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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-Appellant	)	

APPELLANT, CROSS-APPELLEE'S REPLY BRIEF ON APPEAL AND ANSWERING BRIEF ON CROSS-APPEAL

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TABLE OF CONTENTS

TABLE OF CITATIONS iv

SUMMARY OF ARGUMENT ON CROSS-APPEAL 1

REPLY ARGUMENT ON APPEAL 2

I. The CFA does not apply to Blue Beach's communications made after residents began occupancy and intended to terminate that occupancy…….. 2

A. *Stare decisis* supports this Court following longstanding precedent to hold that post-transaction conduct is outside the CFA's scope. 2

B. Adding "receipt" to the CFA did not expand its scope to include post-transaction conduct…….. 5

C. The CFA's text and public policy support holding that post-transaction conduct falls outside the CFA's scope. …… 8

D. The DOJ's arguments that some of the communications are within the CFA's scope because they involved leases are without merit …..... 12

II. This administrative enforcement proceeding violated Blue Beach's right under the Delaware Constitution to a jury trial on the DOJ's CFA claims... 14

A. Blue Beach brings an as-applied challenge to the DOJ's CFA claims, not a facial challenge to the CFA or the DOJ's administrative enforcement statute as a whole. 14

B. Whether the constitutional jury trial right applies turns on the claim's nature and substance, including its common law history and whether it is legal or equitable. 17

C. The DOJ's CFA claims are sufficiently similar to common law fraud to invoke Blue Beach's constitutional jury trial right. 20

D. The DOJ's and amicus's remaining arguments against applying the jury trial right are unpersuasive. 25

i. Other states' decisions reveal mixed approaches and results ...25

ii. The General Assembly cannot alter the constitutional right to a jury trial through legislation. 26

iii. Blue Beach's jury trial right is not lost because the CFA claims are brought by the DOJ.....29

iv. *Jarkesy's* logic rebuts the DOJ's and amicus's arguments. ..… 30

ARGUMENT ON CROSS-APPEAL 31

III. The Hearing Officer's findings of CFA violations based on the June 30 and July 18 letters were legal error and not supported by substantial evidence……..... 31

A. Question Presented.....31

B. Scope of Review……..……... 31

C. Merits of Argument …… 32

i. The Hearing Officer erred in finding that the June 30 and July 18 letters violated the CFA because Blue Beach was not yet the park owner; that conclusion was legally incorrect and lacked substantial evidentiary support. ……..... 33

ii. The Hearing Officer's findings on June 30 and July 18 letters cannot be affirmed on independent grounds the Hearing Officer rejected, as reviewing courts may not make factual findings.... 38

IV. The Hearing Officer's finding that Blue Beach violated the CFA by accepting rent payments was legally erroneous and not supported by substantial evidence. 43

A. Question Presented.....43

B. Scope of Review……..……... 43

C. Merits of Argument …… 43

V. The Hearing Officer's finding of CFA violations based on the RV Letter was legal error and not supported by substantial evidence. 47

A. Question Presented.....47

B. Scope of Review……..……... 47

C. Merits of Argument …… 47

CONCLUSION 52

TABLE OF CITATIONS

Page(s)

Cases

Albence v. Higgin,
295 A.3d 1065 (Del. 2022).....27, 29

Allstate Ins. Co. v. Rossi Auto Body, Inc.,
787 A.2d 742 (Del. Super. 2001) 18, 19

Am. Appliance, Inc. v. State,
712 A.2d 1001 (Del. 1998).....26

Burris v. Wilminton Tr. Co.,
301 A.2d 277 (Del. 1972).....34

Carpenter v. Liberty Mut. Ins.,
2023 WL 3454692 (Del. Ch. May 15, 2023) 24

Carper v. New Castle Cnty. Bd. of Ed.,
432 A.2d 1202 (Del. 1981).....7

Claudio v. State,
585 A.2d 1278 (Del. 1991).....29

Clawson v. Primrose,
4 Del. Ch. 643 (Del. Ch. Sept. 1873) 28

Delaware Bd. of Nursing v. Gillespie,
41 A.3d 423 (Del. 2012).....6

Delaware Dep't of Health & Soc. Servs. v. Jain,
29 A.3d 207 (Del. 2011).....31

Diamond Fuel Oil v. O'Neal,
734 A.2d 1060 (Del. 1999).....41

Falconi v. Coombs & Coombs, Inc.,
902 A.2d 1094 (Del. 2006).....41

Fazio v. Guardian Life Ins.,
62 A.3d 396 (Pa. Super. 2012).....25

Hanna Sys., Inc. v. Capano Grp.,
1985 WL 21119 (Del. Ch. Apr. 16, 1985).....24

Harris v. Harris,
289 A.3d 310 (Del. Ch. 2023).....9

Hilton v. S.C. Pub. Railways Comm'n,
502 U.S. 197 (1991).....3

Hopkins v. J.P. Ct. No.1,
342 A.2d 243 (Del. Super. 1975).....*passim*

IBP, Inc. v. Alvarez,
546 U.S. 21 (2005).....3

Ivory v. Ivory,
69 A.3d 371 (Del. 2013).....40

J.P. Morgan Tr. Co. of Delaware v. Fisher,
2019 WL 6605863 (Del. Ch. Dec. 5, 2019).....6

Johnson Controls, Inc. v. Fields,
758 A.2d 506 (Del. 2000).....31

Kane v. Burnett,
2002 WL 2017066 (Del. Aug. 29, 2002).....39, 40

Ki-Poong Lee v. So,
2016 WL 6806247 (Del. Super. Nov. 17, 2016).....44

Kisor v. Wilkie,
588 U.S. 558 (2019).....3

Lehto v. Bd. of Educ. of Caesar Rodney Sch. Dist.,
962 A.2d 222 (Del. 2008).....31

Lony v. E.I. du Pont de Nemours & Co.,
821 F. Supp. 956 (D. Del. 1993).....2, 4

Marbury v. Madison,
5 U.S. (1 Cranch) 137 (1803).....29

Martin v. Heinold Commodities, Inc.,
643 N.E.2d 734 (Ill. 1994).....25

McCool v. Gehret,
657 A.2d 269 (Del. 1995).....20

Midland Funding LLC v. Graves,
2016 WL 1590999 (Del. Super. Apr. 7, 2016).....39, 40

Money Store/Delaware, Inc. v. Kamara,
704 A.2d 282 (Del. Super. 1997).....18

Nationwide Prop. & Cas. Ins. v. Irizarry,
2020 WL 525667 (Del. Super. Jan. 31, 2020).....3

Nieves v. All Star Title, Inc.,
2010 WL 2977966 (Del. Super. July 27, 2010).....46

Noel-Liszkiewicz v. La-Z-Boy,
68 A.3d 188 (Del. 2013).....31

Norman Gershman's Things to Wear, Inc. v. Mercedes-Benz of N. Am.,
558 A.2d 1066 (Del. Super. 1989).....4, 10

Oceanport Indus., Inc. v. Wilmington Stevedores, Inc.,
636 A.2d 892 (Del. 1994).....9

Office of Comm'r, Delaware Alcoholic Beverage Control v. Appeals Comm'n,
2013 WL 3816682 (Del. Super. July 17, 2013).....35

Park Oil, Inc. v. Getty Ref. & Mktg. Co.,
407 A.2d. 533 (Del. 1979).....18

Protect Our Indian River v. Sussex Cnty. Bd. of Adjustment,
2015 WL 4498971 (Del. Super. July 2, 2015) 34

Price v. State Farm Mut. Auto. Ins.,
2013 WL 1213292 (Del. Super. Mar. 15, 2013) 10

Radius Servs., LLC v. Jack Corrozi Const.,
2009 WL 3273509 (Del. Super. Sept. 30, 2009).....24

Sammons v. Hartford Underwriters Ins. Co.,
2010 WL 1267222 (Del. Super. Apr. 1, 2010).....17

SEC v. Jarkesy,
144 S. Ct. 2117 (2024) 30

Sobolewski v. German,
127 A. 49 (Del. Super. 1924) 28

State ex rel. Brady v. Publishers Clearing House,
787 A.2d 111 (Del. Ch. 2001)…..……..…….....16, 17

State v. Abbott Labs.,
816 N.W.2d 145 (Wis. 2012) 26

State v. Barnes,
116 A.3d 883 (Del. 2015).....3, 4, 5

State v. Cahill,
443 A.2d 497 (Del. 1982).....19

State v. Credit Bureau of Laredo, Inc.,
530 S.W.2d 288 (Tex. 1975) 26

State v. Gardiner,
2000 WL 973304 (Del. Super. June 5, 2000).....16

State v. Gardiner,
2000 WL 1211215 (Del. Super. July 11, 2000) 45, 46

State v. Young,
314 A.3d 688 (Del. Super. 2024) 3, 4

Stephenson v. Capano Dev., Inc.,
462 A.2d 1069 (Del. 1983).....16, 21, 26

Taylor v. Diamond State Port Corp.,
14 A.3d 536 (Del. 2011).....31

Thomas v. Harford Mut. Ins. Co.,
2003 WL 220511 (Del. Super. Jan. 31, 2003).....4, 10

