 5106(d). Accordingly, Blue Beach was beginning the process for removing the residents from their property, rather than merely stating intentions. Just as equitable ownership was not enough to remove tenants from their property in *Burris*, equitable ownership was also insufficient here to start that process.

Similarly, the July 18 letter did more than just announce future intentions. The letter states, "Through this letter, Rig Acquisitions, LLC the successor to Pine

Haven, is revoking your guest license effective October 31, 2022." A816.[6] The letter did not announce that Blue Beach *intended to* revoke the residents' guest licenses, but instead explicitly stated that their guest licenses *were being* revoked by the letter. Such a revocation is akin to the ejectment at issue in *Burris*, and Blue Beach's equitable ownership could not authorize it to revoke the guest licenses. When viewed through the perspective of a resident, this difference becomes clear. A resident who learns that their guest license is being revoked as of a date certain will be far more likely to take immediate action than a resident who learns of a party's plan to purchase the community and, upon becoming an owner, will revoke the guest license. The latter resident is more likely to wait and see what happens before taking action.

Additionally, the Superior Court found that for both the June 30 and July 18 letters, CPU did not plead that the letters violated the CFA because Blue Beach did not yet own Pine Haven when the letter was delivered, and accordingly, the Hearing Officer's findings were not based on violations charged by CPU. Opinion at 21. However, CPU did adequately plead that Blue Beach violated the CFA by

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[6] As discussed *supra,* Rig Acquisitions, LLC, is a shell company that was created by Blue Beach.

sending these letters despite not owning the property. CPU's complaint states that Dale Cohee was the owner of the property when these letters were sent and that the inspection period to decide whether Blue Beach wanted to purchase the property lasted until September 15, 2022. A016 (¶¶ 17, 21). Further, in Count II, CPU alleged that Blue Beach violated the CFA by making false promises and threats to residents. A033 (¶ 77). The Hearing Officer's finding that Blue Beach violated the CFA because it did not yet own the property is consistent with these allegations: these promises and threats were misleading in part because it did not have the authority to carry out the actions that it threatened. By pleading that Blue Beach did not own the property until September 15 and that Blue Beach violated the CFA by making false threats to residents, CPU's pleadings adequately matched the Hearing Officer's findings.

Finally, the Hearing Officer's findings regarding the June 30 and July 18 letters were supported by substantial evidence. The Superior Court disagreed with the Hearing Officer, finding that the June 30 letter was not misleading since it was signed by the then-current owner, Dale Cohee, on his company's letterhead and finding that the July 18 letter was not misleading because the letter identified Blue Beach as the "incoming buyers" of Pine Haven. Opinion at 25. In coming to these conclusions, the Superior Court not only discounted the substantial evidence found by the Hearing Officer, but also misinterpreted his finding. For one, contrary to

what the Superior Court wrote, Cohee did not sign the June 30 letter. A831. But perhaps more importantly, regarding the June 30 letter, the Hearing Officer did not find the letter misleading simply because it had the then-current owner's name on it, but rather because Blue Beach caused a letter to be sent that exercised rights that it did not have. Testimony from the hearing was clear: this document was created by Blue Beach and distributed on its instruction. A669-670, A758-759. Cohee had no desire to send the letter and played no part in drafting it, only delivering it at Blue Beach's request. A669-670, A759. Because there is substantial evidence supporting a finding that the June 30 letter violated the CFA, the Hearing Officer's finding on this letter should be affirmed.

As for the July 18 letter, it is immaterial that the letter identified Blue Beach's as the "incoming buyers" of Pine Haven. The Hearing Officer's finding was not based on the residents' confusion as to who was sending the July 18 letter, but instead was based on Blue Beach attempting to revoke residents' guest licenses without the authority to do so. To hold out that it had such authority is flatly misleading.

b. The Hearing Officer's finding regarding the June 30 and July 18 letters can be affirmed on independent grounds.