Thorley v. Nowlin,
542 P.3d 137 (Wash. App. 2024) 26

Unitrin, Inc. v. Am. Gen. Corp.,
651 A.2d 1361 (Del. 1995) ……..…….. 39

Williams v. Progressive Direct Ins.,
631 F. Supp. 3d 202 (D. Del. 2022) 2

Wyatt v. Rescare Home Care,
81 A.3d 1253 (Del. 2013).....11

Statutes

1 *Del. C.* § 303.....9

6 *Del. C.* § 2-106 12

6 *Del. C.* § 2A-103.....12

6 *Del. C.* § 2513.....*passim*

6 *Del. C.* § 2511.....10

6 *Del. C.* § 2522.....22, 24

8 *Del. C.* § 122.....4

10 *Del. C.* § 6701.....34

25 *Del. C.* § 7003.....48, 49

25 *Del. C.* § 7024.....47

29 *Del. C.* § 2523.....35, 41

29 *Del. C.* § 2524.....22

Del. Const. of 1897.....27, 29

Del. Const. of 1776.....27, 28

Del. Const. of 1792.....27

Del. Const. of 1831.....27

Declaration of Rights and Fundamental Rules of the State of Del. § 13 (1776)….28

Laws of Delaware

Del. H.B. 91 syn., 151st Gen. Assem., 83 Del. Laws. ch. 85, §2.....6, 7

6 *Del. Admin. C.* § 103-13.1.....35, 36, 44

69 *Del. Laws*, c. 203 (1994).....16

74 *Del. Laws*, c. 113, §§ 1, 2 (2003).....4

77 *Del. Laws*, c. 282, § 2 (2010).....16

83 *Del. Laws*, c. 85, §§ 1-2 (2021).....4

83 *Del. Laws*, c. 178, § 5 (2021).....4

84 *Del. Laws*, c. 309, § 1 (2024).....4

Other

Hon. Randy J. Holland, *The Delaware State Constitution: A Reference Guide* 47 (2d ed. 2017) 18

SUMMARY OF ARGUMENT ON CROSS-APPEAL

3. Denied. The Superior Court correctly reversed the Hearing Officer because: Blue Beach, as equitable owner, had the right to send the relevant letters; the Hearing Officer's findings were not based on violations the DOJ had charged; and the record lacked substantial evidence to support the findings.

4. Denied. The Superior Court correctly held that the Hearing Officer's finding of CFA violations based on Blue Beach's failure to correct residents about rent overpayments was improper because the DOJ had not charged that theory, and there was not substantial evidence to support 126 separate CFA violations.

5. Denied. The Superior Court correctly held that the Hearing Officer's findings were legally and factually flawed because the letter was not false as to its recipients, since they were mobile RV owners who had no legal right to reside in the park year-round.

REPLY ARGUMENT ON APPEAL

I. The CFA does not apply to Blue Beach's communications made after residents began occupancy and intended to terminate that occupancy.

A. *Stare decisis* supports this Court following longstanding precedent to hold that post-transaction conduct is outside the CFA's scope.

For decades, Delaware courts have held that a business's communications made after a consumer enters into a transaction fall outside the CFA's scope. For at least 20 years, Delaware trial courts have repeatedly and uniformly applied this limiting interpretation. *See* BBOB 15-17, 24-25 (collecting authority).[1] Blue Beach has argued this throughout these proceedings, and the DOJ has yet to cite contrary precedent.[2] Delaware's settled interpretive principles, particularly *stare decisis*, strongly support adhering to the longstanding judicial construction limiting the CFA's scope, and the DOJ's arguments for departing from it are unpersuasive.

First, the DOJ claims that the legislative acquiescence principle "has been severely downplayed by courts." DOJ 21.[3] But the DOJ cites only federal authorities. DOJ 21-22. It does not address the two on-point Delaware cases Blue

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[1] Blue Beach cites to its brief, filed March 3, 2025, D.I. 16 as "BBOB _."

[2] The only exception is the DOJ's citation to *Lony v. E.I. du Pont de Nemours & Co.*, 821 F. Supp. 956, 982 (D. Del. 1993), the District Court case the Superior Court cited in its opinion (which the DOJ did not cite in its earlier briefing). As Blue Beach explained, *Lony* has little precedential value, including within the District Court itself. BBOB 25; *see Williams v. Progressive Direct Ins.*, 631 F. Supp. 3d 202, 212 (D. Del. 2022) (holding that post-sale communications fell outside the CFA's scope; surveying authority, not citing *Lony*).

[3] Blue Beach cites to the DOJ's brief, filed April 9, 2025, D.I. 25 as "DOJ _."

Beach cited: *State v. Barnes*, 116 A.3d 883 (Del. 2015) and *Nationwide Prop. & Cas. Ins. v. Irizarry*, 2020 WL 525667 (Del. Super. Jan. 31, 2020). Both *Barnes* and *Nationwide* relied on the legislative acquiescence principle to reject an argument to disregard a settled judicial interpretation of a statute. *See Barnes*, 116 A.3d at 892 (affirming on *stare decisis* grounds despite the alternative interpretation being a "better reading of the statute"); *see also Nationwide*, 2020 WL 525667 at *6 (following statutory interpretation from five decisions because the General Assembly had not overturned it). Legislative acquiescence remains alive, well, and often dispositive in Delaware. *See State v. Young*, 314 A.3d 688, 700-704 (Del. Super. 2024) (applying *Barnes* and related authority to uphold a settled interpretation of a statute).

Second, the DOJ overstates the decline of the legislative acquiescence principle in federal courts, and its reliance on federal law is misplaced. The DOJ includes quotes from Supreme Court cases from 1940, 1989, and 1994 questioning the principle's reliability. DOJ 21. But more recent Supreme Court decisions continue to rely on this principle. *See Kisor v. Wilkie*, 588 U.S. 558, 587 (2019); *IBP, Inc. v. Alvarez*, 546 U.S. 21, 32 (2005); *Hilton v. S.C. Pub. Railways Comm'n*, 502 U.S. 197, 202 (1991).

Moreover, while the DOJ notes criticisms about legislative acquiescence assuming too much about Congressional awareness and responsiveness, those

concerns are not echoed in Delaware law. DOJ 21. Delaware courts have consistently recognized that the General Assembly is receptive to stakeholder input and willing to amend statutes when it disagrees with judicial interpretations. *See Barnes*, 116 A.3d at 893; *Young*, 314 A.2d at 703; *cf.* 84 Del. Laws, c. 309, § 1 (enacting S.B. 313 to amend 8 *Del. C.* § 122 to overrule recent judicial interpretation of the statute).

Third, the DOJ relies on an incomplete history of the CFA to support its argument. DOJ 22. The DOJ contends that between 1989 and 2003, the case law interpreting the CFA's scope was sparse, pointing to *Norman Gershman's* and *Thomas* as limiting decisions, and *Lony* not limiting the scope.[4] But the DOJ's historical account ends prematurely in 2003. That was not an oversight, as every decision from 2003 to the present has held that communications made after a consumer entered into a transaction fall outside the CFA's scope. *See* BBOB 15-17, 24-25 (collecting authority). During this 20-year period in which over a half-dozen state and federal trial court decisions limited the CFA's scope, the General Assembly amended the CFA three times,[5] but none of the amendments changed this repeated

[4] *Norman Gershman's Things to Wear, Inc. v. Mercedes-Benz of N. Am.*, 558 A.2d 1066, 1074 (Del. Super. 1989); *Thomas v. Harford Mut. Ins. Co.*, 2003 WL 220511, at *4 (Del. Super. Jan. 31, 2003); *Lony*, 821 F. Supp. at 982.

[5] 74 Del. Laws, c. 113, §§ 1, 2 (2003) (adding private cause of action); 83 Del. Laws, c. 85, §§ 1-2 (2021) (adding "unfair practices" and "receipt"); 83 Del. Laws, c. 178, § 5 (2021) (expanding authority of State to initiate enforcement proceedings).

judicial interpretation. The DOJ's selective omission of this unbroken line of authority underscores the strength of Blue Beach's reliance on legislative acquiescence.

Fourth, the DOJ notes that the scope of the CFA is a matter of first impression for this Court. DOJ 23. Putting aside that this Court has affirmed several Superior Court decisions limiting the CFA's scope,[6] *stare decisis* applies to established statutory interpretations by trial courts, including the Superior Court. *See Barnes*, 116 A.3d at 890–91 (holding longstanding trial court interpretations merit deference under *stare decisis*).

Although this Court has not directly addressed the CFA's scope, it is not writing on a clean slate. For at least 20 years, Delaware courts have held that post-transaction communications fall outside the CFA's scope, and the General Assembly, despite amending the CFA multiple times, has never disturbed that settled interpretation. This longstanding acquiescence confirms the legislature's intent to leave the law as is and strongly supports adhering to precedent.

B. Adding "receipt" to the CFA did not expand its scope to include post-transaction conduct.

The DOJ's lead argument is that "the General Assembly *did* alter the CFA to overrule the Superior Court's case law and further clarify that post-transaction

[6] *See* Blue Beach OB 18, n. 5 (collecting authority).

conduct is within the scope of the CFA." DOJ 23 (emphasis original). It relies on a 2021 amendment that added the word "receipt" to 6 *Del. C.* §2513(a) ("Section 2513"). According to the DOJ, this addition "removed any doubt" that the CFA applies to post-transaction conduct. DOJ 24. It further argues that Blue Beach's communications fall within the CFA's scope because they related to residents' "ongoing receipt of real estate and associated services." *Id*. This argument fails for four reasons.

First, the DOJ's claim that the 2021 "receipt" amendment overruled decades of case law is unpersuasive. As Delaware courts have recognized, "[w]hen a statutory amendment intends to overrule a significant Delaware decision, the synopsis often mentions the decision by name." *J.P. Morgan Tr. Co. of Delaware v. Fisher*, 2019 WL 6605863, at *10 (Del. Ch. Dec. 5, 2019) ("If the General Assembly had intended to abrogate *Riggs*, doubtless the synopsis would have said so."). The synopsis of the 2021 amendment does not expressly state the addition of "receipt" to Section 2513 was intended to abrogate case law limiting the CFA's scope. Del. H.B. 91 syn., 151st Gen. Assem., 83 Del. Laws. ch. 85, §2. If the General Assembly intended to overturn this line of settled decisions, it would have said so explicitly.

Second, adding "receipt" did not unambiguously expand the CFA's scope to include post-transaction conduct. Rather, "receipt" was simply inserted alongside

other types of business-consumer interactions. "[W]ords grouped in a list should be given related meaning." *Delaware Bd. of Nursing v. Gillespie*, 41 A.3d 423, 427 (Del. 2012). Nor did the amendment change the "in connection with" language, the statutory definitions of sale and lease, or add language suggesting that conduct occurring after a transaction begins falls within the CFA's scope. The amendment did not implicitly overrule the longstanding case law limiting the CFA's scope.

Third, the bill's synopsis clarifies that the addition of the ambiguous term "receipt" served a narrow purpose: to extend the CFA to cover businesses that provide goods or services at no charge. A bill's synopsis is "a proper source from which to glean legislative intent." *Carper v. New Castle Cnty. Bd. of Ed.*, 432 A.2d 1202, 1205 (Del. 1981). The 2021 amendment was primarily intended to "include the term 'unfair practice' among the activities explicitly prohibited by the Consumer Fraud Act" to align Delaware's law with those of most other jurisdictions. Del. H.B. 91 syn., 151st Gen. Assem., 83 Del. Laws. ch. 85, §2. 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.

Id. (emphasis added). The synopsis is clear: "receipt" was added solely to cover businesses that provide goods or services at no charge. Moreover, that is not merely

an "example" as the DOJ contends (DOJ 24-25)—the synopsis states it is the reason for adding "receipt."

Fourth, given the narrow purpose behind adding "receipt" to Section 2513, the DOJ's argument that the amendment brought Blue Beach's conduct within the CFA's scope is unavailing. The DOJ contends that "[e]ach 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." DOJ 24. But "receipt" was added to address situations where merchandise is provided at no charge, and Blue Beach (like Mr. Cohee) was not providing free residency to park residents, thus the concept of "receipt" is inapplicable. Moreover, the DOJ misinterprets "receipt" as expanding the definition of "lease," when it was intended to describe a distinct type of business-consumer interaction. In sum, the residents entered into leases or licensees with Mr. Cohee—agreements that Blue Beach later sought to terminate—not mere "receipt" relationships, and the 2021 amendment did not expand the CFA's scope to cover Blue Beach's communications.

C. The CFA's text and public policy support holding that post-transaction conduct falls outside the CFA's scope.

For a communication to violate the CFA, it must be made "in connection with the sale, lease, receipt, or advertisement of merchandise." 6 *Del. C.* § 2513(a) (emphasis added). For decades, Delaware courts have ruled that communications

made after a consumer enters into a transaction are not "in connection with" that transaction and thus fall outside the CFA's scope.

The DOJ argues that a communication "merely must relate to the 'sale, lease, receipt, or advertisement of any merchandise'" to fall within the CFA. DOJ 15 (quoting Section 2513). It relies not on a CFA case, but only on a dictionary definition and cases interpreting "in connection with" in unrelated contexts like partnership agreements and fee-shifting clauses. DOJ 16. This interpretation is untenable because it ignores that the statute's starting point is the business's affirmative conduct aimed at inducing a consumer to engage in a transaction—not any communication that merely relates to commerce. Stated differently, the DOJ's interpretation considers only the text that follows "in connection with"; it fails to also incorporate the text that precedes the phrase.

"Each part or section [of a statute] should be read in light of every other part or section to produce a harmonious whole." *Oceanport Indus., Inc. v. Wilmington Stevedores, Inc.*, 636 A.2d 892, 900 (Del. 1994). And statutory phrases must be read in context. *See* 1 *Del. C.* § 303 (stating "[w]ords and phrases shall be read with their context…."); *see also Harris v. Harris*, 289 A.3d 310, 328 (Del. Ch. 2023) ("[D]efinitions… do not reveal words in their natural habitat."). Properly understood, "in connection with" requires a nexus between the business's

affirmative misconduct and the formation of a consumer relationship, not any communication merely related to commerce.

The statutory definitions of "sale" and "lease" reinforce this reading. Critically, the definitions of both terms alter their common understanding to include pre-transaction activity, such as an "offer for [sale / lease]" and "attempt to [sell / lease]." 6 *Del. C.* § 2511(3), (8). By defining these terms to include offers and attempts, the General Assembly made clear that the CFA targets communications that induce consumers to enter into new transactions, not those concerning existing or ongoing relationships.

This understanding is reflected in Delaware courts' consistent interpretation that a business's communications made after the consumer enters into a transaction fall outside the CFA's scope. In *Norman Gershman's*, the court interpretated "in connection with" to mean "connected to" the sale or advertisement of the vehicle. 558 A.2d 1066, 1074 (Del. Super. 1989). Likewise, in *Thomas*, the court interpretated "in connection with" to mean "connected to" the sale or advertisement of the insurance policy. 2003 WL 220511, at *4 (Del. Super. Jan. 31, 2003). And in *Price v. State Farm Mut. Auto. Ins.*, the court interpreted "in connection with" to mean "while purchasing" the merchandise. 2013 WL 1213292, at *11 (Del. Super. Mar. 15, 2013). These decisions confirm that, when read in context of Section 2513,

"in connection with" refers to conduct tied to the formation of a transaction, not to communications about an existing relationship.

Finally, public policy supports embracing Delaware courts' narrower interpretation over the DOJ's expansive view. As Blue Beach argued in its brief, fraud concerns relationships formed under false pretenses; thus, the CFA's scope should likewise be limited to conduct inducing a transaction, especially since consumers have other substantial legal protections after a transaction begins. BBOB 18-19. The DOJ dismisses this "essentializing" of the CFA as irrelevant (DOJ 19-20); but it is appropriate to for this Court to "resort to other sources [of the statute's apparent purpose], including relevant public policy." *Wyatt v. Rescare Home Care*, 81 A.3d 1253, 1261 (Del. 2013). The DOJ also minimizes the CFA's role in addressing fraud, noting that while "fraud" is in the name, the word "fraud" appears only once in Section 2513's list of unlawful practices. However, apart from the newly added "unfair practices" term, all the practices prohibited by Section 2513 are synonyms of fraud. The public policy principles highlighted by Blue Beach support Delaware courts' longstanding interpretation limiting the CFA to pre-transaction conduct.

D. The DOJ's arguments that some of the communications are within the CFA's scope because they involved leases are without merit.

The DOJ's final argument that some of the communications were within the CFA's scope because they involved leases fails.

First, the DOJ argues that the ongoing nature of a lease distinguishes some of the communications here from post-sale representations that fall outside the CFA's scope. DOJ 14, 26-27. But a sale does not necessarily happen "at a single point in time," as the DOJ suggests. DOJ 14. Rather, many sales initiate continuing relationships, such as installment sales, executory contracts, warranties, and insurance policies. The key legal distinction between a sale and a lease is not their duration, but whether ownership is transferred or retained. *See* 6 *Del. C.* §2-106(1) (sale under UCC), §2A-103(j) (lease under UCC). As the Superior Court correctly concluded, the ongoing nature of the transaction—whether a lease or sale—is a distinction without a difference. Opinion 7-8. This conclusion is reinforced by the four cases Blue Beach cited in its opening brief, where courts held that post-transaction communications—even in ongoing relationships involving consumer rights—fell outside of the CFA's scope. BBOB 20-21. The DOJ's only rebuttal is that those cases involved sales rather than leases, but, as shown above, that distinction is not legally meaningful.

Second, the DOJ argues that because the manufactured home owners had unwritten leases that automatically renewed under the MH Act, all communications to those residents were "in connection with" future leases and thus fell within the CFA's scope. DOJ 14, 27-28. The Superior Court correctly rejected this argument. Opinion 9. As Blue Beach explained in its opening brief, the communications at issue were intended to end existing leases—not to negotiate or induce entry into new leases. BBOB 20-21. Moreover, the DOJ cites no authority suggesting that the CFA was intended to address communications aimed at ending a contractual relationship, rather than inducing one. This argument not only ignores the factual record but also lacks legal support.

II. This administrative enforcement proceeding violated Blue Beach's right under the Delaware Constitution to a jury trial on the DOJ's CFA claims.

The Court should hold that this administrative proceeding violated Blue Beach's jury trial right under the Delaware Constitution. The DOJ's CFA claims—alleging knowing fraud with intent to induce residents that caused harm—closely parallel common law fraud, a legal cause of action historically tried by a jury. Thus, Blue Beach has a constitutional right to have those claims decided by a jury.

In this appeal, the parties and amicus have devoted over 50 pages to this constitutional issue, raising many arguments and counterarguments. This reply recenters the discussion on the three most critical questions: What is Blue Beach's argument? What legal standard applies? And how does that standard apply to the DOJ's CFA claims? The sections below address each of these questions and respond to the DOJ's and amicus's other arguments.

A. Blue Beach brings an as-applied challenge to the DOJ's CFA claims, not a facial challenge to the CFA or the DOJ's administrative enforcement statute as a whole.