While the Hearing Officer's findings on the June 30 and July 18 letters should be upheld as described above, the CFA violations can also be affirmed for reasons other than those articulated by the Hearing Officer. The "right for any

reason" doctrine is settled law, as explained in *Unitrin, Inc. v. Am. Gen. Corp.*, 651 A.2d 1361, 1390 (Del. 1995):

> We recognize that this Court may affirm on the basis of a different rationale than that which was articulated by the trial court. We also recognize that this Court may rule on an issue fairly presented to the trial court, even if it was not addressed by the trial court.

In the thirty years since *Unitrin*, numerous decisions have applied the doctrine.[7] The standard of review used in *Unitrin*, in which legal conclusions are reviewed *de novo* and factual findings are accepted if "sufficiently supported by the record and are the product of an orderly and logical deductive process" is nearly identical to the standard of review applicable to this case. *See Unitrin,* 651 A.2d at 1385. As such, there is no principled reason that the "right for any reason" doctrine should apply to reviews of decisions from the Court of Chancery or the Superior Court, but not decisions from administrative tribunals. If anything, the unavailability of the *Unitrin* approach would give *more* deference to an administrative tribunal by allowing a hearing officer to shield a line of argument

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[7] *See, e.g., Kane v. Burnett,* 2002 WL 2017066 at *1 (Del. 2002) (affirming the lower court, "albeit on alternative and independent grounds"); *Midland Funding LLC v. Graves*, 2016 WL 1590999 at *4 (Del. Super. Ct. 2016) (LeGrow, J.) (ruling by lower court was harmless error where judgement could be affirmed on independent grounds).

from review. Take for example a situation in which a hearing officer finds for a party for one reason but does not address a second argument made by that party. If the reviewing court disagrees with the hearing officer for the first reason, the original prevailing party would lose on the issue without any ability to have the second argument ever heard.[8] That is precisely what happened here. After the Superior Court disagreed with the Hearing Officer's finding, it declined to consider the additional rationale presented by CPU, meaning some of CPU's arguments were never considered. To prevent such an injustice, this Court should consider CPU's other rationale for why the two letters violated the CFA.

The Superior Court offered a few reasons for declining to consider CPU's additional rationales. First, it found that it is limited to the Hearing Officer's rationale because its role is to determine if the findings in the order are supported by substantial evidence, pursuant to 29 *Del. C.* § 2523(d), and it is not able to find new facts. Opinion at 17-18. This is erroneous for two reasons. First, it writes the "right for any reason" doctrine out of the law. Second, there is no reason that the

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[8] A cross-appeal is only allowed when a party is seeking to enlarge its own rights or lessen the rights of an adversary. *Hercules Inc. v. AIU Ins. Co.*, 783 A.2d 1275, 1277 (Del. 2000). Accordingly, a party cannot cross appeal if a hearing officer finds in its favor for one reason but does not address another.

Superior Court could not have affirmed the Hearing Officer's finding using facts found by the Hearing Officer, even if the Hearing Officer did not rely on them. The finding – that Blue Beach violated the CFA through these letters – simply has to be supported by substantial evidence. 29 *Del. C.* § 2523(d). As detailed *infra*, no new facts are required to find that the June 30 and July 18 letters violated the CFA for reasons other than those found by the Hearing Officer. At the very least, if the Court rejects the Hearing Officer's findings and will not consider any arguments other than those considered by the Hearing Officer, then a remand is justified. *See Ferguson v. Delaware Bd. of Nursing*, 2009 WL 4021230, at *4 (Del. Super. Ct. Aug. 20, 2009) (remanding decision due to administrative board ignoring relevant evidence).