Blue Beach advances an as-applied challenge "to the circumstances of this case," not a facial one. A1280. Its argument is that the DOJ's CFA claims are so comparable to a common law fraud claim that they must, under the Delaware Constitution, be tried before a jury. The amicus mischaracterizes this as a broad, facial attack on the constitutionality of the CFA and the DOJ's administrative enforcement statute. That is not Blue Beach's argument.

The DOJ's CFA claims allege knowing fraud with intent to induce residents that caused harm—quintessential elements of common law fraud. *See* A30, 32-35. Blue Beach's argument focuses on how the DOJ's administrative enforcement statute, as applied to these particular claims, violates its constitutional right to a jury trial. *See* A1189-1190, 1203-1206, 1280, 1416-1419. At oral argument, Blue Beach's counsel and the Superior Court discussed the narrow scope of the challenge, including which aspects of the CFA and administrative enforcement statute would remain unaffected by ruling in Blue Beach's favor. *See* A1416-1419. Blue Beach does not argue that all CFA claims trigger the jury trial right or that administrative enforcement is categorically unconstitutional. Rather, it is the fraud-heavy nature of the DOJ's claims in this case which trigger the jury trial right.

Amicus mischaracterizes Blue Beach's position. It attacks strawman arguments Blue Beach has not made, stating its interest as supporting the DOJ's effort to "uphold the constitutionality of the CFA…." Amicus 1.[7] But Blue Beach is not challenging the CFA itself. Its challenge is directed at the DOJ's use of Title 29's administrative process to prosecute these specific claims. Amicus also wrongly asserts that Blue Beach seeks to "eliminat[e]" and "remov[e]" administrative enforcement of the CFA. Amicus 2, 3. Again, Blue Beach does not ask this Court

[7] Blue Beach refers to the Amicus's brief, filed on April 16, 2025, D.I. 35, as "Amicus __."

to declare the entire administrative enforcement process unconstitutional, only its use for claims of this nature. *See* A1416-1419. Amicus's portrayal of a sweeping constitutional assault is simply incorrect.

Moreover, amicus's description of the history of federal and Delaware consumer protection law to support its strawman argument is incorrect. First, amicus incorrectly states that the DOJ was provided administrative enforcement authority for CFA claims in 1994. Amicus 13. The DOJ's enforcement of the CFA began in 1994. *See* 69 Del. Laws, c. 203. But it was not until 2010 that the DOJ was provided with administrative enforcement powers; before then, it could only prosecute CFA claims in court. *See* 77 Del. Laws, c. 282, § 2. Second, amicus misstates the law, contending that "it is evident that the CFA is a 'unique statutory remedy' derived from federal fair trade law, not from common law fraud." Amicus 13; *see also id.* at 6. As support, it cites a law review article and a case involving monition sales. But on point Delaware authorities confirm that the CFA is grounded in common law fraud and is not a unique remedy derived from federal fair-trade regulation. *See Stephenson v. Capano Dev., Inc.*, 462 A.2d 1069, 1074 (Del. 1983) ("In all other respects, however, the statute must be interpreted in light of established common law definitions and concepts of fraud and deceit."); *see also State v. Gardiner*, 2000 WL 973304, at *4 (Del. Super. June 5, 2000) ("The statute is in liberalization of common law fraud…."). Third, amicus relies heavily on dicta from *State ex rel.*

Brady v. Publishers Clearing House, which held that CFA claims are not subject to Rule 9(b) particularity requirements. 787 A.2d 111 (Del. Ch. 2001). But later cases have criticized that decision's ruling and rationale. *See Sammons v. Hartford Underwriters Ins. Co.*, 2010 WL 1267222, at *6 (Del. Super. Apr. 1, 2010) (collecting authority). All these errors undermine amicus's arguments.

The Court should look past amicus's mischaracterizations and flawed rebuttals, and instead focus on Blue Beach's position: an as-applied challenge to the DOJ's CFA claims in this case.[8]

B. Whether the constitutional jury trial right applies turns on the claim's nature and substance, including its common law history and whether it is legal or equitable.

As a threshold matter, both the DOJ and amicus implicitly concede that Blue Beach prevails if the Court accepts the legal-versus-equitable framework. Blue Beach's argument is two-fold: (i) there is a constitutional right to a jury trial in actions at law but not in actions that are historically equitable; and (ii) the DOJ's CFA claims are legal in nature because they mirror fraud claims and seek penalties, both traditionally triable by a jury. BBOB 29-44. The DOJ and amicus disagree with Blue Beach's framework. But they offer no rebuttal to the arguments that the

[8] Similarly, the DOJ points to the CFA's enhanced enforcement tools—such as a five-year statute of limitations and the right to seek injunctions against imminent violations. DOJ 38. While true, this is irrelevant here: the DOJ filed its case well within the usual three-year limitations period and did not seek judicial injunctive relief for future violations.

CFA claims and remedies are legal, not equitable. As a result, they waived any argument as to how Blue Beach's framework applies. Thus, if the Court accepts Blue Beach's framework, the Court should rule that the claims and remedies are legal in nature, and that the jury trial right applies.

What's more, neither the DOJ nor amicus showed Blue Beach's legal-versus-equitable framework is wrong, as it is the framework Delaware courts have consistently applied. *See, e.g., 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."). As then-President Judge Ridgely explained: "[Article 1, Section 4] has been interpreted to guarantee a right of trial by jury as it existed at common law. However, there is no constitutional right to a trial by jury in actions that are historically equitable in nature." *Money Store/Delaware, Inc. v. Kamara*, 704 A.2d 282, 283 (Del. Super. 1997). Justice Holland confirmed this in his 2017 reference guide to the Delaware Constitution: "The common law right to trial by jury exists for actions at law but not for actions brought in equity." Hon. Randy J. Holland, *The Delaware State Constitution: A Reference Guide* 47 (2d ed. 2017). Blue Beach cited these authorities in its opening brief, and neither the DOJ nor amicus discussed them, much less distinguished them.[9] These controlling

[9] The DOJ and amicus argue that two cases cited by Blue Beach—*Hopkins v. J.P. Ct. No. 1*, 342 A.2d 243 (Del. Super. 1975) and *Allstate Ins. Co. v. Rossi Auto Body, Inc.*, 787 A.2d 742 (Del. Super. 2001)—applied the historical analysis test and did

authorities confirm that the legal-versus-equitable framework is correct—and the DOJ's CFA claims fall on the legal side of the divide.

Next, the DOJ and amicus incorrectly rely on *State v. Cahill*, not *Hopkins*, as setting the standard for the degree of similarity necessary for the jury trial right to apply. Both quote *State v. Cahill*, 443 A.2d 497 (Del. 1982) as holding the right applies only if the new statutory claim "is in substance so similar" to the common law claim. DOJ 37; Amicus 14. But that language was not a legal standard—it was the Court paraphrasing and rejecting a party's argument. *Cahill*, 443 A.2d at 499-500. In fact, *Cahill* applied the legal-versus-equitable framework, concluding the statutory paternity action "did not exist in a non-statutory form at law" and was instead analogous to an equitable proceeding. *Id*.

The proper standard is found in *Hopkins* where the court explained that the analysis "looks at the substance not the mere form" of the statute and asks whether it "embraces litigation traditionally triable before a jury." 342 A.2d 243, 246 (Del. Super. 1975). "It is the nature of the proceeding rather than its designation which determines whether it is traditionally triable by jury." *Id.* *Hopkins*, not *Cahill*, articulates the applicable test—and it supports Blue Beach's position.

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not consider whether the claims were legal or equitable. DOJ 32-33; Amicus 7-8. That is incorrect. In both cases, the court observed that the claims at issue were legal claims tried by jury in Superior Court. *Hopkins*, 342 A.2d at 244 (ejectment); *Allstate*, 787 A.2d at 743-749 (replevin).

Finally, the parties' competing frameworks share a common goal. Both approach, from different angles, the same fundamental question: how to apply the constitutional guarantee that "[t]rial by jury shall be as heretofore." Blue Beach's legal-versus-equitable distinction illustrates where the claim would have been heard "heretofore." If the claim is legal, it would have been heard in Superior Court, and either party would have the right to demand a jury trial on fact issues in an action at law. *See McCool v. Gehret*, 657 A.2d 269, 282-284 (Del. 1995) (describing how Article IV, Section 19 reaffirmed this principle). Conversely, if the claim is equitable, it would have been tried in the Court of Chancery without a jury. The DOJ's and amicus's historical framework approach the issue similarly, focusing on whether a particular cause of action or a close analog was historically tried by jury. Under either framework, the inquiry is essentially the same: would the claim at issue have been tried in a court of law to a jury in 1897?

In sum, the Court should frame the question presented as follows: Is the nature and substance of the DOJ's CFA claims sufficiently similar to common law fraud such that they embrace litigation historically tried by jury as of 1897?

C. The DOJ's CFA claims are sufficiently similar to common law fraud to invoke Blue Beach's constitutional jury trial right.

The Court should hold that the nature and substance of the DOJ's CFA claims are sufficiently similar to common law fraud claims historically tried by jury in 1897, and therefore Blue Beach has a constitutional right to a jury trial. The DOJ and

amicus unpersuasively argue that the CFA created a "distinct" and "unique" statutory cause of action that did not exist at common law and thus falls outside the jury trial right. DOJ 37-42; Amicus 14-16.

Their core contention is that the CFA does not require proof of every element of a common law fraud claim. DOJ 37, 41-42; Amicus 13-16. But again, this misses the point. Blue Beach is not arguing that all CFA claims trigger the jury trial right. Rather, it is the nature and substance of the specific CFA claims brought here—alleging knowing fraud, intent to induce reliance, and resulting harm—that so closely mirror common law fraud that the constitutional right attaches.

Indeed, the DOJ's claims implicate four of the five elements of common law fraud. This close parallel becomes clear when comparing those elements to both the general structure of the CFA and the DOJ's specific allegations.[10]

1. False Representation: A false representation, usually one of fact, made by the defendant.

- CFA Generally: Proof of (i) deception, fraud, false pretense, false promise, misrepresentation, unfair practice; or (ii) the concealment, suppression, or omission of any material fact.

[10] The elements of common law fraud are verbatim from *Stephenson*, 462 A.2d at 1074. Descriptions about what the CFA generally provides is from Section 2513.

- DOJ's CFA Claims: The DOJ alleged that Blue Beach both made false affirmative representations and concealed material facts. A32-35.

2. Knowledge of Falsity: The defendant's knowledge or belief that the representation was false or was made with reckless indifference to the truth.

- CFA Generally: Not required.
- DOJ's CFA Claims: The DOJ sought monetary penalties for "wilful" violations under 29 *Del. C.* § 2524, so it alleged that Blue Beach knew or should have known that its conduct was prohibited by the CFA. A33-35; *see* 6 *Del. C.* § 2522 (describing "wilful" standard). Thus, the DOJ sought to prove that Blue Beach knew or should have known its representations were false—nearly identical to the scienter element of common law fraud.[11]

3. Intent: An intent to induce the plaintiff to act or to refrain from acting.

- CFA Generally: Proof of intent to induce is not required for affirmative misrepresentations; but proof of intent that others rely on concealment, suppression, or omission is required.

[11] *See* A278 (DOJ's pre-hearing reply) ("In any event, under any standard of fraud, Blue Beach Bungalows is liable here. On the record already before the tribunal, [Blue Beach's] claim that Pine Haven was – and is – seasonal, is false, demonstrably and indisputably. That conduct is not only reckless, it is intentional.").

- DOJ's CFA Claims: The DOJ alleged that Blue Beach concealed, suppressed, or omitted material facts with the intent that the residents relied on such concealment, suppression, or omission. A32-35.

4. Reasonable Reliance: The plaintiff's action or inaction taken in justifiable reliance upon the representation.

- CFA Generally: Not required.
- DOJ's CFA Claims: Not pled.

5. Damage: Damage to the plaintiff as a result of such reliance.

- CFA Generally: Not required.
- DOJ's CFA Claims: The DOJ alleged that residents were harmed by Blue Beach's illegal conduct and requested that the Hearing Officer order Blue Beach to pay restitution to each resident harmed. A42. Moreover, the DOJ sought to prove that many residents were in fact harmed by Blue Beach's conduct and that restitution was owed.[12]

[12] *See* A288 (DOJ pre-hearing reply) (stating "the harm to the residents is palpable and real," proffering evidence of harm to residents, and requesting restitution); A479-485 (DOJ post-hearing opening) (stating "[t]he evidence presented at the hearing shows just how much injury [Blue Beach's] lies and threats caused to Pine Haven residents," and then summarizing evidence of harm); A508 (DOJ post-hearing reply) (requesting the Hearing Officer to "impose penalties on [Blue Beach] commensurate with the seriousness of their violations and the harm that those violations have caused [and] order restitution due each resident.").

In summary, the DOJ alleged and sought to prove every element of common law fraud except for reliance.

In a final attempt to distance its CFA claims from common law fraud, the DOJ argues that a CFA action "resembles equitable fraud rather than common law fraud." DOJ 40. This mischaracterizes both the DOJ's claims and the law of equitable fraud. The DOJ alleged that Blue Beach committed "wilful" CFA violations (A33-35), so the DOJ had to prove Blue Beach "knew or should have known" that its representations were false. *See* 6 *Del. C.* § 2522. In contrast, "[u]nder the theory of equitable fraud, a remedy is provided for innocent or negligent misrepresentations." *Radius Servs., LLC v. Jack Corrozi Const.*, 2009 WL 3273509, at *2 (Del. Super. Sept. 30, 2009). Moreover, "[t]he existence of a special relationship between the plaintiff and the defendant," such as a fiduciary relationship, distinguishes equitable fraud from common law fraud. *Carpenter v. Liberty Mut. Ins.*, 2023 WL 3454692, at *2 (Del. Ch. May 15, 2023) (cleaned up). There is no such relationship between Blue Beach and the Pine Haven residents. *See Hanna Sys., Inc. v. Capano Grp.*, 1985 WL 21119, at *3 (Del. Ch. Apr. 16, 1985) (stating that landlord and tenant do not share a special relationship for equitable fraud purposes). The DOJ's claims closely resemble common law fraud, not equitable fraud.

Because the nature and substance of the CFA claims in this case share four of the five elements of common law fraud historically tried by jury in 1897, Blue Beach has a constitutional right to have a jury decide this case.

D. The DOJ's and amicus's remaining arguments against applying the jury trial right are unpersuasive.

The DOJ and amicus present various other arguments to rebut Blue Beach's position which are addressed below.

i. Other states' decisions reveal mixed approaches and results.

The DOJ and amicus cite distinguishable non-Delaware authorities to buttress their arguments. Both rely on *Fazio v. Guardian Life Ins.*, 62 A.3d 396 (Pa. Super. 2012), which interpreted Pennsylvania's Unfair Trade Practices and Consumer Protection Law ("UTPCPL")—a consumer protection statute markedly different from Delaware's CFA. DOJ 35-37; Amicus 19-20. As amicus concedes, Pennsylvania took the single statute, "laundry list" approach, whereas Delaware enacted two statutes: the CFA for consumer protection and the Delaware Deceptive Trade Practices Act for unfair competition. Amicus 19, n.4; *id.* 12. Amicus also cites *Martin v. Heinold Commodities, Inc.*, 643 N.E.2d 734 (Ill. 1994), but *Martin* is legally distinguishable. The majority in *Martin* stated that "the Consumer Fraud Act is a statutory proceeding unknown to the common law," *Id.* at 755,[13] whereas

[13] Two dissenting justices would have found the jury trial right applied for reasons Blue Beach argues here. *Martin*, 643 N.E.2d at 758

Delaware courts have observed that CFA claims are rooted in common law fraud, *Stephenson*, 462 A.2d at 1074, and that an action to recover civil penalties is akin to a common law debt action, *Am. Appliance, Inc. v. State*, 712 A.2d 1001, 1003 (Del. 1998).

Moreover, other states have recognized a constitutional right to a jury trial for claims like those pursued by the DOJ here. *See Thorley v. Nowlin*, 542 P.3d 137, 152-162 (Wash. App. 2024) (ruling that Washington's constitution guarantees a jury trial for a consumer protection act claim seeking damages) (surveying authority); *see also State v. Abbott Labs.*, 816 N.W.2d 145, 159 (Wis. 2012) (holding that Wisconsin's constitution guarantees a jury trial for a deceptive trade practices act claim and a Medicaid fraud claim); *State v. Credit Bureau of Laredo, Inc.*, 530 S.W.2d 288, 289 (Tex. 1975) (holding that the Texas constitution guarantees a jury trial in a deceptive trade practices act suit for civil penalties).

In the end, the Court need not engage in a 50-state survey or parse distinctions between other states' statutes and case law. Instead, the Court should focus on Delaware law, which supports Blue Beach's position.

ii. The General Assembly cannot alter the constitutional right to a jury trial through legislation.

The DOJ argues that the General Assembly can modify the right to a jury trial through legislation. DOJ 42. It contends that "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." DOJ 43. Notably, while the amicus brief is mostly an elaboration of the DOJ's positions, this argument is conspicuously absent. The DOJ's argument is wrong for three reasons.

First, the DOJ's argument rests solely on a provision of the 1776 Constitution, which has not been in effect for over 230 years. The 1776 Constitution was replaced in 1792. The 1792 Constitution was then replaced in 1831. And the 1831 Constitution was replaced in 1897. The 1897 Constitution is "still operative" today. *Albence v. Higgin*, 295 A.3d 1065, 1072 (Del. 2022).

Second, the outdated provision the DOJ cites does not authorize the General Assembly to alter constitutional rights through legislation. Article 25 of the 1776 Constitution states:

> The common law of England, as well as 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; such parts only excepted as are repugnant to the rights and privileges contained in this constitution and the declaration of rights, agreed to by this convention.

The DOJ wrongly interprets Article 25 as a perpetual license to alter constitutional rights derived from the common law through future legislation.

Article 25 was a transition provision, intended to preserve an operative body of laws and practices during the State's founding. As the courts explained, "[t]he object of this clause was to secure to the people in their transition from a colonial to

an independent political state, a jurisprudence already complete and adequate immediately to define and to protect their rights of person and property without awaiting the slow growth of a new system to be thereafter matured by legislation and judicial decision." *Sobolewski v. German*, 127 A. 49, 51 (Del. Super. 1924).

Article 25's statement that then-effective laws may be altered by future legislatures addressed the General Assembly's ability to amend that body of transplanted laws but not fundamental rights. *Sobolewski*, 127 A. at 51; *see Clawson v. Primrose*, 4 Del. Ch. 643, 653 (Del. Ch. Sept. 1873). In other words, Article 25 confirmed that the General Assembly could amend the laws that were being reaffirmed, subject to an important exception. The final clause of Article 25 excepted from legislative alteration any "rights and privileges" contained in the Constitution and the Declaration of Rights—including the jury trial right. *See* Declaration of Rights and Fundamental Rules of the State of Delaware § 13 (1776). *Hopkins* confirmed that Article 25 prohibited the General Assembly from legislatively altering the constitutional jury trial right. 342 A.2d at 246, n.1.