Next, the Superior Court found that it could not consider CPU's other rationales because the Hearing Officer rejected those rationales, and CPU did not cross-appeal. Opinion at 18. However, the Hearing Officer found that both the June 30 and July 18 letters violated the CFA, so CPU had nothing to cross appeal and was not attempting to enlarge its own rights regarding those letters. *Winshall v. Viacom Int'l, Inc.*, 76 A.3d 808, 815 (Del. 2013) (clarifying that an appellee need not cross appeal from a ruling that the appellee ultimately prevailed on); *Haley v. Town of Dewey Beach*, 672 A.2d 55, 58–59 (Del.1996); *Massachusetts Mut. Life Ins. Co. v. Ludwig*, 426 U.S. 479, 480 (1976).

Both letters violated the CFA for several reasons other than those articulated by the Hearing Officer. The June 30 letter, which was sent to the RV residents of the community, told the RV residents that they were subject to the Landlord-Tenant Code and would be considered holdover tenants, liable for double rent pursuant to 25 *Del C.* § 5515. A830. Not only does the Landlord-Tenant Code not apply to RV owners renting a plot of land, but Blue Beach later did not afford residents protections of the Landlord-Tenant Code, picking whatever section of the law would benefit Blue Beach the most.[9] *See* A816, A905. These false threats constituted a violation of the CFA.[10]

The Hearing Officer's finding that the July 18 letter violated the CFA can also be upheld for additional reasons. This letter told all RV residents, as well as one traditional manufactured home resident, that Pine Haven was not a year-round facility and that they held a license agreement running from April 15 to October 31. A648-649, A760, A816. However, many of the RV residents had been living there year-round with permission of the owner, meaning that residents' licenses did

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[9] RVs owned by a tenant who rents land from a landlord are exempt from the Landlord-Tenant Code under 25 *Del. C.* § 5102(5).

[10] Since the Hearing Officer found that this letter was sent to residents of Pine Haven, to whom the landlord tenant code does not apply, no new facts are required to support such a finding. A606.

not expire in October. A666, A672. While Blue Beach may have intended to operate the community in a seasonal manner in the future, to tell residents that they currently had a license running only from April 15 to October 31 was a misrepresentation in violation of the CFA. 6 *Del C.* § 2513(a).[11]

Moreover, Blue Beach threatened to call the police if residents did not vacate the premises by October 31. That was a false threat, as it was unreasonable to believe that the police, absent a court order, would remove residents as criminal trespassers from their own homes. A666, A704. *See Fed. Trade Comm'n v. Williams, Scott & Assocs. LLC*, 2015 WL 12856779, at *9 (N.D. Ga. Nov.) 4, 2015), *aff'd*, 679 F. App'x 836 (11th Cir. 2017) (deceptive act found where defendants "claimed that the consumers would be arrested or subject to criminal sanctions or that the consumers' driver's licenses would be revoked or suspended"); *Consumer Fin. Prot. Bureau v. NDG Fin. Corp*., 2016 WL 7188792, at *14 (S.D.N.Y. Dec. 2, 2016) (deceptive act found where defendants misrepresented that failing to pay back loans would result in "lawsuits, arrest,

[11] The Hearing Officer found that this letter was indeed sent to all RV residents (and at least one manufactured home resident) and that RV residents lived at Pine Haven year-around. A571-575, A577, A816. As such, no new facts are required to support this finding.

imprisonment, or wage garnishment"); *Searle v. Harrah's Ent., Inc.*, 2010 WL 3928632, at *12 (Tenn. Ct. App. Oct. 6, 2010) (threatening criminal prosecution to collect a debt was a deceptive practice); *State v. O'Neill Investigations, Inc.*, 609 P.2d 520, 535 (Alaska 1980) ("Threats by debt collection agencies of imminent legal action when no such action is actually contemplated is a deceptive act or practice.")[12].

[12] The Hearing Officer found that this letter was indeed sent. A577. As such, no new facts are required to support this finding.

IV. The Hearing Officer's correctly found that Blue Beach violated the CFA by accepting unlawful rent payments

A. Question Presented

Did Blue Beach violate the CFA by continuing to accept unlawfully charged rent payments? A281-282, A455-456 (to Hearing Officer); A1133-1137 (to Superior Court)

B. Scope of Review

CPU respectfully submits that the scope of review is identical to that set forth in Argument III.B.