Third, the DOJ's argument—that the General Assembly can alter constitutional rights through legislation—turns constitutional law on its head. It is blackletter law that the Constitution cannot be amended by regular legislation. To change a constitutional provision, the General Assembly must follow the formal amendment process: a supermajority vote of both Houses in two successive sessions.

Del. Const. of 1897, art. XVI, §1; *Albence*, 295 A.3d at 1097. More broadly, it is a fundamental principle of American and Delaware law that legislation cannot conflict with the Constitution. *See Albence*, 295 A.3d at 1089 ("The foundation upon which our constitutional jurisprudence is built is the principle that 'the constitution controls any legislative act repugnant to it.' It follows that 'an act of the legislature repugnant to the constitution is void.'") (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)). These long-settled principles foreclose the DOJ's theory. The General Assembly cannot modify the constitutional right to a jury trial through ordinary legislation.

iii. Blue Beach's jury trial right is not lost because the CFA claims are brought by the DOJ.

The DOJ argues that the jury trial right does not apply to CFA claims brought by the State, asserting that its statutory enforcement powers make those claims too distinct from common law fraud to trigger the constitutional right. DOJ 38.

That is a remarkable assertion. The history of Delaware's jury trial right shows it was primarily intended to protect citizens against government overreach. *See Claudio v. State*, 585 A.2d 1278, 1290 (Del. 1991) (describing history). This right is arguably most important when the government is the prosecuting party. The plaintiff's identity is irrelevant; what matters is the nature of the claim and whether it is "traditionally triable to a jury." *Hopkins*, 342 A.2d at 246.

iv. *Jarkesy*'s logic rebuts the DOJ's and amicus's arguments.

The DOJ and amicus dismiss *Jarkesy* because the Seventh Amendment does not apply to the states and, in their view, *Jarkesy*'s focus on legal-versus-equitable claims and relief is irrelevant. DOJ 33-34; Amicus 22-24. However, neither addresses *Jarkesy*'s core reasoning, which directly refutes arguments they repeat here. First, the DOJ argues that State enforcement distinguishes CFA claims and defeats the jury trial right. But the Supreme Court rejected that distinction, holding that what matters is "the substance of the suit, not where it is brought, who brings it, or how it is labeled." *Jarkesy*, 144 S. Ct. 2117, 2136. Second, both the DOJ and amicus argue that a statutory claim must be "in substance so similar" to a common law claim to trigger the jury trial right. DOJ 37; Amicus 14. But *Jarkesy* held that a statutory claim need not be identical—it need only bear a "close relationship" to a common law analogue. 144 S. Ct. at 2130-31. The logic and holdings of *Jarkesy* compellingly rebut the DOJ's and amicus's arguments here.

ARGUMENT ON CROSS-APPEAL

III. The Hearing Officer's findings of CFA violations based on the June 30 and July 18 letters were legal error and not supported by substantial evidence.

A. Question Presented

Whether the Hearing Officer's findings of CFA violations based on the June 30 and July 18 letters were legal error or not supported by substantial evidence.

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). "When the issue on appeal is whether or not proper legal principles have been applied, this Court's review is de novo." *Johnson Controls, Inc. v. Fields*, 758 A.2d 506, 509 (Del. 2000). "On an appeal from an administrative agency, this 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). "Substantial evidence has been defined as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Lehto v. Bd. of Educ. of Caesar Rodney Sch. Dist.*, 962 A.2d 222, 225-26 (Del. 2008) (quotation and citation omitted). "It means 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).

C. Merits of Argument

The Hearing Officer found that Blue Beach violated the CFA by sending letters to residents dated June 30 and July 18, 2022. A606-607. For the June 30 letter, which terminated month-to-month rental agreements, the Hearing Officer found two CFA violations and imposed a $5,000 penalty, concluding the letter was deceptive because "[Blue Beach] did not yet own Pine Haven and was thus not a party to the lease agreements with these residents, which [Blue Beach] knew or should have known." A606, A830. For the July 18 letter, which revoked RV owners' licenses, the Hearing Officer found 25 CFA violations and imposed a $62,500 penalty, finding the letter similarly deceptive because the "letter purports to revoke residents 'guest licenses,' which [Blue Beach] could not do because it did not yet own Pine Haven and was thus not a party to the lease agreements with these residents," and "knew or should have known" as much. A606-607, A816. The Superior Court reversed both findings, holding that they were legally erroneous and unsupported by substantial evidence. Opinion 21-25. The DOJ argues for reinstatement of the Hearing Officer's findings for various reasons. DOJ 45-56. This Court should reject the DOJ's arguments and affirm the Superior Court.

i. The Hearing Officer erred in finding that the June 30 and July 18 letters violated the CFA because Blue Beach was not yet the park owner; that conclusion was legally incorrect and lacked substantial evidentiary support.

The Hearing Officer's findings that the June 30 and July 18 letters violated the CFA were erroneous. The Superior Court correctly held that these findings were both legally erroneous and unsupported by substantial evidence. Specifically, the Superior Court reversed on three grounds: Blue Beach, as equitable owner, had the right to send the letters; the Hearing Officer's findings were not based on violations the DOJ had charged; and the record lacked substantial evidence to support the findings. Opinion 21-25.

First, the Superior Court correctly held that the Hearing Officer's findings were legally erroneous because Blue Beach, as the park's equitable owner, had the right to send the letters. Opinion 22, 24. The Superior Court reasoned that "[a]s equitable owner of the property when the letters were delivered, in my view [Blue Beach] had the right under Delaware law to take steps during the contract period to prepare the community for transfer, and to take formal actions affecting the community and its residents." Opinion 22.

The DOJ argues waiver, asserting that Blue Beach failed to raise its equitable ownership rights as a defense before the Hearing Officer. DOJ 46. But this argument fails because Blue Beach's rights as equitable owner were not litigated leading up to or during the evidentiary hearing. The issue first arose in the Hearing

Officer's decision, where he *sua sponte* found a violation based on an uncharged theory—that Blue Beach did not own the park when the letters were sent—a legal error, as discussed below. Blue Beach raised its equitable-ownership argument in direct response to that error, making the defense timely.

The DOJ also contends that "the Superior Court overstated the rights of an equitable owner," arguing that "[a]n equitable owner does not have the right to exclude individuals from property." DOJ 46. The DOJ's sole authority for this argument is the distinguishable *Burris v. Wilmington Tr. Co.*, where the Supreme Court stated that "mere equitable title will not support an action for ejectment." 301 A.2d 277, 279 (Del. 1972). *Burris* dealt only with the narrow question of standing to bring a statutory ejectment action which requires the plaintiff to have legal title. *Id.; see* 10 *Del. C.* § 6701. *Burris* says nothing about the broader, well-settled principle that a contract purchaser becomes the equitable owner and may "enforce, protect, or modify the interests presently owned in property." *Protect Our Indian River v. Sussex Cnty. Bd. of Adjustment*, 2015 WL 4498971, at *10 (Del. Super. July 2, 2015), *aff'd*, 133 A.3d 981 (Del. 2016). Under Delaware law, once a contract for real property is executed, equitable title vests in the buyer, and the seller retains only a legal interest in the purchase proceeds—not the property itself. *Id.* Under that settled law, Blue Beach, as equitable owner, had the lawful authority to initiate lease or license terminations regarding the property it was buying.

Second, the Superior Court correctly held that the Hearing Officer's findings were legal error because they were not based on violations charged by the DOJ. Opinion 23. In its appeal, Blue Beach argued that the Hearing Officer improperly found three CFA violations, including those involving the June 30 and July 18 letters, on grounds the DOJ never charged and in violation of governing statutes and regulations. A1078-1082. Under 29 *Del. C.* § 2523(a), the DOJ's charges must "provide notice as to the nature of the violation." The regulations go further, requiring the DOJ's complaint to "specify in reasonable detail the conduct alleged to constitute the violation and the statutory provision, rule or regulation the respondent is alleged to be violating or to have violated." 6 *Del. Admin. C.* § 103-13.1 (emphasis added). The statute authorizing the appointment of a hearing officer limits that role "to adjudicate[ing] charges brought by the Director of Consumer Protection…." 29 *Del. C.* § 2523(d). Accordingly, by statute and regulation, the Hearing Officer lacks authority to find violations on grounds raised *sua sponte*. *See Office of Comm'r, Delaware Alcoholic Beverage Control v. Appeals Comm'n*, 2013 WL 3816682, at *3 (Del. Super. July 17, 2013) (an administrative body "has no powers other than those conferred upon it by statute by which it was created.").

The DOJ's complaint did not charge that the June 30 and July 18 letters violated the CFA because Blue Beach lacked ownership of Pine Haven when the letters were sent and therefore had no right to send them. Rather, the DOJ charged

that the June 30 letter "falsely claimed to tenants that Pine Haven is a seasonal community." A30, 32-33, 35-36. And the DOJ charged that the July 18 letter violated the CFA because Blue Beach "threatened residents with arrest and prosecution, and that their belongings would be confiscated and destroyed…." and "subjected the residents to confusing and conflicting notifications and directives." A30-31, 33, 36. Nowhere in the DOJ's complaint did it "specify in reasonable detail the conduct alleged to constitute the violation" as Blue Beach's lack of record ownership of the park when the letters were sent, or claim that Blue Beach did not have the right to send the letters on that basis. 6 *Del. Admin. C.* § 103-13.1. The Superior Court correctly found that the Hearing Officer's *sua sponte* findings, focused on Blue Beach's lack of ownership, were uncharged by the DOJ and therefore constituted legal error.

The DOJ unpersuasively argues that it "adequately plead that Blue Beach violated the CFA by sending these letters despite not owning the property." DOJ 48-49. As support, it cites allegations in the complaint which state that Mr. Cohee owned the park in June and July and that Blue Beach acquired it in September. *Id.* 49. But those allegations simply establish a timeline; the DOJ never specified that those timeline facts were the "conduct alleged to constitute the violation." 6 *Del. Admin. C.* § 103-13.1.

The DOJ also argues that its complaint alleged that Blue Beach violated the CFA by making false promises and threats to residents, so the Hearing Officer's findings were appropriate as "these promises and threats were misleading in part because [Blue Beach] did not have the authority to carry out the actions that it threatened." DOJ 48. But that only proves Blue Beach's point. The complaint never stated that Blue Beach's communications were misleading *because* Blue Beach lacked authority to carry out the actions threatened. That theory was also not argued in the parties' voluminous briefing, or joined as an issue at the evidentiary hearing. It appeared for the first time in the Hearing Officer's decision.[14] Because the DOJ failed to charge that theory in its complaint, the Hearing Officer erred in finding violations on that basis.

Third, the Superior Court properly held that the Hearing Officer's findings lacked substantial evidence. Opinion 24-25. It began by reiterating that, as a matter of law, the letters could not violate the CFA solely because Blue Beach exercised its rights as equitable owner. Opinion 24. The Superior Court then found no substantial evidence to support the Hearing Officer's conclusion that the letters were false and deceptive regarding who sent them or their effect on residents' rights. As to the June

[14] The DOJ's post-hearing briefing does discuss the timing of the July 18 letter and that Blue Beach was not the record owner of Pine Haven when the letters were sent. A449-451. The DOJ did not argue this as a basis for a CFA violation, but instead to counter Blue Beach's position on an unrelated point. *Id.*

30 letter, the Court noted it was on Mr. Cohee's company's letterhead, signed by him, and delivered by him. Opinion 24. As for the July 18 letter, it accurately disclosed that it was from the "incoming buyers of" the park. Opinion 25.

The DOJ attacks this ruling on two bases. Its primary argument persists with the Hearing Officer's legally erroneous finding that the letters violated the CFA because Blue Beach was not the park's legal owner when the letters were sent. DOJ 47-49. As discussed above, this argument fails. On the other grounds cited by the Superior Court, the DOJ quibbles over whether Mr. Cohee actually signed the June 30 letter, but does not dispute that it was on his company's letterhead and delivered by him. DOJ 50. With respect to the July 18 letter, the DOJ has disclaimed any argument that it was deceptive based on the sender's identity. *Id.*

In sum, the DOJ has not shown that any legally valid substantial evidence supports the Hearing Officer's findings of CFA violations regarding the June 30 and July 18 letters. The Superior Court's judgment on these letters should be affirmed.

ii. The Hearing Officer's findings on the June 30 and July 18 letters cannot be affirmed on independent grounds the Hearing Officer rejected, as reviewing courts may not make factual findings.

The DOJ argues that this Court can rely on grounds independent of those relied upon by the Hearing Officer to affirm his finding of CFA violations regarding the June 30 and July 18 letters. DOJ 50-56. This Court should reject the DOJ's argument for four reasons.

First, the DOJ points to what it calls the "right for any reason" doctrine to argue that this Court should independently affirm the Hearing Officer's findings based on alternative grounds drawn from the record. DOJ 50-51. But the DOJ's cited authorities do not support this proposition. The DOJ's primary authority, *Unitrin, Inc. v. Am. Gen. Corp.*, merely recognized that an appellate court may affirm a trial court's judgment on a different rationale and may rule on an issue fairly presented to, but unaddressed by, the lower court. 651 A.2d 1361, 1390 (Del. 1995). Even so, in *Unitrin*, the appellee asked this Court to affirm on an alternative basis, but it declined to so because such a result would be "inequitable." *Id.*

The DOJ's other cases are equally inapposite. In *Kane v. Burnett*, 2002 WL 2017066 (Del. Aug. 29, 2002), the Court summarily affirmed an appeal of a Family Court decision on a motion to affirm under an abuse of discretion standard. In *Midland Funding LLC v. Graves*, 2016 WL 1590999 (Del. Super. Apr. 7, 2016), the Superior Court affirmed dismissal of a debt action based on the Court of Common Pleas' exclusion of dispositive evidence, finding the exclusion proper under a different rule than the one cited by the lower court and due to a failure of proof on a dispositive element.

The three cases the DOJ cites are distinguishable and do not support applying the "right for any reason" doctrine to judicial review of factual findings by an administrative body. In *Unitrin*, this Court declined to do what the DOJ requests of

it here. *Kane* was decided on a motion to affirm with an abuse of discretion standard. And *Graves* was affirmed based on an alternative rule of evidence and a failure of proof, not a factual issue on a disputed record like here. What's more, all three cases involve a higher court reviewing a lower court's decisions, not judicial review of factual findings in administrative proceedings. The DOJ cites no authority for the proposition that this Court may substitute its own factual findings for those of an administrative officer—particularly where, as here, the alternative grounds were rejected below and rest on a disputed evidentiary record.

Second, the DOJ misstates how the Hearing Officer addressed its "other rationale[s] for why the two letters violated the CFA." DOJ 52. The DOJ inaccurately states the Hearing Officer found in its favor for one reason but did not address its other reasons. *Id.* After articulating the grounds on which he found CFA violations, the Hearing Officer explicitly concluded: "I do not find CPU has met its burden of proof as to *any other alleged CFA violations*." A614 (emphasis added). This language confirms that the Hearing Officer considered—and rejected—the very "independent grounds" the DOJ now invokes in seeking affirmance.[15]

Third, appellate courts do not make their own factual findings and are limited to reviewing whether a hearing officer's findings are supported by substantial

[15] The DOJ did not cross-appeal below, so it cannot argue the Hearing Officer's rejection of its independent grounds was error. *Ivory v. Ivory*, 69 A.3d 371 (Del. 2013).

evidence. Under 29 *Del. C.* § 2523(d), the Superior Court must determine "if the *findings in the order* are supported by substantial evidence." (emphasis added). The Superior Court was solely reviewing the Hearing Officer's findings articulated in his decision, not the findings the DOJ now wishes had been made. Moreover, the appellate court's limited role is reinforced by settled law: "The appellate court does not weigh the evidence, determine questions of credibility, or makes its own factual findings." *Falconi v. Coombs & Coombs, Inc.*, 902 A.2d 1094, 1098 (Del. 2006). Under both statute and case law, the Superior Court and this Court only review the Hearing Officer's findings and do not make independent factual findings.

Fourth, if this Court believes the DOJ's independent grounds have merit, this Court should not affirm on an alternative basis but instead remand to the administrative level. *See Diamond Fuel Oil v. O'Neal*, 734 A.2d 1060, 1066 (Del. 1999) (remanding to board for further findings). In its brief, the DOJ quickly recaps its independent grounds for affirmance of the Hearing Officer's findings of CFA violations, arguing that the June 30 letter misleadingly cited the landlord-tenant code, and that the July 18 letter misleadingly claimed the park was seasonal and that police may become involved to remove RV owners. DOJ 54-56. The parties devoted much more than a few pages on these arguments below,[16] and the Hearing Officer ultimately rejected the DOJ's arguments. A614. The Court should not

[16] *See, e.g.*, A449-451, 453-454, 461, 464, 468, 480, 522-523, 530-534, 539-540.

entertain the DOJ's request to, on appeal, issue independent findings on these fact-intensive arguments.

IV. The Hearing Officer's finding that Blue Beach violated the CFA by accepting rent payments was legally erroneous and not supported by substantial evidence.

A. Question Presented

Whether the Hearing Officer's finding of CFA violations based on Blue Beach accepting rent payments was legal error or not supported by substantial evidence.

B. Scope of Review

Blue Beach incorporates the Scope of Review stated *supra* in Argument on Cross Appeal Section III.B.

C. Merits of Argument

The Hearing Officer found 126 CFA violations and imposed a $126,000 penalty against Blue Beach for accepting rent payments above the amount permitted by the MH Act after the DOJ notified Blue Beach of the alleged impropriety. A613-14. He concluded that Blue Beach violated the CFA each time a resident paid rent, based on Blue Beach "seeking these impermissible rent increases and failing to correct residents who continued to pay excess rent." A614. The Superior Court reversed, holding that these findings were legally erroneous and unsupported by substantial evidence. Opinion 23, 30.

The Superior Court correctly held that the Hearing Officer's decision was improper because it rested on an uncharged theory of liability. Opinion 23. Count III of the DOJ's complaint alleged that Blue Beach violated the CFA by "falsely

claiming, repeatedly and willfully, that tenants were required to pay an increased monthly rent." A23. In short, the DOJ charged Blue Beach with making affirmative misrepresentations, not omissions. The Hearing Officer, however, imposed liability based on Blue Beach's failure to correct residents who overpaid rent, effectively adopting a fraud-by-omission theory the DOJ never pled. As the Superior Court explained, the DOJ charged violations by commission, but the Hearing Officer errantly imposed liability for omission. Opinion 23.

Recognizing this deficiency, the DOJ now argues that its allegation of misrepresentation "implicit[ly]" included a fraud-by-omission theory. DOJ 59-60. But that argument fails under the governing regulation, which requires the DOJ to specify in reasonable detail the conduct alleged to constitute the violation. 6 *Del. Admin. C.* §103-13.1. If the DOJ intended to pursue a fraud-by-omission theory based on Blue Beach's continued acceptance of rent, it was required to say so expressly.