C. Merits of Argument

i. The Hearing Officer's finding that Blue Beach violated the CFA by accepting unlawful rent payments was not legal error and was supported by substantial evidence.

The Hearing Officer found that Blue Beach violated the CFA 126 times by continuing to accept unlawful rent payments from Pine Haven residents. A613-614.[13] The Superior Court overturned the Hearing Officer's findings for two reasons. First, the Superior Court found that the Hearing Officer's findings were

[13] The rent payments were unlawful because Blue Beach raised the rent in excess of the amount allowed by 25 *Del. C.* § 7052A. Blue Beach has not disputed that the rent increases themselves were unlawful.

not supported by substantial evidence, stating, "there is no evidence that Blue Beach interacted with a resident each time (or any time) a rent check was dropped off. So, there is no evidence of any communication with residents when they submitted their monthly rent payments that could be found to be false or misleading under the CFA." Opinion at 30-31. As an initial matter, the Superior Court misstated the record, as multiple residents testified that they interacted with employees of Blue Beach when paying rent. B51-55; A693, A701. Given that multiple residents attested to interacting with Blue Beach when paying rent, it was reasonable to conclude that the other residents were paying rent in a similar manner. While the Superior Court may have found differently if they were sitting as the fact finder in this case, that is not relevant here; its job was to affirm if the findings were supported by any substantial evidence. *Squire v. Bd. of Educ. of Red Clay Consol. Sch. Dist.*, 911 A.2d 804 (Del. 2006).

Additionally, Blue Beach and the Superior Court both ignore the CFA's prohibition on omissions of material facts, which by its own terms can occur in the absence of a direct interaction with a victim. The CFA prohibits "...the concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression, or omission..." 6 *Del. C.* § 2513(a). Here, Blue Beach omitted the material fact that the rent it was charging was unlawful and intended for the residents to rely on that, so that Blue Beach could

continue to overcharge the residents. Any lack of interaction Blue Beach had with the residents when they paid their rent is irrelevant. Many businesses transact with their customers without interacting with them directly; to impose such a requirement would insulate many businesses from accountability under the CFA. Even if Blue Beach did not interact directly each month with every resident that paid it rent, the rent payments landing in its bank accounts put it on notice that residents were continuing to pay this rent. Upon receiving such notice, Blue Beach sat by idly as the residents continued to pay it money that the residents did not owe. Blue Beach's own words underscore this point: In the June 30 letter to residents, Blue Beach multiple times referenced its "acceptance of rent" from residents. A830.

Additionally, the Superior Court held the Hearing Officer's findings of 126 CFA violations for the collection of rents were for reasons not charged by CPU in its Complaint, claiming the findings were based on omissions, whereas CPU charged Blue Beach with commissions. Opinion at 23. However, CPU sufficiently pleaded facts necessary to support the Hearing Officer's finding. CPU alleged that Blue Beach "falsely claimed, repeatedly and willfully, that tenants were required to pay an increased monthly rent." A023 (¶83). Implicit in these allegations, especially given the "repeatedly" language, is that Blue Beach continued to charge residents this illegal rent. CPU alleged both that Blue Beach used affirmative

means such as deception, fraud, and misrepresentations as well as non-affirmative means such as omissions, concealment, and suppression in the context of the rent increases. A023-24 (¶¶84-85). By pleading the repeated nature of Blue Beach's rent infractions and alleging that Blue Beach engaged in omissions in violation of the CFA in the context of the rent increases, CPU's pleadings sufficiently matched the Hearing Officer's finding. It is implausible to suggest that Blue Beach was not on notice that CPU had determined such rent charges to be unlawful.

V. The Hearing Officer correctly found that February 23 "Dear RV Residents" violated the CFA

A. Question presented

Did Blue Beach's February 23 letter sent to RV Owners violate the CFA? A237, A454-455 (to Hearing Officer); A1137-1140 (to Superior Court)

B. Scope of Review

CPU respectfully submits that the scope of review is identical to that set forth in Argument III.B.