The DOJ also contends that its bare recitation of statutory language referencing "concealment, suppression, or omission" satisfies the pleading requirement. DOJ 59-60. It does not. Merely parroting statutory terms without supporting facts fails under both the statute and settled case law. *See Ki-Poong Lee v. So*, 2016 WL 6806247, at *4 (Del. Super. Nov. 17, 2016) ("If a complaint were held sufficient simply because it restates the legal elements of a particular cause of

action, Rule 8(a) would be rendered meaningless."). Unwritten, implicit theories and unadorned statutory language do not satisfy the express requirement to specify in detail the conduct alleged to constitute a violation.

The Superior Court also correctly held that the Hearing Officer's finding of 126 CFA violations, based on Blue Beach's failure to correct residents about rent overpayments, was unsupported by substantial evidence. The Superior Court found "no evidence of any communication with residents when they submitted their monthly payments that could be found to be false or misleading under the CFA," and concluded there was "no factual basis to find a CFA violation here, let alone 126 separate violations." Opinion 30-31.

The DOJ disagrees with that ruling for two reasons. First, it defends the Hearing Officer's factual finding of 126 separate CFA violations—one for each payment by up to 20 residents—by citing testimony of just two residents who said they dropped off their payment to a "girl behind the counter." DOJ 58 (citing A693, B51-52). But the Superior Court did not simply note the lack of interaction; it correctly held that there was no substantial evidence to support finding such interactions were false or misleading. Opinion 30-31. It was improper for the Hearing Officer to extrapolate from such meager testimony to conclude that each of the 126 payments involved a meaningful interaction resulting in a deceptive omission. That approach mirrors the flawed reasoning rejected in *State v. Gardiner*,

2000 WL 1211215, at *1, 3 (Del. Super. July 11, 2000) (declining to extrapolate from a few customers' testimony to support 212 separate CFA violations). At best, the record contains only a scintilla of evidence about the rent payment interactions, far short of what is required to support 126 violations.

Second, the DOJ argues that omissions can be CFA violations even without direct interaction. DOJ 58-59. But as explained above, the DOJ never charged Blue Beach with a fraud-by-omission theory based on rent payments, making the Hearing Officer's finding legally improper. The DOJ also asserts, without supporting legal authority, that "[a]ny lack of interaction Blue Beach had with the residents when they paid their rent is irrelevant." DOJ 58. That misreads the law. The CFA addresses a business's affirmative conduct ("act," "use," "employment," "concealment," "suppression", "omission") when interacting with consumers. 6 *Del. C.* §2513(a). And a violation is found based on the business's conduct, not the consumer's. *See Nieves v. All Star Title, Inc.*, 2010 WL 2977966, at *5 (Del. Super. July 27, 2010) ("[I]n determining whether a claim has been stated under the DCFA, the Court must focus on the location of the transaction and the defendant's conduct."). The Hearing Officer's finding is legally untenable because it was based solely on when a few residents acted (by paying rent), not when Blue Beach acted (by communicating or interacting with residents). The Superior Court correctly held that the record did not support 126 separate CFA violations based on rent payments.

V. The Hearing Officer's finding of CFA violations based on the RV Letter was legal error and not supported by substantial evidence.

A. Question Presented

Whether the Hearing Officer's finding of CFA violations based on the February 23 Dear RV Residents Letter was legal error or not supported by substantial evidence.

B. Scope of Review

Blue Beach incorporates the Scope of Review stated in Argument on Cross Appeal Section III.B.

C. Merits of Argument

In February 2023, Blue Beach began the process to change the use of the park. A752, 778-779, 795-796. It was required to provide written notice to all residents living in manufactured homes, as defined by the MH Act. A949-1039; 25 *Del. C.* § 7024(b). Blue Beach's then-outside counsel testified that she used photographs of residents' vehicles to develop an overinclusive list, treating all RVs that appeared immobile as manufactured homes entitled to notice under the MH Act. A807, 813.

For the 24 residents believed to own mobile RVs, counsel sent the Dear RV Residents Letter on February 23, 2023 (the "RV Letter"). A807, 813. It asserted, *inter alia*, that the recipient held a revocable license to keep their RV in the park, that the "Resort is not a year-round facility," that the campground season runs from April 15 to October 31, and that the resident had to vacate by March 15. A905.

The Hearing Officer found 24 CFA violations based solely on the RV Letter's assertion that "Pine Haven was a seasonal campground," and imposed a $84,000 penalty. A610-611. Blue Beach appealed, arguing that the statement was not false as to the 24 recipients of the RV Letter. A1086-1090, 1169-1170. In fact, the RV Letter accurately stated that the "Resort [wa]s not a year-round facility," which was consistent with the Division of Public Health permits authorizing operation as a "recreation camp" from April to October, and with Mr. Cohee's practice of operating the camping section seasonally, including closing the bathhouses during the off-season. A666, 676, 831, 855, 866.

Blue Beach also argued that the residents who received the RV Letter had no legal right to remain in the park beyond the RV season because they were not covered by the MH Act. The MH Act protects both traditional manufactured homes, 25 *Del. C.* § 7003(12)a, and RVs that, "[a]t the time the current tenant obtained title" were "not mobile and could not reasonably be returned to a condition where it would be mobile." 25 *Del. C.* § 7003(12)b. RV residents whose vehicles remained mobile under that definition were not protected by the MH Act.

The DOJ did not show, and the Hearing Officer did not find,[17] that the 24 residents who received the RV letter lived in immobile RVs as defined by statute.

[17] Blue Beach raised this issue in its post-hearing briefing (A533-534, 541-543), but the Hearing Officer did not make a finding on this dispositive issue.

As such, those residents had no legal right to reside in the park after the campground season ended. They were not tenants with protected leasehold rights but licensees whose occupancy could be revoked. Hence, Blue Beach's statement that the resort was not a year-round facility (or was seasonal) was not false as a matter of law.

The Superior Court agreed with Blue Beach. Opinion 29. It began its discussion of the RV Letter violations with a detailed review of the parties' arguments. Opinion 25-29. The Superior Court then concisely held that the RV Letter was not false as to the mobile RV residents, adopting Blue Beach's position:

> I find that Pine Haven had year-round manufactured home residents, year-round immobile RV residents and mobile RV residents. As to the year-round manufactured home residents and the year-round immobile RV residents (including Joy Kaiser), I find that the Dear RV Letter was a misrepresentation in violation of the CFA. As to the 23 remaining mobile RV residents, I do not find substantial evidence to support the Hearing Officer's findings that there was a misrepresentation in violation of the CFA.

Opinion 29.

The DOJ fails to address the key legal issue: the Hearing Officer did not find *any* RV Letter recipients lived in immobile RVs or were protected by the MH Act. At oral argument, the DOJ conceded that "the Hearing Officer did not make a finding on that specific issue…." A1393. Instead of confronting this omission, the DOJ emphasizes that many RV residents lived in the park year-round. DOJ 62. But that is only part of the test. While year-round residence is necessary, it is not sufficient; the RV must <u>also</u> be immobile. 25 *Del. C.* § 7003(12)b. The DOJ ignores this. For

mobile RV residents, Blue Beach's statement that the "Resort is not a year-round facility" was true. Because the Hearing Officer never found that any recipients lived in immobile RVs, the RV letter was not false as a matter of law. The DOJ has no response to this dispositive flaw.

The DOJ contends the Superior Court erred for five reasons, none of which have merit. First, the DOJ claims the Superior Court "mistakenly treated" the RV Letter and the Change of Use Letter "as one." DOJ 61, n. 14. That is incorrect. The section of the Superior Court's opinion addressing the RV Letter violations focuses exclusively on that letter. Opinion 21-25.

Second, the DOJ contends the Superior Court failed to detail its reasoning. DOJ 61. But the opinion clearly builds on Blue Beach's framework, holding that MH Act protections turn on whether an RV is mobile or immobile. Opinion 26-28, 29. The Superior Court's holding is directly supported by, and flowed from, the preceding recitation of the parties' arguments.

Third, the DOJ attacks a strawman argument, claiming the Superior Court wrongly accepted Blue Beach's argument that the RV Letter falsely stated that Pine Haven was a "seasonal campground," a phrase not in the letter. A610, A905. But the Superior Court did not rely on that language. Instead, it ruled based on the immobile / mobile statutory distinction. Opinion 29.

Fourth, the DOJ confusingly argues the RV Letter lacked a "qualifier" distinguishing between MH Act-covered residents and others. DOJ 61-62. But the Hearing Officer never found a violation based on a missing qualifier. And the record shows Blue Beach sent different letters to two distinct groups: the RV Letter to 24 RV residents believed to own mobile RVs, and the Change of Use letter to 37 residents "determined by [Blue Beach] to be in MH units." A580-581; *see* A609-610. The DOJ's argument wrongly assumes all residents received the same letter. In fact, the targeted mailing itself served the purpose of distinguishing recipients.

Fifth, the DOJ argues this Court should affirm based on an argument the Hearing Officer rejected—that the RV letter falsely implied law enforcement might assist with removal. DOJ 63; A614. But as explained above, reviewing courts may not affirm findings on grounds the Hearing Officer considered and rejected.

CONCLUSION

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 which were intended to end their occupancy; and, 2) this administrative proceeding in which the DOJ pursued fraud claims for civil penalties violated Blue Beach's right to a jury trial under the Delaware Constitution. This Court should affirm the Superior Court's rulings appealed by the DOJ.

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