C. Merits of Argument

On February 23, 2023, Blue Beach sent the Dear RV Residents letter, stating that Pine Haven is not a year-round facility and that the police may be called to remove them from their property.[14] A905. The Hearing Officer found "asserting that Pine Haven was a seasonal campground" to be a violation of the CFA, especially given the extensive record demonstrating Blue Beach's awareness at this point that Pine Haven was not seasonal. Without detailing its reasoning, the Superior Court found that there was not substantial evidence to support the

[14] This letter is different than the Change of Use letter sent to manufactured home owners, also on February 23. The Superior Court mistakenly treated them as one letter.

Hearing Officer's finding that the Dear RV Residents letter violated the CFA. Opinion at 29. But the letter contained multiple misrepresentations, and therefore, the Hearing Officer's finding should be affirmed.

If the Superior Court meant to accept one of the arguments raised by Blue Beach below, none have merit. First, Blue Beach took issue with the Hearing Officer's characterization that Blue Beach asserted that Pine Haven was a seasonal campground in the Dear RV Residents letter. A610, A1085. This should not invalidate the Hearing Officer's finding, since the Hearing Officer's statement was accurate. While the letter did not use the phrase "seasonal campground", it said "The Resort is not a year-round facility." A905. Moreover, the very next sentence says, "The Campground Season runs from April 15 to October 31." Taken together, these statements are equivalent to the Hearing Officer's characterization that the letter asserted that Pine Haven is seasonal.

Next, Blue Beach claimed that the letter's statement that the "Resort is not a year-round facility" was true for the recipients of the letter because they were not considered to be living in manufactured homes as defined in 25 *Del. C.* § 7003(12) and thus did not receive the MH Act's statutory protections. But the letter contains no qualifier specifying that the campground is considered year-round for those

covered by the MH Act but seasonal for those in non-qualifying RVs.[15] Even if no RV residents had been living at Pine Haven year-round, this failure would be enough to support a CFA violation. However, the Court does not need to engage in that hypothetical, since many residents were living there year-round. A658-659, A666, A704, A710. Pine Haven had year-round manufactured homes in it, as well as year-round RVs, and thus, Blue Beach's statement that it "is not a year-round facility" was a misrepresentation in violation of the CFA.

Finally, like the July 18 letter discussed *supra,* Blue Beach's threat of calling the police to remove the residents from their property violated the CFA. Given that many of the residents were living in the community fulltime for years, it is deceptive to say that the police were going to remove people from their property without a court order.

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[15] Nor was Blue Beach making such distinctions at the time, as it told the manufactured home owners that Pine Haven was a seasonal campground on the same day. A609, A884-885.

CONCLUSION

For the above reasons, this Court should affirm the rulings of the Superior Court and Hearing Officer by finding that 1) Blue Beach's post-transaction communications are within the scope of the CFA and 2) Blue Beach did not have the right to a jury trial for the action brought by CPU. Further, the Court should affirm the Hearing Officer's decision and vacate the Superior Court's ruling by finding: 3) The June 30 and July 18 letters violated the CFA, 4) Blue Beach violated the CFA through omissions when collecting rent payment, and 5) The February 23 Dear RV Residents letter violated the CFA.

Respectfully submitted,

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Dated: April 9, 2025

IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIRMENT AND TYPE VOLUME LIMITATION

1. I, Brian Canfield, hereby certify that the foregoing Appellee/Cross Appellant's Answering Brief and Opening Brief on Cross Appeal (the "Brief") complies with the typeface requirement of Rule 13(a)(i) because it has been prepared in Times New Roman 14-point typeface using Microsoft Word for Microsoft 365.

2. The Brief complies with the type-volume limitation Rule 14(d)(i) because it contains **13,966** words, which were counted using the word counter function of Microsoft Word for Microsoft 365.

/s/ Brian Canfield (#7207)
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